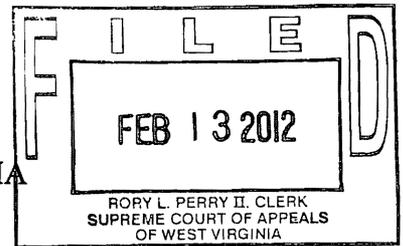


SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 11-1531



LARRY PATTERSON,

Petitioner,

v.

Appeal from a final order of the
Circuit Court of Kanawha County (09-AA-23)

RALEIGH COUNTY BOARD OF
EDUCATION,

Respondent.

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

This is an appeal from a decision rendered by the Circuit Court of Kanawha County that denied Petitioner's claim to be afforded a contract that included paid vacation days and to be awarded back pay based upon uniformity requirements. Petitioner conceded in his circuit court brief that the decision by this Court in the case Dillard v. The Bd. of Educ. of the County of Raleigh, (W. Va. 2011), precluded the consideration of any claim for prospective relief, and that Petitioner only sought relief in the form of back pay for the 2007-2008 school year. A.R. 222-223. The Petitioner's Petition for Appeal also seeks only a back pay award. Petitioner cites several decisions rendered by the Circuit Court of Kanawha County in support of his arguments. However, no Kanawha County Circuit Court decision considered and decided the arguments set forth herein prior to the decision rendered by the circuit court that is subject to the present appeal.

II. SUMMARY OF ARGUMENT

Petitioner's back pay claim, based upon uniformity grounds, is lacking for two reasons. First, the Petitioner's target of comparison was hired and afforded a 261-day contract prior to the effective date of the statute requiring uniformity in wages and benefits [West Virginia Code § 18A-4-5b]. Second, the Petitioner only held a 210-day contract. He could not compare himself to an employee holding a 261-day contract in the establishment of a uniformity claim. The prior decisions of this Court have only allowed comparisons between employees performing substantially the same sort of work for the same duration, with the sole difference being 21 days of paid vacation for one employee and unpaid leave for the other. Petitioner is not able to make such a comparison.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the legal issues presented are not novel and the relevant facts are uncontested, it is the opinion of the Respondents that oral argument is not necessary for the disposition of the present appeal.

IV. ARGUMENT

A. **Uniformity is a Creature of Statute and, as Such, Only Applies to Comparisons Involving Contracts Entered after the Effective Date of the Statute Requiring Uniformity**

During all relevant times, Petitioner was a Custodian III employed under a 210-day contract. In establishing his uniformity claim, the Petitioner seeks to compare himself to Harold French. Mr. French was classified as a Custodian III and held a 261-day contract. Mr. French had a seniority date of January 20, 1969. A.R. 69. Mr. French retired effective June 30, 2008. A.R. 167.

Mr. French is not subject to comparison under the uniformity requirements of West Virginia Code § 18A-4-5b. The Supreme Court of Appeals of West Virginia has held that the compensation of an employee hired before the effective date of West Virginia Code § 18A-4-5b need not be considered when applying uniformity requirements. See Crock v. Harrison County Board of Education, 211 W. Va. 40, 560 S.E.2d 515 (2002). There, the Court stated:

The intent of the Legislature to implement the uniformity provisions in a prospective fashion is clear. Accordingly, the uniformity provisions enacted in 1984, that apply to the paying of salary and benefits to personnel who are employed in similar positions with the county do not affect Mrs. Washington [hired prior to 1984].

The Court in Crock allowed the difference in salary and benefits arising from the application of the grandfather language of Code § 18A-4-5b to persist with respect to the affected employees and did not suggest that this circumstance would give rise to a discrimination, favoritism or uniformity claim. A difference in treatment for employees hired prior to the effective date of Code § 18A-4-5b provides no more basis for a favoritism/discrimination claim than the differences that arise in the salary and benefits of an employee with one year of experience as compared to an employee performing the same duties who has ten years of experience. In each case, the differences in salary and benefits arise from the application of statutory provisions relating to compensation. It is within the province of the Legislature to prescribe the factors that may be applied in fixing the compensation of school employees. Such deference is evident in the Crock decision. While uniformity among all school service employees may be an appropriate objective, the Court was unwilling to ignore statutory language, creating a distinction between employees hired before and after the effective date of Code § 18A-4-5b in prohibiting the Harrison County Board of Education from relying upon uniformity to trump the clear intent of the Legislature to limit the application of uniformity requirements to contracts entered post-1984. The assertions of the Petitioner do not establish a factual basis for discrimination, favoritism or uniformity claims.

The only circuit court decision that squarely addressed this issue prior to the decision that is the subject of the present appeal is styled The Raleigh County Board of Education v. Patricia Tzystuck, Civil Action 09-AA-8 (February 11, 2010, Circuit Court of Raleigh County, West Virginia). A.R. 284-287. This Court refused a petition for appeal in the Tzystuck case. A.R. 298. The Raleigh County Circuit Court's decision provided, in pertinent part:

The Court also concludes that the Administrative Law Judge erred as a matter of law in the application of the decision rendered by the West Virginia Supreme Court of Appeals in the case Crock v. Harrison County Board of Education. A careful reading of this decision reveals that the Court forewarned of a bar to uniformity claims by employees, hired subsequent to the enactment of West Virginia Code § 18A-4-5b, by making comparisons to employees hired in advance of the legislative creation of uniformity requirements. The Court, in Crock, permitted an employee hired subsequent to the enactment of West Virginia Code § 18A-4-5b to maintain a higher level of compensation only through the application of “law of the case” principals and not based upon a determination that school service employees hired after the enactment of West Virginia Code § 18A-4-5b were entitled to establish uniformity claims by comparing themselves to individuals hired before the enactment of the statute. The Court expressly held that Code § 18A-4-5b was intended to be applied prospectively. The Court stated:

The intent of the Legislature to implement the uniformity provisions in a prospective fashion is clear. Accordingly, the uniformity provisions enacted in 1984 that apply to the paying of salary and benefits to personnel who are employed in similar positions within the county, do not affect Mrs. Washington [hired prior to 1984].

A retroactive application of the statute would have inflicted material consequences upon county boards of education in that they would have been afforded no notice or warning that decisions relating to compensation and benefits that occurred prior to the establishment of uniformity requirements would have been “locked in” and have the effect of dictating entitlements to future school service employee compensation and benefit levels. Typically, where the retroactive application of legislation would affect substantive matters, the Courts have required an express intention on the part of the Legislature to be evident. There is no such evidence.

No Kanawha County Circuit Court decision had addressed the issue of whether an individual hired prior to 1984 may serve as a target for a uniformity claim at the point in time the Court below considered the issue. A.R. 293. Because Mr. French was hired prior to 1984 and is

the only individual with whom the Petitioner sought comparison, the Tzystuck decision, if followed, would result in the denial of any back pay award. The Court below found the decision in Tzystuck persuasive and cited it in denying the relief sought by the Petitioner. A.R 292-293.

Although not cited in the decision of the Court below or in the Tzystuck circuit court decision, West Virginia Code § 2-2-10, paragraph (bb) provides:

A statute is presumed to be prospective in its operation unless expressly made retrospective.

This authority provides further support for the proposition that the enactment of West Virginia Code § 18A-4-5b was not intended by the Legislature to attach a retroactive effect to decisions by county boards of education to employ personnel for terms in excess of 200 days.

Petitioner ignores the significance of the number of school service employees holding contracts in excess of 200 days at the point in time that West Virginia Code §18A-4-5b was enacted in 1984. In doing so, Petitioner argues that while it would not be permitted to reduce the contracts of such employees to achieve uniformity, employees hired after the enactment of the uniformity statute are entitled to compel county boards of education to provide them with contracts of extended duration through comparison with employees hired for terms in excess of 200 days prior to enactment of the uniformity statute. County boards of education had no appreciation of the fact that hiring decisions made before the enactment of the uniformity statute would have the effect of establishing, in perpetuity, extended contract terms for school service employees. That is what the Court below recognized in concluding that the Legislature intended no such retroactive effect. Petitioner makes no argument that addresses the circuit court's conclusion on this point.

B. Uniformity Requirements Do Not Require the Duration of all Service Employee Contracts to be Identical. The Only Authority Requiring Uniformity in Contract Duration Relates to the Comparison of a Contract that Provides Paid Vacation with a Contract that Provides an Equal Number of Days of Unpaid Leave.

The Petitioner's contract was for 210 days. The contract held by Mr. French was for 261 days and included 21 days of paid vacation. West Virginia Code § 18A-4-8 provides that all school service personnel shall be afforded with a regular employment contract of at least 200 days. County boards of education are authorized to provide regular employment contracts of greater duration based upon need. There was no showing that the Respondent abused its discretion in establishing the duration of Petitioner's contract at 210 days or that custodial services associated with her regular position were required longer than 210 days. The difference in the Petitioner's responsibilities and duties, when compared to Mr. French, was not limited to the fact that Mr. French was entitled to paid vacation, while the Petitioner was not. Mr. French was required to provide additional services encompassing an additional 30 regular contract days over and above the regular contract days the Petitioner was required to work.

The West Virginia Supreme Court has never held that school service employees holding less than 240-day regular contracts are entitled, by virtue of uniformity requirements, to be granted 261-day contracts. It is only when the sole distinction between 240-day contract and 261-day contract employees involves paid vacation that the Court has afforded relief. See Flint et al. v. Bd. of Educ. of the County of Harrison, 207 W. Va. 251, 257, 531 S.E.2d 76, 82 (1999) (overruled in part on other grounds);¹ Board of Education of County of Wood v. Airhart, 212 W. Va. 175, 569 S.E.2d 422 (2002); Durig v. Board of Education of the County of Wetzel, 215

¹ The Flint decision was later overruled by Bd. of Educ. of the County of Tyler v. White, 605 S.E.2d 814 (2004). Specifically, the White decision overruled the holding in Flint that after an employee asserts a prima facie case for discrimination under Section 18-29-2(m), an employer cannot escape liability by asserting a justification for discriminating against an employee. In this case, as more fully explained below, the Grievant cannot even prove a prima facie case of discrimination under the statute.

W. Va. 244, 599 S.E.2d 667 (2004), all involved the resolution of a 240- versus 261-day contract. Syllabus point 5 of Airhart provides:

Where county board of education employees perform substantially similar work under 261-day and 240-day contracts, and vacation days provided to 261-day employees reduce their annual number of work days to level at or near the 240-day employees, principles of uniformity demand that the similarly situated employees receive similar benefits.

The Petitioner's 210-day contract does not establish the profile required to establish a uniformity claim. Actual work for 210 days fails the "like assignments and duties" test when compared with a 261-day contract requiring (work for 240 days/vacation for 21 days). Code § 18A-5-5b requires uniformity between service employees who perform "like assignments and duties." Assignments that are unlike, by virtue of materially different amounts of work to be performed under the regular employment contracts (210 contract days compared with 240 contract days), are not subject to uniformity requirements.

The Court below correctly applied this Court's precedent in concluding no factual basis existed to the prosecution of a uniformity claim based upon failure of the Petitioner to meet the showing required to establish the existence of "like assignments and duties." A. R. 293-294.

Petitioner does not address the Court's reasoning in his petition for appeal, but, rather, focuses upon the argument that the rule requiring the lack of a knowing and intentional decision to violate uniformity provisions, coupled with satisfaction and acceptance of a lesser contract term, serves to limit the amount of pack pay awards in uniformity. Petitioner argues that the rule lacks continuing vitality based upon language contained within West Virginia Code § 6C-2-3, limiting the amount of back pay available under the grievance procedure. The

language contained in Code § 6C-2-3, establishing the outside limits for pack pay awards, does not compel the abandonment of the application of equitable factors limiting pack pay awards in uniformity claims. Petitioner's argument that the establishment of outside parameters be back pay in grievances equates to an automatic entitlement to an award of back pay at the applicable outside limit is not evident from the language of the statute. However, because the Petitioner is only seeking back pay from the point in time his grievance was filed, it is unclear why he elected to argue an issue not being contested in his petition for appeal. Petition for Appeal, at page 14.

The Petitioner held summer employment. Summer employment is separate and distinct from regular employment and is governed by West Virginia Code § 18-5-39, that provides, in part:

(a) Inasmuch as the present county school facilities for the most part lie dormant and unused during the summer months, and inasmuch as there are many students who are in need of remedial instruction and others who desire accelerated instruction, it is the purpose of this section to provide for the establishment of a summer school program, *which is to be separate and apart from the full school term as established by each county.* (emphasis supplied).

The Court below made the following findings and conclusions upon the question of Petitioner's summer employment:

There is no legal basis to combine the number of days with a school service employee's regular contract and the period of summer employment to achieve a comparison with another school service employee holding a regular contract term in excess of 200 days. The West Virginia Supreme Court has never held that summer employment may be piggy-backed with a regular employment term to establish uniformity claims. The summer employment of school service personnel is related to support for summer programs and are, therefore, different than regular employment. Moreover, the Petitioner made no attempt to show

that his summer responsibilities could be compared to the duties and responsibilities associated with his regular employment. A.R. 300.

Aside from noting that the Petitioner held a summer assignment, Petitioner made no argument that addressed the foregoing conclusions reached by the Court below on the subject.

V. CONCLUSION

WHEREFORE, based upon the foregoing, Respondent respectfully prays that the relief sought by the Petitioner be denied and that the decision of the Court below be affirmed.

Dated: February 10, 2012

Respectfully submitted,

RALEIGH COUNTY BOARD OF
EDUCATION,

Respondent.

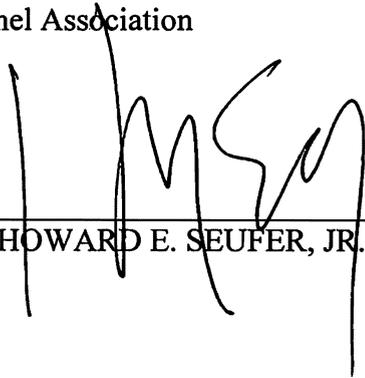


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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of February 2012, I served a true copy of the foregoing "Respondent's Brief" on counsel for Petitioner by United States mail, postage prepaid, and addressed as follows:

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