

**State of West Virginia  
Supreme Court of Appeals**

**Ricky Dillard,  
Petitioner**

**vs) No. 101221** (Kanawha County 09-AA-21)

**The Board of Education of the County of Raleigh,  
Respondent**

**FILED**

February 11, 2011  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**MEMORANDUM DECISION**

Petitioner Ricky Dillard timely appeals the Circuit Court of Kanawha County's May 10, 2010, order affirming the December 31, 2008, decision of the West Virginia Employees Grievance Board. Respondent Board of Education of the County of Raleigh has filed a timely response. The entire record was designated on appeal.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this case is appropriate for consideration under the Revised Rules. Upon consideration of the record on appeal, the parties' briefs, and the circuit court's order, this Court is of the opinion that the decisional process would not be significantly aided by oral argument and that a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Petitioner is employed by the respondent as a Custodian III with a 240-day contract and no paid vacation days. In July 2007, petitioner and other employees classified as Custodian III pursued a joint grievance asserting that respondent violated the uniformity provisions in West Virginia Code §18A-4-5b and the discrimination prohibition of West Virginia Code §6C-2-2(d) by employing a similarly situated Custodian III, Harold French, with a 261-day contract that included paid vacation days. The Grievance Board concluded that petitioner and certain of the other grievants proved that they performed substantially similar duties as Mr. French but were treated differently by virtue of their contracts in violation of the law. However, the Grievance Board denied them any relief. The Grievance Board found that the grievants were not entitled to reinstatement to a 261-day contract because Mr. French retired on June 30, 2008, and no other Custodian III holds a 261-day contract, thus there is no longer any illegal discrimination or favoritism. The Grievance Board denied back pay after finding that the evidence did not establish intentional discrimination by the respondent, that the grievants knew of

this situation for many years, and that the grievants had accepted their contracts without complaint. Petitioner appealed, and the circuit court herein affirmed the Grievance Board's decision.

Petitioner explains that five of his co-grievants also appealed but received different relief from other circuit judges. Although they did not receive any prospective relief, they received back pay for the one school year that the grievance was pending and the discrimination and favoritism continued to exist. In this appeal, petitioner seeks the same relief that was given to the other five grievants who appealed. He raises a single assignment of error: that the lower tribunals erred by denying him back pay and benefits for the 2007 - 2008 school year equaling the difference between a 240-day contract and a 261-day contract.

When denying any back pay award, the grievance board relied upon *Board of Education of the County of Wood v. Airhart*, 212 W.Va. 175, 182-83, 569 S.E.2d 422, 429-430 (2002), and *Durig v. Board of Education of the County of Wetzel*, 215 W.Va. 244, 249, 599 S.E.2d 667, 672 (2004 ) (*per curiam*). In those cases, the school boards violated the uniformity and discrimination statutes by giving some employees 240-day contracts while giving similarly situated employees 261-day contracts. However, this Court found that back pay was inappropriate because the grievants had accepted their 240-day contracts and because the school boards' acts of giving 261-day contracts to other employees were incidental rather than intentional.

Considering the Grievance Board's findings and applying the reasoning in *Airhart* and *Durig*, this Court concludes that the lower tribunals' decision to deny petitioner back pay for the 2007-2008 school year was arbitrary and capricious and characterized by an abuse of discretion. Although petitioner had accepted his contract in prior years, any indication of satisfaction with the offered terms was dispelled when he filed this grievance in July 2007. The Grievance Board found that unlawful discrimination and favoritism existed until the end of the 2007 - 2008 school year, when Mr. French retired. Accordingly, this Court concludes that petitioner is entitled to the difference between his 240-day contract and a 261-day contract for the 2007 - 2008 school year.

We find no error or abuse of discretion in the remainder of the circuit court's and Grievance Board's orders. For the foregoing reasons, we affirm in part and reverse in part.

Affirmed in part, reversed in part.

**ISSUED:** February 11, 2011

**CONCURRED IN BY:**

Justice Robin Jean Davis  
Justice Brent D. Benjamin  
Justice Menis E. Ketchum  
Justice Thomas E. McHugh

Chief Justice Margaret L. Workman voluntarily disqualified