

**No. 30103— *The Board of Education of the County of Wood*
*v. William Airhart, et al.***

FILED

July 3, 2002

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

RELEASED

July 5, 2002

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

McGraw, Justice, concurring in part, and dissenting in part:

I agree with the majority opinion in all respects except its failure to permit retroactive application of the rule announced in this case, so as to permit appellants to obtain back pay in the present case. The majority's stance on this issue is particularly puzzling since the Court has otherwise determined that appellants did not waive their right to "seek redress" for the Board's violation of the uniformity requirement of W. Va. Code §§ 18-29-2(a) & 18A-4-5b.

In syllabus point five of *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879 (1979), this Court summarized the criteria which should be considered in determining whether retroactivity is appropriate:

In determining whether to extend full retroactivity, the following factors are to be considered: First, the nature of the substantive issue overruled must be determined. If the issue involves a traditionally settled area of law, such as contracts or property as distinguished from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified. Second, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded. Third, common law decisions, when overruled, may

result in the overruling decision being given retroactive effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties. Fourth, where, on the other hand, substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored. Fifth, the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity. Finally, this Court will also look to the precedent of other courts which have determined the retroactive/prospective question in the same area of the law in their overruling decisions.

Based upon these criteria, I see no reason why the Court should not give full retroactive effect to the rule announced in syllabus point five of its opinion in this case. This rule clearly does not have the effect of disturbing a previously settled area of law. Moreover, it is not likely to have a serious financial impact, as any award of back pay would be limited to the one year prior to the filing of the grievance under W. Va. Code § 18-29-3(v) (1992) (Repl. Vol. 1999). *See Breza v. Ohio County Bd. of Educ.*, 201 W. Va. 398, 401, 497 S.E.2d 548, 551 (1997) (per curiam).

For these reasons, I respectfully concur in part, and dissent in part from the Court's opinion in this case.