



REPLY TO:
401 Davis Avenue
Suite 315
Elkins, WV 26241
Telephone: 636-1123

Members
James Paul Geary
Orton A. Jones
David L. White

**WEST VIRGINIA EDUCATION
EMPLOYEES GRIEVANCE BOARD**
ARCH A. MOORE, JR.
Governor

Offices
240 Capitol Street
Suite 508
Charleston, WV 25301
Telephone: 348-3361

BOBBY DUFFLE
ROBERT MILLER
HEAROLD NEWHOUSE
RICHARD WILLIAMS
ROBERT YOUNG and
GLESTON SEABOLT

DOCKET NO. 20-87-190-2
DOCKET NO. 20-87-191-2
DOCKET NO. 20-87-192-2
DOCKET NO. 20-87-193-2
DOCKET NO. 20-87-194-2
DOCKET NO. 20-87-195-2

v.

KANAWHA COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievants, Bobby Duffle, Robert Miller, Hearold Newhouse, Richard Williams, Robert Young and Gleston Seabolt, are regularly employed by the Kanawha County Board of Education as service personnel. On July 7, 1987 the grievants filed a level four appeal in which they alleged that the board had denied them summer employment in violation of W.Va. Code, 18A-4-8b and an interpretation of the State Superintendent of Schools. An evidentiary hearing was conducted on August 21, 1987 and "Memoranda of Law" were submitted on September 11 and August 31, 1987, respectively.

The grievants, regularly employed service personnel during the school term, have been in previous summers hired as general maintenance employees assigned primarily to refinish gymnasium floors. In 1987 these general maintenance positions were not advertised as the board of education chose instead to award the work to a private contractor. They argue that this action was in violation of W.Va. Code, 18A-4-8b which states that a board may not prohibit a service employee from retaining or continuing his employment in any position or job held prior to June 3, 1983 and thereafter.

They also contend that while a board of education may enter into contracts, the legislative intent was that it would apply only to projects not defined or specified as service personnel assignments in W.Va. Code, 18A-4-8.

The grievants rely on two interpretations of the State Superintendent of Schools which state that service personnel work may not be contracted out. These interpretations were based upon an informal advisory letter from an Assistant Attorney General who applied the reasoning of O'Connor v. Margolin, 296 S.E. 2d 892 (W.Va. 1982). O'Connor held that a statutory requirement that an administrative division utilize state employees to perform janitorial work prohibited the termination of those employees for the purpose of contracting out the services.

Also cited from O'Connor was California School Employees Association v. Willits Unified School District of Mendocino Co., 52 Cal. Rptr. 165 (1966) which held that a statutory classification of school employees, similar to W.Va. Code, 18A-4-8, imposed a mandatory duty upon administrators to retain janitors as school employees rather than utilizing private janitorial contractors.

The board argues that it has been granted legislative authority to enter into contracts for building repair and the discretion to act in a manner which best meets the needs of the school system. W.Va. Code, 18A-2-5 grants a board of education the authority to hire service personnel but did not require that they be hired as did the controlling statute in O'Connor.¹ Exercising this discretion the board determined that, based upon financial considerations, the needs of the school system could be most efficiently met by awarding the floor refinishing work to private contractors.

¹O'Connor differs substantially from the present matter as it involved a statute which requires that the Department of Finance and Administration secure state employees as janitors to maintain the state capitol buildings and grounds. The Department's attempt to terminate private contracting was disallowed by the W. Va. Supreme Court of Appeals which determined that the Department's authority to enter into contracts for commodities did not include the type of service provided by the petitioners. The California School Employees Association case applied a mandatory statute requiring the school board to employ service personnel.

In addition to the foregoing recitation the following specific findings shall serve as findings of fact and conclusions of law.

Findings of Fact

1. The grievants are regularly employed by the Kanawha County Board of Education as service personnel and have additionally been employed during past summers as general maintenance employees assigned to refinish gymnasium floors.

2. In 1987 the temporary, summer positions were not advertised and competitive bids were solicited from the private sector for this work. This action was based on financial considerations.

Conclusions of Law

1. W.Va. Code, 18-5-5 provides that the county board of education shall be a corporation and as such may contract and be contracted with.

2. The board of education shall provide for the repair and good order of the school grounds, buildings and equipment. W.Va. Code, 18-5-9.

3. While a board of education is authorized by W.Va. Code, 18A-2-5 to employ such service personnel as is deemed

necessary for meeting the needs of the school system, this statute does not make the employment of service personnel mandatory as evidenced by W.Va. Code, 18-5-12 which requires that persons contracting for the building or repair of school property execute a bond in the amount of the contract price.

4. A board of education is not statutorily required to employ service personnel when it is more efficient and/or economical to contract the work to private industry.

Accordingly, this grievance is **DENIED**.

Either party may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. (W. Va. Code, 18-29-7). Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the Court.

DATED

October 26, 1987

Sue Keller

SUE KELLER
Hearing Examiner