



**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

**TIMOTHY C. NEALIS**

**v.**

**DOCKET NO. 02-87-231-2**

**BERKELEY COUNTY BOARD OF EDUCATION**

**DECISION**

Grievant, Timothy Nealis, was first employed by the Berkeley County Board of Education as a bus operator in October 1978. Mr. Nealis filed a level one grievance on May 12, 1987 in which he alleged that he had been wrongfully denied reinstatement based upon an interpretation of Dr. Tom McNeel, State Superintendent of Schools. The matter was waived to level four but not received by the Education Employees Grievance Board until September 1, 1987. An evidentiary hearing was conducted on September 17 and proposed findings of fact and conclusions of law were filed by October 9.

The grievant had been employed by the board for more than eight years when he received a job offer from the Schmidt Baking Company. Although he had been waiting for this job offer for

two years he was unsure of whether to accept the higher paying position or to remain at the board. He inquired about a leave of absence in order to accept the position of driving a truck for the bakery and to determine whether he really wanted to change positions but was informed that leaves were only granted for medical, maternity and educational reasons. Based upon the information provided by the transportation director he submitted his resignation on December 9, 1986 to be effective December 16, 1986.<sup>1</sup>

Two weeks after assuming the position with the bakery the grievant determined that he had made a mistake in leaving the board of education and on January 19, 1987 he inquired about returning to his position as bus operator. Assistant Transportation Director Paul Gregory informed him that there was a hiring freeze in effect but that he could work again as a substitute. Several days later the grievant received a letter from Superintendent Jackson Flanigan dated January 23 advising him that on December 19 the board of education had approved his resignation effective December 16. The grievant then spoke with Superintendent Flanigan and informed him of his wish to withdraw his resignation.

---

<sup>1</sup>The grievant's last day of work was earlier in the week as he used his remaining one and one-half or two days of annual leave prior to the effective date of the resignation.

The Superintendent advised the grievant that legally he could do nothing but that he could file a grievance if he chose to do so. Instead, the grievant approached members of the board of education in an effort to gain reinstatement.

By letter dated April 15, 1987 State Superintendent of Schools Tom McNeel responded to the board's inquiry regarding whether it could reconsider the grievant's resignation when he had verbally requested reinstatement from the Assistant Transportation Director before the board had taken final action. Superintendent McNeel's response was that "...if the board accepts a tendered resignation which might have been withdrawn, then it can correct its mistake because it could have - - although it need not have - - returned the written offer...". Superintendent McNeel interpreted the situation as having resulted from either a mistake, a misunderstanding of the law or misconduct on the part of the assistant transportation director and that under any of these circumstances the employee would be entitled to a hearing before the board to ask for the return of his resignation or that the grievance procedure could be used to gain a resolution to the situation.

The grievant argues that he was incorrectly advised that he was ineligible for a leave of absence and later that nothing could be done regarding his resignation. He asserts that he was entitled to a hearing before the board to ask for a return of his resignation and requests that he be reinstated to his position with back pay or, in the alternative, that he be granted a hearing by the board of education on his request to return his resignation.

The board argues that the grievance was untimely filed and that the resignation was effective when submitted and did not require a responsive action by the board.

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

#### Findings of Fact

1. The grievant was employed by the Berkeley County Board of Education as a bus operator from October 1978 to December 1986.

2. In December 1986 the grievant was offered a position with a local bakery. His request for a leave of absence from the board until he could determine whether or not he wanted to change positions was denied as leaves are granted for medical, maternity and educational reasons only.

3. The grievant submitted his resignation effective December 16, 1986 and withdrew his contributions from the school employee's retirement fund. He used his remaining personal leave of 1½ or 2 days prior to December 16.

4. The grievant began work at the bakery January 2, 1987 and within two weeks determined that the job change had been a mistake.

5. On January 19 the grievant visited the office of the transportation director seeking reinstatement to his former position. The assistant director advised him that a hiring freeze was in effect but that he could be placed at the bottom of the substitute list.

6. On January 19, 1987 the board of education accepted the grievant's resignation effective December 16, 1986. Due to the holidays this was the first board meeting since December 16.

7. The grievant was notified of the board's action by letter of January 23. At that time he met with Superintendent Flanigan who stated that he could legally do nothing but that a grievance could be filed.

8. The grievant contacted members of the board of education who solicited an interpretation from the State Superintendent

of Schools. The Superintendent indicated that the board could correct the mistake and that the employee was entitled to a hearing before the board or that the employee could seek a resolution through the grievance procedure.

9. Apparently the board did not grant the grievant a hearing subsequent to receiving the superintendent's interpretation and a level one grievance was filed on May 12, 1987.

#### Conclusions of Law

1. W.Va. Code, 18A-2-5 provides a contract to be used in the employment of service personnel by a county board of education. Paragraph seven states that the contract may be terminated or modified at any time by the mutual consent of the board and the employee. This provision is in compliance with the general rule that a contract of employment is terminated when an employee tenders a resignation and the proffer is accepted by the employer. 53 Am. Jur. 2d, Master and Servant, §34.

2. The grievant's attempted withdrawal of the resignation on January 19 was improperly processed depriving him of the opportunity to rescind the action before it was considered by the board.

3. The grievant's delay in filing a level one grievance was due to an investigation by the board and constitutes good cause for failure to strictly comply with W.Va. Code, 18-29-4(a)(1); Carl W. Steele v. Wayne County Board of Education, Docket No. 50-87-062.

Accordingly, the grievance is **GRANTED** and the board is **ORDERED** to reinstate the grievant with backpay less any appropriate set off.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Berkeley 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

December 22, 1987

Sue Keller

SUE KELLER

Hearing Examiner