



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

**WAYNE FACELLO and
WAYNE MARCUM**

v.

DOCKET NO. 41-87-235

RALEIGH COUNTY BOARD OF EDUCATION

DECISION

Grievants, Wayne Facello and Wayne Marcum, were employed by the Raleigh County Board of Education as carpenters from July 1985 until June 1987. Grievance proceedings were initiated following receipt of notice that they would not be rehired for the 1987-88 school term. A level four hearing was conducted on October 27 and proposed findings and conclusions were received by November 9.

When hired in 1985 the grievants were issued contracts for probationary service personnel "temporary carpenters". By letter dated April 21, 1986 they were advised that they would not be recommended to be rehired for the 1986-87 term based upon their employment as "temporary" carpenters which was con

tingent upon the availability of bond construction funding. Both grievants were ultimately rehired for the 1986-87 school year and performed in the same capacity as in 1985-86 although they were issued no contract of employment. They were notified in April 1987 that they would not be recommended to be rehired for the 1987-88 school term based upon an opinion of the Attorney General that a county board of education "cannot hire new or additional employees for the sole purpose of undertaking a capital construction or improvement project with a cost in excess of \$25,000.00" as such action would violate the bidding requirements of W.Va. Code, 5-22-1.

It is undisputed that the grievants reported to work regularly and were not substituting for other employees, they have acceptably performed their assigned duties as carpenters II, were employed for a 261 day employment term, were not awarded any vacation time, personal leave, holidays, health, dental or optical insurance and did not accrue seniority. The grievants argue that a sufficient work load exists to maintain their continued employment and that they were treated unfairly as they were led to believe that they would be retained as regular employees and were not permitted to transfer to vacant positions during their two year period of employment.

The board argues that the grievants were specifically hired on a temporary basis to complete carpentry work on construction projects not covered by bond construction contracts and that their employment was not renewed for the 1987-88 school year based upon the Attorney General's opinion. That opinion concluded that while regular full-time employees, as defined by W.Va. Code, 18-1-1(i), could be assigned to work on major construction, renovation or repair projects exceeding \$25,000.00 in cost, a board of education could not hire new or additional employees for this purpose as such action would be in violation of the bidding requirements of W.Va. Code, 5-22-1. New employees hired to work on construction projects financed by a special school bond issuance or other non-recurrent funding mechanism can not be considered "regular full-time employees" of the board as they do not hold contractual positions in accordance with W.Va. Code, 18A-2-5.

Findings of Fact

1. Grievants were employed by the Raleigh County Board of Education in July 1985 as temporary carpenters to complete projects not included in bond construction contracts. They entered into probationary contracts for substitute service personnel "temporary carpenters" for the 1985-86 school term.

2. In April 1986 the grievants were notified by Superintendent Ronald Cantley that they had not been recommended to be rehired for the 1986-87 school term based upon their status as "temporary" employees contingent upon the availability of bond construction funding.

3. Grievants were ultimately rehired for the 1986-87 school term but were not issued contracts as they were expected to work for only a brief period of time.

4. The grievants were notified in April 1987 that they would not be recommended to be rehired for the 1987-88 school term based upon an opinion of the Attorney General which stated that temporary or regular employees could not be hired to work on construction projects with a total cost exceeding \$25,000.00. This opinion was adopted by the State Superintendent of Schools who issued it as guidance to county superintendents and boards of education.

5. Although the grievants were aware that they had been hired on a temporary basis they believe administrators implied to them that they would be "slid" into regular positions. Based on that interpretation they refused other job offers. Any such

promises, actual or implied, occurred prior to the State Superintendent's promulgation of the Attorney General's opinion.

6. The grievants failed to state which regular position vacancies they applied or to establish their entitlement to any position under W.Va. Code, 18A-4-8b(b). Grievants further failed to pursue any rights they had to those positions at that time and offer no explanation for their failure to act other than their reliance on a belief that they would ultimately be made regular employees.

Conclusions of Law

1. The position of the State Superintendent of Schools adopting an Attorney General's opinion interpreting W.Va. Code, 5-22-1 is that new employees may not be hired to specifically complete construction or renovation projects exceeding \$25,000.00 in cost. Interpretations of the State Superintendent of Schools are entitled to great weight unless clearly erroneous. West v. Wetzel County Board of Education, Docket No. 52-86-279-3 and Smith v. Board of Education of the County of Logan, 341 S.E. 2d 685 (W.Va. 1985).

2. As the grievants agreed to accept the positions as temporary employment they have suffered no damages as per that agreement. Therefore there is no basis in law or in equity to award them regular full-time positions with the board.

3. The grievants have failed to timely pursue their rights to any positions posted between 1985 and 1987 or to provide any valid reasons for their failure to do so. It is incumbent upon an employee to timely pursue their rights through the grievance process and when timeliness is questioned to demonstrate the reason for the delay. Scarberry v. Mason County Board of Education, Docket no. 26-86-291-1, Murphy v. Mingo County Board of Education, Docket No. 29-86-341-4.

Accordingly, the grievance is **DENIED**.

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

January 29, 1988

Sue Keller

SUE KELLER

Hearing Examiner