

MICHAEL S. LONG and

JOHNNIE V. ADAMS,

Grievants,

V. DOCKET NUMBER: 96-20-041/

95-20-516

KANAWHA COUNTY BOARD OF EDUCATION,

Employer.

DECISION

Michael Long and Johnnie Adams (hereinafter Grievants or Long and Adams) are both retired from the United States Marine Corps and employed by the Kanawha County Board of Education (hereinafter Board) as Junior Reserve Officers' Training Corps (JROTC) instructors at St. Albans High School in St. Albans, West Virginia. [\(See footnote 1\)](#) Grievants both filed grievances pursuant to West Virginia Code §§18-29-1, et seq., against the Board, claiming that their salaries for the 1995-1996 school year are not as high as they were led to believe they would be prior to the beginning of the school year. Long also filed a separate grievance claiming that his contract term is not for the correct number of days during the school year. These three grievances were consolidated at level four after being denied at the lower levels of the grievance procedure. An evidentiary hearing was held on February 7, 1996, at the Grievance Board's Charleston, West Virginia office. The case became mature for decision on March 6, 1996, after receipt of the parties' post-hearing submissions.

The following facts have been derived from the evidentiary record in the case:

Findings of Fact

1. The United States Marine Corps works with school systems throughout the country to establish MCJROTC units and to help in staffing those units. The Board has executed an agreement with the Marine Corps for the establishment of a JROTC program at St. Albans High School.

2. The agreement referred to above establishes the method by which JROTC instructors' salaries are to be computed. The language of this agreement, in this regard, is as follows:

Retired personnel so employed shall receive their annual retired pay and at least an additional amount equal to the difference between their retired pay and the active duty pay which they would receive if ordered to active duty, excluding hazardous duty and proficiency pay. The additional amount is payable monthly for the actual period of employment in direct support of the MCJROTC program. The institution is the employing agency and shall pay the full additional amount due to the individual employed on a pay schedule identical to that in effect for other faculty members. The Marine Corps shall pay the institution one-half of the difference between the individual's retired pay and the active duty pay and allowances, excluding hazardous duty and proficiency pay, which he would receive if ordered back to active duty. The Marine Corps' responsibility is limited to the period of employment specific in the contract between the instructor and the institution, regardless of the institution's distribution of pay.

2. It was recommended to the Board that Long be interviewed for the position of instructor of the JROTC unit, a job which had been posted as a 220 day position.

3. Long traveled from his home in Virginia, and on June 20, 1995, he met with Carl Garner, Vice Principal of St. Albans' High School and Calvin McKinney from Sissonsville High School. During this meeting, Carl Garner indicated that the job of JROTC instructor was available for Long if he wanted it. He was also told that he could find and recommend the hiring of a Sergeant to work with him in the program.

4. During this discussion, Long asked to have confirmation of what his salary would be. Neither Mr. Garner nor Mr. McKinney knew what the salary for either position would be so they asked if William Milam, Director of Personnel, would meet with them to discuss salaries.

5. Long had a copy of a Leave and Earnings Statement from the Marine Corps with him. He asked Mr. Milam if he would make a certain salary which he had already calculated based upon his understanding of the Marine Corps' determination of JROTC instructors' salaries. Mr. Milam indicated that he did not know what exact dollar amount Long would be making. He indicated that the Marine Corp sends him wage information from which he determines salaries for instructors. Mr. Milam made

a statement something to the extent that "if that is what you should make then that it was you will make."

6. Mr. Milam indicated that Long's salary would be based upon his monthly base pay, as derived from the military, multiplied by 10.5 because his contract would not be for the entire year.

7. At this meeting, Long also indicated that he would not be able to retire and start work for the Board until shortly after the beginning of the school year. He inquired as to whether his employment term could be extended after the normal ending date to account for the days he would miss at the beginning. Mr. Milam indicated that it would probably not be a problem and that the details could be worked out between him and Mr. Garner at the school. Mr. Garner agreed that this could take place.

8. Long left on June 20, 1995, believing that he had been offered the position of JROTC instructor. He also believed that his salary would be his military, monthly base pay (\$3,568.50) multiplied by 10.5.

9. Thereafter, Long contacted Adams and told him that he had been offered the job by the Board and that he had been told he could recommend him for the other instructor's position.

10. At this time, Adams informed Long that he had been offered a job in Choppy, South Carolina, and that they could both work at that school. Adams informed Long that the salary he had been offered was approximately \$35,000.00. After discussing their options, Adams agreed that he would submit his resume to the Board and seek employment in West Virginia. 11. During this phone discussion, Adams asked Long what their salaries would be, and Long indicated that it would be his monthly base pay multiplied by the number of months worked.

12. Adams submitted a resume to Mr. Milam's office but received no response. Long called Adams sometime on or around July 23, 1995, and asked him if he was still planning on working for the Board. Adams responded by indicating that he had not heard anything from the Board. Thereafter, Mr. Garner called Adams and offered him the job.

13. Both Long and Adams moved to West Virginia to start work for the Board. Long started work on September 5, 1995, and Adams started at the beginning of the school year, August 14, 1995.

14. On August 14, 1995, Adams went to the personnel office to complete the necessary forms for employment. At this time, he asked Mr. Milam's secretary, Ms. Allred, if she could tell him what his salary was to be. Ms. Allred indicated that she did not know what his salary was to be but that if he had been told how much it would be, he was probably told the correct amount.

15. On August 23, 1995, Ms. Allred called Adams and asked him to contact the Marine Corps in order to obtain the necessary verification of his military salary so that his salary could be determined. Adams called Captain G. E. Betar with the 4th Marine Corps District in New Cumberland, Pennsylvania, and asked for verification of his military salary. Captain Betar sent him a memorandum, via facsimile machine, indicating that his minimum, annual salary was to be \$29,073.00. Captain Betar also sent Adams a memorandum indicating that Long's minimum, annual salary should be \$30,363.00.

16. Adams presented Ms. Allred with a copy of this document and then attempted to determine what his monthly salary was going to be as paid by the Board. He asked to see Mr. Milam to verify that he was correct in calculating his salary but Mr. Milam would not see him. Adams asked if Ms. Allred would ask Mr. Milam to verify that he was going to receive \$29,073.00 per year. Ms. Allred went into Mr. Milam's office, spoke to him, and returned indicating that if the salary figure was correct, then that is what he would be paid.

17. At this time, Mr. Milam had not been able to determine the exact salaries for either Long or Adams. Ms. Allred knew nothing about the proposed salaries for either gentleman nor did she know how JROTC instructors' salaries were computed.

18. Neither Long nor Adams were provided with employment contracts prior to their starting dates of employment. Further, neither their exact salaries nor employment dates were confirmed with them prior to their starting dates.

19. On September 8, 1995, Long was presented with a probationary employment contract to sign for the current school year.

20. Long's contract indicated that his salary was to be \$26,568.00, for the period of employment commencing on August 4, 1995, and ending 200 days later. The contract indicated that it was made and entered into on July 20, 1995. A cover letter attached with this contract was dated August 30, 1995, and it indicated that the Board had approved his hiring at its meeting on July 20, 1995.

21. On or after October 3, 1995, Adams was presented with his probationary contract of employment.

22. Adams' contract specified that his salary was to be \$25,439.00 for the employment term of August 14, 1995 through 220 days. This contract indicated that the Board had approved Adams' hiring on September 21, 1995.

23. Neither Long nor Adams received a paycheck on the first payday of the school year. They received their first pay on September 8, 1995, the second pay period. On this day, both Long and Adams realized that their salaries were not as high as they believed they would be.

24. After receiving his paycheck, Adams went to Mr. Milam's office to verify whether his salary was correct. He asked if his paycheck reflected the appropriate salary, and he was told that it did.

25. While Adams was speaking to Mr. Milam, Long came to the office to inquire about the correctness of his salary. At some point, Captain Betar was again called and asked to verify the salary figures for Long. Another memorandum was sent via fax machine to Mr. Milam's office similar to the ones sent on August 23, 1995. This time the memorandum indicated that Long's salary should have been based upon a minimum monthly salary of \$2,799.59. Captain Betar had earlier made a mistake in concluding that Long's minimum annual salary should be \$30,363.00. It was communicated to Mr. Milam that his minimum annual salary should be \$33,595.08.

26. Grievant's current salaries are based upon the minimum salary figures supplied to Mr. Milam by Captain Betar.

27. The salary for Adams was determined by dividing the minimum annual salary by 12, then multiplying by 10.5 to represent an annual salary for 10.5 months worked. $(\$29,073 / 12) \times 10.5 = \$25,439.00$.

28. Long's annual salary was calculated in the same manner as Adams. $(\$30,363.00 / 12) \times 10.5 = \$26,568.00$. (However, this is not the correct salary based upon the number of days the contract indicates Long should work). This figure is based upon a 240 day term while the contract contains a 200 day term.

29. Because it was determined on September 8, 1995, that the first minimum annual salary quote provided by Captain Betar was incorrect and the actual amount was higher, Long's salary was increased to \$29,396.00.

30. Other JROTC instructors employed by the Board have different contractual periods of employment.

31. After the grievance was filed, the Board presented Grievants with new contracts to execute that contained employment lengths of 214 days for Adams and 198 days for Long. Obviously, these contracts included salaries based upon these different employment terms.

Discussion

Grievants contend that they were misled into believing that their salaries were going to be higher than they ended up being. They contend that based upon the discussions they had with Mr. Milam and/or Ms. Allred, their salaries were to be calculated by multiplying 10.5 by their base pay as set forth on their Leave and Earnings Statements. [\(See footnote 2\)](#) They aver that based upon this belief, they turned down other more lucrative employment opportunities to move to West Virginia. Therefore, they detrimentally relied upon the statements, actions or omissions of the agents of the Board. Legally, they argue that they maintain oral contracts of employment that entitle them to salaries based upon the minimum monthly salaries they believed their salaries were to be based upon.

Long also argues that he should be awarded, at the least, a 220 day contract based upon the assurances made to him by Mr. Milam during his interview on June 20, 1995. Adams also argues that his employment term should be 220 days and not 214. Grievants both request that consideration be given to awarding them 240 day contracts, as other JROTC instructors employed by the Board have contracts of that length. The Board contends that Grievants have not reasonably relied upon any statements or actions of its agents to their detriment. It contends that neither Mr. Milam nor Ms. Allred made any promises concerning what Grievants' salaries were to be, nor that they had the authority to do so. It asserts that Grievants had preconceived ideas as to the amount of their salaries which did not end up being accurate and the Board should not be responsible for their misconceptions. It denies that it must employ all of its JROTC instructors for the same number of days. It contends Long was properly given an employment term of 198 days because that is what he was scheduled to work due to his late starting date. Finally, with regard to the last contracts which were issued to Grievants, the Board contends that the length of employment is correctly based upon the actual number of days Adams and Long are to work during the 220 and 200 days, respectively, and that this method of payment is consistent with how the military pays its personnel.

The Board is correct in its analysis of the facts in the case. Much testimony and argument has been presented to attempt to establish what exactly was stated to Grievants concerning their salaries by both Mr. Milam and Ms. Allred. However, what is clear from the record is that Long had a preconceived idea as to how his salary was to be calculated by Mr. Milam before the interview on June 20, 1995. He believed that his salary would be based upon his active duty base pay multiplied by some number of months, either 12 if he was to work the full year or some lesser number

depending on how many months he was to work. However, the evidence also demonstrates that nobody on behalf of the Board had any clue as to what Grievants' salaries were to be until information was received from the USMC. Long has not established by a preponderance of the evidence that Mr. Milam, on June 20, 1995, agreed with him that his salary would be based upon the base pay amount delineated on his Leave and Earnings Statement. Mr. Milam did say, and could only confirm that his salary would be determined as Long proposed if the salary information from the USMC was consistent with the same amount. While it is true that Mr. Milam did not say with certainty that Long's salary would not be the amount he (Long) thought it would be, neither did he confirm that it would be the same. Unfortunately for Adams, Long then contacted him and opined that their salaries, if they worked in West Virginia, would be based upon the base pay figure contained on their Leave and Earnings Statements. Therefore, Adams also labored under this same assumption. The evidence does, however, establish that both Grievants were specifically told their salaries would be based upon 10.5/12 of the minimum annual salary figures provided by the USMC.

The Undersigned does find it particularly disturbing that neither Mr. Milam nor any other agent of the Board appeared at all to be concerned about attempting to determine what Grievants' salaries would be before making them an offer of employment, especially since it was known that both Grievants would have to relocate to West Virginia from Virginia in order to accept the positions. Further, it is not an admirable business practice to hold off on the execution of employment contracts until long after an employee has not only accepted a job but has also started working. September 8, 1995, was not the date on which the parties should have begun negotiating their contractual terms. The record indicates that the Grievants are not the first JROTC instructors hired by the Board, and Mr. Milam should have been familiar with the process and should have made a greater attempt to ensure that the exact problem that has occurred did not occur.

This is not to say that all of the blame can be placed upon the Board or Mr. Milam. It would appear that Grievants acted irrationally in making the assumptions they made before deciding to turn down other employment and move to West Virginia, after they were not provided with any concrete information concerning their salaries or other contractual terms of employment. Decisions to change one's career and to move one's family are important decisions that should not be made based solely upon one's assumption that his salary will be X when the amount of the salary is a major factor or the only factor upon which the decisions are based.

The evidence proves that Grievants were told their salaries would be based upon the salary determinations made by Captain Betar, and that their actual salary would be 10.5/12 of the minimum annual amount reported. This is also consistent with the language contained within the contract executed between the Board and the USMC. Therefore, Grievants unreasonably believed their salaries were to be higher. As determined from the exhibits and the testimony of Captain Betar, Long's salary for the 1995-1996 school year should have been \$29,568.00 and Adams' salary should have been \$25,439.00. [\(See footnote 3\)](#) These dollar amounts were not calculated by using Grievant's basic pay figure from their Leave and Earnings Statements but by subtracting their retirement from their total, active monthly salary, then multiplying that product by 10.5. The grievance on this issue is hereby denied.

Regarding Grievants' employment term, the evidence does establish that they were told they would have 220 day contracts. In fact, the job was posted consistent with this term. It is also determined that Mr. Milam did ensure that Long would be able to have a 220 day term even though he was starting after the beginning of the school year. Given the facts of this case, it is determined that equity calls for Long being granted an employment contract matching the terms of the position that he interviewed for and accepted. This is based, in large part, upon the fact that Long's decision was largely, if not entirely based upon the salary offered for the position, coupled with the actions of the Board in not communicating to him any definite terms of employment prior to him beginning work. Also, Long testimony that he was going to work at least 220 days during the year was uncontradicted. Long is to be awarded a 220 contract for the 1995-1996 school year. [\(See footnote 4\)](#) The contracts provided to Grievants after the grievance was filed, indicating that their employment terms were to be less than 220 days, should not be valid or enforced. There was no competent evidence to justify the decreasing of the employment term based upon the reasons given. It appears strange that even though Grievants are not the first JROTC instructors hired by the Board, they appear to be the only ones who have been offered unconventional employment periods. The issuance of these contracts, at the time they were offered, smacks with an inference of retaliation which is illegal and cannot be condoned.

Finally, Grievants have not established sufficient evidence upon which to base a conclusion that they should be granted 240-day contract periods simply because one other instructor at Capital High School has such a term. They have not proven any entitlement to a contract term other than the one

associated with the positions they accepted. Just as the Board is bound to comply with the terms of the position offered to Long, so should Grievants be bound to accept the terms they had already agreed upon.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law:

Conclusions of Law

1. Grievants bear the burden of proving claims by a preponderance of the evidence. See, W. Va. Code §18-29-6. 2. Grievants have failed to establish that they entered into oral contracts of employment with the Board or any of the Board's agents during their negotiations for employment. Further, boards of education in West Virginia are not authorized to employ professional personnel pursuant to oral contracts of employment. See, W. Va. Code §18A-2-2. Any attempt by an agent of a board of education to bind a board by the terms of an oral contract of employment would be an ultra vires act and unenforceable. See, Rose v. Nicholas County Bd. of Educ., Docket No. 93-34-063 (Jun. 29, 1994).

3. "The doctrine of estoppel should be applied cautiously, only when equity clearly requires that it be done, and this principle is applied with especial force when one undertakes to assert the doctrine of estoppel against the state." McFillan v. Berkeley County Planning Com'n, 190 W. Va 458, 465 (1993) citing, Samsell v. State Line Development Co., 174 S.E.2d 318 (W. Va. 1970).

4. Long has established sufficient facts supporting the application of the doctrine of equitable estoppel concerning the number of days of his employment term. He is entitled to a 220 day employment term.

5. All other claims presented by Grievants are not supported by the evidence and are unpersuasive.

Therefore, this grievance is hereby **DENIED IN PART** and **GRANTED IN PART** to the extent that the board is hereby **ORDERED** to execute contracts with grievants for the 1995-1996 school year consistent with the discussion above. All other requests for relief are **DENIED**.

Any 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. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is

a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

ALBERT C. DUNN, JR.
Administrative Law Judge

May 31, 1996

[Footnote: 1](#)

Long's retired military rank is Captain and Adam's retired rank is Master Sergeant.

[Footnote: 2](#)

At times, Grievants have also argued that the minimum annual salary figures provided Mr. Milam by Captain Betar represent the salaries they should receive regardless of the fact that they are only required by the Board to work 10.5 months. This argument is not consistent with the assurances they believe they were given during their meetings with Mr. Milam, with an interpretation of Captain Betar's memoranda or the language of the agreement between the Board and the USMC. Therefore, this argument is without merit.

[Footnote: 3](#)

Although this is the salary Grievants are to be paid, it is recognized by the Marine Corps as the minimum salary and the Board is able to increase the amount if it desires.

[Footnote: 4](#)

Again, the facts of this case are very confusing. It was earlier noted that the first contract offered Long included a salary based upon a 220 day term but stated that the term was 200days. Practically speaking, this holding only has effect assuming the Board has attempted to lower his salary along with the number of days. In any event, whichever contract is actually executed should contain the appropriate employment terms.