



STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

CHARLIE BROWN
ATTORNEY GENERAL

September 25, 1986

Mr. Tom McNeel
State Superintendent of Schools
West Virginia Department of Education
State Capitol
Charleston, West Virginia 25305

Dear Superintendent McNeel:

This letter is in response to your inquiry of September 9, 1986, requesting a official opinion as to the scope of W. Va. Code § 5-22-1, which provides, in pertinent part, as follows:

"As used in this section, 'the State and its subdivisions' means the State of West Virginia, every political subdivision thereof, every administrative entity that includes such a subdivision, all municipalities and all county boards of education.

"The State and its subdivisions shall except as provided in this section solicit competitive bids for every construction project exceeding twenty-five thousand dollars in total cost. * * *

"Nothing in this section shall apply to work performed on construction or repair projects by regular full-time employees of the State or its subdivisions, * * * .

"Nothing herein shall apply to emergency repairs to building components and systems. For the purpose of this paragraph, emergency repairs means repairs that if not made immediately will seriously impair the use of such building components and systems, or cause danger to those persons using such building components and systems." (Emphasis supplied.)

Specifically, you have posed the question of whether "it would be a violation of the law for a county board to hire new employees to work on such projects, thereby avoiding the letting

of bids" on "construction or major renovation projects." Answering the issue which you have raised involves the interpretation of the undefined phrase "regular full-time employees" contained in the third paragraph of Code 5-22-1.

In considering this issue, it is useful to review the interaction between Code 5-22-1 (which repealed former W. Va. Code § 18-5-12a [1974])¹ and Chapter 21, Article 5A, dealing generally with "Wages for Construction of Public Improvements." Code 21-5A-1 defines the term "construction" to mean any "construction, reconstruction, improvement, enlargement, painting, decorating, or repair of any public improvement let to contract. The term 'construction' shall not be construed to include temporary or emergency repairs." Code 21-5A-1(2) (Emphasis supplied.)

Since the enactment of Chapter 21, Article 5A of the Code of West Virginia preceded the enactment in 1983 of Code § 5-22-1, and since both statutes deal with hiring and bidding practices pertaining to public construction and repair projects, the legislative intent in enacting Code 5-22-1 should be considered in light of the statutory requirements then prevailing. The obvious purpose of the Legislature was to increase the cost level of public projects which by law must be submitted for bids from \$5,000.00 to \$25,000.00. In fact, all the proposed legislation considered prior to the passage of Enrolled H. B. 1709 [now Code 5-22-1] concerned the cost level at which competitive bidding would be required.² On the other hand, former Code 18-5-12a permitted schools to "undertake and complete" projects in excess of \$5,000.00 with the "board's own employees" -- all Code 5-22-1 did was to redefine and clarify the term "own employees" and insert in lieu thereof the term "regular full-time employees," and increase the bid requirement level to \$25,000.00.

This legislation clearly evidences the Legislature's intent that only those school employees who are already employed on a full-time basis by a county board of education may work on major

¹ W. Va. Code § 18-5-12a, prior to its repeal in 1983, required that school construction projects of \$5,000.00 or more be let for competitive bidding, except as to "any construction project of such board by the use of such board's own employees."

² See pages 578-582 of the Journal of the House of Delegates, 1983 Regular Session, February 16, 1983.

construction, renovation or repair projects exceeding \$25,000.00 in cost. Simply put, if a county has available school service personnel on its work force, or if a county board of education decides to reallocate its available human resources to permit their participation in a construction project which would otherwise require competitive bidding, it is free to do so. However, it 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; such an action would run counter to the bidding requirements of Code 5-22-1.

Code 18-1-1(i) defines a "regular full-time employee" as one who is "employed by a county board of education who has a regular position or job throughout his employment term, without regard to hours or methods of pay".³ In making the determination as to whether a particular school service employee is employed on a "regular full-time" basis, Code 5-22-1, consideration should be given to Code 18A-4-8, which provides that the "employment term for service personnel shall be no less than ten months. * * *" A "regular" employee then is a contractual employee who fills a personal services position which has been funded in the county school board's budget for the academic year in question.

Obviously, if the occupant of such a position dies, is transferred or promoted, voluntarily resigns, or is discharged for cause, etc., a board of education is authorized to fill such position with a new or substitute employee, and may thereafter utilize such new employee to work on a capital building project to the same extent as it could have utilized the former employee. On the other hand, if the construction project is being funded by a special school bond issuance or other nonrecurrent funding mechanism designed to facilitate completion of one or more major building or construction projects, and the monies to pay the work force hired to complete the project are included in the proceeds thereof, then any such new employees hired to work on the project would not be considered "regular full-time employees" of the board since they do not hold contractual positions in compliance with Code § 18A-2-5.

³ Code § 18-1-1(i) defining a "regular full-time employee," should be construed with Code 18A-1-1(a), which defines "school personnel" as "all personnel employed by a county board of education whether employed on a regular full-time basis, an hourly basis or otherwise. * * * "

Accordingly, we conclude as follows:

1. Unless the project falls within one of the specific exceptions contained in W. Va. Code § 5-22-1, capital construction, improvement or repair projects exceeding \$25,000.00 in total cost must be submitted for public bidding.

2. Unless the public authority already has a sufficient number of available, currently employed full-time workers to devote to the project, the public authority must submit the capital construction project to bid if the cost will exceed \$25,000.00.

3. The public authority may not hire new personnel to perform such capital improvements; nor may the public authority evade the law by hiring new personnel to do the work of regular employees and transfer existing employees to make such capital improvement.

Sincerely,

A handwritten signature in black ink that reads "Charles G. Brown". The signature is written in a cursive style with a large initial "C".

CHARLES G. BROWN
ATTORNEY GENERAL

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