

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

**STATE OF WEST VIRGINIA ex rel. DARRELL
V. McGRAW, JR., in his capacity as
Attorney General for the State of West
Virginia,**

Petitioner,

vs.

Supreme Court No. 30094

**GREGORY A. BURTON, Cabinet Secretary of
the Department of Administration;
NICHELLE PERKINS, Director of Personnel
of the Department of Administration; KAY
HUFFMAN GOODWIN, Cabinet Secretary of
the Department of Education and the Arts;
MIKE CALLAGHAN, Cabinet Secretary of the
Department of Environmental Protection;
PAUL NUSBAUM, Cabinet Secretary of the
Department of Health and Human Resources;
JOE MARTIN, Cabinet Secretary of the
Department of Military Affairs & Public
Safety; BRIAN KASTICK, Cabinet Secretary
of the Department of Tax and Revenue;
and FRED VANKIRK, Cabinet Secretary of
the Department of Transportation,**

Respondents.

**The Public Service Commission of West Virginia;
the West Virginia Board of Education, the West
Virginia Department of Education and the
Superintendent of Schools; the West Virginia
Consolidated Public Retirement Board; and the
West Virginia Regional Jail and Correctional Facility
Authority,**

Intervenors.

**AMICUS CURIAE BRIEF OF
KIMBERLY BENTLEY, CAROL EGNATOFF,
GARRETT JACOBS AND HEIDI TALMAGE**

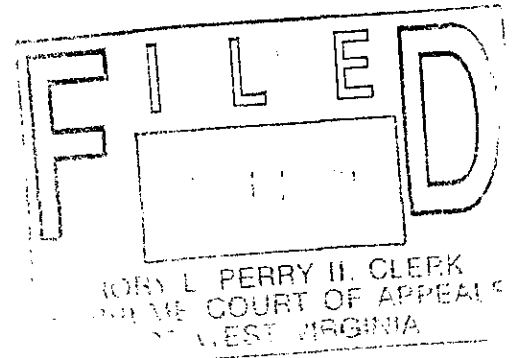


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POINTS AND AUTHORITIES

Baker v. Civil Service Commission of West Virginia, 245 S.E.2d 908 (W. Va. 1978)

Jacobus v. Heydinger, 643 F. Supp. 550 (S. Dist. W. Va. 1986)

Manchin v. Browning, 296 S.E.2d 909 (W. Va. 1982)

Roach v. Regional Jail Auth., 198 W. Va. 694, 482 S.E.2d 679 (1996)

State ex rel. Karnes v. Dadisman, 172 S.E.2d 561 (W. Va. 1970)

Swiger v. Civil Service Commissioner, 365 S.E.2d 797 (W. Va. 1987)

Waite v. Civil Service Commission, 241 S.E.2d 164 (W. Va. 1977)

West Virginia Code § 5-3-1 (2001)

West Virginia Code § 5-3-3 (2001)

West Virginia Code § 29-6-1 (2001)

West Virginia Code § 29-6-4 (2001)

West Virginia Code § 29-6-10 (1999)

West Virginia Code § 48-18-101 (2001)

West Virginia Code § 48-18-110 (2001)

West Virginia Code § 48-19-102 (2001)

West Virginia Code § 48-19-105 (2001)

I.

TYPE OF PROCEEDING

On September 4, 2001, the Petitioner, Darrell V. McGraw, Jr., Attorney General of the State of West Virginia, (hereinafter "Attorney General") filed a "Petition for Writ of Mandamus" with this Court. The writ prayed for would declare all statutes authorizing state agencies to hire or retain legal counsel as unconstitutional; transfer the employ of all legal counsel hired by agencies under those statutes to the employ of the Attorney General; transfer all funds used by state agencies to hire or retain such counsel to the Attorney General; abrogate the contracts and/or civil service status of all such attorneys and make them will and pleasure employees of the Attorney General; declare the expenditure of public funds for the purpose of obtaining legal services as unlawful unless delivered or authorized by the Attorney General; and declare that the Attorney General would be the final determinant of all legal issues, questions, positions, tactics, defenses, and trial strategies involving state agencies, officers, and entities.

On November 8, 2001, this Court issued a rule to show cause in this matter and, sua sponte, made all Cabinet Secretaries of the Executive Branch party respondents. The Court's Order also granted leave to all state officers, boards and commissions not under the supervision of a Cabinet Secretary to file motions to intervene or to file briefs amicus curiae. On December 3, 2001, the undersigned, filed a motion for leave to intervene in this action. On December 6, 2001, this Court denied our request to intervene in this action, but granted leave to file an amicus brief.

In response to the December 6, 2001 Order, we now file this brief amicus curiae.

II.

ARGUMENT

THE WRIT OF MANDAMUS FILED BY THE ATTORNEY GENERAL REQUESTS THE COURT TO DEPRIVE US OF CIVIL SERVICE CLASSIFICATION WITHOUT DUE PROCESS OF LAW.

In Manchin v. Browning, 296 S.E.2d 909, 919 (W. Va. 1982), the Court stated that the Attorney General represents state agencies in the courts unless constitutional or statutory provisions have been enacted to the contrary. Thus, the Legislature has been empowered to delegate the representation of the State of West Virginia to the respective agencies by statute.

The creation of public offices is a legislative function, only restricted by the State Constitution. Baker v. Civil Service Commission of West Virginia, 245 S.E.2d 908, 911 (W. Va. 1978). The Legislature has granted the power to the governor to add positions to the classified service. W. Va. Code § 29-6-4 (2001). However, only the Legislature has the power to remove civil service status or positions within the civil service status. Baker at 911. The Legislature has taken no action to remove civil service status from us as attorneys for the Bureau for Child Support Enforcement.

Furthermore, as attorneys for the Bureau for Child Support Enforcement, we are not employed by the Attorney General and, thus, have been afforded civil service status.

As an officer elected by popular vote, the Attorney General and his employees are exempt from coverage under civil service. W. Va. Code § 29-6-4 (c) (3) (2001).

Therefore, the assistant attorneys general are appointed by the Attorney General and serve at the pleasure of the Attorney General. W. Va. Code § 5-3-3 (2001). If successful, the requests within the writ filed by the Attorney General would remove our civil service status. Such an action would be in violation of our due process rights.

As empowered, the Legislature has specifically removed the Attorneys General from the civil service system. Attorneys for the Bureau for Child Support Enforcement were not intended to be employees of the Attorney General. The Legislature has enacted legislation stating that the Bureau for Child Support Enforcement shall be employed by the Bureau with compensation fixed by the commissioner, who is responsible for the immediate supervision of the Bureau's duties and powers. W. Va. Code §§ 48-18-101 (a), § 48-19-102, § 48-19-105 (2001). The law explicitly states that "[t]he bureau for child support enforcement attorney is an employee of the bureau for child support enforcement." W. Va. Code § 48-19-102 (d) (2001). West Virginia Code § 48-18-110 (2001) states that the attorneys employed by the Bureau for Child Support Enforcement represent this state or another state, pursuant to applicable federal law.

In the case, the petition for writ of mandamus, on its face, requests a mere change in supervision for the attorneys of State agencies. However, the removal of civil service status necessarily follows. Furthermore, essential job functions would inevitably remain the same, but without the civil service protection. Granting the writ of mandamus would unlawfully take our civil service status, in which we have a protected property right. There could also be tangible economic loss associated with such a taking. In both instances, this taking would be in violation of our due process. As individual civil service attorneys of the Bureau for Child Support Enforcement, we have

the right to notice and an opportunity to be heard regarding the "cause" for our termination and deprivation of civil service protection. See Swiger v. Civil Service Commissioner, 365 S.E.2d 797 (W. Va. 1987).

The purpose of the civil service classification is to afford such covered employees with "a system of personnel administration based on merit principles and scientific methods governing the appointment, promotion, **transfer**, layoff, **removal**, discipline, **classification**, **compensation** and welfare of its civil employees...." W. Va. Code § 29-6-1 (2001) [emphasis added]. This system of merit principles and scientific methods mandates that the civil employee be granted notice and opportunity to be heard in any of those events effecting employment as listed in the statute. See Swiger.

Liberal construction of the civil service laws is required for meaningful and effective civil service coverage. State ex rel. Karnes v. Dadisman, 172 S.E.2d 561, 568 (W. Va. 1970). In that case, the Court recites, "[c]onstitutional and statutory civil service provisions should be liberally construed in their entirety to further their purpose to put positions in the classified service **beyond political control or the exercise of partisanship** and personal favoritism.... 15 Am. Jur. 2d, Civil Service, Section 5." *Id.* [emphasis added].

State employees who are in classified service can be dismissed only for good cause, meaning misconduct of a substantial nature directly affecting the rights and interests of the public, rather than upon trivial matters or mere technical violations of statute or official duty without wrongful intention. Roach v. Regional Jail Auth., 482 S.E.2d 679 (W. Va. 1996). Specific procedures for discharge or reduction in rank or

grade only for cause are delineated by statute for the protection of civil service employees. W. Va. Code § 29-6-10 (12) (1999).

The Court has consistently recognized that civil service employees "enjoy broad procedural due process rights that are strictly enforced." Swiger at 802. Stating that the civil service laws "provide security of tenure to public employees", the Court has reinforced the employees' property interest in civil service status. Swiger at 802; Karnes at 568.

The Court has "recognized that a civil service employee has a 'property interest' arising from his tenure of civil service such that he cannot be suspended or dismissed from his employment without being afforded a procedural due process hearing." Baker at 913, citing Waite v. Civil Service Commission, 241 S.E.2d 164 (W. Va. 1977).

When removing a civil service employee from employment, the employee is entitled to certain procedural protections. See W. Va. Code § 29-6-10 (12) (1999). Before the civil service status can be removed, the civil servant is entitled to notice and an opportunity to respond to the alleged cause for removal. Swiger at 800, citing Cleveland Board of Education v. Loudermill, 470 U.S.532, 546 (1985).

In the case of Waite v. Civil Service Commission, 241 S.E.2d 164 (W. Va. 1977), the Court reviewed the ten-day suspension of Waite, a civil service employee. Finding that the civil service employee has a property interest in uninterrupted employment, the Court emphasized that a civil service employee can be suspended for a period of time but such suspension must only be effectuated after affording appropriate due process procedures to the employee. Waite at 169.

The Court has addressed the removal of civil service status in the context of

legislation which abolished the Office of Federal-State Relations within the Governor's office and created the Office of Economic and Community Development. Baker v. Civil Service Commission of West Virginia, 245 S.E.2d 908 (W. Va. 1978). In that instance, the civil service positions within the Office of Federal-State Relations were abolished and civil service employees were discharged. Mr. Baker, a civil service employee of the Office of Federal-State Relations, filed suit seeking relief from the Court. *Id.*

The Court in Baker held that the Legislature does have such power to abolish and create public employment positions. However, the actions will be evaluated to determine whether arbitrary or in bad faith; whether the action is an impermissible classification under the Equal Protection Clause or violative of substantive due process afforded by the State of West Virginia; whether the legislative revisions were directly aimed at removal of a political party. Baker at 913 .

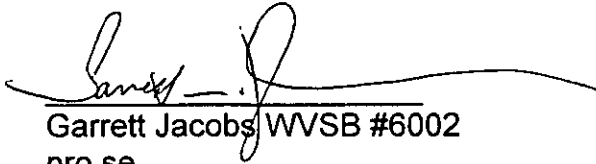
In comparing Baker to Waite where the employee was separated from the position, the Court distinguished "the continued existence of the position, coupled with the employee's statutory entitlement to tenure, absent proof of the statutory grounds for separation from the position, combined to provide a "property interest" which required a procedural hearing under the Due Process Clause of our Constitution, Article III, Section 10." *Id.*

III.

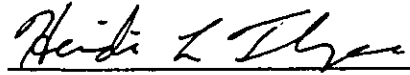
CONCLUSION AND PRAYER

Under all case law created by the Court, we have an undeniable property right in our civil service classification. No legislation has been enacted to remove that classification. No due process procedures have been afforded to us. The granting of the petition filed by the Attorney General will deprive us of our civil service classification and, likewise, our rights of due process. For those reasons, we respectfully request the Court to DENY the petition of the Attorney General.

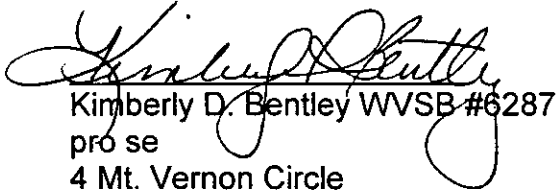
**RESPECTFULLY SUBMITTED,
KIMBERLY BENTLEY, CAROL EGNATOFF,
GARRETT JACOBS AND HEIDI TALMAGE**



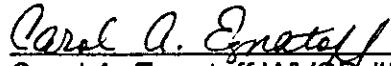
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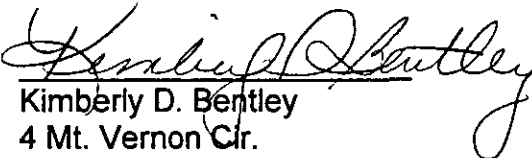
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