

NO. 31859

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CYNTHIA STANLEY, LEXIE REDDEN,  
JERRY L. PAYNE, DAVID KINDER,  
GEORGE CREMEANS, MARYSUE CATLETT,  
and WILLIAM ANNON,

Appellee

v.

THE DEPARTMENT OF TAX  
AND REVENUE;

Appellant,

and THE DIVISION OF PERSONNEL,

(Respondent below).

BRIEF OF THE DEPARTMENT OF TAX AND REVENUE

THE DEPARTMENT OF TAX  
AND REVENUE,  
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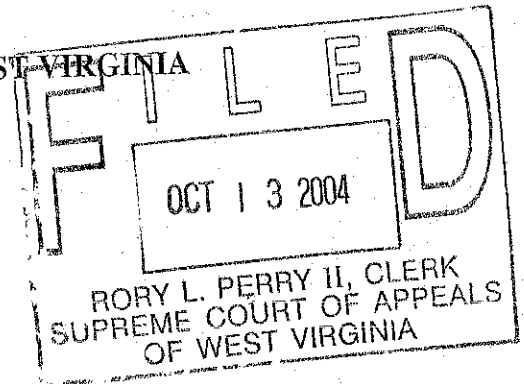


TABLE OF CONTENTS

	<u>Page</u>
I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW .....	1
II. STATEMENT OF FACTS .....	3
III. ASSIGNMENT OF ERROR .....	3
THE CIRCUIT COURT ERRED IN HOLDING THAT ATTORNEY FEES IN A CASE CAN EXCEED THE STATUTORY MAXIMUM AMOUNT OF \$1500, WHEN WEST VIRGINIA CODE § 29-6A-10 CLEARLY STATES: "PROVIDED, THAT IN NO EVENT SHALL SUCH ATTORNEY'S FEES BE AWARDED IN EXCESS OF A TOTAL OF ONE THOUSAND FIVE HUNDRED DOLLARS FOR THE ADMINISTRATIVE HEARINGS AND CIRCUIT COURT PROCEEDINGS." .....	
IV. STANDARD OF REVIEW .....	3
V. ARGUMENT .....	4
A. THE SINGULAR NOUN ENCOMPASSES THE PLURAL .....	5
B. THE PROVISIO SET FORTH AT THE CONCLUSION OF W. VA. CODE § 29-6A-10 MODIFIES AND RESTRICTS THE PRECEDING SUBJECT (ATTORNEY'S FEES) BY PRESCRIBING AN ABSOLUTE MAXIMUM AMOUNT OF RECOVERABLE ATTORNEY'S FEES. ....	6
C. INASMUCH AS THE STATUTE IN QUESTION IS IN DEROGATION OF LONGSTANDING COMMON LAW, IT SHOULD BE NARROWLY CONSTRUED. ....	7
VI. CONCLUSION .....	8

## TABLE OF AUTHORITIES

Page

### STATE CASES:

<i>Appalachian Power Co. v. State Tax Department of West Virginia</i> , 195 W. Va. 573, 466 S.E.2d 424 (1995) .....	3
<i>Hensley v. West Virginia Department of Health and Human Resources</i> , 203 W. Va. 456, 508 S.E.2d 616 (1998) .....	7
<i>Sally-Mike Properties v. Yokum</i> , 179 W. Va. 48, 365 S.E.2d 246 (1986) .....	7
<i>Seagraves v. Legg</i> , 147 W. Va. 331, 127 S.E.2d 605 (1962) .....	7
<i>Shifflette v. Lilly</i> , 130 W. Va. 297, 43 S.E.2d 289 (1947) .....	7, 8
<i>State ex rel. Browne v. Hechler</i> , 197 W. Va. 612, 476 S.E.2d 559 (1996) .....	6
<i>State v. Ellsworth</i> , 175 W. Va. 64, 331 S.E.2d 503 (1985) .....	6
<i>Teavee Oil &amp; Gas, Inc. v. Hardesty</i> , 171 W. Va. 123, 297 S.E.2d 898 (1982) .....	6, 7
<i>Teter v. Old Colony Co.</i> , 190 W. Va. 711, 441 S.E.2d 728 (1994) .....	8

### STATE STATUTES

W. Va. Code § 29-6A-2(i) .....	5, 6
W. Va. Code § 29-6A-2(k) .....	5, 6
W. Va. Code § 29-6A-3(e) .....	5
W. Va. Code § 29-6A-4 .....	5
W. Va. Code § 29-6A-10 .....	4, 5, 6, 8

### OTHER:

2A Norman J. Singer, <i>Sutherland Statutory Construction</i> § 47.08, at 156 (5th ed.1992) .....	6
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and WILLIAM ANNON,

Appellees,

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THE DEPARTMENT OF TAX AND  
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(Respondent below).

**BRIEF OF THE DEPARTMENT OF TAX AND REVENUE**

**I.**

**KIND OF PROCEEDING AND NATURE OF THE RULING BELOW**

The Appellees (sometimes "Grievants") are seven Tax Unit Supervisors I employed by the Department of Tax and Revenue/Compliance Division ("Tax and Revenue"). They filed a consolidated Grievance on January 20, 1999, alleging that they had been misclassified and that they were entitled to reclassification and back pay.

The relief sought by Grievants was denied at Level I on January 29, 1999. The Grievants then appealed their claim to Level II. Their grievance was denied by decision dated February 26,

1999. A Level III hearing was held on August 30, 1999, at which time the Division of Personnel was joined as a party. A Level III Decision denying the grievance was rendered by Grievance Evaluator Jack C. McClung on November 15, 1999, and was adopted by Tax Commissioner Joseph M. Palmer on November 17, 1999. The Grievants then appealed the matter to Level IV.

The Level IV Grievance was heard on September 14 and November 15, 2000. Administrative Law Judge Brenda L. Gould held on June 18, 2001 that Grievants did not demonstrate that the assignment of the Tax Unit Supervisor I classification to a pay grade 14 was arbitrary, capricious, clearly wrong, contrary to regulation, or otherwise illegal or improper, inasmuch as the differences in the level of responsibility of the Tax Unit Supervisor I and the classification to which Grievants compared themselves, Credit Analyst III, were significant in the classification and compensation plan developed by the Division of Personnel.

By Order entered on January 2, 2003, the Circuit Court (J. Zakaib) reversed the holding below and granted the relief requested by the Grievants. Since the Grievants prevailed, they requested that they be reimbursed for their attorney's fees. However, rather than seeking the \$1,500 per grievance provided for by statute, they demanded that they be reimbursed \$1,500 per grievant, or \$10,500. This request was denied by the Department of Tax and Revenue, and the Grievants filed a Motion for Costs<sup>1</sup> and Attorney Fees on May 2, 2003. After briefing and oral argument, Judge Zakaib granted the motion, awarded \$10,500 in attorney's fees, and signed the Order which had previously been prepared by counsel for the Grievants. The order was entered on August 12, 2003.

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<sup>1</sup>At the hearing held on August 11, 2003, the Grievants withdrew their request for such "costs" as postage, telecopier expenses, photocopying, Westlaw charges, parking and telephone expenses.

The Department of Tax and Revenue (hereinafter, "Appellant") filed its Petition for Appeal on December 30, 2003. The Appellees, Cynthia Stanley, et al., filed their response on January 5, 2004. The Petition was granted on September 8, 2004, and the instant appeal was consolidated with the case of Buffey v. Harrison County Bd. Of Education, No. 041092.

## II.

### STATEMENT OF FACTS

The facts in the Stanley case are not in dispute. This matter presents a strictly legal question. The Appellant maintains that, as a matter of law, the Circuit Court misconstrued the relevant statute and awarded attorney fees in an amount in excess of the statutory cap.

## III.

### ASSIGNMENT OF ERROR

**THE CIRCUIT COURT ERRED IN HOLDING THAT ATTORNEY FEES IN A CASE CAN EXCEED THE STATUTORY MAXIMUM AMOUNT OF \$1500, WHEN WEST VIRGINIA CODE § 29-6A-10 CLEARLY STATES: "PROVIDED, THAT IN NO EVENT SHALL SUCH ATTORNEY'S FEES BE AWARDED IN EXCESS OF A TOTAL OF ONE THOUSAND FIVE HUNDRED DOLLARS FOR THE ADMINISTRATIVE HEARINGS AND CIRCUIT COURT PROCEEDINGS."**

## IV.

### STANDARD OF REVIEW

This case presents a pure question of law, which the Court reviews *de novo*. "Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review." Syl. pt. 1, Appalachian Power Co. v. State Tax Dept. of West Virginia, 195 W. Va. 573, 466 S.E.2d 424 (1995).

V.

ARGUMENT

The sole issue in this case is the meaning of West Virginia Code § 29-6A-10, which provides:

If an employee appeals to a circuit court an adverse decision of a hearing examiner rendered in a grievance proceeding pursuant to provisions of this article or is required to defend an appeal and the person substantially prevails, the adverse party or parties is liable to the employee, upon final judgment or order, for court costs, and for reasonable attorney's fees, to be set by the court, for representing the employee in all administrative hearings and before the circuit court and the supreme court of appeals, and is further liable to the employee for any court reporter's costs incurred during any administrative hearings or court proceedings: **Provided, That in no event shall such attorney's fees be awarded in excess of a total of one thousand five hundred dollars for the administrative hearings and circuit court proceedings** nor an additional one thousand dollars for supreme court proceedings: Provided, however, That the requirements of this section shall not be construed to limit the employee's right to recover reasonable attorney's fees in a mandamus proceeding brought under section nine of this article.

West Virginia Code § 29-6A-10 (emphasis supplied).

The meaning of the statute is clear. The entirety of article 6A anticipates consolidated grievances and defines "grievance" and "grievant" such that each term contemplates multiple parties participating in a single case. In addition, the proviso contained in section 10 prescribes an absolute maximum of \$1,500; and that cap applies to all "administrative hearings" and "circuit court proceedings". Finally, subject statute should be strictly construed because it is in derogation of the common law of this State regarding fee shifting, i.e., the American Rule. In short, the maximum attorney fee award is to embrace all levels of the grievance procedure, together with all circuit court appellate matters.

## A. THE SINGULAR NOUN ENCOMPASSES THE PLURAL

The statute is clear on its face. The statutory cap is all-inclusive for all administrative hearings and circuit court proceedings in the case. Even if, *arguendo*, the wording of West Virginia Code § 29-6A-10 is ambiguous, other sections contained in Article 6A, read *in para materia*, buttress the Appellant's interpretation.

West Virginia Code 29-6A-3(e) provides for the voluntary consolidation of grievances. Other pertinent sections of Article 6A then indicate that the use of the singular encompasses the plural. For example, W. Va. Code § 29-6A-4 ("Procedural levels and procedure at each level") consistently refers to the singular "grievant" and does not utilize the plural form of the noun. In addition, this section uses "employee" and "grievant" interchangeably.

Similarly, just as the words "grievant" and "grievants" are accorded identical treatment, the words "employee" and "grievant" are treated synonymously. Although the word "employee" is not separately defined, it is included in the definition of "grievant"; and that word itself includes more than one "employee". W. Va. Code § 29-6A-2(k) defines "grievant" to include a group of employees:

(k) "Grievant" means any named employee **or group of named employees** filing **a** grievance as defined in subsection (i) of this section. (Emphasis supplied.)

The definition of "grievance", referred to in the definition of "grievant", is found in W.Va. Code § 29-6A-2(i). This definition also evidences a legislative intent to include all employees filing one grievance within the word "grievant".

(i) "Grievance" means any claim **by one or more affected state employees** alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms

and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of their employer; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees.

W. Va. Code § 29-6A-2(i)(emphasis supplied).

In this case, the employees filed one grievance on January 20, 1999. At each level in the proceedings, they were represented by one lawyer, and that attorney filed all papers in his collective capacity.

**B. THE PROVISIO SET FORTH AT THE CONCLUSION OF W. VA. CODE § 29-6A-10 MODIFIES AND RESTRICTS THE PRECEDING SUBJECT (ATTORNEY'S FEES) BY PRESCRIBING AN ABSOLUTE MAXIMUM AMOUNT OF RECOVERABLE ATTORNEY'S FEES.**

“The function of a proviso in a statute is to modify, restrain, or conditionally qualify the preceding subject to which it refers.” State v. Ellsworth, 175 W.Va. 64, 68, 331 S.E.2d 503, 506 (1985). “Similarly, it has been stated, ‘Provisos serve the purpose of restricting the operative effect of statutory language to less than what its scope of operation would be otherwise.’ 2A Norman J. Singer, Sutherland Statutory Construction § 47.08, at 156 (5th ed.1992) (citations omitted).” State ex rel. Browne v. Hechler, 197 W.Va. 612, 614, 476 S.E.2d 559, 561 (1996).

In the case of Teavee Oil & Gas, Inc. v. Hardesty, 171 W.Va. 123, 297 S.E.2d 898 (1982), an oil and gas producer attempted to pay substantially less for business and occupation taxes by ignoring a proviso. It failed in the attempt.

Where Business and Occupation Tax Regulation 1.2a(F)(2)(b) provides that fair market value of produced gas at the well mouth may be calculated from the sale price of gas from the same or a proximate field, the proviso in that regulation that “such purchase price accurately represents the well mouth value of the gas severed and produced” qualifies everything else in the subsection and the use of this

method of calculation may be disallowed by the tax commissioner where it appears that the "purchase price" of other gas used for comparison purposes is predicated on old contracts that do not reflect the current fair market value of such gas.

Syl. pt. 2, Teavee Oil & Gas, Inc. v. Hardesty, 171 W.Va. 123, 297 S.E.2d 898, 899 (1982).

In this case, the statutory cap proviso modifies and restricts the subject of the recovery of attorney fees.

**C. INASMUCH AS THE STATUTE IN QUESTION IS IN DEROGATION OF LONGSTANDING COMMON LAW, IT SHOULD BE NARROWLY CONSTRUED.**

With respect to the recovery of attorney fees, West Virginia has always followed the common law "American Rule". "As a general rule each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement." Syl. pt. 2, Sally-Mike Properties v. Yokum, 179 W. Va. 48, 365 S.E.2d 246 (1986). In this case, although there is statutory authority for the recovery of one thousand, five hundred dollars, there is none for the recovery of ten thousand, five hundred dollars. In addition, the statute represents a reversal of common law and must be given a strict interpretation to preserve what has not been affected by the statute. Although the Grievants would have this Court give an expansive reading to the statute, it is well settled law that statutes in derogation of common law must be strictly construed.

In the context of statutory construction, one must read the statute as it relates to longstanding common law, *i.e.*, the American Rule. "The common law is not to be construed as altered or changed by statute, unless legislative intent to do so be plainly manifested." Shifflette v. Lilly, 130 W. Va. 297, 43 S.E.2d 289 (1947). Syllabus Point 4, Seagraves v. Legg, 147 W. Va. 331, 127 S.E.2d 605 (1962)." Hensley v. West Virginia Dept. of Health and Human Resources, 203 W. Va.

456, 467, 508 S.E.2d 616, 627(1998). " 'Statutes in derogation of the common law are allowed effect only to the extent clearly indicated by the terms used. Nothing can be added otherwise than by necessary implication arising from such terms.' Syllabus Point 3, Bank of Weston v. Thomas, 75 W. Va. 321, 83 S.E. 985 (1914)." Teter v. Old Colony Co., 190 W. Va. 711, 724, 441 S.E.2d 728, 741 (1994). "The statute in question, being in derogation of the common law, must be strictly construed, and should not be enlarged in its operation by a construction beyond what its terms express. Harrison v. Leach, 4 W. Va. 383; Kellar v. James, 63 W. Va. 139, 59 S.E. 939, 14 L.R.A. N.S. 1003; State v. Grymes, 65 W. Va. 451, 64 S.E. 728, 17 Ann. Cas. 833; Ash v. Lynch, 72 W. Va. 238, 78 S.E. 365; Snider v. Cochran, 80 W. Va. 252, 92 S.E. 347; Landsman-Hirscheimer Co. v. Radwan, 90 W. Va. 590, 111 S.E. 507; Peters v. Hajacos, 91 W. Va. 88, 112 S.E. 233; McVey v. Chesapeake & Potomac Telephone Co., 103 W. Va. 519, 138 S.E. 97." Shifflette v. Lilly, 130 W. Va. 297, 303-304, 43 S.E.2d 289, 292 (1947).

In summary, the statute is clear on its face; but even if it is ambiguous, it should be strictly and narrowly construed inasmuch as it is derogation of the common law American Rule.

## VI.

### CONCLUSION

The Circuit Court erred in its interpretation of West Virginia Code § 29-6A-10, a statute which is in derogation of common law. In addition, the entire article anticipates consolidated grievances and defines "grievance" and "grievant" such that each term contemplates multiple parties participating in a single case. Furthermore, the proviso in the section prescribes an absolute maximum of \$1,500 payable for attorney's fees - - - a cap that applies to all "administrative hearings" and "circuit court proceedings". In short, the maximum attorney fee award is to embrace

all levels of the grievance procedure, together with all circuit court appellate matters - - - whether the grievance is consolidated or it is not.

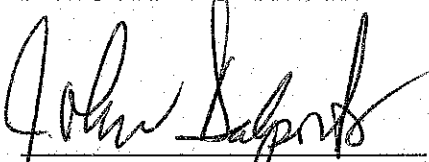
Wherefore, the Appellant prays that the order of the Circuit Court be reversed.

**Respectfully submitted,**

**THE DEPARTMENT OF TAX  
AND REVENUE,**

**By counsel**

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A handwritten signature in black ink, appearing to read "John S. Dalporto", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, John S. Dalporto, Senior Assistant Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing Brief of the Department of Tax and Revenue was served by U. S. mail this 13<sup>th</sup> day of October, 2004, addressed as follows:

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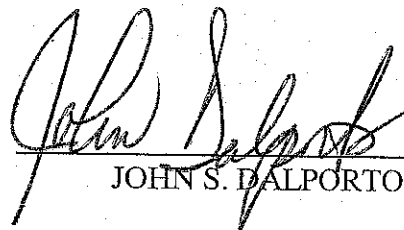
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