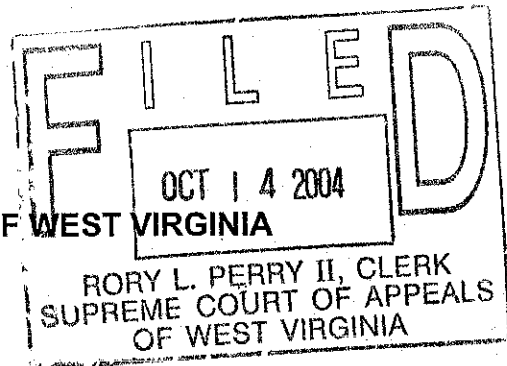


NO. 31859

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



CYNTHIA STANLEY, LEXIE REDDEN,
JERRY L. PAYNE, DAVID KINDER,
GEORGE CREMEANS, MARY SUE CATLETT,
AND WILLIAM ANNON,

Petitioners Below, Appellees,

v.

THE DEPARTMENT OF TAX AND REVENUE
and WEST VIRGINIA DIVISION OF PERSONNEL,

Respondents Below,

THE DEPARTMENT OF TAX AND REVENUE,

Appellant.

BRIEF OF THE
WEST VIRGINIA DIVISION OF PERSONNEL

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Appellant.

BRIEF OF THE
WEST VIRGINIA DIVISION OF PERSONNEL

Comes now the Respondent Below, West Virginia Division of Personnel (hereinafter "DOP"), and submits this Brief in support of Appellant, Department of Tax and Revenue's (hereinafter "Tax") Appeal¹. Tax seeks reversal of an August 12, 2003, Order entered by

¹While the DOP sympathizes with the plight of the employees, the DOP cannot stand silent on an issue whose outcome may have such a negative impact on the concept and foundation of the grievance process established by W. Va. Code § 29-6A-1 *et seq.*, as the decision rendered by the circuit court in this matter would invoke.

the Circuit Court of Kanawha County, wherein the court granted an award of Ten Thousand Five Hundred Dollars (\$10,500.00) in attorney's fees.

I.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

The Appellees are State employees working for Tax.² The Appellees filed a consolidated grievance on January 20, 1999, alleging that they were misclassified as Tax Unit Supervisor I's and demanding that they be reclassified and given back pay for the period of time they were misclassified. The Grievance was denied at Levels I-IV of the grievance process. On June 18, 2001, the Administrative Law Judge (hereinafter "ALJ") for the West Virginia Education and State Employees Grievance Board (hereinafter "Grievance Board") issued a final decision holding that the Appellees 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 Appellees compared themselves, Credit Analyst III, were significant in the classification plan developed by the DOP.

The Appellees appealed the decision of the ALJ to the Circuit Court of Kanawha County and on January 2, 2003, Judge ZaKaib entered an Order reversing the decision of the ALJ and granting the relief requested by the Appellees. As the prevailing party in the matter, the Appellees moved the circuit court for statutory attorney's fees. However, rather than requesting the standard One Thousand Five Hundred Dollars (\$1500.00) as provided

²Appellees were employed by Tax at the time their grievance was filed. Since then some have retired or moved on to employment with other State agencies.

for by statute, the Appellees sought One Thousand Five Hundred Dollars (\$1500.00) per grievant for a total of Ten Thousand Five Hundred Dollars (\$10,500.00). Over the objections of Tax, on August 12, 2003, Judge ZaKaib entered an Order granting Appellees the Ten Thousand Five Hundred Dollars (\$10,500.00) in attorney's fees they requested. On December 11, 2003, Tax filed a Petition for Appeal with this Court. On September 14, 2004, this Court accepted Tax's Petition for Appeal. DOP now files this Brief in Support of Tax's Appeal.

II.

STATEMENT OF FACTS

This matter arises solely out of an Order from a Circuit Court granting attorney's fees in excess of the statutory cap provided for in West Virginia Code § 29-6A-10 (2002 & Supp. 2004). The facts in this matter are not in dispute.

III.

ASSIGNMENT OF ERROR

THE CIRCUIT COURT ERRED IN HOLDING THAT ATTORNEY FEES FOR ADMINISTRATIVE HEARINGS AND APPEALS THEREFROM CAN EXCEED THE STATUTORY CAP OF \$1500 AS PROVIDED FOR IN W.VA. CODE § 29-6A-10.

IV.

DISCUSSION OF LAW

A. STANDARD OF REVIEW

The standard of review for this Court in this matter is *de novo*. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*,

194 W. Va. 138, 459 S.E.2d 415 (1995)." Syl. pt. 1, *State ex rel. McGraw v. Combs Services*, 206 W. Va. 512, 526 S.E.2d 34 (1999), citing Syl. pt. 2, *Webster County Commission v. Clayton*, 206 W. Va. 107, 522 S.E.2d 201 (1999).

B. AMERICAN RULE FOR AWARD OF ATTORNEY FEES AND STATUTES IN DEROGATION THEREOF

Like almost every other jurisdiction, West Virginia follows the American rule concerning attorney fees. In *Capper v. Gates*, 193 W.Va. 9, 20, 454 S.E.2d 54, 65 (1994), the West Virginia Supreme Court described the rule as follows:

In Syl. pt. 2, *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986), we observed that "[a]s 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." See, e.g., *Yost v. Fuscaldo*, 185 W.Va. 493, 499, 408 S.E.2d 72, 78 (1991). This is generally referred to as the American Rule.

See also *State ex rel. Division of Human Serv. v. Benjamin P.B.*, 190 W. Va. 81, 84, 436 S.E.2d 627, 630 (1993) (footnote omitted) ("With certain exceptions, West Virginia has adopted the American rule, which provides that 'each litigant bears his or her own attorney fees absent express statutory, regulatory, or contractual authority for reimbursement.' *Daily Gazette Co. v. Canady*, 175 W.Va. 249, 250, 332 S.E.2d 262, 263 (1985).")

As with awards of attorney's fees, ""[c]osts were unknown at common law. They are created and provided for by statute and may be imposed, recovered or collected only as authorized by statute."" *Sally-Mike Properties*, 179 W.Va. at 50, 365 S.E.2d at 248 (quoting *Geary Land Co. v. Conley*, 175 W.Va. 809, 813, 338 S.E.2d 410, 414 (1985) (per curiam) (quoting *Humphrey v. Mauzy*, 155 W.Va. 89, 95, 181 S.E.2d 329, 332 (1971) (citations omitted))).

Pauley v. Gilbert, 206 W. Va. 114, 123, 522 S.E.2d 208, 217 (1999) (per curiam).

Attorney fees' statutes are in derogation of the common law. *Pauley*, supra. In the case at hand, there is statutory authority for the recovery of One Thousand Five Hundred Dollars (\$1,500.00) in attorney fees. There is no authority for the recovery of any other amount other than the One Thousand Five Hundred Dollars (\$1,500.00) specifically provided for in the statute, with the one exception being for mandamus actions.

"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." Syl. pt. 3, *Bank of Westin 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. Ca. 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).

The relevant statute at issue in this matter is W. Va. Code § 29-6A-10 which states:

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.

Appellees' argument rests solely on one word contained in the very first sentence of W. Va. Code § 29-6A-10, "If an *employee*" However, Appellees' fail to take into consideration the full meaning and intent of the section, clauses, words and parts within the statute that unequivocally bolster the argument made by Tax on Appeal.

C. RULES OF STATUTORY CONSTRUCTION

In the context of statutory construction, one must read the statute as it relates to longstanding common law. "'The common law is not to be construed as altered or changed by statute, unless legislative intent to do so be plainly manifested.' *Shifflette, supra.*; Syl. pt. 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).

This court in *State ex rel. McGraw v. Combs Services*, held that:

When interpreting statutes promulgated by the Legislature, we first discern the objective of the enactment. "'The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.' Syl. pt. 1, *Smith v. State Workmen's Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975)." Syl. pt. 6, *State ex rel. ACF Indus., Inc. v. Vieweg*, 204 W.Va. 525, 514 S.E.2d 176 (1999). In gleaning legislative intent, we endeavor to construe the scrutinized provision consistently with the purpose of the general body of law of which it forms a part.

"Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the

whole of the enactments.' Syl. Pt. 3, *Smith v. State Workmen's Compensation Comm'r*, 159 W.Va. 108, 219 S.E.2d 361 (1975)." Syl. pt. 3, *Boley v. Miller*, 187 W.Va. 242, 418 S.E.2d 352 (1992). Syl. pt. 3, *Rollyson v. Jordan*, 205 W.Va. 368, 518 S.E.2d 372 (1999). See also Syl. pt. 4, in part, *State ex rel. Hechler v. Christian Action Network*, 201 W.Va. 71, 491 S.E.2d 618 (1997) ("In ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation." (internal quotations and citations omitted)); Syl. pt. 2, in part, *Mills v. Van Kirk*, 192 W.Va. 695, 453 S.E.2d 678 (1994) ("To determine the true intent of the legislature, courts are to examine the statute in its entirety and not select 'any single part, provision, section, sentence, phrase or word.' Syl. pt. 3, in part, *Pristavec v. Westfield Ins. Co.*, 184 W.Va. 331, 400 S.E.2d 575 (1990).").

206 W. Va. 512, 526 S.E.2d 34, 40 (1999).

This Court further held:

Once the legislative intent underlying a particular statute has been ascertained, we proceed to consider the precise language thereof. " 'A statute that is ambiguous must be construed before it can be applied.' Syllabus point 1, *Farley v. Buckalew*, 186 W.Va. 693, 414 S.E.2d 454 (1992)." Syl. pt. 7, *State ex rel. ACF Indus., Inc. v. Vieweg*, 204 W.Va. 525, 514 S.E.2d 176. See also Syl. pt. 1, in [206 W.Va. 519] part, *Ohio County Comm'n v. Manchin*, 171 W.Va. 552, 301 S.E.2d 183 (1983) ("Judicial interpretation of a statute is warranted only if the statute is ambiguous"). However, "[w]here the language of a statutory provision is plain, its terms should be applied as written and not construed." *DeVane v. Kennedy*, 205 W.Va. 519, 529, 519 S.E.2d 622, 632 (1999) (citations omitted). See also Syl. pt. 4, in part, *Daily Gazette Co., Inc. v. West Virginia Dev. Office*, 206 W.Va. 51, 521 S.E.2d 543 (1999) ("A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." (internal quotations and citations omitted)); Syl. pt. 5, in part, *Walker v. West Virginia Ethics Comm'n*, 201 W.Va. 108, 492 S.E.2d 167 ("Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." (internal quotations and citations omitted)).

Id at 40-41.

Additionally, "a cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute." *Meadows*

v. Wal-Mart, Inc., 207 W. Va. 203,214, 530 S.E.2d 676, 687, citing *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137,147, 107 S.E.2d 353, 359 (1959).

The statute in question is clear on its face, however, should this Court determine otherwise, the statute must be narrowly construed and cannot be read to allow attorneys to reap a windfall from representing multiple grievants in a singular grievance were the issues to be decided are common to all grievants. Here, there are multiple grievants, but only one grievance. The grievants were all employed by Tax as Tax Unit Supervisor I's. The statement of grievance and relief sought were identical for all Grievants, as their grievance was filed jointly on the same Education and State Employees Grievance Board Form. For this Court's convenience, the Statement of Grievance is attached hereto. The grievance was filed on January 20, 1999, and at all times the grievants have been represented by one attorney, who filed all pleadings in a singular form in his representative capacity as the attorney for all involved in the grievance.

Furthermore, statutes must not be read to result in absurdity or unreasonableness. *Hall v. Board of Educ.*, W. Va. 534, 539, 541 S.E.2d 624, 629 (2000). See also *Richardson v. State Comp. Comm'n'r*, 137 W. Va. 819, 824, 74 S. E.2d 258, 261 (1953) ("It is to be supposed the legislature did not intend an absurd or unreasonable result.") There are currently many ongoing grievances before the Grievance Board that involve multiple grievants numbering well over one hundred (100), two hundred (200) and even three hundred (300) plus employees. Taking Appellees' argument to its extreme, the windfall to an attorney representing the grievants in such grievances would be exponential, if the possibility exists by virtue of the lower court's interpretation to allow attorneys to reap the

benefit of employees/grievants receiving attorney fees in the amount of One Thousand Five Hundred Dollars (\$1500.00) per employee. This absurd interpretation, espoused by Appellees and affirmed by the lower court, could conceivably allow an attorney or law firm to receive hundreds of thousands of dollars in attorney fees.³ One surely cannot argue straight-faced that the intent of the legislature was to allow for attorney fees to, in essence, be used as a penalty against State agencies. Such resulting absurdity is a sufficient demonstration of the insupportability of the circuit court's decision. To counter this argument, Appellees will most certainly take the position that the fees must still be reasonable regardless of the cap set by statute. However, it is quite conceivable that an attorney or law firm could spend countless hours, manpower, etc. on a grievance and have fees much higher than might currently be the norm under the statutory interpretation we have been living under since the statute's inception.⁴

Though this Court may consider DOP's argument in support of Tax's Appeal, as opposed to Appellees argument, to suggest an absurd outcome, one must look only as far as to the request for attorney's fees made by Appellees to see that such a result is conceivable. Appellees did not submit a break down of attorney's fees to the Court for review, rather they merely stated in a cover letter to the circuit court that pursuant to W. Va.

³A singular grievance, wherein there are one hundred participating Grievants, who are considered to have substantially prevailed, would "as a matter of law", as suggested by Appellees, be entitled to attorney's fees in the amount of One Hundred Fifty Thousand Dollars (\$150,000.00). Two hundred grievants in a singular grievance would amount to Three Hundred Thousand Dollars (\$300,000.00). Three hundred grievants in a singular grievance would amount to attorney's fees in the amount of Four Hundred Fifty Thousand Dollars (\$450,000.00) and so on.

⁴There have been no changes to the statute in question since its inception in 1988, with the exception of the legislature increasing the maximum cap available for attorney fees from One Thousand Dollars (\$1,000.00) to One Thousand Five Hundred Dollars (\$1,500.00) for administrative hearings and circuit court proceedings in 1998.

Code § 29-6A-10 "attorney's fees in the amount of \$10,500.00 (\$1,500.00 per grievant) should be awarded to them **as a matter of law.**" (Emphases added.) For this Court's convenience, Appellee's cover letter is attached hereto.

Should this Court determine that the statute is ambiguous on its face, [t]he initial step in construing an ambiguous statute is to ascertain the legislative intent behind the statute. Syl. pt. 1, *Ohio County Commn v. Manchin*, 171 W. Va. 552, 301 S.E.2d 183 (1983). To determine the intent of the Legislature, we must examine the statute in its entirety: In the construction of a legislative enactment, the intention of the legislature is to be determined, not from any single part, provision, section, sentence, phrase or words, but rather from a general consideration of the act or statute in its entirety. *McCoy v. VanKirk*, 201 W. Va. 718, 725, 500 S.E.2d 534, 541 (1997), citing, Syl. pt. *Parkins v. Londeree*, 146 W. Va. 1051, 124 S.E.2d 471 (1962).

Appellees in their response to the Petition for Appeal attempt to have the definition for the word "employee" as used in the statute have some different meaning than grievant as used and defined in the statute, even though the reality is that the "employee" referred to in the statute is clearly one and the same as the "grievant". As "grievant" is merely by its simplest definition, an employee/s that has filed a grievance.

The statute was not intended to allow attorneys representing grievants in the administrative process to reap a windfall of benefits, in fact, quite the opposite the grievance process was established to allow for a fair and equitable avenue for grievants to have their grievances heard without requiring the need in most circumstances for cases to ever even be heard by anyone outside of the administrative process. The legislature,

by statute, and this Court, by interpretation, have bolstered this argument by providing for an extremely narrow review of the entire administrative process⁵. Appellees suggest that Tax seeks to amend the statute in question to substitute the term "grievant" for the term "employee". That suggestion, however, is obscure at best as there is no need for an amendment to the statute to have a clear understanding that employee and grievant are truly one and the same. The "grievant" is merely an "employee" who has filed a grievance. The Court merely need look to the definitions of "grievance" and "grievant" in W. Va. Code § 29-6A-2, where the word "employee" is used throughout.⁶ To suggest a different

⁵§ 29-6A-7(b) sets out the standard of review for court's reviewing decisions from administrative hearings as follows:

(b) Either party or the director of the division of personnel may appeal to the circuit court of Kanawha County or to the circuit court of the county in which the grievance occurred on the grounds that the hearing examiner's decision:

- (1) Is contrary to law or a lawfully adopted rule or written policy of the employer;
- (2) Exceeds the hearing examiner's statutory authority;
- (3) Is the result of fraud or deceit;
- (4) Is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (5) Is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

⁶W. Va. Code § 29-6A-2 provides the following:

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

(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.

interpretation otherwise is a ludicrous, far reaching attempt by counsel for Appellees to get a substantial amount of attorney's fees in this case, with the potential for an even greater windfall in future cases.

Appellees choose to ignore pertinent sections of Article 6A, which indicate that the use of the singular encompasses the plural and that the use of the word "employee" is tantamount to the use of the word "grievant". The definition of "grievant" encompasses individuals or groups of employees. As well, the definition of grievance anticipates multiple grievants in the same grievance. Though Appellees may argue that the definition of employee infers a single individual, when the statute is read in its entirety, it is clear that throughout, the singular was intended to encompass the plural as well, particularly when as is the present matter, you have one singular grievance, with multiple grievants all identically, factually situated, all requesting identical relief. In essence the multiple grievances become one in terms of the grievance's procedural process. An attorney handling such a case does not do something different for each grievant, he or she merely presents one case for all grievants. One might possibly buy an argument for additional attorney's fees if each individual in a joint/consolidated grievance had different issues/relief at stake, however, the premise behind a joint/consolidated grievance is to combine as many grievants as possible, in like positions, with like complaints, seeking like relief, into one grievance for the sake of judicial economy.

The meaning of the statute is clear. W. Va. Code § 29-6A-1 *et seq.* in its entirety anticipates and indeed provides for, consolidated grievances and defines "grievance" and "grievant" such that each term contemplates multiple employees participating in a single

case. Furthermore, W.Va. Code § 29-6A-10 prescribes an absolute maximum cap on attorney fees in the amount of One Thousand Five Hundred Dollars (\$1,500.00). The statutory cap applies to "all administrative hearings" (i.e. grievance/s) "and circuit court proceedings". As such, Appellees are entitled to no more than the statutory cap of One Thousand Five Hundred Dollars (\$1,500.00) in attorney's fees.

V.

CONCLUSION

For the reasons more fully stated above, the circuit court erred in holding that W. Va. Code § 29-6A-10, allows for the maximum cap on the recovery of attorney fees in a joint or consolidated grievance to be determined per employee/grievant as opposed to per grievance. The statute clearly contemplates multiple grievants participating in a single grievance matter and awards fees accordingly.

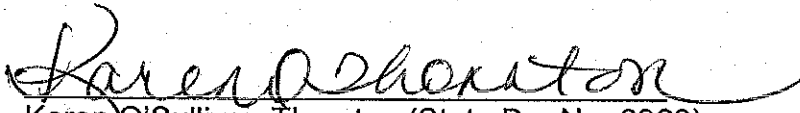
Wherefore, Respondent Below, DOP respectfully requests that ruling and Order of the circuit court be overturned.

Respectfully Submitted,

WEST VIRGINIA DIVISION OF PERSONNEL,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

A handwritten signature in cursive script, reading "Karen O'Sullivan Thornton". The signature is written in black ink and is positioned above the printed name and title.

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EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD FORM FOR STATE EMPLOYEES

FOR LEVELS I, II, III, IV

COMPLIANCE DIVISION

JAN 22 1999

RECEIVED

Part A: Grievant's Information:

Cynthia R. Stanley Et Al.

Grievant's Name

520 Richland Avenue

Grievant's Home Address

Wheeling, WV 26003

City, State and Zip Code

(304) 277-4717

Grievant's Home Telephone No.

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40-14th Street, Suite 101

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Grievant's Work Telephone No.

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Lexie H. Redden

Grievant's Name

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David E. Kinder

Grievant's Name

Grievant's Home Address

City, State and Zip Code

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Grievant's Home Telephone No.

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State Agency

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Grievant's Home Address

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vs **WV Department of Tax & Revenue**

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vs **WV Department of Tax & Revenue**

State Agency

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vs **WV Department of Tax & Revenue**

State Agency

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STATEMENT OF GRIEVANCE: (Please list the specific statutes, policies, rules, regulations or agreements you claim have been violated, misapplied, or misinterpreted.) Additional pages can be added if necessary.

The Tax Unit Supervisor I (TUSI) position is classified at Pay Grade 13 while Credit Analyst III (CAIII) is classified at Pay Grade 16. A disparity exists, as follows: The qualifications for the TUSI are more restrictive because it requires a specific number of hours of accounting within the four year degree while the CAIII simply requires a four year college degree. The job descriptions are parallel-they are both complex, involve meeting and dealing with the public, require analysis of financial documents, conduct performance review of staff, work out payment plans, etc.. In addition, the substitution requirements for the TUSI requires two years experience in lieu of one year of education while the CAIII only requires a year per year substitution. The TUSI position also mandates that you have 2 years experience in a lead worker, supervisor or administrative capacity. The CAIII does not have that requirement. This is a violation of paragraph 3.15 of the Administrative Rules of the WV Division of Personnel. Positions with similar training, experience, responsibilities and qualifications should be paid the same. The WV Supreme Court of Appeals ruled the Civil Service System of the State of West Virginia is required to provide "Equal pay for equal work." Also, in the cases known as AFSCME vs Civil Service Commission of WV 324SE2D63 (WV 1984) and WV Code, Administrative Rule 29-6-10(2), a pay plan for all employees in classified services shall follow the principal of "equal pay for equal work" in the agencies of the State Government

324 SE 2 367

RELIEF SOUGHT: Reassignment of the TUSI classification from Pay Grade 13 to Pay Grade 16 in accordance with the Administrative rules of the WV Division of Personnel, paragraph 3.83 for salary adjustments effective October 16, 1997 with backpay and interest and to be made whole in all ways.

Part B: Procedural Summary (if applicable):

Level I: Check if appropriate: _____

A Level I Informal Conference is requested

Grievant's Signature Cynthia R. Stanley et al.

Date Filed: 1/20/99 Date of Decision: 1-29-99

Level II:

Grievant's Signature Cynthia R. Stanley et al.

Date Filed: 2/1/99 Date of Decision: 2-26-99

Level III:

Grievant's Signature Cynthia R. Stanley ET AL

Date Filed: 3/2/99 Date of Decision: 11/15/99

Level IV: Check One: _____

A Level IV hearing is requested

A decision may be made on the lower level record.

Grievant's Signature: Cynthia R. Stanley

Date Filed: 11/29/99

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James F. Barrett
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Lafe C. Chafin
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James P. McHugh
Roger D. Williams

June 26, 2003

The Honorable Paul Zakaib, Jr.
Kanawha Co. Judicial Annex
111 Court Street
Charleston, WV 25301

Re: Cynthia Stanley, et al. v. The Department of Tax and
Revenue and the Division of Personnel;
Docket No. 01-AA-93

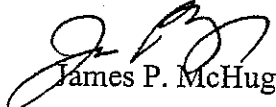
Dear Judge Zakaib:

On June 6, 2003, the Petitioners in the referenced case filed a Motion for Attorney's Fees requesting the statutory attorney's fees of \$1,500.00 per grievant, for a total of \$10,500.00. Thereafter, the Respondent responded by letter to the Motion claiming that since the cases were consolidated, the Plaintiffs are only entitled to one payment of \$1,500.00 for all grievances.

This issue involved the interpretation of W.Va. Code § 29-6A-10. In the attached Motion for Judgement as a Matter of Law, the Petitioners contend that the terms of W.Va. Code § 29-6A-10 are clear and that attorney's fees in the amount of \$10,500.00 (\$1,500.00 per grievant) should be awarded to them as a matter of law. In the event that the Court does not feel that oral argument is necessary in connection with its interpretation of W.Va. Code § 29-6A-10, the Petitioners enclose a proposed Order and request that the Court consider entering the same.

In the meantime, a hearing has been scheduled on Petitioner's Motion for Costs and Attorney's Fees for Monday, August 11, 2003. If you have any questions, please contact me.

Very Truly Yours,


James P. McHugh

Enclosure

cc: John S. Dalporto, Esq.
Karen O. Thornton, Esq.

CERTIFICATE OF SERVICE

I, Karen O'Sullivan Thornton, Assistant Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing Brief of the West Virginia Division of Personnel was served by depositing the same postage prepaid in the United States Mail, this 1st day of October, 2004, addressed as follows:

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And, via interdepartmental mail to:

John Dalporto
Senior Assistant Attorney General
State Capitol, Room W-435
Charleston, West Virginia 25305


Karen O'Sullivan Thornton