

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.

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WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES'  
*AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT,  
THE DEPARTMENT OF TAX AND REVENUE

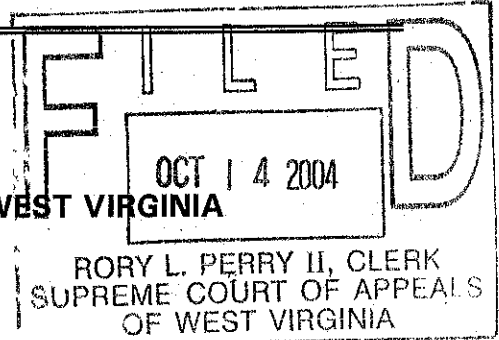
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Comes now the West Virginia Department of Health and Human Resources, ("DHHR"), by counsel, B. Allen Campbell, Senior Assistant Attorney General, and submits the following *amicus curiae* brief in support of the Appellant, the Department of Tax and Revenue ("Tax").

I. Introduction

The above-styled case presently before the Court involves an administrative appeal from the West Virginia Education and State Employees Grievance Board ("Board") in which the Circuit Court of Kanawha County reversed the decision of

the Administrative Law Judge below. This grievance was consolidated grievance containing seven grievants. Upon receiving notice of the reversal, Grievants' counsel moved the Circuit Court to award it attorney's fees pursuant to W. Va. Code §29-6A-10 in the amount of \$10,500.00. Tax responded that W. Va. Code § 29-6A-10 only provides for attorney's fees in the amount of \$1,500.00 per grievance. The Circuit Court of Kanawha County agreed with the Grievants' interpretation of the statute and awarded attorney fees in the amount of \$10,500.00. It is from this ruling that Tax appeals.

## **II. STATEMENT OF FACTS**

This matter on appeal only involves the Circuit Courts' ruling granting attorney's fees in excess of the statutory cap provided for by W. Va. Code § 29-6A-10. The facts in this matter are not in dispute.

## **III. ASSIGNMENT OF ERROR**

**The Circuit Court Erred in Awarding Attorney Fees in Excess of the Statutory Limitation of \$1,500.00 Per Grievance as Provided for in W. Va. Code §29-6A-10.**

## **IV. ARGUMENT**

W. Va. Code § 29-6A-10 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.

Appellees aver the provisions of this statute entitle them to recover the statutory amount of \$1,500.00 for each grievant participating in the consolidated grievance. In the instant case, the seven grievants are seeking attorney's fees in the amount of \$10,500.00. This argument is incongruent with both the plain language of the statute and the Legislative intent in enacting the Grievance Procedure for State Employees.

In 1988 the West Virginia Legislature created the current grievance process "to provide a procedure for the equitable and consistent resolution of employment grievances" for state civil service employees. W. Va. Code § 29-6A-1. In enacting this statute the Legislature recognized that the State, as an employer, and state civil service employees needed a mechanism to resolve issues relating to state employees' working conditions without resorting to expensive and time consuming litigation. The purpose of creating a multi-leveled procedure was so that issues could be worked out at the lowest level possible, and therefore, the most cost-efficient level possible.

In enacting the Grievance Procedure for State Employees the Legislature narrowly defined the issues which a state employee could challenge. W. Va. Code § 29-6A-2(l) defines a "grievance" as

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. (emphasis added).

Additionally, the Legislature narrowly tailored the definition of "employee" to limit the number of people who would be eligible to participate in the grievance procedure. See W. Va. § 29-6A-2(e). Perhaps most importantly, the Legislature defined "Grievant" to mean "any named employee **or group of named employees filing a grievance** as defined in subsection (l) of this section." W. Va. Code § 29-6A-2(k) (emphasis added).

It is clear from these definitions that the Legislature in enacting the statute contemplated that grievances with multiple employees which address the same issues are to be considered one "grievance." Indeed, the administrative law judges are given the express authority to consolidate similar claims in the interest of judicial economy. See W. Va. Code § 29-6A-5(b). Moreover, the procedural levels as defined by the Legislature clearly speak of only one "grievant" and one

"grievance" regardless of the number of employees that have been consolidated.

See W. Va. Code § 29-6A-4.

When reading W. Va. Code § 29-6A-1, *et seq.*, it is apparent the Legislature intended to create one grievance, regardless of the number of alleged violations, and one Grievant, regardless of the number of employees who are participating in the grievance. In examining W. Va. Code § 29-6A-10 in *pari materia* with the rest of this article it is apparent that the intent of the Legislature was to limit attorney's fees in each in each "grievance" regardless of the number of employees participating in the grievance.

Any holding to the contrary would have a devastating effect on state agencies. DHHR, as one of the largest state agencies, employees over five thousand individuals. As such, DHHR is a frequent participant in the State Employees Grievance Procedure. If the Court were to adopt the circuit court's interpretation of W. Va. Code § 29-6A-10, the cost to DHHR would be several millions dollars annually. As part of the grievance procedure, state employees are eligible to challenge their classification. In a large state agency such as DHHR classification grievances are often consolidated into mini "class-action" grievances. For example, DHHR utilizes a classification titled Economic Service Worker. DHHR has approximately 500 employees statewide who are classified as Economic Service Workers. Recently, employees in this classification filed a grievance challenging a job assignment alleging made to these employees alleging that the assignment rendered them misclassified and that they were performing the duties

of the Family Support Specialist. Grievants were seeking back pay for almost a two year period. This grievance was granted in part and denied in part. Should this case have been litigated up to the Supreme Court and the grievants prevailed, the award of attorney's fees in this case would amount to \$1,250,00.00. This amount would be in addition to the back pay award granted the employees. These grievants were represented by one attorney. Under the circuit court's interpretation of this statute this attorney would be entitled to over 1.25 million dollars in fees for conducting one hearing and filing briefs on appeal. Incredibly, the attorney fees in this case would amount to more than the State's liability limit in cases covered by the Board of Risk and Insurance Management. Surely this was not the Legislature's intent in enacting a cap on attorney fees. The Legislature's intent was to limit attorney fees to create a cost-efficient vehicle to resolve state employees' employment issues.

Similarly, DHHR's Bureau for Child Support Enforcement has experienced several mini "class action" grievances over the last year. Several different classifications challenged the Division of Personnel's classification scheme in the Bureau. While these grievances were separated by classification for economy, virtually every employee in the Bureau was involved in one of these grievances. BCSE employs approximately 480 employees. If all of these employees successfully appealed to the Supreme Court, the cost to DHHR would be \$1,200,000.00.

This is not a limited circumstance to DHHR. In response to the successful BCSE grievants noted above, several classifications in the Bureau for Children and Families have filed grievances challenging the Division of Personnel's classification scheme. Although the final number of grievants is yet to be determined in this case, the number of known grievants already amounts to over 300 employees. Under the Circuit Court's theory, should these grievants successfully appeal to the Supreme Court DHHR would be obligated for another \$750,000.00 in attorney's fees.

In these three grievances alone DHHR's liability for attorney's fees under the Circuit Court of Kanawha County's interpretation of the statute is \$3,450,000.00. The Circuit Court's interpretation of the statute results in an unjust windfall for attorneys whose work volume would be the same whether there were 30 or 300 grievants in the case because the issue is exactly the same. This could not have been the Legislature's intent when designing a grievance procedure that was supposed to be more cost efficient than routine litigation.

## V. CONCLUSION

For the reasons stated more fully above, your *amicus curiae* urges this Court to find that the Circuit Court of Kanawha County erred in interpreting W. Va. Code § 29-6A-10 to provide the statutory cap on attorney fees applies to each grievant rather than to each grievance. In determining the intent of the Legislature, it is clear that when this code section is read in *pari materia* with the rest of the article enacting the grievance procedure the Legislature intended to limit the attorney's fees per grievance.

Wherefore, your *amicus curiae*, West Virginia Department of Health and Human Resources, respectfully requests that the ruling of the Circuit Court of Kanawha County be reversed.

Respectfully submitted,

WEST VIRGINIA DEPARTMENT OF  
HEALTH AND HUMAN RESOURCES,  
APPELLEE,

By Counsel,

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CERTIFICATE OF SERVICE

I, B. Allen Campbell, Senior Assistant Attorney General, certify that I have this 14<sup>th</sup> day of October, 2004, served a true copy of the foregoing **WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES' AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT, THE DEPARTMENT OF TAX AND REVENUE** upon the following individual(s) by depositing the same in the United States Mail, postage prepaid, addressed as follows:

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