

No. 31868

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

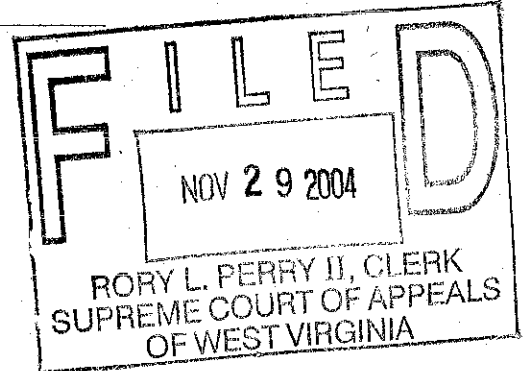
CONSTANCE BUFFEY

Appellant,

v.

HARRISON COUNTY BOARD OF EDUCATION,

Appellee.



BRIEF ON BEHALF OF
CONSTANCE BUFFEY, APPELLANT

BARBARA EVANS FLEISCHAUER
Attorney at Law
State Bar # 1219
235 High Street, Suite 618
Morgantown, West Virginia 26505
(304) 296-7035

Counsel for the Appellant

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**I. THE KIND OF PROCEEDING AND NATURE OF THE RULING IN
THE LOWER TRIBUNAL**

This case is an Appeal of an Order of the Circuit Court of Harrison County dated February 6, 2004. The final Order in that cases set a cap on the amount of attorney's fees awarded to the petitioner, who was the prevailing party in this case. The Circuit Court held that a later-passed statute, W. Va. Code §18-29-8, which allows for "reasonable attorneys fees" but contains no set monetary limit, is superceded by the monetary cap contained in W. Va. Code §18A-2-11, passed many years previously. This is the second time the parties are appearing before the Supreme Court.

This case was initiated on October 12, 2000 upon the filing of an employee grievance by the Petitioner, Constance Buffey, a teacher with Harrison County Schools. Ms. Buffey sought back pay and claimed she was entitled to salary credit for years that she had worked as a teacher at a private school, Fairmont Catholic. In a decision dated May 3, 2001 Senior Administrative Law Judge Sue Keller granted Ms. Buffey's grievance and ordered that she receive back pay from the time that she was hired as a regular teacher in 1995 to July 1, 2000.

The Harrison County Board of Education (the School Board or HCBE) appealed that decision to the Circuit Court of Harrison County. By Order dated January 25, 2002, the Honorable John Lewis Marks, Jr., Chief Circuit Court Judge, affirmed the decision of the Grievance Board. Judge Marks also ordered that Ms. Buffey was entitled to an award of attorney fees.

The School Board voted not to appeal the Circuit Court's Order as it related to the back pay and the merits of Respondent's grievance. Those issues are final and the back pay has been paid. By Order dated July 30, 2002, the Circuit Court held that W.Va. Code §18-29-8, which

became law in 1995, provides for the award of “reasonable attorney’s fees” to prevailing parties, but contains no statutory monetary limit was the applicable statute in this case. The Circuit Court rejected HCBE’s argument that the attorney’s fees were to be capped pursuant to the statutory \$1,000.00 cap on attorney’s fees awards against county Boards of Education provided for in W.Va, Code § 18A-2-11, which was passed by the Legislature in 1981. The Court’s decision was based upon the well-settled legal principle that later-passed statutes are to be given controlling effect when statutory provisions conflict.

The School Board appealed the Circuit Court’s decision to this Court, to which Ms. Buffey responded. Ms. Buffey filed a Motion for a Corrective Order, requesting that the Circuit Court be permitted to issue a final order by adjusting its prior award of attorney’s fees to reflect additional work that had been done on the case, to which the HCBE responded. Without addressing the statutory conflict issue, in a decision dated April 16, 2003, this Court issued an Order remanding the case to Circuit Court for entry of a final appealable Order.

Back once again in the Circuit Court, the parties conducted oral argument and submitted supplemental pleadings. The School Board did not challenge or object to number of hours of work sought to be reimbursed or the hourly rate. Instead, it asked the Court to reconsider its prior ruling, relying on a decision issued by this Court on April 22, 2003, *Wines v. Jefferson County Board of Education*, 582 S.E.2d 826, (W. Va. 2003), in which a school service employee who prevailed in a grievance was held to be entitled to attorney’s fees under W.Va. Code §18A-2-11.

The Circuit Court reconsidered its July 30, 2003 Order and ultimately reversed its decision on the award of attorney’s fees, relying on *Wines*. Significantly, the parties in *Wines*

did not raise or brief the statutory conflict issue, and the Court did not address it. Ms. Buffey requests the Court in this appeal to reverse the Circuit Court's final Order dated February 6, 2004 and rule that W.Va. Code §18-29-8, which does not contain a cap on attorney's fees other than a reasonableness requirement, has controlling effect.

II. STATEMENT OF FACTS

The relevant facts in this case are generally uncontroverted and are as set forth in the preceding section of this Petition.

III. ASSIGNMENT OF ERROR

The Circuit Court erred in failing to award reasonable attorney's fees pursuant to W. Va. Code §18-29-8 in the following ways:

1. the Circuit Court failed to apply the well-settled rule of statutory construction that later-passed Legislative enactments are controlling;
2. the Circuit Court erred by misapplying the rule of statutory construction that precedence should be given to statutes specific in scope, rather than statutes general in scope;
3. the Circuit Court erred by giving precedential weight to the *Wines* case, when that case did not actually decide the issue of which of the two competing attorney fee provisions applied; and,
4. the Circuit Court erred in not strictly construing school employment statutes in favor of the employee in this case.

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V. DISCUSSION OF LAW

Introduction

The parties in this case agree that the standard of review in this case is *de novo* because the issues to be resolved are all legal. The Circuit Court's February 6, 2004 Memorandum Opinion and Order on appeal in this case was based upon application of three principles. First, the Court justified its reversal on the principle of statutory construction that the specific statute be given precedence over a general statute relating to the same subject matter. Second, it ruled that the *Wines* decision was controlling authority. Third, the Circuit Court reasoned that a 1969 repealer provision in Chapter 18A indicating that inconsistent provisions of that Chapter "are hereby repealed to the extent of such inconsistency,"¹ meant that if the Court were to apply a statute adopted in 1992,² it would by implication be repealing the previously adopted provision, which the Court deemed to be prohibited. Each of these three justifications for the Circuit Court's decision reasons will be discussed and applied below, but first a history of the competing statutory Code provisions will be provided.

A. Statutory History

A statutory history is in order because the legal issue to be decided in this case relates to how to resolve the conflict between two inconsistent provisions regarding attorney's fees in school personnel grievance cases.

¹ W.Va. Code §18A-1-2(1969).

² W. VA. Code § 18-29-6.

1. Chapter 18A, Article 2 - School Personnel.

Chapter 18A, Article 2 of the West Virginia Code covers the broad and general topic of school personnel. Originally adopted in 1969, it encompasses a wide range of subjects including leaves of absences, assignment, transfer, demotion, performance evaluations, guidelines for cooks, employment of service personnel, duties of principals, etc. Article 2 contains seventeen (17) sections. Section 11, entitled Employee's right to attorney's fees and costs, was adopted in 1981. This section was the first legislative action making reference to the grievance process. At the time this provision was adopted, all other regulation of grievances and grievance procedures were contained in state school board policies rather than in the state code.

The attorney fee provision in W.Va. Code §18A-2-11 was applicable not just in grievance cases but in all other proceedings brought pursuant to chapters eighteen and eighteen-a. It placed a limit on the amount of attorney's fees that could be collected in a dispute between a county school board and one of its employees. There are two provisos: the first proviso contains a cap on fees for appeals to the Circuit Court and Supreme Court, the second proviso relates to mandamus proceedings and notes that the attorney fee provision is not to be construed to limit fees in mandamus cases.

In 1985, the statutory cap contained in the first provision was raised from \$500 to \$1,000 for a Circuit Court proceeding and from \$500 to \$1,000 for Supreme Court proceedings.³

³ The text of the 1985 version of W.Va. Code §18A-2-11 reads as follows: If an employee shall appeal to a circuit court an adverse decision of either a county board of education or of a hearing examiner rendered in a grievance or other proceeding pursuant to provisions of chapters eighteen and eighteen-a of this code and such person shall substantially prevail, the adverse party or parties shall be liable to such employee, upon final judgment or order, for court costs, and for reasonable attorney's fees, to be set by the court, for representing such employee in all administrative hearings and before the circuit court and the supreme court of appeals, and

2. Chapter 18, Article 29 - Grievance Procedure

An entirely new statewide administrative grievance process for both state employees and for those employed by school boards was created by statute in 1985. A new Education and State Employees Grievance Board was established, W. Va. Code §18-29-5. The new three person Board was given the power to hire and supervise Hearing Examiners who were to preside at hearings and decide upon grievances in different regions of the state. A four step grievance process was established. W.Va. Code §18-29-4. A new hearing process was established, W.Va. Code §18-29-6, and new provisions were enacted relating to mediation of grievances, W.Va. Code §18-29-10 and for enforcement of decisions of hearing examiners in the Courts, W.Va. Code §18-29-7. Significantly, article 18-29 in its entirety covers one, limited topic - grievances.

Initially, the only statement regarding expenses contained in the new administrative grievance process was that in levels one through three, expenses were to be "bourne by the party incurring such expenses." W. Va. Code §18-29-8. Following this statement on allocation of costs, the original version of the new grievance statute included a section recognizing educational institutions could be liable for attorney's fees in mandamus actions:

§18-29-9 Mandamus proceeding. Any institution failing to comply with the provisions of this article may be compelled to do so by mandamus proceeding and shall be liable to any party prevailing against the institution for court costs and attorney fees, *as determined and established by the court.* (Emphasis added)

shall be further liable to such employee for any court reporter's costs incurred during any such 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 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 school employee's right to recover reasonable attorney's fees in a mandamus proceeding brought under section eight, article four, chapter eighteen-a of this code.

In 1992, W.Va. Code § 18-29-8 was amended by adding the following language relating to costs in step four to the previously adopted language relating to costs in steps one through three:

...In the event an employee or employer appeals an adverse level four decision to the circuit court or an adverse circuit court decision to the supreme court, and the employee substantially prevails upon such appeal, the employee or the organization representing the employee is entitled to recover court costs and reasonable attorney fees, *to be set by the court*, from the employer. (emphasis added)

The effect was to harmonize the rules for attorney's fees in grievance actions and mandamus actions. After the 1992 amendment, both Code sections (W. Va. Code § 18-29-8 and §18-29-9) provided for equivalent standards for attorney's fees: attorney's fees are to be set by the Court when employees prevail, using a reasonableness standard.

Because W.Va. Code §18A-2-11 was left untouched by the Legislature when the new administrative grievance process, was adopted, a conflict was created over which of the two attorney fee provisions was intended to apply in cases brought under the administrative grievance process. What principles of statutory construction should govern the resolution of this conflict and how those principles should be applied, are issues to be resolved in this case.

B. The Circuit Court Erred in its Application of Rules of Statutory Construction.

The type of statutory conflict in this case has been considered by this court on many occasions in the past. The general rule for interpreting differing statutory sections is that courts should attempt to harmonize them, whenever it is possible to do so:

A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended

that statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith. *Bailey v. Norfolk and Western Ry. Co.*, 527 S.E. 2d 516, Syl. Pt. 9 (W.Va. 1999) citing *State v. Snyder*, 63 S.E. 2d 385 (1908).

The Circuit Court correctly held that the two conflicting statutory provisions could not be harmonized. The Court's Order dated February 6, 2004 stated as follows:

The Court cannot reconcile W.Va. Code §18A-2-11[1985] and W.VA. Code §18-29-8 [1992]. Although both pertain to an employee's award of attorney's fees, *one contains a cap while the other does not.* (Page 12, *emphasis added.*)

In cases where two statutory provisions could not be reconciled, more than one rule of statutory construction has been utilized by this Court to resolve the conflict. In most instances, given the Legislature's power to change the law in future sessions, the Court has held that the later passed statute is controlling. *See, for example, State ex rel. Pinson v. Varney*, 96 S.E. 2d 72 (W.Va. 1956). In some cases, often in instances when there have been more than two statutes being interpreted, this Court has held that the code section which is more specific in scope with regard to the subject will control over the section more general in scope. *Carvey v. W.Va. State Bd. of Ed.*, 527 S.E. 2d 831 (W.Va. 1999) (*Carvey* involved two statutes and an administrative regulation.) Finally, there have been cases where this Court has adopted an interpretation that was consistent with both of these rules of statutory construction. *Maxey v. McDowell County Board of Education*, 212 W.Va. 668, 575 S.E.2d 778 (2002). All of these rules of construction will be discussed below, and applied to the facts in this case.

1. There are Serious Practical Problems with "Harmonizing" the Conflicting Statutes by Ignoring the Later Legislative Act.

Although the Circuit Court ruled the two statutes could not be harmonized, the Appellee argued in its Response to the Petition that the conflict between the two sections could be easily resolved by ignoring the change made by the Legislature in 1992. The Appellee suggested that because the language in the two statutes is similar, in order to harmonize the two, the cap contained in the statute passed in 1981 should be regarded as supplementing the provision which omitted the cap in 1992.

There are several serious practical reasons why this suggested interpretation should not be followed. First, and most obviously, such an interpretation deprives the later passed legislative act of all meaning. As this Court has consistently held:

The Legislature must be presumed to know the language employed in former acts, and if in a subsequent statute on the same subject it uses different language in the same connection, the court must presume that a change in the law was intended. Syl. Pt. 2, *Hall v. Baylous*, 109 W.Va. 1, 153 S.E.2d 293 (1930); *Longwell v. Board of Education of County of Marshall*, 213 W.Va. 486, 583 S.E.2d 109 (2003).

The interpretation urged by the Appellee would presume the opposite - it would presume the Legislature in 1992 did not know what it was doing when it used different language on the subject of attorney's fees than had been employed in a different part of the Code in 1981.

The *Longwell* case is instructive. *Longwell* involved two conflicting statutes relating to legal representation for school boards. W. Va. Code §7-4-1, enacted in the early 1900's, imposed a duty upon county prosecutors to represent school boards. As early as 1914, this Court concluded that the duty imposed by this statute did not deprive boards of education of the inherent right to hire counsel under certain circumstances, even though there was no statutory support for this right. A series of cases set forth the type of circumstances under which outside counsel could

be hired. Pursuant to this line of cases, the appellant urged the Court to hold that outside counsel could only be hired in cases of necessity. Subsequent to these case, however, the legislature enacted a section authorizing school boards to hire outside counsel, W.Va. Code § 18-5-13(l) [1971].

The Court ruled that it would not impose a requirement that the Legislature chose to omit, stating: “we find it compelling the fact that W.Va. Code § 18-5-13(l) was enacted without any express requirement for necessity imposed upon the authority of the boards to hire legal counsel, notwithstanding the fact that such a requirement had been imposed under the common law.”

Justice Davis, writing for the Court, also rejected the notion that the two statutes must be read *in pari materia*:

to say that because several statutes relate to the same subject, they must always be read *in pari materia* is an oversimplification of the rule. First, it is apparent that what is meant by statutes related to the same subject matter is an inquiry that is answered by how broadly one defines the phrase “same subject matter.” ...The rule is most applicable to those statutes relating to the same subject matter which are passed at the same time to refer to each other or amend each other. *A diminished applicability may be found where statutes are self-contained and have been enacted at different periods of time. Longwell* at citing also 2A Sutherland Statutory Construction Sec. 51.01 (4th ed. 1973)

Here, following the reasoning in *Longwell*, it would be improper to “harmonize” the two statutes by imposing the cap contained in the 1981 and ignoring the omission of the cap included in a different Code section in 1992. Like in *Longwell*, the two statutory articles, 18A-2 and 18-29 being considered in the case at bar are self-contained and were enacted at different periods of time. Similarly, because the two statutes in two separate articles do not cover exactly the same subject matter,⁴ this Court should not impose a requirement that the Legislature chose to omit.

⁴ See section C, 3 of this Brief, *infra*, which discusses the scope of Article 18A-2 comparing it to the scope of Article 18-29. Among other differing factors, the attorney fee provision in § 18-29-8 is applicable only in statutory grievance procedures while §18A-2-11 applies to any proceedings between employees and School Boards referenced to in Chapter 18

The second reason this Court should not ignore the new language in W.Va. Code § 18-29-8 is because such an interpretation would discourage use of the administrative grievance process. As mentioned in the portion of this Brief relating to statutory history, one effect of the 1992 amendments to W.Va. Code § 18-29-8 was to standardize attorney fee provisions in both administrative grievance process and in mandamus cases. W.Va. Code § 18-29-9 recognized the continuing right of employees to pursue the remedy of mandamus, which under the common law of our state gives rise to attorney's fees approved by the Court in successful cases. With the omission of the statutory cap on fees in the preceding section of the Code, W.Va. Code § 18-29-8, the rules governing attorney's fees in administrative grievances then became the same.

This Court ruled in *Ewing v. Board of Education of Summers County*, 202 W. Va. 228, 503, S.E. 2d 541 (1998) that school employees have the option of proceeding under either the administrative grievance process or through mandamus. The Legislature made major changes to the law when it codified the administrative grievance process in 1985. Using the interpretation urged by the Appellee would discourage the use of the grievance process, since those choosing the grievance process would only be partially reimbursed for expenditures for legal services, while those resorting to litigation in the Courts would receive their full fees, under the reasonableness standard.

It is impossible to presume the Legislature would have intended this result, given the effort expended to create the extensive, four-level system contained in W.Va. Code § 18-29-1 et seq. Such a result would clog the Courts and would penalize school employees who chose the "simple, fair and expeditious"⁵ administrative grievance process.

and Chapter 18A.

⁵ The preamble of the Grievance section states that this is the purpose of the statute. W.Va. Code § 18-29-1.

A third practical problem with “harmonizing” the two statutes at issue by ignoring the omission of the cap on attorney’s fees in the later passed provision is that W.Va. Code § 18-29-8 bars attorney’s fees in the first three levels of the administrative process,⁶ whereas the earlier passed statute permits the award of fees for administrative hearings, with a cap.⁷ The effect of this interpretation would be to create confusion and new conflict, not to mention placing Courts in the difficult position of having to choose which portion of the later passed statute to ignore.

Given these three serious practical problems, the only tenable solution is for the Court to give full effect to the 1992 amendments to W.Va. Code § 18-29-8, by presuming that the Legislature intended to omit the cap on attorney’s fees in the appeal portion of the newly created administrative grievance process, and that it intended to prohibit the award of fees in the first three levels of that process.

2. The Circuit Court Erred in Not Giving Controlling Effect to the Last Enactment of the Legislature.

The most common consistent rule of statutory interpretation this Court has applied to conflicting statutory provision is that the later passed statute is controlling. One of the most frequently cited cases is *State ex rel. Pinson v. Varney*, 96 S.E. 2d 72 (W.Va. 1956). That case involved a dispute relating to the election of a school board member. Statutes regulating those elections were housed in two different places, in the Education section of our Code, Chapter 18,

⁶ The first sentence of W.Va. Code §18-29-8 [1992] provides as follows: “(a)ny expenses incurred relative to the grievance procedure at levels one through three shall be borne by the party incurring such expenses except as to the costs of transcriptions as provided for in section six of this article.”

⁷W.Va. Code § 18A-2-11 makes explicit reference to the allowance of fees in administrative hearings: “If an employee shall appeal...the adverse party..shall be lieable..for reasonable attorney’s fees, to be set by the court, *for representing such employee in all administrative hearings* and before the circuit court and the supreme court of appeals...”

as well as in the Elections section, Chapter 3. The Court was unable to resolve the conflict between the two statutes and held that the later passed statute must be given precedence:

In 1985, Justice Miller writing for the Court, followed the *Pinson* reasoning with respect to a juvenile sentencing issue in *State v. Ball*, 175 W.Va. 652, 337 S.E. 2nd 310 (W.Va. 1985). One Code section, W.Va. Code §29-4-6, which had been adopted in 1955, allowed the Court to suspend sentences of juveniles and commit them to institutions other than the penitentiary if they pled guilty to a crime “other than an offense punishable by life imprisonment.” In contrast, W.Va. Code §49-5-13(e), adopted in 1978, provided that “notwithstanding any other provision of this Code to the contrary,” a child transferred to adult jurisdiction could be sentenced as a juvenile in the discretion of the court, and therefore need not be confined in the penitentiary. The Supreme Court held that the inconsistency between the two statutes should be resolved in favor of W. Va. Code §49-5-13, since it was the most recent enactment.

State ex rel. DHHR v. Pub. Emp. Ret. Sys., 393 S.E. 2d 677 (W.Va. 1990) involved a conflict between the Code section relating to the state Public Employee’s Retirement System, enacted in 1961, which banned any type of execution or attachment, and the later passed Family Obligations Enforcement Act, which set up a procedure for withholding income of persons found obligated to pay child support. Justice Neely, writing for the Court, stated that “(w)e are of the opinion that this provision of the Public Employees Retirement Act was implicitly superceded in part by passage in 1986 of the Family Obligations Enforcement Act...” *Id.*, 393 S.E. 2d at 680. Citing *Pinson*, the Court held that the Legislature intended to carve out an exception to the protection of public pensions from legal process when it adopted the new Child Support legislation.

In 1994, this Court decided a case involving a conflict between the 1986 Governmental Tort Claims and Insurance Act, which permitted liability claims against government entities. . . . *Stamper v. Kanawha Co. Bd. of Ed.*, 445 S.E. 2d 238 (W.Va. 1994). The School Board argued that the Tort Claims Act should not apply to an accident at a playground because of a statute passed in 1965 which limited the liability of landowners for injuries on land when persons were permitted to use it for recreational purposes. The Court first reached the conclusion that the earlier statute was intended to protect private and not public landowners. Additionally, the Court presumed the Legislature to be aware of its prior enactments, and applied Syllabus Point 2 of the above-cited *DHHR* case. Controlling effect was therefore given to the last enactment of the legislature because the two Code sections could not be harmonized.

Justice Cleckley cited *Stamper* and *DHHR* as authority for how to construe a case involving an inconsistency between an administrative rule and a statute enacted prior to the adoption of the administrative rule. In *HCCRA v. Boone Memorial Hospital*, 477 S.E. 2d 411 (W. Va. 1996), the hospital was denied permission by the Health Care Cost Review Authority to purchase a CT scanner without going through a Certificate of Need (CON) review process. The hospital claimed that under a 1991 statute, it could avoid the burdensome CON process because it did not meet the threshold requirements. HCCRA disagreed, relying on its administrative rule. Although the Court found the administrative rule to be valid and later in time than the statute in question, it found that the Legislature's eventual promulgation of the administrative rule to be overwhelming evidence of the Legislature's acquiescence to the rule.

In *Wood County Bd. of Ed. v. Peggy Smith et al.*, 502 S.E. 2d 214 (W.Va. 1998), the Supreme Court applied the *Pinson* reasoning to two conflicting Superintendent of Schools

opinions relating to whether a reduction in force of school service personnel had occurred. The Court held that it was appropriate for an administrative law judge to rely upon a 1989 opinion of the Superintendent rather than a 1986 opinion, stating:

It is now *well settled fundamental law* that when two statutes conflict, the general rule is that the statute last in time prevails as the most recent expression of the legislative will. *Id.*, 502 S.E. 2d at 217. (Emphasis added)

The Court in the *Smith* case concluded that this axiom should also hold true for competing administrative opinions interpreting the same statute.

The effect of ignoring the omission of a statutory cap on the amount of attorney's fees in § 18-29-8, as urged by the appellee, would be to ignore the plain, unambiguous language of the later-passed statute. The term "reasonable attorney's fees", standing alone, is a legal term of art. It is defined in the treatise, *Words and Phrases*, the appropriate criteria and the boundaries of that term of art have been expounded upon at great length by our state Supreme Court as well as the U.S. Supreme Court,⁸ and it is now part of the Rules of Professional Conduct for the lawyers permitted to practice law in this state.⁹

⁸ See, for example, *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Blum v. Stenson*, 465 U.S. 886 (1984); *Kanawha County Bd. of Education v. McCuskey*, 403 S.E. 2d 17; (W.Va. 1991); *Casteel v. Consolidation Coal Co.*, 383 S.E. 2d 305 (W.Va. 1989).

⁹ The Rules of Professional Conduct, adopted by the Supreme Court on June 30, 1988 are printed in the State Rules volume of the West Virginia Code. Rule 1.5, relating to Fees, provides the following in part (a):

A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of the fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;

As discussed previously, it should be presumed that the Legislature knew that the earlier passed statute, W.Va. Code §18A-2-11, differentiated between the fees allowable for mandamus actions and appeals. It should further be assumed, that by adopting the same “reasonableness” standard in the 1992 amendments to W.Va. Code § 18-29-8 for attorney’s fees in administrative grievance cases as was applicable in the mandamus section, § 18-29-9, the Legislature was aware that the two successive sections thereafter would be utilizing the same standards for awarding attorney’s fees. It should also be assumed that the Legislature was cognizant of the meaning of the term “reasonable attorney’s fees”, when it used that term standing alone, given the fact that it has been spelled out in the West Virginia Code since 1988 in the form of Supreme Court rules.¹⁰

Given the practical problems with harmonizing the two statutes, added to the weight of authority of the many cases discussed above, this Court should apply “the well-settled rule that the statute last in time prevails as the most recent expression of the legislative will.” *Wood County Bd. of Ed. V. Peggy Smith, et al., supra.* at 217. This Court should therefore reverse the Circuit Court’s decision to cap the award of attorney’s fees to Ms. Buffey and instead remand this case again for adoption of an award of fees pursuant to W. Va. Code §18-29-8.

3. The Circuit Court Erred in its Application of the Rule of Statutory Construction that Precedence Should be Given to Statutes Specific in Scope, Rather Than Those Statutes Which are General in Scope.

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- (4) the amount involved and the results obtained;
 - (5) the time limitations imposed by the client or by the circumstances;
 - (6) the nature and length of the professional relationship with the client;
 - (7) the experience, reputation and ability of the lawyer or lawyers performing the services and
 - (8) whether the fee is fixed or contingent.

¹⁰ See the list of eight requirements for Courts to consider in awarding “reasonable attorney’s fees in footnote 3, *supra*.

The Circuit Court cited two cases in support of the proposition that specific statutory language takes precedence over general language, *Carvey v. W.Va. State Bd. of Ed.*, 527 S.E. 2d 831 (W.Va. 1999) and *Trumka v. Kingdon and US Steel Mining Co.*, 174 W.VA. 380, 325 S.E. 2d 120 (W.Va.1984).

Ms. Buffey concedes that these cases establish a valid statutory rule of construction in our state. However, the Circuit Court misapplied this rule in the case at bar.

In the *Carvey* case, this Court looked not just at the terminology in the competing provisions, but based its decision on the specificity or generalness of the scope of the competing provisions. In *Carvey*, the Court was asked to determine under what circumstances principals required to attend the Principals Academy should be paid a stipend and what entity was responsible for payment. Justice Davis, writing for the Court, noted:

...it is clear that W.Va. Code § 18A-3-2c(I) and W.Va. C.S.R are the more specific provisions as their *scope is limited* to the Principals Academy and the Center's specific duties in that regard. Contrariwise, W.Va. Code § 18A-3A-1 defines, *in general terms, the entire scope* of the Center, from its elementary purpose and component members to its various responsibilities and certain approved budgetary expenditures. As the task at hand involves a determination of whether stipends are available to principals attending the Principals Academy and not other forms of training sponsored by the Center, we conclude that the more specific terminology contained in W.Va. Code § 18A-3-2c(I) and W.Va. C.S.R. § 126-147-6.4 governs this controversy. 527 S.E.2d 842-843. (emphasis added)

Similarly, in the *Trumka* case, there was a specific venue rule for one agency and a general venue rule for all agencies. The general venue statute for agencies in effect at the time, W.Va. Code §14-2-2, required cases involving state administrative agencies to be filed in Kanawha County. Cases involving appeals from decisions of the Board of Appeals of the Department of Mines, however, could be filed either in the county where the petitioner resided or did business or in Kanawha County Circuit Court under W.Va. Code §22-1-30(g). Again, this

Court looked at the *scope* of the venue statute for appeals of all administrative agencies, which was found to be general and compared it to the *scope* of the enactment involving appeals only of decisions of the Board of Appeals of the Department of Mines, which the Court held was narrower. There were two separate statutory schemes, located in two separate portions of the Code and this Court chose the statute more specific in scope over the statute that was more general in scope.

If one undertakes a review of the legislative history of the competing statutes at issue in this case, and considers, in particular, the scope of each statute, it is apparent that W.Va. Code §18-29-8 is more specific and should govern the dispute in this case. W.Va. Code §18-2A-11. was adopted in 1981 as a general attorney fee statute governing several kinds of proceedings, including grievances. In 1981, this section was the only reference to the grievance process contained in the West Virginia Code. At that time, the entire administrative grievance process was instead housed in numerous regulations adopted by the State Board of Education. Also, since its inception, § 18A-2-11 has covered attorney's fees not just in grievance cases (which at the time that section was enacted were a purely administrative creature), but in all employee-School Board disputes included within Chapter 18 and Chapter 18A.

In 1985, the Legislature codified the administrative grievance process in W.Va. Code § 18-29-1 *et seq.* This change resulted in a completely new scheme for resolving employment disputes between school employees and their employers and was effectuated by the creation of completely new article. The attorney fee provision in W.Va. Code § 18-29-8 is narrow in scope, applicable only to disputes resolved via the statutory administrative grievance process. In contrast, W.Va. Code §18A-2-11 retains general applicability to any cause of action authorized in article

18A and article 18. Thus, because the scope of W.Va. Code § 18-29-8 is more specific than § 18A-2-11, it should govern in the case at bar.

Neither case cited by the Circuit Court overrides or overturns the rule of construction in the long list of cases cited previously which mandate that later-in-time passed statutes take precedence in cases of conflicting statutory language. In both *Carvey* and *Trumka*, the governing statute deemed to be more specific in scope was also the latest Legislative enactment.¹¹

4. Like the Taylor-Hurley Case, Both Rules of Statutory Construction Can Be Applied to the Case at Bar.

In *Taylor-Hurley v. Mingo County Board of Education*, 551 S.E. 2d 702(2001), this Court found that both rules of statutory construction (later in time governs, more specific in scope governs) were applicable. *Taylor-Hurley* involved a layoff situation and the Court was asked to make a determination as to which statutory provision should be relied upon in order to determine the order of persons to be laid off. Some of the employees were classified for particular positions and others possessed classifications for particular positions and were also considered “multiclassified.” The Court considered the original statute relating to the status of employees deemed to be multiclassified, examined how that statute had been interpreted administratively and reviewed a statute passed after the administrative determination.

The Court found that the latest legislative enactment was an express legislative rejection of the administrative determination. Furthermore, citing *Stamper*, *Trumka*, *DHHR v. Retirements*

¹¹ The *Carvey* case considered three separate enactments, two statutes and one administrative rule adopted by the legislature. Although using the “more specific” rationale, the Court chose to adopt the interpretation suggested by the enactments passed first and third in time, thus in effect upholding the latest-in-time enactment. Likewise, in *Trumka*, while holding that the statutory scheme that governed was more specific in scope, the Court chose to follow the statute adopted in 1971 and amended in 1977, rather than the statutory provision adopted in 1953.

System and Boone Memorial Hospital, supra, the Court held that the latest statute was also more specific in scope:

To the extent that there is any inconsistency with the more general provision of §18-4-8b, which instructs that the class titles set forth in §18-4-8(I) should be regarded as “separate classification categor[ies], §18A-4-8g represents both a more recent and more specific legislative determination as to the status of multiclassified employees and therefore controls (citations omitted), 551 S.E.2d at 708.

As discussed in the previous two sections of this brief, interpreting this case as being governed by §18-29-8 is consistent with the latest-in-time rule of construction, which has been utilized most frequently by this Court to resolve disputes, as well as the rule of construction favoring provisions that are more specific in scope, rather than general in scope. Under both of those circumstances, Courts look to the “plain meaning” statute which is more recent and/or more specific in scope. Under the clear language of § 18-29-8, there is no statutory cap on attorney’s fees in statutory administrative grievances. This Court should give effect to the clear, unambiguous and plainly expressed legislative intent expressed in § 18-29-8 to award fees to prevailing employees, limited not by any set amount, but by the “reasonableness” requirement contained therein.

C. The Circuit Court Erred by Giving Precedential Authority to the *Wines* Case since the Issue of the Conflicting Statutory Sections on Attorney’s Fees was Not Raised or Briefed by the Parties and was Not Actually Decided by the Court.

Because the *Wines* case was the most recent decision mentioning attorney’s fees in a school personnel grievance case, and the Court in *Wines* cited W.Va. Code §18A-2-11 as authority for an award of fees, the Circuit Court apparently felt compelled to give controlling precedential weight to *Wines*. However, it is beyond argument that *stare decisis* should not be applied in cases where a

legal issue has not been discussed. In *Wines*, Justice McGraw, writing for the Court, made a reference to W.Va. Code § 18A-2-11 in his conclusion that attorney's fees should be awarded to the prevailing party.

Neither party in *Wines* raised the issue of the conflict between the two attorney fee provisions as an assignment of error, nor was the issue briefed by the parties or discussed in the decision of the Court or in the Dissent. The issue was therefore not decided by the *Wines* case. According to the 7th edition of *Black's Law Dictionary*, the term of art, *stare decisis*, is derived from Latin and means "to stand by things decided." A key element in concluding whether application of *stare decisis* is appropriate in a given case is determining whether an issue actually was decided by a Court. As is explained in *Black's Law Dictionary*, citing Brief Making and the Use of Law Books, 321 (3d. Ed. 1914):

The rule of adherence to judicial precedents finds its expression in the doctrine of *stare decisis*. This doctrine is simply that, *when a point or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved*, it will no longer be considered as open to examination or to a new ruling by the same tribunal, or by those which are bound to follow its adjudications, unless it be for urgent reasons in exceptional cases. (Emphasis added)

That *stare decisis* does *not* apply when the issue has *not* actually been decided by a Court has been cited in court cases too numerous to mention. However, for purposes of illustration, one rather well-known U.S. Supreme Court case upholding this principle is *Keyishian v. Board of Regents*, 387 U.S. 599 (1967). In that case, the U.S. Supreme Court ruled that the *Adler* case¹² did

¹² *Adler v. Board of Education*, 342 U.S. 485 (1952).

not have precedential effect because the issue before the Court in *Keyishian* had not been considered or decided in the *Adler* case.¹³

Moreover, the Court in *Wines* did not overrule *Maxey*, decided just a year earlier. *Maxey v. McDowell County Board of Education*, 212 W.Va. 668, 575 S.E.2d 778 (2002) involved the application of State School Board Policy 5300, which requires that teachers be evaluated, notified of performance problems and given an opportunity to improve correctable deficiencies prior to suspending or terminating an employee. Justice Albright, writing for the Court, held that the school board failed to properly apply Policy 5300 and reversed the termination of the employee. The Court ordered the lower court to address the employee's possible entitlement to of back pay as well as attorney's fees: "(t)he limited statutory attorney fees described in West Virginia Code §18-29-8 (1992) (Repl. 1999) should also be considered and ordered as appropriate."¹⁴ The fact that *Wines* did not expressly overrule *Maxey* lends further support to the conclusion that the *Wines* case did not decide the dispute in this case and therefore does not control how the case *sub judice* should be decided.

¹³ Both cases involved challenges to the same New York State statutes that permitted dismissal of employees for treasonous utterances or acts or for advocacy of the overthrow of the government by force. The Court ruled that the doctrine of *stare decisis* did not apply because the issue of unconstitutional vagueness, which was raised by the parties in *Keyishian*, had not been "heard or decided" in *Adler*. 385 U.S. at 595. For this reason, the Court in *Keyishian* found that *Adler* was "not dispositive of the constitutional issues we must decide in this case." *Id.* Like *Keyishian*, the issues in the case at bar were not heard or decided in *Wines*. *Wines* therefore should not be dispositive of the issues to be decided in the case before the Court.

¹⁴ See footnote 14 in *Maxey* and accompanying text.

D. The Circuit Court Erred by Reasoning that a Repealer Provision Adopted in 1969 Would Operate to Repeal Inconsistent Statutory Provisions Adopted by Future Legislatures.

The Circuit Court acknowledged the legal principle cited by Ms. Buffey that statutes passed later in time are to be given controlling weight. However, part of the reason the Court reconsidered its prior decision adopting this principle was because a portion of Chapter 18A, W.Va. Code §18A-1-2, states as follows:

The provisions of any articles or parts of articles, of the code of West Virginia, one thousand nine hundred thirty-one, as amended, which are inconsistent with the provisions of this chapter [Chapter 18A], are hereby repealed to the extent of such inconsistency.”

The Circuit Court, on page 13 of its decision, reasoned that:

In other words, any provision contained within Chapter 18, which is inconsistent with any provision contained within Chapter 18A, is expressly repealed. By applying the more recent attorney’s fee provision contained within Chapter 18 as opposed to the attorney’s fee provision found in Chapter 18A, the Court has not given effect to the Legislature’s intent as expressed in W.Va. Code §18A-1-2[1969]. Moreover, in light of Wine, the Court is of the opinion that it improperly repealed by implication the limitation on attorney’s fees contained within W.Va. Code §18A-2-11 [1985]. The repeal of a statute by implication is not favored in law. Syl. pt. 1, *State ex rel. City of Wheeling v. Renick*, 145 W.Va. 640, 116 S.E. 2d 763 (1960).

There are several reasons why the Court’s reasoning in the above quoted section of its February 6, 2004 decision is flawed. First, under the Court’s reasoning, the legislature would never be able to change a law under the preceding analysis, since it would in effect carve in stone a statutory provision passed in 1969 for all time. History dictates that succeeding Legislators constantly change laws enacted by prior Legislatures.

Second, it is axiomatic that repealer provisions like those cited by the Circuit Court can have only retroactive, not prospective effect. The consequences of this reasoning would be inconsistent with our Constitutional system of government. The legislature is constrained by

limitations contained in the W.Va. Constitution, but nothing therein places a restriction on the ability of future legislatures to alter the actions of prior legislatures. Clearly, the Legislature has the power to change course by enacting new legislation that amends or alters laws passed in previous legislative sessions. Although repealer provisions like the one referenced by the Circuit Court can legitimately overturn prior enactments, they cannot have prospective effect under our system of government.

E. The Circuit Court Erred by Failing to Afford a Liberal Construction to Statutes Affecting School Employees.

The Circuit Court did not mention or attempt to apply the well-settled rule that school laws and regulations are to be strictly construed in favor of the employee. Syl. pt. 1 *Morgan v. Pizzino*, 163 W. VA. 454, 256 S.E.2d 592 (1979); Syl. pt. 4, *Miller v. Board of Educ. of Boone County*, 190 W.Va. 153, 437 S.E.2d 591(1993), *Carvey, supra* 527 S.E. 2d at 836.

As mentioned in the *Longwell* case, *supra*, by statute, it is the duty of prosecutors to represent school boards and by statute, Boards of Education are permitted to employ outside counsel as well. Unlike School Boards, whose position is represented by public or private attorneys in all court cases at taxpayer expense, school employees in grievance cases are only entitled to reimbursement for their fees in cases where they prevail. Statutory provisions relating to attorney's fees in school employment cases thus are intended to inure to the benefit of the employees, not to school boards.

The School Board, perhaps understandably, urges a construction of the two competing statute that would limit the amount of fees available to employees to \$1,000 in cases appealed to the Circuit Court and an additional \$1,000 in cases that are appealed further to the Supreme Court.

Such a limitation gives school boards quite an advantage - there are few private attorneys with the resources to take on cases involving complicated questions of law and/or intricate factual development if they are not going to be guaranteed to be paid for all of their time. There are likewise few school employees with the resources to employ a private attorney, knowing that they will only be able to recover a small portion of the money they ultimately will owe a lawyer. If school employees are by this tactic discouraged from pursuing grievances because of the expense involved, the concomitant effect is to give carte blanche to school administrators to avoid or thwart provisions of the West Virginia Code.

Although it is difficult to discover the true intention of the Legislature, an obvious rationale for omitting the statutory cap in §18-29-8 was to rectify this economic disparity by removing the limitation on the amount of attorney's fees that could be recovered. Strictly construing school employment laws in favor of employees can only be accomplished in this instance by presuming the Legislature intended to remove the prior cap on fees. Construing the statute as the School Board proposes, would obviously inure to the benefit of school administrators and School Boards at the expense of school employees. The purpose of fee shifting statutes is to encourage school boards to comply with the law. Making it financially possible for employees to seek redress for their grievances furthers this objective.

The Circuit Court's failure to apply this important rule of construction was also erroneous and cause for reversal.

IV. RELIEF PRAYED FOR

For all of these reasons, Ms. Buffey respectfully requests this Court to reverse the February 6, 2004 decision of the Harrison County Circuit Court and remand this case to the Circuit Court for adoption of an award of reasonable attorney's fees to Ms. Buffey consistent with W.Va. Code §18-29-8.

Respectfully submitted,
CONSTANCE BUFFEY, Respondent,
By counsel:



Barbara Evans Fleischauer
235 High Street, Suite 618
Morgantown, West Virginia 26505
State Bar No. 1219
304/296-7035