

No. 31868

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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CHARLESTON

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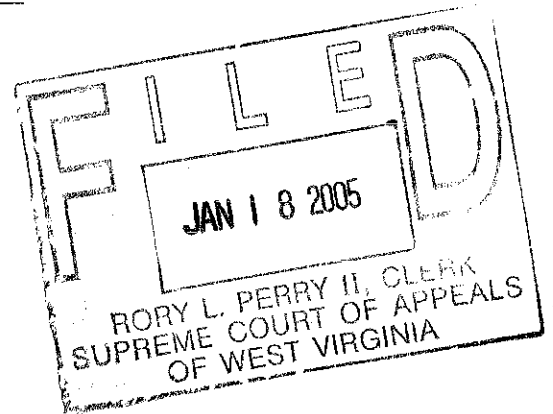
CONSTANCE BUFFEY

Appellant,

V.

HARRISON COUNTY BOARD OF EDUCATION,

Appellee.



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REPLY BRIEF ON BEHALF OF  
CONSTANCE BUFFEY, APPELLANT

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CONSTANCE BUFFEY

Appellant.

V.

HARRISON COUNTY BOARD OF EDUCATION,

Appellee.

APPELLANT'S REPLY BRIEF

1. The School Board's Argument that there is No Conflict Between an Earlier Passed Statute because it "Supplements" a Later Passed Statute Applies the Word "Supplements" in a Way that is Inconsistent with its Definition.

The main thrust of the School Board's argument in its responsive brief is that the attorney fee provisions in W.Va. Code §18A-2-11 do not conflict with, but rather supplement, the provisions in W.Va. Code §18-29-6 (See Brief of Appellee, section D, pages 9-18). A major problem with this novel argument is that it is applied in a fashion inconsistent with the definition of the word supplement. The Oxford English Dictionary<sup>1</sup> defines the word "supplement" when it is used as a noun as "a thing added to something else to enhance or complete it." Further, when the word is used as a verb, it means "to add something to an existing system." Thus, in terms of timing, to be a supplement means that it is a thing that is added to something already in existence. Likewise, inherent in the proper use of the verb supplement is that it is being done after the occurrence of some other event, not before it.

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<sup>1</sup> Contained in Version 10.0 of the word processing program, Wordperfect.

In the case at bar, the appellee misuses the word supplement because it argues that language in an earlier passed statute should be included within and made a part of a later passed statute. This is inconsistent with a basic rule of statutory construction in our state. As this Court has long 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). (emphasis added), cited also in Vol. 2A, Singer, Norman J., Sutherland Statutory Construction §51.01, fn. 27, p. 200.*

As the appellant explained in the statutory history section of her previously submitted brief, pages 1-4, in 1981, the Legislature enacted an attorney fee provision in chapter 18A for employees that covered grievances and any other matters in disputes with school boards W.Va. Code §18A-2-11 (1981). That statute contained a proviso which limited fees to no more than \$500 in hearings before the board and/or the Circuit Court and to an additional \$500 for Supreme Court proceedings. The statute was revised in 1985 to double the amount of fees at the two levels (\$1,000 for administrative and Circuit Court proceedings and \$1,000 for Supreme Court proceedings).

In 1985, the Legislature also enacted an entire Chapter covering grievance proceedings, setting up a four level process prior to appeals to Circuit Court and the Supreme Court. Chapter 18-29 omitted any mention of attorney's fees, stating only that the costs for Levels one through three should be borne by the party incurring the expenses, W.Va. Code §18-29-8 (1985).

A significant change occurred in 1992. The Legislature amended Chapter 18-29 and added relating to attorney's fees:

“(in the event that 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) W.Va. Code §18-29-8 (1992).

Clearly, because the language in Chapter 18A-2-11 relating to attorney’s fees was enacted earlier than the language in Chapter 18-29-8, it could not “supplement” that language, because it was not being added after-the-fact. What was added after the fact, was the attorney fee provision in §18-29-8. That provision reflects the true definition of supplement - it was “added to something else to enhance or complete it.” Prior to that time, when the new grievance statutory process had been established in 1985, there had been no mention of attorney’s fees. By adding the attorney fee provision in 1992, the Legislature completed the process it began in 1985 when the statutory grievance process was originally enacted..

2. The School Board’s Argument that there is No Conflict Between an Earlier Passed Statute because it “Supplements” a Later Passed Statute Applies the Word “Supplements” in a Way that is Inconsistent with Case Law.

Not one case cited by the Appellee contains a holding that an earlier passed statute with similar, but differing language “supplements” a later passed statute. The only case cited by the appellee in which the appellant could find the word “supplement” was *Smith v. Siders*, 155 W.Va. 193, 183 S.E.2d 433 (1971). That case involved an apparent conflict between two sections in Chapter 18 and Chapter 18A relating to removal of school employees from office. The provision in Chapter 18A applied to any person in board employment and stated that school board removal decisions could be appealed to the state superintendent. The provision in Chapter 18 applied only to superintendents, but omitted mention of the appeal to the state school

superintendent. The school board argued that the decision of the state school superintendent was invalid, since appeal to that entity was not specifically mentioned in the section at issue in Chapter 18, which they claimed was the only provision under which superintendents were covered.

Significantly, the Court did not decide the issue of which statute should apply.<sup>2</sup> Instead it decided the case on constitutional grounds. The appeal filed by the county superintendent with the state school superintendent had never been served upon the school board, thus, due process had been violated.<sup>3</sup> The Court did discuss whether one statute supplemented the other, but only in dicta. Finding that the two statutes were similar and related to the same subject matter, the court observed that “(t)he provision in Chapter 18A for appeal to the State Superintendent of Schools is *perhaps* supplemental to but not in conflict with any provision of Chapter 18.”<sup>4</sup>

*WVEA v. Preston Co. Bd. Of Education*, 171 W.Va. 38, 297 S.E.2d 444(1982) is one of several cases which involve overlapping definitions of school employees contained in Chapter 18 and Chapter 18A.<sup>5</sup> Although the school board argues that the case stands for the proposition that

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<sup>2</sup> “We are not required to decide, and therefore we do not decide in this case, the question whether the appeal procedure prescribed by Code, 1931, 18A-2-8, as amended, was the sole avenue of appellate review of the action of the board of education...*Siders*, *supra* 183 S.E.2d at 437.

<sup>3</sup> *Id.* at 436

<sup>4</sup> The Court’s characterization of one statute “perhaps” supplementing another differs substantially in breadth from the characterization by the Appellee of the holding in *Smith v. Siders* on page 12 of their brief: “Indeed, this Court has previously held that Chapter 18A supplements Chapter 18 of the West Virginia Code. *See Siders*, *supra* 183 S.E.2d at 437.

<sup>5</sup> Appelle also cited *Harmon v. Fayette Co. Bd. Of Education*, 205 W.Va.125, 516 S.E.2d 748 (1999) in the section of its brief relating to one section “supplementing” another. That case involved the question of whether attendance employees should be categorized or defined under

the specific provision of one statute supplements the more general statute,<sup>6</sup> that case was actually decided on the Court's interpretation of legislative intent behind a third, criminal statute, W.Va. Code § 61-10-15. That Code section bans superintendents from obtaining proceeds from contracts in which they may have had a "voice, influence or control," but exempts the hire of spouses as principals, teachers, auxiliary or service employees from criminal sanctions. The Court ruled that the narrower definition of teacher should apply, because the spouse was working as a central office administrator, reasoning that "it does not make sense to apply the broad Chapter 18A teacher definition to Code § 61-10-15's exemption from self-dealing or nepotism rules," noting that the spouse's salary over and above her teaching salary inured to the benefit of the superintendent. *WVEA*, 297 S.E.2d at 444. Nowhere does the word "supplement" appear in the *Preston County Board of Education* case.

Likewise, *DMV v. Hillyard*, 172 W.Va. 605, 309 S.E. 2d 105 (1983), cited for the same proposition (Appellee Brief at 11), does not contain the word supplement. Significantly, the two inconsistent statutes in *Hillyard*, unlike in the case at bar,<sup>7</sup> were adopted in the same year.

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Chapter 18 as "classroom teachers" requiring payment of a salary supplement or as "school personnel" under Chapter 18-A, and thus either professional or service personnel. The Court concluded that for purposes of the conflict in the *Harmon* case only, that the employees were not "school personnel," but expressed "no opinion as to the proper resolution of any other possible conflicts between provisions of W.Va. Code §18-8-1 and Chapter 18A." 516 S.E.2d 751, fn. 2. Again, the Court does not state the rule of construction that a later passed section "supplements" an earlier passed statutory section in the *Harmon* case.

<sup>6</sup>Appellee's Brief pgs. 10-11.

<sup>7</sup>In the case at bar, the Appellee argues that the 1985 version of W.Va. Code §18A-2-11, should take precedence over a statute in another chapter of the Code passed in 1992, W.Va. Code §18-29-8. The later passed statute did not contain a proviso limiting attorney's fees that had been included in the earlier passed section of Chapter 18A.

Perhaps in part because of this, the Court chose to favor the procedure that was more detailed (an oral warning accompanied by an affidavit) over the procedure that was less detailed ( a written warning).

*Cropp v. State Compensation Comm'r*, 160 W.Va. 621, 236 S.E.2d 480(1977), cited by Appellee (Brief, p. 8) for the “supplement” argument actually supports a rule of construction argued by Ms. Buffey. As stated in her prior brief, where one statutory section is more specific in scope than another<sup>8</sup>, competing statutory section, the section that is specific in scope is controlling. The Court in *Cropp* stated this in a slightly different fashion, citing an early 20<sup>th</sup> century case:

*It is an accepted rule of statutory construction that where a particular section of a statute relates specifically to a particular matter, that section prevails over another section referring to such matter only incidentally. Kelley & Moyers v. Bowman*, 68 W.Va. 49, 69 S.E.2d 456 (1910). Consequently, we do not believe that the maximum weekly benefit section currently found in W.Va. Code 23-4-6(k) controls to limit temporary total disability payments in this case. (emphasis added) 236 S.E.2d at 484.

In the *Cropp* case, this Court, in attempting to divine legislative intent without the benefit of any legislative history, concluded the weekly benefit contained in the total permanent disability section, which only incidentally involved temporary disability payments, did not operate to limit the opportunity of a worker who had returned to work from obtaining an additional amount of temporary disability payments under the section that specifically related to temporary disability.

In the case at bar, the appellant Ms. Buffey argued in her previously submitted brief that the attorney fee section contained in 18A-2-11, only incidentally relates to grievances, since it

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<sup>8</sup> See *Carvey*, *infra* on page 7 of this brief.

covers other disputes and was enacted several years before the legislature put the grievance process into the state code and added a special attorney fee provision, W.Va. Code § 18-29-8. (Previously, the grievance process had been included within regulations of the state school board, and not in statute). In contrast, the entire contents of Chapter 18-29 relate to the grievance process for school employees. Thus, like in *Cropp*, the attorney fee section that specifically relates to the school employee grievance process, W.Va. Code § 18-29-8, rather than the one which only incidentally applies to the grievance process, W.Va. Code §18A-2-11, should be applied.

3. Although it is Clear that the Legislature May Place Limitations on Attorney's Fees, it is also Axiomatic that the Plain Language of the Statute Must Be Followed, where as here, in W.Va. Code §18-29-8, the Only Limitations on Fees are that they be Reasonable and Set by the Court.

There is no doubt that the Legislature may place limits upon attorney's fees. The United States Supreme Court has clarified that it is constitutionally permissible for the legislative branch to place financial limits on attorney's fee provisions in *Walters v. Nat'l Ass'n. of Radiation Survivors*, 473 U.S. 305 (1985). And, in fact, the West Virginia has a myriad of statutory provisions relating to attorney's fees, some containing limitations and some which do not.<sup>9</sup>

It is nevertheless the duty of the Court, first and foremost, to construe the plain language of a statute. When the Legislature enacts incongruous provisions covering similar topics, this Court in *Carvey v. W.Va. State Bd. Of Education*, 527 S.E.2d 831, 842-843. (W.Va. 1999) set forth a simple, two-step process for resolving such inconsistencies. First, one looks to the whether the competing section is general or specific in scope. As explained in more detail in

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<sup>9</sup> See for example, W.Va. Code §§ 8-15-25, 22A-1-22, 7-14B-17, 29-6A-10.

Appellant's prior brief, Chapter 18A, relates to the entire system of school board employment, while Chapter 18-29 relates specifically to the grievance process for employees. (Appellant's brief, pages 14-16).

The second step, pursuant to the test enunciated in *Carvey*, is to look at the plain language of the section which is more specific in scope: "(t)o ascertain the specific import of this section, we need look no further than the provision's plain language. *Carvey, Id.* At 843. Moreover, it is the *duty* of the Court to confine itself to the plain language of the statute, once the first inquiry has been made:

(w)hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts and in such cases it is the duty of the courts not to construe but to apply the statute. *Carvey, supra* at 843 citing Syl. Pt. 5 of *State of W. Va. v. General Daniel Morgan Post No. 548 V.F.W.*, 144 W.Va. 137, 107 S.E. 2d 353 (1959).

In the case at bar, it is quite clear that W.Va. Code §18-29-8, because it is part of the statutory grievance process contained in Chapter 18-29, is more specific in scope than W.Va. Code §18A-2-11, which is not limited to grievances and is part of a Chapter which relates more generally to school employment, not just disputes between employees and school boards. Therefore, under *Carvey*, this Court is constrained to interpret the plain language of W.Va. Code §18-29-8. That section contains no monetary limit on attorney's fees, but places the power to limit fees in the hands of the court. Attorney's fees under §18-29-8 must be reasonable, a term of art that has been defined in many court cases and in the rules of this Court.<sup>10</sup>

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<sup>10</sup> Rule 1.5, W.Va. Supreme Court Rules of Professional Conduct

4. It is More Logical to Apply of the Canon of Statutory Construction, *Noscitur A Solis*, to The Two Provisions Relating to Attorney's Fees which are Contained in the Same Chapter, Than to Two Provisions in Entirely Different Chapters of the Code.

The Appellee attempts to apply the canon of statutory construction, *noscitur a solis* to W.Va. Code §§ 18A-2-11 and 18-29-8. That phrase has been translated as: a word is known by the company it keeps. A more logical use of this canon would be to compare the two attorney fee provisions in Chapter 18-29, that is, W.Va. Code §§18-29-8 and 18-29-9.

When the Legislature first adopted the statutory grievance process in 1985, it included no reference to attorney's fees in §18-29-8. Instead, as stated previously, that section contained only a provision on how costs were to be allocated during the grievance process in levels one through three. That omission was rectified by the amendment to this section in 1992. Section 18-29-9, however, included a specific statutory provision relating to preservation of the right of employees to file mandamus actions. That provision remained unchanged after the 1992 amendments.

Both sections now contain similar limitations on fees: under §18-29-8 employees who substantially prevail in grievance cases may obtain "reasonable attorney's fees set by the court" upon appeal. Using slightly different language, §18-29-9 also vests courts with discretion to set fees.<sup>11</sup> It makes much more sense to interpret these two sections together, rather than reaching back hundreds of pages to look at the attorney fee provision contained in W.Va. Code §18A-2-11. It does not take a large leap of logic to conclude that by adding the attorney fee provision in §18-29-8, right before the attorney fee provision already included in §18-29-9, the Legislature intended

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<sup>11</sup> 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's fees as established and determined by the court.

for there to be uniformity in the two procedures for resolving employment disputes between employees and school boards - after 1992, prevailing parties in both type of cases would have attorney's fees set by the courts.

As the Appellant noted in her brief, this court has specifically stated that school employees have the *option* of proceeding under both the statutory grievance process and under mandamus. *Ewing v. Board of Education of Summer County*, 202 W.Va. 228, 503 S.E. 2d 541 (1998). Significantly, plaintiffs in cases other than school employees who choose to file a mandamus action must do so under the common law right of mandamus, where procedures are stricter.

This court continues to apply part mandamus test to school employees who proceed under mandamus: 1) a clear legal right to the relief, 2) a legal duty on the part of the respondent and 3) absence of another adequate remedy. However, the inclusion of a specific statutory right to mandamus contained in §18-29-9 clearly blurs the third requirement, since under Chapter 18-29, employees are specifically guaranteed another, albeit administrative, remedy at law. Winning a grievance must almost always include demonstrating both a right of an employee and a duty of the employer, so consequently, there is very little difference in the proof required under either route.

What is quite different between the administrative grievance path and the legal route of mandamus, however, is the convenience and the cost. As the Legislature explained in the preamble to the new statutory grievance procedure, W.Va. Code §18-29-1, the process was adopted to "provide a simple, expeditious and fair process at the lowest administrative level." Filing a mandamus action complicates the resolution of any dispute, because it must be filed in court and almost always involves retention of an attorney. Construing sections 18-29-8 and 18-29-9 together by interpreting them as having the same procedure for attorney's fees - approval by

the court - furthers the statutory grievance process. In contrast, importing the language of §18A-2-11 into the language of §18-29-8 has the effect of undermining the grievance process, since it necessarily means that prevailing employees receive less than full reimbursement, whereas those who choose the more complicated (for both the employee and the school board) mandamus route will receive compensation for all of the time spent by attorneys of prevailing parties that is approved by the Court. Thus, using the *noscitur a solis* canon of construction by comparing the two attorney's fee sections in Chapter 18-29 is the best way to further, not undermine, the grievance process.

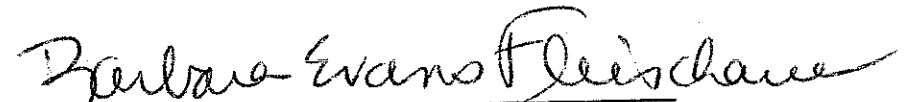
#### CONCLUSION

In a somewhat glaring omission, the Appellee neglected to discuss the important rule of statutory construction applicable to school employees, that such statutes are to be strictly construed in favor of the employees. *Morgan v. Pizzino*, 163 W.Va. 454, 256 S.E.2d 592 (1979); *Miller v. Board of Education of Boone County*, 190 W.Va. 153, 437 S.E.2d 591 (1993); *Carvey*, *supra*, 527 S.E.2d at 836. Application of this statutory rule of construction trumps the many competing rules cited by the Appellee, since interpretation of the inconsistent sections in the manner suggested by the Appellee favors the school board, whereas application of this particularized rule of statutory construction in school cases to the case at bar necessarily inures to the benefit of school employees.

For all of the foregoing reasons, plus those advocated in the Appellant's brief, 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,  
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