

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

31868
NO. 041092

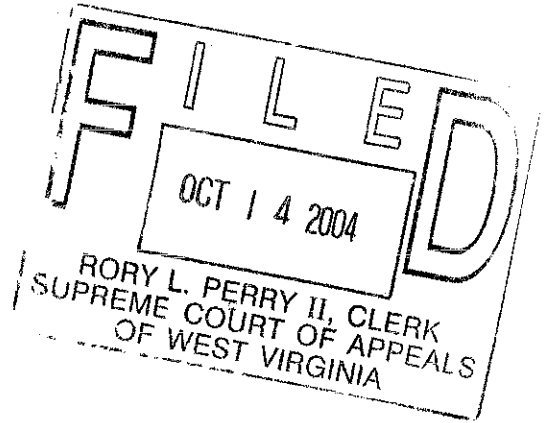
CONSTANCE BUFFEY,

Appellants/Petitioners below,

v.

HARRISON COUNTY BOARD OF EDUCATION,

Appellee/Respondent below.



**BRIEF OF AMICUS CURIAE, AMERICAN FEDERATION
OF STATE, COUNTY AND MUNICIPAL EMPLOYEES COUNCIL 77**

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I. INTRODUCTION

Presently pending before the Court is the appeal of Constance Buffey of the February 6, 2004, Order of the Circuit Court of Harrison County reversing its decision of an award of costs and attorneys fees in a “reasonable amount”; and instead, “capping” the amount of recoverable fees at \$1,000.00 for a grievant who successfully appealed an adverse decision from the West Virginia Education and State Employees Grievance Board.

Although not a party to the proceedings below, American Federation of State, County and Municipal Employees Council 77 (“AFSCME”) has an interest in ensuring State employees have access to competent and affordable legal counsel while involved in an appeal of a decision from the West Virginia Education and State Employees Grievance Board and any subsequent appeals in Court. Consistent with this concern, AFSCME respectfully submits the February 6, 2004, Order of the Circuit Court of Harrison County should be reversed for the

additional reasons set forth below.

II. STATEMENT OF FACTS

Amicus concurs with, relies upon and adopts Appellant's statement of the case and facts for purposes of this appeal.

III. ARGUMENT

Since the founding of our republic, an open discourse between the government and the governed has been a bedrock principle of our form of government. For instance, in the First Amendment to the Constitution, our founding fathers provided that, "Congress shall make no law ... abridging ... the right of the people ... to peaceably assemble, and to petition the government for a redress of grievances."; U.S. Const., amend. I. James Madison further emphasized this fundamental right in his public comments during the First Congress. He noted:

"[T]he people have a right to express and communicate their sentiments and wishes The people may therefore publically address their representatives, may privately advise them, or declare their sentiments by petition to the whole body."

Annals. 1st Congress, 1st Session, pp. 738-739, (James Madison) April 15, 1789.

In West Virginia, this basic principle of democracy is recognized in Article 3, Section 16 of the Constitution of West Virginia, which provides:

The right of the people to assemble in a peaceable manner, to consult for the common good, to instruct their representatives, or to apply for redress of grievances shall be held inviolate.

In recognition of this inherent right, the West Virginia Legislature established a grievance procedure for certain State employees, codified at West Virginia Code §29-6A-1, et

seq. A similar grievance mechanism exists for employees of both State and County educational systems pursuant to West Virginia Code §18-29-1, et seq. In doing so, this Legislature intended to provide State employees with a process to seek redress for an agency's misapplication or misinterpretation of law, policy or procedure regarding hours and terms and conditions of employment. See, Estate of Stollnigs v. DEP, 544 S.E.2d 700 (W.Va. 2000).

AFSCME's concern in this matter is straightforward. The ruling below deprives certain public employees of equal protection of law and chills the exercise of their constitutional statutory right to seek redress of their grievances.

The problem becomes manifest when an employee is forced to file a grievance in response to some adverse employment action taken by a state agency. The employee is placed in an unfair disadvantage in that the agency has unlimited public resources and monies with which to fight an employee's grievance, including representation by in-house counsel or a lawyer from the Attorney General's office. On the other hand, the State employee is hamstrung with a \$2,000.00 defense, if any. Essentially, *Amicus* submits that when such a disparate scenario arises, it results in a denial of equal protection and places the employee at an unfair disadvantage. The employee must attempt to find a lawyer who will handle the matter for \$2,000.00; or, liquidate the family assets to combat the unlimited resources of the public purse.

Often, when faced with this Hobson's choice, an employee will forego vindication of his or her statutory rights. This inequitable situation, based on the lack of adequate personal finances (or, in the case of a Union, institutional finances), also constitutes a violation of the right to equal protection of the law as guaranteed by the State, as well as federal constitution.

See, e.g., State v. England, 363 S.E.2d 725 (W.Va. 1987). (“There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”) Succinctly, as a practical matter, many lawyers are unable or unwilling to take a case with such a low cap. Consequently, the employee suffers. The February 6, 2004, ruling by the trial court below, reversing its earlier order and imposing a \$1,000.00 cap on awardable attorneys fees, perpetuates this injustice and grievously assaults the basic constitutional guarantee of equal protection of law.

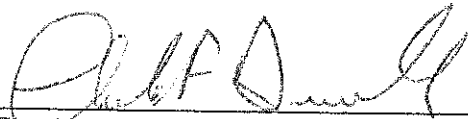
With respect to “group” grievances filed by public employees pursuant to West Virginia Code §29-6A-1, et seq., if a cap is deemed appropriate, AFSCME favors the approach taken by Judge Zakaib applying a cap to each grievant in Stanley, et al. v. Department of Tax and Revenue, Case No. 31859, which has been consolidated with the instant action.

CONCLUSION

In light of the above, *Amicus* respectfully submits that this Honorable Court should grant Appellant’s appeal to resolve the conflict between West Virginia Code §18-29-8, §18A-2-11 and §29-6A-10; and, to ensure the constitutionally guaranteed rights to equal protection of the laws for the State’s employees is preserved.

Respectfully submitted,

American Federation of State, County and
Municipal Employees, Council 77,
By Counsel



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CERTIFICATE OF SERVICE

I, Charles F. Donnelly, do hereby certify that I have served a copy of the foregoing MOTION OF AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES COUNCIL 77, FOR LEAVE TO FILE BRIEF AS AN *AMICUS CURIAE* and BRIEF OF *AMICUS CURIAE*, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES COUNCIL 77, by placing a true copy, postage prepaid, in the United States mail, on this 13th day of October, 2004, upon the following:

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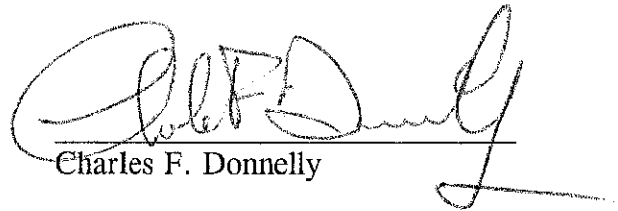
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