

NO. 31944

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

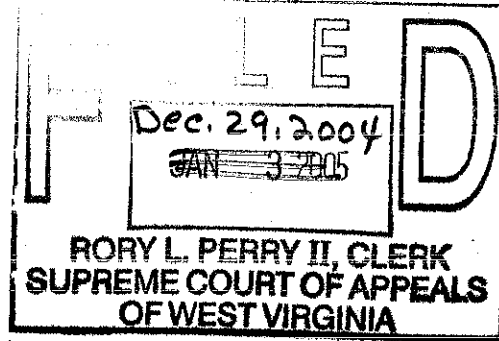
SHIRLEY CROCK and  
GRACE WASHINGTON,

Appellants,

v.

HARRISON COUNTY BOARD  
OF EDUCATION,

Appellee.



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BRIEF OF APPELLEE

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## **I. INTRODUCTION**

Appellee Harrison County Board of Education ("HCBOE") submits this Brief of Appellee in support of affirmance of the judgment of the Circuit Court of Harrison County. The circuit court correctly held that the specific provisions of West Virginia Code Section 18A-2-11 govern to limit certain awards of reasonable attorney's fees to employees of county boards of education. Indeed, the provisions in Section 18A-2-11 supplement the provision in West Virginia Code Section 18-29-8 to limit the "reasonable attorney's fees, to be set by the court" where certain employees of county boards of education prevail in certain proceedings.

Moreover, to the extent that the provisions in Section 18A-2-11 conflict with the provision in Section 18-29-8, which they do not, the specific provisions in Section 18A-2-11 control over the general provision in Section 18-29-8. Appellants Shirley Crock's and Grace Washington's argument that Section 18-29-8 control because it was the last enactment of the Legislature is wholly meritless.

Furthermore, application of Section 18A-2-11 to certain awards of reasonable attorney's fees to employees of county boards of education is consistent with public policy. The public policy expressed in West Virginia Code Section 18-29-1 is "to provide a simple, expeditious and fair process for resolving problems at the lowest possible administrative level."

Finally, the circuit court properly exercised its discretion to grant HCBOE's motion to vacate judgment pursuant to West Virginia Rule of Civil Procedure 60(b). Relief under Rule 60(b) is appropriate to correct a legal mistake such as the circuit court's original order, which failed to limit the reasonable attorney's fees awarded to employees of county boards of education pursuant to Section 18A-2-11. Therefore, this Court should affirm the circuit court's judgment in all respects.

## II. KIND OF PROCEEDING AND NATURE OF RULING BELOW

In *Crock v. Harrison County Board of Education*, 211 W. Va. 40, 560 S.E.2d 515 (2002) (per curiam) ("*Crock I*"), Crock and Washington appealed the judgment of the Circuit Court of Harrison County, which had affirmed the decision of an administrative law judge finding that HCBOE acted lawfully in terminating their respective contracts based on prospective budgetary concerns. This Court reversed the circuit court's order and held that HCBOE violated the "non-regulation" clause of grievance procedure statutes by terminating Crock's and Washington's contracts and reissuing new contracts that were identical except for removal of experience credits, with consequent reduction in salary, and that HCBOE was without authority to remove Washington's experience credit since she was granted the benefit of experience credit six years before enactment of the uniformity provision. The action was remanded with directions that the circuit court enter an order restoring Crock's and Washington's experience credits and directing HCBOE to remit the resulting differences in increased salary to Crock and Washington.

Following remand to the circuit court, Crock and Washington filed a motion for attorney's fees. On July 30, 2002, the circuit court entered an order granting the motion and awarding attorneys fees of \$20,418.70. On June 3, 2003, HCBOE filed a motion for relief from the circuit court's order awarding attorneys fees. The circuit court entered a memorandum opinion and order granting HCBOE's motion and reversing its previous order on February 6, 2004. The circuit court held that in accordance with *Wines v. Jefferson County Board of Education*, 213 W. Va. 379, 582 S.E.2d 826 (2003), Crock's and Washington's attorney's fees are limited by West Virginia Code Section 18A-2-11 to \$1,000 for the circuit court proceedings and \$1,000 for proceedings before this Court.

Crock and Washington filed their petition for appeal, which was granted by this Court.

### III. STATEMENT OF FACTS<sup>1</sup>

HCBOE hired Washington as an Aide II in 1979. At that time, Washington received experience credit for salary but not for seniority purposes. Based on her prior employment with a Head Start program, she received five years of experience credit. All employment contracts signed by HCBOE and Washington reflect this experience credit. Washington testified that she took a "couple thousand on the year" pay cut when she accepted employment with HCBOE and further that, without the experience credit, she could not have afforded to work for HCBOE.

HCBOE hired Crock as an Aide II in February 1998. Because she did not receive an experience credit upon her hiring, Crock instituted a grievance proceeding in March 1998 pursuant to West Virginia Code Section 18-29-3. In support of her position, Crock cited the provisions of West Virginia Code Section 18A-4-5b, which require uniformity for "all salaries, rates of pay, benefits, increments or compensation for all persons . . . performing like assignments and duties within the county." By granting Washington experience credit and denying her such credit, Crock argued that the uniformity provision contained in Section 18A-4-5b was violated. Crock sought ten years' experience credit for her previous employment at Heartland Nursing Home performing similar duties to those she was performing in her position as an aide.

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<sup>1</sup>The facts are taken from this Court's opinion in *Crock I*, 560 S.E.2d at 41-42 & n. 3.

#### IV. STATEMENT OF ISSUES

- A. The circuit court correctly held that the specific provisions of West Virginia Code Section 18A-2-11 govern to limit certain awards of reasonable attorney's fees to employees of county boards of education.
- B. The circuit court properly exercised its discretion to grant HCBOE's motion to vacate judgment pursuant to West Virginia Rule of Civil Procedure 60(b).

#### V. DISCUSSION

##### A. Standard of Review

In *Martin v. Randolph County Board of Education*, 195 W. Va. 297, 465 S.E.2d 399, 406 (1995), this Court held that appeals from the West Virginia Educational Employees Grievance Board are reviewed under West Virginia Code Section 18-29-7, and that the Court "review[s] *de novo* the conclusions of law and application of law to the facts." *See also Cahill v. Mercer County Bd. of Educ.*, 208 W. Va. 177, 539 S.E.2d 437, Syl. Pt. 1 (2000) (holding that plenary review is conducted as to the conclusions of law and application of law to the facts).

On the other hand, in *Zirkle v. Zirkle*, 208 W. Va. 374, 540 S.E.2d 591 (2000), this Court held that a motion to vacate judgment pursuant to West Virginia Rule of Civil Procedure 60(b) "is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion." *Id.* at Syl. Pt. 1.

In this action, the Court should review the legal issue of whether the circuit court correctly held that West Virginia Code Section 18A-2-11 controls the award of attorney's fees to Crock and Washington *de novo*. The Court should review the issue of whether the circuit court properly granted the HCBOE's Rule 60(b) motion under an abuse of discretion standard.

## **B. Statutory Scheme**

In 1981, the West Virginia Legislature passed West Virginia Code Section 18A-2-11, "relating to the right of an employee to a hearing on a dispute with a county board of education; and requiring the board to pay *reasonable attorney's fees*, court costs, and court reporter's fees when [the] employee prevails." (Emphasis added.) The new Section 18A-2-11 stated in relevant part:

*In case of dispute or controversy between the county board of education and any county board employee, except the superintendent, associate superintendent, or assistant superintendent, regarding transfer, suspension, dismissal, assignment, grievance, salary, termination of contract, job classification, or any similar matter, the employee shall be entitled to the payment of attorney fees and court reporter costs as hereinafter provided. . . .*

*If, after such hearing, the employee institutes any proceeding in a circuit court against the board, based upon such dispute or controversy, and shall substantially prevail, the board shall be 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 the hearing before the board, in the circuit court, and in the supreme court of appeals, and shall be further liable to the employee for the charges, if any, for any court reporter's costs incurred during the hearing before the board: *Provided, That in no event shall such attorney's fees be awarded in excess of a total of [\$500] for the board hearing and circuit court proceedings nor an additional [\$500] 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.**

W. Va. Code § 18A-2-11 (1981) (some emphasis in original; some emphasis added).

In 1985, the West Virginia Legislature passed an act with the following stated purpose:

*. . . to amend and reenact sections eight and eleven, article two, chapter eighteen-a of the code of West Virginia, . . . ; and to amend chapter eighteen of said code by adding thereto a new article, designated article twenty-nine, all relating to providing a grievance procedure for employees of the board of regents, state institutions of higher education, state board of education, county boards of education, regional educational service agencies and multi-county vocation centers; declaring legislative purpose and intent; defining certain terms; providing for grievance procedures, hearings and appeals generally; designating procedural levels and providing for*

procedures at each such level; creating and providing for an education employees grievance board; delineating certain powers and duties of said board; providing for hearing examiners; providing for certain powers and duties of such hearing examiners; providing for enforcement and reviewability of decisions of the hearing examiners; *providing for the allocation of costs in certain instances*; authorizing mandamus proceedings upon failure to comply with the provisions of article twenty-nine of chapter eighteen; providing that employee suspended or dismissed for certain reasons have [sic] opportunity to request a hearing pursuant to said article twenty-nine; *providing for recovery of attorney's fees and court cost by an employee prevailing in either circuit court or supreme court of appeals*; and *setting limitations upon such attorney's fees*.

(Emphasis added.)

As enacted in 1985, West Virginia Code Section 18-29-1 stated in its entirety:

The purpose of this article is to provide a procedure *for employees of the board of regents, state board of education, county boards of education, regional educational service agencies and multi-county vocational centers* and their employer or agents of the employer to reach solutions to problems which arise between them within the scope of their respective employment relationships to the end that good morale may be maintained, effective job performance may be enhanced and the citizens of the community may be better served. *This procedure is intended to provide a simple, expeditious and fair process for resolving problems at the lowest possible administrative level and shall be construed to effectuate this purpose. Nothing herein shall prohibit the informal disposition of grievances by stipulation or settlement agreed to in writing by the parties, nor the exercise of any hearing right provided in article two, chapter eighteen-a of this code or any other section of chapter eighteen or eighteen-a of this code: Provided, That employees of the board of regents or of state institutions of higher education shall have the option of filing grievances in accordance with the provisions of this article or in accordance with the provisions of policies, rules and regulations of the board of regents regarding such employees. Any board decision pursuant to such sections may be appealed in accordance with the provisions of this article unless otherwise provided in such section.*

As enacted in 1985, West Virginia Code Section 18-29-8 stated in its entirety:

Any expenses incurred relative to the grievance procedure at levels one through three shall be borne by the party incurring such expenses.

W. Va. Code § 18-29-8 (1985).

As amended in 1985, Section 18A-2-11 states in its entirety:

*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 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 [\$1,000] for the administrative hearings and circuit court proceedings nor an additional [\$1,000] 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 [West Virginia Code Section 18A-4-8].*

W.Va. Code § 18A-2-11(1985) (some emphasis in original; some emphasis added).

In 1992, the West Virginia Legislature passed an act, *inter alia*, to amend Sections 18-29-1 and 18-29-8 relating to grievance procedures for education employees and "authorizing court to set costs and reasonable attorneys fees to employee prevailing upon appeal to circuit court or supreme court." The amendments to Section 18-29-1, relate to the abolishment of the board of regents and are not relevant to this appeal. As amended in 1992, Section 18-29-8, reads in its entirety:

Any 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.

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.

W. Va. Code §18-29-8 (1992) (emphasis added).

### **C. Canons of Statutory Construction.**

This Court has held that in any search for the meaning or proper applications of a statute, it should first resort to the language itself. *Maikotter v. University of W. Va. Bd. of Trs. W. Va. Univ.*, 206 W. Va. 691, 527 S.E.2d 802, 807 (1999). "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." *Id.* (citations omitted); *Michael v. Marion County Bd. of Educ.*, 198 W. Va. 523, 482 S.E.2d 140 (1996); *Byrd v. Board of Educ.*, 196 W. Va. 1, 467 S.E.2d 142 (1995). *Cf. Keatley v. Mercer County Bd. of Educ.*, 200 W. Va. 487, 490 S.E.2d 306, 311 n. 7 (1997) (observing that legislative intent, rather than strict language, controls in rare case in which literal application of statute will produce result demonstrably at odds with intentions of drafters). Accordingly, when a statute is clear and unambiguous and the legislative intent is plain, it is the duty of this Court not to interpret or to construe the statute but to simply apply the statute. *Carvey v. West Virginia State Bd. of Educ.*, 206 W. Va. 720, 527 S.E.2d 831 (1999).

In addition, this Court has held that "[i]n ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation." *Keatley*, 490 S.E.2d at 310 (citations omitted). *See Smith v. United States*, 508 U.S. 223, 113 S. Ct. 2050, 124 L. Ed. 2d 138 (1993) (observing that "[t]he meaning of a word that appears ambiguous if viewed in isolation [will] become clear when the word is analyzed in light of the terms that surround it"). Thus, courts apply the canon of statutory construction called *noscitur a solis* to hold that a word is known by the company it keeps. *Keatley*, 490 S.E.2d at 314 n. 10; *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 465 S.E.2d 399, 414 n. 10 (1995). *Cf. Osborne v. United States*, 211 W. Va. 667, 567 S.E.2d 677 (2002) (explaining that in the interpretation of

statutes, words and phrases therein are often limited in meaning and effect by necessary implications arising from other words or clauses thereof).

Moreover, the Legislature is presumed to know of prior enactments and have full knowledge of all laws in the area in which it acts. *West Virginia Educ. Ass'n v. Preston County Bd. of Educ.*, 171 W. Va. 38, 297 S.E.2d 444, 447 n. 3 (1982). Accordingly, where a statute contains several sections relating to the same subject, the section that is more specific with regard to the subject will control over the more general section. *State by West Virginia Dept. of Motor Vehicles v. Hillyard*, 172 W. Va. 605, 309 S.E.2d 105 (1983); *Cropp v. State Workmen's Comp. Comm'r*, 160 W. Va. 621, 236 S.E.2d 480 (1977).

Finally, in *Ebbert v. Tucker*, 123 W. Va. 385, 15 S.E.2d 583 (1941), this Court held:

In the construction of a statute, a court should seek to avoid any conflict in its provisions by endeavoring to reconcile every word, section, or part thereof, so that each shall be effective.

Where a statute lends itself to two constructions, one of which will result in an irreconcilable conflict between its provisions and the other will result in no conflict, the construction resulting in no conflict should be adopted.

Where there is a conflict between two parts of a single act, the one latest in position will be declared to be the law, as containing the latest expression of the legislative will, *but that rule of construction should be applied only where there exists an irreconcilable conflict between different sections of the same act, and after there are no other means available for ascertaining the legislative intent.*

*Id.* at Syl. Pts. (Emphasis added). *See also Kelley & Moyers v. Bowman*, 68 W. Va. 49, 69 S.E.2d 456 (1910) (holding that clearly expressed intent by plain words in one part of statute cannot be defeated by mere implication from doubtful clause in another part, and that if subsequent clause in statute is obscure, it will not control previous clear clause).

**D. The Provisions in Section 18A-2-11 do not Conflict with, but Rather Supplement, the Provision in Section 18-29-8.**

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This Court should affirm the circuit court's judgment because the provisions in West Virginia Code Section 18A-2-11 do not conflict with, but rather supplement the provision in West Virginia Code Section 18-29-8. Both Sections 18A-2-11 and 18-29-8 specify that an employee who substantially prevails is entitled to "reasonable attorney[']s fees, to be set by the court."<sup>2</sup> Section 18A-2-11, which is specifically limited in its application to employees of county boards of education in certain proceedings, supplements Section 18-29-8 by defining "reasonable attorney['s] fee, to be set by the court" as limited to "a total of [\$1,000] for the administrative hearings and circuit court proceedings [and] an additional [\$1,000] for supreme court proceedings."<sup>3</sup>

Section 18A-2-11 is a textbook example of the application of *noscitur a soliis* – the term "reasonable attorney's fees, to be set by the court" in Section 18A-2-11 is known by the company it keeps, and that company is "a total of [\$1,000] for the administrative hearings and circuit court

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<sup>2</sup>The only distinction between these provisions is purely grammatical. Section 18A-2-11 uses the possessive term "attorney's fees," while Section 18-29-8 uses the simple term "attorney fees." This grammatical distinction makes no legal difference.

<sup>3</sup>This limitation is expressed in a proviso. In *State v. Ellsworth*, 175 W. Va. 64, 331 S.E.2d 503, Syl. Pt. 2 (1985), this Court held that "[t]he function of a proviso in a statute is to modify, restrain, or conditionally qualify the preceding subject to which it refers." *See also Robbins v. McDowell County Bd. of Educ.*, 186 W. Va. 141, 411 S.E.2d 466, Syl. Pt. 5 (1991). Similarly, it has been stated that "[p]rovisos serve the purpose of restricting the operative effect of statutory language to less than what its scope of operation would be otherwise." *State ex rel. Browne v. Hechler*, 197 W. Va. 612, 476 S.E.2d 559, 561 (1996) (citations omitted). *See also* 1A Norman J. Singer, *Sutherland Statutes & Statutory Construction* § 21:6 (stating that "[w]hen an act is drafted in general terms its limitation may be achieved through the use of the proviso, exception, or saving clause"). As this Court observed in *Charter Communications VI, PLLC v. Community Antenna Service, Inc.*, 211 W. Va. 71, 561 S.E.2d 793, 798 (2002), provisos should be construed using the same general rules of construction applied to other kinds of statutory terms.

proceedings [and] an additional [\$1,000] for supreme court proceedings." The modifying phrase in Section 18A-2-11 indicates that the term "reasonable attorney's fees, to be set by the court" has a more specific connotation in that section than in Section 18-29-8, where no modifier is used. See *Keatley v. Mercer County Bd. of Educ.*, 200 W. Va. 487, 490 S.E.2d 306, 314 n. 14 (1997) (applying *noscitur a soliis* to hold that the fact that term "experience" was modified by terms "amount" and "existence" in separate provisions of statute, counsel in favor of "experience" taking on different connotations depending upon different modifiers).

Furthermore, because the Legislature is presumed to know of prior enactments and to have full knowledge of all laws in the area in which it acts, see *West Virginia Educ. Ass'n v. Preston County Bd. of Educ.*, 171 W. Va. 38, 297 S.E.2d 444, 447 n. 3 (1982), the specific provisions in Section 18A-2-11 control to supplement the more general provision in Section 18-29-8. See *State by W. Va. Dept. of Motor Vehicles v. Hillyard*, 172 W. Va. 605, 309 S.E.2d 105 (1983); *Cropp v. State Workmen's Comp. Comm'r*, 160 W. Va. 621, 236 S.E.2d 480 (1977).

This Court has held that "[r]epeal of statutes by implication is not favored and can arise only in cases of irreconcilable conflict or inconsistency." *Smith v. Siders*, 155 W. Va. 193, 183 S.E.2d 433, 437 (1971). Construing West Virginia law, the Fourth Circuit has recognized that repeal by implication is not favored, and has applied the rule that the specific statute should control over the general. In *Niagra Fire Insurance Co. v. Raleigh Hardware Co.*, 62 F.2d 705 (4<sup>th</sup> Cir. 1933), the court explained the rule as follows:

The rule is well settled that 'where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general.'

'The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction in order that its words shall have any meaning at all.'

*Id.* at 709. See also *Kelley & Moyers v. Bowman*, 68 W. Va. 49, 69 S.E. 456 (1910) (holding that subsequent clause in statute which is obscure does not control over previous clear clause).

In this action as well, repeal by implication is not warranted because the provisions in West Virginia Code Section 18A-2-11 do not conflict with, but rather supplement the provision in West Virginia Code Section 18-29-8. Indeed, this Court has previously held that Chapter 18A supplements Chapter 18 of the West Virginia Code. See *Smith*, 183 S.E.2d at 437. In *Smith*, this Court held that in a case in which a county superintendent of schools was removed from office by the county board of education and the superintendent appealed from the action of the board to the state superintendent pursuant to West Virginia Code Section 18A-2-8, the action of the state superintendent in entertaining the appeal and in reversing the action of the county board of education was void because no notice of the appeal was given to the board of education and no opportunity to be heard in the appellate proceedings was afforded the county board of education or the individual members thereof. *Id.* at Syl. Pt. 2. The Court explained:

*Code, 1931, 18A-1-2, as enacted in 1969, provides that any other provisions of the Code "which are inconsistent with the provisions of this chapter, are hereby repealed to the extent of such inconsistency."* No other provision of the Code, by specific reference, is expressly repealed by Chapter 18A. If any other statutory provision is thereby repealed, it must, therefore, necessarily be a repeal by implication. Repeal of statutes by implication is not favored and can arise only in cases of irreconcilable conflict or inconsistency. *State ex rel. Warder v. Gainer*, 153 W. Va. 35, pt. 6 syl., 167 S.E.2d 290; *State ex rel. City of Wheeling v. Renick*, 145 W. Va. 640, pts. 1 and 2 syl., 116 S.E.2d 763. *We do not perceive any such inconsistency between any of the provisions of Chapter 18 and any of the provisions of Chapter 18A. Both relate*

*to public schools, county boards of education, personnel employed by such boards and other related matters.* Code, 1931, 18-4-3, as amended, and Section 8 of Article 2 of Chapter 18A, as amended, relate to removal of county superintendents by county boards of education. The two statutes provide quite similar grounds for removal. *The statutes, generally speaking, relate to the same subject matter. The two chapters of the Code, though not enacted at the same time, should be considered in pari materia and, therefore, they should be read and considered together.* *State v. Reel*, 152 W. Va. 646, pt. 1 syl., 165 S.E.2d 813; *State ex rel. Campbell v. Wood*, 151 W. Va. 807, pt. 1 syl., 155 S.E.2d 893; *Owens-Illinois Glass Company v. Battle*, 151 W. Va. 655, pt. 1 syl., 154 S.E.2d 854. The 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.

*Id.*, 183 S.E.2d at 437 (emphasis added).

In addition, in *Harmon v. Fayette County Bd. of Educ.*, 205 W. Va. 125, 516 S.E.2d 748, 751 (1999), this Court held that, in light of facts that West Virginia Code Section 18A-1-2 repealed provisions of law inconsistent with Chapter 18A and that Chapters 18 and 18A are to be read *in pari materia*, attendance employees should be considered "school personnel" as defined in West Virginia Code Section 18A-1-1(a). Accordingly, the Court proceeded with the premise that the appellants in that case were "school personnel who are subject to the definitions and distinctions in Chapter 18A." *Id.* See also *State ex rel. Boner v. Kanawha County Bd. of Educ.*, 197 W. Va. 176, 475 S.E.2d 176, 183 (1996) (holding that being teacher as defined in West Virginia Code Section 18-1-1(g) contemplates employment covered by teacher's contract under West Virginia Code Section 18A-2-2).

Although this Court has never decided the precise question raised herein, the Attorney General has argued that the analogous provisions in West Virginia Code Section 29-6A-10 govern an award of attorney's fees to state employees. See *University of W. Va. Bd. of Trs. v. Graf*, 205 W. Va. 118, 516 S.E.2d 741 (1998) (disposing of case on other grounds and, therefore, declining to

rule on appellant's argument that circuit court erred by not applying Section 29-6A-10 in limiting attorney fees to \$2000). The provisions in Section 29-6A-10 are substantially similar in all relevant respects to the provisions of Section 18A-2-11. Similar to Section 18A-2-11, Section 29-6A-10 supplements Section 18-29-8 by defining the "reasonable attorney's fees, to be set by the court" as limited to "a total of [\$1,500] for the administrative hearings and circuit court proceedings [and] an additional [\$1,000] for supreme court proceedings."

Both Sections 18A-2-11 and 29-6A-10 define the "reasonable attorney's fees, to be set by the court" where certain employees of county boards of education and the state substantially prevail in certain proceedings. In other cases, where employees of the additional institutions within the scope of Section 18-29-8 substantially prevail, "reasonable attorney's fees, to be set by the court" may not be limited by such specific provisions. Thus, the term "reasonable attorney's fees, to be set by the court" in Section 18-29-8 is not rendered meaningless by this construction of Section 18A-2-11; it is merely further defined for purposes of employees of county boards of education in Section 18A-2-11, and for employees of the state in Section 29-6A-10.<sup>4</sup>

Without expressly discussing the issue raised in this appeal, this Court has recently applied Section 18A-2-11 to limit an attorney's fee award to an employee of a county board of education. *See Wines v. Jefferson County Bd. of Educ.*, 213 W. Va. 379, 582 S.E.2d 826 (2003) (per curiam). In *Wines*, a former substitute school custodian sought judicial review of a decision of the West

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<sup>4</sup>In *Stanley v. Department of Tax and Revenue*, No. 31859 (W. Va.), which has been consolidated with this appeal for purposes of argument, consideration and decision, the issue before the Court is whether the attorney's fees cap in Section 29-6A-10 should apply "per grievance" or "per grievant." In this appeal, Crock and Washington have not argued that the attorney's fees cap in Section 18A-2-11 should apply per grievant.

Virginia Education and State Employee's Grievance Board denying her grievance challenging her termination. The circuit court found that the employee's procedural due process rights were violated, and awarded her the nominal sum of \$1. This Court reversed the circuit court's nominal damage award and directed, instead, that the employee be awarded back pay. This Court further held that the school board's violation of the employee's due process rights entitled her to an award of attorney's fees in the amount of \$2000 as authorized by Section 18A-2-11. In *Wines*, the appellant had requested "reasonable attorney's fees" in this Court. See *Wines v. Jefferson County Bd. of Educ.*, No. 30848, Br. on Behalf of Appellant to W. Va. S. Ct. of Appeals 13 (Nov. 19, 2002).<sup>5</sup>

Similarly, in *Weimer-Godwin v. Board of Education*, 179 W. Va. 423, 369 S.E.2d 726 (1988), a music teacher/choral director appealed from the final order of the circuit court, which awarded her less than all relief requested in her education employee grievance claim. This Court affirmed the circuit court in part, reversed the circuit court in part, and remanded the case with directions that the circuit court award pack pay and prejudgment interest at specified rates. This Court further directed the circuit court to conduct a hearing to determine the amount of reasonable attorney's fees to be recovered by the appellant pursuant to Section 18A-2-11. This Court explained:

Finally, the circuit court erred in not setting the amount of reasonable attorney's fees to be recovered by the appellant. *W. Va. Code*, 18A-2-11 [1985] expressly provides

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<sup>5</sup>Of course, a per curiam opinion may be cited as support for a legal argument. *Walker v. Doe*, 210 W. Va. 490, 558 S.E.2d 290, Syl. Pt. 4 (2001). Moreover, contrary to Crock's and Washington's argument, this Court's grant of attorney's fees pursuant to Section 18A-2-11 in *Wines* is not obiter dictum. In *Walker*, this Court emphasized that "[o]nly those statement included in a per curiam opinion that are not necessary to the decision reached in the case or those that are clearly beyond the legal points that are being resolved in an opinion qualify as 'obiter dictum.'" *Id.*, 558 S.E.2d at 295. In *Wines*, the legal point being resolved was the application of Section 18A-2-11 in response to *Wines*'s request in her appellate brief for "reasonable attorney's fees." There simply is no obiter dictum in *Wines*.

for recovery of reasonable attorney's fees, to be set by the court, for representation of an education employee in grievance-claim administrative proceedings and before the circuit court and this Court on appeal therefrom, subject to stated dollar limits.

The appellant's husband, an attorney, represented her, gratuitously, of course, in the administrative and circuit court proceedings. An attorney's gratuitous representation of a client does not prevent an award of reasonable attorney's fees. . . . Similarly, under the provision for recovery of reasonable attorney's fees set forth in *W. Va. Code*, 18A-2-11, as amended, such fees may be recovered even though the client has not paid or contracted to pay such fees.

*However, before the circuit court can set the amount of reasonable attorney's fees to be recovered by the appellant in this case, her attorneys must submit to the circuit court an itemized attorney-fee bill and develop at a hearing the reasonableness of the same under the factors set forth in syllabus point 4 of Aetna Casualty & Surety Co. v. Pitrolo, 176 W. Va. 190, 342 S.E.2d 156 (1986). See State ex rel. Shaw v. Board of Education, \_\_\_ W. Va. \_\_\_, \_\_\_, 358 S.E.2d 808, 809-10 (1987).*

*Id.*, 369 S.E.2d at 732 (emphasis added). See also *Parker v. Summers County Bd. of Educ.*, 185 W. Va. 313, 406 S.E.2d 744 (1991) (per curiam) (holding that employee who successfully challenged adverse decision of hearing examiner in circuit court was not entitled to attorney's fees pursuant to Section 18A-2-11 when this Court reversed circuit court's order).

Crock's and Washington's criticism of the circuit court's reliance on this Court's decision in *Wines* is not well-founded. The circuit court recognized that the precise issue raised in this action was not expressly discussed in *Wines*, but nonetheless found this Court's application of Section 18A-2-11 in that case to be persuasive. As indicated above, contrary to Crock's and Washington's argument, the appellant in *Wines* had requested "reasonable attorney's fees" in this Court. See *Wines*, Br. on Behalf of Appellant to W. Va. S. Ct. of Appeals 13. As the circuit court concluded, this Court's recognition and utilization on Section 18A-2-11 indicates that the specific limitation of certain awards of attorney's fees to employees of county boards of education is still in effect. As

discussed above, this Court is very familiar with Chapters 18 and 18A, and it presumably understood the plain language of its holding in *Wines*.

This Court's previous *dicta* in *Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575 S.E.2d 278 (2002), that the limited statutory attorney fees prescribed in Section 18-29-8 should be considered and ordered as appropriate does not require a contrary result. This Court did not award attorney's fees in excess of the limitations contained in Section 18A-2-11 in *Maxey*. In that case, the Court merely required that attorney's fees under Section 18-29-8 be considered and ordered as appropriate. *Maxey*, 575 S.E.2d at 290. As discussed above, the provisions in Section 18A-2-11 do not conflict with, but rather supplement the provision in Section 18-29-8 to define "reasonable attorney's fees, to be set by the court" where employees of county boards of education are involved. Moreover, in *Maxey* this Court remanded the matter to the grievance board for further evaluation. *Maxey*, 575 S.E.2d at 291. It is clear that the grievance board does not have authority to award attorney's fees, which must be "set by the court" under both Sections 18-29-8 and 18A-2-11. Thus, at most, this Court was generally instructing the circuit court to consider attorney's fees if and when the case was subsequently appealed.

In accordance with *Wines* and *Weimer-Godwin*, this Court should hold that the specific provisions of West Virginia Code Section 18A-2-11 govern to limit certain awards of reasonable attorney's fees to employees of county boards of education. Any other result would render Section 18A-2-11 meaningless and contravene the plain language of the statute and clear intent of the Legislature.

**E. To the Extent that the Provisions in Section 18A-2-11 Conflict with the Provision in Section 18-29-8, the Specific Provisions in Section 18A-2-11 controls.**

To the extent that the provisions in West Virginia Code Section 18A-2-11 may conflict with the provisions in West Virginia Code Section 18-29-8, which they do not, the specific provisions in Section 18A-2-11 control over the general provision in Section 18-29-8. "With respect to inconsistent statutes which, together, form a part of a comprehensive body of law, '[t]he general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.'" *Carvey v. West Virginia State Bd. of Educ.*, 206 W. Va. 720, 527 S.E.2d 831, 842 (1999) (citations omitted). *See also UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984).

In this action, the circuit court correctly held that the provisions in Section 18A-2-11 are more specific than the provision in Section 18-29-8. First, Section 18A-2-11 specifically applies to employees of county boards of education, while Section 18-29-8 applies more generally to employees of the governing boards of higher education, state boards of education, county boards of education, regional educational service agencies and multi-county vocational centers. *See* W. Va. Code § 18-29-1. As discussed above, with the exception of state employees under West Virginia Code Section 29-6A-10, attorney's fee awards to certain of these additional employees may be governed exclusively by the more general provision in Section 18-29-8.

Second, Section 18A-2-11 specifically limits the "reasonable attorney's fees, set by the court," to "a total of [\$1,000] for the administrative hearings and circuit court proceedings [and] an

additional [\$1,000] for supreme court proceedings." On the other hand, Section 18-29-8 generally refers to "reasonable attorney fees, set by the court."<sup>6</sup>

Third, Section 18A-2-11 specifically provides that it should not be construed to limit a school employee's right to recover reasonable attorney's fees in a mandamus proceeding under West Virginia Code Section 18A-4-8. Accordingly, at least as applied to employees of county boards of education, "reasonable attorney's fees, set by the court," should be limited to "a total of [\$1000] for the administrative hearings and circuit court proceedings [and] an additional [\$1000] for supreme court proceedings," except in certain mandamus proceedings, as provided in Section 18A-2-11 because the provisions in Section 18A-2-11 are more specific than the general provision in Section 18-29-8.

Crock's and Washington's argument that Section 18A-2-11 conflicts with Section 18-29-8 because under Section 18A-2-11 an employee could request attorney's fees for administrative hearings, while Section 18-29-8 prohibits attorney's fees in levels one through three of the grievance procedure is specious. First, the provision for "reasonable attorney's fees, to be set by the court" in Section 18A-2-11 is more specific than the general term "expenses," which is the term actually

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<sup>6</sup>Contrary to Crock's and Washington's argument, Section 18A-2-11 does not conflict with this Court's decision in cases establishing factors used in determining reasonable attorney's fees. As indicated above, in *Weimer-Godwin v. Board of Education*, 179 W. Va. 423, 369 S.E.2d 726 (1988), this Court remanded the case and directed the circuit court to conduct a hearing to determine the amount of reasonable attorney's fees to be recovered by the appellant pursuant to Section 18A-2-11. The Court expressly held that "before the circuit court can set the amount of reasonable attorney's fees to be recovered by the appellant in this case, her attorneys must submit to the circuit court an itemized attorney-fee bill and develop at a hearing the reasonableness of the same under the factors set forth in syllabus point 4 of *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986)." *Id.*, 369 S.E.2d at 732 (citations omitted). See also *Wines v. Jefferson County Bd. of Educ.*, 213 W. Va. 379, 582 S.E.2d 826 (2003) (per curiam) (Davis, J., concurring in part, dissenting in part).

appearing in the first paragraph of Section 18-29-8. Although Section 18-29-8 prohibits expenses relative to levels one through three, it contemplates an award of reasonable attorney's fees when an employee substantially prevails on an appeal to the circuit court from an adverse level four decision. Those reasonable attorney's fees are not expressly limited to attorney's fees incurred in the circuit court and supreme court of appeals. Therefore, the more specific provisions of Section 18A-2-11 should control.

Crock's and Washington's argument that Section 18-29-8 should control because it was the last enactment of the Legislature is likewise without merit. This Court has held that the rule of construction that the latest in position controls should be applied only where there exists an irreconcilable conflict between different sections, and only if there are no other means available for ascertaining the legislative intent. *See Ebbert v. Tucker*, 123 W. Va. 385, 15 S.E.2d 583, Syl. Pt. (1941).

*State ex rel. Pinson v. Varney*, 142 W. Va. 105, 96 S.E.2d 72 (1956), upon which Crock and Washington rely, is not to the contrary. In *State ex rel. Pinson*, this Court held that the statute providing that election for members of a county board of education shall be on the same date as primary elections was *not* in conflict with prior statutes providing that persons appointed to fill vacancies shall serve until the next general election and that vacancies are filled at the general election, but requires that a general election for such positions be held at the date of a primary election, whether the terms for which persons are elected be regular terms or for the filling of vacancies. *Id.*, 96 S.E.2d at 75. The Court explained:

'Consistency in statutes is of prime importance, and, in the absence of a showing to the contrary, all laws are presumed to be consistent with each other. Where it is possible to do so, it is the duty of the courts, in the construction of statutes, to

harmonize and reconcile laws, and to adopt that construction of a statutory provision which harmonizes and reconciles it with other statutory provisions \* \* \*.

*Id.*, 96 S.E.2d at 75 (citations omitted).

Additional cases cited by Crock and Washington are also inapposite. For example, *Wood County Board of Education v. Smith*, 202 W. Va. 117, 502 S.E.2d 214 (1998), did not involve allegedly conflicting statutes, but rather allegedly conflicting administrative opinions interpreting the same statute. In addition, the first holding in *Stamper v. Kanawha County Board of Education*, 191 W. Va. 297, 445 S.E.2d 238, Syl. Pt. 1 (1994), is that the Legislature is presumed to know its prior enactments when it enacts legislation. As an alternative holding, the Court held that if several statutory provisions cannot be harmonized, then controlling effect should be given to the last enactment of the Legislature. *Id.* at Syl. Pt. 2. In that case, however, the last enactment of the Legislature was more specific than the general statute previously passed. Similarly, in *State ex rel. Department of Health and Human Resources v. West Virginia Public Employees Retirement System*, 183 W. Va. 39, 393 S.E.2d 677 (1990), the last enactment of the Legislature was more specific than the earlier enacted statute. The Court held that the last enactment was intended to carve out an exception to the previous statute. *Id.* at Syl. Pt. 3.

As discussed above, the provisions in Section 18A-2-11 do not conflict with, but rather supplement the provision in Section 18-29-8. Therefore, it is unnecessary for this Court to resort to the canons of construction that apply to irreconcilable conflicts. Furthermore, as also discussed above, to the extent that the provisions in Section 18A-2-11 may conflict with the provisions in Section 18-29-8, which they do not, the specific provisions in Section 18A-2-11 should control over the general provision in Section 18-29-8.

Finally, even if this Court were to consider the most recent statutory enactment, HCBOE should prevail. As discussed above, Section 29-6A-10, which applies to state employees, is substantially similar to Section 18A-2-11 insofar as Section 29-6A-10 supplements Section 18-29-8 by defining the "reasonable attorney's fee, to be set by the court" as limited to "a total of [\$1,500] for the administrative hearings and circuit court proceedings [and] an additional [\$1,000] for supreme court proceedings," except in mandamus proceedings under West Virginia Code Section 29-6A-9. Section 29-6A-10 was last amended in 1998, which is six years subsequent to the last amendment to Section 18-29-8. Thus, under Crock's and Washington's argument, Section 29-6A-10 should control over Section 18-29-8 and limit attorney's fees to state employees, because Section 29-6A-10 was last enacted. Moreover, because Section 18A-2-11 is substantially similar to Section 29-6A-10, this Court should hold that the Legislature similarly intended Section 18A-2-11 to continue to limit attorney's fees to employees of county boards of education.

Also in 1998, in accordance with Section 29-6A-10, West Virginia Code of State Regulations Section 81-8-10 was enacted. *See* W. Va. Code § 15-2-6 (providing that legislative rules regarding state police grievance procedure shall be promulgated in accordance with provisions of Section 29-6A-1, *et. seq.*) Section 81-8-10 provides that in the context of a state police grievance procedure "[i]n no event shall attorney's fees be awarded in excess of a total of [\$1,000] for the administrative hearings and circuit court proceedings nor an additional [\$1,000] for supreme court proceedings." The Secretary of State's Administrative Law Division issued a proposed rule to amend the existing regulation in July 2003. *See* Proposed Rule W. Va. C.S.R. § 81-8-10, 2003 WV REG TEXT 4338 (2003). The summary of the proposed rule states:

This rule as proposed serves to eliminate time delays and added costs to the State associated with the filing and resolution of member grievances. These modifications will allow for a more expedited hearing on grievance issues at a reduced cost to the State. . . .

*Id.*

The proposed rule would have amended Section 81-8-10 in ways not relevant here, but would not have changed the limit on reasonable attorney's fees.

In July 2004, the Administrative Law Division again issued a proposed rule to amend the existing regulation. *See* Proposed Rule W. Va. C.S.R. §81-8-10, 2003 WV REG TEXT 4519 (2004). The proposed rule states that "this rule has been modified in order to streamline the grievance process and allow the resolution of grievances in a more timely manner." Again, the proposed rule would amend Section 81-8-10 in a way not relevant here, but would not change the limit on reasonable attorney's fees. *Id.* This Court has recognized that substantial deference should be granted to an agency's interpretation of a statute. *See City of South Charleston v. West Virginia Public Serv. Comm'n*, 204 W. Va. 566, 514 S.E.2d 662 (1999); *Pendleton Citizens for Cmty. Sch. v. Marockie*, 203 W. Va. 310, 507 S.E.2d 673 (1998). Thus, under Crock's and Washington's argument, Section 29-6A-10 should control over Section 18-29-8 and limits attorney's fees to state employees, because Section 29-6A-10 was last enacted and because recent agency interpretations should be given substantial deference. Moreover, because Section 18A-2-11 is substantially similar to Section 29-6A-10, this Court should hold that the Legislature similarly intended Section 18A-2-11 to continue to limit attorney's fees to employees of county boards of education.

**F. Application of Section 18A-2-11 to Certain Awards of Reasonable Attorney's Fees to Employees of County Boards of Education is Consistent with Public Policy.**

Contrary to Crock's and Washington's argument, application of West Virginia Code Section 18A-2-11 is not only consistent with the express statutory language as properly construed, it is also consistent with public policy. As discussed above, Section 18A-2-11 specifically provides that it should not be construed to limit a school employee's right to recover reasonable attorney's fees in a mandamus proceeding under West Virginia Code Section 18A-4-8. Similarly, West Virginia Code Section 29-6A-10 specifically provides that it should not be construed to limit an employee's right to recover reasonable attorney's fees in a mandamus proceeding under West Virginia Code Section 29-6A-9. Both Sections 18A-2-11 and 29-6A-10 are in accordance with the stated legislative purpose and intent "to provide a simple, expeditious and fair process for resolving problems at the lowest possible administrative level." W. Va. Code § 18-29-1. *See Ewing v. Board of Educ.*, 202 W. Va. 228, 503 S.E.2d 541, 552 (1998).

In *Ewing*, this Court held:

When an individual is adversely affected by an educational employment decision rendered pursuant to W. Va. Code § 18A-4-7a (1993) (Repl. Vol. 1997), he/she may obtain relief from the adverse decision in one of two ways. First, he/she may request relief by mandamus as permitted by W. Va. Code § 18A-4-7a. In the alternative, he/she may seek redress through the educational employees' grievance procedure described in W. Va. Code §§ 18-29-1 to 18-29-11 (1992) (Repl. Vol. 1994). Once an employee chooses one of these courses of relief, though, he/she is constrained to follow that course to its finality.

*Id.*, 503 S.E.2d at Syl. Pt. 6. *See also Stapleton v. Board of Educ.*, 204 W. Va. 368, 512 S.E.2d 881, 884 (1998) (per curiam).

Although an employee may obtain relief through either a writ of mandamus or a grievance procedure, this Court has emphasized the limited nature of mandamus relief. Accordingly, in *Stapleton*, this court held:

"A writ of mandamus will not issue unless three elements coexist – (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy."

*Id.*, 512 S.E.2d at Syl. Pt. 2 (citation omitted).

Thus, in this context as in others, mandamus is an extraordinary remedy, which logically is treated differently by the Legislature than the grievance procedure. Because mandamus is an extraordinary remedy, petitions for writs of mandamus often involve more complex issues than are involved in the grievance procedure. It is consistent with the stated legislative purpose and intent of Section 18-29-1 to specifically limit reasonable attorney's fees under Section 18A-2-11 without limiting a school employee's right to recover reasonable attorney's fees in a mandamus proceeding under West Virginia Code Section 18A-4-8.<sup>7</sup>

In *Verba v. Ghaphery*, 210 W. Va. 30, 552 S.E.2d 406 (2001) (per curiam), the Court upheld a statutory cap on noneconomic damages in medical malpractice claims. The Court specifically held:

"*W. Va. Code*, 55-7B-8, as amended, which provides a \$1,000,000 limit or 'cap' on the amount recoverable for a noneconomic loss in a medical professional liability action is constitutional. It does not violate the state constitutional equal protection, special legislation, state constitutional substantive due process, 'certain remedy,' or right to jury trial provisions. *W. Va. Const.*, art. III, § 10; *W. Va. Const.* art. VI, § 39;

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<sup>7</sup>It should be noted that the Legislature enacted West Virginia Code Section 18-29-9, which provided for reasonable attorney's fees in mandamus in 1985, but only provided for reasonable attorney's fees pursuant to Section 18-29-8 several years later, in 1992.

*W. Va. Const.* art. III, § 10; *W. Va. Const.* art. III, § 17; and *W. Va. Const.* art. III, § 13, respectively." Syllabus Point 5, *Robinson v. Charleston Area Medical Center, Inc.*, 186 W. Va. 720, 414 S.E.2d 877 (1991).

*Id.* at Syl. Pt. 3.

In response to the argument that the cap should be held invalid in order to provide the Legislature with the opportunity to increase the cap based on inflation, this Court explained:

We do not believe that the mere passage of time has rendered the medical malpractice cap unconstitutional or invalid. "Presumably the legislature was aware of the effects of inflation and could have opted for some cap indexed to inflation. That the legislature did not index the cap to inflation but set forth an absolute dollar amount does not render the cap unconstitutional." It is up to the legislature and not this Court to decide whether its legislation continues to meet the purposes for which it was originally enacted. If the legislature finds that it does not, it is within its power to amend the legislation as it sees fit. This Court "may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." Accordingly, we decline to find the cap invalid based on inflation.

*Id.*, 552 S.E.2d at 411-12.

Second, in *Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 105 S. Ct. 3180, 87 L.Ed.2d 220 (1985), the United States Supreme Court upheld a statute that limited to \$10 the fee that can be paid an attorney or agent representing a veteran seeking benefits from the Veterans Administration for service connected death or disability. In response to the argument that the fee limitation provision denied veterans any realistic opportunity to obtain legal representation in presenting their claims to the Veterans Administration and hence violated their first amendment and due process rights, the Court explained:

A necessary concomitant of Congress' desire that a veteran not need a representative to assist him in making his claim was that the system should be as informal and nonadversarial as possible. . . . The regular introduction of lawyers into the proceedings would be quite unlikely to further this goal. . . .

Knowledgeable and thoughtful observers have made the same point in other language:

"To be sure, counsel can often perform useful functions even in welfare cases or other instances of mass justice; they may bring out facts ignored or unknown to the authorities, or help to work out satisfactory compromises. But this is only one side of the coin. Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty. The appearance of counsel for the citizen is likely to lead the government to provide one - or at least to cause the government's representative to act like one. The result may be to turn what might have been a short conference leading to an amicable result into a protracted controversy.

...

"These problems concerning counsel and confrontation inevitably bring up the question whether we would not do better to abandon the adversary system in certain areas of mass justice. . . . While such an experiment would be a sharp break with our tradition of adversary process, that tradition, which has come under serious general challenge from a thoughtful and distinguished judge, was not formulated for a situation in which many thousands of hearings must be provided each month." Friendly, "Some Kind of Hearing," 123 U.Pa. L.Rev. 1267, 1287-1290 (1975).

Thus, even apart from the frustration of Congress' principal goal of wanting the veteran to get the entirety of the award, the destruction of the fee limitation would bid fair to complicate a proceeding which Congress wished to keep as simple as possible. It is scarcely open to doubt that if claimants were permitted to retain compensated attorneys the day might come when it could be said that an attorney might indeed be necessary to present a claim properly in a system rendered more adversary and more complex by the very presence of lawyer representation. It is only a small step beyond that to the situation in which the claimant who has a factually simple and obviously deserving claim may nonetheless feel impelled to retain an attorney simply because so many other claimants retain attorneys. And this additional complexity will undoubtedly engender greater administrative costs, with the end result being that less Government money reaches its intended beneficiaries.

*Id.*, 473 U.S. at 325-26.

Indeed, frequently employees successful in the grievance procedure are not represented by attorneys. The 2002 Annual Report to the Governor and the Legislature by the West Virginia Education and Employees Grievance Board contains the following information:

Employees were represented in about 80% of the 223 grievances decided in 2002, most frequently by public employee organizations or unions that handled about 50% of those cases. The table below provides shows how frequently employees were granted relief depending on the nature of their representation in 2002 and 2001. The results this [sic] were very similar last year, except that pro se Grievants, meaning employees who represented themselves, prevailed much more frequently this year.

<b>REPRESENTATION BREAKDOWN</b>	<b>HOW FREQUENTLY</b>	<b>RELIEF GRANTED</b>	<b>GRANTED</b>
Union Representation 2002	111	23	21%
Union Representation 2001	132	32	24%
Attorney 2002	46	10	22%
Attorney 2001	53	10	19%
Other Representation 2002	20	2	10%
Other Representation 2001	11	1	9%
Pro Se 2002	46	10	22%
Pro Se 2001	64	5	8%
Decisions Issued 2002	223	45	20%
Decisions Issued 2001	260	48	18%

West Virginia Education and State Employees Grievance Board, Annual Report to the Governor and the Legislature at 7-8 (2002).<sup>8</sup>

<sup>8</sup>A footnote to the chart explains that the breakdown for union representation includes instances in which the employee organization employs full-time attorneys who represent employees in grievance hearings and related matters.

As the above chart reveals, in 2002 an employee was equally likely to be granted relief in a grievance procedure if he appeared pro se or if he was represented by an attorney. With these statistics, it is not surprising that the Legislature has retained the cap on attorney's fees.

In *In re Greg H.*, 208 W. Va. 756, 542 S.E.2d 919 (2000), this Court reiterated its recognition of the fact that it is not in the business of legislating:

As we have stressed on numerous occasions, "[i]t is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation be modified, revised, amended, distorted, remodeled, or rewritten[.]" "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."

*Id.* at 925.

**G. The Circuit Court Properly Exercised its Discretion to Grant the HCBOE's Motion to Vacate Judgment Pursuant to Rule 60(b).**

Finally, the circuit court properly exercised its discretion to grant the HCBOE's motion to vacate judgment pursuant to West Virginia Rule of Civil Procedure 60(b). Rule 60(b) provides in relevant part as follows:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake; inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b) . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken.

W. Va. R. Civ. P. 60(b). See *Savas v. Savas*, 181 W. Va. 316, 382 S.E.2d 510, Syl. Pt. 1 (1989).

This Court has held that in the exercise of discretion given by the remedial provisions of Rule 60(b) a circuit court should recognize that the rule should be liberally construed to accomplish justice and that it was designed to facilitate the desirable legal objective that cases should be decided on the

merits. See *Cruciotti v. McNeel*, 183 W. Va. 424, 396 S.E.2d 191, Syl. Pt. 5 (1990); *Toler v. Shelton*, 157 W. Va. 778, 204 S.E.2d 85, Syl. Pt. 6 (1973); *Kelly v. Belcher*, 155 W. Va. 757, 187 S.E.2d 617, 626 (1972). Accordingly, in *Zirkle v. Zirkle*, 208 W. Va. 374, 540 S.E.2d 591 (2000) (per curiam), this Court held that a husband could reopen a child custody proceeding against his wife to correct the circuit court's mistake of law under Rule 60(b). In that case, the circuit court had applied the wrong standard of review when deciding a child custody issue in an order entered on December 22, 1997. Although a timely appeal of the circuit court's order was not taken, the husband nevertheless filed a Rule 60(b) motion on April 14, 1998, seeking relief from the circuit court's custody ruling. This Court held that the circuit court did not abuse its discretion by using Rule 60(b) to correct its legal mistake. See also *Allen v. Allen*, 212 W. Va. 283, 569 S.E.2d 804, 809 (2002) (per curiam) (affirming circuit court's grant of Rule 60(b) relief from judgment based upon mistake and misapplication of law).

The cases cited by Crock and Washington are inapposite. For example, Crock and Washington cite to *Johnson v. Nedeff*, 192 W. Va. 260, 452 S.E.2d 63 (1994), and *Woods v. Guerra*, 187 W. Va. 487, 419 S.E.2d 900 (1992), which discuss the proper application of Rule 60(a). The circuit court, however, did not rely on Rule 60(a), and HCBOE does not argue in this Court that Rule 60(a) supports the relief from judgment granted in this action.

In addition, Crock and Washington cite to *Hustead v. Ashland Oil, Inc.*, 197 W. Va. 55, 475 S.E.2d 55 (1996), and *Downing v. Ashley*, 193 W. Va. 77, 454 S.E.2d 371 (1994), which discuss independent actions rather than Rule 60(b) motions. See W. Va. R. Civ. P. 60(b) (stating rule does not limit power of court to entertain "independent action" to relieve party from judgment, order or proceeding, and that procedure for obtaining any relief from judgment shall be by motion as

prescribed in rules "or by an independent action"). In *Hustead*, an independent action was filed with a claim for declaratory relief. In *Downing*, the independent action was filed requesting the court to set aside and order relating to a divorce and to enforce another order and certain directives. By contrast, HCBOE did not file an independent action, and it has not collaterally attacked the judgment entered by the circuit court.<sup>9</sup>

In this action, HCBOE filed a straightforward motion under Rule 60, and the circuit court was well within its discretion in granting relief under Rule 60(b) based upon a mistake of law. The circuit court properly exercised its discretion to vacate its order awarding attorney's fees pursuant to West Virginia Code Section 18-29-8, entered on July 30, 2002, to correct the legal error that became apparent less than one year later, following this Court's decision in *Wines v. Jefferson County Board of Education*, 213 W. Va. 379, 582 S.E.2d 826 (2003) (per curiam). Contrary to Crock's and Washington's argument, *Wines* did not create new law which could not be applied to this action.<sup>10</sup> Indeed, just as in *Zirkle*, this action involves a mistake in the application of clear, longstanding statutory provisions.

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<sup>9</sup>*State ex rel. Aaron v. King*, 199 W. Va. 533, 485 S.E.2d 702 (1997), which is also cited by Crock and Washington, involves a petition for a writ of mandamus in a criminal case and contains no discussion of Rule 60(b) whatsoever.


<sup>10</sup>It is important to note that this Court's decision regarding attorney's fees in *Wines* was applied without a discussion of retroactivity in that case. That is not surprising since *Wines* is a per curiam opinion. As this Court has explained, "a per curiam opinion involves application of settled law to facts necessarily different than those to which the law was previously applied." *Walker v. Doe*, 210 W. Va. 490, 558 S.E.2d 290, 295 (2001).

**VI. CONCLUSION**

For all of the foregoing reasons, this Court should affirm the judgement of the Circuit Court of Harrison County.

Dated this 29<sup>th</sup> day of December, 2004.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 29<sup>th</sup> day of December, 2004, I served the foregoing "Brief of Appellee" upon counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

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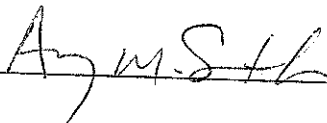
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