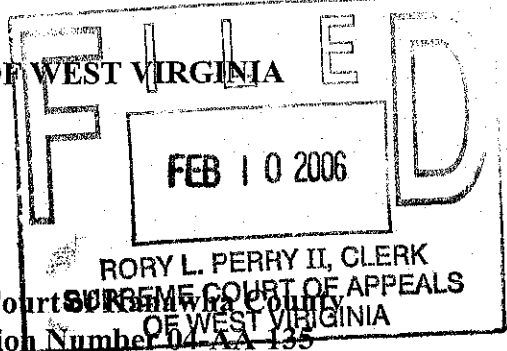


5/27/06

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



PAMELA BLETHEN, et al.,
Appellants-below, Appellants,

v.

Circuit Court ~~SURNAME~~ County
Civil Action Number 04-AA-135
(Judge Louis H. Bloom)
Appeal No. 32962

DEPARTMENT OF REVENUE/
STATE TAX DEPARTMENT and
DIVISION OF PERSONNEL,
Appellees-below, Respondents.

APPELLANTS' BRIEF

John F. Dascoli, I.D. #6303
THE SEGAL LAW FIRM
A Legal Corporation
810 Kanawha Boulevard East
Charleston, West Virginia 25301
(304) 344-9100

Frank J. Venezia, I.D. #4637
SHAFFER & SHAFFER
2116 Kanawha Boulevard, East
Charleston, West Virginia 25301
(304) 344-8716

James P. McHugh, I.D. #6008
MCHUGH WILLIAMS PLLC
One Union Square, Bldg. 2, Suite 201
Charleston, West Virginia 25302
(304)720-2434

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

Appellants are twenty-nine (29) employees and former employees of the West Virginia State Tax Department (hereinafter referred to as the Tax Department) who hold or held the position of Revenue Agent (RA) II . They perform or performed the nearly identical work , i.e., collecting monies owed to the State, but get paid far less than Workers' Compensation Division employees who hold the position of Credit Analyst II. Appellants initially filed two (2) sets of separate grievances that were consolidated in the present grievance at Level IV. After the Level IV hearing, the West Virginia Education and State Employees Grievance Board ("Grievance Board") denied the grievances on purely procedural issues of lack of standing of former State employees to file grievances, timeliness and res judicata. Appellants appealed the Grievance Board's Decision to the Circuit Court of Kanawha County. On March 17, 2005 the lower court affirmed, in part, and remanded, in part, the Board's Decision. The lower court affirmed the dismissal of some of the grievances at issue based on the lack of standing of former State employees to file grievances and the application of res judicata.¹ Appellants assert that the lower court was erroneous on the standing and res judicata rulings.

The following is a summary of the two (2) grievances at issue:

A. Blethen Grievance (a.k.a. May 2003 Grievance)

The consolidated grievances (referenced to collectively as the Blethen Grievance) were filed pursuant to Judge Zakaib's final Order in Stanley, et al. v. Department of Tax and Revenue, Civil

¹ The lower court clarified that res judicata only barred the Blethen grievances of the twenty (20) Appellants who participated in the Bonnett Grievance referred to infra. See March 17, 2005 Amended Final Order Affirming, in Part, and Remanding , in Part, the Decision of the West Virginia Education and State Employees Grievance Board at 4, 10.

Action No. 01-AA-93 (Kanawha County Jan. 2, 2003) and the West Virginia Supreme Court of Appeals' ruling that the Civil Service System of the State of West Virginia is required to provide "equal pay for equal work." See AFSCME v. Civil Service Commission of W.Va., 174 W.Va. 221, 324 S.E.2d 363 (1984); W.Va. Code § 29-6-10(2), (stating "[t]he principle of equal pay for equal work in the several agencies of the state government shall be followed in the pay plan as established"); W.Va. Code § 21-5E-11 requiring the State of West Virginia to "provide state employees equal pay for work of comparable character."

In 1997, pursuant to the request of the Bureau of Employment Programs, and in connection with the reorganization of the Worker's Compensation Division to rehabilitate the Division, which had long-term debts exceeding \$2 billion, the Division of Personnel created entirely new jobs, including the Credit Analyst series. The series contained three levels: Credit Analyst (CA) I, II, and III. In the Stanley case referenced above, Judge Paul Zakaib ruled that the Tax Department Compliance Division Field Office functions and the Credit Analyst functions are essentially identical. And that the corresponding classifications should be paid the same. Judge Zakaib succinctly summarized the situation:

Both TUSIs and CA IIIs are in charge of units that collect taxes. It makes no difference whether you can call one taxes and attempt to soften the other by calling it "insurance." The roles of the employees in collecting these fees are the same.

Id. at 19-20.

In this case a CA II (supposed to be just below a CA III) is placed in pay grade 14 while a RA II (supposed to be just below a TUS I) has a pay grade of 12.² This is a clear violation of Judge

² Initially the RA II position had a pay grade of 10. This changed to 12 in August of 1999.

Zakaib's finding in Stanley, paragraph 3.15 of the Administrative Rules of the West Virginia Division of Personnel, the AFSCME case and other authorities cited above. Positions with similar training, experience, responsibilities, and qualifications should be paid the same.

Moreover, the RA II position actually exceeds the training, experience, responsibilities, and qualifications of the CA II. The qualifications for the RA II are more rigorous in that a specific number of accounting hours within the four (4) year degree is required, while the CA II simply requires any four (4) year college degree, even if in an unrelated field. Additionally, for the RA II position, substitution for the required four (4) year degree is at the rate of two (2) years experience per one (1) year of education, while the CA II only requires a year per year substitution. The RA II position has a special requirement of the availability of a car and possession of a valid West Virginia driver's license as this position requires considerable and frequent travel throughout an assigned region (sometimes under dangerous circumstances), while the CA II position has no such mandate.

As recognized by Judge Zakaib, it is clear that a disparity exists and such disparity violates the "equal pay for equal work" requirement. The Grievance Board did not rule on the merits of the case. Instead, the Board ruled that the Blethen Grievance is barred by the doctrine of res judicata as being similar to Ferguson v. State of West Virginia, Civil Action No. 99-AA-151 (Kanawha County Mar. 1, 2001). (Also referred to as the Bonnett decision). In that case various RA IIs asserted that they should be paid the same as CA IIs. The RA IIs lost at Level IV and the decision was upheld by Judge Bloom.

B. Ferguson Grievance (a.k.a. September 2003 Grievance)

The consolidated grievances (referenced to collectively as the Ferguson Grievance) were filed based on the testimony of James Dixon at the first day of the Level III hearing held on August

27, 2003 and on the testimony of Lowell Dale Basford at the second day of the Level III hearing held on September 9, 2003 in Blethen, Docket No. 03-G-102. In summary, Mr. Basford testified that the Division of Personnel (DOP), after conducting a thorough review of the Tax Unit Supervisor I and RA II positions in 1999, determined that there should be a two (2) pay grade difference between the two positions and implemented that change effective August 1, 1999. See Blethen Hearing Transcript (Blethen Tr.) at 41-47; 423-25. Mr. Basford further elaborated on the two (2) pay grade difference and the process that went into that determination during the Level III hearing in this matter held on December 9, 2003. See Ferguson Hearing Transcript (Ferguson Tr.) at 23-28.

During the Level III Ferguson Hearing held on December 9, 2003 all parties agreed to incorporate the Blethen Level III Transcript into the Ferguson record. At Level IV the parties agreed that the record at Level IV consisted of both the Blethen and Ferguson Level III Transcripts and the oral argument (with additional exhibits) held at Level IV. The Level IV Transcript of the oral argument is included in the Appendix to Grievants' Proposed Findings of Fact and Conclusions of Law at Level IV and contained in the record.

II. STATEMENT OF FACTS

A. Blethen Grievance

The following individuals testified on behalf of Grievants: Patricia Rowsey, Nancy Lepp, Grievant Janet Swinler, Grievant Victor G. Bonnett, Jerry Payne and Grievant Donna Garrison. The Tax Department called Grievant Shawn Mikeal, James Dixon, Victor Bonnett, Lexie Redden, David Townsend and Lowell Dale Basford to testify.

The Tax Department called Grievant Shawn Mikeal to testify. Mikeal testified that there has been a two (2) pay grade disparity between RA IIs and CA IIs since August of 1999. He further testified that Judge Zakaib's decision in Stanley convinced him there was an improper pay disparity between the positions and affected his decision to file the present grievance. Blethen Tr. at 20-21. Mr. Mikeal was part of the Bonnett Grievance filed in 1999. Blethen Tr. at 23. He testified that his job duties have not changed between the time of his individual grievance over the pay disparity and the present one. Blethen Tr. at 34.

The Department also called Grievant Victor Bonnett. Like Mr. Mikeal, Mr. Bonnett stated that the RA II job has stayed significantly the same as it was at the time of the first grievance. Blethen Tr. at 65. He further testified that the pay disparity between RA IIs and CA IIs existed at the time of the first grievance and is an "ongoing grievance" because it still exists today. Blethen Tr. at 66.

The Grievants began their case by calling Patricia Rowsey. Ms. Rowsey is a CA III who previously held the position of CA II and CA I. She held the CA I position from the time it was created, became a CA II in early 1999 and a CA III in the spring of 2000. Blethen Tr. at 88. As a CA I Ms. Rowsey was responsible for collections compliance. Blethen Tr. at 90. As a CA II she did everything that a CA I did plus served as a team leader and handled more complex cases and special projects. Blethen Tr. at 91. A CA II places writs and suggestions on bank accounts but cannot sell property on the courthouse steps. Blethen Tr. at 95.

CA IIIs differ from CA IIs because CA IIIs "act in a supervisory capacity" and "develop the procedures." CA IIIs also coordinate with the Legal Department for injunction hearings, etc. Blethen Tr. at 96. They consider themselves "an in-house collection agency." Blethen Tr. at 97. The

primary objective of a CA II is to “bring employers into compliance. To have them in good standing with Workers’ Compensation.” Blethen Tr. at 98. A CA II calculates amounts owed and, if necessary, estimate the amount owed. Blethen Tr. at 100. A CA II also reviews financial statements and helps employers fill out paperwork to determine the amounts they owe. Blethen Tr. at 101-103. CA IIs also conduct investigations of non-compliance with Workers’ Compensation. Blethen Tr. at 104. Ms. Rowsey also testified that CA IIs have to obtain knowledge of the art of collecting monies and prepare status reports of accounts. Blethen Tr. at 105-106.

When asked whether she considered the Workers’ Compensation Fund to be an insurance company Ms. Rowsey stated “we consider ourselves a Tax Department; we’re a State agency. Workers’ Compensation is tax.” Blethen Tr. at 132. She stated that although the Division has more collection tools, the collective funding and purpose of CA II job has not changed: “our goal has always been to put all employers in compliance.” Blethen Tr. at 151.

The Grievants next called Nancy Lepp, a CA II, to testify. Previously she was a CA I. She stated that as a CA II she handled a large amount of complex accounts, dealt with delinquent and default customers and checked other CA I’s work. Blethen Tr. at 163. Ms. Lepp added that every CA II is assigned a special project, some require special knowledge and some not Blethen Tr. at 165. She also stated that, unlike RA IIs, CA IIs get paid overtime. Blethen Tr. at 167.

The Grievants next called Janet Swinler to testify. Ms. Swinler has been an RA II since 1998 and her job duties have increased since then. Blethen Tr. at 173, 175. She handles between 2000-3000 accounts in some shape or another. Blethen Tr. at 175. She starts her day at seven o’clock in the morning and does not get paid overtime. Blethen Tr. at 177. She deals with attorneys and CPAs all of the time. Blethen Tr. at 181. Ms. Swinler testified that RA IIs also talk to lawyers for the Tax

Department in Charleston, review financial statements, make assessments, monitor and arrange informal payment plans and offers of compromise and file liens. Blethen Tr. at 189, 192-95. The job of the RA II is to enforce collections with the goal of bringing all taxpayers into compliance with State tax law. Blethen Tr. at 198. The RA IIs have to be able to understand and apply State tax law. Blethen Tr. at 198. Ms. Swinler stated that the RA II job involves a great deal of discretion as far as entering into and monitoring payment plans and handling waiver requests. Blethen Tr. at 203-05. The typical day described by Ms. Swinler mirrored the typical day of a CA II described by Ms. Lepp. Blethen Tr. at 168-177, 177-191.

Victor Bonnett testified that he had served as a RA II since 1991. Blethen Tr. at 232. Mr. Bonnett heard the testimony of Ms. Rowsey and Ms. Lepp and does not think any job duties of CA IIs they testified about are more complex than that of RA IIs. Blethen Tr. at 232-33. In addition to the job duties Ms. Swinler testified about he has garnished wages and seized property. Blethen Tr. at 234. RA IIs train new RA IIs and do lead work. Blethen Tr. at 235. Mr. Bonnett performs a financial analysis to determine when and what a taxpayer can pay. Tr. at 240. RA IIs also deal with law enforcement agencies, judges, other Tax Department employees and other State agencies. Tr. at 243-44.

Mr. Bonnett participated in a meeting between Tax and Workers' Compensation official's in 1995 that help lead to the development of the CA II position. At the meeting he told the attendees the job function, duties and techniques of an RA II. Blethen Tr. at 245-47.

After the Grievants rested their case, the Division of Personnel called David Townsend, supervisor of the Receivable Management Unit for Workers' Compensation. Blethen Tr. at 367. Mr. Townsend testified that CA IIs are collection agents. Blethen Tr. at 378. The research that CA IIs do

is to look into the backgrounds of the employers to determine their ability to pay in order to prepare repayment agreements, etc. Blethen Tr. at 378.

B. Ferguson Grievance

The only witness that testified at the December 9, 2003 Level III Ferguson Hearing was Lowell Dale Basford, Assistant Director of the Division of Personnel who is in charge of classification and compensation. Mr. Basford testified in direct examination that there are no rules or regulations requiring set pay grades between particular positions and their supervisory positions. Ferguson Tr. at 11, 14. However, on cross examination Mr. Basford acknowledged his testimony in the Blethen Hearing (Tr. at 423) that there is normally a two (2) pay grade difference between a subordinate and a lead worker. Ferguson Tr. at 18. He also testified (both during direct examination and cross examination) about the detailed process that goes into setting pay grades and for the pay grades for Tax Unit Supervisor I and RA II in particular. Ferguson Tr. at 11-12. Mr. Basford testified that the DOP gave no thought whatsoever to the fact that RA IIs would be four (4) pay grades lower after the implementation of the Stanley decision. Ferguson Tr. at 23. When asked repeatedly why the DOP did not consider raising the pay grade of the RA IIs after the Stanley decision, Mr. Basford kept stating that the Stanley Order did not require the DOP to raise the pay grade of RA II. Ferguson Tr. at 24.

III. ASSIGNMENTS OF ERROR

1. The lower court erred in affirming the West Virginia Education and State Employees Grievance Board's Decision dated September 15, 2004 (Grievants Board's Decision) that former State employees are precluded from filing grievances under West Virginia Code § 29-6A-2 (e).

West Virginia Code § 29-6A-2(e) defines "Employee" for purposes of filing grievances and does not specifically preclude former State employees from being able to file grievances.

2. The lower court erred in affirming the Grievance Board's Decision that the Blethen Grievance is barred under the doctrine of res judicata as to twenty (20) of the Appellants because of the Bonnett Grievance that was decided in 2001. The Blethen Grievance arose from Judge Zakaib's ruling in Stanley in 2003 and therefore the doctrine of re judicata has no application to the Blethen Grievance.

IV. POINTS AND AUTHORITIES RELIED UPON

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

- A. **Blethen Grievance (a.k.a. May 2003 Grievance).**
Stanley, et al. v. Department of Tax and Revenue, Civil Action No. 01-AA-93 (Kanawha County Jan. 2, 2003); AFSCME v. Civil Service Commission of W.Va., 174 W.Va. 221, 324 S.E.2d 363 (1984); Ferguson v. State of West Virginia Civil Action No. 99-AA-151 (Kanawha County Mar. 1, 2001); W.Va. Code § 29-6-10(2)

DISCUSSION OF LAW

- A. **FORMER STATE EMPLOYEES CAN FILE GRIEVANCES UNDER WEST VIRGINIA CODE § 29-6A-2(e).** Appalachian Power Company v. State Tax Department of West Virginia, 195 W.Va. 573, 466 S.E.2d 424 (1995); W.Va. Code § 29-6A-2(e).
- B. **THE DOCTRINE OF RES JUDICATA HAS NO APPLICATION TO THE BLETHEN GRIEVANCE.** Blake v. CAMC, 201 W.Va. 469, 498 S.E.2d 41 (1997); Huntington Brick and Tile Co. v. Public Service Commission, 107 W.Va. 569, 149 S.E. 677 (1929); Gentry v. Farruggia, 132 W.Va. 809, 53 S.E.2d 741 (1949).

V. DISCUSSION OF LAW

A. FORMER STATE EMPLOYEES CAN FILE GRIEVANCES UNDER WEST VIRGINIA CODE § 29-6A-2(e).

The ALJ's conclusion of law (as affirmed by the lower court) that you have to be a current employee of a State agency in order to file a grievance, is erroneous. West Virginia Code § 29-6A-2(e) defines "Employee" for purposes of filing grievances and does not specifically preclude former State employees from being able to file grievances. The statute is controlling and, therefore, these that were no longer employed by the agency at the time of the filing of their grievance do have a right to assert a case. Otherwise a State agency could conceal employment wrongs done to employees and escape any liability as long as the employee terminated his or her employment with State prior to discovering the bad behavior. The discovery rule for the State employee grievances provided in West Virginia Code § 29-6A-4(a) (a grievance can be filed "within ten days of the date on which the event became known to the grievant") would be meaningless.

Faced with the realization that West Virginia Code § 29-6A-2(e) does not preclude former State employees from filing grievances, the Appellees are forced to rely on the case of Appalachian Power Company v. State Tax Department of West Virginia, 195 W.Va. 573, 466 S.E. 2d 424 (1995). Although agencies charged with enforcing statutes are given discretion and reasonable interpretations of such statutes, agencies are not given discretion if the intention of the Legislature is clear. Id. Appellees admit that they can point to no circuit court or Supreme Court decision stating that former employees cannot assert grievances under § 29-6A-2(e). The definition of "Employee" under § 29-

6A-2(e) simply begins “ any person hired for permanent employment...” There are also a number of exclusions in the definition. Nowhere are former employees excluded in the definition. Appellants assert that this Court should look at the standing issue de novo and determine that former State employees can file grievances as long as such grievances are timely.

B. THE DOCTRINE OF RES JUDICATA HAS NO APPLICATION TO THE BLETHEN GRIEVANCE.

The ALJ cites Blake v. CAMC, 201 W.Va. 469, 498 S.E.2d 41 (1997) as authority for applying the doctrine of res judicata in the Blethen case. Res judicata does not apply to as to the Blethen case. Again, the whole Blethen theory is based on Judge Zakaib’s ruling in Stanley. It was a specific finding made by Judge Zakaib, final and not appealed, that the Blethen Grievance came about. The circuit court case in Stanley changed the legal landscape as it pertains to the revenue agents. Clearly, the issues in Stanley and Bonnett were basically similar. In fact, The Tax Department has stated on several occasions that the final outcome of one of the grievances should decide the other. See Grievants’ Exhibits 1-3 at Level IV. The only case between Stanley and Bonnett that was fully briefed, argued and adjudicated at the circuit court level was Stanley. Hence the Tax Department should be estopped from asserting that the decision in Stanley does not give rise to a new pay equity grievance for the RA IIs that participated in the prior Bonnett Grievance.

Res judicata should not be used to perpetuate an injustice after the time that a higher court changed the precedent. For example, in Huntington Brick and Tile Co. v. Public Service Commission, 107 W.Va. 569, 149 S.E. 677 (1929), the West Virginia Supreme Court noted that doctrine of res judicata does not prevent reexamination of the same question between the same parties when subsequent to the judgment, facts have arisen which may alter the rights of the litigants. Moreover, the rule is not rigidly enforced where to do so would finally defeat the ends of justice. Gentry v.

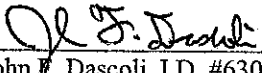
Farruggia, 132 W.Va. 809, 53 S.E. 2d 741 (1949).

Respondents acknowledge the Supreme Court's holding in Huntington Brick but assert that the case is not applicable because there are no new facts that have been discovered regarding the similarities between the RA II and CA II positions. However, Judge Zakaib's ruling in Stanley itself is a new fact giving rise to an opportunity to assert a new grievance over the RA II v. CA II pay disparity issue. Following the Respondent's logic a prior ruling between the same parties that segregated schools were constitutional could not be challenged even if a court in a subsequent case involving a different school in the same school district determined that maintaining a segregated school was unconstitutional. Similarly, Judge Zakaib's ruling that RA IIs and CA IIs do the same work and should receive the same pay is a new judicial determination that gives rise to a reexamination of the pay disparity issue. The legal landscape has changed and the issue of the reexamination of the pay disparity between the RA II and CA II classifications did not exist until Judge Zakaib ruled in Stanley. Accordingly, the doctrine of res judicata has no application to the Blethen Grievance.

V. RELIEF PRAYED FOR

Appellants request that this Honorable Court reverse the portion of the lower court's order affirming, in part, the West Virginia Education and State Employees Grievance Board's Decision dated September 15, 2004 on the lack of standing and res judicata issues.

PAMELA BLETHEN, et al.,
By Counsel,


John F. Dascoli, I.D. #6303
THE SEGAL LAW FIRM
A Legal Corporation
810 Kanawha Boulevard, East
Charleston, West Virginia 25301
(304) 344-9100

Frank J. Venezia, I.D. #4637
SHAFFER & SHAFFER
2116 Kanawha Boulevard, East
Charleston, West Virginia 25301
(304) 344-8716

James P. McHugh, I.D. #6008
MCHUGH WILLIAMS PLLC
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CERTIFICATE OF SERVICE

I, JOHN F. DASCOLI, do hereby certify that I have served a copy of the foregoing *APPELLANTS' BRIEF* on the following individuals by United States mail, postage prepaid this 10th day of February, 2006.

A.M. "Fenway" Pollack, Assistant Attorney General
Attorney General's Office
Tax & Revenue Division
Building 1, Room 435
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305

Karen Thornton, Assistant Attorney General
Attorney General's Office
Building 1, Room E26
State Capitol Complex
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305



JOHN F. DASCOLI, I.D. # 6303