

No. 32962

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

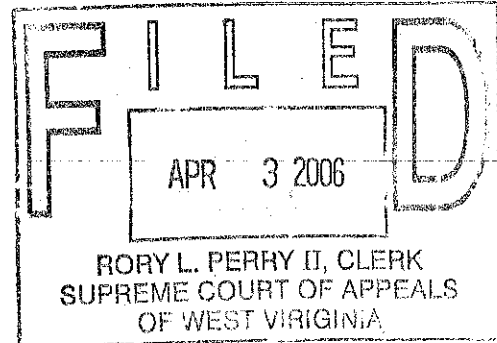
PAMELA BLETHEN, ET AL.,

Appellants,

v.

DEPARTMENT OF REVENUE,
STATE TAX DEPARTMENT, ET AL.,

Appellees.



THE WEST VIRGINIA TAX COMMISSIONER'S AND THE
WEST VIRGINIA DIVISION OF PERSONNEL'S RESPONSE TO
PETITIONERS' PETITION FOR APPEAL

Respectfully submitted,

ACTING TAX COMMISSIONER
OF THE STATE OF WEST VIRGINIA,
WEST VIRGINIA DEPARTMENT OF REVENUE,
and DIVISION OF PERSONNEL,

By Counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

A.M. "FENWAY" POLLACK
WYSB # 6969
ASSISTANT ATTORNEY GENERAL
Building 1, Room W-435
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305
(304) 558-2522
Counsel for Department of Revenue

KAREN O'SULLIVAN THORNTON
WYSB # 6969
ASSISTANT ATTORNEY GENERAL
Building 1, Room E-26
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305
(304) 558-2021
Counsel for the WV Division of Personnel

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NATURE OF PROCEEDING IN LOWER TRIBUNAL

Virgil T. Helton, Acting State Tax Commissioner and the West Virginia Division of Personnel (hereinafter "Respondents"), files this brief in response to the Petitioners' Appeal. The Petitioner has appealed an order from the Circuit Court of Kanawha County entered on March 17, 2005. In this Order the Circuit Court affirmed in part a Decision from the West Virginia Education and State Employees Grievance Board (hereinafter "Grievance Board"), while remanding other issues. The Grievance Board decision involved two consolidated multi-party grievances, one alleging an equal pay for equal work violations and the other alleging a violation of Division of Personnel policy regarding the pay grades between employees and their supervisors. The portion of the Grievance Board decision affirmed by the Circuit Court, ruled that three of the grievants involved in this matter lacked standing to pursue both grievances because they were no longer employees at the time they filed their grievances and that twenty of the twenty-nine equal pay for equal work grievances were denied because the matter, as to those twenty grievants, was barred by the doctrine

of *res judicata*. The Circuit Court remanded nine of the equal pay for equal work grievances and all of the pay grade grievances back to the Grievance Board for a determination regarding their timeliness. In one portion of the Petitioners' Brief at page 2, they assert that this appeal involves twenty-nine (29) grievants, while in contrast at page 10, they acknowledge that Judge Bloom only issued a final ruling regarding twenty of the equal pay for equal work Grievants. Therefore, the matter before this Court involves only the twenty Grievants which the Circuit Court denied relief to based on the application of *res judicata* and the Grievants dismissed because they are no longer employees of the Tax Division.

FACTS

This is a grievance which alleges that Revenue Agent IIs (hereinafter sometimes RA II) who worked for the Tax Department and Credit Analyst IIs (hereinafter sometimes CA II) who worked for the Bureau of Employment Programs should be paid the same under the doctrine of equal pay for equal work. In 1999, in a case commonly referred to as the "*Bonnett*" grievance, these Revenue Agents litigated this identical issue and lost at Level IV of the grievance procedure. Some of these grievants pursued an appeal to the circuit court of Kanawha county; however the Circuit Court dismissed the appeal. The Circuit Court's decision became final when the grievants failed to pursue any further appeal.

In May of 2003, these same employees (and others) filed a new grievance referred to here as the Blethen grievance based upon the same complaints; namely that they perform work that is equal to CA IIs. The Appellants' justification for re-litigating a case resolved against them is based upon Judge Zakaib's ruling in a different grievance involving the RA II's supervisors (hereinafter "Tax supervisors") and CA II's supervisors (hereinafter "Worker's Compensation supervisors"). Judge

Zakaib ruled that the Tax supervisors were performing nearly identical work to that of the Worker's Compensation supervisors. In essence the Appellants argue, that Judge Zakaib's order, which found that the Tax supervisors were doing nearly identical work as the Worker's Compensation supervisors, provides a basis to ignore the final unappealed order of the Circuit Court, which found that the RA IIs were not entitled to the very relief requested here.

In September of 2003 twenty-four new grievances were filed by essentially the same employees discussed above¹. These grievances became commonly known as the "Ferguson" grievances. The grievants again used Judge Zakaib's decision as the grievable event. This time they alleged that they were aggrieved by the fact that as a result of Judge Zakaib's decision their supervisors were given a two pay grade increase. The grievants alleged that an arbitrary and capricious situation had been created because there was a two pay grade difference between themselves and their supervisors in 1997 when the positions were first created, and as a result of Judge Zakaib's decision, there is now a four pay grade difference.

After consolidation of the Blethen and Ferguson grievances, the Grievance Board issued a decision dated September 15, 2004. Administrative Law Judge Paul Marteney declined to rule on the merits of the grievances, instead holding that the claims of three of the Appellants were dismissed because they were not employees of the Tax Department at the time their grievances were filed. As for the remaining Appellants, Judge Marteney ruled that their grievances were denied based upon their untimely filing and based upon the doctrine of *res judicata*. Due to his rulings as described above, Judge Marteney did not need to rule on the merits of the grievance. In their appeal

¹ After September 2003, four more Ferguson grievances were filed, one in February of 2004, two in April of 2004 and one in June of 2004, for a total of twenty-eight. This issue is not presently before the Court but is provided for context.

and subsequent pleadings to the Circuit Court, the Appellants asserted that the ALJ's decision was incorrect and therefore the matter should be remanded to the ALJ for a decision on the merits.

In a decision entered on March 17, 2005, Judge Louis Bloom affirmed part of ALJ Marteney's decision and remanded a portion of the matter back to the Grievance Board. Judge Bloom agreed with Judge Marteney and ruled that twenty (20) of the twenty-nine (29) Blethen grievances were correctly denied based upon *res judicata*. Judge Bloom further ruled that Judge Marteney was correct in ruling that three of the grievants, Michael Martin, Arville Sargent and Cynthia Miller did not have standing to utilize the grievance procedure because their grievances were filed after they were no longer employees. As for the remaining nine (9) Blethen grievants and twenty-five Ferguson grievants,² Judge Bloom remanded the matter back to the Grievance Board to allow Judge Marteney to rule on whether the continuing practice exception to the timeliness requirements would allow those grievances to proceed. It is from Judge Bloom's March Order that the Appellants appeal.³

DISCUSSION OF LAW

I. JUDGE BLOOM WAS CORRECT IN RULING THAT THE TWENTY GRIEVANTS WHO PARTICIPATED IN THE BONNETT GRIEVANCE ARE BARRED BY *RES JUDICATA* FROM PURSUING THIS GRIEVANCE.

Judge Bloom ruled that the grounds raised in the *Bonnett* grievance were barred from review based upon the doctrine of *res judicata*. There is no dispute between the parties that the *Bonnett*

²Excluding the three grievants who were dismissed because they lacked standing.

³ The current procedural posture of the remaining nine (9) *Blethen* grievants and all of the *Ferguson* grievants is that they are at the Grievance Board, awaiting a ruling on the merits of their grievances.

grievances involved the RA II's comparing themselves to the CA II's. See Level III Transcript Pg. 20-21. Rather, the Petitioners' argue here, as they argued unsuccessfully below, that Judge Zakaib ruled that these grievants were doing the same work as the CA II's. That statement is absolutely incorrect. What is correct is that between 1999 and 2001 twenty of the Petitioners currently before this Honorable Court, filed a grievance alleging that they were performing work similar enough to that of the CA IIs that they should have their pay adjusted accordingly. Administrative Law Judge Mary Jo Swartz, in a decision dated August 30, 1999, ruled against the Appellants. The Petitioners appealed Judge Swartz's decision to the Circuit Court of Kanawha County, where in an order entered on March 1, 2001, the Circuit Court dismissed the grievance. Once the Circuit Court's March 1, 2001 Order became final, *res judicata* precludes the parties from bringing forth this cause of action.

The doctrine of *res judicata* is well settled. In *Blake v. Charleston Area Medical Center, Inc.*, 201 W. Va. 469, 498 S.E.2d 41 (1997), one of many West Virginia Supreme Court cases discussing the elements; 1) there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings; 2) the two actions must involve either the same parties or persons in privity with those same parties; 3) the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action. *Id.* at 49.

There has been a final adjudication on the merits with regard to the twenty grievants who were members of the *Bonnett* grievance. As discussed *supra* the Grievance Board ruled that the Revenue Agents involved in the *Bonnett* grievance were not entitled to equal pay for equal work. These Grievants appealed to the Circuit Court of Kanawha County, which appeal was dismissed and

no further appeal was taken. With regard to the *Bonnett* grievance, there is no question that the Grievants who litigated *Bonnett*, and who are present before this Court, are identical and the issue with regard to equal pay is identical.

In an attempt to avoid the obvious application of the doctrine of *res judicata* the Petitioners miss-state Judge Zakaib's ruling with regard to the grievance filed by the Revenue Agent's Supervisors. Judge Zakaib ruled that the Revenue Agents Supervisors were entitled to the same pay as the Credit Analyst Supervisors. In making this ruling, Judge Zakaib did not examine the record as to the differences between the work of RA IIs as compared to CA IIs. Judge Zakaib did not rule regarding the respective pay of RA IIs and CA IIs. The Petitioners attempt to stretch Judge Zakaib's *dicta* is indicative of their inability to provide this Court with new facts which would allow them to avoid the implications of *res judicata*.

The facts stated above render the Petitioners' reliance on *Huntington Brick and Tile Co. v. Public Service Commission*, 107 W. Va. 569, 149 S.E. 677 (1929) misplaced. It is true that the *Huntington Brick* court held that when new facts arise, the doctrine of *res judicata* is inapplicable. This case, in contrast to the *Huntington Brick* case, presents no new fact regarding whether the Revenue Agents before this Court are entitled to pay equal to the compensation of Credit Analysts. The Petitioners have no new fact relating to the comparison of their jobs with that of the Credit Analysts. Thus, the Circuit Court's dismissal of the *Bonnett* appeal (which upheld the Grievance Board finding that the pay grades and classifications for CA IIs and RA IIs were not arbitrarily and capriciously assigned) should not be disturbed.

II. FORMER EMPLOYEES WHOSE SERVICE TO AN EMPLOYER HAS ENDED DO NOT HAVE STANDING TO UTILIZE THE GRIEVANCE PROCEDURE.

While the Appellants attempt to read and interpret the definition of employee, contained in West Virginia Code Section 29-6A-2(e), more expansively than the language in the statute provides, the ALJ correctly ruled that former employees do not have standing to utilize the grievance procedure once their employment with a state agency has ended.

Section One of Article 6A, Chapter Twenty-Nine states that its purpose is "to provide a procedure for the equitable and consistent resolution of employment grievances raised by non-elected state **employees** who are classified under the state civil system, or **employed** in any department, other governmental agencies, or by independent boards or commissions . . ." W.Va. Code § 29-6A-1 (2002)(emphasis added). Reading Section Three of Article Six A *in pari materia* with Section One further shows the Legislature's intention that the grievance procedure is designed for current employees. Paragraph (a)(1) allows the time limits for grievance procedures to be extended if the grievant is not working because of sickness, accident, a death in the family or other cause necessitating personal leave. *W. Va. Code § 29-6A-3(a)(1)* (2002). A grievant may be represented by a **fellow employee**. *Id* at paragraph (f)(emphasis added). If a grievance cannot be concluded by **the end of the employment term** the time limits shall be modified so that the grievance procedure can be concluded within ten days of the end of the employment term or an otherwise reasonable time. *Id* at paragraph (g) (emphasis added). A grievant shall be given access to the employers equipment for purposes of preparing grievance documents. *Id* at paragraph (l). Hearings at levels two and three shall be open to employees of the grievant's **immediate office or work area**. *Id* at paragraph (m)(emphasis added). The grievant shall be granted necessary time off **during working**

hours to pursue the grievance. "However, the first responsibility of **any state employee is the work assigned by the appointing authority.** *Id* at paragraph (p)(emphasis added).

Taken together, the aforementioned paragraphs of Section 3 clearly show the Legislature's intention that the grievance procedure is designed for current not former employees. Former employees: (1) would not need to extend the procedure because they are out on leave; (2) would not use the employers equipment to prepare grievance papers; (3) do not have an immediate office or work area where the hearings could be held; (4) do not need time off during work hours to pursue the grievance; and (5) do not have any further responsibility to complete work assigned by their appointing authority.

The Petitioners' attempts to distort the discovery rule for grievances into giving them standing is equally without merit. There is a discovery rule exception for filing grievances *See e.g. Barthelemy v West Virginia Div. Of Corrections, Pruntytown Correctional Center*, 207 W. Va. 601, 535 S.E.2d 200 (2000) (time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance). In the instant case, the grievants, who are former employees, certainly knew in 1999 of the facts giving rise to this alleged grievance, because they were all participants in the *Bonnett* grievance. As discussed previously, Judge Zakaib's ruling with regard to these former employees' supervisors, is not a new fact which provides a basis for these former employees to pursue this grievance. As a result, even if the discovery rule could be interpreted to allow former employees standing to utilize the grievance procedure, **these grievants**, cannot utilize the discovery rule because, as was discussed above, this exact issue was fully litigated in 1999 and these three former employees were part of that litigation.

Additionally, the Grievance Board has consistently held that former employees do not have standing to utilize the grievance procedure. While there is no case on point from the West Virginia Supreme Court of Appeals, the Grievance Board has consistently held that, save for the discovery rule, former employees do not have standing to utilize the grievance procedure. *See e.g. Archer v. W.Va. Bd. of Trustees*, Docket No. 94-BOT-138 (Sept. 7, 1994); *Karr v. Jackson County Bd. of Educ.*, Docket No. 18-86-297-1 (Feb. 2, 1987); *Jackson v. Div. of Corrections*, Docket No. 97-CORR-345 (Jan. 30, 1998).

It has long been a principle of this Honorable Court that its function as a reviewing court demands that it give deference to an agency's interpretation of a statute that the agency is charged with implementing. *See Appalachian Power Co. v. State Tax Dept. of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995). (An inquiring court--even a court empowered to conduct de novo review--must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion.)

Here, the Grievance Board's interpretation of its implementing statute, West Virginia Code Section 29-6A-2(e), certainly falls within its area of expertise, and does justice to the stated legislative intent of providing a consistent and equitable forum for settling disputes for **employees**. The Legislature limited the relief available to current employees, and its limitation must be honored. To do otherwise would be tantamount to a rewriting of the statute.

CONCLUSION

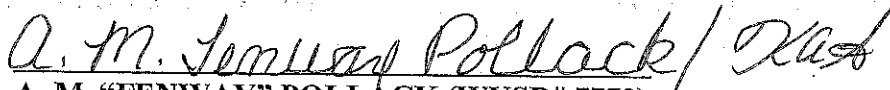
Based upon the foregoing the appeal should be denied with prejudice.

Respectfully submitted,

ACTING TAX COMMISSIONER
OF THE STATE OF WEST VIRGINIA,
WEST VIRGINIA DEPARTMENT OF REVENUE,
and DIVISION OF PERSONNEL,

By Counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



A. M. "FENWAY" POLLACK (WVSB# 7773)

ASSISTANT ATTORNEY GENERAL

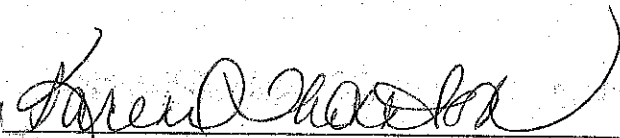
Building 1, Room W-435

1900 Kanawha Boulevard, East

Charleston, West Virginia 25305

(304) 558-2522

Counsel for Department of Revenue



KAREN O'SULLIVAN THORNTON (WVSB# 6969)

ASSISTANT ATTORNEY GENERAL

Building 1, Room E-26

1900 Kanawha Boulevard, East

Charleston, West Virginia 25305

(304) 558-2021

Counsel for the West Virginia Division of Personnel

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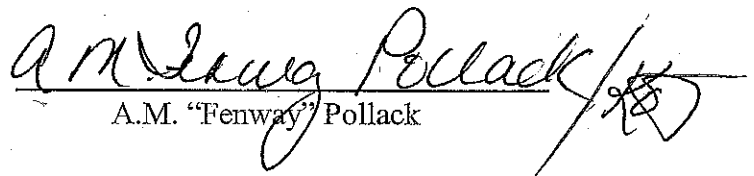
CERTIFICATE OF SERVICE

I, A.M. "Fenway" Pollack, Assistant Attorney General, do hereby certify that the foregoing *West Virginia Tax Commissioner's and the West Virginia Division of Personnel's Response to Petitioners' Petition for Appeal* was served upon the opposing counsel by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 3rd day of April, 2006, addressed as follows:

John F. Dascoli, Esquire
The Segal Law Firm
810 Kanawha Blvd., East
Charleston, WV 25301

James P. McHugh, Esquire
Barrett, Chafin, Lowry, Amos & McHugh
PO Box 6771
Charleston, WV 25362

Frank J. Venezia, Esquire
Venezia Law Offices
2442 Kanawha Blvd., East
Charleston, WV 25301


A.M. "Fenway" Pollack