

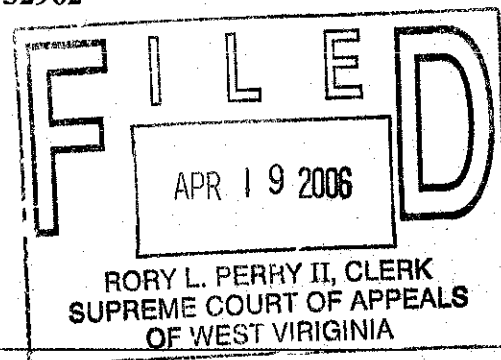
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

v.

Circuit Court of Kanawha 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' REPLY BRIEF

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

Appellants note that now for the first time in this litigation the Appellees admitted in their Response that the discovery rule may allow former State employees to utilize the grievance procedure. See Appellees' April 3, 2006 Response at 8-9. This admission is significant because the position of the Appellees until now on this issue has been simply that former State employees cannot file a grievance under any circumstances. At a minimum, this admission by Appellees should serve as the basis for a reversal so that the applicability of the discovery rule to the former State employees can be fully developed and addressed below. However, this Court should go further and simply hold that former State employees have standing to file any grievance that is timely pursuant to West Virginia Code § 29-6A-4 (a).

Moreover, Appellants assert that West Virginia Code § 29-6A-2(e), the definition of "employee" for purposes of filing grievances, does not specifically preclude former State employees from being able to file grievances. The definition states as follows:

"Employee" means any person hired for permanent employment, either full or part-time, by any department, agency, commission or board of the state created by an act of the Legislature, except those persons employed by the board of regents [abolished] or by any state institution of higher education, members of the department of public safety [West Virginia state police], any employees of any constitutional officer unless they are covered under the civil service system and any employees of the Legislature. The definition of "employee" shall not include any patient or inmate employed in a state institution.

Id. As is clear from above, the definition of "employee" contains many exclusions but nowhere in such definition does it state that former employees are excluded from the definition. As long as the

former employees were “hired for permanent employment” and are not excluded from the definition because of the exceptions (“employed by board of regents,” etc.), they are clearly included in the definition of “employee” and can utilize the grievance procedure. The fact that the Grievance Board precludes former employees from filing grievances should have no bearing because the intent of the Legislature is clear. See Syl. Pt. 3, Appalachian Power Company v. State Tax Department of West Virginia, 195 W.Va. 573, 466 S.E.2d 424 (1995).

The Appellees rely on three (3) Grievance Board decisions to support its position that “save for the discovery rule, former employees do not have standing to utilize the grievance procedure.” See Appellees’ April 3, 2006 response at 9 (citing 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)). The Karr and Jackson cases contain no analysis other than citing prior Grievance Board decisions. In contrast, the Archer decision specifically states that the discovery rule allows former employees to have standing to utilize the grievance procedure. Id. at 6. Appellants assert that the Archer decision is partially correct for stating that the discovery rule allows former employees standing to utilize the grievance procedure. However, Appellants assert that in addition to the discovery rule, former State employees have standing to file any grievance that is timely under West Virginia Code § 29-6A-4 (a).

Again, Appellees have now acknowledged that the discovery rule allows former State employees to file grievances. Appellants assert that, in addition to the discovery rule, former State employees have standing to file any grievance that is timely pursuant to West Virginia Code § 29-6A-4 (a). Otherwise, former State employees who are clearly wronged would be left without any

remedy. Moreover, the limited time frame set forth in West Virginia Code § 29-6A-4 (a) confines the filing of grievances by former State employees to very limited circumstances. Based on the Appellees' admission that the discovery rule could provide former State employees an opportunity to file a grievance, the lower court's ruling on this issue should at a minimum be reversed to allow the development of the applicability of the discovery rule to the claims of the affected former State employees. However, Appellants assert this Court should instead simply clarify that former State employees have standing to file any grievance that is timely pursuant to West Virginia Code § 29-6A-4 (a).

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

Res judicata does not apply to the Blethen Grievance because the third element of Blake v. Charleston Area Medical Center, Inc., 201 W.Va. 469, 498 S.E.2d 41 (1997), does not apply to this case. According to the Court in Blake the third element of res judicata is that:

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 Syl. Pt. 4. Here, the third element is not present because the Blethen Grievance could not have been resolved in the prior grievance because Judge Zakaib had not yet ruled in the Stanley case. Appellants assert that this case should be resolved consistent with Huntington Brick & Tile Co. v. Public Service Commission, 107 W.Va. 569, 149 S.E. 677 (1929), where this Court noted that the doctrine of res judicata does not prevent "a re-examination of the same question between the same parties, when, subsequent to the judgment, facts have arisen which may alter the rights of the litigants. Id. at Syl. Pt. 1.

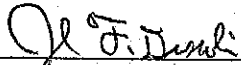
Appellees acknowledge the case relied on by Appellants, Huntington Brick & Tile Co. v. Public Service Commission, 107 W.Va. 569, 149 S.E. 677 (1929). However, Appellees assert that the Huntington Brick case does not apply because the Appellants did not rely on any new facts in asserting the Blethen Grievance. Appellants assert that Judge Zakaib's ruling in Stanley is a new fact giving rise to an opportunity to assert a new grievance on the RA II v. CA II pay disparity issue. Also, it is clear that the RA II v. CA II pay disparity was a continuing practice constituting an additional reason for this Court not to apply res judicata to the Blethen Grievance.

Further, Appellees have no answer to the Appellants' assertion that based on the Appellees' 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. Also, this Court has acknowledged that the doctrine of res judicata should not be rigidly enforced where to do so would plainly defeat the ends of justice. Gentry v. Farruggia, 132 W.Va. 809, 53 S.E. 2d 741 (1949). In this case, like in the segregated schools example, 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.

Finally, it should be noted that nine (9) of the twenty-nine (29) original grievants in the Blethen Grievance still have their Blethen claims currently pending before the Grievance Board for a decision on the merits. Should those nine (9) grievants prevail and the other twenty (20) grievants be precluded from their Blethen claims, there will be two (2) different pay scales within the same job classification of RA II creating new potential pay equity claims. Accordingly, this Court should reverse the lower court and hold that the doctrine of res judicata has no application to the Blethen Grievance.

WHEREFORE, Appellants request that this Honorable Court reverse the portion of the lower court's March 17, 2005 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.

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CERTIFICATE OF SERVICE

I, JOHN F. DASCOLI, do hereby certify that I have served a copy of the foregoing *APPELLANTS' REPLY BRIEF* on the following individuals by United States mail, postage prepaid this 19th day of April, 2006.

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