Volume 100
Issue 5 *Issue 5, A Tribute to Franklin D. Cleckley: A Compendium of Essential Legal Principles From His Opinions as a Justice on the West Virginia Supreme Court of Appeals*

Article 20

June 1998

Administrative Law

Robin Jean Davis
West Virginia Supreme Court of Appeals

Louis J. Palmer Jr.

> determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition.[386]

Justice Cleckley observed in *Gooch v. West Virginia Department of Public Safety*[387] that "W. Va. Code, 17C-5-6 (1981), specifically provides civil immunity to institutions and individuals who draw blood at the direction of a police officer unless there is gross negligence or willful or wanton injury."[388]

H. Retroactiveness of Statute

In *Public Citizen, Inc. v. First National Bank in Fairmont*,[389] the court stated that "[a] statute that diminishes substantive rights or augments substantive liabilities should not be applied retroactively to events completed before the effective date of the statute (or the date of enactment if no separate effective date is stated) unless the statute provides explicitly for retroactive application."[390]

XVI. ADMINISTRATIVE LAW

A. Administrative and Judicial Litigation of Same Issue

The question of litigating a matter before an administrative tribunal and attempting to litigate the same issue in circuit court was addressed in *Vest v. Board of Education of County of Nicholas*:[391]

> For issue or claim preclusion to attach to quasi-judicial determinations of administrative agencies, at least where there is no statutory authority directing otherwise, the prior decision must be rendered pursuant to the agency's adjudicatory authority and the procedures employed by the agency must be substantially similar to those used in a court. In addition, the identicality of the issues

386 *Id.* at Syl. Pt. 1.

387 465 S.E.2d 628 (W. Va. 1995).

388 *Id.* at Syl. Pt. 8.

389 480 S.E.2d 538 (W. Va. 1996).

390 *Id.* at Syl. Pt. 2.

391 455 S.E.2d 781 (W. Va. 1995).

litigated is a key component to the application of administrative res judicata or collateral estoppel.[392]

B. Department of Motor Vehicles

In *Sniffin v. Cline*,[393] Justice Cleckley negated the requirement for an administrative hearing before revoking a driver's licence based upon a prior out-of-state Driving Under the Influence conviction. The opinion held that "[a] prior criminal adjudication in another state establishing driving under the influence of alcohol or drugs satisfies the same function of the administrative hearing described in W. Va. Code, 17C-5A-2 (1986)."[394]

The case of *Miller v. Cline*[395] addressed the issue of administrative reinstatement of a revoked driver's license:

> W. Va. Code, 17C-5A-3(b)(2)(B) (1986), states that when an individual's license is revoked for a period of years "at least one half of such time period" must elapse "from the date of the initial revocation during which time the revocation was actually in effect" before a license may be reissued. It is axiomatic that the revocation could not be "in effect" until the license is revoked for the offense which is currently sought to be enforced. Likewise, it is clear that the revocation must be "in effect," and, if a revocation is suspended for a period of time and an individual retains his or her right to drive, the period of time the individual was permitted to drive may not be credited towards the total amount of time that must elapse for the individual to become eligible to have his or her license reinstated. [396]

---

392 *Id.* at Syl. Pt. 2.

393 456 S.E.2d 451 (W. Va. 1995).

394 *Id.* at Syl. Pt. 3.

395 455 S.E.2d 769 (W. Va. 1995).

396 *Id.* at Syl. Pt. 3.

C. *Tax Commissioner*

In *Frymier-Halloran v. Paige*,[397] Justice Cleckley was concerned with circuit court review of decisions by the state tax commissioner. The opinion held initially that

> [t]he same standard set out in the State Administrative Procedures Act, W. Va. Code, 29A-1-1, et seq., is the standard of review applicable to review of the Tax Commissioner's decisions under W. Va. Code, 11-10-10(e) (1986). Thus, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.[398]

Justice Cleckley went on to qualify the review posture of circuit courts by holding that

> [t]he circuit court may inquire outside the administrative record when necessary to explain the Tax Commissioner's action. When a failure to explain the action effectively frustrates judicial review, the circuit court may obtain from the agency, either through affidavits or testimony, such additional information for the reasons for the Tax Commissioner's decision as may prove necessary. The circuit court's inquiry outside the record is limited to determining whether the Tax Commissioner considered all relevant factors or explained the course of conduct or grounds of the decision.[399]

D. *Unemployment Compensation*

The decision in *Adkins v. Gatson*[400] required a determination of the conditions under which unemployment benefits may be collected during summer months by service personnel of educational institutions:

---

397 458 S.E.2d 780 (W. Va. 1995).

398 *Id.* at Syl. Pt. 3.

399 *Id.* at Syl. Pt. 4.

400 453 S.E.2d 395 (W. Va. 1994).

> W. Va. Code, 21A-6-15(2)(b) (1987), prohibits unemployment benefits during the summer months for service personnel of an educational institution, if such individual performs services in the first academic year or term and is offered a contract or a reasonable assurance that such individual will perform services in any such capacity for any academic institution in the second term of such academic year.[401]

The decision went on to hold,

> [s]ervice personnel employed by an educational institution, who hold a second and separate contract covering the period between two successive academic terms, and who are not reemployed for a consecutive period under the second contract, may escape the prohibitions in W. Va. Code, 21A-6-15(2)(b) (1987), and, thus, be entitled to unemployment compensation benefits. To come within this exception, however, the claimant must prove the existence of an explicit and valid contract or some other definite behavior of the employer establishing a continuing contractual relationship.[402]

E. Education Grievance Board

In *Martin v. Randolph County Board of Education*,[403] Justice Cleckley liberally interpreted the statutory time frame for filing a classification grievance: "W. Va. Code, 18-29-2 (1992), allows an employee to contest a misclassification at any time (although only once). As with a salary dispute, any relief is limited to prospective relief and to back relief from and after fifteen days preceding the filing of the grievance."[404] *Martin* also qualified the nature of the deference given to administrative agency decisions. The opinion held that "[t]he policy underlying a grant of special deference to agency decisions and similar agency pronouncements does not extend to every agency action. It does not extend to ad hoc representations on behalf of an agency, such as litigation arguments."[405]

---

401 *Id.* at Syl. Pt. 1.

402 *Id.* at Syl. Pt. 2.

403 465 S.E.2d 399 (W. Va. 1995).

404 *Id.* at Syl. Pt. 5.

405 *Id.* at Syl. Pt. 6.

F. Open Governmental Proceedings

The case of *McComas v. Board of Education of Fayette County*[406] required Justice Cleckley to interpret the state's Open Governmental Proceedings Act. The opinion found that "[a] planned meeting among a quorum of a school board to gather, review, or discuss information relevant to an issue before the board must be public, and if it is not, its conduct violates the Open Governmental Proceedings Act, W. Va. Code, 6-9A-3."[407] It was determined that "[p]roof of an intent to violate the Open Governmental Proceedings Act, W. Va. Code, 6-9A-1, et seq., is not required to establish that the Act was violated."[408] Finally, Justice Cleckley held that

> [i]n drawing the line between those conversations outside the requirements of the Open Governmental Proceedings Act, W.Va. Code, 6-9A-1, et seq., and those meetings that are within it, a common sense approach is required; one that focuses on the question of whether allowing a governing body to exclude the public from a particular meeting would undermine the Act's fundamental purposes.[409]

G. Judicial Enforcement of Administrative Subpoena

Justice Cleckley clearly laid out guidelines for obtaining judicial enforcement of an administrative subpoena in *State ex rel. Hoover v. Berger*:[410]

> In order to obtain judicial backing for the enforcement of an administrative subpoena, the agency must prove that (1) the subpoena is issued for a legislatively authorized purpose, (2) the information sought is relevant to the authorized purpose, (3) the information sought is not already within the agency's possession, (4) the information sought is adequately described, and (5) proper procedures have been employed in issuing the subpoena. If these requirements are satisfied, the subpoena is presumably valid and

406 475 S.E.2d 280 (W. Va. 1996).

407 *Id.* at Syl. Pt. 5.

408 *Id.* at Syl. Pt. 3.

409 *Id.* at Syl. Pt. 4.

410 483 S.E.2d 12 (W. Va. 1996).

> the burden shifts to those opposing the subpoena to demonstrate its invalidity. The party seeking to quash the subpoena must disprove through facts and evidence the presumed relevance and purpose of the subpoena.[411]

H. Building Commission

Justice Cleckley noted in *State ex rel. Charleston Building Commission v. Dial*[412] that "[a]n individual who has been appointed Chairman Pro Tem of a municipal building commission possesses the same duties and responsibilities as the regularly and duly elected Chairman of that commission would possess."[413] On a more substantive note, the opinion held that

> [t]he City of Charleston, in its distinctive role as the Capital of the State of West Virginia, may provide property to the State to be used as a State Capitol or for other public buildings. This special authority of the City of Charleston extends to the Charleston Building Commission and enables it, also, to provide property for state purposes. W. Va. Code, 8-12-5(36) (1989); W. Va. Code, 8-33-4(f) (1984); Charter of the City of Charleston, West Virginia, Section 59.[414]

I. School Building Authority

Justice Cleckley was called upon to address bond issues in *State ex rel. School Building Authority of West Virginia v. Marockie.*[415] The opinion held that

> [i]n light of ever-changing market and economic conditions, the School Building Authority of West Virginia may decide to refund bonds different from those specifically designated for refunding in *Winkler v. State School Building Authority*, 189 W. Va. 748, 434 S.E.2d 420 (1993), in order to receive the greatest benefit from

---

411 *Id.* at Syl. Pt. 1.

412 479 S.E.2d 695 (W. Va. 1996).

413 *Id.* at Syl. Pt. 2.

414 *Id.* at Syl. Pt. 3.

415 481 S.E.2d 730 (W. Va. 1996).

lower interest rates applicable to the refunding bonds.[416]

Justice Cleckley explained,

> [t]he School Building Authority of West Virginia may issue refunding bonds in a principal amount larger than the principal amount of bonds to be refunded that were issued prior to *Winkler v. State School Building Authority*, 189 W. Va. 748, 434 S.E.2d 420 (1993), in order to establish an escrow account for the repayment of those pre-*Winkler* bonds that are not presently due and payable. However, the School Building Authority of West Virginia may issue such additional refunding bonds only in the amount required to establish and maintain the escrow account, and the revenue generated by the excess refunding bonds should be no greater than that amount needed to secure the repayment of the higher interest pre-*Winkler* bonds to be refunded.[417]

Finally, the opinion cautioned that

> [t]he School Building Authority of West Virginia may not issue bonds alleged to be refunding bonds for the redemption of obligations created before *Winkler v. State School Building Authority*, 189 W. Va. 748, 434 S.E.2d 420 (1993), which have the practical effect of generating cash at closing in order to make immediately available to the School Building Authority of West Virginia the anticipated debt service savings from the so-called refunding bonds. Rather, the authority of the School Building Authority of West Virginia to issue refunding bonds to redeem pre-*Winkler* obligations is specifically limited to encompass only those bonds, the proceeds of which the School Building Authority will use to discharge its pre-existing obligations.[418]

---

416 *Id.* at Syl. Pt. 3.

417 *Id.* at Syl. Pt. 4.

418 *Id.* at Syl. Pt. 5.