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## Administrative Law

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**CASE DIGESTS**  
**WEST VIRGINIA SUPREME COURT OF APPEALS**  
**DECISIONS, 1986**

**ADMINISTRATIVE LAW**

*AMERICAN FED'N OF STATE, COUNTY AND MUN. EMPLOYEES v. CSC OF W. VA.*, 341 S.E.2d 693 (W. Va. 1985).

*Back Pay—Equal Pay for Equal Work—Remedies*

In this consolidated mandamus action, there were two groups of appellants petitioning the court to compel the CSC to award them back pay for the entire period during which they worked out of their classification. The CSC had decided to limit the back pay awards to the 30-day period prior to the filing of the original grievances.

The two issues in this case were: (1) Whether petitioners are entitled to mandamus relief, and (2) for what period of time are petitioners entitled to back pay.

The court held that: (1) The petitioners' legal entitlement to back pay and the respondent's corresponding legal duty to compute the amount of back pay due and ensure that such amount was paid was established earlier in *AFSCME v. CSC*, 324 S.E.2d 363 (W. Va. 1984), and petitioners have not failed to exhaust other legal remedies; and (2) all the petitioners in these two consolidated actions were entitled to the salary differential between the classification to which they were appointed and the higher classification in which they were actually working, and they were entitled to be paid such differential for the entire period during which they worked out of classification.

*ANILE v. ROBERTS*, 345 S.E.2d 822 (W. Va. 1986).

*Administrative Sanctions—Enhancement by Municipal Court Conviction.*

After a automobile driver was convicted for the second time within a year for driving while under the influence of alcohol, the Commissioner issued an order suspending the driver's license for ten years.

The issue in this case was whether a municipal court conviction could be used to enhance an administrative sanction of driver's license suspension.

The West Virginia Supreme Court of Appeals held that a municipal court conviction for driving while under the influence of alcohol can be used to enhance the administrative sanction of driver's license revocation.

*ASH v. RUTLEDGE*, 348 S.E.2d 442 (W. Va. 1986).

*Qualifications for Benefits—Unemployment compensation*

This case arose when fifty-seven members of a local electrical workers' union would not cross the picket line of the striking painters' union in order to get to their job site, and did no further work until the picket line was terminated. They then sought unemployment compensation benefits for the period during the painters' union strike.

The issue was whether petitioners demonstrated that their honoring of a picket line of another striking union falls within a specifically enumerated exception to disqualification in West Virginia Code section 21A-6-3(4) and were therefore qualified to receive unemployment compensation benefits.

The court held that since the labor dispute concerning the painters' union did not involve the petitioners and petitioners had an affirmative willingness to work had a reserve gate been open and available to them during the strike, the Appeal Tribunal and Board of Review properly ruled that the petitioners were entitled to receive benefits.

*BLESSING v. MASON COUNTY BD. OF EDUC.*, 341 S.E.2d 407 (W. Va. 1985).

*Administrative Law—Admission to Public Kindergarten Program—Civil Procedure—Constitutional Law.*

Cindy L. Blessing, mother of Brandon L. Blessing had sought a writ of mandamus in the Circuit Court of Mason County to compel the Mason County Board of Education to admit Brandon to the kindergarten program. He was denied admission because his fifth birthday was on September 3, 1984 and section 18-5-18 of the West Virginia Code provides mandatory admission only for those children who are five years old on or before September 1 of the years in which they seek admission. The circuit court found that Brandon had no clear legal right to be admitted, but admitted him pending the West Virginia Supreme Court of Appeals' answers to certain certified questions.

The issues in this case were: (1) Whether the refusal to consider the petitioner for admission to kindergarten in Mason County, when he would be admitted in thirty-eight counties in West Virginia, is a denial of his constitutional right to equal educational opportunity guaranteed by the equal protection clause of the West Virginia Constitution; (2) whether the respondent had a mandatory duty to grant the infant petitioner equal educational opportunity by admitting him to its kindergarten program.

The court, following its rule that it will not decide constitutional issues not necessary for the resolution of a case, declined to answer the two certified questions as posed. However, the court held that the circuit court was correct in

admitting Brandon Blessing to school because the clear purport of section 18-5-18 of the West Virginia Code is that boards of education intelligently use their discretion to accommodate children who have oddly placed birthdays. A mechanical application of the September 1 deadline confounds the clear intent of the statute and the broad statutory scheme which it provides. The Board's decision was an arbitrary and capricious failure to use discretion, where it was obliged instead to achieve reasonable results in circumstances such as this. The certified questions of the circuit court were improvidently framed. Petitioner had a right to the writ of mandamus.

Justice McGraw felt that procedural safeguards commensurate with the fundamental constitutional interest involved must be incorporated into the rules and regulations mandated by the majority in order for refusal to admit a child into kindergarten to pass constitutional muster.

Justice Brotherton, dissenting, stated the Mason County Board of Education had not arbitrarily exercised its discretionary power in denying the plaintiff admission to its schools. In addition, he felt reading sections 18-2-5 and 18-5-18 of the West Virginia Code together evidenced a legislative intent to make September 1st the cut-off date for admission to kindergarten.

*CHRISTIE v. W. VA. HEALTH CARE COST REVIEW AUTH.*, 345 S.E.2d 22 (W. Va. 1986).

*Authority to Regulate Practice of Law*

In this case, the Health Care Cost Review Authority (HCCRA) had previously suspended an attorney's privileges to practice before it; petitioner sought to compel the HCCRA to reinstate him.

The issue was whether HCCRA had the authority to suspend the attorney's privilege to practice before it.

The court stated that since the West Virginia Supreme Court of Appeals has the exclusive authority to define, regulate and control the practice of law in West Virginia, the HCCRA, an administrative agency, did not have the power to suspend an attorney's privilege to practice before it.

*CITY OF PARKERSBURG v. SKINNER*, 346 S.E.2d 808 (W. Va. 1986).

*Just Cause for Dismissal—Police Officer Conduct*

In this action a police officer was charged with violating various rules and regulations of the Police Department and dismissed. The alleged violations stemmed from two incidents involving the officer and his ex-wife, and one incident between the officer and his ex-wife's boyfriend. After a hearing, the Commission ordered the officer reinstated, and the circuit court affirmed.

The issue was whether the circuit court was correct in upholding the Commission's determination that there was no "just cause" for dismissal of the officer

which specifically relates to and affects administration of his office and directly affects the rights and interest of the public.

The court held that where a police officer shows questionable judgment in making an investigatory stop of a citizen involving a possible violation of vehicle registration laws and engages in heated conversation with that citizen of a personal nature on a subject that is a source of friction and antagonism between the two, the police officer has engaged in conduct violative of his official duty and constitutes just cause for dismissal under West Virginia Code section 8-14-20.

*KIMES v. BECHTOLD*, 342 S.E.2d 147 (W. Va. 1986).

*Criminal Law—Drivers License Revocation—Refusal to Submit to Breathalyzer—When Reissuance is Authorized*

After his arrest for allegedly driving while under the influence of alcohol, petitioner refused to submit to a breathalyzer test. Pursuant to West Virginia Code section 17C-5-7(a), the Commissioner revoked his license for one year for his refusal to submit to the test. Although the statute has specific provisions for early re-issuance of licenses for second and third time refusals, but not for first time refusals, petitioner sought a writ compelling the Commissioner to reinstate his license upon his successful completion of an alcoholism education, treatment or rehabilitation program pursuant to West Virginia Code section 17C-5A-3(b)(2).

The issue was whether the Commissioner must re-issue the license of an operator upon his successful completion of an alcoholism education, treatment or rehabilitation program when his license was revoked for one year for his first refusal to submit to the designated secondary chemical test.

The court held that West Virginia Code section 17C-5A-3 read *in pari materia* with West Virginia Code section 17C-5-7 does not authorize the early re-issuance of a drivers license after successful completion of an alcoholism education, treatment or rehabilitation program where the license had been revoked for a first time refusal to submit to a designated secondary chemical test.

*MONTGOMERY GEN. HOSP. v. WEST VIRGINIA HUMAN RIGHTS COMM'N*, 346 S.E.2d 557 (W. Va. 1986).

*Burden of Proof—Sex Discrimination—Standard of Judicial Review*

In this case, a woman was hired as a clerk in the hospital and was pregnant at the time but unaware of her condition. After working for four months she was terminated, yet the hospital retained part-time workers and others who had less seniority than she had. After she filed a complaint, the Human Rights Commission determined that she established a prima facie case of unlawful discrimination, that the hospital successfully rebutted the presumption by testifying that a decrease in patient population was the reason for her termination, but that the reason offered was merely a pretext for unlawful discrimination. The circuit court

reversed on the pretext issue on the grounds that the finding of pretext was arbitrary, capricious, clearly wrong and not supported by substantial evidence.

The issue was whether the circuit court abused its limited scope of review of the Commission's decision.

The West Virginia Supreme Court of Appeals held that the circuit court exceeded the bounds of the proper scope of review; the Commission's finding of pretext was supported by substantial evidence on the whole record, and the court should not have substituted its judgment for that of the Commission, particularly where the fact-finding depended on the hearing examiner's assessment of witness credibility.

*PRICE v. BOONE COUNTY AMBULANCE AUTH.*, 337 S.E.2d 913 (W. Va. 1985).

#### *Administrative Law*

Petitioner-employee was a part-time employee of respondent prior to a reorganization eliminating all part-time positions. He applied but was not hired for one of the full-time positions created by the reorganization. Petitioner brought an action in circuit court 117 days later, claiming he was not hired because he was black. He did not file a complaint with the West Virginia Human Rights Commission, pursuant to West Virginia Code section 5-11-10, and the respondents moved to dismiss petitioner's action. The circuit court denied the motion, concluding the petitioner should be allowed to sue without having filed a complaint with the West Virginia Human Rights Commission.

The West Virginia Supreme Court of Appeals answered the following certified question: Whether a plaintiff may sue to enforce the substantive provisions of the West Virginia Human Rights Act without complying with the Act's procedural requirements, by not filing a complaint with the West Virginia Human Rights Commission.

The court held that West Virginia Code section 5-11-13, construed in light of its legislative intent, and in light of amendments to the statute that provide a mechanism for transferring a case to circuit court, permits one aggrieved by human rights violations the option to proceed in circuit court, as an alternative to initiating administrative action: both avenues are mutually exclusive.

*PRIDE, INC. v. STATE et rel. STATE OF W. VA. HUMAN RIGHTS COMM'N*, 346 S.E.2d 356 (W. Va. 1986).

#### *Burden of Proof—Discrimination*

In this case complainant, a black woman, was one of six workers laid off; four were transferred and one was later rehired by the same company. After an employee was promoted, complainant inquired into the position vacated and was

told that there was no vacancy. The company then hired a white woman to fill the position, but she soon left. Complainant then filed a written application for the job vacated, and the company hired another black woman for the position.

The issues in this case were: (1) Whether complainant had demonstrated a prima facie case of unlawful discrimination at the time the company hired the white woman; (2) if so, did the company provide some legitimate and nondiscriminatory reasons for its rejection of the complainant, and (3) if so, had the complainant proved that the reasons given were merely a pretext for unlawful discrimination.

The court held that: (1) The Commissioner properly found the establishment of a prima facie case at the time the company hired the white woman; (2) the employer met its burden of proof of providing nondiscriminatory reasons for its actions by stating that complainant had not filed a written application for the job as she had been instructed to do; and (3) complainant failed to prove that the reason given by the employer for not rehiring her was merely a pretext for illegal discrimination.

*ROGERS v. HECHLER*, 348 S.E.2d 299 (W. Va. 1986).

*Campaign Expenditures—Duty to Promulgate—Rules and Regulations*

In this action in mandamus, petitioner sought to compel state election officials to promulgate rules and regulations governing campaign expenditures.

The issue was whether the petitioner had demonstrated that mandamus to compel the Secretary of State and the State Election Commission to promulgate rules and regulations governing campaign expenditures was the appropriate relief.

The court held that petitioner, as a citizen, taxpayer and voter has a sufficient interest in the matters of elections to bring an action in mandamus; resort to a legislative remedy is not an adequate avenue of relief because the Legislature has already spoken on the subject; in order to achieve compliance with the mandatory duty under West Virginia Code section 3-1A-6 (1979) to promulgate rules and regulations necessary to standardize and make effective the administration of the provisions of the West Virginia Election Code, particularly with respect to the enforcement and administration of West Virginia Code section 3-8-9(b) which provides that, "Every liability incurred and payment shall be at a rate and for a total amount which is proper and reasonable and fairly commensurate with the service rendered," the Secretary of State, after consultation with the State Election Commission, has a mandatory duty to: (1) promulgate rules and regulations governing rates of compensation which are proper, reasonable, and fairly commensurate with services rendered candidates, financial agents, or treasurers of political party committees; (2) promulgate rules and regulations governing itemization by providers of the amount and character of services rendered candidates, financial agents, or treasurers of political party committees; and (3) promulgate rules and

regulations governing detailed reporting on campaign financial disclosure forms of the amount and character of services rendered candidates, financial agents, or treasurers of political party committees.

*ROGLIANO v. FAYETTE COUNTY BD. OF EDUC.*, 347 S.E.2d 220 (W. Va. 1986).

*Grounds for Teacher Dismissal—“Rational Nexus” between Conduct and Duties*

A teacher was arrested and charged with possession of marijuana and suspended, pending disposition of his case. Criminal charges were dropped, but the Board conducted a hearing and dismissed him. On appeal, the circuit court remanded the case back to the Board because there was no evidence that the teacher's misconduct impaired his teaching ability. After extensive additional hearings on the subject, the Board found that the teacher's conduct had impaired his teaching responsibilities and dismissed him.

The question was whether the Board demonstrated a “rational nexus” between the teacher's conduct outside of work and the duties the teacher is to perform, i.e., did the conduct directly affect his teaching performance or generate such notoriety as to significantly and reasonably impair his ability to function as a teacher.

The court held that, considering that the Board unnecessarily protracted the proceedings against the teacher, thereby contributing to the adverse publicity and notoriety he attained in the community, together with the fact that the teacher was, by all accounts, an above-average teacher who was well-liked by his students, that the misconduct occurred in private and did not directly involve any student or school personnel, and that he was charged only with a misdemeanor for possession of a small amount of marijuana, the evidence was insufficient to warrant termination of his employment.

*SHELL v. BECHTOLD*, 338 S.E.2d 393 (W. Va. 1985).

*Administrative Sanctions—Enhancement by Municipal Conviction*

Appellant was twice convicted of driving a motor vehicle while under the influence of alcohol, once in West Virginia and four years later in Florida. After notification from Florida, the Commissioner of the W. Va. Department of Motor Vehicles revoked the appellant's drivers license for a period of ten years.

The issue was whether a municipal court conviction for driving a motor vehicle while under the influence of alcohol can be used to enhance the administrative sanction of drivers license revocation.

The court held that under West Virginia Code sections 17B-3-3 and 17C-5A-2, revocation of the appellant's drivers license for a period of ten years following his second conviction for driving while under the influence of alcohol was valid.

*STATE* ex rel. *BOARD OF EDUC. v. CASEY*, 349 S.W.2d 436 (W. Va. 1986).

*Reduction in Principalships—Statutory Provisions Governing Board Actions*

A secondary principal was notified that he was being placed on administrative transfer because his school was going to be closed. He filed a petition for a writ of mandamus requesting that he be placed in the secondary principalship occupied by the least senior principal in the county as per West Virginia Code section 18A-4-8b. The circuit court awarded the writ and the Board seeks prohibition of the enforcement of the court's order.

The major questions raised by the Board's challenge are: (1) Whether the principal failed to exhaust his administrative remedies prior to seeking mandamus relief; (2) whether the trial court's order impermissibly impinged upon the discretion of the County Superintendent and Board of Education with respect to transfers under West Virginia Code section 18A-2-7; and (3) whether the court's order improperly required the Board to violate certain statutory rights of another employee who would be displaced by the respondent principal.

The court held that: (1) Because recourse to the administrative procedures provided under West Virginia Code section 18A-2-7 would have been a futile gesture, the principal was not precluded by the exhaustion of administrative remedies doctrine from seeking extraordinary relief in circuit court; (2) where no vacancy in a secondary principalship currently exists at the time a county board of education votes to close a particular secondary school, a reduction in force of secondary principalships occurs, imposing upon the county board of education, under West Virginia Code section 18A-4-8b, a nondiscretionary duty to notify and release from employment, pursuant to the provisions of West Virginia Code section 18-2-2, the secondary principal with the least amount of seniority, and to place in such secondary principalship the principal whose school is to be closed; and (3) where, as in the present proceeding, violation by the Board of Education prevented notice of discharge or transfer by the first of April to employees who are affected by the exercise of another employee's seniority rights upon a reduction in force, it was sufficient if, in the award of a writ of mandamus compelling recognition of those seniority rights, provision was made for notice on the first of the month immediately following issuance of the writ to employees who are affected, as well as for compliance with the other procedural protections of West Virginia Code sections 18A-2-2 and 18A-2-7.

*WARE v. COUNTY COMM'N*, No. 16832, slip op. (W. Va. Oct. 29, 1986).

*Board of Education Entitlement—Property Tax Revenue*

In this mandamus proceeding, the Webster County Commission had refused to transfer to the Board of Education any part of the principal of the federal

tax compensation money which the county received when the federal government acquired land interests in the county for a wilderness area, but instead, had transferred some of the interest on that money.

The issue was whether the Webster County Board of Education was entitled to a portion of the wilderness area tax compensation money principal itself.

The court held that the County Board of Education was entitled, by statutory right, to the same share of the principal and interest on the federal tax compensation payment as it received from regular tax payments.

WELTY v. BOARD OF EDUC., No. 17228, slip op. (W. Va. July 10, 1986).

*Duties of Board President—Election of County Superintendent*

Petitioner was elected County Superintendent at a Board meeting by three of the five Board members; the other two members had left the meeting after the President adjourned the meeting without taking a vote on the motion to adjourn. The Vice-President certified the petitioner to the State Superintendent and signed the contract with petitioner. At a subsequent Board meeting, the President and two other members voted to elect another person as County Superintendent.

The main issues were: (1) Whether the election of petitioner was valid, and (2) whether the Vice-President acted properly in certifying the petitioner and signing his contract when those tasks are ministerial acts of the President.

The court held that: (1) As per West Virginia Code section 18-5-4 and Board policy, the election of the petitioner was valid; the special meeting was properly called, the meeting was not properly adjourned because the President did not take a vote on the motion to adjourn, and the election of the petitioner by the majority of the Board constituted an official act of the Board; and (2) when the President could not reasonably be expected to perform her ministerial duties of certifying the duly-elected Superintendent and signing the employment contract, the Vice-President was entitled, under Board policy, to perform those duties in her stead. The Board was legally obligated to allow petitioner to assume the duties of his office.

*Patricia A. Morrison*

*See also,*

LABOR AND EMPLOYMENT:

*Smith v. Board of Educ.*, 341 S.E.2d 685 (W. Va. 1985).