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Administrative Law

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ADMINISTRATIVE LAW

I. WEST VIRGINIA HUMAN RIGHTS COMMISSION


Perhaps the most significant development in the area of administrative law during the survey period was the mandate issued by the West Virginia Supreme Court of Appeals to the West Virginia Human Rights Commission (Commission). In an opinion written by Justice McGraw, the court issued several holdings designed to impose a duty upon the Commission and state officials to develop a comprehensive and viable procedural and administrative mechanism evidencing a sincere conviction to enforce the law and implement the legislative policy behind that law ensuring equal opportunity for all.

Allen v. State, Human Rights Commission involved five plaintiffs, four of whom had filed complaints with the Commission in which there had been a finding of probable cause but whose claims had remained dormant for an extended period. One individual plaintiff had attempted to file a claim which the Commission rejected. Responding to the petitioners’ request for mandamus, the court issued its mandate to the Commission. In a compelling opinion the court imposed a duty on the Commission to: (1) accept complaints which meet established criteria; (2) employ at least one full-time hearing examiner; (3) promptly investigate all complaints filed; (4) conduct an immediate conciliation conference following probable cause determinations on all complaints filed; (5) hold public hearings within a reasonable time following probable cause determinations on all complaints filed; and (6) promptly dispose of a backlog of cases hampering its administrative machinery. The court also found that an award for attorneys fees and other costs was particularly appropriate in the proceeding before it. Finally, the court established an elaborate system of judicial administration to ensure compliance with its edict.

As a threshold issue the court addressed the question of whether mandamus was an appropriate remedy for the relief sought. The commission maintained that

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2 Allen v. State Human Rights Comm’n, 324 S.E.2d 99, 108 (W. Va. 1984) (citing W. VA. CODE §§ 5-11-2 (Supp. 1985) which states the legislative intent is to “to provide all of its citizens equal opportunity for employment, equal access to places of public accommodations, and equal opportunity in the sale, purchase, lease, rental and financing of housing accommodations or real property.”).
3 Allen, 324 S.E.2d 99.
4 Id. at 102-05. The plaintiffs: Edith Allen, whose claim had been pending for over seven years; Marguerite Francisco and Virginia Lucas, whose claims had sat idle for over five years; Henry Clay Moore, whose claim had remained dormant for over four years; and Peggy Haid, whose claim initially was improperly rejected and later accepted. Additionally, Douglas T. Davis and Richard H. Fuller, in petitions to intervene, chronicled their claims which had been pending for fifteen years and over three years respectively.
5 Id. at 112-14.
6 Id. at 118-20.
7 Id. at 126-28.
8 Id. at 105.
the statutorily authorized private cause of action⁹ provided an adequate alternative remedy for the petitioners.¹⁰ However, the court recognized that the proper standard indicated that mandamus would not be denied unless the other remedy was equally convenient, beneficial, and effective.¹¹ The court applied the standard and found that the potential for similar delays existed in the future. Consequently, it held the statutorily recognized private cause of action to be ineffective in alleviating the problem prevalent in Allen and thereby found mandamus proper.¹² In response to the respondents’ second contention that action by the Commission is discretionary, the court indicated that a writ of mandamus is proper to “compel the tribunals and officers exercising discretion and judicial power to act, when they fail so to do, in violation of their duty. . . .”¹³ Finding that agency discretion in this instance amounted to agency inaction, the court found it necessary to determine where discretion ended and duty began.¹⁴

Examining the legislative intent behind the West Virginia Human Rights Act, the court found abundant constitutionally and statutorily imposed obligations that require the commission to expeditiously and fairly dispose of claims involving human rights violations.¹⁵ The Legislature found constitutional and statutory guarantees of equal opportunity not to be sufficient to ensure protection of the rights conferred.¹⁶ The administrative mechanism was developed by the Legislature as an attempt to put teeth into what had been token legislation.¹⁷ This administrative mechanism was clearly designed to expedite the process of enforcing each individual claimant’s right to equal opportunity.¹⁸

The court then addressed the individual issues raised by the petitioners. Regarding the docketing of complaints, the court recognized that the West Virginia Code places a mandatory statutory duty¹⁹ on the Human Rights Commission to docket all complaints that meet five criteria: (1) verification; (2) name and address of respondent; (3) description of the alleged discriminatory action or practice; (4) other information as required in rules and regulations promulgated by the Com-

¹⁰ Allen, 324 S.E.2d at 105. “A writ of mandamus will not lie unless three elements coexist—(1) a clear legal right in the petitioner to the relief sought; (2) a clear legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.” State ex rel. Kucera v. City of Wheeling, 153 W. Va. 538, 539, 170 S.E.2d 367 (1969) (syllabus point two); See also Reed v. Hansbarger, 314 S.E.2d 616, 619-20 (W. Va. 1984).
¹¹ Id. at 106 (citing Hardin v. Fogleson, 117 W. Va. 544, 186 S.E. 308 (1936) (syllabus point five)).
¹² Id. at 107.
¹³ Id. (citing Meador v. County Court, 141 W. Va. 96, 87 S.E.2d 725 (1955) (syllabus point three)).
¹⁴ Id.
¹⁶ Id. at 109.
¹⁸ Id. at 111.
¹⁹ Id. at 112 (citing W. VA. Code § 5-11-10 (1979)).
mission; and (5) filing within ninety days after the alleged act of discrimination. Consequently, the court ruled that the failure to docket petitioner Haid's complaint was unlawful.

The court relied upon statutory authorization, case law, and practical considerations in rejecting respondent's contentions that it could not afford to hire a full-time hearing examiner and that part-time examiners were more impartial. The court held that the Human Rights Commission had a statutory duty to hire a full-time hearing examiner, stating that the practical needs of the public and the Commission would be better served.

The court acted upon a finding that legislative intent and procedural due process considerations merged which formed the basis for its imposition of specific guidelines to govern the performance of administrative agency functions. The court relied upon statutory and constitutional provisions mandating prompt resolution of matters before the Commission. The court recognized that the procedural due process right to the prompt disposition of matters pending before administrative agencies in quasi-judicial rules carried with it a concomitant duty on those agencies to act within certain time constraints. Based on these considerations, the court held that the Commissioner had a mandatory duty to hold adjudicatory hearings within 180 days and to issue final orders within one year from the date of filing of complaints upon which it is determined that probable cause for substantiation exists. Further, the court held that the Commission was statutorily empowered to promulgate all rules and regulations necessary and proper to carry out and enforce the West Virginia Human Rights Act. Finally, the court instructed the Commission that one of those rules should provide that hearing dates be set within six months from the filing of all complaints at the time the Human Rights Commission docket those complaints.

Arguably the most pressing problem before the court was the disposition of the tremendous backlog of cases. Despite Commission complaints of lack of fund-

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20 Id.
21 Id.
22 Id. at 112 (citing W. Va. Code § 5-11-6 (1979) which provides that "[t]he commission shall employ a hearing examiner . . . " (emphasis added)).
24 Allen, 324 S.E.2d at 113-14.
25 Id. at 113.
27 Allen, 324 S.E.2d at 119.
28 Id. at 120.
30 Allen, 324 S.E.2d at 121.
31 Id.
ing, administrative impracticabilities, and lack of a legislative adoption of Commission-proposed amendments designed to expedite matters, the court ordered substantial reform. The court related a multitude of statistical information indicating the dire state of affairs while chastising the Commission for dragging its feet and ordered the Commission to establish a part-time hearing examiner program designed to alleviate the backlog of cases facing the Commission.

The court easily resolved the petitioner’s final issue involving reimbursement for attorneys’ fees and other costs associated with the mandamus action. Relying on previous decisions allowing for such recovery in mandamus proceedings where a public officer willfully fails to obey the law, the court had little trouble awarding attorneys’ fees and other costs in what it felt was a particularly appropriate case given the constitutional implications of the respondents’ inaction.

Through the course of its opinion and in its final order, the court enforced what it saw as a statutory duty upon the attorney general to provide the full-time staff and assistance necessary for the Commission to function properly. Additionally, the West Virginia State Bar and other governmental personnel were engaged to effectuate the comprehensive mandate issued by the court. Finally, the court retained jurisdiction over the case in an effort to continue monitoring the situation as a means of fulfilling the legislative intent behind the West Virginia Human Rights Act.

The most significant aspect of the opinion is perhaps the unanimous resolve with which the court approached the problem presented. While the mandate of the court will undoubtedly be viewed by many as another example of judicial meddling with legislative and executive prerogative, such is not the case. The function of the court is to interpret the law, which the court did in finding constitutional and statutory resolve to ensure equal opportunity for all in an efficient, fair, and prompt manner. The court found judicial authority attesting to the propriety of mandamus in situations involving official disregard of legal duties, thereby making it entirely within the court’s bailiwick to act as it did. The court also made a rather effective statement that it would not hesitate to mandate performance of legal duties by government officials and entities who have refused to perform those duties. This was particularly illustrated in a case such as this involving fundamental constitutional rights.

32 Id. at 121-25.
33 Id. at 126-27.
34 Id. at 127 (citing Nelson v. West Virginia Public Employees Ins. Bd., 300 S.E.2d 86, 87 (W. Va. 1982) (syllabus point four); Meadows v. Lewis, 307 S.E.2d 625, 628 (W. Va. 1983) (syllabus point eight)).
35 Id.
36 Id. at 127-28.
37 Id.
38 Id. at 128.
Another decision in the *Allen* case was rendered in mid-1985.\(^9\) All parties, petitioners and respondents alike, including Attorney General Charlie Brown as an intervenor, sought an extension of the court’s retention of jurisdiction in *Allen v. State, Human Rights Commission*.\(^{10}\) The court extended jurisdiction through December 31, 1985, and directed that all cases pending at the time of the original *Allen* decision be heard by October 31, 1985, with proposed findings of fact, conclusions of law, and remedial action to be transmitted to the Human Rights Commission by December 31, 1985.\(^{11}\)

Taken together, the decisions present something of a paradox. While they can be viewed as a reaffirmation of the court’s expressed conviction to put some teeth in the Human Rights Act,\(^2\) it is somewhat curious that seven months after the first *Allen* decision, mandating prompt resolution of cases before the Human Rights Commission, the *Allen* case and others pending at that time are still left unresolved. This would seem to cast some doubt on the viability of the court’s ability to administrate the rather elaborate plan instituted in *Allen*\(^4\) which sought to ensure equal opportunity for all in an expeditious and equitable fashion.

## II. JURISDICTION AND VENUE


During the survey period, the West Virginia Supreme Court of Appeals had occasion to consider the issues of jurisdiction and proper venue in appeals from two different types of administrative proceedings. In *Board of Education, Lincoln County v. MacQueen*\(^3\) the court was concerned with proper venue for obtaining review of a decision made by a state agency not covered by the Administrative Procedure Act. In holding that “[a] writ of certiorari in the Circuit Court of Kanawha County is the proper means for obtaining judicial review of a decision made by a state agency not covered by the Administrative Procedure Act”\(^4\), the court relied upon statutory authority\(^6\) in clarifying inconsistencies between two of its previous decisions.\(^7\) *UMWA v. Kingdon*\(^6\) involved proper venue in appeals from final orders issued pursuant to West Virginia Code section 22-1-30. The court

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\(^{10}\) *Id.* (citing Allen, 324 S.E.2d 99).

\(^{11}\) *Id.*

\(^2\) See W. Va. CODE § 5-11-1 to -19, as construed in Allen, 324 S.E.2d 99.

\(^3\) See Allen, 324 S.E.2d at 127-28.


\(^7\) See Leef v. Via, 293 S.E.2d 442 (W. Va. 1982); *Ginsberg*, 285 S.E.2d 367.

also relied upon statutory authority in holding that a party adversely affected by such a decision is entitled to judicial review either in the Circuit Court of Kanawha County or in the circuit court of the county where the party resides or does business.49

The MacQueen litigation arose as a result of the decision in Jones v. Board of Education.49 The plaintiff in Jones had appealed the decision of the county board of education to demote and transfer her pursuant to the recommendation of the Lincoln County Superintendent of Schools. Reviewing the decision, State Superintendent Roy Truby allowed the transfer but disallowed the demotion. Both sides appealed the State Superintendent’s ruling by writ of certiorari in the Circuit Court of Kanawha County. Subsequently, the Lincoln County Board of Education moved to dismiss the certiorari proceeding in Kanawha County, contending that review of the State Superintendent’s decision was proper in the Lincoln County Circuit Court. Judge A. Andrew MacQueen denied the motion to dismiss, prompting the petitioners to seek review of that denial by way of prohibition to the West Virginia Supreme Court of Appeals. The issue then presented was whether certiorari review of the Jones decision by the State Superintendent lie in the Kanawha County Circuit Court or in the Lincoln County Circuit Court.51

The West Virginia Supreme Court of Appeals focused upon the two avenues of initial review available to employees adversely affected by county board of education personnel actions: administrative review and judicial review.52 Adopting the view taken in State ex rel. Board of Education v. Martin53 and North v. Board of Regents,54 the court found that whether exposed to possible transfer, demotion, suspension, dismissal, or nonrenewal of a probationary contract, a school employee dissatisfied with the local board’s final decision may seek either administrative review by the State Superintendent of Schools or proceed upon writ of certiorari in circuit court,55 which takes the matter de novo.56 The court found adequate statutory, constitutional, and case law to support this position.57 Conversely, by the rule of

50 Jones v. Board of Educ., 294 S.E.2d 113 (W. Va. 1982).
51 MacQueen, 325 S.E.2d at 356-57.
52 Id. at 357.
55 MacQueen, 325 S.E.2d at 357.
Mason County Board of Education v. State Superintendent of Schools, the court found that if the employee does appeal to the State Superintendent, the county board of education has the right to seek review by certiorari in circuit court of any decision adverse to its position.

The court focused next upon the issue of which circuit court was the proper place for certiorari review. The court rejected petitioner's assertion that venue was proper in Lincoln County and dismissed its application for a writ of prohibition. The court therefore found it necessary to overrule syllabus points two and three of Leef v. Via, allowing judicial review by either party in the circuit court of the county in which the teacher was employed, to the extent that Leef was inconsistent with syllabus point two of State ex rel. Ginsberg v. Watt, calling for such review to be in the Circuit Court of Kanawha County. The court refused to apply the rule in Leef due to its perception that the issue there was not one of venue, but instead concerned the timely application for a writ of certiorari following a final administrative order by the State Superintendent of Schools. The Leef decision, however, did attempt to clear up any lingering ambiguity with regard to venue by indicating that venue is proper in the county in which the teacher was employed because "that is where substantially all of the record will have been made." The MacQueen court disagreed, finding instead that statutory authority indicated that "jurisdiction of writs of certiorari . . . shall be in the circuit court of the county in which the record or proceeding is . . ." Relying on a State Board of Education rule mandating that the record of the proceeding before the county board be sent to the State Superintendent in Kanawha County upon appeal, the court found venue proper in Kanawha County, where the record is.

In support of this construction of West Virginia Code section 53-3-1, the court cited syllabus point two of Ginsberg, holding that "[a] writ of certiorari in the Circuit Court of Kanawha County is the proper means for obtaining judicial review of a decision made by a state agency not covered by the Administrative Procedure Act".

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59 MacQueen, 325 S.E.2d at 358.

60 Leef, 293 S.E.2d 442.

61 Ginsberg, 285 S.E.2d 367.

62 The plaintiff in Leef had waited over two years to petition the court for a writ of certiorari, well in excess of the four month limitation imposed in State ex rel. Gibson v. Pizzino, 266 S.E.2d 122 (W. Va. 1980). MacQueen, 325 S.E.2d at 358.

63 MacQueen, 325 S.E.2d at 358.

64 Id. at 359 (quoting Leef, 293 S.E.2d at 445 n.1).

65 MacQueen, 325 S.E.2d at 356 (citing W. Va. Code § 53-3-1 (1981)) (syllabus point two).

66 Id. at 359. See State Board of Educ. Rule 1340.

67 MacQueen, 325 S.E.2d at 359.
Act." While this statutory provision provided sufficient support for its holding, the court went on to further buttress its decision by referring to statutory authority providing that "any suit in which . . . any . . . state officer, or state agency is made a party defendant . . . shall be brought and prosecuted only in the circuit court of Kanawha County." The Court also cited to ample case law revealing the legislative purpose behind the statute and ratifying the statutory provision.

A brief, one paragraph dissent was filed by Justice Neely, who believed that the procedures set forth in Leaf provided a more rational use of judicial resources. Also, he did not feel that the State Superintendent of Schools was a real party in interest which meant that no state officer or agency was a party defendant.

The ultimate significance of the case may lie in a concurring opinion authored by Justice Miller. Addressing what he felt was the real problem in disposing of the litigation, Justice Miller indicated that the reason the court had reluctantly allowed two avenues of initial review, including direct appeal to the circuit court, was that the legislature had not prescribed a comprehensive administrative procedure in handling school personnel grievances. Most likely in response to this sort of criticism, the legislature enacted legislation, effective July 1, 1985, which arguably sets up a more comprehensive administrative procedure for dealing with school personnel grievances. The crux of Justice Miller's criticism was this absence of statutory guidelines which the newly codified legislation seemingly addresses.

The major revision of the previous State Board of Education Rules, as provided by the new legislation, is the revesting of the power to review decisions of the county board of education, which previously rested with the State Superintendent of Schools, in a newly created education employees grievance board. While the statute does not explicitly purport to be a comprehensive administrative procedure, given its timing and its restructuring of the previous procedures in a fashion

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68 Id. (quoting Ginsberg, 285 S.E.2d 367) (syllabus point two).
69 MacQueen, 325 S.E.2d at 359 (quoting W. VA. CODE § 14-2-2(a)(1) (1979)); See W. VA. CODE § 29A-1-3 (Supp. 1984) providing that "the provisions of this chapter do not apply in any respect whatever to . . . the West Virginia board of education . . . "; See also Mason County Bd. of Educ., 160 W. Va. at 349, 234 S.E.2d at 322.
70 MacQueen, 325 S.E.2d at 359-60. (citing Davis v. West Virginia Bridge Comm'n, 113 W. Va. 110, 113, 166 S.E. 819, 821 (1932) (indicating that "the manifest purpose . . . is to prevent the great inconvenience and possible public detriment that would attend if functionaries of the state government should be required to defend official conduct and state's property interests in sections of the commonwealth remote from the capital); State ex rel. Ritchie v. Triplett, 160 W. Va. 599, 236 S.E.2d 474 (1977); Shobe v. Latimer, 162 W. Va. 779, 253 S.E.2d 54 (1979).
71 MacQueen, 325 S.E.2d at 360.
72 Id. at 360-61.
74 MacQueen, 325 S.E.2d at 360-61.
75 W. VA. CODE § 18-29-4(d)(1)-(2) and § 18-29-5 (Supp. 1985).
76 Justice Miller's concurrence was written in January, 1983, while the statute became effective as of July 1, 1985.

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seeming to respond directly to Justice Miller's criticism, it is conceivable that the construction of the statute as a comprehensive administrative procedure could be adopted in subsequent litigation, thereby doing away with the option of judicial review in appealing county school board decisions.

Thus the decision in *MacQueen* is important in two respects. First, it mandates that a writ of certiorari in the Circuit Court of Kanawha County is the proper means for obtaining judicial review of a decision made by a state agency not covered by the Administrative Procedure Act. Secondly, the decision is most likely the impetus behind H.B. No. 1970, which effectively creates a comprehensive administrative procedure for dealing with school personnel grievances, thereby conceivably eliminating the option of initial judicial review of county school board decisions.

In *UMWA v. Kingdom* the court faced another question of venue in administrative proceedings. The petitioners were officials of the United Mine Workers of America (UMWA). The agency proceedings involved a charge initiated against a general mine foreman employed by United States Steel Mining Company (Company). The petitioners contended that this was an action against state officers and the Department of Mines, and consequently that under the West Virginia Code the only proper venue was in the Circuit Court of Kanawha County. The respondents contended that venue was proper in the Circuit Court of Wyoming County because state law dealing with the administration and enforcement of mine and mineral rights required judicial review to be made pursuant to the Administrative Procedure Act (APA). The applicable portion of the APA indicates that "[p]roceedings for review shall be instituted by filing a petition . . . in either the Circuit Court of Kanawha County . . . or in the circuit court of the county in which the petitioner or any one of the petitioners reside or does business. . . ."

While acknowledging that the petitioners did make a logical argument, the West Virginia Supreme Court of Appeals, in an opinion written by Justice Miller,

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77 *UMWA*, 325 S.E.2d 120.
78 *Id.* at 120-21.
79 Members of the Board of Appeals of the Department of Mines and its director were named as respondents in the underlying suit.
80 W. Va. Code § 14-2-2(a)(1) (1985) provides that "Any suit in which the governor, any other state officer, or a state agency is made a party defendant, except as garnishee or suggestee" shall be brought only in the Circuit Court of Kanawha County.
81 *UMWA*, 325 S.E.2d at 120.
82 W. Va. Code § 22-1-30(g) (1981) provides: "Any party adversely affected by a final order or decision issued by the board hereunder shall be entitled to judicial review thereof pursuant to . . . § 29A-5-4 . . . of this Code."
84 The petitioners argued that this choice of venue in administrative appeals would effectively increase the possibility of divergent opinions on similar issues, which would not occur if such appeals were centralized in the Circuit Court of Kanawha County. *UMWA*, 325 S.E.2d at 121.
applied general principles of statutory construction in ruling for the respondents. This general rule of construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.\textsuperscript{85} The court recognized that this was the well settled rule in West Virginia,\textsuperscript{86} and also considered it to be better public policy and more in keeping with the legislative intent behind the APA.\textsuperscript{87} The court also drew further evidence of this legislative intent from other provisions of the code\textsuperscript{88} dealing with enforcement of the Coal Mine Health and Safety Act, calling for review of the Director's order in "the circuit court of the county in which the mine affected is located or in the circuit court of Kanawha County."\textsuperscript{89}

Thus, the court held that under the provisions of West Virginia Code section 22-1-30(g) a party adversely affected by a final order issued pursuant to West Virginia Code section 22-1-30 is entitled to judicial review either in the Circuit Court of Kanawha County or in the circuit court of the county where the party resides or does business.\textsuperscript{90}

III. DISCRIMINATORY DISCHARGE


During the survey period, the West Virginia Supreme Court of Appeals extensively addressed the requisites of a discriminatory discharge claim\textsuperscript{91} before the West Virginia Human Rights Commission (Commission) and the scope of judicial review of a contested case upon appeal.\textsuperscript{92} The court also considered the type of

\footnotesize{\textsuperscript{85} Id. at 121-22.\\
\textsuperscript{86} Id. (citing State ex rel. Sahley v. Thompson, 151 W. Va. 336, 340, 151 S.E.2d 870, 872 (1966); State ex rel. Hill v. Smith, 305 S.E.2d 771 (W. Va. 1983); Hawkins v. Bare, 63 W. Va. 431, 436-37, 60 S.E. 391, 393 (1908).\\
\textsuperscript{87} Id. (citing A. NEELY, ADMINISTRATIVE LAW IN WEST VIRGINIA § 5.51 (1982) construing the issue presented in \textit{UMWA} and dealing with it in a fashion identical to that of the court. Neely indicates the legislature's obvious concern was for the convenience of persons other than the government).\\
\textsuperscript{88} Coal Mine Health and Safety Act, W. VA. CODE § 22-1-18 (1981).\\
\textsuperscript{89} W. VA. CODE § 22-1-18(a) (1981).\\
\textsuperscript{90} \textit{UMWA}, 325 S.E.2d at 122.\\
\textsuperscript{91} The court in \textit{State ex rel. West Virginia Human Rights Comm'n v. Logan-Mingo Area Mental Health Agency, Inc.}, 329 S.E.2d 77, 85 (W. Va. 1985) derived the following requisites for the showing of a \textit{prima facie} case of discriminatory discharge: "(1) that the complainant is a member of a group protected by the Act; [West Virginia Human Rights Act, W. VA. CODE § 5-11-1 to -9 (1979)]; (2) that the complainant was discharged, or forced to resign, from employment; and (3) that a nonmember of the protected group was not disciplined, or was disciplined less severely, than the complainant, though both engaged in similar conduct."\\
\textsuperscript{92} Id. at 85-86. The court indicated that findings of fact of the West Virginia Human Rights Commission should be sustained by reviewing courts if they are supported by substantial evidence or are unchallenged by the parties. Additionally, when the Commission determines that an employer has accorded disparate treatment to members of different races, it is a finding of fact which may not be
damages recoverable by a successful grievant.\textsuperscript{93} In an unanimous opinion by Justice McHugh in \textit{State} ex rel. \textit{West Virginia Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc.},\textsuperscript{94} the court reversed the circuit court ruling and reinstated the Commission finding of discriminatory discharge and an award of damages. The court found that a \textit{prima facie} case had been adequately made before the Commission and that the circuit had exceeded its scope of review.\textsuperscript{95}

The plaintiff in the case, a black female instructor at the Logan County Day Care Center, claimed she had been forced to resign her position at the center.\textsuperscript{96} This forced resignation was the result of a mishap at the center in which the plaintiff and a white instructor were implicated.\textsuperscript{97} The plaintiff claimed that she had been coerced into resignation while her white co-worker, who actually had a worse disciplinary and attendance record than the complainant, had been merely placed on probation.\textsuperscript{98} The Commission concluded that the plaintiff had established a \textit{prima facie} case of racial discrimination, based on disparate treatment, and that the complainant was entitled to compensation for lost wages and for humiliation and suffering.\textsuperscript{99} The employer appealed the Commission’s decision to the Circuit Court of Logan County which reversed the Commission’s holding.\textsuperscript{100} The Commission and the complainant then appealed.

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\textsuperscript{93} \textit{Id.} at 87. The Commission may award incidental damages as compensation for humiliation, embarrassment, emotional and mental distress, and loss of personal dignity, \textit{without} proof of monetary loss. \textit{Pearman v. WVHRC}, 161 W. Va. 1, 239 S.E.2d 145 (1977) (citing \textit{W. Va. CODE} § 5-11-8 (1979)).

\textsuperscript{94} \textit{Logan-Mingo}, 329 S.E.2d 77 (W. Va. 1985).

\textsuperscript{95} \textit{Id.} at 82-88.

\textsuperscript{96} \textit{Id.} at 80.

\textsuperscript{97} \textit{Id.} The incident involved a situation in which one of the students had left the classroom while the plaintiff and the white instructor, her supervisor, had responsibility for the class.

\textsuperscript{98} \textit{Id.} at 81. The evidence indicated that the plaintiff only had a poor attendance record and that she had received one “warning of probation” for sending a note to one child’s parents instructing them to keep the child home. Overall she was found to have a good work record. The white co-worker, on the other hand, had been tardy and absent, received a reprimand for using the center telephone for personal reasons, had reportedly physically abused children on two separate occasions, the second of which resulted in a probationary period, had been sought after at the center by police on two occasions on “bad check” charges, had twice failed to turn in lesson plans, and on one occasion missed a scheduled home visit. Ultimately, the white worker was discharged “due to neglect of job responsibilities.” \textit{Id.}

\textsuperscript{99} \textit{Id.} The Commission ordered the Center to cease and desist all discriminatory practices and instituted comprehensive procedural mechanisms designed to prevent discrimination and inform workers and supervisory personnel of the newly instituted nondiscriminatory policies. The employer was also ordered to pay the complainant $8,750 in back pay with 8% interest per annum from August 19, 1974, until the award was actually paid and $1,250 in incidental damages for humiliation, embarrassment, emotional and mental distress, and loss of personal dignity.

\textsuperscript{100} \textit{Id.} at 82. The reversal was based on a determination that the Commission was clearly wrong, that the discharge of the complainant was justified, and that the claimant had failed to establish a \textit{prima facie} case of racial discrimination.
The court began its discussion by distinguishing the instant situation, discriminatory discharge, from the more conventional situations involving discrimination in hiring brought pursuant to Title VII of the Civil Rights Act of 1964.\(^1\) The court recognized that the tests for establishing a *prima facie* case of discrimination in hiring, as developed in *McDonnell Douglas Corporation v. Green*\(^2\) and *Texas Department of Community Affairs v. Burdine*,\(^3\) must be modified in dealing with the establishment of a *prima facie* case of discriminatory discharge.\(^4\) Those elements that must be established to prove a *prima facie* case of discrimination by the *McDonnell Douglas* rule are:

(1) that the complainant belongs to a protected group under the statute; (2) that he or she applied and was qualified for the position or opening; (3) that he or she was rejected despite his or her qualifications; and (4) that after the rejection, the respondent continued to accept the applications of similarly qualified persons.\(^5\)

The court enunciated two reasons for its modification of the *McDonnell Douglas* formulation. First, the element of *McDonnell Douglas* requiring qualification, while carrying primary significance in the hiring sphere, was deemed inapplicable to discriminatory discharge proceedings since the individual in a discriminatory discharge proceeding may be presumed qualified by the fact of her employment.\(^6\) Secondly, the factor in *McDonnell Douglas* requiring the defendant to continue seeking an employee of plaintiff’s qualification was waived as being more relevant to the defendant’s defense and the plaintiff’s proof of pretext.\(^7\)

Thus, adopting the holding and reasoning of the federal court in *Burdette v. FMC Corporation*,\(^8\) the court held that a complainant in a disparate treatment, discriminatory discharge case brought pursuant to statutory provisions,\(^9\) may meet the initial *prima facie* burden through proving by a preponderance of the evidence: (1) that the complainant is a member of a group protected by the Act; (2) that the complainant was discharged, or forced to resign, from employment; and (3) that a nonmember of the protected group was not disciplined, or was disciplined less severely, than the complainant, though both engaged in similar conduct.\(^10\) The heart of an unlawful discrimination case, in the court’s eyes, was whether members of a protected group were accorded different treatment than nonmembers engaged in similar activity.\(^11\) Additionally, substantial support for

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1. *Id.* at 82 (referring to 42 U.S.C. § 2000 (1982)).
4. *Logan-Mingo*, 329 S.E.2d at 83 (citing 3 EMPLOYMENT DISCRIMINATION § 86.40 (1975)).
5. *Id.* (citing Shepherdstown VFD v. West Virginia Human Rights Comm’n, 309 S.E.2d 342 (W. Va. 1983)).
6. *Id.* at 85 (citing Burdette v. FMC Corp., 566 F. Supp. 808 (S.D. W. Va. 1983)).
7. *Id.* (citing *Burdette*, 566 F. Supp. 808).
the Burdette formulation was found in the decision of other courts which had adopted the same or similar formulations.112

The West Virginia Supreme Court of Appeals then focused its attention upon the reviewing court's decision that the complainant had failed to establish a prima facie cae of disparate treatment and discriminatory discharge. The court recognized the limited scope of the circuit court's review of an order or decision by the Commission113 as statutorily mandated in the state Administrative Procedure Act's provisions for review of contested cases,114 and as affirmed by the standard of review imposed by the United States Supreme Court in actions brought under Title VII of the Civil Rights Act of 1964.115 Thus, the court held that a determination by the West Virginia Human Rights Commission that an employer has accorded disparate treatment to members of different races is a finding of fact which may not be reversed by a circuit court upon review, unless such finding is clearly wrong in view of the reliable, probative, and substantial evidence on the whole record.116

Reviewing the circuit court decision to reverse the findings of the Commission, the court took exception to the decision by both bodies to have the complainant prove, as part of her prima facie case, that the discharge was not justifiable.117 Essentially, both tribunals placed too heavy a burden on the complainant in requiring that she show that the discharge was unjustifiable, with the circuit court erroneously concluding that she had not established a prima facie case of racial discrimination.118 The correct standard, derived from Burdette v. FMC Corporation,119 did not require the complainant to show that her discharge was unjustifiable in establishing her prima facie case.120

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114 Logan-Mingo, 329 S.E.2d at 85 (citing W. Va. Code § 29A-5-4(g) (1980)).


116 Logan-Mingo, 329 S.E.2d at 86.

117 Id. The circuit court required proof that the discharge was unjustified while the Commission required the complainant to show that the conduct for which she was discharged did not justify the discharge.

118 Id. (citing United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983)).

119 Burdette, 566 F. Supp. 808.

120 Burdette required the complainant to show: (1) that she is a member of a group protected by the Act; (2) that she was discharged, or forced to resign, from employment; and (3) that a nonmember of the protected group was not disciplined, or was disciplined less severely, then the complainant, though both engaged in similar conduct. Logan-Mingo, 329 S.E.2d at 83 (citing Burdette, 566 F. Supp. 808).
Essentially, in requiring the complainant to show that her discharge was unjustifiable, a circuit court implicitly suggested that a prevailing employer has successfully rebutted the complainant’s burden of showing that the discharge was unjustifiable, a burden not properly imposed upon the complainant. The employer’s only burden was to clearly explain the nondiscriminatory reasons for its actions, not to rebut the complainant’s claim that the discharge was unjustifiable. Therefore, the supreme court decided that the employer had met its burden by offering evidence that the discharge was motivated by the complainant’s poor attendance and work performance.

The supreme court recognized that this error resulted in neither the Commission nor the reviewing circuit court considering whether the reasons given for the discharge by the employer amounted to a pretext for discrimination. The Commission had found overwhelming evidence of disparate treatment, which is not only useful in establishing a prima facie case of negligence but is probative of pretext as well. The implication of such a finding is that the complainant may prove that she has been a victim of intentional discrimination in one of two ways. She may either show, through her prima facie case, that there existed a discriminatory motivation on the part of her employer or, through proof of pretext, show that the employer’s explanation is not worthy of credence. Thus, the Commission’s finding of disparate treatment, which the circuit court did not review, was held to be sufficient proof of pretext as supported by substantial evidence in the record.

The court relied upon ample support in the record as well as statutory authorization in rejecting the employer’s contention that the $1,250 awarded as damages for humiliation, embarrassment, emotional and mental distress, and loss of personal dignity was not supported by the evidence. The court did not address employer’s contention that the complainant had received double recovery of her backpay as there was no evidence of this double recovery in the record.

The Logan-Mingo court defined the requisites of establishing a claim for disparate treatment and discriminatory discharge, and also defined the scope of judicial review of a decision by the West Virginia Human Rights Commission.

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121 Id. at 86.
122 Id. (citing Burdine, 450 U.S. at 260 (1981)).
123 Id.
124 Id. at 87.
125 Id.
126 Id. W. Va. CODE § 5-11-8 (Supp. 1985) (authorizing the award of “incidental damages as compensation for humiliation, embarrassment, emotional and mental distress, and loss of personal dignity, without proof of monetary loss” Pearlman, 161 W. Va. 1, 239 S.E.2d 143 (syllabus point one)).
127 Id. Ms. Bradsher was alleged to have been awarded pay for that period on the basis of another unrelated claim before the Commission. Id. at 87.
128 Id.
129 Id. at 85-86.
The significance of the case lies in the recognition of a cause of action for disparate treatment and discriminatory discharge, and the relative ease with which a prima facie case may be established when compared to the requisites needed to establish a prima facie case of discrimination in hiring practices. While some might argue that this amounts to an unfair shifting of the burden of persuasion to the employer, the rationale of the court is sound and the reasons for eliminating elements essential toward proving discrimination in hiring practices are warranted and logical. In assessing the scope of the circuit court review, the Supreme Court of Appeals essentially applied the limits to judicial review imposed by statute.

IV. CONTESTED CASES

Princeton Community Hospital v. State Health Planning, 328 S.E.2d 164 (W. Va. 1985)

Twice during the survey period the West Virginia Supreme Court of Appeals had occasion to reiterate and further entrench an earlier holding addressing judicial review of a contested case under the Administrative Procedure Act. In Conner v. Civil Service Commission, the court reversed the circuit court’s decision to alter the Civil Service Commissioner’s award of “reasonable” attorney fees. In consolidated cases, the court in Princeton Community Hospital v. State Health Planning overturned the circuit court decision to reverse a final agency determination that did not authorize the funding of a construction and renovation program at both Bluefield Community Hospital and Princeton Community Hospital Association.

Each decision was made on the basis of West Virginia Code section 29A-5-4(g) and judicial construction of that statute. The provisions of the statute, as so construed, are as follows:

Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order of decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are: “(1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory

130 Shepherdstown, 309 S.E.2d 342 (syllabus point two).
133 Id.
135 Id.
137 Shepherdstown, 309 S.E.2d 342.
authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."[138]

In Conner, the Civil Service Commission had awarded the plaintiff $6,272.40 for attorney fees stemming from a successful challenge to his discharge from a civil service position. The circuit court increased this fee to $12,936.40.[139] Finding that the Commission had been legislatively delegated authority to award reasonable and necessary attorney fees where actions were brought without good cause,[140] the court held that the circuit court was without authority to modify the fees awarded by the Commission unless the Commission's decision was appropriately characterized by a provision of West Virginia Code section 29A-5-4(g).[141]

Similarly, in Princeton the supreme court reversed a decision by the circuit court to allow funding for a proposed hospital construction and renovation program. This decision by the circuit court was contrary to the Tax Commissioner's affirmation of the State Health Planning and Development Agency's decision not to authorize the funding.[142] Once again the court found adequate statutory authority for the analysis of the administrative agency[143] which had found the funding plan inconsistent with the State Health Plan.[144] This determination was deemed by the supreme court to sufficiently comply with the appropriate statutory provision mandating that such plans be both necessary and consistent with the State Health Plan.[145] Essentially, since the funding plan had been found to be inconsistent with the State Health Plan there was no reason to determine the need for the construction project.

In reversing the circuit court and reinstating the administrative decision, the supreme court indicated that under the review standards set forth in the West Virginia Code[146] an agency's determination of matters within its area of expertise is entitled to substantial weight. However, the court did recognize the propriety of judicial review but indicated that the review must be performed with conscientious awareness of its limited nature.[147]
The cases clearly indicate that the statutory standards for judicial review of contested cases under the Administrative Procedure Act will be strictly imposed. Furthermore, the court has defined judicial review of administrative decisions as being very limited in nature. Thus the court has taken a stand of deference toward the decisions of administrative agencies so long as they act in compliance with their statutorily delegated powers in reaching those decisions.

V. ASSIGNMENT OF OBLIGATIONS TO THE STATE AS REIMBURSEMENT FOR BENEFITS RECEIVED


In *State ex rel. Department of Human Services v. Huffman*, the court was called upon to answer a certified question:

Whether the West Virginia Department of Human Services can legally obtain a judgment against a parent or other relative for reimbursement to the state for Aid to Families with Dependent Children benefits paid absent a prior court order or administrative determination fixing an amount of support that the parent is able to pay?

The facts of the case involved a defendant who had abandoned his wife and three children from November 7, 1981, until April, 1984. Upon the defendant's return, the Department of Human Services attempted to recoup $7,139 in Aid to Families with Dependent Children benefits that had been paid to the defendant's family in his absence.

The court applied a twofold analysis, beginning with the standing of the State Department of Welfare to enforce support obligations assigned to the state pursuant to statutory provision. That statutory provision provides that the Department of Human Services stands in the place of, and succeeds to all the legal rights and remedies of, a parent or guardian to maintain an action to enforce these rights.

Having resolved that the Department of Human Services acceded to and had standing to enforce the rights of the defendant's wife, the more significant question became the scope of the rights to which the department had been subrogated. The court found that the department did not obtain any more rights than those of

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149 *Huffman*, 332 S.E.2d at 868-69.
150 *Id.* at 868.
151 W. Va. CODE § 9-3-4 (1979) provides in pertinent part:
[a]ny recipient of financial assistance . . . shall, upon receipt of such assistance be deemed to have assigned to the West Virginia department of welfare all rights, title and interest such recipient may have to the receipt of support and maintenance moneys from any person responsible for the support and maintenance of any member of the benefit group . . . .
152 *Huffman*, 332 S.E.2d at 868-69.
the original obligor. Essentially, the amount sought by the department, the actual amount of AFDC benefits paid, was considered by the court to represent a ceiling on state recoupment, but not to represent the amount necessarily recoverable. In that regard, the court found that the defendant's obligation for reimbursing the department was limited to the amount he could have paid in support and maintenance.153 Since the defendant was an indigent, West Virginia statutory provisions limiting a parent's debt to the amount established in a court order or final decree of divorce, if the amount in such order or decree is less than the amount of assistance paid, was considered analogous and applicable.154 Essentially, the applicable statutory provisions indicated that an individual should not be required to pay more than he is able.155

Ostensibly, the court seems to have reached a decision mandated by practical and equitable considerations. While recognizing a legislative intent to allow the Department of Human Services to recoup aid rendered to individuals, the court also recognized practical limitations on that ability to collect when it limited the amount recoverable to that which the individual was able to pay.

VI. EXHAUSTION OF ADMINISTRATIVE REMEDIES


The West Virginia Supreme Court of Appeals essentially reaffirmed the general rule that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act.156 The case involved a writ of prohibition, filed by the Secretary of State (Secretary), seeking to restrain the trial court from enforcing two orders. One order enjoined the Secretary from disclosing to the public certain information about the employees of Southeastern Security & Investigation (S. S. & I.), and the second enjoined the Secretary from conducting an administrative hearing to determine whether S. S. & I.'s private detective/investigator's license should be suspended or revoked.157

The controversy centered around the fact that S. S. & I. had employed at least three convicted felons in violation of the statute regulating licensing of private detectives and investigators,158 and the Secretary had attempted to obtain information concerning others employed by S. S. & I. Eventually, in response to S. S. & I.'s petition for prohibitory and injunctive relief, the trial court ordered S. S. & I.

153 Id. at 870.
155 Huffman, 332 S.E.2d at 871.
157 Id. at 803.
158 Id. at 804.
to give the Secretary a list showing the names, birthdates, social security numbers, and residence addresses of all its employees while requiring the Secretary to maintain the confidentiality of such information.\textsuperscript{159} The trial court then issued a preliminary injunction, and subsequently refused to dissolve that order.\textsuperscript{160} A writ of prohibition was then sought by the Secretary.

In holding that the trial court had exceeded its jurisdiction in issuing the injunction against the holding of an administrative hearing, the court accepted the arguments of the Secretary. The arguments were that the trial court had exceeded its jurisdiction on the grounds that S. S. \& I. had failed to exhaust its administrative remedies, had failed to prove irreparable harm, and had failed to prove the inadequacy of available legal remedies.\textsuperscript{161}

The court's analysis of this point focused upon statutory provisions\textsuperscript{162} and regulations promulgated by the Secretary\textsuperscript{163} which set up adequate administrative procedures for dealing with S. S. \& I.'s grievance.\textsuperscript{164} Substantial case authority recognizing administrative remedies provided by statute as one form of adequate legal remedy was discussed in determining that the trial court had exceeded its jurisdiction.\textsuperscript{165} Of particular utility in this regard was Cowie v. Roberts, recognizing that the exhaustion of administrative remedies is a well-established rule in this jurisdiction.\textsuperscript{166} The court found this general rule to be applicable in the Hechler case, and it was instrumental in the court's finding that the trial court had exceeded its jurisdiction thus rendering a writ of prohibition a matter of right.\textsuperscript{167}

The court then went on to address two matters of first impression in West Virginia: (a) a definition of invasion of privacy under the Freedom of Information Act\textsuperscript{168} and (b) a determination of what constitute law enforcement investigatory records under the Act.\textsuperscript{169} A preliminary observation by the court was that the provisions of the Act are to be liberally construed while its exemptions were to be strictly construed, ostensibly to provide optimum freedom of information.\textsuperscript{170} The holding pertaining to the invasion of privacy exemption indicated that it did not apply to a list of names and addresses of security guards furnished to the Secretary pursuant to his licensing and regulation of the guards' employer, since such information was not personal in nature but consisted of public facts, and since the risk

\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{162} W. VA. CODE § 30-18-1 to -8 (1980).
\textsuperscript{163} §§ 2.03, 3.03, 3.04, 4.01, 4.02, 9.01, 9.02, 9.03, and 9.04.
\textsuperscript{164} Hechler, 333 S.E.2d at 804-05.
\textsuperscript{165} Id. at 805-06.
\textsuperscript{167} Hechler, 333 S.E.2d at 807.
\textsuperscript{168} W. VA. CODE § 29B-1-1 to -6 (1980).
\textsuperscript{169} Hechler, 333 S.E.2d at 808.
\textsuperscript{170} Id.
of harm from disclosure was speculative.\textsuperscript{171} Since the information in question was not part of an inquiry into specific suspected violations, but was generated pursuant to routine administration of statutory provisions and regulations,\textsuperscript{172} and since it did not reveal confidential investigative techniques or procedures,\textsuperscript{173} the court held that the law enforcement exemption did not apply.

The final question before the court was the recovery of attorney fees by the state. The court did not allow the state to recover attorney fees primarily because no damages were suffered by the state in that the members of the Attorney General’s office used in litigation were retained on a salary basis.\textsuperscript{174} Perhaps the real reason behind its refusal to award the attorney fees was the perceived chilling effect any award might have on a person’s constitutional rights to apply to government for a redress of grievances and to have the courts of the state open to him.\textsuperscript{175} Therefore, the state was not allowed to recover reasonable attorney fees incurred, either as “costs” or as “damages.”\textsuperscript{176}

Thus, the court has indicated that available administrative remedies have been and will continue to be considered adequate remedies at law effectively precluding equitable and injunctive relief prior to exhaustion of those administrative remedies. One caveat, however, lies in the fact that those remedies must be provided pursuant to properly delegated and exercised legislative power. The more significant decision of the court was the strict construction given the two exemptions to the Freedom of Information Act indicating that they may only be invoked in a narrowly defined set of circumstances. This decision was in keeping with the construction given similar exemptory provisions in other state and federal decisions, and was also in keeping with the design of the Act to provide optimum access to gathered information.

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\textsuperscript{171} Id. at 811.
\textsuperscript{172} Id. at 813.
\textsuperscript{173} Id.
\textsuperscript{174} Id. at 815.
\textsuperscript{175} Id. at 816-17.
\textsuperscript{176} Id. at 817.