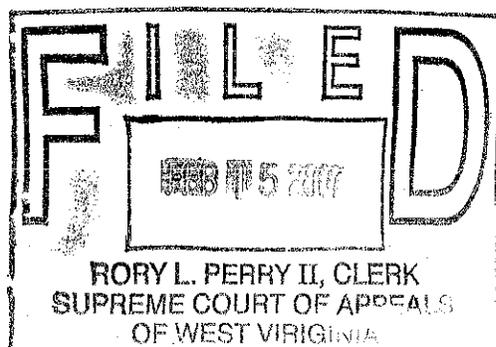


No. 061719

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

THE WEST VIRGINIA UNIVERSITY
BOARD OF GOVERNORS, THE
STAFF COUNCIL OF WEST VIRGINIA
UNIVERSITY, TERRY NEBEL, AND
CHARLES L. MILLER, JR.,

Appellants/Plaintiffs Below,



VS.

THE WEST VIRGINIA HIGHER
EDUCATION POLICY COMMISSION,

Appellee/Defendant Below.

APPELLEE'S BRIEF

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POLICY COMMISSION
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I.

**KIND OF PROCEEDING AND NATURE OF
THE RULING BELOW**

Appellants filed this action in Kanawha County Circuit Court seeking a declaratory judgment to determine whether the West Virginia Higher Education Policy Commission had the authority and jurisdiction to order that all higher education classified employees had to be paid at or above the "zero" step for their paygrade by July 1, 2005, on the salary schedule contained in W. Va. Code § 18B-9-3. The parties entered into a set of stipulations, submitted additional affidavits and documents, and filed cross-motions for summary judgment. Following a hearing, Circuit Judge Charles E. King ruled in an Order dated April 7, 2006, that the Commission had that jurisdiction and authority and that the West Virginia University Board of Governors had a duty and responsibility to abide by the rules and directives of the Commission on this issue. Appellants claim the circuit court was in error.

II.

STATEMENT OF FACTS

The facts in this matter are not in dispute. The extensive history in this matter, along with the relevant statutes, rules and policy actions, were detailed in stipulations agreed to by all parties.

At the center of the controversy is the relationship between the West Virginia Higher Education Policy Commission (hereinafter "Commission") and the governing boards of state institutions of higher education arising out of the restructuring of higher education by the Legislature in the year 2000. Particularly at issue is the salary schedule for classified employees established in W.

Va. Code § 18B-9-3 and the relative responsibilities and authority between the Commission and institutional governing boards regarding that salary schedule.

Briefly restating the facts agreed to by the parties, prior to July 1, 2000, the state institutions of higher education were governed by two separate governing boards - - - the State College System Board of Directors for the four-year and two-year institutions and the University System Board of Trustees for the universities. In 2000, the Legislature abolished these two state-wide governing boards and replaced them with two bodies - - - the Commission, which was to "be responsible to develop, gain consensus around and oversee the public policy agenda for higher education and other statewide issues. . .", W. Va. Code § 18B-1B-1, and an Interim Governing Board, which was to exist only from July 1, 2000, through June 30, 2001, and would exercise the powers and duties of the two previous state-wide governing boards. On July 1, 2001, a board of governors was established at each individual institution of higher education, and certain powers and duties were granted to each board of governors. W. Va. Code § 18B-2A-1, W. Va. Code § 18B-2A-4.

However, the Commission retained a broad range of powers, duties and regulatory authority over the governing boards. See, W. Va. Code § 18B-1B-4. Among these powers were: developing and approving a state master plan for higher education; allocating appropriations among institutions; approval of institutional master plans outlining mission, degree offerings, resource requirements, physical plant and personnel needs, and enrollment levels; approval of institutional rules and policies; approval of the appointment and compensation of institutional presidents; approval of capital projects over \$1 million dollars; approval of tuition and fee increases; approval of institutional issuance of bonds; review and approval of academic programs; implementation of uniform standards for placement of students in remedial or development courses; implementation of transferability of credits standards;

establishment of purchasing practices and procedures for institutions; and submission of budget requests for institutions to the Governor and Legislature. ¹ See, W. Va. Code § 18B-1B-4.

Also, all orders, resolutions, policies and rules of the former State College System Board of Directors and University System Board of Trustees were transferred to the Commission and were to remain in effect and binding on the new boards of governors until the Commission amended or rescinded them, or transferred them to the governing boards. W. Va. Code § 18B-1-3(h). Additionally, title to all real property which higher education institutions utilized was transferred to the Commission. And to ensure the Commission had all power and authority needed to carry out its duties, the Legislature additionally granted the Commission "... such other powers and duties as may be necessary or expedient to accomplish the purposes of this article." W. Va. Code § 18B-1B-4(c).

Specific to the controversy at issue, the Commission was authorized to promulgate rules "... for the purpose of standardizing, as much as possible, the administration of personnel matters among the institutions of higher education." W. Va. Code § 18B-1B-4(a)(33). The Commission was also required to "... establish, control, supervise and manage a complete, uniform system of personnel classification. ..." for classified employees at the institutions. W. Va. Code § 18B-9-1.

There is a long history of legislative enactments centralizing the classification and compensation of classified employees at the state level. The previous state-wide governing boards promulgated Series 62 of their rules establishing an uniform classification and compensation system.

¹ Since 2004, the Commission shares some of these powers with the Council for Community and Technical College Education, but Appellee will not reference these to avoid confusion. Also, in 2005, the Legislature granted certain flexibilities to Marshall University and West Virginia University which are not relevant to the issue in controversy.

Section 12 of Series 62 required that employees whose salaries were below the minimum for their paygrade be increased to at least the minimum [i.e. the "zero" step] for their paygrade. (The "zero" step was called that because it represents the step on the paygrade for a person with "zero" years of experience.) In 1994, a salary schedule was enacted at W. Va. Code § 18B-9-3 that set minimum salaries for each paygrade and provided higher minimums for each year of experience.

In 2001, W. Va. Code § 18B-9-3 was amended, effective July 1, 2001, to increase the minimums of the salary schedule set out therein. Series 62, which was still in effect, as set out above, and described further below, provided that all classified employees be paid at least the minimum for their paygrade, which could have been interpreted to require everyone below the minimum "zero" step on the new salary schedule to receive an immediate increase to the new "zero" step.

At its June 29, 2001 meeting, the Commission adopted guidelines for governing boards regarding salary increases under the new salary schedule. The guidelines stated, "That the institutions are to establish a multi-year salary policy to make even and significant progress toward the full implementation of the new salary schedule, including movement of current employees who are below the equity (zero) step on the salary schedule to the equity (zero) step." Subsequently, at its August 2, 2001 meeting, the Commission was presented with an agenda item recommending that campuses be allowed to take up to two years to move employees to at least the zero step. It was moved and approved "That the Chancellor's office revise Rule 62 and develop a plan to phase in the full implementation of the salary schedule over a period of years, offering flexibility to the institutions to develop their own plans within the guidelines." At its next meeting three weeks later on August 30, 2001, the Commission approved amending Series 62 - - - which had been transferred to the Commission's jurisdiction by W. Va. Code § 18B-1-3(h) - - - and redesignating it as Series 8 under

the Commission's new Title 133 assigned by the Secretary of State's Office. The resolution accompanying that action stated an "understanding that a four-year time frame is allowed for having all current and new employees paid at the entry ["zero"] step."

At its meeting on October 19, 2001, the Commission amended Series 62 under its new designation of Title 133, Series 8. The agenda item accompanying the amendment made it clear that "The revision allows for up to four years to fund the entry (zero) step." Section 12.1 of the amended Series 8 provided that "The entry rate for any classified employee appointed on or after July 1, 2005 shall not be below the entry (zero) step set out in W. Va. Code § 18B-9-3 for the pay grade assigned." The new Series 8 became effective on November 22, 2001. At its meeting on April 19, 2002, the Commission reiterated its guidelines for salary increases and the entry rate, adopting a resolution that "Classified Employees shall be compensated based on the salary goals established by the institutional governing board or Higher Education Policy Commission. Institutional plans for moving classified employees to the zero step should continue so that all current and new employees are being paid at the zero step, or above, by FY 2005."

At its meeting of July 1, 2005, the West Virginia University (hereinafter "WVU") Board of Governors directed its administration not to implement the provisions of § 12.1 of Series 8 and not to bring all current and new employees to the zero step by July 1, 2005. Every other public higher education institution in the state complied with the directives of the Commission and Series 8 by July 1, 2005, except West Virginia State University, which subsequently complied when their error was pointed out.

The Appellants then brought an action for declaratory judgment in the Circuit Court of Kanawha County seeking a ruling that West Virginia University need not abide by the rules and

directives of the Commission to pay all of West Virginia University's classified employees at or above the "zero" step for their paygrade on the schedule in W. Va. Code § 18B-9-3. Circuit Court Judge Charles E. King granted summary judgment to the Commission, and the Appellants brought this appeal

III.

ARGUMENT

1. THE CIRCUIT COURT DID NOT ERR IN RULING THAT THE COMMISSION HAD THE JURISDICTION AND AUTHORITY TO REQUIRE ALL HIGHER EDUCATION CLASSIFIED EMPLOYEES TO BE PAID BY JULY 1, 2005, AT OR ABOVE THE "ZERO" STEP FOR THEIR PAYGRADE ON THE SALARY SCHEDULE IN W. VA. CODE § 18B-9-3

Though Appellants couch their argument as error on the part of the circuit court in allowing the Commission to "alter" WVU's salary policy, the issue is much simpler than Appellants present. The circuit court was merely asked to address whether the Commission had the jurisdiction and authority to require all higher education classified employees to be paid the minimum salary for an employee with "zero" years of experience on the salary schedule in W. Va. Code § 18B-9-3 by July 1, 2005. The Commission's actions in this regard did not constitute any attempt to set salaries at any other level --- only the minimum starting salary. It was not only proper, but a duty, for the Commission to take such action.

W. Va. Code § 18B-9-1 expresses the Legislative purpose of Article 9 of Chapter 18B as requiring the Commission "... to establish, control, supervise and manage a complete, uniform system of personnel classification. ..." for higher education classified employees. It cannot be any clearer that the Legislature wanted a strong central control by the Commission over the classification and

compensation system set out in the salary schedule in W. Va. Code § 18B-9-3. Though Appellants claim the Commission is an entity of limited powers, the Legislature specifically established the Commission to “. . . be responsible to develop, gain consensus around and oversee the public policy agenda for higher education and other statewide issues. . .” W. Va. Code § 18B-1B-1. A statewide classification program certainly qualifies as a “statewide issue.”

The circuit court noted the wide range of powers assigned to the Commission which constitute a vast tapestry that must be examined with care to determine Commission powers and duties in relation to the new boards of governors at the individual institutions. Examination of the enunciated powers of the Commission contained at W. Va. Code § 18B-1B-4 is only a starting place in making the determination that the circuit court did. One must also note W. Va. Code § 18B-9-4(a), which places the Commission in charge of implementing “an equitable system of job classifications” and provides that “The equitable system of job classification and the rules establishing it which were in effect immediately prior to the effective date of this section are hereby transferred to the jurisdiction and authority of the Commission and shall remain in effect unless modified or rescinded by the Commission.” W. Va. Code § 18B-9-4(a) [*Emphasis added.*]

True, as Appellants claim, the individual governing boards are authorized to “administer a system for the management of personnel matters, including but not limited to, personnel classification, compensation and discipline. . .”, but that general grant is qualified by a preamble to that statute that such administration is “subject to the provisions of federal law and pursuant to the provisions of . . . [W. Va. Code § 18B-9-1 et seq. - - - the equitable classification article] . . . and to rules adopted by the Commission. . .” W. Va. Code § 18B-2A-4(j). Further emphasizing this Commission authority is W. Va. Code § 18B-1B-4(a)(33) which allows the Commission to promulgate “. . . rules as

necessary or expedient to fulfill the purposes of [Chapter 18B] “. . . and, specifically . . .” for the purpose of standardizing, as much as possible, the administration of personnel matters among the institutions. . .” W. Va. Code § 18B-1B-4(a)(33). And then there is W. Va. Code § 18B-1B-4(c) which grants the Commission “. . . such other powers and duties as may be necessary or expedient to accomplish the purposes . . .” of that article. ²

To counter this extensive assignment of responsibility to the Commission, Appellants rely on only two things - - - language in W. Va. Code § 18B-9-4(b) which they claim nullifies the Commission’s directives, and faulty beliefs that Series 8 of the Commission is somehow invalid. Both beliefs are flawed. (Series 8 and its continued validity will be discussed below).

W. Va. Code § 18B-9-4(b), which Appellants claim has the “greatest significance to this case”, states that “any classified salary increases distributed within a state institution of higher education after the first day of July, two thousand one shall be in accordance with the uniform classification system and a uniform and equitable salary policy adopted by each individual board of governors.” (*Emphasis added.*) Appellants believe the language after the conjunction puts the WVU Board in sole authority as to salaries and trumps all other language assigning responsibility to the Commission. What they neglect to emphasize is the language before the conjunction which says that salary increases must also be in accordance “. . . with the uniform classification system. . .” of which the Commission is in charge. Yes, the language places responsibility on WVU to adopt a salary policy, but the Legislature has emphasized that salary increases also shall be in accordance with the Commission uniform classification system. Furthermore, what Appellants have challenged in this action is the language in

²

The Court may also take note of further Legislative intent to maintain the Commission as a centralizing determinant of personnel policy by assigning it in 2005 the responsibility to study 13 individual personnel issues and report to the Legislature its recommendations. See, W. Va. Code § 18B-1B-13.

Series 8 of the Commission's rules that mandated that all new employees after July 1, 2005 be paid at the minimum salary of the "zero" step on the salary schedule. New employees do not get a "salary increase", which W. Va. Code § 18B-9-4(b) supposedly regulates - - - they get the starting minimum wage. Thus W. Va. Code § 18B-9-4(b), which Appellants solely rely on in WVU's refusal to pay the minimum wage, is totally inapplicable since a minimum wage for new employees does not involve a "salary increase" - - - it's the beginning salary, and W. Va. Code § 18B-9-4(b) only deals with "salary increases."

In their Footnote No. 11, Appellants criticize as "ludicrous" this distinction pointed out to the Court by the Commission. However, both parties agree that statutes should be read and applied together, and the language of W. Va. Code § 18B-9-4(b) specifically speaks to "salary increases" - - - not "starting salaries", and thus it is important to point out this distinction and flaw in appellants' version of the statutory context.

This Court is faced with a simple matter of statutory construction. At the core of any statutory construction is determining the legislative intent underlying the statutes at issue. Ewing v. Bd. of Educ. of the County of Summers, 202 W. Va. 228, 241, 503 S.E.2d 541, 554 (1998); Syl. Pt. 2, Mills v. Van Kirk, 192 W. Va. 695, 453 S.E.2d 678 (1994). "In ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation." Ewing, supra; Syl. Pt. 2., Smith v. State Workmen's Comp. Comm'r., 159 W. Va. 108, 109, 219 S.E.2d 361, 362 (1975); Syl. Pt. 3, State ex rel. Fetters v. Hott, 173 W. Va. 502, 503, 318 S.E.2d 446, 447 (1984). Furthermore, "Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." Syl. Pt. 2, W. Va. Dep't. of Health and Human Res. v. Hess, 189 W.

Va. 357, 358, 432 S.E.2d 27, 28 (1993).

Appellants have focused on a few individual threads instead of stepping back and viewing the rich tapestry which all the threads together form. It is a court's duty to examine the whole tapestry when statutory construction is called for. An oft quoted syllabus point of this Court is that "A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith." Syl. Pt. 5, State v. Snyder, 64 W. Va. 659, 63 S.E. 385 (1908). Reliance on isolated phrases in code, as urged by Appellants, instead of analysis of the whole tapestry of legislation, is to be avoided. "In the construction of a legislative enactment, the intention of the legislature is to be determined, not from any single part, provision, section, sentence, phrase or word but taken from a general consideration of the act or statute in its entirety." Syl. Pt. 1, Parkins v. Londeree, 146 W. Va. 1051, 124 S.E.2d 471 (1962).

Appellants ignore the holistic approach on this issue and proffer the cases where this Court has ruled that "... a specific statute be given precedence over a general statute relating to the same subject..." Appellant's Brief at 10. And in their opinion W. Va. Code § 18B-9-4(b) is that specific statute that trumps the general. However, the specificity of that statute is lacking in the manner Appellants seek to utilize it, in that it has more qualifications attached to it than earmarks attached to a federal appropriations bill.

First, W. Va. Code § 18B-9-4(b) limits the application of that statute to "salary increases" --

- not establishment of a minimum or “zero” step - - - and the salary increases must be in “accordance with the uniform employee classification system” of the Commission. Second, the Legislative purpose of that article is cited as being a requirement by the Commission . . . “to establish, control, supervise and manage a complete, uniform system of personnel classification . . .” for classified employees. The personnel classification system referenced there is defined as “the process of job categorization adopted by the Commission . . . by which job title, job description, pay grade and placement on the salary schedule are determined . . .” W. Va. Code § 18B-9-2(g) [*Emphasis added.*] The Commission’s rules and directives mandated placement of new and present employees on the “zero” step of the salary schedule. Third, W. Va. Code § 18B-9-4(a) specified that the “equitable system of job classification and the rules establishing it . . . are hereby transferred to the jurisdiction and authority of the Commission and shall remain in effect unless modified or rescinded by the Commission.” This further qualifies W. Va. Code § 18B-9-4(b) by stating that the classification and compensation policies in place by the Commission trump individual governing board policies in conflict with Commission policies. Finally, as previously noted, the Commission was specifically given the authority to “promulgate rules as necessary or expedient” and to promulgate a rule “for the purpose of standardizing, as much as possible, the administration of personnel matters among the institutions of higher education.” W. Va. Code § 18B-1B-4(a)(33).

Likewise, the authority given the governing boards in W. Va. Code § 18B-2A-4(j) to “administer a system for the management of personnel matters, including, but not limited to, personnel classification, compensation, and discipline” is specifically limited as being “Subject to the provisions of federal law and pursuant to the provisions of . . . [W. Va. Code § 18B-9-1 et seq.] . . . and to rules adopted by the Commission.” Yes, the governing boards must administer a “system”, but it is clearly

the Commission's "system" and subject to the Commission's broad powers over the uniform "system" of personnel classification set out in W. Va. Code § 18B-9-1 et seq.

Appellants also attempt to negate the statutes granting the Commission broad and specific powers in this area by claiming the enactment of W. Va. Code § 18B-9-4(b) in 2001 somehow "trumps" the Commission's broad powers because they claim W. Va. Code § 18B-9-4(b) is the more recently enacted and thus supersedes previous enactments in conflict with it. In fact, Appellants' claims in this area actually call for a determination in the Commission's favor because the Commission's broad powers have been reenacted subsequent to that 2001 date. The Commission's broad powers to promulgate rules "as necessary or expedient" and a uniform rule standardizing administration of personnel matters were enacted in 2000 and subsequently reenacted in 2001, 2004 and 2005. The language in W. Va. Code § 18B-2A-4(j) making personnel administration by the governing boards specifically subject to rules of the Commission has been reenacted in 2001, 2002, 2004, and 2005. As stated by the Appellants, "the Legislature is presumed to know the canvass of laws and regulations in existence when it acts", (Appellant's Brief at 11), and so they must have knowingly continued to grant the Commission authority over the uniform personnel classification system through these numerous re-enactments.

Even if this Court found that the isolated phrases in W. Va. Code § 18B-9-4(b) on which Appellants base their argument have more impact than Appellee believes, a court construing a statute must be cautious to avoid another oft quoted warning of this Court. "It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity." Syl. Pt. 2, Click v. Click, 98 W. Va. 419, 127 S.E. 194 (1925). See also, Syl. Pt. 6, Lawson v. County Comm'n of Mercer County, 199

W. Va. 77, 79, 438 S.E.2d 77, 79 (1996). Giving the construction to those isolated phrases that Appellants seek would certainly lead to injustice and absurdity. Such a construction would negate the statewide uniformity, in at least the setting of minimum salaries, in classification and compensation among classified employees that have been a central part of the legislative agenda since at least 1994 when the first salary schedule was put in place. Negating this bare bones uniformity would mean employees of WVU could be compensated at levels significantly lower than their colleagues performing the same jobs at other institutions of higher education. Uniformity would become a paper tiger, and the legislatively imposed salary schedule and goals would become toothless. Furthermore, other institutions would be emboldened to ignore Commission directives and rules regarding the personnel classification system since WVU was allowed to do so. And with that, a state system of higher education would disintegrate into independent fiefdoms, and statewide legislative goals for higher education would be in danger of becoming wisps of memory. Such a result is the injustice and absurdity to be avoided by erroneous statutory construction.

In a recent case, this Court, citing Click v. Click, *supra*, refused to give construction to language that it felt would lead to injustice and absurdity in a situation analogous to that at hand. State ex rel. City of Wheeling Retirees Ass'n v. City of Wheeling, 185 W. Va. 380, 407 S.E.2d 384 (1991) dealt with a statute that guaranteed city employee retirees be charged the same for health insurance as current employees if the city changed insurance carriers. The city did not change carriers but increased retiree premiums higher than current employees were being charged. The retirees protested, but the City and Insurance Commission claimed that the literal language of the statute only guaranteed uniformity in premiums if the city changed carriers - - - which the city had not. This Court, in construing the relevant statutes, believed there was legislative intent in general to keep retiree

and current employee premiums uniform, and thus it should not give any credence to the literal sense of the provision that only guaranteed uniformity if the carrier changes. Here we believe this Court would act similarly to protect the uniformity of starting salaries the Commission has directed.

Appellants never really explain why negating the uniformity in starting minimum salaries mandated by the Commission would not lead to the injustice and absurdity asserted by the circuit court. They cannot articulate why the Legislature would create a minimum salary schedule; make the Commission responsible for establishing, controlling, supervising and managing a complete, uniform system of personnel classification; make the Commission responsible for issuing a rule standardizing personnel administration; state that salary increases for classified employees are to be given "in accordance with the uniform classification system"; make personnel administration by the governing boards subject to rules of the Commission and W. Va. Code § 18B-9-1, *et seq.*; and at the same time not require a certain uniformity in at least the minimum wage paid under this classification system. By ignoring the Commission's directives and rules regarding the "zero" step, a significant number of WVU's employees are now being paid less than the minimum wage for all other similarly situated employees in the state system of higher education.

However, Appellants sidestep this conundrum by arguing that the salary policy they adopted is based on seniority and thus cannot be labeled as an injustice or absurd in its result. But this argument in itself shows the fallacy of the statutory construction they urge. If, as they claim, the Commission, under its statutory framework, has no say with compensation or salary increase policies for classified employees, then each institution would have the authority to ignore any practical effect of the uniform classification system and pay employees under any scheme they concoct. In fact, some institutions could decide to pay employees in a manner directly opposite from that determined by

WVU, with absolutely no reference to seniority at all.

That is why this Court has adopted maxims of statutory construction that preclude "absurd" results. Why would the Legislature ever mandate a "complete, uniform" system of personnel classification if that system then has nothing to do with even the barest minimum standards for uniformity in compensation? As the circuit court noted, "Obviously, it is of no use to an employee to be uniformly classified in comparison to his or her colleagues at another institution when the institutions compensate those classifications differently." Why go to all the expense and effort of a classification system when that classification system cannot be used to mandate basic salary? If institutions can compensate in any way they wish with no central direction, then there is no uniform system.

Appellants make much ado as to how compliance with the Commission's directives and rules regarding a uniform minimum salary is, in their view, an attack on "that most sacred of employee concerns" - - - seniority. Essentially, Appellants argue that requiring a minimum wage can lead to salary inversion or compression in derogation of "seniority", which Appellants claim the WVU salary policy is based upon. Certainly the concept of seniority is ingrained in our society and most enlightened personnel policies incorporate it in part. But just as much a "sacred" employee concern - - - and one this Court has repeatedly endorsed - - - is a certain uniformity in compensation among similarly situated public employees. It must be remembered that the effect of the Commission's directives and rules regarding the "zero" step is to only guarantee a minimum starting salary that is the same for all higher education employees in that paygrade. All other institutions are presently paying that same minimum, or higher starting salary, except WVU.

Complying with the minimum salary directive would at least guarantee a starting salary

uniformity and in no way detracts from the emphasis on seniority. It cannot be over-emphasized that the Commission has not ordered any employee to be paid more than a more senior employee. Any decision to do that is solely the decision of an institution. As noted in the circuit court decision, every institution but WVU is paying all its employees at least the "zero" step, for their paygrade. No institution was forced by the Commission's directives and rules to pay a new employee more than a current employee. Each institution used its own funds to ensure that did not happen.

The Appellants heavily rely on the document they submitted as Attachment R to Plaintiffs' Stipulations wherein WVU's Department of Human Resources claims that funding the "zero" step for all new and current employees would either cause salary inversion or compression or somehow destroy the integrity of the salary schedule by directing all available funding to those below the "zero" step to the detriment of more senior employees who, supposedly, would not then get a raise themselves. This report by WVU has several fallacious assumptions. The most important one is that if available funding went to raise the salaries of new and current employees to at least the "zero" step, then other employees could not get a raise. Curiously, nowhere in the document is it set out what WVU was postulating as "available funding" for salary increases. Admittedly, if WVU was under a mandate to bring all workers to at least the "zero" step and had only \$1,000 to do so with, there would be no money left to address any other raises. So a big factor is what is available. The report does not state what that is.³ However, the Affidavit of Patricia W. Hunt demonstrates that WVU had increased net revenues of \$69,544,000 over the five relevant fiscal years. A small portion of that would bring all

³ It is difficult to assess exactly what the charts in Attachment R attempt to show. A close examination seems to indicate that under every scenario presented, more senior employees earn more than less senior even if WVU follows the Commission's directives. It is particularly hard to analyze the data contained therein where on page 6 of the Attachment they say if they have to hire new employees at the "zero" step, not one of the current 3,189 employees would receive a raise. Frankly, it is incredible to claim that not one current employee would receive a raise if just one new employee was paid at the "zero" step.

employees to the "zero" step, leaving millions of dollars for other salary increases and projects. In addition, Ms. Hunt's Affidavit notes that WVU received a supplemental appropriation in 2005 of over \$1.4 million dollars for salary increases and an additional supplemental appropriation to WVU's health sciences of over \$4.8 million dollars.⁴

Requiring a minimum salary only causes any salary inversion or compression if an employer does not continue to increasingly compensate its other employees. This country has lived with a minimum hourly salary imposed by federal law for decades, and the perceived ills of inversion or compression caused by such a minimum hourly salary have certainly not been a serious topic of concern, or the subject of litigation, in Appellee's knowledge. It has certainly never been a defense of failure to pay the minimum hourly wage by arguing that does not leave you enough money to give raises to your other employees. Even if it occurs, salary inversion or conversion is in no way a violation of law or prohibited. These are merely terms to describe conditions that sometimes occur in the application of personnel policies and actions. In fact, this Court has, in at least two cases, found nothing discriminatory or unlawful about new employees being paid more than present employees. In W. Va. Univ. v. Decker, 191 W. Va. 567, 447 S.E.2d 259 (1994), the WVU Appellant here had a policy for entry rate faculty salaries that would result in new faculty being paid the same or more

⁴ Though in its Footnote 11 the Appellants claim budgets and revenue are irrelevant, they have made that a central part of their argument by asserting that compliance with the Commission's directives would cause salary inversion and compression - - - which can only occur if it does not have adequate funding. Even so, Appellants go into a great deal of calculations in that footnote to convince this Court of a lack of funding. The Commission will merely direct the Court to the Affidavit of Patricia W. Hunt and the attached audited financial statements for WVU which show increased net revenues of over \$69 million from FY 2000 to FY 2005. Of that, \$72 million came from increased tuition and fees. It must be noted that decreased state appropriations are included in this net calculation. Furthermore, rather than increasing revenues in restricted contracts and grants, as pointed out by the Appellants as reducing available funding, the audited financial statements submitted into evidence actually show a \$21 million decrease in contracts and grants revenue during that time period.

their classified employees. If WVU has concerns about salary inversions or compression, they need simply allocate more funding for raises for the more experienced staff. That additional funding can come from the additional \$69,544,000 in net revenues generated by WVU over the relevant five fiscal years, the supplemental appropriations set out above, or through reallocation of resources. The choice is solely up to WVU.

Finally, on the issue of seniority, even if WVU did not wish to allocate funds to remedy any salary compression or inversion it perceives as occurring, those more senior employees continue to reap greater benefits than those least senior. W. Va. Code § 5-5-2 grants every classified employee an annual increment salary increase of \$50 per each year of service. W. Va. Code § 18B-7-1 grants classified employees with greater seniority preference for certain job openings and preferential treatment during layoffs or recalls. Like all other state employees, the amount of annual leave they accrue increases with their years of service. This Court in Decker, *supra*, 191 W. Va. at 576, 447 S.E.2d 259, 268, even recognized and approved that more senior employees often, in lieu of higher compensation paid to less senior employees, have preference “with regard to such things as course scheduling, the type of courses taught, office space, access to logistical support, travel budgets, and other matters that are of supreme importance.”

Though few cases could be found that touch on anything similar to the novel factual issue and statutory construction controversy here, at least two are instructive. In State ex rel. Callaghan v. W. Va. Civil Serv. Comm'n, 166 W. Va. 117, 273 S.E.2d 72 (1980), an employee of the Department of Natural Resources (“DNR”) sought a hearing before the Civil Service Commission over alleged discriminatory conduct against him by DNR. DNR argued that the Civil Service Commission had no jurisdiction to hear the complaint because the statutory provision authorizing Commission hearings

only listed the Commission's appellate jurisdiction as being over demotions, dismissals, and certain suspensions - - - and not discrimination. The Commission claimed its rules gave it jurisdiction over the complaint. The Court held that the Civil Service Systems Act is "... a conglomeration of statutes that must be read in pari materia" and that the Commission had been given the statutory authority to promulgate rules and administrative regulations . . . "as may be proper and necessary for its enforcement." Id. at 120, 273 S.E.2d 72, 74. Thus it upheld the Commission's jurisdiction to hear the complaint and its allegation of discrimination even though the statute did not specifically grant jurisdiction in that area.

As has been noted above, the Legislature has also granted the Policy Commission the authority to establish and control a uniform personnel classification system, the authority to standardize personnel matters, and . . . "such other powers and duties as may be necessary or expedient . . ." Thus, as in Callaghan, this Court should uphold the jurisdiction of the Commission in the matter in controversy here.

And in a case dealing with the recent regional airport dispute, this Court had to deal with a state agency given broad and expansive powers and a local agency that claimed a single phrase in the applicable legislation limited the state agency authority. In Cen. W. Va. Reg'l Airport Authority v. W. Va. Pub. Port Auth., 204 W. Va. 514, 513 S.E.2d 921 (1999), this Court dealt with a statute wherein the Port Authority was authorized to plan, finance, develop, construct and operate ports and airports within the state, but language in the authorizing statute said such must be done "with the concurrence of the affected public agency." Id., at 515, 513 S.E.2d 921, 922. The Regional Airport Authority claimed that they were the "affected public agency" and that the regional airport could not proceed without their concurrence. This Court, noting again the danger of giving effect to a single

part, provision, section, sentence or phrase instead of consideration of an act or statute in its entirety, recited the "broad grant of powers to the Port Authority", Id. and decided that it could not give effect to the phrase the Regional Airport Authority cited in view of the general purposes of the Port Authority Act. "It cannot be disputed the purposes of the Port Project Act could never be accomplished if the Legislature were to give all affected public agencies a veto power over port projects." Id. at 518, 513 S.E.2d 921, 925.

Nor, with the broad powers and responsibilities given to the Commission by the Legislature should one institution be allowed to effectively veto the Commission's efforts to set minimum salary standards in furtherance of its responsibility to standardize certain personnel matters and maintain a uniform personnel classification system.

2. THE CIRCUIT COURT DID NOT ERR IN RULING THAT WVU HAD A DUTY AND RESPONSIBILITY TO ABIDE BY THE RULES AND DIRECTIVES OF THE COMMISSION TO PAY ALL WVU CLASSIFIED EMPLOYEES AT OR ABOVE THE "ZERO" STEP FOR THEIR PAYGRADE ON THE SALARY SCHEDULE IN W. VA. CODE § 18B-9-3 BY JULY 1, 2005.

The Appellants have also claimed that Series 8 of the Commission, which at Section 12.1 mandates all new classified employees be paid at least the "zero" step by July 1, 2005, is not a valid rule and thus unenforceable.

Appellants' misunderstanding of the status and enforceability of the Commission's directives and rules is understandable due to the highly complicated and unusual process undertaken by the Legislature and Commission to transition from one higher education governance system to another. This has confused them regarding the continued efficacy of the Commission's directives and rules.

The parties have all agreed that Series 62 of the old University System Board of Trustees

than faculty already employed by the University. This Court recognized that "compression and inversion" of incumbent faculty salaries had resulted but that did not constitute discrimination, 191 W. Va. at 570, 447 S.E.2d 259, 262. Though Appellants try to distinguish this case, the simple fact is this Court did not find WVU guilty of discrimination for a policy that created salary compression and inversion. In other words, the policy was lawful. In the same year, this Court ruled in Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994), in which certain nurses within the Division of Health claimed it was unlawful for new employees in their classification/paygrade to be paid more than them - - - experienced incumbent employees. Again this Court found that as long as the employees were all paid within the pay range of their classification/paygrade, it was not a violation of the Equal Pay Act or violative of equal protection or substantive due process rights. Again, Appellants have attempted to distinguish Largent, but no discrimination was found there. In other words, the policy was lawful.

Inversion or compression of salaries, as demonstrated above, is not inherently wrong or unlawful. The Legislature has even recognized that differences in salaries among classified employees in the same paygrade are lawful by declaring that "Despite any differences in salaries that may occur, a classified employee is equitably compensated in relation to other classified employees in the same paygrade" . . . if they are being paid at least the minimum required on July 1, 2000, and the institution is making progress toward salary goals set out in statute. W. Va. Code § 18B-9-3(a). It must be further pointed out that any of the salary inversion or compression ills that plaintiffs complain of as arising out of the mandate to pay employees at the "zero" step are completely within WVU's power to alleviate. There is absolutely no other directive of the Commission, beyond the mandated "zero" step, as to how much institutions may, or may not, dedicate in funding to salary increases for any of

(which had jurisdiction over WVU) was a legislative rule dealing with personnel administration and the classification system. Section 12 of that Series 62 required that the entry rates for classified employees must be at least the “zero” step of the salary schedule contained in W. Va. Code § 18B-9-3. The parties have also agreed that pursuant to W. Va. Code § 18B-1-3(h)(1), all rules of the old Board of Trustees, which included Series 62 and its “zero” step requirement, were “transferred to the commission effective [July 1, 2001] and continue in effect until rescinded, revised, altered, amended, or transferred. . . .” Additionally, to make it even more emphatic, in 2001 the Legislature stated, “The equitable system of job classification and rules establishing it . . . are hereby transferred to the jurisdiction and authority of the commission and shall remain in effect unless modified or rescinded by the commission.” W. Va. Code § 18B-9-4(a). [*Emphasis added.*] That which was transferred would be, in part, Series 62 and its “zero” step requirement at Section 12.

So on July 1, 2001, the provisions of Series 62 had been transferred to the authority and jurisdiction of the Commission and, by specific direction of the Legislature, were to continue and remain in effect unless modified or rescinded by the Commission. Also on July 1, 2001, the new salary schedule was enacted at W. Va. Code § 18B-9-3 which increased the “zero” step for each paygrade on the salary schedule. Since Series 62 specifically continued in effect by legislative directive, as well as its requirement that employees be paid at least the “zero” step of the statutory salary schedule, there was a very real argument and possibility that the institutions were to immediately bring employees up to the increased “zero” step.

In the stipulated facts recited by the circuit court, the Commission was originally inclined to require all employees to be immediately moved to the “zero” step as seemed to be required by Series 62. Instead, the Commission, at subsequent meetings in 2001, considered first amending Series 62

to allow a two year transition to the new "zero" step and then to a four year transition. Series 62 was then redesignated as Series 8 of the newly assigned Title 133 of the Commission's rules and amended to not require new employees to be paid the "zero" step until July 1, 2005. The Commission also directed in its resolutions and minutes that all current employees reach the "zero" step by that time.

Appellants, though, have made much of the legislative, or non-legislative, status of Series 8 and their belief that this somehow effects its enforceability. There is no dispute that the original Series 62 of the Board of Trustees was a "legislative" rule that went through the whole complicated legislative approval process that gives a legislative rule the force of law. (See W. Va. Code § 18B-17-2(g) authorizing rule.) And, yes, the Legislature in 2001 in S. B. 703 at W. Va. Code § 18B-1-6 allowed many of the existing legislative rules of the old Boards transferred to the Commission to be "reclassified" as other than a legislative rule. This was to eliminate numerous requirements under the old statutes that certain policies of the old Boards be legislative rules even though they addressed only mundane issues that did not justify legislative review. That Series 62 (as the redesignated Series 8 under the Commission's newly granted Title 133 in the Code of State Regulations) was reclassified from a "legislative" rule to a "procedural" rule does not change the fact that it continued to have the force of law that the Legislature had imposed on it by originally approving it. Additionally, as pointed out earlier, both W. Va. Code § 18B-1-3 and § 18B-9-4 specifically required that the rules of the old Boards transferred to the Commission were to remain in effect unless changed by the Commission.

Appellants claim that W. Va. Code § 18B-1B-4(a)(33) now requires that a joint legislative rule of the Commission and Council for Community and Technical College Education be promulgated by the two bodies regarding standardizing personnel matters, and one has not been filed or adopted and thus the Commission has no authority over the governing boards in this matter. Close attention to

the actual time-lines and transition in governance are required to demonstrate the errors in this claim.

Again, the 2001 Act contained in S. B. 703 transferred Series 62 to the jurisdiction of the Commission, and it was to remain in effect unless modified by the Commission. Series 62 was also reclassified as a "procedural" rule since the Legislature had specifically concluded it need not remain as a "legislative" rule with the difficulty of amendment inherent to a "legislative" rule. In fact, in that same 2001 Act of S. B. 703, at W. Va. Code § 18B-1B-4(a)(40),⁵ the Legislature first gave the Commission the authority to promulgate rules and specifically the power to "promulgate a new uniform rule for the purpose of standardizing as much as possible, the administration of personnel matters among the institutions of higher education." Note that the 2001 Act has no requirement that this personnel rule be "legislative" and, in fact, in another part of the Act the Legislature had just removed the requirement that the personnel rule be a legislative rule - - - as Appellants have noted. Thus, the Legislature must have been comfortable with Series 62 (redesignated as Series 8 of the Commission) being amended as the "procedural" rule it had become. And that is what the Commission did in 2001 with Series 62 - - - amend it under the procedural rule process to allow the institutions to have until July 1, 2005, to bring employees to the "zero" step instead of bringing the employees there immediately, as suggested by the existing Series 62. (The requirement that a personnel rule be promulgated by the Commission and Council as a joint "legislative" rule was not added to the Code until July 1, 2004, through S. B. 448).

The foregoing explains in detail how the provisions of Series 8 of the Commission are valid and enforceable. If Appellants claim they are not, then they are rejecting the Commission's amendment of Series 62 in 2001 that allowed the institutions until July 1, 2005, to reach the "zero"

⁵That section has been subsequently recodified as W. Va. Code § 18B-1B-4(a)(33).

step minimum starting salaries instead of provisions of Series 62 that arguably called for immediate meeting of the "zero" step when a new schedule was enacted in July 1, 2001. And, if they further claim that even the original Series 62 transferred to the Commission is not valid, then they are ignoring clear legislative intent on that issue and arguing there is no rule at all regarding the classification system. No statutory interpretation can condone or uphold such a determination. The Commission was within its jurisdiction and authority to direct all employees to be paid at or above the "zero" step by July 1, 2005.

Interestingly, Appellants recognize the paradox they have created and, in an amazing case of wanting to have their icing-covered pastry and consume it at the same time, claim that Series 62 was no longer in effect once it was amended by the Commission, but that the amendment itself - - - Series 8 - - - was invalid. Again, W. Va. Code § 18B-9-4(a), enacted in 2001, stated "The equitable system of classification and the rules establishing it . . . are hereby transferred to the jurisdiction and authority of the commission and shall remain in effect unless modified or rescinded by the commission." The rule transferred - - - Series 62 - - - arguably required immediate payment of the "zero" step on the salary schedule, which had just been updated in the same legislation. This Court and Appellants must ask themselves why the Commission felt the need to amend Series 62 to allow a delay in transition to the "zero" step till July 1, 2005, if there wasn't great concern that Series 62 immediately required transition to the new "zero" steps. At the urging of the institutions under its jurisdiction the amendment was made by the Commission to allow the delay, and now Appellants say the amendment was invalid. Well, either the amendment was invalid and the old Series 62 provisions remain in effect or Series 8 was valid and institutions had till July 1, 2005. You have to choose. You cannot have

both. That is intellectually inconsistent and unsustainable.⁶

Though the Appellants proffer Chico Dairy Co. v. Human Rights Comm'n, 181 W. Va. 238, 382 S.E.2d 75 (1989) and State ex rel. Kincaid v. Parsons, 191 W. Va. 608, 447 S.E.2d 543 (1994) to buttress their claim that Series 8 is invalid, these cases are not particularly relevant in the unique circumstances posed here by a reorganization of a governance structure and carefully mandated transfers of existing rules. In Chico, this Court found an “interpretive” rule was not valid because it “clearly conflicts with the legislative intent by expressly enlarging upon the substantive rights created by the statute.” Chico, 181 W. Va. at 247, 382 S.E.2d 75, 84. There the Human Rights Commission tried to add a cause of action through an interpretive rule when that was completely contrary to statute and legislative intent. Here, Series 8 is consistent with legislative intent, as demonstrated above.

Kincaid is similarly inapposite. A close reading of the decision indicates this Court only required a legislative rule if it was to enforce a complete ban on smoking or the use of smokeless tobacco. This Court clearly did not think a legislative rule was required to merely regulate the use of tobacco since this Court went on to say that if the Regional Jail Authority wished “to make a part or parts of the facility tobacco-free, and wishes to impose reasonable sanitation requirements upon the use of smokeless tobacco such as spitting in anything but a proper receptacle, it may do so. . . . even in the absence of legislative rules. . . . [since] inmates cannot be allowed in an unfettered manner to impose environmental tobacco smoke upon others who wish to avoid breathing such smoke.” Kincaid, at 611, 447 S.E.2d. 543, 546. [*Emphasis added.*] Similarly, a legislative rule was not needed here

⁶ Interestingly, under Appellant’s argument that neither Series 62 or Series 8 is valid, then there is no personnel rule that exists for higher education since those two rules contain the basis for the classification system, for job classification reviews, upgrades, and promotions. Of course, under the arguments Appellants have put forth, there is no need to do classification reviews, upgrades, or promotions because an upgrade or promotion is mandated under those rules to grant a 5% salary increase per paygrade. But, of course, Appellants argue the Commission has no authority over salary increases.

to merely allow a delay in transition till July 1, 2005 for paying the "zero" step. This is the essence of a procedural rule regulating internal processes.

On this issue of Series 8 and its validity there is another important issue to take into consideration. The circuit court found in its Conclusion of Law No. 6 that the WVU Board of Governors "had a duty and responsibility to abide by the rules and directives" of the Commission regarding the "zero" step. (*Emphasis added*). Not only did the Commission require in Series 8 that all new employees be paid the "zero" step after July 1, 2005, but resolutions of the Commission, contained in its minutes, on August 30, 2001, October 29, 2001, and April 19, 2002, all as stipulated to by the parties, directed that all employees - - - current and new - - - be paid at least the "zero" step by July 1, 2005. These were valid directives of the Commission that clearly demonstrate its policy on this issue and were in furtherance of the legislative directive to "establish, control, supervise and manage a complete, uniform system of personnel classification." W. Va. Code § 18B-9-1.

This Court has oft-stated that "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syllabus Pt 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). Furthermore, "School personnel regulations and laws are to be strictly construed in favor of the employee." Syllabus Pt. 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979). Those tenets also apply to the state's higher education institutions. See, Clarke v. W. Va. Bd. of Regents, 171 W. Va. 662, 301 S.E.2d 618 (1983); Hooper v. Jensen, 174 W. Va. 643, 328 S.E.2d 519 (1985).

This Court, as recently as 1998, reiterated that "An agency policy statement, rule, or regulation is not 'a piece of fluff'." Black v. Consolidated Pub. Retirement Bd., 202 W. Va. 511, 520, 505 S.E.2d 430, 439 (1998). In that case the Retirement Board had adopted a rule granting appeals within

sixty days to employees seeking disability retirement. However, the legislative rule encompassing that policy had not yet been approved by the full Legislature. This Court found for the employee in this situation because even though the legislative rule was not yet in effect, it clearly stated the current policy of the Board - - - just as the resolutions and directives of the Commission on this matter were clearly the adopted policy of the Commission; even if they are not in a legislative rule yet. See also, State ex rel. Wilson v. Truby, 167 W. Va. 179, 281 S.E.2d 231 (1981.) (Employee handbook provisions of State Board of Education to be strictly construed in favor of the employee even though handbook provisions were not in form of a rule).

This Court should strictly construe the rules and directives of the Commission in favor of those guaranteed that they would be paid at least the "zero" step for their paygrade by July 1, 2005.

IV.

CONCLUSION

The Appellee respectfully requests this Court uphold the Order of the Circuit Court in this matter.

Respectfully submitted,

**WEST VIRGINIA HIGHER EDUCATION
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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

THE WEST VIRGINIA UNIVERSITY
BOARD OF GOVERNORS, THE
STAFF COUNCIL OF WEST VIRGINIA
UNIVERSITY, TERRY NEBEL, AND
CHARLES L. MILLER, JR.,

Petitioners,

VS.

Supreme Court Case No. 061719

THE WEST VIRGINIA HIGHER
EDUCATION POLICY COMMISSION,

Respondent.

CERTIFICATE OF SERVICE

I, Bruce Ray Walker, Counsel for Respondent, do hereby certify that I have this 15th day of February, 2007, served a true copy of the foregoing "Appellee's Brief", by depositing same in the United States Mail, first class postage prepaid, addressed to:

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