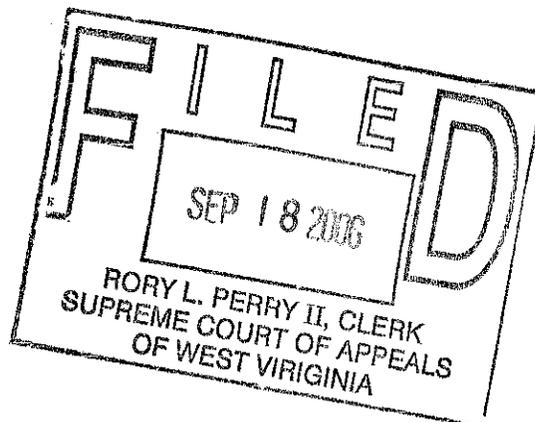


33156

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOHN SMITH,

Appellant,



APPEAL NO. 33156
(Circuit Court of Marion County
Civil Action No. 05-C-107)

v.

DR. D. J. BRADLEY, PRESIDENT OF
FAIRMONT STATE UNIVERSITY,

Appellees.

APPELLANT'S BRIEF

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September 18, 2006

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**I. THE KIND OF PROCEEDING AND NATURE OF THE RULING
IN THE LOWER TRIBUNAL**

This is an appeal from a July 18, 2005, Opinion Order of the Circuit Court of Marion County, West Virginia, (Hon. David R. Janes presiding), finding the student, peer, and chair evaluations of faculty of Fairmont State University contain information of a personal nature that is subject to redaction pursuant to West Virginia Freedom of Information Act, West Virginia Code §29B-1-4(a)(2).

II. A STATEMENT OF THE FACTS OF THE CASE

The Appellant was hired as a probationary, tenure-track faculty of Fairmont State College (now known as Fairmont State University) during the academic year 2001-2002. His employment contract was not renewed for the following year. He went through the grievance process until this Court decided not to hear the case.

During this period, Appellant filed a complaint with the West Virginia Human Rights Commission. Appellant believes that unfortunately, this commission did not bother to seek the student, peer, and chair evaluations of other similarly situated tenure-track faculty, although the Appellant suggested doing so, in making its determination of 'No Probable Cause'.

Next the Appellant filed a civil action at the Circuit Court of Marion County and couple months later filed another civil action at the Circuit Court of Kanawha County, both of which were dismissed for reasons not based on merit.

Using the West Virginia Savings Statute, Appellant filed another civil action at the Circuit Court of Kanawha County. On August 17, 2006, the Circuit Court denied the Defendants' Motion for Summary Judgment and a status conference is scheduled to be held on October 16, 2006 to set a trial date.

Alongside, the Appellant requested the defendant to provide him with the peer review materials, such as student, peer, and chair evaluations of other similarly situated faculty, under the West Virginia Freedom of Information Act, after learning that the faculty evaluations are a matter of public record in Ohio. He sought this information in order to facilitate his latest civil law suit in the Circuit Court of Kanawha County.

Implied in his pleading was to have these evaluations **declared as public record** so that the need of a law suit by future employees to compare the job performance evaluations of other faculty with theirs would be obviated, and to discourage peers and supervisors from making unsubstantiated remarks while evaluating other faculty, and thereby **reduce the number of lawsuits based on discriminatory and bad faith evaluations** by public employee(s). The Respondent denied the request claiming that the information sought was exempt under West Virginia Code §29B-1-4(a)(2) and (8).

The Appellant, *Pro Se*, filed a civil action with Circuit Court of Marion County seeking declaratory and injunctive relief for the production of these documents and for the recovery of the attorney's consultation fee and costs incurred in bringing this law suit.

The Circuit Court of Marion County found that the documents sought contained information of a personal nature¹ and ordered disclosure of the documents in a redacted

¹ Please see Marion County Court Order - item 8 in page 5

form² and denied the recovery of the Attorney's Fees and Costs incurred by the Appellant³ stating that no benefit to the public was evident.

**III. THE ASSIGNMENTS OF ERROR RELIED UPON
ON APPEAL AND THE MANNER IN WHICH THEY
WERE DECIDED IN THE LOWER TRIBUNAL**

- A. Circuit Court of Marion County erred in its ruling that the disclosure of the job performance evaluations in the form of student, peer, and chair evaluations in an un-redacted form would result in an invasion of privacy for the faculty members.

The Court arrived at this decision by finding that the information requested by the Appellant in the form of student, peer, and chair evaluations, contained information of a personal nature as defined by §29B-1-1 et seq¹.

- B. Circuit Court of Marion County erred in denying Appellant the attorney's fees for consultation and the expenses incurred including the court costs.

The Court made an incorrect interpretation of West Virginia Code §29B-1-7 with reference to Attorney fees that the fee paid to an Attorney for consultation by a *Pro Se* is not an Attorney fee, relying on several federal courts' statements "*Pro Se* litigants are ineligible for attorney fees"⁴.

² Please see Marion County Court Order - item 19 in page 10, and items 20 and 21, in page 11

³ Please see Marion County Court Order - item 33 in page 15

⁴ Please see Marion County Court Order - item 28 in page 13

The Court made an incorrect interpretation of West Virginia Code §29B-1-1 et seq with reference to the award of costs incurred by the Appellant by not relying on the simple meaning of the word “cost” but on a ruling by 8th Circuit Court which was based on federal FOIA⁵.

**IV. POINTS AND AUTHORITIES RELIED UPON,
A DISCUSSION OF LAW, AND
THE RELIEF PRAYED FOR.**

- A. The trial Circuit’s decision that the disclosure of the requested documents would result in an invasion of privacy for other faculty members is based on Manns v. City of Charleston Police Dept., Syl. pt. 2, 209 W.Va. 620, 550 S.E.2d 598 (2001)⁶. In Manns, the issue was whether the police records including internal investigation documents were exempt from public disclosure pursuant to ‘Freedom of Information Act’ W.Va. Code § 29B-1-4. The issue in the instant case is whether the student, peer, and chair evaluations of academic faculty who are public employees are exempt from public disclosure.

West Virginia ‘Freedom of Information Act’ Code §29B-1-4(a)(4)
exempts from disclosure

[r]ecords of **law-enforcement agencies** that deal with the detection and investigation of crime and the internal records and notations of such law-enforcement agencies which are maintained for internal use in matters relating to law enforcement. (emphasis added)

⁵ Please see Marion County Court Order - item 31 in page 14

⁶ Please see Marion County Court Order - item 7 in page 5

Previously, this Court has looked to federal FOIA cases for guidance in interpreting the West Virginia Freedom of Information Act, recognizing the close relationship between the federal FOIA and West Virginia FOIA and noting the value of federal precedents in construing West Virginia's parallel provisions. Please see Daily Gazette Co. v. West Virginia Develop. Office, 198 W. Va. 563, 571; 482 S.E.2d 180, 188 (1996), and Farley v. Worley, 215 W.Va. 412, 599 S.E.2d 835 (2004).

Further, it should be noted that the Legislature specifically exempted the records of law enforcement agencies from public disclosure. The trial Court failed to recognize the maxim *expressio unius est exclusio alterius*; that the express mention of one thing within a statute implies the exclusion of another thing not so mentioned. Because the Legislature realized that the FOIA could require the disclosure of the investigation and internal records of law enforcement agencies, the conclusion that the Legislature rejected the opportunity to extend this exemption to other public agencies is inescapable.

In Manns, this Court explained that “[t]he primary purpose of the invasion of privacy exemption to the [FOIA], *W.Va.Code*, 29B-1-4(2) [1977], is to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information.” Syl. pt. 2, 209 W.Va. 620, 550 S.E.2d 598 (2001). This Court relied on *Gannett Co., Inc. v. James*, 86 A.D.2d 744, 447 N.Y.S.2d 781 (1982), *Connecticut Alcohol and Drug Abuse Commission v. Freedom*

of *Information Commission*, 233 Conn. 28, 657 A.2d 630 (1995), which involved disclosure of records of law enforcement agencies.

In Manns, this Court expressed that the disclosure of the information would result in a substantial invasion of privacy; and that the request in that case would require the disclosure of all claims of misconduct no matter how egregious, unfounded, or potentially embarrassing; and that the investigative information was obviously given with an expectation of confidentiality. Manns is distinguishable in additional aspects also, in that the providers of confidential information were a third party public citizens unlike non-law enforcement public employees and anonymous students in the instant case.

Because Manns is not on point and is distinguishable in many aspects and because the trial Court relied on it in making its decision of not requiring the respondent to provide un-redacted documents that the Appellant requested, the Court is in error.

Further, West Virginia Code §29B-1-4(a)(2) exempts from disclosure

[i]nformation of a personal nature such as that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance: *Provided*, That nothing in this article shall be construed as precluding an individual from inspecting or copying his or her own personal, medical or similar file.

Legislature has not clearly defined the meaning of the words 'information of a personal nature such as that kept in a personal file'. In *Daily Gazette Co., Inc. v. West Virginia Development Office*, this Court has explained that "[i]n the absence of any definition of the intended meaning of words or terms used

in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used." Syl. pt. 5, 206 W.Va. 51, 521 S.E.2d 543.

The Appellant interprets the meaning of those words as 'not everything in personal file is information of a personal nature'.

In light of absence of West Virginia case law interpreting exemption provision of Freedom of Information Act, the Appellant now turns to decisions by courts in other jurisdiction interpreting similar act.

The Legislature of the State of Michigan, in its FOIA, M.C.L.A. § 15.243, subd. 13(1)(a) also has used the same phrase 'information of a personal nature'. This Statute states that a public body may exempt from disclosure as a public record under this act, information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.

The Supreme Court of Michigan analyzed the phrase "information of a personal nature" more thoroughly and finally concluded that information is of a personal nature if it reveals intimate or embarrassing details of an individual's **private life**.

Job performance evaluation by students, peers, and chair is obviously not a matter of **private life** and **do not and should not** contain any private information outside the business matters as it would be totally irrelevant and unrelated. Thus applying the above rule, these evaluations do not constitute 'information of a personal nature'.

Just for the sake of argument, even if we were to find that Manns is applicable, because the requested documents do not satisfy the requirement of 'private life' in order to qualify for exemption, they are not exempt from full public disclosure and therefore redaction was not appropriate.

In Bradley v. Saranac Community Schools Board of Education, the Supreme Court of Michigan stated as "[t]his consolidated case presents the issue whether the personnel records of public school teachers and administrators are exempt from disclosure under the Freedom of Information Act. MCL 15.231; MSA 4.1801(1). We hold that the requested records must be disclosed because they are public records and **are not within any exemption under the FOIA.**" 455 Mich. 285, 565 N.W.2d 650 (1997) (emphasis added)

State Ex. Rel James v. Ohio State Univ., 70 Ohio St. 3d 168 (1994); 637 N.E.2d 911 is directly, almost 100% on point as it relates directly to an issue of academic world as does the instant case. In that case, the Supreme Court of Ohio ruled that Promotion and tenure records maintained by a state-supported institution of higher education are "public records" and are subject to public records disclosure requirements of R.C. 149.43(B), and are not subject to any exception, and are, therefore, subject to the public records disclosure requirements of R.C. 149.43(B).

There is no dispute that job performance evaluations are part of the tenure and promotion records. Since they are part of the promotion and tenure records and because promotion and tenure records are not subject to any exception, based on the

above stated Ohio case law, the documents requested by the Appellant should not be subject to any exception.

Aside from legal issue, there are many benefits to the society in declaring the job performance evaluations as "public records" not subject to any exception. Persons belonging to a minority group because of gender, race, and age, etc., do not have to file a law suit to find out whether or not they were discriminated. **Job performance evaluation, most likely, is an indicator of discrimination.** The Court of Appeals for the Third Circuit expressed it this way:

"Clearly, an alleged perpetrator of discrimination cannot be allowed to pick and choose the evidence which may be necessary for an agency investigation. There may be evidence of discriminatory intent and of pretext in the confidential notes and memoranda which the [college] seeks to protect. Likewise, confidential material pertaining to other candidates for tenure in a similar time frame may demonstrate that persons with lesser qualifications were granted tenure or that some pattern of discrimination appears. . . . The peer review material itself must be investigated to determine whether the evaluations are based in discrimination and whether they are reflected in the tenure decision." *EEOC v. Franklin and Marshall College*, 775 F.2d, at 116 (emphasis deleted).

U.S. Supreme Court reiterated the above statement of 3rd circuit in *University of Pennsylvania v. EEOC*, *supra*, 493 U.S. 182, and explained that confidentiality was not the norm in all peer review systems. Court continued by saying that although some evaluators may become less candid as the possibility of disclosure increases, others may simply ground their evaluations in specific examples and illustrations in order to deflect potential claims of bias or unfairness and that not all academics will hesitate to stand up and be counted when they evaluate their peers.

Second, this will deter the peers and chairs from making negligent remarks or comments that they cannot substantiate because of the awareness that their evaluations are public records not subject to any exception, and that the parties affected will soon discover.

Third, the absence of a 'smoking gun' in the evaluations is likely to reduce the number of law suits based on discrimination and thereby **save tax dollars** for the State.

B. The trial Circuit has correctly determined that the Appellant has substantially prevailed. But it erred in relying on Wolfel v. United States, 711 F.2d 66 to determine whether the Appellant should be awarded attorney fee. Wolfel is not on point and is distinguishable from the instant case. In Wolfel, the *pro se* litigant did not incur any attorney fee where as in the instant case, this *pro se* litigant has incurred an attorney fee of \$50.00 for consultation.

The trial Court relied unnecessarily on Wheeler v. Internal Revenue Service, 37 F.Supp.2d 407, to make its decision regarding the award of costs.

West Virginia Code §29B-1-7 uses the word 'costs' in its heading and 'court costs' in its body. Thus the Legislature has used 'costs' and 'court costs' interchangeably.

“§29B-1-7. Attorney fees and costs.

Any person who is denied access to public records requested

pursuant to this article and who successfully brings a suit filed pursuant to section five of this article shall be entitled to recover his or her attorney fees and court costs from the public body that denied him or her access to the records.”

Similarly, Appellant has found, by researching many of this Court’s opinions, that this Court also has used the words ‘costs’ and ‘court costs’ interchangeably. Thus, and from reading the West Virginia Rules of Civil Procedure, Rule 68, the Appellant assigns the meaning of ‘all expenses incurred in bringing the law suit, including the fee paid to the trial Court’ to the words ‘costs’ and ‘court costs’ that are used interchangeably.

This Court has given deference to the plain and simple meaning of words when interpreting statutes.

“Generally the words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use.” Syllabus Point 3, *Byrd v. Board of Education of Mercer County*, 196 W.Va. 1, 467 S.E.2d 142 (1995).

“This and other courts will always endeavor to give effect to what they consider the Legislative intent; but, we do not change plain and simple language employed in framing a statute unless there is an impelling reason for so doing.” (quotation from *Baird-Gatzmer Corp. v. Henry Clay Coal Mining*, 131 W.Va. 793, [805,] 50 S.E.2d 673, [680] (1948)).

The Appellant interprets the word ‘costs’ as expenses incurred in bringing the law suit and that it has no bearing on whether he has an attorney representing him or whether he is a *pro Se*. It does not matter. The statute is simple. The trial Court should have awarded the costs to the Appellant. By not doing so, the Court is in error.

C. Appellant finds, based on his own research, that this Court has looked to D.C. Circuit's rulings on many instances. The D.C. Circuit has permitted *Pro Se* litigants, who are not attorneys, to recover attorney fees⁷. Appellant, being a *Pro Se*, was not knowledgeable enough to seek Attorney fee, beyond the Attorney consultation fee.

D. Based on the foregoing, the Appellant respectfully requests that this Court provide him with the following relief:

1. To DECLARE that the job performance evaluation materials, such as, student, peer, and chair evaluations of faculty of higher education institutions are public records not subject to any exemption and thereby ORDER the Appellees to allow the Appellant to inspect and copy the documents he has sought under the FOIA, in the unredacted form.
2. To ORDER the Appellees to reimburse Appellant the Attorney consultation fee of \$50.00.
3. To ORDER the Appellees to reimburse Appellant \$985.97 plus all costs of this appeal and the costs that he would incur up to the point of compliance by the Appellees.
4. To determine the amount of reasonable attorney fee, if this Court decides that the Appellant is eligible for such an award based on the D.C. Circuit ruling, in

⁷ Please see Circuit Court of Marion County Order - Item 28, Page 13.

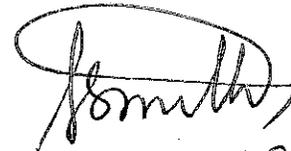
the interest of justice, even though the Appellant did not initially ask for, and to ORDER the Appellees to pay the Appellant the Court determined Attorney's fee.

5. Any other relief that this Honorable Court deems just and equitable.
6. As an alternate, to remand the case back to the Circuit Court of Marion County with directions to provide relief to the Appellant as stated in items 1 through 5 above.

V. REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument in this case.

Respectfully Submitted,



09/18/06

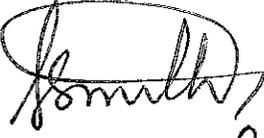
John S. Smith, *Pro Se*

CERTIFICATE OF SERVICE

I, John S. Smith, do hereby certify that I have on September 18, 2006, served the foregoing "APPELLANT'S BRIEF" by mailing a true copy thereof to the Counsel for appellees, U.S. first class postage prepaid, at the following address:

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