

No. 090359

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

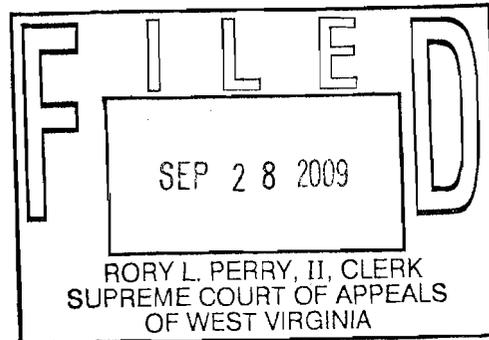
BRIAN M. POWELL,

Petitioner,

v.

**STEVEN L. PAINE, STATE
SUPERINTENDENT OF SCHOOLS,**

Respondent.



APPELLEE'S BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
I. KIND OF PROCEEDING AND NATURE OF RULING BELOW	1
II. STATEMENT OF FACTS	3
III. ARGUMENT	5
A. THE REQUEST FOR EMPLOYMENT-RELATED BENEFITS AND ATTORNEY’S FEES EXCEEDED THE SCOPE OF THE REMAND ORDER FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA AND AS SUCH THE KANAWHA COUNTY CIRCUIT COURT LACKED AUTHORITY TO ENTERTAIN ARGUMENTS ON THESE ISSUES	5
B. THE APPELLANT IS NOT ENTITLED TO EMPLOYMENT-RELATED BENEFITS UNDER ANY THEORY	7
1. Even Though The Appellee Is The Licensing Agency For Teachers, The Appellee Is Not The Appellant’s Employer.	7
2. Appellant’s Claim For Employment-Related Benefits From The State Superintendent Is Barred By The State’s Sovereign Immunity Set Fourth In Article VI, Section 35 Of The West Virginia Constitution.	12
C. THE APPELLANT IS NOT ENTITLED TO ATTORNEYS FEES AND COSTS	16
1. The Appellant’s Claim Was Brought Pursuant To The Administrative Procedures Act And The Grievance Procedure Statutes Have No Applicability In This Case Matter	16
2. There Is No Statutory Provision Pursuant To The Administrative Procedures Act Which Authorizes The Collection of Attorney’s Fees And As Such The American Rule Applies	16
IV. CONCLUSION	18

TABLE OF AUTHORITIES

CASES

<i>Ables v. Mooney</i> , 164 W. Va. 19, 264 S.E.2d 424 (1979)	14
<i>Arnold Agency v. West Virginia Lottery Commission</i> , 206 W. Va. 583, 526 S.E.2d 814 (1999)	13
<i>Capper v. Gates</i> , 193 W. Va. 9, 19, 454 S.E.2d 54, 64 (1994)	17
<i>Ewing v. Board of Education of the County of Summers</i> , 202 W. Va. 228, 503 S.E.2d 541 (1998)	10
<i>Graf v. West Virginia University</i> , 189 W. Va. 214, 429 S.E.2d 496 (1992)	10
<i>Gribben v. Kirk</i> , 195 W. Va. 488, 466 S.E.2d 147 (1995)	15
<i>Hesse v. State Soil Conservation Committee</i> , 153 W. Va. 111, 168 S.E.2d 293 (1969)	13
<i>Johnson v. Gould</i> , 62 W. Va. 599, 59 S.E. 611 (1907)	6
<i>Nelson v. West Virginia Public Employees Insurance Board</i> , 171 W. Va. 445, 451, 300 S.E.2d 86, 92 (1982)	17
<i>Parkulo v. West Virginia Board of Probation and Parole</i> , 199 W. Va. 161, 483 S.E.2d 507 (1997)	13
<i>Pauley v. Gilbert</i> , 206 W. Va. 114, 123, 522 S.E.2d 208, 217 (1999)	17
<i>Pittsburgh Elevator Co. v. West Virginia Board of Regents</i> , 172 W. Va. 743, 310 S.E.2d 675 (1983)	13
<i>Powell v. Paine</i> , 221 W. Va. 458, 655 S.E.2d 204 (2007)	2, 6
<i>State ex rel. Brown v. Corp. of Bolivar</i> , 209 W. Va. 138, 544 S.E.2d 65 (2000)	17
<i>State ex rel. Division of Human Serv. v. Benjamin P.B.</i> , 190 W. Va., 81, 84, 436 S.E.2d 627, 630 (1993)	17
<i>State ex rel. Frazier & Oxley, L.C. v. Cummings</i> , 214 W. Va. 802, 591 S.E.2d 728 (2003)	6
<i>State ex rel. West Virginia Board of Education v. Perry</i> , 189 W. Va. 662, 668, 434 S.E.2d 22, 28 (1993)	13

<i>State v. Ruthbell Coal Co.</i> , 133 W. Va. 319, 56 S.E.2d 549 (1949)	15
<i>University of West Virginia Board of Trustees v. Graf</i> , 205 W. Va. 118, 516 S.E.2d 741 (1998)	10
<i>Waite v. Civil Service Commission</i> , 161 W. Va. 154, 241 S.E.2d 164 (1978)	10
<i>Yost v. Fuscaldo</i> , 185 W. Va. 493, 408 S.E.2d 72 (1991)	17

STATUTES

W. Va. Code § 12-3-13	8
W. Va. Code § 18-2-1	13
W. Va. Code § 18-29-1	9
W. Va. Code § 18A-2-2(c)	9
W. Va. Code § 18A-3-6	<i>passim</i>
W. Va. Code § 29-12-1	13
W. Va. Code § 29A-5-4	<i>passim</i>

CONSTITUTIONAL PROVISIONS

W. Va. Const. art. VI, § 35	12, 13, 15
W. Va. Const. art. XII, § 2	13

OTHER

Black's Law Dictionary, 6 th Edition (1990)	7
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v.

**STEVEN L. PAINE, STATE
SUPERINTENDENT OF SCHOOLS,**

Appellee.

APPELLEE'S BRIEF

I.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

COMES NOW the Appellee, Steven L. Paine, State Superintendent of Schools, by and through counsel, Kelli D. Talbott, Deputy Attorney General and Katherine A. Campbell, Assistant Attorney General, and submits this *Brief* pursuant to an *Order* dated August 5, 2009. This case is a matter filed pursuant to the West Virginia State Administrative Procedures Act, specifically W. Va. Code § 29A-5-4, by the Appellant who received an unfavorable ruling by *Order* dated December 9, 2005, from Steven L. Paine, State Superintendent of Schools, who had accepted the West Virginia Commission for Professional Teaching Standards' (hereinafter "Panel") recommended decision which suspended his teaching license for a period of four years.

However, the Appellant prevailed in an appeal to the West Virginia Supreme Court of Appeals which found that the Appellee had failed to show a rational nexus between the Appellant's

behavior and his ability to teach. *See Powell v. Paine*, 221 W. Va. 458, 655 S.E.2d 204 (2007).¹ Upon receiving the decision, the Appellee reinstated the teaching certificate of the Appellant to active status pursuant to the remand order.² Moreover, the Appellee notified the national disciplinary database that there had been no disciplinary action taken against the Appellant's teaching certificate. No other relief could be afforded the Appellant from the Appellee.

Then, on or about April 25, 2008, the Appellant filed a Proposed Order with the Kanawha County Circuit Court which ordered not only reinstatement of the Appellant's teaching certificate, which had already been done, but also ordered "all employments related benefits he otherwise would have received, dating back to December 10, 2005 at the legal rate of interest" and attorney's fees dating back to December 9, 2005. (R. at *Proposed Order*.) Following briefing, the Kanawha County Circuit Court issued its decision on September 17, 2008, and found that the remand order was limited in scope and that the Appellant's entitlement to employment-related benefits and attorneys fees was not within the remand order of this case matter. The Appellant now appeals from this *Order*, and at issue, is whether a licensing agency that revokes a professional license must pay damages in the form of back wages, attorney's fees and costs to the licensee who lost one's employment as a result of the revocation that was eventually reversed on appeal.

¹References to the October 25, 2005 Record references the record previously designated in this *Powell* matter.

²Appellant's license had expired during the appeal period, and he had completed certain required course work during the period of his suspension. The Office of Professional Preparation extended the time period in which to complete the work in recognition of the fact that Petitioner had been employed outside his teaching field during his period of suspension.

II.

STATEMENT OF FACTS

This Court has already reviewed the underlying facts of this revocation proceeding in the *Powell* decision. However, to be able to fully understand the history of this case matter one needs a time line of events that took place with this case matter both in Hardy County where the Appellant was employed by the county as a teacher and in Charleston where the State Superintendent of Schools issues the teacher certificates. Moreover, one needs to see how the matter proceeded through the grievance procedure with the Hardy County Board of Education and how the case matter moved through the administrative proceedings pursuant to W. Va. Code § 18A-3-6 instituted by the State Superintendent of Schools.

In most cases when a public school teacher is alleged to have engaged in misconduct, the teacher's employer will have first initiated its own investigation and disciplinary proceedings at the county level. The teacher has statutory rights to challenge these proceedings with its employer before the West Virginia Public Employees Grievance Board. Moreover, the County Superintendent has a legal obligation to report such matters to the State Superintendent pursuant to W. Va. Code § 18A-3-6, for possible licensure proceedings. Then the State Superintendent conducts his own investigation and generally waits until the county acts and any grievance proceedings are concluded before determining whether a license revocation proceeding should be commenced.

This is the procedure that took place with the Appellant, and in the beginning, Appellant, Brian M. Powell, was a science teacher and football coach at Moorefield High School in Hardy County who admitted to beating his then nine year old son, Bryce. Subsequently, the West Virginia Department of Health and Human Services (hereinafter "WVDHHR") was called along with the

Hardy County Prosecutor. Both agencies initiated their own investigations. At the conclusion of its investigation, WVDHHR substantiated abuse, and eventually, the Appellant pled to a misdemeanor count of domestic battery and was sentenced to thirty days of incarceration.

As for the Appellant's teaching position with Hardy County, the Superintendent of Hardy County, Ron Whetzel, suspended the Appellant with pay on October 15, 2004, pending the outcome of the criminal action. Appellant's subsequent plea of guilty to a misdemeanor count of domestic battery launched Hardy County Schools' own investigation into the matter. Superintendent Whetzel then recommended that the Appellant be placed on suspension without pay on October 28, 2004, from which he ultimately recommended the dismissal of the Petitioner before the Hardy County School Board. On November 16, 2004, the Hardy County School Board chose not to accept the Superintendent's recommendation of dismissal, and ordered Appellant to undergo a psychological evaluation; however, the Board continued the Appellant's suspension without pay. It is from this decision that the Appellant elected to file a grievance against the Hardy County Board of Education directly at Level Four of the grievance procedure, and the parties chose to submit the matter on the record which had been developed at the November 16, 2004, hearing held before the Board. The grievance was denied on April 4, 2005, the administrative law judge finding that a rational nexus existed between Appellant's conduct and his teaching and coaching positions. This decision was not appealed by the Appellant.

In the meantime, based upon the results of the Board ordered psychiatric evaluation, Appellant was able to return to work on January 12, 2005, with no further discipline taken against him by the Hardy County School Board. Thereafter, Superintendent Whetzel notified the State Superintendent's Office of the action taken against the Appellant as required by W. Va. Code

§ 18A-3-6. At that time an investigation was instituted by the State Superintendent of Schools of the actions taken by the Appellant. During this investigation, the Appellant was interviewed by the State Superintendent of School's investigator, John Morrison, on April 21, 2005. (October 25, 2005, R. at DOE Ex. 2.) During this interview the Appellant was accompanied by his attorney, Jessica Baker, and representative of the WVEA, Mary Snelson. The administrative proceeding was explained when questions arose at the end of the interview as to the time frame and possible outcomes of this investigation.³ Subsequently, the State Superintendent issued a *Notice* dated October 6, 2005, initiating proceedings against the Appellants's teaching license.

The Appellant continued to teach throughout the licensure revocation investigation and hearing. Once the State Superintendent suspended the Appellant's teaching license, the Hardy County Board of Education terminated his employment since he was no longer qualified to teach without a license.⁴

III.

ARGUMENT

A. THE REQUEST FOR EMPLOYMENT-RELATED BENEFITS AND ATTORNEY'S FEES EXCEEDED THE SCOPE OF THE REMAND ORDER FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA AND AS SUCH THE KANAWHA COUNTY CIRCUIT COURT LACKED AUTHORITY TO ENTERTAIN ARGUMENTS ON THESE ISSUES

³It should be noted that the appeal period of the April 4, 2005, grievance decision had yet to run by April 21, 2005, the date of the Appellant's investigative interview by the State Superintendent of Schools.

⁴It should be noted that the Appellant chose not to file a grievance regarding the Hardy County Board of Education's termination.

The mandate rule simply states that:

[a] circuit court has no power, in a cause decided by the Appellate Court, to re-hear it as to any matter so decided, and though it must interpret the decree or mandate of the Appellate Court, in entering order and decrees to carry into effect, any decree it may enter that is inconsistent with the mandate is erroneous and will be reversed.

State ex rel. Frazier & Oxley, L.C. v. Cummings, 214 W. Va. 802, 591 S.E.2d 728 (2003), *citing* Syl. pt. 1, *Johnson v. Gould*, 62 W. Va. 599, 59 S.E. 611 (1907).

The *Frazier* court found that the mandate from the appellate court “controls the framework that the circuit court must use in effecting the remand.” *Frazier* at 735, 809. Moreover, the *Frazier* court found that there are two types of remands—general or limited. A general remand gives a circuit court authority to address all matters, as long as consistent with the remand, and a limited remand explicitly outlines the issues to be addressed by the circuit court. *Id.* There is “no universally applicable standard for determining whether a remand is general or limited, and the particular intricacies of each case will bear on the issue. . . .” *Id.*

In the instant matter, the Supreme Court of Appeals of West Virginia found that “the May 26, 2006, order of the Circuit Court of Kanawha County is reversed and the matter is remanded for reinstatement of Appellant’s teaching license.” *Powell*, at 465, 211. The Kanawha County Circuit Court correctly applied the *Frazier* decision and interpreted this language to constitute a limited remand which was to reverse its previous order and to reinstate the Appellant’s teaching license. The Appellee had already complied with the mandate, and the Kanawha County Circuit Court had no authority or power to grant Appellant’s request for additional relief.

This Court’s decision and mandate in *Powell* was not about the issue of entitlement to employment-related benefits, but whether the State Superintendent met the statutory requirements

in order to suspend the Appellant's teaching license. This issue of entitlement to employment related benefits was not raised in the Appellant's original appeal to the Kanawha County Circuit Court nor to this Court in *Powell*, and although, the Appellant requested attorney's fees in his original appeal to the Kanawha County Circuit Court, he failed to raise this as an issue on appeal to this Court. On remand, the Kanawha County Circuit Court could not possibly have interrupted this Court's literal mandate or even the spirit of the mandate to include consideration of these claims.

B. THE APPELLANT IS NOT ENTITLED TO EMPLOYMENT-RELATED BENEFITS UNDER ANY THEORY

There are no grounds that support the proposition that a licensing agency should compensate a licensee for employment-related benefits lost as a result of the suspension or revocation of a professional license.

1. Even Though The Appellee Is The Licensing Agency For Teachers, The Appellee Is Not The Appellant's Employer.

The Appellant is licensed to teach in the State of West Virginia by the Appellee; however, the Appellee has not employed the Appellant in any capacity. The proceeding that resulted in the Appellant's suspension of his teaching license was not a grievance proceeding, but rather an administrative proceeding against the Appellant solely related to the State Superintendent's authority to issue and revoke teaching licenses. At the time of the incident which precipitated this case matter, the Appellant was employed by the Hardy County School Board as a high school science teacher and football coach. The Appellant is not currently employed by the Appellee nor was he employed by the Appellee at any time in the past.

Moreover, wages are defined as "compensation given to a hired person for his or her services. Compensation of employees based on time worked or output of production." *See Black's Law*

Dictionary 6th Ed. (1990). Furthermore, W. Va. Code § 12-3-13, states that “[n]o money shall be drawn from the treasury to pay the salary of any officer or employee before his services have been rendered.” The requested employment-related benefits are for services that have never been performed by the Appellant for the state of West Virginia since the Appellant has never worked for the state of West Virginia.

However, the State Superintendent of Schools has a mandatory duty to investigate and take what action he or she deems proper against a teacher’s certificate to teach when he receives a report from a county school superintendent pursuant to W. Va. Code § 18A-3-6. This is a separate function apart from what the county school board may or may not do with its teacher employee.⁵ It is not supplemental nor a continuation of any action by the county school board. West Virginia Code § 18A-3-6 clearly contemplates that the State Superintendent may revoke a teacher’s license even though the county board of education that employed him took some disciplinary action less than termination, albeit with a higher burden of proof:

Provided, That the certificates of a teacher may not be revoked for any matter for which the teacher was disciplined, less than dismissal, by the county board that employs the teacher, nor for which the teacher is meeting or has met an improvement plan determined by the county board, unless it can be proven by clear and convincing evidence that the teacher has committed one of the offenses listed in this subsection and his or her actions render him or her unfit to teach. . . .

In the instant matter, the State Superintendent exercised his statutory authority to revoke teaching certificates, which operates independently of a teacher’s employment situation. The State

⁵As a teacher one must first become licensed by the Appellee in order to obtain employment through a county board of education. If a teacher acts inappropriately during his employment as a teacher, then the teacher may face disciplinary action by his employer as well as action against his teaching certificate by the State Superintendent of Schools who issued the teaching certificate. *See* W. Va. Code § 18A-3-6.

Superintendent has revoked the certificates of teachers for misconduct when they were not currently employed with any county school system, when they were teaching out of state, when they had retired or when they were teaching in a private school. If the teachers have a currently active teaching certificate, the State Superintendent has a duty to act under the statute so that the teacher will not be able to teach in public schools in West Virginia and that a national discipline data bank will have a record of the discipline to alert other jurisdictions.

Certainly, the State Superintendent's actions when revoking a teaching certificate indirectly impact on a teacher's employment if the teacher is employed in a position requiring certification. But this indirect impact does not create entitlement to damages in the form of back pay. The Appellee had no contractual relationship with the Appellant. The Appellant alone entered into an employment contract with the Hardy County School Board, and it was the Hardy County School Board who terminated that employment contract with the Appellant. In this Court's decision in *Powell*, this Court made no findings nor rulings regarding the Appellee's conduct in regard to the Appellant's status pursuant to W. Va. Code § 18A-2-2(c). No arguments or briefing of the Appellant's status regarding his employment relationship with Hardy County Board of Education was made before any tribunal that involved the Appellee.

Appellant's reliance upon the grievance procedures statute in effect in 2005 is misplaced since it applies to public employees and their employers to "reach solutions to problems which arise between them within the scope of their respective employment relationships. . . ." *See* W. Va. Code § 18-29-1. In arguing that the former grievance procedure can be used to recoup employment-related benefits, the Appellant mistakenly argues that since the Appellee initiated this administrative proceeding against the Appellant's teaching license pursuant to its authority found at W. Va. Code

§ 18A-3-6, then he is entitled to all the remedies offered by the grievance statutes in effect at the time of this case filing in 2005 found at Chapter 18. For the Appellant states that Chapters 18A and 18 must be read together pursuant to *Ewing v. Bd. of Educ. of the County of Summers*, 202 W. Va. 228, 503 S.E.2d 541 (1998) (finding “when the construction of statutes is involved, it is the responsibility of this Court to construe statutes relating to the same subject matter consistently with one another.” *Id.* at 238, 551.)

Yet, the flaw with this argument is that there is no debate here involving the construction of a statute; instead there is a debate over which statute actually applies in the instant matter. The Appellant argues that the now repealed grievance statutes apply and all its remedies. This is clearly wrong since this case matter was not an appeal filed pursuant to either Chapters 18A or 18, but yet it was filed pursuant to W. Va. Code § 29A-5-4, the West Virginia Administrative Procedures Act. *See Petition Appealing The Final Decision Of Steven L. Paine, State Superintendent Of Schools.* The case decisions cited by the Appellant of *Graf v. West Virginia Univ.*, 189 W. Va. 214, 429 S.E.2d 496 (1992), and *Univ. of West Virginia Bd. of Trustees v. Graf*, 205 W. Va. 118, 516 S.E.2d 741 (1998), are distinguishable since these case matters involved an employee and employer relationship and the grievance procedure itself.

Thus, the Appellant cannot now make an argument that the Appellee is responsible for employment-related benefits because the Appellee interfered with the Appellant’s contractual status with Hardy County Board of Education by instituting an action for revocation of his teaching license. Moreover, Appellant’s citation to *Waite v. Civil Service Comm’n*, 161 W. Va. 154, 241 S.E.2d 164 (1978), as authority for this proposition is unavailing because it involves an employee’s rights to due process before being suspended from employment. In *Waite*, the State Hospital at Barboursville had suspended its employee, Waite, for ten days for violating the hospital’s policies. As a classified civil

service nurse employee, Waite sought a hearing on her suspension from the Civil Service Commission which was a precursor to the West Virginia Public Employees Grievance Board.

The *Waite* Court refused the hearing because the enabling statute only afforded hearings before the Civil Service Commission for suspension in excess of thirty days. The *Waite* Court found a property interest in one's status as a permanent civil service employee; however, the instant case matter is distinguishable because the Appellant was not a permanent civil service employee employed by the state of West Virginia, but instead he was an employee of Hardy County Board of Education pursuant to a contract.

The Appellant had two remedies at the time of the issuance of the December 9, 2005, *Order* to avoid a loss of wages or to preserve a claim for back pay. Appellant could have applied for a stay of the four-year suspension pursuant to W. Va. Code § 29A-5-4, and if successful, could have most likely continued to teach pursuant to his employment contract with Hardy County School Board during the pendency of his appeal or taught elsewhere. Secondly, the Appellant could have grieved his termination by the Hardy County School Board. The grievance board could have stayed the proceedings to await the outcome of the revocation appeal process. Though the Appellant elected not to pursue either remedy, he cannot now request employment-related benefits and attorneys fees from the State Superintendent through the narrow remand of the *Powell* case matter just because he failed to pursue them properly years ago.

This situation is no different from other licensure actions. The Board of Medicine may revoke a doctor's license to practice medicine. If the doctor is currently employed, he will be terminated because he no longer has the legal qualifications to perform his job. If he is self-employed, he will suffer a total loss of income from his private practice for the same reason. Should

the Circuit Court or this Court reverse the Board of Medicine's decision, the doctor is not entitled to nor is he awarded back pay or damages. So too, the Division of Motor Vehicles is not liable for the back pay of a taxi cab driver who was fired when his license was revoked, if the revocation is reversed upon appeal.

The remand from the *Powell* decision, clearly ordered that the Appellant's license be reinstated. The Appellee has fully followed the remand of this Court and reinstated the Appellant's license along with notifying the national database that there has been no disciplinary action taken against the Appellant's license. The Appellee submits that this is all the relief that the Appellant is entitled. Moreover, The Appellant argues that he is entitled to employment-related benefits from the State Superintendent without citation to any pertinent authority. In fact, Appellant insists that in education employment law that "fair and equitable relief" is a "term of art" which includes relief in the form of back pay; however, the Appellant misses a crucial point in his argument that the Appellee is not nor ever was the Appellant's employer.

2. Appellant's Claim For Employment-Related Benefits From The State Superintendent Is Barred By The State's Sovereign Immunity Set Fourth In Article VI, Section 35 Of The West Virginia Constitution.

Pursuant to Article VI, Section 35 of the West Virginia Constitution, the State of West Virginia is immune from suit. Specifically, the Constitution states:

The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, any subdivision thereof, or any municipality therein, or any agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee.

The West Virginia Supreme Court of Appeals has held that the above-stated constitutional provision relating to the State's immunity from suit applies not only to the State, but also extends

to an agency of the State to which it has delegated performance of certain of its duties. *Hesse v. State Soil Conservation Comm.*, 153 W. Va. 111, 168 S.E.2d 293 (1969). The West Virginia Board of Education is a State agency to which the people have delegated the duty of the general supervision of the public schools in this State and licensing of teachers. West Virginia Constitution Article XII, § 2; West Virginia Code §§ 18-2-1 *et seq.*; *State ex rel. West Virginia Bd. of Educ. v. Perry*, 189 W. Va. 662, 668, 434 S.E.2d 22, 28 (1993) (State Board of Education is public agency and is therefore entitled to benefit of state agency venue provision). Therefore, the West Virginia Board of Education, is entitled to the benefit of the immunity set forth in West Virginia Constitution, Article VI, Section 35.

A suit may not be brought against the State of West Virginia, or its agencies, unless the suit seeks no recovery from State funds, but, rather, alleges that recovery is sought under and up to the limits of the State's liability insurance coverage. *Arnold Agency v. West Virginia Lottery Comm'n*, 206 W. Va. 583, 526 S.E.2d 814 (1999); *Parkulo v. West Virginia Bd. of Probation and Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1997); *Pittsburgh Elevator Co. v. West Virginia Board of Regents*, 172 W. Va. 743, 310 S.E.2d 675 (1983). The Appellant does not specifically allege in his proposed *Order* that he is seeking recovery under and up to the limits of the State's liability insurance coverage.

Even if it may be construed that the Appellant is seeking such recovery, the West Virginia Board of Education's insurance policy does not cover the wage claim as alleged by the Appellant, and therefore, the *Pittsburgh Elevator* progeny do not provide Appellant grounds for making an exception to the State's immunity. Pursuant to West Virginia Code § 29-12-1 *et seq.*, the State Board of Risk and Insurance Management (hereinafter "BRIM") is responsible for purchasing

insurance for the State of West Virginia and its agencies. Currently, and at the time that this proposed *Order* was filed on April 25, 2008, the West Virginia Board of Education is, and was, insured by the National Union Fire Insurance Company (hereinafter “National Union”) of Pittsburgh, Pennsylvania. (R. at *Respondent’s Response To Response Memorandum In Support Of Entry of Petitioner’s Proposed Order*, Ex. 1.) AIG Claim Services, Inc. (hereinafter “AIG”) is National Union’s authorized representative. (AIG has recently renamed itself Chartis Insurance.) The relevant Policy Number is RMGL 159-52-62 effective July 1, 2007 to July 1, 2008. (R. at *Respondent’s Response To Response Memorandum In Support Of Entry of Petitioner’s Proposed Order*, Ex. 1.)

Upon receipt of the proposed *Order*, the West Virginia Board of Education, by its counsel, requested a determination of insurance coverage for the Petitioner’s claim from Robert Fisher, BRIM Claims Manager, by correspondence dated June 26, 2008. (R. at *Respondent’s Response To Response Memorandum In Support Of Entry of Petitioner’s Proposed Order*, Ex. 2.) Following a thorough review of the applicable State of West Virginia insurance policy, Joseph G. Mannoni, AIG Casualty Claim Specialist II, denied insurance coverage for Appellant’s claim by correspondence dated July 7, 2008, addressed to Dr. Steven L. Paine, State Superintendent of Schools. (R. at *Respondent’s Response To Response Memorandum In Support Of Entry of Petitioner’s Proposed Order*, Ex. 3.) AIG determined that the West Virginia Board of Education’s insurance policy excludes claims attributable to wages, salaries and benefits. (R. at *Respondent’s Response To Response Memorandum In Support Of Entry of Petitioner’s Proposed Order*, Ex. 3.)

To the extent that the Appellant contends that he is entitled to back wages, the West Virginia Supreme Court has held that such a claim is barred by the State’s constitutional immunity. In *Ables*

v. *Mooney*, 164 W. Va. 19, 264 S.E.2d 424 (1979), State Police troopers sought to obtain retroactive recovery for overtime wages that they alleged that they were owed under a state wage and hour statute. The Supreme Court held that the claim for retroactive wages was barred by Article VI, Section 35 of the West Virginia Constitution. The Court held:

In certain instances a suit may be maintained against a State official in his individual capacity, notwithstanding the constitutional immunity provision found in Article VI, Section 35 of the West Virginia Constitution where the relief sought involves a prospective declaration of the parties' rights. However, where the relief sought involves an attempt to obtain a retroactive monetary recovery against the official based on his prior acts and which recovery is payable from State funds, the constitutional immunity provision bars such relief.

Id. at Syl. Pt. 2.

Moreover, the *Ables* Court noted that sovereign immunity blocks recovery where there has not been a legislatively anticipated liability.

Yet, the Appellant contends the decision of *Gribben v. Kirk*, 195 W. Va. 488, 466 S.E.2d 147 (1995), makes clear that "back pay," if prospective in nature, is permissible in light of sovereign immunity. The *Gribben* Court held that sovereign immunity will not prevent a court from:

entertain[ing] mandamus actions brought by public employees against State officials to force the payment of wages for work previously performed or unlawfully denied where the respondent officials **fail to comply with legislation that regulates the public employment relationship and that includes an enforcement mechanism**. Furthermore, as discussed above, our cases also make clear that mandamus will lie against a State official to adjust prospectively his or her conduct to bring it into compliance with any statutory or constitutional standard.

Id. at 497, 156. (Emphasis added). Appellant in the instant matter is not an employee of the State Superintendent. The State Superintendent has not failed to comply with legislation pertaining to the public employment relationship or in any manner exceeded its authority.

Appellant's reliance on the case matter of *State v. Ruthbell Coal Co.*, 133 W. Va. 319, 56 S.E.2d 549 (1949), is equally inapplicable in the instant case matter. The instant case was not a suit

or action filed in a circuit court which does permit counterclaims, but instead an administrative proceeding instituted pursuant to the authority given the Appellee by the state legislature in order to regulate the licensing of teachers within the state of West Virginia. Administrative proceedings by a licensing authority are regulated by a state agency's own procedures and regulations which do not permit or lend themselves to counterclaims.

C. THE APPELLANT IS NOT ENTITLED TO ATTORNEYS FEES AND COSTS

There are no statutory grounds nor common law grounds for the Appellant's claim to attorney's fees and costs.

1. The Appellant's Claim Was Brought Pursuant To The Administrative Procedures Act And The Grievance Procedure Statutes Have No Applicability In This Case Matter

The Appellant makes the same flawed argument for attorney's fees and costs that he does for employment-related benefits which is that the now repealed grievance procedures set fourth in Chapter 18 of the West Virginia Code applies to license revocation procedures since they are set fourth in related Chapter 18A. The State Superintendent has the same response that this was not a grievance. This was a administrative proceeding governed by the West Virginia Administrative Procedures Act. *See* W. Va. Code § 29A-5-4.

2. There Is No Statutory Provision Pursuant To The Administrative Procedures Act Which Authorizes The Collection of Attorney's Fees And As Such The American Rule Applies

There is no statutory provision under the Administrative Procedures Act which authorizes the collection of attorney's fees, and as such the "American" rule applies which states that each litigant bears his or her own attorney's fees. Like almost every other jurisdiction, West Virginia

follows the American rule concerning attorney fees. In *Capper v. Gates*, 193 W. Va. 9, 19, 454 S.E.2d 54, 64 (1994), the West Virginia Supreme Court described the rule as follows:

In Syl. pt. 2, *Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 365 S.E.2d 246 (1986), we observed that "[a]s a general rule each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement." See, e.g., *Yost v. Fuscald*, 185 W. Va. 493, 499, 408 S.E.2d 72, 78 (1991). This is generally referred to as the American Rule.

See also *State ex rel. Div. of Human Serv. v. Benjamin P.B.*, 190 W. Va., 81, 84, 436 S.E.2d 627, 630 (1993) (footnote omitted) ("With certain exceptions, West Virginia has adopted the American rule, which provides that 'each litigant bears his or her own attorney fees absent express statutory, regulatory, or contractual authority for reimbursement.' *Daily Gazette Co. v. Canady*, 175 W. Va. 249, 250, 332 S.E.2d 262, 263 (W. Va. 1985).")

As with awards of attorney's fees, "[c]osts were unknown at common law. They are created and provided for by statute and may be imposed, recovered or collected only as authorized by statute." *Sally-Mike Properties*, 179 W. Va. at 50, 365 S.E.2d at 248 (quoting *Geary Land Co. v. Conley*, 175 W. Va. 809, 813, 338 S.E.2d 410, 414 (1985) (*per curiam*) (quoting *Humphrey v. Mauzy*, 155 W. Va. 89, 95, 181 S.E.2d 329, 332 (1971) (citations omitted))).

Pauley v. Gilbert, 206 W. Va. 114, 123, 522 S.E.2d 208, 217 (1999) (*per curiam*).

As set forth above, costs and attorney fees may not be awarded in absence of a statutory provisions or court rule. The notable exception is when "the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."⁶ *Nelson v. West Virginia Public Employees Insurance Board*, 171 W. Va. 445, 451, 300 S.E.2d 86, 92 (1982). This Court in the *Powell* decision did not find any bad faith by the Respondent in carrying out his statutorily mandated obligations

⁶Nor is this a case where a petitioner may be awarded costs and attorney's fees from a public agency where a public official has deliberately and knowingly refused to exercise a clear legal duty as in a mandamus proceeding. See *State ex rel. Brown v. Corp. of Bolivar*, 209 W. Va. 138, 544 S.E.2d 65 (2000).

pursuant to W. Va. Code § 18A-3-6. This issue was not even raised, but even had it been, it would have been difficult for this Court to find bad faith when the Appellee's findings were upheld by the Circuit Court and they mirrored the findings of the Grievance Board.

IV.

CONCLUSION

WHEREFORE, based upon the foregoing, the Appellee, Steven L. Paine, State Superintendent of Schools, respectfully requests the Appellant's appeal be denied and the Kanawha County Circuit Court's decision be affirmed.

Respectfully submitted,

STEVEN L. PAINE, STATE
SUPERINTENDENT OF SCHOOLS,

By Counsel

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

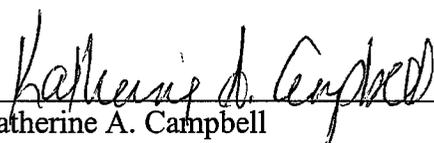


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CERTIFICATE OF SERVICE

I, Katherine A. Campbell, Assistant Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing "Appellee's Brief" was served upon the following counsel of record by depositing the same, postage prepaid, in the United States mail, this 28th day of September 2009 addressed as follows:

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