

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**BRIAN M. POWELL, Petitioner Below,
Appellant,**

v.

**STEVEN L. PAINE, State Superintendent of Schools,
Respondent Below,
Appellee.**

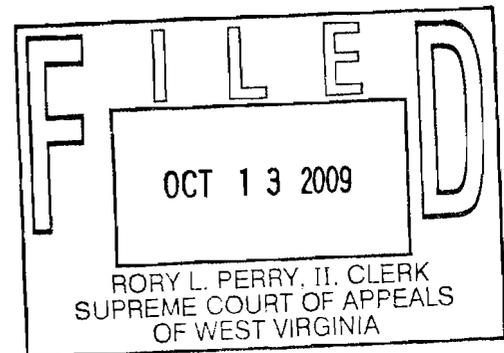
**APPELLANT'S REPLY BRIEF
IN FURTHER SUPPORT OF APPEAL**

**From the Circuit Court of Kanawha County, West Virginia
Civil Action No. 06-AA-3**

No. 34946

Submitted by:

**Ron L. Tucker # 3812
Law Offices of Ron L. Tucker
310 Adams Street
Fairmont, WV 26554
(304) 367-1137
COUNSEL FOR APPELLANT**



I. INTRODUCTION

On August 27, 2009, Appellant/Petitioner below, Brian Powell, served his opening brief in support of his appeal. The Appellee/Respondent below, Paine, made his response to the opening brief, on September 28, 2009. In so doing, Paine essentially recycled all of those arguments initially made in his response to Mr. Powell's Petition for Appeal, simply changing the order in which the arguments were presented. In his opening brief, Mr. Powell responded to those arguments initially made Paine. Accordingly, Mr. Powell provides this brief reply for this Honorable Court's review hoping simply to highlight only the most obvious of the flawed arguments asserted in response and primarily stands upon the arguments of his Opening Brief in support of his appeal.

II. RELEVANT FACTUAL AND PROCEDURAL TIME LINE

On November 18, 2004, the Hardy County Board of education rejected the County Superintendent's recommendation that Mr. Powell be terminated from his employment and instead suspended Mr. Powell. On January 10, 2005 Mr. Powell was reinstated to his position by the Hardy County Board of Education. As he had already been reinstated, Mr. Powell did not appeal an April 4, 2005 Administrative Law Judge decision upholding the November 18, 2004 suspension. Therefore, the appeal period, ending May 4, 2005, expired and Mr. Powell simply continued on with his teaching career.

On October 6, 2005, despite the Hardy County Board of Education's reasoned decision to reinstate Mr. Powell, the Appellee/Respondent Paine, issued a notice of proceedings for revocation of Mr. Powell's license to teach. On December 9, 2005, Paine unlawfully revoked Mr. Powell's teaching license, effective immediately. *See generally* Powell v. Paine, 221 W.Va.

458, 461, 655 S.E.2d 204, 207 (2007) (Powell I). On January 6, 2006, Mr. Powell timely appealed the suspension of his license to teach to the Circuit Court of Kanawha County, on January 6, 2006. In his Petition, Mr. Powell requested that: (1) his license be reinstated *nunc pro tunc*; (2) in conformance with the provisions of W.Va. Code §18-29-8, that he be awarded attorneys fees and costs; and, (3) in conformance with the language of W.Va. Code §18-29-5, that he be awarded any other form of relief the Court deems “fair and equitable.” Petition, ¶49.

III. ARGUMENT

A. The APA Merely Outlines Procedure. The APA Does Not Create Substantive Rights or Duties - Such Rights and Duties as are to be Protected and Enforced Under the APA Must be Located in the Substantive Law Governing the Case.

In his Response the Paine asserts that even though he pursued his action against Mr. Powell, under W.Va. Code §18A-3-6, Mr. Powell is not entitled to invoke the remedial protections of W.Va. Code Chapter 18, in particular §18-29-5(b), because the appeal was filed under the West Virginia Administrative Procedures Act (APA). Paine makes this argument despite this Court’s straight forward holding in Ewing. v The Board of Education of the County of Summers, 202 W.Va. 228, 239, 503 S.E.2d 541, 232 (1998) that the provisions of Chapters 18 and 18A must be read in *pari mater*i. Response, 9-10.

Similarly, Paine asserts that Mr. Powell’s claim for attorney fees cannot survive, even though §18-29-8 expressly supports an award of such fees because, “this was a administrative proceeding governed by the West Virginia Administrative Procedures Act” and “[t]here is no statutory provision under the Administrative Procedures Act which authorizes the collection of attorney’s fees.” Response, 16. Paine’s assertion that Mr. Powell is ineligible for “back pay” and attorney fees because as a matter of procedure he properly sought appeal of the administrative

decision at issue, under the APA, seriously misconstrues the Act's function and purpose.

The APA is not a body of substantive law. Rather, the APA outlines the procedure for hearing contested cases, within the meaning of §29A-1-2(b). *See* Syl. pt 1, *State ex rel, West Virginia Board of Education v. Perry*, 189 W.Va. 662, 434 S.E.2d 22 (1993). This section of the APA defines a contested case as a "proceeding before an administrative agency in which the *legal rights, duties, interests or privileges* of specific parties are required by law or constitutional right to be determined after an agency hearing." W.Va. Code §29A-1-2(b) (emphasis added). The substantive rights of the parties to the administrative proceeding, by contrast, are found outside the APA within other statutory provisions, agency rules, and regulations which govern the legal rights, duties, interests, or privileges of the parties to the contested case. *See* Syl. pt. 2, *Perry* 189 W.Va. at 663, 434 S.E.2d at 23. Thus, Mr. Powell quite properly looked to the statutory language of Chapters 18A and 18 so as to identify the substantive law applicable to the adverse agency decision he appealed and identified therein both the duty owed him by Paine and the rights and remedies available to him as a result of the adverse agency decision taken against him. Therefore, notwithstanding the APA's procedures, Mr. Powell quite properly invoked §§18-29-5(b) and 8 in support of his claims for both "back pay" and attorney fees as asserted in his Petition for Appeal (filed in the circuit court) in connection with the adverse agency decision taken against him by Paine.

Moreover, contrary to Paine's declarations, it matters not whether he directly employed Mr. Powell as the Administrative remedies of §§18-29-5(b) and 8 have as their purpose the remedying of "wrongs done to educational employees *by state agencies*" *Graf v. West Virginia University*, 189 W.Va. 214, 221 429 S.E.2d 496, 503 (1992)(Graf I) (emphasis added); compare

Response, 7-12. In this case, it is undisputed that Paine “wronged” Mr. Powell when he unlawfully suspended his teaching license. *See generally Powell I.* Therefore, Mr. Powell is entitled to the remedies afforded him under §§18-29-5(b) and 8.

B. As Paine Instituted the Adverse Administrative Action Against Mr. Powell and Unlawfully Revoked Mr. Powell’s License in that Adverse Administrative Action, Ruthbell Coal Bars His Invocation of the State’s Sovereign Immunity.¹

In State v Ruthbell Coal Co., 133 W.Va. 319, 56 S.E.2d 549 (1949) this Court, at core, reasoned that when the State institutes an action against a state citizen, the state thereby lays aside its sovereign immunity and subjects its self to the same rules as would apply to any other party invoking the action. *See Ruthbell Coal*, 133 W.Va. at 329, 56 S.E.2d at 555 (when the State has instituted a suit or action against a citizen, it thereby lays aside its sovereignty and is subject to all procedural rules which govern any other party litigant). Moreover, when the State obtains an “erroneous judgment or decree in its favor, the error may be so corrected notwithstanding the provision of section 35, of article 6, of the Constitution.” Ruthbell Coal, 133 W.Va. at 330, 56 S.E.2d at 555-556. Accordingly, “by herself suing, the State subjects herself to all appropriate process to correct errors in judgments or decrees in her favor.” Ruthbell Coal, 133 W.Va. at 331, 56 S.E.2d at 556.

In his opening brief, Mr. Powell invoked the principle enunciated in Ruthbell Coal to support his invocation of the remedial, administrative processes provided by §§18-29-5(b) and 8 to remedy wrongs done to educational employees by state agencies without offense to the State’s sovereign immunity. These remedies are available to state education employees as part of the

¹Mr. Powell reasserts and incorporates herein by reference all those other and additional arguments in contravention of Paine’s assertion of sovereign immunity as set forth in greater detail in his *Appellant’s Brief in Support of Appeal*.

administrative process to which Mr. Powell was subjected by Paine and are available to correct erroneous decisions rendered in the name of the State such as the revocation of Mr. Powell's teaching license in the case *sub judice*.

In an effort to distinguish Ruthbell Coal as raise in support of Mr. Powell's claims for relief under the administrative procedures available to educational employees under §§18-29-5(b) and 8, Paine asserts only that such reliance is misplaced because "the instant case was not a suit or action filed in a circuit court which does permit counterclaims, but instead is an administrative proceeding instituted pursuant to the authority given [Paine] . . . [and] regulated by . . . [the agency's] own procedures and regulations which do no permit or lend themselves to counterclaims." Response, 15-16. Paine's argument is, however, nothing save make weight in light of the competing constitutional interests of citizen and state so carefully balanced by the Ruthbell Coal Court.

We think it would be unconscionable and contrary to the due process clauses contained in the Fourteenth Amendment to the Constitution of the United States, and Article III, Section 10, of the West Virginia Constitution, to permit the State, as a plaintiff, to bring a citizen into court for the purpose of asserting liability against such citizen, and then strip that citizen of all of the procedural rights and defenses which he would have if the State had not been a party plaintiff.

Ruthbell Coal, 133 W.Va. at 331, 56 S.E.2d at 556.

Simply stated, Ruthbell Coal instructs that Paine cannot institute an administrative process against an educational employee, such as Mr. Powell, and at the same time foreclose administrative remedies and defenses available to Mr. Powell on an assertion of sovereign immunity without at the same time offending the due process clause. Therefore, notwithstanding any arguable basis for sovereign immunity which Paine might assert, because Paine commenced

the administrative proceedings, Mr. Powell is entitled to the administrative remedies available to him under §§18-29-5(b) and 8 to remedy the wrongs done to him by Paine without offense to the State's sovereign immunity.

C. Paine Unlawfully Revoked Mr. Powell's License on December 9, 2005. Therefore, the Relevant Policy of Insurance for Purposes of the Pittsburgh Elevator Exception to Sovereign Immunity is for the Policy Period July 1, 2005 to July 1, 2006 NOT July 1, 2007 to July 1, 2008.

Paine attached as "Exhibit 1" to his reply memorandum, filed in the circuit court, an insurance contract issued by National Union Fire Insurance Company of Pittsburgh with an issuance date of July 7, 2007. The policy period under this contract runs from July 1, 2007 to July 1, 2008. However, Paine unlawfully revoked Mr. Powell's license on December 9, 2005. Therefore, the "wrongful act" which gave rise to an "occurrence," within the meaning of the policy, would be covered under a contract of insurance with a policy period commencing July 1, 2005 and ending July 1, 2006. Consequently, the insurance contract produced by Paine is not dispositive of the question of whether the Pittsburgh Elevator exception to the State's sovereign immunity might be satisfied. *See generally* Syl pt. 2, Pittsburgh Elevator Co. v. West Virginia Board of Regents, 172 W.Va. 743, 310 S.E.2d 675 (1983).

As Paine produced an inapplicable insurance contract in the circuit court it cannot be determined on the current record whether there is coverage under any policy and endorsements for the December 9, 2005 occurrence, at issue. Therefore, this case should, at the very least, be remanded to the circuit court for the purpose of ascertaining whether an earlier and applicable contract of insurance provides coverage for the administrative relief requested by Mr. Powell in his January 6, 2006 Petition appealing the adverse agency decision, at issue.

D. There are No Exceptional Limited Circumstances in This Case to Justify Departure from the General Mandate Rule

In the absence of explicit instructions, a remand order is presumptively a general mandate to the circuit court. *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W.Va. 802, 809, 591 S.E. 2d 728, 735 (2003) (Frazier & Oxley II) A general mandate does not “typically impose limits on the trial courts outside the context of the specific issue upon which the writ was granted.” Frazier & Oxley II, 214 W.Va. at 809, 591 S.E.2d at 735, n. 9. Thus, upon remand [the trial court] may consider, as a matter of first impression, those issues not expressly or implicitly disposed of by the appellate decision [citations omitted]. As such, “a trial court is . . . free to make any order or direction in further progress of the case, not inconsistent with the decision of the appellate court, as to any question not settled by the decision.” Bankers Trust Company v. Bethlehem Steel Corporation, 761 F.2d 943, 950 (3rd Cir. 1985).

In Powell I, this Court did not expressly or implicitly dispose of the administrative claims for relief raised by Mr. Powell in his Petition filed in the circuit court and available to him, under §§18-29-5(b) and 8. Therefore, pursuant to the general mandate rule, the circuit court was free to make any order in further progress of Mr. Powell’s administrative appeal as raised in his petition including the administrative remedies of an award of “back pay” and attorney fees. The circuit court, however, without explanation as to the manner in which the Powell I remand order might be distinguished from its presumptive status as a “general mandate” simply declared the order “clearly limited in scope” and refused to consider the relief specifically pled by Petition.

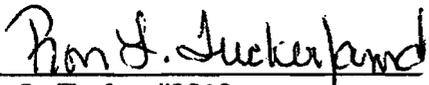
Appealing that decision to this Court, Mr. Powell asserted that the Court’s unsupported holding that the mandate issued in Powell I was so limited as to prevent it from considering the

remedies sought by Mr. Powell in his Petition for appeal of administrative decision was erroneous, as a matter of law, as it violated the general mandate rule. In response, Paine, like the circuit court, does not point to any language or direction which might impose limits on the trial courts ability to decide issues outside the context of the specific issue ruled upon in Powell I. Therefore, Frazier & Oxley II, instructs that the circuit court's refusal to entertain the relief pled by Mr. Powell is erroneous as a matter of law.

IV. CONCLUSION

For the foregoing reasons as well as all those reasons stated in his *Appellant's Brief in Support of Appeal* previously filed herein, Appellant Brian M. Powell, respectfully requests this Honorable Court to grant his Appeal and remand the matter to the circuit court for an order or direction in further progress of the case including but not limited to all proceedings necessary to a determination of all back pay, costs and attorneys fees to which he is entitled as a consequence of his successful challenge to the administrative decision at issue. Mr. Powell further prays for all such additional relief as this Court may deem proper in the interests of justice, including but not limited to all costs and attorneys fees incurred in connection with the instant appeal.

Respectfully Submitted,
Petitioner by Counsel



Ron L. Tucker #3812
Law Offices of Ron L. Tucker
310 Adams Street
Fairmont, WV 26554
(304) 367-1137

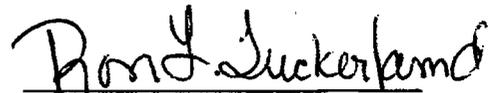
**APPELLANT'S REPLY BRIEF
IN FURTHER SUPPORT OF APPEAL
CERTIFICATE OF SERVICE**

**Appeal From the Circuit Court of Kanawha County, West Virginia
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I hereby certify that on the 9th day of October, 2009 I served a true copy of the foregoing *Appellant's Reply Brief in Further Support of Appeal* upon opposing counsel by depositing the same in the United States mail, postage prepaid, to the following address:

Katherine A. Campbell
Senior Assistant Attorney General
State Capitol Complex
1900 Kanawha Blvd., E., Bldg. 1, Room E-26
Charleston, WV 25303

Sherri Goodwin, Counsel
West Virginia Department of Education
1900 Kanawha Blvd., E., Bldg. 6, Room 362
Charleston, WV 25305-0330



Ron L. Tucker #3812
Law Offices of Ron L. Tucker
310 Adams Street
Fairmont, West Virginia
(304) 367-1137