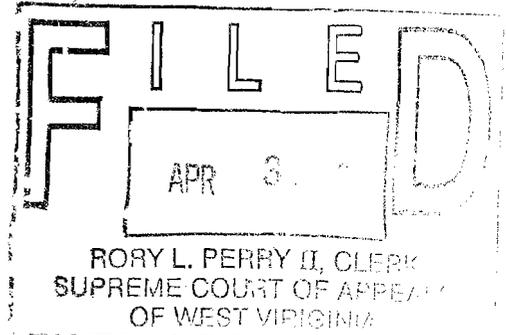


**In the
Supreme Court of Appeals
Of
West Virginia**



**STATE OF WEST VIRGINIA BY
RONALD E. RADCLIFF, COMMISSIONER,
WORKFORCE WEST VIRGINIA,
UNEMPLOYMENT COMPENSATION DIVISION**

Appellants/Respondents Below

v.

NO. 34737

PERRY D. DAVIDSON

Appellee/Petitioner Below

BRIEF OF APPELLANTS

**Mary Blaine McLaughlin, Senior Counsel
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Unemployment Compensation Division
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Charleston, West Virginia 25305
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**IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA**

**RONALD E. RADCLIFF, COMMISSIONER,
WORKFORCE WEST VIRGINIA,
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Appellants/Respondents Below

v.

NO. 34737

PERRY D. DAVIDSON

Appellee/Petitioner Below

BRIEF OF APPELLANTS

This Appeal is brought by Commissioner Ronald E. Radcliff, WORKFORCE West Virginia, Unemployment Compensation Division, (Hereinafter Appellant) pursuant to West Virginia Code §21A-7-27 and Rules 3 and 4 of the Rules of Appellate Procedure. The Circuit Court of Cabell County has abused its discretion by clearly disregarding the appeals jurisdiction of the Unemployment Compensation Act as well as §§21A-7-8 and 21A-7-11 of the W. Va. Code in an Order signed July 15, 2008, which appears to have been entered with the Circuit Clerk on July 15, 2008. The Court exceeded its statutory jurisdiction and abused its discretion by holding that under West Virginia law it could hear an appeal of a final agency decision and by de novo review redetermine an agency's finalized findings of fact and by doing so reverse its statutory final decision. Perry D.

Davidson (Hereinafter Appellee) is not entitled by statute to have his unappealed and final deputy decision reversed seven years after his overpayment was established. Finally, the Circuit Court's order violates §§21A-7-8 of the West Virginia Code.

I.

KIND OF PROCEEDING AND NATURE OF THE RULING OF THE LOWER TRIBUNAL

The instant action arose from a Cabell County Circuit Court ruling holding that the judgment of the Magistrate Court [which was based on an agency's statutory unappealed final decision] in the amount of \$1,962.00 plus court costs was to be SET ASIDE and the case DISMISSED, with prejudice.

The Court ignored the statutory final agency overpayment decision, admitted as Exhibit A, when it set aside the overpayment judgment owed to the Appellant, thus denying the agency a judgment against the Appellee in the amount of \$1,962.00, plus court cost. As a result, the Circuit Court of Cabell County set a precedent that a statutory final unappealed agency decision could be set aside by a Circuit Court's de novo review seven years later on the appeal of a Magistrate Court judgment to collect the money.

II

STATEMENT OF FACTS

The Appellee worked for Data Solutions International and was laid off due to lack of work on March 15, 2000. On July 12, 2000, the Appellee filed an initial unemployment compensation claim and began receiving unemployment compensation benefits for the benefit week ending July 9, 2000.

On October 2, 2000, the Appellee filed a continued claim for unemployment compensation benefits at his weekly benefit rate of \$327.00 for each of the following weeks ending: September 23, 2000 through September 30, 2000. See Exhibit B.

However, after investigation, it was determined that the Appellee filed a fraudulent continued claim on October 2, 2000 for which he received unemployment compensation benefits. This was due to the fact that the Appellee worked for Clientlogic on September 17 and 18, 2000 and did not report this employment, and the fact he voluntarily quit this job when filing his claim for the week ending September 23, 2000. The Appellee was aware that he had to report work and earnings and the reason he separated from work. See Exhibit B and D.

A hearing was held on the alleged fraudulent claim. The local office deputy ruled that the Appellee knowingly made a false statement on his weekly claim form when he said he did not work, and it was discovered by the investigator that he had worked two days for ClientLogic Corporation. See Exhibits B and D.

Wherefore, the Appellee was disqualified from receiving unemployment compensation benefits by the local office deputy for the benefit week of September 23, 2000, in the amount of three hundred twenty-seven dollars (\$327.00). This in turn made all his weeks after that an overpayment. See §21A-6-3(12) of the West Virginia Code as well as Exhibit B.

The statutory authority for a Deputy's decision and its finality is seen in §21A-7-4 and §21A-7-8 of the West Virginia Code. Also, on November 14, 2000 the Appellee, after filing a continued claim for unemployment benefits, received a separation decision on his claim. The separation determination ruled that the Appellee failed to provide the

local unemployment office with proof that the separation from Clientlogic Corporation involved fault on the part of his employer. Therefore, the Appellee was disqualified beginning September 17, 2000, until he returned to covered employment and was employed therein at least (30) working days. See Exhibit A

The Deputy also ruled that “the [Appellee] received unemployment compensation benefits to which he was not entitled at the weekly benefit rate of \$327.00 for each of the following weeks ending September 23, 2000 through October 28, 2000. This created an overpayment in the amount of \$1,962.00. Further the Deputy ruled that the Appellee must repay the overpayment. If he failed to repay prior to filing for future benefits, the amount due would be deducted from future benefits due him.”

Due to the fact that the Appellee concealed his employment with Clientlogic Corporation when he filed his continued claim, (Exhibit D), the deputy’s decision on the continued claim found that the Appellee knowingly made a false statement in order to obtain or to attempt to obtain an increase in benefits, and therefore he was disqualified under §21A-6-3(12) of the West Virginia Code for each week in which fraud occurred - benefit weeks(s) ending September 23, 2000, and for fifty-two weeks thereafter from November 12, 2000 to November 10, 2001.

The Appellee never appealed either the separation or fraud decision. Wherefore, after eight days from which notice of the decision was mailed to the address given by the Appellee, the decisions became final according to §21A-7-8 of the West Virginia Code.

On April 5, 2007, a civil complaint was filed in the Magistrate Court of Cabell County, pursuant to § 21A-7-11 of the West Virginia Code. See Exhibit C The purpose of this Magistrate Court filing was to get a judgment as a last resort to get the Appellee to

repay the overpayment of benefits he owed the Appellant, since the Appellee had not paid the agency any money on his unappealed decisions for seven years. (Tr. at 37)

The magistrate, who was to conduct the hearing, continued the case for 30 days to permit the Appellee to file late appeals to the local office deputy's decisions. The Appellee again declined to file any appeal to the Appellant.

On June 26, 2007, a hearing was held where the Appellant won a judgment by default in the amount of \$1,962.00 together with court costs. (Tr. at 37) The Appellee did not appear at the hearing, but later filed a Motion to Set Aside the Judgment of the Magistrate. The Magistrate who was to hold the hearing on Plaintiff's motion continued the hearing for 30 days so that the Appellate could file a late appeal; this he did not do. (Tr. at 9) A hearing was held on the Motion To Set Aside the Judgment and the Motion was denied. The Appellee then appealed, without filing a petition and request for a hearing de novo, the Magistrate's ruling on the Motion to Set Aside the Judgment to the Circuit Court of Cabell County. (Tr. at 37)

The Circuit Court denied the Appellants' Motion for Summary Judgment by reversing the Magistrate Court's decision to Set Aside the Judgment, and Appellant appealed the Circuit Court's order to the West Virginia Supreme Court of Appeals.

III.

ASSIGNMENT OF ERRORS

- A. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR, WAS ARBITRARY AND CAPRICIOUS AND ABUSED ITS DISCRETION WHEN IT SUBSTITUTED ITS OWN JUDGMENT FOR THAT OF THE AGENCY BY REVERSING THE FINAL AGENCY'S DECISION'S FACT AND THEN SETTING ASIDE THE DEFAULTED JUDGMENT OF THE AGENCY AND THE MAGISTRATE COURT.

- B. THE COURT COMMITTED REVERSIBLE ERROR WHEN IT EXCEEDED THE STATUTORY JURISDICTION OF THE AGENCY BY OVERRULING THE FINALITY OF THE AGENCY'S DECISION AS WELL AS THE MAGISTRATE COURT'S DECISION IN VIOLATION OF §§ 21A-7-8 AND 21A -7-11 OF THE WEST VIRGINIA CODE, WHEN THE APPELLEE HAD NOT EXHAUSTED THE ADMINISTRATIVE APPEAL PROCESS.
- C. THE COURT ERRED WHEN IT APPLIED THE WRONG STANDARD OF REVIEW AND WRONG BURDEN OF PROOF AND THUS MADE ITS DECISION ON UNLAWFUL PROCEDURE.

IV.

AUTHORITIES RELIED UPON AND DISCUSSION OF LAW

- A. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR, WAS ARBITRARY AND CAPRICIOUS AND ABUSED ITS DISCRETION WHEN IT SUBSTITUTED ITS OWN JUDGMENT FOR THAT OF THE AGENCY BY REVERSING THE FINAL AGENCY'S DECISION'S FACT AND THEN SETTING ASIDE THE DEFAULTED JUDGMENT OF THE AGENCY AND THE MAGISTRATE COURT.

In the instant case, the Appellant filed a Complaint in Magistrate Court as a last resort to get the Appellee to repay his money prior to the statute of limitations, on a 2000 Agency Decision of the Deputy. (Tr. at 37, Exhibit C) The Appellee though summoned to the Magistrate hearing did not appear, and the Magistrate Court Judgment which the Circuit Court reversed was won by default. (Tr at 33, 37)

The Appellee then filed a Motion to Set Aside the Judgment with the Magistrate Court. The Court continued the hearing for 30 days in order to allow the Appellee time to file a late appeal of the Deputy's decision at the local office. However, the Appellee refused to do so.

Afterwards, a separate Magistrate hearing was given on the Appellee's Motion to Set Aside the Judgment. At this hearing the Appellee appeared and his motion was denied

This Magistrate Court's denial of Appellee's Motion was what the Appellee appealed to the Circuit Court, and the Circuit Court on its own suggestion reviewed de novo the Magistrate Court's as well as the Appellant's decision.

The appealed issue before the Court was the Appellee's Motion to Set Aside the [Appellant's] Judgment by the Magistrate Court, in the amount of \$1,962.00, which was established by the Agency's deputy's statutory final decision seven years earlier. (See Exhibit A and Tr. at 37)

The Circuit Court erred when it reviewed de novo the appealed motion as well as the Deputy's factual decision and held that the Appellant failed to produce any evidence which established the amount of damages that it was entitled to as a result of overpayment of unemployment compensation benefits; for the Court did not recognize the unappealed Deputy's decision's which established the amount of overpayment seven years ago. The Deputy's decisions were admitted as Exhibit A. However, the Court ignored the fact that this Court has held that judicial review is limited to the record made before the administrative agency and a circuit court is authorized to accept only additional evidence where there is an allegation of procedural irregularity. Wheeling Pittsburg Steel Corp. v. Rawling, 205 W. Va. 286, 517 S.E. 2d 763 (1999). For the Court knew that the Appellee had made no allegation against the Appellant of any procedural irregularity.

Moreover, during the bench trial, James Osborne, the overpayment collection manager for the Appellant testified under oath that the Magistrate Court handed down a judgment against the Appellee in the amount of \$1,962.00 plus court costs of \$85.00. (Tr. at 37) Furthermore, the Deputy's decisions which were admitted as evidence with no objection stated the amount \$1,962.00 due the Appellant. (Exhibit A) Most importantly, the Appellee who was pro se never brought up the issue or gave any testimony at the de novo hearing or any other hearing that he challenged the amount he owed.

Wherefore, by ignoring the above evidence of the Deputy's final decision, the Court erred when it substituted its own judgment by creating its own fact - that of the overpayment amount not having been established – and then reversed the Magistrate Court's decision on this fact when it knew there was testimony and exhibits contrary to its finding in the record.

The clearly wrong and the arbitrary and capricious standards of review are differential ones which presume the agency's actions are valid so long as the decision is supported by substantial evidence on a rational basis. Syllabus Pt. 3, In re Queen, 196 W.Va. 442, 473 S.E.2d 483 (1996). This decision was supported by a deputy's final decision. Thus, the scope is narrow and the Circuit Court is not to substitute its judgment for that of a hearing examiner or deputy when it only has appellate jurisdiction. In this case the court substituted its own judgment for a final unappealed decision.

In the instant action the Appellant's facts were valid and its decisions were supported by substantial evidence as a statutory final and unappealed decision of the agency. The previous testimony of James Osborne, as mentioned above, and the fact that the Appellee never gave any testimony or other evidence that the amount of damages had

not been established as well as the fact that the deputy's decisions establishing the amount of damages was admitted into evidence by the Court shows that the Circuit Court erred when it found that the Appellant had not established the amount of damages owed by the Appellee and the Appellee by means of an unappealed decision had done so on an appeal outside of the Statute of limitations.

As mentioned before, the Circuit Court refused to admit the Magistrate Court decision from which the Appellee's appeal came forth, because according to the Court, the Magistrate Court's decision was irrelevant, since the hearing according to the Circuit Court's call was to be de novo even though it did not involve a question of law. However, the Court did admit the deputy's unappealed decisions which evidenced the amount of overpayment due the Appellant and then prejudiced the hearing by ignoring the decisions and creating its own finding of fact for reversal of the Magistrate order based on a final agency decision.

The West Virginia Supreme Court has established that the Court may review an action of a lower tribunal to determine if it acted in an arbitrary and capricious manner, and if it did, its action will be reversed. North v. West Virginia Bd. Of Regents, 160 W.Va. 248, 260, 233 S.E. 2d 411, 418-19 (1977). Moreover, this Court has advised that a circuit court may not reverse a decision of an agency simply because it would have decided the case differently. Berlow v. West Virginia Bd. Of Medicine, 193 W. Va. 666, 672, 458 S.E. 2d 469, 475. (1995).

Wherefore, based on the above, the substantial rights of the Appellant to have a fair hearing were prejudiced, and the Court was arbitrary and capricious and abused its discretion when it did not recognize the agency's statutory final decision upon which the

Magistrate Court decision was based, ignored the testimony of James Osborne on the outcome of the Magistrate Court hearing, and created its own issue to rule on in favor of the Appellee, and ignored the fact that the Appellee had not exhausted all of his administrative hearings on the matter.

- B. THE COURT COMMITTED REVERSIBLE ERROR WHEN IT EXCEEDED ITS STATUTORY JURISDICTION BY OVERRULING THE FINALITY OF THE AGENCY'S DECISION AS WELL AS THE MAGISTRATE COURT'S DECISION IN VIOLATION OF §§ 21A-7-8 AND 21A -7-11 OF THE WEST VIRGINIA CODE, WHEN THE APPELLEE HAD NOT EXHAUSTED THE ADMINISTRATIVE APPEAL PROCESS.

On appeal, the issue in this case before the Circuit Court was, can the Appellant have a judgment based on the final unappealed decision of the Appellant seven years ago. However, the Court exceeded its statutory jurisdiction when it tried facts that were final unappealed facts from the Deputy's decision as well as ignored the appellant statutory jurisdiction of the unemployment law. (See §21A-7-4, §21A-7-8 of the West Virginia Code)

In Patton v. Gatson, 207 W.Va. 169, 530 S.E. 2d 168, (1999), the claimants were denied unemployment benefits due to the fact that they failed to show good cause for the untimely filing of their claims nine and one half months later.

Similarly, in the instant case, the Appellee responded to a judgment of the Magistrate Court with a Motion to Set Aside the judgment seven years after the deputy's decision became final and granted said judgment against the Appellee on the overpayment of benefits.

Moreover, the legislature, in apparent recognition that a deputy commissioner may rule on an unemployment compensation claim without conducting an initial hearing,

has provided a statutory right to a hearing of an appeal from the deputy's decision. Section 21A-7-8 of the W. Va. Code grants to either party the right to an appeal from a deputy's ruling and provides that such party shall be entitled to a fair hearing and reasonable opportunity to be heard before an appeal tribunal. Syllabus Pt. 2, Parks v. Board of Review of Dep't of Emp. Sec., 188 W Va. 447, 425 S.E. 2d 123, (1992). The statute §21A-7-8 of the West Virginia Code was written in 1936. Most importantly, a late appeal with the Board of Review showing good cause for its lateness is treated in the same manner.

West Virginia Code §21A-7-8 Appeal from Deputy's Decision states that [as in the instant case] "when the decision of the deputy becomes final benefits shall be paid or denied"

Again, the deputy's decision of an overpayment in the amount of \$1,962.22 was never appealed by the Appellee (Tr. at 9, 32) thus making the decision final:

After seven years, the Appellant filed a complaint in the Cabell County Magistrate Court in order to obtain a judgment to collect the overpayment of the Deputy's decision owed the Appellant. (See §21A-7-11 of the West Virginia Code.)

The Appellant won the judgment of \$1,962.00 based on default, since the Appellee did not attend the hearing.

The Appellee then made a Motion to Set Aside the Judgment. The motion was denied by the Magistrate and then the Magistrate's judgment to deny the Motion to Set Aside the Judgment was appealed to the Circuit Court of Cabell County by the Appellate.

West Virginia Code §21A-7-11 states as follows:

... If the final decision in any case determines that a claimant was not lawfully entitled to benefits paid to him pursuant to a prior decision such amount of benefits so paid shall be deemed overpaid. The commissioner shall recover such amount by civil action or in any manner provided in this code for the collection of past due payment ... (Emphasis added)

The question becomes how can there be an appeal to the Circuit Court and a hearing de novo on any part of the Deputy's decision when that appeal and hearing serves to prevent finality of the decision of the Deputy under §21A-7-8 of the West Virginia Code, and when the unemployment law permitting the right to appeal and finality of the deputy's decision became law before §50-5-12 of the West Virginia Code Magistrate Courts trials, Hearings and Appeals. Wherefore an appeal law in conflict with the Appellate jurisdiction of the unemployment act should be reversed, especially when all statutory and case law states that Circuit Courts are to review the record below, not have a bench trial. Syllabus Pt. 7, Expedited Transportation Systems, Inc. v. Vieweg, 207 W. Va. 90; 529 S.E. 2d 110 (2000); Syllabus Pt. 2, Smith v. Thornsberry et al., 214 W.Va. 228; 588 S.E. 2d 217 (2003).

Furthermore, the purpose of the finality of the decision of the deputy is to permit the Appellee the right to appeal the deputy's decision if he thinks it is incorrect. In the instant case, the Appellee never appealed the deputy's decision, until seven years later on a Magistrate Court's judgment to collect the amount owed the Appellant. (See §§ 21A-7-8 and 21A-7-11 of the W.Va. Code.) Moreover instead of taking the opportunity to do a late appeal to the Board of Review the Appellee appealed to the Circuit Court.

The Appellee was noticed to the correct address, the same as noticed by the Circuit Court. Moreover he was told he could file late appeals twice, but did not do so. (See Tr. at 9-10, 32, 33, 34)

Wherefore, the judgment of the Circuit Court should be reversed, since it did not have statutory jurisdiction to override a statutory final agency decision upon which the judgment of the magistrate court was based, and the Appellee never exhausted his administrative remedies.

C. THE COURT ERRED WHEN IT APPLIED THE WRONG STANDARD OF REVIEW AND WRONG BURDEN OF PROOF AND THUS MADE ITS DECISION ON UNLAWFUL PROCEDURE.

The Appellee in this action did not file a Petition for Appeal and Trial de Novo, as mandated by §50-5-12(d) (1). Also no exhibits or any other part of the record were filed in this case. Instead, the Circuit Court of Cabell County prejudiced the Appellant's right to a fair hearing by determining that the hearing was going to be a trial de novo, and that there was no need for the Magistrate Court's judgment to be admitted into evidence, since the Court said it was irrelevant. (Tr. at 38) Thus, the basis of the appeal was not to be placed into evidence at the hearing nor was any other pleading such as Appellee's Motion to Set Aside the Judgment from which the appeal was brought forward. Finally the burden of proof which was to be on the party complaining of the agency action to demonstrate an error of law subject to review was shifted to the Appellant to again make the case for an overpayment decision that the deputy had already decided. Johnston-Willis, Ltd v. Kenley, 6 Va. App. 231, 241, 243, 369 S.E. 2d 1 (1988).

Wherefore, the Appellant's final decision should have been respected as final seven years after it became so, and the Circuit Court should have never tried to

change the finality of the decision by a trial de novo, or accept an untimely appeal, but instead should have seen if the Magistrate Court's decision based on the final agency decision was proper by a review of the Magistrate Court's record. Due to the Circuit Court not reviewing the record of the Magistrate Court's action and reversing the Agency's deputy's decision, the Appellant's right to a fair hearing were prejudiced.

In the instant action, the Court did not remand the case back for a late appeal for good cause, but instead substituted its own judgment for a final deputy's decision based on its own finding of a new fact that of the Appellant not proving it had paid to the Appellee the amount of damages stated in the Magistrate Court judgment. A court cannot consider upon review of the decision a question not considered or passed upon by the agency or a question upon which the agency could not and did not decide Syllabus Pt 1, Nunley v. Salyers, 203 W. Va. 431, 438, 508 S.E. 2d 368, 375 (1998).

In Department of Labor, Licensing and Regulation et al. v. Woodie, 128 Md. App. 398, 411, 738 A.2d 334, 341(1999) the Court of Special Appeals of Maryland held that the Courts' ruling in this case was prejudicial to the Appellants because it needlessly vacated the Board's decision and requires the employer to appear before the Department for a second evidentiary hearing. Similarly as in the instant action the Circuit Court vacated the Deputy's final decision seven years earlier and required the parties to rehear the case. Moreover, the Court held the Circuit Courts sitting in judicial review of administrative decisions are essentially appellate courts and must act only to correct errors. Here the Circuit Court declined to review the record for error before it decided de novo with a bench trial to allow the appellate a second opportunity to present evidence. (Emphasis added)

Thus, the Circuit Court decision should be reversed and the Magistrate Court decision affirmed.

VI.

CONCLUSION

Based on the above, Counsel for the Appellant respectfully requests this Honorable Court to reverse the Circuit Court's decision and grant the judgment of the Magistrate Court based in the Deputy's statutory final decision that the Appellee has a judgment against him in the amount of \$1,962.00 as an overpayment of benefits owed to the Appellant, WorkForce West Virginia Unemployment Compensation Division.

Respectfully submitted,

RONALD E. RADCLIFF, COMMISSIONER
WORKFORCE WEST VIRGINIA
UNEMPLOYMENT COMPENSATION
DIVISION
Petitioner
By Senior Counsel

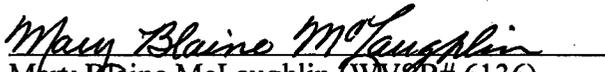

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STATUTES

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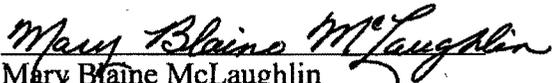
Appellee/Petitioner Below

CERTIFICATE OF SERVICE

I, Mary Blaine McLaughlin, counsel of record for the Appellant, Ronald E. Radcliff, Commissioner, WORKFORCE West Virginia, Unemployment Compensation Division do hereby certify that a true copy of the "BRIF OF APPELLANT", was delivered to Appellee, by depositing a true copy of the same, via the U. S. Mail, postage prepaid, addressed as follows:

Perry D. Davidson
1225 9th Avenue
Huntington, West Virginia 25701

DATED: This 3rd day of April 2009.


Mary Blaine McLaughlin