

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JAMES E. BEICHLER,

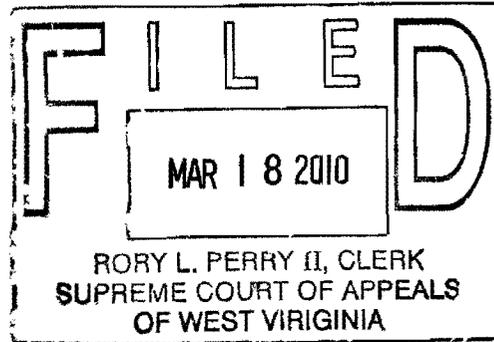
Appellant/Appellant,

v.

**WEST VIRGINIA UNIVERSITY
AT PARKERSBURG,**

Appellee/Defendant.

Appeal No.: 35435



**WEST VIRGINIA UNIVERSITY AT PARKERSBURG'S
BRIEF IN RESPONSE TO APPEAL**

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On Behalf of Appellee/Respondent**

I. INTRODUCTION

Comes now the Defendant, the West Virginia University at Parkersburg Board of Governors, on behalf of West Virginia University at Parkersburg, hereinafter WVUP, by counsel, Jendonnae L. Houdyschell, Senior Assistant Attorney General, does hereby respond to the Appeal filed herein as follows:

II. STATEMENT OF FACTS

James E. Beichler, was employed by West Virginia University at Parkersburg as a tenure track faculty member in the Physics department from August 13, 2001 through May 17, 2008. By letter dated, May 15, 2007, Appellant was advised that his application for tenure was being denied and that he would be issued a one-year terminal contract for the 2007-2008 academic year, with the last date of employment being May 17, 2008. Further, in addition to his regular contracts of employment, Appellant had from time to time entered into several "Faculty Overload Contracts", which provided him additional agreed upon compensation when he taught in an overload capacity. Faculty Overload Contracts are discretionary contracts whereby the institution and the faculty member agree upon the additional compensation to be paid above an individual's regular salary for additional classes (instructional hours) to be taught by the faculty member. Specifically, the contracts that he entered into and which cover the time periods in dispute are as follows: Spring 2007 and Spring 2008. Significantly, the last of these contracts was for the Spring 2008 semester, which was not executed by Appellant until May 19, 2008, **two days after** his employment ended with WVUP and therefore after any work under the same would have been completed. In other words, Appellant agreed to the compensation he was owed at the end of the semester after the work was completed. Further, to the extent the parties did not enter into Faculty Overload Contracts for the Fall

2004, Spring 2005 and Fall 2007 semesters, Mr. Beichler and WVUP did not reach an agreement that Mr. Beichler would be required to teach any additional classes for which he would be provided additional compensated. This would mean the only compensation due to Appellant during those semesters would be under his regular faculty appointment contract. Appellant has now filed this action stating that the amounts he agreed to for these periods were in violation of the West Virginia Wage Payment Collections Act.

There is no dispute that all amounts due under his regular contracts and any additional “Faculty Overload Contracts” were paid in full. Further, at no time during his employment did he file a grievance regarding any compensation issues he may have had with West Virginia University at Parkersburg. Nor did he file any complaint with the West Virginia Division of Labor concerning the wages he was being paid. In fact, Appellant continued to repeatedly and voluntarily enter into these “Faculty Overload Contracts” throughout his employment at WVUP and never raised any issues relevant to his compensation until after his employment with WVUP had ended in May 2008.

III. RESPONSE TO ASSIGNMENTS OF ERROR

1. Due to the application of Constitutional Immunity the Circuit Court lacked jurisdiction to hear Appellant’s claim under the West Virginia Wage Payment Collection Act. Article VI, Section 35 of the West Virginia Constitution.
2. Actions brought against State Agencies under the West Virginia Wage Payment Collection Act are under the jurisdiction of the West Virginia Court of Claims.
3. Appellant was required to exhaust his administrative remedies available through the West Virginia Public Employee Grievance Procedure and the West Virginia Wage Payment and Collection Act.
4. BRIM does not cover claims for wages, including claims brought under the West Virginia Wage Payment and Collection Act.

IV. AUTHORITIES RELIED UPON

STATE STATUTES

W. Va. Code §6C-2-1 11

W. Va. Code §6C-2-1(a) 11

W. Va. Code §6C-2-2(g) 12

W. Va. Code §18-29-1 11

W.Va. Code §18B-1-3. 6

W. Va. Code §18B-2A-1 6

W. Va. Code §§ 21-5-1 12

W. Va. Code §21-5-11 (2002) 13

W. Va. Code §21-5-12 7, 9, 10

W. Va. Code §29-6A- 1 11, 12

W. Va. Code § 29-12-1 8

W. Va. Constitution Article VI, Section 35 6,7,10

STATE CASES

Ables v. Mooney, 264 S.E.2d 424 (W. Va. 1979) 7

Arnold Agency v. West Virginia Lottery Commission, 526 S.E.2d 814 (W. Va. 1999) 7

Bank of Wheeling v. Morris Plan Bank & Trust Co., 183 S.E.2d 692 (W. Va. 1971). 12, 13

City of Morgantown v. Ducker, et. al.,153 W. Va. 121, 131, 168 S.E.2d 298, 204 (1969) 6

Chance v. Hill, et. al., 687 S.E. 2d 564 (W.Va. 2009). 14

<i>Gribben v. Kirk, et. al.</i> , 195 W. Va. 488, 494, 466 S.E. 2d 147, 153 (1995)	9, 10
<i>Hesse v. State Soil Conservation Committee</i> , 168 S.E. 2d 293 (W.Va. 1969)	6
<i>Kincell v. Superintendent of Marion County Schools</i> , 499 S.E.2d 862 (W. Va. 1997)	11, 12
<i>McDaniel v. West Virginia Division of Labor</i> , 214 W. Va. 719, 591 S.E.2d 277 (2003)	12, 13
<i>Myers v. Barte</i> , 167 W.Va. 194, 279 S.E.2d 406 (1981)	9
<i>Parkulo v. West Virginia Board of Probation and Parole</i> , 483 S.E.2d 507 (W. Va. 1997)	7
<i>Pittsburgh Elevator Co. v. West Virginia Board of Regents</i> , 310 S.E.2d 675 (W. Va. 1983).	7, 12
<i>State ex rel. Fahlgren Martin, Inc. v. McGraw</i> . 190 W. Va. 306, 308, 438 S.E. 2d 338, 340 (1993)	9
<i>University of West Virginia Bd. Of Trustees ex. rel. West Virginia University v. Graf</i> , 205 W. Va. 118, 516 S.E.2d 741 (1998)	6

STATE RULES

Rule 10(a) of the West Virginia Rules of Appellate procedure	14
Rule 10(e) of the West Virginia Rules of Appellate procedure	14
Rule 12(b)(1) of the West Virginia Rules of Civil Procedure	14

OTHER AUTHORITIES

<i>Public Administrative Law and Procedure</i> § 43, at 476-77 (1983)	13
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V. DISCUSSION OF LAW

A. **THE CIRCUIT COURT LACKED JURISDICTION AND APPELLANT FAILED TO STATE A CLAIM BECAUSE THIS CASE IS BARRED BY THE STATE'S CONSTITUTIONAL IMMUNITY SET FORTH IN ARTICLE VI, SECTION 35 OF THE WEST VIRGINIA CONSTITUTION.**

1. **Suit is barred by Constitutional Immunity as stated in W. Va. Constitution Article VI, Section 35**

Pursuant to Article VI, § 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 Supreme Court of Appeals of West Virginia 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 Committee*, 168 S.E.2d 293 (W. Va. 1969). WVUP is a State agency to which the people have delegated the duty of providing higher education services in this State. W. Va. Code §§ 18B-2A-1; 18B-1-3.; *City of Morgantown v. Ducker, et. al.*, 153 W. Va. 121, 131, 168 S.E.2d 298, 204 (1969) The Board of Governors of West Virginia University at Parkersburg is a State agency, and, as such, is an arm of the State and, under Article VI § 35 of the Constitution of this State is immune from suit to enforce payment of the monetary claim. *See also, University of West Virginia Bd. Of Trustees ex. rel. West Virginia University v. Graf*, 205 W. Va. 118, 516 S.E.2d 741 (1998). Therefore, WVUP, 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 Commission*, 526 S.E.2d 814 (W. Va. 1999); *Parkulo v. West Virginia Board of Probation and Parole*, 483 S.E.2d 507 (W. Va. 1997); *Pittsburgh Elevator Co. v. West Virginia Board of Regents*, 310 S.E.2d 675 (W. Va. 1983). Appellant in his request for relief demands “\$26,568.00 for violation of the West Virginia Wage Payment and Collection Act, and reasonable costs and attorneys fees incurred in the prosecution of this matter pursuant to West Virginia Code § 21-5-12. . . .” However, the WVUP’s insurance policy does not cover the wage claims alleged by Appellant, therefore this would be a claim for State funds.

Moreover, the Complaint in this matter states that the Appellant is seeking retroactive damages from as far back as the Fall of 2004. In fact, he is attempting to renegotiate these earlier contracts through an unprecedented utilization and application of the West Virginia Wage Payment Collections Act. (See Complaint paragraphs 13 & 14). However, to the extent that Appellant contends that he is entitled to wages, back wages or civil penalties retroactive to 2004, the West Virginia Supreme Court has held that such a claim is barred by the State’s constitutional immunity. In *Ables v. Mooney*, 264 S.E.2d 424 (W. Va. 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 West Virginia Supreme Court held that the claim for retroactive wages was barred by Article VI, §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.

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 the Complaint was filed on November 10, 2008, WVUP was insured by the National Union Fire Insurance Company (hereinafter National Union) of Pittsburgh, Pennsylvania. AIG Claim Services, Inc. (hereinafter AIG) is National Union's authorized representative. The relevant policy number is GL 1595262 effective July 1, 2007 to July 1, 2008.

Upon receipt of the Complaint in this matter, WVUP, by its counsel, Shea R. Browning, Associate General Counsel, requested a determination of insurance coverage for the Petitioners' claim from Robert Fisher, BRIM Claims Manager, by correspondence dated November 13, 2008. Following a thorough review of the applicable State of West Virginia insurance policy, Bret A. Hart, AIG Casualty Claim Specialist II, denied insurance coverage for Petitioners' claim by correspondence dated November 19, 2008, addressed to Christine S. Utt, Deputy Attorney General, Office of the Attorney General. AIG determined that WVUP's insurance policy excludes claims attributable to wages, salaries, benefits, attorneys fees, costs and for any such other relief as the court deems just and proper.

2. Supremacy Clause Does not Apply

The Supremacy Clause has been held to apply generally in cases involving federal statutes. In those cases, the Court has found that “the State’s immunity was superceded by the Supremacy Clause of the United States Constitution and federal legislation” *Gribben v. Kirk, et. al.*, 195 W. Va. 488, 494, 466 S.E. 2d 147, 153 (1995). However, in the case at bar neither the federal constitution nor any federal legislation are the basis for Appellant’s claims. He solely seeks damages under W. Va. Code §21-5-12 of the West Virginia Wage Payment and Collection Act. Therefore, no federal cause of action or protections would apply.

3. The Action Does not Seek Damages that are a “Legislatively Anticipated Liability”

Appellant cites *Gribben, supra.*, for the proposition that since this is a claim for “wages” that it may be brought in Circuit Court. However, *Gribben* is not like this case, nor should it be construed to apply to the case at bar.

First, *Gribben* involves parties seeking a Writ of Mandamus. This matter has not been brought as a Writ of Mandamus, but as suit for damages. As the Court is well aware, “[i]n order for a petition for a writ of mandamus to be upheld, three requirements must first be met. The relator must show ‘(1) a clear right to the relief sought; (2) a legal duty on the part of the respondent to do the thing relator seeks; and (3) the absence of another adequate remedy.’ Syllabus point 2, in part, *Myers v. Barte*, 167 W.Va. 194, 279 S.E.2d 406 (1981).” *State ex rel. Fahlgren Martin, Inc. v. McGraw*. 190 W. Va. 306, 308, 438 S.E. 2d 338, 340 (1993).

Upon reviewing the elements necessary for a Writ of Mandamus, Appellant's claim fails. First, Appellant does not have a clear right to the relief sought. Ultimately, this Court would need to determine if the statute was violated and whether the damages requested are appropriate. Second, there has been no clear duty on the part of WVUP to pay any monies to the Appellant. Finally, there were many remedies available that Appellant could have used, and which he failed to avail himself. Therefore, any exceptions to immunity raised in *Gribben* do not apply to the case at bar.

Since this case involves a claim for unpaid wages, treble damages and attorney's fees, this is exactly the type of raid on the public treasury for which Constitutional Immunity provides protection. W. Va. Code §21-5-12 provides that the party "may bring **any** legal action necessary to collect a claim under this article." Since this article applies to both governmental and private entities there is no requirement that Appellant bring this matter in Circuit Court.

Based upon the foregoing, Appellant's claims are not covered by the West Virginia University Parkersburg Board of Governor's insurance policy. Thus, any claims for wages, back wages or civil penalties Appellant sought to recover constitute a raid on the public treasury and were not actionable before the Circuit Court of Kanawha County pursuant to the protections provided by Article VI, § 35 of the West Virginia Constitution, as affirmed by the West Virginia Supreme Court of Appeals in *Pittsburgh Elevator, supra*, and its progeny.

B. APPELLANT'S CASE WAS PROPERLY DISMISSED BECAUSE HE FAILED TO EXHAUST THE ADMINISTRATIVE REMEDY PROVIDED TO HIM BY WEST VIRGINIA CODE §§6C-2-1, ET SEQ., THE GRIEVANCE PROCEDURE APPLICABLE TO STATE HIGHER EDUCATION EMPLOYEES AND WEST VIRGINIA CODE §§ 21-5-1, ET SEQ, THE WAGE PAYMENT AND COLLECTION ACT.

1. Appellant failed to exhaust his administrative remedies provided to him by the grievance procedure applicable to state higher education employees.

Appellant's action filed in the Circuit Court of Kanawha County essentially challenged or grieved issues of payment relevant to his "overload faculty appointments" from the Fall semester of 2004 through the Spring semester of 2008. West Virginia Code §§ 6C-2-1 *et seq.* contains the grievance procedure available to State Higher Education employees to address alleged wrongful employment actions.

West Virginia Code §6C-2-1(a) provides, "[t]he purpose of this article is to provide a procedure for the resolution of employment grievances raised by the public employees of the State of West Virginia"

The Supreme Court of Appeals of West Virginia has held that education employees must exhaust the grievance procedure set forth in West Virginia Code §§ 18-29-1 *et seq.*¹ before proceeding to Circuit Court. In *Kincell v. Superintendent of Marion County Schools*, 499 S.E.2d 862 (W. Va. 1997) (*per curiam*), the Supreme Court held that teachers who had brought an action seeking injunctive relief and a writ of mandamus in Circuit Court, wherein it was alleged that they were entitled to an additional day of pay pursuant to the school calendar, had to exhaust their

¹ W. Va. Code § 18-29-1 *et seq.* and W. Va. Code § 29-6A- 1, *et seq.* were repealed effective March 7, 2007 and replaced with W. Va. Code §6C-2-1 *et seq.*

administrative remedy provided by the grievance procedure. Accordingly, the West Virginia Supreme Court held that the Circuit Court did not have jurisdiction to maintain the teachers' action absent exhaustion of the administrative remedy.

Further, the statute setting forth an administrative remedy for the appellant's claim in *Kincell* is virtually identical to the statute applicable to the Appellant's claim here. *See generally*, W. Va. Code § 29-6A-1, *et seq.* (repealed July 1, 2007) and W. Va. Code §6C-2-2(g). Specifically, the applicable grievance statutes have given authority to the grievance board claims by an employee alleging violations of statutes or written agreements applicable to the employee. These are exactly the kind of issues which are currently before this Court. Therefore, clearly the holding of *Kincell* does apply and Appellant has failed to exhaust his administrative remedies.

2. Appellant failed to exhaust his administrative remedies provided to him by the West Virginia Wage Payment Collection Act.

In addition, to the extent Appellant seeks damages under the West Virginia Wage Payment and Collection Act, W. Va. Code §§ 21-5-1, *et seq.*, Appellant is likewise required to exhaust his administrative remedies under that Act. *See, McDaniel v. West Virginia Division of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003).

It is of no moment that Appellant sought damages in the Circuit Court of Kanawha County for an alleged violation of the Wage Payment and Collection Act. The Supreme Court has determined that the rule of exhausting administrative remedies before actions in courts are instituted is applicable even though the administrative agency cannot award damages if the matter is within the jurisdiction of the agency. *Syl. Pt. 3, Bank of Wheeling v. Morris Plan Bank & Trust Co.*, 183 S.E.2d 692 (W. Va. 1971).

Secondly, Appellant argues that somehow the case of *McDaniel v West Virginia Division of Labor*, 214 W. Va. 719, 591 S.E. 2d 277 (2003) stands for the proposition that Appellant was not required to exhaust his administrative remedies before the Division of Labor. However in that case, the Court clearly discusses its prior decisions concerning exhaustion of administrative remedies. Going so far as to state in footnote 15 that “[t]he rule of exhausting administrative remedies before actions in courts are instituted is applicable, *even though the administrative agency cannot award damages* if the matter is within the jurisdiction of the agency.” (Emphasis added in original). *McDaniel* at 727, 591 S.E. 2d at 285. Although the Court in *McDaniel* held that the Division of Labor does not have the statutory authority to award damages, nothing in the opinion relieved a party seeking relief under the West Virginia Wage Payment and Collection Act from being required to first exhaust the administrative process. As set forth in footnote 26 of the Court’s opinion:

In any event, though, “an action for damages will not lie prior to the decision of an administrative agency where the question involved is within the jurisdiction of the agency and it demands the exercise of administrative discretion requiring the special knowledge and experience of the agency.” C.J.S. *Public Administrative Law and Procedure* § 43, at 476-77 (1983) (citation omitted). See Syl. pt. 3, *Bank of Wheeling v. Morris Plan Bank & Trust Co.*, 155 W. Va. 245, 183 S.E. 2d 692 (“The rule of exhausting administrative remedies before actions in courts are instituted is applicable, *even though the administrative agency cannot award damages* if the matter is within the jurisdiction of the agency.” (emphasis added)).

By statute, the Commissioner of Labor “shall enforce and administer the provisions of this article . . . [and] determine whether any person, firm or corporation has violated any provision of this article, or any rule or regulation issued hereunder” W. Va. Code §21-5-11 (2002). The issues raised in this Complaint address matters that are within the jurisdiction of the Division of Labor.

Therefore, the issues raised in this complaint must be brought before the Division of Labor before the Circuit Court could award any damages under the Act.

Because the Appellant has failed to exhaust his administrative remedy through the grievance procedure and the Wage Payment and Collection Act, the Circuit Court of Kanawha County lacked jurisdiction over the subject matter of this case and it thus appropriately dismissed this action pursuant to Rule 12(b)(1) of the West Virginia Rules of Civil Procedure.

C. APPELLANT FAILED TO FILE HIS REQUIRED BRIEF IN THE INSTANT APPEAL AS SET FORTH IN RULE 10(a) OF THE WEST VIRGINIA RULES OF APPELLATE PROCEDURE.

Rule 10(a) of the West Virginia Rules of Appellate procedure provides as follows:

Within thirty days of the date of the notice of the filing of the appellate record, or within thirty days of the receipt of the granting order establishing a briefing schedule, the appellant **shall** file an original and nine copies of a brief with the Clerk for the Supreme Court. One copy thereof shall be served by the appellant upon each party to the appeal.

W. Va. Rul. Ap. Proc. 10(a). (Emphasis added.)

Further, Rule 10(e) of the West Virginia Rules of Appellate procedure provides:

The failure to file a brief in accordance with this rule may result in the Supreme Court imposing the following sanctions: refusal to hear the case, denying oral argument to the derelict party, dismissal of the case from the docket, or such other sanctions as the Supreme Court may deem appropriate.

Clearly this rule mandates, as the Court stated in footnote 2 in the case of *Chance v. Hill, et al.*, 687 S.E. 2d 564 (W. Va. 2009), “that once a petition for appeal is granted, both **the appellant** and the appellee **are required** to file briefs regarding their respective positions with this Court. *Id.*

at 565. (Emphasis added.) There is nothing in the rule which provides for Appellant standing on his Petition, as has been done in this case.

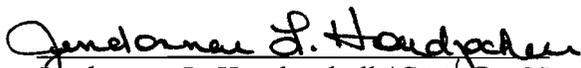
VI. CONCLUSION

WHEREFORE, based upon the foregoing, the West Virginia University at Parkersburg Board of Governors respectfully requests that this Court affirm the Kanawha County Circuit Court and dismiss the Appeal filed herein.

WEST VIRGINIA UNIVERSITY AT
PARKERSBURG BOARD OF GOVERNORS/
WEST VIRGINIA UNIVERSITY AT
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CERTIFICATE OF SERVICE

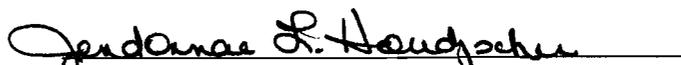
I, Jendonnae L. Houdyschell, Senior Assistant Attorney General, do hereby certify that I have this 18th day of March, 2010, served a true copy of the foregoing **West Virginia University at Parkersburg's Brief in Response to Appeal** by depositing a copy of the same in the regular United States Mail, first class postage prepaid, addressed to:

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The original and nine copies were hand delivered to:

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