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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JAMES E. BEICHLER,

Plaintiff,

v.

Civil Action No.08-C-3098
Hon. James C. Stucky

WEST VIRGINIA UNIVERSITY
AT PARKERSBURG,

Defendant.

FINAL ORDER

This matter came before the Court as a result of a Complaint filed by James E. Beichler on or about November 10, 2008. Thereafter, on February 10, 2009, the parties came before the Court for a hearing on Defendant's Motion To Dismiss on the basis of Constitutional Immunity and Plaintiff's failure to exhaust administrative remedies.

The parties having had the opportunity to make oral arguments to the Court and to submit memoranda of law and proposed orders for entry by the Court, this matter is now ripe for final decision by the Court.

STATEMENT OF FACTS

James E. Beichler, hereinafter "Plaintiff" in this matter was employed by West Virginia University at Parkersburg as tenure track faculty member in the Physics department from August 13, 2001 through May 17, 2008. By letter dated, May 15, 2007, Plaintiff 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,

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in addition to his regular contracts of employment, Plaintiff had entered into several "Faculty Overload Contracts", which provided him additional agreed upon compensation when he taught in an overload capacity. 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.

Sometime after Plaintiff's employment ended with West Virginia University at Parkersburg, he filed suit¹ claiming wages and damages pursuant to W. Va. Code §21-5-1, *et seq* or more commonly referred to as the West Virginia Wage Payment and Collection Act.

In response thereto, West Virginia University at Parkersburg filed its Motion To Dismiss pursuant to West Virginia Rule of Civil Procedure 12(b)(1) and 12(b)(6) and moved this Court to dismiss the Complaint filed herein on the bases of lack of jurisdiction; failure to state a claim for which relief may be granted; the doctrine of Constitutional Immunity pursuant to the West Virginia Constitution; and failure to exhaust administrative remedies.

DISCUSSION

The first matter that must be decided by this Court is whether the Court has jurisdiction to hear this matter or whether Constitutional Immunity applies to cases involving the West Virginia Wage Payment Collection Act.

¹ It should be noted that original suit styled Beichler v. West Virginia University at Parkersburg, Civil Action No. 08-C-1502, was filed in the Circuit Court of Kanawha County on or about August 5, 2008. Thereafter, Plaintiff voluntarily withdrew the suit because Plaintiff had failed to provide the pre-suit notice as required by W. Va. Code §55-17-3(a). Thereafter, the instant suit styled Beichler v. West Virginia University at Parkersburg, Civil Action No. 08-C-3098, was re-filed in the Circuit Court of Kanawha County on or about November 12, 2008. It is important to note that both suits raised the same allegations.

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 Committee*, 168 S.E.2d 293 (W. Va. 1969). West Virginia University at Parkersburg 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 is a State agency, and, as such, is an arm of the State and, under Article VI, Section 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, West Virginia University at Parkersburg, 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). Plaintiff 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 Plaintiff, therefore this would be a claim for State funds.

Moreover, the Complaint in this matter states that the Plaintiff is seeking retroactive damages from as far back as the Fall of 2004. However, to the extent that Plaintiff 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 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.

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 determined that West Virginia University at Parkersburg'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.

Plaintiff has cited various cases for the proposition that the case is not barred by W. Va. Constitution Article VI, Section 35 based upon the "Supremacy Clause" or "Legislatively Anticipated Liability". However this Court finds that these exceptions do not apply to the instant case.

Specifically, 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 Plaintiff'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.

Plaintiff further 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, Plaintiff’s claim fails. First, Plaintiff 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 West Virginia University at Parkersburg to pay any monies to the Plaintiff. Finally, there were many remedies available that Plaintiff 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.

Secondly, 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 Plaintiff bring this matter in Circuit Court.

Based upon the foregoing, Plaintiff’s claims are not covered by the West Virginia University Parkersburg Board of Governor’s insurance policy nor are any of the exceptions cited by Plaintiff applicable. Thus, any wages, back wages or civil penalties Plaintiff may be entitled to recover would constitute a raid on the public treasury and are barred in this Court 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. Therefore, this action cannot be jurisdictionally maintained in this Court and must be dismissed. Furthermore, because

West Virginia University at Parkersburg is immune from suit in this jurisdiction, the Petitioners have failed to state a claim upon which relief may be granted and this case must be dismissed as a result.

Further, Plaintiff has failed to exhaust his administrative remedies and cannot now seek redress in this Court. Plaintiff's action filed in this Court essentially challenges or grieves 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.*² 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 administrative remedy provided by the grievance procedure. Therefore, the Supreme Court held that the Circuit Court did not have jurisdiction to maintain the teachers' action absent exhaustion of the administrative remedy.

² 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.*

In addition, to the extent Plaintiff seeks damages under the West Virginia Wage Payment and Collection Act, W. Va. Code §§ 21-5-1, *et. seq.*, Plaintiff 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 Plaintiff seeks damages in this Circuit Court action 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).

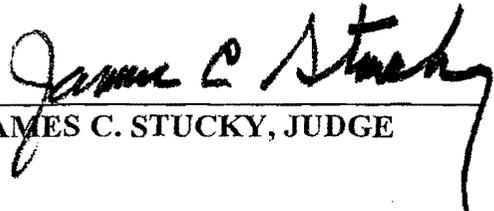
Further, by statute, the commissioner [of Labor] “shall enforce and administer the provisions of this article . . . [and] determine whether any person, firm or corporation has violated any provision of this article, or any rule or regulation issued hereunder” W. Va. Code §21-5-11 (2002). The issues raised 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 Court could award any damages under the Act.

Because the Plaintiff has failed to exhaust his administrative remedy through the grievance procedure and the Wage Payment and Collection Act, this Court lacks jurisdiction over the subject matter of this case and it must, therefore, be dismissed pursuant to Rule 12(b)(1) of the West Virginia Rules of Civil Procedure.

WHEREFORE, based upon the foregoing, the Court does hereby **ORDER** that with regard to Defendant’s claim that this matter is barred by Constitutional Immunity the Court **AGREES** and

orders that this matter be **DISMISSED**. With regard to Defendant's claim that Plaintiff was required to exhaust his administrative remedies the Court also **AGREES** and does hereby **ORDER** that this matter likewise be **DISMISSED**.

ENTERED THIS 3 DAY OF March, 2009.


JAMES C. STUCKY, JUDGE

STATE OF WEST VIRGINIA
COUNTY OF MORGAN, SS
I, CLAYTON B. BERRY, CLERK OF CIRCUIT COURT OF SAID COUNTY
DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE AND CORRECT COPY OF SAID COURT
ORDER AS ENTERED AND RECORDED THIS 5
March 2009
CLAYTON B. BERRY
CLERK OF CIRCUIT COURT OF MORGAN COUNTY, WEST VIRGINIA