

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

CASE NO.: ~~11-005~~ 11-0284

(Kanawha County Circuit Court Docket No.: 08-AA-19)

RANDY HAMMOND, et. al.,

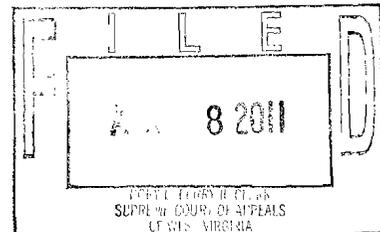
Appellants-Petitioners,

v.

**WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS AND THE DIVISION OF PERSONNEL**

Appellees-Respondents.

APPELLANTS BRIEF



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III. ASSIGNMENT OF ERROR

1) Both the West Virginia Public Employee Grievance Board (hereinafter referred to as the “Grievance Board”) and the Circuit Court of Kanawha County erred by confusing the issue of whether employees are similarly situated such that a discrimination claim may be brought with the rationale the State of West Virginia used to justify its discriminatory treatment. These two issues are not the same. Specifically, the tribunals below erroneously ruled that paying certain classified personnel in three select counties under a higher wage scale than all other similarly classified employees throughout the State doing the same work was not a violation of the State’s anti-discrimination provision pertaining to classified employees because of an alleged recruitment and retention problem in the selected classifications in the selected counties. According to the lower court, and the Grievance Board, this alleged situation meant that the employees receiving the extra pay were not “similarly situated” with those who did not get the pay increase. This ruling is reversible error under the jurisprudence of this Court. The focus on the issue of whether two groups of employees are similarly situated is on the classifications of, and actual job duties performed by, the employees. Here, the lower tribunals focused on certain alleged problems of the employer, not the work performed by the employees. As the undisputed record in this case is that Appellants were of the same classification and performed the same work as those who received the pay supplement, they proved their discrimination claim.

2) Additionally, even assuming that the lower Court and the Grievance Board used the correct legal analysis, they wrongly applied the law to the facts in this case and made erroneous findings of fact when they found that Appellants were not similarly situated to the employees

who received the pay despite the fact that Appellants are in the same job classification and perform the same job duties as the employees who receive additional pay supplement. Appellants proved that the reduction and retention problem throughout District 1 is substantially similar to that found in the three effected counties.

3) The lower court and the Grievance Board erred in finding as a “fact” that no managerial employee from Division of Highways (hereinafter referred to as the DOH) managerial employee complained about any recruitment or retention problem to either higher DOH management or to the Division of Personnel (hereinafter referred to as the “DOP”). In fact, the uncontradicted evidence is that such complaint was made.

4) The lower court and the Grievance Board erred in ruling that some Appellants did not file their grievance in time because the Appellee’s failure to pay Appellants the proper amount is a continuing violation.

IV. STATEMENT OF THE CASE

Appellants are employed for all times relevant to this matter with the DOH in District 1¹ as Transportation Workers (hereinafter “TW”) 1, 2 and 3, plus Transportation Crew Chief Maintenance (hereinafter “TCCMAIN”). Joint Appendix Volume II, p. 5. Administrative Law Judge’s Decision (hereinafter referred to as the “ALJ”) Finding of Fact Number 1². This

¹ District 1 consists the counties of Boone, Clay, Kanawha, Mason and Putnum. Administrative Law Judge’s Decision Finding of Fact Number 2.

² Hereinafter, citations to Volume II of the Joint Appendix will be in the form of “V. II, p. ___.” Also, hereafter, references to the ALJ’s Findings of Fact will be in the form of ALJ FOF No. ___.

grievance arose after Appellees DOH and DOP granted Transportation Workers in the counties of Berkeley, Jefferson and Morgan³ a 25% salary increase for beginning workers and a 15% increase in salary for current employees. See V. II, p. 7, ALJ FOF No. 10. Appellees have attempted to justify their act by claiming that the Eastern Panhandle had a specific problem with retention (keeping employees) and recruitment (having enough qualified individuals to fill vacancies). This salary increase was proposed by DOH Human Resources Director Jeff Black in May of 2005, *id.*, and granted by DOP to be effective July 1, 2005. V. II., p. 5, ALJ FOF No. 1.

Appellees claim to have considered a variety of wage and other data in reaching its decision to give the transportation workers in the Eastern Panhandle Counties the salary increase at issue. For example, the DOH collected fourth quarter 2004 wage data from the Workforce West Virginia (formerly known as the West Virginia Bureau of Employment Programs) related to the private industry positions of “Truck Drivers Heavy and Tractor Trailer” and “Excavating and Loading Machine in Dragline Operators” Investment Area 7⁴. See V. II, p. 92, Respondent’s Exhibit No. 6⁵. Also, Respondents relied on Classified Advertisements in the Martinsburg

³ Hereinafter, these counties will often be referred to collectively as the “Eastern Panhandle counties.” Also, please note that the “Eastern Panhandle counties” are all in DOH District 5, along with the counties of Grant, Hampshire, Hardy, and mineral counties. V. II, p. 5, ALJ FOF No. 3.

⁴ Workforce West Virginia has divided the State into Investment Areas. The DOH used wage data from Investment Area 7 to support its request for a pay differential for the Eastern Panhandle even though the counties given the raise are only 3 of the 8 counties in the Investment Area.

⁵ According to this data, the starting salary in the private sector was \$1.94 an hour greater than earned as a starting salary by Transportation Workers II and III in the Eastern Panhandle. *Id.* Moreover, this data reflected that the average wage paid to a Transportation Worker II and III was \$3.34 below the corresponding private-sector wage. *Id.*

Journal demonstrating that certain jobs for individuals holding commercial driver's licenses, diesel mechanics and craftsmen in the area building construction trade paid in the range of \$14 per hour to \$20 per hour. Id.

In addition to the salary information listed above, Appellees also considered recent job postings and applicable civil service register information for the three county area at issue. For example, the DOH reviewed postings for eight vacancies and noted that the job register⁶ kept by the DOP contained 45 names. Of these, only 23 actual applicants were certified as eligible for the 8 positions.⁷ See V. I, p. 6, ALJ FOF No. 7. Appellees claim that this evidence justifies the giving of salary increases to Transportation Workers in the Eastern Panhandle Counties⁸. However, this rationale is a pretext for Appellees' discrimination as the facts proved below demonstrate that District 1 suffered the same or worse problems with retention and recruitment⁹.

First, one should note that neither the DOP nor the DOH made any statistical analysis to determine whether the retention and recruitment problems in District 1 were as bad or worse as

⁶ When DOH positions become vacant, it requests a "register" from the DOP. This document, also called a "Personnel Certification," includes the top ten percent of qualified applicants who have successfully tested and had their names placed on the register for a particular job classification. ALJ FOF No. 4.

⁷ The ALJ found that there were applicants contained in multiple registers, which reduced the number of actual applicants, but it did not explain how many duplicates there actually was.

⁸ During 2004, there were 19 vacancies in the Eastern Panhandle Counties. Note that the DOH only presented evidence regarding the register for 8 of those positions. As the DOH was attempting to make the point with this evidence that the Eastern Panhandle counties had a retention and recruitment problem, no doubt it chose the 8 examples that most supported its conclusion.

⁹ Also, as will be demonstrated in the Argument section below, even if Appellees proved that there was a more significant overall problem with recruitment and retention, this is not a valid justification for the discriminatory treatment suffered by Appellants.

the problems in the Eastern Panhandle Counties. Had they done so, Appellees would have discovered that a similar problem exists in District 1.

Appellants' expert Gary Storrs¹⁰ did the same type of studies comparing the vacancy rates, salary information and availability of names on the register in District 1 that the Appellees used to justify giving higher pay to the effected employees in the Eastern Panhandle counties. For example, all of District 5 had 39 vacancies in 2004, of which 19 were from the three counties that received a raise. V.II, p. 58, Grievants' Ex. 5. The total number of employees for District 5 in the relevant job classifications in 2004 was 244. V. II, p 54, Grievants' Exhibit 4. Thus by comparing the number of vacancies with the number of total positions, one can see that there was a vacancy rate of 16% for that year¹¹. Yet, in District 1, where Appellants work, there was a total of 79 vacancies in 2004 (V. II, p. 44) out of 369 positions (V. II, p. 54, Grievants' Ex. 4). This leads to a vacancy rate of 21.4%. Thus, keeping employees in the Transportation Worker series is **harder** in the District where Appellants work then it is in the District where the employees got the raise.

Moreover, District 1 also has difficulty recruiting individuals to fill vacancies. According to the data provided by the DOH in its response to Interrogatory Number 7, in 2004 there were 52 vacancies in the Transportation Worker II positions in District 1 and 228 applicants for these positions. V. II, pp. 58-59, Grievants' Ex. 5, Interrogatory 7. As a study conducted by

¹⁰ Mr. Storrs has been a labor economist for AFSCME for 9.5 years. Hearing Transcript at p. 129-130. In that capacity, he often had to do economic and statistical studies in general and often did work comparing the salaries of private and public sector employees doing similar work. Id. at pp. 130-133.

¹¹ 39 (the number of vacancies) is 16% of 244 (the number of positions).

The Rahall Institute using information supplied by Jeff Black, demonstrated that typically 95% of eligible individuals on a certification list are contacted and of those only 30% agree to be interviewed. V. II, p. 41. Applying these figures to the number of applicants as provided by the DOH indicates that of the 228 applicants, approximately 217 (95%) of them will be contacted and approximately 65 (30%) of them will be willing to be interviewed. Thus, using the information provided by the DOH in its discovery response, there would be approximately 65 individuals available to fill the 52 vacancies in the Transportation Workers II positions in District 1.

After submitting its discovery response, the DOH contended at the Level IV Hearing that the "228" figure that it provided in response to Interrogatory 7, which asked for the "total number of persons applying for vacancies in each of the relevant job classifications," was not the correct answer. Rather, the number provided represents the individuals among the applicants who were willing to be interviewed.

While Appellants contend that Appellees should not be able to rely on the evidence that was not disclosed in a proper discovery request, even using these new numbers shows a similar recruitment problem as experienced in the Eastern Panhandle counties. In reviewing the registers entered as an Exhibit at the Level IV hearing, there were postings for approximately 28 vacant positions in the Transportation Worker series in District 1 for 2004. There were a total of 672 "names" listed in these documents. However, after eliminating duplicates, there were only 289 individuals who were on the personnel certification sheets to fill the 28 positions. However, that does not mean that these individuals would be available to fill these positions. As stated before, a study conducted by The Rahall Institute, using information supplied by Jeff Black,

demonstrated that typically 95% of eligible individuals on a certification list are contacted and of those only 30% agree to be interviewed. Using the Rahall Study data, to fill the 28 positions, 95% of the 289 individuals (275 people) would be contacted and 30% of them (82 people) would agree to be interviewed to fill the 28 vacancies. Thus, there would be expected to be less than 3 people showing real interest for each Transportation Worker vacancy in District 1 in 2004. This is not much better than the ratio of positions to applicants as experienced by the Eastern Panhandle counties.

Moreover, there was anecdotal evidence that District 1 suffered from a severe problem regarding recruitment and retention. The most significant was testimonial evidence of Mr. Dennis King¹². The biggest problem concerned the heavy equipment operators in the Transportation Workers II and III classifications. Joint Appendix V. I, pp. 66, 73¹³. There was trouble filling these positions throughout the district. Id. at 74. There were times when a position would be posted and no one would apply Id. at 106. The position would just be filled by an internal rotation, which created another vacancy Id. at 102,. Moreover, retention of experienced people was also a difficult problem. Id. at 74, 92-94, 99-101. Mr. King testified that this was a problem even if he could replace the experienced employees because the replacement employees would have much less experience. Sometimes the new employees did not have sufficient experience to do the job.

¹² In 2004 Mr. King worked for the DOH as the maintenance engineer and acting district engineer in District 1. Hearing Transcript at p. 58.

¹³ Joint Appendix Volume I consists of the Level IV Hearing Transcript. Hereinafter, references to this document will be in the form of V. I, p. __.

Finally, Appellants' expert Storrs also did an analysis of wages comparing what Transportation Workers in District 1 with possible work in the private sector that was very similar to the one Appellees performed to justify the raise in pay receive by such workers in the Eastern Panhandle counties. For example, the West Virginia Parkways Authority, which runs through Kanawha County, by far the biggest County in District 1, had the following pay scale: Craftsman, Highway Technical/Mechanic Apprentice gets paid \$8.55 an hour as a starting salary, \$13.30 at the midpoint, and has a maximum salary of \$15.24 an hour. These jobs are comparable to DOH's Transportation Worker II employees. However, they receive only \$8.15 for a starting salary, \$10.73 an hour at the midpoint and \$14.44 at the maximum. For the Parkways higher level Craftsman/Highway Technician/Mechanic, the minimum salary is \$15.75 an hour, the midpoint is \$16.23 and the maximum is \$17.12. Also, a heavy equipment operator for Parkways makes \$13.71 an hour at a minimum, a rate of \$16.59 at the midpoint and \$21.49 as a maximum. These job classifications are comparable to DOH's Transportation Worker III employees. However, the state workers receive only a minimum hourly rate of \$8.82, a midpoint rate of \$11.62, and a maximum rate of \$15.54. Finally, a foreman for Parkways makes a minimum of \$13.94 an hour, a midpoint rate of \$16.59 and a maximum of \$20.14. This position is comparable to DOH's Transportation Crew Chief. However, the DOH employees make only a minimum of \$9.20 an hour, a midpoint of \$12.10 and a maximum of \$16.14. Thus, all Parkways employees make considerably more then their DOH counterparts, and the difference at the Transportation III and Transportation Crew Chief level far exceeds the difference between relevant private and public sector jobs documented by Respondents to support giving a raise to the relevant job classifications in the Eastern Panhandle.

Moreover, using Workforce West Virginia data for all of 2004 in Investment Area 3, which encompasses Kanawha County, and making the same wage comparison with heavy truck drivers and excavators in the private sector with the wages earned by Transportation Workers II and III that was made by DOH for employees in the Eastern Panhandle and Investment Area 7, demonstrates that Appellants' situation is similar to the individuals who received a wage increase. Reviewing page 2 of the Workforce West Virginia Data, V.II, p. 62, Grievants Exhibit 6, one can compare the salaries of "Truck Drivers, Heavy and Tractor Trailer" (the 8th line from the top of the page) and "Excavating and Loading Machine (the 17th line from the top) with the salaries received by DOH Transportation Workers II and III. In Investment Area 3, the starting average wage for the truck drivers was \$9.32 an hour, and the average wage was \$16.17 an hour. For excavation work, the beginning salary was \$10.44 an hour and the average wage was \$15.66 an hour. Both of these private sector jobs pay much greater than the average of the comparable wages of Transportation Workers II and III, which is \$8.49 an hour for the entry wage and \$11.18 at the midpoint¹⁴. As these figures demonstrate, the comparison between Transportation Workers II and III in District 1 and heavy truck drivers and excavation workers in Investment Area 3 show that the private sector pay is much higher than state employment, just the same result as when the DOH compared the pay of Transportation Workers in the Eastern Panhandle with the pay of the same two private sector jobs in Investment Area 7.

¹⁴ When Jeff Black compared the Workforce West Virginia Data pertaining to truck drivers and excavators with DOH employees, he took the average of the hourly rates of Transportation Workers II and III because both job classifications entail duties similar to the driving of heavy trucks and excavating work.

Finally, a review of the classified ads in the Charleston Gazette during January, 2005, around the same time that the DOH used to review classified ads in the Martinsburg Journal, demonstrates a similar difference between public and private employment wages in District 1 as existed in the Eastern Panhandle when the pay differential decision at issue here was made. Various classified ads from the Charleston Gazette were admitted into evidence as Grievants' Exhibit 7. V. II, p. 66. A review of the kind of CDL truck driver or heavy equipment mechanic that the DOH reviewed in the Martinsburg Journal reveals the following: on the first page of the Exhibit, in the third column from the left, 4 entries from the bottom, there is an ad for someone to work on a construction crew, with a starting salary of \$600-\$720 per week (\$15-\$18 an hour assuming a 40 hour work week); on page 6 of the exhibit, the last entry of the 6th column from the left has a listing for a company driver who must have a CDL who is offered \$40,000.00 a year plus benefits; on the 7th page, the second to last entry of the first column on the left has an add for a CDL driver making \$810-\$850 a week, plus benefits; and on that same page in the second column from the left, the fourth entry is for an experienced heavy machinery mechanic making \$15.00 an hour. Again, this sampling demonstrates that just as private sector jobs listed in the Martinsburg Journal pays well higher then similar jobs in the Transportation II and III positions, the same sort of private sector jobs in the Charleston Gazette pay much higher then the comparable DOH positions.

In summary, the statistical analysis done by Mr. Storrs shows that District 1 has a higher rate of vacant positions, and bigger salary differential with the private sector as the Eastern Panhandle counties and also suffers from a significant recruitment problem. As will be shown below, this means that Appellants' grievances shown have been granted.

V. SUMMARY ARGUMENT

As set forth herein, Appellants proved at the Level IV hearing that they were discriminated against when Appellees gave raises to certain employees, and raised the starting salary for new employees, in various transportation worker classifications in the three counties in the Eastern Panhandle of the state, Jefferson, Morgan and Berkeley, but did not increase the salary of the same classes of employees in District 1¹⁵.

Appellees have attempted to justify their act by claiming that the Eastern Panhandle had a specific problem with retention (keeping employees) and recruitment (having enough qualified individuals to fill vacancies) and that these problems were caused by a large pay disparity between the wages earned by certain classifications and employees in the private sector doing similar work. However, Appellees never demonstrated that these so called recruitment and retention issues effected the job duties or conditions of employment of the transportation workers in the Eastern Panhandle Counties. In fact, Appellees stipulated that Appellants had the same job duties and was performing essentially the same tasks as those within their classification who received the pay increase. This fact is important because this Court has ruled that the anti-discrimination provision for public employees contained in West Virginia Code Section § 29-6A-2(d) requires that any difference in salary between similarly situated employees must be linked to different job duties. The Bd. of Educ. of Tyler Co. V. White, 216 W. Va. 242, 605 S.E.2d 814 (2004).

¹⁵ The DOH has divided the state into “districts.” All Appellants work within “District 1.”

Moreover, the problems in retention and recruitment identified by Appellees were not unique to the counties which received the wage increases¹⁶. In fact, Appellants proved that its situation regarding the factors of retention, recruitment and salary disparity, were very similar, indeed often worse, than experienced by the three counties who received the increase in pay. Thus, Appellants were discriminated against.

Finally, the lower court erred in finding that some Appellants filed their grievances late. The failure by the Appellees to pay Appellants the proper amount of money is a continuing violation that is still occurring today. Thus, the time of filing only effects the amount of back pay to be awarded, not whether the grievance was timely filed.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Appellants request a Rule 20 argument. This issue of what constitutes “similarly situated” employees is of statewide interest to all public employees

VII. ARGUMENT

The lower court’s Order now on appeal contains many errors. The most pronounced pertain to various legal and factual errors concerning whether Appellants were similarly situated to the transportation workers in the Eastern Panhandle counties. The circuit court also erred in finding that some of the grievances were not timely filed. Because of these errors, the lower court’s Order ruling should be reversed and Appellants’ grievances should be granted.

¹⁶ As will be discussed below, the so-called “retention and recruitment” issue should not be considered as relevant to these grievances. However, because the lower tribunals based their decision denying Appellants’ grievances on this issue, it will be discussed herein.

A. THE CIRCUIT COURT'S ORDER AND THE STANDARD OF REVIEW

The Order by the lower court, as well as the ALJ's Decision, essentially adopted Appellees' case and ignored the arguments of Appellants. The court made some 37 "Findings of Fact." There is no "discussion" within the Order. The great majority of the lower court's factual findings pertained to the Appellees' justification for giving the raise to the transportation workers in the Eastern Panhandle counties. The circuit court's Order, and the decision by the ALJ, are silent on much of Appellants' evidence.

Then, the lower court turned to questions of law. The Order correctly states that a grievant prevails on a discrimination grievance by showing: (a) that he or she has been treated differently from one or more similarly situated employees(s); (2) that the different treatment is not related to actual job responsibilities of the employees; and (3) that the difference in treatment was not agreed to in writing by the employee. The Bd. of Educ. of Tyler Co. V. White, 216 W. Va. 242, 605 S.E.2d 814 (2004). The lower court then ruled against Appellant' based on a finding that they were not "similarly situated" to the employees who got the raise that they were denied.

The court's decision on being "similarly situated" has two basis. The lower court erroneously found that there was a recruitment and retention problem that existed for the Transportation Workers series in the Eastern Panhandle counties, but not for District 1. In reaching this decision, the circuit court committed several legal and factual errors and erroneously applied the facts to the law. The lower court also based its decision on an erroneous finding that no managerial employees within District 1 complained to Appellees about any

recruitment and retention problems. However, the uncontradicted testimony from such managerial employee was that he complain about such problems directly to the head of the DOH, and was that such complaints were ignored.

Finally, the lower court ruled that some Appellants did not file their grievance in time. However, the failure to pay the correct wages is a continuing violation. Thus, the lower court's ruling on this issue is also erroneous.

In reviewing a lower court's order either upholding or reversing an ALJ's decision, one is assisted by reviewing the statutory basis for filing an appeal. The appeal provisions of W. Va. Code § 29-6A-7 provide that an appeal may be taken to a circuit court where the final grievance decision:

- (1) Is contrary to law or a lawfully adopted rule or written policy of the employer;
- (2) Exceeds the hearing examiner's statutory authority;
- (3) Is the result of fraud or deceit;
- (4) Is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (5) Is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

More specifically, the West Virginia Supreme Court of Appeals has stated that: "[a] final order of the hearing examiner for the West Virginia Education and State Employees Grievance Board, made pursuant to W. Va.Code, 29-6A-1, *et seq.* [(1988) (Repl. Vol.2004)], and based upon findings of fact, should not be reversed unless clearly wrong." Quinn v. West Virginia N. Comty. Coll., 197 W. Va. 313, 475 S.E.2d 405 (1996). Further, the West Virginia High Court explained that in reviewing in reviewing an ALJ's decision, a circuit court accords deference to the findings below. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 304,465 S.E.2d 399, 406

(1995). A circuit court should affirm the ALJ's factual findings that are supported by substantial evidence, and give substantial deference to inferences drawn from these facts. *Id.* Importantly, there is a *de novo* review of the conclusions of law and application of law to the facts. *Id.* This instruction is "consistent with our observation that rulings upon questions of law are reviewed *de novo*." *Quinn*, 197 W.Va. at 316, 475 S.E.2d at 408, *citing Bolyard v. Kanawha County Bd. of Educ.*, 194 W. Va. 134, 136, 459 S.E.2d 411, 413 (1995). Thus, a circuit court uses both a deferential and plenary standard of review, giving some deference to an ALJ's findings of fact, but reviewing *de novo* any ruling of law and the application of law to the facts. Under this standard, Appellants should prevail.

B. STATEMENT OF THE LAW

As Appellants are alleging "discrimination" in their grievance, a review of the proof required to prevail on such grievance is helpful. Under West Virginia law, discriminating against state employees is prohibited and discrimination is defined as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." W. Va. Code § 29-6A-2(d). "A discrimination claim under [29-6A-2(d)]¹⁷ need only establish that the adverse employment action was neither job related nor agreed to by the employee who brings the claim. *The Bd. of Educ. of Tyler Co. V. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004).

¹⁷ While the *White* decision analyzed discrimination claims in the context of teachers, the ALJ rightly considered that case to be the controlling legal authority to decide this issue herein.

Once a claim is established, an employer cannot escape liability by asserting a justification, such as financial necessity, for the discriminatory treatment. To the extent our prior cases are inconsistent with this holding, they are expressly overruled. “Id. at Syllabus Pt. 5. The White Court expounded on this rule of law in the opinion’s discussion. For example, the Court noted that **any** differences in treatment is prohibited. Thus, “once the grievant proves that he or she has been treated differently, the different treatment is not related to actual job responsibilities of the employees and the grievant has not agreed to the different treatment in writing, the grievant has established his or her discrimination claim.” As Appellants proved these elements below, their grievance should have been granted and the circuit court’s decision should be reversed.

Another legal issue in this case is whether some of the Grievants below filed their grievance within the 10 day period required by law. Appellants contend that all individuals did so because the action that Grievants are complaining of, the failure to pay them the correct amount of money in light of the pay raise granted to the transportation workers in the Eastern Panhandle counties, are a “continuing violation” such that the ten day period to file a grievance is on-going.

The West Virginia Code provides that a grievance must be filed “[w]ithin ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. . . .” W. Va. Code Section 29-6A-4. As will be discussed below, a discrimination grievance that leads to a failure to pay the correct wage is a continuing violation.

C. DISCUSSION

The lower court's decision contained many errors. The most pronounced pertained to various legal and factual errors concerning whether Appellants were similarly situated to the Transportation Workers in the Eastern Panhandle counties. The circuit court also erred in finding that some of the grievances were not timely filed. Because of these errors, the lower court's ruling should be reversed and Appellants' grievances should be granted.

1. The Lower Court Erred in Ruling That Appellants Were Not Similarly Situated to Transportation Workers in the Eastern Panhandle Counties.

As explained above, the lower court committed numerous legal and factual errors. Most fundamentally, the circuit court erred by considering the issue of "recruitment and retention" in terms of whether two groups of employees were similarly simulated. As demonstrated by the West Virginia Supreme Court, factors such as this that effect the employer's situation can not be the basis of finding the employees are not similarly situated. Additionally, the lower court made factual findings that were not supported by substantial evidence, failed to consider certain evidence favorable to Appellants and, in general, erred in applying the facts to the law.

a. The Lower Court Erred as a Matter of Law by Using the Issue of "Recruitment and Retention" as a Basis for Finding the Appellants Are Not Similarly Situated to Transportation Workers in the Eastern Panhandle Counties.

In order to see the error in the circuit court's legal analysis pertaining to the "similarly situated" element of Appellants' discrimination grievance, a review of the case The Bd. of Educ. of Tyler Co. V. White, 216 W. Va. 242, 605 S.E.2d 814 (2004), the seminal West Virginia Supreme Court opinion on the legal framework for a discrimination grievance, is appropriate.

The White Court ruled that: A discrimination claim under [29-6A-2(d)]¹⁸ need only establish that the adverse employment action was neither job related nor agreed to by the employee who brings the claim. Once a claim is established, an employer cannot escape liability by asserting a justification, such as financial necessity, for the discriminatory treatment. To the extent our prior cases are inconsistent with this holding, they are expressly overruled. “Id. at Syllabus Pt. 5. The White Court expounded on this rule of law in the opinion’s discussion. For example, the Court noted that **any** differences in treatment is prohibited. Thus, “once the grievant proves that he or she has been treated differently, the different treatment is not related to actual job responsibilities of the employees and the grievant has not agreed to the different treatment in writing, the grievant has established his or her discrimination claim.”

The White Court did not specifically discuss the “similarly situated” issue. Yet, the facts of that case, as well as the legal rulings, demonstrate the lower court’s error here. In White, the Board of Education argued that it did not discriminate against Ms. White in not offering her a 261 day contract as it had offered to another executive secretary. White, 605 S.E.2d at 816-17. The Board attempted to justify its decision to offer Ms. White the lesser contract because of a decrease in revenue. Id. However, the Supreme Court rejected that analysis. It ruled that such evidence went to the motive for the discrimination and that under West Virginia civil service law, motive is not relevant because all non-job related discrimination is prohibited. Id. at 820-21. Importantly, the Supreme Court did not consider the issue of the Board’s finances to be

¹⁸ While the White case involved a grievance by a school teacher, the Board has recognized that this decision is controlling for State employees too. Both teachers and state employees had a similar definition of “discrimination:” “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” See W. Va. Code § 29-6A-2(d)

related to whether Ms. White was “similarly situated” with other executive secretaries. This fact is crucial here because had our state’s high Court adopted the legal analysis that Appellees’ want this Court to adopt, it would have found that Ms. White was not similarly situated to the other employees because of the different economic circumstances her employer faced. However, the White Court did find that the grievant in that case was similarly situated, despite the difficult economic circumstances faced by the employer. See id. at 817-18.

Indeed, logically, Appellees’ position that a peculiar problem by the **employer** can create a situation whereby two groups of **employees** are not similarly situated makes no sense. The legal test is whether one group of **employees** are similar to another group of **employees**. Yet, what Appellees’ analysis does is compare the situation of the **employer** in regard to two separate groups of employees. Appellees act as if the test is for the grievant to be able to prove that the **employer** is similarly situated. However, that simply is not the test. A grievant must show that he or she is similarly situated to another employee, or group of employees, and whether or not the employer’s situation is the same is irrelevant. Thus, factors that the employer might face, whether it is so called recruitment and retention issues or whether it is declining revenues, is not relevant on the issue of whether the employers are similarly situated in a pertinent way with each other.

Here, there is no dispute that the Appellants are claiming discrimination against individuals in the same classification, doing the same basic work as those employees to which they are comparing themselves. Thus, they are similarly situated. True, the State may have felt it had a legitimate rational for its decision to discriminate against Appellants. However, under

White the rational is irrelevant. Thus, the lower court committed legal error by misapplying White. Using the correct legal analysis, Appellants prevail.

b. The Lower Court Erred in Ruling That Appellants Did Not Prove That They Face Similar Problems Pertaining to Recruitment, Retention and Salary as Found in the Eastern Panhandle Counties.

Even assuming *arguendo* that the issues of “recruitment and retention” are properly considered in determining whether two sets of employees are similarly situated, Appellants should still prevail. This is because Appellants proved that the “recruitment and retention” problem in District 1 is just as severe as in the counties that receive the higher pay raise. Similarly, Appellants also proved that pay disparity between private and public employment in District 1 is very similar to the disparity in the Eastern Panhandle relied on by Appellees in making their decision at issue now. Because Appellants have proven that there is no material difference on the issues of retention, recruitment and salary disparity between themselves and their co-workers in the Eastern Panhandle, they proved that they should be considered “similarly situated” even under the lower court’s erroneous legal analysis.

Before considering the proof that District 1 had the same problems as in the Eastern Panhandle Transportation Workers, the point should be made that Appellees never even looked at any data to determine whether the problems it identified in the Eastern Panhandle occurred elsewhere around the State. Had they done so, they would have seen that there is nothing unique about the situation in Morgan, Berkeley and Jefferson Counties.

A review of the evidence conclusively proves the point that the issues of retention, recruitment and salary are not significantly worse in the Eastern Panhandle than District 1. For

example, consider the evidence regarding retention.¹⁹ Appellants proved that during the key period when this decision was being made, the 2004 calendar year, there were actually a higher percentage of vacancies in District 1 than in District 5, which encompasses the three counties of the Eastern Panhandle²⁰. Over 21% of the relevant positions in District 1 were vacant at some point in 2004, while only 16% of the same positions in District 5 were vacant.

The problems created by these vacancies was testified to by Mr. King²¹ and several of the non-union Grievants. For example, Mr. King noted that when you lose a Transportation Worker II or III, his experience goes with him. He testified that there were problems with hiring experienced, properly trained replacements to fill vacancies in the Transportation Workers positions and some who were hired did not have the proper foundation to perform their jobs. More specifically, Mr. Wazell testified that drivers were being hired that did not know how to operate the truck's ice and snow removal equipment. Moreover, several employees testified that the vacancies were creating short staffing, longer shifts, and absence of breaks, to the extent of

¹⁹No doubt aware that the issue of retention favors Appellants, Mr. Black tried to skew his testimony to show that this factor was a secondary concern to the recruitment issue that will be discussed below. However, one should note that his memorandum in support of the pay differential is referred to as the "Pay Differential and **Retention Incentive** Proposal" (emphasis added) Apparently, at the time Mr. Black made his request, the retention issue was the more important one.

²⁰ Please see Statement of Facts above.

²¹ One of the factual errors made by the ALJ was found in paragraph 17 of the Findings of Fact. The ALJ ruled that no one from management complained to the DOH about this problem. There is not substantial evidence for this Finding. In fact, Mr. King, who was District Manager over Appellants for all times material to this appeal, testified repeatedly that he complained about retention and recruitment problems. See Hearing Transcript at pp. 67-70. In fact, Mr. King testified that he personally talked to the Highways Commissioner at the time, Fred Vankirk. *Id.* As Mr. Vankirk did not testify to rebut this testimony, there is not an adequate basis for the ALJ's Finding.

creating urinary problems and high stress. Clearly, retention of employees is an important concern, and one that hinders the performance of duties in District 1, just as it does in the Eastern Panhandle.

Moreover, the Rahall Study²² also discussed the bad effects that arise from too many vacancies. After noting that statewide there was, at the time of the study, an incredible 250 vacancies statewide in the TW2 series, discussed the problems that these vacancies cause:

The WVDOT pays an entry level Transportation Worker \$8.15 an hour and an experienced Transportation Worker 2 \$10.73 an hour. The cost of unfilled job openings or high turnover is more than lack of services. The cost can be calculated by factoring such costs as recruiting (advertising, postage, interviewing, reference checks, etc), processing, overtime to cover the position, orientation and on the job training. An accepted rule of thumb for human resources professionals is to factor a minimum of 1.5 of the annual salary. The costs of the 250 transportation job vacancies if turned over, would be \$6, 357, 000.

If the positions are not filled, the state will have to contract out its maintenance work due to an inability to recruit workers; WVDOT would be required by law to pay the prevailing union wage, which is currently \$25.26/hr for a class 3 equipment operator (WV Division of Labor).

Rahall Study at p. 45. Clearly, not being able to retain workers is a severe problem statewide. Since this problem was **more** severe in District 1 than in District 5, which contains the Eastern Panhandle counties, this factor alone shows that the two groups of employees are similarly situated.

²² The lower courts seemed to discount this evidence because the statistics were compiled from 2001 to 2006, the latter year being after the wages were given. Yet, this evidence is very relevant and material in two ways. First, about 2/3 of the study comprised of years before the raises were implemented. Even more importantly, the fact that the studied continued adds to its relevance. Clearly, the State's failure to act by giving a raise to other Transportation Workers, including Appellants, have not resolved the problems being encountered throughout the State.

Moreover, the recruitment problem, which entails filling vacancies, has also been pronounced in District 1 just as in the Eastern Panhandle. The ALJ relied on data pertaining to 8 vacancies in the transportation worker series compiled by Mr. Black in his Memorandum to the DOP to support his request for a raise for certain Eastern Panhandle employees. According to Mr. Black's statistical analysis, there were approximately 45 individuals who appeared on the DOP's register to fill these positions, but according to the ALJ, only 23 (or less) were really to be considered in the applicant pool. However, a similar situation existed in District 1. As detailed in the Statement of Fact, there were 52 vacancies in the Transportation Worker II positions in District 1 during 2004 and 228 applicants to fill them. However, as demonstrated in the Rahall Study, less than 30% of the individuals in the applicant pool are likely to respond to requests to be interviewed. Thus, in all likelihood, there were really only approximately 65 individuals who would actually be willing to be interviewed for the 52 positions. This demonstrates a problem more severe than in the Eastern Panhandle.

At the Level IV hearing, the DOH contested the very figures that they provided in discovery. According to Mr. Black, the 228 number provided in discovery was not the total number of people applying for the vacant positions, which is what the Interrogatory clearly asked for, but the total number of individuals willing to be interviewed from among a much larger pool of individuals on the DOP registry. This Court should ignore Mr. Black's testimony. The question asked in Interrogatory Number 7 was clear. So was the DOH's response. Appellees should not now be able to favorably alter the position it took in its discovery response.

Even if the Court allows the DOH to deny its own discovery response, a review of the job registry certifications in 2004 still demonstrate that there is a very real recruitment problem in

District 1. Reviewing the DOP registry for 2004 of postings in District 1, which were entered into the record as a Joint Exhibit, demonstrates that there were 28 vacant positions listed in the transportation worker series. Of these 1 was for a Transportation Worker I, 25 were for a Transportation Worker II and 2 were for a Transportation Worker III. Also, the registry contained approximately 672 “names” listed as expressing some interest in these positions. However, over half these “names” were duplicates, some individuals names being on as many as 12 different postings. In all, there were only approximately 289 separate individuals in the applicant pool²³. Again, using the Rahall Study analysis of data provided by Mr. Black, only 95% of these individuals would be contacted and of that group only 30% would be expected to agree to be interviewed. This leaves approximately 82 people as being available to fill 28 positions, a ratio of less than 3 individuals for every vacancy.

This rate is somewhat comparable to the ratio found by the ALJ. She noted that there were 23 individual names for the 8 positions submitted by the DOH as a reason to support the increase in wages for the Transportation Workers in the Eastern Panhandle counties. She also stated that some of the names were duplicates, though she did not say how many. Moreover, this Court should note that the statistics used by Mr. Black as demonstrating a recruitment problems only dealt with eight vacancies. This is less than half of the 19 vacancies that existed in the three County Eastern Panhandle region. Obviously, Mr. Black chose the registers which best demonstrated the problem that he wanted corrected. Had Mr. Black provided all the DOP

²³ Thus, the lower court’s Finding Number ___ that there were often 30 and sometimes over 100 names of the register for each position simply is not based on “substantial basis.” Appellants evidence is based on an uncontested review of every single register that was supplied by Appellees.

Registry information regarding all the vacancies, one must assume that the ratio of applicants to vacancies would be higher than 1.5 individuals for each vacancy. Thus, while it is possible that there is a slightly greater recruitment problem in the Eastern Panhandle than there is in District 1, the difference is not significant. In fact, it is also possible that had Mr. Black summarized the registry information for all 19 vacancies, this might have shown that the problem in District 1 was actually worse than in the Eastern Panhandle.

Finally, in regard to salary, Appellants demonstrated that a comparison between the wages of DOH workers in the “Transportation Workers” classification with the wages earned in comparable employment in the private sector, shows that the problems in District 1 and in the Eastern Panhandle are similar. For example, the Rahall Study demonstrated that the West Virginia Parkways Authority paid wages much higher than received by Transportation Workers II and III and Transportation Crew Chiefs in District 1 for doing similar work. This pay disparity, especially with the Transportation III and Transportation Crew Chiefs classifications, are much more unfavorable for the DOH employees than the disparities that served as the basis for giving the raises in the Eastern Panhandle.

Moreover, just as Appellees looked at Workforce West Virginia information pertaining to the salary of heavy truck drivers and of excavators in 2004 for the Investment Area encompassing the Eastern Panhandle and compared that data to the average salaries of Transportation Workers II and II, Appellants did a similar comparison with District 1 and heavy truck drivers and excavators for the most relevant Investment Area.²⁴ This document showed

²⁴ Appellants used the data from Investment Area 3, which encompasses Kanawha County. That County dominates District 1 because of its size. Indeed, Mr. King testified that there were certain stations in Kanawha County, such as North Charleston, that was responsible

that regardless of whether the comparison is made of a starting salary or the average, a heavy truck driver and an excavator working in private industry receives a substantially higher rate of pay than a Transportation Worker II/III worker in District 1. Additionally, there was persuasive testimony at the hearing of this matter demonstrating that a District 1 transportation worker can do similar work at a strip mine or working for a private construction company and receive a much higher salary. Finally, a review of the classified ads entered into evidence demonstrates that just as private employment pays a much greater salary than comparable DOH work in the Eastern Panhandle, so would transportation workers in District 1 receive a much greater salary in private employment.

In summary, even under the ALJ's flawed analysis of the effect of the so-called recruitment and retention problems on the issue of whether Appellants are similarly situated with the Eastern Panhandle transportation workers, Appellants should still prevail. Appellants proved that they have a worse retention problem than the employees with which they want to compare. Also, District 1 has a clear problem with recruitment. Finally, both groups work in areas of the State where there is a great salary differential between what they make and what private sector employees doing similar work make. Thus, Appellants are "similarly situated" even in regards to the recruitment and retention issues.

for more road work than entire counties within District 1. Also, the Court should note that Investment Area 7, used by Respondents, was also not a perfect fit because it contained information regarding five counties in addition to the three in the Eastern Panhandle.

2. The Lower Court Made a Clear Factual Error in Ruling that No Managerial Employees Complained to the DOH About Recruitment and Retention Problems in District 1.

A very material factual error was made by the lower court in its Finding of Fact Number 22. The lower court ruled that no one from management complained to the DOH about any recruitment or retention related problem. However, there is not substantial evidence for this Finding. In fact, Mr. King, who was acting District 1 Engineer for all times material to this appeal, testified repeatedly that he complained about retention and recruitment problems. V1, pp. pp. 67-70. In fact, Mr. King testified that he personally talked to the Highways Commissioner at the time, Fred Vankirk. Id. As Mr. Vankirk did not testify to rebut this testimony, this evidence is uncontradicted. Thus, there is not an adequate basis for the ALJ's Finding.

This erroneous factual finding seemed critical to the Order now on appeal. In paragraphs 56, 58 and 59 in the Order's "Conclusion of Law" section, this erroneous fact is listed as a reason to uphold the ALJ's Decision below. In fact, a significant basis for the lower court's finding that Appellants were not similarly situated to the transportation workers in the Eastern Panhandle Counties was this alleged lack of Complaint. See Circuit Court's Order (Paragraph 56). Thus, this error alone requires reversal of the lower court's Order.

3. The Lower Court Erred in Ruling That Certain Grievances Were Not Filed in a Timely Manner

In addition to the errors previously discussed, the lower court also erred in ruling that some of the grievances were not timely filed. The basis of this ruling is that some grievances were filed more than 10 days after the pay raise came into effect. However, even if that is true, it is irrelevant. The statutory section that establishes the 10 day period to file a grievance also specifically recognizes the concept of a “continuing violation” and the West Virginia Supreme Court of Appeals has ruled that in cases of discrimination the “continuing violation” principal applies.

One of the first cases to deal with this issue in a grievance case was Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). In that case, the Martin Court ruled that a discriminatory pay disparity was not time barred because such pay disparity was a continuing practice. Citing a previous case decided under the West Virginia Human Rights Act, our Supreme Court ruled: “Unlawful employment discrimination in the form of compensation disparity. . .is a continuing violation so that there is a present violation of the antidiscrimination statute for so long as the disparity exists.” Martin, 383 S.E.2d at 499. The Court then ruled that even though that precedent was from the West Virginia Human Rights Act, it would apply the same rule of law to grievances. Id.

Another case that reached the same result is Board of Educ. of Wood Co. v. Airhart, 212 W. Va. 175, 569 S.E.2d 422 (2002). In that case, the West Virginia Supreme Court first noted that it had previously found a continuing violation even when a wronged party knew of the basis of a claim for over 10 years before filing one, then ruled that any “uniformity” violation-such as

discrimination or favoritism-is continuing such that the time period to file a claim is being constantly renewed.

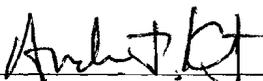
Finally, there is the White case discussed above. As stated previously, this was a appellate review concerning a discrimination grievance. Again, the West Virginia Supreme Court found that an act of discrimination is a continuing practice. As the Court ruled: “[t]he doctrine of laches shall not be applied to prevent a grievant or grievants from recovering back pay or other appropriate relief for a period of one year prior to the filing of the grievance **based on a continuing practice.**” (Emphasis added).

As demonstrated by this legal precedent, an act of discrimination is a continuing violation so long as the discrimination takes place. Since there is no dispute that the discrimination was still occurring when all the grievances were filed, all are timely.

VII. CONCLUSION

For the reasons enumerated herein, the lower tribunals’ decision should be reversed and Appellants’ grievance should be granted. This matter should be remanded back to the Grievance Board for a determination of back pay owed to Appellants.

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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

CASE NO.: 11-005

(Kanawha County Circuit Court Docket No.: 08-AA-19)

RANDY HAMMOND, et. al.,

Appellants-Petitioners,

v.

**WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS AND THE DIVISION OF PERSONNEL**

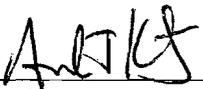
Appellees-Respondents.

CERTIFICATE OF SERVICE

I, Andrew J. Katz, counsel for Petitioners-Appellants do hereby certify that I have on the 28th day of April, 2011 caused to be served a true copy of **APPELLANTS' BRIEF** and the **JOINT APPENDIX**, comprising Volumes I and II via United States first class mail, postage prepaid, to the following individuals:

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