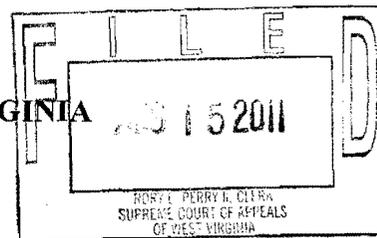


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 100916



STATE EX REL, GREGORY SMITH,

Petitioner/Appellant,

v.

CIVIL ACTION NO.08-C-198
Honorable Jay M. Hoke
(By Assignment)

MINGO COUNTY COMMISSION,
JIM HATFIELD, Mingo County Clerk, and
LONNIE HANNAH, in his official capacity
as Mingo County Sheriff,

Respondents/Appellees.

BRIEF OF RESPONDENT, MINGO COUNTY SHERIFF, LONNIE HANNAH

Submitted By:

Leah Macia, WWSB No. 7742
SPILMAN THOMAS & BATTLE, PLLC
300 Kanawha Boulevard, East
Charleston, West Virginia 25301
(304) 340-3815
lmacia@spilmanlaw.com

ATTORNEY FOR RESPONDENT MINGO
COUNTY SHERIFF LONNIE HANNAH

TABLE OF CONTENTS

ISSUE TO BE ADDRESSED	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
STATEMENT REGARDING ORAL ARGUMENT AND DECISION	3
ARGUMENT	3
CONCLUSION	8

TABLE OF AUTHORITIES

West Virginia Cases:

<u>In re Chevie V.</u> 226 W.Va. 363, 700 S.E.2d 815 (2010)	4
<u>Powers v. Goodwin.</u> 170 W.Va. 151, 291 S.E.2d 466 (1982)	6
<u>Roberts v. Paull, Judge.</u> 50 W.Va. 528, 40 S.E. 470 (1901)	5
<u>Satterlee v. Strider.</u> 31 W.Va. 781, 8 S.E. 552 (1888)	5
<u>State ex rel. Buxton v. O'Brien and the County Court of Mason County.</u> 97 W.Va. 343, 125 S.E. 154 (1924)	6
<u>State ex rel. Canterbury v. County Court.</u> 151 W.Va. 1013, 158 S.E. 151 (1967)	5
<u>State ex rel. Kay v. Steinmetz.</u> 144 W.Va. 802, 111 S.E.2d 27 (1959)	7, 8
<u>State ex rel. Tucker County Solid Waste Authority v. West Virginia Division of Labor.</u> 222 W.Va. 588, 668 S.E.2d 217 (2008)	4
<u>State ex rel. Warner v. Jefferson County Comm'n.</u> 198 W.Va. 667, 482 S.E.2d 652 (1996)	6

TABLE OF AUTHORITIES CON'T

West Virginia Cases Con't:

UMWA by Trumpka v. Kingdom,
174 W.Va. 330, 325 S.E.2d 120 (1984) 4

West Virginia Constitution and Statutes:

West Virginia Constitution Article V, Section 1 5
West Virginia Code § 6-6-7 1, 2, 3, 4, 5, 8
West Virginia Code § 7-3-3 1
West Virginia Code § 7-5-4 1
West Virginia Code § 11-8-31 (a) 2, 3, 5, 6, 7, 8

ISSUE TO BE ADDRESSED

This Court, by Corrected Order dated June 13, 2011, restricted supplemental briefing in this matter to the following issue:

Whether the three-judge panel has authority to award attorney's fees and expenses in a removal action brought under W.Va. Code § 6-6-7 and, if so, whether a party must seek his/her attorney's fees and expenses from the three-judge panel or risk waiving the same.

June 13, 2011 Corrected Order, p. 2.

STATEMENT OF THE CASE

Respondent Hannah filed a Petition For Removal of Gregory Smith from the office of Mingo County Commissioner pursuant to W.Va. Code § 6-6-7. Respondent Hannah alleged several grounds for removal including that Petitioner violated W.Va. Code § 7-3-3 and § 7-5-4. Petitioner denied all allegations contained in Respondent Hannah's Petition for Removal.

A three-judge panel, appointed by this Court pursuant to W.Va. Code § 6-6-7, conducted a hearing on March 26-27, 2007. At the conclusion of the hearing both parties submitted Proposed Findings of Fact and Conclusions of Law to the three-judge panel. In his own submission, Petitioner himself failed to include any conclusion that he was entitled to attorney fees and costs.

On October 2, 2007, the three-judge panel issued an order denying the Petition for Removal.¹ In its October 2, 2007 order, the three-judge panel issued an Order finding that Gregory Smith violated two statutes, W.Va. Code § 7-3-3 and § 7-5-4 but that the

¹ On May 22, 2008, this Court denied Sheriff Hannah's Petition for Appeal of the three-judge panel's order.

“technical” violations of the law did not rise to a level sufficient to justify removal from office. The panel did not address the issue of attorney fees and costs.

Despite the fact that he neglected to include any mention of attorney fees and costs in his Proposed Findings of Fact and Conclusions of Law, and instead of filing any sort of supplemental pleading with the panel to take up the issue, Petitioner Smith filed a mandamus action on July 23, 2008 against the Mingo County Commission, the Mingo County Clerk, and the Mingo County Sheriff to compel them to pay his attorney fees and expenses. The Circuit Court denied Petitioner’s Mandamus Complaint holding that W.Va. Code § 6-6-7 empowered the three-judge panel to decide all issues in the removal case, including the award or denial of attorney fees and expenses, and that the three-judge panel chose not to award attorney fees and costs to Petitioner in its Final Order. The Circuit Court concluded therefore that Petitioner failed to meet the first of the three requirements mandatory for the granting of a writ of mandamus – a clear right to the relief sought. The Court also concluded that Petition lacked the other two elements - a legal duty on the part of the Mingo County Sheriff, Clerk, and Commission to grant him attorney fees, and the absence of another adequate remedy.

This Court ordered the parties to address the issue of whether the three-judge panel has authority to award attorney fees and costs in a removal action brought pursuant to W.Va. Code § 6-6-7 and, if so, whether a party must seek his/her attorney fees and expenses from said panel or risk waiving the same.

SUMMARY OF ARGUMENT

A three-judge panel convened pursuant to W.Va. Code § 6-6-7 has no authority to award attorney fees in a removal case because W.Va. § 11-8-31(a) specifically vests

that authority in the governing body from which a requesting party's removal has been sought. In the instant case, that body is the Mingo County Commission. Petitioner failed to request attorney fees from that body. Therefore, mandamus cannot lie against it. Nor could this Court compel a specific outcome for such request even if it had been made, since the power to grant attorney fees is purely discretionary. Moreover, since more than two years have passed since the conclusion of the underlying removal action, Petitioner would be barred by the doctrine of laches from requesting attorney fees from the County Commission, let alone from the now-dissolved three-judge panel, even if that body had ever had such power.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

In its Corrected Order, the Court has ordered that the instant case will be noticed for a Revised Rule 20(b) argument.

ARGUMENT

The three-judge panel convened in the underlying removal action pursuant to W.Va. Code § 6-6-7 had no authority to award Petitioner attorney fees, because the Legislature has vested that authority instead in the Mingo County Commission from which his removal was sought. W. Va. Code § 11-8-31(a) provides as follows:

§11-8-31(a). Recovery of attorneys' fees authorized.

The governing body of the governmental entity of which a person is an official is hereby authorized to reimburse such person for the reasonable amount of such person's attorney fees in any case:

- (a) Wherein such person has successfully defended against an action seeking his or her removal from office , or
- (b) Wherein such person has successfully defended against an action seeking the recovery of moneys alleged to have been wrongfully expended.

In either case such governing body shall have authority to determine if such reimbursement is warranted and the reasonableness of the amount sought to be recovered.

The Mingo County Court noted in its order denying attorney fees that W.Va. Code § 6-6-7 was amended in 1985 to require a three-judge panel to hear removal cases and to give them the power to issue a final order on all issues presented to it. The Mingo County Circuit Court then denied Petitioner's request because the three-judge panel did not include an award of attorney fees pursuant to that power.

However, the panel could not have done so even if it had wanted to. In the same year that the composition of the removal tribunal was changed and its powers were amended, the Legislature also vested the power to award attorney fees in such actions specifically in the governing body from which removal is sought rather than in the removal panel itself. Thus, the Legislature determined that the body deciding whether to remove a person from office should not be the same body determining whether he should be awarded attorney fees.

Moreover, basic principals of statutory construction dictate that the general powers granted three-judge removal panels cannot encompass awarding attorney fees. "As a rule, when both a specific and general statute apply to a given case, the specific statute governs." *In re Chevie V.*, 226 W.Va. 363, 371, 700 S.E.2d 815, 823 (2010); Syl. Pt. 6, *State ex rel. Tucker County Solid Wast Authority v. West Virginia division of Labor*, 222 W.Va. 588, 668 S.E.2d 217 (2008) ("the general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled"); Syl. pt. 1, *UMWA by Trumpka v. Kingdom*, 174 W.Va. 330, 325 S.E.2d 120 (1984). In this case, the general grant of

authority to a three-judge panel in a removal case to decide all issues presented to it under W.Va. Code § 6-6-7 cannot encompass the power to award attorney fees, since the Legislature has vested that power instead in the governing body from which removal is sought in the more specific statute, W. Va. Code § 11-8-31(a).

If a three-judge panel were to make a decision regarding attorney fees, that would be a clear encroachment by the judicial branch upon the authority vested in the governing executive branch body under W. Va. Code § 11-8-31(a). This would be a clear violation of the separation of powers provided in West Virginia Constitution Article V, Section 1. Thus, the two statutes cannot be reconciled, and the more specific provisions of W. Va. Code § 11-8-31(a) must take precedence over any power that W.Va. Code § 6-6-7 might otherwise arguably grant a three-judge removal panel.

Having failed to exercise his right to seek attorney fees from the Mingo County Commission, Petitioner cannot now seek to compel it to award him fees through the extraordinary writ of mandamus. It is nonsensical for Petitioner to ask this Court to compel an action that he never requested of the Commission in the first instance. Moreover, it is settled that mandamus will not lie to control the judicial or discretionary powers of an officer. It will lie to compel the exercise of such authority, but will not lie to control the exercise of it or compel a particular decision. *Roberts v. Paull, Judge*, Syl. pt. 2, 250 W.Va. 52, 40 S.E. 470 (1901); *Satterlee v. Strider*, Syl. pt. 2, 31 W.Va. 781, 40 S.E. 470 (1888). “Mandamus is a proper remedy to compel tribunals and officers exercising discretionary and judicial powers to act, when they refuse to do so, in violation of their duty, but it is never employed to prescribe in what manner they shall act, or to correct errors they have made.” *State ex rel. Canterbury v. County Court*, Syl. pt. 3, 151

W.Va. 1013, 158 S.E.2d 151 (1967). *See also, State ex rel. Buxton v. O'Brien and the County Court of Mason County*, Syl. pt. 1, 87 W.Va. 343, 125 S.E. 154 (1924) (recognizing that separation of powers provision precludes courts from exercising administrative duties relating to executive branch in refusing to use judicial power of mandamus to control fiscal affairs of the county court). Therefore, at best, the Petitioner could only ask this Court to compel the Mingo County Commission to entertain a request for attorney fees. But because W.Va. Code § 11-8-31(a) invests that executive branch body with complete discretion over such requests, this Court could not compel it to reach a particular outcome. *See* W.Va. § 11-8-31(a) (“[S]uch body shall have the authority to determine if such reimbursement is warranted.”). (Emphasis added) However, since Petitioner has failed to ever ask the Commission to exercise its power to award him attorney fees, he cannot ask this Court to compel the Commission to even entertain such a request, let alone to compel its decision thereon.

In the *Powers v. Goodwin*, 170 W.Va. 151, 291 S.E.2d 466 (1982) line of cases, mandamus was sought either to overturn the exercise of authority as beyond statutory authority, as in *Powers*, or to compel the commission to consider the matter on the merits. In other words, a commission did something or refused to do something. Thus, in *State ex rel. Warner v. Jefferson County Comm'n*, 198 W. Va. 667, 482 S.E.2d 652 (1996), the petitioner “submitted an invoice to the County Commission in the amount of \$ 95,345.56 representing legal fees and expenses incurred in the defense of his criminal prosecution. The County Commission refused to pay any portion of these legal fees and expenses, resulting in the appellant filing a writ of mandamus in the Circuit Court of Jefferson County.”

Here, the Commission did not act or refuse to act on an invoice for legal fees, and it is too late for Petitioner to submit the invoice. *See State ex rel. Kay v. Steinmetz*, 144 W.Va. 802, 111 S.E.2d 27 (1957) (finding that the doctrine of laches prevented petitioners from seeking reinstatement to their positions because a “delay of almost two years in the assertion of their rights [was] unreasonable, and, in the absence of sufficient excuse, the relief sought [would] be denied.”). This same doctrine would prevent him from asking it for expenses.²

In *Steinmetz*, this Court noted that while no statute of limitations applies to mandamus actions, respondents may assert the defense of laches against such actions. *Id.* 144 W.Va. at 803, 11 S.E. 2d at 28. The Court also noted that the burden is on mandamus petitioners to show sufficient excuse for their delay. *Id.* 144 W.Va. at 809, 11 S.E. 2d at 31. Here, Petitioner even if the three-judge panel could have awarded him attorney fees – which, as discussed above, it could not – Petitioner waived his opportunity to have it grant such rights when he failed to include it in his Proposed Findings of Fact and Conclusions of Law. Nor did he bother to address the issue with the panel in any supplementary pleading when the final Order was issued. The panel now being dissolved, it could not be compelled in mandamus to award fees and expenses even if it had once had the power to do so.

And even though the Mingo County Commission does have the power to grant attorney fees, he cannot now seek an order compelling them to do so since he never asked

² W.Va. Code §11-8-31(a) addresses only attorney fees. It does not address expenses. Therefore, arguably the panel could have awarded expense if it so chose. But because the Petitioner jumped straight to this mandamus action without having first at least requested the Mingo County Commission to award him his expenses, mandamus cannot lie to compel the Commission to do something it was never asked.

them to exercise such power in the more than three years and ten months since the panel's issued its final Order. Just as in *Steinmetz*, his won laches must bar such action.

Thus, because the discretionary power to award attorney fees in the underlying removal action was vested solely with the Mingo County Commission in this instance under W.Va. Code § 11-8-31(a), the general language of W.Va. Code §6-6-7 cannot be read to vest such power in the three-judge panel that heard that action. Nor can the Petitioner seek to compel the Mingo County Commission to award him attorney fees since he never requested it to do so, and this Court, in any case, could not order the Commission to reach any specific outcome even if he had.

CONCLUSION

Wherefore, for the foregoing reasons, this Honorable Court should deny the instant Petition for Writ of Mandamus.

SHERIFF LONNIE HANNAH

By Counsel,



Leah Macia WWSB No. 7742
Spilman Thomas & Battle, PLLC
300 Kanawha Blvd., East
P.O. Box 273
Charleston, West Virginia 25321-0273

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 100916

STATE EX REL., GREGORY SMITH

Petitioner/Appellant,

v.

Civil Action No. 08-C-198
Honorable Jay M. Hoke
[By Assignment]

MINGO COUNTY COMMISSION,
JIM HATFIELD, Mingo County Clerk, and
LONNIE HANNAH, in his official capacity
as Mingo County Sheriff,

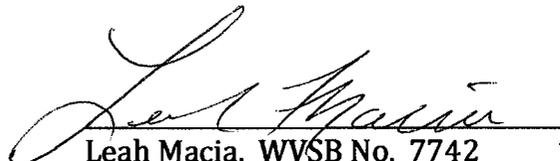
Respondents/Appellees.

CERTIFICATE OF SERVICE

I, Leah Macia, counsel for Respondent Hannah, do hereby certify that on this, the 15th day of August, 2010, I served a true and exact copy of the foregoing "Respondent Hannah's Brief" by United States Mail, postage pre-paid, addressed as follows:

John A. Kessler, Esquire
Carey, Scott, Douglas & Kessler, PLLC
P.O. Box 913
Charleston, WV 25323

Glen Rutledge, Esquire
P.O. Box 340
Williamson, WV 25661



Leah Macia, WWSB No. 7742
Spilman Thomas & Battle, PLLC
300 Kanawha Blvd., East
P.O. Box 273
Charleston, West Virginia 25321-0273