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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

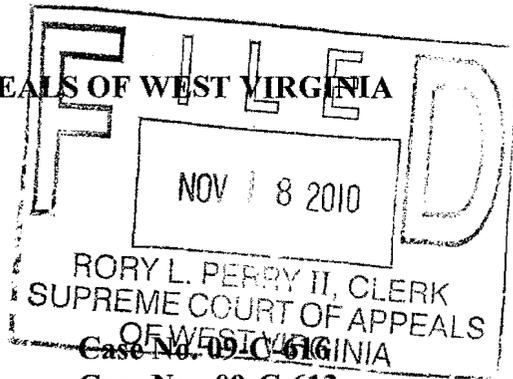
MARY CATHERINE LEHMAN  
PATRICIA ANN POWELL

*Petitioners,*

v.

UNITED BANK, INC.

*Respondent.*



Consolidated by Trial Court for Appeal,  
Circuit Court of Berkeley County

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PETITION FOR APPEAL

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MARY CATHERINE LEHMAN  
PATRICIA ANN POWELL

*Petitioners,*

v.

Case No. 09-C-616  
Case No. 09-C-613  
Consolidated by Trial Court for Appeal,  
Circuit Court of Berkeley County

UNITED BANK, INC.

*Respondent.*

**PETITION FOR APPEAL**

COME NOW the Petitioners, Mary Catherine Lehman and Patricia Ann Powell, by counsel, Tammy Mitchell McWilliams, Esquire, for the law firm of Trump & Trump, L.C. before this Honorable Court this 5<sup>th</sup> day of November, 2010 to respectfully petition this Court for appeal, pursuant to the Rules of the West Virginia Rules of Appellate Procedure.

**I. Kind of Proceeding and Nature of Ruling**

The Petition arises from Civil Action 09-C-613 and 09-C-616 filed in the Circuit Court of Berkeley County, West Virginia. The actions were consolidated for appeal purposes. The claims arise under the West Virginia Wage Payment and Collection Act, W.Va. Code § 21-5-1, et seq. and the failure of the Respondent employer to timely pay all wages due to the Petitioners, as discharged employees in violation of West Virginia Code § 21-5-4.

Cross motions for summary judgment were filed below. The trial court entered summary judgment in favor of the Respondent based upon erroneous conclusions of fact and law that the Plaintiffs were “laid off” and not discharged and that the monies owing to [Petitioners] at the time

of their discharge were not “wages” under the Act; but “severance pay” which was not earned and can never constitute “wages” as a matter of law.

## **II. Statement of Facts of the Case**

1. Respondent, United Bank, Inc., is a corporation organized under the laws of the State of West Virginia and doing business as United Bank in Berkeley County, West Virginia.

2. Lehman and Powell worked for Premier Community Bankshares through the time of its merger with United Bank in the third quarter of 2007(July).

3. On March 1, 2007, Powell and Lehman were advised by United Bank, their continuing employer, in writing that as a result of the merger, their positions were being eliminated. See Letters of March 1, 2007, attached hereto as Exhibits “A and B”.

4. Powell and Lehman were informed, however, that if they agreed to stay and work for United Bank through the transition, each would receive additional monies “equal to two weeks of base pay (at the rate in effect on the termination date) for each year of service at Premier Community Bankshares (with credit for partial years of service), and a maximum payment equal to twenty-six (26) weeks of base pay”. To receive earn additional monies, Powell and Lehman had to agree to perform their duties to a satisfactory level through a job end date which would be selected and determined solely by the employer and which would be subject to revision and change at the employer’s sole discretion.

5. On June 20, 2007, Powell and Lehman were advised that United Bank selected August 3, 2007 as their projected job end dates, subject to change.

6. On June 20, 2007, United Bank again reminded Powell and Lehman that in order to receive the additional monies of \$17,964.53(in the case of Powell) and \$5,695.47(in the case of

Lehman) they had to continue to perform satisfactorily through the designated job end date of August 3, 2007 or any changed or revised job end date selected by the employer. See Letters of June 20, 2007, attached hereto as Exhibit "C and D". Those job end dates were later extended to August 3, 2007.

7. Powell and Lehman agreed to the terms set by their employer, United Bank, for the payment of this additional compensation and following March 1, 2007, affirmatively indicated to United Bank their agreement to remain employed with United Bank to assist in the transition process.

8. Powell and Lehman were employed by United Bank through August 3, 2007, at which time their employment was unilaterally terminated by United Bank, a fact admitted by United Bank in its initial pleadings.

9. At the time of Lehman and Powell's termination, United Bank employed six or more persons during a calendar week.

10. As of August 7, 2007, Lehman had not received her final pay. Lehman thus called and asked why she had not received her final pay. Her final pay was then deposited into her United Bank account by direct deposit on August 10, 2007. Two (2) separate deposits were made by United Bank. The first check of August 9, 2007 was in the amount of \$2,012.29 and the manual check report generated by United Bank and sent to Lehman identifies the same as "Code V(vacation)" and "regular earnings". See Exhibit "E" attached hereto. The second check of August 10, 2007 was in the amount of \$15,763.33 and the manual check report generated by United Bank and sent to Lehman identifies the same as both "other and severance". See Exhibit "F" attached hereto.

11. As of August 7, 2007, Powell had not received her final pay. In response a call was made to ask why she had not received her final pay. Her final pay was then deposited into her United Bank account by direct deposit on August 10, 2007. Three (3) separate deposits were made on August 10, 2007 by United Bank. The first deposit was in the amount of \$1,360.56 and the manual check report generated by United Bank and sent to Powell identifies the same as “regular earnings”. See Exhibit “G” attached hereto. The second deposit was in the amount of \$17,964.53 and the manual check report generated by United Bank and sent to Powell identifies the same as “Code S”(severance). See Exhibit “H” attached hereto. The third deposit was in the amount of \$3,798.23 and the manual check report generated by United Bank and sent to Powell identifies the same as “Code V”(vacation-67 hours). See Exhibit “I” attached hereto.

12. In October of 2007, Powell and Lehman caused a demand to be sent to United Bank for liquidated damages imposed by the West Virginia Wage Payment and Collection Act for the employer’s failure to pay their end of service compensation within seventy-two hours of their termination, that being Monday, August 6, 2007.

13. In response, United Bank, through counsel, issued a check payable to Powell in the amount of \$15,476.37 and clearly made a payment of liquidated damages to Powell as a discharged employee for her regular earnings and her vacation only. See Letter of November 1, 2007.

14. In response, United Bank, through counsel, issued a check payable to Lehman in the amount of \$36,038.76 and clearly delineated that it was making payment to Lehman for liquidated damages for her regular earnings, her vacation, and her bonus only. See Letter of November 1, 2007.

15. United Bank made no payment to Powell or Lehman for the liquidated damages owing for United Bank’s failure to timely pay the respective \$17,964.53 in the case of Powell, and

\$5,695.47 in the case of Lehman, which United Bank termed “severance”. It then contended, as its sole reason for not paying, that the severance pay was not an accrued fringe benefit and thus was not wages under the WPCA.

16. United Bank’s employment policy manual provides for a separation from employment by way of resignation, discharge, or lay off. United Bank’s policy affirmatively indicates that “United reserves the right to discharge an employee at any time with or without notice, cause, or compensation”.

17. United Bank’s “lay off” policy is intended to be a cessation of employment on a temporary basis allowing the employee to be subject to call back. Lehman and Powell’s termination were not temporary nor were they subject to call back. United’s “lay off” policy reads: “United’s policy is to lay off employees only when absolutely necessary. It is hope that lay offs will be temporary and that employees can be called back following a lay off period”.

18. Powell and Lehman were never told they were being laid-off. Their employment with United Bank was eliminated permanently. They were not subject to a call back list nor given any expectation of a return to work.

19. The West Virginia Code of State Regulations § 42-5-2 defines a “discharge” as follows: “Discharge means any involuntary termination or the cessation of performance of work by an employee due to employer-action”.

20. Powell and Lehman, were involuntarily terminated by their employer, United Bank. Powell and Lehman were by definition “discharged” under the Code of State Regulations.

21. West Virginia Code § 21-5-4(b) provides that “whenever a person, firm or corporation discharges an employee, such person, firm or corporation shall pay the employee’s wages in full within seventy-two hours”. (underline added)

22. West Virginia Code § 21-5-10 expressly provides that the provisions of law afforded by the Wage Payment and Collection Act, including the seventy-two (72) hour rule, may not be waived by agreement: “Except as provided in Section 13, no provision of this Article may in any way be contravened or set aside by private agreement...”. Employers may not contract or agree to terms of employment which circumvent the Wage Payment and Collection Act and its requirement that a discharged employee be paid all “wages” within seventy-two (72) hours.

### **III. Assignments of Error**

The trial court’s July 7, 2010 Orders Granting Defendant’s Motions for Summary Judgment and Denying Plaintiffs’ Motions for Summary Judgment are in error:

1. The trial court erred in finding the Petitioners were “laid off” and not “discharged” and thus not an employee covered by W.Va. Code § 21-5-4. In so holding, the trial court (1) erroneously relied upon West Virginia State R. § 24-5-2.10 to the exclusion of West Virginia State R. 24-5-2.08; (2) failed to find that West Virginia Code § 21-5-4(b) was applicable any time an employer “discharges” any person suffered or permitted to work; (3) failed to declare the Legislative Rule codified as Section 42-5-2.10 defining “layoff” void; and (4) erred in allowing the employer to have an unwritten election of statutory remedies and duties.

2. The trial court erred in finding that the “pay to stay” earnings were not “wages” as defined under § 21-5-4. In so holding, the trial court: (1) erred in finding that “severance pay” can never be compensation for labor or services earned by an employee prior to termination and thus can

never fall within the definition of “wages” under the West Virginia Wage Payment and Collection Act; and (2) erred in finding that the severance pay was not an accrued fringe benefit at the moment of discharge.

#### IV. Points and Authorities

##### WEST VIRGINIA STATE CASES:

Anderson & Anderson Contractors, Inc. v. Latimer

162 W.Va. 803, 807-08, 257 S.E.2d 878, 881 (1979)

Bailey v. Sewell Coal Company, Inc.

1988 WL 281948 W.Va.

CNG Transmission Corp. v. Craig

564 S.E.2d 167(W.Va. 2002)

Conrad v. Charles Town Races, Inc.

521 S.E.2d 537, 543(W.Va. 1998)

Farley v. Zapata Corporation

281 S.E.2d 238(1981 W.Va.).

Frymier v. Higher Education Policy Commission

655 S.E.2d 52(W.Va. 2007)

Lovas v. Consolidation Coal Company

662 S.E.2d 645(W.Va. 2008)

Mallamo v. Town of Rivesville.

477 S.E.2d 525 Syl. Pt. 2(W.Va. 1996)

Meadows v. Wal-Mart Stores, Inc

530 S.E.2d 676(W.Va. 1999)

Peyton v. City Council of Lewisburg

387 S.E.2d 532 Syl. Pt. 1(W.Va. 1989)

Rowe v. West Virginia Department of Corrections

292 S.E.2d 650(W.Va. 1982)

Shaffer v. Ft. Henry Surgical Associates, Inc  
599 S.E.2d 876(W.Va. 2004)

State v. Elder  
165 S.E.2d 108 Syl. Pt. 2(W.Va. 1968)

Taylor v. Mutual Mining, Inc.  
543 S.E.2d 313(W.Va. 2000)

Walsh v. Jefferson Memorial Hospital  
589 S.E.2d 527(W.Va. 2003)

**MISCELLANEOUS STATE CASES:**

Chapin v. Camera  
31 Cal App. 3d 192(1st Dist 1973)

Chase v. Warren Petroleum Corporation  
168 SO2d 864(Lo. App.)

Dahl v. Brunswick Corp.  
356 A2d 221(Md. 1976)

Fang v. Showa Entetsu Co.  
91 P 3d 419(Colo. Ct. App. 2003, cert denied 2004 WL 1301893)

Ferry v. XRG International, Inc  
492 SO2d 1101(Fla. Ct. App. 1986)

Gurnik v. Lee  
587 N.E.2d 706(Ind. Ct App. 1992)

Heiment v. PA. Power and Light Company  
23 Wage & Hour Cas.(BNA) 227(Pa. Ct. Common Pleas 1976)

Heimer v. Price, Kong & Co  
2008 WL 5413368(Ariz. App.)

McCabe v. Medex  
786 A2d 57, 2001 Aff'd 811 A2d 297, 2002

Metropolitan Distributors, Inc. v. Illinois Department of Labor

449 N.E.2d 1000(1983)

Schofield v. Zion's Co-op Mercantile  
39 P2d 342(Utah 1934).

Stevenson v. Branch Banking and Trust Corp  
861 A2d 735(Md. App. 2004)

Triad Data Service, Inc. v. Jackson  
153 Cal. App3d Supp 1(1984)

Turner v. Hobby Industry Asso  
280 NY S2d 837(1967)

Wank v. St. Francis College  
740 N.E.2d 908(Ind. Ct. App. 2000)

Ware v. Merrill Lynch  
24 Cal App 3d 35(1972)

Whiting-Turner  
782 A2d 67

**FEDERAL CASES:**

Eckholt v. American Bus. Info  
873 F Supp. 507(1994 DC Kon)

Gregory v. Forest River, Inc.  
No. 09-1256(4th Cir., March 10, 2010)

Gresham v. Luberman's Mut. Cas. Co.  
426 F Supp. 2d 321, aff'd 2006 WL 752182(4th Cir)

In re: Public Ledger, Inc.  
(3rd Sur 1947, 161 F2d 762)

Kulinski v. Medtronic Bio-Medicus  
112 F3d 368(8th Cir. 1997)

Tischmann v. ITT Sheritan Corp  
882 F Sup. 1358(Sd NY 1995)

**WEST VIRGINIA RULES & STATUTES:**

West Virginia Code § 21-5-1, et seq.

West Virginia. Code § 21-5-1(c)

West Virginia Code § 21-5-4

West Virginia Code § 21-5-4(b)

West Virginia Code §21-5-4(c)

West Virginia Code §21-5-4(d)

West Virginia Code § 21-5-10

West Virginia Code § 21-5C-1(f)

West Virginia Code § 21A-6-3

West Virginia Code of State Regulations § 42-5-2

West Virginia Code of State Regulations § 42-5-2.8

West Virginia Code of State Regulations § 24-5-2.10

**OTHER:**

Black's Law Dictionary; Suspend(7th ed. 1999)

Oxford Desk Dictionary and Thesaurus, American Ed.(1997)

## V. ARGUMENT

### **A. Powell and Lehman Were Employees Who Were “Discharged”, Not “Laid-Off”, and In Accordance With West Virginia Code § 21-5-4(b) Must Be Paid “Wages” In Full Within Seventy-Two Hours**

An examination of West Virginia Code § 21-5-4, in its entirety, reveals a comprehensive legislative scheme or pattern. It begins with subsection (a) and therein addresses the tender or form of payment which can be used by employers in compensating employees who are being separated from payroll. It ends with subsection (e) which provides for liquidated damages in the event an employer fails to comply with the section. In the middle, in subsections (b) (c) and (d), the Legislature addresses the three (3) categories or ways an employee may be separated from payroll. It is significant that each subsection starts with “when” or “whenever” to introduce the new class of separated worker to which the subsection will apply.

Subsection (b) applies whenever an employee is discharged:

“(b) Whenever a person, firm or corporation discharges an employee, such person, firm or corporation shall pay the employee’s wages in full within seventy-two hours”.

See W.Va. Code §21-5-4(b).

Subsection (c) applies when an employee quits or resigns:

“(c) Whenever an employee quits or resigns, the person, firm or corporation shall pay the employee’s wages no later than the next regular payday, either through the regular pay channels or by mail if requested by the employee, except that if the employee gives at least one pay period’s notice of intention to quit the person, firm or corporation shall pay all wages earned by the employee at the time of quitting”.

See W.Va. Code §21-5-4(c).

Subsection (d) applies when an employee's work is suspended either (1) as a result of a labor dispute; or (2) when an employee for any reason whatsoever is laid off. The key being the fact that the employee's work is merely suspended. Subsection (d) contemplates a temporary cessation of the employment relationship, not a permanent one:

“(d) When work of any employee is suspended as a result of a labor dispute, or when an employee for any reason whatsoever is laid off, the person, firm or corporation shall pay in full to such employee not later than the next regular payday, either through the regular pay channels or by mail if requested by the employee, wages earned at the time of suspension or layoff”.

See W.Va. Code §21-5-4(d).

“Suspend” is defined by Black's Law Dictionary as: “To interrupt; to cause to cease for a time; to postpone; to stay, delay, or discontinue temporarily, but with an expectation or purpose of resumption....To cause a temporary cessation, as of work by an employee, to lay off.” See Black's Law Dictionary; Suspend(7th ed. 1999).

“Suspension” is also defined by Black's Law Dictionary as “a temporary stop, or temporary delay, interruption, or cessation.... Temporarily withdrawal or cessation from employment as distinguished from permanent severance accomplished by removal....”. See Black's Law Dictionary; Suspension(7th ed. 1999).

Examples of its application would include the lay off of the midnight or third shift pending the employer's receipt of new orders or the suspension of an assembly line crew when the maintenance or replacement of a manufacturer's equipment is needed following a plant fire. In those instances, the employment relationship is not severed permanently, but rather the employee's right to receive pay is temporarily suspended until the anticipated recall.

Reading the statute as providing for three (3) separate and distinct classes of separated employees is consistent with the statute affording three different time periods for the payment of final wages. "Discharged" employees are those for whom the employer-employee relationship has been permanently severed at the request of the employer and hence, the employer has advance knowledge and control over the discharge date and can meet a seventy-two (72) hour time frame for payment of final wages. However, an employer is without this knowledge and ability when an employee "quits". Here, it is the employee who is severing the relationship and the statute gives the employer until the next pay day to calculate wages and make final payment arrangements. This framework is further supported by the statute's removal of the additional time for payment if an employee quits but gives at least one (1) pay period's notice. In the case of a suspension, whether by "lay off" or labor dispute, the employee-employer relationship is not coming to a permanent end. It is believed that the employee will be entitled to additional wages in the future following a return to work. Because these situations could involve many persons and a return to work is anticipated, it is appropriate to allow the existing pay cycle to continue and eventually resume. The burden and the practical effects upon an employer's payroll/HR department were obviously taken into account by the legislature, as was the fact that the employee-employer relationship is not being permanently severed.

United Bank acknowledged Lehman and Powell's status as "discharged" employees long ago and further acknowledged their entitlement to liquidated damages under W.Va. Code § 21-5-4 for its failure to pay under the seventy-two (72) hour rule. When Powell and Lehman asserted that their final "wages" were not given to them within seventy-two hours of discharge, United Bank paid Powell and Lehman three (3) times the sum of their vacation pay, bonus, and final week's salary as

liquidated damages. “It refused, however, to pay liquidated damages on [their] severance payment because the severance payment was not earned until after termination occurred, putting it outside the scope of the West Virginia Wage Payment and Collection Act’s seventy-two hour rule”. See Defendant’s Motion for Summary Judgment, p. 3; See also, Letter of November 1, 2007.

It was not until a lawsuit demanding those same liquidated damages upon Lehman and Powell’s remaining “wages” (i.e. their severance pay), that United Bank suddenly, and for the first time, also claimed Lehman and Powell were “laid off” and that the more lenient provisions of West Virginia Code § 21-5-4(d), requiring payment of wages to be made to laid off employees on the next regular pay day was applicable.

All written communication and notices provided to Powell and Lehman refer to each as a terminated employee. At no time were Powell and Lehman advised that they were being laid off. On the contrary, they were advised that they and their positions were being eliminated permanently.

United’s very own policy handbook clearly defines a “lay off” as a temporary situation whereby the employee and employer are anticipating a call back. United’s policy on lay offs reads, in part:

“United’s policy is to lay off employees only when absolutely necessary. It is hoped that lay offs will be temporary and that employees can be called back following a lay off period...”.

While United Bank argued that it was undertaking a reduction in work force, that does not equate to a lay off. This Court has acknowledged that a reduction in work force is a reduction in the number of employees that may be affected by either a lay off (temporary) or a permanent termination. See Frymier v. Higher Education Policy Commission, 655 S.E.2d 52(W.Va. 2007).

United Bank's last minute attempt to squeeze Powell and Lehman into the definition of a "laid-off" worker under the Code of State Regulation, did not remove Powell and Lehman from the definition of a "discharged" employee. The trial court failed to consider that "in examining statutory language generally, words are given their common usage and courts are not free to read into the language what is not there, but rather should apply the statute as written". *Shaffer v. Ft. Henry Surgical Associates, Inc.*, 599 S.E.2d 876(W.Va. 2004); See *State v. Elder*, 165 S.E.2d 108(W.Va. 1968), Syl. Pt. 2; *Peyton v. City Council of Lewisburg*, 387 S.E.2d 532(W.Va. 1989), Syl. Pt. 1; *Mallamo v. Town of Rivesville*, 477 S.E.2d 525(W.Va. 1996), Syl. Pt. 2.

Section 21-5-4(b) is applicable anytime an employer "discharges" an "employee". The term "employee" is broadly defined in West Virginia Code § 21-5-1(b) and encompasses "any person suffered or permitted to work". Clearly, the meaning of the words "an employee" just as "any employee", is used to refer to "every" within the meaning of West Virginia Code § 21-5-1(b). Lehman and Powell were "employees".

Again, the Code of State Regulation defines "discharged" as "any mandatory termination or the cessation of performance of work by an employee due to employer action". West Virginia Code State Regulation § 42-5-2.8. Lehman and Powell were involuntarily terminated and hence "discharged".

If the Legislature had intended to restrict recovery under Section 21-5-4(b) to only certain categories of "discharged" employees, (i.e. only those who are discharged for cause or without notice), it would have indicated such in the language of the Act, just as it has done in other labor and employment statutes. See e.g. West Virginia Code § 21A-6-3(limiting the recovery of unemployment benefits for employees discharged for cause); *West Virginia Code* § 21-5C-

1(f)(exempting certain classes of employees from overtime hour laws). Instead, the Legislature elected to employ broad language which encompasses any person who is suffered or permitted to work by another who is involuntarily terminated due to employer action. W.Va. Code § 21-5-4(b); W.Va. CSR § 42-5-2.

Furthermore, it is well settled that “the West Virginia Wage Payment and Collection Act is remedial legislation designed to protect working people and assist them in the collection wrongfully withheld”. *Shaffer*, 599 S.E.2d at 881. Therefore, “statutes such as the Wage Payment and Collection Act that are designed for remedial purposes are generally construed liberally to benefit the intended recipients”. *Id.* Citing *Conrad v. Charles Town Races, Inc.*, 521 S.E.2d 537, 543(W.Va. 1998).

While the CSR defines “discharged”, the CSR does not define “laid-off”, the actual words used in § 21-5-4(d). W.Va. Code St. R. § 42-5-2.8; W.Va. Code St. R. § 42-5-2.10. The CSR only defines “lay-off”. See *W.Va. Code § 42-5-2.10*. It is defined as the “involuntary cessation of an employee for a reason not relating to the quality of the employee’s performance...”. *Id.* This definition does not operate in a vacuum. It must be read in context with § 21-5-4(d) which addresses payments to an employee whose work is suspended as a result of a lay off. When read together or *in pari materia* it is reasonable to conclude that, an employee who is temporarily separated from work through no fault of her own and who has an expectation of returning, is on a “lay-off”. These are the persons separated from payroll who fall into subsection (d).

United Bank advanced a narrow reading and application of the legislative rule’s definition of “lay-off” which is inconsistent with and alters the statute’s intent and design. The trial court’s decision to adopt that narrow reading has, in application and effect, rewritten Section 21-5-4 as

providing for only two categories of employees who are separated without fault, not the three delineated in the statute. Under the trial court's holding, the only persons separated from payroll without fault, temporarily or permanently, are both "laid-off" and "discharged". Clearly that was never intended as the time periods assigned to a "laid off" worker and a "discharged" worker for the payment of final "wages" are vastly different. Rules of construction will not sanction such a reading or interpretation.

Moreover, after construing the statute to equate these two categories of workers, the trial court then failed to declare that portion of § 42-5-2.10 defining "lay-off" void. This was explained in *Rowe v. West Virginia Department of Corrections*, 292 S.E.2d 650(W.Va. 1982) and again in *Lovas v. Consolidation Coal Company*, 662 S.E.2d 645(W.Va. 2008).

"It is fundamental law that the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the statute under which the agency functions. In exercising that power, however, an administrative agency may not issue a regulation which is inconsistent with, or which alters or limits its statutory authority".

See *Rowe v. West Virginia Department of Corrections*, 292 S.E.2d 650(W.Va. 1982)

In syllabus point five of *CNG Transmission Corp. v. Craig*, 564 S.E.2d 167(W.Va. 2002) and *Lovas*, 662 S.E.2d at 645, this Court explained further:

"[T]he judiciary is the final authority on issues of statutory construction, and we are obliged to reject administrative constructions that are contrary to the clear language of a statute." See also *Anderson & Anderson Contractors, Inc. v. Latimer*, 162 W.Va. 803, 807-08, 257 S.E.2d 878, 881 (1979) ("Although an agency may have power to promulgate rules and regulations, the rules and regulations must be reasonable and conform to the laws enacted by the Legislature.").

See *CNG Transmission Corp. v. Craig*, 564 S.E.2d 167(W.Va. 2002).

In the case sub judice as in *Lovas*, the application of the legislative rule (42-5-2) defining “lay-off” as advanced by United Bank and adopted by the trial court does not reflect the intention of the legislature as expressed in W.Va. Code § 21-5-4. The definition, standing alone, inaccurately connotes that a “discharged” employee can also be a “laid-off” employee for purposes of the WPCA. To the contrary, the Legislature intended three (3) distinct classes: those who are discharged(permanent); those who quit; and those whose work is suspended(temporary).

Moreover, even if, the trial court correctly adopted United Bank’s argument that our legislature intended the classes of “laid off” and “discharged” employees to overlap, the trial court erred in allowing the employer to make an election from among the statutory imposed mandates. It remains significant that while the trial court ruled that Powell and Lehman were “laid-off” the trial court never found that Powell and Lehman were not “discharged”. Nothing within Section 4 of Article 5 of the WPCA, permits an employer to elect from among its subsections and remedies those to which it will subscribe or abide. Instead, an employer must comply with the Act in its entirety. An unwritten election of alternative remedies for the employer may not be read into the statute by the trial court. The award of liquidated damages is “mandatory...whenever an employer fails to pay an employee wages as required under West Virginia Code § 21-5-4.” Syl. Pt. *Farley v. Zapata Corporation*, 281 S.E.2d 238(1981 W.Va.).

**B. The Trial Court Erred in Finding That Severance Pay is never “Wages”as Defined by W.Va. Code § 21-5-1(c)**

The trial Court summarily, and without analysis, found that severance pay can never fall within the definition of “wages”. As part of its holding, the trial court never answers why the

severance pay owing to Powell and Lehman is not deferred compensation for labor and services rendered by them.

Powell and Lehman earned their severance pay by virtue of the work they performed over the course of time at United Bank, under its predecessor, and as a result of their willingness to continue to work for United Bank, through the transition. The amount of severance pay was based upon past years of service and was clearly delineated and calculable prior to the moment of discharge. In fact, Powell was given notice that she would receive payment of \$17,964.53 so long as she continued to work through a termination date to be determined by United Bank and Lehman was given notice that she would receive payment of \$5,695.47. It was dangled out in front of them, like a carrot in front of the plow horse, as consideration to motivate Powell and Lehman to stay. Their right to these “wages” was vested subject to divestment only if they failed to perform their jobs satisfactorily or quit.

**I. Lehman’s and Powell’s Severance Pay “Wages”: Compensation For Labor and Services Rendered By Powell and Lehman Through August 3, 2007**

United Bank made it abundantly clear that the payments of the \$17,964.53 and \$5,695.47 would be given in exchange for services/labor being performed by Powell and Lehman through an indefinite future point in time which would be selected and determined by United Bank alone. See Exhibits “A” and “B”. Powell and Lehman agreed to these terms and remained loyal to the employer and provided labor and services to United Bank from March 1, 2007 through August 3, 2007 with the knowledge and expectation that they would receive additional compensation in the amounts of \$17,964.53 and \$5,695.47 respectively for this continuing work and service. It behooved United Bank to pay more compensation to key employees with unique knowledge and the ability to

transition accounts and clientele effectively following its merger. The additional compensation was a prominent factor in Lehman's and Powell's decision to continue to provide labor and services for United Bank. Thus, the reason Lehman and Powell coined these monies as "pay to stay" wages.

Jurisdictions looking at the issue of whether "severance pay" is covered by wage payment acts, focus upon the broad definition of "wages" within these acts. See Metropolitan Distributors, Inc. v. Illinois Department of Labor, 449 N.E.2d 1000(1983) ("In a real sense [severance pay] is remuneration for services rendered during the period covered by the agreement as wages is broadly defined as 'compensation for labor or services rendered' as determined on 'any basis of calculation' in addition to 'time, task, or piece'"); Chase v. Warren Petroleum Corporation, 168 SO2d 864(Lo. App.)(Severance pay or retirement benefits have been considered to be in the nature of wages earned and not as gratuities dependant upon the arbitrary will of the employer); In re: Public Ledger, Inc.(3rd Sur 1947, 161 F2d 762)( severance pay constitutes wages wholly earned and accrued and thereby entitles one to priority under the Bankruptcy Act). In West Virginia's Wage Payment Act, "wages" is defined as "compensation for labor or services rendered by an employee whether the amount is determined on a time, task, piece, commission or other basis of calculation". W.Va. Code § 21-5-1(c).

Equally important and totally overlooked by the trial court is the analysis of whether the payment is connected to work performed in any way. An analysis of the case law from other jurisdictions reveals that courts which exclude "severance pay" from their wage payment acts, do so upon the express finding that the "severance pay" was entirely gratuitous and not connected to any work performed by the employee. See Turner v. Hobby Industry Asso., 280 NY S2d 837(1967)(There was no contract either written or otherwise covering the severance pay but a

voluntary act.); *Heimer v. Price, Kong & Co.*, 2008 WL 5413368(Ariz. App.)(Decision to pay severance was discretionary and employee would not show that employer had a known policy or practice of paying such). Conversely, those courts finding severance pay to be deferred compensation covered by a wage act, do so upon a finding that the “severance pay” is connected to performance or length of service.

For example, in *Wank v. St. Francis College*, 740 N.E.2d 908(Ind. Ct. App. 2000), a college merging with another institution terminated a college employee. The Indiana Court found that the severance pay, in that instance, was a gratuitous benefit offered as a mere act of benevolence. In *Wank*, the employee had no right to the payment under the terms of his employment. Neither the terms of *Wank’s* employment nor a written policy required the payment of the severance pay. The *Wank* court specifically found that the payment was not connected to work performed by the employee, was not anticipated by the employee, and thus, could not be considered deferred compensation.

Unlike *Wank*, Lehman’s and Powell’s “severance payment” was not gratuitous. United Bank was required by its policy and by law to extend the payment, as Lehman and Powell continued to perform services in exchange for its deferred payment. Many courts have emphasized that “it is [this] exchange of remuneration for the employee’s work that is crucial to the determination that compensation constitutes a wage”. *McCabe v. Medex*, 786 A2d 57, 2001 Aff’d 811 A2d 297, 2002; See *Wank*, 740 N.E.2d at 908(Ind. Ct. App. 2000); *Whiting-Turner*, 782 A2d 67(severance pay often represents a type of deferred compensation for work performed during the employment); *Fang v. Showa Entetsu Co.*, 91 P 3d 419(Colo. Ct. App. 2003, cert denied 2004 WL 1301893(2004)) (“In the absence of controlling statutory provisions, severance payments are generally viewed as

consideration for past services” so that contractual severance provisions which are determinable and vested upon entering the contract, payable under the contract upon termination, constitute wages); *Ferry v. XRG International, Inc.*, 492 SO2d 1101(Fla. Ct. App. 1986) (severance was wages because compensation was an inducement to procure services and insure continued quality of those services once employed); *Triad Data Service, Inc. v. Jackson*, 153 Cal. App3d Supp 1(1984) citing, *Ware v. Merrill Lynch*, 24 Cal App 3d 35(1972)(severance pay constitutes a wage given the present day concept of employer-employee relations as including not only periodic monetary earnings of the employee, but also the benefits he is entitled as part of his compensation package); *Heiment v. PA. Power and Light Company*, 23 Wage & Hour Cas.(BNA) 227(Pa. Ct. Common Pleas 1976)(severance pay under company plan was a wage because it was clearly a required form of compensation for labor and services rendered over time); *Dahl v. Brunswick Corp.*, 356 A2d 221(Md. 1976)(recognizing that severance pay policy directives ripen into a contractual obligation when employee acts in reliance upon it and the generally accepted view of severance pay as a reward for past services rather than a form of unemployment insurance); *Eckholt v. American Bus. Info.*, 873 F Supp. 507(1994 DC Kon)(severance pay provided for in an employment contract constitutes a wage); *Gresham v. Luberman’s Mut. Cas. Co.*, 426 F Supp. 2d 321, aff’d 2006 WL 752182(4th Cir).

Lehman’s and Powell’s severance pay was explicitly a *quid pro quo* for continuing satisfactory services from March 1, 2007 through a future point in time over which they had no discretion or control. Not only was the “severance payment” offered based upon a continuing agreement to work, but it was calculated based upon the length of Lehman and Powell’s overall employment. United Bank used a fixed formula to calculate the additional wages earned: two (2) weeks of base pay for each year or partial year of service to a maximum of twenty-six (26) weeks.

Thus, in a very real sense, the “severance pay” was remuneration for Lehman’s and Powell’s services rendered during the entire period covered by their employment.

This Court has never specifically addressed whether monies paid to an employee in exchange for the employee’s continued service following a merger through a termination date to be selected by the employer at an unknown point in the future constitutes a “wage” under the WPCA. The reasoning and analysis, however, of the most recent WPCA decisions from this Court are in contradiction of the trial court’s ruling.

In *Conrad v. Charles Town Races, Inc.*, 521 S.E.2d 537(W.Va. 1998), this Court held that payments to laid off employees under the Federal Worker Adjustment and Notification Act(WARN)were not “wages” under the WPCA, but rather a penalty imposed upon the employer for its failure to have provided the required notice prior to its business closure. The central focus of this Court’s inquiry was whether the WARN payments were compensation for services performed by the employees. This Court found that the penalties imposed under WARN were not based upon the quality of the employee’s work or the length of service. It was not a reward for service nor a payment that the employee had a right to receive upon termination had the appropriate advanced notice been given. Thus, while the holding in *Conrad* is not directly on point, its reasoning is nevertheless apposite.

Similarly, in *Taylor v. Mutual Mining, Inc.*, 543 S.E.2d 313(W.Va. 2000), this Court held that an arbitration award arising out of claims for wrongful discharge were a form of damages, rather than wages, and thus were not covered under the WPCA. Again, in so holding, this Court relied upon the fact that the award had not been “earned” by the employees as it did not arise out of any work performed for the present employer although it is readily distinguishable from the facts at hand

its reasoning is again apposite and controlling. In this instance, Lehman and Powell worked for United Bank for an agreed upon indefinite period in order to assist with the transition and in exchange was advised that she would be entitled to receive additional pay in the amount of \$17,964.53 and \$5,695.47 upon their termination.

Unlike the employees in *Conrad* and *Taylor*, Lehman and Powell were receiving a promised reward for continuing service. A severance payment that is based upon the length and/or the nature of the employee's service and promised upon termination, is recoverable under the Wage Payment Act as deferred compensation. See *Stevenson v. Branch Banking and Trust Corp.*, 861 A2d 735(Md. App. 2004); *Eckholt v. American Business Information, Inc.*, 873 F supp. 507(D. Kan. 1994).

According to West Virginia precedent, the determination of whether an employee's designated "severance pay" is a wage, is to be made by the trial courts on a case by case basis. In each, the nature and purpose of the payment is examined.

In some, but not here, payment is understood as an exchange for a release of any claims that the employee might have and thus not wages. See *Black's Law Dictionary*; Severance Pay(7th ed. 1999). In few, but not here, the payment is of a previously undisclosed sum gratuitously made to tide the employee over while he seeks new employment and thus not wages. Yet, in others, as in the instant case, it is an obligation paid in exchange for services rendered and is a wage.

It is this case by case review and analysis that has allowed jurisdictions to construe wage payment statutes to include payments coined "severance pay" thereby keeping with the preventative and remedial goals of promoting timely payment of all compensation owed to an employee after his or her termination. See *Kulinski v. Medtronic Bio-Medicus*, 112 F3d 368(8th Cir. 1997)(severance pay due under a change of control agreement was wages); *Tischmann v. ITT Sheritan Corp.*, 882 F

Sup. 1358(Sd NY 1995)(severance pay clearly falls within the broad definition of wages under New York law); *Triad Data Service, Inc. v. Jackson*, 153 Cal. App3d Supp 1(1984), overruled on other grounds(severance pay constitutes a wage given the present day concept existing between an employer and employee that compensation package includes not only periodic monetary earnings, but all other benefits); *Metro Distributors, Inc. v. Illinois Department of Labor*, 114 Ill. App.3d 1090(1983)(severance pay as provided for in agreement constitutes wages). The law does not exclude a payment as wages simply because it is labeled or designated as something else, i.e. “severance pay” as the lower court held: Courts have hands down rejected employer’s attempts to exclude payments from wages by their mere labeling. See *Gurnik v. Lee* 587 N.E.2d 706(Ind. Ct App. 1992)(Can’t exclude a wage simply because you call it a bonus).

A review and analysis of this case, results in a determination that Lehman’s and Powell’s severance pay is deferred compensation for labor and service and thus a “wage” under the WPCA.

## **II. Lehman’s and Powell’s Severance Pay are “Wages”: An Accrued Fringe Benefit**

The WPCA also defines “wages” to include accrued fringe benefits “capable of calculation” and “payable directly to an employee.” Specifically, it reads:

(c) The term “wages” means compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis of calculation. As used in sections four, five, eight-a, ten and twelve of this article, the term **“wages shall also include then accrued fringe benefits capable of calculation and payable directly to an employee: Provided, that nothing herein contained shall require fringe benefits to be calculated contrary to any agreement between an employer and his employees which does not contradict the provisions of this article(emphasis added).**

*W.Va. Code § 21-5-1(c).*

“Calculate” means to “ascertain or determine before hand, esp. by arithmetic” while “payable” means “due...owed, owing, outstanding, unpaid, receivable.” *Oxford Desk Dictionary and Thesaurus*, American Ed.(1997). Lehman’s and Powell’s “severance pay” was capable of calculation immediately prior to their termination. In fact, the employer calculated it for them and published it as \$17,964.53 and \$5,695.47. See Exhibits “A” and “B”. It was calculated based upon a formula using length of service and rate of base pay. It was first published to Powell and Lehman in March 1, 2007. See Exhibits “A ” and “B”.

This Court has concluded that West Virginia Code § 21-5-1(c) simply means that “if under the terms of employment an employee is entitled to the payment of fringe benefits, the payment of these benefits has the same status as unpaid wages.” *Meadows v. Wal-Mart Stores, Inc.*, 530 S.E.2d 676(W.Va. 1999).

The trial court erred in holding that:

“Severance pay, by its very nature, can not be “earned” by an employee until *after* she is terminated. Therefore, severance pay is not “compensation for labor or services rendered by the employee. ... Therefore, under § 21-5-1(c), it is not a “then accrued fringe benefit”(“then” being the moment of termination). Therefore, severance pay does not meet the definition of wages under West Virginia law and need not be paid within (72) hours of termination”.

See Order Granting Defendant’s Motion for Summary Judgment, p.6.

The word “severance” is not taboo under the WPCA. This Court’s decision recognizes that “severance pay” may constitute a fringe benefit, if the terms of employment establish a right to the same. See e.g. *Bailey v. Sewell Coal Company, Inc.*, 1988 WL 281948 W.Va.(If claim for severance benefits is established by past practice and custom (ERISA) would not preempt claims for payment under the West Virginia Wage Payment and Collection Act). In fact, this Court’s decisions also

reference the fact that some employers and employees refer to the totality of the benefits which are to be paid upon an employee's termination as "severance benefits" and hence has never been suggested that the WPCA would not apply. See e.g. Walsh v. Jefferson Memorial Hospital, 589 S.E.2d 527(W.Va. 2003).

United Bank's policy with respect to severance pay offered to Lehman and Powell indeed ripened into a legal obligation and benefit owing to Lehman and Powell upon acceptance of continuing employment. It was owed absent unsatisfactory performance or a voluntary quit. See e.g. Chapin v. Camera, 31 Cal App. 3d 192(1st Dist 1973); Schofield v. Zion's Co-op Mercantile, 39 P2d 342(Utah 1934).

The trial court's decision does not rest not upon any factual determination that Lehman's and Powell's severance pay was incalculable at the time they were terminated or that it was contingent upon some future act or condition to occur after August 3, 2007. The trial court's decision rests almost exclusively upon a trial court order entered by the Circuit Court of Greenbrier County. In reality, the trial court did not follow the reasoning of the Greenbrier Court order or the Fourth Circuit opinion.

The Greenbrier County trial court's order finds the lump sum severance award in that case is not "wages". It does so, however, based upon a set of facts that are grossly dissimilar from the facts of the case at hand. Unlike the instant case, the employee in the Greenbrier County action was party to a written employment contract which provided for a lump sum severance payment in the event his employment with CSX was terminated for good cause prior to the completion of his five (5) year employment contract with CSX. Hence, rather than serving as deferred compensation for past services, satisfactorily rendered, i.e. "true wages", the trial court found that the severance

payment was a penalty “more akin to a fee” which CSX had to pay as a liquidated damage for not fulfilling the contracted promise of providing an opportunity to earn future wages. The trial court completely disregards the Greenbrier County judge’s finding that the common thread running through his decision and then existing West Virginia authority, including *Conrad*, *Roe*, and *Taylor*, is the focus on the factual nature of the payment at issue,( i.e. whether it is made to compensate an employee for services rendered or to address some other circumstance or contingency) not the label appended to it. The Greenbrier County court emphasized and rested its decision upon the finding that the severance payment benefit was not based upon the employee’s past performance. The Greenbrier Court was also quick to point out that the severance payment was not based on a formula tied to past years of service with the company and did not vary depending upon the length of that service. It was based upon these facts that the Greenbrier Court held that the CSX employee’s lump sum severance was not deferred compensation for services already rendered. To the contrary, it was ruled a penalty for the loss of contracted for future work hours. It was in essence contractual damages or a penalty imposed upon CSX for cutting short the term of employment which the employee negotiated for under his contract. Thus, to truly apply the reasoning of the Greenbrier County trial court, results in a reversal of the trial court order at hand.

Also contrary to the trial court’s holding, the Fourth Circuit’s decision in *Gregory v. Forest River, Inc.*, No. 09-1256(4th Cir., March 10, 2010) actually supports a finding that Lehman and Powell’s “severance pay” is an accrued fringe benefit and thus wages under the WPCA. *Forest River* recognizes whether Lehman and Powell worked to earn the severance pay is relevant and the employment policy is important in determining when and how they are earned. Thus, the trial court’s order is in error wherein it finds that:

“The logic of [*Gregory v. Forest River*] extends to the present case insofar as severance payments, like post-discharge commissions, are not earned until *after* termination and therefore are not covered by the WPCA’s seventy-two (72) hour rule. The fact that the plaintiff employee performed work to “earn” this compensation is irrelevant. The WPCA will not be interpreted to move ahead the accrual date of the compensation where an unambiguous policy establishes a later date”.

See Order Granting Defendant’s Motion for Summary Judgment, p. 9.

In *Forest River*, the Fourth Circuit found the WPCA to be inapplicable only to Gregory’s “post discharge” commissions. In *Forest River*, the employment policy provided that Gregory’s commissions were based upon shipped orders. When Gregory was terminated, he had orders pending that had not yet shipped. Until they shipped, the orders were subject to cancellation. Hence, a determination of whether Gregory would be recovering any commissions on the pending orders would not be known until the orders were either canceled, modified or shipped. Thus, commissions on the pending orders were not yet vested and were not accrued or capable of calculation at the time of Gregory’s discharge.

In the case at hand, nothing could happen following Lehman and Powell’s termination that would make them ineligible for the receipt of the severance pay. Lehman and Powell’s severance pay was not contingent upon some future event after discharge. It was earned and vested at the very moment of their termination by United Bank.

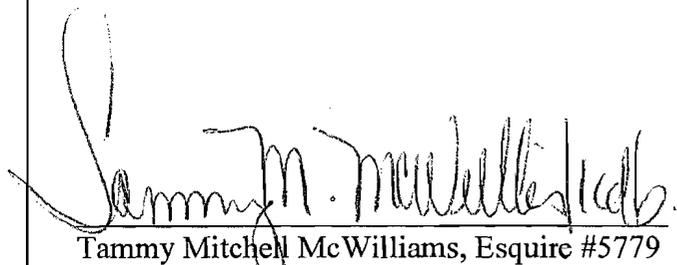
It is equally erroneous for the trial court to compare Lehman and Powell’s employment situation with an employee’s right to “severance pay” under an agreement to release claims under the OWBPA(Older Worker’s Benefit Protection Act). The trial court ruled based upon the

nomenclature given to the monies. The trial court should not have, as it did, relied upon nomenclature and vernaculars such as “severance pay” to make its decision.

Under that OWBPA Act, employees who release the right to sue their employers have a seven (7) day right of rescission. An employee thus will not receive the monies paid by their employers in exchange for this release until the eighth (8<sup>th</sup>) day following the execution of that release. What the trial court failed to recognize is that under these situations, the “severance payment” is in reality a “release/settlement payment” which is being offered in exchange for a full and complete release of any claims which the employee may have under employment acts, including but not limited to the OWBPA. If the employee refuses to sign the release, no “settlement money” or “severance pay” will be paid. In other words, the employee has no right to demand these monies from the employer at the time of termination. It is offered post termination, if at all, by the employer for the first time to employees to buy peace. These monies are not earned, but are first offered and paid solely as consideration for the release of legal claims.

In this instance, Lehman and Powell were not obligated contractually or otherwise to execute any release. They were not offered “severance pay” a settlement under the OWBPA or any other Act. Their “severance pay” was not a settlement offer, but pay to stay monies already owing and vested under the terms of their employment. They earned it by working for United Bank through August 3, 2007.

What is important are the facts of the case! They must be examined and applied to the WPCA on a case by case basis. That examination and application was not done in this case.

A handwritten signature in cursive script, appearing to read "Tammy M. McWilliams".

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PETITIONERS  
By Counsel

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MARY CATHERINE LEHMAN  
PATRICIA ANN POWELL

*Petitioners,*

v.

Case No. 09-C-616  
Case No. 09-C-613  
Consolidated by Trial Court for Appeal,  
Circuit Court of Berkeley County

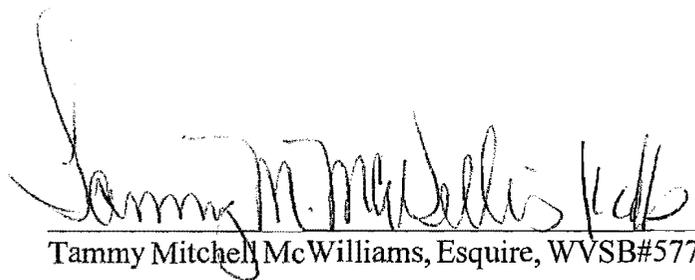
UNITED BANK, INC.

*Respondent.*

CERTIFICATE OF SERVICE

I, Tammy Mitchell McWilliams, Esquire, hereby certify that I have served a true and correct copy of the foregoing **PETITION FOR APPEAL** upon the following individual(s) via United States First Class Mail, postage prepaid, this 5<sup>th</sup> day of November, 2010:

Brian M. Peterson, Esquire  
P.O. Box 1419  
Martinsburg, WV 25402

  
\_\_\_\_\_  
Tammy Mitchell McWilliams, Esquire, WWSB#5779

**EXHIBITS**

**ON**

**FILE IN THE**

**CLERK'S OFFICE**