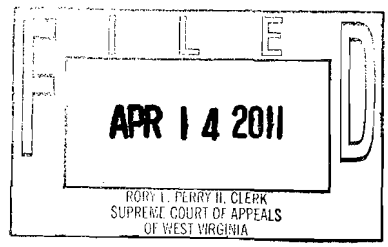
BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS



REBECCA SHANKLIN,
Appellant,

v. **Appeal No. 101526**

THE BOARD OF EDUCATION OF THE COUNTY OF KANAWHA,
Appellee,

SUPPLEMENTAL BRIEF FILED ON BEHALF OF APPELLANT

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State Bar ID # 3173

I. Procedural History

On March 15, 2011, counsel for Appellant received a copy of an order from the West Virginia Supreme Court of Appeals offering the opportunity for submission of a supplemental brief. The present document is in response to that offer.

II. Statement of Facts

Rebecca Shanklin, Appellant, stands by the statement of facts as presented in her Petition of Appeal to the West Virginia Supreme Court of Appeals filed on November 24, 2010.

III. Citation of Error

Appellant is satisfied with the citation of error presented in her "Petition of Appeal to the West Virginia Supreme Court of Appeals" filed on November 24, 2010. In the present document, Appellant wishes to supplement the argument previously presented in her first citation of error, which asserted that "[t]he Circuit Court and the Administrative Law Judge erred in holding that Appellant was not entitled to reinstatement to her General Maintenance position on the basis that Appellee had retained a less senior employee with the General Maintenance classification because Appellant was not the most senior General Maintenance employee who was reduced-in-force."

IV. Citation of Authority

In addition to the authorities cited in her original "Petition of Appeal to the West Virginia Supreme Court of Appeals" filed on November 24, 2010, Appellant cites the following:

A. Smith v. Bell, 41 S.E.2d 695, 700 (W. Va. 1947)

B. Dye v. Pennsylvania Cas. Co., 35 S.E.2d 865 (W. Va.1945)

C. Hoffman v. Wheeling Sav. & Loan Ass'n, 57 S.E.2d 725 (W. Va.1950).

D. State v. Grimmer, 251 S.E.2d 780 (W. Va. 1980)

E. Miller v. Hare, 2011 W.Va. Lexus 18 (W.Va. 2011)

V. Argument

In the her "Petition of Appeal to the West Virginia Supreme Court of Appeals" filed on November 24, 2010, Appellant asserted in her first point argument, that "Appellant is entitled to reinstatement on the basis that Appellee retained a less senior employee within the general maintenance classification." Appellant stands by the argument presented previously. However, in the prior document Appellant contended that the General Maintenance employee who was more senior that Appellant, Barbara Isaacs, did not grieve her reduction in force and that this failure to contest her termination "amounts to a waiver of any rights she might have held and extinguishes her claim to reinstatement as a General Maintenance employee."

This statement requires some expansion. Indeed, the failure of Ms. Isaacs to grieve her reduction in force in some ways does resemble a waiver. Normally a waiver requires some sort of voluntary and explicit action and is generally not implied. See Smith v. Bell, 41 S.E.2d 695,

700 (W. Va. 1947); Dye v. Pennsylvania Cas. Co., 35 S.E.2d 865 (W. Va.1945); Hoffman v. Wheeling Sav. & Loan Ass'n, 57 S.E.2d 725 (W. Va.1950).

In the present situation, Ms. Isaacs made no statement or took no affirmative action specifically relinquishing her right to contest her reduction-in-force. However silence and/or failure to act can constitute waiver in certain circumstances. For example in the context of a trial "silence may operate as a waiver of objections to error and irregularities at the trial which, if seasonably made and presented, might have been regarded as prejudicial." State v. Grimmer, 251 S.E.2d 780 (W. Va. 1980), *overruled on other grounds by* State v. Petry, 273 S.E.2d 346 (W.Va. 1980). Another example, and one closer to the facts of the present case, involves the failure of a person challenging the revocation of his/her driver's license to attend the revocation hearing. As noted in the recent case Miller v. Hare, 2011 W.Va. Lexus 18 (W.Va. 2011), footnote 9, "the non-appearance of the licensee amounts to an effective dismissal or waiver of the revocation challenge".[1]

Whether construed as a waiver or not, the failure of Ms. Isaacs to timely challenge her reduction in force "eliminated" any right she might have had to challenge her reduction in force. She cannot now or at anytime in the future try to exercise any right to retain her employment as a General Maintenance employee. To the extent Ms. Isaacs had a superior right to relief, that right vanished long ago.

Finally, it must be remembered that Appellant is not trying to enforce a "waiver" against Ms. Isaacs to prevent her retention as a General Maintenance employee or a challenge by her of her reduction in force as a General Maintenance employee. In this proceeding the Appellee is utilizing Ms. Isaacs' superior claim to relief as a *defense* to a claim for relief from Appellant.

[1] It should be noted that in the case of a licensee challenging the revocation of his/her license, this result is dictated by regulation, i.e., W. Va. Code R. § 91-1-3.7.

This is being done despite the fact that Ms. Isaacs did not seek the relief, did not actually receive that relief and can no longer seek that relief. Put another way, Appellant is not trying to acquire relief, i.e., retention as a General Maintenance employee, for two people rather than one. Instead, Appellee is seeking to avoid retaining anyone as a General Maintenance employee despite its violation of law.

REBECCA SHANKLIN, Appellant
Respectfully submitted,

By counsel,

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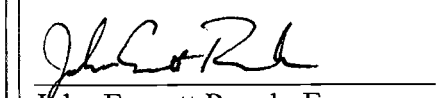
CERTIFICATE OF SERVICE

I, John Everett Roush, Esq., counsel for Appellant, hereby certify that I have served the original and nine copies of the foregoing "Supplemental Brief Filed on Behalf of the Appellant" on the following by hand-delivery, on this the 14th day of April 2011, to:

Rory L. Perry II
Clerk of West Virginia supreme Court of Appeals
State Capitol Room E-317
Charleston WV 25305

Further, I, John Everett Roush, Esq., counsel for Appellant, hereby certify that I have served a true copy of the foregoing "Supplemental Brief Filed on Behalf of the Appellant" on the following by placing the same in a properly addressed envelope, First Class Postage Prepaid, in the United States Mails, on this the 14th day of April 2011, to:

James Withrow, Esq.
Kanawha County Schools
200 Elizabeth Street
Charleston, WV 25311



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