

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

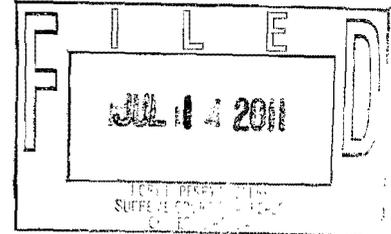
CASE NO.: ¹¹⁻⁰²⁸⁴ ~~11-005~~

(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.

APPELLANTS RESPONSE BRIEF

Andrew J. Katz, Esquire
The Katz Working Families' Law Firm, LC
The Security Building, Suite 1106
100 Capitol Street
Charleston, West Virginia 25301
(304) 342-5579
ajk792000@yahoo.com
Counsel for Appellants

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II. TABLE OF AUTHORITIES

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III. INTRODUCTION

Pursuant to this Court's Order establishing a briefing schedule, both Appellants Randy Hammond et al and Appellees West Virginia Department of Transportation, Division of Highways (hereinafter referred to as the DOH) and West Virginia Division of Personnel (hereinafter referred to as the "DOP") have filed their initial memoranda of law. COMES NOW Appellants Randy Hammond et al and files Appellant's Reply Brief. This document will demonstrate that Appellee's Brief did not alter the legal and factual analysis in Appellants' Brief, which showed that the circuit court's Order upholding the denial of the grievance below was erroneous and should be reversed.

IV. ARGUMENT

The ALJ's ruling denying Appellants' grievances was based on two conclusions of law: (1) that Appellants were not similarly situated to employees in the Eastern Panhandle counties working in the same job classifications and doing the same work; and (2) that at least some Appellants did not file their grievance on time. Appellants' Brief demonstrated that both rulings are erroneous.

The overriding principal concerning the treatment of classified employees is "equal pay for equal work." This principal is enshrined in the West Virginia Code. Thus, this Court, when ruling on civil service discrimination claims, has correctly focused on whether the difference in pay or benefits is based on differences in the work performed. That is what this Court was emphasizing in its decision in The Bd of Educ. of Tyer County v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004) as discussed in Appellant's Brief. Because, as the parties have agreed

throughout this litigation, Appellants performed the same work as their counterparts in the Eastern Panhandle, they are similarly situated with the individuals who received the wage benefits at issue here.

The lower court simply used the wrong legal analysis in reaching its decision on this issue. Instead of focusing on Appellees lack of evidence distinguishing the work performed by the Eastern Panhandle employees from Appellants, it focused on that the two groups of individuals lived in different geographical areas¹ and whether anyone from District 1 complained about recruitment and retention problems. Because Appellee never attempted at the grievance hearing below to prove that these conditions effected the quality or degree of work in the counties that received a raise, these factors can not be the basis of a finding that the Appellants were not similarly situated to their cohorts in the Eastern Panhandle.

Appellees offer several counter arguments against Appellants' position. First, they assert that West Virginia CSR 143-1-5 gives the Division of Personnel the authority to create different pay levels under different criteria. However, this regulatory provision must be read "in para materia" with the anti-discrimination language of the West Virginia Code, as construed by this Court in White. Thus, factors such as "geographic area" relied upon by Appellee here can only be the basis for pay differentials if they alter the conditions of employment.

Another counter argument made by Appellees is that the case of Largent v. W. Va. Div of Health, 192 W.Va. 239, 452 S.E.2d 42 (1994) expressly provides for "geographic area" to be

¹ Apparently, the point of using the "geographic area" as a basis for finding Appellants not similarly situated with their Eastern Panhandle counterparts is that economic conditions in the Eastern Panhandle counties were such that the state was losing employees to the private sector. Surely, Appellees are not contending that a mere difference in location, without more, is enough of a basis to pay one group of employees more then another group.

considered in paying employees within the same classification a different amount. However, as will be demonstrated below, this case has been implicitly overturned by White

Moreover, even if the lower court correctly determined as a matter of law that geography and complaints made or not made by a group of employees is relevant to the issue of whether two groups of employees are similarly situated, it wrongly applied the facts to the law in this case by failing to find that similar market forces were at work in District 1 and that managerial employees in this District complained of recruitment and retention problems.

Finally, as was demonstrated in Appellant's Brief, this Court's jurisprudence has stated that the failure to pay the correct amount of money in a discrimination grievance is a continuing violation such that a new filing period opens up after every pay period. Appellee's Brief attempted to construct a counter argument based on the belief that this law only applies when the discrimination is based on long time historic factors such as race. However, that position simply is contradicted by past decisions by this Court. Thus, this Court should reverse the lower court and grant Appellants' Grievance.

**A. APPELLANTS PROVED THAT THEY WERE
SIMILARLY SITUATED TO THE EMPLOYEES IN THE
EASTERN PANHANDLE THAT WORKED IN THE SAME CLASSIFICATION
AND RECEIVED A RAISE THAT APPELLANTS DID NOT**

In Appellants' Brief, the ALJ's ruling was shown to be erroneous. The ALJ ruled that Appellants and the employees in the Eastern Panhandle doing the same work were not similarly situated because they were in a different geographic area, with different economic conditions and because allegedly no District 1 managerial employees complained about a lack of personnel. However, under the jurisprudence of the West Virginia Supreme Court of Appeals, the focus in

determining whether two sets of employees are similarly situated is on the working situation of the employees, not certain problems of the employing agency. Thus, the fact that Appellees' may have had problems with recruitment and retention is irrelevant without some showing that such conditions altered the working conditions of one set of employees. Because the parties have stipulated that the working conditions among the two groups of employees were virtually the same, they are similarly situated regardless of Appellees' problems with recruitment and retention. Moreover, even if those factors are relevant considerations, Appellants proved that District 1 has similar problems in that regard as the Eastern Panhandle counties.

1. Appellees' Brief Could Not Point to Anything in the Record Showing That the Different Geographic Locations, and Economy, Effected Their Employees' Actual Work Performed; in Fact the Parties Stipulated That the Work Performed by the Transportation Workers in District 1 and the Eastern Panhandle Counties Was Virtually the Same; Thus, the Two Groups of Employees Are Similarly Situated.

In their initial filing, Appellants made the point that under West Virginia law, the focus on whether two groups of employees are similarly situated are the duties and other working conditions. The focus is on the employee and his or her work situation, not on the employer and whatever problems that it might have. Thus, if Appellees have difficulty with recruiting and retaining Transportation Workers in the Eastern Panhandle, or any geographic location, this fact simply is not relevant because Appellees never proved that it changed the working situation of the employees.

Appellees' raise two arguments against Appellants' position. First, they allege that Appellants reading of White can not be correct because West Virginia C.S.R. 143-1-5 expressly

gives the DOP the authority to create pay differentials based on certain factors. Second, they allege that the Largent case also demonstrates that different pay can be given within a classification based on an enumerated set of factors. However, neither argument is telling.

2. W. Va. C.S.R. Section 143-1-5, which gives the DOP authority to create pay differentials, must be read in para materia with W. Va. Code Section 29-6A-2(d)², which defines discrimination as any difference in treatment that is not job related.

Appellees rely greatly on the above-cited regulation as justifying almost any favoritism or discrimination Appellees desire, including the one at issue here, so long as it comes within the broad reach of C.S.R. 143-1-5. However, this regulatory provision simply stands in contradiction to the West Virginia Code's anti-discrimination language discrimination.

When there are two provisions in conflict, both provisions should, if possible, be read *in pari materia*. Thus, the DOP's rights under 143-1-5 are shaped by West Virginia Code Section 29-6A-2(d) and the White decision. Reading the two provisions together, the DOP may consider most of the factors listed in 143-1-5.4(f)4 in determining salary, but only if they are related to the actual work performed.

A useful example of a *in pari materia* analysis can be found in two matters before the Kanawha County Circuit Court. In The Bd. of Educ. of the County of Putnum v. Sargent, Docket No. 06-AA-150 (March 7, 2007), Judge Berger decided an issue with strong similarities to what we have here. In Sargent, the Board of Education wanted to lower the salary of a school bus

² After the underlying grievance commenced, the West Virginia State Legislature revamped the grievance procedures. In the process, certain statutory provisions were moved into other parts of the Code. The statutory citations used herein are of the statutes as they existed at the time the grievance was filed.

operator so it would be uniform with the salary paid to other drivers. The employer maintained that this reduction in pay was necessary in order to conform to the uniformity-anti-discrimination language in the West Virginia Code pertaining to public school personnel found at West Virginia Code Section 18A-4-5b. Mr. Sargent took that position that such reduction violated the “non-relegation” provision of the Code, found at 18A-4-8(m).

Judge Berger ruled that the two provisions had to be read *in pari materia*, in light of the holding in White. Id. at p. 5. The Court ruled that “[a]ccording to principals established in White, if employee A is compensated less than similarly situated employee B, then employee A’s compensation must be raised to match that of employee B.” Id. at p. 6. Ultimately, the Court ruled that “if similarly situated employees receive inconsistent compensation, an *in pari materia* reading of W. Va. Code Section 18A-4-5b and W. Va. Code Section 18A-4-8(m) requires that all employees receive the same compensation as the highest compensated, similarly situated employee.”³ Id.

Just like Judge Berger and Judge Kaufman, this Court should read West Virginia Code Section 29A-6-2(d) *in para materia* with state regulation 143-1-5. The result would be that the DOP can still create pay differentials under the factors listed in the CSR. However, when doing so, it must use its authority under the Code of State Rules consistently with the anti-discrimination provision of the West Virginia Code, which requires a showing that the factors

³ Judge Kaufman reached the same result, using the same legal reasoning, in The Bd. Of Educ. Of the County of Putnum v. Casto, et al., Docket No. 07-AA-33 (March 14, 2008).

listed alter the quality or type of work being done⁴. Since it did not do so in this case, Appellants should prevail.

3. The Largent Case Relied Upon by Appellees' is No Longer Good Law After This Court's Decision in White.

Appellees correctly cite the case of Largent v. W. Va. Div of Health, 192 W.Va. 239, 452 S.E.2d 42 (1994) for the proposition that in the past, this Court has permitted pay differentials to be given to certain employees within a job classification based on certain factors. The key portion of Largent relied upon by Appellees is:

employees who are doing the same work must be placed within the same classification, but within that classification there may be pay differences if those differences are based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, **availability of funds**, or other specifically identifiable criteria that are reasonable and that advance the interests of the employer.

Largent, 452 S.E.2d at 49 (emphasis added). However, this Court, by implication, overturned Largent in the White case.

This Court's intention in White to overturn Largent is clear because it rejected the same legal argument used by the employer in Largent and made by the employer here. In White, the Tyler County Board of Education attempted to justify paying an employee less then it had paid others who had performed the same job was that it had less revenue then had previously been the case. White, 605 S.E.2d at 817. In other words, the employer was arguing that its "availability

⁴ For example, there is nothing discriminatory about paying workers with more experience more then those with less. One assumes that a more experienced employee will perform work of a higher order, either by getting more accomplished or by performing the work in a more skillful manner, then the one with less experience. Thus, the extra pay is still ultimately based on the work performed.

of funds” was less now than before. Availability of funds is a specific factor listed in Largent as justifying a pay differential, but that factor was rejected in White because it was not work related. Id. at 817-19.⁵

The White Court’s rejection of the employers’ “availability of funds” argument demonstrates that this Court no longer follows the Largent precedent. Thus, Appellees’ reliance on Largent is misplaced⁶.

4. Appellees’ Reliance on the Case Pritt v. West Virginia Division of Corrections, 603 S.E.2d 49 (2006) is Misplaced Because its Holding Has No Relevance to the Legal Issue Here.

In addition to the Largent case, Appellees also attempt to use the Pritt case to support its position. Admittedly, Appellees do correctly cite Pritt for the proposition that whether or not two or more employees are similarly situated is a fact-based inquiry. See Pritt 603 S.E.2d at p. 54. Appellants agree with that. However, Appellants contend that the nature of the factual inquiry should concern whether the employees who are being compared do substantially similar work. Nothing in Pritt disputes this.

The reasoning of the Pritt decision is as follows. The ALJ made a factual finding specific

⁵ True, the White Court analyzed the issue of “availability of funds” in terms of whether it was a justifiable reason for the discrimination and not in terms of whether two or more employees were similarly situated. Nonetheless, certainly if the White Court had wanted to rule that a factor such as “availability of funds” would prevent two groups of employees from being similarly situated, it would have done so.

⁶ Also, this Court should note that the Largent decision was **not** based on the anti-discrimination statute at issue here. Apparently, such statute was not yet enacted. This is important because the present anti-discrimination statute specifically requires that any differences (discrimination) must be based on work performed.

to that case that the evidence did not prove that two groups of employees were similarly situated. Id. at 54. That in order to overturn that decision, the lower court had to make a make a specific ruling that this finding was clearly wrong. Id. However, the lower court did not so find. Rather, it reversed the ALJ because it believed that the stated reason for the discrimination was pretextual. Id. Thus, the Pritt Court reinstated the ALJ's Order because the lower court should not have even considered the issue of pretext without first making a finding pertaining to the ALJ's ruling on the similarly situated issue. Id. While this holding is instructive for lower courts in determining how to decide discrimination grievances, it does not shed light on whether Appellees can use "market forces" as a basis for paying some employees more than others within the same classification without a showing that the work was somehow different between the employees.

5. Alternatively, Even If this Court Finds That "Geographic Area" and the Level of Complaints Are Grounds to Rule That Two or More Employees Are Not Similarly Situated, this Appeal Should Still Be Granted Because Appellants Proved That Their Managerial Employees Complained and They Also Proved That Their Geographic Area Were Subjected to Similar Market Forces as the Eastern Panhandle Counties.

As set forth above, Appellants contend that the lower court committed legal error in its analysis of whether they were similarly situated with their Eastern Panhandle counterparts. However, even if this Court disagrees, Appellants should still prevail. The lower court found that Appellants were not similarly situated because of a different geographic area, with different economic conditions and because allegedly no managerial employees complained to Appellees about a lack of personnel. See Conclusion of Law Number 56. Appellants' Brief noted the large

importance placed by the lower court on its determination that no managerial employees from District 1 complained to Appellees about the type of personnel problems experienced in the Eastern Panhandle. The alleged failure to complain appears in Finding of Fact Number 22 and in no less than four Conclusions of Law (paragraphs 56-59). Yet, as discussed in Appellants' Brief, this assertion is contrary to the uncontradicted testimony of Dennis King, who was the Acting District I Engineer the year before the pay differential went in effect. Mr. King testified that he took his concerns and the concerns of his county managers directly to Commissioner Fred Vankirk. Thus, Finding of Fact 22, and the various Conclusions of Law, are clearly wrong.

Appellees tried to attack Mr. King's credibility, but it did so primarily by making allegations that are not in any way part of the record. For example, Appellees' constantly referred to Mr. King as a "disgruntled" former employee. Yet, it cited nothing to the record to substantiate this. True, Mr. King no longer worked for the DOH when he testified. However, former employees are often grievants best witnesses because such individuals do not have to worry about retaliation arising from their testimony. In short, the DOH felt positively enough about Mr. King's veracity and character to give him employment in a high level managerial position. Appellees should not now be able to denigrate his character simply because he testified truthfully against their position.

Similarly, Appellants proved that its geographic area had the same market forces that were creating recruitment and retention problems in the Eastern Panhandle. This was shown by Grievants expert economist Gary Storrs. Mr. Storrs reviewed the exact same type of data that Appellees used and reached a similar result.

For example, to justify a request for a pay differential, DOH Human Resources Manager Jeff Black reviewed salaries from comparable jobs as listed in a Workforce West Virginia study and also reviewed relevant job postings in classified ads from the Martinsburg newspaper. After such review, Mr. Black concluded that relevant positions in the private sector paid a higher salary and benefits than were being offered to the comparable workers in the Eastern Panhandle counties. This alleged “geographic” and economic information is what constituted the lower court’s conclusion that Appellants’ were not similarly situated with their coworkers from District 1.

Yet, as detailed in the Statement of Statement of the Case section of Appellant’s Brief, Mr. Storrs did the exact same analysis and found that, if anything, the market forces in District 1 were even more favorable to the private sector than in the Eastern Panhandle Counties. A recitation of this evidence is not necessary, but the Court is urged to again review pages 8-10 of Appellants’ Brief. These pages demonstrate that the market forces at work favored the private sector over public employment to a greater degree in District 1 than in the Eastern Panhandle.

Moreover, Mr. Storrs found that such market forces created similar problems in recruitment and retention. In fact, as demonstrated by Mr. Storrs testimony, the problem retaining workers was actually more difficult in District 1 than in the Eastern Panhandle Counties. Appellees argue in their Brief that District 1 can be expected to have a higher number of vacancies because it has more employees. However, what Appellees ignore is that Mr. Storrs demonstrated that the vacancy **rate**, the number of vacancies compared to the total number of positions, was higher in District 1 than in the Eastern Panhandle Counties⁷.

⁷ For a review of the problems caused by vacancies, see Appellants Brief at pp. 7, 20-23.

In regard to recruitment, again Appellants below faced severe problems. Yes, as noted by the lower court, there were some certifications that had over 100 names. Yet, what is left unmentioned is that many names were duplicates, appearing over and over on the various certifications. The undersigned counsel's co-counsel went through the certifications provided at the end of the hearing and found that there were 674 total names listed, but when duplicates were eliminated, there were 289 actual people on certifications for 28 positions. However, as discussed in the Rahall Study cited in Appellant's Brief, only a very small portion of individuals on such list are actually willing to be considered for a position. In actuality, only about 3 people would have actually been available to fill each position. See page 7 of Appellant's Brief. For evidence regarding the hardship this created, see Appellant's Brief at pp. 7, 20-22.

In summary, even if this Court rules that "geographic area," which has a unique set of economic issues and complaints are relevant to determining the issue of "similarly situated," Appellants proved that their managerial employees complained and that the market forces were more favorable to the private sector in District 1 than in the Eastern Panhandle Counties.

**B. APPELLEES ARGUMENT REGARDING ITS AFFIRMATIVE
TIMELINES DEFENSE IGNORES THE PRECEDENT
OF THE WEST VIRGINIA SUPREME COURT OF APPEALS**

Appellee argues that the precedent upon which Appellants relied upon in their Brief is distinguishable from the present case. Specifically, they argue that the holding in the case of Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995), that in a discriminatory pay case, each wage payment is a continuing violation, differs from the case *sub*

judice because the discrimination there was based on some unlawful factor. Appellees' Brief a pp 18-19. However, there are several holes in Appellees' position.

The most glaring failure in Appellees' argument is that it ignores additional legal precedent cited in Appellant's Brief. Appellant demonstrated that both the White case and the case of Board of Educ. of Wood Co. v Airhart, 212 W. Va. 175, 569 S.E.2d 422 (2002) ruled that violations of the anti-discriminatory provision that protects public civil service employees are continuing violations such that the statute of limitations is renewed after every event. Neither claim was based on allegations of an unlawful factor. In fact the White case specifically said that no such factor must be shown to prevail on a discrimination claim. Both cases involved a discriminatory pay issue, as here, and found that each payment constitutes a continuous violation.

Another important point is that the Martin case does not really stand for the proposition for which it is being cited. Nowhere in Martin is the suggestion made that its ruling that a discriminatory wage payment is a continuous violation hinges on the cause of the discrimination. In fact, the case strongly implies the opposite. Part of the grievant's claim in that case was that one of the Code's general anti-discrimination provision for school personnel, found at 18-2-9, was violated when she was misclassified. Martin, 195 W. Va. at 311. The court ruled that as with discriminatory salaries, a misclassification in violation of the anti-discrimination policy was a continuing violation such that an employee can bring the claim at any time. Id.

In summary, the West Virginia Supreme Court has continually rejected the State Grievant's Board's position, articulated here by Appellees, that only the first singular act of discrimination can be used for the beginning of the period by which a grievance must be filed. Instead, the Court has consistently held that in civil service discrimination cases, the act of

discrimination is on-going until it is fixed. More specifically, the Court has repeatedly found that a discriminatory pay issue is a continuous violation such that each payment opens the time period for filing a grievance. Thus, all Appellants' grievances were timely filed.

V. CONCLUSION

For the reasons enumerated herein, and in the original Appellants' Brief, the lower court's ruling should be reversed and Appellants' grievance should be granted. This matter should be remanded back to the Board for a determination of back pay owed to Appellants.

RANDY HAMMOND ET AL
By Counsel



Andrew J. Katz (6615)
The Katz Working Families Law Firm, LC
The Security Building, Suite 1106
100 Capitol Street
Charleston, West Virginia 25301

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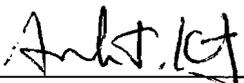
Appellees-Respondents.

CERTIFICATE OF SERVICE

I, Andrew J. Katz, counsel for Petitioners-Appellants do hereby certify that I have on the 14th day of July, 2011 caused to be served a true copy of **APPELLANTS' RESPONSE BRIEF** via United States first class mail, postage prepaid to the following individuals:

Krista D. Black, Esquire
Building 5, Room A-517
Charleston, West Virginia 25305

Karen O'Sullivan Thornton, Esquire
Assistant Attorney General
Building 1, Room E-26
Charleston, West Virginia 25305



Andrew J. Katz (6615)
The Katz Working Families' Law Firm, LC
The Security Building, Suite 1106
100 Capitol Street
Charleston, West Virginia 25301