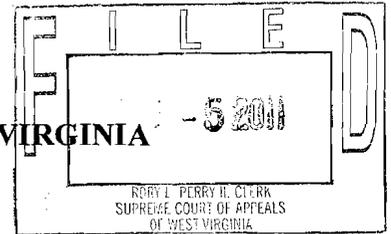


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,**

Petitioner,

v.

DOCKET NO. 11-0629

MICHELLE L. FALQUERO,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR APPEAL

Date: August 4, 2011

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Petitioner West Virginia Department of Environmental Protection ("DEP"), by counsel, replies in support of its Petition for Appeal. There is nothing in Respondent's Response that should dissuade the Court from granting DEP's Petition and reversing the circuit court's decision. Respondent's letter of resignation, though perhaps hastily considered, was binding upon its delivery on February 28, 2008, and required Respondent's separation at the appointed time unless, in the interim, she and DEP came to a new, bilateral agreement to continue her employment.

Respondent's reliance on authority from other jurisdictions is misplaced. Many of the cases cited by Respondent in her brief are all from states that have statutory or common law authority governing the resignation of civil service employees. *Holt v. Personnel Advisory Board of the State of Missouri*, 679 S.W.2d 340 (Mo.App. W.D. 1984) dealt with a civil service employee for the State of Missouri, which is governed (or was governed at that time) by the Revised Statutes of Missouri, which provide, in part, that "[a]ll resignations shall be finally approved by the director as a matter of record." § 36.380, RSMo 1978, 1 CSR 20-3.070(6)(A). The *Holt* court specifically found that the employer in that case acted "without any semblance of

compliance with § 36.380, RSMo 1978.” 679 S.W.2d at 342. The employee involved in *Ex Parte Rhea* was employed by Jefferson County, Alabama, which was governed by rules of its personnel board. That board had rules and regulations that “require[d] a permanent employee to submit to the appointing authority a notice in writing of his intention to resign or retire, if the employee wishe[d] to resign or retire in ‘good standing.’” 426 So.2d 838, 839. In *Armistead v. State Personnel Board*, the court cited the following statutory authority:

Government Code section 19502 provides: “Resignations from the state civil service are subject to board rules. . . .” The board rule that applies here is No. 445 (Cal.Admin.Code, tit. 2, s 445), which states: “An employee may resign from state service by submitting a written resignation to the appointing power. . . .”

583 P.2d 744, 745. There is no such formality in West Virginia’s civil service personnel laws; an employee may resign orally or in writing or by simply by now showing up at work for a period of three days. There is certainly not a requirement that all resignations must be accepted in writing before they become effective. An employee’s resignation is effective when tendered, and the employer is not required to allow rescission.

LeMasters v. Board of Educ. of Grant Dist., 105 W. Va. 81, 141 S.E. 515 (1928), relied on below, is a teacher case, from which all the teacher cases decided by the Board and cited by the ALJ below derive. Like all those other teacher cases, *LeMasters* is inapposite to the case at bar because teachers have formal employment contracts with their school boards that cannot simply be abrogated absent mutual consent, unless one party desires to risk outright breach and exposure to a suit for damages. Classified employees like Respondent, it bears repeating, are not contract employees, notwithstanding the presiding ALJ’s observation that they may only be terminated for cause.

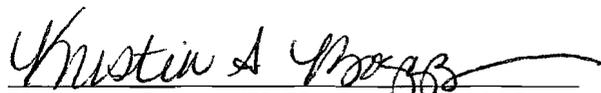
As pointed out in the Petition, *Copley v. Logan County Health Department*, Docket No. 90-LCHD-531 (May 22, 1991), controls the instant dispute, not *LeMasters* or any other teacher or school board case or any cases outside of West Virginia. Whether the grievant in *Copley* was an exempt, at-will employee or a classified employee who could be terminated only for cause is of no moment. The only relevant consideration is that the grievant in *Copley* had no formal contract of employment, just as Respondent did not. As alluded to in the Response, the Unemployment Compensation Board of Review understood this concept and ruled accordingly. The Grievance Board and the circuit court did not, and it is for that reason that this Court should grant DEP's Petition for Review and clarify anew a well-settled area of the law that the underlying Decision threatens to muddle.

WHEREFORE, DEP respectfully requests that this honorable Court enter an Order granting its Petition for Review, reversing the Decision of the Kanawha County Circuit Court, and according it such other relief as deemed appropriate.

Submitted this 4th day of August, 2011.

**WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,**

By Counsel,



Kristin A. Boggs, W. Va. Bar No. 10015

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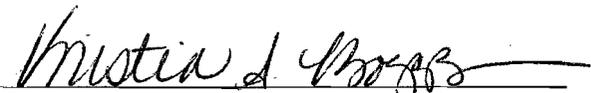
(304) 926-0440

CERTIFICATE OF SERVICE

The undersigned, counsel for Petitioner Department of Environmental Protection, do hereby certify that service of the foregoing **PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR APPEAL** has been made this day upon Respondent by depositing a true and exact copy thereof in the regular course of the United States mail, postage prepaid, addressed as follows:

Thomas H. Peyton, Esquire
PEYTON LAW FIRM, PLLC
2801 First Avenue
Post Office Box 216
Nitro, WV 25143
Counsel for Respondent

Done this 4th day of August, 2011.


KRISTIN A. BOGGS