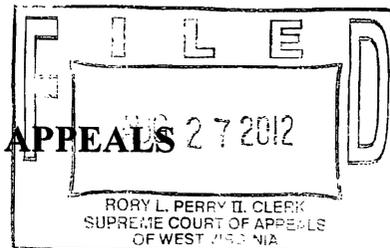


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



Docket No: 12-0477

**Theresa L. Weimer, Plaintiff Below,
Petitioner**

v.

**Appeal from the Circuit Court of
Pocahontas County, West Virginia
(11-C-54)**

**Thomas Sanders, individually and in
his official capacity; C.C. Lester, in
his official capacity; Pocahontas
County Board of Education,
Defendants Below,
Respondents**

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

I. Assignments of Error	1
II. Statement of the Case	1
III. Summary of Argument	2
IV. Statement Regarding Oral Argument and Decision	5
V. Standard of Review	6
VI. Argument	6
1. The Grievance Statute Requires Exhaustion.....	6
2. The Grievance Board Has the Authority to Determine Liability and Provide Relief	11
3. Well-Established Public Policy Requires Exhaustion	16
4. The Lower Court did not Err with its Analysis of the Complaint	22
VII. Response to <i>Amici</i> Briefs	23
1. The Lower Court Properly Applied <i>Vest</i>	24
2. Require Exhaustion of Administrative Remedies will only Benefit Public Employees Subject to Discrimination	25
VIII. Conclusion	27

TABLE OF AUTHORITIES

Case Law:

<i>Bank of Wheeling v. Morris Plan Bank & Trust Co.</i> , 155 W.Va. 245, 183 S.E.2d 692 (1971).....	14,15,20
<i>Beichler v. West Virginia University at Parkersburg</i> , 226 W.Va. 321, 700 S.E.2d 532 (2010)	6,8,9
<i>Booth v. Churner</i> , 532 U.S. 731 (2001)	17
<i>Conaway v. Eastern Associated Coal Corp.</i> , 178 W.Va. 164, 358 S.E.2d 423 (1986)	23
<i>Duarelle v. Traders Federal Savings and Loan Association</i> , 143 W.Va. 674, 104 S.E.2d 320 (1958)	9
<i>Dworning v. City of Euclid</i> , 892 N.E.2d 420 (Oh. 2008)	20
<i>Johnson v. C.J. Mahan Constr. Co.</i> , 210 W. Va. 438, 557 S.E.2d 845 (2001)	5
<i>Price v. Boone County Ambulance Authority</i> , 175 W.Va. 676, 337 S.E.2d 913 (1985)	10,26
<i>State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.</i> , 194 W.Va. 770, 461 S.E.2d 516 (1995)	5
<i>State ex rel. Smith v. Thornsbury</i> , 214 W.Va. 228, 588 S.E.2d 217 (2003)	14
<i>Sturm v. Board of Education of Kanawha County</i> , 223 W.Va. 277, 672 S.E.2d 606 (2008)	9,17
<i>Vest v. Board of Educ.</i> , 193 W.Va. 222, 455 S.E.2d 781 (1995)	<i>passim</i>
<i>West Virginia Department of Health & Human Resources Employees Federal Credit Union v. Tennant</i> , 215 W.Va. 387, 599 S.E.2d 810 (2004)	5

Statutory/Procedural Law:

<i>West Virginia Code</i> § 5-11-2	19
<i>West Virginia Code</i> § 6C-2-1	7,18
<i>West Virginia Code</i> § 6C-2-2	12,14,18
<i>West Virginia Code</i> § 6C-2-3	13,14,20
<i>West Virginia Code</i> § 6C-2-4	7
R.C. 124.40	20
Rule 20 of the <i>West Virginia Rules of Appellate Procedure</i>	5

I. ASSIGNMENT OF ERROR

Petitioner has only asserted one Assignment of Error, which Respondents more appropriately phrase as follows:

The Pocahontas County Circuit Court did not err when it dismissed Petitioner's Complaint, which alleged, in part, allegations under the West Virginia Human Rights Act, *West Virginia Code* § 5-11-1, *et seq.* because Petitioner failed to exhaust her administrative remedies with the West Virginia Public Employees Grievance Board, as required under the law of the State of West Virginia.

II. STATEMENT OF THE CASE

As Petitioner states, the Complaint details a long and complicated history between Petitioner and Respondents. However, for purposes of this Court's review, the only facts necessary are as follows:

Petitioner was a teacher at Pocahontas County High School ("PCHS"). Her tenure at PCHS was plagued with issues involving her ability to be a responsible adult, as well as an educator. (*See e.g.* Paragraph 14 at A.R. 08). Based upon these issues, Petitioner was recommended for termination. (Paragraph 29 at A.R. 11-12). After an extended hearing where Petitioner was represented by legal counsel and presented evidence with respect to issues related to her various teaching deficiencies, such as fall asleep while teaching and leaving her classroom unattended with students in the classroom, the recommendation to terminate Petitioner's employment with the Pocahontas County Board of Education was accepted. (Paragraph 30 at A.R. 12). Her employment was then terminated.

Upon being terminated, Petitioner made a conscious decision to forego her statutorily afforded administrative remedies pursuant to *West Virginia Code* § 6C-2-1, *et seq.* ("Grievance Statute"). (A.R. 46). Instead, Petitioner chose to file a lawsuit in the Circuit Court of Pocahontas County. Contained within her Complaint is a detailed account of her allegations of

Pocahontas County. Contained within her Complaint is a detailed account of her allegations of perceived unfair treatment she received by Respondents, as well as general allegations that certain actions by Respondents were all “aimed at protecting the PCHS Warrior football program.” (Paragraph 43 at A.R. 14). Because Petitioner’s Complaint includes allegations of “discrimination,” “harassment,” and “favoritism,” which are all grievances under the Grievance Statute, Respondents moved to dismiss Petitioner’s Complaint based upon the long-standing doctrine of exhaustion of administrative remedies. (*See generally* A.R. 20-27). Despite Petitioner’s assertion that Respondents failed to provide any legal authority for their position, in Respondents’ Motion, subsequent briefings, and oral argument on this issue, Respondents provided a myriad of legal authority and support for dismissal. (*See* A.R. 20-27 and A.R. 38-44). Because the legal authority relied upon by Respondents is controlling, the Circuit Court of Pocahontas County dismissed Petitioner’s Complaint because the Complaint raised allegations that were covered by the Grievance Statute. (A.R. 1-5). As such, the Circuit Court had no choice but to dismiss this clam based upon the well-settled doctrine of exhaustion of administrative remedies. (A.R. 1-5). It is this dismissal that Petitioner now appeals.

III. SUMMARY OF THE ARGUMENT

Petitioner frames the issue presented before this Court as “whether a public employee who alleges claims under the WVHRA must first exhaust her administrative remedies through the grievance process contained in *West Virginia Code* § 6C-2-1, *et seq.*” More accurately stated, the issue before this Court is actually: Whether a public employee who alleges claims subject to the subject-matter jurisdiction of the West Virginia Public Employee Grievance Board, as provided by *West Virginia Code* § 6C-2-1, *et seq.*, must first exhaust her administrative remedies through the grievance process contained in *West Virginia Code* § 6C-2-1, *et seq.* when

those claims may also violate the West Virginia Human Rights Act (“WVHRA”)?” The only answer supported by the long-standing doctrines, statutes, and case law of this State is YES.

Petitioner asserts essentially four reasons for why the Pocahontas County Circuit Court “erred when it dismissed [Petitioner’s] Complaint.” These reasons are: (1) the Grievance Statute does not require exhaustion; (2) the West Virginia Public Employee Grievance Board (“Grievance Board”) does not have authority to determine liability or provide relief under the WVHRA; (3) public policy favors a no exhaustion requirement for claims brought under the WVHRA; and (4) the lower Court erred in making assumptions about the allegations in the Complaint. After a full and careful analysis of each of these reasons, it is clear that Petitioner’s asserted reasoning is without merit and not supported by law.

With respect to Petitioner’s first assertion, it is clear that the language of the Grievance Statute does, in fact, require exhaustion. While Petitioner relies on the Legislature’s use of the word “may” in the Grievance Statute, it is clear that the Legislature intended the use of the word “may” to mean that a public employee has a choice to file a grievance, as opposed to a choice of forum in which to file a grievance. Based upon prior holdings of this Court in interpreting legislative intent with respect to the doctrine of exhaustion of administrative remedies, this Court has only found the Legislature intended the doctrine of failure to exhaust administrative remedies to not apply only when the statute itself contained a choice of forum. Because the Grievance Statute does not grant a public employee a choice of forum, this analogy fails. Thus, Petitioner’s first assertion is without merit.

Petitioner’s next assertion, that the Grievance Board does not have authority to hear Petitioner’s claim fails based upon prior holdings of this Court. This Court has previously held that “nevertheless, the Grievance Board’s authority to provide relief to employees for

“discrimination,” “favoritism,” and “harassment,” as those terms are defined in W.Va. Code, 18-29-2 (1995)¹ **includes jurisdiction to remedy discrimination that also would violate the Human Rights Act.**” Syl. Pt. 1, *Vest v. Board of Educ.*, 193 W.Va. 222, 455 S.E.2d 781 (1995) (emphasis added). Because of this, it is clear that the Grievance Board has subject-matter jurisdiction over Petitioner’s Complaint, despite her attempted invocation of the WVHRA. Thus, the Grievance Statute itself, based upon the clear precedent of this Court, requires exhaustion of the legislatively afforded administrative remedy prior to Petitioner bringing this Complaint in the Circuit Court. Thus, Petitioner’s second assertion fails.

Petitioner’s third assertion regarding what her opinion as to the public policy of this State is shortsighted. While Petitioner attempts to pit the Grievance Statute against the WVHRA, this position fails. It is clear that both the Grievance Statute and the WVHRA are not mutually exclusive, but each statutory scheme seeks the same outcome. Additionally, the underlying policies of the doctrine of exhaustion of administrative remedies, which have been recognized by this Court, not only support a finding that the doctrine must be applied here, but that judicial economy will be better served by requiring the doctrine of exhaustion of the administrative remedies in this situation. As such, the public policy of this State mandates that this Court uphold the doctrine of exhaustion of administrative remedies in this situation because the same goals of the Grievance Statute and the WVHRA will be better served. Thus, Petitioner’s third assertion fails.

The final assertion of Petitioner, that the lower court misinterpreted Petitioner’s Complaint, is unfounded. The lower court relied upon Petitioner’s Complaint, specifically the

¹ The West Virginia Legislature amended West Virginia Code § 21-5-1, *et seq.* subsequent to the decision in *Vest* and this procedure is now codified under W. Va. Code § 6C-2-2. It is important to note that the words “discrimination,” “favoritism,” and “harassment” are defined similarly under former West Virginia Code § 21-5-1, *et seq.* and the current statute.

paragraphs that assert certain treatment was based solely with the intent to protect the PCHS Warrior football team. Based upon Petitioner's own assertion of Respondents' intent, there can only be one conclusion – not that some of Petitioner's allegations are based on the WVHRA, but are based upon grievances as defined by the Grievance Statute. Additionally, pursuant to *Vest*, the Grievance Statute encompasses claims of discrimination that would fall within the WVHRA. Because, pursuant to the Grievance Statute, the Grievance Board has subject-matter jurisdiction over Petitioner's claims, by properly applying the doctrine of exhaustion of administrative remedies, the lower court had no choice but to properly apply the law and dismiss Petitioner's Complaint. Petitioner's asserted the intent of Respondents and that intent was not based upon discrimination. Thus, Petitioner's final assertion fails.

Quite simply, Petitioner has ignored settled laws and long-standing judicial doctrines of this State in an effort to curtail the administrative procedure afforded to her by the Grievance Statute, for which this Court has explicitly held that “nevertheless, the Grievance Board's authority to provide relief to employees for “discrimination,” “favoritism,” and “harassment,” as those terms are defined in W.Va. Code, 18-29-2 (1995) **includes jurisdiction to remedy discrimination that also would violate the Human Rights Act.**” *Vest*, 193 W.Va. at Syl. Pt. 1, 455 S.E.2d at Syl. Pt. 1 (emphasis added). As such, it is clear this Court must uphold the lower court's dismissal of this claim.

IV. STATEMENT REGARDING ORAL ARGUMENT

Respondents state that this matter is appropriate for oral argument pursuant to Rule 20 of the *West Virginia Appellate Procedure* because it is a matter of great public importance. Therefore, Respondents request this matter be placed on the Court's Argument Calendar.

V. STANDARD OF REVIEW

“Appellate review of a circuit court’s order granting a motion to dismiss a complaint is *de novo*.” Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995). The *de novo* standard is the applicable standard for dismissals based upon lack of subject matter jurisdiction. See *Johnson v. C.J. Mahan Constr. Co.*, 210 W. Va. 438, 441, 557 S.E.2d 845, 848 (2001). As for the burden of proof on an appeal, the Court has noted, “An appellant must carry the burden of showing error in the judgment of which he complains.” Syl. Pt. 2, *West Virginia Department of Health & Human Resources Employees Federal Credit Union v. Tennant*, 215 W.Va. 387, 599 S.E.2d 810 (2004). Finally, “[t]his Court will not reverse the judgment of a trial court unless error affirmatively appears from the record Error will not be presumed, all presumptions being in favor of the correctness of the judgment.” *Id.*

VI. ARGUMENT

1. THE GRIEVANCE STATUTE REQUIRES EXHAUSTION

Petitioner’s first assertion is that the Grievance Statute does not require exhaustion of the administrative remedies. Petitioner bases this assertion on the statutory use of the word “may” and the Court’s holding in the *Beichler v. West Virginia University at Parkersburg*, where the Court held a party is not required to exhaust administrative remedies for claims arising under the Wage Payment and Collection Act, § 21-5-1, *et seq.* *Beichler v. West Virginia University at Parkersburg*, 226 W.Va. 321, 326, 700 S.E.2d 532, 537 (2010). First, it is important to note that Petitioner fails to provide any support for her assertion that the Legislature intended for the use of the word “may” in the Grievance Statute to signify an employee’s choice in the forum. In addition, Petitioner’s position is unavailing because, unlike the Wage Payment and Collection Act and the West Virginia Human Rights Act, the Grievance Statute does not provide any other

avenue for adjudication, which was dispositive in the Court's decision in *Beichler*. As such, Petitioner's first argument fails.

The Grievance Statute provides that "an employee may file a written grievance with the chief administrator" *West Virginia Code* § 6C-2-4(a)(1). However, as this point will be more fully explained below, the Grievance Statute fails to provide the option for an employee to pursue a claim alleging a violation of this statute in any other legal forum. It follows, therefore, that the Legislature's use of the word "may" is not a signal of its intention for an employee to file this claim in any forum of the employee's choosing, as evidenced by the failure of the Legislature to mention any other forum, but "may" is used to signify that an employee has an option to file a grievance. While certainly many employees may be subject to a violation of the Grievance Statute, certain employes "may" decide to not file a grievance.

In addition, the intention of the Legislature's use of the word "may" to signify that an employee has a choice of filing a claim is further clarified by the express purpose of the Grievance Statute. The Grievance Statute states, "[n]othing in this article prohibits the informal disposition of grievances by stipulation or settlement agreed to in writing by the parties" *West Virginia Code* § 6C-2-1(c). Obviously, if the Legislature used the word "shall" in *West Virginia Code* § 6C-2-4(a)(1), one of the expressed purposes of the statute would be undermined because an employee would be *required* to file a grievance, as opposed to coming to an informal stipulation or settlement for which the Grievance Statute expressly announces as one of its purposes. Therefore, based upon the above, it is clear that the Legislature carefully selected the word "may" in *West Virginia Code* § 6C-2-4(a)(1) to signify the employee has an option of pursuing a grievance, as opposed to Petitioner's argument that this signifies the Legislature's

intention to allow an employee to select the forum for which an employee can pursue a grievance.

Because the Grievance Statute fails to mention any other legal forum, Petitioner attempts to analogize this statute to the Wage Payment and Collection Act fails. In *Beichler*, this Court previously found that a plaintiff must not exhaust the administrative remedies when pursuing a claim pursuant to the Wage Payment and Collection Act. *See Beichler*, 226 W.Va. at 324, 700 S.E.2d at 535. However, as touched upon above, the language used in the Grievance Statute is absent of language the Court in *Beichler* found persuasive in finding an exception to the requirement that a plaintiff must exhaust available administrative remedies. Specifically, in *Beichler*, the Court found an exclusion to the doctrine of exhaustion of administrative remedies because the statute, while it *includes* an administrative procedure, allows for a plaintiff to remedy violations of the Wage Payment and Collection Act by “any legal action necessary.” *Id.* at 324, 700 S.E.2d at 535.

Here, unlike the Wage Payment and Collection Act, the Grievance Statute is silent as to bringing actions outside of the grievance procedure as set forth in the statute. In fact, the statute sets forth only one avenue for when a public employee, like Petitioner, suffers from “discrimination,” as defined by the Grievance Statute. This avenue is to file a grievance pursuant to the Grievance Statute. *See Vest*, 193 W.Va. at 227, 455 S.E.2d at 787 (noting that the Grievance Statute “does not give employees the option of skipping the administrative process and pursuing their claims *de novo* in circuit court . . .”). The statute does not give the aggrieved person and option to file “any legal action necessary” like in the Wage Payment and Collection Act, nor does it make reference to pursuing a “discrimination” claim under the WVHRA. The only forum to adjudicate “discrimination,” as defined by the Grievance Statute, is through the

administrative process. Therefore, while Petitioner has placed reliance on the Court's decision in *Beichler*, this reliance is spurious, at best, because of the absence of language in the statute allowing for a public employee to chose the forum to adjudicate claims under the Grievance Statute.

In addition, a closer examination of *Beichler* actually supports the lower court's finding that Petitioner must first exhaust her administrative remedies. In *Beichler*, this Court recognized that the exhaustion of administrative remedies is a well-settled principle in our jurisprudence. The Court stated the well-settled principle as follows:

The general rule is that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act.

Beichler, 226 W.Va. at 324, 700 S.E.2d at 535 (citing Syl. Pt. 1, *Duarelle v. Traders Federal Savings and Loan Association*, 143 W.Va. 674, 104 S.E.2d 320 (1958) and also citing Syl. Pt. 2, *Sturm v. Board of Education of Kanawha County*, 223 W.Va. 277, 672 S.E.2d 606 (2008)). The decision in *Beichler* does nothing to undermine this well-settled doctrine because the Court notes that there are certain exceptions to the rule. While Petitioner asserts futility as an exception, as a matter of law this argument fails based upon settled law in this area. See discussion *infra* at VI.1.2. Because of such great deference to this well-settled doctrine, the Court looked at the language of the Wage Payment and Collection Act to find that the Legislature did not intend for the administrative process included in the Wage Payment and Collection Act statute to be the sole judicial forum available to a claimant. Rather, because of the express language in the statute, the Court rightly found that the doctrine of exhaustion of administrative remedies was not applicable because the Wage Payment and Collection Act provided an option as to the judicial forum. As previously discussed, here, the Grievance Statute does not provide this same

option for a judicial forum. Thus, because the Grievance Statute does not provide an option for a grievant to select the forum for which he or she seeks a remedy, this Court must apply the well-settled doctrine and uphold the lower court's application of the doctrine of administrative remedies in this matter.

Finally, while Petitioner rightly asserts that the West Virginia Human Rights Act does not require an exhaustion of its administrative remedies, this too supports the holding of the lower court in this matter. In *Price v. Boone County Ambulance Authority*, this Court held that “[a] plaintiff may, as an alternative to filing a complaint with the Human Rights Commission, initiate an action in circuit court to enforce rights granted by the West Virginia Human Rights Act.” Syl. Pt. 1., *Price v. Boone County Ambulance Authority*, 175 W.Va. 676, 337 S.E.2d 913 (1985). Much like the reasoning in *Beichler*, the Court in *Price* found that, because Human Rights Act allowed for a transfer to circuit court, the Legislature “intended some combination of administrative and judicial enforcement” *Id.* at 678, 337 S.E.2d at 916. Again, because this Court found that the WVHRA statute provided additional forums for the enforcement of the rights, the doctrine of exhaustion of administrative remedies was not applicable. As discussed above, the Grievance Statute does not provide for any other judicial forum, expressly or otherwise. Therefore, because of such, the doctrine of exhaustion of the administrative remedies is not only applicable, but is controlling in this matter. Thus, the lower court's dismissal of Petitioner's claim because she failed to exhaust her administrative remedies is correct and must be upheld.

In sum, the Grievance Statute fails to provide any other forum for which an employee may bring a claim pursuant to the Grievance Statute. Based upon this fact alone, as was the dispositive reasoning in finding the doctrine of exhaustion of administrative remedies was not

applicable in *Beichler* and *Price*, it is clear that the Legislature intended that an employee must exhaust her administrative remedies before a circuit court may act. As will be discussed below, the claims asserted by Petitioner are squarely within the jurisdiction of the Grievance Board and the Grievance Board has the authority to provide a remedy to the allegations asserted by Petitioner. Therefore, no doubt remains that the Legislature intended for Petitioner to exhaust her administrative remedies pursuant to the Grievance Statute. She failed to do this and her claim was properly dismissed. Thus, it is clear that the lower court's dismissal must be upheld.

2. THE GRIEVANCE BOARD HAS AUTHORITY TO DETERMINE LIABILITY AND PROVIDE RELIEF

Petitioner next asserts that the Grievance Board does not have the authority to determine liability, nor provide relief with respect to WVHRA claims. However, this argument fails based upon this Court's ruling in *Vest*. In *Vest*, the Court was faced with two certified questions raised with respect to the jurisdiction of the Grievance Board to adjudicate claims of discrimination, and if there is jurisdiction, what effect, if any, does a determination by the Grievance Board have on subsequent claims invoking the WVHRA. In responding to the first certified question², the Court held that the Grievance Board has the authority to "provide relief to employees for 'discrimination,' 'favoritism,' and 'harassment.' [that] includes jurisdiction to remedy discrimination that also would violate the Human Rights Act." *Vest*, 193 W.Va. at Syl. Pt. 1, 455 S.E.2d at Syl. Pt. 1.

Applying this holding to the case at bar, there is no dispute that the allegations asserted in Petitioner's Complaint are subject to the jurisdiction of the Grievance Board. Count One of Petitioner's Complaint is entitled "Discriminatory Discharge." (Count One at A.R. 15). A

² The first certified question presented before the Court was: "Does the West Virginia Education and State Employees Grievance Board ('Grievance Board') have subject matter jurisdiction over claims alleging discrimination because of gender-based discrimination?" *Vest*, 193 W.Va. at 223, 455 S.E.2d at 782.

grievance, for purposes of *West Virginia Code* § 6C-2-1, *et. seq.*, is “[a]ny violation, misapplication or misinterpretation regarding compensation, hours terms and condition of employment, employment status or discrimination.” *West Virginia Code* § 6C-2-2(i)(1)(i). Discriminatory discharge falls directly within this definition, as it encompasses both “employment status” and “discrimination.” Therefore, it is clear that Count One, “Discriminatory Discharge,” is a grievance under *West Virginia Code* § 6C-2-2. Thus, Count One is within the subject-matter jurisdiction of the Grievance Board.

Count Two of Petitioner’s Complaint is entitled “Hostile Working Environment on Basis of Disability.” (Count Two at A.R. 17). As noted above, a grievance includes both a “specifically identified incident of harassment” and “[a]ny action . . . constituting substantial detriment to or interference with the effective job performance of the employee” *West Virginia Code* § 6C-2-2(i). Count Two of Petitioner’s Complaint involves not only an alleged “incident of harassment,” but the facts alleged also “constitut[e] substantial detriment or interference with the effective job performance of the employee.” Petitioner’s Complaint specifically states under Count Two that “Plaintiff was subjected to unwelcome and unwanted *harassment*” (Paragraph 59 at A.R. 17). (emphasis added). Moreover, it follows that any alleged harassment would substantially interfere with the effective job performance of the employee. Because of such, Count Two is a “grievance” as defined by *West Virginia Code* § 6C-2-2 and is within the subject-matter jurisdiction of the Grievance Board..

Count Three of Petitioner’s Complaint is entitled “Disparate Discipline.” (Count Three at A.R. 18). As stated previously, a “grievance” includes “[a]ny specifically identified incident of favoritism[,]” as well as “[a]ny violation . . . employment status or discrimination.” *See West Virginia Code* § 6C-2-2(i). Count Three of Petitioner’s Complaint states, in part, “Mr. Knisely . .

. does not have disability(ies), as defined by the WVHRA, was not disciplined for failure to maintain control of his class Plaintiff, in sharp contrast, was terminated, in part, for an alleged inability to properly supervise her classes.” (Paragraph 68 at A.R. 18). Paragraph 68 of Petitioner’s Complaint alleges incidents of favoritism, termination, and discrimination. As such, it is clear that Petitioner’s allegations are is within the subject-matter jurisdiction of the Grievance Board.

Despite the fact that the Grievance Board has subject-matter jurisdiction and the authority to “remedy discrimination that also would violate the Human Rights Act,” Petitioner is arguing that Petitioner does not have to exhaust her administrative remedies afforded to her by the Grievance Statute because the Grievance Board cannot specifically find violations of the WVHRA and provide the same relief provided under the WVHRA. This argument is unavailing because it fails to account for the fact that, while the Grievance Board cannot specifically find discrimination as defined by the WVHRA, the Grievance Board can find “discrimination,” which encompasses “discrimination” as defined by the WVHRA. Additionally, the Grievance Board may provide a remedy for any finding of discrimination. This remedy includes payment of certain lost wages. *See West Virginia Code* § 6C-2-3(c)(2). While the relief granted by the Grievance Board is only equitable in nature and does not account for emotional distress damages, as the Court notes in *Vest*, in many cases it may “end the controversy and preclude the need for further administrative or judicial proceedings under the Human Rights Act; and, it does so by a procedure that is much faster and less expensive.” *Vest*, 193 W.Va. at 226, 455 S.E.2d at 785. This point will be expanded upon *supra* at VI.3.

In addition, the mere fact that a specific remedy afforded by the WVHRA is not available by the Grievance Statute is not an appropriate reason to avoid exhausting administrative

remedies. Before discussion the law on this matter, which is dispositive, it is important to note that certain remedies are available both under a claim filed pursuant to the Grievance Statute, as well as under the WVHRA, including the payment of back-pay. *See e.g. West Virginia Code § 6C-2-3(c)(2)*. As for the controlling law, in West Virginia, a plaintiff may not avoid exhausting an administrative remedy solely based on the nature of the damages available. *See Bank of Wheeling v. Morris Plan Bank & Trust Co.*, 155 W.Va. 245, 249, 183 S.E.2d 692, 695 (1971).

In *Bank of Wheeling*, this Court held:

[t]he rule of exhausting administrative remedies before actions in courts are instituted is applicable, even though the administrative agency cannot award damages, if the matter is within the jurisdiction of the agency. In any event, damages can always be obtained in the courts *after* the administrative procedures have been followed, if warranted.

Id. (emphasis added); *see also State ex rel. Smith v. Thornsbury*, 214 W.Va. 228, 233, 588 S.E.2d 217, 222 (2003).

Here, while Petitioner has asserted that the Grievance Board cannot provide a remedy to the discrimination, while not true, even if it was true, this reasoning has been held invalid as to allowing a plaintiff to forego an administrative process. In fact, while Petitioner has asserted that because any remedy provided by the Grievance Board would be inadequate, thus making her efforts in the administrative process futile, this argument has been expressly rejected. *See Bank of Wheeling*, 155 W.Va. at 249, 183 S.E.2d at 695; *see also State ex rel. Smith*, 214 W.Va. at 233, 588 S.E.2d at 222. As such, the fact that Petitioner may not recovery a remedy prescribed by the WVHRA does not provide an exception to the fact that she must exhaust her administrative remedies afforded to her by the Grievance Statute because, as discussed previously, the Grievance Board has jurisdiction over Petitioner's claims. Therefore, because Petitioner forewent the administrative process, despite not having a valid reason, either factually

or legally, the lower court's dismissal was proper. Thus, this Court must uphold the lower court's dismissal.

Finally, the fact that the Grievance Board cannot specifically determine liability under the WVHRA does not mean that Petitioner may forego the administrative process afforded to her by the Grievance Statute. First, as previously discussed, Petitioner's Complaint raises allegations that fall squarely within the Grievance Board's jurisdiction. While the determination of liability requires a different standard, the alleged discrimination is clearly subject to the jurisdiction of the Grievance Board. Because this act is clearly within the administrative jurisdiction of the Grievance Board, a Circuit Court must not act until the administrative process has been exhausted. Specifically, this Court noted:

[C]ourts are without jurisdiction to grant relief to any litigant complaining of any act done or omitted to have been done if such act or omitted act is within the rules and regulations of the administrative agency involved until such time as the complaining party has exhausted such remedies before the administrative body.

Bank of Wheeling, 155 W.Va. at 249, 183 S.E.2d at 694-95 (emphasis added). Here, the fact remains that the allegations of the Complaint encompasses discrimination, as defined by the Grievance Statute. See *West Virginia Code* § 6C-2-2(d). Under the clear law of this State, because the act ("discrimination") falls squarely "within the rules and regulations of the administrative agency," the Circuit Court was correct to not act until "such time as the complaining party has exhausted such remedies before the administrative body." See *Bank of Wheeling*, 155 W.Va. at 249, 183 S.E.2d at 694-95. Thus, the lower court's dismissal was proper.

Based upon the foregoing, it is clear that the Grievance Board has jurisdiction over the claims asserted by Petitioner. Because the Grievance Board has jurisdiction over the claims asserted by Petitioner, Petitioner was required to exhaust her administrative remedies prior to

filing a claim in the Circuit Court of Pocahontas County. First, the fact that Petitioner, through her Complaint, sought remedies not available through the Grievance Statute is not an adequate reason to forego her afforded administrative procedure. Additionally, the fact that her Complaint alleges violations of the WVHRA does not provide an exception to the doctrine of exhaustion of administrative remedies because her Complaint alleges acts that are “within the rules and regulations of the administrative agency.” Quite simply, Petitioner asserted claims subject to the jurisdiction of the Grievance Board for which the Grievance Board can provide a “remedy [to] discrimination that also would violate the Human Rights Act.” *Vest*, 193 W.Va. at Syl. Pt. 1, 455 S.E.2d at Syl. Pt. 1. Therefore, the lower court’s dismissal of Petitioner’s Complaint was proper. Thus, this Court must uphold this dismissal.

3. WELL-ESTABLISHED PUBLIC POLICY REQUIRES EXHAUSTION

Petitioner asserts that the public policy of the state does not require Petitioner to exhaust her administrative remedies afforded to her by the Grievance Statute. However, Petitioner fails to acknowledge a number of issues with this assertion, the first one, which will be fully addressed in Section VI.4., being the fact that Petitioner’s Complaint raises allegations specifically related to alleged unfair treatment not based upon any disability or perceive disability. Essentially, Petitioner is attempting to bootstrap her employment grievances onto an alleged disability claim to end around the administrative process afforded to her by the Grievance Statute. This is improper and doesn’t provide a reason to forego the administrative process.

Prior to discussing the remaining issues with Petitioner’s assertion regarding the public policy of this State, it is important to understand why the doctrine of exhaustion of administrative

remedies exists. In *Sturm v. Board of Education*, this Court succinctly described the principles behind this doctrine as:

(1) permitting the exercise of agency discretion and expertise on issues requiring these characteristics; (2) allowing the full development of technical issues and a factual record prior to court review; (3) preventing deliberate disregard and circumvention of agency procedures established by Congress [or the Legislature]; and (4) avoiding unnecessary judicial decision by giving the agency the first opportunity to correct any error.

Sturm v. Board of Educ., 223 W.Va. 277, 282, 672 S.E.2d 606, 611 (2008). In addition, the United States Supreme Court noted that the “very act of being heard and prompting administrative change can mollify passions even when nothing ends up in the pocket.” *Booth v. Churner*, 532 U.S. 731, 737 (2001). This Court, in discussing the Grievance Statute, envisioned that the Grievance Statute would accomplish these exact public policies underlying the doctrine of exhaustion of administrative remedies. Specifically, this Court noted, “a grievance decision may, in many cases, end the controversy and preclude the need for further administrative or judicial proceedings under the Human Rights Act; and it does so by a procedure that is much faster and less expensive.” *Vest*, 193 W.Va. at 226, 455 S.E.2d at 785. It is clear, therefore, that this very Court trusted the administrative procedure set forth in the Grievance Statute.

With respect to applying this public policy here, by allowing Petitioner to forego the administrative process merely because her Complaint alleges discrimination based, in part, on violations of the WVHRA, as well as asserting general grievances arising from her employment with the Pocahontas County Board of Education, would go directly against the long standing doctrine of exhaustion of administrative remedies. As this Court announced, the purpose of this doctrine is, *inter alia*, to allow the agency the opportunity to remedy any errors. As will be discussed at length subsequently, multiple allegations in Petitioner’s Complaint are based upon

purely work-place grievances not based upon any of her alleged disability. Bypassing the Grievance Statute does not afford Respondents an opportunity to correct any errors.

Furthermore, the West Virginia Legislature specifically mandated that public employees subject to “discrimination,” which is broadly defined to include discrimination that may violate the WVHRA, must use this procedure. This procedure has been in effect for over 15 years and to date, the Legislature has not specifically excluded claims from the WVHRA from being presented before the Grievance Board, despite the Court’s holding in *Vest* that the Grievance Board has subject-matter jurisdiction over claims that may encompass claims under the WVHRA. As such, in order to prevent deliberate disregard and circumvention of agency procedures established by the West Virginia Legislature, which is an underlying principle to the exhaustion of administrative remedies doctrine, Petitioner must present her claims before the Grievance Board prior to filing this lawsuit. Therefore, in order for the underlying principles of the doctrine of exhaustion of administrative remedies to continue to be upheld, this Court must require Petitioner to exhaust her administrative remedies.

The next issue with Petitioner’s assertion regarding the policy of this State is evidenced by Petitioner’s attempt to create a conflict in the underlying principles established by the Grievance Statute and the WVHRA. However, despite Petitioner’s attempts to assert otherwise, these two statutes are not mutually exclusive, but actually seek a common result – stopping discrimination in the workplace. The Grievance Statute states that the purpose of this statute, *inter alia*, is to “[resolve] grievances in a fair, efficient, cost-effective and consistent manner will . . . better serve the citizens of the State of West Virginia.” *West Virginia Code* § 6C-2-1(b). A grievance is defined, in part, as “[a]ny violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or

discrimination.” *West Virginia Code* § 6C-2-2(i)(1)(i). The WVHRA provides in part that “[i]t is the public policy of the state of West Virginia to provide all of its citizens equal opportunity for employment” *West Virginia Code* § 5-11-2.

Comparing the purposes of these statutes, it is clear that these two statutes seek to ensure West Virginian’s are treated equally, fairly and stopping discrimination in the workplace. Because these two statute seek a common goal, upholding the doctrine of exhaustion of administrative remedies with respect to grievances that fall both under the broad definition of discrimination provided by the Grievance Statute and the definition of discrimination provided by the WVHRA, does not hinder one’s ability to seek a remedy when a person is treated in a manner inconsistent with the mandates of these statutes. By following the doctrine, an employee will seek his or her remedy, which if she prevails, will result in the stopping and remediation of a discriminatory act. Should the employee feel this remedy is inadequate, she may proceed to bringing a claim pursuant to the WVHRA. However, as this Court wisely pointed out in *Vest*, in many cases, the complaint will end at the grievance level.

Moreover, requiring an employee to go through the administrative procedure will further effectuate the policy of judicial economy and settlement of claims without costly or protracted litigation. Should discrimination that violates the WVHRA be established at the administrative level, while this has no preclusive effect, the practical effect is enormous. For example, assuming an employee prevails at the administrative level, but still feels the need to seek additional remedies pursuant to the WVHRA, in all likelihood the employer will be in a better position to settle the matter early, as opposed to re-litigating the matter because the evidence will already be discovered. To that effect, upholding the doctrine of exhaustion of administrative remedies serves its exact purpose, as previously stated.

In addition to the aforementioned issues with Petitioner's assertion regarding the policy of this State, Petitioner's assertion regarding the inadequacy of the remedies provided by the Grievance Statute fails. As previously discussed, even when certain remedies are not available through an administrative process, this fact alone does not make pursuing a claim through administrative procedures futile. *See Bank of Wheeling*, 155 W.Va. at 249, 183 S.E.2d at 694-95. Therefore, Petitioner's assertion with respect to the inadequacies of the Grievance Statute's remedies is unavailing. Finally, this position asserted by Petitioner undermines the value of the Grievance Procedure and the remedies, which are available in both a claim under the WVHRA and the Grievance Statute. *See West Virginia Code* § 6C-2-3(c)(2).

Also, Petitioner cites to an Ohio court case for her assertion of the inadequacies of a West Virginia statutory procedure. The Ohio case relied upon by Petitioner interpreted a Civil Service Hearing Commission statute, which dealt with determinations of "just cause" to fire a public employee who was deemed to have a property interest. *Dworning v. City of Euclid*, 892 N.E.2d 420, 424 (Oh. 2008). Unlike the West Virginia Grievance Statute, which this Court specifically found that claims of discrimination that fall within the purview of the WVHRA also fall within the jurisdiction of the Grievance Board, the Ohio statute merely provided jurisdiction to hear cases regarding "just cause" determination. *See R.C. 124.40*; *see also Dworning*, 892 N.E.2d at 424 (providing excerpts from the *R.C. 124.40*). Therefore, because the Ohio "just cause" statute seeks a determination under a claim that does not encompass "discrimination," such as the West Virginia Grievance Statute and WVHRA, which both seek to remedy discrimination, certainly the application of the doctrine of exhaustion of administrative remedies is questionable when the claim brought under the Ohio "just cause" statute and Ohio discrimination statute are distinct and different. As such, the Grievance Statute and this Ohio statute are not analogous and cherry-

picking quotes from this non-analogous case, without a further explanation of what the Ohio court was actually deciding is disingenuous.

The final issue with Petitioner's assertion regarding the policy of this State involves Petitioner's last ditch effort to inflame the passions and the sympathies of this Court by stating Petitioner's claim is over when this Court upholds the lower court's decision. While Petitioner's statement with respect to the ultimate outcome after this Court upholds the lower court's decision is true, while harsh, Petitioner has only herself, or more aptly her counsel, to blame for this result. Petitioner's counsel in the underlying action is no stranger to the doctrine of exhaustion of administrative remedies. In a remarkably similar case, which was filed in the Circuit Court of Pocahontas County, Petitioner's counsel had a similar case dismissed for the failure of the plaintiff to exhaust administrative remedies. (A.R. 49-51). Despite this prior knowledge, Petitioner decided to gamble. As Petitioner admits, Petitioner "knowingly opted not to file a grievance." (A.R. 46). As such, while it goes without saying that this Court will not be swayed by this last ditch plea to the sympathies of the Court, Respondents must not be saddled by Petitioner's gamble, which she ultimately lost.

Based upon the foregoing, the clear public policy underlying the doctrine of exhaustion of administrative remedies mandates that here, Petitioner be required to exhaust her remedies afforded to her through the Grievance Statute prior to filing a Complaint. In addition, the underlying legislative goal of the Grievance Statute and WVHRA are the same, and therefore, requiring exhaustion will not deter or hinder Petitioner in asserting her rights under the WVHRA after exhausting her administrative remedies. Moreover, Petitioner specific reasoning for seeking an exception to the doctrine of exhaustion of administrative remedies is, as a matter of law, invalid or based upon non-analogous out-of-state case law. Finally, Petitioner's last-ditch

plea to the Court's sympathies is unavailing. In sum, the lower court's dismissal of Petitioner's Complaint was consistent with the public policy of this State and must be upheld.

4. THE LOWER COURT DID NOT ERR IN ITS ANALYSIS OF THE COMPLAINT

Petitioner's final assertion of error in the lower court's dismissal is that the lower court erred in its reading of the Complaint. However, this assertion is a gross exaggeration of the lower court's ruling in this matter. First, Petitioner fails to recognize the fact that this Court, in *Vest*, found that the Grievance Board has subject-matter jurisdiction for claims of discrimination that encompass claims of discrimination as defined by the WVHRA. Because of such, the lower court properly found "[t]hat the Plaintiff complains of "discrimination," "harassment," and "favoritism" which must be heard by the West Virginia Public Employees Grievance Board." (A.R. 4). This is consistent with the statutory definitions of "discrimination," "harassment," and "favoritism" contained within the Grievance Statute, as well as the specific holdings of this Court in *Vest*. As such, Petitioner's argument with respect to the lower court's reading of Petitioner's Complaint fails.

Petitioner next takes issue with the lower court's reliance upon allegations asserted in Petitioner's Complaint. For some reason, Petitioner maintains that the lower court should only rely on the allegations in her Complaint that only support her arguments and ignore the other allegations that are counter to her position. Petitioner's Complaint makes assertions that certain conduct was designed to protect the PCHS Warriors football program. (Paragraph 43-46, A.R. 14-15). These allegations include minimal discipline to a football player who allegedly engaged in sexual relations with a female during school time and allegations of changing school grades so that football players will be eligible. (Paragraph 44-45, A.R. 14-15).

It is Petitioner's position that these allegations are circumstantial evidence of discrimination. However, by Petitioner's own Complaint, this position fails. As Petitioner rightly asserts, this Court stated, "What is required of the plaintiff is to show some evidence which would sufficiently link the employer's decision and the plaintiff's status as a member of a protected class" *Conaway v. Eastern Associated Coal Corp.*, 178 W.Va. 164, 170-171, 358 S.E.2d 423, 429-430 (1986) (emphasis added). By Petitioner's own Complaint, she states what the link between the conduct and intent, which was not discriminatory, but "all aimed at protecting the PCHS Warriors football program." There is no other way to read Petitioner's Complaint because Petitioner specifically states the intent for the alleged conduct. Therefore, the lower court could not read this Complaint, specifically these allegations, as asserting a claim under the WVHRA, but solely as a public employee grievance under the Grievance Statute.

In sum, it is clear that the lower court properly read Petitioner's Complaint. Based upon the statutory definitions of "discrimination," "harassment," and "favoritism," and this Court's holding in *Vest*, the lower court properly held that the allegations contained in Petitioner's Complaint must be heard in the Grievance Board because the Grievance Board clearly has subject-matter jurisdiction over this matter. Additionally, based solely upon Petitioner's Complaint, it is her specific allegations that provide the link of Respondents alleged conduct as being not discriminatory in nature, but based upon an intent to protect the PCHS football team. Therefore, the lower court had no choice by a plain reading of the case to dismiss this claim. Thus, the lower court's holding must be upheld.

VII. RESPONSE TO *AMICI* BRIEFS

In support of Petitioner's position in this matter, a number of organizations, including the State of West Virginia, have filed *amicus curiae* briefs in this matter. While Respondents object

to the filing of these briefs because the arguments made have been advanced by Petitioner and further raising of these points is cumulative, Respondents preserve this objection, but will specifically address certain issues raised by the *amici*. Essentially, all three *amicus*'s briefs assert two grounds for why this Court should overturn the decision by the lower court: (1) the lower court did not properly apply *Vest* and (2) the lower court's decision will hinder public employees from seeking a remedy for discrimination. As will be discussed below, and has been discussed at length above, these reasons are without merit.

1. THE LOWER COURT PROPERLY APPLIED *VEST*

The *amici* all take issue with the lower court's application of *Vest*. However, it is clear that the lower court properly applied *Vest*. This Court specifically found that the Grievance Board has subject-matter jurisdiction over claims of discrimination that includes claims that may also violate the WVHRA. *Vest*, 193 W.Va. at Syl. Pt. 1, 455 S.E.2d at Syl. Pt. 1. In order to get around this argument, both the *amici* and Petitioner assert that a public employee has a choice of forum when seeking to adjudicate claims that are within the subject-matter jurisdiction of the Grievance Board. However, this argument fails because, as previously discussed, the Grievance Statute does not provide a public employee with a choice of forum. As such, this argument presented by the *amici* fails.

Finally, the second reasoning for which the *amici* present as for why a public employee does not have to exhaust her statutorily afforded administrative remedies, despite the Grievance Board having subject-matter jurisdiction over the claims, is because any remedy provided by the Grievance Board is apparently inadequate in the *amici*'s eyes. This inadequate remedy argument fails for two reasons: first, as per the Court's holding in *Bank of Wheeling*, a plaintiff cannot forego an administrative process merely because of the remedy provided by the administrative

process. The plaintiff must exhaust her administrative remedies and if the plaintiff still feels the remedy is inadequate, only then may that plaintiff pursue additional relief. Secondly, the *amici's* position fails because it does not recognize that the Grievance Board is authorized to remedy discrimination. Much like a complaint brought pursuant to the WVHRA, should the public employer be found to be discriminating against an employee, the Grievance Statute allows for the Grievance Board to require the public employer to stop the discrimination and to provide certain compensation. While the WVHRA provides for more avenues of compensatory damages and there is an element of punishment, is not the ultimate goal of the WVHRA to stop discrimination and make the employee whole? This is exactly what the Grievance Statute is designed to accomplish, but in a much more efficient manner.

As such, it is clear, despite the *amici's* arguments that mirror Petitioner's arguments, the lower court properly applied *Vest*. Therefore, this Court must uphold the lower court's dismissal of this matter.

2. REQUIRING EXHAUSTION OF ADMINISTRATIVE REMEDIES WILL ONLY BENEFIT PUBLIC EMPLOYEES SUBJECT TO DISCRIMINATION

The second over-arching position of the *amici* is their opinion that, by requiring a public employee to exhaust her statutorily afforded administrative remedy, the public employee is somehow denied justice. However, as previously discussed, when a public employee pursues an administrative grievance alleging work place discrimination, should the public employee prevail, the discrimination is ordered to stop. While the *amici* somehow feel that the administrative process is not as efficient, this too fails. This Court, in *Vest*, recognized that "in many cases, [a decision by the Grievance Board may] end the controversy and preclude the need for further administrative or judicial proceedings under the Human Rights Act; and it does so by a procedure that is much faster and less expensive." See *Vest*, 193 W.Va. at 226, 455 S.E.2d at

785. As such, this Court has already recognized that this grievance process is much faster and less expensive. As such, the *amici*'s argument asserting otherwise fails as a matter of law.

Additionally, the *amici*'s argument with respect to the WVHRA not requiring exhaustion of its included administrative remedies fails. As previously discussed, the WVHRA allows for a choice of judicial forum. *See Price*, 175 W.Va. at Syl. Pt. 1, 337 S.E.2d at Syl. Pt. 1. However, the Grievance Statute lacks this same choice. Moreover, while the *amici* rely on cases from other states, all of these cases involve Civil Service statutes, and not statutes specifically designed to prevent discrimination, in any form, unlike the subject Grievance Statute. Therefore, these arguments advanced by the *amici* fail.

Moreover, it cannot be stressed enough that by following the well-established and settled doctrine of exhaustion of administrative remedies will not hinder or obstruct a public employee's opportunities to have alleged discrimination remedied. While the *amici* assert that upholding the long-standing, well-defined doctrine of exhaustion of administrative remedies is unfair to public employees, this argument fails because nothing prevents a public employee from seeking additional remedies subsequent to exhausting her administrative remedies. However, in many cases this will be unnecessary because the grievance decision will end many controversies. Even if it does not, the employer, having already been found to be engaging in discriminatory conduct, will be in a better position to seek a resolution of this dispute, as opposed to a protracted and costly litigation.

Finally, the *amici* assert that the time-frame requirements make upholding the doctrine of exhaustion of administrative remedies unfair because the time-frame may run out on the public employee's chance to file a claim pursuant to the WVHRA. However, the *amici* solve their own dilemma by discussing equitable tolling principles. Additionally, this alleged incompatibility

can easily be overcome by simply filing the WVHRA claim near the end of the 365-day period and staying the action until the administrative process has been completed. Finally, the time period set forth by the Grievance Statute makes this “fear” unlikely.

While no doubt that the WVHRA advances an important purpose of seeking to eliminate discrimination in the workplace, this important purpose is not inconsistent with the purpose of the Grievance Statute. There is absolutely no reason why the doctrine of exhaustion of administrative remedies should not apply. In fact the underlying principles of this doctrine mandate the application of this doctrine in this matter. By simply exhausting her administrative remedies, there is a substantially strong likelihood that further adjudication would not proceed under the WVHRA. By going through the administrative process, assuming a successful outcome, a public employee will have the discriminatory practice stopped and receive other equitable relief, all at a process that is more efficient, less costly and has a lesser burden of proof. At the end of the day, shouldn't the point of remedying discrimination be through an efficient process, less costly, with an easier burden to stop the alleged discrimination? That is the ideal of the WVHRA and this process is available to public employees based upon the Grievance Statute, which seeks to remedy discrimination.

VIII. CONCLUSION

Based upon the foregoing, it is clear that the lower court's dismissal of Petitioner's Complaint was based upon well-settled doctrines, legislative intent, statutory language, and precedent set by this Court. As such, the lower court properly dismissed Petitioner's Complaint and therefore, this Court must affirm this dismissal.

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have, on this 27th day of August, 2012, serve the foregoing RESPONDENTS' BRIEF, by first class mail, postage prepaid, on the following:

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