

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-1506

VICKY LOU HUGHES
Plaintiff Below, Petitioner

vs.

WEST VIRGINIA UNIVERSITY,
JEANETTE MOTSCH, and MARY ROBERTA
“BOBBIE” BRANDT,
Defendants Below, Respondents

Hon. Phillip D. Gaujot, Judge
Circuit Court of Monongalia County
Civil Action No. 12-C-321

BRIEF OF THE RESPONDENTS

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I. STATEMENT OF THE CASE

A. INTRODUCTION.

This is the Response of the Defendants below, West Virginia University Board of Governors (improperly named in the Complaint as West Virginia University),¹ Jeanette Motsch, and Mary Roberta “Bobbie” Brandt, to Petitioner’s appeal of an order of the Circuit Court of Monongalia County dismissing her Complaint based upon her failure to exhaust her administrative remedies for the grievance process that she initiated prior to filing the action below. Prior to filing this action, Petitioner commenced, but did not complete, grievance proceedings under the West Virginia Public Employee Grievance Procedure (“WVPEG”), W. VA. CODE §§ 6C-2-1-7, concerning the same alleged acts giving rise to the Complaint. Petitioner argued to the Circuit Court and argues here that this Court’s well-established precedent requiring exhaustion of administrative remedies has no application to claims arising under the West Virginia Human Rights Act (“HRA”), W. VA. CODE §§ 5-11-1-21. The Circuit Court correctly ruled that because Plaintiff had initiated the grievance process prior to filing her action, this Court’s precedent required her to complete the grievance process prior to filing this action.

Petitioner argues in this appeal that the Circuit Court erred by dismissing the action pursuant to *Ewing v. Bd. of Educ. of the County of Summers*, 202 W. Va. 228, 503 S.E.2d 541 (1998).² Petitioner also argues that the Circuit Court erred by relying upon precedent from this Court holding that where an HRA claimant submits claims to the Human Rights Commission, the claimant has elected remedies and cannot maintain a circuit court action.³

¹ Referred to in this brief as Respondent WVUBOG or the WVUBOG.

² See *infra*, Part IV.B.

³ See *FMC Corp. v. W. Va. Human Rights Comm’n*, 184 W. Va. 712, 717, 403 S.E.2d 729, 734 (1991), discussed *infra*, Part IV.C.

However, this Court has consistently held that a public employee who commences the grievance process is required to exhaust the grievance process prior to filing an action in circuit court. Petitioner has not cited a single case where this Court has permitted a party to proceed simultaneously in the grievance process and in circuit court, which is precisely what Petitioner seeks to do here. *Ewing* requires Petitioner to complete the grievance process since she initiated it.

Further, this Court has specifically enforced the exhaustion requirement for alleged violations of the HRA pursuant to the administrative process under the West Virginia equivalent of the Federal Individuals with Disabilities Education Act.⁴ Thus, Petitioner's argument that she need not exhaust because her claims are HRA claims is wrong.

Because the Circuit Court properly granted the Respondents' motion to dismiss, Respondents respectfully request that this Court affirm the Circuit Court's ruling in all respects.⁵

B. STATEMENT OF FACTS.

Petitioner filed the action giving rise to this appeal on May 2, 2012.⁶ Petitioner was employed by Respondent WVUBOG as a Traumatic Brain Injury (TBI) Resource Coordinator/Clinical Associate assigned to the Big Chimney, West Virginia office of the Center for Excellence in Disabilities (CED).⁷ Petitioner alleges that the WVUBOG failed to reasonably accommodate her disabilities and allow her to return to work after a one-year leave due to injury

⁴ See *infra*, Part IV.C.

⁵ The issue in this appeal is also before this Court on certified questions in *West Virginia University Board of Governors v. Wang*, No. 12-1205. In the WVUBOG's opening brief at footnote 52 in *Wang*, the WVUBOG cited Judge Gaujot's decision in *Hughes* and indicated that a notice of appeal had been filed.

⁶ App. at 15.

⁷ App. at 15.

(unrelated to her alleged disabilities). She alleges a violation of her rights under the HRA.⁸ In her Complaint, Petitioner further alleges that Respondent WVUBOG violated the HRA by terminating her employment on October 31, 2011, after she participated in the University's disability monitoring process for four months.⁹ Petitioner alleges that Respondent Motsch and Respondent Brandt assisted the WVUBOG in discriminating against her by failing to accommodate her disabilities.¹⁰

Prior to filing this action, Petitioner initiated grievance proceedings under the WVPEG, styled *Vicky Lou Hughes v. W. Va. Univ.*; Docket No. 2010-1644-WVU.¹¹ Petitioner's pending grievance addresses the same subject matter as this action. Petitioner's hand-written "statement of grievance" states as follows:

1) Reasonable accommodations refused by CED – Jeanette Motsch & ADA [Coordinator] Mary Brandt. 2) Refused to give back past accommodation or other reasonable accommodations. 3) J. Motsch & M. Brandt removed past accommodation and put me in situations that they knew would create life threaten [sic] problems, then J. Motsch threaten [sic] job abandonment & non-compliance of job duties, if I moved out of the area of danger. 4) Threatened my health by consistantly [sic] saying I would be trained in the CED building, which they knew made me ill & had always given me past accommodations but now stripped all accommodations. 5) ADA – Mary Brandt now has placed me in ADA monitoring & released me from my present job, refusing accommodations!¹²

⁸ App. at 18-19.

⁹ App. at 19.

¹⁰ App. at 19-20.

¹¹ App. at 24-25. Exhibits showing the grievance records considered by the Circuit Court were attached to the Respondents' memorandum in support of their motion to dismiss, and appear in the Appendix at pages 34-115.

¹² App. at 35.

Petitioner's grievance was denied in a Level I hearing.¹³ Subsequently, the parties participated in a Level II mediation, which was unsuccessful.¹⁴ At the time Petitioner filed this action, a Level III hearing was scheduled to take place in November or December of 2012.¹⁵ Petitioner has not completed the grievance process to date.¹⁶

While Petitioner's grievance was pending, Petitioner filed a Complaint with the Circuit Court of Monongalia County alleging that the acts identified in Petitioner's "statement of grievance" violated the HRA.¹⁷ Respondents filed a motion to dismiss under West Virginia Rules of Civil Procedure 12(b)(1) and 12(b)(6), arguing that the Circuit Court lacked subject matter jurisdiction based upon the Petitioner's failure to exhaust all available administrative remedies prior to filing the action.¹⁸ Petitioner filed a response in opposition to the Respondents' motion, arguing that public employees should not be required to exhaust administrative remedies with respect to claims under the HRA.¹⁹ Respondents filed a reply in support of their motion, arguing that this Court's precedent requires HRA claimants who have chosen to initiate grievance proceedings to complete the grievance process prior to filing an action.²⁰

¹³ App. at 37-49

¹⁴ App. at 27.

¹⁵ App. at 27. The Level III hearing was rescheduled and has partially, but not completely, been completed as of the filing of this Brief.

¹⁶ The Circuit Court was within its authority to take judicial notice of facts concerning the Petitioner's involvement in the grievance process. As this Court has recognized, a circuit court may consider materials embraced by the pleadings and those documents susceptible to judicial notice, including public records. *See Forshey v. Jackson*, 222 W. Va. 743, 747-48, 671 S.E.2d 748, 752-53 (2008); *Gulas v. Infocision Mgmt. Corp.*, 215 W. Va. 225, 599 S.E.2d 648 (2004). *See also* W. VA. R. EVID. 201(b) (judicial notice). Further, a circuit court may rely on a plaintiff's admissions when ruling on a motion to dismiss, because to rule otherwise would be inconsistent with "notions of judicial integrity." *Harrison v. Davis*, 197 W. Va. 651, 657, 478 S.E.2d 104, 110 (1996).

¹⁷ App. at 15, 19-20.

¹⁸ App. at 22.

¹⁹ App. at 119-24.

²⁰ App. at 127-31.

The Circuit Court granted the Respondents' motion by an order dated November 13, 2012.²¹ The Circuit Court issued the following pertinent findings of fact based upon the pleadings, representations in oral arguments, and judicial notice concerning the procedural background to Petitioner's grievance:

As a public employee, Ms. Hughes initiated grievance proceedings, pursuant to W. VA. CODE § 6C-2-4 (2008), reflecting her allegations relating to West Virginia University's conduct. The procedure involves a three-level process, and Ms. Hughes had her level One conference on September 27, 2011, addressing her filing of three previous grievances (Defs.' Mem. in Supp. of Defs.' Mot. to Dismiss Ex. A "Level One Grievance Decision," at 2); *Id.* On June 30, 2010, she filed two grievances, the first dated April 22, 2010, and the second dated June 22, 2010. On July 8, 2011, she filed a third grievance, dated July 6, 2011 (Defs.' Mem. in Supp. of Defs.' Mot. to Dismiss Ex. A "Level One Grievance Decision," at 1.) In its decision dated October 18, 2011, the West Virginia Public Employees Grievance Board denied Ms. Hughes's grievance, explaining that she had failed to prove it possible to complete the essential duties of TBI Resource Coordinator with reasonable accommodations (Defs.' Mem. in Supp. of Defs.' Mot. to Dismiss Ex. A "Level One Grievance Decision," at 13) Ms. Hughes subsequently participated in an unsuccessful Level Two mediation, and a Level Three hearing is expected to take place in November or December of 2012 (Defs.' Mem. in Supp. of Defs.' Mot. to Dismiss Ex. A "Level One Grievance Decision," at 4.)²²

Based upon those findings of facts, the Circuit Court dismissed the action and issued the following pertinent conclusions of law:

- "Ms. Hughes has already begun the administrative grievance procedure and may not abandon it prior to completion."²³
- "The Plaintiff is correct in arguing that parallel remedies may be elected, namely that a plaintiff can *choose* between remedies in certain instances. However, the *Vest*²⁴ case does

²¹ App. at 1.

²² App. at 5-6 (footnotes omitted).

²³ App. at 7.

not stand for the proposition that parallel *contemporaneous* remedies may be elected, nor does *Beichler*.²⁵ . . . Neither *Beichler* nor *Vest*, the cases heavily at issue in the instant action, spoke to a plaintiff with a *pending* grievance process, like Ms. Hughes.”²⁶

- “Ms. Hughes has already elected to pursue the grievance course, and pursuant to the Court’s ruling in *Ewing*,²⁷ she may not pursue an alternative form of relief before the grievance process she began is complete.”²⁸
- “The WVHRA case law supports alternatives to administrative remedies, not remedies commenced but incomplete.”²⁹
- “In WVHRA cases, the Court has made it clear that resort to Circuit Court is a feasible alternative to initiating an administrative action when human rights violations are alleged. *FMC v. West Virginia Human Rights Commission and Teresa A. Frymier*, 184 W. Va. 712, 717, 403 S.E.2d 729, 734 (1991). . . . The *FMC* Court was careful to note that these two avenues of relief are in fact, mutually exclusive. 184 W. Va. at 717, 403 S.E.2d at 734 (citing *Price [v. Boone County Ambulance Auth.]*, 175 W. Va. 676, 679, 337 S.E.2d 913, 916 (1985)).”³⁰

²⁴ *Vest v. Bd. of Educ. of the County of Nicholas*, 193 W. Va. 222, 455 S.E.2d 781 (1995).

²⁵ *Beichler v. W. Va. Univ. at Parkersburg*, 226 W. Va. 321, 700 S.E.2d 532 (2010).

²⁶ App. at 9 (emphasis in original).

²⁷ *Ewing*, 202 W. Va. at 228, 303 S.E.2d at 541.

²⁸ App. at 10.

²⁹ App. at 11.

³⁰ App. at 11-12.

- “Thus, even though Ms. Hughes’s case implicates a possible violation of the WVHRA, she must complete the grievance process she has already commenced before resorting to Circuit Court.”³¹

This appeal followed. Petitioner lists two assignments of error. First, Petitioner contends that the Circuit Court erred in dismissing the complaint because the Petitioner has not completed the grievance process under the WVPEG.³² Second, Petitioner contends that the Circuit Court erred “in equating the preclusive effect of the pendency of the grievance system administered by the West Virginia Public Employees Grievance Board with the pendency of a human rights act administrative complaint pending before the West Virginia Human Rights Commission.”³³

II. SUMMARY OF ARGUMENT

The Circuit Court of Monongalia County properly granted the Respondents’ motion to dismiss due to Petitioner’s failure to exhaust the grievance process that she initiated under the WVPEG. Petitioner conceded to the Circuit Court that she has not completed the grievance process under the WVPEG. Exhaustion of administrative remedies is deeply rooted in West Virginia law and this Court has consistently recognized that, once a public employee files a grievance, the process must be completed prior to filing a civil action. Petitioner does not cite any authority for her argument that she should be permitted to maintain this action prior to completing the grievance process. To the extent that Petitioner relies upon cases where the administrative process was never commenced or was already concluded, those cases are

³¹ App. at 13.

³² Petitioner’s Brief at 2.

³³ Petitioner’s Brief at 2.

inapposite. By commencing the grievance process, Petitioner waived her right to file her HRA claim in circuit court until she exhausts her remedies.

The Circuit Court also correctly relied upon decisions from this Court holding that HRA claims, in particular, are subject to the exhaustion requirement. Although this Court has held that HRA claimants may pursue their disputes either through administrative processes or through a civil action, other precedent from this Court clarifies that the administrative process and a civil action are *mutually exclusive* avenues for relief. In fact, this Court has specifically enforced the exhaustion requirement with respect to disputes concerning alleged violations of the HRA before the administrative process set forth under the regulations implementing the West Virginia equivalent of the Individuals with Disabilities Education Act.

None of the “concerns” Petitioners voiced to the Circuit Court about applying the exhaustion requirements to her HRA claims are well-founded. The Circuit Court correctly identified multiple authorities allaying Petitioner’s concerns that exhaustion will preclude her from seeking damages, if appropriate, that the statute of limitations may run during the pendency of the grievance process, or that application of the WVPEG grievance process targets public employees for “separate treatment.” Petitioner’s concerns are speculative and do not overcome the exhaustion requirement.

Accordingly, Respondents respectfully request that this Court affirm the order of the Circuit Court of Monongalia County dismissing the action.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the Circuit Court's order is supported by ample authority, as it is plain and undisputed that the Petitioner commenced but did not complete the grievance process for her disputes, and that, accordingly, Petitioner has failed to exhaust her administrative remedies prior

to filing this civil action, oral argument under W. VA. REV. R. APP. P. 18(a) is not necessary. This appeal does not present new issues of law. Should the Court desire oral argument, Respondents submit that this case is appropriate for Rule 19 argument.

IV. ARGUMENT

A. STANDARD OF REVIEW.

Respondents' motion to dismiss was filed under Rule 12(b)(1) (lack of subject matter jurisdiction) and Rule 12(b)(6) (failure to state a claim) of the West Virginia Rules of Civil Procedure. "Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syl. pt. 1, *Lontz v. Tharp*, 220 W. Va. 282, 647 S.E.2d 718 (2007); syl. pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 773, 461 S.E.2d 516, 519 (1995). On appeal, this Court applies the same test that the circuit court applied initially. See *Conrad v. ARA Szabo*, 198 W. Va. 362, 369-70, 480 S.E.2d 801, 808-09 (1996). The Court is not wedded to the circuit court's rationale, but may rule on any alternate ground manifest in the record. *Id.* Application of this standard to this case reveals that the Circuit Court properly granted the Respondents' motion to dismiss because Petitioner plainly failed to exhaust her administrative remedies prior to filing this civil action.

B. **THE CIRCUIT COURT CORRECTLY GRANTED THE RESPONDENTS' MOTION TO DISMISS PURSUANT TO *EWING V. BD. OF EDUC.* BECAUSE PETITIONER DID NOT COMPLETE THE PENDING GRIEVANCE PROCESS PRIOR TO FILING THIS ACTION.**

Petitioner concedes that she commenced, but did not complete, the grievance process concerning her disputes with Respondents. By initiating the grievance process, Petitioner elected her remedy and is bound to exhaust her administrative remedies prior to initiating a civil action. "[W]here 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 court will act.” Syl. pt. 7, *Expedited Trans. Sys., Inc. v. Vieweg*, 207 W. Va. 90, 529 S.E.2d 110 (2000) (emphasis added). As this Court explained:

The doctrine simply provides that when the legislature provides for an administrative agency to regulate some particular field of endeavor, the courts 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.

State ex rel. Smith v. Thornsbury, 214 W. Va. 228, 233, 588 S.E.2d 217, 222 (2003) (citing *Bank of Wheeling v. Morris Plan Bank & Trust Co.*, 155 W. Va. 245, 249, 183 S.E.2d 692, 694-95 (1971)). This principle is deeply rooted in West Virginia law.³⁴

Exhaustion of remedies “serves several useful functions including:”

permitting the exercise of agency discretion and expertise on issues requiring these characteristics;

allowing the full development of technical issues and a factual record prior to court review;

preventing deliberate disregard and circumvention of agency procedures established by Congress [or the Legislature]; and

avoiding unnecessary judicial decision by giving the agency the first opportunity to correct any error.

Sturm v. Bd. of Educ. of Kanawha County, 223 W. Va. 277, 282, 672 S.E.2d 606, 611 (2008) (quoting *Doe v. Alfred*, 906 F. Supp. 1092, 1097 (S.D.W. Va. 1995)) (brackets in original).

Even if the grievance process were initially optional,³⁵ once an employee pursues relief through the grievance process, the employee must exhaust all available administrative

³⁴ See syl. pt. 2, *Thornsbury*, 214 W. Va. at 228, 588 S.E.2d at 217 (citing syl. pt. 1, *Daurelle v. Traders Fed. Savs. & Loan Ass’n*, 143 W. Va. 674, 104 S.E.2d 320 (1958); syl. pt. 1, *Cowie v. Roberts*, 173 W. Va. 64, 312 S.E.2d 35 (1984); syl. pt. 10, *State ex rel. Miller v. Reed*, 203 W. Va. 673, 510 S.E.2d 507 (1998); syl. pt. 7, *Vieweg*, 207 W. Va. at 90, 529 S.E.2d at 110).

remedies. “Once an employee chooses one of these courses of relief [filing a grievance or pursuing a writ of mandamus], though, **he/she is constrained to follow that course to its finality.**” Syl. pt. 6, *Ewing*, 202 W. Va. at 228, 503 S.E.2d at 541. In *Ewing*, the plaintiff, a Summers County Board of Education employee, applied for a position as a business teacher. *Ewing*, 202 W. Va. at 232, 503 S.E.2d at 545. The defendant hired another applicant, and the plaintiff filed a grievance under a predecessor to the modern WVPEG,³⁶ alleging that the defendant misapplied statutory hiring guidelines. *Id.* While a Level II grievance hearing was scheduled and pending, the plaintiff filed a contemporaneous petition for a writ of mandamus in circuit court. *Ewing*, 202 W. Va. at 233, 503 S.E.2d at 546. The circuit court denied the defendant’s motion to dismiss and granted the requested writ. *Id.* This Court reversed on appeal, reasoning that concurrent actions through the grievance process and in circuit court concerning the same employment decision “would emasculate the grievance procedure as it is presently structured.” *Ewing*, 202 W. Va. at 238, 503 S.E.2d at 551. “Not only would such an interpretation foster a party’s ability to ‘stall’ the proceedings, but it would also severely impede the overriding public interest in promptly and efficiently resolving educational grievances” *Ewing*, 202 W. Va. at 550, 503 S.E.2d at 237.

Public education employees were also required to exhaust their administrative remedies under predecessor statutes to the WVPEG in *Kincell v. Superintendent of Marion County Schools*, 201 W. Va. 640, 499 S.E.2d 862 (1997). In *Kincell*, this Court held that teachers who had brought an action seeking injunctive relief and a writ of mandamus in circuit court,

³⁵ The question before the Court in this appeal is not whether the grievance process is initially optional, but rather whether, once the grievance process has been commenced, it must be exhausted. Based upon the posture of this appeal, this brief does not address the question of whether the grievance process would have been required in the first instance.

³⁶ The consolidation of the two prior public employee grievance statutes into W. VA. CODE §§ 6C-2-1-7 is discussed *infra* at Part IV.B.1.

alleging that they were entitled to an additional day of pay pursuant to the school calendar, were required to exhaust their administrative remedies provided by the grievance procedure. *See Kincell*, 201 W. Va. at 641-42, 499 S.E.2d at 863-64. This Court held that the circuit court correctly dismissed the action for lack of jurisdiction due to the failure to exhaust the administrative remedies. *Id.* “We find it unnecessary to reach the merits of this case as Appellants **clearly failed to exhaust their administrative remedies and accordingly, the circuit court correctly ruled that it was without jurisdiction to entertain further proceedings in this matter.**” *Kincell*, 201 W. Va. at 642, 499 S.E.2d at 864 (emphasis added). *See also Stapleton v. Bd. of Educ. of County of Lincoln*, 204 W. Va. 368, 371-72, 512 S.E.2d 881, 884-85 (1998) (“In this instance, the teachers initially chose to seek relief through the employees’ grievance procedure. That choice foreclosed the possibility of contemporaneously therewith seeking the same relief by mandamus until the grievance procedure had been completely followed and exhausted.”).

Petitioner is pursuing the very tactic that *Ewing* forbids. As in *Ewing*, Petitioner initiated the grievance process but did not complete that process.³⁷ Under the WVPEG, Petitioner was obligated to complete the grievance process prior to filing a civil action.³⁸ At the time of the Circuit Court’s decision dismissing the action below, Petitioner had not completed the Level III hearing. Petitioner now wants to leave the grievance process incomplete and pursue the same

³⁷ App. at 24-25.

³⁸ The WVPEG grievance process consists of a Level I hearing before a chief administrator, followed by a Level II alternative dispute resolution proceeding, and culminating with a Level III hearing before an administrative law judge. W. VA. CODE § 6C-2-4(a)-(c). In cases of “discharge[,], suspens[ion] without pay or demot[ion] or reclassifi[cation] resulting in a loss of compensation or benefits,” the grievant may proceed directly to Level III. W. VA. CODE § 6C-2-4(a)(4). Decisions issued by the administrative law judge at Level III are enforceable in the Circuit Court of Kanawha County and may be appealed on various grounds. W. VA. CODE § 6C-2-5.

claim in circuit court. *Ewing* plainly requires Petitioner to complete the grievance process and bars Petitioner's attempt to abandon midstream.

1. This Court's opinion in *Ewing* applies to the WVPEG, which replaced the grievance statute in *Ewing*.

While this Court has not specifically addressed exhaustion under the WVPEG since the Legislature enacted it in 2007 to replace W. VA. CODE §§ 18-29-1-11 and W. VA. CODE §§ 29-6A-1-12,³⁹ the Legislature has made clear that the WVPEG is designed to incorporate consistent rulings and references under the prior statutes. The WVPEG states that with its enactment, "any reference in this code to the education grievance procedure, the state grievance procedure, article twenty-nine, chapter eighteen of this code or article six-a, chapter twenty-nine of this code, or any subsection thereof, shall be considered to refer to the appropriate grievance procedure pursuant to this article." W. VA. CODE § 6C-2-1(d).⁴⁰ This language means that since exhaustion was required under the predecessor statutes, as this Court clearly articulated in *Ewing* and *Kincell*, exhaustion continues to be required under the current WVPEG.

Further, the United States District Court for the Southern District of West Virginia has had occasion to address the current WVPEG and concluded that exhaustion is still required. *See Corbett v. Duerring*, 726 F. Supp. 2d 648 (S.D.W. Va. 2010). In *Corbett*, the plaintiff, a Kanawha County teacher, alleged that he was wrongfully terminated in violation of a substantial public policy in retaliation for the plaintiff's refusal to " 'make deals' effecting [sic] the unequal treatment of students in Kanawha County Schools." *Id.* at 651. The plaintiff also

³⁹ W. VA. CODE §§ 18-29-1-11 and W. VA. CODE §§ 29-6A-1-12 were repealed effective March 7, 2007 and replaced with W. VA. CODE §§ 6C-2-1-7.

⁴⁰ Under a predecessor to the modern WVPEG, the educational grievance statute provided a four-level grievance process. *See* W. VA. CODE § 18-29-4 (2006) (repealed 2007). Level I was a conference with the grievant's immediate supervisor. *Id.* § 18-29-4(a). Level II was an appeal to the chief administrator. *Id.* § 18-29-4(b). Level III was an appeal to the governing board of the institution. *Id.* § 18-29-4(c). Level IV was a hearing with a designated hearing examiner. *Id.* § 18-29-4(d).

alleged negligent supervision. *Id.* Plaintiff sought lost wages, emotional distress, and compensation for humiliation. *Id.* The court in *Corbett* examined the WVPEG and found that exhaustion of remedies was clearly required before the plaintiff could bring his claims in that court. In so finding, the court identified additional policy reasons supporting exhaustion, including that exhaustion may “filter out some frivolous claims and foster better-prepared litigation once a dispute [does] move to the courtroom” and that the “very act of being heard and prompting administrative change can mollify passions even when nothing ends up in the pocket.” *Id.* at 654 (quoting *Booth v. Churner*, 532 U.S. 731, 736-37 (2001)).

2. Petitioner’s attempt to distinguish this Court’s precedent fails.

Petitioner relies upon immaterial distinctions and inapplicable authorities in an attempt to distinguish precedent. *Ewing* is not distinguishable, as Petitioner suggests, on the basis that the relief plaintiff sought in that case was a writ of mandamus.⁴¹ Petitioner does not rely upon any authority to support this argument, and there is no principled basis for applying the exhaustion requirement to claims for mandamus relief differently from claims seeking other forms of equitable or legal relief. In fact, as discussed above, the plaintiffs in *Kincell* specifically sought injunctive relief. This Court could have, but did not, draw the distinction Petitioner now advances, which would have plainly turned the outcome of that appeal. Instead, this Court followed *Ewing* and dismissed the action. *Kincell*, 201 W. Va. at 642, 499 S.E.2d at 864.

Petitioner’s reliance upon this Court’s decision in *Beichler v. W. Va. Univ. at Parkersburg*, 226 W. Va. 321, 700 S.E.2d 532 (2010), is also misplaced.⁴² Critically, the plaintiff in *Beichler* never filed a grievance. *Beichler*, 226 W. Va. at 323, 700 S.E.2d at 534. The question before the Court was whether a plaintiff, who had never filed a grievance, is required to

⁴¹ See Petitioner’s Brief at 8.

⁴² Petitioner’s Brief at 7.

commence and exhaust administrative remedies prior to filing a civil action under the West Virginia Wage Payment and Collection Act (“WVWPCA”), W. VA. CODE §§ 21-5-1-18. *Beichler*, 226 W. Va. at 324, 700 S.E.2d at 535. This Court was not asked to decide whether a plaintiff who has already initiated a grievance under the WVWPCA can simply abandon the process, and this Court did not address that issue. Limiting language in syllabus point 3 confirms that this Court did not hold that a claimant may abandon the grievance midstream. Specifically, “a person whose wages have not been paid in accord with the [WVWPCA] may initiate a claim for the unpaid wages *either* through the administrative remedies provided under the Act *or* by filing a complaint for the unpaid wages directly in circuit court.” Syl. pt. 3, *Beichler*, *supra* (emphasis added). These alternative courses (i.e., filing a grievance or filing a civil action) cannot both be pursued if the terms “either” and “or” are to be given any meaning.

Beichler did not overturn decades of case law and abrogate the requirement to exhaust administrative remedies.⁴³ Yet, that is precisely what Petitioner asks this Court to hold in this case. Were a public employee who has already commenced the grievance process permitted to abandon the grievance and pursue a civil action, the “well-settled principle” requiring exhaustion of administrative remedies would be eroded such that it would be practically non-existent. This Court would have to overrule not only *Ewing*, *Kincell*, and *Stapleton*, but also decades of case law development defining the contours of this doctrine.

Exhaustion serves an important public interest. It clarifies issues and may resolve numerous matters without the need to resort to circuit court. However, the grievance process is rendered meaningless if a grievant is permitted to abandon the process at any time and elect to proceed in circuit court. There is no incentive for either party to a grievance to participate fully if

⁴³ To the contrary, this Court specifically acknowledged the “well-settled principle” requiring exhaustion of administrative remedies. See *Beichler*, 226 W. Va. at 324, 700 S.E.2d at 535.

they know that the grievance can be abandoned at any time. As this Court observed in *Ewing*, “[n]ot only would such an interpretation foster a party’s ability to ‘stall’ the proceedings, but it would also severely impede the overriding public interest in promptly and efficiently resolving educational grievances” *Ewing*, 202 W. Va. at 550, 503 S.E.2d at 237.

The WVPEG and its predecessor statutes require exhaustion of remedies before public employees can file claims covered by the grievance process in circuit court. The flouting of the exhaustion requirement is nowhere more apparent than when a plaintiff begins the grievance process, but then seeks to abandon it, incomplete, as in this case.

3. Petitioner’s Complaint seeks relief based upon the same alleged “discrimination” that is at issue in the pending grievance process.

Petitioner’s claims in this case are covered by the WVPEG. Although Petitioner attempts to distinguish her claims in this civil action from the claims that are at issue in her grievance,⁴⁴ Petitioner cannot evade the requirement to exhaust her administrative remedies simply by re-casting the allegations raised in her grievance under the WVPEG as part of a claim under the HRA. An employee is bound to complete the grievance process for all matters associated with “the same employment decision that is the subject of the previously initiated grievance.” *Ewing*, 202 W. Va. at 238, 503 S.E.2d at 551. In that regard, Petitioner’s “discrimination” claim in her statement of grievance presents the same issues for resolution as the alleged violations of the HRA in Petitioner’s Complaint.

This Court specifically addressed this issue in *Vest v. Bd. of Educ. of Nicholas County*, 193 W. Va. 222, 455 S.E.2d 781 (1995). In *Vest*, a substitute teacher for the Nicholas County Board of Education filed a grievance alleging that she was terminated from her position on the basis of pregnancy and sex. *Vest*, 193 W. Va. at 223, 455 S.E.2d at 782. Plaintiff’s

⁴⁴ Petitioner’s Brief at 10.

grievance was denied at a Level IV grievance hearing, and this denial was affirmed by the Circuit Court of Kanawha County. *Vest*, 193 W. Va. at 223-24, 455 S.E.2d at 782-83. Thereafter, the plaintiff filed a separate civil action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and the HRA. *Vest*, 193 W. Va. at 224, 455 S.E.2d at 783. The *Vest* defendant filed a motion for summary judgment, and the district court certified, *inter alia*, the following question to this Court: “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?” *Id.* This Court answered in the affirmative, holding that “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 (1992), includes jurisdiction to remedy discrimination that also would violate the Human Rights Act.” Syl. pt. 1, *Vest, supra*.⁴⁵

In reaching this conclusion, this Court reasoned that the Grievance Board has jurisdiction because the definition of “discrimination” under the grievance statute is broad enough to encompass any acts of “discrimination” under the HRA, which defines discrimination more narrowly. *See Vest*, 193 W. Va. at 225, 455 S.E.2d at 784. Specifically, “discrimination” under the HRA “prohibits discrimination in public and private employment on the basis of race, religion, color, national origin, ancestry, sex, age, blindness, or handicap.” *Id.* By comparison, under the predecessor to the modern grievance statute, “discrimination” more broadly includes “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” *Vest*, 193 W. Va.

⁴⁵ The statute at issue in *Vest* was W. VA. CODE §§ 18-29-1-11, one of the predecessor statutes to the modern public employee grievance statute.

at 224, 455 S.E.2d at 783 (citing W. VA. CODE § 18-29-2 (1992)).⁴⁶ As this Court observed, “an employment decision that treats an employee differently because of the employee’s race or gender, etc., is by definition, not one that is ‘related to the actual job responsibilities of the [employee.]’” *Vest*, 193 W. Va. at 225, 455 S.E.2d at 784. Consequently, evidence of discrimination under the HRA is not only admissible, but highly material to grievance proceedings, and an employee has a right to present evidence of such discrimination to prove his or her entitlement to administrative remedies:

To hold that a grievant could not present evidence of an illicit motive to help prove ‘discrimination’ just because such motive also is prohibited by the Human Rights Act would be both unfair to the grievant and inefficient for our administrative and judicial systems. It would be unfair to the grievant because it artificially would limit probative evidence relevant to discrimination. It would be inefficient because a grievance decision in favor of the grievant 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. Thus, the Court held, “[i]n other words, the Grievance Board does have subject matter jurisdiction over gender-based discrimination claims—just as it has subject matter jurisdiction over any claim of discrimination, meaning employment decisions that are not based on job-related reasons or agreed to in writing by the employees.” *Id.*

The current WVPEG also covers discrimination that would violate the HRA. Under the WVPEG, a grievance is “any claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements

⁴⁶ “Discrimination” under the current WVPEG is defined similarly: “any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. VA. CODE § 6C-2-2(d).

applicable to the employee” See W. VA. CODE § 6C-2-2(i)(1). Claims qualifying as grievances under the statute include the following:

- (i) Any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination;
- (ii) Any discriminatory or otherwise aggrieved application of unwritten policies or practices of his or her employer;**
- (iii) Any specifically identified incident of harassment;
- (iv) Any specifically identified incident of favoritism; or
- (v) Any action, policy or practice constituting a substantial detriment to or interference with the effective job performance of the employee or the health and safety of the employee.

W. VA. CODE § 6C-2-2(i)(1)(i-v) (emphasis added). Further, “discrimination” is defined to include “any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” *Id.* § 6C-2-2(d).

The WVPEG’s definition of “discrimination” is essentially identical to the statutory definition in *Vest*.⁴⁷ The same interpretation, therefore, should follow: “an employment decision that treats an employee differently because of the employee’s race or gender, etc., is by definition, not one that is ‘related to the actual job responsibilities of the [employee.]’” *Vest*, 193 W. Va. at 225, 455 S.E.2d at 784 (emphasis added). This Court did not limit its decision to cases of “race or gender” discrimination. The *Vest* opinion applies to all protected classifications under

⁴⁷ The language of the modern statute differs only in that it prohibits differences in treatment between “similarly situated employees,” rather than differences in treatment between “employees” generally. Compare W. VA. CODE § 6C-2-2(d) (“any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.”) with W. VA. CODE § 18-29-2 (1992) (“any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.”).

the HRA, as shown by their specific reference to “race, gender, *etc.*” *See id.* (emphasis added). In this case, the alleged classification is based upon Petitioner’s disability.⁴⁸ Therefore, any alleged discrimination based upon Petitioner’s disability is “by definition, not one that is ‘related to the actual job responsibilities of the [employee.]’ ” *See id.*

Accordingly, under *Vest*, Plaintiff’s HRA claims are covered by the WVPEG, and the Circuit Court properly dismissed this action due to Petitioner’s failure to exhaust her administrative remedies.

C. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT CLAIMS UNDER THE HUMAN RIGHTS ACT ARE NOT EXEMPT FROM THE EXHAUSTION REQUIREMENT WHEN A PLAINTIFF INITIATES THE GRIEVANCE PROCESS.

With respect to Petitioner’s second assignment of error, the Circuit Court correctly concluded that HRA claims are subject to the exhaustion requirement under the WVPEG when a grievant initiates the grievance process. The grievance process and a civil action for alleged violations of the HRA are “mutually exclusive” courses of relief. Once an employee chooses one course of action, the other is no longer available to them. *See FMC Corp. v. W. Va. Human Rights Comm’n*, 184 W. Va. 712, 717, 403 S.E.2d 729, 734 (1991). In *FMC*, the plaintiff, an employee of FMC, filed a sex discrimination claim with the Human Rights Commission after she was terminated for telling a “boldfaced lie” to her employer. *FMC*, 184 W. Va. at 714-16, 403 S.E.2d at 731-33. The Commission found that the plaintiff made out a prima facie case of discrimination and decided in her favor. *FMC*, 184 W. Va. at 715, 403 S.E.2d at 732. On appeal to the Circuit Court of Kanawha County, the plaintiff sought to amend her petition to seek additional relief at law based upon the Commission’s decision. *FMC*, 184 W. Va.

⁴⁸ App. at 19.

at 716-17, 403 S.E.2d at 733-34. This Court affirmed the circuit court’s refusal to grant leave to amend, holding,

Thus, [the plaintiff] could have elected to file a civil action in circuit court, but chose instead to avail herself of the services of the Human Rights Commission. In *Price [v. Boone County Ambulance Auth.]*, we noted that, “[t]hese two avenues are, of course, mutually exclusive, as § 5-11-13(a) makes clear.’ 175 W. Va. at 679, 337 S.E.2d at 916. **[The plaintiff] chose one avenue of redress; she cannot now pursue the other.**

FMC, 184 W. Va. at 717, 403 S.E.2d at 734 (emphasis added) (quoting *Price v. Boone County Ambulance Auth.*, 175 W. Va. 676, 679, 337 S.E.2d 913, 916 (1985)).

1. This Court’s opinion in *FMC* requires Petitioner to exhaust her administrative remedies under the WVPEG once she initiated the grievance process.

This Court’s holding in *FMC*, affirming the doctrine of election of remedies as applicable to HRA claims, is not limited to claims pending before the Human Rights Commission. This Court has specifically held that HRA claims are subject to administrative exhaustion with agencies other than the Human Rights Commission. For example, in *Sturm v. Bd. of Educ. of Kanawha County*, 223 W. Va. 277, 672 S.E.2d 606 (2008), this Court held that claims under the HRA were subject to exhaustion of administrative remedies provided under W. VA. CODE § 18-20-1 (“Education of Exceptional Children”), which is the state analogue to the federal Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400-1482. The plaintiff alleged that “the Board ‘discriminated against [him] under the [HRA] on the basis of disability by denying him a free, appropriate education.’ ” *Sturm*, 223 W. Va. at 285, 672 S.E.2d at 614 (brackets in original). This Court rejected the plaintiff’s attempt to re-cast his claims under the HRA to avoid the exhaustion requirement, reasoning, “it is clear from [Mr. Sturm’s] complaint that all of his claims arise from the failure to provide him with a free appropriate public education under Policy 2419. As such, [Mr. Sturm] cannot avoid the Policy’s exhaustion

requirements by pleading separate causes of action.” *Id.* Accordingly, this Court affirmed the circuit court’s order dismissing the complaint. *Id.* In syllabus point 5, this Court held:

Prior to bringing a civil suit alleging failure to provide a free appropriate public education under the Regulations for the Education of Students with Exceptionalities, Policy 2419, 126 C.S.R. § 16, **a complainant must first exhaust his or her administrative remedies** provided under the regulations or meet the burden of proving an exception to the exhaustion requirement.

Syl. pt. 5, *Sturm, supra* (emphasis added).

The holdings in *FMC* and *Sturm* apply equally to the grievance process established by the WVPEG. Petitioner’s suggestion that HRA claims preempt the administrative exhaustion requirement ignores *FMC*, in which this Court plainly held that HRA claims are subject to administrative exhaustion.⁴⁹ *FMC*, 184 W. Va. at 716-17, 403 S.E.2d at 733-34. The exhaustion requirement is not limited to administrative remedies through the Human Rights Commission, as this Court observed in *Sturm*. *Sturm* clarifies that HRA claims are subject to exhaustion if they are otherwise subject to an administrative process. As with the Education of Exceptional Children statute, the WVPEG and its predecessor statutes require employees who have commenced the grievance process to exhaust all available administrative remedies. Petitioner’s “discrimination” claims are encompassed within the broad scope of the WVPEG’s definition of discrimination, and Petitioner has the opportunity and right to raise her concerns with the Grievance Board prior to filing any action in circuit court. Having selected this process, Petitioner is now required to complete it.

This Court has never held that an HRA claimant could abandon the grievance process midstream to pursue a civil action. Petitioner interprets this Court’s opinion in *Vest* to allow an HRA claimant to “pursue claims before the Grievance Board, under the Human Rights

⁴⁹ See Petitioner’s Brief at 9-10.

Act or, in some cases, both”⁵⁰ The *Vest* opinion does not support this conclusion. Ms. Vest had completely exhausted all administrative remedies prior to filing a civil action. *Vest*, 193 W. Va. at 224, 455 S.E.2d at 783. The *Vest* opinion is material because this Court specifically held that the Grievance Board has jurisdiction to remedy claims that would violate the HRA, *see* syl. pt. 1, *Vest, supra*, but *Vest* does not stand for the proposition that an employee can abandon the grievance process. This Court acknowledged this limitation in syllabus point 3, which states, “[a] civil action filed under the [HRA] is not precluded by a *prior* grievance decided by the West Virginia Education and State Employees Grievance Board arising out of the same facts and circumstances.” *See* syl. pt. 3, *id.* (emphasis added).

2. Petitioner’s suggestion that the exhaustion requirement is “untenable” is speculative and ignores numerous authorities refuting the very concerns Petitioner voiced to the Circuit Court.

Petitioner has not given this Court any reason to re-examine its long-standing precedent requiring exhaustion of administrative remedies. The Circuit Court addressed and allayed Petitioner’s concerns that enforcement of the long-standing requirement to exhaust administrative remedies could hypothetically result in some deprivation of her HRA rights. Petitioner’s concerns simply are not well-founded. Petitioner’s argument on this point is highly speculative and draws several unsupported assumptions about how the Circuit Court may rule upon motions that have not been filed, effectively challenging orders that have not even been requested or entered.

With respect to Petitioner’s argument that the Grievance Board will not award statutory damages under the HRA, this Court has held that exhaustion is required even when a plaintiff asserts a claim for damages beyond those available in the administrative process. *See*

⁵⁰ Petitioner Brief at 12.

syl. pt. 3, *Bank of Wheeling v. Morris Plan Bank & Trust Co.*, 155 W. Va. 245, 183 S.E.2d 692 (1971). However, this Court has also observed that plaintiffs may be able to pursue additional remedies upon the conclusion of the administrative process. “The 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.**” *Bank of Wheeling*, 155 W. Va. at 249, 183 S.E.2d at 695 (emphasis added). Further, in *Thornsbury*, this Court observed, “[i]n proper situations, damages can be sought in the courts *after* the administrative proceedings have reached their conclusion.” *Thornsbury*, 214 W. Va. at 233, 588 S.E.2d at 222 (emphasis added).

Petitioner’s concern was further addressed in *Vest*. This Court observed that “to preclude victims of discrimination from subsequently invoking the promises made by the Human Rights Act, we, thereby, would add our own breach of trust to those already committed by public discriminators. Thus, we refuse to so hold.” *Vest*, 455 S.E.2d at 787, 193 W. Va. at 228. As discussed above, the Court also held that an HRA claim, in fact, could be filed following the grievance process, even where the grievance addressed the same alleged discrimination, holding, “[a] civil action filed under the [HRA] is not precluded by a *prior* grievance decided by the West Virginia Education and State Employees Grievance Board arising out of the same facts and circumstances.” *See* syl. pt. 3, *Vest, supra* (emphasis added).

With respect to Petitioner’s argument that the statute of limitations may run during the pendency of the grievance process, the Circuit Court observed in its written order, “the time period for filing a complaint with the Human Rights Commission alleging a violation of the Human Rights Act is not jurisdictional in nature and is subject to waiver and equitable

doctrines of tolling and estoppel.”⁵¹ Additionally, the Circuit Court referred to two types of “equitable modifications” to the statute of limitations: “equitable tolling” and “equitable estoppel.”⁵² While Petitioner has indicated that these authorities are “not greatly comforting,”⁵³ Petitioner disregards her own responsibility for choosing to pursue the grievance process in the first instance. Were Petitioner permitted to abandon her grievance midstream, the exhaustion requirement would be eroded to the point of non-existence, frustrating the well-considered policy choices underlying the enactment of the WVPEG.

Petitioner’s argument that the exhaustion requirement segregates the class of public employees for “separate treatment” grossly mischaracterizes the intent, purpose, and effect of the WVPEG. To the contrary, the WVPEG provides public employees with an additional avenue for relief not available to other employees in West Virginia. This alternative provides public employees with the option to obtain a fair, efficient, cost-effective and consistent process to address their employment-based disputes. The “classification” that Petitioner complains of does not deprive Petitioner of any remedies; it merely requires that she complete the process she initiated. After exhausting her administrative remedies, to the extent that Petitioner believes she is entitled to additional relief under the HRA, Petitioner can pursue those remedies.

The purpose of the WVPEG is to offer this alternative avenue for the benefit of employees, as well as employers and the citizens of the State of West Virginia.

(a) The purpose of this article is to provide a procedure for the resolution of employment grievances raised by the public

⁵¹ App. at 11 (citing syl. pt. 1, *Independent Fire Co. No. 1 v. W. Va. Human Rights Comm’n*, 180 W. Va. 406, 376 S.E.2d 612 (1988)).

⁵² App. at 11 (citing *Mull v. ARCO Durethene Plastics, Inc.*, 784 F.2d 284, 291 (7th Cir. 1986)).

⁵³ See Petitioner’s Brief at 9.

employees of the State of West Virginia, except as otherwise excluded in this article.

(b) Resolving grievances in a fair, efficient, cost-effective and consistent manner will maintain good employee morale, enhance employee job performance and better serve the citizens of the State of West Virginia.

(c) Nothing in this article prohibits the informal disposition of grievances by stipulation or settlement agreed to in writing by the parties, nor the exercise of any hearing right provided in chapter eighteen [§§ 18-1-1 et seq.] or eighteen-a [§§ 18A-1-1 et seq.] of this code. Parties to grievances shall at all times act in good faith and make every possible effort to resolve disputes at the lowest level of the grievance procedure.

W. VA. CODE § 6C-2-1(a)-(c). This alternative avenue of relief works to the Petitioner's advantage. But to allow Petitioner to abandon her grievance would, as this Court observed in *Ewing*, "emasculate the grievance procedure," " 'stall' the proceedings," and "severely impede the overriding public interest in promptly and efficiently resolving educational grievances" See *Ewing*, 202 W. Va. at 550, 503 S.E.2d at 237.

The grievance process has utility in this case, despite Petitioner's attempts to minimize the value of her chosen avenue for relief. If Petitioner's position is vindicated, then a portion of her Complaint will be resolved, as Petitioner could be awarded reinstatement and back pay through the grievance process.⁵⁴ This would effectively moot significant aspects of the remedies sought in Petitioner's Complaint.⁵⁵

Petitioner will not suffer any prejudice to her HRA rights by completing the grievance process. Upon exhausting her administrative remedies, Petitioner could seek statutory damages under the HRA. Equitable doctrines ensure Petitioner's right to pursue her claim

⁵⁴ See W. VA. CODE § 6C-2-3(c)(1)(2) (back pay); *W. Va. Alcohol Beverage Control Admin. v. Scott*, 205 W. Va. 398, 403, 518 S.E.2d 639, 644 (1999) (reinstatement).

⁵⁵ Petitioner specifically requested reinstatement and lost wages in her Complaint. See App. at 20.

following exhaustion. Petitioner is not deprived of any remedies. These principles promote the policies and purposes underlying the enactment of the WVPEG by providing public employees an alternative avenue for relief, not a “separate” avenue from relief as Petitioner urges. There is no basis at law or in equity to allow a public employee who has commenced the grievance process to abandon it, lest the exhaustion requirement be rendered meaningless. Petitioner chose to commence the grievance process, and she is simply required to complete the grievance before moving forward. This result is consistent with decades of precedent recognizing the importance and value of the administrative process. To ensure its continued relevance, the Circuit Court’s decision dismissing the action below should be affirmed.

V. CONCLUSION

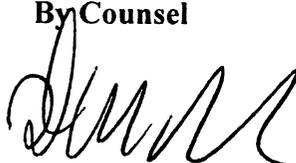
Exhaustion of administrative remedies is deeply rooted in West Virginia law. Petitioner asks this Court to create a new exception broad enough to consume the rule. If the exhaustion rule does not apply to a party who specifically commenced, but did not complete, the grievance process, in what sense does the exhaustion requirement survive? The Legislature’s promise to provide a fair, efficient, cost-effective and consistent alternative avenue for relief would be rendered meaningless. Rather than provide an effective alternative to a civil action, there is a legitimate threat that the grievance process could be abused to stall the resolution of employment-based disputes, as this Court has recognized before. This Court also has recognized that the administrative process cannot be thwarted by re-casting the same allegations as HRA claims in a separate civil action, and this Court should follow that precedent in this case. Accordingly, Respondents respectfully request that this Court affirm the decision below.

Respectfully submitted this 23rd day of April, 2013.

RESPONDENTS

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of April, 2013, I served the foregoing "**Brief of the Respondents**" upon counsel of record by e-mail and first class mail as follows:

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