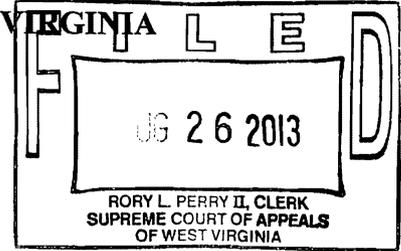


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



RON KING, "Fire Marshal/Code Official"
for the City of Nitro, DAVID A.
CASEBOLT, duly elected and serving
Mayor for the City of Nitro, and the CITY
OF NITRO, a municipal corporation and
political subdivision of the State of West
Virginia

Petitioners,

v.

NO. 13-0603

Appeal from a final order of the
Circuit Court of Kanawha County
(Civil Action No. 12-C-1716)

RICHARD A. NEASE and LORINDA
J. NEASE, husband and wife,

Respondent.

PETITIONERS' BRIEF

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ASSIGNMENTS OF ERROR

1. The lower court erred in ruling that the City of Nitro lacked the authority to enact an ordinance establishing a search, retrieval or compilation fee for documents requested pursuant to the Freedom of Information Act, W. Va. Code §§ 29B-1-1 *et. seq.*

STATEMENT OF THE CASE

I. Procedural History

The Respondents (Plaintiffs) below filed a civil action in the Circuit Court of Kanawha County, Civil Action No. 12-C-1716. The Complaint alleged, in relevant part, that the Petitioners (hereinafter referred to collectively as the “City of Nitro”) unlawfully denied the Respondents access to public records by stating that the records would only be provided if they paid a search fee to the City of Nitro.

The Respondents (Plaintiffs below) filed a Motion for Summary Judgment on this issue. By Order dated and entered April 25, 2013, the Circuit Court granted the Respondents’ Motion for Summary Judgment and held that the City of Nitro may **not** charge a search fee. The Court, in relevant part, ruled:

Based upon the foregoing, this Court concludes, as a matter of law, that defendants’ reliance on Nitro’s ordinance, as well as any similar ordinance, State rules, policies or procedures of other public bodies is misplaced. Further, Nitro lacked the authority to enact its ordinance establishing a search, retrieval or compilation fee and, therefore, the ordinance is unlawful and cannot be relied upon in defense of plaintiff’s FOIA action. As a result, and since plaintiffs are clearly entitled, this Court further concludes that plaintiff’s motion seeking final summary judgment should be granted, and that defendants’ motion to dismiss, or in the alternative, for summary judgment, should be denied. Joint Appendix (“JA”) Order, 0000012-0000013.

II. Statement of Facts

The City of Nitro has an ordinance governing requests made pursuant to the Freedom of

Information Act, W. Va. Code §§ 29B-1-1 *et. seq.* The ordinance imposes a fee for records that require more than ten (10) minutes to search or compile. (000003-000004). The fee is twenty five dollars (\$25.00) per hour or the actual cost, whichever is greater. City of Nitro Code, §113.7.1. The ordinance also establishes copying fees. There is no charge for ten (10) pages or less and twenty five cents (.25) for each page thereafter. Nitro City Code, §113.7.2(a)(b). (000003-000004)

The Respondents herein, Plaintiffs below, requested records from the City of Nitro. Some of the records were provided. Others were not as they would require significant staff time to locate and copy. In this regard, the City of Nitro informed the Plaintiffs below, “the remaining files Back (sic) to 2007 are paper & will be required to be manually pulled and copied. Please advise if you are willing to assume the expenses of an employee’s time and cost of photocopying.” (000003).

There was then some additional communications between the parties. They were unable to resolve the issue. (000003). The Plaintiffs commenced the underlying FOIA action on August 24, 2012.

SUMMARY OF ARGUMENT

The Freedom of Information Act, W. Va. Code § 29B-1-3(5), authorizes the City of Nitro and other public bodies to charge a search fee. The Act specifically states a “[P]ublic body may establish **fees** reasonably calculated to **reimburse** it for its **actual cost** in making reproductions of such records.” W. Va. Code § 29B-1-3(5). The actual cost of reproducing a document extends beyond the cost of owning and operating a copying machine, e.g. the cost of purchasing or leasing the machine, and the cost of electricity, toner and paper. Hence, the Legislature did not limit public bodies to charging a per page copying cost; instead, it authorized them to charge fees reasonably calculated to cover their actual costs. These actual costs include the cost of manpower necessary to locate responsive documents.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is appropriate in this case because it would aid the decisional process. Petitioners further assert that Rule 20 argument is appropriate in this case because the issue is one of first impression and impacts all public bodies in West Virginia.

ARGUMENT

The lower court erred in ruling that the City of Nitro lacked the authority to enact an ordinance establishing a search, retrieval or compilation fee for documents requested pursuant to the Freedom of Information Act, W. Va. Code §§ 29B-1-1 et. seq.

I. Standard of Review

The issue presented involves a question of law and statutory interpretation. Accordingly, it is subject to the de novo standard of review. State ex rel. Smith v. W. Va. Crime Victims Comp. Fund, No. 12-0117, 2013 W. Va. LEXIS 579 (W. Va. 2013), and Syl. pt. 1, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994).

II. The Freedom of Information Act authorizes public bodies to charge reasonable fees, including search fees.

A. Overview

The West Virginia Freedom of Information Act, W. Va. Code §§ 29B-1-1 et. seq. affords citizens access to public information. The City of Nitro recognizes the importance of providing access to information. Indeed, the Legislature has declared:

Pursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared to be the public policy of the State of West Virginia that all persons are, unless otherwise expressly provided by law, entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to

know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments of government they have created. To that end, the provisions of this article shall be liberally construed with the view of carrying out the above declaration of public policy.

W. Va. Code § 29B-1-1. Yet, the right to access is not an unfettered right. There is a cost associated with producing documents.

In balancing the right to access versus the cost, the Legislature had to make a policy decision regarding who would bear the cost of reproducing documents. If governing bodies were prohibited from charging fees, the cost would be borne by all West Virginia taxpayers through the imposition of higher taxes. Clearly the Legislature found this conclusion was not in the interest of the public coffers. Instead, it statutorily established a procedure whereby the cost is borne directly by the person who seeks the information.

To have statutorily established otherwise would interfere with the efficient operations of government and could result in significant costs to the taxpayers of this State. This result would particularly be unfair if out of State citizens or businesses were able to inundate public agencies in this State with requests for which West Virginia taxpayers would solely bear the financial burden.

B. The plain language in the Freedom of Information Act authorizes a public body to charge a search fee.

The plain language of the Freedom of Information Act, W. Va. Code §§ 29B-1-1 *et. seq.*, authorizes public bodies to charge reasonable fees, including search fees. The Freedom of Information Act, W. Va. Code § 29B-1-3, reads in relevant part:

(3) The custodian of any public records, unless otherwise expressly provided by statute, shall furnish proper and reasonable opportunities for inspection and examination of the records in his or her office and reasonable facilities for making memoranda or abstracts therefrom, during the usual business hours, to all persons having occasion to make examination of them. The custodian of the records may make reasonable rules and regulations necessary for the protection of the records and to prevent interference with the regular discharge of his or her duties. If the records requested exist in magnetic, electronic or computer form, the custodian of the records shall make such copies available on magnetic or electronic media, if so

requested.

...

(5) The public body may establish fees reasonably calculated to reimburse it for its actual cost in making reproductions of such records.

The Act clearly authorizes a public body to “establish fees” for “its actual cost in making reproductions of such records.” This authority extends to establishing fees which cover the actual cost of searching for documents, an integral and time consuming component of the reproduction process.

A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the Court but will be given full force and effect.” Syllabus Pt. 2, State v. Epperly, 135 W. Va. 877, 65 S.E.2d 488 (1951). Where the language of the statutory provision is plain, its terms should be applied as written and not construed. DeVane v. Kennedy, 205 W. Va. 519, 529, 519 S.E.2d 622, 632 (1999); and, Syllabus Pt. 5, State v. General Daniel Morgan Post No. 548, VFW, 144 W. Va. 137, 107 S.E.2d 353 (1959). Additionally, as a general matter, “the words of a statute are to be given their ordinary and familiar significance and meaning[.]”. AP v. Canterbury, 224 W. Va. 708, 688 S.E.2d 317 (2009), *citing* Amick v. C & T Dev. Co., Inc., 187 W. Va. 115, 118, 416 S.E.2d 73, 76 (1992).

In the Freedom of Information Act, the Legislature did not provide definitions for the words in question. In the absence of definitions, “meaning can be ascribed to such statutory language by referring to the common, ordinary, accepted meaning of the undefined terminology.” West Virginia Consolidated Public Retirement Bd. v. Weaver, 222 W. Va. 668, 675, 671 S.E.2d 673, 680 (2008). Stated another way, “[g]enerally the words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use.” Syl. Pt. 4, State v. General Daniel Morgan Post No. 548, V.F.W., 144 W. Va. 137, 107 S.E.2d 353 (1959).

When the plain language of the provision is given its ordinary meaning, it is clear that it authorizes the imposition of search fees. Black's Law Dictionary defines fee as "[a] charge fixed by law for services of public officers or for use of a privilege under control of government." BLACK'S LAW DICTIONARY (6th Ed. 2009). It defines the term "cost" as, "[e]xpense; price. The sum or equivalent expended, paid or charged for something." BLACK'S LAW DICTIONARY (6th Ed. 2009). It defines the term "production" as the "[p]rocess or act of producing." BLACK'S LAW DICTIONARY (6th Ed. 2009). Merriam Webster's Collegiate Dictionary defines the term "reproduction" as "the act or process of reproducing." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (11th Ed. 2004)

The use of the terms "fees" and "actual cost in making reproduction" plainly expresses a legislative intent and recognition that the costs which may be charged extend beyond the cost of operating a copying machine, e.g. the cost of toner, electricity and paper. Instead, the statute recognizes that the cost associated with reproducing documents includes the cost of manpower to search for and retrieve documents. Hence, the plain language of the Freedom of Information Act authorizes a governing body to charge a person requesting a document the actual cost incurred by the public body in reproducing the document. This actual cost includes search fees.

C. If the Court finds that the provision is susceptible to two or more interpretations, still, pursuant to the rules of statutory interpretation, the Freedom of Information Act authorizes a search fee.

Even if the Court finds that the plain language, standing alone, does not answer the question presented, i.e., whether a public agency may charge a search fee, the analysis does not stop there. If the Court finds that the plain language in the statute is ambiguous, then judicial interpretation of the statute is warranted. State ex rel. Smith v. W. Va. Crime Victims Comp. Fund, No., 12-0117, 2013 W. Va. LEXIS 579, *11 (W. Va. May 24, 2013). This Court has ruled "[a] statute is open to construction only where the language used requires interpretation because of ambiguity which

renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.” Hereford v. Meek, 132 W. Va. 373, 386, 52 S.E.2d 740, 747 (1949); Mace v. Mylan Pharmaceuticals, Inc., 227 W. Va. 666, 673, 714 S.E.2d 223, 229 (2011); *See also* Syl. Pt. 1, Ohio Cnty. Comm'n v. Manchin, 171 W. Va. 552, 301 S.E.2d 183 (1983) wherein this Court ruled “Judicial interpretation of a statute is warranted only if the statute is ambiguous and the initial step in such interpretative inquiry is to ascertain the legislative intent.”

The Freedom of Information Act and Acts of the Legislature interpreting it must be read together. This conclusion is consistent with the rule of statutory interpretation that "The intent of the legislature when a statute is found to be ambiguous may be gathered from statutes relating to the same subject matter--statutes in pari materia." State v. Epperly, 135 W. Va. 877, 881, 65 S.E.2d 488 (1951) *citing* Sutherland Statutory Construction, 3rd Edition, Horack, Vol. 2, Section 5201. Moreover, it is a rule of statutory construction that “A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.” Syl.Pt. 11, Rice v. Underwood, 517 S.E.2d 751, 762, 205 W. Va. 274, 285 (1998) *citing* Syllabus Point 5, State v. Snyder, 64 W. Va. 659, 63 S.E. 385 (1908); Syl. Pt. 1, State ex rel. Simpkins v. Harvey, 172 W. Va. 312, 305 S.E.2d 268 (1983), superseded by statute on other grounds as stated in State ex rel. Hagg v. Spillers, 181 W. Va. 387, 382 S.E.2d 581 (1989).” Syl. Pt. 2, State ex rel. Hall v. Schlaegel, 202 W. Va. 93, 502 S.E.2d 190 (1998).

The Legislature has expressed its intent regarding the provision in question through its adoption of Legislative Rules authorizing search fees. The West Virginia Code expressly states that a Legislative rule has the force of law. W. Va. Code § 29A-1-2. Two Legislative Rules, in reliance upon the Freedom of Information Act, authorize search fees.

The West Virginia Board of Osteopathy's Legislative Rule, W. Va. Code St. R. § 24-5-4 (2011), reads:

§ 24-5-4. Schedule of Fees For Services Rendered For the General Public.

4.1. Record Search Fee. -- \$ 30.00.

4.2. Copying of written or printed public records. -- no charge for 10 pages or less, \$ 0.75 for each page in excess of 10 pages.

...

Similarly, the West Virginia Bureau of Public Health's Legislative Rule, W. Va. Code St. R. § 64-51-4 (2010), reads in relevant part:

4.3. Fees for Copies of Public Records -- Copies of public records which may be disclosed shall be furnished at a charge of fifty cents (50¢) per page on 8½ x 11" or 8½ x 14" paper. Copies of documents produced on larger paper may be furnished at actual cost, which includes but is not limited to materials, operator's time, and transportation and delivery charges. Copying fees may be required to be paid before issuance of the copies.

4.4. Fee for Record Searches -- Requests for information estimated to require more than ten (10) minutes to search records or to compile may be charged at the rate of fifty dollars (\$50) per hour, and payment may be required before issuance of the information.

...

Both rules cite in their "Authority Clause" the provision of the Freedom of Information Act upon which the City of Nitro relied in adopting its ordinance, W. Va. Code § 29B-1-3(5). *See* W. Va. Code St. R. § 24-5-1 (2011) (Osteopathic Rule) citing W. Va. Code § 29B-1-3(5) and W. Va. Code St. R. § 64-51-1 (2010) (Bureau of Public Health Rule) citing the same.

The Legislature, through its formal approval of Legislative Rules authorizing search fees, has

expressed its intent that the Freedom of Information Act authorizes these fees. The ruling of the lower Court contradicts the Legislature's interpretation of its own statute.

As part of the rulemaking process, rules are reviewed by the Legislative Rule-Making Committee. W.Va. Code § 29A-3-10. The Legislature must then authorize an agency to adopt a rule before it becomes law. W.Va. Code § 29A-3-12. As part of this review the Legislature must determine:

(1) Whether the agency has exceeded the scope of its statutory authority in approving the proposed legislative rule;

(2) Whether the proposed legislative rule is in conformity with the legislative intent of the statute which the rule is intended to implement, extend, apply, interpret or make specific;

(3) Whether the proposed legislative rule conflicts with any other provision of this code or with any other rule adopted by the same or a different agency;

...

W. Va. Code § 29A-3-11(b) . As part of its review the Legislature is statutorily required to determine whether the rule conforms to the legislative intent of the statute it is intended to implement or interpret and whether it conflicts with any other provision in the code.

Once a disputed regulation is legislatively approved, it has the force of a statute itself. Being an act of the West Virginia Legislature, it is entitled to more than mere deference; it is entitled to controlling weight. As authorized by legislation, a legislative rule should be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious.

Men & Women Against Discrimination v. Family Prot. Servs. Bd., 229 W. Va. 55, 60, 725 S.E.2d 756, 2011 W. Va. LEXIS 38 (W. Va. 2011), citing Syl. Pt. 2, W. Va. Health Care Cost Review Auth. v. Boone Mem'l Hosp., 196 W. Va. 326, 472 S.E.2d 411 (1996).

The Legislature in approving the cited rules had to specifically consider whether they were in conformed with the legislative intent of the Freedom of Information Act or conflicted with any other

provision of the code. In conducting this review, the Legislature found they did not. Hence the same body which created the Freedom of Information Act has expressly passed Legislative Rules which authorize search fees.

In reading the Freedom of Information Act in *pari materia* with subsequent acts of the Legislature, it must be construed as authorizing public bodies to include search fees as part of the fees it charges for the actual costs of reproducing records. This conclusion is also consistent with language in the Freedom of Information Act authorizing the custodian of public records to “make reasonable rules and regulations necessary...to prevent interference with the regular discharge of his or her duties.” W. Va. Code § 29B-1-3(3). This Court in interpreting statutory provisions had declared, “In the construction of a legislative enactment, the intention of the legislature is to be determined, not from any single part, provision, section, sentence, phrase or word, but rather from a general consideration of the act or statute in its entirety.” “State ex rel. Smith v. W. Va. Crime Victims Comp. Fund, 2013 W. Va. LEXIS 579, 16, 2013 WL 2302057 (W. Va. May 24, 2013) *citing* Parkins v. Londeree, 146 W.Va. 1051, 124 S.E.2d 471 (1962)..”

A voluminous records request may require a public body to use significant resources to respond to the same. By authorizing public bodies to adopt reasonable rules whereby a reasonable fee is charged to citizens or businesses who request records, a public bodies guards against a Freedom of Information Act request interfering with its abilities to serve the public through the discharge of its day-to-day statutory duties.¹

Last, the statute uses the term “fees”. It is a rule of statutory construction “that the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning.” State ex rel. Johnson v. Robinson, 162 W. Va. 579, 584, 251 S.E.2d 505 (1979). The

¹ W. Va. Code § 29B-1-2(1) defines “Custodian” as “the elected or appointed official charged with

rules of statutory interpretation provide:

(a) A word importing the singular number only may be applied to several persons or things, as well as to one person or thing; a word importing the plural number only may be applied to one person or thing as well as to several; and a word importing the masculine gender only may be applied to females as well as males.

...

W.Va. Code § 2-2-10(a). This rule must be applied unless a different intent of the Legislature is apparent from the context. W.Va. Code § 2-2-10. The plural form must be given its intended effect.

The Legislature chose the term “fees.” It is evident the Legislature contemplated that more than one fee may be necessary to reimburse a public body for its actual cost. In this case, the **fees** established by the ordinance consist of a photocopying fee and a search fee. There is nothing apparent about the context in which this plural term is used in the Freedom of Information Act which indicates a Legislative intent that public bodies be restricted to charging one fee which only covers the cost of photocopying. Instead, the plain meaning must be applied. It authorizes the imposition of all fees necessary for a public body to recoup its actual cost in reproducing documents. The actual cost of reproducing includes personnel cost for searching.

CONCLUSION

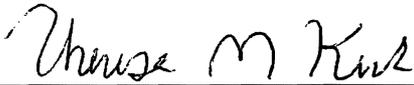
Relying upon the plain language in the Freedom of Information Act the City of Nitro passed a valid ordinance imposing reasonable fees for responding to a FOIA request. The ordinance, including the provision establishing a search fee, is consistent with the plain language of the Freedom of Information Act and the Legislature’s intent. For all the foregoing reasons, the

administering a public body.

Petitioners respectfully request that this Honorable Court reverse the decision of the Circuit Court of Kanawha County and to enter judgment for the City of Nitro.



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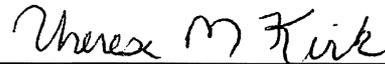
CERTIFICATE OF SERVICE

The undersigned, counsel of record for Petitioners, do hereby certify on this **26th** day of **August, 2013**, that a true copy of the foregoing "**PETITIONERS' BRIEF**" and its "**Appendix**" were served upon opposing counsel by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

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