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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Nos. 18-0929 and 18-0932

DIVISION OF HIGHWAYS, and
TERRA GOINS,
Petitioners,

v

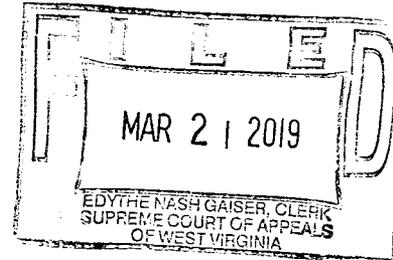
MICHAEL POWELL,
Respondent.

And

DIVISION OF HIGHWAYS,
Petitioner,

v.

MICHAEL POWELL,
Respondent.



BRIEF OF DIVISION OF HIGHWAYS

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TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIESii

I. ASSIGNMENTS OF ERROR..... 1

II. STATEMENT OF THE CASE 1

III. SUMMARY OF ARGUMENT.....4

IV. STATEMENT REGARDING ORAL ARGUMENT6

V. STANDARD OF REVIEW.....6

VI. ARGUMENT6

VII. CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Appalachian Power Co. v. Public Serv. Comm'n of West Virginia, 170 W.Va. 757, 296 S.E.2d 887 (1982).....	13
Armstrong v. W.Va. Div. of Culture and History, 229 W.Va. 538, 729 S.E.2d 860 (2012).....	7
Belcher v. Dynamic Energy, Inc., 240 W. Va. 391, 813 S.E.2d 59 (2018).....	11
Darby v. Kanawha Co. Bd. of Educ., 227 W. Va. 525, 529, 711 S.E.2d 595, 599 (2011).....	6, 11
Lewis Co. Bd. of Educ. v. Holden, 234 W. Va. 666, 769 S.E. 2d 282 (2015).....	9
Mowery v. Hitt, 155 W. Va. 103, 181 S.E.2d 334 (1971).....	11
Sands v. Security Tr. Co., 143 W. Va. 522, 102 S.E.2d 733 (1958).....	11
State ex rel. Barker v. Manchin, 167 W. Va. 155, 279 S.E.2d 622 (1981).....	13
State v. Clark, 232 W. Va. 480, 752 S.E.2d 907 (2013).....	13

STATE RULES

W. Va. Code R. 156-1-3(3.1)	12
West Virginia Code § 6C-2-3(a)(1).....	7, 9, 12
West Virginia Code § 6C-2-4(a)(1).....	6, 7, 9, 12
West Virginia Code § 6C-2-5	5, 9, 10, 13

I. ASSIGNMENTS OF ERROR

- A. THE ADMINISTRATIVE LAW JUDGE CORRECTLY DECIDED THAT PETITIONER'S GRIEVANCE WAS NOT FILED WITHIN THE FIFTEEN-DAY STATUTORY PERIOD FOR FILING GRIEVANCES, AND THE CIRCUIT COURT ERRED IN REVERSING THE DECISION OF THE ADMINISTRATIVE LAW JUDGE.
- B. EVEN IF THE ADMINISTRATIVE LAW JUDGE ERRED IN DISMISSING THE GRIEVANT'S CLAIM AS UNTIMELY, THE CIRCUIT COURT ERRED IN DECIDING THE CASE ON THE MERITS AND AWARDING THE GRIEVANT A PROMOTION, RATHER THAN REMANDING THE CASE TO THE PUBLIC EMPLOYEES GRIEVANCE BOARD.
1. THE CIRCUIT COURT'S ORDER VIOLATES WEST VIRGINIA CODE § 6C-2-5 BECAUSE THE CIRCUIT COURT WAS ONLY AUTHORIZED TO REVERSE, VACATE OR MODIFY THE ADMINISTRATIVE LAW JUDGE'S DECISION DISMISSING THE CLAIM ON STATUTORY GROUNDS, NOT ISSUE A DECISION ON THE MERITS.
 2. THE CIRCUIT COURT'S ORDER VIOLATES THE PRECEDENT OF THIS COURT THAT APPELLATE COURTS SITTING IN REVIEW OF TRIAL COURTS SHOULD NOT DECIDE NONJURISDICTIONAL QUESTIONS WHICH WERE NOT DECIDED BY THE TRIAL COURT IN THE FIRST INSTANCE.
 3. THE CIRCUIT COURT'S ORDERING THE DIVISION OF HIGHWAYS TO PROMOTE GRIEVANT THE POSITION OF HIGHWAY ENGINEER FOR DISTRICT 10 IS CONTRARY TO THE RECORD AND VIOLATES THE SEPARATION OF POWERS DOCTRINE.

II. STATEMENT OF THE CASE

One February 23, 2015, the West Virginia Division of Highways ("DOH") posted DOT 1501037 for a vacancy in the Highway Engineer classification. *See ALJ's Dismissal Order at AR Vol. I, 0050.* The deadline for applying for that position was March 4, 2015. *Id.* Four or five individuals applied for the position and were interviewed on April 14, 2015, including Michael

Powell, Terra Goins and Josh Anderson. *See ALJ's Dismissal Order at AR Vol. I, 0050 and Level Three Transcript at 075:20–076:1.* On June 29, 2015, Mr. Powell was notified that he was not selected for the Highway Engineer position. *See ALJ's Dismissal Order at AR Vol. I, 0050.* Mr. Powell learned shortly thereafter that Ms. Goins had been selected for the position. *Id.*

On November 4, 2015, Ms. Goins and Mr. Powell met at a Division of Highways field office. *Id.* During the meeting Mr. Powell questioned Ms. Goins about her work experience history. *Id.* As a result of that meeting, Mr. Powell came to believe that Ms. Goins' work experience did not meet the minimum qualifications for the Highway Engineer position. *Id. at 0050-0051.*

On November 18, 2015, Mr. Powell filed a Grievance Form, stating the following:

<p>Statement of Grievance. The successful applicant for posting DOT 1501037 did not meet the requirements detailed in the posting and should not have granted the position.</p> <p>Relief Sought. To be placed in the position with back pay for the salary increase.</p>

Mr. Powell's Grievance at AR Vol. I, 006.

The level one grievance evaluator informed Ms. Goins that she had a right to intervene in the grievance. *ALJ's Dismissal Order at AR Vol. I, 0048.* Ms. Goins was granted intervenor status by Order entered on December 8, 2015. *Id. and AR Vol. I, 141.* A level one conference was held on Mr. Powell's grievance on December 10, 2015. *ALJ's Dismissal Order at AR Vol. I, 0048.* On December 15, 2015, a level one decision was issued, finding that Mr. Powell's grievance was not timely filed. *Id. and AR Vol. I, 197-98.*

Mr. Powell appealed to level two by form dated December 31, 2015. *ALJ's Dismissal Order at AR Vol. I, 0048.* On March 8, 2016, DOH moved to dismiss Mr. Powell's grievance as untimely filed. *AR Vol. I, 197-98.* On June 3, 2016, Mr. Powell appealed to level three – before

the Public Employees Grievance Board. *Id.* A level three hearing was conducted in Beckley, West Virginia, on October 14, 2016. *ALJ's Dismissal Order at AR Vol. I, 0049.*

During the October 14, 2016 hearing, Administrative Law Judge McGinley heard from four witnesses: Michael Powell, Terra Goins, Kristin Shrewsbury and Stephen Rumbaugh. Kristin Shrewsbury, the Human Resource Manager for DOH District 10, testified that in addition to Michael Powell and Terra Goins, two or three other candidates were interviewed for the Highway Engineer position, including Josh Anderson. *AR Vol. II, 0059-0060, 0075-0076.* Josh Anderson is the current Bridge Engineer for District 10. *AR Vol. II, 0075.* Stephen Rumbaugh, the Deputy State Highway Engineer of Construction and Development, testified that from the candidates that were interviewed, DOH chose two of the candidates – Terra Goins and Josh Anderson – as the “top two candidates.” *Id. at 126-127.* Mr. Rumbaugh testified that the two candidates were “basically equal[.]” *Id. at 126.*

On February 8, 2017, the ALJ granted DOH's motion to dismiss Mr. Powell's grievance on statute of limitations grounds. *ALJ's Dismissal Order at AR Vol. I, 0048-0057.* In his *Dismissal Order*, the ALJ found that Mr. Powell's grievance was filed beyond the statutory limitations period and dismissed Mr. Powell's grievance on that basis alone. The ALJ made no findings or conclusions regarding the job qualifications (relative or otherwise) of Mr. Powell or Ms. Goins. Mr. Powell then appealed the ALJ's *Dismissal Order* to the Circuit Court of Kanawha County, West Virginia, on March 8, 2017. *AR Vol. I, 0059.*

On June 28, 2017, Judge Joanna Tabit held a hearing on the appeal. **Circuit Court Order at AR Vol. I, 001.** The circuit court entered its Order on September 19, 2018. *Id.* In its Order, the circuit court acknowledged that the underlying grievance was dismissed by the ALJ because Mr. Powell did not timely file his grievance. *Id. at 002.* The circuit court reversed that finding,

and held that Mr. Powell “was justified in filing his grievance within fifteen days of learning from [Ms. Goins] that she did not meet the minimum qualifications.” *Id.* at 004-005. The circuit court further held that (a) that Mr. Powell “established his qualifications for the position of Highway Engineer[,]” (b) that Mr. Powell “established the lack of qualifications by . . . Terra Goins[,]” (c) that Mr. Powell “was improperly denied the position of Highway Engineer,” and (d) that Mr. Powell “should be awarded this position as soon as is practicable[.]” *Id.* at 004. The circuit court ordered that the case be remanded to the ALJ “for a calculation of [Mr. Powell’s] back pay and an award of attorney fees, if any, to which [Mr. Powell] is entitled.” *Id.*

On October 2, 2018, DOH filed a *Motion for Stay Pending Application for Appeal* of the circuit court’s September 19, 2018 Order. **AR Vol. I, 235.** The circuit court granted DOH’s motion by Order entered on October 3, 2018. **AR Vol. I, 246.**

Both DOH and Ms. Goins filed notices of appeal of the circuit court’s Order on October 19, 2018. The two appeals were consolidated by this Court on February 14, 2019.

III. SUMMARY OF ARGUMENT

The ALJ correctly decided that Mr. Powell’s grievance was time-barred under West Virginia Code §§ 6C-2-3(a)(1) and 6C-2-4(a)(1). Under those sections, employee grievances must be filed within 15 days of the event upon which the grievance is based, or within 15 days of the days of the event becoming known to the employee. The ALJ correctly found that the “event” that Mr. Powell grieves is the DOH’s hiring Ms. Goins for the Highway Engineer position, which he knew about approximately four months prior to filing his grievance. The circuit court erred in finding that the event was Mr. Powell’s “discovery” that DOH failed to properly vet Ms. Goins to learn that she was allegedly not qualified for the Highway Engineer position. The circuit court has taken one discrete event – hiring Ms. Goins – and attempted to “split hairs” to turn that one event

into multiple events. The event happened one time – when Ms. Goins was hired – and the circuit court erred as a matter of law in finding otherwise.

If the “event” was DOH’s failure to follow proper procedure in hiring Ms. Goins, the relief Mr. Powell should seek is for DOH to re-post the District 10 Highway Engineer position – and follow the correct procedure. Instead, Mr. Powell seeks for Ms. Goins to be demoted from the Highway Engineer position and to be appointed to the position himself – instead of the individual who was the other finalist for the position: Josh Anderson. Because Mr. Powell wants the position for himself, any alleged procedural flaw is simply a red herring. As the ALJ correctly found, the date Mr. Powell learned that he was not appointed Highway Engineer was the event from which he should have grieved, and he did not do so timely.

Even if the circuit court was correct that the discovery rule tolled Mr. Powell’s grievance deadline, the circuit court erred in awarding Mr. Powell the Highway Position for a number of reasons. First, the circuit court was required to follow the procedure set forth in West Virginia Code § 6C-2-5, which directs the circuit court to “reverse, vacate or modify the decision of the administrative law judge, or may remand the grievance to the administrative law judge or the chief administrator for further proceedings.” The ALJ dismissed the grievance on statute of limitations grounds, but the circuit court did not reverse or modify the ALJ’s decision – it decided the case on the merits. Under Section 6C-2-5, the circuit court was not authorized to decide the merits of the case in the first instance. Second, the circuit court violated fundamental appellate review doctrine by deciding a case on the merits that had been dismissed. Third, the circuit court erred in awarding the Highway Engineer position to Mr. Powell when the record was clear that Josh Anderson would have been chosen for the position if not for Ms. Goins. Finally, the circuit court’s awarding the

Highway Engineer position to Mr. Powell violates the separation of powers doctrine because the judiciary should not appoint individuals to executive branch positions.

IV. STATEMENT REGARDING ORAL ARGUMENT

The Division of Highways requests a Rule 20 Oral Argument in this case because it involves fundamental issues regarding when grievances must be filed under West Virginia Code §§ 6C-2-3(a)(1) and 6C-2-4(a)(1) and the power of circuit courts to exceed their appellate review authority in state employee grievances.

V. STANDARD OF REVIEW

“[The Supreme] Court reviews decisions of the circuit court under the same standard as that by which the circuit court reviews the decision of the ALJ.” *Darby v. Kanawha Co. Bd. of Educ.*, 227 W. Va. 525, 529, 711 S.E.2d 595, 599 (2011). The standard of review on appeal is well-settled:

Grievance rulings involve a combination of both deferential and plenary review. Since a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. Credibility determinations made by an administrative law judge are similarly entitled to deference. Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed *de novo*.

Syl. Pt. 1, *Id.* This Court has also held that:

. . . a final order of the hearing examiner for the West Virginia [Public] Employees Grievance Board, made pursuant to W. Va. Code, [6C-2-1], et seq. [], and based upon findings of fact, should not be reversed unless clearly wrong.

Syl. Pt. 3, *Armstrong v. W. Va. Div. of Culture and History*, 229 W. Va. 538, 729 S.E.2d 860 (2012).

VI. ARGUMENT

This case involves an issue of high importance to DOH: who is the Construction Engineer for District 10 (Mercer, McDowell, Raleigh and Wyoming counties). DOH hired Terra Goins for that position in 2015, and she remains the District 10 Construction Engineer. She has held that

position for more than three years. Ms. Goins's work is critical to DOH's progress on important Roads-to-Prosperity projects that are ongoing in District 10. Those projects would experience a great disruption if Ms. Goins were suddenly removed from her position. **AR Vol. I, 240.**

Mr. Powell seeks to use the judicial branch to appoint him to Ms. Goins' position – and for Ms. Goins to be demoted – despite Mr. Powell having been interviewed for the position and not having been one of the top two choices. **AR Vol. II, 126.** Josh Anderson, the District 10 Bridge Engineer, was the other finalist for the position, along with Ms. Goins. Thus, even assuming Ms. Goins is demoted from Construction Engineer to another position, the record does not support Mr. Powell being judicially awarded that position.

A. THE ADMINISTRATIVE LAW JUDGE CORRECTLY DECIDED THAT PETITIONER'S GRIEVANCE WAS NOT FILED WITHIN THE FIFTEEN-DAY STATUTORY PERIOD FOR FILING GRIEVANCES, AND THE CIRCUIT COURT ERRED IN REVERSING THE DECISION OF THE ADMINISTRATIVE LAW JUDGE.

The West Virginia Code requires that employees file grievances within 15 days of the event upon which their grievance is based. West Virginia Code § 6C-2-3(a)(1) states that “[a]n employee shall file a grievance within the time limits specified in this article.” West Virginia Code § 6C-2-4(a)(1) states, in relevant part, that “[w]ithin fifteen days following the occurrence of the **event** upon which the grievance is based, or within fifteen days of the date upon which the **event** became known to the employee . . . an employee may file a written grievance[.]” (emphasis added).

The ALJ found that “the event giving rise to the grievance was the filling of the vacancy for Highways Engineer” which Mr. Powell was notified of on June 29, 2015. ***ALJ's Dismissal Order at AR Vol. I, 0053.*** The ALJ rejected Mr. Powell's reliance on the “discovery rule” because he “was aware of the identity of the successful applicant shortly after he was notified that he did not receive the position but made no attempt to investigate their comparative qualifications and

there is no evidence that [DOH] wrongfully withheld that information from him.” *Id.* In its order, the circuit court reversed the ALJ, concluding that the “event” was “the Division of Highways’ employees [failure] to properly perform their duties of evaluating and vetting applicants for the [Construction Engineer] position.” **Circuit Court Order at AR Vol. I, 003-004.**

The DOH’s decision to promote Ms. Goins, to not promote Mr. Powell, and DOH’s alleged failure to vet Ms. Goins are all the same transaction. It is undisputed that Mr. Powell knew who DOH hired for the position four months before he filed his grievance. Learning that DOH may not have followed certain guidelines is simply not a separate “event.” If Mr. Powell believed he was the most qualified candidate, he should have filed a grievance within 15 days of learning that he did not receive the promotion. Instead, months later, Mr. Powell questioned Ms. Goins about her qualifications for the position in an apparent attempt to manufacture a reason for the DOH to reconsider his application. If unsuccessful job candidates are permitted to question successful candidates about their promotions for an indefinite period of time afterward, there is simply no end to either the hiring process or the grievance process. As this court has noted previously, grievants should not be permitted to prolong the grievance process by their own volition by requesting reconsideration of already-decided issues. *See Lewis Co. Bd. of Educ. v. Holden*, 234 W. Va. 666, 674, 769 S.E. 2d 282, 290 (2015) (“Holden’s position would allow a grievant to prolong the grievance process at his/her will by requesting reconsideration of already-decided issues. This result would render the fifteen-day deadline for filing a grievance meaningless.”). Because the event upon which Mr. Powell’s grievance is based is DOH’s decision to promote Ms. Goins, his grievance is time-barred, and the circuit court erred in holding otherwise.

Additionally, if Mr. Powell’s grievance is based solely on DOH’s alleged failure to follow hiring protocols, then the relief he should seek is the re-posting of the position for DOH to

reconsider all applicants. Instead, Mr. Powell seeks the job for himself. Mr. Powell's requested relief is telling. Because the event is the promotion of Ms. Goins, his grievance is time-barred.

For all these reasons, the ALJ correctly decided that Mr. Powell's grievance is time-barred under West Virginia Code §§ 6C-2-3(a)(1) and 6C-2-4(a)(1). Therefore, the circuit court's order must be reversed.

B. EVEN IF THE ADMINISTRATIVE LAW JUDGE ERRED IN DISMISSING THE GRIEVANT'S CLAIM ON STATUTE OF LIMITATIONS GROUNDS, THE CIRCUIT COURT ERRED IN DECIDING THE CASE ON THE MERITS AND AWARDING THE GRIEVANT A PROMOTION, RATHER THAN REMANDING THE CASE TO THE PUBLIC EMPLOYEES GRIEVANCE BOARD.

In the alternative, if this court concludes that the circuit court correctly reversed the ALJ's decision that Mr. Powell's grievance was time-barred, the circuit court erred when it decided the grievance on the merits instead of remanding the grievance to the ALJ for further proceedings.

1. THE CIRCUIT COURT'S ORDER VIOLATES WEST VIRGINIA CODE § 6C-2-5 BECAUSE THE CIRCUIT COURT WAS ONLY AUTHORIZED TO REVERSE, VACATE OR MODIFY THE ADMINISTRATIVE LAW JUDGE'S DISMISSAL OF THE CLAIM ON STATUTORY GROUNDS, NOT ISSUE A DECISION ON THE MERITS.

The circuit court's authority to review the ALJ's decision is set forth in West Virginia Code § 6C-2-5. That section of the Code states, in relevant part, that:

(b) A party may appeal the decision of the administrative law judge[.];

...

(d) The court shall review the entire record that was before the administrative law judge, and the court may hear oral arguments and require written briefs. The court may reverse, vacate or modify the decision of the administrative law judge, or may remand the grievance to the administrative law judge or the chief administrator for further proceedings.

The circuit court has exceeded its authority in this case. In exercising its statutory appellate jurisdiction, the circuit court was limited to (1) reversing the ALJ's decision, (2) vacating the ALJ's decision, (3) modifying the ALJ's decision and/or (4) remanding the grievance to the ALJ.

The ALJ's only holding in his dismissal order was that Mr. Powell's grievance was not timely-filed. The ALJ did not address the merits of Mr. Powell's claim that Ms. Goins was not qualified for the Highway Engineer position. When the circuit court reversed the ALJ's decision, it went on to decide the case on the merits and conclude Ms. Goins was not qualified for the position – and that Mr. Powell should be promoted to that position. The circuit court went beyond simply modifying the ALJ's decision: it issued a decision wholly separate from the ALJ's decision. The circuit court, however, was prohibited by Section 6C-2-5 from deciding the case on the merits before the ALJ had the opportunity to do so. Rather, the circuit court was statutorily required to remand the grievance to the ALJ for further proceedings. The circuit court's order should be reversed for that additional reason.

2. THE CIRCUIT COURT'S ORDER VIOLATES THE PRECEDENT OF THIS COURT THAT APPELLATE COURTS SITTING IN REVIEW OF TRIAL COURTS SHOULD NOT DECIDE NONJURISDICTIONAL QUESTIONS WHICH WERE NOT DECIDED BY THE TRIAL COURT IN THE FIRST INSTANCE.

If the circuit court had remanded the grievance, Judge McGinley, who saw and heard the parties' witnesses, could have decided whether Mr. Powell should have been awarded the promotion instead of Ms. Goins. When the circuit court decided these issues on its own, it ceased to act as an appellate court and became a court of original jurisdiction, which is contrary to this court's precedent. *Darby v. Kanawha Co. Bd. of Educ.*, 227 W. Va. at 529, 711 S.E.2d at 599 (circuit courts are to be appellate courts which review the decisions of the ALJ). This Court, sitting in review of the circuit courts, has held that it "will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance." Syl. pt. 2, *Sands v. Security Tr. Co.*, 143 W. Va. 522, 102 S.E.2d 733 (1958). See also Syl. pt. 1, *Mowery v. Hitt*, 155 W. Va. 103, 181 S.E.2d 334 (1971) ("In the exercise of its appellate jurisdiction, this Court will not decide

nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken.”). In *Belcher v. Dynamic Energy, Inc.*, 240 W. Va. 391, 406, 813 S.E.2d 44, 59 (2018), the Court stated that for nonjurisdictional matters “the facts of which have not been fully developed before the circuit court and the merits of which have not been determined by that tribunal, we conclude that our consideration of and resolution of th[ese] issue[s] is premature at this time.” The *Belcher* court remanded the case to the circuit court to decide the claims in that case. *Id.*

Here, because the ALJ never addressed the merits of Mr. Powell’s claim, the circuit court – acting as an appellate court – should have remanded the case to the ALJ for a decision on the merits, rather than itself acting as the finder of fact.

3. THE CIRCUIT COURT’S ORDERING THE DIVISION OF HIGHWAYS TO PROMOTE GRIEVANT THE POSITION OF HIGHWAY ENGINEER FOR DISTRICT 10 IS CONTRARY TO THE RECORD AND VIOLATES THE SEPARATION OF POWERS DOCTRINE.

The circuit court’s decision to award Mr. Powell the position of Highway Engineer for District 10 was also both contrary to the record and a usurpation of the DOH’s right to select its own employees. The uncontradicted testimony before the ALJ was that DOH interviewed four or five candidates for the Highway Engineer position, and that Terra Goins and Josh Anderson were the top two candidates. Thus, even assuming Mr. Powell’s grievance was filed timely, the record does not support a finding that Mr. Powell should be awarded the position before Mr. Anderson.

Again, the relief that Mr. Powell seeks in this case is “[t]o be placed in the [Highway Engineer] position with back pay for the salary increase.” Mr. Powell is required to prove that he is entitled to this relief by a preponderance of the evidence. W. Va. Code R. 156-1-3(3.1) (“The grievant bears the burden of proving the grievant’s case by a preponderance of the evidence[.]”).

Because Mr. Powell failed to prove that he was entitled to the Highway Engineer position, the circuit court erred in awarding him that position.

Finally, the circuit court's *sua sponte* judicial appointment of Mr. Powell to the Highway Engineer position is a clear violation of the Article V, § 1 of the Constitution of West Virginia ("The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature."). "Article V, section 1 of the Constitution . . . is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed." Syl. Pt. 1, in part, *State ex rel. Barker v. Manchin*, 167 W. Va. 155, 279 S.E.2d 622 (1981). "The separation of powers doctrine implies that each branch of government has inherent power to 'keep its own house in order,' absent a specific grant of power to another branch[.]" *State v. Clark*, 232 W. Va. 480, 498, 752 S.E.2d 907, 925 (2013); Syl. pt. 2, *Appalachian Power Co. v. Public Serv. Comm'n of West Virginia*, 170 W.Va. 757, 296 S.E.2d 887 (1982) ("Where there is a direct and fundamental encroachment by one branch of government into the traditional powers of another branch of government, this violates the separation of powers doctrine contained in Section 1 of Article V of the West Virginia Constitution."). Simply put, the circuit court cannot judicially award Mr. Powell the District 10 Highway Engineer position consistent with the Constitution of West Virginia, and it should have at least remanded the case to the ALJ to decide the case on the merits. For that additional reason, the circuit court's order must be reversed.

VII. CONCLUSION

The circuit court erred in reversing the ALJ's decision that Mr. Powell's grievance was time-barred under West Virginia Code §§ 6C-2-3(a)(1) and 6C-2-4(a)(1). Mr. Powell's argument

that his grievance is based on a faulty hiring procedure is a red herring. In this proceeding, Mr. Powell seeks to be appointed as the District 10 Highway Engineer, and he was aware that he did not receive that position approximately four months before he filed his grievance. Thus, the grievance is time-barred.

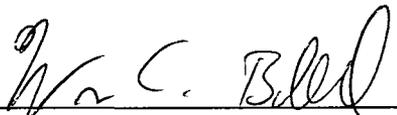
Even if Mr. Powell's grievance is not time-barred, the circuit court nevertheless erred because it is statutorily prohibited by West Virginia Code § 6C-2-5 from deciding grievances on the merits before the ALJ rules. The circuit court also erred doctrinally because, sitting as an appellate court, it should not have decided the merits of the grievance (which was dismissed on statute of limitations grounds) in the first instance. Finally, the circuit court's award of the Highway Engineer position to Mr. Powell was both contrary to the record developed by the ALJ and Section 1 of Article V of the West Virginia Constitution.

For all of these reasons, and those set forth below, this Court should reverse the circuit court's order.

Respectfully Submitted,

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