

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

State of West Virginia ex rel Belinda Biafore *et al*,

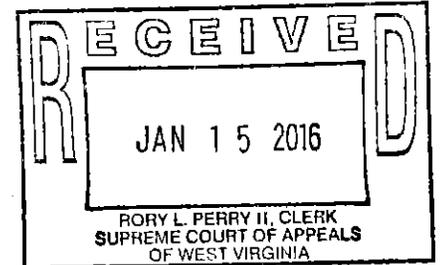
Petitioners,

v.

No. 16-0013

Earl Ray Tomblin, et al

Respondents.



**Amicus Curiae Brief by the West Virginia AFL-CIO and the West Virginia State Building and Construction Trades Council, AFL-CIO for Leave of the Court to file an Amicus Curiae Brief**

Submitted by

Vincent Trivelli, Esq. (WVSB #8015)  
*Counsel for the West Virginia Building  
and Construction Trades Council*  
The Law Office of Vincent Trivelli, PLLC  
178 Chancery Row  
Morgantown, WV 26506  
(304) 291-5223

Thomas P. Maroney, Esq. (WVSB #2326)  
*Counsel for the West Virginia AFL-CIO*  
Maroney Williams Weaver  
& Pancake PLLC  
608 Virginia Street, East  
Charleston, WV 25301  
(304) 3469629

**Table of Contents**

Table of Contents.....2  
Table of Authorities.....2  
Statement of the Identity of the Amicus Curiae .....3  
Argument.....3  
    • Overarching Duties, Responsibilities and Rights.....4  
    • The Governor.....7  
    • The Wording of the Statute .....8  
Certificate of Service .....10-11

**Table of Authorities**

**Cases**

*Affiliated Constr. Trades Found. v. Stucky*  
229 W. Va. 408; 729 S.E.2d 243 (2012) .....3  
*Affiliated Construction Trades Foundation*  
*v. The University of West Virginia Board of Trustees*  
557 S.E.2d 863, 210 W.Va. 456 (2001) .....3, 4  
*Affiliated Constr. Trades Found. v. W. Va. DOT*  
227 W. Va. 653; 713 S.E.2d 809 (2011) .....3  
*Appalachian Power Co. v. State Tax Department*  
195 W.Va. 573, 466 S.E.2d 424 (1995) .....8  
*Hardy County v. West Virginia Division of Labor*  
445 S.E.2d 192, 191 W.Va. 251 (1994) at Syllabus Point 2” .....7  
*State ex rel Tucker County Solid Waste Authority*  
*v. West Virginia Division of Labor*  
668 S.E.2d 216, 222 W.Va. 588 (2008) .....3

**Statutes**

West Virginia Code §3-10-5.....6, 8

Now comes the West Virginia AFL-CIO and the West Virginia State Building and Construction Trades Council, AFL-CIO (hereinafter collectively referred to as the “AFL/Building Trades) by counsel<sup>1</sup>, and pursuant to Rule 30 of the Rules of Appellate Procedure provisionally files this Amicus Curiae Brief in this matter and in support thereof states the following:

#### **Statement on Identity of Amicus Curiae**

The AFL/Building Trades/ACT are entities that represent approximately tens of thousands of workers in West Virginia and surrounding states. As discussed in the accompanying Motion the AFL/Building Trades have a direct and substantial interest in the instant matter and have a long history of participation in civil actions regarding the prevailing wage (including: *Affiliated Construction Trades Foundation v. University of West Virginia Board of Trustees*, 557 S.E.2d 863, 210 W.Va. 456 (2001); *State ex rel Tucker County Solid Waste Authority v. West Virginia Division of Labor*, 668 S.E.2d 216, 222 W.Va. 588 (2008); *Affiliated Constr. Trades Found. v. W. Va. DOT* 227 W. Va. 653: 713 S.E.2d 809 (2011) and *Affiliated Constr. Trades Found. v. Stucky*, 229 W. Va. 408; 729 S.E.2d 243 (2012))

#### **Argument**

The AFL/Building Trades have reviewed the Emergency Petition in this manner and concurs with the Petition in all respects. The AFL/Building Trades therefore will not

---

<sup>1</sup> The undersigned, Thomas P. Maroney and Vincent Trivelli, counsel for the West Virginia AFL-CIO and the West Virginia Building and Construction Trades Council, are the sole authors of this brief. Counsel for a party did not author this brief in whole or in part. No monetary contribution was made by a party or any group or individual other than the amicus curiae to fund, in whole or in part the preparation of this brief.

repeat those arguments herein. The AFL/ Building Trades however will briefly discuss a few key points.

***Overarching Duties, Responsibilities and Rights***

The instant matter is a primarily a matter of statutory interpretation. As such it is important to note the breath of this Court's holdings in this area regarding the importance of looking to upholding the duties, responsibilities and rights West Virginia Legislature intended in enacting the statute at issue. When one applies these holdings to the instant matter the rights of the voters not the whim of an individual should prevail.

In *Affiliated Construction Trades Foundation v. The University of West Virginia Board of Trustees* (557 S.E.2d 863, 210 W.Va. 456 (2001)), this Court considered a situation where the Circuit Court had ruled that prevailing wage did not apply to the construction of a new WVU building because the project had not been bid and a public agency did not sign the contract for construction. In that matter, the Circuit Court looked to statutory interpretation for support. In response this Court held that, while certainly the language of the statute was one step in an analysis, it was not the only step. This Court held that statutory language was the starting point and the legislative intent underlying the statute is a critical second step of any statutory analysis. This Court stated:

In making its summary judgment ruling, the lower court, consistent with established principles of statutory interpretation, looked to the language of the statutes to resolve the laborer-related issues of wages and bidding. *See In re Greg H.*, 208 W.Va. 756, 760, 542 S.E.2d 919, 923 (2000) (stating that "[i]n interpreting a statute, the initial focus is, of course, upon the statutory language itself"); *accord Maikotter v. University of West Virginia Bd. of Trustees/West Virginia Univ.*, 206 W.Va. 691, 696, 527 S.E.2d 802, 807 (1999) ("In any search for the meaning or

proper applications of a statute, we first resort to the language itself."). *While the statutory language is clearly the starting point of any issue of statutory interpretation, the legislative intent underlying the statute is the critical second step of any statutory analysis. (ACT supra at 873, emphasis added)*

This Court then held that, while the public agency may not be a signatory to the contract for the construction of a public improvement, the prevailing wage law would still apply. This Court stated that it would read into the statutory language certain requirements in the interest of upholding the laudatory policy advanced by the wage act of establishing a floor for the workers engaged in construction for the public's benefit. This Court held it would turn back neat legal maneuvers that undercut the overarching duties, responsibilities and rights that the West Virginia Legislature intended. This Court held:

Implicit in our holding regarding the factors to consider in evaluating whether a "public improvement" exists for prevailing wage purposes is a recognition that the term "public authority," like the term "public improvement," cannot be used as a shield to prevent the wage act from operating when the public entity for whom the construction is being performed is not a party to a contract. It only stands to reason that if the wage act was intended to extend to those workers who are doing work on behalf of a public authority, then the mere lack of a signature by that public authority to a contract should not be permitted to operate in such a fashion to circumvent the intent of this state to fairly compensate those laborers. We acknowledge that the wage act, as currently written, clearly hinges its operation on the existence of a contract having been signed by a public authority. *See* W.Va. Code § 21-5A-6. Barring statutory amendment to section six to include language indicating that an entity acting on behalf of a "public authority" can sign a contract which invokes the protections of the wage act, we feel compelled to read in such language in the interest of upholding the laudatory policy advanced by the wage act of establishing a floor for the workers engaged in

construction for the public's benefit. *See* W.Va. Code § 21-5A-2; *see also* *Banker v. Banker*, 196 W.Va. 535, 543-44, 474 S.E.2d 465, 473-74 (1996) (noting that "in interpreting the terms of our ... statutes specifically, we, in the past, have taken care not to undermine the statutes' fundamental goals" and that "we consistently have turned back neat legal maneuvers attempted by litigants that were not in keeping with overarching duties, responsibilities, and rights that the West Virginia Legislature intended"); *State v. Elder*, 152 W.Va. 571, 575, 165 S.E.2d 108, 111 (1968) (*Id.* 878)

The instant matter is no different. The filings in opposition to the Emergency Petition in this matter are attempting a neat legal maneuver that is not in keeping with the overarching duties, responsibilities and rights that the West Virginia Legislature intended in enacting West Virginia Code §3-10-5 – the rights of the citizens of this State to representation at the Legislature that is consistent with their votes. It is after all the voters' rights at issue and not the changing political preference of one former State Senator.

If the position of those who opposed the Emergency Petition were to prevail it could lead to the absurd result where the Governor of this State would be forced to appoint a State Senator from any number of political parties potentially including extreme parties for which the voters of this State did not support. A review of the records of the West Virginia Secretary of State for the 2014 general election finds party affiliations including the Mountain Party, the Libertarian Party, the Constitution Party, the American Freedom Party as well as Independents. The website of the American Freedom Party states that its current Presidential candidate Bon Whitaker believes that "diversity is a code word for white genocide" (<http://american3rdposition.com/>) If a vacating Senator decided to

change his or her party affiliation to a party such as the American Freedom Party the result could be absurd and damaging to this State.

Some have argued that voters elect the person not the party and that person is free to change parties. However, political parties are how we as a people have chosen to nominate and select our political leaders. It is our method, for better or worse, for people of similar views work together for common goals. The use of political parties for the nomination of persons to fill vacancies is the method chosen by the Legislature. While some urge this Court to leave it to the individual is leaving to determine the political philosophy of his or her constituents, the method we have long chosen is for the voters through the elections. Once the vacancy occurs the political party chosen by the voters is the way we determine the political philosophy of the people who voted not the whim of an individual.

The AFL/Building Trades urge this Court to ensure that it is the voters' decision is upheld rather than the party affiliation of one individual.

### ***The Governor***

Governor Early Ray Tomblin has filed with this Court a Summary Response indicating that he interoperates this statute in question in the same manner as the Emergency Petition. This Court has long held that great weight must be given to the interpretations of statutes by bodies charged with their administration. As this Court held in *Hardy County v. West Virginia Division of Labor*, (445 S.E.2d 192, 191 W.Va. 251 (1994) at Syllabus Point 2”

" 'Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.' Syllabus Point 4, *Security National Bank & Trust Co. v. First*

W.Va. Bancorp., Inc., W.Va. , 277 S.E.2d 613 (1981), appeal dismissed, 454 U.S. 1131, 102 S.Ct. 986, 71 L.Ed.2d 284 [ (1982) ]." Syl. Pt. 1, Dillon v. Bd. of Educ., 171 W.Va. 631, 301 S.E.2d 588 (1983).

The AFL/Building Trades urge this Court to give the same weight to the Governor whose job it is to appoint someone to fill the vacancy at stake.

***The Wording of the Statute***

With regard to whether the wording of West Virginia Code §3-10-5 when read in its entirety is ambiguous it is worth noting that the statute uses three wording variations for political party creating ambiguity:

- “the party executive committee of the party with which the person holding office immediately preceding the vacancy was affiliated (West Virginia Code §3-10-5 (a))
- “ of the same political party as the person vacating the office” (West Virginia Code §3-10-5 (a)) and
- “the party executive committee of the senate committee [delegate district] in which the vacating senator [delegate] resided at the time of his or her election. (West Virginia Code §3-10-5 (b) and (c))

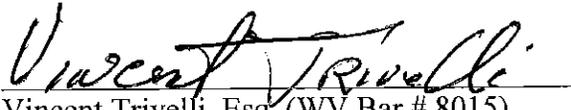
In none of the three does the statute make clear at what point in time political party is to be determined. Reasonable minds can – and currently are - disagree or are uncertain as to the meaning of the statute. Such a disagreement and uncertainty is the hallmark of an ambiguous statute (*Appalachian Power Co. v. State Tax Department*, 195 W.Va. 573, 466 S.E.2d 424 (1995) It is also important that if the Legislature meant to look whatever political party the individual vacating the office selected him or herself

prior to vacating the office the Legislature could have clearly stated that. They simply did not clearly state and we are left with an ambiguous statute.

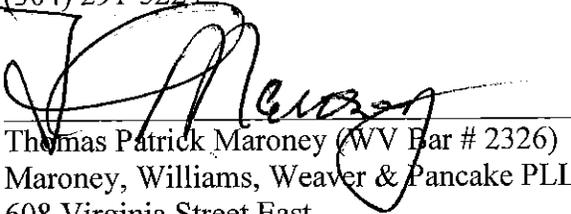
WHEREFORE, the AFL/Building Trades requests this Court issue Emergency Writ as requested and uphold the voters of this State.

Respectfully submitted this 15<sup>th</sup> day of January, 2016.

**West Virginia State Building and  
Construction Trades Council, AFL-CIO,  
and its division, the Affiliated Construction  
Trades Foundation,  
By Counsel**



Vincent Trivelli, Esq. (WV Bar # 8015)  
by Thomas P. Maroney (with permission)  
The Law Office of Vincent Trivelli, PLLC  
178 Chancery Row  
Morgantown, WV 26505  
(304) 291-5223



Thomas Patrick Maroney (WV Bar # 2326)  
Maroney, Williams, Weaver & Pancake PLLC  
608 Virginia Street East  
Charleston WV 25301  
(304)-346-9629

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January 2016, I caused the foregoing document to be filed with the Clerk of the Court by hand-delivery. The following counsel will be served by U.S. mail and electronic service:

Anthony J. Majestro  
POWELL & MAJESTRO, PLLC  
405 Capitol Street, Suite P1200  
Charleston, WV 25301  
[amajestro@powellmajestro.com](mailto:amajestro@powellmajestro.com)  
*Counsel for Petitioners*

WV Republican Executive Committee  
PO Box 2711  
Charleston, WV 25301

Beverly R. Lund  
136 Wade Road  
Beckley, WV 25801

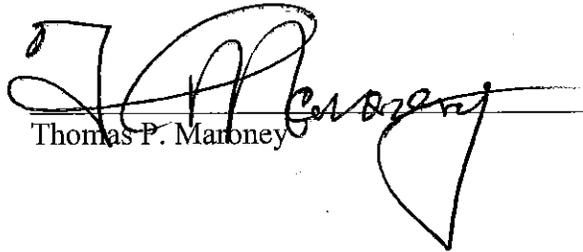
Naomi "Sue" Cline  
PO Box 46  
Brenton, WV 24818-0046

Justin M. Arvon  
101 Triangle Lane  
Beckley, WV 25801-7005

Tony Paynter  
HC 68 Box 931  
Hanover, WV 24839-9702

Peter G. Markham  
General Counsel  
Office of Governor Earl Ray Tomblin  
1900 Kanawha Blvd., East  
State Capitol  
Charleston, WV 25305  
(304) 558-2000  
[peter.gjmarkham@wv.gov](mailto:peter.gjmarkham@wv.gov)  
*Counsel for Respondent Governor Tomblin*

Patrick Morrissey, Attorney General of West Virginia  
Elbert Lin, Solicitor General  
J. Zak Ritchie, Assistant Attorney General  
State Capitol Building 1, Room 26-E  
Charleston, WV 25305



Thomas P. Maroney