No. 26364 - SER Affiliated Construction Trades Foundation v. William F. Vieweg, Commissioner, et al

Workman, Justice, concurring:

A Rotting Carp

This entire case reminds me of the old saying that "There's something rotten in Denmark." Well, there is definitely something rotten in West Virginia, and I am outraged not only by the aspects of the history of this case that the record permits us to get our teeth into, but perhaps even more so by various hidden agendas that smell[1] to the high heavens, but which we can't get our teeth into on this record. Because of the lack of factual development, I am limited in my ability to pull back the curtains so as to cast light upon the shrouded plans, conduct, and actions surrounding the entire process from inception to date. Indeed, a review of the available documents, most of which are only here as a result of being requested by this Court, suggests that anybody who is not confused, doesn't really understand what's going on. Nevertheless, even the sparse documentation available casts an odor not unlike that of a dead and rotting carp. This opinion will neither win friends nor influence people on either side of the philosophical aisle, but these are things that need to be said.

[1]One of the dissenters states "the majority seems to miss what must be so readily apparent to thousands of West Virginians - this deal just doesn't pass the smell test." The majority did not miss the smell. Unfortunately, whether this series of transactions passes the "smell test" is not the legal standard by which this Court determines whether to grant extraordinary relief in mandamus.

That I have voted with the majority should not be taken as an opinion that the dismissal of the underlying lawsuits was a wise or even proper course of action.[2] Nor should it be taken as agreement with anything that either of the last two Commissioners or the Performance Council have done in this entire issue. Moreover, the decision of the Court that neither prohibition nor mandamus is appropriate should not be construed as limiting the possibilities for bringing a lawsuit for breach of fiduciary responsibility, violations of open government requirements, violations of ethics requirements, or any other potential causes of action. In fact, as I shall make clear, I believe there should be a full and complete factual exposition of what occurred here so that the chips can fall where they may.

The reason I join the majority is that the law is absolutely clear that neither prohibition nor mandamus is available to order the Commissioner to dismiss the lawsuits. The Commissioner is a statutory animal, created, molded, and maintained by legislative authority. West Virginia Code § 21A-2-6 (1996) provides that the Commissioner "is the executive and administrative head of the bureau and has the power and duty to. . . exercise general supervision. . . , [s]upervise fiscal affairs and responsibilities. . . , [i]nvoke any legal or special remedy. . . , [e]xercise any other power necessary to standardize administration, expedite bureau business, and assure the establishment of fair rules and promote the efficiency of the service[.]" West Virginia Code § 23-1-1(a) (1996) provides that the Commissioner "has the sole responsibility for the administration of this chapter except for such matters as are entrusted to the compensation programs performance council. . . ." West Virginia Code § 21A-2-1 (1996) further defines the Commissioner's role, indicating that the Commissioner "shall be appointed by the

[2]These lawsuits were all based on substantially the same legal theory. It would have been very simple for the Commissioner to have brought one test case, gotten a clear legal ruling on the theory of recovery, and if he prevailed, pursued the other claims under a contingency fee contract.

governor, by and with the advice and consent of the Senate, and shall hold his office subject to the will and pleasure of the governor." Thus, the Commissioner's powers, duties, and limitations have been broadly delineated by statute and have been created exclusively by statute.

A mandate by this Court that the Commissioner must obtain court approval for dismissals of civil actions would be an improper intrusion by this Court into the legislative arena. "Courts are not free to read into the language what is not there. . . ." State ex rel. Frazier v. Meadows, 193 W. Va. 20, 24, 454 S.E.2d 65, 69 (1994).

> It is not the province of courts to revise the work of the Legislature and supply what, in their opinion, are omissions of provisions necessary to make a statutory system or plan wise and expedient. If that could be done in one case it could be done in all, and the courts would become legislative, as well as judicial, tribunals, a result positively forbidden by the Constitution of the state.

In re Application for License to Practice Law, 67 W.Va. 213, 231, 67 S.E. 597, 604-05 (1910).

In Boyd v. Merritt, 177 W. Va. 472, 354 S.E.2d 106 (1986), we explained that "[t]his Court does not sit as a superlegislature, commissioned to pass upon the political, social, economic, or scientific merits of statutes pertaining to proper subjects of legislation. It is the duty of the legislature to consider facts, establish policy, and embody that policy in legislation." Id. at 474, 354 S.E.2d at 108. Similarly, in Randolph County Board of Education v. Adams, 196 W.Va. 9, 467 S.E.2d 150 (1995), we stated:

> When acting within its legitimate constitutional sphere, judicial deference given to both the West Virginia Legislature and administrative bodies has been confirmed. See Appalachian Power Co. v. State Tax Dept. of W. Va., 195

> W.Va. 573, 466 S.E.2d 424 (1995). The practice of deferring to rationally based legislative enactments is a paradigm of judicial restraint.

Id. at 24, 467 S.E.2d at 165.

One local newspaper recently ran an editorial to the effect that the Commissioner should not be allowed to drop the lawsuits. I was intrigued by the newspaper's comment that "We leave the complex legal details to the State Supreme Court, but, we hope they find a sound reason" to prevent the lawsuits' dismissal. Well, the devil is in the details. The fact is that the complex legal "details" involve the doctrine of the separation of powers and a whole history of legal precedent, and they to me are not just niceties that can be overlooked.

Fiduciary Duty

I concur with the majority that there is a fiduciary duty on the part of the Commissioner and members of the Performance Council to protect the financial integrity of the Workers Compensation Fund. Because there is a fiduciary duty, the Petitioners may have the right to bring a breach of fiduciary duty suit against the Commissioner and the Performance Council. Before addressing that possibility in more depth, however, there are other matters that need to be addressed.

$3 1/2 Million Down the Drain

The waste of $3 1/2 million of West Virginia taxpayers money is a sorry saga that ought to be examined closely. These "fee arrangements" (if one can be so

charitable as to call them that) initially entered into by the previous administration[3] are shocking to the conscience. But the current administration,[4] which now uses the contract for these absurd and excessive legal fees and expenses and the $3 1/2 million of state funds already spent thereunder as one of the primary bases for seeking the dismissal of the lawsuits, fails to point out that these contracts are cancellable by the State upon thirty days notice. Why didn't the Commissioner cancel the contracts and pursue these lawsuits either through the Attorney General's Office, through in-house counsel, or through contingency contracts with private lawyers, any of which would have cost the state only reasonable expenses unless there was recovery? Only when recovery was had would the contingency fees be taken from the sums recovered.

In fact, it seems that the outcome for the State is rather like that of Alice's situation in Wonderland-less or nothing.

> 'Take some more tea,' the March
> Hare said to Alice, very earnestly.
> 'I've had nothing yet,' Alice replied in
> an offended tone, 'so I can't take
> more.'
> 'You mean you can't take <u>less</u>,' said
> the Hatter: 'it's very easy to take <u>more</u> than nothing.'

[3] Governor Gaston Caperton, Workers Compensation Commissioner, Andrew Richardson, and the Performance Council, which has had the same membership continuously since its creation in 1993.

[4] Governor Cecil Underwood, Commissioner Vieweg and the Performance Council.

Here, the State got less or nothing while the lawyers got more. The old proverb that a lawyer's opinion is worth nothing unless paid for has been extended to the maximum of absurdity in this case. The State has paid legal fees of $1,891,500[5] to the firms of Fredeking & Fredeking and Galloway & Associates for "litigation recommendations."

A brief recitation of how the State came to pay nearly $2 million for the thoughts of Fredeking and Galloway is instructive. The process of providing full employment status for several lawyers appears to have been initiated by a solicitation letter from R. R. Fredeking, II, to John H. Kozak, Director of Legal Services Division, Bureau of Employment Programs. Mr. Fredeking, in a letter dated April 7, 1995, announced that he would like to meet with Mr. Kozak and then Commissioner Richardson to discuss a plan to collect delinquent premiums owed the Fund by the coal industry. Mr. Fredeking pitched his access to a "comprehensive coal ownership and control database" available to identify links to entities who may be legally responsible for payment in addition to a nominal employer. It appears that shortly thereafter, Mr. Fredeking and Mr. Kozak met and discussed contracts. On May 12, 1995, Mr. Fredeking submitted a proposed agreement to Commissioner Richardson for the collection of delinquent worker's compensation accounts due from the coal industry.

By June of 1995, Commissioner Richardson must have contacted Attorney General Darrell V. McGraw, Jr., regarding the matter. In a letter dated June 8, 1995, to Commissioner Richardson, Managing Deputy Attorney General Deborah L. McHenry indicated that a meeting was scheduled regarding the collection of unpaid worker's compensation premiums. Ms. McHenry noted that the Attorney General requested

[5]The entire tab to the taxpayers totals almost $3 1/2 million, when other litigation expenses are included.

written documentation outlining the extent of the problem with respect to unpaid premiums including the special legal theories involved and a proposal as to the functional structure, goals and objectives regarding collections work. Finally, Ms. McHenry requested that the Attorney General be advised as to who had been involved in the development of the Bureau proposal.

On June 12, 1995, Commissioner Richardson wrote to Attorney General McGraw stating that he had concluded

> that there is a reasonable probability that several of the larger employers in the mineral extracting industry have engaged in a pattern and practice of behavior to circumvent the payment of justly due premium taxes to the Fund. In particular, we have reason to believe that these employers operated mines and other facilities through captive companies and through vastly under capitalized companies knowing such companies could not operate under the laws of this State, including the requirements to pay premium taxes due to Worker's Compensation Fund and remain viable entities. Other schemes also appear to have been used.

Commissioner Richardson indicated that as part of his fiduciary capacity on behalf of the Fund, he wanted to pursue actions against these larger employers.

Commissioner Richardson indicated that he had discussed litigation with Mr. L. Thomas Galloway, Esquire, of the law firm of Galloway & Associates of Washington, D.C. It was stated that Mr.Galloway had compiled an extensive proprietary database of information on the inner workings of the coal industry and that the database was not available anywhere else in the country. Commissioner Richardson sought the consideration and approval of the appointment of Mr. Galloway and other attorneys as special assistant attorney generals to work on these litigation matters by use of a contingency fee mechanism.

On July 7, 1995, Mr. Fredeking forwarded a contingent fee proposal of Mr. Fredeking and Mr. Galloway to collect the Worker's Compensation Fund debt. On July 31, 1995, the Attorney General appointed several attorneys including Mr. Galloway as special assistant attorneys general to the litigation team for the prosecution of causes of action to recover unpaid worker's compensation premiums. Interestingly, the appointment letter provided that:

> it is contemplated that you will advance all expenses necessary to commence and maintain these actions. Your fee shall be subject to the approval of the court and shall not exceed the proper reasonable and customary fee rate which is equal to one-third (33-1/3%) of recovery for those cases which are filed in any circuit court and the fee not to exceed 20% of any premiums which are recovered due to any administrative action which is undertaken.

Apparently, this appointment letter was not satisfactory. The documentation, as well as public newspaper accounts at the time, indicate a disagreement between the Attorney General and Commissioner Richardson regarding the lawyers to be appointed as well as the terms of appointment. Mr. Galloway declined appointment under the fee terms outlined by the Attorney General. During the month of August 1995, the Attorney General requested information so that the project of attempting to recover the delinquencies could proceed.

On August 21, 1995, the Attorney General's Office informed Commissioner Richardson that

> none of the attorney's fees to be paid are to paid from the monies received for the Fund, or from any other State fund. Rather, said fees will be separately awarded by the Court against the delinquent employers to be paid from the delinquent employers' own fund, <u>not</u> from their delinquent

> premiums. All fees are required to be approved by the Court as customary, reasonable and proper.

It appears that no agreement was reached between Attorney General McGraw and Commissioner Richardson. On December 29, 1995, the Attorney General's Office informed Mr. Kozak of the impropriety of the Bureau approving any contract for legal services on the basis that the Bureau had no authority to enter into a contract for legal services. Apparently, the administration promptly went to the legislature seeking statutory authority for bypassing the Attorney General and for hiring outside counsel on this matter. Pursuant to the enrolled committee substitute for House Bill 4862, effective March 7, 1996, W.Va. Code § 21A-2-6 (17), was amended to authorize the Commissioner of the Bureau of Employment Programs, with the approval of the Compensation Programs Performance Council, to retain counsel outside the Attorney General's Office.

The Compensation Programs Performance Council immediately published an attorney solicitation and on June 21, 1996, approved the hiring of attorneys (including Mr. Galloway and Mr. Fredeking) to represent the Bureau in the collections litigation. The representation agreement provided that the law firms of Fredeking & Fredeking and Galloway & Associates would receive a flat fee of $5,200 for computer use and attorney related work for each recommendation made, as to each employer, regarding whether administrative and/or judicial action should be taken against one or more entities. An addendum to the agreement provided for a reduced legal fee of $2,340 for each recommendation made in 1998. To date, the Fredeking and Galloway firms have been paid $1,891,500 for their recommendations. Attorney's fees of this sort represent an absolutely outrageous "boondoggle." [6]

[6]Indeed, it appears that these payments for recommendations bolster the Attorney General's argument that the potential for harm and damage to the State when the power to coordinate the State's legal services is stripped from the Attorney General is immense.

Moreover, the agreement provided for a contingent fee to be approved by a court or an administrative law judge in an amount no less than 20% of the recovery. This was in addition to the $5200 for every litigation memorandum! Further, and unbelievably, the Bureau agreed to pay the cost for consultation for screening, coding, storage and retrieval of documents and transcripts; microfilm readers; reproduction costs; mailing costs; telephone costs; paralegals based outside West Virginia; consulting experts; Lexis and Westlaw Research; and, ownership and control tracking and other computer related expenses not to exceed $5,000 per month. Interestingly, it appears that the contract had a one-year term and has been annually renewed by virtue of a change order approved through the State of West Virginia Purchasing Division. It appears that by virtue of purchase order no. BEP979 the representation agreement was extended for an additional year beginning July 1, 1999, and ending June 30, 2000. The Bureau Division Head, Ed Burdette, and Commissioner Vieweg signed the justification for the continuation of the coal litigation project on April 27, 1999. Now, four years after inception, some $3.4 million lighter and less than two months after renewing the representation agreement, Commissioner Vieweg, in his capacity as the fiduciary of the Fund, abandons this project with respect to the major big coal companies. We are left to wonder what the State has achieved. The record does not reflect whether the payment of over $1.8 million for "recommendations" resulted in the collection, through an administrative process or otherwise, of one penny of worker's compensation premiums.

Backroom Deals

While I recognize that legislative matters generally involve negotiation and compromise by competing interest groups, a review of the record in this matter, together with oral arguments of this case, have left me with the clear impression that something is "rotten in Denmark." This entire matter is a landmine of hidden agendas. While there is no written agreement regarding a "deal" whereby the coal industry agreed to an increase in premium rates in return for the dismissal of the lawsuits at issue, all entities involved dance gingerly around this issue of a deal.

The Performance Council vote to drop 25 major coal companies from the lawsuits seeking to collect the unpaid premiums and interest came almost simultaneously with Governor Cecil Underwood's signing of a new Worker's Compensation Fund Bill making it easier for injured workers to qualify for permanent total disability benefits. It is extremely troubling that the Performance Council discussed the decision to dismiss the lawsuits in a secret executive session[7] letting a few large coal companies off-the-hook from huge potential liabilities after closed-door meetings, while regularly suing small

[7]Although the issue of the closed-door discussion was not raised in a manner which placed the issue properly before us, the parties argued the propriety of closing the Performance Council meeting on March 12, 1999. Discussions regarding pending litigation without an attorney present do not appear to be proper subjects of closed executive sessions pursuant to the Open Governmental Proceedings Act, West Virginia Code §§ 6-9A-1 to 7 (1993 and Supp. 1998) (hereinafter the "Act"). See W. Va. Code § 6-9A-4. We recently addressed whether a public meeting otherwise required to be open under the Act, could be closed because an agency attorney was present in Peters v. Wood County Commission, No. 25354 (filed July 14, 1999), ___ W.Va.___, ___S.E.2d.__ (1999). In Peters we held that privileged communications between a public body subject to the Act and its attorney are exempted from the Act, as long as the statutory requirements of the Act are met. Syl. Pt. 5, Peters, ___, W.Va. at ___, ___ S.E.2d. at ___.

business people and sole proprietors. Such action appears to violate all notions of open, fair and accessible government and leaves the public with no confidence in the operation of government.

Performance Council

The conduct of the labor representatives on the Performance Council is troubling. If representations made to this Court are accurate, these individuals do not consult with the labor organizations they represent. If this is the case, the legislature should reconsider whether the Performance Council is functioning as intended. In any event, the fact that these individuals have not truly represented the viewpoints of their affiliated organizations leads to an environment that promotes "brokered deals" that are then "broken." This Court has been provided only with the shattered remnants and is unable to put the pieces together in a proceeding where there has been no factual development.

UbiJus, ibi remediation, (or For Every Wrong, There is a Remedy)

As law students, we learn that in the law, for every wrong there is a remedy. Because this Court cannot properly give relief by prohibition or mandamus, we cannot untangle the web that has been woven.

The fiduciary duties of the Commissioner are of great magnitude, and they are not diminished by our judicial restraint in this case. By declining to grant the requested mandamus, we do not disregard the fiduciary duty; we simply find that the existence of the fiduciary duty in the context of the record presently before us does not compel the conclusion that the Commissioner had a mandatory, non-discretionary duty to continue to pursue the underlying lawsuits.

Although this Court has not previously identified precisely the elements of a cause of action for a breach of a fiduciary duty, courts have held that the elements of such a cause of action are the existence of the fiduciary relationship, its breach, and damage proximately caused by that breach. Pierce v. Lyman,, 3 Cal. Rptr.2d 236, 240 (1991). "A cause of action for breach of fiduciary duty requires proof of fraud, breach of trust, or an action outside the limits of the fiduciary's authority." Gerdes v. Estate of Cush, 953 F.2d 201, 205 (5th Cir. 1992).

Thus, there may well be a cause of action for the alleged breach of a fiduciary duty. Such a lawsuit would entail a complete and thorough exposition of the facts at the heart of this issue. The people of West Virginia deserve the facts. They deserve to find out how and why the present and former administrations have spent three and one-half million dollars of their tax money for nothing, and what closed-door meetings and/or deals were held to decide the issues at the heart of this dispute.

Will the Commissioner really dismiss these lawsuits without further explanation in view of this fiduciary duty?

If he does, will a lawsuit(s) for breach of fiduciary duty be brought against the Commissioner and the Performance Council?

Will the people of West Virginia really know the truth?

Stay tuned.