

Maynard, Justice, dissenting:

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OF WEST VIRGINIA

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I dissent because I find two problems with the majority's disposition of this case. First, the majority's decision ignores our law as stated in Syllabus Point 1 of *State ex rel. C & P Telephone Co. v. Ashworth*, 190 W.Va. 547, 438 S.E.2d 890 (1993). Second, and more fundamentally, the issues in this case are now *res judicata* so that there is no reason to remand the case to the circuit court.

As quoted by the majority opinion, Syllabus Point 1 of *State ex rel. C & P Telephone Co. v. Ashworth* provides:

Although the general rule is that one must exhaust administrative remedies before going into court to enforce a right, *W.Va. Code 24-4-7* [1923] confers concurrent jurisdiction on the Public Service Commission and the circuit court in a limited number of cases -- namely those cases seeking a refund based on rules and practices of the Public Service Commission that are clear and unambiguous. In these limited cases, a plaintiff can proceed either before the Public Service Commission or the circuit court. However, these avenues are mutually exclusive: once a Public Service Commission complaint is filed, an appeal to the circuit court is foreclosed until the administrative remedies are exhausted.

Accepting the fact that this case falls under the exception to the general rule that one must exhaust administrative remedies prior to going into court, a plaintiff still must proceed *either* before the PSC or the circuit court, but not both at the same time. Mr. Hedrick first filed his complaint with the PSC. At that

point, he was foreclosed from filing suit in the circuit court. Accordingly, the circuit court properly dismissed his case.

A more fundamental flaw with the majority opinion is the fact that the majority remands the case to the circuit court *despite the fact that there are no issues remaining for the circuit court to consider*. After Mr. Hedrick filed his complaint with the PSC, the ALJ entered a recommended decision which determined, *inter alia*, that the estimate provided by the GCPSD was reasonable and the GCPSD's actions toward Mr. Hedrick were reasonable. Mr. Hedrick filed exceptions to the recommended decision, and the PSC denied the exceptions, adopted the recommended decision, and dismissed the complaint. Mr. Hedrick then appealed the PSC's ruling to this Court, and this Court denied the petition. As a result, the issues ruled upon by the PSC are now *res judicata*.

We have said,

Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.

Syllabus Point 4, *Blake v. Charleston Area Medical Center, Inc.*, 201 W.Va. 469, 498 S.E.2d 41 (1997). "It is now well-established that 'the doctrine of *res judicata* may be applied to quasi-judicial

determinations of administrative agencies.”” *Wheeling-Pittsburgh Steel Corp. v. Rowing*, 205 W.Va. 286, 296, 517 S.E.2d 763, 773 (1999) (quoting *Rowan v. McKnight*, 184 W.Va. 763, 764, 403 S.E.2d 780, 781 (1991) (per curiam)) (citation omitted).

For issue or claim preclusion to attach to quasi-judicial determinations of administrative agencies, at least where there is no statutory authority directing otherwise, the prior decision must be rendered pursuant to the agency’s adjudicatory authority and the procedures employed by the agency must be substantially similar to those used in a court. In addition, the identity of the issues litigated is a key component to the application of administrative *res judicata* or collateral estoppel.

Syllabus Point 2, *Vest v. Bd. of Educ. of Cty. of Nicholas*, 193 W.Va. 222, 455 S.E.2d 781 (1995).

Applying this rule to the present facts, it is clear that the prior decision was rendered pursuant to the PSC’s adjudicatory authority, and that the procedures applied by the PSC are substantially similar to those used in a court. The presiding officers at formal PSC hearings have a duty to conduct full, fair, and impartial hearings and also possess the power to administer oaths, issue subpoenas, provide for other methods of discovery, receive evidence, and rule upon objections and motions. 150 C.S.R. § 1-12.2(b) (1987). Parties at these hearings are entitled to enter an appearance, introduce evidence, examine and cross-examine witnesses, and make arguments. 150 C.S.R. 1-12.4(a) (1987). Finally, the issues before the PSC are identical to those which will be considered by the circuit court on remand. Therefore, I believe that *res judicata* applies to the PSC decision in this case.¹ Further, there is no reason to

¹In Syllabus Point 4 of *Central West Virginia Refuse v. PSC*, 190 W.Va. 416, 438 S.E.2d 596 (1993), this Court said that when the PSC is exercising its rate-making authority, its decisions are not subject to *res judicata* because rate making is a legislative function. The instant case, in contrast,

remand to the circuit court for consideration of damages since the PSC found that the GCPSD did nothing wrong.

For the above-stated reasons, I dissent from the majority opinion. I am authorized to state that Justice Davis joins me in this dissent.

concerns the PSC's adjudicatory function.