

FILED

July 27, 2009

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Benjamin, Chief Justice, concurring and dissenting:

I fully concur with my colleagues on all matters in this case except with regard to the issue of attorney fees. Ms. Gainer appears to be a dedicated foster care worker who cares deeply about the children with whom she works. She is one of many such individuals employed by the Department of Health and Human Resources.

I dissent from the majority decision on the issue of attorney fees. Specifically, where this case clearly comes within a statutory attorney fees provision, as conceded by Ms. Gainer in oral argument, I am uncomfortable avoiding such a clear and unambiguous statutory provision under the banner of “equity.” Such judicial maneuvering can too frequently have unintended consequences no matter the present good intentions.

Ms. Gainer’s grievance was brought under the old statute, W.Va. Code § 29-6A-10. That statutory provision limits attorney fees to \$1,500.00. Ms. Gainer’s grievance was already at the circuit court when a new statute, providing for more attorney fees for later-filed grievances, became effective. W.Va. Code § 6C-2-1. Furthermore, under the new statute, venue would lie only in the Circuit Court of Kanawha County. Ms. Gainer did not bring her claim in that court. Under statutory law, a party is not permitted to mix and match

statutory provisions for his or her convenience.

The decision by this Court to award Ms. Gainer attorney fees in excess of \$1,500.00 is contrary to applicable statutory law which is clear and unambiguous. I therefore dissent from the attorney fees portion of the majority opinion and concur with the majority on all other issues.