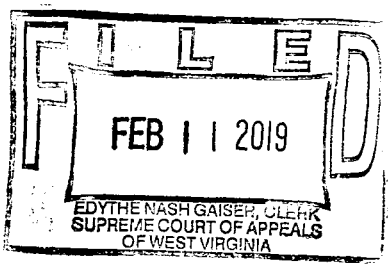
BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

CASE NO.: 18-0776
(Kanawha County Circuit Court Docket No.: 18-AA-188)



MELISSA WILFONG,
Petitioner-Appellant,

v.

RANDOLPH COUNTY BOARD OF EDUCATION.
Respondent-Appellee

APPELLANTS REPLY BRIEF

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III. ARGUMENT IN REPLY

As stated in Appellant's Brief, this matter is an appeal of the lower court's upholding a denial of Ms. Wilfong's (hereafter referred to by name, "Appellant" or "Petitioner") grievance filed before the West Virginia Public Employees Grievance Board (hereinafter referred to as the "Grievance Board"). The substance of Ms. Wilfong's grievance is that when she was transferred due to her school being closed, she should have been placed in an administrative position. The Grievance Board ruled against Petitioner on several grounds, one of which was that she did not timely file her grievance. On appeal, the lower court upheld the ecision solely on the basis that Petitioner did not file her grievance in a timely manner. Petitioner contends that the lower court erred in ruling that her matter was not timely filed because she filed her grievance on the same day she found out that the position to which she was being assigned was not an administrative one. Ms. Wilfong would have had no need to file a grievance if she had been assigned to an administrative position. Thus, her injury was only "speculative" until she knew to what position she was being placed. Ms. Wilfong's "harm" or "injury" did not occur until she was placed in a non-administrative position and her grievance is timely filed because it was filed on the very day that she was given her new assignment.

Respondent made three arguments in support of its position. First, it argued that Petitioner "waived" appealing the substance of the Grievance Board's decision because she did not make assignments of error regarding the these rulings with this Court. Second, while this argument is not crystal clear, Appellee apparently argues that any error on its part should be disregarded because Appellant "invited" the same. Finally, Respondent asserts that both the

Grievance Board and the lower court were correct in ruling against Ms. Wilfong on the timeliness issue. As will be demonstrated below, each contention by Appellee is incorrect.

A. APPELLEE'S CONTENTION THAT APPELLANT "WAIVED" HER ALLEGATIONS OF ERROR ON THE SUBSTANCE OF THE DECISION BY THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD BY NOT ASSIGNING AS ERROR THE LOWER COURT'S LACK OF RULING ON SUCH ISSUES BELOW IS NOT WELL TAKEN BECAUSE APPELLANT ASSIGNED ERROR TO THE ONE RULING THAT THE LOWER COURT MADE-THAT MS. WILFONG'S GRIEVANCE WAS NOT TIMELY FILED.

Respondent argues that because Ms. Wilfong made no assignments of error herein regarding the substance of her grievance, such issues are waived. Thus, Appellee contends, even if this Court agrees with Appellant that her grievance was timely, this matter is still favorably concluded because of the "failure" of Petitioner to raise the substantive issues ruled on by the Grievance Board in this appeal. However, this argument is not well taken.

For over 100 years, this Court has decided an appeal based on some ground and then thought it unnecessary to rule on other grounds raised on appeal. Petitioners often, if not virtually always, raise multiple issues on appeal. Once reaching a decision that decides the case, this Court will often find it unnecessary to rule on other assignments of error.

That is what happened below. Petitioner appealed the substantive rulings by the Grievance Board, as well as the timeliness issue now before this Court, to the Circuit Court of Kanawha County. The lower court's ruling upheld the Grievance Board's decision on the issue of timeliness and did not address any other issue. To fail to address certain allegations of error after upholding the lower tribunal's ruling on the timelines of the grievance is not error. It is

routine. The lower court's error is its ruling that Petitioner's grievance was not timely filed and that is what is now on appeal.

B. APPELLEE'S CONTENTION THAT APPELLANT VIOLATED THE "INVITED ERROR" DOCTRINE IS NOT WELL TAKEN AS THERE IS NO EVIDENCE IN THE RECORD THAT APPELLANT INDUCTED EITHER JUDICIAL BODY BELOW TO COMMIT LEGAL ERROR

Respondent alleges that Appellant's conduct after she was removed from her old position constitutes "invited error." However, Respondent is misapplying that doctrine. This rule applies when a party induces a tribunal to error, not a party[1].

This Court stated the complete principal in Smith v. Bechtold, 190 W.Va. 315, 438 S.E.2d 347 (1993), which is cited in Appellee's Brief. In Smith, the Commissioner of the Department of Motor Vehicles appealed to this Court the circuit court's reversal of his decision to revoke Smith's drivers license. Smith, 438 S.E.2d at 348. The lower court had reversed because of the delay in reaching an adjudication of Mr. Smith's appeal of the revocation of his driving license. Id at 349-350. However, this Court noted that much of the delay appeared to be caused by Smith or his lawyer. Id. at 351. Thus, the Smith Court noted that: "it has long recognized that it is not appropriate for an appellate body to grant relief to a party who invites error *in a lower tribunal*" and reinstated the revocation of the Appellee's driver's license. Id. at 352 (emphasis added).

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[1] Additionally, even if the "invited error" doctrine included allegations of one party inducing the other to act in a way that is contrary to law, this would only apply to the substance of Appellant's grievance. This entire argument on the part of Respondent does not apply to the timeliness issue. Finally, Ms. Wilfong did not "induce" Respondent to do anything..

The "invited injury" doctrine was stated in the same manner in the case Young v. Young, 194 W, Va. 405, 460 S.E.2d 651 (1995), also cited in Appellee's Brief. In Young, the husband in a divorce proceeding filed his financial information on February 23, 1994, which was the morning of the final hearing on his wife's divorce petition, and failed to attend the hearing itself. Young, 460 S.E.2d at 652-653. At the hearing, Mrs. Jones testified to her knowledge of her husband's income, based on his 1992 tax return. Id. at 653, n. 1. The Family Law Master made his ruling pertaining to the monetary portion of the divorce decree based on that income. Id. at 653. Mr. Young appealed to circuit court, requesting that the economic issues be remanded due to the fact that his 1993 income was significantly less then what he earned in 1992. Id. The circuit court granted Mr. Young's appeal and remanded the case back to the Family Law Master. Id. Mrs. Young appealed to this Court, arguing that a litigant should not be rewarded for "gambling" before a Family Law Master and if the gamble results in a loss, to receive a second chance in court. Id. at 653-54. This Court agreed, stating in part that: "[a]n appellant cannot complain of errors or irregularities of the *lower court*, which were brought about by his own motion, and which he alone caused." Id. at 655-56 (citation omitted) (emphasis added).

Indeed, all of the cases cited by Appellee involve a party that invited a *tribunal* to do or fail to do something that the party later claimed was erroneous. Consider, for example, the case that Appellee quotes for some length, Hopkins v. DC Chapman Ventures, Inc., 228 W.Va. 213, 719 S.E.2d 381 (W. Va., 2011) (denying an appeal based on the lower court not having authority to alter its final order, when the petitioner was the one who requested that the order be altered). A similar situation occurred in all the other cases cited by Appellee. See State v. Riley, 151 W.Va. 364, 151 S.E.2d 308 (1967) (holding that a criminal defendant could not claim that the

trial court erred in not declaring a mistrial due to the prejudicial nature of an in court statement made by the prosecutor, when the prosecutor was merely responding truthfully to a question asked by defense counsel), *overruled on other grounds*; State v. Crabtree, 198 W.Va. 620, 482 S.E.2d 605 (1996) (holding that a criminal defendant can not appeal his conviction on the grounds that the trial court permitted inadmissible hearsay testimony when such testimony was elicited by questioning by defense counsel); Shamblin v. Nationwide Mut. Ins. Co., 183 W.Va. 585, 396 S.E.2d 766 (1990) (holding that a party can not allege that a trial court erred in admitting prejudicial testimony when it was the one that elicited such testimony); Comer v. Ritter Lumber Co., 59 W. Va. 688, 53 S.E. 906 (1906) (holding that a party can not object at trial to a motion on the part of the other party to exclude certain testimony and then on appeal argue that the court erred by not excluding the same); Mcelhinny v. Minor, 91 W.Va. 755, 114 S.E. 147 (1922) (holding that an appellant can not allege that the lower court erred in referring a certain issue to a commissioner, when appellant was the party that requested such matter be so referred); and State v. Bowman, 155 W.Va. 562, 184 S.E.2d 314 (1971) (holding that the criminal defendant can not allege that the trial court erred in permitting certain testimony regarding the blood alcohol level of the victim when he elicited such testimony). In every one of these cases cited by Appellee, the appealing party induced the lower tribunal to err.

Here, Respondent claims that Petioner induced it, a party, to err. This is not a proper application of the invited error doctrine. Thus, Respondent's argument is not well taken.

C. RESPONDENT DID NOT DEFEND THE LOWER COURT'S ERRONEOUS FAILURE TO RECOGNIZE THAT APPELLANT FILED HER GRIEVANCE WITHIN 15 DAYS OF SUFFERING HER "INJURY IN FACT"

Appellant demonstrated that she filed her grievance immediately after learning that the position to which she was placed was not an administrative position. Appellee replied by pointing to parts of the decision by the Grievance Board and the Order by the lower court supporting its position. However, neither decision demonstrates that Ms. Wilfong had been actually "injured" on the date it held the timeline for Ms. Wilfong should begin[2].

Having received an "injury in fact" is a requirement of having standing to file a grievance before the Grievance Board. For example, citing this Court's opinion in Shobe v. Latimer, 162 W. Va. 779, 253 S.E.2d 54 (1979)' the Grievance Board stated: "[i]t is necessary for a grievant to 'allege an injury in fact, either economic or otherwise, which is the result of the challenged action and shows that the interest [he seeks] to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit.'" Moffett v. Mason County Bd. Of Educ., Docket No.: 2018-0160-MasED at p. 11 (August 31, 2018). Here, Ms. Wilfong did not suffer an "injury in fact" until she actually received her new job assignment. Before that, any injury was just speculative.

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[2] Note that the lower court also erred by concluding that the burden is on the grievant to prove a timely filing of the grievance. JA at p. 5. The lower court confused the burden of proof in a non-disciplinary case, which is on the grievant, with the burden of proof on the issue of timeliness. The Grievance Board considers timeliness to be an affirmative defense and the proof thereof is with the respondent. The correct rule of law was stated by the Grievance Board in its Level III decision. See JA at pp. 12, 16. While Petitioner did not specifically note this error in her assignment of errors, it is part of the lower court's error on the timelines issue.

The lower court ruled that Ms. Wilfong should have filed her grievance within 15 days of April 20, 2017, "the date on which she learned she was being transferred with no assurance of being transferred to an administrative position." JA at p. 5. However, "receiving no assurance that she would be transferred to an administrative position" is not the same thing as knowing that she definitely would not receive an administrative position. Thus, any injury at that point was still speculative.

The lower court uses the date of April 20, 2017 because that is the date of the letter notifying Appellant of her transfer. Here is the part of the letter which informs Ms. Wilfong of the position to which she is being transferred: "[w]hen the final recommendation for your assignment for the 2017-18 school year is made by the Superintendent and approved by the Board, you will be notified[3]." JA at p. 67. Again, this letter does not inform Ms. Wilfong where she will be located or what position she will hold. Thus, at this point, her injury is only speculative. Not until Respondent made its final decision regarding Ms. Wilfong's placement had she suffered an "injury in fact" as opposed to a potential, speculative injury. Ms. Wilfong filed her grievance immediately after learning that her job placement was not into an administrative position. Thus, her grievance was filed on time[4].

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[3] The lower court also noted that during Ms. Wilfong's "five meetings with the Superintendent (sic) at the time she was never offered an administrative position." JA at p. 4 (citing pp. 8-9 of the Level III transcript [pp. 25-26 of the JA], which actually indicates that she met with two different individuals).

[4] This Court is respectfully urged to consider creating a syllabus point stating that a teacher being transferred has two legal interests. The first interest is in her present employment. This interest is protected through18A-2-7. The second interest is in not being transferred into a lesser position then the one she currently holds. Often, the employee does not know the position to which she is going to be placed when notified of her transfer. Thus, the rights set forth in 18A-2-7 can not be the basis for filing a grievance if she is placed in a lesser position.

VIII. CONCLUSION

Ms. Wilfong should prevail for the reasons contained herein and in her Appellant's Brief. The matter should be remanded back to the lower court for a ruling on the substance of her appeal

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