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# Administrative Law

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# ADMINISTRATIVE LAW

## I. INTERPRETATION OF AGENCY MANDATES

*Meadows v. Lewis*, 307 S.E.2d 625 (W. Va. July 7, 1983).
*McGraw v. Hansbarger*, 301 S.E.2d 848 (W. Va. 1983).
*Hodge v. Ginsberg*, 303 S.E.2d 245 (W. Va. 1983).

In three decisions during the survey period, the West Virginia Supreme Court of Appeals issued writs of mandamus to compel the heads of three different administrative agencies to provide expanded services or to better perform specific duties. The Director of the Department of Health was ordered to establish community based inpatient detoxification and alcoholism treatment programs in *McGraw v. Hansbarger*.[1] In the second case, *Hodge v. Ginsberg*,[2] the court compelled the Commissioner of the Department of Welfare[3] to provide emergency shelter, food and medical care to homeless persons throughout the state. The third case, *Meadows v. Lewis*,[4] resulted in the court ordering Workers' Compensation Commissioner Lewis to: (1) comply with statutory time limits, (2) promulgate procedural rules and regulations, (3) immediately grant one of the petitioners a total disability award, (4) pay all the petitioners' costs and attorney fees for the mandamus proceeding and, (5) to pay certain specified attorney fees.

In each of the three cases the court found that the petitioners had a statutory right to the relief sought. Similarly, the court found that the respective agency heads had a corresponding legal duty under the same statutes.

Thus, two of the three elements detailed in *Cooper v. Gwinn* as necessary for the proper issuance of a writ of mandamus, were found in all three cases.[5] However, only in *Lewis* did the court specifically address the absence of another adequate remedy at law, which is the third required element for proper mandamus.[6]

*Lewis*, though the most factually complex of three cases, presented several straight-forward legal issues, as well as one potentially controversial holding. The three petitioners had been involved for up to six years with a maze of claims procedures, hearings, medical reports, benefits payments and terminations which the court characterized as "kafkaesque."[7] The West

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[1] 301 S.E.2d 848 (W. Va. 1983).
[2] 303 S.E.2d 245 (W. Va. 1983).
[3] Now the West Virginia Department of Human Services.
[4] Meadows v. Lewis, 307 S.E.2d 625 (W. Va. July 7, 1983).
[5] In Cooper v. Gwinn, 298 S.E.2d 781, 787 (W. Va. 1981), the court states:
Before this Court may properly issue a writ of mandamus, three elements must coexist: (1) the existence of a clear right in the petitioner to the relief sought; (2) the existence of a legal duty on the part of the respondent to do the thing the petitioner seeks to compel; and (3) the absence of another adequate remedy at law.
[6] *Lewis*, at 637-38.
[7] *Id.* at 644.



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Virginia Code[8] provides that temporary total benefits shall be commenced either upon receipt of the employer's report or within fifteen days of receipt of a necessary physician's report. Yet, one petitioner's claim for temporary total disability benefits was not acted on until fifty-four days after the deadline established by the statute. Another petitioner waited more than six months longer than the statutory period[9] for action on an objection to an order of the Commissioner. The third petitioner in this case waited nearly nine months for the Commissioner to rule on a petition to reopen a closed claim, even though the Code[10] mandates that the Commissioner act within thirty days.

The court rejected Commissioner Lewis' argument that compliance with these statutes was impossible because of limitations of personnel, space and funding. Since the Legislature had *authorized* hiring adequate staff and paying necessary expenses, the court found that "any deficiencies in this regard are a failure of management attributable to the commisioner's failure to staff the agency in the manner necessary to administer the system created by the Legislature."[11] However, the court did not examine the question of whether the Legislature, after enacting the enabling statute, had *appropriated* adequate funds to carry out the mandates set forth. There is, however, little doubt that massive case backlogs beyond the statutory periods are the rule rather than the exception at the Workers' Compensation Commission. Auditors have reported numerous such apparent violations of the law to the Legislature.[12] It is clear that the controversies over the management of the Workers' Compensation Commission will continue for some time.

The court also required the Commissioner to promulgate regulations specifying the time limits to be complied with internally in the Commission.[13] The West Virginia Code requires the adoption of rules of procedure and prescription of time limits for awards and adjudications.[14]

Another holding in the *Lewis* case may have more far-reaching implications. In *Nelson v. Public Employees Insurance Board*,[15] attorney fees had been awarded to the mandamus petitioners when it was found that the commissioner of that board had willfully failed to obey the law.[16] In the *Lewis* case, the court found that Commissioner Lewis' conduct met that willfulness

[8] W. VA. CODE § 23-4-1c (1981).

[9] Unless a continuance is requested, under W. VA. CODE § 23-5-1 the maximum time to reach a ruling on an objection should be 90 days from the filing of the protested order.

[10] W. VA. CODE § 23-4-16 (1981).

[11] *Lewis*, at 641.

[12] *Interim Comm. Hearings Before the House Gov't Operations Comm.* (June 13, 1983) (report of the Legislative Auditor's Office).

[13] *Lewis*, at 642.

[14] W. VA. CODE § 23-1-13 (1981).

[15] 300 S.E.2d 86 (W. Va. 1983).

[16] *Id.* at 92.

requirement, and so the costs of the mandamus action should be paid by the Commissioner.[17]

The court then went on, however, to award attorney fees for representation below.[18] The court observed that conventional thinking is that each party in a compensation case is required to pay his own attorney, no matter what the outcome of the litigation.[19] However, the court apparently felt that application of this conventional thinking would be in contradiction to the "beneficient and bountiful" spirit of West Virginia's compensation law.[20] Sounding a theme often heard in the three cases here under consideration, the court pointed out that the compensation statutes are remedial in nature and will be liberally construed in favor of the intended beneficiaries of the legislation.[21] In *Lewis*, the court utilized its rule of liberal construction of remedial statutes to allow payment of attorney fees below since it found that nothing in the statutes prevented such an award.[22] Additional justification was found in two of the purposes of Workers' Compensation law. First, the fact that benefits are designed at levels sufficient only to maintain workers and workers' families during a period of disability and, second, the intent of the law to reduce the need for legal representation.[23] What is not clear from the court's decision is just how far this same logic will be extended into other areas of remedial legislation and whether many other similarly situated claimants may be able to expect similar relief if they choose to utilize the courts to settle their disputes with state administrative agencies.

The petitioners in a second case were also granted a requested writ of mandamus. In *Hansbarger*, the court mandated the provision of inpatient detoxification and other alcoholism treatment services through local community mental health centers. Kanawha County Magistrate Patsy McGraw had sent an inebriated detainee to a local community mental health center, Shawnee Hills, for examination. When it was determined that the detainee was intoxicated, belligerent and homicidal, the clinical director of Shawnee Hills notified the magistrate that the patient could not be housed there because of the lack of secure facilities. Shawnee Hills arranged for the detainee to be examined at the Charleston Area Medical Center, but it turned out that it also lacked secure facilities for dangerous patients. The prisoner was eventually committed to Spencer State Hospital, after an unexplained two day delay between being taken into custody and his admission to the state hospital.

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[17] *Lewis*, at 644.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 646.
[21] *Id.* at 645.
[22] *Id.*
[23] *Id.* at 646.

The court had previously determined that the state constitution forbids criminal punishment of chronic alcoholics.[24] In an addendum to *Harper*, the court pointed out that the Department of Health has an affirmative duty, under statute, to provide a comprehensive program for the treatment of alcoholics.[25] Although the court recognized the fact that the Director of the Department of Health had already taken steps to improve his agency's ability to deal with the public inebriate, the court in *Hansbarger* again stressed the "positive command" of the statute.[26]

All parties agreed that "comprehensive" treatment for alcoholics should include inpatient care.[27] The court, however, found that such inpatient services are "an essential element of care which community mental health centers are required to provide within the center or on a written contractual basis with another facility."[28] In reaching that conclusion, the court first applied the general rule that remedial acts are to be construed to achieve their beneficial purposes[29] and, thus, found that such services were authorized by the statute.[30] Second, the court took judicial notice that the Board of Health's regulations require that persons charged with a crime who are involuntarily hospitalized be examined by community mental health center personnel or by others through formal arrangements.[31]

The court anticipated that payment for all of these additional services would come from the proceeds of a dedicated tax on alcoholic liquors, which was passed in 1969.[32] Since funds from that tax should have been accumulated in a special account,[33] the court estimated that surplus dedicated revenue amounting up to fourteen million dollars would be available to develop the mandated alcoholism programs.[34] Nevertheless, nothing in the court's findings indicated that such surplus funds had *actually* been accumulating since 1969. Since the court's ruling in *Hansbarger*, it has become clear that no such account exists and no additional funds are available to provide the mandated services.[35] The West Virginia Legislature, however, has attempted to provide

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[24] Harper v. Zegeer, 296 S.E.2d 873 (W. Va. 1982).

[25] *Id.* at 885.

[26] 301 S.E.2d at 853.

[27] *Id.* at 854.

[28] *Id.* at 857.

[29] *See, e.g.*, Gibson v. Rutledge, 298 S.E.2d 137 (W. Va. 1982); Andy Bros. Tire Co., Inc. v. W. Va. State Tax Comm'r, 233 S.E.2d 134 (W. Va. 1977).

[30] 301 S.E.2d at 854-55.

[31] *Id.* at 856 (noting W. Va. Bd. of Health, REGULATIONS FOR LICENSING PSYCHIATRIC AND OTHER RELATED FACILITIES AND PROGRAMS, ch. 27-29, §§ 5.3.2, 17.1.1(a), 5.1.9).

[32] W. VA. CODE § 60-3-9c (1977).

[33] W. VA. CODE § 12-2-2 (1979) provides for exceptions to the requirements to deposit money to the general fund and requires separate accounts be maintained for the expected revenues.

[34] 301 S.E.2d at 858.

[35] Telephone conversation with Jack Clohan, Director, Alcohol and Drug Abuse Programs,

the Department of Health with guidance as to what services are to be provided for alcoholics.[36]

In a third case, the court again demonstrated that it will adhere to the principle that remedial legislation should be construed to achieve its beneficial purposes. In *Ginsberg* a writ of mandamus was issued ordering the Department of Welfare to provide emergency shelter, food and medical care to homeless residents of the state.[37] In 1981, the West Virginia Legislature passed an act entitled "Social Services for Adults."[38] The Act authorizes the Department of Welfare to develop a comprehensive plan to provide adult protective services to incapacitated adults and their caretakers who request and are entitled to such services.[39] The Act defines an incapacitated adult as "any person who by reason of physical, mental or other infirmity is unable to independently carry on the daily activities of life necessary to sustaining life and reasonable health."[40]

The original petitioners in *Ginsberg* were six homeless residents of Charleston. The court allowed intervention by seven other homeless persons and by two organizations concerned with providing services to the homeless. *Ginsberg* was an original proceeding in mandamus. There was no prior action instituted below, though several petitioners did allege that the Department of Welfare had refused to provide them with assistance.[41] The court granted the writ sought by petitioners compelling the Department of Welfare to provide adult protective services to the petitioners and other similarly situated incapacitated adults.[42]

The petitioners asserted that the homeless "street people" of the state should be included in the class of persons the Act was designed to benefit. Without further explanation, the court noted that, if this assertion were true, the petitioners would have a right to the mandamus relief they sought under article III, section 10 of the West Virginia Constitution.[43] The Department of Welfare argued, however, that the Act was primarily intended to authorize intervention by the Department when an adult is somehow mistreated by a

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W. Va. Dept. of Health reports that no funds have been accumulated and that he estimates the costs of a comprehensive program for FY85 to be $4 million. (Sept. 19, 1983).

[36] H.B. 1540, 66th W. Va. Leg., 1st Sess. (1983) provided for alternatives to criminal penalties for public intoxicants and for treatment of alcoholics.

[37] 303 S.E.2d at 251.

[38] W. VA. CODE §§ 9-6-1 to -8 (Supp. 1983).

[39] W. VA. CODE § 9-6-7 (Supp. 1983).

[40] W. VA. CODE § 9-6-1 (Supp. 1983).

[41] 303 S.E.2d at 252.

[42] *Id.* at 247.

[43] *Id.* An *amicus curiae* brief was submitted by two service organizations, Community Kitchen, Inc. and Romero House, Inc., regarding the due process and equal protection issues. However, it is impossible to tell from the *Ginsberg* decision which, if any, of the constitutional arguments were accepted by the court.

person acting as caretaker.[44] In reaching its decision, the court looked to the word "infirmity" as used in the statute to determine if the petitioner class should be included in the class of incapacitated persons covered by the Act. The court concluded that the petitioners were, indeed, "infirm" within the meaning of the Act because "the recurring misfortunes of life" had made them unable to carry on necessary daily activities of life.[45]

In implementing the Act, the Department of Welfare had established criteria for adult protective services clients which required the client to have "a serious impairment in physical or mental functioning."[46] Normally, such administrative interpretations of statutes are given deference,[47] but in this case the court found that the Department's interpretation was not in concert with legislative intent to broadly define the term "incapacitated adult" and, so, refused to apply the interpretation embodied in the regulations.[48]

The Department had also contended that the provision of services under the Act is discretionary and, therefore, not the proper subject for issuance of mandamus. West Virginia Code section 9-6-2 provides for the promulgation of regulations to implement the goals of the Act to the extent found feasible by the Commissioner. The court interpreted this section as granting discretion in developing regulations to implement the Act, but held that, once those regulations were promulgated, the provision of services was mandatory for those clients meeting the criteria.[49] Since the court found that the petitioners met the criteria of the Act, it found a corresponding duty to provide services to them.[50]

Justice Neely filed an acidulous dissent, contending that the majority's opinion "though woofed with dreams, is warped with folly."[51] He criticized the majority's mandate to the Department for failing to clearly state what services are to be provided to whom.[52] Justice Neely pointed out that the majority did not adequately deal with the question of costs or with the possible impact on current welfare recipients who might be denied benefits so that the majority's mandated program could be funded.[53] Neely next took issue with the majority's interpretation of the statute, asserting that "[t]hrough

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[44] Brief for Respondent at 35, Hodge v. Ginsberg, 303 S.E.2d 245 (W. Va. 1983). It should be noted that persons who were active in seeking the passage of the Act, such as Nancy Tonkin Icard of the W. Va. Human Services Ass'n, agree with this statement of the intent of the Act.

[45] 303 S.E.2d at 250.

[46] W. VA. DEPT. OF WELFARE, SOCIAL SERVICES MANUAL, Reg. 29100 (Aug. 14, 1981).

[47] *See, e.g.*, Security Nat'l Bank and Trust Co. v. First W. Va. Bancorp, Inc., 277 S.E.2d 613, 616 (W. Va. 1981).

[48] 303 S.E.2d at 250.

[49] *Id.* at 250-51.

[50] *Id.* at 251.

[51] *Id.*

[52] *Id.* at 252.

[53] *Id.*

the magic of ellipsis, great mischief can be accomplished. . . ."[54] Most readers, he observed, would read the statute to provide incapacitated adults protection from abuse or neglect and to permit intervention by the police in emergency situations.[55] Since the stated purposes of the statute are to promote achieving self-sufficiency and reducing dependency on the state,[56] Justice Neely felt the majority's position was in direct conflict with the design of the statute.[57]

Because there was no evidence that the Department of Welfare denied benefits to the original petitioners, Justice Neely questioned the existence of a "controversey" sufficient for litigation.[58] Though several of the intervenors asserted that they had been denied services, and, thus, established a "controversy," Neely again pointed out the difficulty in establishing the class of people to be served under the new ruling.[59] He went on to pose a number of questions regarding exactly who is in the class to be served under the court's mandate and what new services are required.[60] Of particular concern to Justice Neely was the possibility that funding for these services would be obtained at the expense of ongoing services to more traditional clients of the Department.[61]

Finally, it should be noted that the *Ginsberg* decision sparked controversy in the West Virginia Legislature, which was in session when the decision was announced. A bill sponsored by Delegates Hatcher and Wooten would have redefined the term "incapacitated" to make it clear that the homeless were not per se included in the class of persons to be served by the statute.[62] The bill passed the House of Delegates on March 8, 1983, but was not acted upon by the Senate Health and Welfare Committee during the final days of the session.

## II. PUBLIC SERVICE COMMISSION PROCEDURES

*C & P Telephone Co. v. Public Service Commission*, 301 S.E.2d 798 (W. Va. 1983).

When the Public Service Commission granted slightly more than $32 million of the $67.69 million rate increase requested by the Chesapeake and Potomac Telephone Company of West Virginia, Inc., the company appealed in

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[54] *Id.*

[55] *Id.*

[56] W. VA. CODE § 9-6-2 (Supp. 1983).

[57] 303 S.E.2d at 252.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* at 253. In a telephone conversation with Commissioner Ginsberg, he reported that these services are currently being provided utilizing federal funds allocated in response to nationwide high unemployment. He speculated that when these funds are no longer available, the

*C & P Telephone Co. v. Public Service Commission.*[63] The Commission had ruled on thirty-one issues. C & P appealed from three of those rulings which denied rate increases for (1) management salary increases, (2) a cash working capital allowance, and (3) an inflation adjustment for purchases made from Western Electric.

The court articulated the standard of review used to examine the Commission's rulings in *Monogahela Power Co. v. Public Service Commission.*[64] In that decision, the court indicated that its primary concern is to determine if the Commission has abused or exceeded its authority. The court also assures itself that the Commission has given reasoned consideration to each of the pertinent factors involved.[65] The court is also guided by the fact that the West Virginia Code establishes that the burden of proof rests with the utility seeking a rate increase to show that the requested increase is just and reasonable.[66]

The court affirmed the Commission's refusal of C & P's request to grant management salary increases in excess of the inflation adjustment previously approved by the Commission.[67] The court found that the Commission's ruling had balanced the competing interests of C & P's need to hire and retain qualified employees against the public interests in paying only just and reasonable charges for service.[68]

On the second issue on appeal, the court disagreed with the Commission's denial of C & P's request for a cash working capital allowance to pay any outstanding indebtedness resulting from the time lag between rendering of service and receipt of customer payment.[69] Even though the Commission staff had presented evidence that such an allowance was not needed by C & P, the court ruled that the company reasonably relied on the Commission's rules[70]

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Department will be forced to reallocate emergency assistance or social services appropriations for this purpose. (Aug. 19, 1983).

[62] H.B. 1984, 66th W. Va. Leg. 1st Sess. (1983).

[63] 301 S.E.2d 798 (W. Va. 1983).

[64] 279 S.E.2d 179 (W. Va. 1981). A reversal of the Commission's findings is mandated if any of the following is present:

(1) The finding is contrary to the evidence.
(2) The finding is without evidence to support it.
(3) The finding is arbitrary and capricious.
(4) The finding is the result of a misapplication of legal principles.

*Id.* at 181.

[65] *Id. See also Survey of Developments in West Virginia Law: 1982*, 85 W. VA. L. REV. 411, 420 (1983) (discussing the *Monongahela Power* case).

[66] W. VA. CODE § 24-2-4a (1980).

[67] 301 S.E.2d at 802.

[68] *Id.*

[69] *Id.* at 805.

[70] PUBLIC SERVICE COMM'N RULES AND REGULATIONS FOR THE GOVERNMENT OF THE CONSTRUCTION AND FILING OF TARIFFS OF PUBLIC UTILITIES AND COMMON CARRIERS BY MOTOR VEHICLE, Rule 42, Statement B, Schedule 7.

and precedents in planning its proof for the requested rate.[71] While utilities have no vested right in the retention of rules for deciding rate requests, fairness dictates that reasonable notice be given before a rule is changed.[72] Because C & P had only three weeks notice of the staff's position, it had no time to conduct the proper studies to prove the need for a cash working capital allowance.[73] In reversing this portion of the Commission's ruling, the court observed that an administrative agency's action might appear arbitrary and capricious unless it gives "reasonable notice and supporting rationale before it changes its standards" when precendents run in a different direction.[74] It is interesting to note that, in a subsequent rate case, the Commission disallowed the working capital allowance request of C & P when the company's own study could not show it was needed.[75]

The final ruling at issue involved the Commission's denial of an inflationary provision for Western Electric purchases and license contract fees. C & P sought to have the inflation adjustment adopted by the Commission elsewhere in its rulings on the requested rate increases applied to these expenses. The Commission took the position that actual price increase information should be provided by the utility for intercompany transactions. The court agreed with the Commission, again recognizing the burden of proof placed upon the utility in seeking a rate increase.[76] The Commission repeatedly requested data to determine what inflation adjustment would be most appropriate, but C & P failed to submit the data needed.[77] Not surprisingly, the Commission took strong exception in its decision to the company's failure to provide the required information.[78] C & P appealed the ruling, asserting that the denial of the inflation adjustment was intended as a punishment which constituted arbitrary action on the part of the Commission. While the court supported the Commission's denial of the inflation increase because of the failure of C & P to provide proof of its reasonableness, it ordered the Comission to revise the language in its decision which tended to indicate the denial was punitive.[79]

## III. REINSTATEMENT OF DISBARRED ATTORNEYS

*Committee on Legal Ethics v. Pence*, 297 S.E.2d 843 (W. Va. 1982).

The court denied the petitioner's request to reinstate his license to prac-

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[71] 301 S.E.2d at 803.
[72] *Id.* at 804.
[73] *Id.* at 803.
[74] *Id.* at 804.
[75] Chesapeake and Potomac Tel. Co., P.S. Case No. 82-317-T-42T (April 30, 1983).
[76] 301 S.E.2d at 807.
[77] *Id.*
[78] *Id.* at 806.
[79] *Id.* at 809.

tice law in *Committee on Legal Ethics v. Pence*.[80] That denial was heavily influenced by the court's detailed consideration of the petitioner's conduct during the period of his disbarment.

Pence's license to practice law had originally been suspended on July 1, 1975, for one year on charges of co-mingling a client's funds with his own.[81] Following the expiration of the suspension period, the petitioner filed for reinstatement. The Committee on Legal Ethics recommended that the petition be denied, and instituted disciplinary proceedings against Pence. In annuling Pence's license to practice law, the court found that the Ethics Committee had proved its charges "by full, clear and preponderating evidence."[82] Following the expiration of the five-year period required by the By-laws of the West Virginia State Bar,[83] Pence again filed for reinstatement in the current case.

Justice McGraw first noted that "the petitioner bears the burden of showing that he presently possesses the integrity, moral character, and legal competence to resume the practice of law."[84] The petitioner must show a course of conduct demonstrating rehabilitation and allowing the court to conclude that it is unlikely that the petitioner will again engage in unprofessional conduct.[85]

The primary purpose of disciplinary proceedings against lawyers is to protect the public and reassure it regarding the reliability and integrity of attorneys.[86] Because of these concerns, the court first considers the seriousness of the underlying offense which led to disbarment in making its decision on a petition for reinstatement.[87] In *Pence* the court noted that the multiple violations which had led to Pence's disbarment were serious offenses and considered those offenses an indication of the lack of the required good moral character and integrity.[88] While serious underlying offenses do not preclude reinstatement, the court in *Pence* was faced with allegations of subsequent misconduct such as to show that rehabilitation had not occurred.[89]

The court found that Pence, during the period of disbarment, was involved in questionable financial dealings and "engaged in conduct precariously

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[80] 297 S.E.2d 843 (W. Va. 1982).

[81] Committee on Legal Ethics v. Pence, 216 S.E.2d 236 (W. Va. 1975).

[82] Committee on Legal Ethics v. Pence, 240 S.E.2d 668, 671 (W. Va. 1977).

[83] BY-LAWS OF THE WEST VIRGINIA STATE BAR, art. VI, § 35 (1976), *reprinted in* W. VA. CODE vol. 1A (1982).

[84] 297 S.E.2d at 845.

[85] *In re* Brown, 273 S.E.2d 567, 571 (W. Va. 1980).

[86] Committee on Legal Ethics v. Mullins, 226 S.E.2d 427, 429 (W. Va. 1976).

[87] 297 S.E.2d at 846.

[88] *Id.*

[89] *Id.*

approaching the unauthorized practice of law."[90] Several persons had testified that Pence represented them in legal matters during the time in question and that they had been unsuccessful in obtaining refunds of moneys paid to Pence. Among other business dealings, Pence formed a corporation along with three other persons. Although he received $15,000 from the other shareholders, no business was ever conducted by the corporation and no records were produced to show what Pence did with the money.

The court found that Pence had failed to meet the burden of proof required for reinstatement.[91] The Ethics Committee's recommendation that the petition be denied was given substantial weight.[92] The court generally gives serious consideration to administrative agency findings. It has specifically held that it will do so in the case of Ethics Committee recommendations unless some mistake of law or arbitrariness has been shown.[93] Pence asserted that the Ethics Committee failed to consider testimony in his behalf offered by numerous character witnesses. The court found that the testimony in question had been fully considered, but pointed out that such general testimony as to the petitioner's character is afforded little weight in deciding on the issue of rehabilitation.[94]

Although the court denied Pence's petition for reinstatement, apparently he may re-petition at any time he feels he can meet the burden of proof imposed on him by law. The Ethics Committee felt that another five-year period should have to elapse before a petition would again be proper, but the court held that this would be in contravention of the State Bar By-Laws.[95]

## IV. SCHOOL PERSONNEL

*Dillon v. Board of Education*, 301 S.E.2d 588 (W. Va. 1983).
*Totten v. Board of Education*, 301 S.E.2d 846 (W. Va. 1983).
*Clarke v. West Virginia Board of Regents*, 301 S.E.2d 618 (W. Va. 1983).

The West Virginia Supreme Court of Appeals has previously established that "the law of this State is that school personnel laws are to be strictly construed in favor of personnel, and regulations and statutes for their protection, carefully complied with."[96] Three cases decided in March of 1983 reemphasize that position.

In *Dillon v. Board of Education*,[97] the appellants were teachers seeking

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[90] *Id.*
[91] *Id.* at 848.
[92] *Id.*
[93] 273 S.E.2d at 572.
[94] 297 S.E.2d at 848.
[95] *Id.* at 849 n.2.
[96] Morgan v. Pizzino, 256 S.E.2d 592, 595 (W. Va. 1979).
[97] 301 S.E.2d 588 (W. Va. 1983).

back pay from the Mingo County Board of Education for days on which the school was closed as a result of parents' picketing. The teachers claimed they were due the pay under a West Virginia Code provision allowing the closing of schools for certain specified reasons.[98] The lower court had denied the teachers' request for a writ of mandamus and had refused to order a pay award. In *Dillon*, the court reversed the circuit court's decision and remanded the case for further proceedings.[99]

Even though the West Virginia Code has always included a provision for the closing of schools by proper authorities, *Dillon* is a case of first impression involving this statute.[100] The court's holding indicates that it will broadly construe this statute, as exemplified by the court defining "calamitous cause" as any threatening emergency.[101] In its original form, the statute allowed for such school closing only because of the prevalance of disease.[102] The current West Virginia Code section 18A-5-2 also allows closings for weather conditions or any calamitous cause which is not within the control of the school board and specifically provides for paying school personnel for those days when the school is closed pursuant to the statute.[103]

In his opinion, Justice Miller indicates the court's belief that the legislative intent of the amendments was to increase the coverage of the statute.[104] He also applies the general rule of liberal construction of legislation that grants economic or social rights in order to advance the legislative intent.[105]

The Mingo County Board of Education had refused the teachers' request for pay in spite of a letter from the state superintendent of schools indicating that the teacher's claim was justified.[106] The state superintendent is charged with making administrative interpretations of the school law.[107] Therefore, the court gave considerable weight to the superintendent's opinion in finding a duty on the part of the Board to pay the appellants.[108]

As noted earlier, the court defined the statute's term "calamitous cause"

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[98] W. VA. CODE § 18A-5-2 (1977). This statute allows proper authorities to close a school on account of "contagious disease, conditions of weather or any other calamitous cause over which the board has no control" and also provides that, in such circumstances, personnel "shall receive pay the same as if school were in session."

[99] 301 S.E.2d at 592.

[100] *Id.* at 589.

[101] *Id.* at 591.

[102] W. VA. CODE § 18-7-4 (1931).

[103] The expanded language was added by amendments enacted in 1959 and 1969.

[104] 301 S.E.2d at 590.

[105] *Id. See, e.g.*, Andy Bros. Tire Co. v. W. Va. Tax Comm'r, 233 S.E.2d 134 (W. Va. 1977).

[106] 301 S.E.2d at 590.

[107] W. VA. CODE § 18-3-6 (1977).

[108] 301 S.E.2d at 590.

to mean any emergency threatening to the school, its pupils or personnel.[109] The Mingo County School Board had obtained an injunction against the picketing to prevent violence.[110] On each of the days in question the school was closed by permission of the county school superintendent's office.[111] The court held that the teachers had proved that the school had been closed by proper authorities for calamitous cause and were entitled to pay under the statute.[112]

In another case filed against the Mingo County Board of Education, the court once again demonstrated that it will construe school personnel laws in favor of the employees. The appellant in *Totten v. Board of Education*[113] was suspended from his duties as principal of Kermit High School after he had been found guilty of insubordination and willful neglect of duty.

In May, 1979, the appellant developed a written plan for procedures to be followed in closing the school at the end of the term. That plan stated that final report cards would be distributed to students on a Friday, even though school was scheduled for the following Monday and Tuesday. Despite the fact that Principal Totten twice announced to his students that the school would be open on Monday and Tuesday, only a few students attended school on those days. Less than a week following the end of the school term, the appellant was informed by the Board that he was dismissed from his position as principal. Following a procedural protest by appellant Totten, the Board rescinded its dismissal, but subsequently informed appellant that formal charges had been levied against him by the superintendent. Following a hearing on the charges, the appellant was suspended from his duties as principal for a fifteen day period. The circuit court affirmed appellant's suspension, and Totten appealed.[114]

State law enumerates the "just causes" for suspending or dismissing a school employee.[115] Insubordination and wilful neglect of duty are among the causes listed. However, the court had previously held that the Board's authority to suspend or dismiss an employee must be exercised reasonably, not arbitrarily or capriciously.[116] In this per curiam decision, the court found that the evidence did not support the Board's finding that the appellant was

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[109] *Id.* at 591.

[110] *Id.* at 589.

[111] *Id.* at 591.

[112] *Id.* at 592.

[113] 301 S.E.2d 846 (W. Va. 1983).

[114] *Id.* at 847.

[115] W. VA. CODE § 18A-2-8 (1977) allows suspension or dismissal of employees at any time for immorality, incompetency, cruelty, insubordination, intemperance or willful neglect of duty. The statute details the procedures to be followed before so disciplining an employee.

[116] Beverlin v. Board of Educ., 216 S.E.2d 554 (W. Va. 1975).

guilty of the charges.[117] The court felt that the appellant's actions amounted only to an error of judgment, which is not sufficient cause for suspension.[118] The lower court's decision was reversed and remanded, since the Board's action against the appellant was found to be an arbitrary and capricious exercise of its authority.[119]

A third case stresses that, when an administrative body has adopted procedures for the conduct of its affairs, it is bound by those procedures and must follow them. *Clarke v. Board of Regents*[120] involved the dismissal of a tenured college professor. The court had ruled in an earlier suit by Clarke[121] that dismissal proceedings must follow the Regents' own guidelines.[122] The circuit court had then awarded Clarke back pay from the date of his dismissal until the hearing examiner's recommendation of dismissal was adopted by the college president. Clarke again appealed, objecting to the lower court's determination of the amount of back pay due him. In this second appeal, the court ruled that, since Clarke had the guaranteed right to appeal the adverse action to the Regents, his dismissal was not final until their action and, therefore, he was entitled to backpay up until the Regents made his dismissal final by upholding the previous decisions.[123]

The Regents' policies provide procedural protections to tenured faculty members threatened with dismissal. These policies create a substantial property interest in the faculty member's position and salary, which the court observed could not be taken away without observing procedural due process protections.[124] Since, however, no actual damages were proven in this case, Clarke was awarded only nominal damages for the due process violation.[125]

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[117] 301 S.E.2d at 848.

[118] *Id.*

[119] *Id.*

[120] 301 S.E.2d 618 (W. Va. 1983).

[121] Clarke v. Board of Regents, 279 S.E.2d 169 (W. Va. 1981).

[122] POLICY BULLETIN No. 36, published by the Board of Regents, grants an appeal as of right to the Regents when a college president decides to dismiss a tenured professor. 301 S.E.2d at 619-20.

[123] 301 S.E.2d at 620.

[124] *Id.*

[125] *Id.* at 621.