KIRK BROWN, .

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Grievant, .

.

.

v. . Docket No. 92-BOD-128

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WEST VIRGINIA STATE BOARD .

OF DIRECTORS at BLUEFIELD .

STATE COLLEGE, .

.

Employer. .

.

D E C I S I O N

Kirk Brown (hereinafter Grievant) was employed at Bluefield State College (hereinafter College) as an Athletic Trainer until his dismissal of October 23, 1991. After his termination from employment, Grievant filed the instant complaint stating as follows:

> On October 22, 1991, I was called into Dr. Mangus' office. At that time, I was told that the meeting was a pre-termination investigative hearing. I did not have any legal representation at this meeting. After the meeting, Dr. Mangus said that he needed to see me at 9:00 a.m. October 23, 1991, for his decision. With in [sic] a 24 hour period I was terminated from my position at Bluefield State College. I feel that I was denied the right of due process and representation. The relief that I am seeking is reinstatement as Athletic Trainer and back pay to the time of dismissal.

Grievant filed his complaint directly at level four of the grievance procedure. A Decision was issued by Administrative Law Judge M. Drew Crislip on November 25, 1991, dismissing the claim pursuant

to W.Va. Code §18-29-1, et seq. It was recognized that no expedited filing procedure exists for educational employees as is established for state employees who file grievances pursuant to W.Va. Code §29-6A-1 et seq. Grievant had previously initiated grievance proceedings at level one by sending a letter dated November 21, 1991, to College Director of Personnel Stephen Leach.

Grievant's November 21, 1991 letter contained five challenges to his dismissal which are summarized below:

> (1) Denial of the right to due process;
>
> (2) Concern about two letters of reprimand being used as support for dismissal. One letter was referred to by incorrect date and the other letter referred to an incident which occurred more than a year from the date of the dismissal;
>
> (3) Whether a letter of May 2, 1991, could be considered as a letter of reprimand;
>
> (4) Whether the May 2, 1991 letter was prepared with malicious intent; and
>
> (5) Whether Grievant had notice that the above mentioned letters of reprimand were presented to him prior to being included in his personnel file.

A level one grievance conference was held on January 21, 1993, with College Athletic Director Terry Brown, College Dean of Student Services Dr. Larry Mangus and Grievant in attendance. Pursuant to the January 23, 1992 response from Dr. Mangus, Grievant's arguments were summarized as follows:

> The termination letter of October 23, 1991 refers to a letter of reprimand dated September 19, 1991. That is in error, as that letter is dated September 19, 1990. You felt that since it was over a year old it should have been removed from your personnel file and cited the classified employee handbook as a rationale for this.
>
> You objected to a letter dated May 2, 1991 being referred to as a reprimand because it was not specifically stated in the letter that it was a letter of reprimand.

It was confirmed at this conference that the date of the September 19, 1990 letter was erroneously referred to in Grievant's termination letter. However, the result of this conference was that Grievant's termination was sustained based upon his 1991-1992 performance evaluation and work record which were both discussed at that conference.

Grievant filed a level two appeal of his dismissal on January 30, 1992, with Mr. Brown, claiming that his termination was arbitrary and capricious. A Decision was issued on February 18, 1992, by a grievance evaluator who recommended that the complaint be denied. This decision concluded by stating the following:

> In accordance with the provisions of §18-29-4(c) of the West Virginia Code and Section 15 of Policy Bulletin Number 36, either party to the grievance may appeal this decision to level III or directly to level IV for an appropriate hearing. The proper Grievance Form for such appeal should be completed and submitted within the prescribed guidelines to the following:

Dr. Gregory D. Adkins, President

Bluefield State College

219 Rock Street

Bluefield, West Virginia 24701

> It is necessary that the proper procedure for appeal be followed in order that the record of the level II hearing can be prepared and submitted within the established time frame.

This recommendation was accepted and approved by College President Gregory D. Adkins on February 27, 1992. Grievant had obtained the services of an attorney and, on the same day, sent a letter to President Adkins noting that he disagreed with the level twoDecision. He also requested that the College furnish him with the proper appeal forms. By letter of March 3, 1992, Mr. Leach confirmed that Grievant wished to appeal to level four and stated that he would forward the proper forms to Grievant's attorney. Ultimately, Grievant's appeal form was not received by this Grievance Board until April 13, 1992, some twenty-nine working days later.

On April 7, 1992, Grievant's counsel, Thomas L. Fuda phoned the Grievance Board and inquired

as to the status of Grievant's appeal. He was told that there was no record of an appeal. Thereafter, he mailed a letter to this Board dated April 13, 1992, expressing concern that there was no record of Grievant's appeal to level four. The letter indicated that a level four appeal form dated February 28, 1992, had been mailed to Mr. Leach's office. This letter from Mr. Fuda stated, in pertinent part,

> I pulled the necessary documents from the file that are required to accompany the appeal form. After copying the letter and grievance form, I mailed the appeal with our copies of the disposition of the level I and II hearings to your office [Grievance Board].

Mr. Fuda indicated that he had not mailed the appeal form by certified mail. Attached to this letter was a level four appeal form signed by Grievant on April 14, 1992.

This case was assigned to the undersigned and set for hearing by notice of April 24, 1992. Subsequently, a Motion for Continuance was submitted by the College and granted on May 28, 1992. This continuance was based upon the fact that the Assistant Attorney General who had been representing the College through theproceedings below had resigned. The Order of Continuance requested that the parties contact the Grievance Board in order to establish a second hearing date. Overall, four more continuances were granted upon motions made by the College and agreed to by the Grievant. On May 15, 1993, the College filed a Motion to Dismiss the claim alleging that the appeal to level four was not perfected in a timely fashion pursuant to W.Va. Code §18-29-4(c). Grievant's counsel responded to said Motion on May 27, 1993. The first day of hearing at level four was July 22, 1993, and the taking of testimony was completed on October 4, 1993, the fourth day of hearing. The case ultimately became mature for decision on December 3, 1993, after the parties agreed in writing to waive the filing of post-hearing briefs. The undersigned stated that a ruling on the College's Motion to Dismiss would be held until the issuance of this Decision in order to allow for a review of the relevant facts and controlling law presented during the hearing in the matter.

The College takes a strict approach in arguing that this grievance must be dismissed because the appeal to level four was untimely and cites to the following language of W.Va. Code §18-29-4(d)(1):

> If the grievant is not satisfied with the action taken by the chief administrator, or, if appealed to level three, the action taken by the governing board, within five days of the written decision the grievant may request, in writing, on a form furnished by the employer, that the grievance be submitted to a hearing examiner as provided for in section five [§ 18-29-5] of this article, . . . (Emphasis added).

Further, the College cites to Casanova v. Kreusch, 21 W.Va. 720 (1883), for the proposition that an appeal in a civil suit is not an absolute right, but rather, is subject to certain restrictions and conditions as may be established by the Legislature. It further cites to other Supreme Court cases which have held that a party is precluded from appealing to the Court in civil cases after the appeal period has lapsed. The College further contends that Grievant's appeal should not be accepted because he did not comply with the instructions on the appeal form itself. The typical grievance forms contain the following instructions:

> UPON APPEAL TO LEVEL IV THE GRIEVANT MUST:
>
> (1) forward a copy of this appeal to the chief administrator of the agency, Board of Education or College/University of Higher Learning and
>
> (2)Submit this form and all lower level responses to the
>
> West Virginia Education and State Employees Grievance Board
>
> 240 Capitol Street, Suite 508
>
> Charleston, West Virginia 25301

Grievant responds by asserting that he substantially complied with the appeal provisions of Code §18-29-3 when he mailed the letter dated March 3, 1992, to President Adkins notifying him that he wished to appeal to level four and requesting the appropriate material. Grievant's response to the College's Motion to Dismiss also includes, as attachments, affidavits from Mr. Fuda, Attorney McGinnis E. Hatfield and himself, in support of the fact that an appropriate appeal form was mailed to the Grievance Board on March 9, 1992, without being certified. Grievant contends that the procedural provisions of the grievance statute should be given a flexible interpretation so as to achieve desired goals; therefore,his appeal should not be dismissed as untimely due to the nature of the issue in question.

Both parties cite to Duruttya v. Board of Education of the County of Mingo, 382 S.E.2d 40 (W.Va. 1990) in support of their arguments. In Duruttya, the appellant (grievant) appealed to the Supreme Court from an adverse ruling in the Circuit Court of Mingo County which overturned the Administrative Law Judge's ruling that he had substantially complied with the filing requirements of Code §18A-29-4(d)(1). Duruttya had been dismissed from employment and filed a grievance challenging the board's action. He received an adverse level two decision from the board which stated that he had five days to appeal to level four; however, the letter was silent as to how the appeal was to be perfected. Thereafter, Duruttya presented the Assistant Superintendent with a letter requesting a level four hearing within the five-day time frame. At level four, the board contended that Duruttya had not complied with the appeal period established by Code §18-29-1, et seq. Administrative Law Judge Jerry A. Wright denied the board's Motion to Dismiss, holding that Duruttya had substantially complied with the appeal provisions of the Grievance Procedure for Education Employees. The Circuit Court of Mingo County reversed that Decision.

The Supreme Court heard Duruttya's appeal and, based upon the facts, ruled that

> In the absence of any evidence that Duruttya acted in bad faith when he filed his grievance with the Mingo County Board of Education, we believe that his substantial compliance with the filing procedures contained in W.Va. Code §§ 18A-2-8 and 18-29-1 et seq. should be sufficient in this case.

Id. at 43. The Court was influenced by the fact that the lower level decision issued to Duruttya did not specify where or how an appeal to level four was to be perfected. The Court also referenced Code §18-29-1 (1988) which states that the grievance procedure is "intended to provide a simple, expeditious and fair process for resolving problems at the lowest possible administrative level. . . ." The doctrine of substantial compliance was born out of the Duruttya decision. In this case, however, Grievant did more than substantially comply with the appeal provisions of Code §18-29-4 because, according to his supporting affidavit, his appeal was timely mailed to the proper address. A case more analogous to the facts at issue herein is Jack v. W.Va. Div. of Human Services, Docket No. 90-DHS-524 (May 14, 1991).

In Jack, the grievant's counsel had failed to timely mail a level four appeal form to the Grievance Board which was not due to any fault of Jack. Administrative Law Judge Sunya N. Anderson analyzed the issue as to whether Jack's grievance should be dismissed as untimely under the

standards utilized by circuit courts in setting aside default judgments under the West Virginia Rule of Civil Procedure 60(b). Consistent with the established principle that cases should be decided upon their merits as opposed to being dismissed for technical or procedural reasons, ALJ Anderson held that it would be inequitable to dismiss Jack's grievance upon the basis of timeliness because Jack was not at fault. The employer's Motion to Dismiss was denied.

In the instant case, it would be easy to adopt the substantial compliance standard as approved by the Court in Duruttya to defeat the College's Motion to Dismiss based upon Grievant's initial compliance with the level two decision dated February 27, 1992. It could be determined that Grievant substantially complied with the appeal provisions by submitting his March 3, 1992 letter of appeal to President Adkins. However, the uncontroverted facts are that Grievant not only indicated to President Adkins that he wished to appeal but he also requested verification of the steps which he needed to take to appeal. Thereafter, he mailed the proper appeal form. Grievant had time to comply with the filing requirements of Code §18A-29-4(d)(1) at this point. According to the affidavits, Grievant did attempt to perfect a proper appeal within the five-day time limitation established. (See footnote 1)

Based upon the uncontroverted facts as presented through testimony and affidavit, Grievant did more than substantially comply with the filing requirements of Code §18A-29-4(d)(1) because it is determined that he complied with said statutory provision. Therefore, the ruling in Jack is persuasive as to deciding the Motion at hand. Grievant cannot be faulted for the fact that his appeal was not received by this Board, for whatever reason, until after the statutory time period. Grievant should not be made to suffer as a result of this occurrence as he did everything he could do to timely perfect the appeal. Therefore, the College's Motionto Dismiss is denied and the substantive claims of the grievance shall now be addressed.

Discussion of the Merits

The October 23, 1991 letter of dismissal stated that Grievant's employment was to be terminated based upon the charges of "insubordination and dereliction of duties in your receipt of monies or benefits to which you were not lawfully entitled." Specifically, Grievant was fired as a result of an incident which occurred on October 18, 1991. Although the dismissal letter goes further to detail various other work-related problems Grievant had suffered during his tenure with the College, it is clear from the record that he was dismissed pursuant to the College's disciplinary policy as a result of

his actions of October 18. According to the College, Grievant had previously received two letters of reprimand dated May 2, 1991 and September 19, 1990, which he did not challenge as inappropriate until his termination. Grievant questions the fact that he had received two formal written reprimands issued consistent with the College's disciplinary policy. Assuming arguendo, Grievant had been disciplined twice in the past, he cannot now challenge the appropriateness of these adverse actions to establish that his discharge was unwarranted. The following findings of fact are deduced from the record in this case.

Findings of Fact

1. On October 17, 1991, Grievant asked Terry Brown if and when there were scheduled basketball practices to be held at theCollege on the next day. He was informed that the women's team was scheduled to practice at 2:00 p.m. and the men's team at 4:30 p.m. 2. Grievant then made arrangements for two medical kits, medical tape and a water cooler to be delivered to the office of another member of the Athletic Department in case he would not be at work the following day.

3. On October 18, 1991, Grievant called Leigh Thompson, Athletic Department Secretary, in the morning and reported that he wished to use sick leave for that day.

4. At some time around 2:30 p.m. or 3:00 p.m. that day, Grievant went to the Bluefield High School to act as a trainer for its football team.

5. At the College, the cross county coach was in need of a medical kit and inquired of Terry Brown where he could locate one. 6. Terry Brown was given a tip that Grievant was at the High School based upon the belief that his Ford Bronco was in the High School parking lot.

7. Terry Brown and Dr. Mangus drove to the High School and located Grievant in the gym. They asked him of the whereabouts of a medical kit and then left. Grievant commented to them that he had called in sick that day.

8. Grievant had started helping Bluefield High School as a trainer sometime around July 30, 1990. He did not receive any pay for his services until sometime around the Spring of 1991.

9. Grievant had not received express permission from the College to work for or to volunteer his services as a trainer for the High School.

10. Sometime during the spring and summer of 1990, Grievant took various days off or afternoons off from work at the College, without receiving prior approval, to work as a trainer at

Bluefield High School. Once this was discovered, Grievant was allowed to use annual leave for a period of approximately twenty-two days in order to make up for the time he was absent. He was allowed to prepare Annual Leave Request Forms and back-date the time of his absences. Terry Brown approved this use of leave.

11. Grievant received a letter of reprimand on May 2, 1991 due to numerous problem areas which had developed in his job performance as a trainer at the College.

12. On September 19, 1990, Grievant was given a letter or reprimand regarding his alleged release of confidential medical record information of a College athlete at an Athletic Committee meeting.

13. Grievant did receive pay from Bluefield High School for services rendered as a trainer during the period of April and May 1991.

The College has adopted a progressive disciplinary policy within its Classified Employees' Handbook. Section 10.0 of this handbook begins by stating the following:

> The employee's immediate supervisor will outline standards of performance and conduct for each employee. If an employee does not observe these standards, his/her supervisor will counsel him/her to try to resolve theproblem. If counseling is not effective, the employee may receive a series of warning letters, then a period of suspension and, finally, if the conduct does not improve dismissal.
>
> Immediate dismissal for cause is also possible under certain circumstances discussed below.

Section 10.2 provides that "Disciplinary action, including suspension or dismissal, may be taken whenever an employee's conduct interferes with the operation of his/her unit or brings discredit to the work unit." Further, Section 10.2.2 provides that

> Immediate dismissal may be appropriate in cases of flagrant or willful violations of rules, regulations, standards of accepted behavior or performance, or for actions where an investigation proves the employee was in clear violation of policy.

Section 10.2.2.1 sets forth a list of reasons for dismissal:

1.

Reporting to work under the influence of alcohol or narcotics or partaking of these

substances while at work;

2.

Malicious destruction or theft of property of the institution, the Board of Regents, or its visitors, patrons, or employees;

3.

Wrongful injury to an employee of the Board of Regents or an employee's institution;

4.

Refusal to comply with institutional rules;

5.

Neglect of duty;

6.

Dishonesty;

7.

Sleeping on duty;

8.

Failure to maintain established performance standards;

9.

Habitual absence from work without permission or proper explanation;

10. Tardiness;

11. Insubordination.

Finally, the Employee Handbook allows for an employee to be discharged after two written warnings are issued pursuant to 10.3.1. Section 10.3, dealing with written warnings contains the following language:

> A supervisor will give an employee written warnings about his/her performance or conduct. Written warnings are to be given to the employee with a copy placed in the employee's personnel file. A written warning must specify how long it will remain in the file. In no case can a period specified be longer than twelve months from the date the letter was written.

The College's Handbook sets forth provisions dealing with the progressive discipline of employees and also for the immediate dismissal of employees for cause.

Grievant contends at level four that the College's decision to dismiss him from employment was too harsh of a penalty. He contends that, at the most, he should have been suspended without pay. Grievant also alleges that he should not have been dismissed pursuant to Section 10.3.1 of the College's Employee Handbook because the two written warnings were technically lacking in that they did not state the time period for which they were to be maintained in his personnel file. He also argues that the first warning letter was too old to have been considered active at the time the termination decision was made. Finally, he alleges that he was dismissed in retaliation for having refused to allow an athlete to play after said athlete's physician cleared him to play. The College simply avers that Grievant was properly dismissed from employment pursuant to the applicable law and regulations.

Grievant does not contest the fact that he was at Bluefield High School during the afternoon of October 18, 1991, while on sick leave from the College. However, he contends that once on sick leave, an employee's time is his/her own to do with as he/she deems fit. He testified that he was sick in the morning but felt betterin the afternoon so he decided to go to the High School to see how the athletes were doing. He asserts that he was simply volunteering his time, the type of conduct which is generally encouraged by the College.

The West Virginia Board of Regent's Procedural Rules, 128 CSR 35, contains the applicable provisions dealing with the granting of sick leave. (See footnote 2) 123-35-8.8.3 states, in pertinent part, as follows:

> Sick leave may be used by the employee when injured or ill, when a member of the immediate family is seriously ill, or when death occurs in the immediate family.

Section 8.9 also contains the following provision:

> An employee is required to notify his supervisor immediately if ill or unable to work for any reason. The notification shall be given to the immediate supervisor prior to the employee's normal starting time and should include the approximate length of absence. (Emphasis added).

There are no provisions contained in this regulation which can be interpreted to stand for the proposition that once an employee reports to his/her supervisor that he/she is unable to work the entire day is his/hers to use as deemed fit. The opposite conclusion can be drawn from the highlighted language of Section 8.9 which requires the employee to approximate how long he/she will be away from work because of sickness or other reason. This language could as easily be interpreted to stand for the proposition that once an employee is no longer too ill to workhe/she should be required to discontinue use of sick leave and either return to work or take annual leave.

In the instant case, not only can it be determined that Grievant violated the Board of Regent's policy on sick leave, but that he also acted dishonestly by neglecting the duties he was customarily paid by the College to perform in order to provide the same type of service to the High School. If Grievant was well enough to act as a trainer at Bluefield High School, then he should have been at the College attending to both the men's and women's basketball teams. This is obviously the reason why the College hired him in the first instance. Further, the evidence of record supports the conclusion that Grievant knew he was going to be absent from work on October 17 because he made arrangements for someone else to have his equipment. From this fact, it can be inferred that Grievant planned on working at the high school on the 17th and not that he simply decided to go after he felt better on the 18th. Grievant's argument that his actions were remotely proper flies in the face of both common sense and the law. See, Luzader v. West Virginia University, Docket No. BOR1-86-345-2 (Apr. 12, 1987).

Grievant's contention that he should not have been dismissed even if his use of sick leave was improper is unpersuasive. Grievant's abuse of sick leave was classified by the College as insubordination and dereliction of duty in the dismissal letter; his actions could just have easily been

categorized as willful neglect of duty or dishonesty. These various terms can be used todescribe the same type of action which is clearly established as grounds for immediate dismissal under the College's Employee Handbook. It does not matter whether the written reprimands discussed in the dismissal letter were technically in compliance with the provisions of Section 10.3 because Grievant was not dismissed for having improperly or negligently performed the same act a third time. The dismissal decision was not based upon Section 10.3.1. The dismissal letter simply referred to various problems or concerns related to Grievant's work history at the College to support the ultimate conclusion that Grievant's conduct could not be mitigated based upon his work record. (See footnote 3) In conclusion, Grievant was lawfully dismissed for cause pursuant to the grounds established for dismissal under Section 10.2.2 of the College's Employee Handbook.

Grievant has alleged that he was the subject of a retaliatory discharge because, he contends, the College believes that he improperly second guessed a physician's physical assessment of an athlete. The order and allocation of proof to establish that a retaliatory discharge has occurred was discussed in Frank's Shoe Store v. Human Rights Com'n., 365 S.E.2d 251 (W.Va. 1986), wherein the following approach was set forth:

> The burden is upon the complainant to prove by a preponderance (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation) (4) that complaintant's discharge followed his or her protected activities within such a period that the court can infer retaliatory motivation.

Id. citing, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). This Grievance Board has adopted this standard as a test to judge whether a discharged employee has established a prima facie case of retaliatory discharge. After this consideration, the burden of production is shifted to the employer to offer a legitimate reason for its action. The former employee may still prevail if he or she can prove by a preponderance of the evidence that the employer's legitimate reason is only pretextual. Glavasic v. W.Va. Board of Directors, Docket No. 91-BOT-391 (Feb. 28, 1992), citations omitted.

The record is not entirely clear as to the facts supporting Grievant's claim. However, Grievant has failed to establish a prima facie case of retaliatory discharge under the applicable law cited above, even considering the facts in a light most favorable to him. First, Grievant has not established that he

engaged in any protected activity. Second, it has already been determined that Grievant's actions on October 18, 1991 were inappropriate. Therefore, even if Grievant had engaged in a protected activity which the College did not like, it would still not be proper to find that he was fired solely based upon his exercise of some rightbecause the College had legitimate grounds to fire him upon the October 18, 1991 incident. The main reason the retaliatory discharge doctrine is recognized within the law is to prevent employers from firing employees based upon nonexistent or inconsequential matters unrelated to their actual job performance in order to cover up the true reason for the adverse action. In the instant case, Grievant's real contention is that the College had two reasons to fire him and chose to fire him for the wrong reason. This type of argument is neither persuasive nor consistent with the law on point. The College has proven by a preponderance of the evidence that he committed the offense upon which the dismissal is based. Therefore, Grievant cannot establish that his dismissal was in retaliation for some action on his behalf related to the treatment of one of the College's athletes. Grievant's affirmative defense is denied.

The foregoing discussion of the facts of the case and of the law applicable to those facts is hereby supplemented by the following appropriate conclusions of law.

Conclusions of Law

1. The College has proven by a preponderance of the evidence that Grievant abused the use of sick leave on October 18, 1991, justifying his dismissal under Section 109.2.2 of the Board of Regent's Classified Employee's Handbook.

3. Grievant's actions consitituted a willful and flagrant violation of the applicable sick leave policies.

3. Grievant has failed to establish the affirmative defense of retaliatory discharge.

Therefore, this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court or Mercer County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any

appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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ALBERT C. DUNN, JR.

Administrative Law Judge

March 30, 1994

Footnote: 1The College's attorney did not object to the admissibility of the affidavits submitted on behalf of Grievant's claim.

Footnote: 2The parties agreed by stipulation that this procedural rule was in effect at the time of the discharge.

Footnote: 3This Grievance Board has previously recognized that "[T]he work record of a long-time civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." Stewart v. W.Va. Alcohol and Beverage Control Commission, Docket No. 91-ABCC-137 (Sept. 19, 1991), citing Buskirk v. Civil Service Comm'n, 332 S.E.2d 579, 585 (W.Va. 1985) (citing two previous decisions).