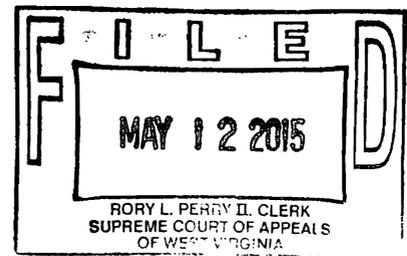


No. 14-1264



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**WEST VIRGINIA BOARD OF EDUCATION
and L. WADE LINGER, JR.,**

Defendants Below, Petitioners,

v.

JOREA M. MARPLE,

Plaintiff Below, Respondent.

**From the Circuit Court of Kanawha County, West Virginia
The Honorable James C. Stucky
Civil Action No. 14-C-731**

**PETITIONERS', WEST VIRGINIA BOARD OF EDUCATION AND L. WADE LINGER,
JR., REPLY BRIEF**

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NOW COME Petitioners, West Virginia Board of Education and L. Wade Linger, Jr., by counsel, J. Victor Flanagan and the law firm of Pullin, Fowler, Flanagan, Brown & Poe, PLLC, pursuant to Rule 10(g) of the West Virginia Rules of Appellate Procedure, and file Petitioners' Reply Brief to Respondent's Response to Petitioners' Brief to Order Denying Defendants Motion to Dismiss the Complaint for Failure to State a Claim Upon Which Relief Can be Granted Pursuant to R.C.P. 12(b)(6). Petitioners reincorporate, as if fully set forth herein, all facts and legal analysis synthesis and argument set forth in Petitioners' opening Brief, and in further support of Petitioners' appeal of the Circuit Court's Order, Petitioners state as follows:

ASSIGNMENTS OF ERROR

Petitioners reincorporate the three Assignments of Error set forth in Petitioners' opening Brief. Petitioners object to Respondent's portrayal of Assignment of Error 1 to the extent that Petitioners are not claiming that the Circuit Court's Order improperly "expands the clear prohibition for assertions of absolute (sovereign) immunity" or "hold[s] that the clear denial of absolute immunity . . . extended to qualified (good faith) immunity." (Resp't's Resp. 3, 7, 10.) Instead, Petitioners contend that the Circuit Court erred to the extent that its ruling holds that Petitioners are not entitled to qualified immunity solely on the basis that the liability-insurance exception to sovereign immunity applies to preclude the availability of qualified immunity.

STATEMENT OF THE CASE

Petitioners herein reincorporate the Statement of the Facts and Procedural History set forth in Petitioners' opening Brief. (Pet'rs' Br. 2-4.)

I. STATEMENT OF THE FACTS

Petitioners object to Respondent's Statement of the Facts to the extent that it asserts legal conclusions and derives from documents outside the scope of Respondent's Complaint and/or

involve matters not material to this Court's decision concerning whether the Circuit Court erred by denying Petitioners' Motion to Dismiss pursuant to Rule 12(b)(6). (Resp't's Resp. 4-7.) More specifically, Respondent's factual assertions relating to her career as an educator and performance evaluations are outside the scope of her Complaint. (Resp't's Resp. 4, 6-7.) Respondent improperly asserts legal conclusions concerning Petitioners' allegedly illegally terminating her employment, denying her pre-termination notice and hearing, violating the Open Governmental Proceedings Act, and defaming her and casting her in a false light. (Resp't's Resp. 4-6.) Even if the factual assertions upon which Respondent relies are taken as true, those assertions do not support Respondent's claim that Petitioners' terminating her constitutionally and statutorily prescribed at-will employment violated her property, liberty, and procedural due process rights or defamed her or cast her in a false light.

II. PROCEDURAL HISTORY

Respondent did not provide a recitation of the procedural history. In the interest of the public and judicial economy, and in an effort to move this litigation forward without needless delays and further unnecessary expenditure of money and resources, Petitioners do not object to Respondent's untimely filing her Brief. Also, Petitioners note that as Respondent's counsel failed to sign Respondent's Brief and sign and date the Certificate of Service, Respondent is noncompliant with Rule 37 of the Rules of Appellate Procedure.

SUMMARY OF ARGUMENT

Pursuant to Rule 10(g) of the Rules of Appellate Procedure, Petitioners delineate their Summary of Argument by each of the three Assignments of Error and reincorporate Petitioners' Summary of Argument set forth in Petitioners' opening Brief. (Pet'rs' Br. 1-2.) Respondent fails to proffer any factual or legal basis to support her contention that the Circuit Court's Order

denying Petitioners' Motion to Dismiss premised upon qualified immunity is proper where Respondent's claims arise from Petitioners' discretionary actions in terminating her constitutionally and statutorily prescribed at-will employment.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners reassert that oral argument is warranted by both Rule 19 and Rule 20 as this appeal involves issues of fundamental public importance. Not only does the public have an interest in this matter relating to the State and its taxpayers incurring further prohibitive and unnecessary expenditures of costs and resources, but allowing Respondent to proceed on her meritless claims in contravention of Petitioners' qualified immunity will have significant ramifications negatively affecting the State's effective operations and judicial system. In jeopardy is the constitutional and statutory authority of the State and all its agencies to discharge at-will employees, which would create unintended life-long positions and likely open the floodgates for similar meritless lawsuits by similarly situated at-will employees who are disgruntled by being discharged.¹

ARGUMENT

I. STANDARD OF REVIEW

It is undisputed that Respondent's Complaint is required to meet a heightened pleading requirement as Petitioners invoke qualified immunity. *See Hutchison v. City of Huntington*, 198

¹ The following are examples of other State entities and officials that have similar statutorily prescribed authority to appoint and retain employees at their will and pleasure: The Governor appoints the Secretary of each Department of the Executive Branch to serve at his will and pleasure. W. Va. Code § 5F-1-2 (i.e. Secretaries of the Departments of Administration, Education and the Arts, Environmental Protection, Health and Human Resources, Military Affairs and Public Safety, Revenue, Transportation, Commerce, and Veterans' Assistance). *See* W. Va. Code § 7-6-2a. The Attorney General appoints assistant attorneys general to serve at their pleasure. W. Va. Code § 5-3-3. *Accord* W. Va. Code 5-1-24; Syl. pt. 4, *Williams v. Brown*, 190 W. Va. 202, 437 S.E.2d 775 (1993). The Justices of the Supreme Court of Appeals may appoint a clerk and any other professional and clerical assistants who shall serve at the will and pleasure of the Justices. W. Va. Code § 51-1-11. The Supreme Court of Appeals may also appoint an administrative director to serve at the Court's pleasure. W. Va. Const. art. VIII, § 3.

W. Va. 139, 149, 479 S.E.2d 649, 659 (1996). Further, the decision of whether Petitioners are entitled to qualified immunity must be determined at the “earliest possible stage of litigation” as qualified immunity is “immunity from suit rather than a mere defense to liability.” *Saucier v. Katz*, 533 U.S. 193, 200-01 (2001) (emphasis added). Significantly, the Supreme Court of the United States has held that “[u]ntil this threshold immunity question is resolved, discovery should not be allowed.” *Siegert v. Gilley*, 500 U.S. 226, 231 (1991) (emphasis added) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Thus, Respondent’s assertion that Petitioners may not be entitled to qualified immunity at this juncture because the “record is bare of discovery or any filings to permit a conversion to a motion for a 12(b)(6) ruling” (Resp’t’s Resp. 1-2, 14 n. 4, 20 n. 7, 23 n. 9) is an incorrect statement of law.

Furthermore, the Circuit Court’s Order fails to set forth the requisite Findings of Fact and Conclusions of Law necessary for meaningful appellate review. *See City of St. Albans v. Botkins*, 228 W. Va. 393, 400-01, 719 S.E.2d 863, 870-71 (2011). The Order not only fails to indicate that Respondent sufficiently alleged a clearly established right that Petitioners termination of her at-will employment violated, it fails to even reference qualified immunity. (A.R. 395-396, Order 3-4).

II. PETITIONERS’ MOTION TO DISMISS SUFFICIENTLY ASSERTS THE DEFENSE OF QUALIFIED IMMUNITY.

Petitioners clearly asserted that the Board and Linger are immune from suit in the Motion itself and specifically stated that the basis for their Motion is set forth fully in the Memorandum in Support which was filed contemporaneously. The Memorandum specifically and unequivocally sets forth the analysis of the defense of qualified immunity and the reasons the Petitioners are entitled to their defense.

Respondent's primary argument in support of upholding the Circuit Court's Order is her assertion that Petitioners' Motion to Dismiss does not raise qualified immunity because the term "qualified immunity" is not specifically spelled out in the Motion itself. Thus, Respondent argues that the Board only asserted sovereign immunity and Linger only asserted "immun[ity] from liability." (Resp't's Resp. 9, 12-13.) Respondent acknowledges that Petitioners' Memorandum of Law asserts absolute immunity and "some version of 'qualified immunity,'" but nevertheless argues that "reference in a brief without any antecedent in the body of a motion or pleading are not the basis for a court ruling even if premised on legal precepts." (Resp't's Resp. 10.) Respondent offers no legal support for this argument, as none exists.

Pursuant to Rule 10(c), "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion." W. VA. R. CIV. P. 10(c). Consistently, Trial Court Rule 22.01 provides that all motions may be accompanied by a supporting memorandum. W. VA. T. CT. R. 22.01. Further, "[a]ll pleadings shall be so construed as to do substantial justice." W. Va. R. Civ. P. 8(f). Accordingly, the Rules of Civil Procedure and Trial Court Rules dictate that the Motion and Memorandum of Law should be read *in pari materia*. See *Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin*, 957 F.2d 515, 516-517 (7th Cir. 1992) ("[o]ften motions specify the relief sought while accompanying documents give the explanation"); *Strain v. Payette Sch. Dist. No. 371J*, 134 F.3d 379 (9th Cir. 1998) ("because the motion and its supporting memorandum were both timely filed, they should be read together"); *Roy v. Volkswagenwerk Aktiengesellschaft*, 781 F.2d 670 (9th Cir.1985) (per curiam) (holding that a motion was advanced with sufficient particularity when it was followed by "a later document" which was timely filed and contained the details of the argument); *Hendrickson & Sons Motor Co. v. Osha*, 331 N.E.2d 743, 749 (Ind.

1975) (“[i]n determining whether the requirement of specificity has been met, the motion should be read together with its supporting memorandum”).

Petitioners asserted the defense of qualified immunity in their Motion and accompanying Memorandum. (A.R. 23-25, Mot. to Dismiss ¶¶ 1, 2, 6.) By attaching the Memorandum of Law in Support as cited in their Motion, pursuant to Rule 10(c), the arguments and defenses asserted therein are thus incorporated by reference in the Motion to Dismiss. Petitioners unequivocally assert in their accompanying Memorandum that the Board and Linger are entitled to qualified immunity from suit for claims arising out of Linger’s discretionary actions undertaken in his official capacity as Board President and note that Respondent’s claims are improperly duplicative and redundant. (A.R. 34-36, Defs.’ Mem. of Law in Support of Mot. to Dismiss 7-10.) Further, Respondent has no grounds to assert that she was prejudiced by any such omission of the specific term “qualified immunity” in the Motion as she clearly had notice that Petitioners were asserting qualified immunity as a defense.

III. ASSIGNMENT OF ERROR 1: The Circuit Court erred in finding that the liability-insurance exception to the sovereign immunity afforded the State by Article VI, Section 35, of the West Virginia Constitution creates an exception to the defense of qualified immunity.

The Circuit Court’s Order denying Petitioners’ Motion to Dismiss premised upon qualified immunity by applying the liability-insurance exception to sovereign immunity is improper. Respondent fails to plead or proffer any factual or legal basis to support her assertion that the Circuit Court’s Order is anything but improper. Respondent’s assertion that “[t]he extension of the unavailability of absolute immunity in the present context to qualified immunity is clearly a legitimate act” and that “[t]he entire body of law including statutory enactments and dispositive decisions reason that a government entity can not [*sic*] claim any immunity (absolute or qualified) if an insurance policy protects the state’s assets” is simply and unequivocally a

misstatement of law. (Resp't's Resp. 10-11.) Similarly, Respondent's conclusion that the Circuit Court did not err in extending the liability-insurance exception to qualified immunity, reasoning that "any immunity," including qualified immunity, is unavailable as a defense because Respondent's "claims are fully covered" by the Board's Insurance Policy is also a misstatement of law. (Resp't's Resp. 11, 15.)

Although Respondent acknowledges that "qualified immunity possesses different parameters than the blanket constitutional barrier" (Resp't's Resp. 12), she nonetheless cites *Pittsburgh Elevator*, which holds that an exception to the State's absolute sovereign immunity exists where a plaintiff seeks recovery up to the limits of the State's policy of liability insurance, (Resp't's Resp. 12) to support her contention that the existence of liability insurance also creates an exception to the defense of qualified immunity. However, this Court, later in *Clark*, held that:

In the absence of an insurance contract waiving the defense, the doctrine of qualified or official immunity bars a claim of mere negligence against a State agency . . . and against an officer of that department acting within the scope of his or her employment, with respect to the discretionary judgments, decisions, and actions of the officer.

Syl. pt. 6, *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1994) (emphasis added). Respondent did not and does not assert that the insurance contract waived the defense of qualified immunity.

As discussed in Petitioners' opening Brief, hereby reincorporated, while Respondent's allegation that she seeks recovery within the coverage and limits of the Board's Insurance Policy (A.R. 10, Compl. ¶ 49) may preclude absolute sovereign immunity, it is inapposite of Petitioners' defense of qualified immunity pursuant to *Clark* and its progeny. In holding that qualified immunity is available in absence of a waiver in *Clark*, this Court specifically acknowledged that the issue of qualified or official immunity is not resolved solely by the

application of the exception to sovereign immunity created by liability insurance and specifically noted that there exists a further source of immunity available for discretionary acts committed within the scope of employment not addressed by *Pittsburgh Elevator*. *Id.* at 277, 379. Accordingly, *Pittsburgh Elevator*'s holding does not preclude the defense of qualified immunity.

Here, Respondent does not plead in her Complaint and did not raise in her various briefs the existence of an insurance contract waiving the defense of qualified immunity. Thus, the Circuit Court clearly erred to the extent that it denied Petitioners' Motion to Dismiss based solely on its finding that the existence of liability insurance precludes Petitioners from asserting qualified immunity. (A.R. 396-397, Order 4-5.)

IV. ASSIGNMENT OF ERROR 2: The Circuit Court erred by denying the Board's Motion to Dismiss because the Board, as a State agency, is entitled to qualified immunity for its discretionary actions relating to terminating Respondent's at-will employment.

Respondent fails to sufficiently plead or proffer any factual or legal basis to support her contention that the Circuit Court's Order denying qualified immunity to the Board was proper. To the contrary, the Board is immune from suit as all of Respondent's allegations against it arise from its discretionary acts in the performance of its duties, government function, and authority relating to terminating Respondent's employment as Superintendent which is prescribed by both the West Virginia Constitution and West Virginia Code to be at-will. Thus, the Board's actions taken in terminating Respondent's employment did not violate any of her clearly established rights and were not fraudulent, malicious, or oppressive.

A. Respondent was not entitled to due process prior to her termination.

Respondent was not entitled to due process prior to her employment termination because she had no liberty interest or property right in continued employment as Superintendent which is constitutionally and statutorily prescribed to be at-will.

1. **Respondent had no clearly established liberty interest in continued employment as Superintendent.**

Respondent fails to plead facts that support that Petitioners' actions in terminating her at-will employment "reflect[] upon her good name, reputation and potential for future employment" such that they amount to a charge of a serious character flaw. Therefore, Respondent has not pled facts sufficient to implicate a liberty interest in the position of Superintendent. Not only has Respondent not proffered any such facts, she cannot produce any supporting evidence.

Respondent's synthesis of the law demonstrates that she agrees that a liberty interest is not implicated unless the State makes a charge against her that insinuates a serious character flaw, such as dishonesty, immorality, or criminality, that seriously damages her reputation, standing, and associations in the community. (Resp't's Resp. 18-19.) Accordingly, as Petitioners have previously stated, "Courts are rather uniform in holding that an unexplained termination or discharge from employment does not create a sufficient stigma to invoke a liberty interest protection." Syl. pt. 5, *Freeman v. Poling*, 175 W. Va. 814, 338 S.E.2d 415 (1985). Courts distinguish the types of statements and communications that give rise to a protected liberty interest, which imply "the existence of serious character defects such as dishonesty or immorality" and criminality, from statements that do not implicate a liberty interest and only suggest incompetence, unsatisfactory job performance, interpersonal issues, and similar traits. *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 308-09 (4th Cir. 2006). *Accord Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 159-16, 241 S.E.2d 164, 167 (1977) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972)). (See Pet'rs' Br. 19-21 for demonstrative cases).

Respondent has been clear that the only statements upon which she relies to support her liberty interest claim is Linger's Statement that the Board adopted during the November 29, 2012, meeting, attached as Exhibit 1 to her Complaint. (Resp't's Resp. 27-28.) Accordingly,

Petitioners reincorporate the legal synthesis and argument in Petitioners' opening Brief (Pet'rs' Br. 21-22) and reassert that one cannot discern from the *entirety* of Linger's Statement to whom Linger was referring as he specifically prefaced his Statement by clarifying that the Board was not affixing blame and only referenced the "department" when describing the "issues" that Respondent now claims are charges Linger, and by adoption, the Board made against her. (A.R. 6, Compl. ¶¶ 25-26, Ex. 1.) Second, regardless of to whom Linger referred and asserted the four "issues" or charges against, Linger's Statement cannot be understood or construed to insinuate that Respondent had a serious character flaw such as dishonesty, immorality, or criminality sufficient to implicate Respondent's liberty interest.

Additionally, Linger's Statement does not implicate Respondent's liberty interest as Linger merely recited five statistics regarding West Virginia's student achievement and national education rankings which Respondent does not claim were fabricated to impugn her character and, indeed, cannot be construed as implying that Respondent has serious character defects. (A.R. 6, Compl. ¶¶ 25-26, Ex. 1.) Immediately following Linger's recitation of these education statistics, he expressly stated that he was not affixing blame on Respondent and explained that the Board did not hold Respondent more responsible than governors, legislators, educators, or Board Members for the education statistics. (A.R. 16-17, Compl., Ex. 1.)

Even Respondent's most recent characterization of the purported stigma—"assignment of a massive failure in the educational structure of this State to no one besides the plaintiff"—that has resulted in her "never [having] been seriously considered" for jobs for which she has applied clearly does not denote a character flaw such as dishonesty, immorality, or criminality sufficient to implicate Respondent's liberty interest. (Resp't's Resp. 29.) Respondent's assertion that "it must be emphasized that only Dr. Marple was terminated" is immaterial and does not change the

fact that nothing in Linger's Statement can be understood or construed to suggest a serious character flaw sufficient to implicate Respondent's liberty interest. (Resp't's Resp. 28.)

Further, Linger's Statement adopted by the Board did not create a liberty interest because it was not defamatory of Respondent, did not cast her in a false light or invade her privacy, and, moreover, was privileged as the Statement was made in the public interest. (Pet'rs' Br. 22-25.) Because Respondent, a public figure, has not pled that Linger's Statement, containing the allegedly defamatory statements, was false, she has not pled a factual basis for a defamation claim. Additionally, Respondent has not proffered any basis for stripping the privilege afforded Linger's Statement because she has not pled that the public, to whom the Statement was made, had no interest in the information provided by Linger concerning her employment termination and the State's education system status. (Pet'rs' Br. 22-23.) Respondent also failed to establish a basis for a false light claim because Linger's Statement cannot be construed as publicly disclosing facts or information of a private nature that are highly offensive or objectionable. Again, Linger's Statement is privileged as the public had an interest in the information contained therein, and Respondent has not pled otherwise. (Pet'rs' Br. 24-25.)

Thus, as Linger's Statement is privileged and not actionable, it cannot form the basis of a liberty interest in the at-will position of Superintendent. Because Linger's Statement did not create a liberty interest and concomitant right to due process, Petitioners are entitled to the defense of qualified immunity.

2. Respondent had no clearly established property interest in continued employment as Superintendent.

Respondent, similarly, fails to proffer any factual or legal basis to support her claim that she had a property interest in the "right to continued government employment as Superintendent" beyond her unilateral expectation. (A.R. 7, Compl. ¶ 32.) While Respondent asserts that "at-will

employees do have a property interest in continued government employment under certain circumstances,” she fails to ever specify the circumstances that would create a property interest in the circumstances as pled. (Resp’t’s Resp. 20.) This Court has held that “[a] ‘property’ interest protected by due process must derive from private contract or state law, and must be more than a unilateral expectation of continued employment.” *Major v. DeFrench*, 169 W. Va. 241, 251, 286 S.E.2d 688, 695 (1982). As a matter of law, Respondent cannot demonstrate that she had more than a unilateral expectation of continued employment given that the Board is expressly authorized to “select the state superintendent of free schools who shall serve at its will and pleasure,” pursuant to Article XII, Section 2, of the West Virginia Constitution, and “appoint[] . . . a State Superintendent of Schools who serves at the will and pleasure of the state board,” pursuant to West Virginia Code Section 18-3-1.

Significantly, the Board, by State law, cannot bind itself to retain a Superintendent:

Where a statute conferring the power to appoint fixes no definite term of office, but provides that the tenure shall be at the pleasure of the appointing body, the implied power to remove such appointee may be exercised at its discretion, and cannot be contracted away so as to bind the appointing body to retain him in such position for a definite, fixed period.

Syl., *Barbor v. Cnty. Court of Mercer Cnty.*, 85 W. Va. 359, 101 S.E. 721 (1920) (emphasis added). However, in an apparent attempt to undermine the significance and dispositive nature of *Barbor*, Respondent inaccurately sets forth the *Barbor* holding as merely standing for the proposition that “if the employment is for ‘no definite term of office’ it automatically makes the employee at-will with certain exceptions not applicable here.” (Resp’t’s Resp. 20.) Instead, the significance of the *Barbor* holding is that where there is no definite term of office but tenure is at the appointing body’s will and pleasure, as it is here, the power to discharge the appointee cannot be contracted away so as to bind the appointing body to retain the employee. Further, somewhat

confusingly, Respondent appears to distinguish the instant matter from *Barbor* by contending that she “does not posit such a position” of imposing a term of office. (Resp’t’s Resp. 20.) However, Respondent’s claim that she is entitled to continued employment as Superintendent clearly is such an attempt to bind the Board to retain her to a term of office.

Respondent agrees that she “must have had more than a unilateral expectation of continued employment,” but she erroneously contends that the “expectation [of continued employment] can be based on factors adduced in evidence at a trial which may show an ‘understanding’ derived from the Board’s history . . . [and] can be based upon ‘defacto’ consideration of previous actions not premised on announced rules” and through prior conduct and dealings giving rise to an implied contract. (Resp’t’s Resp. 23-24.) Contrary to Respondent’s contention, under the *Barbor* controlling precedent, the Board is simply incapable of reaching such a mutual understanding in a way that would bind it to retain Respondent.

Accordingly, Respondent’s argument that she may be able to submit evidence to substantiate her entitlement to continued employment, requiring discovery and upholding the Circuit Court’s Order denying Petitioners’ Motion to Dismiss, fails. Regardless of the evidence Respondent claims she may obtain concerning her understanding and expectations of continued employment, the Board simply cannot bind itself to continually employ her. As such, Respondent cannot produce any evidence that would support her claim. Even if Respondent could proffer evidence of stellar Annual Performance Evaluations that resulted in annual salary raises by unanimous vote and a positive press release (Resp’t’s Resp. 24-25), she still could not create more than a unilateral expectation that the Board would never discharge her. Regardless of Respondent’s expectations, the Board cannot be subject to written or implied terms that bind it

to continue to retain her other than at its will and pleasure as the Board is constitutionally and statutorily prescribed to do.

Respondent's contention that she had a "reasonable objective expectation" that "her annual employment would continue at least until the next annual evaluation" is wholly illogical and unsupported by the law. First, from a logical viewpoint, to accept Respondent's contention, a positive annual evaluation would protect any at-will employee from discharge regardless of interim conduct that would warrant discharge under any and all forms of employment relations such as criminal conduct, gross official misconduct, and the like. Second, although the Board has the statutory duty to annually evaluate Respondent's performance and publicly announce the results, the results of such evaluation do not create continued employment. *See* W. Va. Code § 18-3-1. Third, none of the cases Respondent cites supports her contention that she had a protected property interest as none of the cases are on point: none involve similar government employees with constitutionally and statutorily prescribed at-will employment. Therefore, Respondent's contention that she has a property and liberty interest in continued employment, requiring pre-termination due process protection, based solely on her expectation of continued employment in the event she meets requirements is misplaced. (Resp't's Resp. 20-21.)

Unlike the instant matter, where Respondent's position as Superintendent is both constitutionally and statutorily prescribed to be at-will, the cases Respondent relies upon involve employees who are afforded specific statutory procedural safeguards prior to being discharged or subject to adverse employment decisions. In *Major*, the case upon which Respondent places the heaviest reliance, the issue presented was whether the civil service police officer was entitled to a written statement of the reasons for her dismissal and opportunity for a hearing, pursuant to the procedural protections for probationary police officers set forth in Civil Service for Certain

Police Departments, West Virginia Code Sections 8-14-11 and 20 (“Civil Service Statute”), where the city-employer and police officer disagreed as to when the probationary period commenced. *Major*, 169 W. Va. at 245-46, 286 S.E.2d at 692. Accordingly, it is correct that the Court found that the probationary civil service police officer had a property and liberty interest and reasonable expectancy of continued employment, free of arbitrary treatment, if she satisfied all the eligibility requirements and performed well, requiring the procedural protections provided in the Civil Service Statute. *Id.* at 257, 697-98. However, in the instant matter, there are no such procedural protections for Superintendents set out in the State Constitution or statute. To the contrary, the position of Superintendent is prescribed by both the Constitution and by statute to be an at-will position. W. Va. Const. art. XII, § 2; W. Va. Code § 18-3-1.

Furthermore, the cases Respondent relies upon are distinguishable as they involve contract employees who have a protected property right to tenure upon meeting certain tenure standards and, as such, are afforded specific procedural protections. *See Perry v. Sindermann*, 408 U.S. 593 (1972) (finding that state college professor, employed under a series of one-year written contracts, must be given an opportunity to prove his eligibility for the *de facto* tenure program to show a legitimate claim of entitlement to tenure and procedural due process protection); *Roth*, 408 U.S. at 564 (holding that as the assistant state university professor, hired on a one-year contract, did not have the statutorily requisite years of service, he did not have a protected property interest protected by constitutional due process); *W. Va. Univ. v. Sauvageot*, 185 W. Va. 534, 408 S.E.2d 286 (1991) (finding that the University employee had a reasonable objective expectation of continued employment and, thus, a property interest, based on the University’s long-term pattern of renewing the employee’s one-year contracts consistent with its policy concerning protecting long-term, non-tenured employees); *Orr v. Crowder*, 173 W. Va.

335, 341, 315 S.E.2d 593, 599 (1983) (finding that the state college librarian, hired under one-year contracts and then a terminal contract, failed to establish entitlement to termination procedures afforded to tenured faculty); Syl. pt. 3, *State ex rel. McLendon v. Morton*, 162 W. Va. 431, 432, 249 S.E.2d 919, 919 (1978) (holding that “[a] teacher who has satisfied the objective eligibility standards for tenure adopted by a State college has a sufficient entitlement so that he cannot be denied tenure on the issue of his competency without some procedural due process”).

Respondent cannot demonstrate under any set of facts that she has a property interest derived from contract, as no contract exists and no contract can create a property interest in Respondent’s continued employment as the Board cannot bind itself to retain her. Respondent cannot demonstrate that she had a property interest derived from State law as West Virginia law is clear that Respondent’s position as Superintendent is constitutionally and statutorily prescribed to be at-will. Because Respondent had no property interest in the at-will Superintendent position, her termination at the will of the Board does not support a contention that Petitioners violated her clearly established property right to defeat the Board’s qualified immunity.

B. Respondent was not entitled to procedural due process rights.

Because Respondent had no liberty or property interest implicated by the Board’s terminating her at-will employment, Respondent had no right to procedural due process. Respondent correctly acknowledges that if an individual’s claims do not implicate the deprivation of a liberty or property interest, the court’s inquiry may end as the individual has no claim warranting constitutional protection. (Resp’t’s Resp. 15, 18.) *Waite*, 161 W. Va. at 159, 241 S.E.2d at 167.

Further, Respondent proffered no factual or legal basis to support her entitlement to a name-clearing hearing as she does not plead, discussed *supra*, that Linger’s Statement contained

any false statements concerning her discharge as Respondent does not contend that the stated statistics are false or fabricated by Linger to impugn her character. Thus, such purported right to pre-termination notice and hearing procedural safeguards cannot form the basis of a violation of a clearly established right sufficient to defeat the Board's qualified immunity.

C. Respondent fails to sufficiently plead that the Board's discretionary acts were fraudulent, malicious, or oppressive.

Although Respondent now characterizes Petitioners' purported violations of the Open Governmental Proceedings Act as "malicious" and "oppressive" (Resp't's Resp. 14), Respondent fails to plead in her Complaint that the Board's discretionary acts in terminating her at-will employment were fraudulent, malicious, or oppressive. Further, Respondent fails to plead fraud with particularity as required by Rule 9(b) of the Rules of Civil Procedure.

Therefore, because Respondent fails to provide any factual or legal basis substantiating the Board's violating any of her clearly established rights or otherwise fraudulent, malicious, or oppressive conduct, the Board is entitled to qualified immunity.

V. ASSIGNMENT OF ERROR 3: The Circuit Court erred by denying Linger's Motion to Dismiss because he is entitled to qualified immunity as a State official for his discretionary actions relating to terminating Respondent's at-will employment.

Respondent fails to proffer any factual or legal basis to support the Circuit Court's Order denying qualified immunity to Linger from Respondent's claims. Linger is immune from suit as all of Respondent's allegations against him arise from his discretionary acts in the performance of his duties, government function, and authority as Board President in terminating Respondent's constitutionally and statutorily prescribed at-will employment, which did not violate any of Respondent's clearly established rights and were not fraudulent, malicious, or oppressive.

In addition to reasserting that her discharge violated her clearly established property, liberty, and procedural due process rights, Respondent proffers that Petitioners held “secret meetings” in violation of open meeting statutes. (Resp’t’s Resp. 30.) To the contrary, upon a public majority vote during properly noticed meetings, the Board terminated Respondent’s employment on November 15, 2012, and affirmed its termination decision on November 29, 2012. (A.R. 3-6, Compl. ¶¶ 6, 15, 17-18, 21-22, 24, Ex. 1; A.R. 59-81, 82-88.)

First, as Respondent fails to plead a clearly established right that Petitioners violated to defeat Linger’s qualified immunity, Linger is entitled to qualified immunity for the same reasons as the Board: Respondent had no property interest in continued employment or liberty interest in potential future employment, and, thus, no right to procedural due process.

Second, Respondent’s contention that pleading violations of the Open Governmental Proceedings Act, West Virginia Code Section 6-9A-1, *et seq.* (“Act”), may form the basis of a clearly established right of Respondent that Petitioners violated precluding Petitioners’ qualified immunity is without legal basis and is illogical.

Petitioners deny that any violations of the Act occurred. However, whether Petitioners complied with or violated the Act has no effect on the Board’s discretionary authority to retain a Superintendent at its will and pleasure. Even if Petitioners complied with the Act and did not hold the alleged secret meetings, Petitioners could have voted to terminate Respondent’s employment as she had no right to continued employment. Even if it were determined that a violation occurred, such would not strip the Board of its authority to retain a Superintendent at its will and pleasure as a violation would not necessarily invalidate Respondent’s employment termination or prevent the Board from subsequently terminating her employment.

A finding that a violation occurred, however, does not necessarily require invalidation of all actions taken during or following from the wrongfully held

private meeting. The relevant statutory authority, W. Va. Code, 6-9A-6 (1993), leaves such matters in the court's discretion: "The court is empowered to compel compliance or enjoin non-compliance with the provisions of this article and to annul a decision made in violation thereof."

McComas v. Bd. of Educ. of Fayette Cnty., 197 W. Va. 188, 201, 475 S.E.2d 280, 293 (1996).

Further, as the Act's purpose is to benefit the public and decision-makers by requiring certain governmental proceedings to be open, it is illogical for Respondent to rely upon any purported violations of the Act as violations of her clearly established right that would strip Petitioners of their qualified immunity. The Act simply is not intended to provide the procedural protections concerning termination that Respondent seeks:

The Legislature hereby finds and declares that public agencies in this state exist for the singular purpose of representing citizens of this state in governmental affairs, and it is, therefore, in the best interests of the people of this state for the proceedings of public agencies be conducted openly, with only a few clearly defined exceptions. . . . Accordingly, the benefits of openness inure to both the public affected by governmental decisionmaking and the decision makers themselves.

W. Va. Code § 6-9A-1. Moreover, as personnel matters, which include Respondent's employment termination, are excepted from the open meeting requirement, it is illogical that any purported "secret meeting" discussing Respondent's employment is a violation of Respondent's clearly established right under the Act that she may claim defeats Petitioners' qualified immunity. *See* W. Va. Code § 6-9A-4(b)(2)(A).

Respondent's apparent attempt to place a higher burden on Petitioners, a purported "deliberative body" that is "distant from a cop on the beat," is without basis. (Resp't's Resp. 29.) It is well established that qualified immunity is not only equally available to non-police officers and those not faced with immediate peril or urgent decision-making needs, the burden of proving the defense is no greater. *E.g. W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, No. 13-0037, 766 S.E.2d 751, 2014 WL 5507522 (W. Va. Oct. 31, 2014) (remanding for entry of order

granting the jail's qualified immunity from plaintiff's negligent training, supervision, and retention claims arising from the jail's employee's sexually assaulting plaintiff while in jail).

Therefore, because Respondent fails to provide any factual or legal basis substantiating Linger's violating any of her clearly established rights or acting fraudulently, maliciously, or oppressively, Linger is entitled to qualified immunity.

CONCLUSION

WHEREFORE, for the foregoing reasons and the reasons set forth in Petitioners' opening Brief, Petitioners, West Virginia Board of Education and L. Wade Linger, respectfully request that this Court: Reverse the Circuit Court's Order denying Petitioners' Motion to Dismiss, entered on November 3, 2014; remand this Civil Action to the Circuit Court for entry of an Order granting Petitioners' Motion to Dismiss and dismissing Respondent's Complaint against Petitioners with prejudice; and grant Petitioners costs and any and all other such relief allowable by law.

Respectfully submitted,

**WEST VIRGINIA BOARD OF EDUCATION
and L. WADE LINGER, JR.,**

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**WEST VIRGINIA BOARD OF EDUCATION
and L. WADE LINGER, JR.,**

Defendants Below, Petitioners,

v.

JOREA M. MARPLE,

Plaintiff Below, Respondent.

**From the Circuit Court of Kanawha County
The Honorable James C. Stucky
Civil Action No. 14-C-731**

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Petitioners, West Virginia Board of Education and L. Wade Linger, Jr., does hereby certify on this 12th day of May, 2015, that a true copy of the foregoing "*Petitioners', West Virginia Board of Education and L. Wade Linger, Jr., Reply Brief*" was served upon counsel of record by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

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