
NO. 35539

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

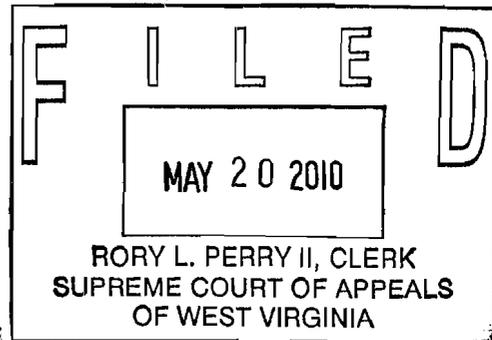
WILLIAM B. HAMM,

Petitioner below, Appellee,

v.

**DR. STEVEN L. PAINE, STATE
SUPERINTENDENT OF SCHOOLS,
WEST VIRGINIA DEPARTMENT OF
EDUCATION,**

Respondents below, Appellants.



APPELLANTS' BRIEF

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APPELLANTS BRIEF

I.

INTRODUCTION

This case presents an issue of first impression for the Court that relates to the interplay of the State Superintendent of School's teacher licensing process and a county superintendent's responsibilities in making a recommendation for one of his or her employees when submitting an application to renew a teaching certificate or permit.

The State Superintendent of Schools and the West Virginia Department of Education have filed this appeal primarily because the decision of the Mason County Circuit Court limits the authority of the State Superintendent to deny a license even when he possesses sufficient evidence to justify a denial if a county superintendent who refused to recommend a teacher for licensure renewal did not have that information at the time of refusal. Such a result was surely not intended

by the Legislature. The Circuit Court's ruling has the potential to impact adversely all future hearings when a county superintendent refuses to recommend a renewal applicant, and to jeopardize the well being and education of this State's public school students.

II.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

The Appellants, Dr. Steven L. Paine, State Superintendent of Schools and the West Virginia Department of Education ("WVDE"), appeal the final Order of the Mason County Circuit Court, dated August 19, 2009, reversing the State Superintendent's decision of June 22, 2007, and remanding the matter for additional proceedings. The State Superintendent's decision denied the Appellee, William B. Hamm, a renewal of his out-of-field authorization permit to teach children with disabilities in Mason County schools following an administrative hearing. This Court accepted the *Petition for Appeal* in this matter on April 14, 2010.

In order to understand this case and the ruling below, Appellants must briefly explain the teacher licensure process in general and what was involved in the Appellee's case. A flow chart of the renewal process as described below is included with this brief as Exhibit "A".

On or about July 26, 2006, Appellee made application to the Appellants to renew his out-of-field authorizations in learning disabilities/mentally impaired/behavior disorders and autism, kindergarten through adult. This application, as with all license applications, is submitted to and reviewed by the Appellants pursuant to the authority granted the State Superintendent of Schools in W. Va. Code § 18A-3-2a:

In accordance with state board of education rules for the education of professional educators adopted after consultation with the secretary of education and the arts, the state superintendent of schools may issue certificates valid in the public

schools of the state: Provided, That a certificate shall not be issued to any person who . . . is not of good moral character and physically, mentally and emotionally qualified to perform the duties for which the certification would be granted

Out-of-field authorizations, such as the ones sought by the Appellee, are permits good for one year that allow teachers with a professional teaching certificate to teach a subject in which they are not certified for a specific county that wishes to employ them. In order to qualify for an initial out-of-field authorization, a teacher must have the approval of the county board of education and a recommendation from the county superintendent that the applicant is the most qualified for the position or is the only candidate.¹ The teacher must also verify he or she is enrolled in a state approved college program to complete necessary course work to be certified in that field. Policy 5202, "Minimum Requirements for the Licensure of Professional/Paraprofessional Personnel and Advanced Salary Classifications," W. Va. Code R. § 126-136-11.7.3.a.A.²

To renew the authorization from year to year, a teacher must have completed six hours course work and receive the recommendation of the county superintendent from the county in which the applicant has worked within the last year. The Board's recommendation requirement for permit renewals mirrors the Legislature's statutory requirement of a county superintendent's recommendation for a professional teaching certificate found in W. Va. Code § 18A-3-3(c). The recommendation language on the renewal application form applies the same standard as does the

¹In other words, an out-of-field authorization will not be granted if a fully certified teacher has applied for the position.

²W. Va. Code § 18A-3-3(d) authorizes the West Virginia State Board of Education to promulgate legislative rules setting forth renewal requirements for out of field authorizations and other permits.

State Superintendent in W. Va. Code § 18A-3-2a. It requires the county superintendent to attest to the following:

I certify that I have reviewed and can attest to the accuracy and truthfulness of the information provided in this application. When necessary, I have included documentation verifying this information. I have reviewed the disclosure of background information, and, to the best of my knowledge, the applicant is of good moral character and is physically, mentally, and emotionally qualified to perform the duties of a teacher. I recommend that s/he be granted certification.

The Office of Professional Preparation in the West Virginia Department of Education (“OPP”) reviews all applications for licensure, and, if warranted, conducts an investigation, particularly if the applicant discloses significant background information. Following the review and investigation, OPP decides whether to approve the application. If OPP decides to deny an application because of adverse background information, the denial is considered a “denial for cause” pursuant to W. Va. Code § 18A-3-2a. Then, the applicant has the right to request a hearing on the denial before the Licensure Appeal Panel of the Commission on Professional Teaching Standards (“LAP”). The LAP acts as a designee for the State Superintendent to conduct hearings and issue recommended decisions that the State Superintendent may adopt. *See* W. Va. Code § 18A-3-6.

If the county superintendent refuses to sign the recommendation for a renewal application or withdraws his or her signature before OPP makes the decision to approve the application or deny it for cause, Appellants will deny the permit application for being “incomplete.”³ However, in that instance, the renewal applicant has a right to a hearing pursuant to W. Va. Code § 18A-3-3(e), which provides:

³ Other reasons why an application would be denied as incomplete are the applicant’s failure to provide documentation that he or she has taken certain required coursework since the last certificate or permit was issued or failure to provide requested information about a background disclosure made on the application. There is no statutory right of appeal in these other instances.

If the applicant seeking renewal has cause to believe that the county superintendent refuses to give a recommendation without just cause, the applicant shall have the right, in such case, to appeal to the State Superintendent of Schools whose responsibility it shall be to investigate the matter and issue a certificate if, in the opinion of the state superintendent, the county superintendent's recommendation was withheld arbitrarily.

Although, the renewal statute directs the State Superintendent to issue a certificate if, in his opinion after investigation, the county superintendent's recommendation was withheld arbitrarily, the State Superintendent must also carry out the Legislature's mandate under W. Va. Code § 18A-3-2(a) not to issue a license to a teacher who is not of good moral character and who is not physically, mentally or emotionally qualified to teach. In other words, Appellants read W. Va. Code § 18A-3-3(e), *in pari materia* with W. Va. Code § 18A-3-2a, which imposes an independent duty on the State Superintendent.

In the instant case, after the Appellee was denied renewal of his out-of-field authorization by the Appellants on January 11, 2007, because the county superintendent had withdrawn his recommendation, the Appellee elected to appeal the matter pursuant to W. Va. Code § 18A-3-3(e) on February 16, 2007.⁴ Appellants accordingly investigated the matter, and a hearing was held on April 20, 2007 and May 31, 2007 over a period of two non-consecutive days before a designee of the State Superintendent acting as Hearing Officer. Over the objection of the Appellee, the Hearing Office permitted Appellants to introduce evidence relevant to whether the Appellee's out-of-field authorization should not be renewed even if the county superintendent, Dr. Parsons, had not been aware of such evidence at the time he withdrew his recommendation. Following submission by the

⁴The Mason County Board of Education suspended the Appellee without pay following a hearing held on February 15, 2007 on the grounds that he lacked appropriate licensure for his position.

parties of proposed findings and conclusions, the Hearing Officer recommended that the Appellee's appeal be denied, finding that the Appellants met their burden of proving that the county superintendent's recommendation was not withheld arbitrarily under W. Va. Code § 18A-3-3(e) and that the applicant was currently not of good moral character and physically, mentally or emotionally qualified to teach under W. Va. Code § 18A-3-2a.

The State Superintendent accepted the Hearing Officer's recommendation and signed an Order dated June 22, 2007, denying the Appellee's appeal. On Appellee's appeal to the Mason County Circuit Court, the Court reversed the State Superintendent's decision on August 19, 2009, and remanded the case for further proceedings consistent with its opinion, holding that:

- (1) The Hearing Officer erred by considering any evidence that the county superintendent did not have at the time he withdrew his signature. For example, the Hearing Officer allowed Appellants to introduce a transcript of Appellee's suspension hearing before the Mason County Board of Education—based upon Appellee's denial of the out-of-field authorization—held one month after the county superintendent withdrew his signature.
- (2) Appellants violated Appellee's procedural due process rights in an administrative hearing under the standard enunciated in *North v. West Virginia Board of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977) in two ways: a. Appellee was not provided with adequate time to prepare to rebut the charges because Appellants had not provided him with their evidentiary exhibits prior to the hearing; and b. Appellee was not permitted to call witnesses on his behalf when the Hearing Officer excluded two witnesses he wished to call even though they had not been sequestered from the hearing room pursuant to the Hearing Office's order.

III.

STATEMENT OF FACTS

The Appellee, William B. Hamm, holds teaching certifications in Driver Education, grades 9-12, Health Education, grades 5-12, and Social Studies, grades 5-9, all of which expire on June 30,

2010. In October 2003, the Appellee acquired an out-of-field authorization endorsed for specific learning disabilities, grades 5-12, mentally impaired-mild-moderate, grades 5-12, and autism, grades K through adult. This authorization allowed the Appellee to teach special education classes in addition to his regular areas of certification though he had not completed the requirements to be fully certified in special education. Relying on his out-of-field authorization, the Appellee was employed by the Mason County Board of Education as a special education teacher at Point Pleasant Middle School in 2003, where he was assigned primarily to teach one special needs student. The Appellee renewed his out-of-field authorizations for the next two years and continued to work in the special education field throughout the 2004-2005 and 2005-2006 school years.

In February 2006, another special education teacher at the Appellee's school made a complaint to the school's principal that the Appellee was harassing her. An investigation into these allegations was started by the school. The principal learned that there had been exchange of electronic mail between the two in which the complaining teacher attempted to make clear to the Appellee that he should leave her alone and that she had no desire to pursue a sexual relationship nor any other type of relationship with the Appellee. In spite of the complaining teacher's attempts to cease communication with the Appellee, he continued to pursue a sexual relationship with her.

As a result of an investigation into the matter, the Appellee's principal placed a copy of the Mason County's sexual harassment policy in the Appellee's school mailbox on February 13, 2006, and spoke with him about his inappropriate behavior on February 14, 2006. The Appellee agreed to stay away and not communicate with the complaining teacher. However, in spite of his principal's warnings, the Appellee continued to harass the complaining teacher, so an investigation into the Appellee's inappropriate actions was also conducted on behalf of the Mason County Board of

Education by Linda Rollins, the Human Rights Officer. Based on the findings of Ms. Rollins, whose report was completed on June 8, 2006, the Mason County Superintendent decided to suspend the Appellee for five days without pay commencing in August 2006. This decision was sent to the Appellee via letter dated July 11, 2006.

The Appellee requested a hearing to protest the five-day suspension before the Mason County Board of Education. Due to scheduling conflicts with Appellee's counsel, the scheduled hearing date was continued, and Appellee's counsel never followed up in order to reschedule the hearing. The five-day suspension became moot when the Mason County Board of Education suspended the Appellee without pay on February 15, 2007, for not having an out-of-field authorization, and so a hearing was never held on the issue of the five-day suspension.

Pursuant to W. Va. Code § 18A-3-6, the Mason County Superintendent notified the State Superintendent of Schools via letter dated September 26, 2006, of the Appellee's five-day suspension for inappropriate behavior. Between the time of the suspension decision in July 2006 and the notification to the State Superintendent of Schools in September 2006, the Appellee filed his renewal application for the out-of-field authorization. The renewal application required a county superintendent's signature which meant that the Appellee needed Dr. Parsons' signature recommending him for the out-of-field authorization. Dr. Parsons signed the renewal application on July 24, 2006. At the hearing, Dr. Parsons testified that, based on his knowledge at the time he signed the renewal application in July 2006, the Appellee's misconduct merited no more than a five-day suspension. Although the misconduct seriously bothered him, Dr. Parsons did not believe that the Appellee deserved to be terminated, which would occur if he did not receive a renewal of his out-of-field authorization. Despite his signing the application, Dr. Parsons testified that he was troubled

about giving his recommendation. *See* April 20, 2007, Administrative Hearing Transcript, at 17-18 (hereinafter “4/20/07 R. at ____”).

The September 26, 2006 notice from Dr. Parsons to the State Superintendent triggered an investigation by Appellants for possible denial of Appellee’s out-of-field authorization and revocation of his other teaching certificates that were to expire in 2010. *See* 4/20/07 R. at 73-74. So, after the application for renewal of the out-of-field authorization had been submitted to the Office of Professional Preparation and while an investigation was being conducted by Appellants, the Appellee was charged on October 25, 2006, in two criminal complaints in the Magistrate Court of Mason County with harassing telephone calls and stalking involving his contact with the teacher at his school. These criminal charges did not convince Dr. Parsons to withdraw his recommendation because his staff had conducted an independent investigation into the same conduct earlier. However, being in a small community, Dr. Parsons testified that he was concerned about the reaction of the community.

The Appellee continued to work in the position that required the out-of-field authorization; however, in December 2006, Dr. Parsons learned that the Appellee had been criminally charged again in the Magistrate Court of Mason County, but this time with one count of domestic battery against his wife, Tequilla, and one count of possession of marijuana under 15 grams. Dr. Parsons testified that he obtained the police report of the charged incidents and spoke with individuals who had knowledge of the events, including the arresting officer and Ronny Vanscoy, father of Tequilla and her sister, Autumn, who witnessed the incident of alleged domestic battery.

Based upon all the information gathered, Dr. Parsons testified that he withdrew his recommendation from the Appellee’s application for renewal of the out-of-field authorization via

letter dated January 2, 2007, addressed to the State Superintendent of Schools. *See* 4/20/07 R. at 30-34. His letter stated “[m]y communication with law enforcement officials concerning Mr. Hamm’s conduct, resulting in these charges, indicated that he exhibited violent behavior in the presence of his children and was found smoking marijuana in his home.” *See* 4/20/07 R. at Ex. 2. At the hearing before the State Superintendent’s designee, Dr. Parsons further explained his decision:

[I]t came in a, seemed like a compiling of, of events, of misbehavior, inappropriate conduct, that, you know, built upon my already concerns about me being able to put my integrity, by my signature, upon Mr. Hamm having good moral character, being emotionally stable, to be able to be a teacher.

See 4/20/07 R. at 32. Dr. Parsons elaborated that if Mr. Hamm had difficulty maintaining his behavior in a proper professional manner outside the school setting, it would be difficult to ask him to have a high level of responsibility to work with children that have behavioral problems themselves. *See* 4/20/07 R. at 33. Subsequently, via letter dated January 11, 2007, the State Superintendent, through the Office of Professional Preparation, denied the Appellee’s application for an out-of-field authorization as incomplete due to the withdrawal of Dr. Parsons’ recommendation.⁵

IV.

ASSIGNMENT OF ERRORS

- A. THE MASON COUNTY CIRCUIT COURT ERRED BY LIMITING THE SCOPE OF THE INVESTIGATION TO BE PERFORMED BY THE STATE SUPERINTENDENT PURSUANT TO W. VA. CODE § 18A-3-3(e) THEREBY NULLIFYING THE STATE SUPERINTENDENT’S INDEPENDENT OBLIGATION PURSUANT TO W. VA. CODE § 18A-3-2a.

⁵It should be noted that the Office of Professional Preparation had not made a determination whether to approve or deny for cause the renewal application for the out-of-field authorization because the pending investigation being conducted by Mr. Morrison was not finished.

The Mason County Circuit Court erred when it ruled that W. Va. Code § 18A-3-3(e) “means that the state superintendent is limited to reviewing what was available to the county superintendent at the time of the decision.” W. Va. Code § 18A-3-3, is entitled “Renewal of Certificates; permanent certificates,” and subsection (e) states that:

If the applicant seeking renewal has cause to believe that the county superintendent refuses to give a recommendation without just cause, the applicant shall have the right, in such case, to appeal to the State Superintendent of Schools whose responsibility it shall be to investigate the matter and issue a certificate if, in the opinion of the state superintendent, the county superintendent’s recommendation was withheld arbitrarily.

In addition, W. Va. Code § 18A-3-2a states:

In accordance with state board of education rules for the education of professional educators adopted after consultation with the secretary of education and the arts, the state superintendent of schools may issue certificates valid in the public schools of the state: Provided, That a certificate shall not be issued to any person who . . . is not of good moral character and physically, mentally and emotionally qualified to perform the duties for which the certification would be granted . . .

1. West Virginia Code § 18A-3-3 Must Be Read In Pari Materia With West Virginia Code § 18A-3-2a.

The Supreme Court of Appeals of West Virginia in its decision of *Clower v. West Virginia Department of Motor Vehicles*, 223 W. Va. 535, 678 S.E.2d 41 (2009), reiterated the finding that “[s]tatutes which relate to the same subject matter should be read and applied together so that the Legislature’s intention can be gathered from the whole of the enactments.” *Clower* citing Syl. Pt. 3, *Smith v. State Workmen’s Compensation Commissioner*, 159 W. Va. 108, 219 S.E.2d 361 (1975); see also Syl. Pt. 13, *Zimmerer v. Romano*, 223 W. Va. 769, 679 S.E.2d 601 (2009). Moreover, the Court found that “[s]tatutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to

assure recognition and implementation of the legislative intent.” *Clower* citing Syl. Pt. 5, in part, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975); *see also Strick v. Cicchirillo*, 224 W. Va. 240, 683 S.E.2d 575 (2009).

In the instant case, Appellee sought to renew his out-of-field authorization, a type of license different from a professional teaching certificate. Pursuant to W. Va. Code § 18A-3-2a(4), “[o]ther certificates and permits may be issued, subject to the approval of the state board, to persons who do not qualify for the professional or paraprofessional certificate. Such certificates or permits shall not be given permanent status and persons holding such shall meet renewal requirements provided by law and by regulation . . .” According to W. Va. Code § 18A-3-2a, a teacher candidate must be of “good moral character and physically, mentally and emotionally qualified to perform the duties for which the certification would be granted”

The subject matter and common goal of both statutes, W. Va. Code §§ 18A-3-3 and 18A-3-2a, is to make sure that all applicants possess the requisite skills and knowledge, are of good moral character and are physically, mentally and emotionally qualified to teach for the ultimate protection of the students. Consistent with this goal, the State Superintendent always has an independent statutory duty *not* to issue a license if the applicant is not of good moral character and is unfit for the job pursuant to W. Va. Code § 18A-3-2a. The Mason County Circuit Court’s interpretation of W. Va. Code § 18A-3-3(e) ignores this independent duty by preventing the State Superintendent from considering any information not relied upon or known to the county superintendent at the time he or she refused to sign or withdrew his or her signature. Its ruling, if

allowed to stand, could compel the State Superintendent to license unfit teachers no matter what his investigation uncovers.⁶

Since both of these statutory code sections relate to the same subject matter and have a common purpose of evaluating teacher candidates for licensure, they must be read together. When a renewal applicant requests an appeal from a county superintendent's refusal to recommend, the State Superintendent investigates the facts surrounding the county superintendent's decision under W. Va. Code § 18A-3-3(e) and looks at any other facts that the county superintendent may not have known or events that had not yet occurred at the time of the county superintendent's refusal if those facts reflect on the applicant's current fitness under W. Va. Code § 18A-3-2(a).

A county superintendent's decision not to recommend a renewal applicant might be arbitrary for a number of reasons irrespective of a renewal applicant's actual fitness.⁷ The county

⁶ “[G]enerally the words of a statute are to be given their ordinary and familiar significance and meaning. . . .” *Amick v. C & T Development Co., Inc.*, 187 W. Va. 115, 118, 416 S.E.2d 73, 76 (1992). “It is not for this Court arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something that the Legislature purposely omitted.” *Banker v. Banker*, 196 W. Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996).

Thus, in the instant case the State Superintendent's responsibility “shall be to investigate the matter.” As defined by *Merriam Webster Dictionary*, investigate means “to observe or study by close examination and systematic inquiry or to conduct an official inquiry.” Investigate means more than just review. The State Superintendent must make an independent inquiry of his own to adequately make his determination. Had the Legislature intended to limit the State Superintendent to a review of the county superintendent's decision on the record, it would have said that.

⁷Appellants wish to emphasize that in this instant case, the county superintendent's decision to withdraw his recommendation was not arbitrary and was fully supported by the evidence he considered at the time. However, Appellants are concerned about the impact of the Mason County Circuit Court's ruling on future licensure cases and accordingly seek clarification from this Court.

superintendent may not have done a thorough job of investigating the facts. The information he or she relied upon may have been insufficient to justify a refusal to recommend despite the existence of sufficient facts to justify the refusal that a thorough investigation would have revealed. Should the State Superintendent be prevented from conducting his own investigation when he often has greater resources to devote to the task?

For example, the State Superintendent has forensic computer programs and trained personnel to look at a teacher's school computer for e-mails or pictures that were never saved or may have been deleted. If a county superintendent refused to recommend a renewal applicant because she just had a hunch or a suspicion that a teacher was engaged in an inappropriate relation with a student, such a refusal may be deemed arbitrary. But if the West Virginia Department of Education then examines the teacher's computer and finds deleted e-mails between the teacher and student, the State Superintendent has an independent duty to consider this evidence before renewing a license.

Events that occur subsequent to the refusal to recommend, but prior to the hearing before the State Superintendent's designee, may also confirm unfitness. If there was insufficient evidence at the time the county superintendent acted, the circuit court's ruling would prohibit the State Superintendent from considering such evidence and would mandate the certificate or permit be renewed. Two examples where this could occur: (1) A student may complain about a teacher's inappropriate behavior, but there are no witnesses or documentary evidence to support the allegations. Before the West Virginia Department of Education hearing, another student comes forward after the county superintendent refuses to sign. The original refusal may be deemed arbitrary, but subsequent events and evidence render the refusal justified; (2) A county superintendent refuses to sign a renewal because of a suspicion that a teacher is impaired by drugs.

After the refusal but before the West Virginia Department of Education hearing, the teacher's vehicle is stopped by law enforcement and cocaine is found, thus confirming the suspicion.

A county superintendent's refusal to recommend might be considered arbitrary because he or she has condoned similar behavior by another teacher. However, the behavior of both teachers might be sufficient to warrant action against a teacher's license. Though the WVDE had no prior knowledge of the other teacher's behavior, the State Superintendent should not be precluded from taking appropriate action against the current renewal applicant.

The Mason County Circuit Court's suggestion that the State Superintendent can later take separate licensure action per W. Va. Code § 18A-3-6 is unworkable. If the State Superintendent issues the license under W. Va. Code § 18A-3-3(e) because the county superintendent's refusal was arbitrary, but immediately initiates revocation proceedings on the very same facts, the teacher would have a collateral estoppel defense. Besides, this is an extremely cumbersome method inconsistent with the notion of judicial economy that exposes students to a teacher that the State Superintendent deems unfit and requires often reluctant students to testify about the same events repeatedly.

By ignoring W. Va. Code § 18A-3-2a, the Mason County Circuit Court's interpretation of the renewal statute leads to the inevitable conclusion that all a renewal applicant needs is the county superintendent's recommendation of good moral character and that the State Superintendent can never independently assess renewal applicants for character and fitness. This is clearly not the state of the law. The facts and holding of *Adkins v. West Virginia Dept. of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) clearly establishes that even when a county superintendent of schools recommends a teacher for renewal of a license, the State Superintendent maintains an independent duty to

consider the request, investigate the applicant's fitness to teach, and issue the certificate only if he is convinced that the applicant meets the necessary requirements for licensure.

In the *Adkins* case, a teacher sought renewal of his license, converting it from a five-year license to a permanent one in 1999. He disclosed on the application that he had been convicted of a felony for cocaine distribution 22 years earlier, but had not disclosed the fact on two earlier renewal applications.⁸ The Braxton County Board of Education and its county superintendent had been aware of the felony conviction when it hired him, and the county superintendent recommended the teacher on each of his renewal applications for those applications to have been successfully processed.

Nonetheless, the State Superintendent conducted an independent investigation into the background of Mr. Adkins and denied the renewal application for cause. Mr. Adkins appealed the decision. Following a hearing, the State Superintendent upheld the denial and adopted the recommendation that Mr. Adkins not be permitted to apply for a renewal for two years. On appeal, the Supreme Court of Appeals affirmed the authority of the State Superintendent to impose, in effect, a two year suspension, even while taking into account the fact that the Braxton County school system continued to allow Mr. Adkins to teach after being given notice that his license would not be renewed. *Adkins*, 210 W. Va. at 108, 556 S.E.2d at 75. This case clearly illustrates that even when a county superintendent of schools recommends a teacher for renewal of a license, the State Superintendent maintains an independent duty to consider the request, investigate the applicant's

⁸Apparently, the State Superintendent had not been aware of the 1977 felony conviction which occurred while Mr. Adkins was teaching in Nicholas County and therefore did not revoke Mr. Adkins's original teaching certificate. When the teacher applied for a substitute permit in 1983 with intentions to teach in Braxton County, he disclosed the felony but the State Superintendent erroneously did not conduct an investigation.

fitness to teach, and issue the certificate only if he is convinced that the applicant meets the necessary requirements for licensure.

2. The Mason County Circuit Court Erred When It Found The Admission Of A Hearing Transcript To Be An Abuse Of Discretion By The Hearing Officer.

The Mason County Circuit Court ruled that “Mr. Hamm is asserting his right to appeal the county superintendent’s decision and that appeal must be based on why that decision was made. Any evidence introduced beyond that is an abuse of discretion. Since the transcript of the county proceeding held two weeks [sic] after the county superintendent’s decision was introduced into evidence, this proceeding amounted to an abuse of discretion.” *See Judgment Order* dated August 19, 2009. The Mason County Circuit Court erred when making this finding for two reasons. First, the ruling impermissibly limits the State Superintendent’s independent authority to investigate fitness irrespective of what the county superintendent knew at the time he withdrew his signature, as argued above. Second, even if the Circuit Court correctly interpreted W. Va. Code § 18A-3-3(e), admission of the transcript was harmless error. Harmless error has been described as:

A law enforcement officer’s failure to strictly comply with the DUI arrest reporting time requirement of W. Va. Code , 17C-5A-1(b) [1994] is not a bar or impediment to the commissioner of the Division of Motor vehicles taking administrative action based on the arrest report, unless there is actual prejudice to the driver as a result of such failure. Syl. Pt. 3, *Carpenter v. Cicchirillo*, 222 W. Va. 66, 662 S.E.2d 508 (2008) citing Syl. Pt. 1, *In Re Burks*, 206 W. Va. 429, 525 S.E.2d 310 (1999).

The transcript, which was of a hearing before the Mason County Board of Education to terminate the Respondent because his application for an out-of-field authorization had been denied by the State Superintendent, contained no facts or information not relied upon by the county superintendent in withdrawing his recommendation. At this county level hearing, Dr. Parsons explained his reasons for the withdrawal; his Human Rights Officer, Linda Rollins, testified about

facts she reported to Dr. Parsons before his withdrawal; and the arresting officer testified as to the basis of the criminal complaint. Dr. Parsons had talked with the police officer prior to withdrawing his recommendation. The transcript also contained exhibits which were documents that had been created before the withdrawal as well as certain administrative letters notifying the Appellee of Dr. Parsons' decision. The Appellee and his counsel participated in this hearing. They were, therefore, aware of the contents of the transcript and how they related to Dr. Parsons' decision to withdraw his recommendation.

Equally important was the fact that the Hearing Officer did not rely upon Exhibit 21 in making her decision, as is apparent on the face of the Recommended Decision adopted by the State Superintendent as his final Order dated June 22, 2007. The lengthy Recommended Decision cites many exhibits and transcript references to support the findings of fact. Nowhere in the Recommended Decision is Exhibit 21 cited. The Appellee has failed to show any actual prejudice which resulted from the admission of Exhibit 21, and as such, any admission of Exhibit 21 can be considered harmless error.

B. THE APPELLEE WAS AFFORDED DUE PROCESS AT THE ADMINISTRATIVE HEARING OF THIS MATTER.

To determine whether the Appellee's procedural due process rights were violated during the appeal process, the Mason County Circuit Court applied the minimum standards articulated in Syl. pt. 3, *North v. West Virginia Board of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977) which are "formal written notice of charges; sufficient opportunity to prepare to rebut the charges; opportunity to have retained counsel at any hearings on the charges, to confront his accusers and to present evidence on his own behalf; an unbiased hearing tribunal; and an adequate record of the proceedings." The Mason County Circuit Court held that the Appellee did not have sufficient

opportunity to prepare to rebut the charges because he had not received the Appellants' proposed exhibits prior to the hearing. The Circuit Court further held that the Appellee had not been permitted to present evidence on his own behalf when the Hearing Officer excluded two witnesses he tendered on the grounds that they had not been sequestered.

In both instances the Circuit Court erred in its holding by requiring a high level of voluntary pre-hearing discovery upon the Appellants and by failing to articulate how the Appellee was prejudiced or harmed.

1. The Circuit Court erred in interpreting the due process requirement of "adequate time to prepare" to mandate the production of proposed exhibits prior to the hearing.

There is no absolute constitutional right nor a statutory right to pre-hearing discovery in administrative licensure proceedings held under the West Virginia State Administrative Procedures Act, W. Va. Code § 29A-5-1 *et seq.* This Court found with its decision in *State ex rel. Hoover v. Smith*, 198 W. Va. 507, 512, 482 S.E.2d 124, 129 (1997), that there is no constitutional right to pre-hearing discovery; however, this Court did acknowledge that "in some circumstances, an administrative agency must grant discovery to a party in a contested case regardless of whether the enabling statute or agency rules provide for it, if refusal to grant discovery would so prejudice the party as to amount to a denial of due process." *Hoover*, 198 W. Va. at 512, 482 S.E.2d at 129, citing *In Re Tobin*, 628 N.E.2d 1268, 1271 (Mass. 1994).

In the instant case, the Circuit Court relied upon the above-quoted language in *Hoover* to make its conclusory finding that the Appellee had an insufficient opportunity to prepare and was thus denied due process without articulating how he was prejudiced by reviewing the Appellants'

documentary evidence for the first time during the hearing. Indeed, it is difficult to determine how he was harmed.

Only one of the Appellee's objections to the proffered exhibits concerned, in part, lack of notice. The other objections were based upon hearsay (Exhibits 5, 6, 7, 8 and 9), being conclusory in nature (Exhibits 11 and 13) and being created after Dr. Parsons made his decision to withdraw his recommendation (Exhibit 21). Many of these documents were criminal complaints filed against the Appellee, and all are were public documents. The Appellee also had heard some of this evidence at the February 15, 2007, employment hearing before the Mason County Board of Education when Dr. Parsons and Linda Rollins both testified regarding his suspension for incompetency because he lacked an out-of-field authorization.

The only exhibit that the Appellee objected to for lack of notice was Exhibit 15, which was the investigative report of Linda Rollins dated June 8, 2006 concerning the harassment complaint of teacher Serena Bright against Mr. Hamm. Appellee objected based upon two grounds: (1) the exhibit was self-serving and contained hearsay; and (2) Appellants refused to provide Appellee's counsel with a copy upon written request. *See* 4/20/07 R. at 22-23. The report contained detailed notes of Ms. Rollins's interviews with Ms. Bright, Mr. Hamm and other school personnel as well as e-mails, notes and letters written by Mr. Hamm and Ms. Bright.

However, Counsel for the West Virginia Department of Education explained to the Hearing Officer the reason for the refusal to produce. When the Appellee's counsel wrote to the Department on February 14, 2007 requesting everything in its file pertaining to the denial of the permit, counsel wanted this information to use at a hearing before the Mason County Board of Education scheduled for February 15, 2007. The investigative report had been provided to the State Superintendent on

September 26, 2006 by Dr. Parsons pursuant to his statutory obligation to report misconduct under the revocation statute, W. Va. Code § 18A-3-6. *See* 4/20/07 R. at Exhibit 13. Because the report was part of its ongoing investigative file for possible revocation proceedings and was not relied upon by the Office of Professional Preparation in denying the permit as incomplete, the Department refused to produce it, claiming work product and confidentiality of the investigative file. *See* 4/20/07 R. at 26.

At the hearing before the Mason County Board of Education on February 15, 2007 on whether Mr. Hamm should be terminated or suspended because he lacked appropriate licensure as a special education teacher, the parties agreed that the Appellee's legal recourse was to appeal Dr. Parson's withdrawal of his recommendation to the State Superintendent pursuant to W. Va. Code § 18A-3-3. The Appellee's counsel then wrote to the State Superintendent on February 16, 2007 appealing the withdrawal of recommendation. *See* 4/20/07 R. at Exhibit 1. A hearing was scheduled for April 20, 2007, but the Appellee's counsel never renewed his request for documents nor inquired as to who would be called. *See* 4/20/07 R. at 24-26.

It is important to note that the Appellee's primary objection to the report's admissibility, as argued at the hearing, was not that he had insufficient time to prepare. Instead, he asserted that it did not meet the hearsay exception as a school or business record, because the WVDE had previously claimed it was part of an investigative file. *See* 4/20/07 R. at 24. It is equally important to note that because the Appellants presented all of their witnesses and exhibits on the first day of hearing, the Appellee then had a month in between the two hearing dates to review all of Appellants' exhibits and prepare a defense. He used the time to make a videotape of his house to impeach the testimony of his sister-in-law, Autumn Vanscoy, concerning the domestic violence incident she saw as she

stood at the Hamms' front door. This videotape was shown and introduced into evidence on the second hearing date, May 31, 2007. Had the Appellee needed to recall any of Appellants' witnesses for further cross-examination based on his review of the exhibits, he could have done so. Appellee could have even requested additional time from the Hearing Officer before the second day of hearing to review and prepare a defense. As referenced below, the Hearing Officer encouraged the Appellee to take as much time as he needed.

2. The refusal to allow Appellee's nonsequestered witnesses to testify did not deny his due process rights.

The purpose of the sequestration rule is "to prevent the shaping of testimony by one witness to match that of another and to discourage fabrication and collusion. The rule applies to rebuttal witnesses as well. . . ." *Roy Young & Sons Paving, Inc. v. Ash*, 203 W. Va. 510, 513, 509 S.E.2d 333, 336 (1998). *citing* Syl. Pt. 2, *State v. Omechinski*, 196 W. Va. 41, 468 S.E.2d 173 (1996). The *Ash* case is the only reported decision involving purely civil matters, and the Court, observing the "paucity of decisions" from civil cases, drew from holdings in criminal appeals. *Ash*, 203 W. Va. at 510 n.4, 509 S.E.2d at 336 n.4.

The *Ash* Court noted that it had previously developed a test for determining whether to exclude the testimony of a previously-known rebuttal witness in Syl Pt. 7, *State v. Omechinski*, 196 W. Va. 41, 468 S.E.2d 173 (1996). The *Ash* Court found the *Omechinski* test to be inapplicable, because the existence of the rebuttal witness, the court bailiff, was not known to the plaintiff until after each side had rested its case-in-chief; hence, the court's sequestration order did not govern the testimony.⁹

⁹ The defendant, Mr. Ash, testified that the corporate plaintiff's principal, Roy Young, visited the defendant's residence in an intoxicated state while attempting to collect the contract
(continued...)

However, in ordinary circumstances, the *Ash* Court found, the tribunal should apply the *Omechinski* factors to determine admissibility of the testimony from a nonsequestered witness:

(1) how critical the testimony in question is—that is, whether it involved controverted and material facts; (2) whether the information ordinarily is subject to tailoring such that cross-examination or other evidence could bring to light any deficiencies; (3) to what extent the testimony of the witness is likely to encompass the same issues as other witnesses'; (4) in what order the witness would testify; and (5) if any potential for bias exists which may motivate the witness to tailor his or her testimony.

Ash, 203 W. Va. at 514 n.5, 509 S.E.2d at 333 n.5.

In the instant case, the Mason County Circuit Court held that the Hearing Officer's refusal to permit two witnesses who had not been excluded from the hearing to testify deprived the Appellee of his due process right to present evidence on his own behalf, because the Appellants had not disclosed the nature of their witnesses' testimonies before the hearing. According to the Mason County Circuit Court, Appellee did not have the ability to foresee each avenue the Appellants would explore. The Mason County Circuit Court did not consider or apply the *Omechinski* factors, instead merely holding that the fourth prong of the *North* test for due process in administrative proceedings—opportunity to present evidence on his own behalf—was violated. Had the Court reviewed the entire transcript with respect to the issue of sequestration and applied the *Omechinski* factors to the facts, it would have found no reason to dispute the Hearing Officer's ruling.

At the beginning of the hearing, the Hearing Officer asked the Appellee's counsel whether he wanted witnesses excluded from this room since he had opted to have an open hearing. Counsel stated that he "would like to have a sequestration of the witnesses." Then, Counsel for the West

⁹(...continued)
invoice at issue, forcing Mr. Ash to call the police. The bailiff approached plaintiff's counsel during a break and disclosed that he had responded to Mr. Ash's call but that it was Mr. Ash who was intoxicated, loud and boisterous. *Ash*, 203 W. Va. at 511, 509 S.E.2d at 334.

Virginia Department of Education specifically asked the Appellee's counsel if any of the individuals seated behind him were intending to be witnesses. Counsel replied, "I don't think so, no." He then changed his mind and directed an unidentified individual to wait in a room set aside for the Appellee's witnesses. *See* 4/20/07 R. at 5-6. He also stated that the Appellee was ready to proceed and waived having the parties make opening statements, at which time counsel usually state what evidence will be introduced through their witnesses. *See* 4/20/07 R. at 8.

The Appellants, having the burden of proof, called its witnesses first. According to the Appellee, the testimony of the following three witnesses prompted him to call two witnesses who had not been sequestered. First, Linda Rollins, the Human Rights Officer for Mason County schools, testified about her investigation of the complaints made by Serena Bright that Appellee was stalking her. Ms. Rollins said that after making her initial complaint, Ms. Bright became upset about rumors she heard from school personnel that she was in a romantic or sexual relationship with the Appellee. She suspected the source of those rumors to be the Appellee. Ms. Rollins testified that when asked whom she had talked to about the situation, Ms. Bright admitted calling Larry Wright, her former high-school teacher and the Appellee's stepfather, to express her concerns about the Appellee on April 10, 2006. *See* 4/20/07 R. at 89. Ms. Rollins's investigative report also recounted that Ms. Bright had called Mr. Wright, and it included notes of her interview with the Appellee in which he relayed Mr. Wright's version of the conversation. *See* 4/20/07 R. at 9, 18, 21-22 and Exhibit 15.

Ronny Vanscoy, the Appellee's father-in-law, testified after Ms. Rollins on the first day of the hearing. He testified that he had found drug paraphernalia in the Appellee's mobile home on one occasion when he was helping his daughter, Tequilla Hamm move back home. He then received a call from the Appellee that if Mr. Vanscoy and Tequilla did not return his drug paraphernalia and

drugs, he was coming to their house and shoot holes in it. The Appellee did drive to the house and pull in the end of the driveway. But Larry Wright, who happened to be dropping off the Hamms' daughter, showed up before the Appellee did and defused the situation. Mr. Vanscoy testified, "Whether he had a gun or not, I don't know." *See* 4/20/07 R. at 134 and 138.

Mr. Vanscoy's daughter, Autumn Vanscoy, testified next. She was an eyewitness to the incident of domestic battery against Tequilla with which the Appellee was charged in December 2006. She recounted what she saw through the glass in the front door. *See* 4/20/07 R. at 144-47. Following Ms. Vanscoy's testimony, the Appellants rested its case. The Hearing Officer asked the Appellee's counsel if he wanted to continue that day or reschedule, because she wanted to make sure he had ample time to present his case. *See* 4/20/07 R. at 159. Appellee's Counsel elected to reschedule.

The hearing was reconvened on May 31, 2007. The Appellee's counsel had submitted a request to the State Superintendent to issue subpoenas for several witnesses, including Larry Wright and Sherry Wright, who had not been excluded from the hearing. This issue was raised by the WVDE counsel when the hearing began. The Appellee's counsel explained he wanted to call the Wrights to rebut testimony "that had not been disclosed, never been disclosed, notwithstanding requests had been made." *See* May 31, 2007, Administrative Hearing Transcript, at 7-8 (hereinafter "5/31/07 R. at ___"). WVDE's counsel objected on the grounds that the Wrights had listened to all of the testimony and had the opportunity to review all of the exhibits. It was proposed that the Appellee vouch the record to preserve the issue. *See* 5/31/07 R. at 7-8. The Hearing Officer sustained the objection and asked the Appellee's counsel to vouch the record. He responded that he would defer proffering the testimony until the end of the hearing. *See* 5/31/07 R. at 10.

The last witness the Appellee called was his wife, Tequilla. During her testimony, the Appellee's counsel introduced a videotape of the Hamms' mobile home recorded by Larry Wright following the first hearing in an attempt to demonstrate that Autumn Vascoy could not have seen what she described through the glass in the door. Because Mr. Wright's testimony had been excluded and the videotape contained his narration, the sound was muted and Mrs. Hamm provided the narration. *See* 5/31/07 R. at 60-61.

After the Appellee rested his defense, his counsel made the following proffer: Mr. Wright would testify that physically, it would be impossible for Autumn Vascoy to see what she testified she observed; that Brian Hamm had not brought a gun to Ronny Vascoy's house; and that Serena Bright had told him she wanted the rumors about his stepson and her stopped. In response to Mr. Wright's question whether Mr. Hamm had not been doing anything to bother her, she said, "no." *See* 5/31/07 R. at 100-101. Appellee's Counsel stated that Mrs. Wright's testimony would be basically the same.

Applying three of the *Omechinski* factors to this case, it is clear that the Hearing Officer's ruling was correct and that the Appellee was not deprived of his ability to put on evidence. First, Mr. Wright's testimony was not critical. His opinion that Autumn Vascoy could not see what she described in her testimony would not have been helpful to the Hearing Officer. He was not present on that date and had no personal knowledge. His testimony that Mr. Hamm did not bring a gun to Ronny Vascoy's house would not have controverted the primary point of Mr. Vascoy's testimony-- that Mr. Hamm used drugs and made threats of violence when upset. While his testimony would have contradicted a small portion of Serena Bright's statements found in the investigate report, the bulk of evidence concerning the harassment complaint was comprised of a series of electronic mail

correspondence that Mr. Hamm had sent and his admissions to Ms. Rollins that he had been obsessed by Ms. Bright.

Second, the potential for bias from these witnesses to tailor their testimony was great. Larry Wright is Mr. Hamm's step-father and Sherry Wright is his mother. Unlike the court bailiff in *Ash*, they could not be considered disinterested, independent witnesses. If they truly had material first-hand knowledge about the incidents that led to Dr. Parsons withdrawing his recommendation, the possibility of their testifying should have occurred to the Appellee's counsel in the several months between the Appellants' denial of the permit and the scheduled hearing.

Third, and most importantly, the substance of Mr. Wright's testimony was already in the record through other witnesses. He created the videotape to impeach Autumn Vascoy's testimony, and his daughter-in-law, who was more familiar with her mobile home than was Mr. Wright, narrated and explained its significance. Tequilla Hamm testified that her husband did threaten to shoot holes in the Vascoys' house because he was upset that she had moved, but that he did not own any weapons. 5/31/07 R at 73-74. The investigative report prepared by Ms. Rollins contained Mr. Wright's recollection of his conversation with Serena Bright provided by Mr. Hamm during an interview with Ms. Rollins.

To end, when applying the *North* standards to administrative hearings, this Court has reversed cases for denial of due process only where there have been fundamental flaws and unfairness in the proceedings. See e.g., *Zaleski v. West Virginia Physicians' Mut. Ins. Co.*, 220 W. Va. 311, 647 S.E.2d 747 (2007) (Nonrenewal of malpractice insurance coverage procedures deprived insured of due process where the physician was only permitted fifteen minutes in which to make a brief statement to the Underwriting Committee, ask questions of the Committee and be

asked questions by the Committee and there was no stenographic recording made of the hearing); *Clarke v. West Virginia Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981)(failure of hearing examiner at dismissal proceeding to state in the report of findings and recommendation the specific charges against professor which were found to be supported by evidence); and *North, supra*, (medical student expelled at a hearing at which he was not allowed to bring his lawyer). The Appellee's nonrenewal appeal was neither flawed nor unfair.

V.

RELIEF REQUESTED

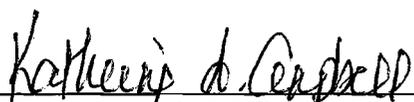
WHEREFORE, based upon the foregoing, the Appellants, the State Superintendent of Schools, Dr. Steven L. Paine, and the West Virginia Department of Education, respectfully request that this Court reverse the Judgment Order dated August 19, 2009, and affirm the Order dated June 22, 2007.

Respectfully submitted,

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SUPERINTENDENT OF SCHOOLS,
and the WEST VIRGINIA DEPARTMENT
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By counsel

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Certificate Renewal Process

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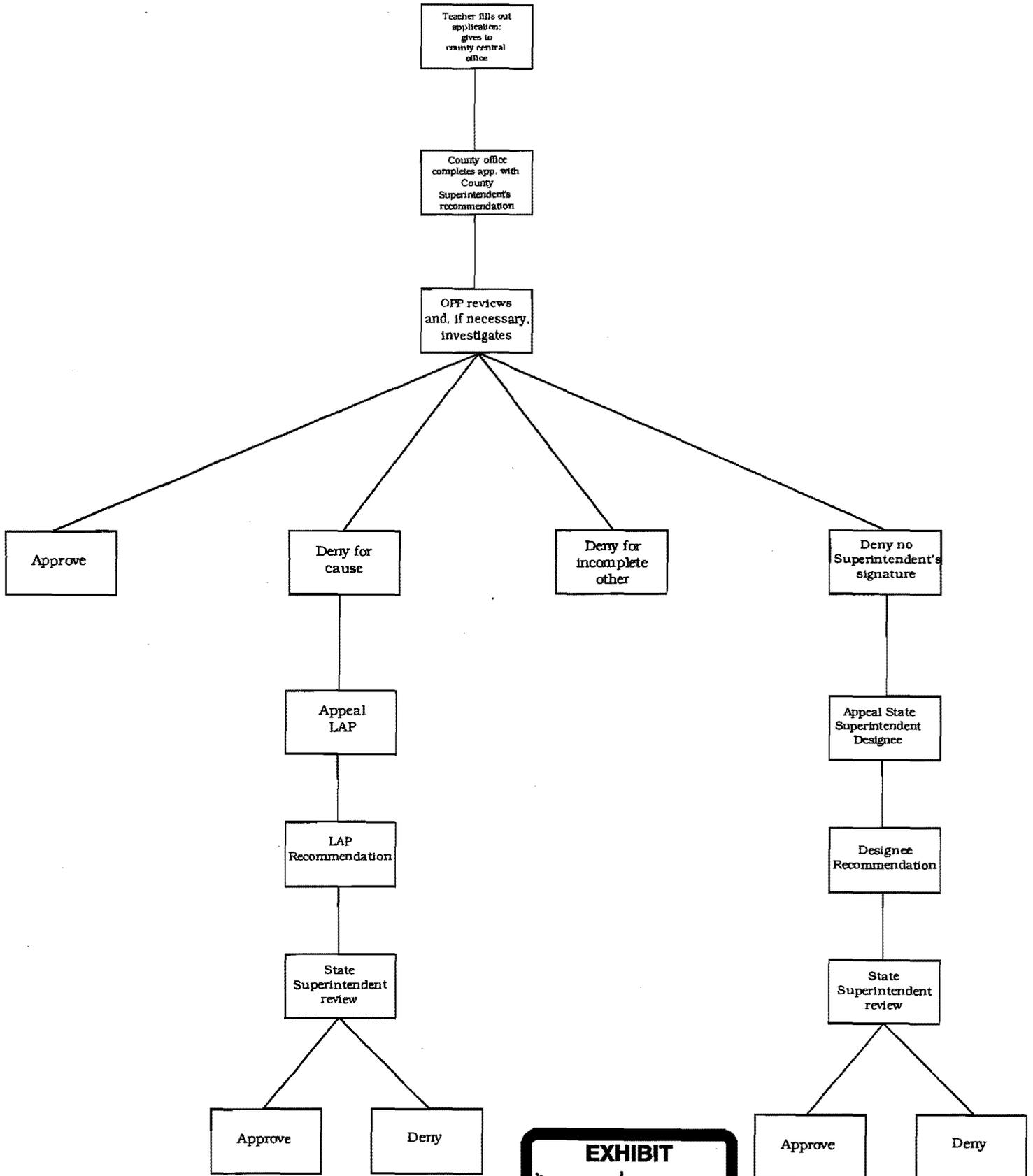


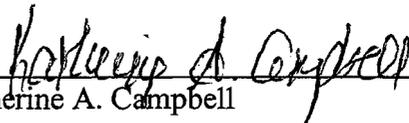
EXHIBIT
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CERTIFICATE OF SERVICE

I, Katherine A. Campbell, Assistant Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing "Appellant's Brief" was served by depositing the same postage prepaid in the United States mail, this 20th day of May 2010, addressed as follows:

James M. Casey, Esq.
611 Viand Street
Point Pleasant, West Virginia 25550



Katherine A. Campbell