35539

NO. ~~33539~~

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

WILLIAM B. HAMM,

Petitioner below, Appellee

v.

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

Respondents below, Appellants

BRIEF OF APPELLEE WILLIAM B. HAMM

Bradley J. Pyles, State Bar No. 2998
Pyles & Turner, LLP
408 Main Street
P. O. Box 596
Logan, WV 25601
(304) 752-6000
Fax: (304) 756-3123

James M. Casey, State Bar No. 667
P. O. Box 427
Point Pleasant, WV 25550
(304) 675-3999
Fax: (304) 675-3956

FILED
JUL 21 2010
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF FACTS 3

ARGUMENT 11

A. The Circuit Court Correctly Held That the Scope of State Superintendent's Review Under § 18A-3-3(e) Is Limited to the Matters Relied On by the County Superintendent. 11

B. The State Superintendent's Interpretation of the Statute Conflicts With Related Statutory Provisions. 15

C. The Circuit Court Correctly Ruled That Mr. Hamm Was Denied Due Process by the State Superintendent's Failure to Timely Disclose and Produce the Documents Introduced at the Hearing, and by the Hearing Officer's Exclusion of Appellee's Witnesses. 29

CONCLUSION 31

TABLE OF AUTHORITIES

CASES

Adkins v. West Virginia Department of Education, 210 W.Va. 105, 556 S.E.2d 72 (2001) 28

Bailey v. Norfolk and Western Railroad Co., 206 W.Va. 654, 527 S.E.2d 516 (1999) 28

Bledsoe v. Wyoming County Board of Education, 183 W.Va. 190, 394 S.E.2d 885 (1990) ... 23

Board of Education v. Wirt, 192 W.Va. 568, 433 S.E.2d 402 (1994) 22

Golden v. Board of Education, 169 W.Va. 63, 285 S.E.2d 665 (1981) 19, 20, 23, 28

Morrison v. State Board of Education, 1 Cal.3d at 225-27, 82 Cal.Rptr. at 382-84, 461 P.2d at 382-84). 19

Powell v. Paine, 221 W.Va. 458, 655 S.E.2d.204 (2007) 23

Rogliano v Fayette County Board of Education, 176 W.Va. 700, 347 S.E.2d 220 (1986) .. 20, 23

Stanley v. Department of Tax and Revenue, 217 W.Va. 65, 614 S.E.2d 712(2005) 29

State ex rel. Pinson v. Varney, 142 W.Va. 105, 96 S.E.2d 72 (1956) 29

Waugh v. Board of Education, 177 W.Va. 16, 350 S.E.2d (1986) 23

Wines v. Jefferson County Board of Education, 213 W.Va. 379, 582 S.E.2d 826 (2003) 22

Woo v. Putnam County Board of Education, 202 W.Va. 409, 504 S.E.2d 644 (1998) 23

STATUTES

W.Va. Code § 18A-2-8 ..... 14, 17, 19-21, 28

W.Va. Code § 18A-3-2a 14, 16, 21

W.Va. Code § 18A-3-3 . . . . . 11, 12, 29

W.Va. Code § 18A-3-3(e) 2, 9, 13-15, 17, 27-29

W.Va. Code § 18A-3-6 . . . . . 14, 17, 18, 20, 21, 25, 27-29

W.Va. Code § 29A-5-4 1

W.Va. Code § 60A-4-407 23

INTRODUCTION

This is an appeal by the State Superintendent of Schools from the Judgment Order of the Circuit Court of Mason County, David W. Nibert, J., which reversed and remanded the administrative decision of the State Superintendent. The State Superintendent in an administrative proceeding had upheld the withdrawal by the Mason County superintendent of a recommendation that his teaching permit had be approvded. The Appellee, William Brian Hamm, appealed the administrative ruling and filed a petition for appeal to the Circuit Court of Mason County, pursuant to *W.Va. Code* § 29A-5-4. (R 1)[1]

The Circuit Court concluded that the State Superintendent erred in expanding the scope of the hearing beyond the matters upon which the county superintendent based his withdrawal of a recommendation. The court also found that Mr. Hamm was denied due process under the circumstances by the failure of the State Superintendent to provide "a multitude of documents" until the hearing, despite a previous request, and that Mr. Hamm was also wrongfully denied the testimony of two witnesses by the Hearing Examiner who were present in the courtroom during the testimony of other witnesses, because Mr. Hamm's counsel was not given notice of the State Superintendent's intent to expand the scope of the hearing into areas where Mr. Hamm required their testimony.

The consequences to Mr. Hamm of the action of the county superintendent and the State Superintendent's erroneous view of its role in this situation were considerable. The county superintendent, Dr. Parsons, sent a letter to the West Virginia Department of Education ("WVDE")

---

[1]Citations to the record will include record number (R _) where possible. The transcript of the hearings before the State Superintendent are also designated as Vol. 1 and Vol. 2. The transcript hearing before the Mason County Board of Education is designated as Mason County BOE. The Mason County Circuit Court hearing is designated "Circuit Court hearing."

withdrawing his previous recommendation that his teaching permit be renewed. The only reason cited for that action was that Mr. Hamm had been arrested on two misdemeanor charges on December 28, 2006, neither of which involved the schools or his teaching duties. He was later acquitted of both charges in a bench trial. (Circuit Court hearing at 13).[2] The WVDE denied his permit, Dr. Parsons thereupon sought his dismissal by the Mason County Board of Education because he was "incompetent" (*i.e.*, did not have a permit), he was initially suspended by the Board, and subsequently discharged. His appeal to the Grievance Board has been stayed pending the outcome of this appeal. He has been out of his job since February 2006. His only appeal from the county superintendent's action was to the State Superintendent, who construed his responsibility as defending the decision of the county superintendent, and extended the scope of the inquiry to any additional derogatory information it could find, without disclosing that intent to Mr. Hamm or his counsel.

The Appellee, Brian Hamm, submits that the decision of the Circuit Court of Mason County was correct in holding that on an appeal from the denial or withdrawal of a recommendation by a county superintendent, the State Superintendent's review pursuant to *W. Va. Code* § 18A-3-3(e) is limited to the matters relied upon by the county superintendent. The Circuit Court also correctly held that Mr. Hamm was denied due process by the failure to disclose the documents and the scope of the proceeding. The decision of the Circuit Court of Mason County should be affirmed.

---

[2]Mr. Hamm was also acquitted by a magistrate court jury of misdemeanor charges of stalking and harassing phone calls from an earlier charge, which was not cited as a reason for the withdrawal of the county superintendent's his recommendation.

STATEMENT OF FACTS

Brian Hamm, the Appellee in this case, was a teacher at Point Pleasant Middle School in Mason County. He has held Professional Teaching Certificates since 2002 in Driver Education, Health Education, and Social Studies. Beginning in 2004, he was employed in a special education position, with Out-of-Field Authorizations in Specific Learning Disabilities, Mentally Impaired Mild-Moderate, and Autism, and was teaching on First Class Full Time Permits in those fields. For most of that time he was assigned to work with a single autistic student who required one-on-one attention. In order to teach pursuant to those permits, he was required to demonstrate that he was working toward certification in the fields in which he was teaching. He had been attending Marshall University and taking classes in those fields sufficient to qualify him for an out-of-field authorization and a permit allowing him to teach. He was initially suspended without pay and then later discharged and has been off work since January or February 2007 as a result of the events described below.

Mr. Hamm submitted an application to renew his out-of-field authorization and permit for the 2005-2006 school year in June 2005, listing the classes he was taking. The form also requires a recommendation by the County Superintendent, which reads as follows:

> I have reviewed the disclosure of background information, and to the best of my knowledge, the applicant is of good moral character and physically, mentally, and emotionally qualified to perform his/her duties as an educator. I recommend the license be granted.

The Mason County Superintendent of Schools, Larry Parsons, signed the recommendation on June 28, 2005, and the renewal was granted. (R 99, Ex. 4). Mr. Hamm sought to renew the permit again for the 2006-2007 school year in July 2006, submitting the necessary forms showing his course work

for continued progress his regular certification in the fields he was teaching. Dr. Parsons again signed the recommendation on July 27, 2006. (R 78, Vol. 1 at 11-12).

Between the 2005 and 2006 applications, a complaint was made in April 2006 by another teacher at the school that Mr. Hamm was spreading rumors of a romantic relationship with the complainant. The complaint was investigated by Linda Rollins, administrative assistant to Dr. Parsons, the superintendent. Her investigation indicated that Mr. Hamm and the complainant had a friendship relationship and worked together, and that there had been rumors about their relationship. Ms. Rollins agreed that her investigation indicated that there had been a mutually agreeable discourse from the summer of 2005 to February 10, 2006, between Mr. Hamm and the complainant. At that time, she notified Mr. Hamm not to contact her further, after conferring with the principal informally. The complainant did not file a formal complaint until April 12, 2006, when she became aware of the rumors and felt that Mr. Hamm was responsible for them.

Ms. Rollins completed her investigation of the complaint in June 2006, and provided her findings to Superintendent Parsons. The report did not indicate any further improper conduct after April 2006. On July 11, 2006, Dr. Parsons notified Mr. Hamm that he had concluded that Mr. Hamm had violated the district's sexual harassment policy, and that he was suspended without pay for five days for his conduct. A copy of Ms. Rollins' investigation was forwarded to the State Superintendent along with a notice of the disciplinary action. Dr. Parsons was aware of this incident and the contents of the report, and had already notified Mr. Hamm of the disciplinary action when he recommended to the State Superintendent that the renewal of the Mr. Hamm's permit should be approved. (R 78, Vol. 1 at 56).

Mr. Hamm served his 5-day suspension, and continued to teach pursuant to his permit until January 2007. Two months after the suspension, misdemeanor complaints were issued on October 26, 2006, in the Magistrate Court of Mason County charging Mr. Hamm with harassing telephone calls and stalking, related to the same matters which were the subject of Ms. Rollins investigation. (R 78, Vol. 1, Exhibits 8, 9). The record does not indicate why they were filed at that particular time, some six months after the conduct alleged in the complaints.[3] Dr. Parsons and Ms. Rollins were aware of those charges in October and knew that they were based upon the same conduct that had previously been investigated by Ms. Rollins. (R 78 Vol. 154-56). Dr. Parsons took no action regarding the misdemeanor charges filed in October, which was encompassed in the earlier discipline. Mr. Hamm ultimately went to trial and was acquitted of those charges. (R 169, Circuit Court hearing at 13).

On December 28, 2006, Mr. Hamm was arrested and jailed overnight as a result of a domestic altercation with his wife. He was charged with two misdemeanors, domestic battery and possession of less than 15 grams of marijuana, based upon a small amount of marijuana found in the house. Mr. Hamm was also eventually tried and acquitted of those charges as well. By then, however, he was out of a job and had lost his permit to teach.

On the first day of school after the incident, January 2, 2007, Dr. Parsons sent a letter to the State Superintendent withdrawing the recommendation he made on July 27, 2006. (Exhibit 2). The only reason stated for that action was that Mr. Hamm had been charged with those two misdemeanors.

---

[3]The complaint stated that the alleged conduct occurred between January 2005 and April 2006. The complaints were filed by a state trooper.

Dr. Parsons became aware of the charges from Mr. Hamm's father-in-law, Ronnie Vanscoy, who called the superintendent's office, and then followed that up with a personal visit in what appears to have been a successful effort to get Mr. Hamm fired. (R 78 Vol 1, at 42-44). He talked to Linda Rollins, Dr. Parson's administrative assistant, for 45 minutes to an hour about the incident, his opinion of Mr. Hamm, and earlier incidents, while she took notes, although Mr. Vanscoy had not witnessed the incident or any signs of physical abuse.[4] Ms. Rollins also received copies of the criminal charges from Mr. Vanscoy. (R 78, Vol. 1 at 114, 131, 136).

Other than the information provided by Mr. Vanscoy, there was no further investigation of the incident. Neither Dr. Parsons nor Linda Rollins contacted Mr. Hamm or spoke with him regarding the charges prior to Dr. Parsons' letter withdrawing his recommendation. (R 78, Vol. 1 at 58, 115). Ms. Rollins stated that she did not inquire because it did not happen on school property. (Vol.1 at 57, 114-115). No further investigation of the facts of the criminal charges were pursued. (Mason County BOE Tr. at 31).

Hamm was never given an opportunity to respond or explain the situation before any action was taken. He was never notified that Dr. Parsons was taking any action regarding the misdemeanor charges. He was not notified that Dr. Parsons had sent a letter withdrawing the recommendation. He was not sent a copy of the letter.

Within weeks, Mr. Hamm found himself effectively terminated from his job, losing his income and medical coverage for his family. On January 11, 2007, Nathan Estel, Assistant Director of the Office of Program Preparation drafted a letter to Hamm, with copy to Dr. Parsons, that

---

[4]It is apparent from the record that Mr. Vanscoy and Mr. Hamm were not on good terms and that situation had been the case for some time. (R 103, Vol. 2 at 52-54; R 78, Vol. 1 at 136-137).

because Parsons had withdrawn his recommendation, that "your request for a license to work in the public schools of West Virginia has been denied." (Exhibit 3).

Dr. Parsons received an email copy of the letter that same day[5]. On January 12, Dr. Parsons sent a letter to Mr. Hamm notifying him that because "your application for an out-of-field authorization has been denied . . . it appears that you lack the necessary credentials to perform your assignment as a classroom teacher." Dr. Parsons invited him to meet with Don Bower, an assistant superintendent, at 1:00 p.m. that same day to discuss his status. Dr. Parsons did not disclose the fact that the reason his authorization was denied was the withdrawal of his recommendation. Mr. Hamm, who had not yet seen the letter from Mr. Estel and had no idea what the problem was with his permit, elected to seek representation before such a meeting.

Mr. Hamm and Bruce Boston, a WVEA representative, met with Linda Rollins and Don Bower on January 17. At that point, Mr. Hamm and Mr. Boston were still under the impression that there was some technical problem with his permit, and they still had not seen the Estel letter. (R 78, Vol. 1 at 115). They were shown a copy of the Estel letter, which indicated that Dr. Parsons had withdrawn his recommendation, but did not indicate the reasons. Dr. Parsons' January 2 letter was not provided to Mr. Hamm at that time. (R 78, Vol. 1 at 116). Dr. Parsons did meet briefly with Mr. Hamm and Mr. Boston after the meeting with Mr. Bower and Ms. Rollins, at which time Dr. Parsons handed Mr. Hamm a letter dated January 17, 2007, advising Hamm that he was suspended and that Parsons was recommending that the Board of Education terminate his employment "on the ground of incompetence" since he lacked the necessary credentials to perform his duties. The letter did not

---

[5]Dr. Parsons testified in the WVBE hearing that he received an email of the letter in advance of Hamm receiving his copy, and went ahead and took his further actions immediately. (R 78 Vol. 1 at 61).

disclose that Dr. Parsons caused Hamm's application to be denied, or describe the reasons for Parsons' withdrawal of his recommendation. (January 17, 2007 letter). Only at the end of that meeting was there any indication of the reasons Dr. Parsons withdrew his recommendation. (R 78, Vol.1 at 118, Mason BOE Tr. 27-31).

A hearing was held before the Mason County Board of Education on February 15, 2007, where the Superintendent and his staff continued to take the position that the discharge was simply a certification issue, that Dr. Parsons had discretion to withhold or withdraw the recommendation, and that Mr. Hamm could not teach because his application for out-of-field authorization had been denied by the State Department of Education and neither Parsons nor the Mason County Board could change that determination. Therefore Hamm could not teach and must be terminated. (Mason County BOE Tr. 32-33).

By the maneuver of withdrawing the recommendation, which automatically blocked the permit, while hiding the fact that his action caused the WVDE to deny the permit, and not disclosing the reasons for that action, Dr. Parsons effectively turned the issue before the board of education from Mr. Hamm's conduct to his "incompetence" to teach due to the lack of a permit, a *fait accompli* which Dr. Parsons created. That action essentially deprived Hamm of any meaningful hearing on the issue of his conduct and whether it warranted discharge, neatly bypassing the issues involved in a discharge and depriving him of a hearing by the Grievance Board.

Dr. Parsons sent Mr. Hamm a letter dated February 19, 2007, advising him that the Mason County Board had ratified his suspension without pay, which would continue pending the outcome of any appeal he may have regarding the denial of his out-of-field authorization, and to notify him of the result of that appeal. He was later terminated.

Although Mr. Hamm had valid and current Professional Teaching Certificates in the three areas where he was fully certified (Driver's Education, Health Education and Social Studies), he was hired for the special education job, which required the permit. Dr. Parsons also stated in the WVDE hearing that even if Mr. Hamm would apply for a position as a substitute teacher, he would veto his hiring by the same procedure of refusing to make the required recommendation to the State Superintendent. (R 78, Vol. 1 at 65-66).

Notwithstanding the fact that Dr. Parsons' decision to withdraw his recommendation was prompted by allegations of specific conduct, the shortcut he took to achieve termination of his employment left Mr. Hamm with no remedy but an appeal to the State Superintendent pursuant to *W.Va. Code* § 18A-3-3(e).

A hearing was conducted by the Superintendent's designee as Hearing Examiner, Dr. Pamela Cain on April 20, 2007 and May 31, 2007. The attorney for the Department of Education presented evidence not only of the two criminal complaints of December 28, 2006, the only matters identified by Dr. Parsons as support for his withdrawal of the recommendation, but also presented extensive testimony relating to the sexual harassment complaint which had been resolved by the five-day suspension imposed by Dr. Parsons, and additional evidence regarding Mr. Hamm's marital problems, including notes made during other marital problems several years earlier. Mr. Hamm's counsel was not put on notice that additional matters would be presented in support of Dr. Parsons' decision to withdraw his recommendation. Dr. Cain permitted all those matters in evidence, over objection by Mr. Hamm's counsel.

Dr. Cain also refused to permit the testimony of two witnesses offered by Mr. Hamm, after the scope of the hearing was enlarged by allowing evidence on additional issues to support Dr.

Parsons' decision. Mr. Hamm elected an open hearing, and Mr. Hamm's stepfather and mother Lawrence and Sherry Wright, were spectators at the hearing, before the additional issues were brought in, and Mr. Hamm's counsel was not aware at that time that they could provide rebuttal testimony regarding the additional charges. Dr. Cain sustained the Board's attorney's objection to their testimony on the grounds that they had been in attendance during the earlier testimony. Mr. Hamm presented testimony of three teachers familiar with his teaching testified in favor of Mr. Hamm, and Mrs. Tequila Hamm also offered rebuttal testimony regarding the allegations of her father, Ronny Vanscoy and her sister.

Following the hearing, the parties submitted proposed findings and conclusions. Dr. Cain recommended that Dr. Parsons' withdrawal of the recommendation be affirmed, and the Superintendent adopted that recommendation. Mr. Hamm then appealed that ruling to the Circuit Court of Mason County.

The parties submitted written briefs to the Circuit Court, and the court heard oral argument on the issues on March 30, 2009. Judge Nibert entered a Judgment Order on September 8, 2009, finding that the proceedings before the State Department of Education were legally flawed in several respects. The Court concluded that the State Superintendent erred in considering evidence of matters that were not included in the county superintendent's reason for withdrawing his recommendation of Mr. Hamm's permit.

The circuit court also found that the State Superintendent erred in refusing to provide documents to Mr. Hamm's counsel prior to the hearing, including internal reports regarding the earlier sexual harassment complaint and notes regarding Mr. Hamm's marital problems, which were never disclosed but were submitted as exhibits or read into the record, without prior notice that those

matters would be issues in the proceeding, giving Mr. Hamm's counsel no opportunity to prepare to cross-examine or rebut those documents. The court found that

> It is inherently unfair to require Appellant to rebut documents entered into evidence, during the cross-examination of witnesses, while only having a moment's glimpse at such documents. There exists a real danger that the information could be taken out of context, not authentic, or need to be rebutted by other witnesses which Appellant would be unaware were needed. The Appellant should have been provided with this information prior to the hearing.

Judgment Order at 9.

The same problem infected the Hearing Examiner's ruling that excluded Mr. Hamm's rebuttal witnesses Lawrence and Sherry Wright, because they were present in an open hearing and Mr. Hamm's counsel had no advance notice that their testimony would be needed to rebut matters that he had no way of knowing would be presented by the State Superintendent. The court held that Mr. Hamm had been denied his due process right to call those witnesses.

The Circuit Court's order reversed and remanded the decision to the State Superintendent for further proceedings consistent with its order. The State Superintendent has appealed to this Court.

ARGUMENT

A. The Circuit Court Correctly Held That the Scope of State Superintendent's Review Under § 18A-3-3(e) Is Limited to the Matters Relied On by the County Superintendent.

The principal issue in this matter is the construction of *W.Va. Code* § 18A-3-3, which provides for the renewal of teaching certificates. The relevant provisions are sections (a) and (e), which provide that:

(a) Until the person qualifies for a permanent certificate, any professional or first class certificate based upon a bachelor's degree shall be renewable provided the holder within five years from the date the certificate became valid:

(1) Files application on a prescribed form with the State Department of Education;

(2) Presents an official transcript of six semester hours of approved credit as may be prescribed by the state board;

(3) Successfully completes a beginning teacher internship program, if applicable; and

(4) Submits a recommendation based on successful teaching experience from the county superintendent of schools of the county in which the holder last taught or resides.

(e) 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 this case, Mr. Hamm met the requirements of section (a) when he submitted an application, transcripts of the required credit hours, and the recommendation of the county superintendent, Dr. Parsons, as he had done for previous years. Dr. Parsons signed the recommendation on July 27, 2006. Mr. Hamm entered into his teaching duties and worked as a teacher from August 2006 to January 17, 2007, when he was suspended. Section (e) provides that if the county superintendent refuses to make a recommendation, the State Superintendent is to "investigate the matter" and issue a certificate if the recommendation was withheld arbitrarily. [6]

---

[6]There is no evidence in the record whether the WVDE took any formal action on the permit application. However the Department had the application for some five months and Mr. Hamm taught pursuant to that application for more than four months. Nothing in either (a) or (e) authorizes a county superintendent withdraw a recommendation previously made or provides any criteria for such an action.

The Appellant seeks a ruling that would permit the State Superintendent under section 18A-3-3(e) to investigate and present any adverse information regarding a teacher it can find, where the county superintendent has refused to make or withdrawn the required recommendation that a permit or certificate be approved, regardless of whether or not the county superintendent knew about or relied on that information as the basis of his or her decision, and whether or not that information would be admissible or relevant in a discharge or license revocation proceeding.

That is essentially what occurred here. While it may offer a more convenient method of disposing of teachers which the State Superintendent decides should be removed, it is clearly inconsistent with the plain reading and context of the statute, other similar provisions relating to discharges and licensing, and the holdings of this court.

The State Superintendent relies upon the phrase "whose responsibility it shall be to investigate the matter" in arguing that this provision authorizes or requires the State Superintendent to investigate and pursue all aspects of the teacher's fitness. However, the question is "investigate what?" – the basis of county superintendent's decision to withhold or withdraw the recommendation or the entire history of the applicant's conduct.

The circuit court analyzed the language and rightly concluded that "the matter" too investigated was the decision of the county superintendent to deny or rescind the recommendation, rejecting the State Superintendent's argument that he "has a duty to review and investigate anything and everything he may find relevant to the applicants prospective certificate.":

> Interpreting a statute in such broad terms, as the Respondent suggests, will open a door to overreaching application and takes away from the legislature's intent. This statute was drafted to provide the applicant a remedy when that applicant suffers certificate denial due to an arbitrary county superintendent decision. Upon reading the statute, the Court's attention is drawn to two key phrases. The statute speaks

> twice about reviewing the county superintendent's error. These phrases are: (1) "refuses to give a recommendation without just cause," and (2) "if, . . . the county superintendent's recommendation was withheld arbitrarily." These phrases focus upon the county superintendent' actions. The Respondent focuses on the phrase, "the State Superintendent of Schools, whose responsibility it shall be to investigate the matter. . . ." Under the Respondent's interpretation, this phrase would give the state superintendent an unrestricted entitlement to investigate into any factor, no matter how remote or whether it was known to the county superintendent at the time of his decision, in deciding whether to issue this certificate. However, this phrase cannot be read alone; rather, the statute reads in its entirety, that the state superintendent is to investigate why the county superintendent withheld his recommendation. This means that the state superintendent is limited to reviewing what was available to the county superintendent at the time of his decision.

The language of the statute indicates that "just cause" is required to refuse a recommendation, and indicates that the recommendation might be "withheld arbitrarily," further demonstrating that the focus of the language is on the county superintendent's decision, not the applicant's overall record. The State Superintendent's interpretation that § 18A-3-3(e) requires or authorizes him to investigate and use in the section (e) hearing any adverse information makes it necessary to read *in pari materia* the general language of *W.Va. Code* § 18A-3-2a that a certificate shall not be provided to someone who "is not of good moral character and physically, mentally and emotionally qualified to perform the duties for which the certification would be granted," because the two provisions have a common goal, ensuring that teachers are qualified, of good moral character, and able to perform their duties.

There is no need to tie these two statutes together to achieve that result because there are specific provisions of the *West Virginia Code* dealing those matters in *W.Va. Code* §18A-2-8 and W. Va.Code §18A-3-6, the discharge and license revocation statutes. There is absolutely no reason to believe that the legislature, by the provisions relied upon by the Appellant, intended to create a

parallel path to removing bad teachers, one which, as applied in this case, conflicts with the statutory language and case law of the specific discharge and revocation statutes.

B. The State Superintendent's Interpretation of the Statute Conflicts With Related Statutory Provisions.

There is a significant potential for abuse if the Appellant's interpretation prevails. It appears to be rare, if not unique, that a county superintendent would refuse to recommend a teacher, and more rare that a recommendation would be withdrawn after being made. It appears, from the uncertainty of the State Superintendent as to how to proceed and who had the burden of proof, that the appeal provision of *W. Va. Code* §18A-3-3(e) has seldom, if ever, been used.[7] (R 78, Vol. 1 at 8; R 103, Vol. 2 at 5).

The State Superintendent construed his responsibility in the hearing as "proving that the county superintendent's withdrawal of his recommendation was not arbitrary and that, therefore, Mr. Hamm is not of good moral character and does not physically, mentally, and emotionally qualify to perform the duties of a teacher." The State Superintendent acted as a prosecutor whose job it was to make the case against Hamm, not as an independent check on whether the county superintendent's action was for "just cause" and not arbitrary. In short, the State Superintendent asks this Court to rule that a county superintendent may withhold or withdraw a recommendation, effectively revoking a teacher's license and terminating his employment, and his or her only remedy is a hearing before the State Superintendent, where the State Superintendent may, in defense of the county superintendent's action, introduce any derogatory evidence it may find regardless of the county

---

[7]The State Superintendent's counsel stated at the hearing that ". . . I will admit that this is the first such hearing we have had." (Vol. 1 at 39). If so, it does not appear that a statute that has been on the books for decades should now need to be reinterpreted as an essential tool in the State Superintendent's toolbox for removing bad teachers.

superintendent's actual basis for withholding the recommendation, and uphold the action unless the teacher can show that it was arbitrary.

Although this case involved a temporary permit rather than a regular certificate, the requirement that the county superintendent make a recommendation applies not only to teachers working under temporary permits such as Mr. Hamm, but also applies to professional teaching certificates and other certificates and permits. Any teacher who is required to apply for a license or permit (*i.e.*, all teachers except those with permanent certificates) could potentially be subject to a refusal to make a recommendation. *W.Va. Code* § 18A-3-2a requires that

> . . . a certificate shall not be issued to any person who is not a citizen of the United States, is not of good moral character and physically, mentally and emotionally qualified to perform the duties for which the certification would be granted and who has not attained the age of eighteen years on or before the first day of October of the year in which the certificate is issued.

Based upon that provision, the forms used to apply for or renew certifications require the county superintendent to make a recommendation in the following form:

> 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 reviewed the disclosure of background information, and, to the best of my knowledge the applicant is of 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.
>
> (R 98).

Since the recommendation is an absolute requirement for a certificate or a permit, a county superintendent effectively holds a veto over whether or not a teacher can be certified. In the case of Mr. Hamm, Dr. Parsons' withdrawal of the recommendation effectively caused him to lose his temporary permit and his job, with his only recourse the appeal of the county superintendent's

decision to the State Superintendent under § 18A-3-3(e). Mr. Hamm lost the recommendation, *ergo* he could not get a permit to teach, *ergo* he could not teach in the position for which he was hired.

In this case, Dr. Parsons further indicated that he would refuse to provide a recommendation if Mr. Hamm applied for a substitute teaching job or any other position, since the recommendation would be part of any application. (R 78, Vol. 1 at 65-66). Mr. Hamm has effectively been discharged, but has not had the benefit of the protections of *W. Va. Code* § 18A-2-8, including an appeal to the Grievance Board, and the protections of the law recognized by this Court, including the requirement that there be a rational nexus between the misconduct and his position as a teacher before he can be discharged for misconduct unrelated to his teaching duties.[8]

Mr. Hamm has also effectively had his permit to teach rescinded, but not because he failed to meet the education requirements to work toward full certification in special education. Because that result was accomplished by the county superintendent's withdrawal of the recommendation rather than a license revocation, he has not had the benefit of the protection of *W. Va. Code* § 18A-3-6, the license revocation statute, which also requires a rational nexus between the misconduct and the performance of his job duties, and specifically prohibits the use in revocation cases of conduct which had previously been subject to discipline short of discharge, without clear and convincing that he is guilty of one of the listed offenses.

---

[8]He was initially suspended in February 2007 pending his appeal to the State Superintendent. He was subsequently discharged and his appeal to the Grievance Board has been stayed pending the outcome of this appeal. If the decision of the State Superintendent is upheld, then his employment will be terminated because of the lack of a recommendation and the lack of the necessary permit, and the issue of whether the conduct cited by the county superintendent was sufficient to warrant discharge will be moot.

It is not the responsibility of the county superintendent to decide whether a license or permit should be denied or rescinded. That responsibility belongs to the State Superintendent. It is the responsibility of the county superintendent to report to the State Superintendent matters which may warrant revocation.

> The state superintendent may, after ten days' notice and upon proper evidence, revoke the certificates of any teacher for any of the following causes: Intemperance; untruthfulness; cruelty; immorality; the conviction of a felony or a guilty plea or a plea of no contest to a felony charge; the conviction, guilty plea or plea of no contest to any charge involving sexual misconduct with a minor or a student; or for using fraudulent, unapproved or insufficient credit to obtain the certificates.
>
> * * *
>
> It shall be the duty of any county superintendent who knows of any acts on the part of any teacher for which a certificate may be revoked in accordance with this section to report the same, together with all the facts and evidence, to the state superintendent for such action as in the state superintendent's judgment may be proper.
>
> *W. Va. Code* § 18A-3-6.

Although reports were sent to the State Superintendent by Dr. Parsons, regarding both the sexual harassment complaint in August 2006 and the criminal charges in December 2006, the State Superintendent has not sought to initiate proceeding to either rescind his temporary permit or his three valid professional certificates on the basis of those reports. (R. 78, Vol. 1 at 74-78).

Both Mr. Hamm's loss of his job and the denial of his teaching permit were triggered solely by Dr. Parsons' withdrawal of the recommendation, without waiting for the State Superintendent to act. Mr. Hamm's only recourse has been the appeal to the State Superintendent. Assuming that Dr. Parsons is sincere in his belief that Mr. Hamm is not a person of good moral character, his belief alone cannot satisfy the requirements of due process. This Court addressed the term "immorality"

as a grounds for dismissal pursuant to *W.Va. Code* § 18A-2-8 in *Golden v. Board of Education*, 169 W.Va. 63, 67-68, 285 S.E.2d 665 (1981), noting that

> The statute does not define immorality and this Court has not been referred to, nor has it located, any case decided in West Virginia which construes the meaning of the term "immorality" within the context of this Code section.
>
> Immorality is an imprecise word which means different things to different people, but in essence it also connotes conduct "not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior." Webster's New Twentieth Century Dictionary Unabridged 910 (2d ed. 1979).

Golden involved a teacher who had been arrested for shoplifting, and who entered a plea of *nolo contendere*. The Court held that there must be a "rational nexus" between the immoral behavior and her teaching responsibilities which in some way made the teacher unfit to carry out her responsibilities. The Court further held:

> One reason for requiring a showing that the alleged immoral conduct has a resulting impact upon the teacher's fitness to teach or upon the school community is that to examine only the conduct itself would result in a statute that would be void for vagueness under substantive due process constitutional standards.
>
> > Without such a reasonable interpretation the terms [immoral, unprofessional, and the like] would be susceptible to so broad an application as possibly to subject to discipline virtually every teacher in the state. In the opinion of many people laziness, gluttony, vanity, selfishness, avarice, and cowardice, constitute immoral conduct . . . A more constricted interpretation of "immoral", "unprofessional", and "moral turpitude" . . . enabl[es] the State Board of Education to utilize its expertise in educational matters rather than having to act "as the prophet to which is revealed the states of morals of the people of the common conscious (citing *Morrison v. State Board of Education*, 1 Cal.3d at 225-27, 82 Cal.Rptr. at 382-84, 461 P.2d at 382-84).

Golden, 169 W.Va. 63, 68-69, 285 S.E.2d 665, 668-669; *Rogliano v Fayette County Board of Education*, 176 W.Va. 700, 703, 347 S.E.2d 220, 224 (1986).

Dr. Parsons' opinion cannot be supported without evidence of specific conduct that demonstrates Mr. Hamm's lack of good moral character. There must be objective standards by which the conduct in question may be judged, and there must be "a rational nexus between conduct occurring outside the job and the duties the employee is to perform." Without the specific conduct and evidence that the teacher's ability to perform his duties has been significantly compromised, a decision by a county superintendent to withhold or withdraw the recommendation that the teacher be certified violates substantive due process. *Golden*, 169 W.Va. at 68. In this case, the only objective conduct relied upon by Dr. Parsons was the fact that Mr. Hamm had been charged with domestic battery and possession of less than 15 grams of marijuana.

The appropriate standards of conduct which may be sufficient to warrant withholding a recommendation are easily discernable: the provisions of the Code dealing with the termination of a teacher's employment and the revocation of a license or teaching certificate, provisions which appear in the adjacent article of the Code (§ 18A-2-8) and in the same article (§ 18A-3-6). The effect of the withholding of a recommendation is that the teacher cannot be employed and cannot get a license or permit.

W.Va. Code § 18A-2-8 provides that a board of education may dismiss an employee at any time for

> Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge.

W.Va. Code § 18A-3-6, provides that

> The state superintendent may, after ten days' notice and upon proper evidence, revoke the certificates of any teacher for any of the following causes: Intemperance; untruthfulness; cruelty; immorality; the conviction of a felony or a guilty plea or a plea of no contest to a felony charge; the conviction, guilty plea or plea of no contest to any charge involving sexual misconduct with a minor or a student; or for using fraudulent, unapproved or insufficient credit to obtain the certificates:

W. Va. Code § 18A-3-2a provides that a certificate should not be issued to a person who is not a citizen of the United States, is not of good moral character and physically, mentally, and emotionally qualified to perform the duties for which the certification should be granted and has not attained the age of eighteen years on or before the first day of October of the year in which the certificate is to be issued.

A county superintendent can reasonably refuse a recommendation where the applicant is not a citizen, does not meet the age requirements, or is incapacitated to perform his or her duties, where the facts are clear and undisputed and the statute prohibits issuing a certificate. Where a county superintendent refuses or withdraws a recommendation on the grounds that he or she believes the teacher is "immoral," that determination is subject to same standards as the term "immorality" as used in §§ 18A-2-8 and 18A-3-6, including the requirement that there be a rational nexus between the immoral conduct and the individuals' teaching duties, and the other precedents of this Court. Nothing in the statutes suggests that a county superintendent's opinion is sufficient regardless of the facts to take an action that will result in a discharge or the revocation of a teaching certificate. All three statutes contain the term "immorality" relating to teachers and should be read *in pari materia* to define the conduct and circumstances which would warrant those consequences.

When there is an appeal to the State Superintendent pursuant to § 18A-3-3(e), the matter to be investigated is whether or not the reasons given for refusing or withdrawing a recommendation

were legally sufficient, including the nature of the conduct and whether or not there is a sufficient rational nexus to warrant a discharge or license revocation. If not, then the State Superintendent should determine that the refusal or withdrawal was arbitrary and issue the certificate.

This case illustrates the potential problems in the use of withholding a recommendation to bypass the normal discharge or license revocation provisions. The only basis given by the county superintendent in his letter was that Mr. Hamm had been charged with domestic battery and possession of less than 15 grams of marijuana. This information was provided to Dr. Parsons and his administrative assistant, Linda Rollins, by Ronnie Vanscoy, Mr. Hamm's father-in-law who was not a witness to the incident, has a hostile relationship with Hamm, and had a strong interest in having him fired. The charges arose out of a domestic dispute between Mr. Hamm and his wife, Tequela, on December 28, 2006. The incident occurred at the home of Mr. and Mrs. Hamm, and Mr. Hamm was subsequently arrested and jailed overnight. The marijuana charge was added when police found a small amount of marijuana in the home.

Dr. Parsons acted to withdraw his recommendation without any effort to notify Mr. Hamm and give him an opportunity to explain or respond to the charges before he took action which resulted in the effective termination of his employment. Mr. Hamm did not receive even the equivalent of the bare standard of a pre-termination hearing, a notice of the proposed action and an opportunity to make a personal response on the spot. *Wines v. Jefferson County Board of Education*, 213 W.Va. 379, 382, 582 S.E.2d 826, 832 (2003), *Board of Education v. Wirt*, 192 W.Va. 568, 572-76 , 433 S.E.2d 402, 406-10 (1994). By the time Mr. Hamm knew the facts and had any opportunity to respond, he was standing in the superintendent's office on January 17 with a termination letter in his hand, and his discharge was an accomplished fact.

The charges which led to Dr. Parson's withdrawal were misdemeanor charges which had no relation to the school system or his ability to teach. The charges do not stem from his employment, as they did in *Bledsoe v. Wyoming County Board of Education*, 183 W.Va. 190, 394 S.E.2d 885 (1990) (maintenance supervisor used his office to extort a supplier), and *Waugh v. Board of Education*, 177 W.Va. 16, 350 S.E.2d (1986) (taking items from clinic on school property, discharge reduced to two years suspension). The incidents in this case did not occur on school property or school functions. There is no evidence that there was any widespread publicity or notoriety that would impact on the school system to the point that there was a rational nexus between the incident and the school system as in *Woo v. Putnam County Board of Education*, 202 W.Va. 409, 504 S.E.2d 644 (1998). These were misdemeanor charges, which in the absence of a rational nexus affecting his teaching ability, would not warrant either a discharge or license revocation.

This Court has held a misdemeanor offense is insufficient to warrant discharge or license revocation in the absence of a rational nexus affecting his work or the school. *Golden v. Board of Education, supra*, (misdemeanor shoplifting, *nolo contendere* plea, no rational nexus); *Rogliano v. Fayette County Board of Education*, 176 W.Va. 700, 347 S.E.2d 220 (1986) (misdemeanor possession of marijuana, found at home),[9] *Powell v. Paine*, 221 W.Va. 458, 655 S.E.2d.204 (2007)(no rational nexus, beating son with belt at home). There is no such nexus in this case.

In this case, like *Golden*, *Rogliana* and *Powell*, there was no evidence that the conduct generating the misdemeanor charges had any effect on his ability to teach or otherwise affected the school system. Moreover, at the time Dr. Parsons submitted his letter, there was no disposition of the

---

[9]The Court noted that a first offense of possession of less than 15 grams of marijuana provides for expungement upon certain conditions, pursuant to *W.Va. Code* § 60A-4-407. That was apparently the case for both Rogliano and Mr. Hamm.

misdemeanor charges and the ink was barely dry on the criminal complaints. In addition, Mr. Hamm was subsequently tried and acquitted of the charges. (Circuit Court Tr. at 13). Based upon the reasons cited by Mr. Parsons in his January 2 letter, neither a discharge nor a license revocation would be sustainable under existing law.

Dr. Parsons' letter to Mr. Hamm advising him that he was recommending to the Mason County Board of Education that he be terminated made no reference to the misdemeanor charges, but stated that he was recommending that he be terminated "on grounds of incompetence." However, the only incompetence was that he was not granted a permit, which was solely the result of Dr. Parsons' withdrawal of his previous recommendation. That maneuver appears to have been an effort to sidestep the requirements of a rational nexus between the conduct and his employment and the nature of criminal charges, where established law would not sustain a discharge on the basis of two misdemeanor charges unrelated to his teaching duties. It essentially meant that he could not contest the real reason for Dr. Parsons' action before the Mason County Board of Education or the Grievance Board, and thus his only avenue to challenge that action was the appeal to the State Superintendent on the withdrawal of the recommendation.

Dr. Parsons' stated reason for his decision to withdraw the recommendation did not include the complaint of harassment filed by another teacher. That complaint was investigated and Dr. Parsons concluded that a five-day suspension was an appropriate level of discipline for Mr. Hamm's conduct. With full knowledge of the circumstances of that complaint, he signed the recommendation for Hamm's out-of-field permit. (R 78, Vol. 1, at 51-54). When he became aware of the misdemeanor charges of stalking and harassing phone calls, several months later, he took no further action because

he already knew about the situation from their earlier investigation. (R 78, Vol. 1 at 54-55). The allegations in the criminal charges contained nothing later than April 2006.

Notwithstanding the fact that Dr. Parsons did not rely on the harassment complaint as a reason for withdrawn the recommendation, the State Superintendent's office, in its self-appointed role as prosecutor, introduced substantial evidence relating to that complaint as evidence supporting Dr. Parsons' decision with withdraw his recommendation. Most of that evidence was information that Mr. Hamm and his counsel had never seen, consisting of the investigation file compiled by Dr. Parsons' assistant, Linda Rollins. That information was known to the State Superintendent, either by the reports made by Dr. Parsons at the time of the incident and the five-day suspense in late August, or by additional documents by provided by Dr. Parsons or Ms. Rollins in anticipation of the hearing. Mr. Hamm and his counsel, James Casey, received no notice that those charges were to be part of the Superintendent's case, and they were not provided with that material until the documents were introduced into evidence. The State Superintendent's counsel submitted not only the report but a lengthy narrative or summary by Ms. Rollins that went for more than ten pages virtually without interruption. (R 78, Vol. 1 at 84-95).

In a proceeding to revoke a certificate or permit pursuant to § 18A-3-6, the evidence of matters which have been resolved with discipline less than discharge should not have been admitted or considered, unless found by clear and convincing evidence that he committed one of the listed offenses and his actions rendered him unfit to teach. The statute, as amended in 2004, provides

> Provided, That the certificates of a teacher may not be revoked for any matter for which the teacher was disciplined, less than dismissal, by the county board that employs the teacher, nor for which the teacher is meeting or has met an improvement plan determined by the county board, unless it can be proven by clear and convincing

> evidence that the teacher has committed one of the offenses listed in this subsection and his or her actions render him or her unfit to teach.

The Legislature has also incorporated the requirement that there must be a rationale nexus between a teacher's conduct and his duties in revoking a certificate or permit in the same amendment:

> Provided, however, *That in order for any conduct of a teacher involving intemperance; cruelty; immorality; or using fraudulent, unapproved or insufficient credit to obtain the certificates to constitute grounds for the revocation of the certificates of the teacher, there must be a rational nexus between the conduct of the teacher and the performance of his or her job.* The state superintendent may designate the West Virginia commission for professional teaching standards or members thereof to conduct hearings on revocations or certificate denials and make recommendations for action by the state superintendent.

There was no rational nexus between the criminal charges in December 2006 and Mr. Hamm's teaching responsibilities and the evidence of the harassment complaint in April 2006 had been resolved with the suspension, which Dr. Parsons apparently considered an appropriate penalty. Neither of those matters should have been sufficient to justify the revocation of a certificate or a permit. Nevertheless the hearing examiner allowed in extensive testimony of the harassment complaint, and substantial testimony and evidence of the prior marital problems of Mr. and Mrs. Hamm, over the objection of Mr. Hamm's counsel. Those documents included notes written some three years earlier to her lawyer, at a time when they were separated and arguing about child custody, which were apparently obtained by Mr. Vanscoy and made available to the State Superintendent's counsel. (R 103, Vol 2 at 87-88). Mrs. Hamm testified at the hearing in support of her husband, and acknowledged fault on her part as well in their marital problems. They have since divorced.

The Hearing Officer's proposed order, endorsed by the State Superintendent, relied in substantial part on the evidence of the prior harassment complaint and the Hamms' marital problems. The position of the State Superintendent appears to be that a hearing before the State Superintendent

under §18A-3-3(e) is not constrained by the requirement of a rational nexus between a teacher's conduct and the teacher's ability to perform his duties, or the provision of § 18A-3-6 that prior conduct that was resolved by disciplinary action less than discharge may be considered only in limited circumstances. The State Superintendent's apparently believes that anything goes. The evidence and standards relied upon in this case stand in stark contrast to proceedings under § 18A-2-8 and § 18A-3-6. These inconsistent standards are irreconcilable.

The Circuit Court rejected the State Superintendent's argument that restricting the evidence to be considered in an appeal under § 18A-3-3(e) would tie the State Superintendent's hands, noting that

> There are multiple sections within the same code chapter that provide relief if the state superintendent finds an unfit teach in a teaching position. Beyond that, the county superintendent, the county superintendent has a continual duty to report any misfeasance; therefore those things that come to light after the superintendent's decision may be used in later proceedings. But the fact remains, Mr. Hamm is asserting his right to appeal the county superintendent's decision and that appeal must be based on why the decision was made. Any evidence beyond that is an abuse of discretion.
>
> Judgment Order at 8.

For those reasons, the Appellee contends that the Circuit Court was clearly correct in holding that the State Superintendent on appeal of a refusal to make a recommendation is limited to a review of the matters available to the county superintendent at the time of his decision to withhold or withdraw a recommendation that a certificate or permit be granted. Although the Circuit Court's ruling was based primarily on construction of the language, the interpretation urged by the State Superintendent would conflict with other statutory provisions and would violate due process.

The only way that § 18A-3-3(e), at least as interpreted by the State Superintendent, can be reconciled with §§ 18A-2-8 and 18A-3-6 is to construe the term "investigate the matter" to refer to the county superintendent' decision, not as a mandate to investigate and submit evidence without the constraints of the discharge and license revocation statutes.[10] The fact that § 18A-3-3(e) is silent regarding the requirement of a rational nexus between the conduct and his teaching duties does not permit a county superintendent or the State Superintendent to ignore that requirement. The requirement that there be such a nexus between the conduct and the job where the charge is "immorality" is a matter of substantive due process, not a legislative choice, although the legislature has adopted that requirement in § 18A-3-6.[11] *Golden, supra.*

The general rule for interpreting differing statutory sections is that courts should attempt to harmonize them, if possible.

> A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.
>
> *Bailey v. Norfolk and Western Railroad Co.*, 206 W.Va. 654, 527 S.E.2d 516 (1999) Syl. 9,

---

[10]For example, the decision of county superintendent who refused a recommendation to a felon or non-citizen would not be arbitrary. *Adkins v. West Virginia Department of Education*, 210 W.Va. 105, 556 S.E.2d 72 (2001), applying § 18A-3-6. A misdemeanor charge with no rationale nexus affecting his teaching duties would be arbitrary, especially when it resulted in an acquittal.

[11]The Appellee disagrees with Judge Nibert's ruling that the requirement of a rational nexus was not required because the proceeding was not under the revocation statute, § 18A-3-6, for the reasons discussed above. The statute also includes both "revocations or certificate denials" in its mandate. The rationale nexus is required both by due process and the language of the statute.

The ruling of the Circuit Court decision is consistent with that principle. If the related provisions cannot be reconciled, the rule of construction is that " that section must prevail which can properly be considered as the last expression of the law making power . . . " *Stanley v. Department of Tax and Revenue*, 217 W.Va. 65, 71, 614 S.E.2d 712, 718 (2005), *State ex rel. Pinson v. Varney*, 142 W.Va. 105, 109, 96 S.E.2d 72, 74 (1956).

In this case, *W. Va. Code* § 18A-3-6 was amended by the Legislature in 2004, to add the provision that required a rational nexus between the teacher's conduct and his or her employment, and the provision limiting the use in a license revocation or denial of matters that have previously been resolved with a lesser disciplinary action. (HB 4552, passed March 13, 2004). The operative provisions of § 18A-3-3 have not been modified in more than twenty years. The intent of the Legislature in the 2004 amendment is the most recent enactment, and therefore controls.

The State Superintendent has managed to deal with unfit teachers until now using the provisions of § 18A-3-6. Its effort to use § 18A-3-3(e) as an alternative method of revoking or denying licenses should be rejected. The Circuit Court's ruling that the State Superintendent is limited to the reasons and knowledge of the county superintendent was correct and should be affirmed.

C. The Circuit Court Correctly Ruled That Mr. Hamm Was Denied Due Process by the State Superintendent's Failure to Timely Disclose and Produce the Documents Introduced at the Hearing, and by the Hearing Officer's Exclusion of Appellee's Witnesses.

The State Superintendent's complaints of ruling of Judge Nibert's ruling regarding were largely the product of the Superintendent's overreaching and the assumption that his role was to defend the unilateral action of the county superintendent.

Mr. Hamm had been teaching at Point Pleasant Middle school for several years, and had submitted yearly applications to maintain his permit status. As discussed above, Mr. Hamm did not know that Dr. Parson's had withdrawn the recommendation for some two weeks after Dr. Parsons sent the January 2, 2007, letter withdrawing his recommendation. He only learned that Dr. Parsons had effectively blocked his permit when he was notified on January 17 that Dr. Parsons was recommending his termination to the Mason County Board of Education due to his "incompetence" (the failure to have a permit). The focus on the permit issue continued at the hearing before the board of education, with minimal mention of the underlying charges cited by the county superintendent. The only indication Mr. Hamm and his counsel had was that the matter was precipitated by the misdemeanor charges of domestic battery and possession of less than 15 grams of marijuana.

Prior to the hearing before the State Superintendent, Mr. Hamm's Counsel, James Casey, requested any documents to be used at the hearing, and was provided only a few documents relating to his license and permit applications. At the hearing, the Superintendent's counsel produced and offered into evidence a substantial amount of material regarding the earlier investigation of the sexual harassment complaint, which had been investigated and discipline imposed in the form of a five-day suspension. A report had been sent State Superintendent, and subsequent to all that Dr. Parsons had signed and submitted the recommendation that his permit be approved. There was no disclosure prior to the hearing and Mr. Hamm and his counsel had no reason to expect that the earlier incident was an issue in the case. He was never provided with the documents and evidence prior to the hearing. Those documents included Ms. Rollins reports, emails, notes and other materials. The same was true of documents and testimony regarding Mr. Hamm's marital problems with his wife. Over Mr. Casey's objection, those documents were all admitted, and Mr. Casey was forced to try to cross

examine without any prior opportunity to review the records and plan a defense to those documents.

The failure to disclose the Superintendent's intent to bring in the harassment complaint and Mr. Hamm's marital difficulties also caused the refusal to allow Mr. and Mrs. Wright, Mr. Hamm's father-in-law and mother, to testify. Mr. Hamm and his counsel were under the impression that the case was about his permit and the incidents of December 28, 2006. The hearing was open and the Wrights were present. The unexpected expansion of the scope of the hearing to other personal matters left Mr. Hamm with the two people who knew him best and were most likely to have information of those matters compromised and excluded because they had heard some of the previous testimony. The Judge Nibert did not err in holding that Mr. Hamm was deprived of his opportunity to present their testimony, and the failure to provide the documents in a timely matter and notice of the scope of the inquiry resulted in a denial of due process. The Circuit Court acted within the scope of his discretion and his Judgment Order on those matters should be affirmed.

CONCLUSION

According, the Appellee requests that the Court affirm the Judgment Order of the Circuit Court of Mason County, hold that the evidence in any further hearing should be limited to the reasons stated by the Mason County superintendent, and that the Court make such other order as may be appropriate.

WILLIAM B. HAMM,
Appellee, by Counsel

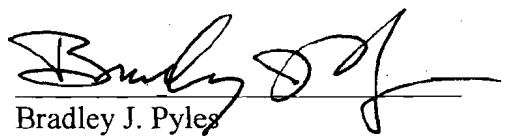
Bradley J. Pyles, State Bar No. 2998
Pyles & Turner, LP
408 Main Street
P. O. Box 596
Logan, WV 25601
(304) 752-6000
Fax: (304) 756-3123

James M. Casey, State Bar # 667
P. O. Box 427
Point Pleasant, WV 25550
(304) 675-3999
Fax: (304) 675-3956

CERTIFICATE OF SERVICE

I, Bradley J. Pyles, counsel for the Appellee, hereby certifies that on July 20, 2010, I served the foregoing Motion for Enlargement of Time to File Brief of Appellee, as indicated below, by depositing true copies thereof in the United States Mail, postage prepaid, addressed as follows:

Katherine A. Campbell
Assistant Attorney General
1900 Kanawha Boulevard
Building 1, Room E-26
Charleston, WV 25305



Bradley J. Pyles
Counsel for Appellee, William Hamm