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IN THE CIRCUIT COURT OF MASON COUNTY WEST VIRGINIA

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WILLIAM B. HAMM,  
Appellant,

ATTORNEY GENERAL'S  
OFFICE

v.

Case No. O7-AA-112  
Judge David W. Nibert

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

Respondent.

**JUDGMENT ORDER**

This matter came before the Court for oral argument on March 30, 2009. The Appellant was represented by counsel, James M. Casey, and the Respondent was represented by counsel, Katherine A. Campbell. Appellant's appeal was filed on July 26, 2007. The Appellant's Memorandum Brief in Support of Appeal was filed on July 18, 2008. The Respondent's Response to the Appellant's Memorandum Brief in Support of Appeal was filed on September 4, 2008.

The Court has considered the petition for judicial review of the State Superintendent of Schools, West Virginia Department of Education's Order of June 22, 2007 denying the Appellant's Appeal of Denial of Licensure, the evidentiary record presented below, the decision of the State Superintendent of Schools, West Virginia Department of Education, adopted by the Respondent; and the Court has considered the briefs and oral arguments submitted by the Appellant and the Respondent.

The standard for review of the administrative order made below is set forth in W. Va. Code §29A-5-4, *Judicial Review of Contested Cases*, which provides, in pertinent part that:

(g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

### **Grounds for Appeal**

The Petition for Appeal sets forth many separate assignments of error; however, the Appellant's Brief in Support of Appeal relies on five grounds. Those grounds are:

- A. The hearing examiner erred by allowing into evidence events which occurred after the county superintendent revoked his recommendation.
- B. Discovery was not provided to the Appellant following multiple requests.
- C. The hearing examiner was not impartial.
- D. There was no evidence presented that any of the charges had notoriety within the community.
- E. There was no evidence presented of a rational nexus between the conduct of Hamm and the performance of his job.

### **Legal Authority**

“(a) Until the person qualifies for a permanent certificate, any professional or first class certificate

... shall be renewable provided the holder within five years from the date the certificate became valid: . . .

... (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.” W.Va. Code §18A-3-3 [2007].

“(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.” W.Va. Code §18A-3-3(e) [2007].

“A reviewing court must evaluate the record of an administrative agency’s proceeding to determine whether there is evidence on the record as a whole to support the agency’s decision. The evaluation is conducted pursuant to the administrative body’s findings of fact, regardless of whether the court would have reached a different conclusion on the same set of facts.” Syllabus Point 1, *Walker v. West Virginia Ethics Comm’n*, 201 W.Va. 108, 492 S.E.2d 167 (1997).

### Opinion

After review of the evidentiary record, the Appellant’s Memorandum Brief in Support of Appeal, the Respondent’s Response to the Appellant’s Memorandum Brief in Support of Appeal, and the oral arguments of the Appellant and the Respondent, the Court makes its opinion as follows:

#### *Hearing Examiner’s Relevant Findings of Fact*

The administrative Hearing Examiner found the following relevant facts by a preponderance of the evidence:

“(1) Brian Hamm first received professional teaching certifications in Driver Education, grades 9-12; Health Education, grades 5-12; and Social Studies, grades 5-9, on May 11, 2002. These certificates were renewed July 1, 2005. [WVDE 16].

(2) He received one-year out-of-field authorizations in specific learning disabilities, grades 5-12; mentally impaired-mild-moderate, grades 5-12; and autism, grades 0K-AD, on October 15, 2003. These were renewed in 2004 and 2005 as first-class/full-time permits. [WVDE 16]. . . .

... (4) The investigative report and attachments show the following. On February 7, 2006, another special education teacher at Point Pleasant Middle School, Serena Bright, voiced concerns to her principal, Ms. Rita Cooper, that Brian Hamm was causing her problems, but she did not want to get him in trouble.

(5) Mr. Hamm was trying to develop a romantic/sexual relationship with Ms. Bright and would not leave her alone. The two had evidently shared rides to graduate courses for several weeks in January, had e-mail correspondence and telephone calls. ...

... (22) Ms. [Linda] Rollins conducted an investigation that indicated personnel from the school, including custodians, aids and teachers, had become involved in the issue. ...

... (24) Ms. Rollins testified that she had concerns about Mr. Hamm's behavior impacting on his ability to be a teacher. [Vol. I, p. 93].

(25) Based upon the investigation conducted by Ms. Rollins, Dr. Parsons decided to suspend Mr. Hamm for five days without pay commencing in August 2006 for sexually harassing Ms. Bright. This decision was communicated in a letter to Mr. Hamm on July 11, 2006. [WVDE Ex. 11]. ...

... (28) On June 1, 2006, Mr. Hamm completed his renewal application for his first class permit renewal and submitted it to the county. Dr. Parsons signed the superintendent's recommendation portion on July 24, 2006. [WVDE Ex. 4].

(29) Dr. Parsons testified that Mr. Hamm's misconduct merited no more than a five-day suspension. Although the conduct seriously bothered him, Mr. Hamm did not deserve to be terminated, which would occur if the teacher did not receive his permit renewal. However, Dr. Parsons was troubled about giving his recommendation. [Transcript, Vol. I, page 18].

(30) On October 25, 2006, Mr. Hamm was charged in two criminal complaints in the Magistrate Court of Mason County with harassing telephone calls and stalking involving his contact with Serena Bright. [WVDE Ex. 8]. There has been no trial on these charges yet.

(31) These criminal charges did not convince Dr. Parsons to withdraw his recommendation, because his staff had conducted an independent investigation into the same conduct. However, being a small community, Dr. Parsons was concerned about the reaction of the community. [Vol. 1, p. 30].

(32) On December 28, 2006, Mr. Hamm was charged with one count domestic battery against his wife, Tequilla, and one count possession of marijuana under 15 grams in the Magistrate Court of Mason County. [WVDE Exs. 6 & 7].

(33) Dr. Parsons obtained the police investigative report and gained information from a conversation Linda Rollins had with Mr. Hamm's father-in-law, Ronny Vanscoy. He then wrote a letter on January 2, 2007 to the State Superintendent withdrawing his endorsement. His letter stated:

My 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.

[WVDE Ex. 2]. Dr. Parsons explained his decisions thusly:

[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.

[Vol. 1, p. 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.

[Vol. 1, p. 33].

(34) The parties presented conflicting testimony with respect to the allegations of domestic battery and marijuana usage.

(35) Autumn Vanscoy, . . . testified that she is Tequilla Hamm's sister. In December of 2006, she drove to Tequilla's house . . . . When she got out of her car, she heard loud fighting. She went to the door. The screen door was open, and she looked through the glass in the front door. She saw Tequilla standing by the couch and crying. Brian was in the kitchen screaming something about a light bulb and telling her to come into the kitchen. She heard Brian telling her he was going to kill her. [Vol. 1, pp. 144-45]. . . . She saw Brian grab Tequilla by the arms and take her into the kitchen. Tequilla tried to resist. . . .

. . . (38) When a Sheriff's Deputy went to serve the domestic petition and warrant for domestic battery on Mr. Hamm at his residence, he smelled marijuana in the house. He then observed marijuana lying beside the couch in the basement. He searched Mr. Hamm and discovered a silver pipe containing marijuana. [WVDE Ex. 7]. According to the Point Pleasant Police Investigative Report, Mr. Hamm admitted that he smoked marijuana once in a while. [WVDE Ex. 5].

(39) The Investigative Report also details that Tequilla told the police that she had been abused by her husband for several months. That evening of December 28, 2006, Brian became angry at her because she did not take the Christmas tree down right away. Brian threatened to kill her. He dragged her by the arm off the couch through the living room. She showed the officer a bruise on her arm. Tequilla also told the office [sic] that "Brian smokes marijuana inside of the residence and the marijuana will be downstairs in the basement." [WVDE Ex. 5].

(40) Tequilla Hamm testified . . . . She has been married to Brian for seven years. [Vol. II, pp. 51-52]. . . . On the night in question, they had an argument about taking down the Christmas tree . . . . Brian came in the living room and asked, "Will you please come in her [sic] and help me fix this light" that she had taken apart. She refused because she was being difficult. Brian grabbed a hold of her arm and pulled her off the couch. He moved her into the kitchen "like you would an

unruly child” to help him fix the light fixture. [Vol. II, pp. 58-59]. . . . She felt one of them needed to leave, and she thought it should be Brian. She went to the police station to get the cops to come back and remove him from the home. . . . She had not intention of having him arrested. She just wanted him removed from the home for a few days so they could cool off and get things straight. The police officer told her that he could not remove Brian without a domestic violence petition. She filled out the paperwork, and the magistrate insisted she have Brian arrested so that Child Protective Services would not accuse her of neglect for not stopping the abuse. She was terrified and agreed to have him arrested. . . . No one asked her about the drugs being in the house. There were no drugs in her house. She knew this because she cleans the house ever day. She doubted whether Brian would have a place to stash them because “Brian doesn’t use drugs.” .

. . . (42) Mrs. Hamm denied ever accusing Brian of using drugs a lot. [Vol. II, p. 82]. She was then shown WVDE Exhibit 22. She identified the sheets of paper as her handwriting and testified that she wrote Exhibit 22 about three years ago when she was separated from Brian. Her attorney had asked her to write down things about Brian. At first she answered “No” to the question whether her attorney told her to write lies. [Vol. II, p. 84]. Later in her testimony she said, “My attorney told me to [lie].” [Vol. II, p. 91]. Mrs. Hamm wrote in Exhibit 22 that Mr. Hamm got drunk and high a lot with the knowledge of his daughter. . . . Mrs. Hamm acknowledged that pictures of bruises on her arm and thigh were taken at Holzer Clinic shortly after December 28, 2006, but that was part of her parents manufacturing evidence against Brian. [Vol. II, p. 92]. . . .

. . . (46) The Hearing Officer finds that the evidence submitted by WVDE through Ronny Vanscoy and Autumn Vanscoy and the investigative reports by Linda Rollins and the Point Pleasant police to be credible, and the exculpatory testimony of Tequella Hamm not to be credible.

(47) The Hearing Officer bases this finding on her own observations, plus these surrounding circumstances:

a. Autumn Vanscoy’s testimony differs very little from that of Tequella Hamm as to what occurred on December 28, 2006: the Hamms were arguing, and Brian Hamm grabbed Tequella Hamm in anger and forcibly took her into the kitchen. The Hearing Examiner notes that the glass pane in the Hamm’s door, although frosted in the middle, is framed in clear beveled glass. The videotape demonstration that one cannot see through the glass was also made during daylight hours. The event in question happened at night when lights would be on in the house, making it easier to see inside.

b. Mrs. Hamm has accused everyone of lying or directing her to lie: her father, her sister, the Pt. Pleasant police officer and her attorney. Her testimony that Brian Hamm is drug free is inconsistent with her own writings, her statement to the police and the evidence found at their house.

c. The e-mails and notes by Brian Hamm show an individual with obsessive behavior exacerbated by admitted drinking. He acknowledged inappropriate conduct both in and

out of school. The investigative report demonstrates that Mr. Hamm brought his personal problems into school and continues to have personal problems impacting the lives of his wife, his young children and the Vanscoys. It appears that he takes little responsibility for his conduct.

d. The attempt of Mr. Hamm to show that whatever he has done in his private life has no impact on his fitness to teach is unpersuasive. As one of his character witnesses pointed out, he has an influence on the students of Point Pleasant Middle School. His use of drugs, loss of control and obsessive tendencies render him a bad influence and a dangerous teacher.”

### *Scope of State Superintendent's Investigation*

The Appellant first argues that the hearing examiner incorrectly allowed evidence that was outside the knowledge of the county superintendent. The applicable statute for this proceeding is West Virginia Code §18A-3-3(e). *Supra*. The Appellant asserts that this statute limits the state superintendent to investigate only why the county superintendent withheld his recommendation by reviewing what was known by the county superintendent at the time that decision was made. The Respondent argues the contrary and submits that the state superintendent has a duty to review and investigate anything and everything he may find relevant to the applicant's 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's 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.

Respondent argues that this interpretation will tie the state superintendent’s hands by requiring him to issue a certificate to an unfit employee. However, the state superintendent’s hands are not tied. There are multiple sections within the same code chapter that provide relief if the state superintendent finds an unfit teacher in a teaching position. Beyond that, 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 that decision was made. Any evidence introduced beyond that is an abuse of discretion. Since the transcript of the county proceeding held two weeks after that county superintendent’s decision was introduced into evidence, this proceeding amounted to an abuse of discretion.

#### *Pre-Hearing Discovery*

The Appellant argues that he was not provided with requested discovery. Several months before the hearing was held, the Appellant made multiple attempts to obtain investigative documents from the board of education. The Appellant was not provided with these documents

until the hearing was held. [WVDOE File 07-07 Transcript of Proceedings Volume 1 pp. 13, 16, 20, 27, 34, 35, 37, 42, 49].

“Generally, there is no constitutional right to pre-hearing discovery in administrative proceedings.” *State ex. rel. Hoover v. Smith*, 198 W.Va. at 512, 482 S.E.2d at 129 (1997). However, “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.” *Id.* (quoting *In re Tobin*, 628 N.E.2d at 1271.) The Court in *North v. West Virginia Board of Regents* set out the standard of procedural due process required in administrative proceedings. That Court said, “due process is met when an aggrieved party is afforded: a 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.” *North v. West Virginia Board of Regents*, 160 W.Va. at 257, 233 S.E.2d at 417. See also *Jordan v. Roberts*, 161 W.Va. 750, 755-56, 246 S.E.2d 259, 262-63 (1978).

The first prong addresses the notice required by due process. Mr. Hamm was provided with a letter dated January 11, 2007 which stated in substance that Dr. Parsons had revoked his recommendation of Mr. Hamm and accordingly that Mr. Hamm’s license to work in the public schools had been denied. [DOE Exhibit No. 3]. Mr. Hamm was also given a letter dated January 17, 2007 from Dr. Parsons that in substance terminated Mr. Hamm’s employment due to his lack of credentials. [DOE Exhibit No. 10]. The hearings on these matters were conducted on April 20, 2007 and May 31, 2007. [WVDOE File 07-07 Transcript of Proceedings Volume 1 and 2]. Because Mr. Hamm had received in writing all the charges several months prior to the hearings

held on April 20th and May 31st of 2007, the first prong of the due process test is satisfied.

The second prong requires that the Appellant be given sufficient opportunity to prepare to rebut the charges. Most of the discoverable evidence was provided to the Appellant during the April 20, 2007 hearing. [WVDOE File 07-07 Transcript of Proceedings Volume 1 pp. 13, 16, 20, 27, 34, 35, 37, 42, 49]. Up until that time, the Appellant only knew of the charges that were being brought against him. [Appellant's Memorandum Brief in Support of Appeal para. 11]. Each document that was introduced into evidence was provided to the Appellant in the first hearing. The second hearing took place over one month after the first hearing was held. [WVDOE File 07-07 Transcript of Proceedings Volume 2].

From review of the record, it is apparent to this Court that the Appellant was not provided with adequate time to prepare to rebut the charges. He was served with the charges prior to the hearing. However, he was not provided with a multitude of documents until those documents were introduced at the hearing. The Respondent argues that over a month passed between the two hearings and that any documents entered as evidence at the first hearing could have been reviewed by Appellant and his counsel. Respondent continues by asserting that Appellant then had ample time to review, prepare a rebuttal, and cross-examine witnesses about these documents.

The Court is not persuaded by this argument. 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. Since he was not, the second requirement of the due process test

is not met.

The third prong requires that the Appellant is afforded an opportunity to have retained counsel at any hearings on the charges, to confront his accusers, and to present evidence on his own behalf. Attorney James M. Casey appeared as counsel for the Appellant at both State hearings as well as the county board hearing. Appellant's counsel cross-examined each of the Respondent's witnesses. However, the record reflects that Mr. Hamm was not allowed to present testimony of two witnesses. The Hearing Examiner prevented those witnesses from testifying because they were not sequestered from the hearing. [WVDOE File 07-07 Transcript of Proceedings Volume 2 p. 10]. The Appellant requested those two witnesses be allowed to testify as rebuttal witnesses and stated the reason they were not sequestered was due to the lack of disclosure from the state agency. [WVDOE File 07-07 Transcript of Proceedings Volume 2 pp. 8, 9]. The Appellant claims to have had no way of knowing what the state agency's witnesses' testimonies were going to be. *Id.* During the beginning of the first hearing, the Respondent asked the Appellant if the two individuals should be sequestered. The Appellant indicated that he did not foresee them testifying. [WVDOE File 07-07 Transcript of Proceedings Volume 1 pp. 5, 6].

Due process requires that an appellant be given a chance to present witnesses on his own behalf. The Respondent's failure to disclose the nature of their witnesses' testimonies was the cause for denying Appellant's witnesses to testify. The Appellant does not have the ability to foresee each avenue the Respondent would explore. To deny Appellant's presentation of evidence is to deny his due process rights. Mr. Hamm should have been allowed to call those two witnesses despite their attendance at the hearings. Because Respondent did not disclose the nature of their witnesses' testimonies and the Appellant was not allowed to call witnesses to rebut those testimonies, the Appellant was denied his due process right to present evidence on his own

behalf. Accordingly, the third due process requirement has not been met.

The fourth prong states the hearing must be before an unbiased hearing tribunal. This issue is addressed more thoroughly below. The hearing examiner was Dr. Pamela S. Cain. This Court finds no bias in the hearing examiner for the reasons stated below. Accordingly, the fourth due process prong is satisfied.

The fifth and final prong requires an adequate record of the proceedings be kept. Transcripts of the proceedings on April 20<sup>th</sup> and May 31<sup>st</sup> of 2007 were recorded by Rebecca L. Baker, Certified Court Reporter. A copy of these transcripts are contained within the case file. Accordingly, the final requirement of due process is met.

For the reasons stated above, specifically with regards to the second and third prongs, this Court finds that Appellant was denied his due process rights. Therefore, discovery should have been provided to protect the Appellant's due process rights. Because it was not, the decision of the Hearing Examiner was an abuse of discretion.

#### *Impartiality*

Next, the Appellant claims the Hearing Examiner was not impartial as is evidenced by the rulings admitting evidence, overruling objections, and the commentary of the Hearing Examiner. "By its express terms, West Virginia Code §29A-5-1(d) permits an administrative agency to designate any member within the agency to preside as a hearing examiner and requires that such hearing be conducted in an impartial manner. No inherent conflict of interest is created simply because such agency member serves as a hearing examiner." Syl. Pt. 2, *Varney v. Hechler*, 189 W.Va. 655, 434 S.E.2d 15 (1993). Even further, West Virginia Code §18A-3-6 provides in part: "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.”

The Appellant asserts that the Hearing Examiner was not impartial during the proceedings. The Appellant claims the Hearing Examiner indicated bias when admitting evidence, overruling objections, and making certain commentary. At the beginning of the second hearing, the Hearing Examiner made the statement, “[b]ecause of that, *we* put *our* case on first.” [WVDOE File 07-07 Transcript of Proceedings Volume 2, p. 5, lines 16-17]. *Emphasis added.* Otherwise, the Hearing Examiner ruled on objections and asked questions during the proceedings.

While it may be troubling that the Hearing Examiner spoke in a possessive tense, this Court sees no reason why this one sentence in over two days of hearings would rise to the level of an unbiased tribunal. Dr. Cain works for the Department of Education and she used possessive terms in identifying the procedures to be followed. This singular statement, without more to evidence some type of partiality, does not rise to the level of an unbiased tribunal.

As to the Appellant’s assertion that certain rulings on evidence and objections were bias, the Appellant does not offer any specific error made by the Hearing Examiner. Although the Hearing Examiner ruled against the Appellant on a majority of rulings, this in-and-of itself does not speak to bias. This Court has reviewed the record and finds no clearly erroneous ruling by the Hearing Examiner. Accordingly, the Hearing Examiner was not bias.

#### *Rational Nexus*

The Appellant’s final two arguments are so interconnected that they will be addressed together. The Appellant argues there was no evidence presented of a rational nexus between his conduct and the performance of his job nor was there evidence presented that these incidents have any notoriety within the community.

The Appellant relies on West Virginia Code §18A-3-6. *Grounds for revocation of*

*certificates; recalling certificates for correction.* However, Mr. Hamm was not issued a certificate. He may have been working in a position requiring a certificate and had received this certificate in prior years; but, his annual application was still pending. Therefore, W. Va. Code §18A-3-6 does not apply in this proceeding since it only applies to the revocation of a certificate. A certificate must first be issued before it can be revoked. The Appellant at no time was given a certificate for the year in question. Accordingly, the grounds for appeal as to rational nexus and notoriety have no merit.

#### *The Result*

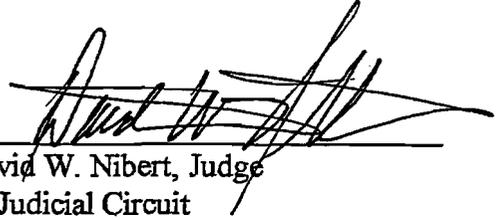
Because evidence outside the knowledge of the county superintendent was allowed and the Appellant had not been afforded his due process rights, the decisions by the Hearing Examiner to allow irrelevant evidence and prevent certain of Appellant's witnesses from testifying was an abuse of discretion. The Appellant was prejudiced by the denial of his pre-hearing discovery requests. Accordingly, the administrative agency should have provided the Appellant with pre-hearing discovery. Because they did not, the Order of the State Superintendent of Schools was arbitrary and capricious.

#### **ORDER**

Based on the foregoing, the Order of the State Superintendent of Schools West Virginia Department of Education is hereby REVERSED and REMANDED to the State Superintendent of Schools, West Virginia Department of Education for further proceedings consistent with this Order.

This is a FINAL ORDER. The Circuit Clerk will deliver attested copies of this order to counsel of record. The Clerk will forward an attested copy of this order to: **DR. STEVEN L. PAINE, State Superintendent of Schools, West Virginia Department of Education.**

ENTERED this Order the 19 day of August, 2009.



David W. Nibert, Judge  
5<sup>th</sup> Judicial Circuit

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TRUE COPY TESTED BY Bill Withers plr  
MASON COUNTY CIRCUIT CLERK