
NO. 35539

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

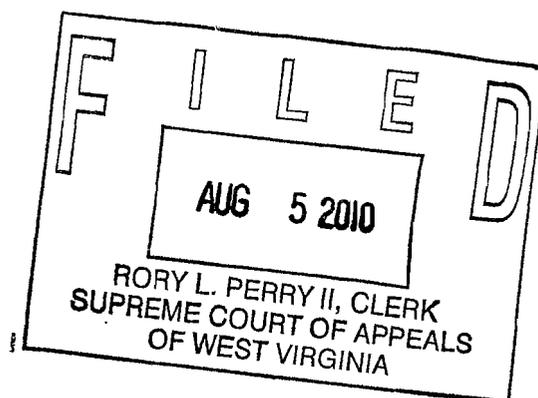
WILLIAM B. HAMM,

Petitioner below, Appellee,

v.

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

Respondents below, Appellants.



APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

I.

INTRODUCTION

The Appellants, Dr. Steven L. Paine, State Superintendent of Schools and the West Virginia Department of Education, come now to file their Reply Brief in order to correct misstatements of facts along with other inaccuracies found in the Responsive Brief filed by the Appellee. As noted in the Appellant's Brief this case involves the interplay of the State Superintendent of School's teacher licensing process and a county superintendent's responsibilities in making a recommendation for one of his or her employees when submitting an application to renew a teaching certificate or permit.

However, in his Brief, the Appellee has misstated the holding of the Mason County Circuit Court in order to argue that the Mason County Circuit Court limited the evidence that can be heard

on remand to the “charges” that Mr. Hamm committed domestic battery and possession of marijuana because those are the only ones stated in the county superintendent’s letter withdrawing his recommendation. As such, the Appellant did not prove a rational nexus of those charges to Mr. Hamm’s ability to teach, as required under the revocation statute, W. Va. Code § 18A-3-6, and therefore the proceedings should be dismissed.

Yet in reality, the Mason County Circuit Court held that State Superintendent is limited to reviewing information that was available to the county superintendent at the time of his decision, and in the instant case matter this included the investigation of Mr. Hamm’s sexual harassment of a fellow teacher and the history of domestic violence. The Mason County Circuit Court found it an error to introduce exhibits that did not exist at the time of the county superintendent’s decision, such as the transcript from Mr. Hamm’s termination hearing before the Mason County Board of Education.

Moreover, the Appellee, without so designating it, has cross appealed the Mason County Circuit Court’s ruling that the Appellants were not required to prove that any of the charges had notoriety within the community and that there was a rational nexus between his conduct and the performance of the job under W. Va. Code § 18A-3-6. The Mason County Circuit Court held that W. Va. Code § 18A-3-6 did not apply, because this was not an attempt to revoke a license that had been granted. The inquiry under W. Va. Code § 18A-3-3 was whether the county superintendent’s action was “arbitrary.” The county superintendent articulated why he did not believe Mr. Hamm was fit to teach. The Hearing Officer found that the recommendation was not arbitrarily withdraw, and that Mr. Hamm was not mentally and emotionally qualified to teach as well as lacking good moral character under W. Va. Code § 18A-3-2a. The inquiry was always focused on Mr. Hamm’s

qualifications to perform the job for which he was applying for an authorization renewal, not whether he lacked character in his personal life or was a poor role model for students. The application for which the county superintendent withdrew his recommendation was an out-of-field authorization to work with children with disabilities, a vulnerable group, including, specific learning disabilities, grades 5-12, mentally impaired-mild-moderate, grades 5-12, and autism, grades K through adult. The evidence demonstrated that the Appellee had a history of emotional problems that spilled over into harassment and violence towards women, including a fellow teacher, and in the presence of children.

II.

STATEMENT OF FACTS

As noted earlier there are several misstatements of fact throughout the Appellee's Responsive Brief, and as such, the Appellants will clarify those facts. The Appellee referenced the fact that he was acquitted of all criminal charges on pages two and five of his Brief without clarifying that these acquittals occurred well *after* completion of the administrative proceedings before the State Superintendent (hereinafter "WVDE hearing".) The WVDE hearing was held on April 20 and May 31, 2007, with a decision rendered on June 22, 2007. Although the Appellee's counsel did not place on the Mason County Circuit Court record the dates of Mr. Hamm's criminal trials, the Mason County Magistrate Court records reflect that Mr. Hamm was tried before a jury on the stalking and harassing phone calls on September 12, 2007, and he had a bench trial on marijuana possession and domestic battery on December 4, 2007.

It is indeed ironic that the Appellee argues that the State Superintendent should not consider any evidence beyond what the county superintendent knew as of January 11, 2007, yet implies that

this Court should be influenced by the fact that he was acquitted many months after that date. On remand from the Mason County Circuit Court pursuant to that court's Judgment Order dated August 19, 2009, any new administrative proceedings would not include evidence of the acquittals.

In the recitation of the events on page six of his Brief, the Appellee stated that other than speaking with Mr. Vanscoy, Mr. Hamm's father-in-law, and obtaining copies of the "criminal charges," the county superintendent, Dr. Parsons, and his assistant, Linda Rollins, did no further investigation. The Appellee added that Mr. Vanscoy had not witnessed the event leading to the domestic battery charge, implying that Dr. Parsons acted precipitously.

Yet, the record shows that Dr. Parsons reviewed not only the criminal charges, but also the Point Pleasant Police Department Incident Report. *See* April 20, 2007, Administrative Hearing Transcript, at DOE Ex. 5 and DOE Ex. 6 (hereinafter "4/20/07 R. at ____"). The Incident Report not only recited what Mr. Hamm's wife, Tequilla, told the police officer but also recounted the facts underlying the possession of marijuana charge: The officer smelled marijuana in the house when he went to serve Mr. Hamm with the domestic violence petition. Mr. Hamm was quoted as admitting that he smokes marijuana once in a while. The officer observed marijuana lying by the couch on the floor.

Also, while Mr. Vanscoy did not witness the domestic violence, his other daughter, Autumn Vascoy, did. As Mr. Vanscoy testified at the WVDE hearing, both Autumn and Tequilla almost immediately after the incident called him distraught. He met Tequilla at a parking lot and she told him what had occurred. He also testified that Tequilla's young children were crying and the eight-year old said, "Paw-paw, you gotta help us. My daddy's threatened to kill us." *See* 4/20/07 R. at 126-128. Although Autumn did not speak with Dr. Parsons or Linda Rollins, she did tell her father

what she had witnessed and she testified at the hearing on April 20, 2007. Thus, the information available to Dr. Parsons through the police investigation report, the criminal charging documents and Mr. Vanscoy was considerable.

Also, the Appellee stated on page eight of his Brief that prior to the WVDE hearing, the county superintendent would not disclose that his actions caused the Appellants to deny his permit and did not disclose the reasons for this action. He argued on page nine that he was unaware that the “additional charge” concerning the sexual harassment of a fellow teacher would be heard at the WVDE hearing. This is not accurate.

Dr. Parsons testified at the Mason County Board of Education hearing on February 15, 2007 that when he originally signed the recommendation on Mr. Hamm’s renewal application, he had misgivings because of the fact that he had suspended Mr. Hamm for five days for sexually harassing a teacher. *See* 4/20/07 R. at DOE Ex. 21 at 8-9.¹ When he received information that Mr. Hamm had been arrested for domestic battery of his wife and possession of marijuana and reviewed the police report and the criminal complaint, he no longer felt that Mr. Hamm possessed good moral character and emotional stability to teach. *See* 4/20/07 R. at DOE Ex.21 at 11-15. The Mason County Board of Education hearing was held over two months prior to the WVDE hearing. Thus, the Appellee, and his counsel, knew prior to the WVDE hearing the reasons why Dr. Parsons withdrew his signature.

Moreover, on page ten of his Brief, the Appellee stated that, “The Court concluded that the State Superintendent erred in considering evidence of matters that were not included in the county

¹ It is also ironic that the Appellee cites to the record of 4/20/07 R. at DOE Ex. 21, in his Brief since this exhibit is the transcript of the Mason County Board of Education hearing which was the sole exhibit that the Mason County Circuit Court listed as evidence that should not have been introduced.

superintendent's reason for withdrawing his recommendation of Mr. Hamm's permit." He followed this with an argument on page twenty-five that the State Superintendent's office acted improperly by introducing evidence of the sexual harassment complaint at the WVDE hearing, because Dr. Parsons did not rely upon the harassment complaint as a reason for withdrawing the recommendation.²

This is inaccurate for several reasons. First, the Mason County Circuit Court said, "[T]he 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." *See* Judgment Order at 8.

Second, Dr. Parsons testified at the WVDE hearing that he did consider the sexual harassment complaint when he withdrew his recommendation. He explained that when he originally signed the recommendation, the sexual harassment conduct "seriously bothered" him. He was troubled by signing the recommendation, but he had not terminated Mr. Hamm and he hoped that the five day suspension would cause him to "get the idea and get a clean start." *See* 4/20/07 R. at 18. However, when he learned of the domestic battery and marijuana possession charges, he decided to withdraw his recommendation based upon the cumulative effect:

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

See 4/20/07 R. at 32.

² "Notwithstanding the fact that Dr. Parsons did not rely on the harassment complaint as a reason for withdrawn [sic] 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 [sic] withdraw his recommendation." *See* Appellee's Brief at 25.

The fact that Dr. Parson's letter to Office of Professional Preparation on January 2, 2007 referenced the charges of domestic battery and possession of a controlled substance without mentioning the sexual harassment conduct does not prevent the State Superintendent from considering the conduct, even pursuant to the Judgment Order dated August 19, 2009. Dr. Parsons need not have referenced the sexual harassment charge in this letter, because he had already made the State Superintendent aware of Mr. Hamm's suspension on the sexual harassment charge by letter dated September 26, 2006, and that matter was still being investigated by the West Virginia Department of Education to determine if the State Superintendent would grant the renewal application. *See* 4/20/07 R. at DOE Ex. 13 and 75-76.

Further, the Appellee stated incorrectly on pages nine through ten of his Brief that the reason he needed to call the two witnesses who were not permitted to testify was because, in his words, the hearing had been "enlarged by allowing evidence on additional issues to support Dr. Parsons' decision." He repeated this assertion when he explained that these two witnesses, his mother and stepfather, were spectators at the hearing "before the additional issues were brought in." The Appellants stress that there were no "additional issues." The Appellee wanted to rebut testimony concerning the domestic violence conduct on December 28, 2006 and the sexual harassment conduct—both issues that were known to him prior to the hearing, as the Circuit Court found.

Finally, on pages ten through eleven of the Appellee's brief, he stated that the Mason County Circuit Court "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* . . ." Emphasis supplied.

This is an inaccurate statement in two aspects. First, the Mason County Circuit Court rejected the Appellee's arguments that he had not received notice of "all the charges" prior to the hearing. *See* Judgment Order at 9-10. Instead, the Mason County Circuit Court found that the Appellee was not given sufficient opportunity to prepare to rebut the charges because he was not provided with documents that were submitted into evidence before the hearing.

Second, the Mason County Circuit Court's Judgment Order specifically referenced the sexual harassment investigation report as an example of documents, but did not mention the "notes regarding Mr. Hamm's marital problems." These were handwritten notes that Appellee's wife had made about Mr. Hamm's violence and drug activity conducted in front of their children. They were used to impeach the testimony of Tequilla Hamm, who was called by the Appellee, that Mr. Hamm was not a violent person and that he did not use drugs. *See* May 31, 2007, Administrative Hearing Transcript, at 70-78, 82-88 and DOE Ex. 22 (hereinafter "5/31/07 R. at ____"). They were not in the possession of the Appellants prior to May 31, 2007, and the Appellants did not have knowledge as to what Tequilla would say in her testimony ahead of time.³

III.

ARGUMENT

The Appellee's argument in support of the Mason County Circuit Court's interpretation of W. Va. Code § 18A-3-3 highlights the problems with the Mason County Circuit Court holding. As set forth above, the Mason County Circuit Court held that the State Superintendent's investigation of why the county superintendent withheld his recommendation was limited to "reviewing what was

³ The issue of when the notes came into the possession of Appellants was not addressed at the WVDE hearing, and this fact is not in the record.

available to the county superintendent at the time of his decision.” The lower court only identified one piece of evidence that exceeded the scope of the review—the transcript of the Mason County Board of Education hearing held six weeks after Dr. Parson withdrew his signature.

The Appellee, however, seized on this ruling to attack the evidence that Appellants submitted of Mr. Hamm’s conduct prior to January 2, 2007, the time of Dr. Parson’s decision. Throughout his brief, the Appellant suggested that the review should have been limited to the two criminal charges referenced in Dr. Parson’s letter, even though the investigation report of the sexual harassment charge and the attached notes and electronic mail of Mr. Hamm to the teacher were available to Dr. Parsons and did play a part in his decision. The Appellee also suggested that if the county superintendent knew about information concerning Mr. Hamm’s “overall record,” but did not rely upon it as a basis for his decision, the State Superintendent should not be able to consider it. He argued that the history of domestic violence by Mr. Hamm against his wife, as testified to by Mr. Vanscoy and his daughter, Autumn, should not have been considered, because Dr. Parson only relied upon the December 28, 2006 domestic violence incident. Finally, the Appellant suggests that even if the county superintendent knew about the information and relied on it, the State Superintendent should not consider it if that information would not be admissible or relevant in a discharge or license revocation proceeding.

The Appellee’s arguments demonstrate why W. Va. Code § 18A-3-3 must be read in conjunction with W. Va. Code § 18A-3-2a. At issue was whether William B. Hamm was emotionally fit to perform the duties for which a permit was to be issued—teaching autistic, mentally impaired and learning disabled children. The Legislature did not intend to circumscribe the State Superintendent from considering information pertinent to this inquiry whether Dr. Parsons knew

about it or whether Dr. Parsons relied upon it. This is the kind of inquiry that the State Superintendent makes for any application for a renewal certification under W. Va. Code § 18A-3-2a. The State Superintendent's office was in the process of making this investigation of Mr. Hamm's renewal application when Dr. Parsons short-circuited the process by withdrawing his recommendation.

What the Appellee ignored is that if Dr. Parsons had not withdrawn his signature and the State Superintendent had denied Mr. Hamm's application for cause based upon facts from the sexual harassment incidents, the history of domestic violence and the current domestic violence and drug charge, the Appellee would have been entitled to a hearing before the Licensure Appeal Panel pursuant to W. Va. Code § 18A-3-2a and West Virginia State Department of Education Policy 1340. The very same information would have been introduced. The only difference is that Dr. Parsons would have testified why he recommended Mr. Hamm instead of why he decided to withdraw his recommendation.

The point is that the State Superintendent needs to be able to consider this evidence for the safety and well-being of the children the applicant is teaching. The purpose of requiring certificates, permits and out-of-field authorizations to be renewed is to review periodically not only an applicant's academic qualifications, but whether he or she is fit on a physical, emotional and mental level to teach. With respect to teaching certificates, the law presumes, after several renewals, that a teacher no longer needs this type of periodic review and he or she will be issued a permanent certificate. The State Superintendent only reviews a teacher's permanent certificate in proceedings brought pursuant to the revocation statute, W. Va. Code § 18A-3-6.

The Appellee's argument wrongly implies that the county superintendent cannot refuse to sign a recommendation on a renewal application unless he can prove the grounds enumerated under

the revocation statute, W. Va. Code § 18A-3-6, and that the State Superintendent has an obligation to approve all renewal applications if a county superintendent recommends the applicant since he can only consider fitness issues by proceeding to revoke a license under W. Va. Code § 18A-3-6. In making this argument, the Appellee suggested that W. Va. Code § 18A-3-3 must be read *in para materia* with the termination statute, W. Va. Code § 18A-2-8 and the license revocation statute, W. Va. Code § 18A-3-6.

In this manner, the Appellee resurrected a basis he asserted for reversing the State Superintendent's decision that the Circuit Court of Mason County rejected. In his brief to the Circuit Court, the Appellee contended that no evidence was presented that any of the charges had notoriety within the community and there was no evidence presented of a rational nexus between his conduct and the performance of his job.⁴ The Circuit Court held that "the grounds for appeal as to rational nexus and notoriety have no merit" because the revocation statute did not apply to this proceeding. *See* Judgment Order at 13-14.

The Appellants agree. However, although there was no explicit rational nexus standard referenced in the WVDE hearing, under W. Va. Code §§ 18A-3-3 or 18A-3-2a, the inquiry was functionally focused on Mr. Hamm's emotional and mental fitness to work with kids with disabilities and to function as a teacher in the school setting. These were Dr. Parsons' concerns and the State Superintendent's concerns. There is little discernible difference between "fitness to teach" standard and the rational nexus standard. Both examine whether conduct would directly affect the

⁴These are factors set forth in *Golden v. Bd. of Edu.*, 169 W. Va. 63, 285 S.E.2d 665 (1981) to define "immorality" under the termination statute and been added to the license revocation statute when the asserted grounds for revocation are immorality, intemperance or cruelty.

performance of the occupational responsibilities of the teacher. *See Powell v. Paine*, 221 W. Va. 458, 463, 655 S.E.2d 204, 209 (2007). Therefore, the Appellants did produce evidence of a rational nexus.

The Appellee cannot argue that the sexual harassment conduct towards another teacher lacked a rational nexus to his job. The electronic mail that Mr. Hamm sent the teacher, in spite of her requests to stop, reference his being in great emotional pain and depression. He threatened to overdose on his medication. When the teacher complained about his sending a letter to her via his students and coming to see her in class, he responded “Your students are inbred with an IQ below 70. . . .” The teacher wrote on a copy of the e-mail, “Please Read he treats the students just like he is talking in this e-mail.” *See* 4/20/07 R. at DOE Ex. 15.

Mr. Hamm’s domestic violence also reflected on his fitness to teach children, especially those with disabilities. Dr. Parsons, in his letter of January 2, 2007 withdrawing the recommendation, focused on the fact that the domestic violence was committed in the presence of children. Both Autumn and Ronny Vascoy testified that Mr. Hamm’s eight year old daughter said on December 28, 2006 that her daddy was going to kill them. Dr. Parsons testified that with the new evidence of the domestic violence and marijuana charges, coming on the heels of the sexual harassment incidents, he concluded that Mr. Hamm was not emotionally stable to be a teacher.

The Appellee argued that if a rational nexus standard of W. Va. Code § 18A-3-6 were applied, this matter merits dismissal under this Court’s holding in *Powell* that Appellants did not prove by clear and convincing evidence that a teacher’s physical abuse of his son one time at home had a rational nexus to his teaching position as a high school chemistry teacher or that he was unfit to teach. The *Powell* Court observed:

We fail to see from this conclusory statements what anticipated ill-effects Appellant's corporal punishment of his child had or would have on Appellant's fitness to teach or upon the school community. Nor do we see why suspending the teaching certificates for four years will somehow change Appellant so as to be fit to teach. The unrefuted evidence in the record, including the testimony of two counselors—one of whom was providing family counseling to the family at the time of the hearing—and reports of two additional counselors all supported the conclusion that Appellant posed no threat to children in his classroom or other students. Additionally, our thorough and complete examination of the record did not disclose that Appellant exhibited any cruel behavior or even display a mean disposition to students or school personnel in any situation occurring on school grounds or at school functions.

221 W. Va. at 464, 655 S.E.2d at 210.

The facts of *Powell* are quite different. In that case, there was one incident. The teacher had received ongoing counseling and had acknowledged his cruelty. He had been examined by a psychologist at the direction of the Board of Education and been assessed as posing no danger to his students. There was no evidence of prior issues or problems with students or school personnel.

In the instant case, Mr. Hamm's emotional problems and marital difficulties led him to harass a fellow teacher and cause problems in school towards the beginning of 2006. He did not acknowledge any problems, because he was in the process of appealing the five-day suspension when he was arrested for other conduct on December 28, 2006. The evidence showed a history of marital abuse and drug usage. In fact, the evening that Mrs. Hamm took the children and fled from her home, he was found by the police at home to be smoking marijuana. The students he taught had disabilities rendering them very vulnerable to teachers who cannot control their temper and lack emotion stability and maturity. He made a written comment disparaging the very type of students he taught. Mr. Vanscoy also testified as to other insensitive comments Mr. Hamm made about his students.

The Appellee actually makes two contradictory arguments to this Court for finding that the Mason County Circuit Court Judgment order should be affirmed. First, the Appellee argued that the State Superintendent should not have investigated whether the domestic violence on December 28, 2006 was a single incident or a pattern of abuse, but then he argued that his case should be dismissed because it is similar to the *Powell* case where there was a single incident. Yet with either argument the Appellee fails to show how the Mason County Circuit Court did not err in its Judgment Order.

IV.

CONCLUSION

Based upon the foregoing, the Appellants respectfully request that this Court reverse the Circuit Court of Mason County's Judgment Order dated August 19, 2009, and reinstate the decision of the State Superintendent dated June 22, 2007.

Respectfully submitted,

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

By counsel

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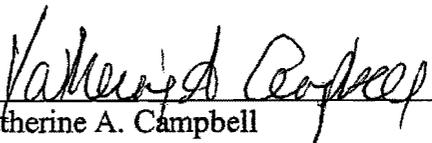
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CERTIFICATE OF SERVICE

I, Katherine A. Campbell, Assistant Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing "Appellant's Reply Brief" was served by depositing the same postage prepaid in the United States mail, this 5th day of August 2010, addressed as follows:

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