

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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ROBERT FULMER,

Plaintiff / Respondent,

v.

**KANAWHA COUNTY BOARD OF
EDUCATION,**

Defendant / Petitioner.

SATHY S. GUSTON, CLERK
KANAWHA CO. CIRCUIT COURT

Appeal No. 101578

[Appeal from Civil Action No. 09-MISC-371
Honorable Paul Zakaib]

PETITION FOR APPEAL

Saturday, November 6, 2010
[Filed Monday, November 8, 2010]

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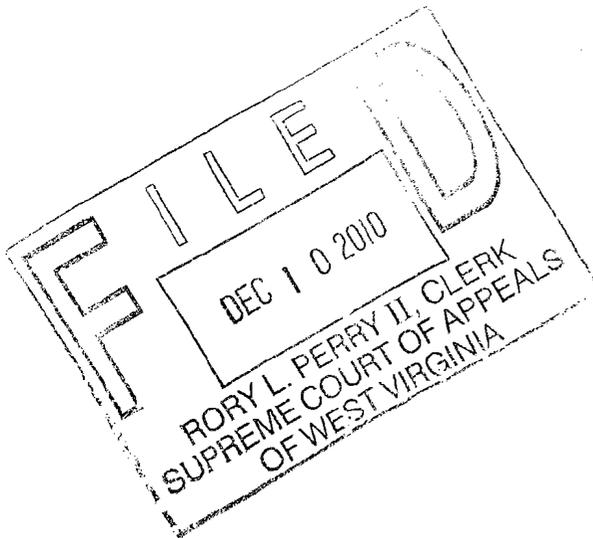


TABLE OF CONTENTS

I.	KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL.....	1
II.	STATEMENT OF THE FACTS.....	9
	A. Respondent’s Termination from Nitro High School.....	9
	B. Level IV Grievance Hearing.....	10
	C. Level IV Decision.....	11
	D. Plaintiff’s Reinstatement to His Employment.....	11
	E. Communications Between Counsel For Respondent And Counsel For KCBOE Regarding “Conclud[Ing] The Damage Aspect Of The Case”.....	12
	F. Writ of Mandamus Proceeding.....	16
	G. KCBOE’s Motion to Alter or Amend the Circuit Court’s April 1, 2010 Order.....	23
III.	ASSIGNMENTS OF ERROR AND RULINGS BELOW.....	28
	A. The Assignment of Error.....	28
	B. Rulings Below.....	29
IV.	DISCUSSION OF LAW.....	30
	1. Error No. 1: Improper Ruling Regarding Mitigation Of Damages.....	30
	2. Error No. 2: Improper Award Of Damages By Failure To Offset Income Earned....	33
	3. Error No. 3: Improper Award Of Damages When Teaching Certificate Not Valid....	36
	4. Error No. 4: Improper Award Pre- Judgment Interest And Post-Judgment Interest...37	
	5. Error No. 5: Improper Award For Retirement Benefits.....	38
	6. Error No. 6: Absence Of Evidentiary Show Cause Hearing: Improper Procedure.....	38
V.	RELIEF PRAYED FOR.....	39

TABLE OF AUTHORITIES

Cases

<i>Buckhannon-Upshur County Airport Authority v. R&R Coal Contracting</i> , 186 W.Va. 583, 413 S.E.2d 404 (1991).....	37
<i>Dadisman v. Moore</i> , 181 W. Va. 779; 384 S.E.2d 816 (1988).....	31
<i>Hensley v. West Virginia Dep't of Health & Human Resources</i> , 203 W. Va. 456, 508 S.E.2d 616 (1998).....	30, 34
<i>Law v. Monongahela Power Company</i> , 210 W.Va. 549, 558 S.E.2d 349 (2001).....	30
<i>Mason County Board of Education v. State Superintendent of Schools</i> , 170 W.Va. 632, 295 S.E.2d 719 (1982).....	14, 22, 31
<i>Savage v. Booth</i> , 196 W.Va. 65, 468 S.E.2d 318 (1996).....	34
<i>State ex rel. Burdette v. Zakaib</i> , 224 W. Va. 325, 685 S.E.2d 903, 909 (2009).....	30, 33, 36, 37, 38
<i>State ex rel. Kucera v. City of Wheeling</i> , 153 W.Va. 538, 170 S.E.2d 367 (1969).....	22
<i>Wickland v. American Travellers Life Ins. Co.</i> , 204 W. Va. 430, 513 S.E.2d 657 (1998).....	30
<i>Willey v. Bracken</i> , 2010 W. Va. LEXIS 104.....	34

Statutes

<u>W.Va. Code</u> § 18-29-7 (2006).....	22
<u>W.Va. Code</u> § 18-29-9 (2006).....	16, 22
Section 18-9A-1 of the <u>West Virginia Code</u>	35
<u>W.Va. Code</u> § 18-9A-4(a).....	35
<u>West Virginia Code</u> 18A-4-1.....	35
<u>W.Va. Code</u> § 56-6-31(a).....	37

Rules

Rule 3 of the <u>Rules of Appellate Procedure</u>	1
---	---

W.Va.R.A.P. 7.....8

Rule 59(e) of the West Virginia Rules of Civil Procedure.....6, 23, 29, 30

Constitutional Provisions

W.Va. Const., Article XII § 134

Article XII § 5 of the West Virginia Constitution.....34

**I. KIND OF PROCEEDING AND NATURE OF
THE RULING IN THE LOWER TRIBUNAL**

Pursuant to Rule 3 of the Rules of Appellate Procedure of the West Virginia Supreme Court of Appeals, Defendant / Petitioner, Kanawha County Board of Education (hereinafter “KCBOE”), files its Petition for Appeal from a July 6, 2010 “Order Denying Defendant’s Motion to Alter or Amend Judgment” (hereinafter “July 6, 2010 Order”) entered by the Honorable Paul Zakaib in the Circuit Court of Kanawha County, West Virginia. On April 1, 2010 (hereinafter “April 1, 2010 Order”), the Circuit Court entered an “Order on Plaintiff’s Petition for Writ of Mandamus” granting “Plaintiff’s Complaint (Petition for Writ of Mandamus)” (hereinafter “Petition for Writ of Mandamus”) and “Plaintiff’s Revised Damages Calculation” (hereinafter “Revised Petition for Writ of Mandamus”) *in toto* and mandated KCBOE pay Respondent \$259,566.99 in damages, as a result of a Level IV Decision entered by an Administrative Law Judge (hereinafter “ALJ”) of the West Virginia Public Employees Grievance.

The Level IV proceeding resulted from a grievance filed by Respondent against KCBOE, as a result of his termination as a teacher from Nitro High School. Respondent was terminated from his position, by KCBOE, following a pre-disciplinary proceeding held before an independent hearing examiner, who is not an employee of KCBOE, where the independent hearing examiner found that Respondent engaged in inappropriate and immoral conduct of a sexual nature toward two (2) female students of Nitro High School. After a Level IV hearing was conducted, the ALJ granted Respondent’s grievance in his favor, by Decision entered on October 29, 2008. The ALJ ordered KCBOE to reinstate Respondent to his position and further ordered he be paid lost wages and benefits to which he would have been entitled had he remained in the position, with legal interest on any back pay. The ALJ ruled he would not address the issue of damages due and owing to

Respondent at the Level IV hearing but ordered damages be calculated by the parties post-hearing. After the ALJ's ruling, counsel for KCBOE properly raised and preserved the mitigation of damages defense.

Respondent was reinstated by KCBOE to his position on or about December 15, 2008. Although the Level IV Decision was entered on October 29, 2008, Respondent was not reinstated until December 15, 2008 because of his failure to get his teaching certificate renewed until December 2008. Prior to the October 29, 2008 Level IV Decision, Respondent allowed his teaching certificate to lapse. In September 2008, Respondent was notified by the West Virginia Department of Education that he needed to submit additional information to have his teaching certificate renewed. Although Respondent knew in September 2008 that he needed to submit additional information to the West Virginia Department of Education, he did not properly submit the documentation to the West Virginia Department of Education, which was required to have his teaching certificate renewed, until December 1, 2010. After his teaching certificate was renewed, KCBOE reinstated him to his position. With regard to the monetary damages due and owing to Respondent, the parties could not reach an agreement as to the proper amount of damages due and owing to Respondent, post-hearing.

As a result of the parties failure to reach an agreement regarding the monetary damages due and owing to Respondent, Respondent filed his Petition for Writ of Mandamus claiming that he was entitled to \$277,274.52 in damages for back pay, insurance reimbursement, retirement contributions, and pre-judgment and post-judgment interest, as a result of the Level IV Decision. **(10/14/09 Petition for Writ of Mandamus).**

In "Defendant Kanawha County Board of Education's Memorandum Showing Cause Why the Petition for Writ of Mandamus Must Be Denied" (hereinafter "Show Cause brief"), KCBOE requested the Court deny Respondent's Petition for Writ of Mandamus where he sought damages in

the amount of \$277,274.52, because of the following: (1) Respondents back pay calculation was improper, because he used improper KCBOE salary schedules for the relevant time periods; (2) Respondent's back pay calculation was improper, because he was required to mitigate his damages and failed to consider mitigation in his back pay calculation; (3) Respondent's calculation for back pay in the Fall 2008 semester, when he was not reinstated for his failure to have his teaching certificate renewed, was improper; (4) Respondent's calculation for back pay was improper insofar as he failed to offset his back pay award by income actually earned, while terminated, in the amount of \$58,314.04; (5) Respondent's calculation of wages for cafeteria supervision duties was improper, because he calculated payment for the time period when he was not reinstated, due to his failure to have his teaching certificate renewed; (6) Respondent's calculation of back pay was improper for coaching duties, because he calculated payment for a time period when he was not reinstated, due to his failure to have his teaching certificate renewed; (7) Respondent's calculation of private insurance reimbursement was improper, because he calculated payment for a time period when he was not reinstated, due to his failure to have his teaching certificate renewed; (8) Respondent's calculation of KCBOE's obligation to reinstate monies to his retirement account, in the amount of \$13,973.05, was improper, because he elected to transfer from the Teacher's Defined Contribution System to the Teachers' Retirement System, upon reinstatement; (9) Respondent's calculation regarding the contribution he claimed was due and owing by KCBOE to his retirement account was improper, because his calculation was based upon his improper back pay calculation; (10) Respondent's calculation of pre-judgment interest was improper, because it was based upon his improper damages calculation; and (11) Respondent's calculation for post-judgment interest was improper, because it was based upon his improper damages calculation. **(2/24/10 Show Cause Brief).**

A Show Cause hearing was held on Respondent's Petition for Writ of Mandamus on

February 25, 2010. At the Show Cause hearing, Respondent submitted his Revised Petition for Writ of Mandamus to the Circuit Court and to counsel for KCBOE where he sought damages in the amount of \$259,566.99. Respondent changed his requested relief, because he acknowledged he used improper salary schedules for the relevant years, as KCBOE demonstrated in its Show Cause brief. This was only one (1) of the many fatal flaws rectified by Respondent in his revised calculation of damages. Although KCBOE did not have the opportunity to submit a written response to Respondent's revised calculation of damages, the arguments in KCBOE's Show Cause brief were applicable to Respondent's Revised Petition for Writ of Mandamus, because he still failed to consider mitigation of damages, he still failed to provide KCBOE with an offset from the income he earned, while terminated, he still computed damages to be paid to him by KCBOE for the time period, when he was not reinstated due to his failure to have his teaching certificate renewed, he still improperly calculated the retirement benefits he claimed were due and owing to him by KCBOE, he still failed to properly calculate his pre-judgment interest, and he still failed to properly calculate his post-judgment interest.

At the Show Cause hearing, the Circuit Court did not conduct an evidentiary hearing but merely heard oral argument on one (1) of several contested issues among the parties, which was mitigation of damages. With regard to argument surrounding mitigation of damages, counsel for Respondent argued that KCBOE was required to raise the mitigation of damages defense at the Level IV hearing, KCBOE failed to raise mitigation of damages, and KCBOE failed to submit evidence regarding mitigation of damages at the Level IV hearing thereby resulting in waiver of the defense. In response to the representations of counsel for Respondent, counsel for KCBOE, who was present at the Level IV hearing, told the Circuit Court the ALJ did not conduct a full-blown hearing on damages. Thus, mitigation was not an issue to be addressed at that time. After hearing oral argument

solely on the issue of mitigation of damages by counsel, from the bench, the Circuit Court granted Petitioner's Revised Petition for Writ of Mandamus and mandated KCBOE pay Respondent \$259,566.99. **(2/25/10 Hearing Transcript (hereinafter "2/25 HT"))**.

By granting Respondent's Revised Petition for Writ of Mandamus in its entirety, the Circuit Court granted the following relief requested by Respondent: (1) \$129,162.00 in back pay, which did not deduct income actually earned by Respondent, while terminated, in the amount of \$58,314.04 or any amount of income that could have been earned in comparable employment by Respondent, which KCBOE disputes is proper; (2) \$1,400 in wages for Respondent's cafeteria duties, which included payment for a time when Respondent was not reinstated as a result of his own failure to have his teaching certificate renewed, which KCBOE disputes is proper; (3) \$18,550.00 in wages for Respondent's coaching activities, which included payment for a time when Respondent was not reinstated as a result of his own failure to have his teaching certificate renewed, which KCBOE disputes is proper; (4) \$7,642.40 in private insurance Respondent claimed he had to obtain during his termination, which included payment for a time when Respondent was not reinstated as a result of his own failure to have his teaching certificate renewed, which KCBOE disputes is proper; (5) \$9,687.15 in retirement benefits, which KCBOE disputes is proper, because it was based upon an improper damages calculation by Respondent; (6) \$13,973.05 in a return of retirement funds by KCBOE, which KCBOE disputes is a proper calculation; (7) \$59,356.40 in pre-judgment interest, which KCBOE disputes is proper, because it was based upon an improper damages calculation by Respondent; and (8) \$19,795.99 in post-judgment interest, which KCBOE disputes is proper, because it is based upon an improper damages calculation of Respondent. **(2/26/10 Plaintiff's Revised Damages Calculation (hereinafter "2/26/10 Revised Petition for Writ of Mandamus"))**.

On April 1, 2010, the Circuit Court entered a written Order reflecting its ruling, from the

bench at the February 25, 2010 Show Cause hearing, granting Respondent's Revised Petition for Writ of Mandamus in the amount of \$259,566.99. **(4/1/10 Order)**. The only legal issue addressed by the Circuit Court in its written April 1, 2010 Order was mitigation of damages, although numerous issues were raised by KCBOE in its Show Cause brief demonstrating error in Respondent's damages calculation. **(4/1/10 Order, Pgs. 1-4)**. With regard to its ruling concerning mitigation of damages, in its April 1, 2010 Order, the Circuit Court found that KCBOE failed to raise mitigation of damages at the Level IV hearing and waived the defense, based solely upon oral argument of counsel for Respondent at the Show Cause hearing, absent any documentary evidence supporting the representations, which was improper as shown by the Level IV hearing transcript. **4/1/10 Order, Pg. 4¶ 6)**.

With regard to its ruling on damages, in its April 1, 2010 Order, the Circuit Court did not explain the breakdown of the \$259,566.99 that it awarded to Respondent but simply accepted the damages calculated by Respondent in his Revised Petition for Writ of Mandamus. **(4/1/10 Order, Pg. 5)**. Absent conducting an evidentiary hearing and absent allowing KCBOE to argue any other issue it raised in its Show Cause brief, apart from mitigation of damages, the Circuit Court found: (1) Respondent had a clear legal right to the relief sought in his petition for writ of mandamus in the amount of \$259,566.99; (2) Kanawha County Board of Education had a legal duty to do what he sought to compel; and (3) There were no other adequate remedies available to him. **(4/1 Order: Pg. 5)**. Therefore, his Revised Petition for Writ of Mandamus was granted.

Pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure, KCBOE requested the Circuit Court alter or amend its April 1, 2010 Order awarding Respondent \$259,566.99 in damages, because, by and through "Defendant Kanawha County Board of Education's Motion to Alter or Amend Judgment" (hereinafter "Motion to Alter or Amend Judgment") and oral argument by

KCBOE, KCBOE contended the Revised Petition for Writ of Mandamus was improperly granted, based upon the following: (1) Respondent omitted material facts in his oral argument to the Circuit Court at the Show Cause hearing regarding the issue of mitigation of damages, which resulted in the misrepresentation of relevant facts mistakenly relied upon by the Circuit Court in finding that KCBOE failed to raise and preserve the mitigation of damages defense at the Level IV hearing; 1 (2) The Circuit Court erred by not providing KCBOE with an offset of wages actually earned by Respondent, while terminated, in the amount of \$58,314.04, which improperly resulted in Respondent being placed in a better position than he would have been had he not been terminated by KCBOE in violation of the public policy of West Virginia; (3) By and through oral argument of counsel at the Show Cause hearing, the Circuit Court only addressed one (1) of several disputed issues among the parties in relation to the proper amount of damages owed to Respondent, which was improper and resulted in Respondent being awarded damages for a period of time when he was not reinstated, due to his failure to have his teaching certificate renewed; and (4) The Circuit Court did not conduct an evidentiary Show Cause hearing to establish the actual damages due and owing to Respondent from KCBOE but merely accepted Respondent's damages calculations, absent evidence, which was improper.

By Order entered on July 6, 2010, the Circuit Court denied KCBOE's Motion to Alter or Amend Judgment. In the July 6, 2010 Order, the Court did not state any findings of fact and/or conclusions of law relied upon but merely denied KCBOE's motion to alter or amend judgment by the following relevant language:

On June 30, 2010, came the Plaintiff, Robert Fulmer, in

¹ KCBOE is not arguing the omissions of fact by counsel for Respondent at the Show Cause hearing were known and intentional. Whether intentional omissions of fact or simply mistaken omissions of fact that occurred, due the passage of time, the result is the omissions of fact stated to the Circuit Court at the Show Cause hearing resulted in misrepresentations of the Level IV proceedings, which the Court mistakenly relied upon in its April 1, 2010 Order.

person and by counsel, William L. Mundy, Esq. and James Spenia, Esq., and came the Defendant, Kanawha County Board of Education, by counsel, Billie Jo Streyle, Esq. for oral argument on Defendant's motion.

After hearing oral argument of counsel, and after reviewing the memoranda of law submitted by the parties, this Court is of the opinion to deny the Defendant's Motion to Alter or Amend Judgment.

(7/6/10 Order).

KCBOE respectfully requests this Honorable Court grant its Petition for Appeal, because the Circuit Court's April 1, 2010 Order granting Respondent's Revised Petition for Writ of Mandamus was not plainly right and its subsequent July 6, 2010 Order denying KCBOE's motion to alter or amend its April 1, 2010 Order was not plainly right. W.Va.R.A.P. 7. KCBOE requests this Court exercise its appellate jurisdiction and review, *de novo*, the Circuit Court's ruling, which granted Respondent relief through his extraordinary writ of mandamus. KCBOE is a political subdivision that operates with public monies. The Circuit Court's April 1, 2010 Order was issued, as a result of serious procedural flaws and factual errors. The April 1, 2010 Order improperly mandates KCBOE to pay Respondent damages that are not due and owing to him. The Circuit Court's ruling is not only unjust to KCBOE but is also unjust to the taxpayers of this State whose monies would, in effect, be improperly used to pay an excessive judgment to Respondent. KCBOE does not dispute Respondent was entitled to be placed back into a position that made him whole, as a result of the Level IV Decision.² However, KCBOE strongly disputes that Respondent is entitled to be placed in a better position than he would have been had he not been terminated, which is the result of the Circuit Court's April 1, 2010 Order. Payment of an excessive judgment to Respondent, by and through the

² KCBOE was required to file a brief with this Honorable Court requesting the judgment of the Circuit Court be stayed pending exhaustion of the appellate process, because the Circuit Court denied KCBOE's request for stay, which this Honorable Court granted. As was stated in KCBOE's memorandum requesting a stay with this Honorable Court, KCBOE has paid Respondent \$87,091.39, to date, which it acknowledges was due and owing.

use of public monies, harms KCBOE, this State's citizens, and violates the public policy of West Virginia. Therefore, KCBOE respectfully requests its Petition for Appeal be accepted by this Honorable Court.

II. STATEMENT OF THE FACTS

A. Respondent's Termination from Nitro High School

In or around the year 1999, Respondent was employed as a classroom teacher at Nitro High School. **(2/24/10 Show Cause Brief, Pg. 1)**. Respondent was accused by two (2) female students of engaging in inappropriate conduct of a sexual nature toward them. As a result of the allegations against Respondent, KCBOE informed Respondent that a pre-disciplinary proceeding would be held to address the substance of the allegations against him.

The pre-disciplinary proceeding is held before an independent hearing examiner, who is not an employee of KCBOE, to address allegations of misconduct against KCBOE employees, prior to termination. **(2/24/10 Show Cause Brief, Pgs. 1-2)**. The purpose of the pre-disciplinary proceeding is for KCBOE to obtain an independent decision by the independent hearing examiner as to what disciplinary action, if any, should be imposed against an employee. **(2/24/10 Show Cause Brief, Pgs. 1-2)**. The pre-disciplinary process is an evidentiary hearing where the parties have the opportunity to call and examine witnesses, under oath, and to present documentary evidence to the independent hearing examiner. **(2/24/10 Show Cause Brief, Pg. 2)**.

In May 2005, a pre-disciplinary hearing was brought before an independent hearing examiner regarding the allegations by the students against Respondent. The two (2) students who accused Respondent of misconduct testified, under oath, at the pre-disciplinary proceeding. **(2/24/10 Show Cause Brief, Pg. 2)**. On June 17, 2005, a pre-disciplinary decision was rendered by the independent hearing examiner finding Respondent "being guilty of the charges alleged, should be dismissed from

Kanawha County Schools.” (2/24/10 Show Cause Brief, Pg. 2, Ex. 2, Level IV Grievance Decision: Pg. 5).

Due to the independent hearing examiner’s findings, on July 1, 2005, Bill Courtney, employee of KCBOE, forwarded correspondence to the KCBOE’s Board Members affixing the record before the independent hearing examiner regarding the allegations against Respondent and further notifying them that Superintendent of Kanawha County Schools, Dr. Ronald Duerring, was recommending the termination of Respondent’s employment, based the independent hearing examiner’s decision. (2/24/10 Show Cause Brief, Pg. 2). On July 11, 2005, KCBOE voted to terminate Respondent from his employment. (2/24/10 Show Cause Brief, Pg. 2).

B. Level IV Grievance Hearing

On July 13, 2005, Respondent filed a Level IV grievance with then West Virginia Education and State Employees Grievance Board against KCBOE, as a result of his termination. (2/24/10 Show Cause Brief, Pg. 2). The Level IV hearing was conducted on February 5 and 6, 2008.³ (2/24/10 Show Cause Brief, Pg. 3). The ALJ was to determine whether KCBOE proved by a preponderance of the evidence that Respondent engaged in inappropriate and immoral conduct with a student. (2/24/10 Show Cause Brief, Pg. 2, Ex. 2, Level IV Grievance Decision: Pg. 4). With regard to damages, at the Level IV hearing, the ALJ stated that damages were not required to be put on at the Level IV hearing, and, if the grievant prevailed on his Level IV grievance, after the hearing, the ALJ would “put to the School Board to figure out what [Respondent’s] out for the time[h]e should have been paid, and then if there [wa]s a dispute about it. . . deal with it at that time. . .” (4/14/10 Motion to Alter or Amend Judgment (hereinafter “4/14/10 MAAJ”), Level IV Transcript, Ex. 2, Pg.

³ From the time Respondent filed his Level IV Grievance to the time of the Level IV hearing was held, the West Virginia Education and State Employees Grievance Board was abolished and the West Virginia Public Employees Grievance Board was established. However, the grievance procedure in effect at the time of Respondent’s

140, Lines 1-4). In response to the ALJ's statement that damages would be calculated post-hearing, if Respondent prevailed on his grievance, counsel for Respondent at the Level IV hearing, William Mundy, Esq. who is Respondent's counsel in the present matter stated: "That's fine, I mean we can handle it like that." (4/14/10 MAAJ, Ex. 2, Level IV Transcript, Pg. 141, Lines 12-13). At the Level IV hearing, counsel for KCBOE preserved the defense of mitigation of damages by explicitly stating that, if and when damages had to be calculated, KCBOE would have to consider the income Respondent made over the years he was terminated from his employment at KCBOE in calculating damages, which the ALJ acknowledged at the Level IV hearing. (4/14/10 MAAJ, Level IV Transcript, Ex. 2, Pg. 142, Lines 1-5).

C. Level IV Decision

A Level IV Decision was issued by the ALJ on October 29, 2008. (2/24/10 Show Cause Brief, Pg. 2, Ex. 1, Level IV Grievance Decision). The ALJ found the testimony of the two (2) students who made the accusations against Respondent was not credible and contrary to statements previously given. (2/24/10 Show Cause Brief, Pg. 2, Ex. 1, Level IV Grievance Decision, Pgs. 8-10). The ALJ held that "[KCBOE] did not prove the allegations against Grievant by a preponderance of the evidence." (2/24/10 Show Cause Brief, Pg. 2, Ex. 1, Level IV Grievance Decision, Pg. 13, ¶ 8). The ALJ further stated:

For the foregoing reasons, this grievance is hereby **GRANTED**. [KCBOE] is **ORDERED** to reinstate Grievant to his previous position, and to compensate him for lost wages and benefits to which he would have been entitled had he remained in the position, with legal interest on any back pay.

(2/24/10 Show Cause Brief, Pg. 2, Ex. 1, Level IV Grievance Decision, Pg. 13). The ALJ did not compute the damages owed to Respondent.

D. Plaintiff's Reinstatement to His Employment

After the October 29, 2008 Level IV Decision, Respondent could not immediately be reinstated to his position, because he did not have a valid teacher's license by and through his own conduct. In particular, in June 2008, Respondent filed an application for renewal of his teaching license with the West Virginia Department of Education. (2/24/10 Show Cause Brief, Pg. 3). In September 2008, the West Virginia Department of Education informed Plaintiff that he needed to provide additional information to have his license renewed. (2/24/10 Show Cause Brief, Pg. 3). Respondent did not provide the required information to the West Virginia Department of Education until December 1, 2008. (2/24/10 Show Cause Brief, Pg. 3). The West Virginia Department of Education processed his application for renewal on December 5, 2008. (2/24/10 Show Cause Brief, Pg. 3-4). On or about December 5, 2008, Respondent's license was retroactively renewed to September 1, 2008. (2/24/10 Show Cause Brief, Pg. 4). After Respondent got his licensed renewed through the West Virginia Department of Education, he was reinstated to his position with KCBOE on or about December 15, 2008. (2/24/10 Show Cause Brief, Pg. 4). Therefore, due to Respondent's own conduct in failing to submit the proper documentation to the West Virginia Department of Education until December 1, 2008, he was not reinstated to his position until December 15, 2008.

E. Communications Between Counsel for Respondent and Counsel for KCBOE Regarding "Conclud[ing] the Damage Aspect of the Case"

After the ALJ issued his Level IV Decision, in accordance with the ALJ's instructions, counsel for Respondent and counsel for KCBOE corresponded in an attempt to calculate the amount of damages due and owing to the Respondent, since he prevailed on his grievance. A few of the communications among counsel for Respondent and counsel for KCBOE demonstrating damages were to be calculated, after the Level IV hearing was complete, is reflected by the following:

By correspondence dated February 27, 2009, counsel for the Respondent, William Mundy, stated to counsel for KCBOE:

We need to conclude the damage aspect of this case. Would you be so kind as to provide the Board's calculation of the number of days Mr. Fulmer was removed from his employment as a teacher at Nitro High School.

In addition, please advise me as to the number of sick days that Mr. Fulmer had accrued at the time of his wrongful termination.

(6/17/10 Response of Respondent to KCBOE's Motion to Alter or Amend Judgment (hereinafter "6/17/10 Response to MAAJ"), 2/27/09 Correspondence, Ex. F) (Emphasis added).

By correspondence dated March 24, 2009, counsel for the Respondent, James Spenia, Esq., who is employed with Mr. Mundy, requested information from KCBOE regarding the number of days Respondent was removed from his position and further requested the number of sick days Respondent had at the time of his termination. In said correspondence, counsel for Respondent stated:

Obviously, we need to conclude the damages aspect of this case, but need those calculations in order to do so.

(6/17/10 Response to MAAJ, 3/24/2009 Correspondence, Ex. G) (Emphasis added).

By correspondence dated May 20, 2009, counsel for Respondent, Mr. Spenia, forwarded correspondence to counsel for KCBOE where he stated he calculated the total damages to be awarded to Respondent by KCBOE in the amount of \$246,564.72, which included lost wages, insurance reimbursement, retirement reimbursement, and interest. **(6/17/10 Response to MAAJ, 5/20/ 2009 Correspondence, Ex. H).**

By correspondence dated June 9, 2009, counsel for KCBOE responded to counsel for

Respondent stating that KCBOE disputed the calculation of damages offered by counsel for Respondent and further stating that the calculations offered by Respondent failed to take into account any wages, salary, or other earnings of Respondent made during the time he was terminated from his position at Nitro High School. After the Level IV hearing, Respondent never submitted his income tax returns for the years he was terminated to counsel for KCBOE but did forward W-2's showing income he earned at Smoker Friendly, while terminated from Nitro High School. The known income earned by Respondent, while terminated, is as follow: Year 2005: \$6,803.78; Year 2006: \$23,370.26; Year 2007: \$28,140.00. **(2/24/10 Show Cause Brief, W-2s 2005, 2006, 2007: Ex. 5)**

By correspondence dated June 17, 2009, counsel for Respondent, by and through Mr. Spenia, informed counsel for KCBOE that he was in receipt of counsel for KCBOE's June 9, 2009 correspondence "**concerning Mr. Fulmer's claim for damages. . .**" (6/17/10 Response to MAAJ, 6/17/ 2009 Correspondence, Pg. 1, Ex. J). In said correspondence, counsel for Respondent noted his disagreement with the position of counsel for KCBOE in relation to the basis for calculating damages. (6/17/10 Response to MAAJ, 6/17/ 2009 Correspondence, Pgs. 1-2, Ex. J). In particular, counsel for Respondent stated that he did not believe the wages earned by Respondent, while he was terminated, should be deducted from the wages owed by KCBOE, because it was the position of counsel "**that KCS is not entitled to a set off for the amounts earned based upon the malicious actions in the wrongful termination.**" (6/17/10 Response to MAAJ, 6/17/ 2009 Correspondence, Pg. 2, Ex. J) (Emphasis added). Counsel for Respondent further stated: "As I am sure you aware, a wrongfully discharged employee only has a duty to mitigate damages when the wrongful discharge is not malicious in nature. Mason Board of Education v. State Superintendent of Schools, 170 W.Va. 632, 295 S.E.2d 719 (1982)." (6/17/10 Response to MAAJ, 6/17/ 2009 Correspondence, Pg. 2, Ex. J). Counsel for Respondent further stated: "Furthermore, KCS is only entitled to a set off for income

earned in this period if the performance of Mr. Fulmer's job would have [been] incompatible with his work at this school. We believe that, to a great extent, Mr. Fulmer could have worked at both Smoker Friendly and Nitro High School." (6/17/10 Response to MAAJ, 6/17/ 2009 Correspondence, Pg. 2, Ex. J). Counsel for Respondent never asserted in his June 17, 2009 correspondence that counsel for KCBOE failed to raise the issue of mitigation of damages at the Level IV hearing and thereby waived the defense.

On June 17, 2009, counsel for Respondent forwarded correspondence to the ALJ, who issued the Level IV Decision, wherein he stated: "The parties have been having discussions concerning the amount of damages Mr. Fulmer is entitled to as a result of his wrongful termination but have reached a few sticking points." (6/17/10 Response to MAAJ, 6/17/ 2009 Correspondence, Pg. 2, Ex. K) (Emphasis added). Counsel for the Respondent further stated to the ALJ: "Therefore, I, on behalf of the grievant, Robert Fulmer, would like to request a hearing and permit the Court to determine the proper amount of damages." (6/17/10 Response to MAAJ, 6/17/ 2009 Correspondence, Pg. 2, Ex. K) (Emphasis added).

By correspondence dated July 2, 2009, counsel for the Respondent informed counsel for KCBOE that he recalculated Respondent's damages to be \$245,933.90. (6/17/10 Response to MAAJ, 7/2/2009 Correspondence, Pg. 2, Ex. L).

On September 3, 2009, counsel for Respondent forwarded a second correspondence to the Level IV ALJ wherein he requested a hearing be provided by the ALJ so that the parties could "present the evidence on damages and bring a final resolution to this matter." (6/17/10 Response to MAAJ, 9/3/ 2009 Correspondence, Pg. 2, Ex. N) (Emphasis added). This statement reflects the fact that damages were not addressed at the Level IV hearing.

On September 29, 2009, the ALJ entered an "Order Denying Request for Hearing." (6/17/10

Response to MAAJ, 9/29/2009 Order, Pg. 2, Ex. O). In said Order, the ALJ stated the following:

The Grievant is now requesting that the Grievance Board conduct a hearing to determine the amount of damages he is entitled. The Grievance Board is without statutory authority to reopen this matter to conduct a hearing to address a dispute over damages. The undersigned directs Grievant's attention to W.Va. Code § 18-29-9, which provides that "any institution failing to comply with the provisions of this article may be compelled to do so by mandamus proceeding and shall be liable to any party prevailing against the institution for court costs and reasonable attorney fees, as determined and established by the court."

F. Writ of Mandamus Proceeding

Respondent filed his Petition for Writ of Mandamus in the Circuit Court of Kanawha County, because the parties could not agree on the proper amount of damages due and owing to him.

In his Petition for Writ of Mandamus, Respondent summarized his damages as follows:

a.	Salary from 2005-2006 school year through fall 2008	\$143,976.00
b.	Payment for working in cafeteria	1,500.00
c.	Payment for coaching	18,550.00
d.	Private insurance Mr. Fulmer was required to obtain	7,642.40
e.	Retirement funds returned to Kanawha Co. Board of Education at the time of Mr. Fulmer's termination	13,973.05
f.	Interest	80,834.87
	Total	\$277,274.52

(10/14/10 Petition for Writ of Mandamus, Pg. 5). Respondent further requested he be awarded attorney's fees and court costs. In his Petition for Writ of Mandamus, Respondent did not consider mitigation of damages, he did not provide KCBOE with a set off of income he actually earned, while terminated from KCBOE, and he calculated damages in his favor for a period of time, when he was

not reinstated, based upon his failure to have a valid teaching certificate.

On January 21, 2010, the Circuit Court of Kanawha County, by and through the Honorable Paul Zakaib, entered an "Order Issuing Rule to Show Cause." (**1/21/10 Show Cause Order**). The Show Cause hearing was scheduled for February 25, 2010.

In response to the Court's Show Cause Order, KCBOE responded by filing "Defendant Kanawha County Board of Education's Memorandum Showing Cause Why the Petition for Writ of Mandamus must be Denied." (**2/24/10 Show Cause Brief**). KCBOE argued that Respondent's Petition for Writ of Mandamus must be denied by the Circuit Court for good cause shown, because the amount of damages requested by Respondent was improper.

KCBOE disputed the amount of damages Respondent claimed was due and owing, on pages four (4) through thirteen (13) of its Show Cause memorandum submitted to the Circuit Court, because of the following:

1. Respondent's calculation of back pay was wrong, because: (A) He used incorrect salary schedules for the relevant time periods; (B) He failed to consider mitigation of damages in his calculations, including failing to deduct \$58,314.04 he actually earned from employment, while terminated from KCBOE; and (C) He improperly calculated damages that he claimed were due and owing to him, when he was not reinstated, during the time he failed to have a valid teaching certificate. (**2/24/10 Show Cause Brief, Pgs. 4-9**).
2. Respondent's calculation of wages for cafeteria duties and coaching duties were wrong, because he improperly calculated wages due and owing to him, when he was not reinstated, during the time he failed to have his teaching certificate renewed. (**2/24/10 Show Cause Brief, Pg. 9**).

3. Respondent's calculation for reimbursement of private insurance he had to obtain was wrong, because he improperly calculated damages due and owing to him, when he was not reinstated, during the time he failed to have his teaching certificate renewed. **(2/24/10 Show Cause Brief, Pg. 9-10).**
4. Respondent's calculation of reinstatement to his retirement account was wrong, due to his election to change retirement plans, upon reinstatement. **(2/24/10 Show Cause Brief, Pgs. 10-11).**
5. Respondent's calculation as to KCBOE's required retirement contribution he claimed was due and owing was wrong, due to the fact it was based upon his improper calculation of back pay damages. **(2/24/10 Show Cause Brief, Pg. 11).**
6. Respondent's calculation of pre-judgment interest and post-judgment interest were wrong, based upon his improper calculation of damages. **(2/24/10 Show Cause Brief, Pgs. 11-12).**

A Show Cause hearing was conducted by the Circuit Court on February 25, 2010. At the beginning of the hearing, Respondent provided counsel for KCBOE and the Circuit Court with a revised calculation of damages in the amount of \$259,566.99, because, as KCBOE pointed out in its Show Cause brief, Respondent used incorrect salary schedules in computing the wages he claimed was due and owing to him in his Petition for Writ of Mandamus. **(2/26/10 Respondent Revised Calculation of Damages)**. By using the improper salary schedules, Plaintiff initially computed his damages to total \$277,274.52, which he acknowledged was incorrect. **(10/14/10 Petition for Writ of Mandamus, Pg. 5)**. The only change in Respondent's revised calculation of damages resulted from his acknowledgement that he used improper salary schedules. Respondent did not correct any of the other errors raised by KCBOE in its Show Cause brief. Therefore, although KCBOE did not have the

opportunity to respond to the new numbers calculated by Respondent, the arguments KCBOE set forth in its Show Cause brief demonstrating the errors in Respondent's damages calculation applied to his revised calculation of damages.

At the Show Cause hearing, KCBOE was prepared for the Circuit Court to conduct a full evidentiary hearing on the issue of damages owed to Respondent. KCBOE had a PowerPoint ready to present to the Circuit Court, which reflected KCBOE's position as to why Respondent did not have a clear legal right to the relief requested and why the Petition for Writ of Mandamus should be denied. KCBOE also had witnesses present in the courtroom to be called to present testimony and documentary evidence to the Circuit Court demonstrating why Respondent's requested relief was improper. However, the Circuit Court did not conduct an evidentiary Show Cause hearing but merely heard oral argument from counsel for Respondent and counsel for KCBOE on one (1) disputed issue, which was mitigation of damages, although KCBOE contended there were multiple disputed issues surrounding the Respondent claimed were damages due and owing to him. **(2/24/10 Show Cause Brief, Pgs. 4-13).**

With regard to mitigation of damages, KCBOE argued that Respondent was required to mitigate his damages, and, in fact did mitigate his damages by working at Smoker Friendly, while he was terminated. KCBOE requested a set off to Respondent's damages for income actually known to be earned by him, while terminated. **(4/14 /10 MAAJ, 2/25/10 Hearing Transcript (hereinafter "2/25 HT"), Ex. 1, Pg. 5: Lines 8-12).** In response to KCBOE's argument, the Court stated: "Is it the general law that you are required to mitigate damages in a situation such as this? It is my understanding of the law." **(4/14/10 MAAJ, 2/25 HT, Ex. 1, Pg. 6: Lines 6-8).** In response to the Circuit Court's inquiry, counsel for Respondent argued, in relevant part, that KCBOE was not entitled to the defense of mitigation of damages, because KCBOE failed to raise mitigation of

damages in the Level IV proceeding thereby waiving the defense. (4/14/10 MAAJ, 2/25 HT, Ex. 1, Pgs. 7, 10, 11, and 14). Counsel for Respondent made the following statements to the Circuit Court regarding the mitigation of damages issue:

They did not put on one witness in front of the ALJ regarding anything, much less mitigation. They waived that. The Order is what it is and it's for full back pay.

(4/14/10 MAAJ, 2/25 HT, Ex. 1, Pg. 7, Lines 6-9).

Judge, I tried this case, the underlying cases (Level IV Proceeding), so I do know what went on at the ALJ proceeding. The ALJ ruled Bob Fulmer was entitled to full back pay and full benefits.

(4/14/10 MAAJ, 2/25 HT, Ex. 1, Pg. 10, Lines 9-12).

We put on evidence in front of the ALJ as to what Bob made. The Board of Education had the obligation at that proceeding, if they claimed he wasn't entitled to that rate of pay, then put your evidence on. They had the burden of that. They didn't put any evidence on. We put on evidence, Your Honor, showing the malice in that case.

(4/14/10 MAAJ, 2/25 HT, Ex. 1, Pg. 10, Lines 20-22; Pg. 11: Lines 1-7).

They had the burden, if they claimed he wasn't entitled to back pay, to bring it up in front of the ALJ, and to have that issue determined. And I submit to you they didn't put on any evidence. I was there.

(4/14/10 MAAJ, 2/25 HT, Ex. 1, Pg. 14, Lines 15-19; Ex. 1).

James Withrow, Counsel for KCBOE at the Level IV hearing, informed the Circuit Court that mitigation of damages was not addressed by the ALJ, because he did not take up evidence on the issue of damages at the Level IV hearing. Mr. Withrow stated the following to the Circuit Court regarding the mitigation of damages issue:

. . . he didn't take evidence as to actual lost wages or lost benefits, that sort of thing. In fact, Mr. Fulmer's actual counsel did attempt to do that and the ALJ said that's not what we do here. We make the decision and then later you figure out the damages. There was no evidence, full-blown evidence of what the damages would have been.

(4/14/10 MAAJ, 2/25 HT, Ex. 1, Pg. 18: Lines 7-15; Ex. 1).⁴

⁴ The hearing transcript has Mr. Spenia listed as counsel who made these statements. However, Mr. Withrow made these statements to the Circuit Court.

Based solely upon Respondent's counsel's argument, absent any documentary evidence, the Circuit Court granted Respondent's Revised Petition for Writ of Mandamus and stated the following:

If the Board felt that mitigation was proper, they should have raised it at that time.

(4/14/10 MAAJ, 2/25 HT, Pg. 26, Lines 16-18).

I think your client is entitled to the relief you're asking.

(4/14/10 MAAJ, 2/25 HT, Pg. 26, Lines 5-6).

Prior to ruling from the bench, the Circuit Court never addressed the accuracy of Respondent's damages calculation. There was no evidence whatsoever regarding Respondent's wages, insurance benefits, or retirement benefits presented to the Circuit Court.

APRIL 1, 2010 ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

On April 1, 2010, the Circuit Court entered its Order regarding its ruling on Respondent's Revised Petition for Writ of Mandamus. In its April 1, 2010 Order, the Court made the following Findings of Fact relevant to the Level IV hearing and mitigation of damages issue:

5. During the hearing before the West Virginia Public Employees Grievance Board, the defendant, Kanawha County Board of Education, did not present any evidence whatsoever concerning mitigation of damages or otherwise raise that issue before the Administrative Law Judge.

(4/1/10 Order: Pg. 2, ¶ 5).

8. Additionally, the Administrative Law Judge did not speak to either mitigation of damages, or malice, as the Kanawha County Board of Education did not raise those issues before the Administrative Law Judge.

(4/1/10 Order: Pg. 2, ¶ 8).

In its April 1, 2010 Order, the Circuit Court made the following Conclusions of Law relevant to the Level IV hearing and mitigation of damages issue:

1. A writ of mandamus will not issue unless three elements coexist – (1) the existence of a clear right in the petitioner to the relief sought; (2) the existence of a legal duty on the part of the respondent to do the thing which petitioner seeks to compel; and (3) the absence of another adequate remedy. Syl. Pt. 2, State ex rel. Kucera v. City of Wheeling, 153 W.Va. 538, 170 S.E.2d 367 (1969).
(4/1/10 Order: Pg. 3, ¶ 1).
2. Pursuant to W.Va. Code § 18-29-7 (2006) and W.Va. Code § 18-29-9 (2006), this Court has the power to enforce the Order dated October 29, 2008 entered by the Administrative Law Judge for the West Virginia Public Employees Grievance Board.
(4/1/10 Order: Pg. 3, ¶ 2).
3. West Virginia law is clear that the burden of raising the issue of mitigation in a case of wrongful discharge is on the employer. Syl. Pt. 2, Mason County Board of Education v. State Superintendent of Schools, 170 W.Va. 632, 295 S.E.2d 719 (1982).
(4/1/10 Order: Pg. 4, ¶ 3).
4. *It is clear in this case that the employer, Kanawha County Board of Education, wholly failed to raise the issue of mitigation of damages during the hearing before the Administrative Law Judge for the Public Employees Grievance Board.*
(4/1/10 Order: Pg. 4, ¶ 4) (Emphasis added).
5. It is further clear that the Administrative Law Judge made an award of back pay, benefits, and legal interest which Kanawha County Board of Education has failed to abide by in refusing to make any payment whatsoever, despite admitting the fact that it owes at least \$92,175.60, a damages amount calculated by the Kanawha County Board of Education utilizing an offset of income the plaintiff made from other employment in the years 2005, 2006, 2007, and 2008.
(4/1/10 Order: Pg. 4, ¶ 5).
6. *As the Kanawha County Board of Education failed to raise the issue of mitigation of damages or present any evidence on this issue before the Level IV Administrative Law Judge, the Administrative Law Judge was not required to determine whether or not the Kanawha County Board of Education*

acted with malice in terminating Mr. Fulmer.
(4/1/10 Order: Pg. 4, ¶ 6) (Emphasis added).

7. Therefore, as outlined in the original Complaint in the present action, as well as the Plaintiff's Revised Damages Calculation, the plaintiff is entitled to payment in the amount of \$259,566.99.
(4/1/10 Order: Pg. 4, ¶ 7).

The Circuit Court thereby "**ORDERED, ADJUDGED, and DECREED**, that the plaintiff has met his burden of proof in showing: (1) he has a clear legal right to the relief sought in his petition for writ of mandamus; (2) the Kanawha County Board of Education has a legal duty to do what petitioner seeks to compel; and (3) there are no other adequate remedies available to plaintiff. Kucera, supra." (4/1/10 Order: Pg. 5). The Circuit Court further "**ORDERED, ADJUDGED, and DECREED** that the Kanawha County Board of Education make payment to Robert Fulmer immediately in the amount of \$259,566.99, no later than ten (10) days from the date of entry of this Order." (4/1/10 Order: Pg. 4, ¶ 7). Apart from finding KCBOE waived the mitigation of damages defense, the Circuit Court never addressed any of the other issues raised KCBOE's Show Cause brief in its April 1, 2010 Order.

G. KCBOE's Motion to Alter or Amend the Circuit Court's April 1, 2010 Order

On April 14, 2010, KCBOE filed "Defendant Kanawha County Board of Education's Motion to Alter or Amend Judgment" requesting the Circuit Court alter or amend its April 1, 2010 Order, pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure.⁵ KCBOE requested the Circuit Court alter or amend the April 1, 2010 Order, because: (1) Respondent omitted material facts at the Show Cause hearing regarding the Level IV hearing, which resulted in misrepresentations of relevant

⁵ KCBOE filed its motion to alter or amend judgment, pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure rather than Rule 60(b) of the West Virginia Rules of Civil Procedure, because the motion to alter or amend judgment was filed within ten (10) working days after the entry of the Circuit Court's April 1, 2010 Order. See Syl. Pt. 3, Law v. Monongahela Power Company, 210 W.Va. 549, 551, 558 S.E.2d 349, 351 (2001).

procedural facts mistakenly relied upon by the Circuit Court in finding KCBOE waived the mitigation of damages defense; (2) The Circuit Court erred by not providing KCBOE with an offset of income actually earned by Respondent from other employment, while he was terminated from KCBOE, which placed Respondent in a better position than he would have been had he not been terminated from KCBOE in violation of the public policy of the State of West Virginia; (3) The Circuit Court erred by failing to consider all disputed issues between the parties regarding the proper calculation of damages to be awarded to Respondent, which resulted in Respondent being awarded damages not due and owing to him; and (4) The Circuit Court erred in not conducting an evidentiary Show Cause hearing to determine the proper amount of damages owed to Respondent but merely finding Respondent met his burden of proof to have the writ of mandamus issued in the amount of \$259,566.99, based solely upon memoranda and arguments of counsel, in spite of the significant disputes among the parties. (4/14/10 MAAJ, Pgs. 2-11; 6/30/2010 Hearing Transcript⁶ (hereinafter “6/30/10 HT), Pgs. 1-14).

With respect to KCBOE’s argument the Circuit Court erred by mistakenly relying upon improper facts in finding KCBOE failed to raise and waived the mitigation of damages defense at the Level IV hearing, KCBOE cited to the Level IV hearing transcript that demonstrated counsel for Respondent’s oral argument to the Circuit Court, at the Show Cause hearing, omitted relevant procedural facts that required the Circuit Court to alter or amend its April 1, 2010 Order.

As was documented above, at the Show Cause hearing, counsel for Respondent argued mitigation of damages was not raised and waived by KCBOE, because (1) KCBOE did not put on any witnesses regarding mitigation of damages at the Level IV hearing; (2) Respondent put on

⁶ On the first page of the transcript from the hearing on KCBOE’s request the Circuit Court alter or amend its April 1, 2010 Order, the transcript reflects the hearing was conducted on June 6, 2010; however, the hearing was actually conducted on June 30, 2010.

evidence of damages at the Level IV hearing and KCBOE had an obligation to put on evidence regarding his rate of pay at the Level IV proceeding but didn't do so; and (3) KCBOE had the duty to bring up mitigation of damages and failed to do so. (4/14/10 MAJ, 2/25 HT, Ex. 1, Pg. 7: Lines 6-9); (4/14/10 MAJ, 2/25 HT, Ex. 1, Pg. 10: Lines 9-12); (4/14/10 MAJ, 2/25 HT, Ex. 1, Pg. 10: Lines 20-22; Pg. 11, Lines 1-7); and (4/14/10 MAJ, 2/25 HT, Ex. 1, Pg., 14: Lines 15-19: Ex. 1). However, although these facts as stated may be true, the misrepresentation mistakenly relied upon by the Circuit Court resulted from the omission of facts by counsel for Respondent to the Circuit Court that: (1) The ALJ ruled he would not take up damages at the Level IV hearing; (2) The ALJ ruled damages were to be calculated post-hearing; and (3) KCBOE did in fact raise the fact that any income earned by Respondent, while terminated, would have to be considered when calculating damages thereby preserving the mitigation of damages defense. This is evidenced by the following excerpts from the Level IV hearing:

The ALJ stated the following in relation to damages at the Level IV hearing:

There is not a requirement for putting on a damages case in the way one would do it, say in, oh the Circuit Court.
(4/14/10 MAJ, Level IV Transcript, Ex. 2, Pg. 141, Lines 1-4)
(Emphasis added).

The ALJ further stated, if Plaintiff was successful in his grievance, he would then **“put to the School Board to figure out what he's out for the time that [h]e should have been paid, and then if there's a dispute about it, as per Mr. Withrow says, deal with it at that time, if that's of any help to you counsel.”** (MAJ, Level IV Transcript, Ex. 2, Pg. 141, Line 4-11) (Emphasis added).

In response to the ALJ's ruling, counsel for Plaintiff then stated to the ALJ:

That's fine. I mean we can handle it like that.
(4/14/10 MAJ, Level IV Transcript, Ex. 2, Pg. 141, Lines 12-13)
(Emphasis added).

Furthermore, at the Show Cause hearing, the Circuit Court was not informed of the multiple communications between counsel for Respondent and counsel for KCBOE, which occurred after the Level IV hearing, where Respondent acknowledged the need to “**conclude the damages aspect of this case.** . . .” and, in fact, requested a hearing on damages with the West Virginia Public Employees Grievance Board post-Level IV hearing. See, (6/17/10 Response to MAJJ, Exs. F, G, H, J, K, L, N, and O).

The Circuit Court was also informed that KCBOE had the duty to raise mitigation of damages and failed to do so. This is inaccurate, as demonstrated by the Level IV transcript, which shows counsel for KCBOE did raise the issue of mitigation of damages to preserve the defense, as shown by the following language:

I mean we'd have to go back. . . I assume Mr. Fulmer's had some income over those years and we'd have to look (inaudible) and we would have to look at the whole picture assuming that's the order and, you know, assuming that the way it would be resolved.

(4/14/10 MAJJ, Level IV Transcript, Ex. 2, Pg. 141, Lines 20-24, Pg. 142, Lines 1-3).

As shown by the Level IV transcript, the omission of relevant procedural facts resulted in the Circuit Court mistakenly finding KCBOE failed to preserve the mitigation of damages defense at the Level IV hearing, which required the Circuit Court alter or amend its April 1, 2010 Order.

With respect to KCBOE's argument that the Circuit Court erred by not providing KCBOE with an offset of income actually earned by Respondent in the amount of \$58,314.04, while he was terminated from KCBOE, KCBOE orally argued that Respondent was placed in a better position than he would have been had he not been terminated from KCBOE, which was contrary to the public policy of West Virginia. **(6/30/10 HT, Pgs. 11-12).** Therefore, KCBOE requested the Court alter or amend its April 1, 2010 Order.

With regard to KCBOE's argument that the Circuit Court erred by failing to consider all disputed issues between the parties regarding the proper calculation of damages to be awarded to Respondent, KCBOE orally argued Respondent was improperly awarded damages that were not due and owing to him in violation of public policy. (6/30/10 HT, Pgs. 1-14). Therefore, KCBOE requested the Court alter or amend its April 1, 2010 Order.

With respect to KCBOE's argument that the Circuit Court erred in not conducting an evidentiary Show Cause hearing to determine the proper amount of damages owed to Respondent, KCBOE orally argued the Circuit Court's finding that Respondent met his burden of proof to have the writ of mandamus issued in the amount of \$259,566.99, based solely upon memoranda and arguments of counsel was improper. (6/30/10 HT, Pgs. 9-10). Therefore, KCBOE requested the Court alter or amend its April 1, 2010 Order.

**JULY 6, 2010 ORDER DENYING DEFENDANT'S
MOTION TO ALTER OR AMEND JUDGMENT**

On July 6, 2010, the Circuit Court entered an "Order Denying Defendant's Motion to Alter or Amend Judgment." In said Order, the Circuit Court did not state any findings of fact and/or conclusions of law relied upon in denying KCBOE's motion to alter or amend its April 1, 2010 Order. The Circuit Court denied KCBOE's motion to alter or amend judgment, by the following relevant language:

On June 30, 2010, came the Plaintiff, Robert Fulmer, in person and by counsel, William L. Mundy, Esq. and James A. Spenia, Esq., and came the Defendant, Kanawha County Board of Education, by counsel, Billie Jo Streyle, Esq., for oral argument on the Defendant's motion.

After hearing oral argument of counsel, and after reviewing the memoranda of law submitted by the parties, this Court is of the opinion to deny the Defendant's Motion to Alter or Amend Judgment. (7/6/10 Order).

III. ASSIGNMENTS OF ERROR AND RULINGS BELOW

A. The Assignment of Error

1. The Circuit Court erred by finding Respondent proved that he had a clear legal right to the relief sought in the amount of \$259,566.99 and granting Respondent's Revised Petition for Writ of Mandamus, because KCBOE did not fail to raise the defense of mitigation of damages and did not waive the defense of mitigation of damages at the Level IV proceeding, as reflected by the Level IV transcript.
2. The Circuit Court erred by finding Respondent proved that he had a clear legal right to the relief sought in the amount of \$259,566.99 and granting Respondent's Revised Petition for Writ of Mandamus, because the Circuit Court improperly refused to deduct income actually known to be earned by Respondent, while terminated from KCBOE, in the amount of \$58,314.04, which resulted in Respondent being placed in a better position than he would have been had he not been terminated from KCBOE in violation of the public policy of West Virginia.
3. The Circuit Court erred by finding Respondent proved that he had a clear legal right to the relief sought in the amount of \$259,566.99 and granting Respondent's Revised Petition for Writ of Mandamus, because the Circuit Court awarded Respondent damages for a period of time, when he was not reinstated by KCBOE, for his own failure to have his teaching certificate renewed in violation of the public policy of West Virginia.
4. The Circuit Court erred by finding Respondent proved that he had a clear legal right to the relief sought in the amount of \$259,566.99 and granting Respondent's Revised Petition for Writ of Mandamus, because the Circuit Court ordered KCBOE pay Respondent improper pre-judgment interest and post-judgment interest, which were based on improper damages

calculations of Respondent.

5. The Circuit Court erred by finding Respondent proved that he had a clear legal right to the relief sought in the amount of \$259,566.99 and granting Respondent's Revised Petition for Writ of Mandamus, because the Circuit Court ordered KCBOE pay Respondent improper retirement benefits, which were based on improper damages calculations of Respondent.
6. The Circuit Court erred by finding Respondent proved that he had a clear legal right to the relief sought in the amount of \$259,566.99 and granting Respondent's Revised Petition for Writ of Mandamus absent conducting an evidentiary hearing on the disputed damages issues between the parties.

B. Rulings Below

By Order entered on April 1, 2010, the Circuit Court found that Respondent met his burden of proof in showing: (1) he had a clear legal right to the relief sought in his Revised Petition for Writ of Mandamus; (2) KCBOE had a legal duty to do what Respondent sought to compel; and (3) there were no other adequate remedies available Respondent. (4/1/10 Order: Pg. 5). The Circuit Court ordered KCBOE to pay Respondent damages in the amount of \$259,566.99, absent conducting an evidentiary hearing and absent addressing all issues disputed among the parties. (4/1/10 Order: Pg. 4, ¶ 7).

KCBOE moved to alter or amend the Circuit Court's April 1, 2010 Order, pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure, based upon the assignments of error noted herein. By Order entered on July 6, 2010, the Circuit Court denied KCBOE's request to alter or amend its judgment, absent noting any findings of fact or conclusions of law relied upon in reaching its decision.

IV. DISCUSSION OF LAW

1. Error No. 1: Improper Ruling Regarding Mitigation of Damages.

Pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure, a “motion to alter or amend the judgment shall be filed not later than ten days after entry of the judgment.” W. Va. R. C. P. 59(e). If a “motion is filed within ten days of the circuit court’s entry of judgment, the motion is treated as a motion to alter or amend under Rule 59(e).” Law v. Monongahela Power Company, Syl. Pt. 3, 210 W. Va. 549, 551, 558 S.E.2d 349, 351 (2001) (Citation omitted). “The standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed.” Wickland v. American Travellers Life Ins. Co., Syl. Pt. 1, 204 W. Va. 430, 513 S.E.2d 657 (1998).

“The standard of appellate review of a circuit court's order granting relief through the extraordinary writ of mandamus is de novo.” Hensley v. West Virginia Dep't of Health & Human Resources, Syl. Pt. 1, 203 W. Va. 456 508 S.E.2d 616 (1998) (Quotations omitted). The West Virginia Supreme Court of Appeals standard of review for proceedings in mandamus “has long been established that: A writ of mandamus will not issue unless three elements coexist--(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.” State ex rel. Burdette v. Zakaib, 224 W. Va. 325, 331 685 S.E.2d 903, 909 (2009) (Quotation and citations omitted). “[T]he burden of proof as to all the elements necessary to obtain mandamus is upon the party seeking the relief. . . a failure to meet any one of them is fatal.” Id. at 331, 685 S.E.2d at 909. (Citation omitted). “To entitle one to a writ of mandamus, the party seeking the writ must show a clear legal right thereto and a corresponding duty on the respondent to perform the act demanded.”

Dadisman v. Moore, Syl. Pt. 1, 181 W. Va. 779; 384 S.E.2d 816 (1988) (Quoting State ex rel. Cooke v. Jarrell, Syl. Pt. 2, 154 W. Va. 542; 177 S.E.2d 214 1970).

This Honorable Court has held: “Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have received in comparable employment where it is locally available, will be deducted from any award of back pay; however, the burden of raising mitigation is on the employer.” Mason County Board of Education v. State Superintendent of Schools, Syl. Pt. 2, 170 W.Va. 632, 633, 295 S.E.2d 719, 720 (1982). Moreover, “[w]ages from any job taken by a wrongfully discharged employee will be deducted from his or her back pay award whether the work taken is comparable to the work contracted for or not, if the employee’s performance of the job would have been incompatible with his or her performance of the contract.” Mason County Board of Education v. State Superintendent of Schools, Syl. Pt. 3, 170 W.Va. 632, 633, 295 S.E.2d 719, 720 (1982).

In the underlying proceeding, the Circuit Court erred by finding KCBOE wholly failed to raise the mitigation of damages defense at the Level IV hearing and waived the defense, because the facts relied upon by the Circuit Court were mistaken, as shown by the Level IV hearing transcript. The error of the Circuit Court resulted in Respondent being improperly awarded a full, flat back pay amount, which he did not have a clear legal right to receive from KCBOE. **(4/1/10 Order: Pgs. 2-4).**

A review of the Level IV transcript demonstrates: (1) KCBOE could not put on a damages case at the hearing, because the ALJ ruled damages were to be calculated post-hearing, if Respondent prevailed on his grievance; and (2) KCBOE did properly raise mitigation of damages at the hearing and preserved the defense. In particular, as the Level IV transcript shows counsel for Respondent

was questioning Respondent about the damages he was claiming to have suffered, as a result of his termination. Upon inquiry by counsel for KCBOE, the ALJ ruled that he would not address damages at the Level IV hearing, and, if Respondent prevailed on his grievance, KCBOE would be put to the task of calculating the damages, post-hearing. **(4/14/10 MAJJ, Level IV Transcript, Ex. 2, Pg. 141, Lines 1-11)**. The transcript further reflects counsel for Respondent's understanding of the ruling by the ALJ that damages would be calculated post-hearing and his discontinuation of questioning of Respondent regarding his wage information, based upon the ALJ's ruling. **(4/14/10 MAJJ, Level IV Transcript, Ex. 2, Pg. 141, Lines 12-13)**. Due to the ALJ's ruling that he would not address damages at the Level IV hearing, KCBOE was not required to and did not put on evidence in relation to mitigation of damages, because, if it had done so, KCBOE would be violating the order of the ALJ. However, after the ALJ stated his ruling to the parties concerning damages, counsel for KCBOE did raise and preserve the mitigation of damages defense regarding damages to be calculated post-hearing, by stating the following:

I mean we'd have to go back. . . I assume Mr. Fulmer's had some income over those years and we'd have to look (inaudible) and we would have to look at the whole picture assuming that's the order and, you know, assuming that the way it would be resolved.

(4/14/10 MAJJ, Level IV Transcript, Ex. 2, Pg. 141, Lines 20-24, Pg. 142, Lines 1-3). In response to KCBOE's statement concerning the need to consider Respondent's mitigation in calculating damages, the ALJ stated:

We think your point is taken, Mr. Withrow.

(4/14/10 MAJJ, Level IV Transcript, Ex. 2, Pg. Pg. 142, Lines 4-5). Moreover, as demonstrated by various correspondence of counsel for Respondent forwarded to KCBOE and the ALJ post-hearing, the damages aspect of the case was not concluded at the Level IV hearing. See See, **(6/17/10**

Response to MAAJ, Exs. F, G, H, J, K, L, N, and O).

As demonstrated by the foregoing, KCBOE could not put on damages in relation to mitigation of damages at the Level IV hearing, based upon the ALJ's ruling and did, in fact, raise mitigation of damages at the Level IV hearing. Therefore, the Circuit Court erred by finding Respondent met his burden of proof that he had a clear legal right in a flat back pay award and further erred in finding KCBOE had a legal duty to pay him a flat back pay award.

Additionally, KCBOE requests this Court find that it is legally entitled to have mitigation of damages factored into the back pay award of Respondent in this case, because KCBOE did not act with malice in terminating Respondent, as shown by the evidence in the underlying proceedings. In particular, Respondent attended a pre-disciplinary, evidentiary proceeding regarding the allegations of misconduct by the two (2) female students. After the hearing, a decision was rendered by an independent hearing examiner finding Respondent engaged in misconduct toward the two (2) students that justified his termination. KCBOE terminated Respondent only after it received the decision of the independent hearing examiner. Thus, there was no evidence demonstrating KCBOE maliciously terminated Respondent from his position at Nitro High School. Respondent earned at least \$58,314.04 in wages, while terminated from his position at Nitro High School. KCBOE is entitled to an offset of wages actually earned and or that could have been earned in comparable employment. Therefore, the Circuit Court's April 1, 2010 Order must be reversed, because Respondent did not have a clear legal right to the back pay awarded by the Circuit Court. See, State ex rel. Burdette v. Zakaib, 224 W. Va. 325, 331 685 S.E.2d 903, 909 (2009). Moreover, KCBOE requests this Court also find that it is entitled to utilize the mitigation of damages defense.

2. Error No. 2: Improper Award of Damages by Failure to Offset Income Earned.

“[P]ublic policy is that principle of law which holds that ‘no person can lawfully do that

which has a tendency to be injurious to the public or against public good even though 'no actual injury' may have resulted therefrom in a particular case to the public.” Willey v. Bracken, 2010 W. Va. LEXIS 104, 17 (Quoting Cordle v. General Hugh Mercer Corp., 174 W. Va. at 325, 325 S.E.2d at 114 (internal quotation omitted)). “[T]he sources determinative of public policy are, among others, our federal and state constitutions, our public statutes, our judicial decisions, the applicable principles of the common law, the acknowledged prevailing concepts of the federal and state governments relating to and affecting the safety, health, morals and general welfare of the people for whom government--with us--is factually established.” Id. at 17 (Quoting Morris v. Consolidation Coal Co., 191 W. Va. 426, 433 n.5, 446, S.E.2d 648, 655, n. 5 (1994)) (Internal quotation omitted). An award of back pay and lost wages and income serves to place the injured party in the financial position he/she would have enjoyed had he/she not been deprived of his/her income, either in part or in whole. Hensley v. West Virginia Dep't of Health & Human Resources, 203 W. Va. 456, 463 623 (Citing Gribben v. Kirk, 195 W.Va. 488, 501, 466 S.E.2d 147, 160 (1995). “Public policy strongly disfavors an injured plaintiff obtaining a double recovery.” Savage v. Booth, 196 W.Va. 65, 70, 468 S.E.2d 318, 323 (1996) (Citation omitted).

In funding public schools, the West Virginia Constitution provides that “[t]he legislature shall provide, by general law, for a thorough and efficient system of free schools.” W.Va. Const., Article XII § 1. Pursuant to Article XII § 5 of the West Virginia Constitution, “[t]he legislature shall provide for the support of free schools by appropriating thereto the interest of the invested ‘school fund,’ the net proceeds of all forfeitures and fines accruing to this State under the laws thereof and by general taxation of persons and property or otherwise. It shall also provide for raising in each county or district, by the authority of the people thereof, such a proportion of the amount required for the support of free schools therein as shall be prescribed by general laws.” Pursuant to Section 18-9A-1

of the West Virginia Code, the Legislature found and declared “that the future of education in this State is dependent upon a plan of financial support for the public schools which provides for a fair and adequate pay scale for teachers sufficient to ensure teacher excellence. . .” and established the “West Virginia Public School Support Plan” to support public schools, including the salaries of teachers. “The basic foundation allowance to the county for professional educators [teachers] shall be the amount of money required to pay the state minimum salaries[,]” subject to enumerated exceptions, in accordance with West Virginia Code 18A-4-1. W.Va. Code § 18-9A-4(a). Pursuant to West Virginia Code 18A-4-1, salaries are defined as: “(a) ‘Basic salaries’ which shall mean the salaries paid to teachers with zero years of experience and in accordance with the classification of certification and of training of said teachers; and (b) ‘advanced salaries’ which shall mean the basic salary plus an experience increment based on the allowable years of experience of the respective teachers in accordance with the schedule established herein for the applicable classification of certification and of training of said teachers.”

KCBOE’s teachers’ salaries are funded by taxpayer monies appropriated by the West Virginia Legislature. The basic allowance for teachers is determined by the amount of money required to pay the state minimum salaries. In the underlying proceeding, the Circuit Court erred in its April 1, 2010 Order by improperly awarding Respondent lost wages that are not due and owing to him. The Circuit Court refused to provide KCBOE with an offset of the income actually known to be earned by Respondent, while terminated, in the amount of \$58,314.04. Based upon the Court’s refusal to provide an offset, Respondent recouped his all of his lost wages that he would have earned from KCBOE and gained at least \$58,314.04 in additional income known to be earned by Respondent at other employment, while terminated. This resulted in Respondent being placed in better position than he would have been had he not been terminated by KCBOE at the taxpayers’

expense. This violates the principles in the West Virginia Constitution and the West Virginia Code in relation to the proper payment of teachers salaries, in violation of the public policy of West Virginia. Furthermore, in essence, the Circuit Court's ruling resulted in Respondent receiving a double recovery of income for the same time periods from KCBOE and his other employment, which violates public policy by placing Respondent in a better position than he would have been had he not been terminated by KCBOE. The Circuit Court's April 1, 2010 Order must be reversed, because Respondent did not have a clear legal right to the lost wages awarded by the Circuit Court. See, State ex rel. Burdette v. Zakaib, 224 W. Va. 325, 331 685 S.E.2d 903, 909 (2009).

3. Error No. 3: Improper Award of Damages When Teaching Certificate Not Valid.

In the underlying proceeding, the Circuit Court erred by awarding Respondent damages for a period of time, when he was not reinstated, due to his failure to get his teaching certificate renewed. **(4/1/10 Order: Pgs. 2-4)**. The Circuit Court awarded Respondent back pay and reimbursement for insurance premiums he paid from October 29, 2008 until the time he was reinstated to his position on December 15, 2008, which was improper.

The Level IV Decision ordering KCBOE reinstate Respondent was entered on October 29, 2008. In June 2008, Respondent filed an application for renewal of his teaching license with the West Virginia Department of Education. **(2/24/10 Show Cause Brief, Pg. 3)**. In September 2008, the West Virginia Department of Education informed Plaintiff that he needed to provide additional information to have his license renewed. **(2/24/10 Show Cause Brief, Pg. 3)**. Respondent did not provide the required information to the West Virginia Department of Education until December 1, 2008. **(2/24/10 Show Cause Brief, Pg. 3)**. The West Virginia Department of Education processed his application for renewal on December 5, 2008. **(2/24/10 Show Cause Brief, Pg. 3-4)**. After Respondent finally got his license renewed, he was reinstated to his position with KCBOE on or

about December 15, 2008. (2/24/10 Show Cause Brief, Pg. 4).

It is contrary to public policy to require KCBOE to pay the Respondent damages for a period of time, when he was not reinstated, because he failed to get his teaching license renewed. This is an abuse of taxpayers' monies, because Respondent is essentially being rewarded for failing to have a valid teaching certificate, which delayed his reinstatement. Therefore, the Circuit Court's April 1, 2010 Order must be reversed, because Respondent did not have a clear legal right to be awarded damages by the Circuit Court for a time frame that he was not reinstated to his teaching position, because he did not have a valid teaching certificate. See, State ex rel. Burdette v. Zakaib, 224 W. Va. 325, 331 685 S.E.2d 903, 909 (2009).

4. **Error No. 4: Improper Award Pre- Judgment Interest and Post-Judgment Interest**

"Pre-judgment interest. . . is a form of compensatory damages intended to make an injured plaintiff whole as far as loss of use of funds is concerned." Buckhannon-Upshur County Airport Authority v. R&R Coal Contracting, Syl. Pt. 1, 186 W.Va. 583, 413 S.E.2d 404 (1991). "[S]pecial damages [which includes lost wages, income, and similar out-of-pocket expenditures]. . . shall bear interest at the rate in effect for the calendar year in which the right to bring the same shall have accrued." W.Va. Code § 56-6-31(a). Post-judgment interest on a judgment or decree "for the payment of money. . . shall bear interest from the date [of the judgment]. . ." Id.

In the underlying proceeding, the Circuit Court erred by awarding Respondent pre-judgment interest in the amount of \$59,356.49 and post-judgment interest in the amount of \$19,795.99, because Respondent did not prove that he had a clear legal right to the interest. (2/26/10 Revised Petition for Writ of Mandamus, Pg. 2); (4/1/10 Order: Pgs. 2-4). In particular, as was discussed above, Respondent's calculation of back pay and benefits was improper. In calculating his pre-judgment and post-judgment interest, Respondent used his improper damages calculations in

calculating the interest he claimed was due and owing. Therefore, the Circuit Court's April 1, 2010 Order must be reversed, because Respondent did not have a clear legal right to be pre-judgment interest and post-judgment interest awarded damages by the Circuit Court. See, State ex rel. Burdette v. Zakaib, 224 W. Va. 325, 331 685 S.E.2d 903, 909 (2009).

5. Error No. 5: Improper Award for Retirement Benefits

In the underlying proceeding, the Circuit Court erred by awarding Respondent retirement contribution from KCBOE in the amount of \$9,687.15, because Respondent did not prove that he had a clear legal right to that amount. (2/14/10 Revised Petition for Writ of Mandamus, Pg. 2); (4/1/10 Order: Pgs. 2-4). Respondent calculated his retirement contributions by multiplying 7.5% of \$129,162.00 in salary he claimed was due and owing to him, which was improper, because the salary he used did not take into consideration the income actually earned by Respondent, while terminated, or income that could have been earned by him in comparable employment. (2/24/10 Revised Petition for Writ of Mandamus, Pg. 1). The Circuit Court's April 1, 2010 Order must be reversed, because Respondent did not have a clear legal right to be pre-judgment interest and post-judgment interest awarded damages by the Circuit Court. See, State ex rel. Burdette v. Zakaib, 224 W. Va. 325, 331 685 S.E.2d 903, 909 (2009).

6. Error No. 6: Absence of Evidentiary Show Cause Hearing: Improper Procedure.

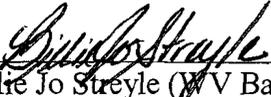
At the Show Cause hearing, Respondent provided the Circuit Court and KCBOE with his Revised Petition for Writ of Mandamus. The Circuit Court only heard oral argument of counsel regarding mitigation of damages, although there were multiple other significant, disputed issues among the parties. The Court took no evidence but granted Respondent's Revised Petition for Writ of Mandamus in, its entirety, from the bench. The Circuit Court erred, because it failed to conduct an evidentiary hearing where it mandated Respondent prove the requisite elements to have his Revised

Petition for Writ of Mandamus granted. The Circuit Court simply accepted the calculations in Respondent's Petition for Writ of Mandamus as accurate, which was submitted on the date of the Show Cause Hearing, and ruled from the bench the relief requested by Respondent was granted. The procedure implemented by the Circuit Court was improper and prejudicial to KCBOE. Therefore, the Circuit Court's April 1, 2010 Order must be reversed.

V. RELIEF PRAYED FOR

The Circuit Court erred on numerous grounds, by and through its April 1, 2010 Order, which resulted in Respondent being awarded damages that he is not entitled to recover. The Circuit Court refused KCBOE's request to alter or amend its judgment, by and through its July 6, 2010 Order, absent stating any findings of fact or conclusions relied upon in reaching its decision. The issues raised in this Petition for Appeal impacts both KCBOE and the taxpayers whose monies will inevitably be used to pay the damages award to Respondent. KCBOE respectfully requests this Court accept its Petition for Appeal, based upon the reasons cited herein or those apparent to the Court, because of the significance of the issues to both KCBOE and the public. KCBOE further prays that it be provided with the opportunity to oral present the issues raised in its Petition for Appeal.

**Kanawha County Board of Education,
By Counsel,**



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FILED

ROBERT FULMER,

Respondent (Plaintiff),

2010 NOV -8 PM 4: 14

CATHY S. BRISSON, CLERK
KANAWHA CO. CIRCUIT COURT

v.

KANAWHA COUNTY BOARD OF
EDUCATION,

Petitioner (Defendant).

Appeal No. _____
[Civil Action No. 09-MISC-37
Honorable Paul Zakaib]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing "Petition for Appeal" was served upon the following parties by U.S. Mail on this day, November 8, 2010:

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