

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**ROBERT FULMER,**

**Plaintiff / Respondent,**

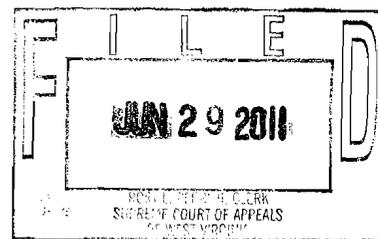
**v.**

**KANAWHA COUNTY BOARD OF  
EDUCATION,**

**Defendant / Petitioner.**

**Appeal No. 101578**

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



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**PETITIONER KANAWHA COUNTY BOARD OF EDUCATION'S REPLY TO  
RESPONSE OF RESPONDENT ROBERT FULMER TO REPLY OF PETITIONER  
KANAWHA COUNTY BOARD OF EDUCATION**

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Wednesday, June 29, 2011

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## I. INTRODUCTION

Petitioner, Kanawha County Board of Education, Defendant below, files this reply to “Response of Respondent Robert Fulmer to Reply of Petitioner Kanawha County Board of Education,” in accordance with the requirements contained in this Court’s April 14, 2011 Order.

## II. ARGUMENT

### A. THE *DE NOVO* STANDARD OF REVIEW IS THE PROPER STANDARD OF REVIEW, AND, AS THE UNDERLYING RECORD REFLECTS, THE WRIT OF MANDAMUS WAS IMPROPERLY GRANTED BY THE CIRCUIT COURT, BECAUSE RESPONDENT DID NOT HAVE A CLEAR LEGAL RIGHT TO THE RELIEF HE WAS AWARDED IN THE AMOUNT OF \$259,566.99.

In the “Reply of Petitioner Kanawha County Board of Education,” Petitioner argued the proper standard of review to be applied in this matter is *de novo*. (Petitioner’s Reply Pgs. 1-3). In support of its position, Petitioner relied upon this Court’s decisions in Wickland v. American Travellers Life Ins. Co., Syl. Pt. 1, 204 W.Va. 430, 513 S.E.2d 657 (1998) and Hensley v. West Virginia Dep’t of Health & Human Resources, Syl. Pt. 1, 203 W.Va. 456, 508 S.E.2d 616 (1998). In particular, as Chief Justice Davis stated in Hensley, “[t]he standard of appellate review of a circuit court order granting relief through the extraordinary writ of mandamus is *de novo*.” Hensley, 203 W.Va. at 460, 508 S.E.2d at 620. On appeal, this Court “consider[s] *de novo* whether the legal prerequisites for mandamus relief are present.” 263 Towing v. Hannah et al., 222 W.Va. 80, 85, 662 S.E.2d 522, 527 (2008) (Quotation omitted).

In Argument A of “Response of Respondent Robert Fulmer to Reply of Petitioner of Kanawha County Board of Education,” it appears Respondent has concurred that the standard of review in determining whether a writ of mandamus was properly granted by a circuit court is *de novo*. (Respondent Response: Pgs. 1-6). However, if he does not concur, Petitioner believes that it adequately briefed its position regarding the proper standard of review to be applied in this

appeal in the “Reply of Petitioner Kanawha County Board of Education” and would refer this Court to the legal arguments contained in pages one (1) through three (3) of said reply. See, Wickland v. American Travellers Life Ins. Co., Syl. Pt. 1, 204 W.Va. 430, 513 S.E.2d 657 (1998) and Hensley v. West Virginia Dep’t of Health & Human Resources, Syl. Pt. 1, 203 W.Va. 456, 508 S.E.2d 616 (1998).

In “Response of Respondent Robert Fulmer to Reply of Petitioner of Kanawha County Board of Education,” Respondent stated that “[a]lthough KCBOE goes to great lengths, in its Reply, to stress that the *de novo* standard of review applies, it pays scant attention to the standards for the issuance of writ of mandamus. It is well settled 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 the respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.” (Respondent’s Response: Pg. 3).

With all due respect to Respondent, Petitioner disagrees with Respondent’s argument that Petitioner “paid scant attention to the standards for the issuance of writ of mandamus.” The entire subject of Petitioner’s thirty-nine (39) page “Petition for Appeal” contains Petitioner’s position as to why the Circuit Court erred in granting the relief Respondent requested in the writ of mandamus proceeding, because he did not have a clear legal right in the relief awarded to him by the Circuit Court. The “Petition for Appeal” contains a detailed and extensive statement of facts and procedural history of the underlying proceedings, based upon the underlying record (relevant to a *de novo* standard of review), and raises six (6) errors on appeal as to why Petitioner believed the Circuit Court erred in awarding Respondent extraordinary relief in the amount of \$259,566.99. Throughout the “Petition for Appeal,” Petitioner argued the Circuit Court erred, because Respondent did not have a “clear legal right” to the relief he was awarded, which is a

mandatory legal requirement in granting a writ of mandamus. Petitioner believes it articulated substantial and detailed grounds in its "Petition for Appeal" that reflects the Circuit Court erred in this matter. Petitioner respectfully refers this Court to the statements of facts, procedural history, and six (6) assignments of error contained in its thirty-nine (39) page "Petition for Appeal."

**B. PETITIONER DID PROPERLY RAISE ERROR NO. 4, ERROR NO. 5, AND ERROR NO. 6, AS THE RECORD BELOW DEMONSTRATES.**

In Argument B of "Response of Respondent Robert Fulmer to Reply of Petitioner of Kanawha County Board of Education," Respondent argued that Petitioner failed to raise Error No. 4 in relation to pre-judgment and post-judgment interest, Error No. 5 in relation to retirement benefits, and Error No. 6 in relation to the Circuit Court's failure to provide a proper evidentiary hearing in the underlying writ of mandamus proceeding. Petitioner believes that it fully briefed all of these issues at pages four (4) through nine (9) of the "Reply of Petitioner Kanawha County Board of Education" and respectfully refers the Court to the arguments forwarded therein regarding these issues.

**C. THE RECORD FROM THE UNDERLYING PROCEEDING SPEAKS FOR ITSELF IN RELATION TO THE GRIEVANCE BOARD HEARING, WHICH DEMONSTRATES THE ARGUMENTS FORWARDED BY RESPONDENT IN ARGUMENT C. OF HIS RESPONSE ARE INCORRECT.**

In Argument C of "Response of Respondent Robert Fulmer to Reply of Petitioner Kanawha County Board of Education," Respondent argued: (1) The Grievance Board awarded specific damages to him for specific time periods; (2) Petitioner did not raise any damages evidence, cross-examine him, object to his damages evidence, or properly raise the issue of mitigation of damages; (3) Petitioner silently acquiesced to the alleged error of the Grievance Board and should not be permitted to invite error; and (4) Petitioner had a duty to introduce evidence

regarding mitigation of damages at the Grievance Board hearing, but it chose not to do so. (Respondent's Response: Pgs. 8-13). He further stated to this Court that "the Grievance Board ordered the payment of wages which Mr. Fulmer would have received for the school years 2005-2006, 2006-2007, 2007-2008 and until the time of his reinstatement in late 2008. The Grievance Board also ordered the payment of damages for benefits, i.e. health insurance and retirement, for the years 2005-2008 to which Mr. Fulmer would have been entitled had he not been terminated." (Respondent's Response: Pg. 8). Again, with all due respect to Respondent, Petitioner cannot understand how these arguments can be forwarded to this Court, as they were to the Circuit Court, because the arguments consist of the omission of relevant and critical facts, which are and were relevant to the relief he requested in the writ of mandamus proceeding and which resulted in an improper Order by the Circuit Court.

Petitioner is confident that it fully briefed all of these issues in reliance on the underlying record, which demonstrates: (1) The cited portions of the transcript from the Grievance Proceeding showed that the Administrative Law Judge stopped Respondent's counsel from introducing damages evidence, because the Administrative Law Judge ruled, if Respondent prevailed on the grievance, the parties were to calculate damages post-hearing (which is why KCBOE did not present damages evidence); (2) Petitioner explicitly stated to the Administrative Law Judge that income over the years, when Respondent was terminated, would have to be considered by the parties post-hearing in calculating damages (i.e. mitigation of damages), which was confirmed by the Administrative Law Judge; (3) Respondent's counsel forwarded multiple letters, after the Grievance Proceeding was concluded, which explicitly stated his position that the damages aspect of the case needed to be "concluded" and which reflected his position on mitigation of damages; thus, based upon Respondent's counsel's own words, the damages aspect

of the case was not concluded post-hearing and mitigation of damages was still being disputed by the parties. (Petitioner's Petition for Appeal: Pgs. 10-16; 19-20; 23-27; and 30-33). Based upon the record below, Petitioner requests this Court find that it properly raised the mitigation of damages issue at the Grievance Proceeding, Petitioner properly abided by the ruling of the Administrative Law Judge and did not present damages evidence at the Grievance Proceeding, and mitigation of damages must be considered in calculating the proper amount of damages due and owing to Respondent.

**D. THE RELIEF AWARDED TO PETITIONER IS NOT SUPPORTED BY THE EVIDENCE, BECAUSE THERE WAS NO EVIDENTIARY HEARING CONDUCTED BY THE CIRCUIT COURT; THEREFORE, THERE WAS NO EVIDENCE ENTERED AT THE SHOW CAUSE HEARING DEMONSTRATING RESPONDENT HAD A CLEAR LEGAL RIGHT TO THE RELIEF HE WAS AWARDED BY THE CIRCUIT COURT IN THE AMOUNT OF \$259,566.99.**

In Argument D of "Response of Respondent Robert Fulmer to Reply of Petitioner Kanawha County Board of Education," Respondent argued that, although he submitted "Plaintiff's Revised Calculation of Damages" to the Circuit Court on the date of the Show Cause hearing, because his initial calculation of the relief he requested was wrong, the Circuit Court's Order awarding him relief in the amount of \$259,566.99, after oral argument of counsel on one (1) of the numerous issues raised by Petitioner was properly supported by "evidence" that was introduced. (Respondent's Response: Pgs 14-16). This simply is not accurate, as the record in this case reflects.

Petitioner seems to be claiming the parties legal memoranda and exhibits filed with the Circuit Clerk were items "introduced into evidence" by the Circuit Court, by and through the filing. (Respondent's Response: Pgs 14-16). The legal memoranda and exhibits filed with the Circuit Clerk, prior to the Show Cause hearing, were not items "introduced into evidence" by the Circuit Court. The February 25, 2010 Transcript from the Show Cause hearing demonstrates

there was absolutely no evidence taken in the matter, prior to the Court awarding Respondent \$259,566.99.

As Error No. 6 in Petitioner's "Petition for Appeal" states, the Circuit Court erred, because there was no evidentiary hearing conducted on the date of the Show Cause hearing. (Petition for Appeal: Pgs. 38-39). The Circuit Court took no evidence at all at the hearing conducted on February 25, 2010. (2/25/10 Transcript). The only thing that occurred at the Show Cause hearing was that: (1) Respondent gave Judge Zakaib a copy of "Plaintiff's Revised Calculation of Damages" where he set forth what he deemed the proper calculation of damages; and (2) the Circuit Court only heard oral argument in relation to the mitigation of damages issue before awarding Respondent \$259,566.99. (2/25/10 Transcript). Nowhere in the transcript does it show the Circuit Court took any evidence to ensure that Respondent was legally entitled to \$259,566.99, because the Circuit Court never permitted the introduction of any evidence.

On the date of the Show Cause hearing, Petitioner was present with a PowerPoint for opening statement, Petitioner was present with witnesses to testify as to the salary and benefit information relevant to the proceeding, and Petitioner was present with exhibits relevant to Respondent's salary and benefits to introduce into evidence with the Circuit Court. However, the Circuit Court did not hear any testimony of witnesses nor did the Court address and/or rule upon the admissibility of any documents establishing Respondent's salary and/or benefits. See, Rules 104, 401-403, 601-602, and 901 of the West Virginia Rules of Evidence. The Court simply heard oral argument of counsel on one (1) issue and awarded Respondent his requested relief in the amount of \$259,566.99, based upon calculations he submitted to the Circuit Court and to Petitioner at the Show Cause hearing. Petitioner respectfully requests that this Court review the February 25, 2010 transcript, because it demonstrates Respondent's argument concerning the introduction of

evidence is incorrect and further demonstrates the Circuit Court did nothing to ensure that Respondent was legally entitled to \$259,566.99 in relief.

**E. PETITIONER REQUESTS EXHIBITS A, B, AND C AFFIXED TO RESPONDENT'S RESPONSE TO PETITION FOR APPEAL BE STRICKEN, BECAUSE THEY WERE NOT PART OF THE UNDERLYING RECORD BEFORE THE CIRCUIT COURT.**

In the "Reply of Petitioner Kanawha County Board of Education," Petitioner requested that Exhibits A, B, and C be stricken, because they were not part of the record before the Circuit Court. In Argument E of "Response of Respondent Robert Fulmer to Reply of Petitioner Kanawha County Board of Education," Respondent argued that Exhibit A was a portion of the transcript before the Grievance Board, but it was not crucial whether Exhibit A be considered or not. (Respondent's Response: Pg. 17). Petitioner states that Exhibit A was never submitted to the Circuit Court by Respondent, during the course of the writ of mandamus proceeding, and should not be considered by this Court. Moreover, Respondent argues Exhibit B and Exhibit C should be reviewed by this Court but did not argue these were properly before the Circuit Court in the underlying proceedings. Petitioner contends that these documents were never submitted to the Circuit Court by Respondent at any point in the writ of mandamus proceeding, which is reflected by the record below. The first time these exhibits were submitted was on appeal with this Court, which is improper. Therefore, Petitioner requests Exhibit A, B, and C be stricken.

**F. RESPONDENT'S ARGUMENT THAT THE FINDINGS OF FACT AND CONCLUSIONS OF LAW CONTAINED IN THE CIRCUIT COURT'S APRIL 1, 2010 ORDER ARE SUBSUMED IN THE CIRCUIT COURT'S ONE (1) PAGE JULY 6, 2010 ORDER MUST BE REJECTED, BECAUSE THE ARGUMENT IS NOT SUPPORTED BY LAW.**

In argument F of "Response of Respondent Robert Fulmer to Reply of Petitioner Kanawha County Board of Education," Respondent continues to argue that facts discussed in the Circuit Court's April 1, 2010 Order should be incorporated into the Circuit Court's one (1) page July 6,

2010 Order. To support his position, Respondent did not cite to any legal authority but simply argued the Circuit Court was not required to restate its facts in the July 6, 2010 Order. Petitioner believes that it fully briefed this issue in its "Reply of Petitioner Kanawha County Board of Education" at pages thirteen (13) through fourteen (14). Petitioner contends that July 1, 2010 Order speaks for itself insofar as the Circuit Court elected not to state any findings of fact and/or conclusions of law before denying Petitioner's request for the Circuit Court to alter or amend its Order granting Respondent \$259,566.99 in relief. Therefore, the facts contained in the Circuit Court's April 1, 2010 Order must not be incorporated into the July 1, 2010 Order of the Circuit Court.

### III. CONCLUSION

Petitioner requests this Court grant the relief prayed for in its "Petition for Appeal" and in the "Reply of Petitioner Kanawha County Board of Education."

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



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ROBERT FULMER,  
Respondent (Plaintiff),

v.

Appeal No. 101578  
[Civil Action No. 09-MISC-37  
Honorable Paul Zakaib]

KANAWHA COUNTY BOARD OF  
EDUCATION,  
Petitioner (Defendant).

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of foregoing "PETITIONER KANAWHA COUNTY BOARD OF EDUCATION'S REPLY TO RESPONSE OF RESPONDENT ROBERT FULMER TO REPLY OF PETITIONER KANAWHA COUNTY BOARD OF EDUCATION" was served upon the following parties by U.S. Mail on this day, Wednesday June 29, 2011:

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