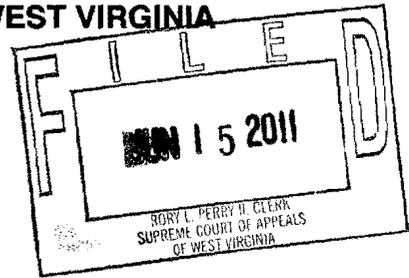


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



ROBERT FULMER,
Respondent (Plaintiff),

v.

Appeal No. 101578
[Appeal from Civil Action
No. 09-MISC-371
Honorable Paul Zakaib]

KANAWHA COUNTY BOARD OF
EDUCATION,

Petitioner (Defendant).

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

June 14, 2011

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

NOW COMES Respondent Robert Fulmer (hereinafter "Respondent," "Respondent/Plaintiff" or "Mr. Fulmer"), by counsel, Mundy and Associates, and files this Response, pursuant to Rule 3(f) of the West Virginia Rules of Appellate Procedure, to the Reply of Petitioner Kanawha County Board of Education.

I. ARGUMENT

A. UNDER THE *DE NOVO* STANDARD OF APPELLATE REVIEW, THE WRIT OF MANDAMUS WAS PROPERLY GRANTED.

Petitioner Kanawha County Board of Education (hereinafter "KCBOE") argues in its initial argument in the Reply of Petitioner Kanawha County Board of Education (hereinafter "KCBOE's Reply") that Respondent Fulmer incorrectly stated the standard of review to be applied herein and that he relied upon "secondary legal sources."

Respondent Fulmer fully understands and acknowledges that "the standard of review applicable to an appeal from a motion to alter or amend 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., 204 W. Va. 430, 531 S.E.2d 657 (1998). Moreover, the standard of appellate review of a circuit court's order granting relief through a writ of mandamus is *de novo*. Hensley v. West Virginia Dep't of Health & Human Resources, 203 W. Va. 456, 508 S.E.2d 616 (1998).

However, as indicated by West Virginia Supreme Court of Appeals Justice Robin Jean Davis; former Supreme Court Justice Franklin D. Cleckley and co-author

Louis J. Palmer, Jr. in their "Litigation Handbook on West Virginia Rules of Civil Procedure," Second Edition, "an abuse of discretion standard is used in reviewing a trial court's decision to grant or deny a motion under Rule 59(e). The abuse of discretion review is superimposed on the standard of review used for the original judgment." *Id.* at §59(e)[II][d].¹ Petitioner KCBOE relies upon Blake v. Charleston Area Medical Center, 201 W. Va. 469, 498 S.E.2d 41 (1997), for the proposition that "[w]hen employing the *de novo* standard of review, [this Court] review[s] anew the findings and conclusions of the circuit court, affording no deference to the previous decision maker." However, as Justice Davis further explained in Blake, "[g]enerally, when determining the propriety of a circuit court's ruling, we employ a multifaceted standard of review. 'This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*.'" Blake, 498 S.E. 2d at 46.

Although the standard of review applicable to an appeal from a motion to alter or amend a judgment pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure is the same standard which would apply to the underlying judgment upon which the motion is based (the writ of mandamus), the fact remains that Petitioner KCBOE is appealing the Order Denying Defendant's Motion to Alter or Amend Judgment. As set forth more fully in the Respondent's Response to Petition for Appeal, the KCBOE set forth three grounds in its Motion to Alter or Amend Judgment. Those

¹ The authors cited to Venegas-Hernandez v. Sonolux Records, 370 F.3d 183 (1st Cir. 2004) ("We review for abuse of discretion the district court's decision to grant Rule 59(e) motion. Williams v. Poulos, 11 F.3d 271, 289 (1st Cir. 1993); DeSenne v. Jamestown Boat Yard, Inc., 968 F.2d 1388, 1392 (1st Cir. 1992). Our abuse of discretion review is superimposed on the standard of review the Rule 59(e) judge exercises over the original judgment.")

grounds were: (1) that counsel for Mr. Fulmer made false and fraudulent misrepresentations² by stating that KCBOE failed to attempt to raise the issue of mitigation of damages; (2) that the Circuit Court did not provide KCBOE with a setoff for income which Mr. Fulmer had earned³, and (3) that Mr. Fulmer was awarded damages for a time period during which his teaching certificate had not been renewed.

Although 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 a 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 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). Respondent Fulmer clearly meets these three standards.

Subsequent to the October 28, 2008, Decision from the Grievance Board ordering Petitioner KCBOE “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 his position, with legal interest on any back pay,” the Petitioner KCBOE did not appeal this decision and did not request an additional Grievance Board hearing to address damages or any other issue. (See Exhibit A to Plaintiff’s Response to

² In its Petition for Appeal, KCBOE completely changed its earlier allegation of “false and fraudulent misrepresentations” to alleged “omissions of fact” by counsel for Mr. Fulmer. See, Petition for Appeal, at page 7.

³ Circuit Court Judge Zakaib found that the Grievance Board order “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.” See, Order on Plaintiff’s Petition for Writ of Mandamus, at Findings of Fact No. 8.

Defendant, Kanawha County Board Of Education's, Motion to Alter or Amend Judgment.)

For the next year, counsel for Respondent Fulmer repeatedly requested information from Petitioner KCBOE in order to perform the mathematical calculation of the specific dollar figure of his lost wages and benefits. (See, Exhibits F-J, L and M to Plaintiff's Response to Defendants, Kanawha County Board of Education's, Motion to Alter or Amend Judgment.) During this period of attempting to obtain correct information from KCBOE, Respondent Fulmer requested a second hearing before the Grievance Board regarding damages in light of his inability to receive adequate information or an agreement with KCBOE regarding damages. (See, Exhibit K to Plaintiff's Response to Defendant, Kanawha County Board of Education's, Motion to Alter or Amend Judgment.)

After the Grievance Board failed to respond to Respondent Fulmer's initial request for a second hearing, he submitted a second request. (See, Exhibit N to Plaintiff's Response to Defendant, Kanawha County Board of Education's, Motion to Alter or Amend Judgment.) The Grievance Board denied that request on the grounds that it was "without statutory authority to reopen this matter to conduct a hearing to address a dispute over damages." The Grievance's Board's Order directed Respondent Fulmer's attention to W. Va. Code §18-29-9, which provides for mandamus proceedings. (See, Order Denying Request for Hearing, dated September 29, 2009, attached as Exhibit O to Response to Motion to Alter or Amend Judgment.)

Clearly, then, Respondent Fulmer had no “adequate remedy” other than the filing of the Writ of Mandamus to enforce the Grievance Board’s decision. See, State ex rel. Burdette, 685 S.E.2d at 903. Moreover, inasmuch as the Grievance Board had ordered reinstatement of Respondent Fulmer to his previous position and compensation for lost wages, benefits and legal interest on any back pay, Mr. Fulmer established the required second element for the granting of a writ of mandamus: that the KCBOE had a “legal duty... to do the thing” which Mr. Fulmer had sought to compel by the mandamus action. See, State ex rel. Burdette, 685 S.E.2d at 903.

The third element necessary for the granting of a writ of mandamus is “a clear legal right ... to the relief sought.” See, State ex rel. Burdette, 685 S.E.2d at 903. This Court, in Smith v. W.Va. State Board of Education, 170 W. Va. 593, 295 S.E.2d 680 (1982), explained the requirement of “a clear legal right”:

The clear legal right to the relief sought is generally a question of standing. Thus, where the individual has a special interest in the sense that he is part of the class that is being affected by the action then he ordinarily is found to have a clear legal right. Walls v. Miller, 162 W.Va. 563, 251 S.E.2d 491 (1978). Moreover, where the right sought to be enforced is a public one in the sense that it is based upon a general statute or affects the public at large the mandamus proceeding can be brought by any citizen, taxpayer, or voter. (Citations omitted.)

The clear legal right of the petitioner to bring a writ of mandamus besides involving a standing issue is also entwined in the legal duty which the respondent is required to perform. This is the second element of our traditional test for the appropriateness of a writ of mandamus. There is a certain amount of legal sophistry in this area because if there were such a clear legal right on behalf of the petitioner to the relief sought and the countervailing legal duty on the respondent, the matter would be resolved without court

intervention. In the usual case the matter at issue may be somewhat opaque until the court pronounces the clear legal right and duty. Typical of this category of mandamus cases is where the respondent refuses to act because he relies on an ordinance which the petitioner claims is invalid or unconstitutional. (Citations omitted.) Much of the same utilization of the writ of mandamus has been made in regard to the validity of statutes. (Citations omitted.)

Smith, 295 S.E.2d at 683.

Therefore, as Judge Zakaib found in the hearing on the Writ of Mandamus and in his Order on Plaintiff's Petition for Writ of Mandamus, Respondent Fulmer has a clear legal right to lost wages, benefits and legal interest on back pay.

B. PETITIONER KCBOE DID NOT RAISE THREE ALLEGED ERRORS IN ITS MOTION TO ALTER OR AMEND JUDGMENT AND, ACCORDINGLY, THESE ARGUMENTS SHOULD NOT BE CONSIDERED ON APPEAL.

As set forth more fully in Respondent Fulmer's Response to Petition for Appeal, Petitioner KCBOE set forth only three specific grounds in its Motion to Alter or Amend Judgment. Accordingly, KCBOE should not be permitted to pursue three additional grounds which it set forth in its Petition for Appeal. KCBOE responds to this premise by stating, in its Reply, that this is not correct and that this Court has authority to resolve "assignments of non-jurisdictional errors" which have been "passed upon" by the court below and "fairly arising upon portions of the record designated for appellate review." KCBOE cites to Skidmore v. Skidmore, 225 W. Va. 235, 691 S.E.2d 830 (2010), a Per Curiam opinion, in support of its assertions.

The Court in Skidmore did not consider errors claimed on appeal which had not been included in a Rule 59(e) Motion to Alter or Amend Judgment. Moreover,

Skidmore quoted the “fairly arising” language in discussing the necessity of designating the record on appeal. The Petitioner KCBOE designated all portions of the Writ of Mandamus proceedings as part of the record on appeal. That record establishes that, in the Show Cause hearing before Judge Zakaib, KCBOE failed to introduce any evidence relating to the three additional errors which it now asserts. Those errors are (1) Error No. 4, that pre-judgment and post-judgment interest was calculated improperly based on Respondent Fulmer’s allegedly “improper” calculation of damages; (2) Error No. 5, that the Circuit Court improperly awarded retirement benefits based upon an “improper” salary calculation, and (3) Error No. 6, that the Circuit Court accepted Mr. Fulmer’s damages calculations without the taking of any evidence.

The record in the Show Cause proceeding reflects that Petitioner KCBOE did not raise the issues of pre-judgment and post-judgment interest or retirement in that proceeding. KCBOE did not present any evidence regarding pre- and post-judgment interest or retirement before Judge Zakaib in the Writ of Mandamus proceedings and, contrary to what it seems to argue on appeal, it was not prevented from doing so. At the very least, if KCBOE believed that Judge Zakaib somehow prevented it from introducing evidence of any type, it was required to have presented a proffer of evidence before the Court. This was not done.

Similarly, to the extent that this Court is considering the document which Petitioner KCBOE contends is a transcript⁴ of the proceedings before the Grievance Board, that “transcript” illustrates that KCBOE likewise did not introduce any evidence concerning two of the alleged errors, pre-judgment and post-judgment interest and

⁴ See, discussion of this issue at C., 2., infra.

retirement benefits, before the Grievance Board⁵. At the Grievance Board hearing, Petitioner KCBOE in fact introduced no evidence whatsoever concerning damages and only presented one witness in support of all other issues, and her testimony was not specific to Mr. Fulmer or the allegations against him.

C. THE GRIEVANCE BOARD ADMINISTRATIVE LAW JUDGE'S ORDER MADE AN AWARD OF DAMAGES WHICH DID NOT REQUIRE A DEDUCTION FOR MITIGATION OF DAMAGES.

1. The Grievance Board Order awarded specific damages to Mr. Fulmer for specific time periods.

The Grievance Board's Order is the only official record of the ruling of the Grievance Board. That Order requires the KCBOE to pay Mr. Fulmer lost wages and benefits "had he remained in his position" along with "legal interest on any back pay." (See, Decision of ALJ M. Paul Marteney dated October 29, 2008, at p. 13, attached as Exhibit A to Plaintiff's Response to Defendant, KCBOE's, Motion to Alter or Amend Judgment.)

Therefore, the Grievance Board ordered the payment of wages which Mr. Fulmer would have received for the school years of 2005-2006⁶, 2006-2007, 2007-2008 and until the time of his reinstatement in late 2008. The Grievance Board also ordered 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.

The Grievance Board hearing was held February 5 and 6, 2008, but the Board did not issue its Order until October 29, 2008. It was accordingly impossible for the Grievance Board ALJ to have calculated a precise numerical award based upon the

⁵ Petitioner's Error No. 6, that Circuit Court accepted Mr. Fulmer's damages calculation without the taking of evidence, could not, of course, have been considered at the Grievance Board hearing.

⁶ Mr. Fulmer was terminated on July 12, 2005.

February hearing. Teachers' salaries are based upon formulas which change every year. Mr. Fulmer testified regarding his income (or lack thereof) from the KCBOE for the years 2004, 2005, 2006, 2007 and 2008, as more fully discussed at D., infra, and he also introduced other testimony and documentary evidence which supports the damages awarded him in the Writ of Mandamus proceedings.

Importantly, the Grievance Board Order does not require a deduction for mitigation of damages. It is black letter law that "a court only speaks through its orders." The Grievance Board's Order is the only ruling which it has ever issued in the matter of Robert Fulmer. See, State ex rel. Kaufman v. Zakaib, 207 W.Va. 662, 535 S.E.2d 727 (2000). Moreover, the Grievance Board Order also does not indicate that damages and liability would be bifurcated.

Therefore, since mitigation of damages was not ordered by the Grievance Board, and damages were not bifurcated from the liability issues, the Grievance Board's Order awarding "lost wages and benefits" and "interest on any back pay" and not ordering a deduction for mitigation of damages is clear and conclusive.

2. Petitioner KCBOE did not introduce any damages evidence, cross-examine Mr. Fulmer, object to Mr. Fulmer's damages evidence or properly raise the issue of mitigation of damages.

No official, complete transcript of the Grievance Board hearing exists.

Apparently only a tape recording was made of those proceedings. The only portions of the hearing which arguably are in the record before this Court are contained in an attachment to Defendant KCBOE's Motion to Alter or Amend Judgment as Exhibit 2. The source of the portion of the Grievance Board hearing "transcript" attached as Exhibit 2 to that motion has never been made known to Respondent Fulmer. The exhibit contains what apparently is being represented as pages 135-142 of a Grievance

Board hearing transcript. Nowhere in the record before this Court is an explanation as to the source of this partial "transcript" or who prepared it. The partial document contains no certification by a court reporter and, indeed, not even a cover page or a signature from a reporter.

The accuracy of the purported "transcript" arguably, then, is not part of the record before this Court. Petitioner KCBOE relies on this document to contend that the Grievance Board Administrative Law Judge "ruled" that damages were not to be calculated at the hearing and that KCBOE "did properly raise the mitigation of damages defense." (See, Reply of Petitioner Kanawha County Board of Education, at p. 9.)

To the extent the Court wishes to rely upon the unofficial, incomplete "transcript," rather than upon the Grievance Board's Order, the "transcript" does not reflect either an objection by KCBOE or a ruling by the Administrative Law Judge on the issue of mitigation of damages. The exchange on this issue in the purported "transcript" reads as follows:

Q: Bob, did you – let me show you what we've marked as Exhibit 27, if you'd be so kind as to turn to that exhibit. Can you recognize that, please?

A: Yes.

MR. WITHROW: Just a procedural matter. I mean I'm assuming here that you're trying to establish damages or cost for repayment in the event the Board orders Mr. Fulmer to be reinstated. It's generally been my experience that this Board doesn't write a detailed order that says you pay X amount. It says could be reinstated with back pay, benefits, et cetera, without any specific findings of what that might be. And when the case is all resolved, again assuming that there's no appeals, or if there are appeals, appeals are exhausted then there's, you know, an adverse finding we

generally get together and figure out back wages, benefits, and unless there's some disagreement, there has to be some enforcement in Circuit Court, then these things might become more relevant, but I'm not sure these things are relevant for your purposes.

EXAMINER GILLOOLY: It is my observation, although my tenure here is relatively brief, that it is handled in the matter that Counsel has just described. There is not a requirement for putting on a damages case in the way one would do it, say in, oh, Circuit Court. In the event the Grievant is successful I would expect the order to read pretty much as Mr. Withrow has described, put to the School Board to figure out what he's out for the time that she (sic) should have been paid, and then if there's a dispute about it, as Mr. Withrow says, deal with it at that time, if that's of any help to you, Counsel.

MR. WITHROW: I mean we'd have to go back. We probably don't need all this on the record. I assume Mr. Fulmer's had some income over those years and we'd have to look (inaudible) and we would look at the whole picture assuming that's the order and, you know, assuming that's the way it would be resolved.

See, Exhibit 2 to KCBOE's Motion to Alter or Amend Judgment [emphasis added]

Circuit Court Judge Zakaib correctly held at the Show Cause hearing that this exchange did not constitute KCBOE having raised the issue of mitigation of damages. Contrary to KCBOE's assertions, a proper objection was not made before the Administrative Law Judge and, instead, KCBOE's counsel attempted to influence the ALJ in his conduct of the hearing. Moreover, the ALJ did not make a clear ruling -- orally-- even if KCBOE's counsel's comments set forth in the unofficial "transcript" could be construed to be a proper objection. The ultimate authority on this issue, of course, is the Grievance Board's written Order. That Order clearly does not require -- or address in any manner-- a deduction for mitigation of damages.

As outlined in D., infra, Respondent Fulmer did introduce damages evidence at the Grievance Board hearing, and that evidence was properly before Circuit Court Judge Zakaib and is properly before this Court.

3. "A litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal" as the Petitioner has done.

In its Reply, Petitioner KCBOE reiterates its argument that it did in fact properly raise the issue of mitigation of damages before the Grievance Board.

To the extent that the Court wishes to consider the partial "transcript" of the Grievance Board hearing, it illustrates that Petitioner KCBOE initiated any "error" by taking the position that any damages should be addressed later.

KCBOE failed, or refused, to challenge Respondent Fulmer's evidence on damages or to present its own evidence. "A litigant may not silently acquiesce to an alleged error or actively contribute to such error, and then raise that error as a reason for reversal on appeal." Syllabus Point 1, Maples v. West Virginia Dep't of Commerce, 197 W.Va. 318, 475 S.E.2d 410 (1996).

Therefore, the Petitioner KCBOE should not be permitted to invite error in this manner and then to use that error as a basis to relitigate the issue of damages. This is precisely what Petitioner here has done, and its actions have resulted in significant delay in the resolution of this matter. ⁷

⁷ The Grievance Board decision requiring the KCBOE to pay Respondent Fulmer back wages and benefits with interest was entered more than two and a half years ago, on October 29, 2008.

4. Petitioner KCBOE had a duty to introduce evidence regarding mitigation of damages at the Grievance Board hearing, but it chose not to do so.

It is well settled in West Virginia that, in wrongful discharge cases, “the burden of raising the issue of mitigation is on the employer.” Seymour v. Pendleton Cmty. Care, 549 S.E.2d 662 (W.Va. 2001). Similarly, the Procedural Rules of the (former) West Virginia Education and State Employees Grievance Board in effect at the time of Respondent Fulmer’s hearing provide that: “Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence.” 156 CSR 1 (effective December 4, 2004).

Respondent/Plaintiff Fulmer presented his testimony and documentary evidence regarding damages at the Grievance Board hearing. As Petitioner KCBOE failed, or refused, to challenge Respondent’s evidence or to present its own evidence, it should not be permitted to invite error in this manner and then to use that error as a basis to relitigate the issue of damages. See, Maples, 475 S.E.2d at 410.⁸

⁸ KCBOE disingenuously argued, at the hearing on its Motion to Alter or Amend Judgment, that it was “prohibited” from presenting testimony regarding mitigation by the Grievance Board ALJ. See, transcript of June 6, 2010, hearing, at pp. 10-11. This contention obviously is not correct.

D. ALTHOUGH THE GRIEVANCE BOARD DECISION DID NOT AWARD DAMAGES IN A SPECIFIC AMOUNT, THE SUBSEQUENT AWARD OF DAMAGES BY THE CIRCUIT COURT IS SUPPORTED BY THE EVIDENCE.

In its arguments on pages 11-12 of its Reply, Petitioner KCBOE attempts to skew the issue of whether damages were raised at the Grievance Board hearing through its use of phrases such as that "damages were not calculated" at the hearing.

Counsel for Respondent Fulmer presented his damages case at the Grievance Board hearing. That evidence, consisting of exhibits and five pages of Mr. Fulmer's testimony, was properly before Circuit Court Judge Zakaib in proceedings regarding the Writ of Mandamus, and it is likewise properly before this Court. Mr. Fulmer's exhibits included his W-2's, information on his retirement plan ("Defined Contribution Plan"), and his 1099 form. See, Exhibit C to Plaintiff's Response to Defendant, Kanawha County Board of Education's, Motion to Alter or Amend Judgment. Moreover, at the Grievance Board hearing, Mr. Fulmer testified concerning his income, or lack of income, from the KCBOE for the years 2004, 2005, 2006, 2007 and 2008. See, Exhibit 2 to KCBOE's Motion to Alter or Amend Judgment. In addition, Mr. Fulmer testified that he would have received pay raises during the years from 2005-2008. Mr. Fulmer also testified that he and his wife had to pay a portion of health insurance premiums through his wife's employment due to his loss of health insurance through the KCBOE.

Petitioner KCBOE attempts to portray the Respondent/Plaintiff Fulmer's "Plaintiff's Revised Damages Calculation" as containing incorrect figures regarding lost wages and benefits and as having purposefully not been served until the day of the

Show Cause hearing. In reality, the delays in Mr. Fulmer's compilation of the dollar amounts of each item of damages were necessitated by the actions by KCBOE, which had the sole control and custody of documents and information from which the dollar amounts were calculated.

Following the decision of the Grievance Board, counsel for Mr. Fulmer repeatedly attempted -- for one full year -- to obtain correct information and documents from KCBOE regarding wages and benefits. (See, discussion of correspondence between the parties in Response to Petition for Appeal, at II., C.) When the KCBOE finally provided Mr. Fulmer with the necessary information, it was determined that the information was inaccurate. The correct information was not provided by KCBOE until the day prior to the hearing on the Writ of Mandamus. Hence, the figures presented during the Writ of Mandamus proceedings were obtained from KCBOE, which took more than one year to provide Mr. Fulmer with correct and complete information regarding his wages and benefits. Petitioner KCBOE can hardly claim prejudice when it had possession and control of the information necessary for a correct damages computation both before and after the Grievance Board hearing.

During proceedings before Circuit Court Judge Zakaib pursuant to Mr. Fulmer's Petition for Writ of Mandamus, Judge Zakaib was presented with additional evidence to support Mr. Fulmer's calculations of lost wages and benefits. Specific salary schedules for Kanawha County teachers for the school years of 2005-2006, 2006-2007 and 2007-2008 were introduced into evidence. See, Defendant Kanawha County Board of Education's Memorandum Showing Cause Why the Petition for Writ of

Mandamus Must be Denied, at Exhibit Nos. 2, 3 and 4. In addition, KCBOE submitted copies of Mr. Fulmer's W-2 forms from clerical employment which he had to obtain due to his wrongful termination by KCBOE. See, Id., at Exhibit 5.

Specific information on Mr. Fulmer's retirement benefits was also presented during the Writ of Mandamus proceedings. His Complaint (Petition for Writ of Mandamus) also set forth in detail each item of damages which he had sustained. In his Order on Plaintiff's Petition for Writ of Mandamus, Judge Zakaib relied upon the breakdown in the Complaint/Petition for Writ of Mandamus as well as the Plaintiff's Revised Damages Calculation.

The KCBOE likewise presented very specific damages evidence before Judge Zakaib in the Writ of Mandamus proceedings. KCBOE made various arguments regarding calculations by Mr. Fulmer and argued that his clerical income from Smoker Friendly should have been deducted from his lost wages. See, Defendant KCBOE's Memorandum Showing Cause Why the Petition for Writ of Mandamus Must be Denied. Finding that the Grievance Board Order did not require mitigation of damages, and that the KCBOE had not raised this issue in the Grievance Board hearing, Judge Zakaib correctly rejected KCBOE's arguments and issued a six-page Order on Plaintiff's Petition for Writ of Mandamus which includes specific Findings of Fact and Conclusions of Law.

E. THIS COURT SHOULD CONSIDER EXHIBITS A, B AND C TO RESPONDENT'S PETITION FOR APPEAL.

Exhibit A to Respondent Fulmer's Response to Petition for Appeal is simply a portion of a transcript of the Grievance Board hearing which was transcribed by Accurate Reporting Service, Inc. The two pages of the transcript submitted as Exhibit A simply verify that Mr. Fulmer's exhibits relating to his lost wages and benefits were properly admitted by the Grievance Board Administrative Law Judge. Inasmuch as the exhibits were in the record before the Grievance Board, and before Circuit Court Judge Zakaib in the Writ of Mandamus proceedings, it is not crucial whether that Exhibit A is considered or not.

Exhibits B and C relate to proceedings against Mr. Fulmer by the KCBOE prior to the Grievance Board hearing. Both of these documents reflect that Mr. Fulmer's termination by KCBOE was malicious and that, accordingly, even if the KCBOE had raised the issue of mitigation at the Grievance Board hearing, mitigation would not apply. See, Respondent's Response to Petition for Appeal, at p. 36.

F. THE CIRCUIT COURT'S ORDER DENYING THE MOTION TO ALTER OR AMEND JUDGMENT SIMPLY DENIED PETITIONER'S MOTION; THE CIRCUIT COURT'S COMPLETE ORDER SETTING FORTH FINDINGS OF FACT AND CONCLUSIONS OF LAW IS THE COURT'S APRIL 1, 2010, ORDER GRANTING THE WRIT OF MANDAMUS.

Although Petitioner KCBOE asserts that Respondent Fulmer argued that the Circuit Court's Findings of Fact and Conclusions of Law in its April 1, 2010, Order were "subsumed" in the Court's July 6, 2010 Order, Respondent Fulmer in fact did not make this argument. Respondent Fulmer in fact argued that KCBOE's Motion to Alter

or Amend Judgment related to the April 1, 2010, detailed Order and, as such, the Circuit Court was not required to again repeat the Findings of Fact and Conclusions of Law which it had set forth in its initial April 1, 2010, Order.

Circuit Court Judge Zakaib's April 1, 2010, Order contained Findings of Fact and Conclusions of Law and accordingly informed the parties of the precise factual and legal grounds for this decision. The subsequent July 6, 2010, Order simply denied KCBOE's Motion to Alter or Amend the April 1, 2010, Order.

II. CONCLUSION

Respondent Robert Fulmer urges the Court to deny the Kanawha County Board of Education's appeal and to affirm Circuit Court Judge Zakaib's July 6, 2010, Order denying KCBOE's Motion to Alter or Amend Judgment.

Respondent Fulmer requests that the Court find that, under the abuse of discretion and *de novo* standard of review, the Circuit Court properly granted Respondent Fulmer's Writ of Mandamus and properly denied the KCBOE's Motion to Alter or Amend Judgment. Respondent Fulmer also urges the Court to find that KCBOE's appeal is limited to the three specific grounds set forth in its Motion to Alter or Amend Judgment. This Court should also find that Petitioner KCBOE did not clearly and properly raise the affirmative defense of mitigation of damages in the Grievance Board hearing and that Circuit Court Judge Zakiab was correct in finding that KCBOE accordingly had waived that defense.

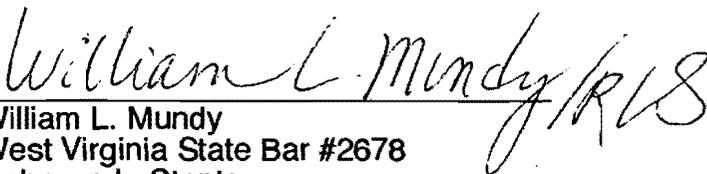
Respondent Fulmer also urges the Court to find that the Circuit Court's award of \$259,566.99 was supported by the evidence at the Grievance Board hearing

and before the Circuit Court in the Writ of Mandamus proceedings. Finally, Mr. Fulmer urges the Court to find that the Circuit Court properly set forth its Findings of Fact and Conclusions of Law with regard to the Petition for Writ of Mandamus in its April 1, 2010, Order.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ROBERT FULMER,

Respondent (Plaintiff),

v.

Appeal No. 101578
[Appeal from Civil Action
No. 09-MISC-371
Honorable Paul Zakaib]

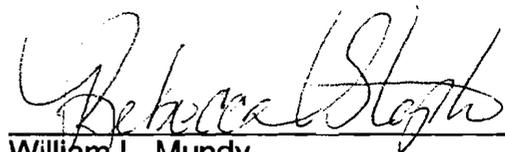
KANAWHA COUNTY BOARD OF
EDUCATION,

Petitioner (Defendant).

CERTIFICATE OF SERVICE

I, Rebecca L. Stepto, counsel for the Respondent/Plaintiff, Robert Fulmer, do hereby certify that a true and correct copy of the foregoing **RESPONDENT ROBERT FULMER'S RESPONSE TO REPLY OF PETITIONER KANAWHA COUNTY BOARD OF EDUCATION** was served upon the following counsel, United States Mail, first class, postage prepaid, this 14th day of June, 2011:

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