

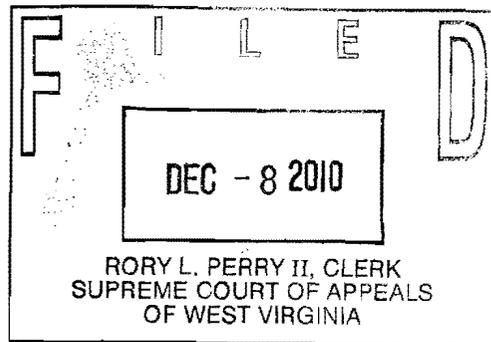
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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 TO PETITION FOR APPEAL

December 7, 2010

William L. Mundy
West Virginia State Bar #2678
Rebecca L. Stepto
West Virginia State Bar #3597
MUNDY & NELSON
Post Office Box 2986
Huntington, West Virginia 25728
(304) 525-1406
*Counsel for Respondent/
Plaintiff Robert Fulmer*

TABLE OF CONTENTS

I.	NATURE OF PROCEEDING AND RULING IN CIRCUIT COURT	6
II.	STATEMENT OF THE FACTS.....	8
	A. Respondent's Wrongful Termination by KCBOE	8
	B. Level IV Grievance Hearing and Decision	9
	C. Post-Hearing Attempts to Agree on Damages Calculations	11
	D. Writ of Mandamus in Circuit Court.....	14
III.	BRIEF RESPONSE TO ASSIGNMENTS OF ERROR	15
	A. Error No. 1: Improper Ruling Regarding Mitigation of Damages.....	15
	B. Error No. 2: Improper Award of Damages by Failure to Offset Income Earned.....	16
	C. Error No. 3: Improper Award of Damages when Teaching Certificate Not Valid.....	16
	D. Error No. 4: Improper Award of Pre-Judgment Interest and Post-Judgment Interest.....	16
	E. Error No. 5: Improper Award for Retirement Benefits.....	16
	F. Error No. 6: Absence of Evidentiary Show Cause Hearing: Improper Procedure	16
IV.	DISCUSSION OF LAW	17
	A. The Circuit Court Properly Denied KCBOE's Motion to Alter or Amend Judgment	17
	B. The Circuit Court Properly Granted The Writ of Mandamus	25
	C. The Grievance Board Hearing was not Bifurcated as to Liability and Damages	28

D.	The Circuit Court Set Forth Findings of Fact and Conclusions of Law Regarding Mandamus.....	29
E.	A Court Speaks Only Through Its Orders.....	31
F.	Mitigation is an Affirmative Defense Which Was Waived Since It was Not Raised by KCBOE at the Level IV Hearing.....	32
G.	The Requirement of a Teaching Certificate May be Waived for up to Three Months; Respondent's Claim for Back Pay and Benefits for Six Weeks in 2008 is Therefore Valid.....	37
V.	CONCLUSION	38

EXHIBITS

- A. Excerpts from February 5, 2008, Grievance Board hearing transcript
- B. Excerpts from May 12, 2005, pre-disciplinary hearing
- C. Order of the State Superintendent of Schools

TABLE OF AUTHORITIES

Cases

<u>Maples v. W.Va. Dept. of Commerce</u> , 197 W.Va. 318, 475 S.E.2d 410 (1996)	10, 25
<u>Sussman v. Salem, Saxon & Nielsen, P.A.</u> , 153 F.R.D. 689 (M.D.Fla. 1994)	17
<u>Ruscavage v. Zuratt</u> , 831 F.Supp. 417 (E.D.Pa. 1993)	17
<u>Pennsylvania Ins. Guar. Ass'n v. Trabosh</u> , 812 F.Supp. 522 (D.C.Pa. 1992)	17
<u>Rottmund v. Continental Assur. Co.</u> , 813 F.Supp. 1104 (E.D.Pa.1992)	17
<u>Woodrum v. Thomas Mem'l Hosp. Foundation, Inc.</u> , 186 F.R.D. 350, 351 (S.D.W.Va. 1999)	18
<u>Westfield Ins. Co. v. White</u> , 19 F.Supp.2d 615, 616 (S.D.W.Va. 1998)	18
<u>Burzynski v. Travers</u> , 111 F.R.D. 15 (E.D.N.Y. 1986)	18
<u>Hager v. Paul Revere Life Ins. Co.</u> , 489 F.Supp. 317 (E.D.Tenn. 1977)	18
<u>Pennsylvania R. Co. v. Erie Ave. Warehouse Co.</u> , 193 F.Supp. 471 (E.D.Pa. 1960)	18
<u>Pioneer Paper Stock Co. v. Miller Transp. Co.</u> , 109 F.Supp. 502 (D.N.J. 1953)	19
<u>Solar Labs v. Cincinnati Advertising Prods. Co.</u> , 34 F.Supp. 783 (D.Ohio 1940)	19
<u>Satterlee v. Allen Press, Inc.</u> , 455 F.Supp.2d 1236 (D.Kan. 2006)	19
<u>Obriecht v. Raemish</u> , 517 F.3d 489 (7 th Cir. Wis. 2008), <i>cert. denied</i> , 129 S. Ct. 417 (2008)	19
<u>Mason County Bd. of Educ. v. State Superintendent of Schools</u> , 170 W.Va. 632, 295 S.E.2d 719 (1982)	22, 27, 30, 32, 35
<u>State ex rel. Williams v. Dep't of Military Affairs</u> , 212 W.Va. 407, 573 S.E.2d 1 (2002)	25
<u>State ex rel. Kucera v. City of Wheeling</u> , 153 W.Va. 538, 170 S.E.2d 367 (1969)	25
<u>State ex rel. Kaufman v. Zakaib</u> , 207 W.Va. 662, 535 S.E. 2d 727 (2000)	31
<u>State v. White</u> , 188 W.Va. 534, 425 S.E.2d 210 (1992)	31
<u>Erlewine v. Thompson</u> , 15 W.Va. 714, 207 S.E.2d 105 (1973)	31
<u>Harvey v. Harvey</u> , 171 W.Va. 237, 241, 298 S.E.2d 467 (1982)	31
<u>Tennant v. Marion Health Care Found. Inc.</u> , 194 W.Va. 97, 459 S.E.2d 374 (1995)	31
<u>Seymour v. Pendleton C'mty Care</u> , 549 S.E.2d 662 (W.Va. 2001)	32

Martin v. Bd. of Educ., 120 W.Va. 621, 199 S.E. 887 (1938) 35

Rules

Rule 3(f) of the Rules of Appellate Procedure 6
Rule 59(e) of the West Virginia Rules of Civil Procedure 17-20

Statutes

W.Va. Code § 56-6-31(a) (1981) 7
W.Va. Code §§ 18-29-1 to 18-29-11 (repealed March 7, 2007) 8
W.Va. Code §§ 29-6A-1 to 29-6A-12 (repealed March 7, 2007) 8
W.Va. Code §§ 6C-3-1 to 6C-3-6 (2007) 8
W.Va. Code § 18A-3-2 (1990) 16, 37, 38

Texts

Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2810.1 17, 18, 19
Litigation Handbook on West Virginia Rules of Civil Procedure,
at Rule 59(e)[2] 18, 19

RESPONSE TO PETITION FOR APPEAL

NOW COMES Respondent Robert Fulmer (hereinafter "Respondent," "Respondent/Plaintiff" or "Mr. Fulmer"), by counsel, William L. Mundy and Mundy & Nelson, and files this Response, pursuant to Rule 3(f) of the West Virginia Rules of Appellate Procedure, to the Petition for Appeal.

I. NATURE OF PROCEEDING AND RULING IN CIRCUIT COURT

The Defendant/Petitioner Kanawha County Board of Education ("KCBOE") has appealed from the July 6, 2010, "Order Denying Defendant's Motion to Alter or Amend Judgment." In that Motion, KCBOE set forth the following three (3) specific grounds:

- "(1) Counsel for Plaintiff made false and fraudulent misrepresentations to this Court by stating KCBOE failed to attempt to raise the issue of mitigation of damages of the Level IV proceeding thereby waiving the defense;
- (2) Plaintiff was employed at Smoker Friendly for a period of time after he was terminated from his position with KCBOE; however, in awarding Plaintiff damages in the amount of \$259,566.99, the Court did not provide KCBOE with a set off for the income Plaintiff actually earned thereby placing Plaintiff in a better position than he would have been had he not been terminated by KCBOE, which is contrary to the public policy of the State of West Virginia; and
- (3) Plaintiff was impermissibly awarded damages for a period of time when he could not be reinstated based upon his own failure to renew his teaching certificate, which is contrary to public policy. (sic)"

Accordingly, the instant appeal is limited in scope to a review of the KCBOE's Motion to Alter or Amend Judgment and more specifically to the July 6, 2010, Order Denying Defendant's Motion to Alter or Amend Judgment. In its appellate brief, however, Petitioner sets forth three grounds not discussed in its motion which accordingly should not be considered by this Court. First, Petitioner now argues, in its Error No. 4, that the Circuit Court erred in 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 (Petition for Appeal at pp. 37-38).

As the Petitioner has correctly acknowledged, W.Va. Code § 56-6-31(a)(1981) provides that “every judgment or decree for the payment of money entered by any Court of this State shall bear interest from the date thereof, whether it be so stated in the judgment or decree or not.” Petitioner contends that in calculating pre-judgment and post-judgment interest, Respondent used improper damages calculations in calculating the interest he claimed was due and owing. Respondent asserts that pre-judgment interest and post-judgment interest, as of April 1, 2010, when awarded by the Circuit Court, was correct inasmuch as the Respondent had a clear legal right to the underlying damages granted by the Circuit Court.

Petitioner also raises, for the first time on appeal, the argument, set forth in Error No. 5, that the Circuit Court in the underlying proceeding erred in awarding Respondent retirement contributions from KCBOE in the amount of \$9,687.15 because Respondent did not prove that he had a clear legal right to that amount. Petitioner contends that Respondent erred by calculating his retirement contributions based upon \$129,162.00 in salary being owed to him. Petitioner contends that the salary figure Respondent used should have deducted income which he earned in a clerical position which he was forced to take following his wrongful termination by the KCBOE. Procedurally, this argument should be rejected by the Court because it was not raised in the KCBOE’s Motion to Alter or Amend Judgment. Substantively, the KCBOE provides no legal support for its argument. Respondent is entitled to the full benefit of the ruling by the Administrative Law Judge in the Level IV Grievance Board hearing, which was that he be compensated for “lost wages and benefits to which he would have been entitled had he remained in his position.” The fact that Respondent obtained other, clerical-level employment in an attempt to survive during the pendency of his appeals of the wrongful

termination by the KCBOE should not work to deny him his full retirement benefits. Those benefits should be based upon wages to which he would have been entitled had he remained in his position as a public school teacher.

Thirdly, Petitioner raises, again for the first time on appeal, the argument that the Circuit Court erred by failing to hold an evidentiary show cause hearing on the Respondent's Revised Petition for Writ of Mandamus. Petitioner fails to establish that it requested an evidentiary hearing, was entitled to such a hearing in addition to its written submissions and hearing actually held by the Circuit Court, or that it raised this issue in its Motion to Alter or Amend Judgment. Petitioner's Error No. 6 accordingly should not be considered by this Court.

II. STATEMENT OF THE FACTS

A. Respondent's Wrongful Termination by KCBOE

The facts giving rise to this litigation began more than five years ago. On July 12, 2005, Robert Fulmer was wrongfully terminated from his employment as a teacher, coach and lunchroom supervisor by the KCBOE. Respondent has prevailed in multiple administrative and judicial forums, including before the Professional Practice Panel of the West Virginia Department of Education, in a Level IV hearing before the West Virginia Public Employees Grievance Board¹ and in a civil action in the Circuit Court of Kanawha County which had been brought by the complainant student, Megan McKown, against both the Petitioner and the Respondent. The only ruling adverse to Respondent Fulmer was in the pre-disciplinary proceeding, where a hearing examiner found charges of inappropriate and immoral conduct of a sexual nature to have been substantiated. Mr. Fulmer was not represented by counsel at this initial hearing.

¹ In 2007, the Legislature in S.B. 442 abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W.Va. Code §§ 18-29-1 to 18-29-11 and W.Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W.Va. Code §§ 29-6A-1 to 29-6A-12 and W.Va. Code §§ 6C-3-1 to 6C-3-6 (2007).

Moreover, the Petitioner presented testimony in that hearing from two students who had given completely written statements to the KCBOE's own investigator which were completely contradictory to the testimony which KCBOE elicited at the hearing. See, Exhibit 1 to KCBOE's Motion to Alter or Amend Judgment. Robert Fulmer was reinstated to his position as a classroom mathematics teacher at Nitro High School effective December, 2008.

B. Level IV Grievance Hearing and Decision

The day after his termination, Respondent filed a Level IV grievance with the West Virginia Education and State Employees Grievance Board. The case had been assigned to Administrative Law Judge Thomas J. Gillooly, but he was ill on the first day of the hearing (on February 5, 2008). By agreement of the parties, Administrative Law Judge Janis Reynolds conducted the first day of the hearing. The second day (on February 6, 2008) was conducted by ALJ Gillooly. (See, Plaintiff's Response to Defendant, Kanawha County Board of Education's Motion to Alter or Amend Judgment.)

At the hearing, Respondent/Plaintiff Fulmer introduced his testimony regarding wages he earned from the KCBOE in 2004, 2005 and 2006, and the fact that he had received no salary or benefits from the KCBOE since July of 2005. (See, Exhibit 2 to KCBOE's Motion to Alter or Amend Judgment). He testified that he would have received pay raises during 2006, 2007 and 2008 from the KCBOE. He further testified that he had health insurance through his employment at KCBOE, but that since his termination he had had to pay \$214.00 every two weeks for insurance coverage for himself and his family. Id. Respondent Fulmer's documentary evidence, which was admitted without objection from the KCBOE at the beginning of the hearing, included Exhibit No. 26 (W2s for 2004 and 2005), No. 27 (West Virginia Teachers Defined

Contribution (retirement) Plan) and No. 28 (Great-West Life & Annuity Insurance Co.) (See, excerpt from Grievance Board hearing, pp. 17 & 27, attached hereto as Exhibit A.)

Rather than cross-examining the Respondent/Plaintiff regarding his damages evidence, or presenting its own evidence regarding damages or the mitigation thereof, counsel for the Petitioner simply made comments regarding damages evidence, but did not object, introduce evidence or otherwise make a proffer of evidence. In fact, at the hearing, Petitioner called only one witness, a psychologist who offered only general opinions not specific to Respondent Fulmer.

Petitioner now alleges, without evidentiary support, that Respondent/Plaintiff failed to mitigate his damages. As Petitioner 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. However, this is precisely what Petitioner here has done, and its actions have resulted in significant delay in the resolution of this matter.² "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).

Following the hearing, ALJ Gillooly issued an Order Reopening Grievance at Level IV on May 16, 2008, stating therein that he was "inclined to reconsider the decision permitting the BOE to rely on the student testimony adduced at the pre-termination hearing." ALJ Gillooly further ordered that the parties submit to mediation, apparently in the belief that the West Virginia Commission for Professional Teaching Standard's decision in Mr. Fulmer's favor would change the KCBOE's position. (Grievance Board Order, Exh. 1 to Petition for Stay of Execution of Judgment.) Following the mediation session, Respondent Fulmer filed a motion for sanctions

² The Grievance Decision requiring the KCBOE to pay Respondent Fulmer back wages and benefits with interest was entered more than two years ago (on October 29, 2008).

against KCBOE as no representative from KCBOE had appeared at the mediation with any authority to settle the case in contradiction of ALJ Gillooly's Order. The Grievance Board denied the motion, stating it had no authority to issue sanctions. (See, Decision, attached as Exhibit A to Plaintiff's Response to Defendant, KCBOE's, Motion to Alter or Amend Judgment.)

Administrative Law Judge M. Paul Marteney issued a Decision on October 29, 2008. The Decision found that Respondent Fulmer had been terminated from employment by the Petitioner on the basis of an accusation by a student of inappropriate, immoral conduct and that the Petitioner had failed to meet its burden of proving that Respondent had engaged in such conduct. The Administrative Law Judge found that KCBOE's accusing witnesses were not credible and that it provided no corroborating evidence from a credible source. The Decision specifically noted that the relief sought by (Grievant) Fulmer was "reinstatement, back pay with 10% interest, attorney fees and any and all benefits to which entitled." The Decision ordered 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." (Id.)

Importantly, Petitioner failed to appeal the Administrative Law Judge's October 29, 2008, decision. Similarly, KCBOE did not request an additional Grievance Board hearing to address damages or any other issue. It is now attempting a "back door appeal" of the ALJ's Decision, and its attempts should be soundly rejected by this Court.

C. Post-Hearing Attempts to Agree on Damages Calculations

Following the decision of the Grievance Board, counsel for the Respondent/Plaintiff repeatedly attempted -- for one full year -- to resolve this matter. On February 27, 2009, counsel for the Respondent/Plaintiff requested that KCBOE provide its calculation of the length of time Mr. Fulmer was discharged in order to

determine damages. (See, letter to Jim Withrow, dated February 27, 2009, attached as Exhibit F to Plaintiff's Response to Defendant, Kanawha County Board of Education's, Motion to Alter or Amend Judgment ("Response to Motion to Alter".)) Having received no response, counsel for the Respondent/Plaintiff once again contacted KCBOE on March 24, 2009, requesting lost wage information. (See, letter to Jim Withrow dated March 24, 2009, attached as Exhibit G to Response to Motion to Alter.)

After finally receiving the requested information³ from the Respondent KCBOE on May 20, 2009, the Respondent/Plaintiff presented his damages calculation to KCBOE eight days later. (See, letter to Jim Withrow, dated May 28, 2009, attached as Exhibit H to Response to Motion to Alter.) After again receiving no response from the KCBOE, the Respondent/Plaintiff was again required to follow-up with KCBOE. (See, letter dated June 5, 2009, attached as Exhibit I to Response to Motion to Alter.) Nearly two (2) weeks later, the Respondent/Plaintiff again attempted to resolve the damages issue by presenting his position to KCBOE. (See, letter to Jim Withrow, dated June 17, 2009, attached as Exhibit J to Response to Motion to Alter.) On that same date, counsel for the Respondent/Plaintiff contacted the Grievance Board and requested a hearing on damages. (See, letter to M. Paul Marteney, dated June 17, 2009, attached as Exhibit K to Response to Motion to Alter.)

In a continued attempt to resolve this matter, counsel for Respondent/Plaintiff provided documentation to KCBOE concerning his damages relating to insurance on July 2, 2009. (See, letter to Jim Withrow, dated July 2, 2009, attached as Exhibit L to Response to Motion to Alter.) Respondent/Plaintiff also attempted to schedule a second mediation on the condition that KCBOE attend with full settlement authority. (See, letter to Jim Withrow, dated July 8, 2009, attached as Exhibit

³ It later was determined that the information initially provided by KCBOE was inaccurate. The correct information was not provided by KCBOE until the day prior to the hearing on the Writ of Mandamus.

M to Response to Motion to Alter.) In the meantime, having heard no response from the Grievance Board, counsel for the Respondent/Plaintiff again contacted the Grievance Board and made a second request for a hearing on damages. (See, letter to M. Paul Marteney, dated September 3, 2009, attached as Exhibit N to Response to Motion to Alter.)

The Grievance Board denied the request for a hearing on damages on the grounds that it "is without statutory authority to reopen this matter to conduct a hearing to address a disputed over damages." It directed the Respondent/Plaintiff's attention to W.Va. Code § 18-29-9, and stated that it 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." (See, Order Denying Request for Hearing, dated September 29, 2009, attached as Exhibit O to Response to Motion to Alter.)

Petitioner stresses in its Petition for Appeal that counsel for Respondent/Plaintiff sent correspondence to counsel for Petitioner KCBOE stating that "we need to conclude the damage aspect of this case." Petitioner inappropriately argues that this and other references to Mr. Fulmer's claim for damages "reflects the fact that damages were not addressed at the Level IV hearing." (Petition for Appeal at p. 15). Damages in fact were addressed at the Level IV hearing by Respondent/Plaintiff presenting testimony and documentary evidence regarding wages which he lost between his 2005 wrongful termination and his 2008 reinstatement. The necessity of counsel for Respondent/Plaintiff having to repeatedly press the KCBOE for factual information on which to base calculations of damages is actually what is reflected in the multiple pieces of correspondence from counsel for Respondent/Plaintiff to the KCBOE's counsel.

D. Writ of Mandamus in Circuit Court

Left without an adequate remedy to require the KCBOE to compensate him for the lost wages and benefits to which he had been entitled had he remained in his position along with legal interest on any back pay, which had been ordered by the ALJ on October 29, 2008, the Respondent/Plaintiff was forced to file a Petition for Writ of Mandamus in the Circuit Court of Kanawha County one year later.⁴

The Petition for Writ of Mandamus set forth damages owed to Respondent/Plaintiff in the following amounts:

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 KCBOE	13,973.05
f.	Interest	80,934.87
	TOTAL	\$277,274.52

These figures were subsequently reduced as they were based on inaccurate information provided to the Respondent by the KCBOE. In his Petition for Writ of Mandamus, Respondent/Plaintiff did not set forth any amounts for any alleged mitigation of damages inasmuch as Petitioner KCBOE had not raised mitigation of damages before the Administrative Law Judge, and the ALJ did not order that mitigation be determined or addressed following the hearing. Mitigation is an affirmative defense which must be raised, by a defendant challenging damages.

KCBOE denied that the Respondent/Plaintiff was entitled to the damages he asserted in his Complaint. (See, Defendant, Kanawha County Board of Education's Answer to Plaintiff's Complaint (Petition for Writ of Mandamus) dated November 19, 2009.) The Circuit Court entered an order issuing a Rule to Show Cause on January

⁴ Contrary to Petitioner's representation, the Petition in fact was filed on October 14, 2009. (Petition for Appeal, at p. 16.)

21, 2010. (See, Order Issuing Rule to Show Cause.) On the afternoon of February 24, 2010, less than one day before the February 25, 2010, hearing to show cause, KCBOE for the first time provided a specific amount of damages it admitted it owed Mr. Fulmer and the method used to calculate those damages. (See, Defendant, Kanawha County Board of Education's Memorandum Showing Cause Why the Petition for Writ of Mandamus Must Be Denied, dated February 25, 2010, at p. 8). KCBOE admitted that it owed the plaintiff \$92,176.60. Despite the late response by KCBOE, the Respondent/Plaintiff recalculated his lost wages and interest—based on the correct salary schedules provided by the KCBOE the day before the hearing—to be \$259,566.99. (See, Plaintiff's Revised Damages Calculation, dated February 25, 2010.) The Circuit Court ruled that the Respondent/Plaintiff was entitled to damages in this amount. (See, Order on Plaintiff's Writ of Mandamus at p. 5.)

At the February 25, 2010, Show Cause hearing, KCBOE was not prohibited from introducing evidence, but it did not do so or attempt to proffer any evidence. (See, Hearing Transcript (Exhibit 1 to KCBOE's Motion to Amend).) Moreover, KCBOE's counsel at the Grievance Board hearing, James Withrow, was present at the Show Cause hearing, although not as KCBOE's counsel, and spoke extensively. Id. Respondent Fulmer was also present and could have been cross-examined regarding his damages by the KCBOE, but this also was not done.

III. BRIEF RESPONSE TO ASSIGNMENTS OF ERROR

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

The Circuit Court did not err in finding that Petitioner failed to properly raise the affirmative defense of mitigation of damages before the Grievance Board. The Board's Order does not provide that any amounts be deducted from its award of back pay and benefits, to Respondent/Plaintiff Fulmer.

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

The Circuit Court did not err in refusing to deduct income earned by Respondent/Plaintiff Fulmer after his wrongful termination as the KCBOE failed to raise this issue in the Grievance Board hearing. Moreover, there has been no showing that Respondent/Plaintiff could not have earned the other income during evenings, weekends and the summer months while contemporaneously fulfilling the terms of his contract with the KCBOE.

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

The Circuit Court did not err in refusing to deduct from Mr. Fulmer's award back pay and benefits for the six-week period during which he had no current teaching certificate. W.Va. Code § 18A-3-2 allows a teacher to be paid for up to three months without a certificate. The KCBOE therefore could have reinstated Mr. Fulmer immediately upon receiving the Grievance Board's decision ordering his reinstatement.

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

The Circuit Court did not err in granting pre-judgment and post-judgment interest on Respondent/Plaintiff Fulmer's entire amount of back pay.

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

The Circuit Court did not err in awarding Mr. Fulmer the employer's contribution toward his retirement plan based upon his entire amount of back pay.

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

The Circuit Court did not err in not holding an additional hearing on Respondent/Plaintiff's Writ of Mandamus. The parties submitted very detailed documentary evidence on their respective positions regarding mitigation of damages and other issues being raised on appeal, and such documentation was considered by

Judge Zakaib before issuing his order on Respondent/Plaintiff's Writ of Mandamus. Moreover, Petitioner provides no legal support for its contention that a second, or evidentiary, hearing must be held regarding such Writs.

IV. DISCUSSION OF LAW

A. The Circuit Court Properly Denied KCBOE's Motion to Alter or Amend Judgment

The Petitioner is appealing the Circuit Court's denial of its Rule 59(e) Motion to Alter or Amend Judgment. The Petition for Appeal is therefore limited to a review of the Circuit Court's July 6, 2010, Order Denying Defendant's Motion to Alter or Amend Judgment.

Rule 59(e) of the West Virginia Rules of Civil Procedure provides only that "[a]ny motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment." Since specific grounds for a motion to alter or amend are not listed in the rule, the trial court enjoys considerable discretion in granting or denying the motion. However, reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly. See, Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2810.1, citing to Sussman v. Salem, Saxon & Nielsen, P.A., 153 F.R.D. 689 (M.D.Fla. 1994) (Reconsideration of previous order is extraordinary remedy to be employed sparingly; only change in the law or facts upon which decision is based will justify reconsideration of previous order.); Ruscavage v. Zuratt, 831 F.Supp. 417 (E.D.Pa. 1993); Pennsylvania Ins. Guar. Ass'n v. Trabosh, 812 F.Supp. 522 (E.D.Pa. 1992) (Motions for reconsideration should be granted sparingly because of interest in finality and conservation of scarce judicial resources); Rottmund v. Cont'l Assur. Co., 813 F.Supp. 1104 (E.D.Pa.1992) (Federal district court has inherent power over interlocutory orders and may modify, vacate, or set aside these orders when it is

consonant with justice to do so; however, because of the interest in finality, court should grant motions for reconsideration sparingly.)

Generally, courts have set forth four basic grounds upon which a Rule 59(e) motion may be granted. First, the movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based. Second, the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice. Serious misconduct of counsel may justify relief under this theory. Fourth, a Rule 59(e) motion may be justified by an intervening change in controlling law. Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2810.1.

Importantly, a Rule 59(e) motion may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment. Woodrum v. Thomas Mem'l Hosp. Foundation, Inc., 186 F.R.D. 350, 351 (S.D.W.Va. 1999) (Even if the discharged employee had a valid argument for tolling the one-year limitations period for his filing of a discrimination complaint with the West Virginia Human Rights Commission, this argument should have been raised in response to the employer's motion for summary judgment, and could not be belatedly asserted on a motion by the employee to correct or amend an adverse summary judgment.) Westfield Ins. Co. v. White, 19 F.Supp.2d 615, 616 (S.D.W.Va. 1998). In practice, because of the narrow purposes for which they are intended, Rule 59(e) motions typically are denied. Id. (emphasis added). A motion for a new trial in a nonjury case or a petition for rehearing should be based upon manifest error of law or mistake of fact, and a judgment should not be set aside except for substantial reasons. Burzynski v. Travers, 111 F.R.D. 15 (E.D.N.Y. 1986), Hager v. Paul Revere Life Ins. Co., 489 F.Supp. 317 (E.D.Tenn. 1977); Pennsylvania R. Co. v. Erie Ave. Warehouse Co., 193 F.Supp. 471 (E.D.Pa. 1960), *vacated on other grounds*, 302 F.2d 843 (3d Cir. Pa.

1962); Pioneer Paper Stock Co. v. Miller Transp. Co., 109 F.Supp. 502 (D.N.J. 1953); Solar Labs v. Cincinnati Advertising Prods. Co., 34 F.Supp. 783 (D.Ohio 1940), *appeal dismissed*, 116 F.2d 497 (6th Cir. Ohio 1940).

A Rule 59(e) motion is a motion that calls into question the correctness of a judgment. It may be invoked to correct manifest errors of law or fact, or to present newly discovered evidence. See, Wright, Miller & Kane, at § 2810.1. Litigation Handbook on West Virginia Rules of Civil Procedure, at § 59(e)[2]. Rule 59(e) is not a vehicle for a party to undo his/her own procedural failures or to advance arguments that could and should have been presented to the trial court prior to judgment. Id. (Exhibits that consisted of deposition transcripts, letters, and other documents, that employee's counsel failed to file with the court in response to the employer's summary-judgment motion, were not new evidence, for the purpose of a motion to alter and amend the judgment, since the exhibits were in existence before the court issued an order granting summary judgment to the employer. Satterlee v. Allen Press, Inc., 455 F.Supp.2d 1236 (D.Kan. 2006)). A motion to alter or amend the judgment cannot be used to present evidence that could have been presented before judgment was entered. Obrieht v. Raemish, 517 F.3d 489 (7th Cir. Wis. 2008), *cert, denied*, 129 S. Ct. 417 (2008).

An abuse of discretion standard is used in reviewing a trial court's decision to grant or deny a motion under Rule 59(e). Litigation Handbook on West Virginia Rules of Civil Procedure, at § 59(e) [2][d].

In KCBOE's Motion to Alter or Amend Judgment, KCBOE requested the Circuit Court to alter or amend its judgment entered on April 1, 2010, on the following grounds:

- "(1) Counsel for Plaintiff made false and fraudulent misrepresentations to this Court by stating KCBOE failed to attempt to raise the issue of mitigation of damages of the Level IV proceeding thereby waiving the defense;

- (2) Plaintiff was employed at Smoker Friendly for a period of time after he was terminated from his position with KCBOE; however, in awarding Plaintiff damages in the amount of \$259,566.99, the Court did not provide KCBOE with a set off for the income Plaintiff actually earned thereby placing Plaintiff in a better position than he would have been had he not been terminated by KCBOE, which is contrary to the public policy of the State of West Virginia; and
- (3) Plaintiff was impermissibly awarded damages for a period of time when he could not be reinstated based upon his own failure to renew his teaching certificate, which is contrary to public policy. (sic)"

KCBOE's Motion to Alter or Amend Judgment, at p.1.

Of the three arguments advanced by the Petitioner in its Motion to Amend or Alter Judgment, only the first, alleged misconduct of counsel, would qualify as a valid ground under the four basic grounds for granting a Rule 59(e) motion. The Petitioner's arguments regarding mitigation of damages and failure to renew a teaching certificate are matters that do not fall within the four basic grounds for a Rule 59(e) motion. Further, the mitigation issue and the teaching certificate issue both were issues that had previously been presented to the Court, and thus may not be relitigated under a Rule 59(e) motion.

In its Motion to Alter or Amend Judgment, KCBOE alleged that the Respondent's attorney made "blatant misrepresentations ... which are tantamount to fraud on this Court." (KCBOE's Motion to Alter or Amend Judgment, p. 3). Petitioner's allegations that counsel for Respondent/Plaintiff made false and fraudulent misrepresentations to the Court were not substantiated factually by what occurred and accordingly cannot validly or successfully support a Rule 59(e) motion.

The KCBOE cited the following four (4) statements of counsel that it alleged were false representations of fact. Id. at pp. 3-4, 7:

1. 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.

2. 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.
3. 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. 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.

Each statement will be addressed individually below.

1. 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.

The KCBOE called one witness at the Level IV hearing, Ms. Cherie Cowder. Ms. Cowder, a psychologist, testified generally regarding the effects of sexual abuse on adolescent children. Ms. Cowder never addressed any issue of damages much less mitigation.

In fact, Ms. Cowder's testimony was of no value in the case as:

1. she had never examined Ms. McKown (the alleged sexual assault victim);
2. she had never reviewed any medical records or even statements;
3. she would consider Ms. McKown an adult, not a child; and,
4. she testified repeatedly that she was not rendering any opinion regarding Ms. McKown.

There was not one witness called by the KCBOE who testified on the issue of mitigation. The KCBOE has not set forth, even today, that it did have such a witness. Therefore, this statement of fact is absolutely correct.

2. 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.

While the Board's argument was that Mr. Fulmer's counsel made false representations of "fact," this statement of counsel appears to be argument. The first portion of this statement, that the KCBOE had the burden of proof on mitigation, is accurate and a correct statement of law. See, Syl. Pt. 2 of *Mason County Bd. of Educ. v. State Supt. of Schools*, 179 W.Va. 632, 295 S.E.2d 719 (1982).

The next "factual" statement is that the Board did not present any evidence on the issue of mitigation of damages. Again, this statement was one hundred percent (100%) accurate. Not only did the KCBOE fail to call any witness, or present any other type of evidence or damages in its case in chief, the KCBOE did not cross any of Respondent Fulmer's witnesses on the issue of damages, let alone mitigation. Again, the KCBOE has not shown, or even alleged, today that it did present such evidence.

3. 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. We put on evidence. our Honor, showing the malice in that case.

At the Level IV hearing, Mr. Fulmer introduced evidence, including his own testimony and numerous exhibits as to wages and other benefits of what he had earned as an employee of the Petitioner. See, II.B., supra. Again, this statement of counsel was accurate.

The statement that KCBOE had the burden of proof on mitigation is, again, accurate. See, *Mason County*, supra. Counsel's statement that KCBOE did not put on any evidence on the issue of damages, but that Fulmer did, is also accurate. See, *Mason County*, supra.

Finally, the statement regarding malice is true as Fulmer presented the following evidence:

- a. That the KCBOE simultaneously took diametric opposite positions with respect to Fulmer's conduct. In the Grievance Board proceeding, KCBOE took the position that Mr. Fulmer made improper sexual contact with Megan McKown while, simultaneously, in McKown's civil action in the Circuit Court of Kanawha County against the Kanawha County Board of Education and Fulmer, it took the position that Fulmer did not commit any type of improper sexual contact or activity with McKown;
- b. That the KCBOE ignored favorable witnesses to Fulmer during its investigation of this incident;
- c. That KCBOE knew that the testimony of the two students was not consistent with statements previously given to the KCBOE's investigator that Fulmer had not acted inappropriately and had not had any sexual contact with the young women;
- d. That the KCBOE did nothing to investigate the credibility of the students and allowed Megan McKown to testify that she saw Mr. Fulmer touch Amber Hancock's butt despite recorded statements where she said she had never seen Mr. Fulmer do anything wrong. The KCBOE continued to prosecute Fulmer in the Grievance Board hearing despite the Professional Practice Panel having found in his favor.

Therefore, again, the statements of counsel were accurate in that Fulmer and his counsel presented evidence showing the malice of KCBOE in prosecuting the matter.

4. Judge, I tried this case, the underlying cases (Level IV proceeding), so 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.

The record is clear that the undersigned did, in fact, try the underlying Level IV grievance proceeding and, therefore, was generally familiar with what occurred at hearing. Additionally, the transcript reflects that Mr. Mundy was counsel for Mr.

Fulmer at the hearing. The record shows that Mr. Mundy gave the opening, directed witnesses, cross-examined witnesses and argued legal matters on behalf of Mr. Fulmer.

Finally, with respect to the statement contained herein that the ALJ ruled that Bob Fulmer was entitled to full back pay and benefits, again, the Order speaks for itself. The Order does, in fact, indicate that Fulmer is entitled to what Mr. Mundy stated – full back pay and benefits. Therefore, again, there are no fraudulent statements contained by counsel in this passage.

Despite making the serious accusations of fraud and misrepresentation of fact against Fulmer's counsel, the KCBOE has admitted that “. . . these facts as stated may be true ...” (Petition for Appeal, p. 25). After Fulmer's counsel established that KCBOE's argument that he had made false and fraudulent misrepresentations was inaccurate and clearly wrong, KCBOE changed its position. It now alleges instead that counsel "omitted" a “ruling” of the ALJ. (Petition for Appeal, p. 24).

At the June 30, 2010, hearing on KCBOE's Motion to Alter or Amend Judgment, counsel for Respondent Fulmer established – and Judge Zakaib agreed – that the KCBOE had not proven proper grounds to alter his previous ruling granting the Writ of Mandamus. KCBOE's argument that counsel made an “omission” is not well taken. KCBOE's counsel at the Level IV grievance hearing, James Withrow, was present at the Show Cause hearing. Mr. Withrow⁵ spoke with the Court at length regarding the circumstances relating to the Level IV hearing. (See, transcript of 2/25/10 Show Cause Hearing, pp. 17-22, attached as Exhibit 1 to KCBOE's Motion to Alter or Amend Judgment.) If counsel for KCBOE or Mr. Withrow believed there was any alleged misrepresentation or omission as to what had occurred at the Grievance Board hearing, KCBOE certainly had every opportunity to present its version of events that

⁵ The hearing transcript inaccurately identifies Mr. Withrow as Mr. Spenia.

occurred at the hearing. Interestingly, Mr. Withrow never took exception to any of Fulmer's counsel's statements.

The statements made by Withrow regarding damages and the comments by the ALJ in the Level IV hearing do not amount to a "legal ruling." First, there was no objection to Fulmer's testimony regarding damages. Further, it is clear that the ALJ did not prohibit any type of evidence from being presented by KCBOE. The ALJ simply indicated that, in his view, the damage to which Mr. Fulmer would be entitled was simply a clerical, mathematical calculation based upon Fulmer's rate of pay and the number of days missed. There is nothing in the statements by the ALJ to indicate that he ruled that a mitigation of damages issue had been preserved and would be considered at a later date. Even assuming, for the purposes of argument, that the comments by Mr. Withrow and by the ALJ preserved the mitigation issue, the KCBOE cannot invite error and then benefit from the same. Maples, 475 S.E.2d at 410.

B. The Circuit Court Properly Granted The Writ of Mandamus

Mandamus lies to require the discharge by a public officer of a nondiscretionary duty. Syllabus Point 1, State ex rel. Williams v. Dep't of Military Affairs, 212 W.Va. 407, 573 S.E.2d 1 (2002). 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. Syl. Pt. 2, State ex rel. Kucera v. City of Wheeling, 153 W.Va. 538, 170 S.E.2d 367 (1969); Circuit Court Judge Zakaib properly considered these three requirements before issuing his decision. (See, Order on Plaintiff's Petition for Writ of Mandamus (hereinafter "Order"), pp. 3 and 5.)

Importantly, he considered the KDBOE's evidence and argument (1) that Respondent/Plaintiff used the wrong salary schedule to calculate lost wages for 2005-06, 2006-07 and 2007-08; (2) that Respondent/Plaintiff used salary schedules for 200-

day rather than 210-day employees; (3) that Respondent/Plaintiff's calculations failed to address mitigation of damages; (4) that the termination had not been malicious; (5) that Respondent/Plaintiff was not entitled to back pay for teaching, cafeteria duty and coaching or reimbursement for health insurance between the October 29, 2008, Grievance Board decision ordering his reinstatement and December 5, 2008, when he submitted another application for renewal of his teaching license; (6) that monies earned by Respondent/Plaintiff during the pendency of his appeals of his wrongful termination should have been deducted from his back pay award; (7) that Respondent/Plaintiff was not entitled to reinstatement of \$13,973.05 into his retirement plan because he elected to transfer from the Teachers' Defined Contribution System to the Teachers' Retirement System when he was reinstated; (8) that Respondent/Plaintiff was only entitled to an employer's contribution to this retirement account in the amount of 7.5% of total lost wages of only \$36,654.77 rather than the \$143,976.00 initially asserted in the Petition for Writ of Mandamus; (9) that pre- and post- judgment interest should be calculated on back pay of \$36,654.77 rather than on the \$143,976.00 initially asserted in the Petition for Writ of Mandamus. (See, KCBOE's Memorandum Showing Cause Why the Petition for Writ of Mandamus Must Be Denied, pp. 4-13).

Accordingly, Petitioner KCBOE submitted detailed argument and evidence to the Circuit Court in arguing that Respondent Fulmer's Petition for Writ of Mandamus should be denied. The KCBOE set forth the specific amounts of wages for each school year which Respondent Fulmer was seeking, and detailed figures with supporting salary schedules and other documents to support its own figures for back pay which it contended Mr. Fulmer should receive. Id. at p. 6. Similarly, Petitioner KCBOE presented to the Circuit Court its precise figures which it argued constituted amounts which should be deducted from the back pay due to Mr. Fulmer because of income earned from alternative employment performed after he was terminated by KCBOE. Id. at pp. 7-8. Moreover, the KCBOE, in painstaking detail, presented arguments to Circuit

Court Judge Zakaib regarding the cafeteria supervision payment, payment for coaching extracurricular activities, an insurance reimbursement, reinstatement of monies to Mr. Fulmer's retirement account, the employer's contribution into his retirement account, and pre-judgment and post-judgment interest. *Id.* at pp. 9-13.

Judge Zakaib therefore considered—and rejected—the KCBOE's arguments, as set forth in its Memorandum Showing Cause Why the Petition for Writ of Mandamus Must be Denied and at the hearing on the Writ. He ruled that “[a]t the time of the grievance hearing, both sides had an opportunity to present any evidence they believed pertinent to the issues involved in the case.” (Order on Plaintiff's Writ of Mandamus, at Finding of Fact No. 4.) The Petitioner KCBOE does not—and cannot—dispute the accuracy of his finding. He also found that during the Grievance Board hearing the KCBOE “did not present any evidence whatsoever concerning mitigation of damages or otherwise raise that issue before the Administrative Law Judge.” (Order, at Finding of Fact No. 5). Again, KCBOE does not—and cannot—dispute the accuracy of this finding.

Judge Zakaib then looked to the four corners of the Order issued by the Grievance Board Administrative Law Judge and correctly concluded that he had ordered that Mr. Fulmer be reinstated to his former position and that he “be compensated 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.” (Order, at Finding of Fact No. 7.) Judge Zakaib's Conclusions of Law reflect the correct legal conclusion that “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 Bd. of Educ. v. State Superintendent of Schools*, 170 W.Va. 632, 295 S.E.2d at 719. (1982)” (Order, at Conclusions of Law No. 3.)

Accordingly, the record establishes that Judge Zakaib's granting of the Writ of Mandamus was correct factually and legally and should be upheld.

C. The Grievance Board Hearing was not Bifurcated as to Liability and Damages

At the Show Cause hearing on the Writ of Mandamus, the Petitioner made the same arguments that it is presenting before this Court. Circuit Court Judge Zakaib specifically found that the burden was on the KCBOE to raise the issue of mitigation of damages at the hearing before the Grievance Board Administrative Law Judge, and that if had not done so.⁶ Counsel for the Petitioner/Defendant stated to Judge Zakaib that it had the burden of establishing mitigation. Moreover, and importantly, Judge Zakaib correctly perceived and stated: "I can't see the logic in having a ruling or having an ALJ say he's entitled to back pay and not address the issues associated with back pay and then say, 'Well, you're entitled to back pay, but you have to have another hearing to decide what the back pay will be.' That's what you're saying there should be and I don't think that's so." (February 25, 2010, Hrg. Tr. at p. 28.)

Judge Zakaib was absolutely correct in his ruling. The Grievance Board heard testimony and admitted documentary evidence relating to both liability and damages. At the hearing, Respondent/Plaintiff Fulmer introduced his testimony regarding wages he earned from the KCBOE in 2004, 2005 and 2006, and the fact that he had received no salary or benefits from the KCBOE since July of 2005. (See, Exhibit 2 to KCBOE's Motion to Alter or Amend Judgment). He testified that he would have received pay raises during 2006, 2007 and 2008 from the KCBOE. He further testified that he had health insurance through his employment at KCBOE, but that since his termination he had had to pay \$214.00 every two weeks for insurance coverage for himself and his family. Id. Respondent Fulmer's documentary evidence, which was admitted without objection from the KCBOE at the beginning of the hearing, included Exhibit No. 26 (W2s for 2004 and 2005), No. 27 (West Virginia Teachers Defined

⁶ Counsel for Petitioner stated to Judge Zakaib, at the Show Cause hearing, that "the burden is on us to prove or to bring up mitigation." (February 25, 2010, Hrg. Tr., at p.17).

Contribution (retirement) Plan) and No. 28 (Great-West Life & Annuity Insurance Co.)
See Exhibit A.

The Grievance Board's Decision provides that the 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 his position, with legal interest on any back pay." The Grievance Board's Decision did not contain any provisions to the effect that "earnings from other sources shall be deducted," that "mitigation of damages shall be considered" or any similar language.

D. The Circuit Court Set Forth Findings of Fact and Conclusions of Law Regarding Mandamus

Although Petitioner argues that the Circuit Court's July 6, 2010, Order Denying Defendant's Motion to Alter or Amend Judgment did not contain any Findings of Fact or Conclusions of Law, the Circuit Court in fact had included such Findings of Fact and Conclusions of Law in the underlying April 1, 2010, Order on Plaintiff's Petition for Writ of Mandamus. Defendant'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 set forth in the original April 1, 2010, Order.

The April 1, 2010, Order on Plaintiff's Petition for Writ of Mandamus included the following Findings of Fact relevant to the instant proceedings:

- At the time of the Grievance hearing, both sides had an opportunity to present any evidence they believed pertinent to the issues involved in this case.
- 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.

- 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.
- However, the Kanawha County Board of Education has failed to compensate Mr. Fulmer for his lost wages and benefits, including legal interest, as required as a result of the October 29, 2008, ruling.
- Mr. Fulmer's lost wage claim with benefits, and interest, totals \$259,566.99.

The April 1, 2010, Order also included the following Conclusions of Law which are relevant to the instant proceeding:

- 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 Bd. of Educ. v. State Superintendent of Schools, 170 W.Va. 632, 295 S.E. 2d 719 (1982).
- It is clear in this case that the employer, the 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 Employee Grievance Board.
- It is further clear that the Administrative Law Judge made an award of back pay, benefits, and legal interest which the 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 \$92,176.60, 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.
- 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.

- 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.

E. A Court Speaks Only Through Its Orders

Ultimately, regardless of what any attorney argued to the Circuit Court regarding what comments had been made by the Grievance Board ALJ at the Level IV hearing, the Grievance Board's Order is the ultimate "authority" on the issue. It is black letter law that "a court only speaks through its orders." State ex rel. Kaufman v. Zakaib, 207 W.Va. 662, 535 S.E.2d 727 (2000), citing to State v. White, 188 W.Va. 534, 536 n. 2, 425 S.E.2d 210, 212 n. 2 (1992). As the Court in State ex rel. Kaufman noted:

("[H]aving held that a court speaks through its orders, we are left to decide this case within the parameters of the circuit court's order." (citations omitted)); State ex re. Erlewine v. Thompson, 15 W.Va. 714, 718, 207 S.E.2d 105, 107 (1973) ("A court of record speaks only through its orders[.]" (citations omitted)).

This Court has adhered to this principal when presented with conflicting signals from a circuit court. Always, the law favors written orders or records:

As an initial matter, it is clear that where a circuit court's written order conflicts with its oral statement, the written order controls. Therefore, "we are left to decide this case within the parameters of the circuit court's order." State v. White, 188 W.Va. 534, 536 n. 2, 425 S.E.2d 210, 212 n. 2 (1992). *See also Harvey v. Harvey*, 171 W.Va. 237, 241, 298 S.E.2d 467, 471 (1982) ("[t]hat a court of record speaks only through its records or orders has been generally affirmed by this Court in subsequent cases"). Considering the above authority, we believe it is necessary to give greater credence to the circuit court's order. Thus, we find in this case that the defendants' concerns of the difference between the circuit court's ruling from the bench and the subsequent written order have no merit. Tennant v. Marion Health

Care Found., Inc., 194 W.Va. 97, 107 n. 5, 459 S.E.2d 374, 384 n. 5 (1995).

State ex rel. Kaufman, 535 S.E.2d at 736.

The court at issue here—the Grievance Board—set forth its complete ruling in its Decision, which was that the KCBOE was to “compensate [Bob Fulmer] for lost wages and benefits to which he would have been entitled had he remained his position, with legal interest on any back pay.” (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.)

F. Mitigation is an Affirmative Defense Which was Waived Since It was Not Raised by KCBOE at the Level IV Hearing

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), citing to Syllabus Point 2, Mason County Bd. of Educ., 295 S.E.2d at 719. Although this Court has also stated that:

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 at comparable employment where it is locally available, will be deducted from any back pay award; however, the burden of raising the issue of mitigation is on the employer.

Seymour, 549 S.E.2d at 666 (emphasis added).

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).

KCBOE’s counsel at the Grievance Board hearing, James Withrow, did not object to the Respondent/Plaintiff’s evidence regarding his lost income but merely interjected what he termed “just a procedural matter.” His complete comment at the hearing was:

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 purpose.

See, Exhibit 2 to KCBOE’s Motion to Alter or Amend Judgment, at p. 140 (attaching pages from unofficial transcript of Grievance Board hearing).

Counsel Withrow’s comments do not constitute an objection. Moreover, although ALJ Thomas Gillooly responded to Withrow’s comments, his comments, importantly, do not constitute a ruling on an objection since no objection was made. The ALJ had a responsibility to create a record for an appeal. He did not, as Petitioner now contends, “rule[d] 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.” The ALJ merely commented that:

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. MUNDY: That's fine. I mean we can handle it like that. I just wanted to make sure Mr. Withrow knew how much to write the check for. So.

MR. WITHROW: I don't write the checks.

MR. MUNDY: (Inaudible) right person.

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.

EXAMINER GILLOOLY: We think your point is taken, Mr. Withrow.

Id., at pp. 141-42.

Circuit Court Judge Zakaib correctly held that this exchange did not constitute KCBOE having raised the issue of mitigation of damages. There was no order by the Grievance Board ALJ that damages and liability would be bifurcated and Respondent/Plaintiff Fulmer presented his evidence of liability and damages (lost wages and benefits) to the Grievance Board ALJ. As Petitioner 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. "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.”
Maples, 475 S.E.2d at 410.

Alternatively, even if one were to consider KCBOE’s counsel’s comments to have raised the affirmative defense of mitigation of damages, its argument that monies earned by Respondent Fulmer from 2005-2008 should be deducted from his back pay award is without legal or factual support. Mr. Fulmer, a public school teacher who worked during the daytime hours until approximately 3:00 p.m., Monday through Friday, from late August until early June of every year, was free to accept other employment in the evenings, on weekends and, importantly, during the summer months from early June until late August. There is no showing by the KCBOE that Mr. Fulmer could not have earned the wages which he earned from 2005-2008 and fulfilled the terms of his teaching contract with KCBOE.

As this Court has recognized, earnings he actually received in dissimilar employment should not be credited on his contractual damages, unless the employment is shown to have been incompatible with his contractual service. Mason County Bd. of Educ., 295 S.E.2d at 724. The Court noted an example of a “compatible” job, where a teacher took a night job supervising a federal adult education program. The Court noted that since his assertion that the work would not have interfered with his teaching duties was not controverted, it held in Martin v. Bd. of Educ., 120 W.Va. 621, 199 S.E. 887 (1938), that those earnings were not to be considered in mitigation of damages. Petitioner’s argument that the \$58,314.04 earned by Mr. Fulmer in an attempt to support his family during his protracted three and one-half year challenge and appeal of the KCBOE’s wrongful termination of him should be deducted from his back pay should therefore be rejected.

West Virginia law is also clear that if a wrongful discharge is malicious, the wrongful discharged employee does not have a duty to mitigate damages by accepting similar employment to that contemplated by his contract if it is available in the

local area. Mason County Bd. of Educ., 295 S.E.2d at 724. In the instant case, Respondent Fulmer's discharge was in fact malicious and, accordingly, even assuming that the KDBOE had raised the issue of mitigation of damages at the Grievance Board hearing, he would not have been under a duty to mitigate his damages due to the malicious nature of his discharge.

KCBOE persisted in not reinstating Respondent Fulmer even after the West Virginia Commission for Professional Teaching Standards, Professional Practice Panel, recommended that no action be taken against his teaching certification after considering evidence presented on June 18-19, 2007, which was more than one year prior to the Grievance Board's Decision ordering Mr. Fulmer's reinstatement. (See, Order of the State Superintendent of Schools, attached hereto as Exhibit C.) This is yet another indication that his termination was malicious. Accordingly, even if the KCBOE had raised the issue of mitigation at the Grievance Board hearing, mitigation would not apply given the facts of this case.

KCBOE, on appeal, now relies on a finding made in a pre-disciplinary hearing against Mr. Fulmer to argue that it was justified in discharging him. At that hearing, Mr. Fulmer was not represented by counsel and was not allowed to confront the witnesses against him inasmuch as the students were allowed to testify via video camera in a separate room from the hearing site. (See, excerpts from transcript of May 12, 2005, hearing, attached hereto as Exhibit B.) Moreover, the KCBOE therein presented testimony from the complaining student, and another student, which had been directly contradicted by both students' earlier statements to investigators. A further indication of the KCBOE's maliciousness in the discharge and continuing prosecution of Respondent Fulmer is the fact that, during its prosecution of Mr. Fulmer for alleged sexually-related misconduct, it contemporaneously – and inconsistently –

took the position in the complainant Megan McKown's civil suit⁷ that Mr. Fulmer had not done any of the actions which formed the basis of the KCBOE's administrative actions against him.

G. The Requirement of a Teaching Certificate May be Waived for up to Three Months; Respondent's Claim for Back Pay and Benefits for Six Weeks in 2008 is Therefore Valid

Petitioner's argument that the Circuit Court erred in awarding back pay and reimbursement for insurance premiums which had been paid by the Respondent for the period of October 29, 2008, to December 15, 2008, is incorrect and contrary to W.Va. Code § 18A-3-2 (1990). That statute provides that "if a teacher is employed in good faith on the anticipation that he or she is eligible for a certificate and it is later determined that the teacher was not eligible, the state superintendent of schools may authorize payment by the county board of education to the teacher for a time not exceeding three school months or the date of notification of his or her ineligibility, whichever shall occur first."

This statute is intended to protect a teacher who is employed and anticipates being eligible for a teaching certificate but who later is determined to not be eligible for the certificate. The situation in which the Petitioner KCBOE placed Respondent Fulmer is more egregious and clearly warrants a finding that damages awarded for back pay and reimbursement for insurance premiums paid from October 29, 2008, until the Respondent was reinstated to his teaching position on December 15, 2008, must be upheld without consideration of the fact that his license had not yet been properly renewed until December 1, 2008. Contrary to the situation addressed by the statute, the Respondent had a valid teaching certificate during his years of teaching and ultimately was found eligible for a teaching certificate again in 2008.

⁷ Civil Action No. 06-C-483 in the Circuit Court of Kanawha County, West Virginia.

Respondent Fulmer had been wrongfully terminated by the KCBOE in 2005. Following protracted proceedings during 2005, 2006 and 2007, his teaching certificate lapsed in the summer of 2008. In June, 2008, he filed an application for renewal of his license with the West Virginia Department of Education. Subsequently he was informed that it was necessary that he take a class to complete his renewal, which he did. His instructor, however, failed to promptly report his successful completion of the class until after she returned from a vacation. She submitted her information to the Department of Education on December 1, 2008. Mr. Fulmer's application was processed on December 5, 2008, and Respondent was then reinstated to his teaching position on approximately December 15, 2008. (See, Plaintiff's Response to Defendant, KCBOE's, Motion to Alter or Amend Judgment, at p. 14).

Petitioner now argues, in contravention of W.Va. Code §18A-3-2, that Respondent Fulmer is not entitled to back pay, health insurance benefit reimbursement or retirement benefits for the period from October 29, 2008, until December 15, 2008. This Court should reject this argument, as well as the Petitioner's unsubstantiated and inflammatory arguments that it would be a "abuse of taxpayers' monies⁸," that the Respondent is "essentially being rewarded for failing to have a valid teaching certificate" and that it is "contrary to public policy" to require KCBOE to pay Respondent damages for the full period in which he had been wrongfully terminated.

V. CONCLUSION

Respondent Robert Fulmer, by counsel, urges the Court to reject the Petition for Appeal for the reasons set forth herein. Circuit Court Judge Zakaib was correct in granting Respondent/Plaintiff's Writ of Mandamus. Respondent Fulmer

⁸ Petitioner also makes an unsubstantiated argument, in its "Relief Prayed For" section, that the appeal herein "impacts both KCBOE and the taxpayers whose monies will inevitably be used to pay the damages award to Respondent." This argument is unsupported by any evidence or authority and should be rejected.

established, through evidence before the Grievance Board and in evidence and argument before Judge Zakaib, his clear legal right to full back pay, as ordered by the Grievance Board, without deductions. Moreover, the KCBOE has a legal duty to pay the damages ordered by the Grievance Board and by Judge Zakaib. Finally, the Respondent/Plaintiff had no other adequate remedy other than to file a Writ of Mandamus to enforce the Grievance Board's order granting him "lost wages and benefits to which he would have been entitled had he remained in his position, with legal interest on any back pay.

ROBERT FULMER
BY COUNSEL

MUNDY & NELSON
Post Office Box 2986
Huntington, West Virginia 25728
(304) 525-1406

BY:



William L. Mundy, Esq. (WV Bar #2678)
Rebecca L. Stepto, Esq. (WV Bar #3597)

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ROBERT FULMER,

Respondent (Plaintiff),

v.

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

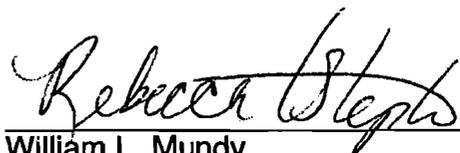
KANAWHA COUNTY BOARD OF
EDUCATION,

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 **RESPONSE TO PETITION FOR APPEAL** was served upon the following counsel, via facsimile and United States Mail, first class, postage prepaid, this 7th day of December, 2010:

George J. Joseph, Esq.
Billie Jo Streyle, Esq.
Bailey & Wyant, PLLC
500 Virginia Street East, Suite 600
P.O. Box 3710
Charleston, West Virginia 25337-3710



William L. Mundy
West Virginia State Bar #2678
Rebecca L. Stepto
West Virginia State Bar #3597
MUNDY & NELSON
Post Office Box 2986
Huntington, West Virginia 25728
(304) 525-1406

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE