

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ROBERT FULMER,

Plaintiff / Respondent,

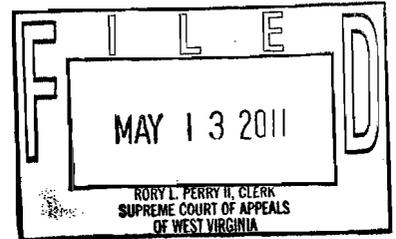
Appeal No. 101578

v.

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

KANAWHA COUNTY BOARD OF  
EDUCATION,

Defendant / Petitioner.



Supplemental Brief

~~REPLY OF~~ PETITIONER KANAWHA COUNTY BOARD OF EDUCATION

Friday, May 13, 2011

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## I. INTRODUCTION

Kanawha County Board of Education (hereinafter “KCBOE”), Defendant below and Petitioner, files this reply brief in support of its Petition for Appeal. In its Petition for Appeal, KCBOE appealed the ruling of the Circuit of Kanawha County, which awarded Respondent \$259,566.99 in relief he requested in a mandamus proceeding. KCBOE contends that the Circuit Court’s ruling was in error on six (6) legal grounds, as documented in its Petition for Appeal. In this reply, pursuant to this Court’s requirements, KCBOE will address arguments presented by Respondent in his “Response to Petition for Appeal” (hereinafter “Response”) that it believes are improper and that require further briefing. KCBOE does not concede to any facts and/or legal arguments not explicitly addressed herein, as presented by Respondent in his Response.

## II. ARGUMENT

### A. RESPONDENT INCORRECTLY STATED THE STANDARD OF REVIEW TO BE APPLIED IN THIS MATTER, BASED UPON SECONDARY LEGAL SOURCES, IN SPITE OF PRECEDENT ESTABLISHED BY THIS COURT REGARDING THE PROPER STANDARD OF REVIEW TO BE APPLIED IN THIS APPEAL.

In Respondent’s Response, he argued that, generally, “there are four basic grounds upon which a Rule 59(e) motion may be granted.” (**Response: Pg. 18**). The four basic grounds Respondent stated were: “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 and previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice. Fourth, a Rule 59(e) motion may be justified by an intervening change in controlling law.” (**Response: Pg. 18**). In support of his position, Respondent cited to Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2810.1. (**Response: Pg. 18**). Respondent further argued that “[a]n abuse of discretion standard is used in reviewing a trial

court's decision to grant or deny a motion under Rule 59(e)[,]" in reliance on Litigation Handbook of West Virginia Rules of Civil Procedure § 59(e) [2][d]. **(Response: Pg. 19)**. Based upon these secondary legal sources, Respondent argued that only one (1) of the appellate issue raised by KCBOE in its Petition for Appeal would qualify as a valid ground for appeal. **(Response: Pg. 20)**. Moreover, Respondent argued that the appellate issues were already presented to the Circuit Court and "may not be relitigated under a Rule 59(e) motion." **(Response: Pg. 20)**. KCBOE disagrees.

By Order entered April 1, 2010, the Circuit Court of Kanawha County found that Respondent met his burden of proof in a mandamus proceeding to be awarded relief in the amount \$259,566.99 from KCBOE. **(4/1/10 Order)**. In a one (1) page Order entered on July 6, 2010, the Circuit Court denied KCBOE's request to alter or amend its April 1, 2010 Order. **(7/6/10 Order)**.

As KCBOE cited in its Petition for Appeal, on Page thirty (30), this Court has established that the "[t]he standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed." Wickland v. American Travellers Life Ins. Co., Syl. Pt. 1, 204 W. Va. 430, 513 S.E.2d 657 (1998). "The standard of appellate review of a circuit court's order granting relief through the extraordinary writ of mandamus is de novo." Hensley v. West Virginia Dep't of Health & Human Resources, Syl. Pt. 1, 203 W. Va. 456 508 S.E.2d 616 (1998) (Quotations omitted). Since the underlying judgment in this matter involved the Circuit Court's Order granting relief through the extraordinary writ of mandamus, the standard of appellate review in this appeal is de novo. See, Hensley v. West Virginia Dep't of Health & Human Resources, Syl. Pt. 1, 203 W. Va. 456 508 S.E.2d 616 (1998) (Quotations omitted). "When 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.” Blake v. Charleston Area Medical Center, 201 W.Va. 469, 476, 498 S.E.2d 41, 47 (1997) (Quotations omitted) (Emphasis added).

As this Court has articulated, “[a] writ of mandamus will not issue unless three elements coexist--(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.” State ex rel. Burdette v. Zakaib, 224 W. Va. 325, 331 685 S.E.2d 903, 909 (2009) (Quotation and citations omitted). “[T]he burden of proof as to all the elements necessary to obtain mandamus is upon the party seeking the relief. . . a failure to meet any one of them is fatal.” Id. at 331, 685 S.E.2d at 909 (Citation omitted) (Emphasis added).

Pursuant to the precedent of this Court and contrary to Respondent’s argument, the proper standard of review in this matter is de novo. On appeal, this Court should look anew at the record before the Circuit Court to determine whether Respondent met his burden by proving that he had a clear legal right to the relief he requested in the amount of \$259,566.99, which KCBOE contends he failed to do. If this Court finds Respondent failed to meet his burden of proof, based upon the record below, the ruling of the Circuit Court must be reversed.

**B. CONTRARY TO RESPONDENT’S ARGUMENT THAT PETITIONER FAILED TO RAISE ERROR NO. 4, ERROR NO. 5, AND ERROR NO. 6 BELOW, THE RECORD ON APPEAL DEMONSTRATES THAT EACH OF THESE ERRORS ARE PROPERLY BEFORE THIS COURT ON APPEAL.**

On Pages six (6) through eight (8), Respondent argued that KCBOE raised Error No. 4, Error No. 5, and Error No. 6 for the first time on appeal by simply stating these specific errors were not addressed in “Kanawha County Board of Education’s Motion to Alter or Amend Judgment.” (Response: Pgs. 6-8). Respondent cited no law to support his position.

As this Court has held, the authority of the Court regarding appellate issues is limited “to resolve

assignments of nonjurisdictional errors to a consideration of those matters passed upon by the court below and fairly arising upon portions of the record designated for appellate review.” Skidmore v. Skidmore, Syl. Pt. 6, 225 W.Va. 235, 691 S.E.2d 830 (Per Curiam) (2010) (Quotation omitted) (Emphasis added). As the underlying record reflects, each of these errors were properly preserved for appeal.

1. *ERROR NO. 4: PRE-JUDGMENT AND POST-JUDGMENT INTEREST*

In the Petition for Appeal, KCBOE cited, in Error No. 4, that the Circuit Court erred by finding Respondent had a clear legal right to the relief he sought in the amount of \$259,566.99, because the Circuit Court improperly awarded him pre-judgment interest in the amount of \$59,356.49 and post-judgment interest in the amount of \$19,795.99. The pre-judgment and post-judgment interest were calculated in error by Respondent, based upon his improper calculation of damages.

On the date of the mandamus hearing, Respondent presented “Plaintiff’s Revised Damages Calculation” to the Circuit Court and KCBOE, which included the improper calculation of interest. The court did not hear any testimony from witnesses and/or admit any documents into evidence confirming the accuracy of Respondent’s calculations. **(Petition: Pgs. 37-38)**. In Respondent’s Response, he argued that Error No. 4 was raised for the first time on appeal with this Court and should not be considered on appeal. **(Response: Pgs. 6-7)**. KCBOE disagrees and contends that Error No. 4 was properly raised below, as demonstrated by the record on appeal, and is properly before this Court. See, *Skidmore v. Skidmore*, Syl. Pt. 6, 225 W.Va. 235, 691 S.E.2d 830 (Per Curiam) (2010).

The record below shows that KCBOE raised Respondent’s improper calculation of pre-judgment interest and post-judgment interest initially submitted to the Circuit Court in his Petition for Writ of Mandamus. **(2/24/10 KCBOE Show Cause Memo: Pgs. 11-12)**. On the date of the

mandamus hearing, Respondent submitted to the Circuit Court “Plaintiff’s Revised Calculation of Damages” modifying his calculation for pre-judgment interest and post-judgment interest. At the hearing, Respondent acknowledged that his initial calculation of damages in his Petition for Writ of Mandamus was not accurate. (2/24/10 HT: Pg. 4: 5-17). Although Respondent acknowledged that his initial figures were inaccurate, at the conclusion of the mandamus hearing, the Circuit Court summarily granted Respondent the relief he sought in the amount of \$259,566.99, which included pre-judgment interest in the amount of \$59,356.49 and post-judgment interest in the amount of \$19,795.99. In ruling in favor of the Respondent the Circuit Court stated:

I think your client is entitled to the relief you are asking. In other words, his back pay, and you’ve got the figures there and computed it.

(2/25/10 HT: Pg. 26: 5-7). At this juncture, KCBOE had no opportunity to brief the issues raised in “Plaintiff’s Revised Calculation of Damages.”

Thereafter, in “Kanawha County Board of Education’s Motion to Alter or Amend Judgment” filed on or about April 14, 2010, KCBOE argued that Circuit Court’s April 1, 2010 Order granting Respondent’s Writ of Mandamus was improper, because the Circuit Court failed to consider mitigation of damages in awarding the back pay and benefits to Respondent, the Circuit Court failed to provide KCBOE with a setoff of income actually earned by Respondent, while terminated, and the Circuit Court improperly awarded Respondent back pay and benefits for a period of time that he was unemployed, based upon his own failure to renew his teaching certificate. (4/14/10 Motion to Alter or Amend). The Circuit Court’s award of pre-judgment and post-judgment interest was based upon the calculation of back pay and benefits presented by Respondent in “Plaintiff’s Revised Calculation of Damages,” which KCBOE contended was improperly calculated. (April 1, 2010 Order; 2/26/10 Plaintiff’s Revised Calculation of Damages). These same grounds were orally argued by KCBOE

at the June 30, 2010 hearing regarding KCBOE's request that the Circuit Court alter or amend its April 1, 2010 Order. (6/30/10 HT).<sup>1</sup>

KCBOE properly raised the issue that Respondent's calculation, and, ultimately, the Court's award of pre-judgment in the amount of \$59,356.49 and post-judgment interest in the amount of \$19,795.99 was improper, because it was based upon Respondent's improper calculation of back pay and benefits. Moreover, Respondent does not contend that KCBOE failed to raise Error No. 1 concerning mitigation of damages, Error No. 2 concerning the failure of the Court to deduct income actually earned by Respondent, while terminated, and Error No. 3 concerning the Circuit Court's award of back pay to Respondent for a period of time, when he failed to have his teaching certificate renewed. If this Court finds that KCBOE was legally correct in Error No. 1, Error No. 2, and/or Error No. 3, the back pay of Respondent will be decreased, which will result in the requirement that pre-judgment interest and post-judgment interest be recalculated. Therefore, Error No. 4 is directly tied to this Court's decision regarding Error No. 1, Error No. 2, and Error No. 3, which Respondent does not contend were not properly raised before the Circuit Court. Based upon the foregoing, as the record reflects, Error No. 4 is ripe for review by this Court on appeal.

*2. ERROR NO. 5: RETIREMENT BENEFITS.*

In the Petition for Appeal, KCBOE cited, in Error No. 5, that the Circuit Court erred by finding Respondent had a clear legal right to the relief he sought in the amount of \$259,566.99, because the Circuit Court improperly awarded him retirement benefits in the amount of \$9,687.15, which was based upon the improper salary calculation of Respondent. Similar to Error No. 4, Respondent argued that Error No. 5 was not properly raised before the Circuit Court and should not be

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

considered on appeal. As with Error No. 4, KCBOE properly challenged the retirement benefits calculated by Plaintiff in “Defendant Kanawha County Board of Education’s Memorandum Showing Cause Why the Petition for Writ of Mandamus Must Be Denied[.]” (2/24/10 KCBOE Show Cause Memo: Pgs. 11). However, on the date of the writ of mandamus hearing, due to the fact Respondent submitted “Plaintiff’s Revised Calculation of Damages” to the Circuit Court, KCBOE had no opportunity to further brief the issue. At the conclusion of the hearing, the Circuit Court summarily granted the relief requested by Respondent, including his revised calculation regarding retirement benefits.

As record below reflects, KCBOE raised the improper calculation of retirement benefits by Respondent in “Defendant Kanawha County Board of Education’s Memorandum Showing Cause Why the Petition for Writ of Mandamus Must be Denied.” (2/24/10 KCBOE Show Cause Memo: Pg. 11). Moreover, as with Error No. 4, Error No. 5 is directly tied to this Court’s ruling regarding Error No. 1, Error No. 2, and Error No. 3, which Respondent does not contend were not raised in the Circuit Court. If the Court determines KCBOE was legally correct in Error No. 1, Error No. 2, and/or Error No. 3, the calculation of retirement benefits by Respondent will be improper. Based upon the foregoing, Error No. 5 is ripe for review by this Court on appeal.

3. *ERROR NO. 6: ABSENCE OF EVIDENTIARY SHOW CAUSE HEARING: IMPROPER PROCEDURE.*

In the Petition for Appeal, KCBOE cited, in Error No. 6, that the Circuit Court erred by finding Respondent had a clear legal right to the relief he sought in the amount of \$259,566.99, because the Circuit Court summarily accepted the calculations provided by Respondent to the Circuit Court in “Plaintiff’s Revised Calculation of Damages” at the mandamus hearing. At the hearing, the Circuit Court simply granted Respondent the relief he requested in the amount of \$259,566.99, after oral

argument by counsel on one (1) of multiple issues. The Circuit Court did not hear any witness testimony and/or take any evidence whatsoever to ensure the accuracy of the calculations submitted by Respondent on the date of the hearing. Respondent contends that Error No. 6 was raised by KCBOE for the first time on appeal and should not be considered by this Court. KCBOE disagrees.

As the record reflects, KCBOE did raise its request that an evidentiary hearing on the matter take place with the Circuit Court. In particular, the hearing on Plaintiff's Petition for Writ of Mandamus was held by the Circuit Court on February 25, 2010. KCBOE believed that the Court's "show cause" hearing would be an evidentiary hearing. On said date, KCBOE brought witnesses to attest to relevant facts, as well as documentary evidence supporting its position. However, at the hearing, the Court only heard oral argument of counsel before summarily granting the modified relief requested by Respondent on the date of the hearing. Thereafter, the Circuit Court issued its April 1, 2010 Order reflecting its award to Respondent in the amount of \$259,566.99.

KCBOE properly filed a request asking the Circuit Court to modify or amend its April 1, 2010 Order. A hearing was held on KCBOE's request that the Circuit Court modify or amend its April 1, 2010 Order on June 30, 2010. At the hearing, KCBOE notified the Court that it wanted an evidentiary hearing to be held. The record from the June 30, 2010 hearing reflects the following exchange between the Court and KCBOE:

THE COURT:           What you're saying, in essence, is you should be entitled to a hearing on the issue of mitigation.

MS. STREYLE:       Yes, sir. Because when we were here initially the first time we had witnesses and everybody here for the show cause proceeding in the event the Court wanted to take up as to whether or not there was malice in the termination and we had our witnesses here, so yes, I would like another hearing for the Court to address as to whether mitigation should apply in this case.

So, yeah, that is what I would seek.

(6/30/10 HT: Pg. 10: 13-23).

On July 6, 2010, the Circuit Court entered “Order Denying Defendant’s Motion to Alter or Amend Judgment” in a one (1) page Order absent documenting any findings of fact or conclusions of law. This Court has the power to resolve assignments of nonjurisdictional errors considered by the Circuit Court and “fairly arising upon portions of the record designated for appellate review.” Skidmore v. Skidmore, Syl. Pt. 6, 225 W.Va. 235, 691 S.E.2d 830 (Per Curiam) (2010) (Quotation omitted) (Emphasis added). As the record reflects, KCBOE properly raised its request that the Circuit Court mandate the parties to engage in an evidentiary hearing to decide the proper damages to be awarded to Respondent, and the Circuit Court rejected this request by and through its July 1, 2010 Order. Therefore, Error No. 6 is properly before this Court.

**C. CONTRARY TO RESPONDENT’S ARGUMENT IN HIS RESPONSE TO PETITION FOR APPEAL, THE RECORD REFLECTS THE ADMINISTRATIVE LAW JUDGE AT THE LEVEL IV HEARING RULED THAT DAMAGES WERE NOT TO BE CALCULATED AT THE HEARING; THEREFORE, KCBOE WAS NOT REQUIRED TO INTRODUCE EVIDENCE OF DAMAGES AND DID PROPERLY RAISE THE MITIGATION OF DAMAGES DEFENSE.**

On Page ten (10) of Respondent’s Response, he argued that KCBOE’s argument to this Court that the Circuit Court erred by not considering mitigation of damages was done with the alleged intent “to invite error in this manner and then to use that error as a basis to relitigate the issue of damages[.]” (**Response: Pgs. 9-10**). Respondent argued, at the Level IV hearing, KCBOE failed to cross-examine Respondent on the documentary evidence he introduced regarding wages, retirement benefits, and insurance benefits and further argued that KCBOE “simply made comments regarding damages evidence, but did not object, introduce evidence or otherwise make a proffer of evidence.” (**Response: Pg. 10**). Respondent further argued that KCBOE failed to properly raise the mitigation of damages issue at the Level IV hearing. (**Response: Pgs. 15-16**). Therefore, according to

Respondent, KCBOE should not be permitted to raise the issue of mitigation of damages and/or request an offset simply to “invite error” on appeal. However, as the Level IV Hearing record reflects, damage amounts were not to be addressed at the Level IV hearing and mitigation of damages was properly raised by KCBOE.

At the Level IV proceeding, the Administrative Law Judge informed the parties that damages were not to be addressed at the hearing, and, if Respondent won his grievance, KCBOE would then be required to calculate what was due and owing to Respondent in relation to damages. **(4/14/10 Motion to Alter or Amend: Ex. 2: Level IV HT: Pgs. 139-141)**. As the Level IV Hearing record further reflects, Respondent, by present counsel, agreed to this procedure by stating:

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.

**(4/14/10 Motion to Alter or Amend: Ex. 2: Level IV HT: Pg. 141: 12-15)**.

Therefore, pursuant to the Administrative Law Judge’s ruling, Respondent acknowledged the Administrative Law Judge’s position on the issue of damages and stopped introducing evidence of his damages. Likewise, KCBOE abided by the Administrative Law Judge’s ruling and did not put on any evidence of damages. As the Level IV record reflects, Respondent and KCBOE abided by the Administrative Law Judge’s ruling not to litigate damages at the proceeding. In relation to mitigation of damages, the record reflects that KCBOE raised the affirmative defense of mitigation by explicitly stating, if and when damages were calculated, the parties would have to review any income earned by Respondent in deriving the damages due to Respondent, which the Administrative Law Judge acknowledged. **(4/14/10 Motion to Alter or Amend: Ex. 2: Level IV HT: 20-24)**. Therefore, KCBOE has not simply raised these issues to simply “invite error” but raised these issues with this Court, in good faith, to ensure Respondent is only awarded damages that are due and owing to him

from KCBOE.

**D. RESPONDENT'S RECITATION OF FACTS IN HIS RESPONSE TO PETITION FOR APPEAL REGARDING POST-HEARING ATTEMPTS TO AGREE ON DAMAGES CALCULATIONS DEMONSTRATES DAMAGES WERE NOT CALCULATED AT THE LEVEL IV HEARING.**

In KCBOE's Petition for Appeal, KCBOE argued that the Circuit Court's award of damages for full back pay and benefits was improper, because, as the Level IV record reflects, the Administrative Law Judge did not issue a ruling concerning the amount of damages due and owing to Respondent. The damages were to be calculated, after the Level IV grievance decision was rendered. To further support its position, KCBOE cited to written communications between KCBOE and Respondent's present counsel that occurred post-Level IV hearing, which shows that the parties were attempting to reach an agreement regarding the calculation of damages due and owing to Respondent, including a discussion of mitigation of damages. **(Petition: Pgs. 13-16)**. In his Response, in Subsection "C. Post-Hearing Attempts to Agree on Damages[.]" Respondent acknowledged that, post-Level IV hearing, he forwarded correspondence to KCBOE "to determine damages." **(Response: Pgs. 11-13)**. Respondent further acknowledged that, post-Level IV hearing, he contacted the Grievance Board "and requested a hearing on damages." **(Response Pg. 12)**.

After these acknowledgements in his Response, Respondent then argued to this Court that "[d]amages 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." **(Response: Pg. 13)**. Again, as KCBOE tried to tell the Circuit Court, this statement does not reflect the complete historical facts in this matter, which resulted in error by the Circuit Court.

The historical facts are as follows: (1) At the Level IV hearing, Respondent did begin introducing

damages evidence; (2) The Administrative Law Judge ruled that damages were to be calculated post-Level IV hearing, if a decision was rendered in favor of Respondent; (3) Respondent, by present counsel, acknowledged the Administrative Law Judge's ruling and stopped introducing evidence of damages; (4) KCBOE did not introduce evidence of damages at the Level IV hearing, based upon the ruling of the Administrative Law Judge; (5) A decision was rendered in favor of Respondent by the Administrative Law Judge; (6) As Respondent's counsel's own correspondence reflects, he submitted his proposed calculation of damages to KCBOE, post-Level IV hearing, and stated his position on mitigation of damages, because damages were not calculated at the Level IV hearing; and (7) The Circuit Court summarily granted Respondent relief in the amount of \$259,566.99, based simply upon calculations of Respondent provided to the Circuit Court and KCBOE on the date of the mandamus hearing. (6/7/10 Response to MAAJ, Ex. J, K, L, and N). KCBOE believes that the record clearly reflects the Administrative Law Judge did not compute damages at the Level IV hearing, the parties attempted to compute damages, post-Level IV hearing, but were unable to reach an agreement, and the Circuit Court erred by simply accepting Respondent's calculation of damages in the amount of \$259,566.99, based simply upon calculations submitted to the Court and KCBOE on the date of the mandamus hearing. Therefore, KCBOE respectfully requests this Court accept its Petition for Appeal.

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

In his Response, Respondent affixed three Exhibits as follows: (A) Exhibit A: Purported excerpt of pages seventeen (17) and twenty-seven (27) from the Level IV Disciplinary Hearing; (B) Exhibit B: Purported excerpt of pages six (6) through ten (10) of a May 12, 2005 pre-disciplinary proceeding

held before an Independent Hearing Examiner; and (C) Exhibit C: Purported Order of State Superintendent. None of these exhibits were produced in the underlying proceeding before the Circuit Court of Kanawha County but were presented, for the first time, to this Court on appeal, which is improper.

As was discussed above, the standard of appellate review regarding an award of relief through an extraordinary writ of mandamus is de novo. Hensley v. West Virginia Dep't of Health & Human Resources, Syl. Pt. 1, 203 W. Va. 456 508 S.E.2d 616 (1998) (Quotations omitted). “When reviewing a circuit court’s decision to grant such relief, [the Court] look[s] to the circumstances surrounding the writ of mandamus to determine if the facts before the court supported the award.” Hensley v. West Virginia Department of Health and Human Resources, 203 W.Va. 456, 460, 508 S.E.2d 616, 620 (1998) (Emphasis added). This Court’s consideration of appellate issues is limited “to resolve assignments of nonjurisdictional errors to a consideration of those matters passed upon by the court below and fairly arising upon portions of the record designated for appellate review.” Skidmore v. Skidmore, Syl. Pt. 6, 225 W.Va. 235, 691 S.E.2d 830 (Per Curiam) (2010) (Quotation omitted) (Emphasis added). KCBOE respectfully requests that this Court strike Exhibit A, Exhibit B, and Exhibit C to Respondent’s Response, because those exhibits were not presented to the Circuit Court, the exhibits are not a part of the underlying record, and the exhibits have been improperly presented, for the first time, on appeal to this Court.

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

On Pages twenty-nine (29) through thirty (30) of Respondent’s Response, he argued that, although the Circuit Court’s one (1) page July 6, 2010 Order denying KCBOE’s request the Court

alter or amend its April 1, 2010 Order had no findings of fact or conclusions of law, the Circuit Court's findings of fact and conclusions of law in its April 1, 2010 Order are automatically incorporated in the Circuit Court's July 6, 2010 Order. According to Respondent, the Circuit Court "was not required to again repeat the Findings of Fact and Conclusions of Law set forth in the April 1, 2010 Order." (**Response: Pg. 29**). Respondent has not cited to any legal authority to support his position.

As Respondent acknowledged in his Response, "'a court only speaks through its orders. [...]'" (**Response: Pg. 31 (Quoting State ex rel. Kaufman v. Zakaib, 207 W.Va. 662, 535 S.E.2d 727 (2000)); (Citation omitted)**). The July 6, 2010 Order of the Circuit Court is a one (1) page Order simply denying KCBOE's request that the Circuit Court alter or amend its April 1, 2010 Order. The Court did not state any findings of fact and/or conclusion of law relied upon in reaching its decision. Furthermore, the Circuit Court did not explicitly incorporate the findings of fact or conclusions of law contained in its April 1, 2010 Order into its July 6, 2010 Order. Therefore, Petitioner requests this Court find Respondent's argument improper.

### **CONCLUSION**

In its reply, KCBOE requests that this Court find the following: (1) In this matter, the proper standard of review of this Court is de novo; (2) KCBOE properly preserved Error No. 4, Error No. 5, and Error No. 6 for appeal; (3) KCBOE was not required to put on damages evidence at the evidentiary hearing, as was instructed by the Administrative Law Judge; (4) KCBOE properly raised the defense of mitigation of damages at the Level IV hearing; (5) Respondent's Exhibits A, B, and C affixed to his Response are improperly before this Court and must be stricken; and (6) The findings of fact and conclusions of law contained in the Circuit Court's April 1, 2010 Order are not subsumed in the Circuit Court's July 6, 2010 Order.

As KCBOE stated in its Petition for Appeal, KCBOE was required to pay Respondent damages in the amount of \$259,566.99, based simply on numbers calculated by Respondent and submitted to the Circuit Court and KCBOE on the date of the mandamus hearing. The Circuit Court's ruling was only based upon oral argument of counsel on one (1) of multiple issues and absent an evidentiary proceeding. This resulted in Respondent being awarded damages that KCBOE contends were not due and owing to him.

The Circuit Court's procedure and rulings were improper. KCBOE acknowledges that Respondent should be compensated for damages that he has a clear legal right to recover. However, KCBOE does not believe that Respondent should receive any damages in excess of what he has a clear legal right to receive. KCBOE, as well as the public, deserve to have a ruling that is fair and just and not simply based upon calculations submitted by Respondent to the Circuit Court at the mandamus hearing. KCBOE respectfully requests this Court accept its Petition for Appeal, based upon the reasons cited herein or those apparent to the Court, because of the significance of the issues to both KCBOE and the public.

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

  
\_\_\_\_\_  
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
ROBERT FULMER,  
Respondent (Plaintiff),

v.

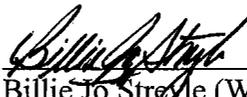
Appeal No. 101578  
[Civil Action No. 09-MISC-37  
Honorable Paul Zakaib]

KANAWHA COUNTY BOARD OF  
EDUCATION,  
Petitioner (Defendant).

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of foregoing "Reply of Petitioner Kanawha County Board of Education" was served upon the following parties by U.S. Mail on this day, Friday, May 13, 2011:

William Mundy, Esq.  
Rebecca L. Steptoe  
Mundy & Nelson  
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