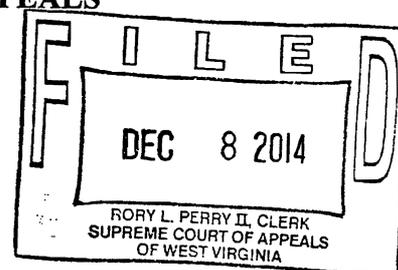


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

DOCKET NO. 14-1250



**WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,**
Petitioner,
As Administrator of
**THE WEST VIRGINIA PUBLIC
EMPLOYEES RETIREMENT SYSTEM**

v.

**(Mason County Circuit Court)
(Civil Action No. 01-C-264)**

**DAVID W. NIBERT, Judge of the
Circuit Court of Mason County,**
Respondent,

and

MICHAEL WHALEN,
Party in Interest.

VERIFIED PETITION FOR WRIT OF PROHIBITION

**Presented by:
WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD**

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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**WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,
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(Defendant below)**

v.

**(Mason County Circuit Court)
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**DAVID W. NIBERT, Judge of the
Circuit Court of Mason County,
Respondent,**

and

**MICHAEL WHALEN,
Party in Interest.
(Plaintiff below)**

VERIFIED PETITION FOR WRIT OF PROHIBITION

Comes now Jeffrey E. Fleck, Executive Director of the West Virginia Consolidated Public Retirement Board (hereinafter "Petitioner"), as administrator of Petitioner West Virginia Public Employees Retirement System, by counsel, J. Jeanen Legato, and hereby submits the instant Petition for Writ of Prohibition pursuant to Revised Rule of Appellate Procedure 16 for the reasons that follow: (The circuit court Order is on page 1 of the Appendix.)

I. QUESTIONS PRESENTED

- (A.) Whether the Circuit Court of Mason County exceeded its legitimate authority by issuing an Order when it lacked venue, and the Complaint failed to state a claim upon which relief could be granted.
- (B.) Whether the Circuit Court of Mason County exceeded its legitimate authority by issuing an Order when it lacked subject matter jurisdiction.
- (C.) Whether the Circuit Court of Mason County exceeded its legitimate authority by ruling upon a civil action regarding an administrative issue which was previously decided approximately three years ago by the Petitioner Board's final administrative order.

II. STATEMENT OF THE CASE

Mr. Whalen (Plaintiff below) retired from the Teachers Retirement System effective July 1, 1997. In 1996, Mr Whalen entered into a settlement agreement with the Mason County Board of Education (co-Defendant below) in which he accepted an offer of \$60,000 to forego the final year of his Superintendent contract. He continued to be employed in a different capacity for that year and received a salary of \$36,850. (AR 18-23). By letter dated August 27, 1997 which summarized previous conversations, the Retirement Board informed him that based upon their attorney's November 5, 1996 legal opinion regarding his case, the settlement for the buy-out of \$60,000 would not be included as part of his final average salary in the calculation of his retirement benefit because it was not considered salary, in that it was not compensation paid for services performed, and more specifically, that he would not be permitted to add the buyout to his 1996-97 \$60,000 salary, making it \$120,000 instead, to compute his final average salary.¹ (See attached as Exhibit A).

By letter dated January 29, 1998, Mr. Whalen's WVEA representative requested an appeal of this issue. An administrative hearing was held on March 26, 1998. On March 31, 1998, Hearing Officer DeBolt issued a Recommended Decision which found that the contract buy-out payment of \$60,000 did not meet the statutory definition of "salary" and therefore should not be included in the calculation of his final average salary. (AR 18-23). The Retirement Board met

¹This letter is evidence contrary to the lower Court's finding that "after his retirement, the Board told the Plaintiff that his retirement would not include the \$60,000 ...He thereafter filed a grievance which led us to this litigation." (AR 2). However, the record reflects that Mr. Whalen retired July 1, 1997 after Petitioner Board's attorney's November 5, 1996 legal opinion that the settlement would not be included as salary in the calculation of his retirement. The settlement has never been included as part of his retirement computation nor has he ever been told by Petitioner Board that it would. Additionally, Mr. Whalen filed a grievance against the Mason Co. BOE, the Petitioner Retirement Board was not a party to that grievance. *See attached as Exhibit A.*

on June 30, 1998 and issued a Final Order which adopted the Recommended Decision. (AR 72). Nearly three years later, on June 13, 2001, Mr. Whalen filed a Civil Complaint, rather than an administrative appeal, in the Circuit Court of Mason County naming the Mason County Board of Education and the West Virginia Public Employees Retirement System as Defendants, and seeking the same relief he sought in his administrative appeal. (AR 213-218).

More than thirteen years later, the Circuit Court entered an Order on November 13, 2014, received by Petitioner Board on December 4, 2014, which granted the relief Mr. Whalen had requested during his administrative appeal in 1998. (AR 1-5). In addition to the Circuit Court lacking venue and subject matter jurisdiction, the Order is replete with numerous legal errors as well as factual findings which are not supported by the record.²

III. SUMMARY OF ARGUMENT

The extraordinary remedy of prohibition is sought herein on the grounds that the Circuit Court of Mason County has exceeded its jurisdiction and legitimate powers as follows:

- (a) The lower tribunal exceeded its legitimate authority by denying Petitioner's *Motion for Summary Judgment* and Rule 12(b) *Motion to Dismiss for failure to state a claim*, and instead issuing an Order against the WV Public Employees Retirement System in favor

²Although not discussed in this petition because it is a substantive legal error as opposed to a procedural error, the lower Court erred in finding that a lump sum settlement of \$60,000 counted as "salary". Since the filing of Plaintiff's *Complaint*, the West Virginia Supreme Court has clarified the terms "salary" and "annual" as they relate to the calculation to be used in determining one's "final average salary", and the Court did so in the same manner used by the Hearing Officer in this case. In *WV Consolidated Public Retirement Board v. Carter*, 633 S.E.2d 521, 219 W.Va. 392 (W.Va. 2006), the Court held that "a 'salary' is a fixed amount of income regularly paid to an employee for services rendered" and "the adjective 'annual' means that the salary is specified or calculable in terms of a regular annual or yearly amount." *Id.* at p. 526, 527. Permitting Mr. Whalen to include a \$60,000 lump sum settlement as additional salary would result in the unacceptable practice of spiking, inflating his final average salary to increase his annuity, and would be inconsistent with the actuarial assumptions used in calculating his retirement, which would be detrimental to the Fund and other members. The *Summers* case relied upon by the lower Court involved a legislative rule change to the detriment of the members; whereas, inclusion of a settlement buy out as salary has never been authorized by statute or legislative rule. Mr. Whalen cannot detrimentally rely upon a right that never existed. Additionally, the record reflects that in November 2006 prior to his retirement that the Petitioner Board told him the settlement would not be included. See *attached Exhibit A*.

of Mr. Whalen who has never been a member of that retirement plan. Mr. Whalen is a retiree of the Teachers Retirement System which is a separate and distinct plan;

- (b) The lower tribunal exceeded its legitimate authority by issuing an Order when it lacked venue. Because this is a civil action as opposed to an administrative appeal, Mason County Circuit Court is not the proper venue. Pursuant to West Virginia Code §14-2-2, civil actions against a state agency must be filed in Kanawha County; and,
- (c) The lower tribunal exceeded its legitimate authority by issuing an Order when it lacked subject matter jurisdiction. Mr. Whalen's Civil Complaint involves an administrative issue which was previously decided by Petitioner Board's June 30, 1998 *Final Order*. The Administrative Procedures Act, West Virginia Code §29A-5-1 *et al* governs the review of contested administrative decisions, and W.V. Code §29A-5-4(b) requires an administrative appeal from an agency's *Final Order* to be filed with the Circuit Court within thirty (30) days. The general rule with respect to the exhaustion of administrative remedies provides "that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act." *Syllabus Point 2, Strum v. Kanawha County BOE*, 672 S.E.2d 606 (2008). Respondent filed a Civil Complaint approximately three years after the Petitioner Board's Final Order;

The extraordinary remedy of prohibition is sought herein on the grounds that the circuit court of Mason County has exceeded its legitimate authority by issuing an Order when Mason County was not the proper venue and the Court lacked subject matter jurisdiction in accepting an untimely filed petition for administrative review which was filed as a civil action. The issuance of a writ is necessary to prevent potential irreparable harm to the Public Employees Retirement System trust fund, a fund in which Mr. Whalen has never contributed to or been a member.

There is insufficient time to appeal the Order because it directs the Petitioner Board to submit an estimate of the amount owed within thirty days of the entry of the Order so that the Court may prepare a separate Order regarding the amount of the judgment. Because the lower Court's Order violates the clear requirements set forth in W.V. Code §14-2-2 and W.V. Code §29A-5-4(b), Judge Nibert has exceeded his legitimate authority.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner, Consolidated Public Retirement Board, submits that review of the record should allow this Court to dispose of the pending case without either issuance of a Rule or oral argument. However, if this Court schedules oral argument, the Board submits that the argument should proceed under Rule 19.

V. ARGUMENT³

A. Prohibition is the Only Remedy to Correct a Clear Legal Error

During this protracted thirteen year litigation, Judge Nibert refused after numerous repeated requests to rule on any of the Petitioner's and Co-Defendant's (below) (Mason Co. BOE's) motions involving the procedural and jurisdictional issues in this case.⁴ The Circuit Court's Order entered on November 13, 2014, received by Petitioner on December 4, 2014, also neglected to rule upon any of the jurisdictional issues, and addressed only the substantive administrative issue.

Pursuant to W.Va. Code §53-1-1, a "writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, which the inferior court has no jurisdiction of the matter in controversy or having such jurisdiction exceeds its legitimate powers." In that regard a writ of prohibition shall lie as a matter right in all cases of usurpation and abuse of power, when the

³ Portions of Petitioner's argument were previously submitted to the lower Court by Petitioner's former counsel, Susan Saxe, Esq. Petitioner adopts all previous arguments made by Ms. Saxe, and explicitly notes that said portions of Ms. Saxe's argument are reiterated in this Petition by the undersigned counsel.

⁴ Respondent Whalen's counsel has yet to file a *Notice of Appearance* in this case. It is interesting to note that he formerly represented Defendant (below) Mason Co. BOE in this very matter before switching sides to represent Plaintiff (below) Mr. Whalen, and shortly thereafter, he agreed to dismiss his former client Mason Co. BOE. (AR 106, Order of Partial Dismissal). Petitioner Board's *Motion to Disqualify Counsel* due to the obvious conflict was not ruled upon by the Court. (AR 107-08)

inferior court, although having jurisdiction, exceeds its legitimate powers. See *State ex el. Abraham Linc. Corp. v. Bedell*, 216 W.Va. 99, 602 S.E.2d 542 (2004).

In the instant matter, Judge Nibert Order's entered on November 13, 2014, received by Petitioner on December 4, 2014, exceeded the jurisdiction and legitimate power of the Mason County Circuit Court. The Order would cause irreparable harm by depleting hundreds of thousands of dollars from the Public Employees Trust fund, a fund which Mr. Whalen has never contributed to or been a member of, which would result in a clear breach of the Petitioner Board's fiduciary duty as a trustee to the fund and members, and could result in disqualification of the plan by the Internal Revenue Service for noncompliance.

In summary, immediate relief from the lower Court's Order is necessary to prevent irreparable harm to a state retirement trust fund from a circuit court that lacks jurisdiction to issue such an Order.

B. Failure To State A Claim Upon Which Relief May Be Granted

The Circuit Court exceeded its legitimate authority by denying Petitioner's *Motion for Summary Judgment* and Rule 12(b) *Motion to Dismiss for failure to state a claim*, and instead issuing an Order against the WV Public Employees Retirement System in favor of Mr. Whalen.

This action was filed as a civil complaint rather than an administrative appeal, and the Complaint names the West Virginia Public Employees Retirement System as a party Defendant. (AR 213-218). The West Virginia Public Employees Retirement System ("PERS") is a governmental retirement plan which is administered by the Consolidated Public Retirement Board ("Board"). *See W.V. Code §5-10D-1*. The Board is an administrative agency of the state of West Virginia, and is the proper party to any cause of action seeking a state pension related remedy.

The Teachers Retirement System established by W.V. Code §18-7A-1 et seq. and the Public Employees Retirement System established by W.V. Code §5-10-1 et seq are separate and distinct retirement plans.

Effective July 1, 1997, Mr. Whalen, retired from the West Virginia Teachers Retirement System ("TRS"). He has never been a member of or contributed to the Public Employees Retirement System ("PERS").

Wherefore, pursuant to Rule 12(b) of the West Virginia Rules of Civil Procedure, the Complaint fails to state a claim upon which relief can be granted because it names a governmental retirement plan as the defendant rather than the state agency, and additionally names the wrong retirement plan. Thus, the Circuit Court erred in issuing an Order awarding damages against the Public Employees Retirement System to a nonmember.⁵

C. Improper Venue

The Circuit Court of Mason County exceeded its legitimate authority by issuing an Order when it lacked venue. Because this is a civil action against a state agency, Mason County Circuit Court is not the proper venue. The Complaint was filed as a civil action, given a civil action number rather than an administrative appeal docket number, and the lower Court ordered discovery in this matter, which typically is not permitted in an administrative appeal. (AR 50-52)

West Virginia Code §14-2-2 governs the venue of actions which are brought against an agency of the state, and states that, with few exceptions which are not applicable here, "any suit in which the governor, any other state officer, or a state agency is made a party defendant..."

⁵The Order, in the first paragraph incorrectly refers to the W.V. Public Employees Retirement System as "(now the Consolidated Public Retirement Board)". (AR 1). The Board was established in 1991 to administer various distinct and separate governmental pension plans.

"shall be brought and prosecuted only in the Circuit Court of Kanawha County." See W. Va. Code §14-2-2.

The West Virginia Supreme Court of Appeals has held that venue for actions against state agencies is controlled by the provisions of W. Va. Code §14-2-2, and that the statute's mandatory provisions apply to actions at law as well as suits in equity. See, e.g. *Newman v. Bailey*, 22 S.E.280 (W.Va. 1942). See also, e.g., *Board of Education v. MacQueen*, 325 S.E.2d 355 (W.Va. 1994).

Recently, this Court issued a *Writ of Prohibition* during the September 2014 Term of Court, and reaffirmed this holding. In Syllabus point 2 of *State v. Chiles (No. 14-0233)*, the Court held that "Actions wherein a state agency or official is named, whether as principal party or third-party defendant, may be brought **only** in the Circuit Court of Kanawha County." Syl. Pt. 2, *Thomas v. Bd. of Educ.*, 167 W.Va. 911, 280 S.E.2d 816.

Therefore, the Petitioner's Writ of Prohibition should be granted because pursuant to West Virginia Code §14-2-2 the proper and exclusive venue for this civil action is the Circuit Court of Kanawha County.

D. Lack of Subject Matter Jurisdiction

The Mason County Circuit Court exceeded its legitimate authority by issuing an Order when it lacked subject matter jurisdiction. Mr. Whalen's Civil Complaint involves an administrative issue which was previously decided by Petitioner Board's June 30, 1998 *Final Order*. (AR 72). The Administrative Procedures Act, West Virginia Code §29A-5-1 *et al* governs the review of contested administrative decisions, and W.V. Code §29A-5-4(b) requires an administrative appeal from an agency's *Final Order* to be filed with the Circuit Court within thirty (30) days.

The general rule with respect to the exhaustion of administrative remedies provides "that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act." *Syllabus Point 2, Strum v. Kanawha County BOE*, 672 S.E.2d 606 (2008).

The Court in *Strum* granted the Respondent's Rule 12(b)(6) Motion to Dismiss for failure to state a claim, holding that the general rule with respect to the exhaustion of administrative remedies provides "that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act." *Syllabus Point 2, Strum v. Kanawha County BOE*, 672 S.E.2d 606 (2008), *Daurette v. Traders Fed. Sav. & Loan Assn.*, 143 W.Va. 674, 104 S.E.2d 320 (1958). See also *State ex rel. Fields v. McBride*, 216 W.Va. 623, 609 S.E.2d 884 (2004) (same); *State ex rei. Miller v. Reed*, 203 W.Va. 673, 510 S.E.2d 507 (1998) (same); *Hechler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799 (1985) (same); *McGrady v. Callaghan*, 161 W.Va. 180, 244 S.E.2d 793 (1978) (same); *State ex rel. Burchett v. Taylor*, 150 W.Va. 702, 149 S.E.2d 234 (1966) (same).

Unlike personal jurisdiction, subject-matter jurisdiction may not be waived or conferred by consent and must exist as a matter of law for the court to act. For this reason, lack of jurisdiction of the subject matter may be raised at any time even upon the Court's own motion. *Syl. Pt. 6, State ex rei. Hammond v. Worrell*, 144 W.Va. 83, 106 S.E.2d 521 (1959), citing *Syl. Pt. 3, Charleston Apartments Corp. v. Appalachian Electric Power Co.*, 118 W. Va. 694, 192 S.E. 294. Furthermore, the Supreme Court will reverse a trial court which exceeds its lawful jurisdiction. *Syl. Pt. 3, Hinkle v. Bauer Lumber & Home Bldg. Center, Inc.*, 158 W.Va. 492, 211

S.E.2d 705 (1975). The Court in *Morris v. Calhoun*, 119 W.Va. 603, 195 S.E. 341 (1938), recognized the appropriateness of prohibition as a remedy to situations where the lower court lacked jurisdiction by stating:

[W]hen a court is attempting to proceed in a cause without jurisdiction, prohibition will issue as a matter of right, regardless of the existence of other remedies, and regardless of whether or not the objections to the jurisdiction of the trial court have been presented to that court prior to the application for relief here. *Id.* at 608, 195 S.E. at 345 (citations omitted).

On June 13, 2001, Mr. Whalen filed a Civil Complaint regarding the same administrative issue that was previously decided by the Petitioner Board on June 30, 1998. West Virginia Code §29A-5-4(b) requires an administrative appeal from an agency's *Final Order* to be filed with the Circuit Court within thirty (30) days of receipt of the decision. Mr. Whalen did not appeal the Retirement Board's Final Order, and his time to do so expired years before he filed his civil Complaint. Because the Circuit Court below lacks subject matter jurisdiction, any ruling by that Court other than a dismissal should be deemed void.

E. Failure To Timely Seek Judicial Review Of Contested Administrative Case

At issue in both a previously concluded administrative appeal to the Consolidated Public Retirement Board, and in Mr. Whalen's current, albeit untimely filed civil complaint, is his desire to have had a sixty-thousand dollar lump sum received for the buy-out of his employment contract with the once co-defendant below included within his TRS "final average salary" for retirement benefit calculation purposes.

The dispute with the Board's calculation of his retirement benefit as stated in his complaint challenges the propriety of a decision of a state administrative agency, which challenge was and remains subject to the contested case provisions of the West Virginia Administrative Procedures Act. See W.Va. Code 29A-5-I, et. seq. Such challenges must, according to well-established law, be adjudicated through the available administrative appeal

procedure. Any judicial appeals from an adverse state agency decisions must be timely appealed by the filing of a petition for judicial review in circuit court within thirty (30) days of the party's receipt of notice of the agency's final decision. See W.Va. Code §29A-5-4(b).

The matters complained of in this action were previously the subject of an administrative appeal, including a full administrative hearing held by the Board's hearing officer, Jack W. DeBolt, on March 26, 1998.

In his Recommended Decision, issued after the administrative hearing, Hearing Officer DeBolt concluded that Mr. Whalen's receipt of a lump sum payment for the buy-out of his employment contract with the Mason County Board of Education did not constitute "salary" within the meaning of the TRS plan provisions, and should not be included by the Board in the calculation of the plaintiffs final average salary for retirement purposes. (AR 18-23).

A copy of the Recommended Decision of the Hearing Officer was forwarded to both Mr. Whalen and to his then legal representative, Edward Stephenson, on February 10, 1998, prior to the Board's consideration thereof at its next regularly scheduled meeting. (AR 63).

At its meeting on June 30, 1998, the Board considered the appeal, voted to adopt the hearing officer's Recommended Decision, and denied Mr. Whalen's request to have the lump sum included within his final average salary.

By certified mail item number P 370 694 401, on July 1, 1998, the Board's former Executive Secretary, James L. Sims, forwarded written notice of the Board's adoption of the hearing officer's Recommended Decision to the plaintiff's representative, Mr. Stephenson, attaching thereto and incorporating by reference a duplicate copy of the hearing officer's Recommended Decision which had been fully adopted by the Board. See July 1, 1998, letter of James L. Sims to Edward G. Stephenson, (AR 71).

Mr. Whalen's legal representative received actual notice of the Board's final decision in his administrative appeal, as reflected by the signed certified mail/return receipt. (AR 73).

Mr. Whalen has, through his former and current counsel, incorrectly asserted in his complaint that his administrative claim with the Board was or is "still under consideration or otherwise not resolved." *See* Complaint, at paragraph 26 (AR 217).

Contrary to the allegations contained in his Complaint, both Mr. Whalen and his counsel were specifically notified in writing by Susan B. Saxe, Esq., in August, 1998, that the Board had adopted the hearing officer's recommended decision and had administratively denied his appeal at its meeting on June 30, 1998. (AR 75). Mr. Whalen and his counsel were further advised that the Board's final decision had been previously communicated in writing to his former legal representative, Mr. Stephenson, whose office had acknowledged receipt thereof. See Letter of August 18, 1998 to James M. Casey, Esq. and copied to Michael Whalen (AR 75).

Duplicate copies of the Board's final decision in the administrative claim, for a second time, were again sent to both the Mr. Whalen and his counsel, by certified mail, return receipt requested, on January 14, 1999. See Letter to James M. Casey, Esq., and copied to Michael E. Whalen, dated January 14, 1999 (AR 80).

Both Mr. Whalen and his former counsel, James Casey, received actual notice of the Board's final action, and of its adoption of the hearing officer's recommended decision, as evidenced by the certified mail/return receipts signed by Mr Whalen and Mr. Casey's office on January 15, 1999. (AR 90).

Pursuant to the contested case provisions of the Administrative Procedures Act, Mr. Whalen had a maximum of thirty (30) days from the date he received written notice of the

Board's decision in his case to file an action seeking judicial review of the same in circuit court. See WV Code §29A-5-4(b).

Mr. Whalen's current civil action filed on June 13, 2001 which, in effect, seeks judicial review of the Board's prior administrative decision rendered on July 1, 1998, nearly three years after the fact, was statutorily required to have been filed no later than 30 days after confirmed receipt of written notice of the Board's final decision- namely no later than thirty (30) days after his verified receipt of the second certified mailing to him of the Board's final decision on January 15, 1999. See Certified Mail confirmation of plaintiffs receipt of Board's Final Decision, (AR 90). Mr. Whalen is time barred from seeking judicial review of the Board's administrative decision in this case under the contested case provisions of the Administrative Procedures Act. See W.Va. Code §29A-5-4(b).

The lower Court treated the civil action as an administrative appeal and held that it was required to be filed within thirty days of receipt of the order adopting the recommended decision; however, the lower Court erred by holding that the Board's Order was not valid because it was not signed, and therefore the Complaint was timely filed. (AR 2).

The Administrative Procedures Act, W.V. Code §29A-5-3, requires only written notification to a party of an administrative agency's final decision. As set forth above, this was accomplished by former Executive Secretary Sims certified letter to Mr. Whalen's then legal representative on July 1, 1998, and by letters from Petitioner Board's former counsel, Susan Saxe, communicating the agency's final decision in both August 1998 and January 1999. Certified mail receipt of the Petitioner Board's final decision was acknowledged by Mr. Whalen on January 15, 1999. Contrary to the lower Court's ruling, a "signed Order" is not required by the APA. *See* W.V. Code §29A-5-3.

VI. CONCLUSION

For the reasons listed above, Petitioner Board prays that this honorable Court grant Petitioner's Verified Petition for Writ of Prohibition and overrule the *Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment and Motion to Dismiss* entered by Judge Nibert on November 13, 2014.

Respectfully Submitted,

Jeffrey E. Fleck, Executive Director,
WV Consolidated Public Retirement Board,

By Counsel:


Jeanee Legato, WVSB# 6978

WV Consolidated Public Retirement Board
4101 MacCorkle Ave, SE
Charleston, WV 25304
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Exhibit A

**State of West Virginia
Consolidated Public Retirement Board**

Capitol Complex, Building 5, Room 1000
1900 Kanawha Boulevard, East
Charleston, WV 25305-0720
Telephone: 304-558-3570 or 800-654-4406
Fax: 304-558-6337

August 27, 1997

Michael E. Whalen
Rt. 1 Box 724
Point Pleasant, WV 25550

Dear Mr. Whalen,

This letter is a follow-up of the phone conversation you had with Jo Ann Edwards and myself regarding the buy out of your contract with the Mason County Schools.

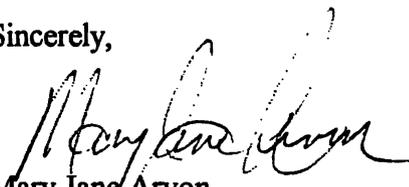
Mason County has verified that the \$60,000.00 was a payment in full for your 96/97 fiscal year contract which was an agreement that you made with the Board of Education for your resignation as Superintendent effective as of June 30, 1996.

Your salary for the fiscal year 1996-97 was \$60,000.00 and you are wanting us to add the \$60,000.00 buy out and use \$120,000.00 in the computation of your final average salary. As I explained we can not do this as the buy out money was not full compensation paid to you for services preformed.

On November 5, 1996 our attorney, Kenneth E. Webb, Jr., wrote an opinion on your case stating that the "\$60,000.00 buy out payment should not be considered."

If you have questions please call me.

Sincerely,



Mary Jane Arvon
Benefits Manager

MJA/se

Exhibit A

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

DOCKET NO. _____

WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,
Petitioner,

v.

(Mason County Circuit Court)
(Civil Action No. 01-C-264)

DAVID W. NIBERT, Judge of the
Circuit Court of Mason County,
Respondent,

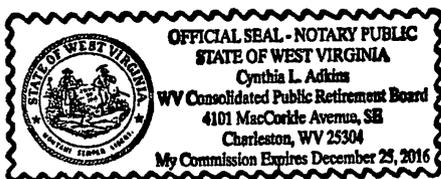
and

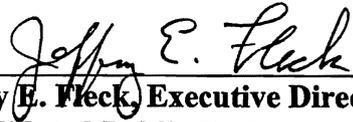
MICHAEL WHALEN,
Party in Interest.

VERIFICATION

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA

In accordance with the requirements of W. Va. Code §53-1-3, the undersigned hereby verifies that the foregoing Petition constitutes a fair and correct statement of the proceedings in the civil action identified in this Petition, based upon his information and belief.





Jeffrey E. Fleck, Executive Director
Consolidated Public Retirement Board

Subscribed and sworn before me this 8TH day of DECEMBER, 2014.

My commission expires on: DECEMBER 25, 2016



Cynthia L. Adkins
Notary Public

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

DOCKET NO. _____

WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,
Petitioner,

v.

(Mason County Circuit Court)
(Civil Action No. 01-C-264)

DAVID W. NIBERT, Judge of the
Circuit Court of Mason County,
Respondent,

and

MICHAEL WHALEN,
Party in Interest.

CERTIFICATE OF SERVICE

I, J. Jeaneen Legato, Counsel for the West Virginia Consolidated Public Retirement Board, do hereby certify that *Petitioner's Verified Petition for Writ of Prohibition*, filed herein on this 8th day of December, 2014, was forwarded to Respondent and Party in Interest by facsimile and U.S. Mail with proper postage affixed on the same day of said filing, and further certify that the same was mailed emailed and/or faxed as follows:

The Honorable David Nibert
Mason County Courthouse
200 Sixth Street
Point Pleasant, WV 25550
Facsimile: (304) 675-7757

William B. Summers Esq.
Summers & Associates
3301 Dudley Ave
Parkersburg, WV 26101
Email: wbslawyer99@yahoo.com

Respectfully Submitted,
WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD

BY:


J. Jeaneen Legato, WVSB# 6978
WV Consolidated Public Retirement Board
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