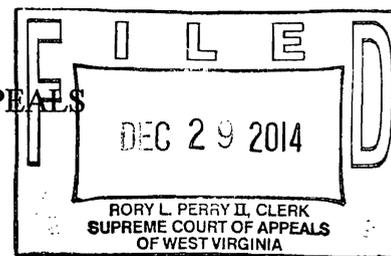


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS  
DOCKET NO. 14-1250



WEST VIRGINIA CONSOLIDATED  
PUBLIC RETIREMENT BOARD,

Petitioner,

(MASON COUNTY CIRCUIT  
COURT CIVIL ACTION NO.  
01-C-264)

As Administrator of  
THE WEST VIRGINIA PUBLIC  
EMPLOYEES RETIREMENT SYSTEM

(Defendant below)

v.

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

Respondent,

and

MICHAEL WHALEN,

Party in Interest.  
(Plaintiff below)

**RESPONDENT, MICHAEL WHALEN'S RESPONSE TO PETITIONER'S  
PETITION FOR WRIT OF PROHIBITION**

Presented by:  
Michael Whalen

By Counsel:

William B. Summers, 7239  
Summers & Associates  
3301 Dudley Avenue  
Parkersburg, WV 26104  
304-420-0975

TABLE OF CONTENTS

I. Statement of the Case.....2

II. Summary of Argument.....2

III. Statement Regarding Oral Argument and Decision.....2

IV. Argument.....3-9

V. Conclusion.....10

VI. Verification.....11

VII. Certificate of Service.....12

## **I.STATEMENT OF THE CASE**

The Petitioner would adopt by reference the findings of fact that were made by the Hearing Examiner in this matter as the same are not in dispute. *See Exhibit A, Hearing Examiner's Decision*. It is the conclusions of law that are disputed by the Respondent in this matter.

## **II.SUMMARY OF ARGUMENTS**

**(A) The Circuit Court of Mason County did not exceed its legitimate authority by issuing an Order granting the Respondent's Motion for Summary Judgment because it was not an improper venue, and the Complaint did not fail to state a claim upon which relief could be granted.**

**(B) The Circuit Court of Mason County did not exceed its legitimate authority by issuing an Order granting the Respondent's Motion for Summary Judgment because it did not lacked subject matter jurisdiction.**

**(C)The Circuit Court of Mason County did not exceeded its legitimate authority by ruling upon a civil action regarding an administrative issue which was previously decided approximately thirteen years ago by the Petitioner Board's final administrative order.**

## **III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Respondent agrees that a review of the record in this matter should allow the Court to make a determination as to whether a writ should issue. The Respondent is prepared to argue under either rule that the Court deems fit.

#### **IV. ARGUMENT**

**(A) The Circuit Court of Mason County did not exceed its legitimate authority by issuing an Order granting the Respondent's Motion for Summary Judgment because it was not an improper venue, and the Complaint did not fail to state a claim upon which relief could be granted.**

This matter should not be subject to the extraordinary remedy of a Writ of Prohibition. The standard for a writ of prohibition or mandamus is as follows:

In determining whether to entertain and issue a writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, the court will examine five factors: 1. Whether the party seeking the writ has no other adequate means such as a direct appeal, to obtain the desired relief; 2. Whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; 3. Whether the lower tribunal's order is clearly erroneous as a matter of law; 4. Whether the lower tribunal's order is an often repeated error or manifests persistent disregard for either procedural or substantive law; and 5. Whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

*State ex rel. AIG Domestic Claims, Inc., v. Starcher*, \_\_ W.Va. \_\_, \_\_ S.E.2d \_\_, 2014 W.Va. LEXIS 159 (2014), citing with approval *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2<sup>nd</sup> 12 (1996). Accord: *State ex rel. Richmond American Homes o/West Virginia, Inc. v. Sanders*, 226 W.Va. 103, 697 S.E.2d 139 (2010).

First, the Petitioner can appeal this matter, and has already filed a notice of intent to appeal. See Exhibit B, Notice of Intent to Appeal. In addition, after this Court's denial of emergency relief,

the Petitioner filed a motion with the Mason County Circuit Court to stay the execution of the Order that is now set for hearing. *See* Exhibit C, Notice of Hearing.

Second, the Petitioner will not be damaged from this Order in a way that could not be corrected on appeal, as it will be likely that the Circuit Court will stay the action pending appeal of this matter. In addition, the interests of the Respondent in being paid what he is entitled to are no less legitimate than the Public Employee's Trust Fund or other appropriate retirement account.

Third, the Circuit Court's order is not clearly erroneous as a matter of law insofar as there is some precedent for its decision on the merits in this matter and there is no significant dispute as to the facts.

Fourth, there has not been a clearly demonstrated history of disregard for procedural or substantive law in this matter. This case has simply – for reasons that are unclear to the undersigned counsel who came into the case relatively recently – taken a lengthy time to come to fruition. It could be argued that both the Petitioner's former counsel, the Respondent's former counsel, and the Court may have “dropped the ball” in not pushing for a decision in this matter earlier. But we are here, now.

Fifth and finally, this case is not a case of new impression and, as will be stated below, there is some precedent for the Circuit Court's decision.

In its argument to the Court, the Petitioner is correct that the rules require an appeal from the Retirement Board's decision must be filed within 30 days of the receipt of the order adopting the recommended decision. However, the Respondent never received a signed copy of the order. While the Respondent did receive a “recommended decision” from the Administrative Law Judge and “Order” which was unsigned by the Chairman of the Consolidated Public Retirement Board, in the

same way an Order is not valid unless signed by the Court or a law is not effective unless it is signed by the Governor, the receipt of an unsigned "Order" does not begin the running of the appeal deadline. Consequently, the Plaintiff's actions in filing a civil suit were timely given that filing suit in Mason County Circuit Court was, at the time, the Plaintiff's remedy for the adverse decision as the Plaintiff never received a signed copy of the Final Order. In fact, the attached correspondence demonstrates that no such signed copy was provided prior to the filing of the Complaint. *See Exhibit D.* To Counsel's knowledge, the Defendant has never produced proof that a signed copy of the Order was ever served either on Plaintiff's counsel at the time, James Casey, or the Plaintiff. Consequently, Mr. Casey was within the bounds of the rules by filing the complaint against the school board and the Defendant because no 30 day period had started to run. This matter deserves to be ruled on upon its merits and not be dismissed on a "technicality" which, after thorough review of the facts, is actually not a technicality at all.

It should be noted in footnote 4, Counsel indicates that the part of this matter against the Board of Education was dismissed and that the undersigned counsel had a conflict with the Board. The record is clear in this matter that the Respondent signed a release with the Board of Education which, upon the undersigned counsel's review, would prevent the Respondent from pursuing any matter against the Board of Education and, thereby, relieve him of any conflict. *See Exhibit E, Release, attached.*

**(B) The Circuit Court of Mason County did not exceed its legitimate authority by issuing an Order granting the Respondent's Motion for Summary Judgment because it did not lack subject matter jurisdiction.**

A writ of prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari. Syl. pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953).

Here, there is not a legitimate question as to whether the Mason County Circuit Court has jurisdiction. At the time that the original complaint in this matter was filed, appeals on grievances from administrative law judges took place in the County from which the action arose, not in Kanawha County as they do today. Consequently, the only issue here which would have denied the court jurisdiction is the timeliness issue, which has been sufficiently addressed both before the Circuit Court of Mason County and, hopefully, above in this brief. This Court can hear this matter on appeal – which is apparently in the works – and does not have to resort to this writ issue and avoid deciding this case on the merits, which the Respondent believes favors him.

**(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.**

The Respondent would agree that the facts were in large part decided by the hearing examiner some time ago, and as stated earlier, would submit the hearing examiner's decision as an exhibit reciting, in essence, the facts for this response. However, it is the interpretation of these facts that the Respondent would argue favors the Circuit Court's decision when applied to the law, and the Petitioner filed what was, at the time, a legitimate appeal to this action. The merits of this action

warrant this issue being decided on full appeal not by this “thirteen year” issue raised by the Petitioner. The Complaint in this matter suffices as an appeal of the hearing examiner’s decision to the Mason County Circuit Court.

The Respondent, in his Motion for Summary Judgment to the Circuit Court relied on the case of Summers v. W. Va. Consol. Pub. Ret. Bd., 217 W. Va. 399; 618 S.E.2d 408; 2005 W. Va. LEXIS 94 (2005). In the Respondent’s case his next to last year of his salary was increased by \$60,000 due to a contract buyout when he was the Superintendent of the Mason County Board of Education. The Petitioner/Board received retirement contributions and the school board withheld taxes and social security **as if the amount was a salary**. See Exhibit F letter from Edward Stevenson UNISERV Consultant September 9, 1997. Mr. Whalen, prior to retiring, asked the board, who obtained the estimations for his retirement, what his retirement benefits would be. The Board provided retirement benefits including the calculations that included the \$60,000 payment. Mr. Whalen retired **believing and relying upon the calculations provided** that these were his retirement benefits. Afterwards, Mr. Whalen was told by the Board that his retirement would not include the \$60,000. He thereafter filed a grievance which led us here.

In Summers, two retired administrators, George Summers and Ronald Fertile, sought review of a decision of the retirement board, which adopted a hearing officer's recommendation to deny the teachers' request to include lump sum payments for *accumulated vacation days* in the calculation of their retirement benefits. The Circuit Court of Kanawha County (West Virginia) affirmed the decision. The teachers appealed.

By including accumulated unpaid vacation benefits in their final year of active employment, the pension benefits of the teachers would have been increased (*in exactly the same way that Mr.*

*Whalen's pension benefits would increase with his contractual buyout included in his computations*). However, W. Va. Code St. R. tit. 162, § 8-5.4 prevented this practice. While the Supreme Court of Appeals did not adopt several of the administrators' arguments, the Court reversed the Circuit Court's judgment on a **detrimental reliance** argument because the administrators' retirement process had progressed sufficiently by the time W. Va. Code St. R. tit. 162, § 8-5.4 became effective that the legislative rule should not have applied to the calculation of the teachers' retirement benefits. The Court looking at the facts, stated as follows:

As indicated above, the legislative rule at issue became effective on April 10, 2002. The record reveals that Mr. Fertile made a request for an estimate of retirement benefits in February 2002, and applied for retirement benefits that same month. Therefore, this Court believes that Mr. Fertile's retirement process had progressed sufficiently far by the time 162 C.S.R. § 8-5.4 became effective that the legislative rule should not apply to the calculation of his retirement benefits. We find the same to be true of Mr. Summers. Although Mr. Summers did not apply for retirement benefits until April 19, 2002, nine days after 162 C.S.R. § 8-5.4 became effective, the record indicates that Mr. Summers filed a "Benefit Estimate Request," in which he requested an estimate of his retirement benefits from the Teachers Retirement System, in December 2001, and indicated that his last day of employment would be June 30, 2002. Based on this, we find that the Retirement Board must include lump-sum payments for accumulated vacation pay in the calculation of Appellants' final average salary determination of benefits from the Teachers Retirement System in accord with *Kiser v. West Virginia Consolidated Public Retirement Board, supra*, which was the law in effect prior to 162 C.S.R. § 8-5.4. Accordingly, the circuit court's order to the contrary is reversed.

In this matter --- just like in **Summers** ---- Mr. Whalen's next to last year of his salary was increased by \$60,000 due to a contract buyout. The Board received retirement contributions and the school board withheld taxes, retirement and social security as if the amount was a salary. **The Defendant has never refunded the retirement contributions to Mr. Whalen.** Mr. Whalen, prior to retiring, asked the board, who obtained the estimations for his retirement, what his retirement benefits would be. (Note that in **Summers**, Mr. Summers filed a "*benefit estimate request*" just like

Mr. Whalen did). The Board provided retirement benefits in May of 1996 -- including the calculations that included the \$60,000 payment. Mr. Whalen retired **believing and relying upon the calculations provided** that these were his retirement benefits. Afterwards, Mr. Whalen -- who retired in June of 1996 -- was told by the Board that his retirement *would not* include the \$60,000. This resulted in an annual loss of annuity benefits of \$ 8,599.44 -- a tremendous sum of money for Mr. Whalen, who dedicated his life to teaching and administering in schools. This matter is clearly similar to the Summers decision, except that in Summers the Court dealt with unused but accrued vacation pay. The circuit court decided to consider Mr. Whalen's contract buyout as salary. The Petitioner/Board cannot have its proverbial cake and eat it, too. Mr. Whalen's retirement should be recalculated to include the additional \$60,000 of income in the next to the last year and he should be awarded judgment in his favor and against the Petitioner/Board -- contrary to the administrative law judge's recommendation -- and be awarded damages equal to his loss in annuity payments since 1996 with pre and post judgment interest. The Circuit Court made the correct decision in this matter and this is not the type of matter that should be subject to the extraordinary remedy of a Writ.

**V. CONCLUSION**

The Petitioner has not met its burden in justifying a Writ of Prohibition, and this matter should be dismissed for further proceedings in this matter, including a hearing before the Mason County Circuit Court and a proper Appeal of this matter.

MICHAEL WHALEN,

By counsel,



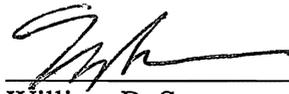
---

William B. Summers Bar Id. No. 7239  
3301 Dudley Avenue  
Parkersburg, WV 26104  
304-420-0975

**VI. VERIFICATION**

STATE OF WEST VIRGINIA,  
COUNTY OF WOOD, TO-WIT:

William B. Summers, being first duly sworn, says that the statements made in the Statement of Facts, are accurate to the best of counsel's ability.



William B. Summers  
Counsel for Michael Whalen

STATE OF WEST VIRGINIA,  
COUNTY OF WOOD, to wit:

The forgoing document was acknowledged before me on this the 29 day of December, 2014.

My commission expires: September 27, 2020.



NOTARY PUBLIC in and for the  
State of West Virginia

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS  
DOCKET NO. 14-1250

WEST VIRGINIA CONSOLIDATED  
PUBLIC RETIREMENT BOARD,

Petitioner,

(MASON COUNTY CIRCUIT  
COURT CIVIL ACTION NO.  
01-C-264)

As Administrator of  
THE WEST VIRGINIA PUBLIC  
EMPLOYEES RETIREMENT SYSTEM

(Defendant below)

v.

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

Respondent,

and

MICHAEL WHALEN,

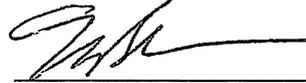
Party in Interest.  
(Plaintiff below)

**CERTIFICATE OF SERVICE**

I, William B. Summers, do hereby certify that on December 29, 2014, I served a copy of the hereto annexed **PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS AND FOR SUMMARY JUDGMENT and PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** to the parties of record by FAX AND, THEREAFTER, United States mail, postage prepaid at the following address:

Jeaneen Legato  
Special Assistant Attorney General  
Capitol Complex, Building 5, Suite 1000  
1900 Kanawha Boulevard, East  
Charleston, WV 25305

Judge David W. Nibert  
C/O Mason County Circuit Court  
200 Sixth Street  
Pt. Pleasant, WV 25550



---

William B. Summers