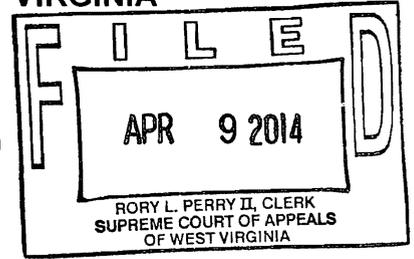


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-0045

(Circuit Court Civil Action No. 13-AA-85)



LEWIS COUNTY BOARD OF EDUCATION

Petitioner

v.

MICHAEL HOLDEN

Respondent

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PETITIONER'S BRIEF

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## **ASSIGNMENTS OF ERROR**

1. THE CIRCUIT COURT ERRED IN FINDING THAT RESPONDENT'S GRIEVANCE REGARDING DENIAL OF A LEAVE OF ABSENCE FOR THE 2012-2013 SCHOOL YEAR WAS TIMELY FILED AND IN ORDERING THAT A LEAVE OF ABSENCE EITHER BE GRANTED OR THAT A HEARING ON THE ISSUE BE HELD BY PETITIONER.

2. THE CIRCUIT COURT ERRED IN REVERSING THE GRIEVANCE BOARD'S FINDING THAT RESPONDENT WAS PROPERLY TERMINATED FOR INCOMPETENCY PURSUANT TO WEST VIRGINIA CODE § 18A-2-8.

## **STATEMENT OF THE CASE**

Respondent was employed by Petitioner Lewis County Schools as a bus operator, beginning in 1999. During the summer of 2010, he injured his foot at home. Due to complications from that injury, Respondent requested and was granted a leave of absence for the entire 2010-2011 school year. Appendix at 256-257. After attempting to return to work at the outset of the 2011-2012 school year, Respondent was in poor physical condition, having continued difficulty with ambulation, and suffering from diabetic neuropathy in both legs, making it impossible for him to perform his bus operator duties. Again, he requested and was granted another discretionary leave of absence for the 2011-2012 school year, in order to provide him the opportunity to achieve a full recovery from his injury and complicating conditions. Appendix at 258, 289, 292.

During the summer of 2012, Respondent informed Petitioner's administration that he intended to return to work at the beginning of the 2012-2013 school year in August. Observations of various administrators, board members, employees and the public indicated serious concerns that Respondent did not appear to be able to safely operate a school bus. Appendix at 135-137, 179. At that time, Respondent's weight was

approximately 580 pounds, he had been observed having difficulty getting in and out of the driver's seat of a school bus, and many had concerns regarding his ability to perform all required bus operator duties, specifically emergency safety procedures. Appendix at 115-120, 135-137, 179-181, 262. Therefore, Petitioner's transportation officials contacted Ben Shew, Executive Director for the Office of School Transportation, West Virginia Department of Education. Because of the concerns regarding Respondent's ability to perform required bus operator duties in a safe manner, Mr. Shew recommended that a Physical Performance Test ("the Test") promulgated by his office be performed on Respondent. Appendix at 108-110, 139, 179, 234-236. Although mostly used for testing the capabilities of new bus operators prior to their initial certification, this Test is used all over the state of West Virginia for the purpose of assessing the skills and abilities of current bus operators, including those who have medical/physical conditions and/or are attempting to return to work after leave. Appendix at 64-68.

David Baber, a certified inspector for the Office of School Transportation, performed the Test on Respondent on August 24, 2012. Appendix at 294. Respondent was unable to complete the first task on the performance test, which requires the driver to make three trips up and down the bus stairwell within 30 seconds, resulting in failure of the Test. Appendix at 68-69, 141, 241-242. The extreme difficulty Respondent had in attempting this initial task was conclusive evidence of his inability to perform any of the requirements of the Test and of a school bus operator, resulting in Mr. Baber recommending that Respondent not be permitted to drive a school bus unless or until his physical condition would enable him to successfully complete the Test. Appendix at

113, 140-142. Respondent was immediately advised that he would not be permitted to continue operating a bus for Lewis County Schools.

After failing the Physical Performance Test and being removed from his bus operator duties, Respondent requested another leave of absence for the 2012-2013 school year, which was denied by the Board of Education on September 10, 2012. Appendix at 26, 289. Consistent with its past practice, Petitioner had not granted any employee more than two years of medical leave and exercised its discretion to deny Respondent additional leave. Appendix at 289. After the Board voted to reject this request, Respondent was notified in writing, by letter dated September 11, 2012, that the requested leave had been denied. Appendix at 31, 289.

Because of Respondent's obvious inability to perform his required job duties, Superintendent Joseph Mace recommended that his employment be terminated. In the same letter in which the Respondent was notified that his requested leave had been denied, the Superintendent also notified him that he would be recommending termination of his employment. Appendix at 289-290. Respondent was afforded a full evidentiary hearing before the Board of Education on October 8, 2012, at the conclusion of which, the Board voted to terminate Respondent's employment, due to his physical inability to safely perform his job duties. Appendix at 179-288, 298.

After receiving notification of the denial of an additional leave of absence on September 11, 2012, Respondent did not at any time submit another request for leave, and he did not file a grievance regarding the denial within fifteen days of receiving that notice. While Superintendent Mace was asked various questions as to what information "might" change his mind about the recommendation of termination, at the hearing on

October 8, 2012, the sole recommendation presented to the Board for action was for termination of Respondent's employment. Contrary to Respondent's assertions, Dr. Mace did not at any time modify his recommendation to the Board, nor did he agree to ask the Board to grant Respondent an additional leave of absence, during the October 8 hearing. Respondent's own counsel stated in closing remarks that the superintendent had testified as to "a couple of reasons why he was not recommending a leave of absence anymore." Appendix at 285. Respondent knew unequivocally upon receipt of the superintendent's September 11, 2012, letter that the request for a leave of absence had been denied.

On October 26, 2012, Respondent filed a grievance with the West Virginia Public Employees Grievance Board, challenging the termination of his employment and denial of an additional leave of absence. Following another evidentiary hearing before Administrative Law Judge ("ALJ") Brenda L. Gould, a decision upholding the termination was issued by the Grievance Board on June 6, 2013. Appendix at 351-366. ALJ Gould held that the Board of Education had proven that Respondent was not physically able to safely perform the duties of a bus operator, constituting incompetency, for which termination is permitted pursuant to West Virginia Code § 18A-2-8. She also concluded that Respondent's grievance filing on October 26, 2012, challenging the denial of a leave of absence on September 10, 2012, was untimely. The ALJ noted that, after receiving the September 11, 2012, letter, Respondent should have filed a grievance regarding the leave of absence issue no later than October 4, 2012. Respondent had no cause to believe the issue had not been decided or that it would be reconsidered at

the hearing on October 8, 2012; therefore, he did not provide any reason for his failure to timely grieve the Board's decision.<sup>1</sup>

Respondent appealed the grievance decision to the Circuit Court of Kanawha County. Although concluding that the termination of Respondent's employment was clearly wrong, the Court did not order Respondent reinstated to his position as a bus operator. Rather, the Court determined, without explanation, that the grievance regarding the denial of a leave of absence was timely filed and ordered Petitioner to either grant the request for medical leave or "hold a hearing on [Respondent's] grievance pertaining to the same." Appendix at 441. The Circuit Court's ruling in this regard is erroneous; even the Court itself acknowledging that, even though Respondent's counsel requested that the Board of Education grant additional leave in lieu of termination, the Board "declined to consider the request" at the hearing before them on October 8, 2012. Appendix at 438. The termination letter dated October 10, 2012, advised Respondent of the Board's vote to terminate his employment and notified him of his grievance rights; however, that letter made no mention of denial of a leave of absence, which, of course, had previously been decided on September 10, 2012. Accordingly, the Circuit Court obviously erred in finding that the October 10, 2012, notification of grievance rights somehow triggered Respondent's right to appeal the previous denial of a leave of absence.

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<sup>1</sup> Although at the Grievance Board hearing, Respondent had alleged discrimination, which was addressed in the ALJ's decision, that issue was not raised in the petition of appeal to the circuit court and was not addressed by the Court. Appendix at 432. Therefore, the discrimination issue will not be discussed herein.

With regard to the termination issue, the Circuit Court order is similarly flawed. The Court ruled that the Physical Performance Test administered by the Department of Education could not be used as the basis for termination, because West Virginia regulations regarding school bus operation do not specifically authorize it. Appendix at 440. In concluding that the ALJ's finding that Respondent was physically unable to safely perform his job duties was clearly wrong, the Court failed to address a Board of Education's statutory right to terminate employees for various causes, including incompetency, and its discretion to make such determinations based upon objective factors. Indeed, after setting aside the Grievance Board's decision and finding that the termination was improper, the Court declined to order Respondent reinstated to his position.

### **SUMMARY OF ARGUMENT**

The Circuit Court erred in reversing the decision of the Public Employees Grievance Board, both in finding that the leave of absence grievance was timely filed, and in concluding that the termination of Respondent's employment was improper. The grievance statute mandates that a claim be initiated within a specific time limit, and the evidence in this case conclusively established that Respondent failed to grieve the denial of a leave of absence within that required time period, without presenting a valid and justifiable excuse. Therefore, the Circuit Court's conclusion that the Grievance Board's decision was clearly wrong in that regard is obviously erroneous, in light of the uncontroverted evidence of record regarding when the decision was made, Respondent's notification of that decision in writing, and his filing of a grievance approximately six weeks later, far beyond the fifteen-day statutory limitation. To say

that an argument made during a termination hearing somehow “revives” a previously denied request, thereby creating a new grievable event, would provide absurd results and constitute a clear abuse of the grievance process.

The Court’s order is also erroneous in its finding that the ALJ was clearly wrong in upholding the termination of Respondent’s employment. The Court’s focus on the Physical Performance Test itself and the state transportation regulations was misplaced and an improper basis for reversal of the decision. There is no law, policy or rule that dictates a specific mechanism by which West Virginia boards of education are to determine whether to terminate or otherwise discipline employees for the causes listed in West Virginia Code § 18A-2-8. Rather, this Court has recognized for many years that boards have discretion in such matters, which discretion should not be exercised in an unreasonable or arbitrary and capricious fashion. In the instant case, a specific test which is designed for the purpose of measuring the capabilities of West Virginia school bus drivers was used to provide an objective assessment of Respondent’s abilities to safely perform his assigned duties. Respondent’s obvious limitations, as observed by various individuals, combined with his failure of the Test, led to the recommendation that his employment be terminated on the basis of incompetency. That decision was well within the superintendent’s and the Board’s authority and was reasonable under the circumstances. The Circuit Court’s reversal of that conclusion is incorrect and not based upon a proper assessment of the applicable legal authority.

## STATEMENT REGARDING ORAL ARGUMENT

Petitioner submits that oral argument would be pertinent and necessary in order to clarify the issues presented in this case. The Circuit Court's decision represents an unsustainable exercise of discretion and is contrary to the overwhelming evidence of record establishing that Respondent was incompetent to continue employment as a West Virginia school bus operator. As will be discussed below, due to statutory changes regarding terminations for cause of school employees and the need for clarification of the definition of "incompetency" pursuant to current law, a memorandum decision would not be appropriate in this case, and Petitioner believes that an opinion from this Court is necessary.

## ARGUMENT

### I. Standard of Review

This Court, "in reviewing an ALJ's decision that was affirmed by the circuit court, . . . affords deference to the findings of fact made below. This Court reviews decisions of the circuit court under the same standard as that by which the circuit court reviews the decision of the ALJ." *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995). Thus, "[a] final order of the hearing examiner for the West Virginia Educational Employees Grievance Board, . . . should not be reversed unless clearly wrong." Syl. Pt. 1, *Randolph County Bd. of Educ. v. Scalia*, 182 W. Va. 289, 387 S.E.2d 524 (1989). This Court reviews *de novo* the conclusions of law and application of the law to the facts. *Holmes v. Berkley County Bd. of Educ.*, 206 W. Va. 534, 526 S.E.2d 310 (1999). Further it has recognized that it "must determine whether the ALJ's

findings were reasoned, i.e., whether he or she considered the relevant factors and explained the facts and policy concerns on which he or she relied, and whether those facts have some basis in the record." *Martin, supra*, 465 S.E.2d at 406.

In this case, the findings and conclusions of the ALJ were not clearly wrong, as the Circuit Court erroneously concluded. The Grievance Board's decision was fully supported by the evidence of record and was not contrary to applicable law.

**II. THE CIRCUIT COURT ERRED IN FINDING THAT RESPONDENT'S GRIEVANCE REGARDING DENIAL OF A LEAVE OF ABSENCE FOR THE 2012-2013 SCHOOL YEAR WAS TIMELY FILED AND IN ORDERING THAT A LEAVE OF ABSENCE EITHER BE GRANTED OR THAT A HEARING ON THE ISSUE BE HELD BY PETITIONER.**

**a. Timeliness**

The West Virginia Public Employees Grievance Procedure requires that all grievances be filed within the time limits specified in the statute. West Virginia Code § 6C-2-3(1). Specifically regarding initiation of grievances, the statute provides as follows:

Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing.

West Virginia Code § 6C-2-4(a)(1).

Respondent was well aware of the denial of his request for a leave of absence upon receipt of the superintendent's September 11, 2012, letter.<sup>2</sup> As discussed in the ALJ's decision, even accounting for delivery and receipt of that letter, his timeline for initiating a grievance would have expired on approximately October 4. Therefore, the filing of the grievance on October 26, 2012, was far beyond the fifteen-day limit prescribed by statute.

The Circuit Court's conclusion that the issue of the denial of a leave of absence was somehow "renewed" or "revived" at the hearing before the Board on October 8, 2012, is not supported by the facts of record. The leave of absence issue concluded with the board of education's decision at a meeting held on September 10, 2012. The only recommendation presented to the Board on October 8, 2012, was for termination of Respondent's employment and was the only item on the agenda for that meeting. Although it is clear that Respondent and his counsel would have preferred a leave of absence over termination and made arguments to that effect on the night of the hearing, that did not change the fact that the Board had already decided the issue on September 10.

It has long been recognized by this Court that the grievance procedure is meant to be simple, fair and expeditious, and that, "[i]n the absence of any evidence of bad faith, a grievant who demonstrates substantial compliance with the filing provisions . . . is entitled to the requested hearing." Syllabus Point 2, *Duruttya v. Board of Educ.*, 181 W.Va. 203, 382 S.E.2d 40 (1989). However, "substantial compliance" did not occur in

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<sup>2</sup> And in reality, after meeting with the Board in executive session at the meeting on September 10, 2012, Respondent knew at the conclusion of that meeting that his request was denied.

this case. Once an employee has actual knowledge of the facts giving rise to his grievance, the fifteen-day time clock begins ticking. See *Spahr v. Preston County Bd. of Educ.*, 182 W.Va. 726, 391 S.E.2d 739 (W.Va., 1990). Respondent's knowledge of the Board's decision on his leave of absence request occurred within a few days of issuance of the September 11, 2012, letter. The record is devoid of any excuse for his failure to initiate a grievance on that issue within the required fifteen days. In this case, Respondent and the Circuit Court would have us believe that, even after an employer has definitively decided an issue and provided written confirmation of the same, the simple fact of the employee making an argument or request on the same issue "revives" the prior decision and somehow creates a new grievable event, by virtue of the employer taking no action to modify its prior decision. This would be an absurd and ridiculous construction of the grievance statute and its mandated timelines.

**b. Leave of Absence Issue**

Although presented as "optional" by the Circuit Court, Petitioner submits that the Court also erred in ordering the Board of Education to grant Respondent a leave of absence. Leaves of absence for school employees are addressed by the provisions of West Virginia Code § 18A-2-2a, as follows:

(a) Any teacher who is returning from an approved leave of absence that extended for a period of one year or less shall be reemployed by the county board with the right to be restored to the same assignment of position or duties held prior to the approved leave of absence. Such teacher shall retain all seniority, rights and privileges which had accrued at the time of the approved leave of absence, and shall have all rights and privileges generally accorded teachers at the time of the reemployment.

(b) An employee shall notify the county board at least ten working days prior to beginning a leave of absence. The county board shall approve such leave of absence for any teacher or service personnel who requests an extended leave of absence without pay for any period of time not

exceeding one year for the purpose of pregnancy, childbirth or adoptive or infant bonding. An employee shall not be required to use accumulated annual leave or sick leave prior to taking an extended leave of absence.

(c) Such employee who returns from an approved leave of absence for the purpose of pregnancy, childbirth or adoptive or infant bonding which lasted for a period of one year or less than one year shall be reemployed with the right to be restored to the same assignment of position or duties and benefits held prior to the approved leave of absence. Such employee shall retain all rights and privileges generally accorded employees at the time of the reemployment.

Clearly, the only mandated leaves pursuant to this statute are for the reasons designated therein,<sup>3</sup> so the granting of all other requested leaves of absence is within the discretion of the board of education. After having been on approved leave for nearly two full school years because of his physical and medical difficulties, there is no question that any additional approval of leave for Respondent was a decision solely within the discretion of the Board. There is no evidence of record indicating an abuse of that discretion under these circumstances.

This Court "generally accord[s] deference to boards of education in personnel matters." *Baker v. Board of Education*, 534 S.E.2d 378, 207 W.Va. 513 (W.Va., 2000). "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, *Dillon v. Wyoming County Board of Education*, 177 W.Va. 145, 351 S.E.2d 58 (1986). Absent some finding that Petitioner's denial of a third year of leave to Respondent was unreasonable or arbitrary and

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<sup>3</sup> Specifically, pregnancy, childbirth or adoptive or infant bonding.

capricious, regardless of whether the issue was grieved in a timely manner, the Circuit Court exceeded its authority in ordering that such discretionary leave be granted.

Finally, in light of the circumstances presented and Petitioner's discretion regarding such matters, it would be an exercise in futility for Petitioner to avail itself of the alternative option as ordered by the Circuit Court, i.e. hold a hearing on Respondent's grievance regarding the leave of absence. All pertinent information regarding the request for leave was presented to and reviewed by the Lewis County Board of Education at a meeting on September 10, 2012, including a discussion in executive session between Respondent and board members. Appendix at 278, 289. Therefore, it is virtually guaranteed that the Board will not change that decision at this juncture, even if a hearing were held. Moreover, pursuant to the grievance statute, a grievance regarding such an issue would be initiated at level one with the chief administrator, i.e., the superintendent, who has no authority to modify a decision previously decided by the Board. See West Virginia Code § 6C-2-4. Accordingly, the relief granted by the Circuit Court is not only contrary to law and exceeds the Court's authority, but would result in a wasteful expense of time and resources of all parties concerned and achieve no change in the ultimate result, i.e., the Board had the discretion to deny a leave of absence and did so, opting to exercise its authority to terminate this employee for incompetency.

**III. THE CIRCUIT COURT ERRED IN REVERSING THE GRIEVANCE BOARD'S FINDING THAT RESPONDENT WAS PROPERLY TERMINATED FOR INCOMPETENCY PURSUANT TO WEST VIRGINIA CODE § 18A-2-8.**

The Circuit Court erred in focusing upon whether the regulations regarding school transportation in West Virginia specifically authorize the use of the Physical

Performance Test in the manner it was performed in this case, ignoring the applicable law regarding termination and discipline of school employees. Simply stated, Petitioner exercised its statutory authority to terminate Respondent for cause, as authorized by West Virginia Code § 18A-2-8. The particular mechanism by which that determination was made, while relevant, should not have been the dispositive issue in this case.

West Virginia Code § 18A-2-8 authorizes a board of education to “suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge.” “The authority of a county board of education to dismiss a[n employee] under [this statute] must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously.” Syl. pt. 3, in part, *Beverlin v. Board of Educ. of the County of Lewis*, 158 W.Va. 1067, 216 S.E.2d 554 (1975). In the instant case, the Grievance Board correctly concluded that, based upon legitimate concerns and objective evidence, Petitioner established by a preponderance of the evidence that Respondent was not competent to perform his job duties, giving just cause for termination due to incompetency.

Although “incompetency” has been listed as a statutory cause for discipline or termination of board of education employees for many years, this Court has yet to define the term precisely, as it has with other terms listed in West Virginia Code § 18A-2-8. In fact, on the occasions when this Court has discussed the term “incompetency,” it has only been with reference to termination of school employees for performance-related issues. However, the basis for those opinions was rooted in the version of the

statute that existed prior to 1990, when there was no separate cause for discharge because of “unsatisfactory performance” related to the evaluation process. Prior to those amendments, this Court held that “[t]he procedures specified in West Virginia Board of Education Policy No. 5300(6)(a)<sup>4</sup> must be followed in every proceeding under W.Va. Code 18A-2-8 (1969) for the dismissal of a school employee on the ground of incompetency.” Syl. Pt. 3, *Mason County Bd. of Educ. v. State Superintendent of Schools*, 165 W.Va. 732, 274 S.E.2d 435 (W.Va., 1980). At the time, however, “incompetency” was the only term within the statute which could be applied to discharge for performance issues.

When West Virginia Code § 18A-2-8 was amended in 1990, the additional cause for discipline for unsatisfactory performance was added, along with the statement that “[a] charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article[,]” referencing West Virginia Code § 18A-2-12, also newly adopted during that legislative session. See 1990 W.V. ALS 4; 1990 W. Va. Acts 4; 1990 W.V. Ch. 4; 1990 W.V. SB 1. Therefore, since that time, employees who have been unsuccessful in the evaluation and improvement process have been terminated for the specific cause of unsatisfactory performance. See *Baker, supra*; *Wines v. Jefferson County Bd. of Educ.*, 582 S.E.2d 826, 213 W.Va. 379 (W.Va., 2003). Because the legislature chose to retain the term “incompetency” as a cause for termination in addition to “unsatisfactory performance,” it is only logical to presume that they are separate reasons for discipline of employees.

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<sup>4</sup> Policy 5300 was an earlier version of what in recent years has been West Virginia Board of Education Policy 5310, “Performance Evaluation of School Personnel,” 126 CSR 142.

In recent years, the Grievance Board has issued several decisions which discuss and define incompetency as a cause for termination of a school employee. As stated by the ALJ in the decision rendered in the instant case, the legal definition of "incompetency" pertains to "lack of ability, legal qualification, or fitness to discharge the required duty." Black's Law Dictionary 526 (Abridged Sixth Ed. 1991). In its line of decisions, the Grievance board has held that physical conditions which render an employee unable to perform his or her job duties may constitute incompetency. Appendix at 340-341.

The determination that Respondent was physically incompetent to perform his required job duties was based largely upon the results of the Physical Performance Test administered by the West Virginia Department of Education. However, there is ample evidence in the record verifying that various individuals observed Respondent's apparent physical limitations and believed that they would impact his ability to safely perform his job. Appendix at 115-120, 135-137, 179-181, 262. As stated by the ALJ in her decision, "[t]he . . . Test verified the misgivings of Respondent's personnel. Rather than place children at risk under Grievant's watch, Grievant's employment was terminated for incompetency." Appendix at 361. Therefore, Respondent's contention that the Test itself was the sole basis for his termination for incompetency is incorrect. Again, in the words of the ALJ, "[r]ather than assuming that Grievant could not carry out his duties in a safe manner [based upon the observations of individuals], Respondent asked the DOE for guidance . . . and was advised that the PP Test could be administered . . . ." Appendix at 360.

While both Respondent and the Circuit Court have focused extensively upon the provisions of the state transportation policy in support of the concept that the results of a Physical Performance Test were not “authorized” to be used in this manner, the Grievance Board was correct in finding that such issues were not relevant. As stated in the decision, Petitioner “had every right to” ascertain whether Respondent posed a safety risk and could perform his job duties, which determination was verified by the results of the Test. Appendix at 360-361. The testimony of Ben Shew, Director of the Office of School Transportation, is dispositive on this issue. As Mr. Shew explained, although mainly used as a required performance test prior to initial bus operator certification, this Test is also widely used, pursuant to the recommendation of his office, to assess the skills of certified drivers who have suffered injuries or physical conditions which have brought their abilities into question. Appendix at 60-67.

There is no specific tool, test or mechanism which a board of education is required to use to determine whether or not an employee is competent to perform his or her job duties. In the instant case, the Physical Performance Test just happened to be an available, objective tool for measuring and assessing the specific skills and capabilities required of school bus drivers. If, for instance, Respondent had been a custodian or maintenance worker, instead of a bus operator, a specific performance test would not have been available. Rather, the administration would have had to make a fairly subjective decision as to the employee’s competency, based upon whatever evidence might be available. However, because of the existence of this Test and the State Department of Education’s recommendation and endorsement of its use in this manner, it provided an objective confirmation of the suspicions of everyone who had

observed Respondent, i.e., that his physical condition prohibited him from safely operating a school bus.

The Circuit Court was also wrong in its finding that, in order to assess Respondent's situation, the superintendent's authority was dictated by the provisions of the state policy which allows him to require a medical examination of a driver whose condition is in question. See West Virginia Board of Education Policy 4336, *West Virginia School Bus Transportation Policies and Procedures Manual*, 126 CSR 92.18.2. But as explained by Mr. Shew, a medical examination is not necessarily always the best method of assessing an employee's abilities. Medical practitioners, such as Respondent's personal physician (who completed his medical certification form for certification purposes), do not always know what specific duties are required of the employee, nor does a general medical examination assess the ability to perform certain tasks. Appendix at 59, 95-97. As noted by the ALJ in this case, the option to require a medical examination is just that, an option, and the provisions of Policy 4336 certainly do not constrain a county superintendent from exercising his statutory authority to recommend discipline of employees. Appendix at 340.

Regardless of the specific method used to make the determination, there is no question that the evidence of record conclusively established a valid reason for termination of Respondent's employment on the basis of incompetency. By using the Physical Performance Test, as directed by the Department of Education, Petitioner utilized an objective standard for determining whether Respondent could safely and adequately perform his assigned job duties. Accordingly, Petitioner's decision was justified by objective, specific evidence, and was certainly not arbitrary and capricious.

Pursuant to its discretion in personnel matters, Petitioner properly terminated Respondent for incompetency within the meaning of West Virginia Code § 18A-2-8, based upon a preponderance of the credible evidence of record. The Circuit Court's finding that the ALJ's decision was clearly wrong is erroneous and must be reversed.

## CONCLUSION

The Circuit Court order in this matter is clearly erroneous in its reversal of the decision of the Public Employees Grievance Board. The Grievance Board's decision was well-reasoned, supported by the established facts of record, and in accordance with applicable law. Accordingly, Petitioner respectfully requests that the order of the Circuit Court of Kanawha County be reversed and that the final decision of the Public Employees Grievance Board be reinstated.

Lewis County Board of Education,  
By counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-0045

(Circuit Court Civil Action No. 13-AA-85)

LEWIS COUNTY BOARD OF EDUCATION

Petitioner

v.

MICHAEL HOLDEN

Respondent

CERTIFICATE OF SERVICE

I, Denise M. Spatafore, do hereby certify that I served the foregoing **Petitioner's Brief** on the parties by placing a true copy thereof, in the United States Mail, First Class pre-paid, this 9<sup>th</sup> day of April, 2014, in an envelope addressed as follows:

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