

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-0045

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

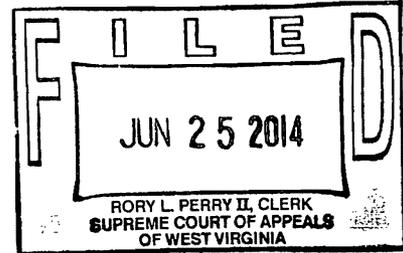
LEWIS COUNTY BOARD OF EDUCATION

Petitioner

v.

MICHAEL HOLDEN

Respondent



PETITIONER LEWIS COUNTY BOARD OF EDUCATION'S REPLY BRIEF

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INTRODUCTION

Just as that of the Circuit Court, Respondent Michael Holden's ("Mr. Holden") reasoning that assessment of a school employee's physical competence is exclusively governed by the West Virginia Department of Education's transportation regulations, 126 CSR § 92 ("Policy 4336"), is misplaced and erroneous. The fact remains, as clearly established at the level three grievance hearing below, that Mr. Holden's obvious physical limitations raised legitimate and serious concerns as to his ability to safely operate a school bus. As the legal caretaker of all students in its custody, Respondent Lewis County Board of Education ("Lewis BOE") had a responsibility and obligation to ensure and verify Mr. Holden's physical capabilities, especially concerning safety issues and care for the students on his bus.

It is incorrect for Mr. Holden to contend that the only mechanism for a superintendent under these circumstances was to require a physical examination from a medical practitioner as set forth in Policy 4336, 126 CSR § 92. Mr. Holden's extreme size and obesity raised very unique concerns and issues that would and could not be assessed in a medical examination. Indeed, as evidenced by the physical examination report completed by Mr. Holden's personal physician for his certification renewal, it is apparently possible to have no specific medical diagnosis, disorder or disease, but still have overwhelmingly obvious physical limitations. Appendix at 295-297. Stated simply, there is and was no specific mechanism dedicated to the purpose of measuring Mr. Holden's physical abilities; however, at the direction of the Department of Education's Office of Transportation, the Test was administered in order to provide an objective measure of how severe Mr. Holden's limitations were and how they would impact his

ability to perform his job duties. As confirmed by both the Test results, as administered by an individual trained and licensed to do so, and physical observations of his limitations, Mr. Holden was properly determined to be incompetent within the meaning of West Virginia Code § 18A-2-8.

With regard to the Lewis BOE's denial of a leave of absence, Mr. Holden has conveniently omitted the fact that, at a board meeting on September 10, 2012, with Mr. Holden present, the Lewis BOE officially acted upon the request for a leave of absence, voted to deny it, and confirmed that vote in writing. Appendix at 26, 31, 289. As stated in Petitioner's Brief in this appeal, the mere fact that an employee raises an issue during argument at a termination hearing does not create a grievable event. It is the board of education's action on any such request that would initiate the time for filing a grievance, and in this case, Mr. Holden missed the 15-day deadline by many days and weeks.

The Lewis BOE cannot disagree with Mr. Holden's observation that the normal relief that would flow from the reversal of a termination decision would be reinstatement. The Circuit Court's failure to order this relief is simply a further testament to the fact that every forum that has dealt with this case – the Lewis BOE and its administration, the Grievance Board, and the Circuit Court – has been unable to avoid the only realistic outcome. That is, because of his size and consequent physical limitations and issues, Mr. Holden cannot be entrusted with the safe operation of a school bus, let alone efficiently responding to the needs of students on board or handling health or safety emergencies. Apparently, the Circuit Court did not want to be responsible for returning an unsafe driver to employment, and instead ordered the Lewis BOE to either grant

another leave of absence or hold a hearing on that issue, neither of which it had the authority to do.

Likewise, Mr. Holden mistates the law regarding the standard for proving discrimination pursuant to West Virginia Code § 6C-2-2(d). Although somewhat difficult to understand, Respondent seems to argue that, for purposes of discrimination, he may only be compared to other bus drivers who were required to take the Test to prove their physical capabilities. However, Mr. Holden's own evidence at the grievance hearing in this regard focused exclusively upon whether any other bus operators returning from leaves of absence had been similarly required to take the Test upon their return, the circumstances of their leave, and types of injury or health issues for which leave was taken. Appendix at 33-45. He even went so far as to call some of those "similarly situated" bus drivers who had taken leaves of absence to testify on Mr. Holden's behalf. Appendix at 149-159. Accordingly, it contradicts Mr. Holden's own arguments to date for him to now allege that discrimination occurred because no other bus operator was asked to take the Test for any reason, regardless of their physical condition or having returned from extended leave with questionable abilities. The grievance statute clearly defines discrimination to apply only to "similarly situated" employees who have been treated differently. The uncontroverted evidence in the instant case has established that discrimination did not occur, in that no other bus operators returned from a leave of absence demonstrating clear, observable limitations which would raise concerns about their ability to perform their duties. The employees to whom Mr. Holden has compared himself were not similarly situated for purposes of proving discrimination.

ARGUMENT

I. Respondent's argument that State Policy 4336 provides the only legal method for assessing a bus operator's abilities is incorrect. All West Virginia school boards have the authority to terminate employees for any of the statutory causes of West Virginia Code § 18A-2-8, as supported by a preponderance of credible evidence.

Both Respondent and the Circuit Court have placed the utmost importance upon the provisions of the state transportation regulations and whether or not they specifically "authorize" the Physical Performance Test as it was used by the Lewis BOE to assess Mr. Holden's capabilities. Mr. Holden insists that the "physical competencies" of bus operators are defined within these regulations and that the Lewis BOE did not provide "substantial evidence" that he was incompetent pursuant to those provisions. This is wrong and a gross mischaracterization of the transportation regulations, the law governing termination of incompetent employees, and the employer's burden of proof in disciplinary matters.

a. Policy 4336 and Physical Qualifications

Respondent contends that he was, in fact, able to perform each of the duties set forth in 126 CSR § 92.16.2, and that, in the absence of evidence to the contrary, his employer's assessment of his abilities had to end there. There are several problems with Mr. Holden's reasoning. First, as noted by the Administrative Law Judge in the Grievance Board's decision in this case, the list of "duties" contained in the cited provision "includes" some specific responsibilities of bus drivers, but is certainly not an all-inclusive listing of everything required of them. Common sense would dictate that there are also many other duties not listed in the regulations which are necessarily required of bus operators, such as having physical mobility, being able to react quickly

and efficiently in an emergency, and being able to get up from the driver's seat without taking substantial time and effort. Appendix at 115-120. Again, as aptly noted by the Administrative Law Judge, when Mr. Holden contended he could safely perform all bus operator duties, "he did not explain how this would be possible when he could not manage to quickly get up and down the bus steps to get the children off the bus" in an emergency. Appendix at 362.

Moreover, one need only look to the preceding portion of the regulation, at 126 CSR § 92.16.1, to ascertain that the entire section, including the listing of duties, pertains to the "physical qualifications of bus operators." And, specifically in Section 16.1, it states that a bus operator must not have any "disease, psychiatric disorder, or take any medication" which will interfere with the performance of their duties. As the Lewis BOE has explained over and over throughout this proceeding, Mr. Holden's circumstances did not involve any particular medical condition, disease, or disorder. Rather, his extreme size and weight, and their consequent effects upon his physical movements, were the issue at hand which prompted the administration of the Test, which confirmed that he was not physically competent to continue employment as a bus operator. These provisions pertain to physical qualifications and conditions, not "competencies" as Mr. Holden alleges. As confirmed by the Director of the Office of Transportation, a driver may have none of the medical conditions addressed in the policy, but still have issues with performing their duties, as did Mr. Holden. Appendix at 95-96.

b. Policy 4336 and the Physical Performance Test

Respondent continues to insist, albeit incorrectly, that the Test was not authorized to be used to measure a certified bus operator's capabilities, thus somehow negating the Lewis BOE's determination that Mr. Holden was not safe to continue employment as a school bus driver. These contentions simply ignore the clear testimony provided by Benjamin Shew, then-director of the State Department of Education's Office of Transportation and the individual official charged with interpretation and administration of the policy/regulations. As explained by Mr. Shew, this particular test is administered to both new drivers and currently certified drivers throughout the state, with the blessing of the State Department of Education, to assess the ability to perform tasks specific to school bus operation. Appendix at 61-68.

The Lewis BOE very strongly disagrees with Mr. Holden's contention that the Office of Transportation's policy prohibits the use of this particular Test for the assessment of the abilities of certified bus drivers. The portion of the policy which discusses initial certification of school bus operators discusses required testing, and states that, after passage of other tests, a candidate "shall pass additional tests on skill and performance" administered by a certified bus inspector. 126 CSR § 92.15.2.14. However, and quite importantly, there is absolutely nothing in the entire policy or any regulations of the State Department of Education which specifies or dictates what should be addressed or contained in such tests. Obviously, the discretion to determine what skills and abilities of bus operators are appropriate for testing and in what manner is left to the sound discretion of the Office of Transportation. Likewise, it is logical to conclude, as supported by the Office of Transportation Director's explanation, that

similar “tests on skill and performance” might be used to assess current drivers whose abilities are in question, or as a mechanism for providing them additional training to improve their performance in particular areas. Appendix at 61-68. There is absolutely nothing which prohibits the use of the same performance test on both new and certified drivers.

c. Policy 4336 and an Additional Medical Examination

It has been asserted repeatedly throughout this case that, if the superintendent had any questions about Mr. Holden’s physical condition, he was required to exercise his option of requesting an additional physical examination from a health care provider, as provided in 126 C.S.R. § 92.18.2. However, as the Lewis BOE has thoroughly explained and proven, while this medical examination is only one of the options available to the superintendent when a driver’s abilities are in question, it was simply inapplicable under the circumstances presented in the instant case. As explained by Mr. Shew, a medical examination most certainly does not measure or assess the specific tasks to be performed by school bus operators, let alone whether such tasks can be performed in an acceptable and efficient manner that does not place the health and safety of students or others at risk. Therefore, an additional medical evaluation of whether Mr. Holden suffered from such medical conditions as heart, hearing or vision problems would have been an exercise in futility and would not have provided pertinent information regarding his ability to perform specific assigned tasks.

Finally, as thoroughly discussed in Petitioner’s original brief in this case, Mr. Holden was properly terminated for incompetency as set forth in West Virginia Code § 18A-2-8. Although not yet specifically defined by this Court, incompetency may

encompass either legal or physical inability to perform one's job duties. There is no basis for Mr. Holden's contention that physical incompetency may only be defined in medical terms by medical personnel. Rather, it is incumbent upon the school system to prove the termination was justified, by a preponderance of credible evidence, in a manner that is not arbitrary and capricious or which represents an abuse of a board of education's ample discretion in personnel matters. *See Watkins v. McDowell County Board of Education*, 229 W. Va. 500, 729 S.E.2d 822 (2012). The Lewis BOE has easily and unequivocally met its burden by proving by a preponderance of the evidence that Mr. Holden was terminated for incompetency. For that reason, the Circuit Court must be reversed.

II. Respondent has ignored the fact that his request for a leave of absence was denied by the Lewis BOE on September 10, 2012, making his grievance in that regard untimely.

Apparently, Respondent is hopeful that this Court will forget or ignore the uncontroverted facts of record on this issue, i.e. that the Lewis BOE formally denied his request for a leave of absence on September 10, 2012, in his presence and after a discussion with Mr. Holden in executive session at that same meeting. As noted by the Administrative Law Judge, nothing occurred after that date, or after the written notification of the Lewis BOE's decision, which would or should have caused Mr. Holden to have any basis for believing the request was still under consideration. In fact, on the date of the termination hearing before the Lewis BOE on October 8, 2012, the 15-day deadline for filing a grievance on the denial of a leave of absence had passed. The board vote denying the leave was the grievable event on this issue, not Mr. Holden's attempt to revive the previously decided issue during his termination hearing.

And, as previously explained in Petitioner's Brief, there was nothing on the agenda on October 8, 2012, except for the recommendation of termination, and no action was taken on any other issue at that meeting, including the previously decided denial of leave of absence.

Although it is beyond ridiculous that Respondent continues to insist that the leave of absence issue was decided by the Lewis BOE at the termination hearing on October 8, 2012, Petitioner is compelled to point out to the Court that the West Virginia Open Governmental Proceedings Act, West Virginia Code § 6-9A-1, *et seq.*, along with opinions of the West Virginia Ethics Commission interpreting that Act, clearly requires that any item upon which a board acts during any public meeting must be specifically set forth on the published agenda. The single item for consideration at the Lewis BOE meeting on October 8, 2012, was a recommendation of termination of Michael Holden's employment. Any action or vote on an item not on that agenda, such as a leave of absence request, would have violated the Act and been subject to nullification.

Mr. Holden's claim that he timely filed a grievance on the denial of a leave of absence is completely contrary to the evidence of record and applicable law. Therefore, the Court's flawed and totally baseless conclusion in this regard must certainly be reversed.

III. Respondent did not prove discrimination in this case, because no similarly situated employees were treated differently.

In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

- (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
- (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52, 221 W. Va. 306 (2007); See West Virginia Code § 6C-2-2(d).

Respondent appears to contend that discrimination occurred when Mr. Holden was “singled out” as the only currently certified bus operator in Lewis County required to take the Test to prove his abilities. However, one cannot simply look to whether an employee has been treated differently from others when considering whether discrimination has occurred, without also analyzing the reason for the differing treatment and whether the employees were similarly situated.

In this regard, Mr. Holden’s argument is confusing and illogical. As set forth above, prior to and during the grievance hearing in this case, in arguing his discrimination claim, he focused specifically upon other bus operators who had taken leaves of absence and then returned to work for the Lewis BOE. Therefore, Respondent’s attempt to now argue that he may only be compared to Lewis BOE bus operators in general is disingenuous. Simply stated, no other Lewis BOE bus operator returned from extended leave displaying obvious signs of physical limitations which might impact their ability to safely operate a school bus. Accordingly, there were no similar situations which would or should have prompted the administration of the Test or the resultant decision to terminate the driver’s employment for incompetency. There is no basis in law or in fact to support a finding of discrimination in this case.

IV. Because Respondent's termination for incompetency was proven by a preponderance of the evidence, he has no right to reinstatement to employment.

There is no doubt that the Circuit Court order in this case is fatally flawed and erroneous in several respects, only one of which was with regard to the strange relief that was ordered. One logical justification for the Circuit Court's failure to order reinstatement, instead ordering only relief related to leave of absence, was that the Lewis BOE had sufficiently established that legitimate questions existed as to Mr. Holden's ability to safely discharge his job duties. However, it is not necessary to engage in conjecture and speculation as to why the Circuit Court ordered this odd relief, when the Lewis BOE proved by a preponderance of the evidence that Mr. Holden's termination was justified.

The Lewis BOE does believe it is important to bring to this Court's attention that, not only was Mr. Holden's termination justified and proper, but that returning him to employment as a school bus operator did, would and will present even more difficult issues for him, his employer, and the state. Although after-the-fact, some intervening events in this case will make it difficult, if not impossible, to fairly and appropriately grant the relief ordered by the Circuit Court, if that decision were affirmed. First, West Virginia school bus operators must renew their certification to drive prior to the beginning of each school year. 126 C.S.R. § 92.15.1. After the termination of his employment, Mr. Holden's certification for the 2012-2013 school year expired and has remained expired since that time. As explained by Mr. Shew, because of his failure of the Test administered by a Department of Education transportation official and subsequent events, Mr. Holden has been tagged as "under investigation" for purposes of renewing or obtaining a valid bus operator certification, meaning that he would not be certified or

renewed without verification that he could meet all state requirements. Appendix at 70-71. Moreover, as confirmed by Mr. Holden and his counsel, one of Mr. Holden's legs was recently amputated below the knee, presenting an additional and likely insurmountable obstacle to his ever being able to perform the duties of a school bus driver, much less successfully complete all certification requirements.

Another problem presented by the relief ordered by the Circuit Court is that, even if the Lewis BOE were to decide to grant Mr. Holden a leave of absence for the 2012-2013 school year, the Circuit Court failed to provide instructions on several related and critical issues. First, since Mr. Holden had been on leave of absence for two years, he was not eligible for any type of paid leave of absence for 2012-2013. He had used all of his accrued sick leave during the prior two years, had not been at work in order to be provided with the minimum leave days provided by law, and was not eligible for Family and Medical Leave, due to not having worked for so long. Therefore, even if the Lewis BOE had or would grant the request to give Mr. Holden a leave for the 2012-2013 school year, it would have been unpaid leave (negating any right to back pay), and it is totally unclear to what Mr. Holden would have been entitled at the expiration of that one year leave of absence in June of 2013. Mr. Holden's expired certification, along with his continuing extreme health and physical issues, would have brought the parties right back to where they were in August of 2012, but with even more difficult issues to resolve as to Mr. Holden's employment and certification status. Accordingly, the Lewis BOE begs this Court's careful consideration of the consequences of affirming the Circuit Court's decision and the obvious need for its reversal.

CONCLUSION

Despite his obvious and extreme physical problems and their impact upon his ability to perform simple tasks, such as getting in and out of the driver's seat of the bus or walking up and down the bus stairs, Mr. Holden has insisted throughout this proceeding that he can safely operate a school bus and respond in an emergency situation. Even now, with an amputated foot and suffering from undoubtedly worse physical conditions, he continues to contest the termination of his employment, inexplicably (and quite irresponsibly) insisting that he is perfectly capable of operating a school bus. Mr. Holden's disregard for the safety of Lewis County's school children is shocking and shameful.

The Lewis BOE urges this Court to reverse the Circuit Court's order in its entirety and take this opportunity to clarify the meaning of "incompetency" as stated in West Virginia Code § 18A-2-8. Surely, when an employee appears at work with very obvious physical limitations and issues, preventing the performance of even the simplest of tasks, a board of education is justified in attempting to ascertain that employee's capabilities, especially one charged with operating such dangerous equipment as a large motor vehicle with children on board. There can be no question that the Lewis BOE proved that Mr. Holden's termination for incompetency was justified by the evidence of record, and the Circuit Court must be reversed.

Lewis County Board of Education,
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A handwritten signature in black ink, appearing to read "Denise M. Spatafore", is written over a horizontal line.

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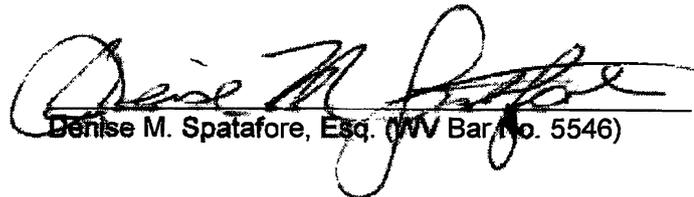
MICHAEL HOLDEN

Respondent

CERTIFICATE OF SERVICE

I, Denise M. Spatafore, do hereby certify that I served the foregoing **Petitioner Lewis County Board of Education's Reply Brief** on the parties by placing a true copy thereof, in the United States Mail, First Class pre-paid, this 25th day of June, 2014, in an envelope addressed as follows:

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