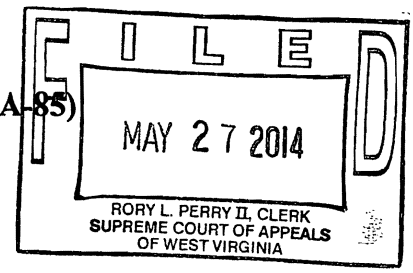
**BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS**

**CASE NO.: 14-0045**

**(Kanawha County Circuit Court Docket No.: 13-AA-85)**




**LEWIS COUNTY BOARD OF EDUCATION,**
**Petitioner,**

**v.**

**MICHAEL HOLDEN,**
**Respondent.**

# RESPONDENT'S BRIEF AND CROSS ASSIGNMENT OF ERRORS

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## III. CROSS ASSIGNMENT OF ERROR

1. After correctly ruling that Petitioner did not meet its burden of proof on the issue of discharging Respondent, the lower court erred in not ordering Mr. Holden's reinstatement and granting him back pay, back benefits, interest and reasonable attorney fees.

2. The lower court erred by not ruling that Petitioner suffered from discrimination when he was the only bus operator who was required to take a physical agility test to be continue to operate a school bus[1].

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[1] The lower court did not address this issue, probably because it ruled that Mr. Holden was wrongfully terminated on other grounds. Moreover, Petitioner incorrectly states that Mr. Holden did not raise this issue below. That is false. See Joint Appendix at pages 385-86.

## IV. STATEMENT OF THE CASE

Michael Holden (hereinafter referred to by name or as the "Respondent") was hired as a substitute bus operator for Petitioner Lewis County Board of Education (hereinafter referred to as the "Petitioner") starting in the 1996 school year and as a full time bus operator starting in 1996. Joint Appendix at page. 332[2]. The origination of the dispute between the parties started when Mr. Holden injured his back as he twisted and fell while brush hogging in October of 2010. See Id. This injury immobilized Mr. Holden as it tore several muscles in his back. Respondent's injury was compounded by the fact that he had a very severe blister on his foot at this time. This slowed the recovery of his back, which required Respondent to get up and walk around. However, his foot needed rest in order to heal. As a result of his injuries, Mr. Holden did not return to work for the remainder of the 2010-2011 school year. See id.

Mr. Holden attempted to return to work in the beginning of the 2011-2012 school year. Id. However, after driving for one half day, Mr. Holden called off work because his back felt too weak. Id. Appellant was again placed on an unpaid medical leave of absence for the rest of the school year. Id. During the entire time that he was on medical leave, Respondent took the necessary steps to be annually re-certified, including passing a physical examination by a doctor. See Jt. Ap. at pp. 294-97 (showing that Mr. Holden was certified to operate a school bus for the 2012-13 school year) and Jt. Ap. at p. 335.

Respondent attempted to return to work in the beginning of the 2012-2013 school year. Jt. Ap. at p. 332. When he did so, Mr. Holden could perform all of the physical duties of a bus operator required by Section 126 CSR 92.16.2. See Jt. Ap. at 268-69. Right before the school

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[2] Hereinafter, citations to the Joint Appendix will be in the form of "Jt. Ap. at p. __."

year started, Respondent was asked by Terry Cogar, Lewis County transportation supervisor, to demonstrate that he could return to work by operating a school bus in the transportation parking lot[3]. See Jt. Ap. at p. 333. Respondent did so. Moreover, Mr. Holden was able to sit in a regular school bus and his stomach did not interfere with the operation of the vehicle. In fact, Mr. Holden drove the school bus for a day and a half without incident. See Jt. Ap. at pp. 333-34.

Before the school year, Mr. Cogar and newly hired Lewis County Director of Transportation Mr. L.D. Skarzinski conferred with West Virginia Department of Education Director of Transportation Benjamin Shew about how to bring Mr. Holden back to work considering their concern over Respondent's weight. See Jt. App. at p. 333. Mr. Shew recommended that Petitioner require Respondent to take a physical agility test before returning to work. Id. The test in question was one that Mr. Shew took from New York State. This test was not intended to be used as a criteria for employment for existing bus operators, but was created to be given to newly hired bus operators, and to act as a training device to show a driver where he or she needs to improve. See Jt. Ap. at p. 334.

The physical agility test that Mr. Holden was required to take was administered by school bus inspector David Baber on August 24, 2012. Respondent failed to pass the first part of the test, which required him to climb the school bus stairs three times within 30 seconds. The way the test was administered was that if the bus operator failed at any one point in the test, the remainder would not be given.

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[3] Apparently, Superintendent Dr. Joseph Mace had a concern that Mr. Holden's weight prevented him from being physically able to perform his job duties. See Jt. Ap. at pp. 332-33. Mr. Holden's weight approached 640 pounds at one point when he was off work, though he reduced it to approximately 580 pounds at the time of his hearing before Respondent. Jt. Ap. at p. 332.

Petitioner held a hearing on October 8, 2012 regarding Superintendent Mace's recommendation that Respondent be terminated. Jt. Ap. at p. 335. At that time, Respondent requested that he be allowed to return to work as he was a properly certified bus operator, with a return to work note from his doctor or, in the alternative, to be allowed to have a continuing leave of absence. Id. After the conclusion of the hearing, Petitioner terminated Mr. Holden's employment by letter dated October 10, 2013. Id.

Respondent grieved the matter to the West Virginia Public Employees' Grievance Board. However, the ALJ hearing the grievance ruled in Appellee's favor, finding that Mr. Holden's grievance on the issue of a medical leave of absence was not timely filed and that Petitioner proved that Respondent was not physically competent to operate a school bus.

Mr. Holden appealed this decision in the Circuit Court of Kanawha County. The lower court primarily upheld Mr. Holden's appeal. It first ruled that Respondent's appeal on the issue of a medical leave of absence was timely filed because he raised that issue as an alternative to being terminated at the October 8, 2013 hearing. Jt Ap. at pp. 437-38. Then, the lower court ruled that the Grievance Board's decision to uphold Respondent's termination based on physical incompetency was clearly wrong in light of of the "reliable, probative, and substantial evidence on the whole record and is contrary to law." Jt. Ap. at pp. 440-41. However, erroneously, the lower court did not give the remedy that naturally flowed from that ruling: reinstatement with back pay and interest, as well as reasonable attorney fees. Id. Rather, the only remedy provided by the court was to either request Mr. Holden's request for a medical leave of absence or hold a hearing on that issue. Id. Probably because the lower court found that Respondent's termination was

wrongful on other grounds, it did not rule on his claim that his termination constituted unlawful discrimination.

## V. SUMMARY OF ARGUMENT

Respondent is contesting his termination as a bus operator for Petitioner. Mr. Holden was terminated as a bus operator after failing to pass an agility test that he was required to perform, allegedly because of a concern over his weight, even though he was a certified bus operator and he could do all the physical requirements of his position. Moreover, there is nothing in the West Virginia Code, nor Code of State Regulations (hereinafter referred to as the "CSR") that permit a county school board or superintendent to fire a bus operator for failing to pass an agility test. Additionally, Respondent was discriminated against as he is the only certified bus operator who has had to take the agility test in question, Also, Petitioner failed to give Mr. Holden a leave of absence as he requested.

Respondent grieved his termination. However, the Administrative Law Judge (hereinafter referred to as the "ALJ") ruled for Petitioner. In so ruling, as the lower court noted, the ALJ essentially ignored the CSR, which gives the physical and medical requirements to be a certified bus operator and the process whereby a county superintendent may take action if he or she believes that a bus operator still is not physically able to perform the position despite meeting the regulatory qualifications. The ALJ also used the incorrect "compare employees" when ruling on Respondent's discrimination claim, an issue that was not ruled on by the lower court. Finally, the ALJ erred by ruling that Mr. Holden's grievance as it pertained to the denial of a request for a leave of absence was not timely filed. .

Petitioner argued first that Respondent's grievance as it pertained to the medical leave of

absence issue was not timely filed. However, the lower court correctly ruled that the grievance was timely filed because at the hearing before Petitioner regarding whether Respondent should be terminated, Mr. Holden sought two separate remedies in lieu of termination: reinstatement or a medical leave of absence. Petitioner's act of terminating Respondent was a rejection of both remedies offered by Mr. Holden. Thus, just as Mr. Holden's grievance regarding the issue of reinstatement was timely filed, so was his grievance pertaining to a medical leave of absence[4].

Additionally, Petitioner argues that the lower court erred in ruling that there was not sufficient evidence in the record to sustain Mr. Holden's termination for physical incompetency. In short, Petitioner first states that certain individuals had concerns about Mr. Holden's physical competency and this could sustain his termination regardless of the results of the physical agility test. Petitioner also argued that there was no one specific mechanism for making a determination whether a bus operator is physically competent and the use of the physical agility test in question is one acceptable method. However, both of these contentions are not really helpful to Petitioner. Mere suspicion of physical incompetency not by medical opinion is not enough to establish physical competency. Furthermore, there is a very specific method of testing physical competency for a bus operator set forth in the CSR. Petitioner simply chose to ignore it.

Finally, Respondent alleges two cross assignment of errors. First, after determining that Petitioner had not established sufficient grounds in the record for terminating Respondent, the lower court erred by failing to order his reinstatement with back pay. Reinstatement, with back

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[4] Petitioner also argued that it has discretion regarding whether or not to give Mr. Holden a medical leave of absence and it did not abuse its discretion in denying his request. However, that issue was never reached by the ALJ, so it is not part of this appeal. The lower court ordered that Petitioner either grant Mr. Holden's request for a medical leave of absence or hold a hearing on the same. In regard to the medical leave of absence issue, that was the proper ruling.

pay, is the universal remedy for a wrongful termination for a grieving employee. The second assignment of error pertains to the issue of discrimination. This issue was not decided by the lower court because it negated Mr. Holden's termination on other grounds. However, this Court should recognize that Mr. Holden's discharge was also an act of discrimination under the West Virginia Code pertaining to employment rights of public employees.

## VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

While Respondent does not believe oral argument necessary, obviously, this Honorable Court best knows if oral argument will assist clarifying any points raised by the parties.

## VII. ARGUMENT

### A. STANDARD OF REVIEW

This appeal is to be viewed in light of the following statutory and common law principals. The appeal provisions of W. Va.. Code § 29-6A-7 provide that an appeal may be taken to a circuit court where the final grievance decision:

(1) Is contrary to law or a lawfully adopted rule or written policy of the employer;
(2) Exceeds the hearing examiner's statutory authority;
(3) Is the result of fraud or deceit;
(4) Is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
(5) Is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

"A final order of the hearing examiner for the West Virginia Education and State Employees Grievance Board, made pursuant to W. Va.. Code, 29-6A-1, *et seq.* [(1988) (Repl. Vol.2004)], and based upon findings of fact, should not be reversed unless clearly wrong[5]." Quinn v. West Virginia vs. Comty. Coll., 197 W. Va. 313, 475 S.E.2d 405 (1996). Further, the West Virginia High Court explained that in reviewing in reviewing an ALJ's decision, a circuit court accords deference to the findings below. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 304,465 S.E.2d 399, 406 (1995). A circuit court should affirm the ALJ's factual findings that are supported by substantial evidence, and give substantial deference to inferences drawn from these facts. Id. There is a *de novo* review of the conclusions of law and application of law to the facts. Id.. Quinn, 197 W.Va. at 316, 475 S.E.2d at 408, *citing* Bolyard v. Kanawha County Bd. of Educ., 194 W. Va. 134, 136, 459 S.E.2d 411, 413 (1995). Ultimately, a circuit court uses both a deferential and plenary standard of review, giving some deference to an ALJ's findings of fact, but reviewing *de novo* any ruling of law and the application of law to the facts. Finally, this Court should note that rules and regulations pertaining to the civil service code should be construed liberally in favor of the employees. Syl. Pt. 1, Cruciotti v. McNeel, 396 S.E.2d 191 (W. Va. 1990). Under this standard, the lower court's ruling regarding the timeliness of Mr. Holden's grievance and the lack of evidence to support his termination should be upheld and his request for reinstatement and back pay should be granted.

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[5] "Clearly wrong" is when a decision constitutes a misapplication of the law, entirely fails to consider an aspect of the problem or offers an explanation that runs counter to the evidence offered or offers an implausible explanation. See In Re Queen, Syl. Pt. 1, 473 S. E. 2d 483 (W. Va. 1996).

## B. STATEMENT OF LAW

As this is a discharge grievance, the burden of proof has always been on Petitioner. Jt. Ap. at p. 338. (citations omitted). A school board may not terminate an employee for any reason. Rather, public school employees may only be fired for one of the reasons contained in West Virginia Code Section 18A-2-8. Id.

True, a bus operator who can not perform the duties of his or her position is "incompetent," under Section 18A-2-8. Jt. Ap. at p. 344 (citations omitted). However, the standard of "incompetency" must be construed by the language of Policy 4336, which governs the operation of school buses and the qualification of school bus operators.

Policy 4336 has been incorporated into the West Virginia Code of State Regulations (CSR) at title 126, Rule 92. The physical requirements of a bus operator are found in 126 CSR 92.16, including 126 CSR 92.16.2, which lists the specific physical duties to be performed by a bus operator. Additionally, the physical examination requirements are found in Section 126 CSR 92.17. Further relevant regulations are set forth at 126 CSR 92.18. There was no evidence introduced at either hearing of any other relevant regulatory provision concerning the physical or medical requirements to be a bus operator.

Petitioner also claimed that his termination is an act of discrimination because no other experienced bus operator has been required to that the physical agility test at issue[6]. To prove a discrimination claim under grievance law, a grievant need only establish that there was an adverse employment action and such action was neither job related nor agreed to by the employee who brings the claim. The Bd. of Educ. of Tyler Co. V. White, 216 W. Va. 242, 605

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[6] Appellee only uses the physical agility test in question for newly hired bus operators.

S.E.2d 814 (2004). Under White, "once the grievant proves that he or she has been treated differently, the different treatment is not related to actual job responsibilities of the employees and the grievant has not agreed to the different treatment in writing, the grievant has established his or her discrimination claim." Id.

Finally, there is the issue of whether Petitioner's grievance as it pertained to a request for a medical leave of absence instead of termination was not timely filed. West Virginia Code 6C-2-1 *et seq.* clearly establishes a 15 "working" day filing period for all grievances.[7] Under these rules of law, Mr. Holden should prevail on his grievance.

## C. ARGUMENT

Petitioner argued that the lower court erred in finding that the ALJ was "clearly wrong" in upholding Mr. Holden's termination for physical incompetency. The main basis for the lower court's ruling was that the CSR sets forth the physical and medical requirements to perform the duties of a bus operator and also how to resolve the concerns of a county superintendent if he or she believes that there is a competency issue even when the bus operator has met all the statutory and regulatory requirements of the position. The lower court further noted that the evidence of physical incompetency relied on by Petitioner consisted of a physical agility test that is neither applicable to existing operators nor part of the regulatory scheme to be used when the

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[7] When the meaning of a statute is clear, such statute is just followed and no statutory construction is necessary. Frymer v. Higher Ed. Policy Com'n., 655 S.E.2d 52 (W. Va. 2007). Thus, Article 2 of Chapter 6C should simply be followed as written. Even if statutory construction is necessary, "school personnel regulations and laws are to be strictly construed in favor of the employee." Morgan v. Pizzino, 256 S.E.2d 592 (W. Va. 1979).

superintendent has doubts about an operator's ability to per form his or her job duties. Thus, there was not substantial evidence in the record to sustain the finding of physical incomptetence.

Petitioner responded to stating that there was additional evidence of physical incompetency in the record to sustain the ALJ's upholding of Mr. Holden's termination, primarily some personal observations and concerns of various employees of Petitioner. Petitioner also argues that when a county superintendent has a fear that a bus operator may not safely perform his or her job duties, then such official can use the physical agility test at issue because there is no specific mechanism for a superintendent to make this determination. As will be demonstrated below, both arguments are wrong.

Petitioner also argued that the lower court erred in finding that Mr. Holden's grievance pertaining to his request for a medical leave of absence was not timely filed. It argued that the issue at the hearing which lead to the filing of this grievance "only" dealt with Respondent's termination. However, as the lower court noted, a medical leave of absence was one of the alternatives requested by Mr. Holden. Since Mr. Holden made a request for a medical leave of absence at the hearing of October 8, 2013, his grievance was timely.

Finally, Respondent argues herein that the lower court erred in not ordering Mr. Holden to be reinstated, with back pay, when it found that Petitioner did not meet its burden of proof to sustain Mr. Holden's termination for physical incompetency. Additionally, the lower court should have also found that Mr. Holden's termination was an act of discrimination.

**1. The Lower Court Correctly Ruled That the Physical Competencies Required of a School Bus Operator Are Defined in the Code of State Regulations and That Petitioner Did Not Offer Substantial Evidence That Mr. Holden Could Not Meet Those Competencies**

The physical and medical requirements of a bus operator are set forth in the Code of State Regulations. For example, Section 126 CSR 92.16.1 states, in pertinent part, that a school bus operator "shall have no mental, nervous, organic or functional disease or psychiatric disorder and take no medication likely to interfere with his or her ability to operate the bus safely." There was no evidence presented, nor argument made, that indicated this provision disqualified Mr. Holden from being a bus operator.

Next, Section 126 CSR 92.16.2 gives the job duties that a bus operator must be able to perform. They are: walk from the operator seat to the rear of the bus; open all emergency exits; install snow chains on a bus; raise the hood and check oil and anti-freeze levels, remove obstructions from the wind shield and under the wiper blades; adjust all outside mirrors; and secure a wheelchair. Mr. Holden testified that he could perform all of these functions and this testimony was, essentially, uncontradicted.[8]

Finally, Section 126 CSR 92.17 discusses the requirements and the specifics of a medical examination. There is no dispute that Mr. Holden passed a proper medical examination. Mr. Holden also had a return to work slip from his doctor.

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[8] Superintendent Mace testified that he "heard" that Grievant had to "lift his belly" to walk from the front to the back of the school bus. While that opinion is irrelevant, it was also contradicted by Mr. Holden that said it was not true. Further, Dr. Mace said something else that was simply flatly contradicted by his own employees. Dr. Mace testified that Grievant could only fit in a retrofitted bus, and that Grievant's belly interfered with the steering wheel of the bus. This was contradicted by Mr. Cogar who testified that Mr. Holden could fit in a regular bus with his belly not touching the wheel.

Thus, the record demonstrates that Mr. Holden met all the medical and physical requirements of his position.

Despite the foregoing, Petitioner argues that it presented evidence to sustain the ALJ's ruling that Mr. Holden was not physically incompetent to operate a school bus apart from his failure to pass the physical agility test[9]. It cited four places in the record where there was evidence supporting the ALJ's ruling that Mr. Holden was physically incompetent to ride a bus.

First, it calls attention to pages 115-120 in the Joint Appendix, which pertains to a discussion of the admissibility of a purported video tape, which had never been given to opposing counsel, of Mr. Holden operating a school bus. However, this Court should note that the ALJ specifically noted, in over ruling counsel's objection on its admissability, that Petitioner was not entering the evidence to show Mr. Holden was not competent to drive, but was entering it to show why they wanted him to take the physical agility test. Jt. Ap. at p. 117-18.

Then Petitioner refers to pages 135-137 and 179-81as providing evidence supporting the ALJ's ruling that Mr. Holden was incompetent to operate a school bus. However, this "evidence" merely consists of hearsay testimony concerns discussion that various individuals had concerning their doubts about whether Mr. Holden could operate a school bus. However, none of this is actually evidence of incompetency. It is merely speculation. What these parts of the record does show is that evidence was introduced that tended to prove Superintendent Mace specifically and Petitioner generally had a concern about whether Mr. Holden could operate a school bus. However, the CSR provides a specific mechanism regarding how those concerns

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[9] This Court should note that the failure to pass the unlawful physical agility test is virtually the only grounds that the ALJ considered in reaching her determination that Mr. Holden was not physically competent. See Jt. Ap. at pp. 339-41.

should be resolved. The lower court correctly ruled that Petitioner did not follow that regulatory framework.

**2. The Lower Court Correctly Ruled That the CSR Provides a Mechanism for When a County Superintendent is Concerned About Whether a Bus Operator Can Safely Perform the Duties of His Position and that Petitioner Did Not Follow it.**

Petitioner argued below, and is likely to still maintain, that the physical and medical requirements contained in the CSRs cited within are not all encompassing. In other words, there could still be an issue of whether or not a school bus operator can safely perform his or her job duties even if the statutory requirements are met. Indeed, the CSR provides for that eventuality. However, Petitioner did not avail itself of this regulatory method of resolving these concerns.

Section 126 CSR 92.18.2 permits a county superintendent who feels that a medical exam, while passed, may not cover all his or her concerns about whether a bus operator is fit to drive, to require additional examination by a designated health care provider. Thus, if Superintendent Mace thought that Respndentdespite having passed a medical exam, presented safety issues, this was the vehicle he had to address this.

Mr. Shew testified that Superintendent Mace could have directed such examination to cover and test whatever he felt was necessary to satisfy himself that Mr. Holden was competent to drive. This is what Dr. Mace should have done. Clearly, as the lower court noted, in approving the above cited CSR, the Legislature made the determination that physical competenceis to be made by a medical professional. In the common variety situation, proof of fitness is demonstrated by passing the medical examination that is set forth in the Code of State Regulations. However, for special circumstances when this does not suffice, the county

superintendent can seek an additional, more specialized, physical examination. This was not done here.

Petitioner argues that there is not one specific method of determining physical incompetence. However, that is simply wrong. Section 126 CSR 92.18.2 is the method that the Legislature determined must be used to satisfy questions of physical incompetency.

Petitioner argues that it can ignore the procedure set forth at 126 CSR 92.18.2 and base its determination of physical competency on the passing of a physical agility test. However, as Mr. Shew testified on cross examination, no where does 126 CSR 92 authorize the use of the physical agility test in question on experienced bus operators. Nor is there any authorization for a county superintendent to require a certified bus operator to take such test, with termination being the result of a failure to pass.

Moreover, the CSR actually implies that it is not to be used for that purpose. This is shown by the fact that a county superintendent is permitted to use the physical agility test at issue for candidates for initial certification. This is shown by Section 126 CSR 92.15.14. That section states, in pertinent part, that after passing an online examination, the "candidate shall pass additional tests on skills and performance administered at the request of the county or institution seeking to employ the candidate by a qualified bus inspector employed by the State Department using vehicles owned or leased by the county[10]." The fact that the CSR included the use of this the test for first time drivers, but not for recertification, demonstrates that the Legislature knew of the test, but did not intend for it to be used on existing drivers.

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[10] Note that this is consistent with Mr. Shew's testimony that the original purpose of the test at issue here was to be used on first time drivers.

Ultimately, the lower court ruled that Administrative Rules matter. When the CSR lists certain competencies that must be passed and certain methods for checking physical and medical competencies, these regulations must be followed. And when such regulation also has a method of resolving doubt that may exist even when such medical and physical requriements are met, then, again, the CSR must be followed. In this case, Petitioner did not have the authority to ignore the CSR in its decision to terminate Mr. Holden.

**3. The Lower Court Correctly Ruled That Respondent's Grievance as it Pertains to His Request for a Medical Leave of Absence Was Timely Filed Because Such Request Was an Alternative to His Being Terminated .**

Petitioner argues that the lower court erred when it ruled that Respondent's grievance as it pertained to the leave of absence issue was timely filed. Petitioner's position is based on the argument that Mr. Holden's termination was the only item on its agenda during the hearing of October 8. 2013 and the only issue that it considered.

However, Petitioner ignores the fact that Mr. Holden's request for a leave of absence was intertwined with its decision to terminate him. At the hearing in question, Respondent argued that he should be given a leave of absence as an alternative to reinstatement or termination. This matter was clearly discussed at that hearing. Ultimately, Petitioner terminated Respondent, thereby rejecting both his request for reinstatement and his request to a leave of absence.

Because Petitioner could have given Mr. Holden a medical leave of absence instead of terminating him on that work day, but chose not to do so, the "termination" issue and the "leave of absence" issue have the same starting date for the purpose of when Respondent's grievance should have been filed. Since the grievance was filed within 15 working days of the grievable

event, if Mr. Holden is not reinstated, the issue of whether he should have been given a medical leave of absence is still subject to a grievance.

**4. The Lower Court Erred in Not Finding Mr. Holden's Termination an Act of Discrimination Because Petitioner Required Him to Take the Physical Agility Test at Issue, but Did Not Require any Other Experienced Drivers to Do so.**

At the Level III hearing below Petitioner stipulated that no already employed, certified bus operators had to take the agility test that Appellant had to take. The ALJ ruled that this does not constitute discrimination, essentially, because there were no 'similarly situated" employees who had a two year medical leave of absence that raised a safety concern. See Decision at pp. 12-13. However, the ALJ's legal reasoning is flawed pertaining to what should be the group of similarly situated employees to which Mr. Holden should be compared.

One should note that the compare employees should not be "employees who are returning from a two year leave of absence" because that is not why Mr. Holden was terminated. Nor is the compare employees other operators whose weight is such that there is a concern if such individuals could safely assist the children off the school bus, because Mr. Holden was not terminated because of his weight. Rather, the ALJ took the position that Mr. Holden's failure to pass the first componnent of the physical agility test, climbing the bus stairs three times in 30 seconds, the only part of the agility test that he was given, meant that he could not operate a school bus. See Decision at pp. 10-12. That is literally the only justification in the record that supports the finding that Mr. Holden was not physically competent to operate a bus. The ALJ essentially made a per sse rule that a bus operator who can not climb the school bus stairs in 30

seconds, can not safely operate a school bus because he or she could not assist the school children leave the bus in the event of an emergency.

Yet, this standard has been applied to no other school bus operator in Lewis County who already has been certified to drive a bus. Neither Superintendent Mace, the Lewis County Board of Edcation, nor the ALJ has any idea whether **any** certified school bus operator that it employs tcan meet this criteria. Since Petitioner, and the ALJ, has ruled that being able to perform this task is central to doing the task of being a bus operator, it simply can not single out Mr. Holden as the one certified bus operator that must pass this agility component.

The lower court did not address this issue, almost certainly because it found no basis in the record to support the ALJ's ruling that Respondent was physically incompetent. However, this Court should rule that Mr. Holden was, in fact, discriminated against.

**5. The Lower Court Erred in Failing to Reinstate Mr. Holden to His Position as Bus Operator and to Award Him Back Pay.**

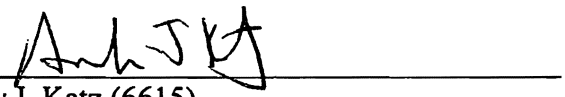
Strangely, after correctly ruling that the ALJ's decision upholding Mr. Holden's termination was "clearly wrong" in view of the substantial evidence in the record, the lower court did not order him to be reinstated. This is error. It is axiomatic that a successful grievant has a right to be "made whole." See e.g. Estate of Stollings v. Division of Enviornmental Protection, 209 W. Va. 194, 544 S.E.2d 700 (2003). Moreover, there are scores if not hundreds of grievance decisions as well as several decisions by this Court giving reinstatement and back pay for wrongfully terminated employees covered by the West Virginia Public Employees Grievance Board. See e.g. Wounaris v. West Virginia State College, 214 S.E.2d 241, 508 S.E.2d 406 (2003).

Petitioner may argue that it still has a concern regarding Mr. Holden's physical competency to drive a school bus. If that is the case, Petitioner may certainly act on that concern pursuant to Section 126 CSR 92.18.2 as discussed above. If it chooses to do so, however, it must put Mr. Holden on paid administrative leave while satisfying itself of Mr. Holden's competence.

## V. CONCLUSION

Mr. Holden's Petition for Appeal should be granted for the reasons contained herein.

MICHAEL HOLDEN
By Counsel



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**BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS**

**CASE NO.: 14-0045**

**(Kanawha County Circuit Court Docket No.: 13-AA-85)**

**LEWIS COUNTY BOARD OF EDUCATION,**
**Petitioner,**

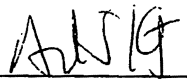
**v.**

**MICHAEL HOLDEN,**
**Respondent.**

## CERTIFICATE OF SERVICE

I, Andrew J. Katz, counsel for Respondent Michael Holden, do hereby certify that I have on the 27th day of February, 2014 caused to be served a true copy of **RESPONDENT'S BRIEF** via United States Postal Service regular mail, postage prepaid, to the following individuals:

Jason S. Long, Esquire
Denise M. Spatafore, Esquire
Dinsmore & Shohl, LLP
215 Don Knotts Blvd.
Morgantown, WV. 26501



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