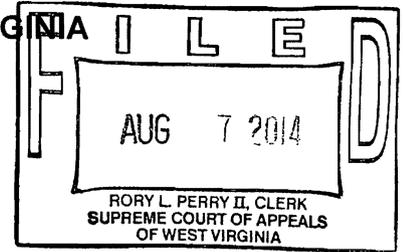


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-0521

(Circuit Court Civil Action No. 13-AA-142)



LEWIS COUNTY BOARD OF EDUCATION

Petitioner

v.

TONYA R. BOHAN

Respondent

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PETITIONER'S BRIEF

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## **ASSIGNMENTS OF ERROR**

1. THE CIRCUIT COURT ERRED IN RULING THAT THE LEWIS BOE'S PROCEDURE FOR OFFERING ASSIGNMENTS AND PROVIDING WORK OPPORTUNITIES TO SUBSTITUTE SERVICE PERSONNEL WAS IN VIOLATION OF THE PROVISIONS OF WEST VIRGINIA CODE § 18A-4-15.
2. THE CIRCUIT COURT ABUSED ITS DISCRETION IN ORDERING THE LEWIS BOE TO ADOPT A SPECIFIC PROCEDURE FOR HANDLING SUBSTITUTE ASSIGNMENT CANCELLATIONS IN THE FUTURE, WHICH WAS NOT BASED UPON PERTINENT EVIDENCE OF RECORD, WAS NOT REQUESTED AS RELIEF IN THE ORIGINAL GRIEVANCE, AND CONSTITUTES PROSPECTIVE RELIEF BEYOND ITS AUTHORITY.

## **STATEMENT OF THE CASE**

The Lewis BOE utilizes an automated system, SmartFind Express ("the callout system"), which allows employees to enter an absence via computer, prompting the system to automatically begin calling substitute employees within the applicable job category to serve in the absent employee's position. Appendix at 22-23. As required by West Virginia law, substitute service employees' names are programmed into the callout system in a seniority-based order, with the most senior employee being listed and called first. Once a substitute has entered an acceptance of an assignment into the callout system, it then continues on with the rotation for the next available unfilled assignment, calling the next substitute listed in the rotation for the applicable job category. Appendix at 23.

The Respondent, Ms. Bohan, was employed as a substitute secretary for the Lewis BOE. During the summer of 2012, a full-time school secretary entered an absence into the callout system and requested a substitute by mistake. Appendix at 25-26. Therefore, even though a substitute was not needed to fill the regular secretary's absence, the callout system began calling substitute secretaries, in order of

seniority, until Ms. Bohan accepted the assignment. Because it was a mistake, the job was cancelled, and Ms. Bohan did not work or receive pay for that day. Appendix at 56-57.

Because the automated system had registered Ms. Bohan's acceptance of the mistaken assignment, the next time that a substitute secretary was needed, the system automatically began its calling with the next person on the list after Ms. Bohan. Appendix at 59-61. When she was not offered this next assignment, Ms. Bohan filed a grievance, alleging her acceptance of a job that was cancelled should not have caused her to "lose her turn" in the calling rotation and requesting to be paid as if she had performed that next assignment, which lasted for nine days. She asserted in her statement of grievance that the Lewis BOE's "mistake in rotating substitute jobs prevented her from working an assignment . . . starting August 20, 2012." Her requested relief was only "compensation for lost wages with interest." Appendix at 9.

The Grievance Board denied Ms. Bohan's grievance and requested relief. It held that, so long as substitutes are called in order of seniority and are provided "the opportunity to perform similar assignments," a board of education has fulfilled its obligations under the applicable statute, West Virginia Code § 18A-4-15. Appendix at 180. The Grievance Board's decision also noted that, in the absence of some legal requirement or mandate on a particular subject, it simply does not have the authority to dictate that an employer adopt a particular policy, nor may it substitute its judgment for the employer's in the management of day-to-day operations. Appendix at 181-182. In the absence of a specific statutory provision addressing the situation presented, i.e. the cancellation of a substitute assignment, the Lewis BOE's practice of continuing the

rotation with the next substitute on the list was not unreasonable or arbitrary and capricious. Appendix at 181-182.

Ms. Bohan appealed the Grievance Board's decision to the Circuit Court of Kanawha County. The Circuit Court reversed the Grievance Board's decision, finding that "a cancelled assignment does not constitute an opportunity for a substitute service employee . . . within the meaning of the statute." Appendix at 234. However, although agreeing with Ms. Bohan's contention that she was entitled to the next assignment, which in this case lasted nine days, the Circuit Court encouraged the parties to agree to a payment of substantially less and granted Ms. Bohan only three days' pay. Appendix at 234. At the hearing before the Circuit Court, where counsel for both sides presented arguments, the Court opined that, since Ms. Bohan did, indeed, receive a similar lengthy assignment within the first month of the school year (Appendix at 29, 32-33), it would appear to be awarding her a "windfall" to also grant her the full nine days of pay for the initial assignment for which she was not called.

Furthermore, although not requested as relief in the underlying grievance, the Circuit Court ordered the Lewis BOE to follow a specific practice on all future occasions, i.e. that when a substitute assignment is "rescinded or cancelled, the substitute employee is entitled to be offered the next substitute assignment available in his or her classification title." Appendix at 234.

### **SUMMARY OF ARGUMENT**

The Circuit Court's Order is erroneous in its entirety and exceeds its statutory authority when reviewing grievance decisions. As established by the ample evidence of

record, the Lewis BOE's substitute calling system works very efficiently, and it unquestionably accomplishes the statutory goal of providing all substitute secretaries with similar opportunities for work.

While the statute (West Virginia Code § 18A-4-15) does set forth some basic requirements to be followed and applied to the employment and assignment of substitute employees, as with many statutes, it simply does not – and cannot – address the many potential logistical issues involved in its “real world” application. The statute merely requires that substitutes be offered opportunities for work assignments in a seniority-based rotation, which is what the Lewis BOE's callout system does. However, there is no provision which provides any guidance or directive as to what action must be taken by a board of education when mistakes occur or jobs are cancelled. As concluded by the Grievance Board in this instance, the Lewis BOE's actions were not unreasonable or arbitrary and capricious.

Finally, the Circuit Court far exceeded its authority in this matter by ordering Petitioner to take specific action on all future occasions when substitute service employee assignments are cancelled. By specifically directing that in all such instances, the scheduled substitute must be offered the next available assignment, the Circuit Court has granted relief not specifically requested and without any basis in factual evidence of record as to the logistics or implications of such an order. Accordingly, the lower court's order in this matter must be reversed in its entirety.

## STATEMENT REGARDING ORAL ARGUMENT

The facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process will not be significantly aided by oral argument. Accordingly, the Petitioner does not believe this appeal merits oral argument.

## 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. 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.

Furthermore, the prospective relief granted by the Circuit Court far exceeded its authority when reviewing grievance decisions.

**II. THE CIRCUIT COURT ERRED IN RULING THAT THE LEWIS BOE'S PROCEDURE FOR OFFERING ASSIGNMENTS AND PROVIDING WORK OPPORTUNITIES TO SUBSTITUTE SERVICE PERSONNEL WAS IN VIOLATION OF THE PROVISIONS OF WEST VIRGINIA CODE § 18A-4-15.**

Pursuant to the provisions of West Virginia Code § 18A-4-15, substitutes must be selected to fill absences "on a rotating basis according to the length of their service time until each substitute has had an opportunity to perform similar assignments. . . ." The Lewis BOE's practice complies with this mandate and effectively accomplishes the statutory intent of providing substitute school employees with opportunities to perform the various types of assignments available. Beyond having a seniority-based rotation system for offering substitute work, the law is silent regarding the specific details or requirements of such a system. There is no specific provision in law which addresses the procedure to be followed when substitutes are called for assignments which are subsequently cancelled.

The clear objective of the service personnel substitute statute is to provide for a system whereby substitutes are offered assignments on a rotating basis, so that all substitutes will eventually have the opportunity to perform the various types of assignments available. It is this language regarding what constitutes an "opportunity" where the Circuit Court and Grievance Board differ in their rulings. However, the evidence of record in this case establishes quite clearly that the Lewis BOE's callout system accomplishes the objectives of the statute and does so very efficiently. Indeed, just the number of calls made to Ms. Bohan during one school year provides more than

sufficient evidence that substitutes in Lewis County are receiving numerous opportunities for assignments of every type and length. Appendix at 146-163. In fact, Ms. Bohan alone was called almost daily for substitute secretary assignments, declining many of those jobs and simply not answering the call for numerous others. And, most importantly, she received assignments similar to the one which she was the subject of her grievance. There is no question whatsoever that Petitioner has proven that its system complies with its statutory obligation to provide similar work opportunities to all substitute employees. The Circuit Court's conclusion that a single cancelled assignment violates the statute's requirement of providing similar opportunities to all substitutes is obviously in error, contrary to law, and clearly wrong in light of the evidence of record.

It cannot be disputed that the legislature has not provided any specific procedures or instructions whereby the goals of West Virginia Code § 18A-4-15 are to be accomplished. But as this Court has noted "when faced with a problem of statutory construction, the circuit court and this Court should give some deference to the interpretation of the officer who is charged with statutory implementation." *Martin*, 465 S.E.2d at 415. In this case, the Grievance Board judge reasonably concluded that, in the absence of a specific statutory mandate or evidence of an unreasonable application by the board of education, Petitioner's actions were not contrary to the applicable law. Aside from providing for a seniority-based rotation order for offering assignments, the legislature chose not to dictate specific procedures for boards of education when offering work and assigning substitutes. "If the legislature had meant to foreclose all but one intended interpretation, it could have precisely drafted the statute to say so." *Id.*

Therefore, the Circuit Court's finding that the Lewis BOE violated the provisions of West Virginia Code § 18A-4-15 is completely unsupported by fact or law.

**III. THE CIRCUIT COURT ABUSED ITS DISCRETION IN ORDERING THE LEWIS BOE TO ADOPT A SPECIFIC PROCEDURE FOR HANDLING SUBSTITUTE ASSIGNMENT CANCELLATIONS IN THE FUTURE, WHICH WAS NOT BASED UPON PERTINENT EVIDENCE OF RECORD, WAS NOT REQUESTED AS RELIEF IN THE ORIGINAL GRIEVANCE, AND CONSTITUTES PROSPECTIVE RELIEF BEYOND ITS AUTHORITY.**

Perhaps the most troubling aspect of the Circuit Court's order in this case is that it not only reversed the Grievance Board's decision, but also that it directs the Lewis BOE to adopt a specific procedure for handling future incidents when an assignment is accepted, but subsequently rescinded or cancelled. Granting of this unrequested relief, potentially binding the Lewis BOE in the future in a multitude of varied and unforeseen circumstances, is unquestionably beyond the Circuit Court's authority and presents many problematic issues.

Pursuant to the grievance statute, West Virginia Code § 6C-2-5, the circuit court may reverse, vacate or modify the Grievance Board's decision, or it may remand the case for additional proceedings. However, it may only do so when the decision is contrary to law, clearly wrong, an abuse of discretion, or arbitrary and capricious. See *Martin v. Barbour County Bd. of Educ.*, 228 W. Va. 238, 719 S.E.2d 406 (2011). The Lewis BOE submits that the statute does not authorize the circuit court to grant additional, unrequested relief, binding upon a board of education indefinitely in the future, without factual evidence of the consequences of such prospective relief. In the instant case, the Circuit Court has far exceeded its authority even to "modify" the Grievance Board's decision by crafting additional relief and issuing a blanket directive

regarding all future situations, a possibility which was not addressed in the underlying grievance proceedings. Even Ms. Bohan did not request this expansive future edict for herself and all other substitutes in Lewis County, but merely requested in her appeal to the Circuit Court that she be granted “compensation for lost wages . . . for the dates August 14, 2012 through August 24, 2012” and costs and attorneys’ fees. Appendix at 216. Clearly, the requested remedy in this grievance was only related to the specific assignment which Ms. Bohan believed she should have received, not to all future situations regarding cancelled substitute assignments.

Although not specific to the issue presented here, this Court’s reasoning in *Parsons v. West Virginia Bureau of Employment Programs*, 189 W. Va. 107, 428 S.E.2d 528 (1993) is pertinent to the issue of providing the parties with notice and the opportunity to address any potential relief granted. Although addressing a subsequently repealed provision in the grievance statute which required the consent of all parties for the requested relief to be modified (West Virginia Code § 29-6A-3, *Repealed*, 2007 W.V. ALS 207; 2007 W. Va. Acts 207; 2007 W.V. Ch. 207; 2007 W.V. SB 442), the reasoning is applicable here. That is, for any party to not be informed of or involved in a change in requested relief would be unfair, because that party “would not have the opportunity to present evidence on whether or not the modification is a solution to the grievance.” *Parsons*, 428 S.E.2d at 534. Similarly, in the instant situation, it is unfair and beyond the appellate court’s discretion to grant unanticipated, broad, future relief for which the parties did not have sufficient opportunity to provide specific evidence regarding potential implications or consequences, let alone whether granting such relief is even possible for the board of education to accomplish.

A pivotal and important element of the Grievance Board's decision in this case was based upon the concept that directing an agency to adopt a specific procedure, policy or process for handling situations unaddressed by existing law or policy is beyond the administrative law judge's authority. The following discussion from this Court's opinion in *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997) is relevant here:

The jurisdiction of the . . . Grievance Board is limited to the resolution of grievances as defined by [statute] so that its "authority extends only to resolving grievances made cognizable by its authorizing legislation." *Vest v. Bd. of Educ.*, 193 W.Va. 222, 225, 455 S.E.2d 781, 784 (1995). The grievance board simply does not have the authority to second guess a state employer's employment policy. The grievance board's discussion of this issue in its final decision and the appellees' brief to this Court fail to cite any rule or regulation that mandates that the appellant adopt a [specific] policy. In the absence of such, the grievance board has no jurisdiction to order the appellant to adopt a . . . policy, and it exceeded its statutory authority when it did so. . . . [T]he grievance board, the circuit court and this Court simply do not have the authority to substitute our management philosophy for that of the [agency] in this instance.

490 S.E.2d at 796.

Pursuant to this reasoning, both the Grievance Board and Circuit Court in this case were presented only with the question of whether or not Tonya Bohan demonstrated that her acceptance of the mistaken call on July 29 should have entitled her to be called for the next available assignment in late August. The issue to be decided pertained only to the factual situation presented, not to any potential future incidents which may or may not involve the same or similar circumstances. Indeed, the Circuit Court's order did not even take into consideration whether or not there may be other circumstances which might result in a cancelled substitute assignment which could differ substantially from the incident in which Ms. Boyan was involved.

Although not discussed in detail during the grievance hearing in this matter, there are references in the record below which indicate that the nature of the mechanized callout system used by the Lewis BOE and many other West Virginia counties could present major problems with providing the relief which was ultimately granted by the Circuit Court. Appendix at 3, 28. It is quite obvious that Respondent and her counsel made little to no effort to inquire into this proposition, even though it was mentioned by Lewis BOE administrators several times, likely because of their familiarity and knowledge of the automated callout system. As with any technological system, there are both advantages and disadvantages to its use; however, the bottom line is there is no statutory requirement or prohibition regarding use of an automated system for accomplishing the objectives of West Virginia Code § 18A-4-15. Likewise, as discussed above, and as concluded by the administrative law judge, there is simply no required procedure for dealing with cancelled substitute assignments, leaving that decision to the management discretion of each board of education.

Nevertheless, a review of the extensive documentary evidence introduced at the grievance hearing reveals relevant and helpful insight into the potential difficulties presented by the Circuit Court's order of unauthorized and unrequested relief. The most glaringly obvious issue is that absences and the substitutes assigned to fill them are not entered in chronological order. For example, Grievant's Exhibit 2 at the grievance hearing provides information regarding the mistaken call Ms. Bohan received and accepted, but which was subsequently cancelled. The regular secretary's absence was entered into the callout system on July 27, 2012, for the anticipated absence which would begin on July 30, 2012. Appendix at 57. However, the setup of the callout

system does not have it begin calling for substitutes until the evening before the assignment is to begin, regardless of when the absence was entered. So the absence entered by the employee on July 27 did not result in calls from the system until July 29 at 6:00 p.m. for the assignment which was to begin the next morning. Appendix at 58. As Ms. Bohan explained in her testimony, once she accepted the assignment and suspected it was a mistake, she contacted the board office and was informed that there was, in fact, no need for a substitute, resulting in cancellation of the assignment. Appendix at 44-45. It can only be presumed that this occurred either late on the evening of July 29 or early on the morning of July 30, the day the assignment was to begin.

Also, the evidence of record reveals the vast number and variety of calls made for substitutes during any given time period. On September 17, 2012, for example, Ms. Bohan (who is apparently employed in multiple substitute classifications, including secretary and aide) was called four different times in the early morning hours for two separate assignments. Appendix at 147. The same document, Respondent's grievance Exhibit 1, demonstrates the numerous calls made for substitute assignments, their frequency, and the variety of responses, which include acceptance of the assignment, no answer, hang-ups, and declining the assignment. Appendix at 147-163. Therefore, one can reasonably conclude from this evidence that, once a call has been made and an assignment accepted, it is quite possible that the callout system could quickly move on to assign the next available position, and would likely fill several additional assignments in a short time period.

This information presents many unanswered questions which remain unaddressed in the record or by the Circuit Court. If the Lewis BOE (and potentially numerous other county school systems) is to comply with the Circuit Court's directive in this matter, how is it to determine what is the "next available assignment" to be given to a substitute whose assignment was cancelled, and, for that matter, will it be possible to do so on every such occasion? What if, before it is discovered that an absence was entered and a substitute called in error, the system has proceeded to fill the next several assignments for that day, calling and assigning substitutes in the job category in seniority order? Potentially, several less senior substitute employees will already have accepted and proceeded to work in their offered assignments, while the substitute who was mistakenly called has, as Ms. Bohan has alleged, "missed their turn" in the rotation because of the mistake. How is the board of education to properly correct this mistake by offering the "next available assignment," which has probably already begun and is being performed by another substitute employee? If multiple assignments have been accepted in the interim period before discovery of the mistake, how is the board of education to provide the mistakenly called substitute with the next available assignment, when the callout system may likely be at a completely different point in the rotation? What, then, will happen if the mistakenly called substitute is given an assignment out of order – which we do not even know is possible, due to lack of evidence on the issue -- and accepts the assignment, while the automated system proceeds with its calling for other assignments? By the time an error is discovered and/or reported, the system could possibly already have returned to the mistakenly called employee's position in the rotation and have offered them another assignment anyway. Is that substitute to then

be given their most recently accepted assignment AND the next assignment after, which would once again require that the automated system somehow be stopped and the rotation discontinued? And, again, is this even possible?

There is obviously good reason for the legal principle that, when reviewing a decision of the Grievance Board, a circuit court is limited to the factual record as presented to the administrative law judge and the legal issues addressed therein by the parties. Accordingly, “[t]he appellate review of a ruling of a circuit court is limited to the very record there made and will not take into consideration any matter which is not a part of that record.” *Syl. pt. 2, State v. Bosley*, 159 W.Va. 67, 218 S.E.2d 894 (1975). With regard to grievance matters, the circuit court is limited to a review of only the factual evidence properly admitted into the grievance record. *Martin, supra*, 719 S.E.2d at 411. By ordering potentially problematic relief that was not fully discussed or developed by evidence in the record below, the Circuit Court has far exceeded its authority in ordering prospective relief regarding the handling of all future substitute assignments.

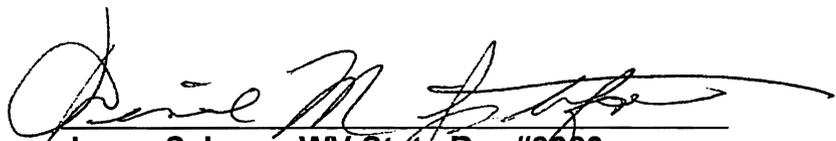
If it had been requested in the underlying grievance or it had been anticipated that this decision in this case would pertain not only to Ms. Bohan’s specific circumstance, but to every potential future situation, it is likely that both parties would have provided additional, specific evidence on that issue. From the Lewis BOE’s standpoint, it would have taken the opportunity to explain in detail how the automated callout system works, along with information as to whether and how it can be “stopped” or “overridden” when it is in the process of assigning substitutes. Also, there could have been evidence provided which would have addressed how often cancellation of

substitute assignments occurs and under what circumstances, which would be informative as to how unique or typical Ms. Bohan's situation might have been. Unfortunately, the Circuit Court appears to have presumed that all cancellations occur under the same circumstances presented in Ms. Bohan's case. Having been provided the opportunity, the Lewis BOE most certainly would have attempted to explain that this is not accurate. In the absence of proper evidence regarding such unrequested, prospective relief, the Circuit Court's order in this case far exceeded its authority and constitutes an abuse of its discretion.

### 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.

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LEWIS COUNTY BOARD OF EDUCATION

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v.

TONYA R. BOHAN

Respondent

**CERTIFICATE OF SERVICE**

I, Denise M. Spatafore, do hereby certify that I served the foregoing **Petitioner's Brief** on the following by placing a true copy thereof, in the United States Mail, First Class pre-paid, this 7<sup>th</sup> day of August, 2014, in an envelope addressed as follows:

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