

**FILED**

**December 12, 2001**  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**RELEASED**

**December 12, 2001**  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

Davis, J., dissenting:

The majority opinion has reversed the circuit court's decision by finding that Mr. Scott could use the writ of certiorari to have the circuit court review an administrative ruling. The majority also reversed by concluding that the administrative hearing in this case was invalid because it was conducted before a panel. For the reasons set forth below, I respectfully dissent.

***A. The Statute Authorizing a Writ of Certiorari Expressly Prohibits its Use When Another Method of Appeal is Provided for by Law***

Mr. Scott failed to appeal the State Superintendent's ruling, as permitted under the Administrative Procedure Act (APA). Instead, after the time for appeal had expired,<sup>1</sup> Mr. Scott sought to have the administrative ruling reviewed through a writ of certiorari.<sup>2</sup> The circuit court found that, as a matter of law, Mr. Scott could not have the administrative ruling reviewed through a writ of certiorari. The majority opinion disagreed with the circuit court. In doing so, the majority opinion has overruled prior precedent and exceeded this Court's authority by granting circuit courts certiorari jurisdiction to review

---

<sup>1</sup>Mr. Scott had thirty days to appeal under APA.

<sup>2</sup>'[A]n application for a writ of certiorari must be filed within four months from the date of the final administrative order[.]' Syl. pt. 3, in part, *State ex rel. Gibson v. Pizzino*, 164 W. Va. 749, 266 S.E.2d 122 (1979).

decisions rendered pursuant to the procedures of the APA.

The majority opinion correctly noted that prior to 1988 administrative proceedings by the State Superintendent were exempt from the provisions of the APA. Consequently, prior to 1988, this Court recognized that a circuit court's review of a decision by the State Superintendent had to be filed by a writ of certiorari pursuant to W. Va. Code § 53-3-2. See Syl. pt. 1, *Beverlin v. Board of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975) ("The action of a county board of education in dismissing a teacher for wilful neglect of duty and insubordination is reviewable by a circuit court on certiorari."). The majority opinion also correctly observed that in 1988 the Legislature amended the APA and included administrative hearings by the State Superintendent within its purview.

However, the majority opinion has incorrectly used a provision in the APA to allow for the continued use of the writ of certiorari in challenges to administrative decisions by the State Superintendent. The majority opinion has anchored its decision on language in the APA, stating that "nothing in this chapter shall be deemed to prevent other means of review, redress or relief provided by law." W. Va. Code § 29A-5-4(a) (1998) (Repl. Vol. 1998). The problem with the majority's reliance on this provision alone, is that it ignores the language of the statute creating the writ of certiorari and the cases interpreting the limitations of that statute.

Under W. Va. Code § 53-3-2 (1923) (Repl. Vol. 2000) the Legislature has expressly stated that a writ of certiorari *cannot* be used "in cases where authority is or may be given by law to the

circuit court, or the judge thereof in vacation, to review such judgment or order on motion, or on appeal, writ of error or supersedeas, or in some manner other than upon certiorari[.]”<sup>3</sup> We have long interpreted this language to mean that a writ of certiorari cannot be used when a statute provides for another means of judicial review. We articulated this point in syllabus point 4, in part, of *North v. West Virginia Board of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977), wherein we said “[a] writ of certiorari will lie from an inferior tribunal, acting in a judicial or quasi-judicial capacity, where substantial rights are alleged to have been violated and where there is *no other statutory right of review given.*” (Emphasis added). See also *Rawl Sales & Processing Co. v. County Com’n*, 191 W. Va. 127, 131, 443 S.E.2d 595, 599 (1994) (holding that writ of certiorari could not be used to appeal property tax assessment decision to circuit court because specific statute provided for appeal); *In re Adoption of Johnson*, 144 W. Va. 625, 628, 110 S.E.2d 377, 379 (1959) (“[T]he writ of certiorari cannot be allowed as a substitute for an

---

<sup>3</sup>W. Va. Code § 53-3-2 (1923) (Repl. Vol. 2000) reads in full as follows:

In every case, matter or proceeding, in which a certiorari might be issued as the law heretofore has been, and in every case, matter or proceeding before a county court, council of a city, town or village, justice or other inferior tribunal, the record or proceeding may, after a judgment or final order therein, or after any judgment or order therein abridging the freedom of a person, be removed by a writ of certiorari to the circuit court of the county in which such judgment was rendered, or order made; *except in cases where authority is or may be given by law to the circuit court, or the judge thereof in vacation, to review such judgment or order on motion, or on appeal, writ of error or supersedeas, or in some manner other than upon certiorari;* but no certiorari shall be issued in civil cases before justices where the amount in controversy, exclusive of interest and costs, does not exceed fifteen dollars.

(Emphasis added).

appeal or writ of error.”); Syl. pt. 1, *Reynolds Taxi Co. v. Hudson*, 103 W. Va. 173, 136 S.E. 833 (1927) (“Certiorari is the appropriate process to review the proceedings of bodies and officers acting in judicial or quasi judicial capacity, where no other remedy is provided.”); *Quesenberry v. State Road Comm’n*, 103 W. Va. 714, 719-720, 138 S.E. 362, 364 (1927) (“The writ [of certiorari] is an extraordinary remedy resorted to for the purpose of supplying a defect of justice in cases obviously entitled to redress and yet unprovided for by the ordinary forms of procedure.”); *Ashworth v. Hatcher*, 98 W. Va. 323, 325, 128 S.E. 93, 94 (1924) (“[I]f the case, matter, or proceeding may be reviewed by appeal, writ of error or supersedeas, or in any other manner, certiorari will not lie.”); *Carroll Hardwood Lumber Co. v. Kentucky River Hardwood Co.*, 94 W. Va. 392, 395, 119 S.E. 162, 163 (1923) (“[I]f the case, matter, or proceeding may be reviewed by appeal, writ of error, or supersedeas, or in any other manner, certiorari will not lie.”); Syl. pt. 4, *Humphreys v. County Court*, 90 W. Va. 315, 110 S.E. 701 (1922) (“No express remedy having been provided for review of [the county commission’s] action in such case, the circuit court has jurisdiction to review the same by the writ of certiorari.”); *Arnold v. Lewis County Court*, 38 W. Va. 142, 147, 18 S.E. 476, 477 (1893) (“[I]n cases where the party has permitted the time for appeal to expire, certiorari will not issue for relief[.]”); *Long v. Ohio River R. Co.*, 35 W. Va. 333, 336, 13 S.E. 1010, 1011 (1891) (“[W]here the party has permitted the time for appeal to expire, certiorari will not issue[.]”); Syl. pt. 1, *Poe v. Machine Works*, 24 W. Va. 517 (1884) (“Certiorari is an extraordinary remedy resorted to for the purpose of supply[ing] a defect of justice in cases obviously entitled to redress and yet unprovided for by the ordinary forms of proceeding.”).

The writ of certiorari may only be used when *no* mechanism for review of a judicial or

quasi-judicial proceeding is provided for by law. This proposition has stood firm and unshakeable from the beginning of this state's creation. See *Welch v. County Court*, 29 W. Va. 63, 73 (1886) (“[T]he writ of certiorari ought not to issue but should be denied, where there is other adequate remedy[.]”); Syl. pt. 5, in part, *Beasley v. Town of Beckley*, 28 W. Va. 81 (1886) (“Where a party aggrieved can obtain redress by appeal or writ of error, he will not be allowed the extraordinary writ of certiorari.”). The majority opinion has, in effect, has overruled precedent followed for over one hundred years without even acknowledging that it has done so.<sup>4</sup>

Equally important and disturbing is the fact that the majority opinion has usurped the authority of the Legislature by granting certiorari in a situation where W. Va. Code § 53-3-2 has expressly prohibited such jurisdiction. It is well settled law that “jurisdiction is derived from the constitutional or statutory provisions by which it is created, and can be acquired and exercised only in the manner prescribed.” *State v. Bailey*, 154 W. Va. 25, 129, 73 S.E.2d 173, 175 (1970), *modified on other grounds by State v. Walters*, 186 W. Va. 169, 411 S.E.2d 688 (1991). Moreover, while the state constitution may “prescribe the jurisdiction of courts to entertain and consider specific extraordinary

---

<sup>4</sup>The lone exception to this rule is an opinion authored by Justice Albright, *Lipscomb v. Tucker County Comm'n*, 197 W. Va. 84, 475 S.E.2d 84 (1996), wherein he misinterpreted the facts and holding in *Falconer v. Simmons*, 51 W. Va. 172, 41 S.E. 193 (1902) in order to allow a party to use the writ of certiorari after the time for appeal to the circuit court had expired. The decision in *Falconer* concerned filing a writ of certiorari instead of an appeal to the circuit court from a judgment from the justice of the peace court. However, the writ of certiorari was filed within the time allowed for an appeal. The Court in *Falconer* determined that it would not make a distinction between an appeal and writ of certiorari under the particular facts of that case, since it was timely filed, and therefore allowed the writ of certiorari to substitute as an appeal.

remedies, the various legal and equitable attributes of the remedies may be formulated, prescribed or altered by the Legislature.” Syl. pt. 2, in part, *State ex rel. Blankenship v. McHugh*, 158 W. Va. 986, 217 S.E.2d 49 (1975).<sup>5</sup> Through its enactment of W. Va. Code § 53-3-2, the Legislature has expressly prohibited use of the writ of certiorari when the right to appeal has been granted by another statute. This Court has no authority to disregard the limitations imposed on the writ of certiorari by the Legislature.

In the instant proceeding the APA has provided a method of an appeal from a decision rendered by the State Superintendent. Because the APA provides for an appeal, the writ of certiorari cannot be used. The majority opinion has incorrectly ruled otherwise and surreptitiously conferred certiorari jurisdiction to circuit courts to review all decisions by the State Superintendent. With this flawed rationale, I cannot agree.

***B. The State Superintendent is Authorized  
to Use a Panel to Hear Proceedings***

Mr. Scott asserted on appeal that the administrative decision was invalid because the State Superintendent was not personally present at the hearing. The majority opinion, in a terse paragraph, has ruled that the State Superintendent cannot select a panel to hear complaints. The majority opinion has concluded that, under its interpretation of the APA, the right to use a panel to hear administrative complaints is not permitted. Thus, the State Superintendent was without authority to create such a hearing

---

<sup>5</sup>The general right of circuit courts to entertain proceedings in certiorari is set out in Art. VIII, § 6 of the State Constitution.

panel. Specifically, the majority opinion states that “West Virginia Code § 29A-5-1(d) authorizes hearings to be conducted by ‘[t]he agency, any member of the body which comprises the agency, or any hearing examiner or other person permitted by statute to hold any such hearing. . . .’” The majority opinion concluded that “[w]e can find no statute authorizing the establishment of a panel to hold a hearing[.]”

The above reasoning by the majority opinion completely distorts the statutory language. A plain reading of W. Va. Code § 29A-5-1(d) (1964) (Repl. Vol. 1998) clearly shows that it does not “authorize” anyone to conduct a hearing. The intent of that statute is to set out the quasi-judicial “power” granted to any “person permitted by statute to hold any such hearing for such agency, and duly authorized by such agency so to do.” W. Va. Code § 29A-5-1(d).<sup>6</sup>

---

<sup>6</sup>W. Va. Code § 29A-5-1 (1964) (Repl. Vol. 1998) reads in its entirety:

All hearings shall be conducted in an impartial manner. The agency, any member of the body which comprises the agency, or any hearing examiner or other person permitted by statute to hold any such hearing for such agency, and duly authorized by such agency so to do, *shall have the power to:* (1) Administer oaths and affirmations, (2) rule upon offers of proof and receive relevant evidence, (3) regulate the course of the hearing, (4) hold conferences for the settlement or simplification of the issues by consent of the parties, (5) dispose of procedural requests or similar matters, and (6) take any other action authorized by a rule adopted by the agency in accordance with the provisions of article three of this chapter.

(Emphasis added.)

The State Superintendent, pursuant to his/her rule making authority,<sup>7</sup> promulgated regulations for conducting administrative hearings involving teachers. *See* 9A-CSR § 126-4-4-1 et seq. (1999), the term “Superintendent” has been defined to “mean the State Superintendent of Schools, or that person assigned by the Superintendent to hear and determine issues of teaching certificate revocation.” Consistent with the latter rule, the State Superintendent has authorized a Professional Practice Panel to hear proceedings. Pursuant to 9A CSR § 126-4-4.4, a Professional Practice Panel is defined as “seven (7) individuals selected to hear and make recommendations to the Superintendent regarding revocation for cause of a teacher’s license.”

Nothing in the APA or any statute or rule of this Court precluded the State Superintendent from using a panel to hear teacher revocation issues. The majority opinion has erroneously taken language

---

<sup>7</sup>Part of that authority is found in W. Va. Code § 18-3-4 (1923) (Repl. Vol. 1999):

The state superintendent of schools shall cause to be instituted such proceedings or processes as may be necessary properly to enforce and give effect to any provision or provisions of this chapter and to the provisions of any other general or special laws pertaining to the school system of the State, or any part thereof, or of any rule or direction of the state board of education made in conformity with its powers and duties. The superintendent shall have authority to administer oaths and to examine under oath, in any part of the State, witnesses in any proceeding pertaining to the public schools, and to cause such examination to be reduced to writing. Witnesses, other than employees of the State, shall be entitled to the same fees as in civil cases in the circuit court. The state superintendent of schools shall have power to institute proper proceedings for the removal of any school official charged with dishonesty, continued neglect of duty, or with failure to comply with the provisions of this chapter or of the rules of the state board of education.

from W. Va. Code § 29A-5-1(d) out of context to contend that this provision establishes who may hear administrative proceedings. I am deeply troubled by this illogical and unjustified conclusion.

In view of the foregoing, I respectfully dissent.