

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2001 Term

FILED

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

No. 29772

RELEASED

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

DORSEY C. SCOTT,
Petitioner Below, Appellant,

v.

DAVID STEWART, STATE SUPERINTENDENT
OF SCHOOLS AND WEST VIRGINIA
DEPARTMENT OF EDUCATION,
Respondents Below, Appellees

Appeal from the Circuit Court of Kanawha County
Honorable Tod J. Kaufman, Judge
Civil Action No. 00-MISC-427

REVERSED AND REMANDED

Submitted: November 6, 2001
Filed: December 12, 2001

Basil R. Legg, Jr.
Clarksburg, West Virginia
Attorney for the Appellant

Darrell V. McGraw, Jr.
Attorney General
Kellie D. Talbott
Senior Assistant Attorney General
Charleston, West Virginia
Attorneys for the Appellees

JUSTICE ALBRIGHT delivered the Opinion of the Court.

JUSTICE DAVIS dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. “This Court reviews the circuit court’s final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*.” Syl. Pt. 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996).

2. Absent an express statutory provision to the contrary, West Virginia Code § 29A-5-4 (1998) does not preclude a party from seeking relief from an administrative decision through an extraordinary writ. A party seeking to challenge an administrative decision by means of an extraordinary writ does so under the authority of the statutes permitting such writs.

Albright, Justice:

This is an appeal from the January 25, 2001, order of the Kanawha County Circuit Court, denying the petition for a writ of certiorari filed by Dorsey C. Scott (hereinafter “Appellant”) to obtain judicial review of the administrative proceedings of the State Superintendent of Schools (hereinafter “State Superintendent”) by which Appellant’s professional teaching and administration certificates were revoked. Appellant assigns error to the circuit court’s ruling that, as a matter of law, certiorari is no longer a proper means by which judicial review of the State Superintendent’s decisions regarding certification revocation may be obtained. Appellant also argues that the lower court incorrectly found that his due process rights were not abridged by the procedures followed in the administrative proceedings. Upon review of the petition for appeal, the certified record and the briefs and argument of counsel, we reverse the decision of the circuit court and remand for further proceedings.

I. Factual and Procedural Background

Appellant was certified as a professional teacher or administrator in the West Virginia school system for over forty years. He retired from service in the school system in 1987.

By letter dated March 8, 2000, the State Superintendent notified Appellant that proceedings would be instituted to consider revocation of his certification because of a history of drunkenness, including a felony conviction for a third offense of driving under the influence (hereinafter

“DUI).¹ The letter also informed Appellant that a hearing on the matter would be held before the Professional Practice Panel (hereinafter “Panel”) on March 28, 2000, with the proceedings governed by State Board Policy 1340 (hereinafter “Policy 1340”).² Additionally, the letter noted that failure to contest or defend the allegations would result in the admission of the charges under the provisions of section 4.14 of Policy 1340.

Appellant’s counsel formally requested and was granted a continuance of the March 28, 2000, hearing. During the period of continuance, settlement negotiations between counsel for the parties ensued. By letter dated June 14, 2000, counsel for the State Superintendent forwarded to Appellant’s counsel a proposed settlement agreement. After making minor changes in the agreement, Appellant’s counsel forwarded it to his client on June 20, 2000.³ On June 29, 2000, counsel for the State Superintendent faxed a letter bearing the same date to Appellant’s counsel which indicated that she understood that his client was agreeable to entering into a settlement agreement in lieu of appearing before the Panel but that she had not received a response to the settlement proposal. The letter went on to state: “Please be advised that the Practice Panel is currently scheduled to meet on July 18, 2000 at the Wingate Inn in South Charleston, West Virginia. If Mr. Scott has not agreed to a settlement by that date, we will

¹West Virginia Code § 18A-3-6 (1969) (Repl. Vol. 2001) provides in pertinent part: “The state superintendent may, after ten days’ notice and upon proper evidence, revoke the certificates of any teacher for drunkenness, untruthfulness, immorality, or for any physical, mental or moral defect which would render him unfit for the proper performance of his duties as a teacher”

²126 W.Va. C.S.R § 4 (1999).

³Appellant’s counsel asserts in his brief that he did not receive the proposed settlement agreement until June 17, 2000, and that his client did not return the document to him until July 10, 2000.

be presenting evidence before the Panel in his case.” Appellant’s counsel asserts that he called counsel for the State Superintendent upon receipt of the June 29, 2000, letter to request that the hearing be continued until the August 2000 meeting of the Panel because he would be in Florida on July 18, 2000, and no other attorney was available to appear on his client’s behalf on that date.⁴

Subsequently, the State Superintendent sent a letter by certified first-class mail to Appellant on July 13, 2000. The letter was captioned “AMENDED NOTICE” and informed Appellant that, unless he agreed to the settlement proposal, the revocation hearing before the Panel would be held on July 18, 2000. The amended notice also specified the time and place of the hearing. A copy of the amended notice was also sent to Appellant’s counsel.⁵

The Panel convened the hearing as scheduled on July 18, 2000.⁶ Neither Appellant nor his attorney were present at the hearing and no explanation was given to the Panel for their absence. Instead, the State Superintendent’s counsel informed the Panel that Appellant and his attorney were duly notified of the hearings. Thereafter, the State Superintendent’s counsel presented evidence in support of revocation of Appellant’s certification.

⁴Appellant’s counsel said that he had informed the State Superintendent’s counsel during the settlement agreement negotiations that he would be in Florida from July 12 to July 20, 2000, to watch his daughter play in a national youth basketball tournament.

⁵Appellant’s counsel maintains that his office received the amended notice after he was in Florida, and that he called the State Superintendent’s counsel from Florida to again request a continuance of the hearing.

⁶The State Superintendent did not attend the hearing.

On August 2, 2000, the Panel entered its decision recommending that the State Superintendent revoke Appellant's certification based on his felony DUI conviction and other DUI convictions dating back to 1977. The State Superintendent adopted the Panel's recommendation and by order dated August 17, 2000, revoked Appellant's certification.

Appellant sought judicial review of the administrative revocation proceedings by filing a petition for writ of certiorari in the Kanawha County Circuit Court on November 14, 2000. On or about December 13, 2000, the State Superintendent by counsel filed a motion to dismiss the petition on the grounds that it was not timely filed within the thirty-day period required by the Administrative Procedures Act (hereinafter "APA").⁷ Following the submission of briefs by the parties, the circuit court entered an order on January 25, 2001, denying Appellant's petition. In this order, the lower court found as a matter of law that the 1988 amendment of the APA, which added the state board of education to the agencies subject to the provisions of the APA, eliminated any other avenue for obtaining judicial review of the State Superintendent's revocation proceedings. The order also found that the notices of the administrative hearing issued by the State Superintendent were adequate under due process principles. It is from this order that this appeal is taken.

II. Standard of Review

⁷W.Va. Code § 29A-5-4(b) (1998).

We are guided by the fact that “[t]his Court reviews the circuit court’s final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*.” Syl. Pt. 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996).

III. Discussion

The first issue presented is whether the provisions of West Virginia Code § 29A-5-4 (1998), governing judicial review of administrative decisions in contested cases subject to the APA, constitutes the sole means of achieving judicial review of agency actions.

We initially note that when the APA was first enacted in 1964,⁸ the State Board of Education and the state superintendent of schools as its chief executive officer⁹ were exempt from the provisions of the Act. In the absence of legislative guidelines for review of the quasi-judicial administrative actions of the state superintendent, this Court determined that such review was appropriately achieved through use of writs of certiorari pursuant to the provisions of West Virginia Code §§ 53-3-1 to -6 (1923) (Repl. Vol. 2000). *Mason County Bd. of Educ. v. State Superintendent of Schools*, 160 W.Va. 348, 234 S.E.2d 321 (1977); *see also State ex rel. Gibson v. Pizzino*, 164 W.Va. 749, 266 S.E.2d 122 (1979).

⁸1964 W.Va. Acts Reg. Sess. ch. 1.

⁹*Mason County Bd. of Educ. v. State Superintendent of Schools*, 160 W.Va. 348, 349, 234 S.E.2d 321, 322 (1977).

Subsequent amendment to the APA removed the exemption of the State Board of Education.¹⁰ The State Superintendent argues this amendment, in effect, established the provisions of the APA as the sole means of pursuing judicial review of quasi-judicial administrative decisions of the state superintendent. West Virginia Code § 29A-5-4(a), which provides for appeal of such orders to a circuit court, sets forth the ready answer to this argument: “[N]othing in this chapter shall be deemed to prevent other means of review, redress or relief provided by law.”

We applied West Virginia Code § 29A-5-4(a) in *Halstead v. Dials*, 182 W.Va. 695, 391 S.E.2d 385 (1990), in which we granted a writ of mandamus regarding a consent order made by the Commissioner of the Department of Energy in a contested administrative hearing. We recently commented on the vitality of *Halstead* in *State ex rel. Stewart v. Alsop*, 207 W.Va. 430, 533 S.E.2d 362 (2000). In *Alsop*, we granted a writ of mandamus to prevent a circuit court from joining the state superintendent

¹⁰1988 W.Va. Acts 3rd Ex. Sess. ch. 7.

of schools in an action against a county board of education on an employment issue.¹¹ We observed in

Alsop that

[a]lthough W.Va. Code § 29A-5-4 governs only appeals from administrative decisions, the statute does not preclude a party from seeking relief from an administrative decision through an extraordinary writ. It is specifically provided under W.Va. Code § 29A-5-4(a) that “nothing in this chapter shall be deemed to prevent other means of review, redress or relief provided by law.” When a party seeks to challenge an administrative decision through an extraordinary writ, he/she does so under the authority of the statutes permitting such writs.

Id. at 433 n. 4, 533 S.E.2d at 365 n. 4 (citations omitted). We adopt this commentary from *Alsop* to hold that, absent an express statutory provision to the contrary, West Virginia Code § 29A-5-4 does not preclude a party from seeking relief from an administrative decision through an extraordinary writ. A party seeking to challenge an administrative decision by means of an extraordinary writ does so under the authority of the statutes permitting such writs. We conclude that Appellant in the case before us was

¹¹The alternatives for obtaining judicial review of employment decisions involving school personnel are expressly provided by statute, as we explained in syllabus point six of *Ewing v. Board of Education*, 202 W.Va. 228, 503 S.E.2d 541 (1998):

When an individual is adversely affected by an educational employment decision rendered pursuant to W.Va. Code § 18A-4-7a (1993) (Repl. Vol. 1997), he/she may obtain relief from the adverse decision in one of two ways. First, he/she may request relief by mandamus as permitted by W.Va. Code § 18A-4-7a. In the alternative, he/she may seek redress through the educational employees’ grievance procedure described in W.Va. Code §§ 18-29-1 to 18-29-11 (1992) (Repl. Vol. 1994). Once an employee chooses one of these courses of relief, though, he/she is constrained to follow that course to its finality.

Id. at 230, 503 S.E.2d at 543. West Virginia Code § 18A-4-7a relates to professional educational employees; a similar mandamus provision is found in West Virginia Code § 18A-4-8, which governs school service personnel.

entitled to apply to the circuit court for a writ of certiorari if the statutory requirements for such a writ were met by his case. Accordingly, the circuit court's decision in this regard is reversed.

The next issue presented by Appellant is whether the "amended notice" issued by the State Superintendent after the time and place for the initial hearing was altered was sufficient. In the circumstances of this case, we cannot find Appellant was harmed by the limited effect of the second notice since it merely advised him of that which changed — the time and place of the hearing. *See West Virginia Dept. of Human Servs. v. Tammy B.*, 180 W.Va. 295, 376 S.E.2d 309 (1988); 2 Am. Jur. 2d *Administrative Law* § 336 (1994).

However, Appellant further claims that he was entitled to a hearing before the State Superintendent and that a hearing before the Panel, even if he and his counsel were able to attend, is insufficient. We agree. Although the State Superintendent contends that the procedures set forth in Policy 1340 regarding the conduct of certification revocation proceedings comport with the provisions of the APA, West Virginia Code § 29A-5-1(d) (1964) (Repl. Vol. 1998) authorizes hearings to be conducted only 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" *Id.* (emphasis supplied). We can find no statute authorizing the establishment of a panel to hold a hearing on the serious matter of terminating a license to teach in this state.

Based upon the foregoing, the order of the Kanawha County Circuit Court denying the writ of certiorari is vacated and the matter is remanded to the circuit court for further proceedings consistent with the conclusions herein stated.

Reversed and remanded.