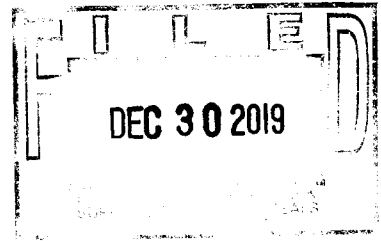


**DO NOT REMOVE  
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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS**



**DEBRA LYNN WHEELER and CATHY McCOMAS,  
Petitioners,**

**v.           Appeal No. 19-0687**

**LINCOLN COUNTY BOARD OF EDUCATION,  
Respondent.**

**REPLY BRIEF FILED ON BEHALF OF PETITIONERS WHEELER AND McCOMAS**

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On this day comes the Petitioners by counsel and provide the following reply to Respondents' Brief on areas or issues raised by Respondent's Brief and not covered in Petitioners initial brief. In particular, Petitioners reply to the assertion that the Petitioners may not properly address the questions of whether they meet the statutory definition of the Executive Secretary classification and whether the issue of overpayment recovery may be addressed by this court.

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**ISSUES PRESENTED**

- ✦ May the Petitioners raise the issue of whether they meet definition of the Executive Secretary classification in West Virginia Code §18A-4-8?

On pages 4 - 5 of its brief, Respondent contends that Petitioners may not raise issues in the appeal to the West Virginia Supreme Court of Appeals that were not raised before the circuit court. Principally, this argument is aimed at the assertion of the Petitioners that the Administrative Law Judge erred in determining that the administrators to whom Petitioners were assigned did not have significant administrative duties.<sup>1</sup>

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<sup>1</sup> Brief Filed on Behalf of Petitioners Wheeler and McComas, pp. 28 - 31

Petitioners concede that the Administrative Law Judge ruled that the administrators to whom Petitioners were assigned did not have significant administrative duties. This finding meant that Petitioners did not meet the statutory definition of Executive Secretary as contained in West Virginia Code §18A-4-8. Petitioners also concede that satisfied that their grievance had been granted on different grounds and the sought for relief awarded, they did not appeal this adverse finding of the Administrative Law Judge. Further, Petitioners concede that Respondent did not *explicitly* raise this issue in its brief to the circuit court and Petitioners did not *explicitly* raise this issue in the reply brief to the circuit court.

However, the question of whether Petitioners met the statutory definition of Executive Secretary arises indirectly in an issue that was raised in the briefs of Respondent<sup>2</sup> and Petitioners<sup>3</sup> to the circuit court and addressed by the circuit court<sup>4</sup> in its order, i.e., whether Respondent's job description for the Executive Secretary is contrary to law, i.e., West Virginia Code §18A-4-8.

There is no question that Petitioners met the county job description.<sup>5</sup> Given this fact, the question of whether Petitioners, who met the county job description, also met the statutory definition is closely related to the question of whether the county job description is contrary to the statutory definition. Perhaps Petitioners would have been prudent to subsume the

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<sup>2</sup> Appendix pp. 293 - 295

<sup>3</sup> Appendix pp. 315- 316

<sup>4</sup> Appendix p. 340

<sup>5</sup> Level III decision, Appendix pp. 269 – 270. The testimony of the Petitioners to the fact that they work for department heads or directors and what duties they performed for these individuals and upon which the level III decision on this issue is based is found in the level III transcript. Petitioner Wheeler's testimony of this subject is at Appendix pp. 135 – 141. Petitioner McComas's testimony is at Appendix pp. 123 – 129.

argument that they meet the statutory definition of Executive Secretary into their argument that the county job description was not contrary to the statutory definition. It seemed more practical to separate the issues for argument.

The Petitioners also contend that the issue of whether they met the statutory definition of Executive Secretary may properly be appealed to this court on the basis that the Circuit Court addressed this issue in the final order. West Virginia Code §6C-2-5(d) provides that the circuit court “shall review the *entire record* that was before the administrative law judge”. The Circuit Court obviously took this mandate to heart, reviewed the entire record and addressed the issue of whether Petitioners met the statutory definition of Executive Secretary.

The Circuit Court specifically affirmed the decision of the Administrative Law Judge on the issue of whether Petitioner’s met the statutory definition of Executive Secretary in two places in the final order.<sup>6</sup> Initially, under the rubric of “Discussion and Conclusions of Law”, the Circuit Court notes that the decision of the Administrative Law Judge on this issue was not appealed and therefore, is final.<sup>7</sup> Standing alone, this language would lend credence to the assertion that the Circuit Court did not believe that issue fairly before it and accordingly would not address it. However, the Circuit Court was not content to let the matter rest there. A few lines later, under the rubric of “Decision”, the Circuit Court specifically affirms in part the Administrative Law Judge’s decision “in that Grievants failed to prove that their positions met the statutory requirements of Executive Secretary ... as so ruled by the Administrative Law Judge”.<sup>8</sup> The

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<sup>6</sup> Appendix p. 341

<sup>7</sup> Appendix p. 341

<sup>8</sup> Appendix p. 341

Circuit Court squarely made the affirmation of the Administrative Law Judge's decision on this issue a central part of the Order. Accordingly, any argument that the Circuit Court was not given a chance to consider this issue must fail.

- ✎ May the Petitioners raise the issue of recovery of wages paid to Petitioners pursuant to the original level III decision?

On pages 6 - 8 of its brief, Respondent contends that Petitioners may not raise issues concerning recovery of overpayments to Petitioners for several reasons. First, Respondent contends these issues were not timely raised as they were not included in the Notice of Appeal. In response, Petitioners note that Rules of Appellate Procedure, West Virginia Supreme Court of Appeals Rule 7(e) provides, in pertinent part, the following:

The parties are encouraged to agree on the contents of the appendix. In the absence of an agreement, the petitioner must, within the time period set forth in the scheduling order, serve on the respondent a list of the parts of the record that the petitioner intends to include in the appendix, along with a list of any issues intended to be presented to the Court that were not contained in the notice of appeal.

The scheduling order indicates that the list of any issues intended to be presented that were not included in the notice of appeal had to be served on Respondent by September 30, 2019. Respondent was given notice of the two new issues on September 27, 2019. Accordingly, Petitioners assert that these two issues were timely raised.

The decisions cited by Respondent, Canterbury v. Laird, 221 W. Va. 453, 655 S.E.2d 199 (2007), Koerner v. West Virginia Department of Military Affairs & Public Safety, 217 W. Va. 231, 617 (2005) and Holmes v. Basham, 130 W. Va. 743, 45 S.E.2d 252 (1947), arose under the vastly different Rules of Appellate Procedure applicable prior to December 1, 2010. Rather than the current “Notice of Appeal”, the first document filed was a “Petition of Appeal” that contained not only assignments of error, but also points of authority relied upon and a discussion of the applicable law.<sup>9</sup> The petitioners, known then as appellants, had the right to oral presentation of their cases.<sup>10</sup> The Court voted whether to accept or reject the appeal outright.<sup>11</sup> Only after and if the Court voted to accept the appeal, the record was filed with the Court and briefs permitted.<sup>12</sup> To equate the current Notice of Appeal and Brief with the former Petition of Appeal and subsequent Brief is erroneous. The Notice of Appeal is a preliminary document and comparable to the Petition of Appeal under the former rules.

Ironically, Respondent has raised these arguments in a document that itself appears not to be timely filed. The Petitioners perfected their appeal on October 25, 2019. A copy of the brief and other documents were hand-delivered to the office of Respondent’s counsel on that day. Pursuant to Rules of Appellate Procedure, West Virginia Supreme Court of Appeals Rule 10(b), Respondent’s brief should have been filed within forty-five days of October 25, 2019. The

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<sup>9</sup> Rule 3(c)(3) & (4), Rules of Appellate Procedure, West Virginia Supreme Court of Appeals (Effective January 1, 1980, Amended January 1, 2002) p. 703, State Court Rules, Michie’s West Virginia Code Annotated 2007

<sup>10</sup> Rule 5, Rules of Appellate Procedure, West Virginia Supreme Court of Appeals (Effective January 1, 1980, Amended January 1, 2002) p. 705, State Court Rules, Michie’s West Virginia Code Annotated 2007

<sup>11</sup> Rule 7, Rules of Appellate Procedure, West Virginia Supreme Court of Appeals (Effective January 1, 1980, Amended January 1, 2002) p. 707, State Court Rules, Michie’s West Virginia Code Annotated 2007


<sup>12</sup> Rule 10(a), Rules of Appellate Procedure, West Virginia Supreme Court of Appeals (Effective January 1, 1980, Amended January 1, 2002) p. 710, State Court Rules, Michie’s West Virginia Code Annotated 2007

deadline for filing of the brief was December 9, 2019. Respondent's brief was placed into the mail to Petitioners on December 12, 2019 and appears to have been filed with this Court on the same day.

The other arguments advanced by Respondent regarding whether these issues are properly before this court are more significant. The issues involving collection of overpayments did not arise until the Circuit Court reversed the decision of the Administrative Law Judge. Accordingly, the Circuit Court did not have the opportunity to consider those issues.

There are reasons to consider the overpayment issues in the present appeal as set out in Petitioners' Brief.<sup>13</sup> Petitioners will rely on those arguments. However, as indicated in Petitioners' Brief, Petitioners prime objective in raising this issue in the present appeal is the wish to avoid the failure to do so as being construed as a waiver of the right to do so at a later time in another proceeding. If this Court decides that these issues should be addressed in a different forum at a later time, Petitioners will not feel aggrieved.

**DEBRA LYNN WHEELER and**  
**CATHY McCOMAS, Petitioners**  
By counsel,



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<sup>13</sup> Brief Filed on Behalf of Petitioners Wheeler and McComas, pp. 34 - 38