IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 22-0234

THE BOARD OF EDUCATION OF THE COUNTY OF WYOMING,

Petitioner,

v.

MARY DAWSON,

Respondent.

Appeal from a final order of the Circuit Court of Kanawha County, West Virginia, Civil Action No. 18-AA-246

PETITIONER'S BRIEF

Joshua A. Cottle (WVSB No. 12529)
Counsel of Record for Petitioner
BOWLES RICE LLP
Post Office Box 1386
Charleston, West Virginia 25325-1386
(304) 347-2116
(304) 343-2867
jcottle@bowlesrice.com

Francesca C. Rollo (WVSB No. 13856)
Counsel of Record for Petitioner
BOWLES RICE LLP
Post Office Box 1386
Charleston, West Virginia 25325-1386
(304) 347-1147
frollo@bowlesrice.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ASSIGNMENTS OF ERROR

1. The Circuit Court was clearly wrong in holding that the County Board failed to prove, by a preponderance of the evidence, that the County Board previously committed a legal mistake by modifying the Respondent's and another employee's regular bus runs, without approval by the Board, rather than following the statutory requirements of Chapter 18A of West Virginia Code.

2. The Circuit Court erred and was clearly wrong in holding that the County Board was not permitted to correct the mistake made by an employee of the County Board.

3. The Circuit Court erred and was clearly wrong in failing to hold that the County Board was not bound by a mistake and *ultra vires* act made by an employee of the County Board without Board approval.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This appeal arises from a Level One grievance filed on September 19, 2017, by Respondent against the Wyoming County Board of Education (the "County Board" or the "Board"). App. 1. The Respondent, employed by the County Board as a bus operator, alleged that the County Board violated West Virginia Code § 18A-4-16 when it "RIFed" her from an additional bus run she had erroneously been awarded. *Id.* On October 2, 2017, following a Level One conference, the grievance was denied. App. 3. Respondent appealed, requesting mediation by an administrative law judge, which failed. App. 7. Respondent again appealed and requested a hearing. App. 9.

In its Level Three Decision, the West Virginia Public Employees Grievance Board (the "Grievance Board") erroneously held that Petitioner had violated West Virginia Code §§ 18A-4-8a(j), 18A-4-8(m), and 18A-4-16(6) when it corrected its mistake of allowing Respondent to run two conflicting bus runs. App. 26-27. The Grievance Board further inaccurately averred that a

mistake by a school board could not be corrected if not within a certain time frame—contrary to a long line of precedent that *encourages* school boards to fix errors when made aware of them. App. 21-22.

On October 17, 2018, the County Board filed its Petition for Appeal with the Circuit Court of Kanawha County, asking that the Circuit Court reverse the Grievance Board's Decision. App. 91-123. On March 4, 2022, the Kanawha County Circuit Court entered its Final Order Denying Appeal and Affirming Grievance Board Decision (the "Final Order"). App. 190. The Circuit Court erroneously held that the Grievance Board was correct in finding that Petitioner failed to prove that a mistake occurred. App. 188. Thus, ignoring established precedent encouraging school boards to correct mistakes, the Circuit Court held that Petitioner's statutory rights under West Virginia Code §§ 18A-4-8(m), 18A-4-8(j), and 18A-4-16(6) had been violated. App. 189-90.

The County Board timely filed a Notice of Appeal with this Court on March 29, 2022. App. 192-211. The County Board respectfully asks that this Court reverse the Circuit Court's Final Order, as it failed to follow well-settled precedent and, thus, was clearly wrong.

II. STATEMENT OF THE FACTS

Respondent is employed by the County Board as a bus operator. App. 11. She has been employed by the County Board since 1980, entering into a Continuing Contract of Employment with the Board in 1983. App. 12. Respondent's original bus run required that she transport elementary and high school students to and from school at specific times during the morning and afternoons. *Id.* Two years into her employment with the County Board, Respondent bid on, and was awarded, a vocational run, in addition to her elementary and high school runs. *Id.* At first, Respondent's schedule allowed her to make her regular morning and afternoon runs, as well as the new vocational run. *Id.* However, approximately two years after she obtained the vocational run, the start times for her elementary school and high school runs were changed, which caused a scheduling conflict. *Id.* As a

result, an individual unknown to the parties in the County Board's administrative office modified Respondent's regular bus run. App. 13. This individual—without the approval of the County Board—removed the morning elementary portion of Respondent's run, allowing her to make the remainder of the regular run, in addition to the vocational run. *Id.* This mistaken modification, which did not follow the posting or other statutory requirements of Chapter 18A of the West Virginia Code, allowed Respondent to continue both her regular and vocational runs for many years.

The mistake was discovered by the County Board when another bus operator asked for the same "deal." App. 14. Mr. Jeffrey Hylton, Director of Safety and Transportation for the County Board, investigated the issue and discovered what amounted to an error of the County Board. App. 15. Mr. Hylton revealed that Respondent was awarded the conflicting vocational run effective October 15, 1985. *Id.* However, he did not find any record of the elementary school portion of Respondent's run—the portion reassigned—being posted for bid, which is required pursuant to West Virginia Code § 18A-4-8b(g).[1] Further, Mr. Hylton discovered that Respondent was legally incompetent[2] to perform the vocational run due to the conflict between her regular bus schedule and the vocational run which authorized the termination of the vocational run. Moreover, there was no record, in the County Board's meeting minutes or otherwise, of the County Board approving any modification of Respondent's

[1] West Virginia Code § 18A-4-8b(g) provides, "County boards shall post and date notices of all job vacancies of existing or newly created positions in conspicuous places for all school service personnel to observe for at least five working days." W. Va. Code § 18A-4-8b(g).

[2] Incompetent in this context means only that the indisputable scheduling conflict created such a situation that prohibited Respondent from performing the additional vocational run. Legal competence is not related to job performance. *See Phelps v. Raleigh Cty Bd. of Educ.*, West Virginia Public Employees Docket No. 2020-0866-RalED (Feb. 5, 2021) (https://pegb.wv.gov/Decisions%20Docs/dec2021/phelps.pdf); *Rollyson v. Kanawha Cty Bd. of Educ.*, West Virginia Public Employees Docket No. 2018-0296-KANED (April 4, 2018) (https://pegb.wv.gov/Decisions%20Docs/dec2018/Rollyson.pdf).

regular bus run, which was required pursuant to West Virginia Code § 18A-2-6.[3] Level Three Decision. Thus, Mr. Hylton appropriately concluded that a mistake had been made by the County Board.

In an effort to correct this mistake, on March 7, 2017, Superintendent Deirdre A. Cline informed Respondent that her vocational run would be eliminated. App. 14. Thereafter, all vocational runs with new terms were posted for the 2017-2018 school year, including the run that Respondent had held. *Id.* At the start of the 2017-2018 school year, Respondent's terminated vocational run position had not yet been filled. App. 15. Thus, from August 14, 2017, until September 8, 2017, Respondent was assigned to cover the vocational run. *Id.* On or about September 11, 2017, the vocational run was awarded to a bus operator who had bid on the posting. App. 16. Respondent's indisputable conflict in the start times of her regular morning elementary and high school runs, and the start time of the vocational run, barred her from being awarded the vocational run. Respondent's bus run was thereafter appropriately returned to her original run—transporting both elementary and high school students to school in the morning and from school in the afternoons. App. 15. Respondent was subsequently awarded two extracurricular runs, one of which paid the same as her previous vocational run. App. 14, 16.

SUMMARY OF THE ARGUMENT

The County Board proved, by a preponderance of the evidence, that it committed a legal mistake when a school employee modified the Respondent's bus run and regular contract without receiving approval by the County Board. Because that action was clearly a mistaken application of the law, the Board was authorized to correct the mistake.

---

[3] West Virginia Code § 18A-2-6 provides, "After three years of acceptable employment, each service person who enters a new contract of employment with the board shall be granted continuing contract status . . . The continuing contract of any such employee shall remain in full force and effect except as modified by *mutual consent of the school board and the employee*." W. Va. Code § 18A-2-6 (emphasis added).

However, the Circuit Court erroneously applied an incorrect legal standard to determine whether the County Board committed a legal mistake. The Court held, in error, that the County Board did not prove the mistake was significant or substantial and, accordingly, held that the County Board was not permitted to return Respondent to her original bus run. The Circuit Court's Final Order fails to follow this Court's precedent, would force the County Board to perpetuate a legal mistake and *ultra vires* act, and is clearly wrong.

County Boards are creatures of statute and only have authority or power given by statute. County boards of education have no authority to enforce *ultra vires* contracts with employees entered into outside of the legislative requirements set forth in the school personnel laws in Chapter 18A of the West Virginia Code. When the employee in the County Board's central office modified the Respondent's bus run and contract without County Board approval, thus violating the posting requirements of West Virginia Code § 18A-4-8(g), the County Board had no authority to enforce the contract.

However, under the Circuit Court's flawed analysis and ruling, the County Board will be forced to perpetuate the mistake and enforce the modified bus run and contract. In turn, because the County Board must treat all similarly situated employees the same, it will be required to extend similar treatment to other employees. The Circuit Court's Final Order is clearly wrong and should be reversed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Although the issues will likely be adequately briefed for this Court to render a decision, Petitioner requests oral argument in this case pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, in the event this Court seeks further clarification of the issues before it. Rule 19 oral argument is appropriate for the purpose of addressing settled law to the facts of this case.

In that regard, a memorandum decision may be issued reversing the Circuit Court's erroneous holding if this Court deems it appropriate.

STANDARD OF REVIEW

In *Martin v. Barbour Cnty. Bd. of Educ.*, 228 W. Va. 238, 719 S.E.2d 406 (2011), at syllabus points one, two, and three, this Court articulated the following standard of review for appeals from the circuit court concerning decisions of the Grievance Board:

> 1. When reviewing the appeal of a public employees' grievance, this Court reviews decisions of the circuit court under the same standard as that by which the circuit court reviews the decision of the administrative law judge.
>
> 2. "Grievance rulings involve a combination of both deferential and plenary review. Since a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. Credibility determinations made by an administrative law judge are similarly entitled to deference. Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed de novo." Syl. pt. 1, *Cahill v. Mercer Cnty. Bd. of Educ.*, 208 W. Va. 177, 539 S.E.2d 437 (2000).
>
> 3. "A final order of the hearing examiner for the West Virginia [Public] Employees Grievance Board, made pursuant to W. Va. Code, [6C–2–1], et seq. [ ], and based upon findings of fact should not be reversed unless clearly wrong." Syl. pt. 1, *Randolph Cnty. Bd. of Educ. v. Scalia*, 182 W. Va. 289, 387 S.E.2d 524 (1989).

See also Webster Cnty. Bd. of Educ. v. Davis, 244 W. Va. 702, 709, 856 S.E.2d 661, 668 (2021).

ARGUMENT

County boards of education face myriad laws, regulations, rules, and policies that they must apply and enforce, including complex personnel decisions. It is therefore unsurprising that county boards make occasional legal mistakes when applying these rules. For that reason, the Grievance Board has consistently held that county boards are encouraged to correct mistakes after the county board becomes aware of a mistaken legal application.

That is precisely what occurred in this case. When the Respondent bid on and was awarded the extracurricular vocational run, her regular bus run did not conflict with the extracurricular run. She was thus qualified and legally permitted to make the run. However, two years after she started the vocational run, the start times for her high school and elementary runs changed, which caused a conflict with her extracurricular run. Because the extracurricular run conflicted with her regular run, she could not continue with the duties of her extracurricular run and was, thus, legally incompetent for the extracurricular run. In that circumstance, rather than modifying the Respondent's regular run, the County Board should have removed her from the extracurricular run and posted the position. Moreover, at a minimum, any action should have been approved by the County Board. The meeting minutes from the times in question clearly evidence that the County Board did not vote to approve modifying the Respondent's regular bus run. Thus, someone without authority to do so unilaterally altered the Respondent's regular run, which resulted in an unenforceable, *ultra vires* action.

That situation persisted for multiple years until another employee asked the County Board's administration for a "deal" like Respondent's. At that time, the County Board did what it should have done: it corrected a legal mistake that occurred years earlier by returning the Respondent to her regular bus run and posting the vacant extracurricular run.

The faulty linchpin of the Circuit Court's erroneous holding is that the County Board failed to prove that a "significant" mistake occurred, warranting the County Board's action of returning the Respondent to her original run and filling the vacant extracurricular vocational run. The Circuit Court's flawed holding has no basis in law and was clearly wrong. The County Board had to prove that it corrected a legal mistake. There is no requirement in West Virginia Code § 18A-4-16 or any part of the Education Code, Chapters 18 and 18A, that asks whether an action and resulting legal

mistake is "significant." The only question before the Grievance Board and the Circuit Court was whether a legal mistake occurred. Because the County Board proved by a preponderance of the evidence that Respondent's regular bus run was modified without County Board approval, the Circuit Court should have reversed the Grievance Board's Level Three and denied the Respondent's grievance. This Court should therefore reverse the Circuit Court's erroneous Final Order.

A. The County Board Proved that it Committed a Legal Mistake By Failing to Post the Extracurricular Vocational Run When a Conflict Arose Between the Respondent's Regular Contract/Bus Run and the Extracurricular Contract/Bus Run.

Rather than remove Respondent from the extracurricular position that she was no longer able to perform, the Respondent's board-approved regular bus run was changed so that she could maintain the extracurricular run. Extracurricular vocational bus runs, such as the one at issue in this case, are governed by West Virginia Code § 18A-4-16, which, among other things, provides:

> (1) The assignment of teachers and service personnel to extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval. Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis: Provided, That all school service personnel assignments shall be considered extracurricular assignments, except such assignments as are considered either regular positions, as provided by section eight of this article, or extra-duty assignments, as provided by section eight-b of this article . . .
>
> (5) The board shall fill extracurricular school service personnel assignments and vacancies in accordance with section eight-b of this article . . . .

W. Va. Code Ann. § 18A-4-16. A long line of Grievance Board precedent establishes that an employee may not be awarded or continue in an extracurricular position if that position conflicts with her regular service position.

In *Cole v. Putnam Cnty. Bd. of Educ.*, the Grievance Board held, "[i]n order for a person to be qualified to take on an extracurricular assignment, he/she must already be a regular employee of a county board of education and the assignment must not interfere with his/her normal duties[.]" *Cole v. Putnam Cnty. Bd. of Educ*, West Virginia Public Employees Docket No. 40-88-240[4] (Mar. 17, 1989) (emphasis added).[5] In *Cole*, the Grievant had been employed as a bus operator by the Putnam County Board of Education for eighteen years. Putnam County had a policy in place since 1977 to only allow applications for extracurricular runs from drivers whose regular run were in the same region of the county. Grievant applied for three extracurricular runs but was not awarded any as he was not located in the same region of the county. While the Grievance Board held that the geographic locale requirement was inappropriately applied as to Grievant, it importantly articulated that any extracurricular bus assignment must not interfere with the operator's normal duties.

In *Bowman v. Marion Cnty. Bd. of Educ.*, the Grievance Board held, "for an employee to be qualified to assume an extracurricular assignment the new assignment must not interfere with his normal duties or any other extracurricular assignments which he already holds." *Bowman v. Marion Cnty. Bd. of Educ.*, Docket No. 91-24-343 (Feb. 27, 1992).[6] In *Bowman*, the Grievant was employed by the Marion County Board of Education as a bus operator. *Id.* at 1. During his tenure,

---

[4] All citations herein with references to docket numbers are to decisions of the West Virginia Public Employees Grievance Board, unless otherwise noted.

[5] *See* https://pegb.wv.gov/Decisions%20Docs/dec1989/COLE.pdf.

[6] *See* https://pegb.wv.gov/Decisions%20Docs/dec1992/bowman.pdf.

two after-school activity runs became available. *Id.* at 2. When the position was posted, it was broken up into "slots" and divided amongst the bus operators who sought the additional work. *Id.* Slot number one became available and was bid on by multiple operators. *Id.* at 3. The slot was given to the most senior operator, despite the fact that it conflicted with his existing run. *Id.* The county board argued that, while seniority should be considered in awarding positions, "the assignment must not interfere with the performance of duties for which an employee is already committed to perform." *Id.*

The Grievance Board agreed, holding that, while considering the seniority provisions of West Virginia Code § 18A-4-8b is appropriate, "those guidelines should not be interpreted to mean that the most senior applicant is entitled to hold every position for which he applies." *Id.* at 5. The Grievance Board further concluded that "[w]hen an employee is offered an extracurricular assignment which is scheduled at the same time as another extracurricular assignment held by that employee, the employee must choose which assignment he wishes to retain and which he wishes to relinquish." *Id.* Thus, it is clear that an employee cannot hold conflicting bus runs, despite seniority or any other factor.

Thus, following the holdings in *Cole* and *Bowman*, the Grievance Board has consistently held that "[i]mplicit in the provisions of W. Va. Code § 18A-4-8b governing the appointment of school service employees is the premise that an employee making application must be available to assume the duties of a position at the times designated by the Board." *See Barber v. McDowell County Bd. of Educ.*, Docket No. 94-33-405 (Apr. 21, 1995)[7]; *Skeens v. Lincoln County Bd. of Educ.*, Docket No. 02-22-070 (June 19, 2002)[8]; *White v. Monongalia County Bd. of Educ.*, Docket

[7] *See* https://pegb.wv.gov/Decisions%20Docs/dec1995/barber2.pdf.

[8] *See* https://pegb.wv.gov/Decisions%20Docs/dec2002/skeens.pdf.

No. 00- 30-279 (Jan. 2, 2001)[9]; *Teter v. Randolph County Bd. of Educ.*, Docket No. 95-42-535 (May 9, 1996)[10]; *O'Neal v. Kanawha County Bd. of Educ.*, Docket No. 20-86-239 (May 13, 1987)[11].

When the start times for Respondent's regular bus runs were changed, her extracurricular assignment interfered with her normal duties, and she was no longer available to assume the duties of the extracurricular bus run. The County Board should have terminated her extracurricular contract (thus creating a vacancy for the extracurricular position) and filled the position pursuant to West Virginia Code § 18A-4-8b (the statute used to post and fill service personnel vacancies). The County Board's failure to do so was a legal mistake.

The Circuit Court's holding otherwise was clearly wrong. The County Board submitted meeting minutes and other documentary evidence for the relevant times. There was nothing in any documentation showing that the County Board took such action to affirm posting the extracurricular vocational run. In fact, it is apparent from the very nature of the underlying grievance that the County Board did not remove the Respondent from the extracurricular position.

B. The County Board Proved that it Committed a Legal Mistake By Failing to Post the Modified Bus Runs and/or By the Board Failing to Approve Modifications to the Respondent's Regular Contract.

Other than posting the extracurricular contract when the conflict occurred between Respondent's extracurricular contract and her regular contract, the County Board had only two other legally permissible alternatives to allow Respondent to continue in the extracurricular position: (i) due to the change in the daily schedule of Respondent and the person who was assigned the elementary portion of her run, the two positions were new positions and could have

---

[9] *See* https://pegb.wv.gov/Decisions%20Docs/dec2001/white.pdf.

[10] *See* https://pegb.wv.gov/Decisions%20Docs/dec1996/teter.pdf.

[11] *See* https://pegb.wv.gov/Decisions%20Docs/dec1987/oneal.pdf.

been filled pursuant to the posting requirements of West Virginia Code § 18A-4-8b(g); or (ii) at a minimum, as required by West Virginia Code § 18A-2-6, the modifications to the Respondent's and the other employee's routes and contracts should have been agreed to by the mutual consent of the employee and the County Board.[12]

Either of these alternatives, however, would have required County Board action and vote, and it is clear from the evidence in this case that the County Board did not take any action to either approve the new positions or the modifications of the employees' positions. For instance, the Transportation Director testified at the Level Three hearing that he researched the meeting minutes relating to Respondent's contract after the employee requested a "deal" similar to Respondent's. App. 70. The meeting minutes reflected the original high school and elementary portion of Respondent's run, and that she had bid on and accepted the extracurricular vocational run in 1985. Further, when asked whether he had researched the County Board minutes to determine if any Board action had been taken to change the runs or reassign portions of runs, the Transportation Director testified that he and the administration had researched the minutes and "didn't find anything." *Id.* 71. Accordingly, the testimony and evidence in this case show, by a preponderance of the evidence, that the County Board did not vote to approve of modifying the Respondent and the other employee's schedules. The Circuit Court's holding to the contrary is not supported by Grievance Board precedent.

For instance, in *Rose v. Nicholas Cnty. Bd. of Educ.*, Docket No. 93-34-063 (June 29, 1994,[13] *aff'd* Kanawha County Circuit Court, Civil Action No. 94-AA-171, the employee, a custodian, filed a grievance challenging the county board's decision to remove the employee from

[12] West Virginia Code § 18A-2-6 provides: "The continuing contract of any such employee shall remain in full force and effect except as modified by mutual consent of the school board and the employee[.]"

[13] *See* https://pegb.wv.gov/Decisions%20Docs/dec1994/rose.pdf.

a full-time regular position that he had occupied for four years but that was never posted or approved by the County Board. As evidence for the lack of county board approval, the board argued, like in this case, that there was no mention in the meeting minutes reflecting the county board's approval. The Grievance Board denied the employee's grievance, holding that "the record did not support that the Board ever took official action to appoint the grievant to a regular custodian position." *Id.* at 3.

The same is true here. The only meeting minutes reflecting the Respondent's employment agreement and contract with the County Board were the meeting minutes pertaining to the original bus run (before the start times changed) and the minutes reflecting her acceptance of the vocational run (again, before the start times changed). After the conflict between her extracurricular vocational and her regular runs arose, no Board action was taken to approve of the modification of her bus route or contract. It was thus apparent from the record in this case that someone else in the central office modified the Respondent's regular run so that she could keep her original run. That should have been the end of the matter.

The Circuit Court, however, applied an erroneous standard and held that there was not a significant or substantial enough change in the Respondent's bus routes to require Board vote and approval and held, "there is no evidence in the record to support a finding or conclusion that any change made to Ms. Dawson's regular run was 'substantial' . . . In order to prevail on its affirmative defense of a 'mistake,' Petitioner [the County Board] had the burden to prove that a substantial change resulting in mistake and necessitating Board approval actually occurred." App. 187. That is not the standard. Rather, the County Board had to prove, by a preponderance of the evidence, that it had committed a legal mistake by not having the Board take official action to approve of modifying the Respondent's contract. The evidence, including the testimony of the Transportation

Director and the meeting minutes, proves, by a preponderance of the evidence, that the County Board did not vote to approve of the new bus routes. Instead, it is apparent that someone in the central office changed the bus routes without Board approval, a legal mistake that resulted in an *ultra vires* action.

C. The Action by a School Employee to Modify the Respondent's Contract and Regular Bus Run Without Approval by the County Board Was an *Ultra Vires* Act, and Any Rights Arising From the Action Were Void *Ab Initio*.

The Circuit Court's erroneous Final Order contains contradictory holdings. The Circuit Court held that "someone in the administrative office, whose identity is unknown, modified Respondent's regular bus run to remove the morning elementary portion of her regular run." App. 198. Yet, despite finding that someone other than the County Board approved of the modification, the Circuit Court erroneously applied an incorrect standard, as addressed above, and held that the County Board failed to prove that a substantial mistake occurred. Instead, the Circuit Court should have held that the action of central office employee was *ultra vires* and not binding upon the County Board.

This Court has consistently held that governmental entities, such as county boards of education, are not bound by the *ultra vires* or legally unauthorized acts of their officers or employees:

> The general rule is that an estoppel may not be invoked against a governmental unit when functioning in its governmental capacity[.] A governmental unit is not estopped to deny the validity of *ultra vires* acts of its officers. A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers; and all persons must take note of the legal limitations upon their power and authority. In accordance with a well settled principle, this Court has stated many times that the state and its political subdivisions are not bound, on the basis of estoppel, by the ultra vires or legally unauthorized acts of its officers in the performance of governmental functions.

Freeman v. Poling, 175 W. Va. 814, 819, 338 S.E.2d 415, 420 (1985) (internal citations omitted); *Cunningham v. Cnty. Ct. of Wood Cnty.*, 148 W. Va. 303, 309–10, 134 S.E.2d 725, 729 (1964).

In *Rose v. Nicholas Cnty. Bd. of Educ.*, Docket No. 93-34-063 (June 29, 1994), discussed *supra*, the employee argued that even if the county board had failed to take official action to approve of the regular custodian shift, the board was estopped from removing him from the position. The Grievance Board turned to this Court's holdings in *Freeman v. Poling*, 175 W. Va. 814, 338 S.E.2d 415 (1985), and *Parker v. Summers Cnty. Bd. of Educ.*, 185 W. Va. 313, 406 S.E.2d 744 (1991), and noted that this Court had "recognized [in *Poling*] the harshness of a rule which discounted an employee's reliance on the employer's promise but held that the public's interest in its officials' compliance with law ordinarily outweighs that of the employee." *Rose*, Docket No. 93-34-063, at. *5. In holding that actions of a board employee to place the grievant/employee in the regular full-time custodian position was *ultra vires*, the Grievance Board reasoned that

> Grievant's occupation of the post for four years was a continuous violation of Code § 18A-4-8b and an ongoing encroachment of the rights of other service employees to bid upon it. These violations undoubtedly constitute *ultra vires* actions as that term is used by the Court in *Freeman* and *Parker*.

The situation before this Court is similar. While it may be unfortunate that a mistaken application of the County Board's personnel laws persisted for many years, the Board must take action to correct such mistakes. Otherwise, the Board risks violating the statutory rights of other employees in its school system.

This Court's holding in *Parker v. Summers Cnty. Bd. of Educ.*, 185 W. Va. 313, 406 S.E.2d 744 (1991), also illustrates why this Court should reverse the Circuit Court and hold that the County Board was and is not bound by the *ultra vires* act of the school administrator who unilaterally changed the Respondent's contract. In *Parker*, the county board of education granted

a school secretary sick leave for nine years in which she was not an employee of the board of education and then rescinded its action. The Court found that the award of benefits contravened West Virginia Code § 18A-4-10 and was therefore an *ultra vires* act, which was not binding on the county board.

D. The County Board Was Authorized to Correct the Legal Mistake and Did Not Violate Any Statutory Provisions in Correcting the Mistake.

The County Board was authorized under this Court's and the Grievance Board's precedent to correct a legal mistake and, contrary to the Circuit Court's holding, did not violate any statutes in doing so. The fact that the County Board never approved the transfer or modification of the Respondent's bus run contract is uncontroverted. Thus, assigning the Respondent to conduct the run that the respondent did approve, was not a unilateral change in a contract resulting in loss of compensation to the respondent. It was simply compliance with the only action of County Board regarding the regular bus run assigned to the Respondent. In so doing, the Respondent was not available for the posted mid-day run and was, therefore, not hired for the same. This was not a violation of the non-relegation clause found in West Virginia Code § 18A-4-8(m).

This statute provides that:

> Without his or her written consent, a service person may not be:
>
> (1) Reclassified by class title; or
>
> (2) Relegated to any condition of employment which would result in a reduction of his or her salary, rate of pay, compensation or benefits earned during the current fiscal year, or for which he or she would qualify by continuing in the same job position and classification held during that fiscal year and subsequent years.

This same statute was addressed by the Grievance Board in *Vannoy v. Roane County Bd. of Educ.,* Grievance Board Docket No. 2014-0265-RoaED (June 27, 2014),[14] *aff'd* Kanawha

[14] *See* https://pegb.wv.gov/Decisions%20Docs/dec2014/Vannoy.pdf.

County Circuit Court Civil Action No. 14-AA-80 (Feb. 23, 2016), in correcting a pay error. In that case, the Grievance Board and the Circuit Court, on appeal, concluded that a Board cannot be estopped from correcting a decision that violates the law. Because in that case the employee was never entitled to split-shift pay, the Grievance Board and the Circuit Court held that the decision to correct the error does not amount to relegation.

The Grievance Board's holding in *Vannoy* is consistent with, and is buttressed by, this Court's holdings in *Freeman v. Poling*, 175 W. Va. 814, 338 S.E.2d 415 (1985), and *Parker v. Summers Cnty. Bd. of Educ.*, 185 W. Va. 313, 406 S.E.2d 744 (1991), discussed *supra*, and by this Court's holding in *Cochran v. Trussler*, 141 W. Va. 130, 89 S.E.2d 306 (1955). In *Cochran*, the superintendent of the county board did not nominate the employee for employment as a schoolteacher on a specific year. Rather, the president (a member of the county board) nominated the teacher for employment, and the board approved the nomination. The teacher then taught the following year. During personnel season, the superintendent again did not nominate the teacher for employment in the succeeding year. A member of the board moved the board to employ the teacher for the succeeding year, but did not designate a specific school. The superintendent refused to place the teacher at a school without specific direction, which the board refused to give. The teacher brought a writ of mandamus directing the superintendent to assign her to a school in that county.

This Court denied the writ of mandamus. First, the Court noted that the applicable statutes gave the superintendent, not any other officer or member of a board, the authority to "nominate all teachers . . . to be employed." *Id.* at 133, 89 S.E.2d at 308. The Court then reasoned that the "law is well settled in this jurisdiction that a Board of Education cannot exercise any power that is not expressly conferred by statute, or does not fairly arise by implication." *Id.* at 135, 89 S.E.2d at 310

(*citing Jarrett v. Goodall,* 113 W. Va. 478, 168 S.E. 763 (1933)). Thus, because the right to nominate teachers was statutorily limited to the superintendent, any other action was void *ab initio*. Accordingly, the Court held, "the contract being contrary to the prohibitive provisions of a valid statute, it was void *ab initio*, and cannot: become valid on being carried into execution; be purged of its infirmity by means of an estoppel; or be ratified by subsequent acts of the parties to it." *Id.* at 137, 89 S.E.2d at 310.

Here, the change from the original bus assignment of the respondent, without posting or modification with board approval, was violative of valid statutes regarding posting and modification of contracts and, therefore, void. Even if such action could be ratified, there was no evidence of the same. Because the action to modify the Respondent's original contract and bus run was *ultra vires*, any such contractual rights arising from the action were *void ab initio*. Thus, returning the employee to the only legally enforceable position does not violate a statutory provision arising from any subsequently void contract.

Moreover, as the Court recognized in *Cochran*, this Court has consistently held that county boards are statutory corporations and may exercise only the power conferred by statute:

> The Board of Education of a school-district is a corporation created by statute with functions of a public nature expressly given and no other; and it can exercise no power not expressly conferred or fairly arising from necessary implication, and in no other mode than that prescribed or authorized by the statute.

Napier v. Lincoln Cty. Bd. of Educ., 209 W. Va. 719, 724–25, 551 S.E.2d 362, 367–68 (2001); Syl. pt. 7, *City of Huntington v. Bacon*, 196 W. Va. 457, 473 S.E.2d 743 (1996) (quoting syl. pt. 4, *Shinn v. Board of Educ.*, 39 W. Va. 497, 20 S.E. 604 (1894)); *Bailey v. Truby*, 174 W. Va. 8, 15, 321 S.E.2d 302, 309 (1984); Syl. pt. 1, *Evans v. Hutchinson*, 158 W. Va. 359, 214 S.E.2d 453 (1975); *Board of Educ. of Raleigh County v. Commercial Cas. Ins. Co.*, 116 W. Va. 503, 506, 182 S.E. 87, 89 (1935); Syl. pt. 1, *Honaker v. Board of Educ. of Pocatalico Dist.*, 42 W. Va. 170, 24

S.E. 544 (1896); *see also Herald v. Board of Educ.*, 65 W. Va. 765, 65 S.E. 102 (1909) ("A board of education is a quasi-public corporation, existing only under statute, having only the powers given by statute and such implied powers as are absolutely necessary to execute such express powers. It cannot engage in business or make contracts outside its functions touching education."); Syl. pt. 1, *Pennsylvania Lightning Rod Co. v. Bd. of Educ. of Cass Twp.*, 20 W. Va. 360 (1882) ("Corporations created by statute must depend, both for their powers and the mode of exercising them, upon the true construction of the statute creating them.").

County boards of education have no authority to enforce contracts with employees entered into outside of the legislative requirements set forth in the school personnel laws in Chapter 18A of the West Virginia Code. When the employee in the County Board's central office modified the Respondent's bus run and contract without County Board approval, thus violating the posting requirements of West Virginia Code § 18A-4-8(g), the County Board had no authority to enforce the contract because it would exceed its statutory authority to do so.

E. The Circuit Court's Final Order Would Require the County Board to Perpetuate A Legal Mistake in Violation of Statutory Requirements.

County boards of education may not discriminate against, or show favoritism towards, employees. West Virginia Code § 6C-2-2 defines discrimination and favoritism as follows:

> "'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.
>
> "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee.

W. Va. Code Ann. § 6C-2-2(d)(h). This Court has acknowledged that the elements of discrimination and favoritism are essentially identical. *Frymier v. Higher Educ. Pol'y Comm'n*,

221 W. Va. 306, 313, 655 S.E.2d 52, 59 (2007). In order to establish either discrimination or favoritism claim asserted under the grievance statutes, an employee must prove: (a) that he or she has been treated differently from one or more similarly situated employee(s); (b) that the different treatment is not related to the actual job responsibilities of the employees; and (c) that the difference in treatment was not agreed to in writing by the employee. *Bd. of Educ. of The Cnty. of Tyler v. White*, 216 W. Va. 242, 248, 605 S.E.2d 814, 820 (2004).

Thus, the County Board is prohibited from treating similarly situated employees differently. Applying that unambiguous rule and standard, the County Board would be required, under the Circuit Court's flawed Final Order, to perpetuate a mistake made many years ago. Therefore, rather than follow the statutory posting requirements, the County Board must unilaterally modify other employees' regular bus runs or schedules when conflicts arise between regular schedules and extracurricular assignments so that those other employees may keep their extracurricular positions. That, in turn, is why the County Board took very seriously the other employee's request to get a "deal" like the Respondent received in this case. That is also why the County Board took action to correct the mistake when it became aware of it.

The Grievance Board has confronted many situations like that presented here. For instance, in *Huling v. Nicholas Cnty. Bd. of Educ.*, Docket No. 07-34-025 (March 21, 2008),[15] the employee filed a grievance claiming favoritism and discrimination because the county board refused to extend to him a past practice that violated the posting requirements of West Virginia Code § 18A-4-8(g). In that case, the employee held a bus operator position that required a grade school run. *Id.* at *2. For many years, the county board had an unwritten practice that allowed a senior operator to permanently give a portion of his or her assigned run—the grade school run—to a less senior

[15] *See* https://pegb.wv.gov/Decisions%20Docs/dec2008/spencer.pdf.

operator. *Id.* at *3. When a new transportation director began employment with the county, the director was uncomfortable with the practice and sought legal advice. The county board was advised that this practice violated statutory posting requirements. The county board therefore decided to correct its mistake and stop the practice. *Id.* After the county board reconfigured some bus runs, the employee found that some less senior bus operators no longer had grade school runs, and the employee requested to give the grade school portion of his run to a less senior operator (consistent with the board's past mistaken action). *Id.* at *4.

> The Grievance Board denied the grievance, reasoning as follows:
>
> > The answer to this grievance is simple. No discrimination has occurred here. When NCBOE allowed prior bus operators to engage in this incorrect and improper "sloughing-off" procedure, it was in violation of statutory mandates. NCBOE is required to follow the statutory mandates of W. Va. Code § 18A-4-8b(g) which states in pertinent part:
> >
> > County boards shall post and date notices of all job vacancies of established existing or newly created positions in conspicuous places for all school service personnel to observe for at least five working days. . . . (2) Notice of a job vacancy shall include the job description, the period of employment, the amount of pay and any benefits and other information that is helpful to prospective applicants to understand the particulars of the job. . . .
> >
> > NCBOE's past, unwritten practice violated the above cited Code Section. It allowed a bus operator to apply for a posted position, and then allowed this same bus operator to change the duties of his position, and, in essence, "dump" some of his assigned and posted duties on a less senior bus operator, who had not applied for them. This practice violated W. Va. Code § 18A-4-8b(g), should never have occurred, and NCBOE was correct to discontinue it. Past mistakes do not create an entitlement to future incorrect actions . . . Additionally, this Grievance Board has previously held that a county board of education is not bound by an employee's mistake.

Id. at *4 (internal citations omitted).

The reasoning of the Grievance Board in *Huling* is precisely applicable to this case. Here, the County Board determined that a mistake was made and took action to correct the mistake by

reinstating the Respondent's original, regular bus run and contract. However, under the Circuit Court's flawed decision, the County Board will be forced to perpetuate its mistake. In turn, it will be required to treat all other employees similarly and reconfigure and modify bus runs to permit employees to be awarded or continue in extracurricular positions if a conflict arises. The Circuit Court's holding is contrary to the applicable statutes, this Court's and Grievance Board's precedent, and should therefore be reversed.

CONCLUSION

For the reasons set forth herein, and for all those apparent from the record, the County Board respectfully asks that this Court reverse the Circuit Court's erroneous Final Order and deny the Respondent's grievance.

Respectfully submitted,

THE BOARD OF EDUCATION OF THE COUNTY OF WYOMING,
Petitioner.

By Counsel

Joshua A. Cottle (WVSB No. 12529)
Francesca C. Rollo (WVSB No. 13856)
Counsel of Record for Petitioner
BOWLES RICE LLP
Post Office Box 1386
Charleston, West Virginia 25325-1386
(304) 347-2116
(304) 343-2867
jcottle@bowlesrice.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THE BOARD OF EDUCATION OF THE COUNTY OF WYOMING,

Petitioner,

v.

Appeal from a final order of the Circuit Court of Kanawha County, West Virginia, Civil Action No. 18-AA-246

MARY DAWSON,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certify that on the 5th day of July 2022, we served the foregoing *PETITIONER'S BRIEF* upon counsel of record by depositing a true copy of the same in the United States Mail, addressed as follows:

Rebecca Roush, Esquire
WV School Service Personnel Association
1610 Washington Street, East
Charleston, West Virginia 25311

Joshua A. Cottle (*WVSB # 12529*)
Francesca C. Rollo (WVSB No. 13856)
BOWLES RICE LLP
600 Quarrier Street
Post Office Box 1386
Charleston, West Virginia 25325-1386
(304) 347-2116
(304) 343-2867 (fax)
jcottle@bowlesrice.com