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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



CASE NO. 22-0234

THE BOARD OF EDUCATION OF  
THE COUNTY OF WYOMING,

Petitioner,

v.

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

MARY DAWSON,

Respondent.

**PETITIONER'S REPLY BRIEF**

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## ARGUMENT

The Respondent's Brief (i) mischaracterizes and ignores the issues raised on appeal to this Court; (ii) fails to address or analyze the pertinent legal authorities requiring reversal of the Circuit Court's flawed Final Order; and (iii) as with the Circuit Court's Final Order, asks, by implication, that this Court require county boards of education to perpetuate *ultra vires* actions of county board employees that result in legal mistakes.

First, the Respondent's Brief misquotes and mischaracterizes the arguments made to this Court on appeal. Without any citation to Petitioner's Brief, the Respondent states:

The arguments are identified in Petitioner's brief as follows: (1) that '[t]he Circuit Court Judge and All erred in failing to conclude that a mistake was made'; (2) that '[t]he Circuit Court Judge and AU erred in finding the mistake could not be corrected if not so corrected within a certain, unidentified, time frame'; and (3) that '[t]he Circuit Court Judge and ALI erred in concluding that personnel statutes arc, or cannot be, contravened to correct a mistake.'

*Respondent's Brief*, at 2. The quoted sentences were not advanced in Petitioner's Brief to this Court, and although Petitioner agrees with those assignments of error (in addition to the arguments raised in Petitioner's Brief), Respondent fails, due to the mischaracterization of the Petitioner's Brief, to address the other critical assignments of error and arguments advanced by the County Board.<sup>1</sup>

To be clear, the County Board advanced three central arguments to this Court. First, the County Board proved that it committed a legal mistake by failing to post the extracurricular bus run when a conflict arose between the Respondent's regular contract/bus run and the extracurricular contract/bus run. Secondly, other than posting the extracurricular contract when

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<sup>1</sup> Although Petitioner cannot discern for certain and does not want to mischaracterize Respondent's Brief, it appears that the above language in Respondent's Brief was copied and pasted from Respondent's brief to the Circuit Court of Kanawha County. It further appears that, with minor modifications, the Respondent has used the entire brief that was submitted and filed with the Circuit Court.

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 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. Third, 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*.

**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.**

West Virginia Code § 18A-4-16 governs the employment and selection of personnel for extracurricular bus runs, and 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 . . . .

As set forth in Petitioner's Brief, 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. See *Cole v. Putnam Cnty. Bd. of Educ.*, West Virginia Public Employees Docket No. 40-88-240<sup>2</sup> (Mar. 17, 1989)<sup>3</sup> (holding, "[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[.]"); *Bowman v. Marion Cnty. Bd. of Educ.*, Docket No. 91-24-343 (Feb. 27, 1992)<sup>4</sup> ("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.")

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)<sup>5</sup>; *Skeens v. Lincoln County Bd. of Educ.*, Docket No. 02-22-070 (June 19, 2002)<sup>6</sup>; *White v. Monongalia County Bd. of Educ.*, Docket No. 00- 30-279 (Jan. 2, 2001)<sup>7</sup>; *Teter v. Randolph County Bd. of Educ.*, Docket No. 95-42-535 (May 9, 1996)<sup>8</sup>; *O'Neal v. Kanawha County Bd. of Educ.*, Docket No. 20-86-239 (May 13, 1987)<sup>9</sup>.

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<sup>2</sup> All citations herein with references to docket numbers are to decisions of the West Virginia Public Employees Grievance Board, unless otherwise noted.

<sup>3</sup> See <https://pegb.wv.gov/Decisions%20Docs/dec1989/COLE.pdf>.

<sup>4</sup> See <https://pegb.wv.gov/Decisions%20Docs/dec1992/bowman.pdf>.

<sup>5</sup> See <https://pegb.wv.gov/Decisions%20Docs/dec1995/barber2.pdf>.

<sup>6</sup> See <https://pegb.wv.gov/Decisions%20Docs/dec2002/skeens.pdf>.

<sup>7</sup> See <https://pegb.wv.gov/Decisions%20Docs/dec2001/white.pdf>.

<sup>8</sup> See <https://pegb.wv.gov/Decisions%20Docs/dec1996/teter.pdf>.

<sup>9</sup> See <https://pegb.wv.gov/Decisions%20Docs/dec1987/oneal.pdf>.

The indisputable record in this case shows that 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.**

Secondly, 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 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.<sup>10</sup>

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. There was no evidence to the contrary. 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 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

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<sup>10</sup> 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[.]"



Respondent's regular run, without Board approval, so that Respondent could keep her original run, which was 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 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. This Court has never held that in order to determine whether an *ultra vires* act by a public employee is void, a court must determine whether such action was significant or substantial.

Rather, the critical inquiry is whether the action was legally authorized:

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).

County boards are creatures of statute, have only authority or power given by statute and 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.

Accordingly, as fully set forth in the Petitioner's Brief, the County Board was authorized, under a long line of precedent, to correct a mistake once it became aware of the same. The Circuit Court's holding to the contrary was clearly wrong and should 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.

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CASE NO. 22-0234

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MARY DAWSON,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 8th day of September 2022, I caused the foregoing  
“**Reply Brief of Petitioner The Board of Education of the County of Wyoming,**” to be served  
on the following by United States mail, postage prepaid:

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