

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**WILLIAM B. HAMM,
Petitioner Below, Appellee,**

v. No. 35539 (Mason County, No. 07-AA-112)

**DR. STEVEN L. PAINE,
State Superintendent of Schools,
West Virginia Department of Education,
Respondent Below, Appellant.**

FILED

February 16, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

The Appellant, State Superintendent of Schools, West Virginia Department of Education (“State Superintendent”), appeals an order of the Circuit Court of Mason County. The circuit court reversed the State Superintendent’s decision denying the Appellee, William B. Hamm (“Mr. Hamm”), an appeal from the Mason County School Superintendent’s refusal to recommend renewal of Mr. Hamm’s out-of-field teaching authorizations. For the reasons set forth in this Memorandum Decision, the order of the circuit court is reversed and this matter is remanded with directions. The Court further finds that this case does not present a new or significant question of law and, therefore, a Memorandum Decision is appropriate under Rule 21 of the *Revised Rules of Appellate Procedure*.

I.

Facts and Background

Following completion of his undergraduate studies in 2002, Mr. Hamm was issued Professional Teaching Certificates in Driver Education, Health Education, and Social Studies. In 2004, Mr. Hamm applied for employment with the Mason County Board of Education for a position at the Point Pleasant Middle School (“PPMS”) teaching children with "Specific Learning Disabilities, Mentally Impaired Mild-Moderate, and Autism." Because Mr. Hamm was not certified to teach in that field, he was required to obtain an "out-of-field" authorization from the State Superintendent. Mr. Hamm submitted the required application and the State Superintendent granted Mr. Hamm out-of-field authorization for the 2004-2005 academic year. Mr. Hamm was subsequently hired by the Mason County Board of Education to teach "autistic, mentally impaired and learning disabled

children" at PPMS. The out-of-field authorizations were subsequently renewed by the State Superintendent for the 2005-2006 academic school year.

In late January or early February of 2006, Mrs. B¹, a married teacher working at PPMS, notified the school's principal that Mr. Hamm was harassing her. Mrs. B complained that Mr. Hamm had been sending her emails, calling her, coming uninvited into her classroom, and that Mr. Hamm appeared to be seeking an extra-marital sexual relationship with her. Mrs. B said that the situation made her extremely uncomfortable and that she wanted it to stop. A decision was made to try and address Mrs. B's complaint "at an informal level." At the principal's suggestion, Mrs. B sent a letter to Mr. Hamm telling him to stop contacting her. The principal also spoke with Mr. Hamm, telling him to stop contacting Mrs. B and giving him a copy of the school's sexual harassment policy.

Following this informal process, the situation did not improve. Mr. Hamm continued sending emails to Mrs. B, entering uninvited into her classroom, and sending notes to Mrs. B through her students. Mr. Hamm also began telling Mrs. B's co-workers that he was having an affair with her. On February 10, 2006, an exasperated Mrs. B emailed Mr. Hamm as follows: "Stop e-mailing me!!!" In response, Mr. Hamm sent Mrs. B an expletive filled email with the subject line reading "Hello death." In the body of the email, Mr. Hamm intimated that he "might just overdose," that he was "extremely miserable in his marriage," that Mrs. B's "students are inbred with an IQ below 70," and that her "f***ing husband is a g**d*** hypocrite [sic]." Mr. Hamm continued to contact Mrs. B, including sending her a CD of "sad songs" that he had compiled and an email reading entirely as follows: "We are but a moments sunlight fading in the grass!" On April 12, 2006, Mrs. B filed a formal complaint against Mr. Hamm, which was investigated by the Board of Education.

On July 1, 2006 – and while the Board's investigation remained open – Mr. Hamm applied for the renewal of his out-of-field teaching authorization, which expired on June 30th. Shortly thereafter, the Board's investigation of Mrs. B's complaint was completed. After receiving a copy of the investigation, the Mason County School Superintendent, Dr. Larry Parsons ("County Superintendent"), sent Mr. Hamm a letter informing him that he had been found to be "in violation of the District's Sexual Harassment policy" and that he was being suspended for five days without pay, commencing at the start of the 2006-2007 school year. Mr. Hamm appealed the five day suspension.

¹Given the sensitive nature of Mrs. B's involvement in the matter below, she will be referred to herein only as "Mrs. B" rather than by using her full surname. *See, e.g., Tackett v. American Motorists Insurance Co.*, 213 W.Va. 524, 526 n. 1, 584 S.E.2d 158, 160 n. 1 (2003).

On July 24, 2006, the County Superintendent recommended that the State Superintendent grant Mr. Hamm's renewal application. The County Superintendent would later testify that while he had reservations about giving Mr. Hamm a favorable recommendation because of the sexual harassment findings, it was his hope that Mr. Hamm, who was young and who claimed that his improper conduct was the consequence of depression, might learn from the situation and be able to move on and continue teaching.

Three months later, on October 25, 2006, Mr. Hamm was arrested and charged with two misdemeanor criminal offenses. One of the charges alleged that Mr. Hamm made harassing telephone calls to Mrs. B. The second charge alleged that Mr. Hamm was stalking Mrs. B. At the time of this arrest, the State Superintendent had not taken any action on Mr. Hamm's renewal application. The County Superintendent investigated the arrest and concluded that it was based upon the same conduct for which he had previously suspended Mr. Hamm. Because he had already disciplined Mr. Hamm for that conduct, the County Superintendent did not believe any further action was warranted.

Mr. Hamm was again arrested on December 28, 2006, for domestic battery of his wife and for possession of an illegal controlled substance (marijuana less than 15 grams). The County Superintendent investigated this arrest by obtaining copies of the police reports and speaking with law enforcement officers and others who had knowledge of the circumstances surrounding the events that led to Mr. Hamm's arrest. From this investigation, the County Superintendent concluded that Mr. Hamm's children, ages three and eight, were in the house at the time of the alleged domestic battery, that Mr. Hamm had smoked the marijuana while the children were in the house, and that Mr. Hamm admitted to law enforcement officers that he occasionally smoked marijuana. At the time of Mr. Hamm's December arrest, his application seeking the renewal of his out-of-field teaching authorization remained pending in the State Superintendent's office.

After concluding his investigation, the County Superintendent sent a letter dated January 2, 2007, to the State Superintendent notifying him that he was withdrawing his recommendation for approval of Mr. Hamm's July 1, 2006, application to renew his out-of-field teaching authorization. In this letter, the County Superintendent wrote, in part, that:

Mr. Hamm was recently charged with a number of misdemeanor offenses, including domestic battery and possession of a controlled substance. My communication with law enforcement officials concerning Mr. Hamm's conduct, resulting in these charges, indicated that he exhibited violent behavior in the presence of his children and was found smoking marijuana in his home.

Thereafter, the Assistant Director for the West Virginia Department of Education, Office of Professional Preparation ("OPP"), sent a letter to Mr. Hamm dated January 11, 2007, informing him that his application for an out-of-field teaching authorization was denied.

After learning that the Department of Education had denied Mr. Hamm's out-of-field teaching authorizations, the County Superintendent sent a letter to Mr. Hamm informing him that he "lacked the necessary credentials to perform [his] assignment as a classroom teacher" and, as a result of that lack of credentials, he was "compelled to recommend the termination of [his] employment on grounds of incompetence." The letter informed Mr. Hamm that the Mason County Board of Education would consider his recommendation at a hearing on February 15, 2007.

Prior to the "termination hearing" before the Mason County Board of Education, Mr. Hamm filed a petition for appeal to the State Superintendent, pursuant to *W.Va. Code*, 18A-3-3(e) [2007], which permits a county superintendent's refusal to give a favorable recommendation for renewal of a teaching certificate, permit, or other authorization to be challenged as having been withheld "without just cause" or as having been "arbitrarily" withheld. The State Superintendent directed that a hearing be held, and designated an employee of his office as the "Hearing Examiner."² This hearing commenced on April 20, 2007, and the Department of Education presented its evidence and supporting documents. The hearing was then recessed, by agreement, for approximately six weeks. On May 31, 2007, the hearing resumed and Mr. Hamm presented his evidence and supporting documents. After Mr. Hamm finished presenting his evidence, counsel for the parties agreed to submit proposed findings in lieu of making a final argument.

After receiving the parties' proposed findings, the Hearing Examiner issued her written findings and recommendation, concluding that the County Superintendent's decision to withdraw his recommendation was not arbitrary and that the County Superintendent had

²We note that *W.Va. Code*, 18A-3-3(e) [2007], requires only that the State Superintendent "investigate" a petition for appeal filed thereunder. While in this particular case the State Superintendent chose to hold a formal hearing to aid in his investigation of Mr. Hamm's petition, the parties have pointed to no statute, regulation or policy that would actually require a formal "administrative hearing" before the State Superintendent can be said to have fulfilled his duty to "investigate" a petition for appeal filed pursuant to *W.Va. Code*, 18A-3-3(e) [2007]. Accordingly, any reference in this Memorandum Decision to "hearing" should not be construed to imply that we today hold that such a formal hearing is actually required as that issue is not before us.

just cause for withdrawing his recommendation. The Hearing Examiner recommended that the State Superintendent deny Mr. Hamm's petition for appeal. On June 22, 2007, the State Superintendent accepted the recommendations of the Hearing Examiner and denied Mr. Hamm's petition for an appeal.

Mr. Hamm thereafter filed a petition for appeal of the State Superintendent's denial to the Circuit Court of Mason County. Following briefing and oral argument, the circuit court reversed the State Superintendent's denial of Mr. Hamm's petition for appeal, and ordered that Mr. Hamm be provided a new "administrative" hearing. In reversing, the circuit court found that Mr. Hamm's due process rights had been violated.

II. Discussion

The circuit court found that Mr. Hamm's due process rights had been violated by: (1) the Hearing Examiner's admitting into evidence facts and circumstances unknown to the County Superintendent at the time he withdrew his favorable recommendation of Mr. Hamm's application; (2) the Department of Education's failure to disclose, before the first day of the hearing, a "multitude" of exhibits; and, (3) the Hearing Examiner barring Mr. Hamm from calling two rebuttal witnesses. The State Superintendent argues that the circuit court erred in finding that Mr. Hamm's due process rights were violated and that Mr. Hamm was entitled to a new hearing. We address each of these findings separately.

Evidentiary Issues. On February 15, 2007, the Mason County Board of Education held a hearing to consider the County Superintendent's recommendation to terminate Mr. Hamm's employment. The evidentiary issues before us largely arise from the admission of a transcript of that hearing. This transcript contained information that the County Superintendent was not aware of and, therefore, did not consider when he made the decision to withdraw his recommendation. While we concur with the circuit court's finding that the transcript should not have been admitted, we do not find that its admission requires reversal of the State Superintendent's denial of Mr. Hamm's petition for appeal or a remand to the State Superintendent for a new hearing. In Syllabus Point 6, *Kanawha Valley Transportation Co., v. Public Service Commission*, 159 W.Va. 88, 219 S.E.2d 332 (1975), we considered a similar issue and held that:

Where an administrative agency entertains both proper and improper evidence and the proper evidence is sufficient to sustain its order, the reviewing court will not reverse unless it is clear that the agency rested its conclusions primarily on the improper evidence.

Reviewing the record before us, we cannot conclude that the State Superintendent "rested its conclusions primarily on the improper evidence." *Id.* Even were we to accept, *arguendo*, that all evidence *challenged* as having been improperly admitted should be excluded, the admissible evidence more than sufficiently established that the County Superintendent had just cause for his decision and that he did not act arbitrarily in making that decision.

The admissible evidence considered by the County Superintendent shows that over the course of a several week period, Mr. Hamm sexually harassed and otherwise engaged in grossly improper and offensive conduct towards a married female co-worker. This conduct alone could have formed a reasonable, justified, basis for the County Superintendent to immediately terminate Mr. Hamm's employment. However, instead of terminating Mr. Hamm at that time, the County Superintendent testified that he tried to correct Mr. Hamm's improper behavior by disciplining him with a five-day unpaid suspension. In explaining that decision, the County Superintendent testified that he at that time had hope that Mr. Hamm, who he saw as a young teacher with promise, would amend his improper behavior.

As we have noted in our recitation of the factual background of this appeal, Mr. Hamm was subsequently arrested for stalking the same female co-worker and for making harassing telephone calls to her. Approximately two months later Mr. Hamm was again arrested, this time for the domestic battery of his wife and for the possession of an illegal controlled substance. The County Superintendent learned that Mr. Hamm had physically abused his wife, and that the abuse occurred in the presence of Mr. Hamm's minor children. The circumstances also revealed that Mr. Hamm admitted to both possessing and using an illegal controlled substance – marijuana – and that Mr. Hamm used this substance in the presence of minor children. The County Superintendent came to the conclusion that Mr. Hamm was not fit to be in the classroom, and felt compelled to withdraw his recommendation.

We find that the evidence properly admitted and considered by the State Superintendent clearly establishes that the County Superintendent's decision to withdraw his recommendation of Mr. Hamm was deliberative, measured, and not arbitrary. Similarly, that same evidence clearly establishes that the County Superintendent had "just cause" for withholding his recommendation that the State Superintendent grant Mr. Hamm's application for renewal of the out-of-field teaching authorization.

Discovery Issues. The circuit court found that the State Superintendent failed to disclose a "multitude" of exhibits to Mr. Hamm prior to the hearing on his petition for appeal and, as a consequence of that failure, Mr. Hamm's due process rights were violated. We disagree.

We find no support in the record that Mr. Hamm was not provided meaningful discovery, with the single exception of the Board of Education's investigative report of the sexual harassment allegations. The record shows that the "multitude" of exhibits referred to by the circuit court were primarily the emails sent between Mr. Hamm and Mrs. B. Reviewing the record, we find this to be somewhat of a contrived issue. We do find that to the extent that the Department of Education was going to introduce the investigative report, it should have been provided to Mr. Hamm in advance of the hearing. However, the record shows that the report was introduced during the first hearing on April 20, 2007, and that a six-week recess occurred before the hearing resumed on May 31, 2007. Mr. Hamm's lawyers had six-weeks to review the document before presenting their evidence at the second hearing. This recess cured any prejudice that may have been occasioned as a result of the failure to timely provide Mr. Hamm with the investigative report or any other documents presented by the Department of Education.

Witness exclusion. The final due process issue arises from the Hearing Examiner's decision that Mr. Hamm could not call two rebuttal witnesses. The circuit court concluded that the exclusion of these witnesses violated Mr. Hamm's due process rights on the grounds that he was entitled to present a defense to the "charges" against him.

Prior to commencement of the hearing, a motion to sequester witnesses who might be called to testify was granted. Mr. Hamm did not sequester the two witnesses at issue (Mr. Hamm's father- and mother-in-law) and, as a consequence, they observed all of the testimony presented during the course of the hearing. Mr. Hamm argues that it was prejudicial error to prevent him from calling these two witnesses to testify. We do not find that argument persuasive based upon the record before us.

While the Hearing Examiner barred Mr. Hamm from calling the two witnesses, Mr. Hamm was permitted to vouch the record as to the testimony these witnesses would provide. *W.Va. Code*, 29A-5-2(a),³ specifically provides that: "[i]n contested cases irrelevant, immaterial, or unduly repetitious evidence shall be excluded." Reviewing the proffer made by Mr. Hamm, we find that the testimony would have been largely repetitious and unhelpful in terms of providing any new information.

³We reiterate our comment in n.2, *supra*.

III. Conclusion

The undisputed evidence is overwhelmingly supportive of the conclusion that the County Superintendent did not act arbitrarily and that the County Superintendent had just cause for withdrawing his recommendation of Mr. Hamm. We therefore reverse the circuit court and remand this matter with directions that the circuit court enter an order affirming the State Superintendent's denial of Mr. Hamm's petition for appeal.

Chief Justice Workman, deeming herself disqualified, did not participate in the decision of this appeal. Judge Groh sitting by temporary assignment.

Reversed and Remanded.

ISSUED: February 16, 2011

CONCURRED IN BY:

Acting Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

Judge Gina M. Groh, Temporarily Assigned

Chief Justice Workman Disqualified.