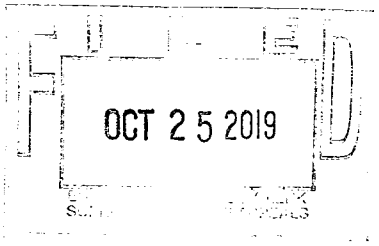
BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS



DEBRA LYNN WHEELER and CATHY McCOMAS,
Petitioners,

v. **Appeal No. 19-0687**

LINCOLN COUNTY BOARD OF EDUCATION,
Respondent.

BRIEF FILED ON BEHALF OF PETITIONERS WHEELER AND McCOMAS

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ISSUES PRESENTED[1]

- Did the Circuit Court err in holding that the Administrative Law Judge should not have considered the Respondent's job description for the Executive Secretary classification title?

[1] In the Notice of Appeal Petitioners listed the following issue: Did the circuit court apply an inappropriate standard of review to the decision of the Administrative Law Judge by substituting its judgement for his? However, after review of the case law, it appears that the prohibition against substituting the circuit court's opinion for that of the Administrative Law Judge applies to credibility judgements and other factual issues. Although it is clear that the Circuit Court substituted its judgement for the Administrative Law Judge, this occurred on legal issues and the application of the law to the facts. Accordingly, Petitioners will not be pursuing that particular issue in this appeal.

- Did the Circuit Court err in holding that Respondent's job description for the Executive Secretary classification title was contrary to law?

- Did the Circuit Court err in affirming the finding of the Administrative Law Judge that Petitioners' supervisors did not have significant administrative duties within the meaning of the statutory definition of the Executive Secretary classification title?

- Did the Circuit Court err in holding that Petitioners were excluded from holding a classification other than Secretary III by their assignment to particular departments referenced in the statutory definition of Executive Secretary?

- Does the Circuit Court order permit the recovery of wages paid to Petitioners pursuant to the level III grievance decision?[2]

- Is it arbitrary and capricious to permit recovery of wages paid pursuant to a level III grievance decision under the circumstances of the current case? [3]

STATEMENT OF CASE

[2] Petitioners notified Respondent of this issue on September 27, 2019 as provided in the scheduling order. Respondent objected to assertion of this issue.
[3] Petitioners notified Respondent of this issue on September 27, 2019 as provided in the scheduling order. Respondent objected to assertion of this issue.

- Party Identification

The **Lincoln County Board of Education,** hereinafter referenced as Respondent[4], is a quasi-public corporation created by statute for the management and control of the public schools of Kanawha County, West Virginia. The West Virginia Department of Education was originally a party as it had intervened into the operation of Lincoln County Schools pursuant to West Virginia Code §18-2E-5, However, prior to the entry of the Circuit Court order, it had returned control to Respondent.[5] **Debra Lynn Wheeler and Cathy McComas, Petitioners[6],** were regularly employees in the secretarial category assigned to Respondent's central office. They were classified as Secretary III prior to the initiation of the employment grievance underlying this appeal.

- Procedural History

Petitioners initiated a grievance seeking reclassification to the Executive Secretary classification title pursuant to West Virginia Code §6C-2-1, et seq., on February 14, 2011. A conference was held at level I of the grievance procedure on February 22, 2011. A decision denying the grievance was issued at level I on March 3, 2011.

Petitioners appealed to level II of the grievance procedure, which was a mediation. By order dated March 30, 2011, Petitioners' grievances were consolidated with the similar

[4] The Lincoln County Board of Education filed the appeal to the circuit court of the level III decision granting the grievance. Accordingly, it was the Petitioner at the Circuit Court level. For clarity, the Lincoln County Board of Education will be identified in this document as the Respondent regardless of what level of the grievance procedure or appeal process a particular passage references.

[5] **Appendix p. 336**

[6] Ms. Wheeler and Ms. McComas will be identified as Petitioners throughout this document regardless of what level of the grievance procedure or appeal process a particular passage references.

grievances of two other employees, Susie McCann and Tammy Parsons. A mediation session was held on June 8, 2011. The grievance could not be resolved at that level.

Petitioners appealed to level III on June 21, 2011. The Administrative Law Judge held evidentiary hearings at level III on February 27, 2012, February 29, 2012, and August 29, 2012.[7] By decision dated April 17, 2013, Administrative Law Judge granted the grievance in part and denied the grievance in part. The Administrative Law Judge held that Petitioners did not meet the statutory definition of Executive Secretary because the administrators to whom they were assigned did not have positions characterized by significant administrative duties. However, he held that Petitioners did meet the Respondent's county job description for Executive Secretary. Accordingly, he granted Petitioners' reclassifications to Executive Secretary with back pay.

Respondent filed an appeal to Kanawha County Circuit Court on or about May 22, 2013. Respondent also paid Petitioners the back pay ordered by the Administrative Law Judge and began paying them at the higher rate of pay.[8] Respondent filed its brief on August 15, 2013. Petitioners filed a response brief on September 13, 2013. Respondent filed a reply brief on or about October 1, 2013. There the matter rested for more than five and a half years.

By order entered June 27, 2019, the Circuit Court reversed the decision of the Administrative Law Judge in part and affirmed it in part. The Circuit Court affirmed the ruling that Petitioners did not meet the statutory definition because the administrators to whom they

[7] Administrative Law Judge Stollings-Parr conducted the first two hearings. She took new employment prior to the third and concluding day of hearing, which was conducted by Administrative Law Judge William McGinley who issued the level III decision.

[8] The record, which ends with the Circuit Court decision, contains no information concerning these post-order occurrences. The undersigned asserts that these actions did occur and believes that they will not be controverted.

were assigned did not have positions characterized by significant administrative duties. The Circuit Court did not rule that Petitioners failed to meet the county job definition of Executive Secretary. However, it ruled that the Administrative Law Judge should not have considered the county job description since it was not introduced until level III and that the county job description was contrary to law. The Circuit Court order did not refer to overpayments to Petitioners based upon the Executive Secretary pay rate. After receipt of the Circuit Court's order, Respondent ceased paying Petitioner Wheeler[9] at the Executive Secretary rate of pay and advised both Petitioners that it would seek reimbursement for the approximately eight years that Petitioners had received the Executive Secretary pay rate and supplement.[10]

Petitioners filed a Notice of Appeal of the Circuit Court order to the West Virginia Supreme Court of Appeals on July 29, 2019.

- Statement of Facts[11]

Petitioner Wheeler is the secretary for Respondent's maintenance department.[12] Dana Smith, Director of Maintenance, was her supervisor. She was classified as a Secretary III and worked a 240-day employment term. Director of Maintenance Smith was responsible for maintaining all of the Board's buildings and facilities. He supervised six employees and oversaw a budget exceeding three million dollars per year. Maintenance of the Respondent's facilities is

[9] By this point, Petitioner McComas had already retired.
[10] The record, which ends with the Circuit Court decision, contains no information concerning these post-order occurrences. The undersigned asserts that these actions did occur and believes that they will not be controverted.
[11] The factual statement of duties of the Petitioners and their supervisors is based on the time the grievance was filed and the time period preceding it.
[12] The following recitation of the duties and responsibilities is drawn heavily, if not quite verbatim, from the Findings of Fact of the Administrative Law Judge in the level III decision. **Appendix pp. 257 - 263**

essential to the health and safety of staff and students, as well as the successful completion of the Respondent's mission.

In addition to providing routine secretarial and clerical services to Director Smith, Petitioner Wheeler assigned the daily jobs to maintenance workers and has been delegated the authority to prioritize the order of assignments. Among other duties, Petitioner Wheeler prepared the payroll for the maintenance department, contacted independent contractors for specific work, ordered supplies and coordinated in-service training for maintenance workers.

Tina Black is also assigned to Respondent's central office and is multi-classified as Receptionist/Switchboard Operator, Executive Secretary and Clerk II. Her direct supervisor is Assistant Superintendent Midkiff. In addition to answering the telephone and transferring calls, Ms. Black is responsible for calling out all professional and service personnel substitutes between 8:00 a.m. and 4:00 p.m. Ms. Black also monitors the security cameras for the central office building in addition to providing general secretarial and clerical services as needed.[13] At the beginning of the 2011-2012 school year, a rotation was established so that all Central Office secretaries took turns filling in for one hour for Ms. Black. Petitioner Wheeler took part in the rotation to cover the one hour of time when Tina Black was at lunch.[14]

Petitioner McComas was employed by Respondent in the Secretary III classification and had a 240-day employment term.[15] Her direct supervisor was Charlene Colburn, Respondent's Federal Program Director/Literacy Supervisor. Petitioner McComas also worked for Danny

[13] **Appendix p.262**

[14] The record does not indicate whether this rotation is still in existence and if not, when it ceased functioning.

[15] The following recitation of the duties and responsibilities is drawn heavily, if not quite verbatim, from the Findings of Fact of the Administrative Law Judge in the level III decision. **Appendix pp. 256 - 257**

Dailey, Respondent's Technology Director and Danna Snyder, Respondent's Director of Special Programs.

- As Director of Federal Programs, Ms. Colburn writes grants securing significant amounts of federal funding for Respondent's programs, and she oversees these programs.
- The Director of Technology, Danny Dailey, was responsible for planning, purchasing and maintaining technology equipment for Lincoln County schools. A large amount of money was involved in this process. Director Dailey oversaw the federal program for virtual learning (ERATE), and the Tools for Schools program.
- Dana Snyder, Director of Special Projects, is responsible for the system-wide student assessment and is responsible for 21st Century and Counseling grants.

The duties and responsibilities of each of the supervisors described above, Dana Smith (Wheeler), Charlene Colburn (McComas), Danny Dailey (McComas), and Dana Snyder (McComas), are important to the successful operation of Respondent's school system. The Administrative Law Judge made a Findings of Fact in the level III decision in this grievance that:

> [Respondent's] Directors have substantial administrative duties that are comparable in difficulty and responsibility.[16]

[16] **Appendix p. 263**, Level III decision, Finding of Fact #25

It appears from the context that he meant these Directors' duties were comparable in difficulty to the duties of the Superintendent, Assistant Superintendent, and the Treasurer because in the next sentence the Administrative Law Judge continued:

> However, they [Respondent's Directors] are lower on the administrative hierarchy than the Assistant Superintendent, Treasurer and Superintendent.[17]

In any event, Petitioner McComas provided secretarial and clerical services to Director Colburn, including but not limited to, handling telephone calls and electronic communications, preparing correspondence, scheduling events, completing reports and maintaining a website related to professional development. Ms. Petitioner McComas' duties require her to spend a little more than half her time working for Director Colburn and the remainder of her time was split between the other two directors.

Prior to the 2011-2012 school year, Petitioner McComas also filled in for Tina Black for one hour each day to give Ms. Black a lunch break. Like Petitioner Wheeler, Petitioner McComas was part in the rotation of secretaries filling in for Ms. Black that was established at the beginning of the 2011-2012 school year.

Brenda Powell was a secretary assigned to then Superintendent Patricia Lucas. Joanne Adkins, Tina Black and Angela Prichard were secretaries assigned to Assistant Superintendent Jeff Midkiff. Marsha Weaver, Trina Barrett, and Darlene Neil were secretaries assigned to

[17] **Appendix p. 263**, Level III decision, Finding of Fact #25

Treasure Birdie Gandy. These secretaries held the classification title of Executive Secretary as their classification or as part of a multiclassification title.[18]

Both Petitioners perform nearly all the duties listed in Respondent's job descriptions for Secretary III and Executive Secretary.[19] Of importance to the current litigation, Respondent's job description for Executive Secretary provided, under the rubric of "Responsibilities" of an Executive Secretary:

> ... to serve as secretary to specific department/department head, assisting to assure that the office operates smoothly and efficiently.[20]

Further, under the rubric of "Relationships to Others", Respondent's job description for Executive Secretary provided the following:

> Works under the direct supervision of the department head/director.[21]

The foregoing job descriptions were offered into evidence at the level III hearing. There was no evidentiary record at the first two levels, a conference at level I and a mediation at level II. The Petitioners' level III appeal form referenced county policies, but their level I and level II forms did not.

[18] **Appendix pp. 252 & 260 - 262**
[19] **Appendix pp. 220-221, 241-242, & 259**
[20] **Appendix p. 220**
[21] **Appendix p. 220**

As can be seen from the foregoing descriptions of the duties of the Petitioners, both worked under the direct supervision of an administrator or administrators who are the department head or the director of a department. These administrators have substantial administrative duties comparable in difficulty and responsibility to those performed by the Superintendent, Assistant Superintendent and Treasurer.

After receipt of the level III appeal, Respondent paid Petitioners back wages as awarded by the Administrative Law Judge and began compensating them as Executive Secretaries.[22] Respondent filed an appeal to Circuit Court but did not request a stay. Petitioners did not seek enforcement of the level III decision. After receipt of the Circuit Court final order, Respondent ceased paying Petitioners as Executive Secretaries and advised Petitioners that it would seek recovery of the back pay and additional pay already provided to Petitioners since the level III decision.[23]

SUMMARY OF ARGUMENT

The Circuit Court erred in holding that the county job description for the Executive Secretary classification title should not have been taken into account because it was not referenced in the level I and level II grievance forms. The statutes related to the grievance procedure only require that the nature of the grievance be described. The statutes do not require that the form and the information inserted into that form remain identical from one

[22] The record, which ends with the Circuit Court decision, contains no information concerning these post-order occurrences. The undersigned asserts that these actions did occur and believes that they will not be controverted.
[23] The record, which ends with the Circuit Court decision, contains no information concerning these post-order occurrences. The undersigned asserts that these actions did occur and believes that they will not be controverted.

level of the grievance procedure. Indeed, the statutes do not require that a particular form be used at all, though the procedural rules of the Grievance Board make use of the standard form a mandatory. These procedural rules do not require that the level III grievance appeal form be identical to that utilized at levels I and II.

The Circuit Court erred in concluding that the county job description for the Executive Secretary classification title was contrary to law. The county job description for the Executive Secretary classification title merely expands the statutory definition of the Executive Secretary classification title without contravening it.

The Circuit Court erred in affirming the decision of the Administrative Law Judge's conclusion that Petitioners did not meet the statutory definition of Executive Secretary. The Administrative Law Judge held that Petitioners' supervisors had significant administrative duties. This finding entitled Petitioners to the Executive Secretary classification title by the terms of the statutory definition of Executive Secretary. The fact that the Superintendent, Assistant Superintendent and Treasurer are higher on the Respondent's administrative hierarchy is irrelevant.

The Circuit Court did not address the question of whether Respondent could recover compensation paid over a period of eight years to Petitioners at the Executive Secretary rate. Permitting Respondent to recover this money would be arbitrary and capricious given the circumstances, i.e., Respondent's compliance with the level III order was voluntary, the lengthy passage of time between the level III decision and the Circuit Court's reversal of the same, and the accrual of potential "overpayment" that resulted form the passage of time.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners believe that the facts and legal arguments will be adequately presented in the briefs and record on appeal but welcomes the opportunity for oral argument if the Court determines that oral argument would be helpful or necessary.

ARGUMENT

Prior to addressing the issues peculiar to this case, Petitioners will address two general issues common to all appeals to the West Virginia Supreme Court of Appeals arising from Circuit Court decisions on administrative appeals from the West Virginia Public Employees Grievance Board. The first of these issues is the standard of review that this Court must apply to this case. The second is the statutory construction to be applied to laws pertaining to school personnel.

STANDARD OF REVIEW

In Darby v. Kanawha County Board of Education, 711 S.E.2d 595 (W. Va. 2011), the West Virginia Supreme Court of Appeals explained that the standard of review that it applies to circuit court decisions is identical to the standard applied by circuit courts to decisions of Administrative Law Judges of the West Virginia Public Employees Grievance Board pursuant to West Virginia Code §6C-2-5(b). Accordingly, West Virginia Code §6C-2-5(b), which sets the

standard for review of Grievance Board decisions by circuit courts is of some relevance to the current appeal to the West Virginia Supreme Court of Appeals. This section provides:

> A party may appeal the decision of the administrative law judge on the grounds that the decision:
> (1) Is contrary to law or a lawfully adopted rule or written policy of the employer;
> (2) Exceeds the administrative law judge's statutory authority;
> (3) Is the result of fraud or deceit;
> (4) Is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
> (5) Is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In Darby the Court continued, quoting Martin v. Randolph County Board of Education, 465 S.E.2d 399 (W.Va. 1995), to hold,

> [The circuit court] must uphold any of the ALJ's factual findings that are supported by substantial evidence, and we owe substantial deference to inferences drawn from these facts. Further, the ALJ's credibility determinations are binding unless patently without basis in the record. Nonetheless, this Court must determine whether the ALJ's findings were reasoned, *i.e.,* whether he or she considered the relevant factors and explained the facts and policy concerns on which he or she relied, and whether those facts have some basis in the record. We review *de novo* the conclusions of law and application of law to the facts.

Quoting Cahill v. Mercer County Board of Education, 539 S.E.2d 437 (W. Va. 2000), the Court held that:

> 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.

Finally, quoting Randolph County Board of Education v. Scalia, 387 S.E.2d 524 (W.Va. 1989), the Court added:

> [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.

- STATUTORY CONSTRUCTION

The long-standing rule regarding statutory construction of laws and regulations dealing with school personnel is that such laws and regulations are to be strictly construed and in favor of the employee(s) that the law or regulation is designed to protect. Morgan v. Pizzino, 256 S.E.2d 592 (W.Va. 1979).

- The Circuit Court erred in holding that the Administrative Law Judge should not have considered the Respondent's job description for the Executive Secretary classification title.

The Circuit Court held that West Virginia Code §6C-2-3(j) requires the West Virginia Public Employees Grievance Board prepare and make available grievance forms for the use by employees filing a grievance. The Circuit Court stated that the grievance form provided by the West Virginia Public Employees Grievance Board requires that the grievant "list the specific statues, policies, rules, regulations or agreements you claim have been violated, misapplied or misinterpreted."[24] The Petitioners did not specifically mention the Respondent's job descriptions on the Level I and II grievance forms that Petitioners themselves prepared. The Level III appeal form, prepared by counsel, does reference "Respondent's policies".[25] Based on the foregoing, the Circuit Court ruled that:

> Issues not raised in the Level One grievance forms should not have been entertained by the ALJ at Level Three, and the decision to address the new allegations regarding job descriptions exceeded the ALJ's authority and was arbitrary and capricious, and therefore, erroneous.[26]

There are several problems with this pronouncement by the Circuit Court. First, West Virginia Code §6C-2-3(j) merely provides:

> Forms. -- The board shall create the forms for filing grievances, giving notice, taking appeals, making reports and recommendations and all other necessary documents and provide them to chief administrators to make available to any employee upon request.

The language does not address what the grievance forms must or, indeed, should contain. It does not make use of the grievance form prepared by the West Virginia Public

[24] **Appendix p. 4**
[25] **Appendix p. 17**
[26] **Appendix p. 4**

employees Grievance Board mandatory to initiate a grievance. The statutory language does not address the question of what information an employee must place in the grievance form or what the consequences of an omission might be.

The Rules Of Practice And Procedure Of The West Virginia Public Employees Grievance Board 156CSR1 provide a little more guidance.[27] Use of the form generated by the West Virginia Public Employees Grievance Board is mandated. 156CSR1, §4.1.

The question of what information a grievance form should contain in order to initiate the grievance process is found in West Virginia Code §6C-2-4(a)(1) which provides:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. The employee shall also file a copy of the grievance with the board. State government employees shall further file a copy of the grievance with the Director of the Division of Personnel.
> (Emphasis Added)

There is no basis in the statutory language for a conclusion that omission by a grievant of mention of a policy in the level I grievance form prohibits the Administrative Law Judge from considering such a policy in deciding the grievance. The statutory language requires the

[27] The current rules went into effect on August 27, 2018. The version of the rules that were in effect at the time the grievance arose, effective July 5, 2008, are the same on this point. The earlier version of the rules may be found at http://apps.sos.wv.gov/adlaw/csr/ruleview.aspx?document=6823 .

grievant to state the nature of the grievance and the relief sought. Petitioners did that on their level I and level II grievance forms, though perhaps not as articulately as one would desire.

There is also no statutory basis for the pronouncement of the Circuit Court that:

> The same form, once completed by the grievant, is to be reused when appealing to Level Two and Three.[28]

Regarding appeals from level I to level II, West Virginia Code §6C-2-4(b)(1) provides:

> Within ten days of receiving an adverse written decision at level one, the grievant shall file a written request for mediation, private mediation or private arbitration.

Regarding appeals from level II to level III, West Virginia Code §6C-2-4(c)(1) provides:

> Within ten days of receiving a written report stating that level two was unsuccessful, the grievant may file a written appeal with the employer and the board requesting a level three hearing on the grievance. State government employees shall further file a copy of the grievance with the Director of the Division of Personnel.

The word "form" is not defined in the statute, but is commonly defined as:

> A printed document with blank spaces for information to be inserted[29]

Having established exactly what the statutes state, let us examine the Circuit Court's conclusion. First, the statute does not require that a particular form be used to appeal from one

[28] **Appendix p. 339**

[29] The New Oxford American Dictionary (2nd Ed. 2005)

level to the next, much less the same form. Again, the Rules Of Practice And Procedure Of The West Virginia Public Employees Grievance Board 156CSR1 are more specific. The original form or a copy must be used in appealing from a level I decision to level II. 156CSR1, §5.1.1. *However, no such requirement is stated with regard to an appeal from level II to level III.* See 156CSR1, §6.1 generally.[30]

The Petitioners *did* use the same "printed document with blank spaces" for each level of the appeal. In reality, though, it is apparent that what the Circuit Court found objectional was not the printed form, but rather the difference in the information inserted into those blank spaces for the "Statement of Grievance" at level III. Again, the statutory language does not specify or imply that the information on the "Statement of Grievance" be identical from the level I grievance through the appeal to level III. Though such a requirement regarding the level I and II forms may be read into the "original or copy" language of 156CSR1, §5.1.1, it is not present regarding the appeal from level II to level III.

There is no basis in statute or rule for removal from consideration any policy not mentioned on the original grievance form. In fact, the latter, at 156CSR, 6.12[31], provides the following suggestive language:

> ... if a party intends to assert the application of any statute, policy, rule, regulation, or written agreement or submits any written response to the filed grievance at any level, a copy is to be forwarded to the grievant and any representative of the grievant named in the grievance. .

[30] The current rules went into effect on August 27, 2018. The version of the rules that were in effect at the time the grievance arose, effective date July 5, 2008, are the same on this point. The earlier version of the rules may be found at http://apps.sos.wv.gov/adlaw/csr/ruleview.aspx?document=6823 .

[31] The current rules went into effect on August 27, 2018. The prior version of the rules that were in effect at the time the grievance arose, effective July 5, 2008, are the same on this point. The earlier version of the rules may be found at http://apps.sos.wv.gov/adlaw/csr/ruleview.aspx?document=6823 .

This language, though it could have been drafted a little more clearly, implies that applicability of a policy can be asserted at any level and not just at level I.

By the foregoing argument, Petitioners are not suggesting that a grievant can completely change the nature of a grievance by simply rewriting the statement of grievance when appealing to level III. For example, a grievance concerning the filling of a vacant Custodian III position cannot be transformed into a challenge of a negative assessment on a performance evaluation by a few strokes of the keyboard. That is not what occurred in the present case. The essential nature of the case, i.e., that Petitioners were entitled to reclassification to the Executive Secretary classification title and the additional compensation the comes with that title, never changed.

Finally, Petitioners ask this Court to take note of the fact that the form made available by the Grievance Board itself does not clearly indicate that listing all statutes or policies is mandatory under pain of exclusion of omitted statutes or policies references from consideration in the grievance. The Circuit Court quotes only a portion of the directions given for the Statement of Grievance from the designated form. The full quote from that form is:

> (Please state the event causing the grievance and list the specific statutes, policies, rules, regulations or agreements you claim have been violated, misapplied or misinterpreted. Additional sheets may be attached.)
> (Emphasis Added)

The word "please" is appropriately described as

> Used in polite requests or questions[32]

[32] The New Oxford American Dictionary (2nd Ed. 2005)

Let us put all of these matters in perspective. The purpose of the grievance procedure is supposed to provide a simple, expeditious and fair method of resolving disputes between employer and employee. See West Virginia Code §6C-2-1. The ruling of the Circuit Court in this case defeats that purpose. Perhaps foreseeing such situations arising, the West Virginia Supreme Court of Appeals held in Spahr v. Preston County Board of Education, 182 W.Va. 726, 730, 391 S.E.2d 739, 743 (1990):

> We do not believe that the legislature intended the grievance process to be a procedural quagmire where the merits of the cases are forgotten. In many instances, the grievant will not have a lawyer; therefore, the process should remain relatively simple.

It is as if the Court in Spahr had the current situation in mind. Petitioners, layman both, did not list a supporting document, the county job description for Executive Secretary, on their grievance forms. As a consequence, the Circuit Court removed from consideration this important part of their case.

Petitioners note that the holding of the West Virginia Supreme Court of Appeals in Spahr was not an aberration. The West Virginia Supreme Court of Appeals has consistently held that "where there is substantial compliance on the part of the party in regard to a procedure, a mere technical error will not invalidate the entire procedure." West Virginia Alcohol Beverage Control Admin. v. Scott, 205 W. Va. 398, 402, 518 S.E.2d 639, 643 (1999) (per curiam). See also State ex rel. Catron v. Raleigh County Bd. of Educ., 201 W. Va. 302, 496 S.E.2d 444 (1997) (per curiam) (finding substantial compliance in filing grievance); Mahmoodian v. United Hosp. Ctr., Inc., 185 W. Va. 59, 404 S.E.2d 750 (1991) (finding substantial compliance with rules for revoking

physician's medical staff appointment privileges); Hare v. Randolph County Bd. of Educ., 183 W. Va. 436, 396 S.E.2d 203 (1990) (per curiam) (finding substantial compliance with termination procedure); Duruttya v. Board of Educ. of County of Mingo, 181 W. Va. 203, 382 S.E.2d 40 (1989) (finding substantial compliance in seeking grievance hearing); Vosberg v. Civil Serv. Comm'n of West Virginia, 166 W. Va. 488, 275 S.E.2d 640 (1981) (holding that violation of grievance procedure by employer was merely technical and that there was substantial compliance with the procedure).

Clearly, this Court has held in the past that the merits of a case should be addressed. Technicalities should not decide the case.

- The Circuit Court erred in holding that Respondent's job description for the Executive Secretary classification title was contrary to law.

In addition to holding that the Respondent's job description for Executive Secretary should not have been considered at all, the Circuit Court also held that the Respondent's job description was illegal and contravened the statutory definition of Executive Secretary[33] as set out in West Virginia Code §18A-4-8(i)(45). This subsection provides:

> "Executive secretary" means a person employed as secretary to the county school superintendent or as a secretary who is assigned to a position characterized by significant administrative duties

[33] **Appendix p. 340**

Petitioner takes exception to the Circuit Court's determination that the Respondent's job description "contravenes" the statute. Contravene is defined as:

> Violate the prohibition or order of (a law, treaty or code of conduct) ... conflict with (a right, principle, etc.) especially to its detriment.[34]

The Respondent's job description does not violate the statutory definition. Instead, it expands or clarifies it by providing examples of positions characterized significant administrative duties, i.e., department heads or directors. An example of "contravention" would exist if the Respondent's job description provided that the secretary for the county superintendent *did not qualify* for the classification title of Executive Secretary classification title. Such a provision would contravene the statutory definition of Executive Secretary.

The right of county boards of education to expand upon the statutory definitions has been generally recognized. An example of this is found in Randolph County Board of Education v. Scott, 617 S.E.2d 478 (2005 1998). In Scott the West Virginia Supreme Court of Appeals held that a county board of education could add certification or licensure as Licensed Practical Nurse to the definition of aide.[35] The Administrative Law Judge did an admirable job of explaining his rationale

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[34] The New Oxford American Dictionary (2nd Ed. 2005)

[35] West Virginia Code §18A-4-8(i) provides the following definitions for the four aide classification titles:

"(8) "Aide I" means a person selected and trained for a teacher-aide classification such as monitor aide, clerical aide, classroom aide or general aide;
(9) "Aide II" means a service person referred to in the "Aide I" classification who has completed a training program approved by the state board, or who holds a high school diploma or has received a general educational development certificate. Only a person classified in an Aide II class title may be employed as an aide in any special education program
(10) "Aide III" means a service person referred to in the "Aide I" classification who holds a high school diploma or a general educational development certificate; and
(A) Has completed six semester hours of college credit at an institution of higher education; or
(B) Is employed as an aide in a special education program and has one year's experience as an aide in special education;

on this issue in the level III decision in the current case. We cannot do better than to quote the relevant portion of his level III decision:

> As Grievants point out, "A county board of education may utilize its own expanded job descriptions for various service personnel positions but those descriptions must be consistent with and not contrary to those contained within W. VA. CODE §18A-4-8." Powell v. Lincoln County Bd. of Educ., Docket No. 2010-0592-LinED (Feb. 14, 2011) See also Ohio County Bd. of Educ. v. Hopkins, 193 W.Va. 600, 457 S.E.2d 537 (1995); Hancock County Bd. of Educ. v. Hawken, 209 W.Va. 259, 262, 546 S.E.2d 258, 261 (1999); and Randolph County Bd. of Educ. v. Scott, 217 W. Va. 128, 617 S.E.2d 478 (2005). The Board's job description has expanded the definition of Executive Secretary to include secretaries assigned to department heads and Grievants work for Directors who are the heads of their particular departments. Once again, "[t]he distinction between the Secretary III and Executive Secretary classifications depends upon the duties and responsibilities of the individual to whom the secretary is assigned, not the secretary's own duties and responsibilities." Francisco, supra. This expansion is consistent with the statutory job description. It merely indicates that the Board included their Directors as administrators who perform "significant administrative duties." The evidence undoubtedly demonstrates that Grievant's fit within the job description of Executive Secretary adopted by the Board.
>
> Respondent argues that the job description is antiquated and needs to be rewritten. However, the description remains in effect and no evidence was presented that it has been rewritten, replaced or updated. The Superintendent prepared an "Executive Secretary Chart" which showed the present executive secretaries

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(11) "Aide IV" means a service person referred to in the "Aide I" classification who holds a high school diploma or a general educational development certificate; and
(A) Has completed eighteen hours of State Board-approved college credit at a regionally accredited institution of higher education, or
(B) Has completed fifteen hours of State Board-approved college credit at a regionally accredited institution of higher education; and has successfully completed an in-service training program determined by the state Board to be the equivalent of three hours of college credit"

As can be easily seen, there is not even a hint of LPN licensure or certification in the statutory definitions for the aide classification titles.

> and their direct supervisors, but that chart was created after the grievances were filed and is not anything like a job description.[36]

Petitioners will contend in a subsequent point of argument that the Administrative Law Judge was wrong in determining that Petitioners did not meet the statutory definition of Executive Secretary. Assuming arguendo that he was correct on this point, then Respondent's job description widens the number of secretaries entitled to the Executive Secretary classification title.

Respondent is compelled to comply with its own policy. Again, we can do no better than to turn to the level III decision on this point.

> The West Virginia Supreme Court has regularly held that, "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs," even if those procedures are more generous than employees might otherwise be entitled to. Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977).[37]

Finally, the Circuit Court makes much of the fact that Respondent's job description for Secretary III tracks the statutory language for the definition of Executive Secretary and that Respondent's job description for Executive Secretary tracks the statutory definition for Secretary III.[38] We have already seen that the Respondent's job description for Executive Secretary does not contravene the statutory definition for Executive Secretary. It is arguable that the Respondent's job description of Secretary III does violate the statutory definitions. Respondent's job description of Secretary III indicates that a Secretary III works under the supervision of and

[36] **Appendix pp. 269 -270**
[37] **Appendix p. 270**
[38] **Appendix p. 338**

reports to the superintendent or his designee.[39] This description may be interpreted as designating the county superintendent's secretary as a Secretary III, whereas the statutory definition of Executive Secretary clearly indicates that the county superintendent's secretary is a Executive Secretary. If the Respondent's job description for Secretary III is interpreted this way, then it would contravene the statute and may be invalid. However, it is a *non sequitur* to conclude that the Respondent's job description for Executive Secretary is invalid or illegal just because the Respondent's job description for Secretary III is invalid or illegal.

- The Circuit Court erred in affirming the finding of the Administrative Law Judge that Petitioners' supervisors did not have significant administrative duties within the meaning of statutory definition of the Executive Secretary classification title.

Although Petitioners find that most of the Administrative law Judge's level III decision is as solid as a rock, it is clear that he made an error on the issue of whether Petitioners met the statutory definition of Executive Secretary.

As indicated above, the statutory definition of Executive Secretary is found in West Virginia Code §18A-4-8(i)(45).[40] It provides:

> "Executive secretary" means a person employed as secretary to the county school superintendent or as a secretary who is assigned to a position characterized by significant administrative duties

[39] **Appendix pp. 241 - 242**
[40] **Appendix p. 340**

The phrase "position characterized by significant administrative duties" refers not to the position of the secretary, but rather to the position held by the individual to whom the secretary is assigned. On this point the Administrative Law Judge stated:

> It is apparent from the way the statutory definitions are written that, "[t]he distinction between the Secretary III and Executive Secretary classifications depends upon the duties and responsibilities of the individual to whom the secretary is assigned, not the secretary's own duties and responsibilities." W. VA. CODE § 18A-4-8(h)(40). 17 W. VA. CODE § 18A-4-8(h)(78). Francisco v. Fayette County Bd. of Educ., Docket No. 03-10-108 (Aug. 21, 2003) (citing, O'Neal v. Fayette County Bd. of Educ., Docket No. 02-10-369 (Mar. 6, 2003); Sanders v. Putnam County Bd. of Educ., Docket No. 01-40-630 (Mar. 28, 2002)).[41]

The question, then, is "Did the individuals to whom Petitioners were assigned hold positions characterized by significant administrative duties?"

As indicated in this brief's Statement of the Case, the Administrative Law Judge made findings of fact in the level III decision in this grievance that:

> [Respondent's] Directors have substantial administrative duties that are comparable in difficulty and responsibility.[42]

The Administrative Law Judge equated the term "substantial" with "significant" in the following terms:

> ... the terms "important," "substantial" and "significant" are synonyms and can generally be used interchangeably. Roget's 21st Century Thesaurus, Third Edition Copyright © 2013 by the

[41] **Appendix pp. 266 - 267**

[42] **Appendix p. 263**, Level III decision, Finding of Fact #25

> Philip Lief Group. Clearly their duties are significant to the Board's operation in the general sense of the word.[43]

How did the Administrative Law Judge avoid the conclusion that Petitioners met the statutory definition of the Executive Secretary Classification title? After indicating that the Directors' duties were comparable in difficulty to the duties of the Superintendent, Assistant Superintendent, and the Treasurer, he continued:

> However, they [Respondent's Directors] are lower on the administrative hierarchy than the Assistant Superintendent, Treasurer and Superintendent.[44]

He then noted that the particular directors to whom Petitioners' were assigned directed the activities in departments that are described in the statutory definition of Secretary III. He held:

> Employees assigned to "administrators in charge of various instructional, maintenance, transportation, food services, operations and health departments, federal programs or departments with particular responsibilities in purchasing and financial control" fit within the Secretary III classification. (Emphasis added) W. VA. CODE § 18A-4-8(h)(78). Significantly, the Directors who are the Grievants' direct supervisors are in charge of the Federal Programs, Special Education, Transportation and Maintenance Departments. Accordingly, their duties fit within the Secretary III classification. The significant duties set out in the statutory Executive Secretary classification appear to mean something more than the duties of these Directors.[45]

[43] **Appendix p. 266**, Level III decision
[44] **Appendix p. 263**, Level III decision, Finding of Fact #25
[45] **Appendix p. 267**

The flaw in this is that the Administrative Law Judge ignores his own finding that the Directors served by Petitioners had significant administrative duties. The fact that the Directors stood lower on the Respondent's hierarchy than the Superintendent, Assistant Superintendent and Treasurer seems to be irrelevant. Accordingly, Petitioners met the statutory definition of Executive Secretary.

If, as the Administrative Law Judge clearly implies, the Petitioners also meet the statutory definition of Secretary III, the Petitioners must not be automatically relegated to the lower Secretary III classification title nor granted the Executive Secretary classification title exclusively. West Virginia Code §18A-4-8(i)(67) provides the appropriate classification title in cases where an employee meets the definition of more than one classification title. This section provides:

> "Multiclassification" means a person employed to perform tasks that involve the combination of two or more class titles in this section. In these instances the minimum salary scale is the higher pay grade of the class titles involved

- The Circuit Court erred in holding that Petitioners were excluded from holding a classification other than Secretary III by their assignment to particular departments referenced in the statutory definition of Executive Secretary.

In part, the question of whether Petitioners are excluded from holding a title other than Secretary III by virtue of their assignment to particular departments mentioned in the statutory definition of Secretary III is addressed above in the previous point of argument. In addition to the possibility of multiclassification as a resolution to the problem presented by this case, there is another consideration.

The Secretary classification title is somewhat odd in that employees holding any of the four classification titles have similar duties. Only the lowest two titles, Secretary I and Secretary II, have a description of duties. Though those descriptions are differently worded, they essentially describe the same activities. [46] These descriptions of duties apparently also apply to the higher classification titles, Secretary III and Executive Secretary. The distinction between the classifications, for the most part, involves where the Secretary is assigned or for whom he or she works. Accordingly, the following underscored language from the definition of Secretary II may be important. West Virginia Code §18A-4-8(i)(82) provides:

> "Secretary II" means a person employed in any elementary, secondary, kindergarten, nursery, special education, vocational, or any other school as a secretary. The duties may include performing general clerical tasks; transcribing from notes; stenotype, mechanical equipment or a sound-producing machine; preparing reports; receiving callers and referring them to proper persons; operating office machines; keeping records and handling routine correspondence. Nothing in this subdivision prevents a service person from holding or being elevated to a higher classification
> (Emphasis Added)

The term "subdivision" is not defined in Chapter 18A and the ordinary meaning of that word really doesn't shed any light on how it is meant here. Clearly the language applies to employees meeting the definition of Secretary II. Petitioners assert that it should also apply to employees, like Petitioners, that meet the definition

[46] West Virginia Code §18A-4-8(i)(81) provides that a Secretary I is employed to "transcribe from notes or mechanical equipment, receive callers, perform clerical tasks, prepare reports and operate office machines". West Virginia Code §18A-4-8(i)(82) provides that a Secretary II's duties may include "performing general clerical tasks; transcribing from notes; stenotype, mechanical equipment or a sound-producing machine; preparing reports; receiving callers and referring them to proper persons; operating office machines; keeping records and handling routine correspondence." There is very little real difference between the duties described in each class title.

of a higher classification title. Such an interpretation would be in accord with the holding of the West Virginia Supreme Court of Appeals in Smith v. Siders, 183 S.E.2d 433 (W. Va. 1971), in which the Court held that Chapters 18 and 18A of the West Virginia Code:

> ... though not enacted at the same time, should be considered in pari materia and, therefore, they should be read and considered together. State v. Reel, 152 W.Va. 646, pt. 1 syl., 165 S.E.2d 813; State ex rel. Campbell v. Wood, 151 W.Va. 807, pt. 1 syl., 155 S.E.2d 893; Owens-Illinois Glass Company v. Battle, 151 W.Va. 655, pt. 1 syl., 154 S.E.2d 854.

- Did the Circuit Court order permit the recovery of wages paid to Petitioners pursuant to the level III grievance decision?

The Circuit Court order make no reference to recovery of the difference in wages paid to Petitioners at the rate received by Executive Secretaries and the wages Petitioners would have received as Secretary III's. The circuit court granted Respondent's appeal. However, the Petition of Appeal filed by Respondent makes no mention of recovery of wages paid to Petitioners pursuant to the level III decision in the relief for which it prayed[47] or anywhere else in the petition itself.[48]

In Legg v. Felinton, 219 W. Va. 478, 637 S.E.2d 576 (W. Va.), the West Virginia Supreme Court of Appeals held:

> It is a paramount principle of jurisprudence that a court speaks only through its orders. See State v. White, 188 W.Va. 534, 536 n. 2, 425 S.E.2d 210, 212 n. 2 (1992) ("[H]aving held that a court speaks through its orders, we are left to decide this case within the parameters of the circuit court's order." (citations omitted)); State

[47] **Appendix p. 279**
[48] **Appendix pp. 277 - 280**

ex rel. Erlewine v. Thompson, 156 W.Va. 714, 718, 207 S.E.2d 105, 107 (1973).

Clearly, the order does not specifically or implicitly direct or permit Respondent to recoup payments to Petitioners during the long period between the level III decision and the final order of the Circuit Court reversing the level III decision.

Respondent has objected to the raising of this issue in this appeal. It is true that it has not been a part of the underlying proceedings. However, should this Court uphold the Circuit Court order, then the issue of recoupment of "overpayments" will doubtless generate another round of litigation. There is a clear argument based upon judicial economy[49] for raising and deciding this issue as part of the current litigation.

Further the undersigned is loathe not to bring the issue up at this point for fear that it will be later decided that the issue had been waived by the failure to bring it up at this point.

- Is it arbitrary and capricious to permit recovery of wages paid pursuant to a level III grievance decision under the circumstances of the current case?

Petitioners assert that under the particular circumstances of the current case, it would be arbitrary and capricious to permit Respondent to recover eight years of wages paid to Petitioners. Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. See State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An

[49] Judicial economy is defined as "A principle that seeks to ensure the most efficient use of the judiciary's limited resources by permitting courts to hear or decline to hear cases or claims that could be resolved elsewhere." https://www.quimbee.com/keyterms/judicial-economy

action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Id. (citing Arlington Hosp. v. Schweiker, 547 F. Supp 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion." See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985) Let us now apply these principles to the particular circumstances of the current case.

First, Respondent could have chosen to seek a stay. Toward this end, West Virginia Code §6C-2-5(c) provides, in pertinent part, the following:

> The decision of the administrative law judge is not automatically stayed upon the filing of an appeal, but a stay may be granted by the circuit court upon a separate motion for a stay.

Respondent chose not to seek a stay. Instead, it complied with the terms of the level III decision, paid Petitioners back wages, began and continued paying Petitioners the wages of the Executive Secretary classification.

Petitioners took no action to force Respondent to immediately comply with the terms of the level III decision. West Virginia Code §6C-2-5(a) provides:

> The decision of the administrative law judge is final upon the parties and is enforceable in the circuit court of Kanawha County.

In addition, West Virginia Code §6C-2-7 provides:

> Any employer failing to comply with the provisions of this article may be compelled to do so by a mandamus proceeding and may be liable to a prevailing party for court costs and reasonable attorney's fees to be set by the court.

Petitioners did not exercise the rights provided by these sections of law. Respondent's actions were completely voluntary.

Second, the Circuit Court took no action on the Respondent's appeal for quite a long time. The final order was issued more than six years after the issuance of the level III decision and almost five years and nine months after the case was ripe for decision. This long wait allowed the amount of "overpayment" to accumulate to a staggering amount. Petitioner Wheeler would owe, as of August 2019, $67,509.84. Petitioner McComas, due to her retirement in December 2016, would owe $49,173.78.[50]

Needless to say, such a repayment would prove ruinous to Petitioners. Further, one trembles to think of the difficulty of unraveling the "overpayment" effect upon Petitioners' retirement contributions, upon the retirement pension which Petitioner McComas has been receiving for almost three years, and the effect the altered income would have on Petitioners' income taxes, state and federal, for the last eight years.

Finally, there is a large disparity between the actual interest rates available for investments and the legal rate of interest on awards. If the ultimate decision on this litigation is in Petitioners' favor, then Respondents action of immediate compliance to avoid an additional six years of interest at the legal rate would prove wise and prudential. It is simply not fair to allow the Respondent to reap this benefit and then also reap the benefit of recovering all of those wages if or when an apparently

[50] The record has no reference to these amounts. Petitioners were advised of these calculations after issuance of the Circuit Court order.

unexpected reversal of the level III decision occurs. The possibility that the "additional" wages paid would not be recoverable is a fair consequence to avoidance of interest at the legal rate. Respondent should not have the best of both worlds. In contrast to Petitioners, Respondent had a choice and should now have to abide by the consequences of its choice.

An analogy might be drawn with the holding of the West Virginia Supreme Court of Appeals in Hall v. Bd. of Educ., 208 W. Va. 534, 541 S.E.2d 624 (2000). In Hall an employee had been placed in a service position and worked in it for several years. It was later determined through the grievance process, that his placement in the position was erroneous. The Administrative Law Judge ordered that the seniority Mr. Hall had earned working in the position be removed. The Court reversed this decision and ordered Hall's retention of the seniority because he was not responsible for the miscalculation that resulted in his placement in the position nor had he acted in an unlawful or deceitful manner.

A similar analysis should be applied to Petitioners in the current case. It was the decision of the Respondent to commence paying them the higher rate of pay during the pendency of the appeal to Circuit Court. Petitioners took no steps to compel this action. Petitioners were also not responsible for the eight-year lapse of time between initiation of the grievance and the Circuit Court's issuance of a final order reversing the decision of the Administrative Law Judge.

As with the previous point of argument, Respondent has objected to the raising of this issue in the current appeal. Again, it is true that it has not been a part of the underlying proceedings. However, should this Court uphold the Circuit Court order, then this issue will doubtless generate another round of litigation. As above, there is a clear argument based upon judicial economy for raising it as part of the current litigation. Again, as above, the undersigned

fears maintaining silence on this issue at present might prevent the opportunity to raise it in the future.

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