IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 19-0687

DEBRA LYNN WHEELER and CATHY MCCOMAS,

Respondents Below, Petitioners,

v.

LINCOLN COUNTY BOARD OF EDUCATION,

Petitioner Below, Respondent.

RESPONDENT'S BRIEF

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STANDARD OF REVIEW

The grounds for appealing a Grievance Board decision are set forth in West Virginia Code § 6C-2-5(b):

> 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.

On appeal, "[t]he court shall review the entire record that was before the administrative law judge. ..." W. Va. Code § 6C-2-5(d). *Martin v. Barbour Cnty. Bd. of Educ.*, 228 W. Va. 238, 719 S.E.2d 406 (2011).

"When reviewing the appeal of a public employees' grievance, this Court reviews decisions of the circuit court under the same standard as that by which the circuit court reviews decisions of the administrative law judge." *Martin v. Barbour Cnty. Bd. of Educ.*, 228 W. Va. 238, 239, 719 S.E.2d 406, 407 (2011). In *Martin*, this Court articulated the following standard of review:

> 2. 'Grievance rulings involve a combination of both deferential and plenary review . . . [A] circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations . . . Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed de novo.' Syl. pt. 1, *Cahill v. Mercer Cnty. Bd. of Educ.*, 208 W. Va. 177, 539 S.E.2d 437 (2000).
>
> 3. 'A final order of the [Grievance Board], made pursuant to W. Va. Code, [6C-2-1], et seq. [ ], and based upon findings of fact should not be reversed unless clearly wrong.' Syl. pt. 1, *Randolph Cnty. Bd. of Educ. v. Scalia*, 182 W. Va. 289, 387 S.E.2d 524 (1989).

Id.

SUMMARY OF ARGUMENT

Petitioners erroneously argue that (1) their new allegations, first raised at Level Three of the grievance procedure, relating to the errant job descriptions, should have been considered and, if considered, the job descriptions did not contravene the statutory definitions of Executive Secretary and Secretary III and should be applied in favor of classifying the petitioners as Executive Secretaries; (2) they meet the statutory definition of "Executive Secretary" though that issue was not appealed by the petitioners or the respondent to Circuit Court; (3) the Circuit Court order did not authorize the recovery of wages overpaid to the petitioners, though not raised in the notice of appeal; and (4) it would be arbitrary and capricious to permit recovery, by the respondent, of wages overpaid in light of facts not contained in the record or otherwise developed below or in the notice of appeal. *See Pet. Brief.*

The Circuit Court correctly applied the relevant statutes, holding that and the petitioners clearly met the Secretary III class title as found in West Virginia Code 18A-4-8 and the petitioners were not entitled to the Executive Secretary classification. The Circuit Court's Order was not arbitrary, capricious, an abuse of discretion or otherwise contrary to the law and should thus be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, oral argument is unnecessary is this case because the facts and arguments are adequately presented in the briefs and the record on appeal, and the decisional process would be not be significantly aided by oral argument.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY HELD THAT THE PETITIONERS WERE NOT ENTITLED TO THE EXECUTIVE SECRETARY CLASSIFICATION.

Neither the Administrative Law Judge ("ALJ"), nor the Circuit Court Judge ("Judge") found that the petitioners met the statutory definition of "Executive Secretary" as outlined in West Virginia Code 18A-4-8(h), part of their original claims. "'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." *Id.* The decision of the ALJ was not appealed by the petitioners on this point.

Neither the ALJ, nor the Circuit Court Judge found that the petitioners proved that they were similarly situated to any other secretary employed by the Board who held the title Executive Secretary, their original claims, and, as result, the ALJ held that the Petitioners failed to prove favoritism or discrimination. The decision of the ALJ was not appealed by the petitioners on this point, either. In fact, the petitioners did not appeal the ALJ Decision, at all.

The ALJ ruled that the petitioners were entitled to the Executive Secretary class title as a result of the Board's job descriptions, an issue first raised at Level Three of the grievance procedure by the petitioners. The Board appealed this portion of the ALJ's Decision and the Judge appropriately found that the job descriptions should not have been considered by the ALJ; even if it were appropriate to consider new matters raised at Level Three, the job descriptions contravened the statutory definitions of Executive Secretary and Secretary III and could not be applied; and the petitioners clearly met the Secretary III class title as found in West Virginia Code 18A-4-8. "'Secretary III means a person assigned to the county board office 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 or any person who has served for eight years in a position which meets the definition of 'secretary II' or 'secretary III.'" *Id.*

A. Procedural Irregularities Require Finding that All Findings of Fact and Conclusions of Law, Not Appealed, Stand as Uncontested, and the Addition of New Issues in this Appeal are Untimely and Should Not be Considered.

1. Uncontested Findings of Fact Stand

Rule 52(a) of the West Virginia Rules of Civil Procedure requires that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon ... Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous." *Hopkins v. DC Chapman Ventures, Inc.*, 228 W. Va. 213, 215, 719 S.E.2d 381, 383 (2011). "When circuit courts are reviewing the decisions of county boards of education and other administrative tribunals, they must submit findings of fact and conclusions of law with the order." Rules Civ. Proc., Rule 52(a). *Golden v. Board of Educ. of Harrison County*, 169 W. Va. 63, 285 S.E.2d 665 (1981). (Prior to *Golden* there had not been a requirement for findings of fact when a Circuit Court reviewed the decisions of county boards of education and administrative tribunals).

Petitioners now claim, for the first time, that the finding of the Administrative Law Judge, below, that the "supervisors did not have significant administrative duties within the meaning of statutory definition of the Executive Secretary classification title" was erroneous. *Petitioners' Brief.* This factual finding was neither appealed by the Board, nor the petitioners, when the Board appealed the Level Three Decision to the Circuit Court of Kanawha County.

The West Virginia Supreme Court has held, "[T]he rule in West Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace." *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 215–16, 470 S.E.2d 162, 169–70 (1996). This has been referred to as the "raise or waive" rule.

The "raise or waive rule," under which silence may operate as a waiver of objections to error and irregularities, is designed to prevent a party from obtaining an unfair advantage by failing to give a trial court an opportunity to rule on the objection and thereby correct potential error, and the rule also prevents a party from making a tactical decision to refrain from objecting but later assigning error if the case turns sour, or even worse, planting an error and nurturing the seed as a guarantee against a bad result. *Hopkins v. DC Chapman Ventures, Inc.*, 228 W. Va. 213, 719 S.E.2d 381 (2011). *See also Sydenstricker v Raleigh General Hosp.*, No. 01-C-185-K, 2004 WL 5786801 (W.Va. Cir. Ct. Jan. 16, 2004).

In *Cooper v. Caperton*, the Respondent (Mr. Cooper) filed a motion to suspend the briefing schedule until an evidentiary hearing so that he could present witnesses in support of his contentions. The circuit court did not rule on the motion and the parties proceeded with briefing the merits of the case. Mr. Cooper did not object or move for an evidentiary hearing after it became clear the court was going to rule without first having an evidentiary hearing.

This Court held,

> To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect. It must be emphasized that the contours for appeal are shaped at the circuit court level by setting forth with particularity and at the appropriate time the legal ground upon which the parties intend to rely. Here, Mr. Cooper undermined these mechanisms by not taking the necessary action at a meaningful time to preserve the issue of the lack of an evidentiary hearing.

State ex rel. Cooper v. Caperton, 196 W. Va. 208, 216, 470 S.E.2d 162 (1995) (emphasis added). In this case, since the petitioners failed to contest the findings of the ALJ in Circuit Court relating to their failure to prove that they met the statutory definition of Executive Secretary, they waived the right to address it on appeal to the Supreme Court.

2. Addition of the New Issues is Untimely

Rule 5(b) of the West Virginia Rules of Appellate Procedures states that, "**Within thirty days** of entry of the judgment being appealed, the party appealing shall file the notice of appeal and the attachments required in the notice of appeal form contained in Appendix A of these Rules." W. Va. R. App. P. 5(b) (emphasis added). The Circuit Court order that the Petitioners have appealed was entered June 28, 2019. Their Notice of Appeal was properly filed July 29, 2019.

Section 17 of the Notice of Appeal directs petitioners to identify the assignments of error. The directions state, "[e]xpress the assignments in the terms and circumstances of the case, but without unnecessary detail. Separately number each assignment of error and for each assignment: (1) State the issue; (2) Provide a succinct statement as to why the Court should review the issue."

Petitioners identified five assignments of error, none related to the backpay/overpayment issues now brought before this Court. Appendix A of the West Virginia Rules of Appellate Procedure discusses the Notice of Appeal and provides that the "nature of the proceedings and the relief sought should be stated summarily." W. Va. R. App. P. App. A. This form was updated on October 19, 2010, and the Rules of Appellate Procedure require the form to be used for appeals of all final orders entered on or after December 1, 2010.

In an apparent effort to correct the oversight regarding the overpayment issues, two months later, counsel for the petitioners sent a letter dated September 27, 2019 advising of the "two additional issues which Petitioners wish to present in this appeal, and which were not included in notice of appeal..." Counsel for the Board, in response, advised Attorney Roush, counsel for the Petitioners, of the "object[ion] to the addition of the new issues that have neither been the subject of the grievance, nor ruled on at any level below." The letter from counsel for the

petitioners does not serve as a new, revised, or amended Notice of Appeal. Upon information and belief, the letter was not even filed with this Court.

Additionally, the new issues are not subsidiary to the petitioners' assignments of error. Rule 10(c) of the West Virginia Rules of Appellate Procedure addresses what can be included within a petitioner's brief and indicates that the assignments of error addressed do not need to be identical and are deemed to include every subsidiary question comprised therein. Specifically, Rule 10(c)(3), states as follows:

> (3) Assignments of Error. The brief opens with a list of the assignments of error that are presented for review, expressed in terms and circumstances of the case but without unnecessary detail. The assignments of error need not be identical to those contained in the notice of appeal. The statement of the assignments of error will be deemed to include every subsidiary question fairly comprised therein. If the issue was not presented to the lower tribunal, the assignment of error must be phrased in such a fashion as to alert the Court to the fact that plain error is asserted. In its discretion, the Court may consider a plain error not among the assignments of error but evident from the record and otherwise within its jurisdiction to decide.

W. Va. R. App. P. 10(c)(3) (emphasis added).

In *Canterbury v. Laird*, this Court held, "[o]ur cases have made clear that this Court ordinarily will not address an assignment of error that was not raised in a petition for appeal." *Canterbury v. Laird*, 221 W. Va. 453, 458, 655 S.E.2d 199, 204 (2007); *see also Koerner v. West Virginia Dep't. of Military Affairs & Pub. Safety*, 217 W.Va. 231, 617 S.E.2d 778 (2005) (refusing to consider an argument in appellant's brief that was not assigned as error in petition for appeal); *Holmes v. Basham*, 130 W.Va. 743, 45 S.E.2d 252 (1947) (same).

The newly raised issues involve the recovery of overpaid wages by the Board, and not the application of the statutory definitions applicable to secretaries to determine their appropriate classification titles, or the applicability of job descriptions, or the duties of the

petitioners – all issues raised in the notice of appeal. As a result, these New Issues are not subsidiary to the initial assignments of errors identified by the petitioners.

3. The New Issues Were Not Addressed at the Lower Level.

While petitioners argue that the New Issues relating to the recovery of overpaid wages are related, because wages are determined based upon a job classification, it is impossible for the petitioners to support their argument with citations to the record below because these New Issues were never presented/addressed in the lower court. Rule 10(c)(7), states that a Petitioner's brief "[m]ust contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal. The Court may disregard errors that are not adequately supported by specific references to the record on appeal." W. Va. R. App. P. 10(c)(7). (emphasis added).

The New Issues were not addressed, nor decided upon, at any lower level and should be disregarded.

4. There Was No Final Judgment at the Lower Level on the New Issues.

The New Issues relating to the recovery of overpayments are not appealable issues. In order for an issue to be appealable, there must first be a final judgment. This is called the "Rule of Finality." This Court has held appeals may only be taken from final decisions of a circuit court. *C & O Motors, Inc. v. W. Virginia Paving, Inc.*, 223 W. Va. 469, 473, 677 S.E.2d 905, 909 (2009). "The required finality is a statutory mandate, not a rule of discretion." *Province v. Province*, 196 W.Va. 473, 478, 473 S.E.2d 894, 899 (1996).

As stated above, there is nothing in the record below, at any level, addressing or deciding the issues relating to the overpayment of wages to the petitioners. Petitioners' brief making allegations of fact and purported conclusions of law should not form the basis of a final judgment that could be appealed.

B. The Circuit Court Correctly Held that the Job Descriptions Should Not Have Been Considered at Level Three.

The Judge held 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 the job descriptions exceeded the ALJ's authority and was arbitrary and capricious, and therefore, erroneous." *Order*, 4 *App* at 339. The Petitioners' Level One forms indicate that they are "Requesting uniformity of secretaries in Central Office" and only reference West Virginia Code § 18A-4-8. *App.* at 57-58.

A review of the Level One Decisions for the petitioners reveals no mention of job descriptions or the application thereof. *App.* 3-8. The only arguments were uniformity and the application of the statutory definitions for Executive Secretary in W. Va. Code § 18A-4-8. At Level Two, the petitioners used a similar form as they did at Level One, with no change in the allegations/claims and no change in the "statutes, policies, rules, regulations or agreements" claimed to have been violated. (*App.* 9-10). Neither Level Two form referenced job descriptions. Finally, at Level Three, the petitioners add a reference to "[the Board's] policies." *App.* 17. Based upon this vague reference to the Board's policies, the petitioners now erroneously contend that Grievance Board correctly considered the Board's job descriptions and that the Circuit Court erred in holding otherwise. The petitioners' argument is incorrect for multiple reasons.

In defending the grievances of the petitioners herein, the Board was clearly only on notice that one statute, W. Va. Code § 18A-4-8, was at issue. Each petitioner made reference to a portion of the statute in their grievance forms at Levels One and Two, that being the allegations that their supervisors had "significant administrative duties". *App.* at 1-2, 9-10. The petitioners are required to follow the proper grievance procedure set forth in the grievance statute. Quite simply, the issue of the Board's job descriptions was not at issue at Level One or Two of the grievance

procedure. In order for that issue to be properly before the Grievance Board at Level Three, it must have first been addressed at Levels One and Two of the grievance procedure. *See* W. Va. Code § 6C-2-4(a)(3)-(4) (stating that a chief administrator shall hold a level one hearing and issue a decision, and that an employee may only proceed directly to level three when the parties agree or when the grievance is disciplinary).

The Judge, noting the pre-printed language on the grievance form, found that "The form clearly requires the grievant to: 'list the specific statutes, policies, rules, regulations or agreements you claim have been violated, misapplied or misinterpreted." *Order, 2, App.* 337. The form was created in compliance with W. Va. Code § 6C-2-3(j). Of course, avoiding surprise claims is clearly the intent of the pre-printed language on the grievance forms so that the respondents will be on notice of all claims and can be prepared to defend the contents of the claims for which they are on notice. The petitioner's vague reference to the Board's policies did not place the Board on notice that that the job descriptions were at issue, and, relatedly, neither the Board's policies nor the job descriptions were at issue at Levels One or Two.

The claims that the job descriptions were at issue was a significant departure from the claims outlined on the grievance forms at Levels One and Two. The only issue raised by the petitioners throughout the grievance process at Levels One and Two was whether each met the statutory definition of Executive Secretary, as defined in W. Va. Code § 18A-4-8, and it was appropriately held by the Judge to be the only issue that should have been addressed by the ALJ at Level Three of the grievance procedure.

C. The Circuit Court Correctly Held that Petitioners' Job Descriptions were Contrary to Law

Petitioners' argument is that the respondent's job description for executive secretary does not contravene law and simply "expands or clarifies it..." *Petitioners' Brief* at 25.

Board adopted job descriptions become the law in the county, so long as they do not contravene state law. "A county board of education may utilize its own expanded job description 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)[1]; see also *Gregory v. Mingo County Bd. of Educ.*, Docket No. 95-29-006 (July 19, 1995)[2]; *Hatfield v. Mingo County Bd. of Educ.*, Docket No. 91-29-077 (Apr. 15, 1991)[3] (holding that a school service employee who establishes, by a preponderance of the evidence, that he is performing the duties of a higher W. Va. Code § 18A-4-8 classification than that under which he is officially categorized, is entitled to reclassification"). In this case, the issue was whether the petitioners were properly classified as Secretary IIIs or whether their duties more closely matched the duties of the Executive Secretary classification title. In making such a determination, the examination of both the Secretary III and Executive Secretary job descriptions and statutory definitions were examined.

> West Virginia Code § 18A-4-8 provides the following definitions:
>
> "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;
>
> * * * * *
>
> "Secretary III" means a person assigned to the county board office 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 or any person who has served for eight years in a position which meets the definition of "secretary II" or "secretary III";

[1] https://pegb.wv.gov/Decisions%20Docs/dec2011/powell.pdf

[2] https://pegb.wv.gov/Decisions%20Docs/dec1995/gregory.pdf

[3] https://pegb.wv.gov/Decisions%20Docs/dec1991/hatfield.pdf

Neither of these definitions describes the job of a secretary. To make that determination, an examination of additional definitions is required, including that of Secretary II and Secretary I, which are defined as follows:

> "Secretary I" means a person employed to transcribe from notes or mechanical equipment, receive callers, perform clerical tasks, prepare reports and operate office machines...
>
> "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;

W. Va. Code § 18A-4-8. As a result, all secretary classification titles must be read *in pari materia* to discern the duties and distinctions among the definitions.

The language in the respondent Board's Secretary III job description, almost verbatim, tracks the language in the definition found in West Virginia Code § 18A-4-8 for Executive Secretary. And the language in the respondent Board's Executive Secretary job description, almost verbatim, tracks the language of the definition found in West Virginia Code § 18A-4-8 for Secretary III.

A close examination reveals that nothing in the job description for executive secretary requires that the secretary work for the superintendent or the assistant superintendent to be classified as an Executive; however, that very language is found in the job description for the Secretary III position. When reading the two job descriptions together, it is clear that they were not an expansion of the definitions in the statute—they simply contravened the statute by erroneously transposing the two definitions, or the two job description titles.

Just like the statutory definitions of the secretary classification titles must be read together, so must the secretary job descriptions of the respondent. None should be read in isolation. When doing the same, it is clear that the Secretary III and Executive Secretary job descriptions contravened the clear and unambiguous language in the statutory definitions.

As was correctly noted in the Order of the Circuit Court,

> The Board's job descriptions do not expand state law, as argued by the Respondents, but rather, are an illegal contravention to State Code. To have the secretary to the superintendent classified as a Secretary III, as is the result of the Board's job descriptions, is illegal, as it contravenes the definitions found in *W. Va. Code* § 18A-4-8. This example clearly highlights the error in the Board's descriptions, the titles on the same are reversed.

Order, 5.

D. The Circuit Court Correctly Upheld the ALJ's Ruling that the Petitioners Did Not Meet the Legal Definition of Executive Secretary.

Even if appropriately raised herein, the petitioners have still failed to prove that they met the legal definition of Executive Secretary. In this case, the findings of fact that are contested are those of the Level Three decision, which were relied upon by the Circuit Court. Petitioners have not shown those findings of fact to be clearly erroneous. A finding of fact would be clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948); *see also Minyard Enterprises, Inc. v. Se. Chem. & Solvent Co.*, 184 F.3d 373, 380 (4th Cir. 1999) (holding the Court "may only set aside findings of fact if they are clearly erroneous, and [the Court] must give due regard to the opportunity of the trial court to judge the credibility of the witnesses.") Both the ALJ and the Circuit Court Judge, in reviewing the entire record, appropriately found that the petitioners did not meet the definition of Executive Secretary as discussed below.

Again, W. Va. Code § 18A-4-8 provides the following definitions:

> "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;
>
> * * * * *
>
> "Secretary III" means a person assigned to the county board office 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 or any person who has served for eight years in a position which meets the definition of "secretary II" or "secretary III"

Responding to detailed questioning, the petitioners admitted that their jobs met the definition of a Secretary III as found in West Virginia Code § 18A-4-8, which include employees assigned to "county board office administrators in charge of various instructional, maintenance, transportation, ...[and/or] federal programs." In fact, petitioner McComas, when asked about the difference between the job description of Secretary III and Executive Secretary, testified that "I really don't see a lot of difference between the two." *App.* 134. Petitioner McComas also testified that she worked under not one, but three department heads. *Id.* Those departments included Federal Programs, Technology and Special Education, headed by Mr. Dailey, Mr. Snyder and Ms. Coburn, the supervisors of Petitioner McComas. *App.* 129. Likewise, Petitioner Wheeler testified that she was the secretary for Mr. Smith, the Director of the Maintenance Department. *App.* 135. One need not proceed any further with the analysis since the positions fall clearly within the definition of Secretary III.

Additionally, the respondent developed a chart showing to whom its Executive Secretaries reported. *App.* 252. Each reported to employees in positions higher in the organization than that of its Directors – the Treasurer, the Assistant Superintendent and the Superintendent. *Id.*

The ALJ correctly found that:

> 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.

ALJ Decision at 15. At a minimum, the ALJ's finding is not clearly erroneous in light of the totality of the evidence in the record.

When analyzing the definition of Executive Secretary, the phrase "position characterized by significant administrative duties" has been held by the Public Employees Grievance Board to mean the person(s) to whom the secretary reports, not the duties of the secretary. *See* W. Va. Code § 18A-4-8; *Francisco v Fayette County Bd. of Educ.,* Docket No. 03-10-108.[4] The statutory framework provides guidance as to which positions are not characterized by significant administrative duties – those outlined in the definition of Secretary III of "instructional, maintenance, transportation, food services, operations and health departments, federal programs or departments." W. Va. Code § 18A-4-8.

The finding that the petitioners deem require a conclusion that the petitioners meet the definition of Executive Secretary is that "The Board's Directors have substantial administrative duties that are comparable in difficulty and responsibility." *ALJ Decision* at 11. Petitioners in their Brief erroneously argue that the term used by the ALJ "substantial" is the same as "significant" and that "comparable in difficulty" meant "comparable in difficulty to that the of the Superintendent, Assistant Superintendent and Treasurer." *Pt. Brief* at 29-30. However, one need not look far to find that "substantial. adjective. [also means] large in amount or degree."[5] A large amount does not necessarily mean a large amount of significant administrative duties.

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[4] The above-cited Grievance Board decision may be found at the following link: https://pegb.wv.gov/Decisions%20Docs/dec2003/francisco.pdf.

[5] https://www.macmillandictionary.com/us/thesaurus-category/american/words-used-to-describe-large-amounts-and-quantities

Additionally, the ALJ's finding of "comparable in difficulty" does not necessarily mean "comparable in difficulty to that the of the Superintendent, Assistant Superintendent and Treasurer." The phrase may just as readily be interpreted to mean "comparable in difficulty to that the of the other Directors." The same finding of fact goes on to state, "[h]owever, they are lower on the administrative hierarchy than the Assistant Superintendent, Treasurer and Superintendent." *Decision* at 11.

Just like there is a continuum of responsibilities outlined in the statutory definitions of the various secretary classification titles, so too is there a continuum of administrative duties among central office administrators. That is what was noted in the finding of the ALJ, as discussed above. Both the statute, West Virginia Code § 18A-4-8, and the hierarchy chart, *App.* 252, identify the cutoff point between a Secretary III and an Executive Secretary. The findings, below, are not clearly erroneous on this point.

II. THE COUNTY BOARD SHOULD BE PERMITTED TO RECOVER OVERPAID WAGES MADE TO THE PETITIONERS BECAUSE FAILURE TO DO SO CONSTITUTES UNJUST ENRICHMENT OF THE PETITIONERS AND AN UNAUTHORIZED EXPENDITURE OF PUBLIC FUNDS.

As is stated in West Virginia Code 6C-2-5(c), "a stay may be granted by the circuit court upon a separate motion for stay." There does not appear any mandatory duty to seek a stay, nor any mandatory duty to grant a stay, if requested. It is speculative to suggest that a stay would have been granted, if requested. Additionally, there appears to be no prohibition of the petitioners herein to have requested a stay, if they were concerned regarding the possibility of repaying any overpayment[6] determined by the Circuit or Supreme Court.

[6] Although not part of the record, because the issue was not raised below, the petitioners were warned regarding the possibility of having to return sums overpaid should the respondent herein ultimately prevail. Petitioners could have placed the money paid them in an interest-bearing account until final resolution.

If there had been such a request for a stay and if a stay had been granted, and if the decision of the ALJ had been affirmed years later, petitioners would have requested not only the wages due, but also interest for those years.

Petitioners' Brief notes that "[t]he Circuit Court order make [sic] 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 Order, likewise, does not prevent the 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 IIIs. However, failure to permit such a recovery would result in unjust enrichment to the petitioners and an unauthorized expenditure of public funds.

"Unjust enrichment occurs when one party has and retains money or benefits which in justice and equity belong to another ... the benefit may be an interest in money...; beneficial services conferred ...; or anything which adds to his security or advantage. *Baugh v. Darley*, 112 Utah 1, 184 P.2d 335 (1947). When one party is given the rewards, without the costs, of another party's efforts, unjust enrichment results." *Metzner v. Metzner*, 191 W. Va. 378, 446 S.E.2d 165 (1994).

Additionally,

> It is well settled in West Virginia that a county board of education is a corporation created by the Legislature and, as such, has only such powers as are expressly conferred upon it by statute or that fairly arise by necessary implication to execute such express statutory powers.

Hunt v. Board of Education of County of Kanawha, 321 F. Supp. 1263, 1265 (S.D. W. Va. 1971) (citing *State ex rel. Town of South Charleston v. Partlow*, 133 W. Va. 139, 55 S.E.2d 401 (1949); *Herald v. Board of Education*, 65 W. Va. 765, 65 S.E. 102 (1909)).

The Supreme Court of Appeals of West Virginia reiterated that holding in 1975:

> A board of education is a corporation created by statute with functions of a public nature expressly given, and no other; as such, it 'can exercise only such power as is expressly conferred or fairly arises by necessary implication, and only in the mode prescribed or authorized by the statute.'

Evans v. Hutchinson, 158 W.Va. 359, 214 S.E. 2d 453 (1975) (citing *Dooley v. Board of Education*, 80 W.Va. 648, 93 S.E. 766 (1917); *Honaker v. Board of Education*, 42 W.Va. 170, 24 S.E. 544 (1896); *Shinn v. Board of Education*, 39 W.Va. 497, 20 S.E. 604 (1894); *Herald v. Board of Education*, 65 W.Va. 765, 65 S.E. 102 (1909); *Pennsylvania Lightning Rod Co. v. Board of Education*, 20 W.Va. 360 (1882)).

West Virginia law exacts severe penalties for spending a school board's funds for an unauthorized purpose. *See* W. Va. Code § 11-8-26 (unauthorized expenditures forbidden), § 11-8-28 (suit may be brought to recover unlawful expenditure), § 11-8-29 (personal liability for participating in unlawful expenditure), § 11-8-30 (liability of public official participating in unlawful expenditure shall include principal and interest and may, at court's discretion, include a penalty and payment of prevailing party's attorney's fees and costs), § 11-8-31 (willful violations may be prosecuted as criminal misdemeanors; willful or grossly negligent violations mandate removal from office).

Related to bonuses, this Court has ruled that "there is no provision in our law for the payment of bonuses to public employees." *State ex rel. Cooke v. Jarrell*, 154 W. Va. 542, 547 S.E. 2d 214, 217 (1970). Therefore, unless there is express authority, or such as fairly arises by necessary implication, in a statute, bonuses to school employees are prohibited. There is no statutory authority, explicit or by implication to permit employees to keep overpaid wages.

Compensation for employees is governed by statute and local policy. For school service personnel, West Virginia Code provides the minimum monthly salaries at § 18A-4-8a, and

§ 18A-4-5b provides for county salary supplements for school service personnel. That latter statute provides that the permissible county salary supplement schedules

> shall be uniform throughout the county with regard to any training classification, experience, years of employment, responsibility, duties, pupil participation, pupil enrollment, size of buildings, operation of equipment or other requirements. Further, uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county...

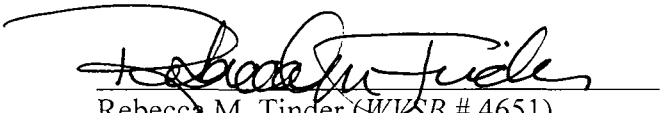
W. Va. Code § 18A-4-5b. There is no board-approved salary supplement that would justify the petitioners keeping the overpaid wages.

CONCLUSION

For all the reasons set forth in this brief and such other reasons as may appear in the record, the Respondent Lincoln County Board of Education respectfully requests that this Court AFFIRM the Circuit Court's decision.

Respectfully submitted,

LINCOLN COUNTY BOARD OF EDUCATION
By Counsel



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