

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

Docket No. 33325

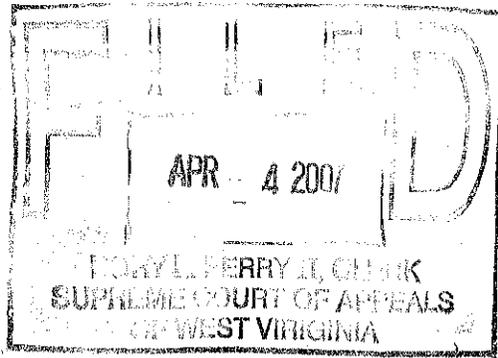
BRIAN M. POWELL,

Appellant,

v.

STEVEN L. PAINE, STATE  
SUPERINTENDENT OF SCHOOLS,

Appellee.



**BRIEF OF PETITIONER**

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**BRIEF OF PETITIONER**

**I. KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER TRIBUNAL**

Following a Recommended Decision of the Professional Practices Panel (hereinafter "PPP")<sup>1</sup> (Exhibit B-2 to Petition), the teaching license of the Petitioner was suspended for four years by the West Virginia Superintendent of Education, the Respondent Steven L. Paine, by Order of December 9, 2005 (Exhibit B-1 to Petition). An appeal from that suspension was taken to and denied by the Circuit Court of Kanawha County by Order of May 25 2006. (Exhibit A to Petition) Following a timely Petition for Appeal, this Court granted review on February 28, 2007.

Because Petitioner had been disciplined for the same misconduct for which he was

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<sup>1</sup>The last sentence of §18A-3-6 (at p. 12 above) permits the Superintendent to delegate the hearing and making of a Recommended Decision to the PPP. The hearing was held before a the Professional Practices Panel appointed by the West Virginia Commission For Professional Teaching Standards pursuant to 126 CSR 154-7.2. That Panel then made a recommendation to the Superintendent regarding the suspension. The Panel is composed of teachers and educational administrators appointed pursuant to sec. 154.

suspended, West Virginia Code §18A-3-6 required the Superintendent of Education to demonstrate by clear and convincing evidence the unfitness of the Petitioner to be a teacher. The same statute also required the Superintendent to find a rational nexus between the admitted away-from-school misconduct of Petitioner and the performance of his job as a senior high school science teacher. This appeal is primarily based on the absence of any "unfitness" finding. The appeal also challenges whether findings of professional misconducts akin to "conduct unbecoming" supplies a sufficient "nexus" between the away-from-school misconduct in question and performance of the duties of a high school science teacher within the meaning of the same statute.

## II. STATEMENT OF FACTS

Petitioner Brian Powell ("Teacher"), age 38,<sup>2</sup> has taught with satisfactory evaluations for eleven years in West Virginia and four years in South Carolina with no record of discipline or misconduct (T 92-3), a total of fifteen years.

In his home on Sunday evening, September 26, 2004, he struck his 9-year-old son, BP, with a belt several times after the son refused to disclose the nature of his conduct in the son's fourth-grade classroom the preceding Friday. A note had been sent home to the parents with a request for a response, because in front of his fourth grade class the son had accused two other students in his class of engaging in sex. FoF 2-10.<sup>3</sup> As soon as the then

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<sup>2</sup>Except as noted, all time references will be given as of the time of the October 25, 2005 hearing before the Superintendent of Education ("State Superintendent").

<sup>3</sup>The Findings of Fact in Exhibit B-1 will hereinafter be referenced as "FoF \_\_\_" and the Conclusions of Law will be referenced as "CoL \_\_\_." The Circuit Court also made Findings of Fact and Conclusions of Law which track the administrative findings referenced

9-year-old son told his father why he had been disciplined, Petitioner immediately stopped striking his son with the belt. FoF 10-11, T 112-13.<sup>4</sup> When the father saw that swelling had developed, he administered first aid to the child. FoF 13, T 112-20.

Powell, who was raised in an environment of corporal punishment (T 19 or 62; FoF 55), and who had administered controlled corporal punishment to his own children, never denied that his actions on September 26, 2004 were excessive and inappropriate.<sup>5</sup> The following day Mr. Powell drove his son to school, as he usually did. T 113-16.

Based upon a discussion among classmates, the matter came to the attention of the school hierarchy and to the Department of Health and Human Resources (DHHR). T 35-16. DHHR began its investigation that day, September 27, 2004. Unilaterally and without notice to the parents, DHHR removed three of the teacher's five children from the home of the teacher and his wife, leaving two older children, both aged 17, in the home. FoF 14-28.

In immediate response to a neglect and abuse action filed by DHHR in Circuit Court, Powell and his wife moved for, and were granted, an improvement program. During the course of the improvement program, one of the three children, the 11-year-old child, who had been removed from his parents' home was returned within seven days, and

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above. Except as noted, these judicial fact findings will not be further discussed.

<sup>4</sup>The transcript of hearing before the Professional Practices Panel of October 25, 2005 will be hereinafter referred to as "T \_\_\_."

<sup>5</sup>A State Police witness called, unnecessarily in the opinion of the undersigned, 1<sup>st</sup> Sgt. Steve Reckart, admitted the local community (including himself personally) accepted the practice. T 62.

the remaining two children within less than two months. Although not denying responsibility, an important tactical consideration in Powell's plea to the misdemeanor domestic battery charge discussed below, like the improvement program and the high degree of cooperation with it, was to have his family reunited as soon as possible under one roof. The blended family had lived under one roof for the 4+ years that they lived in Hardy County. T 97-10 & 19.

Civil Abuse Proceeding – Pursuant to the improvement period, an MDT (Multi-Disciplinary Team) was formed to arrive at the precise terms of the improvement plan. Among others,<sup>6</sup> the MDT included the Prosecuting Attorney, a representative of DHHR, and several guardian ad litem for the children. Their plan called for an individual evaluation of each family member, counseling for Powell and his wife and the son involved in the incident, counseling for the children and parenting counseling for Mrs. Powell. FoF 48. Finally, joint family counseling was conducted under the terms of the Plan and was continuing at the time of the October 25, 2005 administrative hearing. Initially, Powell was evaluated by two local licensed psychologists.<sup>7</sup> The reports concerning the parents and five children are in the record and the psychological and family counselors were involved in therapy with varying members of the blended family and are in RX-3.

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<sup>6</sup>The family was a blended one. Between themselves, the Petitioner and his wife had custody of all the children of each of their prior marriages and of their marriage. The prior spouses were named as members of the MDT but never materially participated.

<sup>7</sup>The exhibits introduced at the October 25, 2005 hearing will be referred to: Department of Education Exhibits, "DOE X\_\_"; Respondent Teacher's Exhibits, "RX \_\_". The details of the favorable reports are at RX 3, Tabs 2 and 5. Ultimately, two additional psychologists gave him a clean bill of health. See BOE Ex. 4 and RX 3, Tab 6.

Although DHHR paid for a few of the initial reports, the brunt of the expense of even this evaluation procedure was borne by Mr. Powell. T 131, RX 6.

Less than seven months after the plan was approved on October 27, 2005, DHHR moved on May 2, 2006 to dismiss the child neglect case on the grounds of full compliance with the plan and the absence of any need to supervise the completion of the plan. The letter from DHHR to Judge Cookman (Tab 7 of RX 3) stated in part:

Mr. and Mrs. Powell worked hard to complete the items outlined in their class plan.

The Child Protective Service worker summarized the various therapies and interventions which all members of the family had been through successfully and mentioned that as the individual therapy of many of the members was successful, they were being referred into family counseling sessions. The report concluded:

Throughout the improvement period [Mr. and Mrs. Powell] have been cooperative and have not only completed the services recommended but it is felt they have also benefitted from the services. At this time they are all participating in family therapy and they should continue until Dr. Morris recommends closure.

RX 3, Tab 7. The guardians ad litem agreed. Without objection, the case was dismissed on May 10, 2005 by the Circuit Court. Id. Family counseling continued and was ongoing at the time of the October 2005 hearing. T 164-5, FoF 50.

Misdemeanor Conviction – On or about October 13-14, 2004, the Prosecuting Attorney of Hardy County indicted Mr. Powell for felony child abuse. Seven days later he pled to the misdemeanor of domestic battery with the understanding, accepted by the court, that he would be able to serve a 30-day jail sentence on weekends so that he could

continue to teach and support his family in the interim. He was assessed courts costs totaling \$1,578.50. DOE Ex. 6. In addition, he had to pay \$200 in processing fees in order to enter the regional jail for about ten weekend incarcerations. T 132-10, RX 6, FoF 35, 37-38.

Discipline by the Hardy County Board of Education – As noted, Powell was a high school science teacher employed by the Hardy County Board of Education. FoF 1. He taught senior high school science classes including chemistry, biology and advanced chemistry.<sup>8</sup> As soon as the events occurred, Powell informed the Superintendent and his immediate supervisor, the Principal of the Moorefield High School. Upon learning of the indictment, the County Superintendent suspended Powell with pay pending an investigation on October 29, 2004. FoF 36. After the plea bargain, he was suspended without pay and with the recommendation to the Board of Education that Powell be discharged pursuant to West Virginia Code §18A-2-8. FoF 39-40. Powell appealed the suspension, discharge recommendation and pay issues to the County Board of Education.

The Board rejected the County Superintendent's recommendation of dismissal. However, the County Board of Education did require a full psychological evaluation of Powell to determine whether he was "not a danger to any Hardy County School students ...". BOE Ex. p. 86, FoF 41-2.

With drafting assistance from the Prosecutor's Office, the wording of the referral was "that the evaluation should focus on [Powell's] '... suitability to educate and supervise

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<sup>8</sup>He also served as head coach of the high school football team.

children and whether he poses a risk to physically harm children under his supervision'."

BOE Ex. 17, p. 1.

With the assistance of the County Prosecutor (BOE Ex. 17, p. 1), the Board of Education selected Dr. Allan DeVoie, Ph.D., a practicing psychologist in Elkins. After two interviews with Powell, the administration of several psychological tests, interviews with the Principal, wife and the two eldest children, Dr. DeVoie found that Mr. Powell "... is at no greater risk of physically harming a student than any other teacher would be" and recommended that he be returned to the classroom. DOE Ex. 17, FoF 44. Based on that report, Mr. Powell was returned to his classroom duties on January 12, 2005, but without back pay.<sup>9</sup> He continued to teach without incident until his hearing before the PPP on October 25, 2005. He was again discharged by the County Superintendent in light of the apparent outcome of the licensing procedure, as described below.

Licensure Proceeding – On July 25, 2005, the Superintendent of Education initiated proceedings against Mr. Powell's teaching license based on the September 26, 2004 events and on other allegations.<sup>10</sup> See DOE Ex. 1. The only charge discussed in any further detail is the one pertaining to the incident of September 26.

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<sup>9</sup>Powell continued his grievance as to the issue of back pay for the period of two and a half months. The Grievance Board denied the back pay. Brian Powell v. Hardy County Board of Education, Docket No. 04-16-412, Decision of Administrative Law Judge dated April 4, 2005. No appeal was taken from that decision. Thus, Powell was suspended from his teaching duties without pay from October 29, 2004 to January 12, 2005.

<sup>10</sup>Although the remaining charges occupy a great deal of space in the record, none of them held up. Accordingly, they are not discussed further.

After receiving numerous exhibits and hearing the testimony of Powell and nine other witnesses, the Panel made a bench decision the day of the hearing recommending to the Superintendent that Powell's license be suspended for four years. The Panel found that Powell's licenses should be subject to a "significant penalty." CoL 11-12, Ex. B-2.

The Superintendent found "cruelty" by clear and convincing evidence (CoL 3-5). Recognizing his obligation to find a rational nexus (CoL 1, 2, 6), the Superintendent found that the single incident of conduct was contrary to general language in the terms and provisions of the Teacher's Code of Conduct.<sup>11</sup> Without previous challenge, we have generalized those provisions of the Teacher's Code as amounting to essentially a charge of "conduct unbecoming." The Superintendent concluded that the violation of three standards in the situation herein was sufficient to establish unfitness by any standard of proof and concluded that those violations satisfied the rational nexus requirement. CoL 9. The Superintendent concluded his findings by noting that the incident:

... dictates that Mr. Powell's certification must be subject to a significant penalty. We conclude that a four-year suspension is the appropriate penalty, factoring in the seriousness of the incident involving [the son] and the mitigating circumstances surrounding the psychologist's report and the counseling and therapy that Mr. Powell has undertaken to address his problems at home."<sup>12</sup>

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<sup>11</sup>126 CSR §162-4.2 provides in pertinent part: All West Virginia school employees shall: ... demonstrate responsible citizenship by maintaining a high standard of conduct and self-control moral/ethical behavior. Section 162-4.2.7 requires compliance "with all Federal and West Virginia laws, policies, regulations and procedures."

<sup>12</sup>The Superintendent further found that the event, quoting from Rogliano v. Fayette County BOE, 176 W.Va. 700, 704, 487 S.E.2d 220, 224 (1986) (per curiam), had not "become the subject of such notoriety as to significantly and reasonably impair the capability of the particular teacher to discharge the responsibilities of the teaching

CoL 11-12.

The written version of the bench finding (Ex. B-2) was adopted by the State Superintendent (Ex. B-1) and a timely appeal to the Kanawha County Circuit Court was taken pursuant to West Virginia Code §29-5-4. The Circuit Court, The Honorable Louis H. Bloom, Judge, adopted in toto the proposed findings submitted by the Department of Education, including specifically Conclusion of Law No. 5. It found that:

Mr. Powell's private conduct, in severely beating [BP] ... had a direct affect on his performance of the occupational responsibilities as a teacher under Golden [v. Harrison County BOE], 169 W.Va. 63, 285 S.E.2d 665, 668 (1981)]. Mr. Powell has demonstrated through his conduct that he lacks self control and moral/ethical behavior required of a teacher in the performance of his duties.

Exhibit A to Petition.

### III. ASSIGNMENTS OF ERROR AND POINTS AND AUTHORITIES RELIED UPON

1. The Superintendent breached his statutory duty to determine whether or not the actions in question render Mr. Powell "unfit to teach."

W.Va. Code §18A-3-6, as amended in 2002, provides that where, as here, a teacher has already been disciplined, the same conduct, that his certificate "may not be revoked for any matter for which the teacher was disciplined, less than dismissal by the County Board ..., unless it can be proven by clear and convincing evidence that the teacher has committed one of the offenses listed in this subsection and his or her actions render him or her unfit to teach. (Emphasis added)

2. Despite the authoritative handling of the criminal and child abuse aspects of the occurrence by the Prosecuting Attorney of Hardy County and the DHHR, both before  

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position." Thus, the second means of proving a rational nexus is not involved in this case.

and subject to the jurisdiction of the Circuit Court of Hardy County, the Superintendent was guided by the need to impose "a significant penalty" and failed to correctly determine as also required by §18A-3-6 (2002) whether a "rational nexus between the conduct of the teacher and the performance of his ... job" existed.

#### IV. ARGUMENT

##### THE SUPERINTENDENT IGNORES HIS OBLIGATION TO FIND UNFITNESS TO TEACH BY CLEAR AND CONVINCING EVIDENCE AND FAILS TO JUSTIFY OR EXPLAIN HOW A FOUR-YEAR SUSPENSION WOULD IMPROVE THE "PERFORMANCE OF ... [THE TEACHER'S] JOB" UNDER THE "RATIONAL NEXUS" TEST.

###### A. NO FINDING AS REQUIRED BY 2004 AMENDMENTS OF UNFITNESS TO TEACH.

The Superintendent ignored this statutory requirement.<sup>13</sup> We submit he did so

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<sup>13</sup>The Department of Education submitted no proposed ruling on the failure of the Superintendent to make any finding on the fitness issue, and the Circuit Court made no mention of the issue. In opposing the Petition for Appeal, the Superintendent argued that the teacher had waived the issue at the Circuit Court level by not making it. That position is, we submit, directly contrary to the wording of our proposed findings and brief submitted to the Circuit Court. Quotes from the proposed findings submitted by the Petitioner-Teacher to the Circuit Court on May 24, 2006 bely this assertion. Proposed Conclusion of Law No. 5 read in part:

5. Despite the length and detail provided by the Superintendent's Decision, there is no explicit finding that the record establishes by clear and convincing evidence that Powell is "unfit to teach."

The "Brief of Petitioner" filed with the Circuit Court on or about March 27, 2006 at pp. 24 and 25 under the "Argument" heading, stated "the unrefuted evidence of fitness makes proof by clear and convincing evidence impossible." The 2004 amendments concerning the requirement of proof by clear and convincing evidence of unfitness to teach were discussed. An argument, consistent with the foregoing argument heading, was made that -- especially, given the circumstance that the record, in particular the psychological reports and treatment of Mr. Powell by DHHR "overwhelmingly establish[es] the fitness of Powell to teach ..." -- "... it would have been impossible to make a finding to the contrary, especially by clear and convincing evidence."

because the evidence – the opinions of four psychologists, the position of the DHHR, the various case workers and social workers involved forcefully and unanimously established that the teacher was fit to teach, to be a father and to continue life.

While some consideration was given to the counseling and success in counseling Mr. Powell had achieved, that information was only considered in “mitigation” once the question of liability, that is breach of the standards of the statute, had already been decided. This is a question of what must be determined before liability can be determined. The factors that were considered in mitigating the penalty were not considered in determining whether there should be any penalty at all. Thus, while the steps Powell had taken may be relevant considerations on the penalty question, assuming arguendo it could have been reached, that issue could not be reached until a finding by clear and convincing evidence of unfitness to teach had been made. Although the Superintendent questioned the bona fides of Powell’s remorsefulness, the Superintendent did so in such a qualified manner that the “questioning” could not even have been a finding by clear and convincing evidence that the teacher was not remorseful.

1. The Unrefuted Evidence of Fitness Makes Proof of Unfitness By Clear and Convincing Evidence Impossible

Prior to 2004, Golden had required that a rational nexus be shown between the act the teacher was charged with and its effect on his fitness to be a teacher. The case law codified by the 2004 amendments to West Virginia Code §18A-3-6<sup>14</sup>, is marked as [2] and

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<sup>14</sup>The Teacher’s license revocation statute, West Virginia Code §18A-3-6, as amended and effective on June 13, 2004 and still in effect states in pertinent part:

underscored in footnote 14. In addition, the 2004 Legislature attached a further proviso, marked [1] in footnote 14 above, with the critical language. This proviso concerns teachers who had been "disciplined less than dismissal" for the same matter at issue in the licensure proceeding and required proof of both the more general interference with "performance of his or her job" standard and a new, more specific "unfit to teach" standard and by clear and convincing evidence.

While the evidence before the Superintendent established that Mr. Powell did something he will regret for the rest of his life and which has substantially disrupted his family, the evidence addressing the question of fitness overwhelmingly establishes the

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The state superintendent may, after ten days' notice and upon proper evidence, revoke the certificates of any teacher for any of the following causes: Intemperance; untruthfulness; cruelty; immorality; the conviction of a felony or a guilty plea or a plea of no contest to a felony charge; the conviction, guilty plea or plea of no contest to any charge involving sexual misconduct with a minor or a student; or for using fraudulent, unapproved, or insufficient credit to obtain the certificates or for using fraudulent, unapproved or insufficient credit to obtain the certificates; *Provided [1]*, That the certificates of a teacher may not be revoked for any matter for which the teacher was disciplined, less than dismissal by the county board that employs the teacher, nor for which the teacher is meeting or has met an improvement plan determined by the county board, **unless it can be proven by clear and convincing evidence that the teacher has committed one of the offenses listed in this subsection and his or her actions render him or her unfit to teach;** *Provided, However, [2]* That in order for any conduct of a teacher involving intemperance; cruelty; immorality; or using fraudulent, unapproved or insufficient credit to obtain the certificates to constitute grounds for revocation of the certificates of a teacher, there must be a rational nexus between the conduct of the teacher and the performance of his or her job. The state superintendent may designate the West Virginia commission for professional teaching standards or members thereof to conduct hearings on revocations or certificate denials and make recommendations for action by the state superintendent.

... (Effective June 13, 2004, Cum. Supp. 2005). (Numbering, bolding and underscoring added).

fitness of Powell to teach.

Several undisputed facts demonstrate Powell's fitness to teach:

1. The conclusion of the psychologist selected by the school board with the assistance of the local prosecutor which stated that Powell could be safely returned to the home.
2. With the acceptance of that recommendation by the Board of Education and, critically, the continuation of Powell's unblemished teaching record of satisfactory, and better, job evaluations covering his eleven years teaching in state, Powell was returned to work. Nothing happened subsequently that has brought into question Dr. LaVoie's opinion.
3. All of the other psychologists in the case reached a like conclusion that Mr. Powell was no danger to his children.
  - a. Neil Morris, Ph.D.— Dr. Morris, who has known the older two boys of the Powell family "for quite a few years on and off" in the context of family counseling and who was at the time involved in counseling the Powell family, which resulted in the recommendations of the other psychologists being carried out and the prerequisites for family counseling being carried out, and Mr. Trainor were both of the opinion that Mr. Powell would not harm children. T 161, 167. Dr. Morris concluded:

So I've had a lot of contact time with him. I've watched him in the therapy room. I see how he responds to the children and to the statements that I think – I have good confidence that he is not going to use physical means in the future, that he is going to be using other forms of instruction and discipline with the children that do not involve physical activity.

T. 163. Nor would Dr. Morris be "at all concerned about him in the classroom situation." T 164; RX-3, Tab 6.

- b. Thomas C. Stein, Ed.D. – One of the tests he administered "revealed [Powell's] regret over his actions and the adverse impact that same has had on his family. ... Noted further were a very high level of concern re: losing custody of his children,

losing his ability to produce income and support his family. (RX 3, tab 2, p.1). ... Mr. Powell verbalizes regret no[t] only over his behavior but the effects that his behavior has had on his family, both spouse and other children. ... He reports his highest priority is to have his children returned to him and his wife's custody." RX-3, Tab 2

- c. Gregory Trainor, M.A. – Mr. Trainor concluded that Mr. Powell "did not ... pose ... a greater risk than your typical person after that period of time. ... He was cooperative with me in his counseling. We did work on some anger management and tried to sensitize him to the feeling of his children in regard to them receiving physical punishment versus more responsible consequences." T. 167; RX-3, Tab 5

Particular weight should be given to these opinions as they are from treating, rather than evaluating, practitioners.

4. The strong recommendation of DHHR based on reports of three separate individuals who were variously licensed counselors, social workers and licensed family therapists to Circuit Judge Cookman that the plan of improvement agreed to by the teacher and his wife had been thoroughly complied with to the extent that the civil abuse case should be dismissed before the counseling was complete. See RX-3, Tab 7.

In addition to the foregoing direct evidence of fitness, several significant and undisputed circumstances corroborate the above and reinforce the unlikelihood of a recurrence.

1. Removal of his younger children from the house for an extended period of time.
2. Extensive and productive counseling and therapy of the family members on an individual level and the entire family at a group level, most of which was at Mr. Powell's expense and costs .
3. The economic cost in the range of \$15,000 is staggering for a family with five children. Mr. Powell has been unemployed for long periods of time; thus, requiring Mrs. Powell, who is a registered nurse, to spend more time away from home working longer hours. Mr. Powell, at the time of the hearing, was unemployed.

4. The incident will always remain a black mark on his record and will follow him throughout his employment career, especially either as a teacher or in some professional job(s) associated with his training in chemistry. Participation in the licensing proceeding itself left a mark on the teacher for life and will certainly not be forgotten by Mr. Powell.

Thus, it would have been impossible to make a finding of unfitness to teach, especially by clear and convincing evidence. Each of the facts and circumstances the Superintendent should have, but did not, consider, as summarized at pp. 13-15 below and pp. 19-23 below, are highly relevant to the question of fitness to teach, but were not even considered by the Superintendent as to that issue.

2. Genuine Remorse - Irrelevancy and Error in Finding to the Contrary

Fact finding 52 states:

Mr. Powell's testimony made it apparent to the Panel that he fails to appreciate the severity of his conduct, despite all of the repercussions he has faced.

53. Mr. Powell appeared more concerned about the troubles he had faced and the money he has lost and spent as a result of the incident with B., than the injuries that B. suffered at his hand. (Emphasis added.)

Assuming the foregoing are credibility finding, they are "plainly wrong," especially under the clear and convincing standard.

This finding is clearly erroneous for several reasons. There is no explicit evidence. The efforts to obtain explicit evidence on cross examination were unavailing. The ruling is contrary to all of the treating psychologists findings. There is no finding that the

conclusion is supported by clear and convincing evidence,<sup>15</sup> let alone any clear and convincing evidence.

As bad as the underlying act was, it only occurred once. Powell returned to the class and taught for about ten months without any incident, as he had for the previous fifteen years. He was found by the County BOE's own expert to be fit to teach.

The Teacher made a very serious mistake. He never denied it and cooperatively accepted numerous consequences that flowed from it. Especially for someone who has been through as much deterrence-oriented punishment as jailing, separation from members of his family, payment of substantial sums of money, loss of job and possible loss of teaching license – the line between a true (he honestly believed he should not injure his son) and conditioned response (he says he would not injure his son to “say the right thing” and put himself in a better light) is extremely difficult to draw. While in some criminal cases, which this is not, it may be necessary to look into the psyche or “heart” of the accused, we respectfully submit that it is beyond the authority or ability of the Superintendent to do so. His authority is limited by §18A-3-6 to determining the questions of fitness, not divining the purity of heart of someone who has been through the agony Mr. Powell has.

While the PPP somehow “felt” that Mr. Powell was more concerned about cost of the penalties imposed rather than acceptance of responsibility, those matters were only mentioned briefly by Mr. Powell. The numerous steps (which we will not repeat) Powell

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<sup>15</sup>Note that when the Superintendent does find by clear and convincing evidence, it so notes.

has been through do impose an enormous burden.

In light of the foregoing, the finding that Powell failed to appreciate the severity of his conduct and that he was more concerned with the penalties than with the physical injury he had caused B. is not supported by the record of this case. By the time of the hearing, long after his family had been reunited, it is understandable that, when faced with loss of his livelihood, he referred to the punishments and processes he had already been through.

Further counter-weight against the clear and convincing burden are found in the opinions of the impartial experts who found Powell to be genuinely remorseful. In any event, the findings of those experts far outweighs the tentative, "seemed" and "apparent" finding of the Superintendent, which themselves are inconsistent with the Superintendent's ignored duty to make findings by clear and convincing evidence. Therefore, that finding could not have been made by clear and convincing evidence and cannot stand.

B. SIMPLY RULING THAT AN ACT OF MISCONDUCT VIOLATES THE TEACHERS' CODE OF CONDUCT DOES NOT ESTABLISH THE REQUIRED NEXUS BETWEEN THE ACT OF MISCONDUCT AND THE FITNESS TO TEACH.

1. When the Statute Itself Calls For An Examination of the "Performance of His Or Her Job" It Is Calling For An Examination of the Likely Outcomes in the Classroom Not A One Dimensional Determination of "Conduct Unbecoming."

The basis of the Board's finding of unfitness was that the Teacher's "abusive physical conduct towards a child is not consistent with his responsibilities as a teacher" and violates the Board of Education Policy 5902, Employee Code of Conduct for School Personnel which require the teacher to "maintain a high standard of conduct, self-control

and moral/ethical behavior, 126 C.S.R. 162, §4.2.6" and to obey the law, §4.2.7. Decision, p. 8.

Without meaning in any way to diminish the seriousness of the underlying conduct or the importance of the Code, the Teacher's Code violation is essentially a "conduct unbecoming" finding and does not address the performance by Powell of his duties as a classroom teacher. As this Court has made clear, wrongful conduct away from school such as shoplifting,<sup>16</sup> possession of marijuana,<sup>17</sup> theft from a third party,<sup>18</sup> mistaken showing a pornographic cartoon,<sup>19</sup> and sharing a hotel room with someone else at school expense<sup>20</sup> is not necessarily conduct inimical to the performance of the duties of the teaching profession. All of the teachers in the above-referenced cases engaged in "conduct unbecoming" and undoubtedly violated the general standards of the Code of Conduct quoted above as well as violating some rule or regulation; yet, no "rational nexus" was found in those cases.

Before the 2004 codification of the judicial nexus requirement of Golden v. Harrison County BOE, 169 W.Va. 63, 285 S.E.2d 665, 668 (1981), was based on the

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<sup>16</sup>Golden v. Harrison County BOE, 169 W.Va. 63, 285 S.E.2d 665, 668 (1981).

<sup>17</sup>Rogliano v. Fayette County Board of Education, 176 W.Va. 70, 347 S.E.2d 220 (1986).

<sup>18</sup>Waugh v. Board of Education of Cabell County, 177 W.Va. 16, 3350 S.E.2d 17 (1986).

<sup>19</sup>DeVito v. Board of Education, 173 W.Va. 396, 317 S.E.2d 159 (1984).

<sup>20</sup>Bledsoe v. Wyoming County Board of Education, 183 W.Va. 190, 394 S.E.2d 885 (1990).

California Supreme Court's seminal decision on away-from-school misconduct in Morrison v. State Board of Education, 1 Cal. 3<sup>rd</sup> at 214, 228-30, 82 Cal. Rptr. 175 at 186-87, 461 P.2d at 375 (1969), cited in Golden at 169 W.Va. at 68-9, 285 S.E.2d at 669. The Superintendent did not consider what have come to be known as the "Morrison factors,"<sup>21</sup> some of the areas of inquiry suggested by the California Supreme Court as applied to the away-from-school situations herein are:

1. No adverse effect on students. The Superintendent implicitly found that there was no accompanying exposure of students to information concerning the incident. CoL's 6-9
2. Conduct was physically remote from school.
3. Beyond the various findings of the psychologists that a recurrence was unlikely, the Teacher taught senior high school science classes, an environment highly unlikely to expose students to the situation which resulted in the injuries like those suffered by his son. There was no history

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<sup>21</sup>Morrison provided some guidance for determining the fitness issue.

In determining whether the teacher's conduct thus indicates unfitness to teach the board may consider such matters as the likelihood that the conduct may have adversely affected students or fellow teachers, degree of adversity anticipated, the proximity or remoteness and time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, the likelihood of the recurrence of the questioned conduct and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. These factors are relevant to the extent that they assist the board in determining a teacher's fitness to teach, i.e. in determining whether teacher's future classroom performance and overall impact on his students are likely to meet board's standards.

Morrison, 1 Cal3d 214, 235, 82 Cal. Rptr. 175,191, 461 P.2d 375, 391 (1969), cited by Golden, 169 W.Va. at 68-69, 285 SE2d at 669.

of the Teacher using violence to resolve disputes with students.

4. Although attempting to solve the problem in a completely inappropriate manner, the father was attempting to deal with a disciplinary problem the school had requested be addressed by the parents and was dealing with a recalcitrant child.

Thus, even when the possible effect on the class or the fitness of the teacher are examined under the most recognized criteria, no performance of the job issue is identified.

Consistent with the wording of the statute – “there must be a rational nexus between the conduct of the teacher and the performance of his or her job – obviously the rational nexus standard calls for an examination of the effect of the away-from-school act on the classroom. The fundamental failure in the Superintendent’s analysis, as repeated by the Circuit Court, is that both fixate on the single, non-recurring act of misconduct itself.

The Superintendent fixated on the incident to the exclusion of virtually all other evidence. Even the effort of the Superintendent to make a “nexus” finding based on the act itself did not mention any of the positive factors, discussed above, which constitute unrefuted expert testimony from “treating” professionals. Since they are obviously relevant, they should have been at least be addressed for the decision to minimumly comport with §18A-3-6.

The fixation on the act itself and the accompanying decision, without even the statutorily mandated unfitness finding of liability coupled with the central finding that a “substantial penalty” is called for, belies a second guessing of the discretion of the Hardy County Prosecutor, DHHR officers and the Hardy County Circuit Court who have already imposed penalties.

2. The Primary Emphasis of the Superintendent on Punishment Exceeds the Authority of the Superintendent under 18A-3-6.

Specifically, the Superintendent's determination of the need for a "significant penalty" coupled with the failure to meaningfully address the question of the relationship of conduct of the teacher to the performance of his job and the failure to address the "fitness to teach" issue at all strongly suggest that the Superintendent was intent upon the second guessing the penalties already imposed rather than in carrying out the purposes of the statute.

Without explaining why – in particular without any explanation of what a four-year suspension has to do with either performance of the job or fitness to teach – the Superintendent concludes that, despite the occurrence away from school and the absence of a finding or any particular effect on the classroom or student, Mr. Powell is not fit to teach.

A warning letter or some similar memorialization of the Superintendent's view of the conduct in question or something of that ilk would be more than sufficient to protect the children in the classroom and assure the continuing fitness of the Teacher. Involvement in such a disciplinary proceeding from beginning to end, including the ups and downs of trial preparation in a discipline proceeding when the Teacher's career is "on the line" is, we submit, enough to deter a repetition of the conduct in question, assuming deterrence remains necessary even after the successful completion of civil, criminal and school disciplinary proceedings.

The Superintendent ignores the judgment of the Legislature as carried out by the

Hardy County Prosecutor and the Circuit Court as to the punishment for child abuse and ignores the extensive measures taken on the civil side by the DHHR operating under the wing of the child protective laws and the Circuit Court of Hardy County.

The primary role of a licensing authority is to see that persons practicing the teaching profession are trained and otherwise qualified to do so. In doing so, the Superintendent has to consider the interests of the other constituencies of the profession, the students' parents, and in a broader sense the public as a whole, are served, while at least being fair to the members of the regulated profession. Those purposes are not normally achieved by punishment.

The awesome power of virtually removing a teacher mid-career in his 40's from a career cannot be imposed without a searching determining "fitness." Thus, whatever power the Superintendent had to impose to supplement punishments above those already imposed by the appropriate authorities should have been exercised cautiously.<sup>22</sup> Since the expertise of the Superintendent lies in the area of deciding what should or should not happen in the classroom, not in deciding punishments, the power should have been

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<sup>22</sup>WV Dept. Of Human Services v. Boley, 178 W.Va. 179 at 181-82, 358 S.E.2d 438, 440-41 (1987), held that the child abuse and neglect statute did not provide a basis for removal of a public school teacher from that position. This Court pointed out that other remedies such as a complaint by the parents, dismissal or discipline by the school board and a civil suit against the teacher were available. By the same reasoning, the Hardy County Prosecutor and Circuit Court have more than ample power, which they exercised, to "punish" Mr. Powell for the action. Since, we submit, the four-year suspension is not, as it is dressed up to be, a period for reformation, it is, as the Superintendent virtually admits, a punishment, a "significant penalty." Since the power to punish lies elsewhere, the State Superintendent of Schools has exceeded his authority in imposing punishment in the name "performance of the" teacher's job.

exercised carefully and documented by findings which demonstrate how punishment is intended to the achievement of the statutory criteria of "fitness" and "rational nexus."

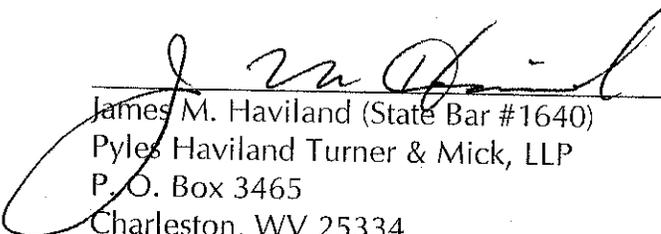
Also inherent in the ruling is the notion that change, acknowledgment of a wrong, reformation, maybe even redemption, are not available to teachers. It is as if the Superintendent does not recognize that good people make serious mistakes and society allows recovery. If what Powell has already gone through, and the effect of it on him as attested by the expert witnesses and the psychologists reports, is not enough and does not indicate acceptance of a responsibility, then what does?

#### CONCLUSION

The Decision of the Superintendent should be reversed and the Court should enter an Order directing the Superintendent to dismiss the proceedings and reinstate Powell's license.

Respectfully submitted,

BRIAN M. POWELL  
Petitioner,  
By Counsel.



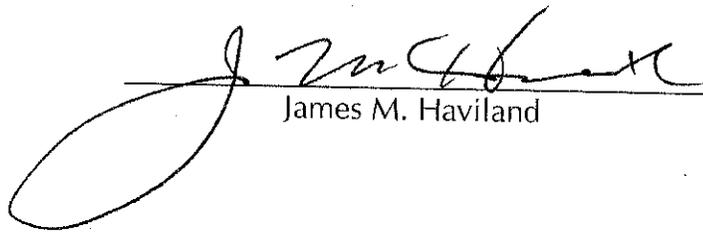
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CERTIFICATE OF SERVICE

I, James M. Haviland, hereby certify that a copy of the foregoing BRIEF OF PETITIONER was served on opposing counsel by the United States Mail, first-class mail, postage prepaid, by mailing to:

Katherine A. Campbell  
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this 4th day of April, 2007.

  
James M. Haviland