

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

Docket No. 33325

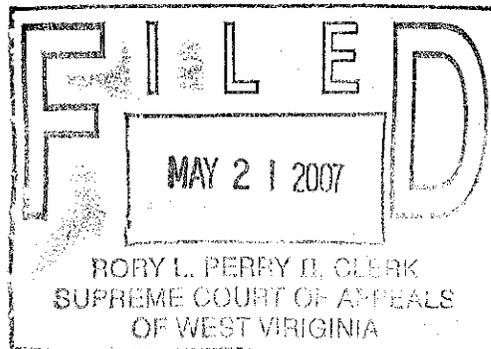
BRIAN M. POWELL,

Appellant,

v.

STEVEN L. PAINE, STATE
SUPERINTENDENT OF SCHOOLS,

Appellee.



REPLY BRIEF

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1. The Superintendent's assertions that the nexus findings are required fitness findings must fail. The problem with the Decision of the Superintendent, the opinion of the Circuit Court and now the response of the Superintendent is the failure to make fitness determinations required by West Virginia Code §18A-3-6. The Superintendent acknowledges his duty to make a fitness finding, and points to verbiage in his findings which he claims are findings of "fitness"; however, even a surface examination of those findings reveal that he is attempting to convert findings concerning a nexus between the bad act and performance in the classroom¹ into a "fitness" finding.

Fitness and "relationship to performance" are two different issues. For example, the fact that a lawyer may be impaired by some problem, such as drinking or depression, that

¹Hereinafter, the requirement of a separate finding (item [1] in bold at p. 12 of our Brief) will be referred to at times as "performance," "relationship to performance" or "nexus". The "nexus" test is item [2] at same page. Our Brief of Petitioner will be referred to as "Brief" and the Appellee's Brief will be referred to as "Response."

effects the performance of his work as a lawyer, does not mean that he is per se unfit to be a lawyer and that his license should be per se suspended or revoked. Normally, a question of the ability to perform his professional responsibilities exposes the lawyer to intervention, voluntary or involuntary, from the Bar Association or the Court, but does not necessarily mean that he is unfit to even be licensed. "Perform" is a broad term and in either the lawyer hypothetical or the statute now in question requires exacting proof, indeed in this situation clear and convincing proof.

In the 2004 amendments, the Legislature drew a distinction between fitness and performance of duties and required separate findings on each. The Legislature would not have established the two separate requirements of "fitness" and "relationship to performance" unless each meant something distinct and different. Not only are "performance of his or her job" and "fitness" two different concepts, but the finding of unfitness is a more far-reaching, broader requirement; yet, the Superintendent made no such finding. Given the unique circumstances including the single occurrence in the privacy of his own home, the unlikelihood of a recurrence established by numerous psychological reports and the DHHR proceedings, and the fact that there was no adverse effect on the school environment, the "directly effects" question was particularly critical and the failure to address it was material legal error.

The 2004 amendments supercede the standard of Golden.² Therefore, the circumstance that unfitness is part of the nexus test as formulated in Golden, as argued at

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

Response 13, does not lessen the requirements of Code §18A-3-6.

Even surface examination of the Superintendent's argument that he has made the fitness findings as required by 18A-3-6 are transparently wrong and reveal that the Superintendent has attempted to convert "relationship to performance" findings into "fitness" findings. Although recognizing the fitness issue at Response 9, the Superintendent never answers the "fitness" question. Instead, the remainder of the argument addresses only the "nexus between the conduct of the teacher and the performance of his or her job." Response 10. For example, the Superintendent refers to nexus findings in the remainder of the first complete paragraph of Response 10 when he quotes from conclusions of law nos. 7 and 8. Those findings address only the "nexus" issue and make no mention of fitness. Brief 9-10, 15-17. Finally, the Superintendent asserts at Response 10 that his finding that the Teacher "clearly crossed the line of acceptable behavior ...", located in Recommended Decision 6, constitute a finding by the "Panel by clear and convincing evidence ... that the Appellant's actions render the Appellant unfit to teach as required pursuant to West Virginia Code §18A-3-6." Response 10.

The Superintendent even acknowledges at Response 14 that his conclusions of law numbered 6 and 9 found that "a rational nexus does exist between Appellant's conduct at home and his responsibilities as a teacher." Thus, Conclusions 6 and 9 which the Superintendent offers at Response 14 as being a finding of unfitness, he asserts at page 10 to "relate to performance" finding.

At page 9, the Superintendent argues how fitness could be implicated but never

points to any actual finding of unfitness by clear and convincing evidence. He cannot because such a finding is not to be found in his decision.

The finding of the Superintendent that the actions of the Teacher amounted to "cruelty" within the meaning of 18A-3-6 (Response page 8) does not, as may be inferred from Response pp. 8 and 9, satisfy the separate requirement in the case of rediscipline that, in addition to there being a statutory ground for suspension, the Superintendent make a finding of unfitness to be a high school teacher by clear and convincing evidence.

The pathology of the Superintendent's confusing the two issues is seen when, to support his position that "the requisite finding that the Appellant's actions rendered the Appellant unfit to teach ..." were made by the Panel, the Superintendent then quotes from a portion of the Panel's Recommended Decision which deals with the nexus issue. Specifically, the portion of the Superintendent's Decision which is asserted to be a finding of unfitness,³ as quoted at page 10 of the Superintendent's brief, is:

"Therefore, the question is does Mr. Powell's conduct toward Bryce directly affect the performance of his duties as a teacher? We conclude that it does directly affect the performance of Mr. Powell's duties as a teacher."

Thus, it is clear that the Superintendent tries to portray his findings on the "performance" issue as proof of "unfitness."

In conclusion on the "fitness" issue, it should be noted that, in his responsive brief, the Superintendent makes no mention of the overwhelming evidence of fitness of Mr. Powell to teach (see pp. 13-15 of our Brief). It was arbitrary and an abuse of discretion for

³The end of the last complete paragraph on page 10.

the Superintendent not to weigh and balance (even if only to discredit, assuming it could have properly been done) the numerous and unanimous psychological reports and other evidence of fitness.⁴ When the Superintendent fails to even mention, much less evaluate and determine the weight to be given to such highly relevant evidence generated in earlier governmental proceedings, discretionary deference should not be given to his determination.

2. The Superintendent did not establish the required relationship of the misconduct to classroom performance. The simple fact that conduct may be determined to be "conduct unbecoming" does not establish how such "conduct unbecoming" effects the performance in the classroom. What the Superintendent seems not to recognize is that all human beings, including those in the various professional walks of life, including teachers, make mistakes. The mere fact that the person is a professional and made a mistake does not mean that his or her privilege to practice a profession should be brought into question in this case.

⁴ Indeed, there are two instances when the Superintendent makes factual arguments and innuendos which are not even the subject of fact findings. Although the Superintendent points out that the misconduct ceased as soon as the son began to describe the reasons he had been sent home with a note to be responded to by his parents (Response page 3, note 2), the son had been subjected to, the Superintendent attempts to conjure the stereotype of a bully type of "teacher/coach" who would go so far as to "coerce" a "confession" from his own son. Response pp. 9, 13. This medieval imagery is beyond the bounds of the record. His coaching job is not involved in the determination at all. A more accurate imagery is of a highly qualified teacher who teaches advance placement, high school science, physics and chemistry.

We submit that the Iowa case⁵ actually supports our position. Away-from-school repeated and flagrant intentional conduct involving one's own child which attempts to sabotage law enforcement to the point of having the child participate in an illegal act to defeat an alcohol testing device was found to be child abuse. The child abuse was found to be a basis for license revocation, but only after consideration of the very factors we point to which were not considered by the Superintendent.⁶ A proper nexus finding cannot be made without recitation of the relevant factors. Brief 19.

⁵Halter v. Iowa Board of Educational Examiners, 698 N.W.2d 337 (Iowa App., April 28, 2005) (table) 2005 WL 974713.

⁶Iowa Code Annotated, §272.2, initially §272.2(9), grants the Board of Examiners the discretion to establish standards for teacher qualifications and §272.2(14) requires the adoption of rules "to determine whether an applicant is qualified to perform the duties for which a license is sought." §272.2(14) contains two critical subparts, (a) and (b). Under (a), the Board of Examiners "may deny a license to or revoke the license of a person ... convicted of a crime or [the subject of] a founded report of child abuse ...". (Emphasis added) In exercising that discretion, however, the Board of Examiners in Halter was required to consider:

the nature and seriousness of the founded abuse or crime in relation to the position sought,

the time elapsed since the crime was committed,

the degree of rehabilitation which has taken place since the incident of founded abuse or commission of a crime,

the likelihood that a person will commit the same abuse or crime again, and

the number of founded abuses committed by or criminal convictions of the person involved.

§272.2(14)(a) (spacing added).

The Bledsoe case,⁷ involved a shakedown and bribery by a school official on school time who solicited political contributions from a vendor of the Board of Education for whom the maintenance supervisor worked and from whom the maintenance supervisor in fact ordered maintenance materials. One cannot argue with the Court's finding that that conduct was "directly related to his work." As the maintenance supervisor, he was in charge of purchasing a variety of materials for the Board. ..." The criminal conduct in that case occurred when the employee was carrying out his duties and directly concerned those duties and involved an outside vendor with whom he carried out his duties. The facts now before the Court are entirely different in that the Teacher was not performing his duties, his child was not a student of his and did not even attend the same school, and the Teacher made a full acceptance of responsibility. This contrasts with Halter where the teacher repeatedly involved her own child in illegal, if not criminal, conduct on a repeated basis to defeat a device to prevent a person who had been drinking from exposing the public to a drunk driver. Halter, WL 1.

Notwithstanding the Superintendent's efforts to distinguish our reliance upon Waugh⁸ and Rogliano,⁹ the fact remains that the misconduct in those cases occurred away

⁷Bledsoe v. Wyoming County Board of Education, 183 W.Va. 190, 394 S.E.2d 885 (1990). We apologize for misconnecting the facts of Rovello v. Lewis Co. BOE, 181 W.Va. 122, 381 S.E.2d 237 (1989) with Bledsoe, but submit that Bledsoe's facts as explained in argument actually support our position.

⁸Waugh v. Board of Education of Cabell County, 177 W.Va. 16, 350 S.E.2d 17 (1986).

⁹Rogliano v. Fayette County BOE, 176 W.Va. 700, 704, 487 S.E.2d 220, 224 (1986).

from school and, as in this case, never became a subject of concern in the student setting. Whether or not conviction ensued, the fact that the misconduct occurred away from school calls for a complete "rational nexus" determination.¹⁰

3. The previous punishment the Teacher received for the same event is relevant to all three goals of 18A-3-6 asserted by the Superintendent. We are not arguing, as paraphrased at Response 14, that because of prior punishment "the State Superintendent should step aside thinking that [the Teacher] has been 'punished' enough." But we are arguing that, assuming "punishment" is within the purview of the State Superintendent of Schools, punishment can only be imposed when the purposes of the revocation process are found to be present. While we think the Superintendent's powers are more limited than he sets forth at page 1 of his brief and emphasize that the "goals" are self-serving and apparently ad hoc, we use the Superintendent's own description of "the important goals of the revocation process." The Superintendent asserts that those goals are:

[1] To protect students and other staff members, [2] to bolster the integrity of the educational process and the confidence of the public in public education, and [3] to deter other teachers from such conduct.

There was no showing or finding in the record that the single act of the Teacher made him any the less qualified for the lofty description of the role of the Teacher offered at page 14.

¹⁰The line is not drawn at intentional behavior as is suggested at Response 13. While it is true that DeVito v. Bd. of Edu., 173 W.Va. 396, 317 S.E.2d 159 (1984) involved unintentional behavior (mistakenly showing a pornographic cartoon to students), Golden involved a teacher who was charged with the intentional offense of shoplifting. Response p. 13. This is the same page that the Superintendent quotes Golden without noting that the "unfit" standard of Golden has been superceded, in the case of rediscipline, by the 2004 amendment.

Further, the extent to which the goals of the revocation process were already satisfied by other governmental proceedings should at least have been taken into account in determining liability. The avoidance of double punishment is implicit in the enhanced proof requirements applicable, as here, in rediscipline cases.

There is no record that "protect[ion of the] students and other staff members" is needed or that the four-year unexplained suspension adds "protection" or anything to the "educational process and the confidence of the public."¹¹ In fact, the Superintendent, in affirming the Panel, found that there was no "notoriety" concerning the incident which impaired the Teacher's capability to discharge his duties. Decision 7-8.¹² If anything, the positive outcome of the counseling the Teacher agreed to, especially when combined to the absence of any prior or subsequent history, suggests that, unlike a teacher whose propensity for not filling the role model role has never been tested, the Teacher's ability to do so has been severely tested and retested and found by experts to be meeting all requirements, in the words of the psychologist selected by the local school board with the help of the local prosecutor, the Teacher is no more of a danger to students than any other teacher.

¹¹The Teacher had a clean record before the incident and after the incident there was no complaint of any misconduct or ill effect on the students even though he was teaching under the shadow of an indictment and in fact was serving his jail time on weekends so that he could teach during the week. Having passed the psychological test required by the Hardy County Board of Education, he continued to teach without incident until removed within days of the ruling of the Panel of October 25, 2005.

¹²The hearsay bases for County Superintendent Wetzel's testimony concerning supposedly disgruntled parents was not given any weight in the findings by the Superintendent.

The punishment meted out by the County Prosecutor and the DHHR and the Circuit Court of Hardy County are obviously more than enough to "deter other teachers from such conduct." It is interesting that after the fact the Superintendent proposes eloquent goals to justify his actions, but at the time the four-year suspension was imposed there was no explanation whatsoever of what purpose the suspension was to serve, why four as opposed to three or any other number of years of suspension would further any of these goals or carry out any public purpose. Thus, the justification offered by the Superintendent played no role at the time the four-year suspension was imposed and is an afterthought.

Therefore, even assuming the goals posited by the Superintendent are the goals of Code §18A-3-6, they cannot be relied on in the manner proposed. The absence of any finding underscores that the Superintendent's characterizations of the purposes of the revocation proceedings is an afterthought and violates the procedural due process protection to be informed of the applicable law and policy when an unstated policy supposedly provides a basis for adverse findings.

The failure to meet the express requirements of the 2004 amendments with regard to rediscipline is more than, as the Superintendent attempts to characterize it, a "simple disagreement" by the Teacher with a ruling of the State Superintendent. Response 15. The failure to make the statutorily required determination as well as the failure to make findings considering the very substantial evidence of fitness constitute conduct subject to judicial review under 29A-5-4(g)(1) [violation of statutory provision], (3) [made upon unlawful procedures], (4) [affected by other error of law], (5) [clearly wrong in view of the reliable probative and substantial evidence on the whole record] and (6) [arbitrary and capricious

and characterized by an abuse of discretion]. The failure to apply the applicable law violates 29A-5-4(g)(1)-(3) and the failure to take into account substantial portions of the record tending to prove fitness and addressing the issue of fitness mean that the "whole record" was not considered and the decision is arbitrary.

Therefore, we are not asking the Court to make its own decision as to whether or not Mr. Powell is fit to be in the classroom; rather, we are asking the Court to hold the Superintendent to the specific rules of law which apply to the Superintendent in making that determination. No amount of discretion frees the Superintendent from those obligations.¹³ Indeed, there is no record at all. Discretion is earned by, among other things, complying with the requirements of the statute and due process.

The analogy to gross misconduct of Woody Hayes performed in a stadium seating nearly 90,000 people while he was performing his duties as coach of an educational institution and in a game that was probably televised, is probably an apt example of conduct, like the criminal conduct of the Iowa teacher, which does provide a basis for a finding of unfitness (had it been made). By contrast, the regrettable conduct of the Teacher herein occurred in private and has been dealt with in several public fora. How the

¹³There is no record for the assertion at Response page 16 that the "four-year suspension levied upon the Appellant is ... well within the context of previous suspensions levied by this Panel."

The Superintendent never answered our argument that there is no record at all supporting the four-year suspension as opposed to any other remedy or number of years.

punishment which the Teacher has been through, all of which, with minor exception¹⁴ he accepted or acceded to, now including nearly two years loss of work as a teacher and lost pension credit opportunity, could conceivably constitute a "minimiz[ation]" or failure to treat his conduct "seriously," (Response 17) is never explained. The circumstance that another agency "gets there first" does not license the Superintendent to impose more sanctions than are necessary or to fail, as he did, to take into account the extent to which the discipline already imposed by the other agencies satisfies the stated goals of §18A-3-6.

Even the conclusion of the Superintendent that this Court should recognize, as other agencies have supposedly done, the nexus between the Teacher's conduct and his teaching responsibilities as sufficient grounds invites this Court to compound the error by also ignoring the multiple and explicit requirements of the 2004 amendments.

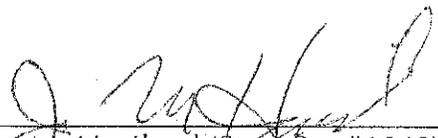
CONCLUSION

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

Respectfully submitted,

BRIAN M. POWELL
Petitioner,
By Counsel.

¹⁴The affirmance of the Grievance Board dealt only with the question remaining after passing his psychological test the Teacher sought back pay for the period of time he was suspended. The local Board of Education did not provide for interim pay once he was suspended without pay and the Grievance Board affirmed its Decision. Thus the Grievance Board Decision deals with a relatively minor question of back pay for a period of several months rather than four years of suspension.



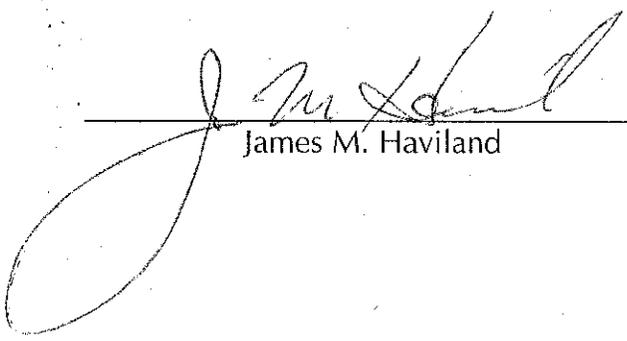
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CERTIFICATE OF SERVICE

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

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this 21st day of May, 2007.



James M. Haviland