

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

**D.C., Petitioner Below,
Petitioner**

vs) **No. 11-0077** (Kanawha County 10-AA-43)

**Wayne County Board of Education,
Respondent Below, Respondent**

FILED

February 14, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Kanawha County, wherein the circuit court affirmed the decision of the West Virginia Public Employees Grievance Board denying petitioner's grievance. The appeal was timely perfected by counsel, with petitioner's appendix from the circuit court accompanying the petition. Respondent Wayne County Board of Education has filed a summary response.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Petitioner D.K. is an employee of the Respondent Board, and worked as a bus operator for nine years prior to filing her grievance below.¹ Petitioner suffered from depression, and although she was being treated by prescription medication and therapy, she eventually attempted suicide in September of 2008. Petitioner was then admitted to the hospital for psychological treatment for a week, and reported the incident to her employer after her discharge on October 8, 2008. On that date, petitioner attempted to return to work. However, upon petitioner's self-report at the respondent's bus garage, then Transportation/Service Personnel Director Tab Mathis reported the information to the offices of Ben Shrew, the Executive Director of Transportation of the West Virginia State

¹Petitioner filed a motion to seal the file for this appeal due to the presence of medical records within, and the Court granted the same. Because of the nature of petitioner's allegations and respondent's reliance on information contained in these records, the Court will address petitioner by her initials in order to protect the private nature of the medical records and in the spirit of this Court's order sealing the file in this matter.

Department of Education. According to petitioner's testimony, Director Mathis stated that petitioner was not to return to work until he heard back from Director Shrew. Upon being provided with the information concerning petitioner's suicide attempt and subsequent hospitalization, Director Shrew informed Director Mathis that petitioner's state bus operator's certification was being suspended until further notice from the State Department of Education Transportation Department.

Over the next few months, petitioner was directed to undergo several examinations to determine if she was mentally able to have her certification restored and to resume her operator's duties. Following testing and a doctor's examination at Prestera Center for Mental Health Services, Director Shew and other members of the State Department of Education committee who determine the status of county bus operator certifications were not fully satisfied with the opinions rendered. As such, petitioner then had various doctors, including her primary physician and a psychotherapist, provide letters to Director Shew concerning her ability to return to work. However, Director Shew expressed concerns about these representations, and petitioner was then required to undergo a neuropsychological evaluation on May 1, 2009. The results showed that the doctor found petitioner's neuropsychological functioning to be intact, and his findings raised no concern about petitioner's readiness to return to work. Following receipt of this report, Director Shew restored petitioner's certification to operate a school bus, and Director Mathis immediately put petitioner back to work on May 21, 2009.

However, prior to her operator's certification being restored, petitioner filed a grievance with the Respondent Board on April 27, 2009. She claimed that the Board had improperly refused to allow her to return to work, while subjecting her to medical tests and not providing her with alternative work. She alleged that these actions were arbitrary and capricious. Petitioner did not, however, file any form of objection or protest, or demand a hearing with the West Virginia Department of Education with regard to the suspension of her state bus operator's certification by its Executive Transportation Director and committee. Petitioner sought relief in the form of reinstatement, back pay and benefits, back pay for lost extra runs, and interest for back pay. Petitioner's grievance was denied, and she then initiated an appeal of that decision to the circuit court. The circuit court affirmed the Public Employees Grievance Board decision by order dated December 8, 2011. It is from this order that petitioner appeals, alleging that both the West Virginia Public Employee Grievance Board and the circuit court erred when they upheld appellant's suspension of approximately eight months without a due process hearing before such suspension, as required under the West Virginia Code and the West Virginia Constitution.

“A final order of the hearing examiner for the West Virginia [Public] Employees Grievance Board, made pursuant to W. Va.Code, [6C-2-1], *et seq.* [], and based upon findings of fact, should not be reversed unless clearly wrong.’ Syllabus Point 1, *Randolph*

County Bd. of Educ. v. Scalia, 182 W.Va. 289, 387 S.E.2d 524 (1989).” Syl. Pt. 2, *Darby v. Kanawha Cnty. Bd. of Educ.*, 227 W.Va. 525, 711 S.E.2d 595 (2011). On appeal, petitioner argues that the undisputed evidence in this case establishes that she was suspended from work without any written notice or opportunity for a hearing. She argues that this violates her rights under both West Virginia statutory and constitutional law. Petitioner cites West Virginia Code § 18A-2-7, which allows for suspension of a bus operator, but argues that suspension cannot be finalized until the appropriate board of education has a hearing. Citing *Kessell v. Monongalia County General Hospital*, petitioner argues that these requirements are consistent with the due process clause of the West Virginia Constitution, which requires procedural safeguards whenever the government takes action which effects a person’s liberty or property interests. See Syl. Pt. 5, 215 W.Va. 609, 600 S.E.2d 321 (2004).

We find, however, that petitioner’s argument is without merit because of her failure to file a grievance against the appropriate entity below. Simply put, petitioner was entitled to no relief from the Respondent Board because it took no action to suspend her. As the circuit court correctly noted, “126 CSR 92 West Virginia State Department of Education Policy 4336 . . . requires that county board of education school bus operators must have state certification in order to operate a county school bus.” Additionally, Section 19.1 of that same policy grants the Superintendent of the West Virginia State Department of Education the power to suspend, revoke, or refuse to renew the certification of any school bus operator upon evidence that the operator is not otherwise qualified to perform the duties of such position. The circuit court found that “[n]owhere in our state statutory laws or state policies is there any indication that a county board of education has been given any such similar powers with regard to state suspensions of such certifications, nor has been given the power to reverse or overrule such a state suspension of certification.” In denying petitioner’s appeal, the circuit found that “had such a due process hearing been conducted by the [respondent] herein, the [respondent] would have not had any authority to overrule or reverse the . . . decision to suspend the [petitioner’s] state bus certification.” In short, the circuit court found that petitioner was asking the Administrative Law Judge below to exceed his statutory authority by the relief she requested.

In her petition for appeal, petitioner argues that the analysis above is contrary to this Court’s jurisprudence and the facts of the case. Citing *Wines v. Jefferson County Board Of Education*, she points out that this Court has already ruled that failure to give a due process hearing before acting under West Virginia Code § 18A-2-8 is not harmless error. 213 W.Va. 379, 582 S.E.2d 826 (2003). In *Wines*, this Court ruled that the plaintiff was entitled to back pay because she was not given a hearing on charges against her until after her employment was terminated. Further, petitioner argues that respondent cannot rely on the suspension of petitioner’s certification to contend such hearing would be meaningless because it was involved in having that certification suspended. However, petitioner’s argument ignores the

fact that the Administrative Law Judge was precluded from rendering an opinion in petitioner's favor because, as the circuit court properly noted, "the [petitioner] has sought the wrong forum for any relief for her claims. Any claims of deprivation of her rights or property interests, etc., by the [respondent] should have been directed to the West Virginia Department of Education and not the [respondent herein]." Additionally, the circuit court found that the respondent played no role in suspending petitioner's certification, and stated that "[t]here is no indication in the facts of this matter that the [respondent] board of education or any of its employees did anything more than report this incident to Executive Director Shew and to thereafter immediately forward him copies of any medical reports, etc, that the [respondent] received concerning the [petitioner]." For these reasons, petitioner's claims are without merit, and the final decision below is not clearly wrong.

For the foregoing reasons, we find no error in the decision of the circuit court and the order affirming the decision of the grievance board is hereby affirmed.

Affirmed.

ISSUED: February 14, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

DISQUALIFIED:

Justice Margaret L. Workman