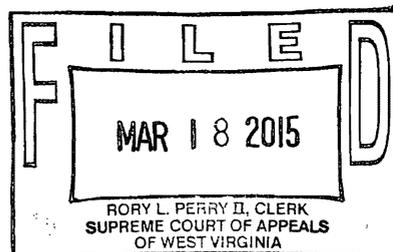


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-0131



STATE EX REL. LISA MILES,

Petitioner,

v.

WEST VIRGINIA BOARD OF REGISTERED  
PROFESSIONAL NURSES,

Respondent.

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RESPONSE TO WRIT OF PROHIBITION ON BEHALF OF THE WEST VIRGINIA  
BOARD OF EXAMINERS FOR REGISTERED PROFESSIONAL NURSES

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BOARD OF EXAMINERS FOR REGISTERED PROFESSIONAL NURSES**

COMES NOW, the Respondent, the West Virginia Board of Examiners for Registered Professional Nurses, by counsel, Greg S. Foster, Assistant Attorney General, and respectfully requests this Court to refuse to issue a rule to show cause and deny Lisa Miles' Petition for Writ of Prohibition for the reasons set forth herein.

**I.**

**INTRODUCTION**

This case arises from a complaint submitted to the Board from Camden Clark Memorial Hospital ("Camden Clark") regarding misconduct by Petitioner while employed at Camden Clark as a registered nurse. The complaint alleges that Petitioner repeatedly violated the hospital's narcotic wasting policy with regard to Dilaudid, a very powerful pain medication. An audit of Petitioner's charting revealed a significant amount of Dilaudid was not accounted for.

Petitioner requests this Court to prohibit the Board from proceeding against Petitioner on the grounds that the Board did not strictly comply with certain procedural instructions, even though the substance and ultimate purpose of the instructions were achieved, with the same

results. Petitioner attempts to elevate form over substance, and does not appreciate the distinction between directory and mandatory statutes. The essence and purpose of the statute's intent was achieved, and Petitioner was not prejudiced or otherwise harmed by the Board's actions.

Petitioner unfairly attempts to compare the facts of this case to those in *State ex rel. Fillinger v. Rhodes*, 230 W. Va. 560, 741 S.E.2d 118 (2013). This case is not *Fillinger*. The facts are not remotely on the same level as *Fillinger*. Petitioner improperly bootstraps the facts from *Fillinger* in an attempt to bolster her argument. Unlike *Fillinger*, the Board substantively complied with the statutory requirements, but Petitioner attempts to escape a hearing before the Board due to procedural nuances.

## II.

### STATEMENT OF THE CASE

#### **Background**

The West Virginia Board of Examiners for Registered Professional Nurses (hereinafter referred to as the "Board") is a state agency, enabled by West Virginia Code § 30-7-1 *et seq.*, and regulates the practice of registered professional nursing within the State of West Virginia.

The practice of registered professional nursing is a privilege, and any person engaged in the professional practice of registered nursing must possess the requisite experience and training, and shall be subject to the regulation and control of the Board. West Virginia Code §§ 30-1-1a and 30-7-1 *et seq.* As a result, in order to practice registered professional nursing in the State, it is necessary to obtain and hold licensure through the Board. West Virginia Code § 30-7-2.

Licensees may be subject to discipline for failure to comply with hospital policies or procedures, including a hospital's narcotic wasting policy. A hospital's narcotic wasting policy

acts as an accounting system for medication and a safeguard against misappropriation or abuse. Nurses are entrusted with handling medication on a daily basis. Medication pulled by a nurse must be charted as either given to a patient or wasted. If the medication is not charted as given to a patient or wasted, hospital policy is violated because medication that was dispensed is unaccounted for. Upon receiving a complaint alleging such violations, it is the Board's duty to investigate and determine whether there is misconduct by the licensee such that discipline is appropriate.

### **Petitioner's Termination**

Petitioner is a licensed registered professional nurse in the state of West Virginia, License No. 78299. On April 2, 2013, Petitioner was terminated from her employment in the emergency room at Camden Clark in Parkersburg, West Virginia, for failure to follow hospital policy related to narcotic wasting. The termination occurred after the hospital conducted an audit of Petitioner's narcotic charting which revealed at least twenty (20) violations of the hospital's narcotic wasting policy from January 5, 2013 to March 11, 2013. Upon her termination, Petitioner self-reported her misconduct to the Board on or about April 2, 2013.

Each of the violations involved Dilaudid, one of the most powerful pain medications. (Respondent App. P1-P3.) The audit revealed that there were eleven (11) occasions when Petitioner improperly pulled Dilaudid without an order from a physician. (Respondent App. P3.) There were also three (3) occasions when Petitioner pulled Dilaudid for patients that had already left the emergency department. *Id.* There were also nine (9) occasions where Petitioner entered orders for Dilaudid on behalf of a physician. *Id.* In each of these instances, not all of the Dilaudid was accounted for, as some doses were not charted as either given to the patient or

wasted. In sum, the audit indicated that nearly 10 mg of Dilaudid pulled by Petitioner was missing. *Id.*

### **The Board's Investigation into the Complaint**

In addition to her self-reporting, Petitioner's misconduct was reported in a complaint from Camden Clark received by the Board on or about April 12, 2013. (Respondent App. P1-P3.) The Board served Petitioner with a Notice of Complaint on or about April 12, 2013. (Respondent App. P4.)

On May 23, 2013, through her counsel, Petitioner submitted her response to the Notice of Complaint. (Respondent App. P5-P8.) Petitioner denied she was guilty of misconduct and attributed her violations to difficulties with Camden Clark's electronic medical record system, known as "Enlight". *Id.*

In her response, Petitioner also requested a copy of her employment file from Camden Clark, which the Board had recently subpoenaed on May 6, 2013. (Respondent App. P7.) The Board timely responded to Petitioner's request for documents and provided a certified copy of the Board's file to Petitioner's counsel on June 24, 2013. (Respondent App. P9.) Notably, as indicated in Petitioner's May 23, 2013 response, the Board had already produced a copy of Petitioner's licensee file maintained by the Board on May 2, 2013. (Respondent App. P10.) Furthermore, on April 15, 2014, Petitioner's counsel's legal assistant, Linda Marconnet, visited the Board's office and was granted access to review, inspect and obtain copies of any document contained within the Board's file on Petitioner. (Respondent App. P11-P13.)

The Board proceeded with its investigation of the complaint and issued the first status report to the complainant, Camden Clark, on August 14, 2013, four (4) months after receiving the complaint. (Respondent App. P14.) The status report was delivered to complainant by first

class mail. The status report indicated that the matter was under continued investigation and review by the Board. *Id.* Upon inquiry by the undersigned, Camden Clark confirmed that they received the August 14, 2013 status report.<sup>1</sup> (See Respondent App. P55-P56.)

In the months of January, February and March of 2014, email and letter correspondence was exchanged by the Board and Petitioner's counsel in an effort to reach a resolution without a hearing. On March 6, 2014, Petitioner, through counsel, provided a supplemental response to the complaint via email, again attributing her violations to difficulties with the hospital's electronic record system. (Respondent App. P15-P16.) On or about March 20, 2014, the Board submitted a proposed consent agreement to the Petitioner through her counsel.<sup>2</sup>

On October 10, 2014, within eighteen (18) months of receiving the complaint from Camden Clark, the Board served the complainant with a letter of agreement to extend the time frame for the Board to resolve the complaint, in accordance with West Virginia Code § 30-1-5(c). (Respondent App. P18.) Upon inquiry by the undersigned, Camden Clark confirmed receipt of the October 10, 2014 letter. (See Respondent App. P55-P56.) The letter provided that if the complainant did not agree to extend the time frame, the complainant was to notify the Board. However, if complainant was in agreement with the extension, no response was necessary. *Id.* Complainant did not object, and thus the letter formed an agreement between the Board and complainant to extend the time to resolve the complaint.

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<sup>1</sup> The Board's file also indicates a second status report was mailed to Camden Clark by first class mail on March 25, 2014. (Respondent App. P17.) Upon inquiry by the undersigned, Camden Clark was unable to confirm receipt of the second status report. (see Respondent App. P55-P56). However, West Virginia Code § 30-1-5(c) does not require the Board to send a second status report, and the Board will not rely on it since Camden Clark could not confirm receipt.

<sup>2</sup> Though Petitioner asserts that she submitted a "counter-proposal" to the Board, there is no record of a "counter-proposal" in the Board's file, nor did Petitioner include the alleged "counter-proposal" within her appendix.

On December 11, 2014, by letter similar to the October 10, 2014 letter, the Board again sought complainant's permission to extend the time frame to resolve the complaint in accordance with West Virginia Code § 30-1-5(c). (Respondent App. P19-P20.) Upon inquiry by the undersigned, Camden Clark confirmed receipt of the December 11, 2014 letter. (See Respondent App. P55-P56.) Complainant did not object to the December 11, 2014 letter, thereby agreeing to the extension.

### **Pre-Hearing Proceedings**

On December 12, 2014, the Board noticed Petitioner's hearing for January 20, 2015 (Respondent App. P21-P24), which brought the matter to the attention of the West Virginia Attorney General. Pursuant to W. Va. Code R. § 19-5-3.10.2, the Board is represented by the West Virginia Attorney General at contested case hearings. The undersigned, an Assistant Attorney General, represents the Board at such hearings. As is standard practice, at or around the time a matter is noticed for hearing, the Board's file is transferred to the undersigned to review and prepare for the hearing. The undersigned may also conduct additional investigation, if necessary. In some cases, through further investigation, the undersigned obtains additional documents not contained within the Board's file.

In this case, upon investigation and interviews with witnesses, the undersigned obtained the following documents not contained within the Board's file: (1) the complete audit performed by Camden Clark on the licensee's narcotic charting history<sup>3</sup> (30 pages); (2) a copy of the training manual/reference guide for the "Enlight" electronic medical record system that was

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<sup>3</sup> The Board's file only included a *summary* of the audit, which was attached by Camden Clark to its complaint filed with the Board. (See Respondent App. P3.) The complete audit was not produced by Camden Clark in response to the Board's subpoena. Upon inquiry, the undersigned was able to obtain the complete audit from Camden Clark.

available, at all times, at the nurse's station next to the "Enlight" computer (119 pages);<sup>4</sup> and (3) a Board of Pharmacy Report regarding medications prescribed to Petitioner (3 pages).<sup>5</sup>

The complete audit was obtained from Camden Clark by the undersigned via email attachment on January 9, 2015 (Respondent App. P25.) The training manual was obtained from Camden Clark by the undersigned via email attachment on January 13, 2015 (Respondent App. P27.) The Board of Pharmacy report was obtained by the undersigned on January 7, 2015 (Respondent App. P30.)

On January 15, 2015, undersigned counsel transmitted several documents to Petitioner's counsel. All of the aforementioned documents, a total of 152 pages, were provided as a supplement to what Petitioner's counsel had already been given. (Respondent App. P33-P35.)

Also on January 15, 2015, the undersigned emailed Petitioner's counsel the Board's entire file (even though Petitioner's counsel had been in possession of the Board's file since 2013), because Petitioner's counsel erroneously indicated to the undersigned that she had not received any documents from the Board. (Respondent App. P31-P35.) Thus, the majority of the documents provided on January 15, 2015 were duplicates of the Board's files, which had previously been produced to Petitioner's counsel in May and June of 2013, and also in April of 2014.

The Board was fully prepared to proceed with the hearing as scheduled on January 20<sup>th</sup>. But on Friday, January 16, 2015, at 1:59 p.m., counsel for Petitioner, via email, submitted a "Motion to Dismiss Complaint, or, in the Alternative, Motion to Stay to Allow the Filing of a

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<sup>4</sup> The training manual/reference guide was obtained from Camden Clark upon the undersigned's discovery of its existence when interviewing witnesses. The existence of the manual refutes Petitioner's assertions that Camden Clark did not have hard copies of manuals or reference materials readily available to assist a nurse using the "Enlight" system other than "online materials."

<sup>5</sup> In January of 2015, the undersigned requested that the Board obtain a Board of Pharmacy report on Petitioner.

Writ of Prohibition or, in the Alternative, Motion to Continue January 20, 2015 Hearing” (“Motion to Dismiss”). (Respondent App. P36-P54.)

The lengthy Motion to Dismiss was untimely filed under West Virginia Code R. § 19-3-10.21, which requires that motions be filed ten (10) days prior to the hearing. The untimeliness of the motion extremely prejudiced the Board’s ability to respond, as it was emailed the Friday afternoon prior to the scheduled hearing on Tuesday. (Respondent App. P36.)

A telephonic conference with the ALJ was quickly arranged that Friday afternoon, at which the ALJ continued the hearing.<sup>6</sup> The Board objected to the continuance on the grounds that the late filing of the motion was unjustifiable, as the hearing had been noticed on December 12, 2014. The crux of the Motion to Dismiss asserted many of the same procedural arguments at issue here, which were known to Petitioner when the hearing was noticed on December 12, 2014. Yet, Petitioner did not file her motion until the eve of the hearing, preventing the Board from submitting a proper written response. Nevertheless, the ALJ continued the hearing and rescheduled it for February 19, 2015. (Respondent App. P55.)

When the new hearing date approached, however, Petitioner again took steps to disrupt the administrative process. On February 18, 2015, one day before the rescheduled hearing, Petitioner emailed the undersigned a copy of the foregoing Writ of Prohibition as well as a “Motion to Stay Licensure Proceedings Pending Appeal.” Due to a snow storm and freezing temperatures across West Virginia the week of the rescheduled hearing, the February 19, 2015 hearing was continued. In light Petitioner’s Writ, the hearing has not yet been rescheduled.

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<sup>6</sup> Monday, January 19, 2015, was Martin Luther King Day, a state holiday, so in order for a pre-hearing on the motion to take place prior to the day of the actual hearing, a telephonic conference was quickly organized that Friday afternoon, the same day the motion was filed.

### III.

#### SUMMARY OF ARGUMENT

**A. The Board's failure to send the status report by certified mail is not a ground for dismissal because the certified mail instruction in West Virginia Code § 30-1-5(c) is directory, not mandatory.** Because the Board timely delivered a status report by first class mail to the complainant, there is no basis for dismissal under West Virginia Code § 30-1-5(c). Though the statute states that status reports are to be sent by certified mail, that requirement is directory and not mandatory. As this Court has explained, directory statutes have a permissive element, and non-compliance therewith does not deprive an agency of jurisdiction or otherwise prevent it from proceeding against a licensee. Whether a statute is mandatory or directory is determined from the intent of the legislature. Under this Court's test, discussed *infra*, the certified mail instruction is directory.

**B. The Letters of Agreement properly extended the time to resolve the complaint under West Virginia Code § 30-1-5(c).** West Virginia Code § 30-1-5(c) anticipates an eighteen (18) month time frame to resolve a complaint, which may be extended by agreement between the Board and the party filing the complaint. On October 10, 2014, the Board sent a letter requesting the complainant to agree to an extension. Complainant did not object to the extension. A similar letter seeking another extension was also sent to complainant on December 11, 2014, and again complainant did not object.

Petitioner asserts the letters are insufficient to grant an extension. However, the statute provides only that the Board and complainant "agree in writing." The letters form the basis of a written agreement that is effective unless the complainant objects. Further, the extension was timely because it was obtained before the expiration of the original eighteen (18) month time

frame. Accordingly, the Board and the complainant agreed in writing to an extension, in compliance with West Virginia Code § 30-1-5(c).

**C. Petitioner was timely provided with discovery.** Petitioner was provided with certified copies of the Board's files in May and June of 2013. In April of 2014, Petitioner's counsel (through her assistant) visited the Board's office and was permitted to inspect and make copies of the Board's file. On January 15, 2015, the undersigned promptly supplemented additional documents to Petitioner's counsel that were only very recently obtained. Petitioner's allegations that the Board failed to produce documents upon request is not only meritless, but disingenuous.

**D. The Board promptly disclosed its anticipated witnesses, exhibits and the identity of the hearing examiner upon request, while Petitioner failed to reciprocate.** Petitioner complains that the Board untimely disclosed its anticipated witnesses, exhibits and the identity of the hearing examiner on January 15, 2015. However, unless requested, such disclosures are not required in contested case proceedings. The general practice is for the parties to exchange anticipated witnesses and exhibits a few days before the hearing. Petitioner never requested this information until January 15, 2015, and only after the undersigned contacted Petitioner's counsel to exchange witness information. Though the Board promptly disclosed this information, Petitioner failed to reciprocate the courtesy.

**E. Rule 41(b) of the West Virginia Rules of Civil Procedure is inapplicable.** Petitioner asserts that the complaint should be dismissed pursuant to Rule 41(b) for failure to prosecute. This argument must be disregarded because Rule 41(b) has no application to contested case proceedings before the Board.

#### IV.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Board does not believe oral argument is necessary in this case, as the facts and the legal arguments in this matter are more than adequately presented in the briefs and the record filed with the Court. Oral argument would not significantly aid the decisional process. If this Court decides, however, that oral argument is necessary, the Board stands ready to appear and present its position.

#### V.

#### **ARGUMENT**

**A. The instruction in West Virginia Code § 30-1-5(c) to send the status report to the complainant by certified mail is directory, not mandatory.**

Petitioner asserts that the Board is divested of its power to proceed because it failed to send the status report *to the complainant* via certified mail in accordance with West Virginia Code § 30-1-5(c). West Virginia Code § 30-1-5(c) provides as follows:

(c) Every board referred to in this chapter has a duty to investigate and resolve complaints which it receives and shall, within six months of the complaint being filed, send a status report to the party filing the complaint by certified mail with a signed return receipt and within one year of the status report's return receipt date issue a final ruling, unless the party filing the complaint and the board agree in writing to extend the time for the final ruling.

West Virginia Code § 30-1-5(c). Petitioner fails to appreciate the difference between mandatory and directory statutes.

**1. This Court has explained the difference between mandatory and directory statutes, and has set forth the proper analysis to distinguish the two.**

This Court has repeatedly held that an instruction in a statute may be either directory or mandatory. Non-compliance with a directory statute does not divest an agency of its power to act, as directory statutes have a permissive element and are non-jurisdictional. Conversely, a

mandatory statute requires strict compliance. The distinction between directory and mandatory statutes has been explained by this Court:

There is an important distinction between directory and mandatory statutes. The violation of a directory statute is attended with no consequences, since there is a permissive element. The failure to comply with the requirements of a mandatory statute either invalidates the transaction or subjects the noncomplier to the consequences stated in the statute...Although directory provisions are not intended by the legislature to be disregarded, the seriousness of noncompliance is not considered so great that liability automatically attaches for failure to comply. The question of compliance remains for judicial determination. If the legislature considers the provisions sufficiently important that exact compliance is required then the provision is mandatory. If the statute is merely a guide for the conduct of business and for orderly procedure rather than a limitation of power, it will be construed as directory.

*W. Virginia Human Rights Comm'n v. Garretson*, 196 W. Va. 118, 468 S.E.2d 733, 741 n.11 (1996), quoting 1A Norman J. Singer, *Sutherland Statutory Construction*, § 25.03 at 449 (5<sup>th</sup> Ed. 1991).

While “[t]here is no authoritative checklist that can be consulted to determine conclusively if a statute is mandatory or directory”, this Court has provided guidance on the relevant factors for consideration. *W. Virginia Human Rights Comm'n*, 468 S.E.2d at 741. Critically, the use of the word “shall” is not conclusive in determining whether the statutory instruction is directory or mandatory:

Though generally the use of the word ‘shall’ in constitutions and statutes limits or prevents the exercise of discretion, its use in such provisions is not conclusive in determining whether they are mandatory or directory. ‘The rule that the word “shall” should be construed as mandatory has appropriate application when the provision of the statute relates to the essence of the thing to be done, or to matters of substance.’

*Canyon Pub. Serv. Dist. v. Tasa Coal Co.*, 156 W. Va. 606, 195 S.E.2d 647, 651 (1973), quoting *State ex rel. Boone Cnty. Coal Corp. v. Davis*, 133 W. Va. 540, 56 S.E.2d 907, 913 (1949). See also *Thomas v. McDermitt*, 232 W. Va. 159, 751 S.E.2d 264, 275 (2013) (holding that the use of the word “shall” is not conclusive in determining whether a statute is mandatory or directory).

Rather, “whether a statute is mandatory or directory is determined from the intention of the Legislature. If that intention is to make compliance with the statute essential to the validity of the act directed to be done, the statute is mandatory.” *Thomas*, 751 S.E.2d at 275; see also *Canyon Pub. Serv. Dist.*, 195 S.E.2d at 651.

As the goal is to determine legislative intent, one of the most critical factors announced by this Court is whether the statute identifies a consequence for non-compliance. This Court has held that absent a statutory provision providing consequences for non-compliance, a presumption exists that the statute is merely directory. See *W. Virginia Human Rights Comm'n*, 468 S.E.2d at 741.

Consideration is also given to whether the instruction goes to the essence of the statute or is simply a matter of form. In other words, whether the thing to be done is material or immaterial, or whether it affects the substantial rights of a party. This Court explained:

Whether a statute is mandatory or directory depends on whether the thing directed to be done is of the essence of the thing required, *or is a mere matter of form*, and what is a matter of essence can often be determined only by judicial construction. Accordingly, when a particular provision of a statute relates to some immaterial matter, as to which compliance with the statute is a matter of *convenience rather than substance*, or where the directions of a statute are given merely with a view to the proper, orderly, and prompt conduct of business, it is generally regarded as directory, unless followed by words of absolute prohibition; and a statute is regarded as directory where no substantial rights depend on it, no injury can result from ignoring it, and the purpose of the legislature *can be accomplished in a manner other than that prescribed*, with substantially the same results.

*Thomas*, 751 S.E.2d at 275(emphasis original), quoting 82 C.J.S. *Statutes* § 376.

Both this Court and the United States Supreme Court recognize that a practical and common sense approach is necessary in ascertaining the legislature’s intent:

We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline,...courts should not assume that...(the Legislature) intended the agency to lose its power to act.

*W. Virginia Human Rights Comm'n*, 468 S.E.2d at 741, citing *Brock v. Pierce Cnty.*, 476 U.S. 253, 260, 106 S. Ct. 1834, 90 L. Ed. 2d 248 (1986). Further stated:

Adopting '[a] rule that rendered every administrative decision void unless it was determined in strict literal compliance with statutory procedure would not only be impractical but would also fail to recognize the degree to which broader public concerns, not merely the interests of the parties, are affected by administrative proceedings.'

*W. Virginia Human Rights Comm'n*, 468 S.E.2d at 742, citing *Syquia v. Bd. of Educ. of Harpursville Cent. Sch. Dist.*, 80 N.Y.2d 531, 536, 606 N.E.2d 1387 (1992).

Guided by these principles, the general rule established by this Court in distinguishing between a mandatory and directory statute is as follows:

As a general rule, where a statute directs certain proceedings to be done in a certain way, and the form does not appear essential to the judicial mind, the law will be regarded as directory, and the proceedings under it will be held valid, though the command of the statute as to form has not been strictly obeyed, the manner not being the essence of the thing to be done.

*Thomas* at Syl. pt. 11, citing Syl. pt. 11, *Calwell's Ex'r v. Prindle's Adm'r*, 19 W. Va. 604 (1882).

**2. Under the analysis established by this Court, it is clear that the legislature intended the certified mail instruction to be directory.**

First and foremost, the statute does not identify any consequences for an agency's failure to send the status report to the complainant via certified mail. Thus, at the outset, there is a presumption that the statute is directory. No justifiable grounds exist to overcome this presumption.

The instruction to serve by certified mail is, by its very nature, a matter of procedural form. It is merely a guide for the conduct of business and orderly procedure. It is not the "essence of the thing to be done."

The legislature's intent is that the complainant, in this case Camden Clark, be kept informed of the Board's investigation of their complaint. This was accomplished. A status report

was mailed on August 14, 2013, within the six (6) timeframe. (Respondent App. P14.) Camden Clark confirmed receipt of the August 14, 2013 status report. (See Respondent App. P55-P56.) Although the status report was delivered by first class mail instead of certified mail, the objective of the statute was achieved – Camden Clark timely received the status report. The Board accomplished the essential purpose of the instruction, although in a manner other than that prescribed by the statute.

Critically, the method of delivery did not prejudice or impact any substantial rights of Petitioner. The statute was not created for the benefit of the Petitioner. It was created for the benefit of the complainant, as the statute directs the status report be sent to the “party filing the complaint”, i.e., Camden Clark. Petitioner is not entitled to a status report. Petitioner’s rights, including that of due process, are unaffected by the class of mail used to send the status report to the Camden Clark. Petitioner cannot legitimately complain she was prejudiced, nor does her Petition allege as such.

Important public policy considerations weigh in favor of finding the statute to be directory. Nurses are the backbone of health care and are critical to patient care. Nurses that are incompetent, unfit or guilty of misconduct pose risks to patient safety. The Board has a statutory duty to protect the public. A nurse that is alleged to have engaged in misconduct should not be able to escape a hearing due to the class of mail used to send a status report to a complainant. Certainly, such is not in the best interest of the public, nor the intent of the legislature.

In sum, the certified mail instruction is a classic example of a directory statute. There is no consequence for non-compliance. It is merely a procedural instruction that does not go to the essence of the thing required, and its purpose can be (and was) accomplished by other methods, with the same results. The instruction does not affect the substantial rights of Petitioner, who

suffered no injury for non-compliance. Finally, public policy dictates that patient safety should not be compromised by procedural nuances.

The facts in this matter are not comparable to those in *State ex rel. Fillinger v. Rhodes*, 230 W. Va. 560, 741 S.E.2d 118 (2013). *Fillinger* involved two separate complaints filed against a licensee, the first on March 24, 2008, and a second on September 22, 2009. The crux of *Fillinger* was that the Board effectively denied the licensee an administrative hearing by unilaterally continuing every scheduled hearing since the 2008 and 2009 complaints were filed. The administrative hearing in *Fillinger* was originally scheduled for July 26, 2011, but was continued and rescheduled by the Board four (4) times until the licensee filed a writ of prohibition in May of 2012. By the time the writ was filed, fifty (50) months had passed since the first complaint was filed, and thirty-two (32) months had passed since the second complaint was filed. Also in *Fillinger*, only one status report was sent by the Board on September 22, 2008, with regard to the first complaint. No status reports were provided to the second complainant. And unlike the present case, as discussed *infra*, the Board in *Fillinger* failed to obtain the complainant's consent to extend the time to resolve the complaints.

In the present case, the Board was ready to proceed on the first scheduled hearing date, January 20, 2015, approximately twenty-one (21) months after the complaint was received from Camden Clark. However, it was Petitioner who sought a continuance at the last minute. Petitioner again delayed the administrative process by filing this writ one day before the rescheduled hearing on February 19, 2015. The Board timely delivered the status report to Camden Clark and also sent two letters of agreement to Camden Clark to extend the time to resolve the complaint. In sum, the question presented here was neither presented nor addressed by *Fillinger*.

Accordingly, for the foregoing reasons, the statutory instruction to serve the status report by certified mail is directory, and non-compliance does not divest the Board of jurisdiction to proceed against Petitioner. Petitioner's writ should be denied with respect to this issue.

**B. The Letters of Agreement to extend the time to resolve the complaint comply with West Virginia Code § 30-1-5(c).**

Petitioner next asserts the letter agreements between the Board and complainant are insufficient to extend the time to resolve the complaint. Petitioner attempts to read requirements into the statute that do not exist.

West Virginia Code § 30-1-5(c), quoted *supra*, anticipates a time period of up to eighteen (18) months for a complaint to be resolved, subject to further extensions in writing. A status report must be sent to the complainant within six (6) months, and thereafter the Board has one (1) year to resolve the complaint. However, this time period can be extended if "the party filing the complaint and the board agree in writing to extend the time for the final ruling." West Virginia Code § 30-1-5(c).

On October 10, 2014, and again on December 11, 2014, the Board sent similar letters to Camden Clark informing that West Virginia Code § 30-1-5(c) required the parties to agree to an extension because the complaint would not be resolved within the statutory time frame. (Respondent App. P18-P20.) Camden Clark confirmed receipt of both letters to the undersigned. (See Respondent App. P55-P56.) Pursuant to each letter, if Camden Clark agreed to the extension, no response was necessary. If Camden Clark objected to the extension, it was instructed to notify the Board in writing. Camden Clark did not object to the extensions. Indeed, at all times Camden Clark fully cooperated with the undersigned as the matter proceeded to hearing.

The October 10, 2014 letter and December 11, 2014 letter constitute written agreements to extend the time to resolve the complaint. The letters clearly explain and inform Camden Clark of the purpose for the extension, a need for an agreement, cite the applicable statute, and permit Camden Clark to object. Since Camden Clark agreed to the extension, no response was necessary, and the letters memorialized the agreement. Neither the statute nor any Board regulations require the agreement to be signed by both parties in the nature of a contract. Accordingly, the Board and Camden Clark “agreed in writing” in satisfaction of West Virginia Code § 30-1-5(c).

Petitioner asserts that the extension agreement is untimely because the status report was sent to Camden Clark on August 14, 2013, which Petitioner argues sets a deadline of August 14, 2014, to resolve the complaint or obtain an extension. This is wrong for two independent reasons in a case where, as here, the extension was obtained within eighteen (18) months of the filing of the complaint.

First, as stated above, the statute does not provide a deadline for when the Board and complainant must agree to an extension. There is no statutory requirement that the extension agreement be in place within one year of the status report. Without a specific deadline, the question of timeliness is determined under a reasonableness standard. See Syl. pt. 3, *State ex rel. Fillinger*, 741 S.E.2d 118.

The reasonableness standard is easily satisfied because the extension was obtained within original eighteen (18) month time frame, which would have expired on or about October 12, 2014.

Second, it is clear that the statutory instruction to resolve the complaint within one year of the status report is directory and not mandatory. There are no consequences for non-

compliance identified in the statute, creating a presumption that the instruction is directory. This factor is particularly significant with respect to statutory time frames. As held in *W. Va. Human Rights Comm.*:

Many jurisdictions have considered the issue of whether a statute listing a time limit without specifying consequences should operate to actually divest a court of jurisdiction to hear a case for an agency's failure to abide by the time limit. Frequently, these jurisdictions have held that the absence of a section providing for consequences for inaction or late action creates a presumption that these statutes merely fill a directory function and no consequences befall the negligent agency's failure to comply. **We have been presented with no persuasive basis in law or reason for departing from this solid line of authority.**

*W. Virginia Human Rights Comm'n*, 468 S.E.2d at 740-741. [Emphasis added.]

Further, this instruction is not the essence or purpose of the statute. It is not a statute of limitation. It is a procedural instruction. Non-compliance does not prejudice the Petitioner or provide an advantage to the Board. A determination that the instruction is directory merely upholds the *status quo* by maintaining the intended eighteen (18) month time frame.

The eighteen (18) month time frame should not be reduced because the Board was overly prompt in providing a status report to complainant on August 14, 2013, only four (4) months after the complaint was filed. The Board should not be penalized by being more proactive in providing updates to a complainant than statutorily required. This cannot be the intent of the legislature.

Viewing the statute as a whole, the intent of the legislature is to grant the Board an eighteen (18) month time frame to resolve the complaint, which may be extended by agreement. The legislature's intent is also to require the Board to keep the complainant informed of the status of the investigation. The legislature's intent is perverted if the intended eighteen (18) month time frame is condensed because the Board provided a status report to a complainant *earlier* than the statute required. This effectively penalizes the Board for overachieving, and

encourages the Board to delay the status update until the last possible minute. Fundamentally, it creates a disincentive for the Board to more promptly communicate with the complainant, which is contrary to the legislature's intent. As such, the instruction should be deemed directory.

Nevertheless, a determination of whether this instruction is mandatory or directory is not dispositive on whether the extension agreement was timely. The fact remains that the statute does not provide a deadline for when an extension agreement must be reached. Absent a specific time frame, the timeliness of the extension is determined by a reasonableness standard. As asserted above, the Board obtained an extension within the original eighteen (18) month time frame, which should be considered per se reasonable.

The fact that extensions were requested and obtained from Camden Clark further distinguishes this case from *Fillinger*, where no extensions were sought from the complainants. Moreover, the Board's delay in proceeding to a hearing in *Fillinger* was far more severe – being fifty (50) months after the filing of the first complaint and thirty-two (32) months after the filing of the second complaint. Here, after obtaining an extension from the complainant, the hearing would have taken place approximately twenty-one (21) months after the complaint was filed if not for Petitioner's attempts to avoid the hearing.

In sum, the letters of agreement are sufficient to extend the time to resolve the complaint in accordance with West Virginia Code § 30-1-5(c). The timeliness of the extension was per se reasonable, as the extension was obtained before the original eighteen (18) month time frame elapsed.

Accordingly, for the foregoing reasons, Petitioner's Writ should be denied.

**C. Petitioner was timely provided with discovery.**

Petitioner misleadingly asserts that the Board failed to respond to Petitioner's requests for documents. Petitioner alleges that no documents were produced until merely five (5) days prior to the first scheduled hearing, when "over 500 pages of documents" were emailed by the undersigned to Petitioner's counsel on January 15, 2015. (See Petition at p. 8, ¶ 23.) The Board strongly contests and takes issue with these representations, as they are patently false.

Petitioner's counsel was originally provided a certified copy of Petitioner's licensee file maintained by the Board in May of 2013. (Respondent App. P10.) In June of 2013, the Board produced a copy of the entire file, which included the documents subpoenaed from Camden Clark. (Respondent App. P9.) And again, in April of 2014, Petitioner's counsel was permitted to visit the Board office and inspect and make copies of the Board's entire file. (Respondent App. P11-P13.) The Petition omits these critical facts. The new documents that were supplemented to Petitioner on January 15, 2015, were documents very recently obtained by the undersigned in preparation for the hearing.

The undersigned, through the office of the Attorney General, represents the Board at disciplinary hearings. Typically, the undersigned receives the Board's file at or around the time the matter is noticed for hearing. The undersigned reviews the file, interviews the witnesses and conducts additional investigation, if necessary, in preparation for the hearing. At times the undersigned's investigation will lead to additional documents.

Contested case hearings do not have scheduling orders. There is no discovery deadline, and neither party is prohibited from continuing to gather documents leading up to a hearing. In this matter, upon receipt of the file, the undersigned's investigation lead to obtaining the following additional documents: (1) the complete audit performed by Camden Clark on the

licensee's narcotic charting history<sup>7</sup> (30 pages); (2) a copy of the training manual/reference guide for the "Enlight" electronic medical record system that was available, at all times, at the nurse's station next to the "Enlight" computer (119 pages);<sup>8</sup> and (3) a Board of Pharmacy Report regarding medications prescribed to Petitioner (3 pages).<sup>9</sup>

The complete audit was obtained from Camden Clark by the undersigned via email attachment on January 9, 2015 (Respondent App. P25.) The training manual was obtained from Camden Clark by the undersigned via email attachment on January 13, 2015 (Respondent App. P27.) The Board of Pharmacy report was obtained by the undersigned on January 7, 2015 (Respondent App. P30.) All of the aforementioned documents, a total of 152 pages, were promptly supplemented by the undersigned to Petitioner's counsel via email on January 15, 2015. (Respondent App. P33-P35.)

Petitioner complains that she received over 500 pages of documents on January 15, 2015. This is misleading. As stated above, the "new" documents totaled only 152 pages. In addition to the recently obtained documents, the undersigned also emailed Petitioner's counsel with the entire Board file – which Petitioner already had - because Petitioner's counsel mistakenly indicated to the undersigned that she had not received any documents to date. (Respondent App. P31-P35.) Thus, the majority of the documents provided on January 15, 2015, were documents already in the possession of Petitioner's counsel.

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<sup>7</sup> The Board's file only included a *summary* of the audit, which was attached by Camden Clark to its complaint filed with the Board. (See Respondent App. P3.) The complete audit was not produced by Camden Clark in response to the Board's subpoena. Upon inquiry, the undersigned was able to obtain the complete audit from Camden Clark.

<sup>8</sup> The training manual/reference guide was obtained from Camden Clark upon the undersigned's discovery of its existence when interviewing witnesses. The existence of the manual refutes Petitioner's assertions that Camden Clark did not have hard copies of manuals or reference materials readily available to assist a nurse using the "Enlight" system other than "online materials."

<sup>9</sup> In January of 2015, the undersigned requested that the Board obtain a Board of Pharmacy report on Petitioner.

Ultimately, Petitioner's assertion that the Board was not responsive or somehow dilatory in responding to her request for documents is unfounded, misleading and disingenuous.

**D. The Board promptly disclosed its anticipated witnesses, exhibits and the identity of the hearing examiner upon request, while Petitioner failed to reciprocate.**

Petitioner asserts that she was prejudiced because the Board did not disclose its anticipated witnesses, exhibits or the identification of the hearing examiner until January 15, 2015. Petitioner's allegations are misleading and lack merit.

Neither the relevant statutes nor regulations governing contested case proceedings require such disclosures. The general practice is for the parties, upon request, to disclose this information as a professional courtesy a few days before the hearing. In fact, it was the undersigned who reached out to Petitioner's counsel on January 15, 2015 to exchange anticipated witnesses. Prior to January 15, 2015, Petitioner's counsel had never requested the Board to disclose its anticipated witnesses, exhibits or the identity of the hearing examiner. *Nor had Petitioner disclosed her witnesses or exhibits to the Board.* That same day, after the phone call, the undersigned promptly disclosed the Board's anticipated witnesses, exhibits and the hearing examiner via email dated January 15, 2015. (Respondent App. P35.) Yet, despite the undersigned's prompt disclosure and request for Petitioner to reciprocate the courtesy, Petitioner never disclosed her witness list or anticipated exhibits.

Accordingly, Petitioner's assertion that the Board did not timely make these disclosures is meritless.

**E. Rule 41 of the West Virginia Rules of Civil Procedure is inapplicable to contested case proceedings before the Board.**

Rule 41(b) of the West Virginia Rules of Civil Procedure has no application in this case. Neither the applicable statutes nor administrative regulations incorporate 41(b). Rule 81(a) is likewise inapplicable. Rule 81(a) does not make the West Virginia Rules of Civil Procedure

applicable to the underlying administrative proceeding. Rule 81(a) merely provides that the West Virginia Rules of Civil Procedure apply when an administrative decision is before the Circuit Court on appeal.

Notwithstanding, even if Rule 41(b) was considered, there is no basis for dismissal because this matter was not inactive for more than a year. The parties engaged in settlement negotiations in 2014, leading to a proposed consent agreement offered to Petitioner in March of 2014. Petitioner then continued to engage in discovery in April of 2014, and the matter was noticed for hearing on December 12, 2014. Thus, dismissal under Rule 41(b) would be improper nonetheless.

Accordingly, this argument fails as a matter of law, and should be disregarded.

## VI.

### CONCLUSION

The Board respectfully requests that this Court deny Petitioner's writ. The Board substantially complied with West Virginia Code § 30-1-5(c). A timely status report was delivered to the complainant and the Board timely agreed in writing with the complainant to extend the time to resolve the complaint. To the extent the Board did not strictly adhere to certain procedural instructions in the statute, such are immaterial to the essence of the statute, and thus are directory. Non-compliance with a directory statute does not divest the Board of jurisdiction to proceed against Petitioner.

Accordingly, for the foregoing reasons, the Board respectfully requests that this Court deny Petitioner's Writ of Prohibition.

WEST VIRGINIA BOARD OF  
EXAMINERS FOR REGISTERED  
PROFESSIONAL NURSES,

By Counsel

PATRICK MORRISEY  
ATTORNEY GENERAL



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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**No. 15-0131**

STATE EX REL. LISA MILES,

Petitioner,

v.

WEST VIRGINIA BOARD OF REGISTERED  
PROFESSIONAL NURSES,

Respondent.

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**RESPONSE TO WRIT OF PROHIBITION ON BEHALF OF THE WEST  
VIRGINIA BOARD OF REGISTERED PROFESSIONAL NURSES**

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CERTIFICATE OF SERVICE

I, Greg S. Foster, Assistant Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing Response to Writ of Prohibition on Behalf of the West Virginia Board of Examiners for Registered Professional Nurses was served by depositing the same postage prepaid in the United States Mail, this 18 day of March, 2015, addressed as follows:

Lisa L. Lilly, Esq.  
Michelle Roman Fox, Esq.  
Martin & Seibert, L.C.  
300 Summers Street, Suite 610  
Charleston, WV 25301



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GREG S. FOSTER