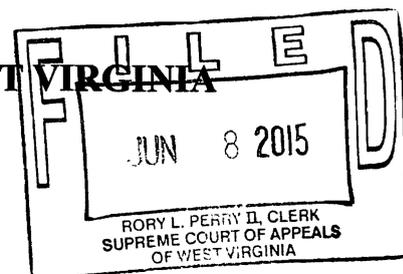


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**DOCKET NO. 15-0221**



**WEST VIRGINIA DIVISION OF JUSTICE  
AND COMMUNITY SERVICES,**

**Petitioner**

**v.**

**Appeal from a final order of the Circuit  
Court of Kanawha County (14-AA-98)**

**GINGER MCLAUGHLIN,**

**Respondent.**

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**Petitioner's Brief**

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## **I. ASSIGNMENTS OF ERROR**

1. Contrary to the standard adopted by this Court, for the appellate review of unemployment compensation decisions by the Board of Review, the Circuit Court failed to apply the appropriate review of the Board of Review findings. The Board of Review findings were not clearly wrong and were entitled to substantial deference by the Circuit Court. However, the Court substituted its findings of fact for those of the Administrative Law Judge and Board of Review.
2. Contrary to W. Va. Code § 21A-6-3, and precedents established by this Court, the Circuit Court erred when it ruled that the Respondent's actions did not constitute "gross misconduct."

## **II. STATEMENT OF THE CASE**

This is an unemployment compensation case filed by an employee of the Division of Justice and Community Services (hereinafter "DJCS" or "Petitioner"), Claimant/Respondent, Ginger McLaughlin (hereinafter "Respondent"), who had been employed as an accountant with DJCS, was terminated pursuant to a violation of the Employer's Conduct Policy, as a result of an arrest and subsequent criminal charge of possession of a controlled substance.

On February 18, 2014, the Respondent was arrested by the Charleston Police Department and charged with possession of a controlled substance (marijuana). DJCS terminated Claimant concluding that she had violated Conduct Policy, specifically as it provides that:

Employees are expected to observe a standard of conduct which will not reflect discredit on the abilities and integrity of DJCS. Employees shall not engage in activities that would tend to disrupt, diminish, or otherwise jeopardize public trust and fidelity in the Division, or create suspicion with reference to the Division's capability in discharging its duties and responsibilities.

App. 2.

Administratively, the Workforce deputy commissioner, an Administrative Law Judge, and the Board of Review determined that Respondent was terminated due to “gross misconduct” and thus, is disqualified from receiving unemployment benefits.

DJCS presented evidence that the Claimant was arrested and charged with possession of a controlled substance. Upon reviewing the surrounding facts of Respondent’s arrest, and subsequent behavior, the Employer determined that Respondent’s actions were in violation of the Employee Conduct Policy. However, upon review, the Circuit Court reversed the findings below, ruling that “the evidence clearly does not support the findings and conclusions of law.” App. 20. The Circuit Court further ordered that Respondent be awarded unemployment benefits. The Circuit Court erroneously concluded “[i]f the legislature had intended drug abuse or mere *allegations* of misdemeanors, including misdemeanors for or drug possession *outside of work*, to be deemed gross misconduct, the lawmakers would have said so by omitting the words “while at work” from the statute.” App. 15-16. (Emphasis in original).

### III. SUMMARY OF ARGUMENT

Prior to her termination, the Respondent was employed as an accountant with DJCS.

DJCS’ role in state government is unique in that our responsibilities bridge any gaps between federal, state, and local units of government, as well as private/non-profit organizations and the general public. The Division is experienced in program administration that requires the coordination of all facets of the criminal and juvenile justice systems, including law enforcement, jails, courts, corrections, community supervision and victim services.<sup>1</sup>

Evidence was presented that, while still employed with DJCS, but on FMLA, the Respondent was arrested and charged with possession of a controlled substance, a criminal violation of law. Upon learning of Respondent’s arrest, the Petitioner initiated disciplinary proceedings, after Respondent returned from FMLA, and subsequently terminated Respondent.

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<sup>1</sup> <http://www.djcs.wv.gov/About%20the%20Division/Pages/default.aspx>

Respondent filed for unemployment benefits, but based upon the substantive evidence, a West Virginia Workforce deputy, an Administrative Law Judge, and the Board of Review concluded that the Respondent was discharged for an act of gross misconduct and was disqualified from receiving unemployment benefits.

On appeal, although the Circuit Court claims to have applied a clearly wrong standard, in regards to the agency's factual findings, it appears to have substituted its own weight to the facts and evidence presented. In addition, the Circuit Court misapplied the applicable law and precedents pertaining to "gross misconduct." Accordingly, Petitioner respectfully requests that this Court set aside the Circuit Court's order and reinstate the decision of the Board of Review ruling that Respondent engaged in "gross misconduct" and thus, is disqualified from receiving unemployment benefits.

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

Pursuant to Rule 18(a), of the Rules of Appellate Procedure, oral argument is unnecessary as "the dispositive issue or issues have been authoritatively decided" and "the facts and legal arguments are adequately presented in the brief[] and record on appeal, and the decisional process would not be significantly aided by oral argument," unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

#### **V. ARGUMENT**

##### **A. STANDARD OF REVIEW**

This Court has established that:

The findings of fact of the Board of Review of the West Virginia Department of Employment Security [now known as Workforce West Virginia]

are entitled to substantial deference unless a reviewing court believes the findings are clearly wrong. If the question on review is one purely of law, no deference is given and the standard of judicial review by the court is *de novo*.

*Alcan Rolled Products Ravenswood, LLC. v. McCarthy*, 234 W. Va. 312, \_\_\_, 765 S.E.2d 201, 207 (2014) (quoting *syl. pt. 3, Adkins v. Gatson*, 192 W. Va. 561 at *syl. pt. 3*, 453 S.E.2d 395 (1994)).

In the case at bar, the Circuit Court did not give substantial deference to the lower tribunal, but rather, substituted its own factual findings. After hearing all the testimony, and evaluating all of the evidence, the ALJ determined that “[t]here is a nexus or relationship between the respondent’s drug abuse and criminal activity . . . and employment.” Further, the ALJ ruled that that activity was sufficient to constitute gross misconduct and, thus, Respondent was disqualified from receiving benefits. App. 22, ¶ 9. Rather than providing deference to the ALJ, the Circuit Court does not provide clarification as to how the ALJ’s factual findings are clearly wrong, but generally dismisses them.

In its *de novo* review of the applicable legal matters, the Circuit Court failed to properly apply and interpret this Court’s precedents. The Circuit Court determined that “prior decisions of the West Virginia Supreme Court and other jurisdictions do not support disqualification of benefits under circumstances where the off-duty, off-premises misconduct does not involve a co-worker, a felony charge, or any kind of conviction.” App. 16. The Circuit Court’s interpretation of this Court’s precedents was erroneous.

Accordingly, this Court should reverse the decision of the Kanawha County Circuit Court and reinstate the Workforce West Virginia Board of Review decision finding that the Respondent is disqualified from receiving unemployment compensation benefits due to her gross misconduct.

**B. CONTRARY TO THE STANDARD ADOPTED BY THIS COURT, FOR APPELLATE REVIEW OF UNEMPLOYMENT COMPENSATION DECISIONS BY THE BOARD OF REVIEW, THE CIRCUIT COURT SUBSTITUTED ITS OWN FINDINGS OF FACT FOR THOSE OF THE ADMINISTRATIVE LAW JUDGE AND BOARD OF REVIEW.**

The Circuit Court failed to give the Board of Review’s factual findings the proper deference, instead inserting its own weight to the presented facts. “[T]he ALJ’s credibility determinations are binding unless patently without basis in the record.” *Alcan*, 234 W. Va. at \_\_\_, 765 S.E.2d at 208. This Court further noted that:

[t]he standard of review used by this Court on a question of fact resolved by an ALJ is necessarily one of deference . . . [and] [i]n addition to affording deference to the ALJ on credibility determinations, a reviewing court is not permitted to decide the factual issues de novo or to reverse an ALJ’s decision simply because it would have weighed the evidence differently.

*Id.* at 208-209.

In *Alcan*, the reliable evidence indicated that the Claimant, while on strike, threw a “jack rock” at, or in proximity to, several vehicles containing various employees and supervisors. The Claimant was subsequently terminated and deemed disqualified to receive unemployment benefits due to gross misconduct. *Id.* at 201. As discussed *infra*, this Court determined that a determination of gross misconduct must be done on a case-by-case basis.

Furthermore, pursuant to code:

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are: (1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedure; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W. Va. Code § 29A-5-4(g) (2014).

On February 18, 2014, Respondent was arrested and subsequently charged with possession of a controlled substance<sup>2</sup>. App. 26-31. After a pre-determination conference, the Claimant was terminated specifically due to “sufficient evidence that you [Claimant] have acted inappropriately and unprofessionally and have violated the DJCS Employee Conduct Policy.” App. 39. The Respondent filed for unemployment compensation benefits and was denied upon a finding that she was disqualified due to gross misconduct.

On June 16, 2014, this claim was presented for hearing before an Administrative Law Judge. After taking and hearing testimony, taking and evaluating evidence, the ALJ affirmed the decision of the deputy, that “claimant was discharged for an act of gross misconduct.” App. 23. On September 5, 2014, the Board of Review reviewed the ALJ’s Decision and determined that “the Administrative Law Judge has made a proper ruling and adopts the findings of the Judge, by reference in its entirety.” App. 47.

Ms. Leslie Boggess, Deputy Director of DJCS, presented testimony regarding the function of the agency, as well as the Respondent’s responsibilities. She testified that all employees were required to sign a Confidentiality Agreement due to the relationship between the agency and other law enforcement entities. App. 59. She further testified “that as a State Agency and as the Division [of] Justice and Community Services, we feel like the agency or our employees should not do anything that can jeopardize employee trust and that can mean several things.” App. 59.

The DJCS’ Employee Conduct Policy was entered into evidence and also reviewed by the ALJ. The Policy states:

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<sup>2</sup> Claimant’s arrest and alleged criminal activity have never been disputed. In fact, Claimant presented testimony to the ALJ that she acknowledges the arrest, but that “I don’t remember much of it.” App. 74.

Employees are expected to observe a standard of conduct which will not reflect discredit on the abilities and integrity of DJCS. Employees shall not engage in activities that would tend to disrupt, diminish, or otherwise jeopardize public trust and fidelity in the Division, or create suspicion with reference to the Division's capability in discharging its duties and responsibilities.

App. 2.

In regards to the Respondent's responsibilities, as the agency accountant, Ms. Boggess testified her duties would have included:

A They do several things. They wear many hats. One thing they do is they process grant payments that come into the office. Also, they put . . . payments into the FIM System, which is the State Financial System that goes up to the Auditors to make payments. They look at state and federal grants that come in. They draw down funds from the federal government, they put requests to draw down. Also, if we have local funds that come in, for example the law enforcement professional standards, we get checks that actually come into the office and an accountant and auditor would at any given time, possibly handle one of those checks.

Q Okay. Does an accountant or auditor have any interaction with any division or people outside of the office?

A Certainly. They would talk to grantees. They may talk to another state agency, which would be a grantee.

App. 71.

Given the nature of the Respondent's position, it is reasonable to assert that she did, or certainly could have had contact with various law enforcement agencies and their representatives. Further, it is feasible that her arrest and subsequent charges could have been discovered by other agencies or the public. The Respondent's arrest is an act that could discredit DJCS and create suspicion with reference to their capability in discharging its duties and responsibilities and jeopardize public and professional trust and fidelity within the Division.

In the ALJ's Findings of Fact, they note the function and purpose of the agency, the circumstances underlying the arrest and conclude that there is a nexus between the conduct and employment exists. App. 22., ¶¶ 7-9.

However, inexplicably, and somewhat confusingly, the Circuit Court discounted the ALJ's factual findings, ruling that:

Though this finding may arguably be considered vague enough to cover the causes listed in the preamble [of Employee Conduct Policy], the Court finds that the ALJ clarifies this finding in the Conclusions of Law and Discussion when stating that the claimant's "criminal behavior" violated the code, by making the conclusion regarding the behavior's "nexus" with her employment (something only listed in the Employee Code of Conduct's criminal activity provision, by stating that the drug abuse occurred during the criminal activity, and that the drug abuse and criminal activity were the alleged "gross misconduct" for which the Petitioner was fired. Therefore, Respondent's continued focus on the grounds for which Petitioner was fired does not comport with the decision of the ALJ, affirmed by the Board of Review.

App. 12-13.

The Circuit Court was required to adopt the ALJ's factual findings, unless they were shown to be clearly wrong. Where there is conflicting evidence, or conflicting inferences may be drawn from the evidence, deference must be given to the resolution arrived at by the Administrative Law Judge. *Brammer v. W. Va. Rights Comm.*, 183 W. Va. 108, 111, 394 S.E.2d 340, 343 (1990) ("The record contains conflicting evidence on the employer's motivation for discharging the complainant. These conflicts were resolved by the fact finder in favor of the complainant.") In this case, there is no dispute regarding whether Respondent was arrested and charged with a criminal violation. Further, the record consistently supports that this criminal violation was deemed a violation of the Employee Conduct Policy, which was the basis for termination<sup>3</sup>.

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<sup>3</sup> Claimant has asserted that her termination was due to her FMLA leave. However, there has been scant evidence presented to support this allegation.

“ “[T]he ALJ’s findings of fact were based on a plausible view of the evidence. The ALJ conducted the hearing and observed the witnesses firsthand, so he was in the best position to make credibility determinations.”” *Alcan v. McCarthy*, 234 W. V. 312, \_\_\_, 765 S.E.2d 201, 209 (quoting *Patton v. Gatson*, 207 W. Va. 168, 530 S.E.2d 167 (1999)). The ALJ heard testimony regarding the events leading to termination, as well as in regards to the function of the Employer, the Respondent’s duties, and the potential ramifications of the Respondent’s alleged criminal activity.

The Circuit Court failed to demonstrate that the ALJ findings were either clearly wrong or arbitrary or capricious. Thus, the ALJ factual determinations, that there was a nexus between Respondent’s behavior and employment, should have been given proper deference.

**C. CONTRARY TO THIS COURT’S PRECEDENTS, THE CIRCUIT COURT ERRED IN RULING THAT THE RESPONDENT’S ARREST AND SUBSEQUENT CRIMINAL CHARGES DID NOT CONSTITUTE GROSS MISCONDUCT.**

The Circuit Court failed to utilize the appropriate legal precedents in its *de novo* review. The Circuit Court order erroneously found that: 1) “[a]lleged drug abuse and possession of marijuana while on FMLA leave are not as serious as the specifically enumerated acts in W. Va. Code § 21A-6-3; 2) “[p]etitioner has not been accused of committing any other acts as serious as the specifically enumerated acts in W. Va. Code § 21A-6-3(2); and 3) “. . . **prior decisions of the West Virginia Supreme Court and other jurisdictions do not support disqualification of benefits under circumstance where the off-duty, off-premises misconduct does not involve a co-worker, a felony charge, or any kind of conviction.**” App. 15-16. (Emphasis added).

In *Dailey v. Board of Review*, 214 W. Va. 419, 589 (2003), this Court ruled that:

. . . we believe that the legislature’s provisions regarding gross misconduct can be divided into three distinct categories: (1) those specifically enumerated

acts which shall be considered gross misconduct; (2) items which may be interpreted to be “other gross misconduct;” and (3) acts of misconduct for which the employee has received prior written warning that continued violation will result in employment termination.

*See also Alcan*, 234 W. Va. 312, \_\_\_, 765 S.E.2d 201, 210.

This Court further determined that “. . . the statutory definition could not possibly set forth every conceivable act of gross misconduct . . . the phrase, ‘other gross misconduct,’ in West Virginia Code § 21A-6-3 evidences the legislature’s intent *to provide some element of discretion in the Board and reviewing courts, based upon the peculiar facts of each case.*” *Id.* at 210 (*quoting Dailey*, 214 W. Va. at 421) (emphasis in original).

“*Dailey* instructs that we must evaluate the peculiar facts of a given case to determine whether an employee’s action “rises to a level of seriousness equal to or exceeding that of the other specifically enumerated items” constituting gross misconduct.” *Alcan*, 234 W. Va. \_\_\_, 765 S.E.2d at 211. As noted *supra*, Respondent was employed as an accountant for an agency that has a close relationship with a variety of law enforcement agencies. The nature of the Respondent’s actions is of a nature that could have a direct impact on the credibility or reputation of the agency. An employer must be entitled to a certain degree of autonomy when deciding what behaviors or activities may be detrimental to its operations and as noted in *Dailey*, this must be evaluated case-by-case.

The Circuit Court’s determination that the applicable parts of the policy are but a “preamble” and somehow not enforceable, is inappropriate.

In *Alcan*, this Court further noted that:

[t]he unemployment compensation program is an insurance program, and not an entitlement program, and is designed to provide “a measure of security to the families of unemployed persons” . . . who become involuntarily unemployed

through no fault of their own. “The [Act] is not intended, however, to apply to those who ‘*willfully contributed to the cause of their own unemployment.*”

*Alcan*, 234 W. Va. \_\_, 765 S.E.2d at 212 (Emphasis in original).

Again, the Respondent’s arrest and subsequent criminal charges are not disputed. Ms. Boggess’ testimony noted that she was present during the Respondent’s pre-determination hearing (prior to her termination) and testified that:

There were 2 main topics involved in the predetermination conference, the first being Mr. Estep indicated that he would provide her with information about the disciplinary action that was being considered against her and the reasons for that action. The second was to also provide her with an opportunity to give the division or Mr. Estep information to the circumstances which led up to us having this disciplinary action and the conference.

Ms. Starcher: Did Ms. McLaughlin answer any questions at that meeting?

Ms. Boggess: She answered a few question and then Mr. McLaughlin, her attorney, indicated that she would not be answering those questions, and then Ms. McLaughlin signed off on a document stating that she did not answer any questions.

App. 57.

In fact, Respondent primarily has asserted that her termination was due to her FMLA leave, not her arrest. However, Respondent has provided absolutely no evidence that her termination was retaliatory. Furthermore, Respondent testified, during the ALJ hearing that:

Q . . . Did you consider yourself to still be a confidential employee with certain obligations while you were off on FMLA?

A Yes.

App. 75.

**D. CONTRARY TO THE PRECEDENTS ESTABLISHED BY THIS COURT, THE CIRCUIT COURT ERRED IN ITS DETERMINATION THAT THE ALJ COMMITTED REVERSIBLE ERROR BY FINDING THAT THE PETITIONER'S ALLEGED CONDUCT CONSTITUTES CRIMINAL ACTIVITY.**

The Circuit Court erred in its determination that, in order to support a finding of “criminal activity”, there must first be a criminal conviction. The Circuit Court ruled that:

[s]ince there was never any conviction for any crime, the ALJ’s decision in finding that the allegations against Petitioner amount to criminal activity, is therefore reversible error as a matter of law. Petitioner was charged with a crime (simple marijuana possession), but had not been found by a court of law to be responsible for a crime at the time of her termination. Therefore, Petitioner was terminated on ground that are, again, clearly erroneous as a matter of fact and law since she had not yet violated any written policy of the DJCS . . .

App. 18.

This Court has established that “[t]he dismissal of criminal charges that prompted initial disciplinary action against a public employee does not preclude a public official from administering further disciplinary action, including discharge.” *Neely v. Mangum*, syl. pt. 2, 183 W. Va. 393, 396 S.E.2d 160 (1990). In *Neely*, the appellant was employed at the sheriff’s tax office and was ultimately indicted on a variety of charges, with some being dismissed, and one dismissed pursuant to a mistrial. *Id.* at 161, 394. The Court noted that “both the suspension and the discharge resulted from allegations of wrongdoing which sufficiently raised the issue of whether Mrs. Neely’s continued employment would impair the all-important public image of an efficient and effective administration acting in the public’s interest.” *Id.* at 165, 398.

In this case, Respondent was employed with a criminal justice planning agency that works closely with other law enforcement agencies. DJCS developed its Employee Conduct Policy “to communicate basic principles regarding standards of conduct and to ensure that DJCS

is safe, productive, and secure for employees and the public they serve.” App. 2. To require an employer to wait until an employee’s criminal matter has been thoroughly adjudicated, before it can dismiss or terminate, would be incredibly detrimental and burdensome. The adjudication of criminal, as well as civil, matters can be tedious and time-consuming. In fact, in the case at hand, Respondent was criminally charged in February 2014 and the case had still not been adjudicated by entry of the Circuit Court Order, February 2015.

The Circuit Court erroneously determined that there must be a criminal conviction before an employee can be deemed to have committed “criminal activity.”

**E. CONTRARY TO APPLICABLE STATUTE AND CASE LAW, THE CIRCUIT COURT ERRED IN ITS DETERMINATION THAT THE ALJ COMMITTED REVERSIBLE ERROR BY CONSIDERING HEARSAY EVIDENCE.**

Pursuant to W. Va. Code § 29A-5-2(a) (2014), the formal rules of evidence do not apply to administrative procedures. In addition, in *Crouch v. DMV*, 219 W. Va. 70, 631 S.E.2d 628 (2006), this Court found that a “Statement of Arresting Officer”, without the officer’s actual testimony, was sufficient enough to support a license revocation. Further, the Court noted that there was a lack of any contradictory evidence. *Id.* at 77, 635.

In the case at bar, whether the Respondent was arrested and/or charged with a criminal violation is undisputed. As noted *supra*, Respondent testified that she does not remember the details of her arrest, but she does not deny that it happened. App. 74. In addition, Ms. Boggess provided testimony detailing the circumstances in which the arrest was discovered, namely that she was told by another agency employee. App. 56.

Hearsay evidence is not impermissible in administrative procedures. The ALJ is tasked with evaluating each particular piece of evidence and determining the appropriate amount of weight to be given. In this case, the ALJ evaluated all of the evidence and testimony and

determined there was sufficient evidence that an arrest and criminal charge had occurred. Further, the Respondent presented no evidence to the contrary.

## VI. CONCLUSION

The Employer/Petitioner, the West Virginia Division of Justice and Community Services, respectfully requests that this Court reverse the judgement of the Kanawha County Circuit Court, and reinstate the decisions of the Board of Review, which properly determined that Claimant/Respondent, Ginger McLaughlin, was disqualified from receiving unemployment benefits.

### DIVISION OF JUSTICE AND COMMUNITY SERVICES

By Counsel,

  
\_\_\_\_\_  
Celeste Webb-Barber (WVSB #10624)

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
DOCKET NO. 15-0221**

**WEST VIRGINIA DIVISION OF JUSTICE  
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**v.**

**Appeal from a final order of the Circuit Court of  
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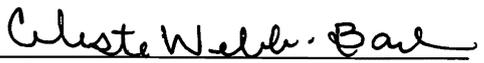
**GINGER MCLAUGHLIN,**

**Respondent.**

**CERTIFICATE OF SERVICE**

I hereby certify that on this 8th day of June, 2015, true and accurate copies of the foregoing Petitioner's Brief were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

Ginger McLaughlin  
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308 Unity Lane  
Cross Lanes, WV 25313

  
\_\_\_\_\_  
Celeste Webb-Barber  
Assistant Attorney General