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IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA,  
DIVISION 3

KENNETH A. HARRISON,  
Petitioner,

v.

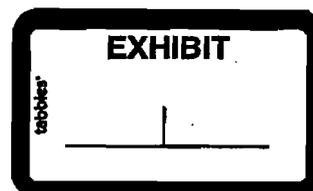
Case No.: 09-CAP-28  
Judge Phillip D. Gaujot

WEST VIRGINIA MEDICAL IMAGING  
AND RADIATION THERAPY TECHNOLOGY  
BOARD OF EXAMINERS,  
Respondent.

**OPINION ORDER REVERSING ADMINISTRATIVE ORDER**

This matter is presently before the Court on Petitioner's Appeal Petition seeking review of Respondent's September 25, 2009 Final Administrative Order which suspended Petitioner's license to practice medical imaging in the State of West Virginia for two years – followed by a three-year probationary period – as well as assessing to him the proceeding's costs. This matter initially arose from a complaint alleging that Petitioner worked outside the scope of his practice as a Radiologic Technologist at West Virginia University Hospitals on July 1, 2008 by intravenously administering Benadryl to a patient.

In his Petition for Appeal, Petitioner states as grounds that Board's Final Administrative Order is arbitrary, capricious, an abuse of discretion, and is clearly wrong in view of the reliable, probative, and substantial evidence on the record as a whole. The Court has considered the Petition for Appeal, the Response to the Petition for Appeal, all supporting memoranda of law, the evidence and testimony presented, the entirety of the record, and reviewed pertinent legal authorities. As a result of these deliberations and for the reasons set forth below, the Court concludes that the Respondent's September 25, 2009 Final Administrative Order should be REVERSED.



**APPLICABLE AUTHORITY REGARDING THE PRACTICE  
OF RADIOLOGIC TECHNOLOGY IN WEST VIRGINIA**

1. "A person performing medical imaging or radiation therapy technology in this state shall be licensed." W. VA. CODE § 30-23-1(2).

2. "License" means "a medical imaging and radiation therapy technology license issued under the provisions of this article," "radiologic technologist" means "a person, other than a licensed practitioner, who applies medical imaging or assists in the application of ionizing radiation to human beings for diagnostic or therapeutic purposes as prescribed by a licensed practitioner," and "Board" means the West Virginia Medical Imaging and Radiation Therapy Technology Board of Examiners." W. VA. CODE § 30-23-4(d), (l), (w).

3. To carry out its regulatory duties, the Board may "issue, renew, deny, suspend, revoke or reinstate a license, permit, certificate and registration . . . [and] take all other actions necessary and proper to effectuate the purposes of this article." W. VA. CODE § 30-23-6(c)(3), (6). The Board may suspend a license "if it determines that there is probable cause to believe that the licensee's or permittee's conduct, practices or acts constitute an immediate danger to the public," or "upon satisfactory proof that a licensee . . . , in his or her professional capacity, engaged in conduct, practices or acts constituting professional negligence or a willful departure from accepted standards of professional conduct." W. VA. CODE ST. R. § 18-4-4, 6.

4. The Board's Standard of Ethics dictates that "an individual shall not . . . [p]ractice outside the scope of practice authorized by the individual's current state permit or license." W. VA. CODE ST. R. § 18-5-5-1.17.

5. The West Virginia Code provides that a Radiologic Technologist's "scope of practice" includes the following:

(1) Analysis and correlation of procedure requests and clinical information provided by a physician or patient, or both, for preprocedure determination of the appropriate exam, its extent, and its scope; (2) Evaluation of the physical, mental and emotional status of the patient with respect to the ability to understand the risk versus benefit of the procedure and to undergo the procedure requested; (3) Selection, preparation, and operation of medical imaging equipment and accessories to perform procedures; (4) Positioning patient to best demonstrate anatomy of interest, while respecting patient's physical limitations and comfort; (5) Determination of imaging exposure factors, setting of factors on control panel, and application of medical imaging exposures; (6) Application of radiation protection principles to minimize radiation exposure to patient, self, and others; (7) Evaluation of images for technical quality; (8) Performance of noninterpretive fluoroscopic procedures according to institutional policy; (9) Oversight of image processing standards and the appropriate labeling of images; (10) Administering contrast media after consultation with, and under the supervision of, a physician who is immediately and physically available; (11) *Maintaining values congruent with the profession's Code of Ethics and scope of practice as well as adhering to national, institutional and/or departmental standards, policies and procedures regarding delivery of services and patient care*; and (12) Performing any other duties that the board authorizes for a Radiologic Technologist.

W. VA. CODE § 30-23-10 (emphasis added).

6. The American Society of Radiologic Technologists (“ASRT”), a national organization, has issued the following position statement: ASRT “advocates that preparation, identification, and administration of contrast media, radiopharmaceuticals and/or medications are within the scope of practice of radiologic technologists with appropriate clinical and didactic education and where federal and state law and/or institutional policy permit.”<sup>1</sup>

7. A relevant excerpt purported to be from a Protocol Manual – located at Ruby Memorial Hospital, available and addressed to Radiological Technicians, and in effect at least until June 22, 2008 – outlines instructions as to the proper steps that should be taken when a patient has an allergic reaction to the administration of Contrast. The Protocol Manual Excerpt provides:

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<sup>1</sup> (TR I, Harrison’s Exhibits 2, 4). In this Court’s Opinion Order, citations to “TR I” refer to a transcript of a hearing held in this matter before a Hearing Examiner on January 29, 2009, and citations to “TR II” refer to a transcript of a second hearing held in this matter before the aforementioned Hearing Examiner on April 2, 2009. The second hearing was held to provide the West Virginia Medical Imaging and Radiation Therapy Board with additional time to gather and present evidence regarding Mr. Harrison’s Exhibit 1.

<sup>1</sup> (TR I, pgs. 163-64).

If the patient develops a mild to moderate allergic reaction with the injection:

- i. Notify the radiology resident and/or attending.
- ii. If the allergic reaction is hives, rash, redness or itching, the treatment is Benadryl 50 mgm IV or PO.
- iii. Observe the patient for 30 to 60 minutes until hives or rash begin to resolve. . . . .
- iv. The patient must be seen by a physician prior to discharge, and must be given a copy of the contrast reaction discharge instructions, which must be signed by the patient and the physician.
- v. Add IV contrast allergy in CHIP.
- vi. Fill out an incident report on line . . . .
- vii. Fill out the QI report and give to Manager.<sup>2</sup>

### FACTS AND PROCEDURAL HISTORY

Petitioner, Kenneth Harrison (“Mr. Harrison”), has been a Radiologic Technologist (“Rad Tech”) since 1986,<sup>3</sup> and was employed by West Virginia University Hospitals (“WVU Hospitals”) for approximately six years.<sup>4</sup> On June 22, 2008, Mr. Harrison, as part of a medical stroke team at Ruby Memorial Hospital (“Ruby”), was caring for a patient (“J.M.”). J.M.’s particular procedure that day required an IV injection of Contrast. Contrast, commonly known as IVP dye, is an ionic or non-ionic material that is injected into patients so that certain organs can be imaged more clearly.<sup>5</sup> After J.M. received the contrast injection, Mr. Harrison observed J.M. having an allergic reaction to the Contrast, and Mr. Harrison subsequently intravenously administered 50 mg of Benadryl to J.M.

On July 3, 2008, Darlene Headley (“Ms. Headley”) – the Director of Radiology and Radiation Oncology at Ruby and Mr. Harrison’s supervisor – notified the West Virginia Medical

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<sup>2</sup> (TR I, Harrison’s Exhibit 1); (Hearing Examiner’s Recommended Decision ¶ 46). As noted in the Hearing Examiner’s Recommended Decision, this exhibit generated a substantial amount of testimony, and created the need for the April 2, 2009 hearing. At the January 29, 2009 hearing, there was confusion among the Board’s witnesses as to precisely what this exhibit is and from where it came. At the April 2, 2009 hearing, the Board’s witness, Darlene Headley – Director of Radiology and Radiation Oncology at Ruby Memorial Hospital –, testified that she found duplicates of this exhibit in Protocol Manuals in two rooms at Ruby Memorial Hospital that Radiological Technicians regularly access. (TR II, pgs. 6-20).

<sup>3</sup> (TR I, pg. 160).

<sup>4</sup> (TR I, pgs. 163-64).

<sup>5</sup> (TR I, pg. 53).

Imaging and Radiation Therapy Board (“Board”) by letter that WVU Hospitals had terminated Mr. Harrison’s employment.<sup>6</sup> Ms. Headley sent the letter to the Board to comply with Rule 21 of The American Registry of Radiologic Technologists, (“ARRT”), Rules of Ethics. The letter stated,

The termination was due to unfavorable conduct for working outside of the scope of practice for a radiologic technician at WVUH.

Upon investigation of a patient care situation, Ken admitted to administering Benadryl intravenously to a patient without physician involvement. The lack of a physician order and the lack of involvement of a physician, nurse or pharmacist in the dose calculation and administration of a medication are outside of the scope of practice for a radiologic technologist.<sup>7</sup>

Prior to the Board’s receipt of Ms. Headley’s letter, Mr. Harrison was licensed to practice radiologic technology by the Board at all times during his employment at WVU Hospitals.<sup>8</sup>

On or around July 7, 2008, the Board’s Executive Director sent Mr. Harrison a letter stating that the Board had received WVU Hospital’s notice of Mr. Harrison’s termination, and, “as a result, the Board is charged with the responsibility of investigating the information received, and determining the proper course of action to take thereafter.”<sup>9</sup> On or around August 5, 2008, the Board received Mr. Harrison’s lengthy written response to the allegations contained in WVU Hospital’s July 7, 2008 letter to the Board, wherein Mr. Harrison explained that he had administered Benadryl to a patient who had an anaphylactic reaction to IV Contrast and the on-call doctor did not respond to his calls in a timely manner.<sup>10</sup> The Board subsequently sought written statements from two other employees whom Mr. Harrison had identified as being on-duty and present during the incident leading to the termination of his employment.<sup>11</sup>

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<sup>6</sup> (TR I, pg. 101).

<sup>7</sup> (TR I, Board’s Exhibit 1).

<sup>8</sup> (TR I, pg. 1).

<sup>9</sup> (TR I, Board’s Exhibit 2).

<sup>10</sup> (TR I, Board’s Exhibit 3).

<sup>11</sup> (TR I, Board’s Exhibits 4, 5).

On January 29, 2009 at 1:30 p.m., an administrative hearing was held in this matter before Hearing Examiner Jack McClung at which the Board appeared by counsel, Nicole Cofer – Assistant Attorney General for the State of West Virginia –, and Mr. Harrison appeared in person and by counsel, Jacques Williams. This administrative hearing was held to determine whether the Board should revoke, suspend, limit, or otherwise discipline Mr. Harrison’s license as a Medical Imaging Technologist in West Virginia.

At the hearing, several witnesses testified as to the Board’s procedures regarding investigating complaints and disciplinary action, the events surrounding the June 22, 2008 incident that led to the termination of Mr. Harrison’s employment, Mr. Harrison’s reputation and history as a WVU Hospitals employee, and standard practices and expectations for and of Rad Techs at Ruby.

The Board first called Grady Bower (“Mr. Bower”), the Board’s Executive Director, to testify regarding licensing and the investigation of complaints.<sup>12</sup> On cross-examination, Mr. Bower confirmed that the complaint and proceedings presently pending against Mr. Harrison is the first disciplinary action that has been taken against Mr. Harrison.<sup>13</sup> Second, the Board called Board Member Nancy Godby (“Ms. Godby”), member of the Board’s Ethics Committee, to testify regarding the specific code sections and regulations that the Board relied upon in initiating disciplinary action against Mr. Harrison. Ms. Godby first testified that the “scope of practice” items contained in the enumerated list of West Virginia Code section 30-23-10 are merely “guidelines,” and that the list is not exhaustive.<sup>14</sup> Ms. Godby then testified that “an example of

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<sup>12</sup> The record does not identify those Board members who participated in the decision-making process that resulted in the Board’s September 25, 2009 Final Administrative Order. If, however, Ms. Godby testified against Mr. Harrison and subsequently voted to take disciplinary action against him, her involvement in both this proceeding and the disciplinary proceedings is improper.

<sup>13</sup> (TR I, pg. 33).

<sup>14</sup> (TR I, pg. 37).

something that would fall outside the scope of practice of a radiologic technologist would be mixing, for example, an antibiotic into an IV fluid and then administering that through an IV to a patient.”<sup>15</sup> On cross-examination, however, Ms. Godby agreed that the West Virginia Code does not contain a specific provision that prohibits Rad Techs from administering medication.<sup>16</sup>

Third, the Board called Mr. Harrison’s co-worker, Ronna Shaneyfelt (“Ms. Shaneyfelt”). Ms. Shaneyfelt is a Board-licensed Rad Tech who has been employed by WVU Hospitals since 2005 and was on-duty with Mr. Harrison on June 22, 2008 at the time of the underlying incident. At the Board’s request, Ms. Shaneyfelt provided a detailed account of what transpired regarding patient J.M. on that date.<sup>17</sup> In sum, Ms. Shaneyfelt testified as follows: (1) she and Mr. Harrison injected J.M. with Contrast and scanned him without incident;<sup>18</sup> (2) following the Contrast injection and the scan, Ms. Shaneyfelt noticed a noted Contrast allergy on J.M.’s chart;<sup>19</sup> (3) Ms. Shaneyfelt then noticed “a few hives on the patient,” she asked J.M. if he was alright, and J.M. “nodded his head okay;”<sup>20</sup> (4) she then immediately paged Dr. Kimyai due to J.M.’s visible allergic reaction, Dr. Kimyai responded that she would be there, and indeed Dr. Kimyai arrived “within just a few minutes”;<sup>21</sup> (5) she and Dr. Kimyai walked into J.M.’s room where she then overheard Mr. Harrison state that he had pushed 50 mg of Benadryl IV.<sup>22</sup> When asked in what situation she would feel comfortable pushing IV drugs without first contacting a doctor, Ms. Godby stated, “It wouldn’t be at any level that I would push any drug. I don’t have authority to do

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<sup>15</sup> (TR I, pgs. 37-38).

<sup>16</sup> (TR I, pg. 39). Ms. Grody further acknowledged that ASRT has issued a position statement advocating that administrating medications is within the scope of practice for Rad Tachs, and agreed that ASRT is a knowledgeable organization in the field of radiologic technology. (TR I, pgs. 43-44). The Board looks to the ASRT for reference but has not fully adopted ASRT principles into its own guidelines. (TR I, pgs. 50-51).

<sup>17</sup> (TR I, pgs. 57-67).

<sup>18</sup> (TR I, pg. 59).

<sup>19</sup> (TR I, pg. 60).

<sup>20</sup> (TR I, pg. 60).

<sup>21</sup> (TR I, pg. 60-61). Ms. Shaneyfelt testified that, in her estimate, Dr. Kimyai arrived approximately five minutes after Ms. Shaneyfelt first noticed the hives on J.M. (TR I, pg. 64).

<sup>22</sup> (TR I, pg. 61).

that. Two reasons; number one, I didn't have an order; number two, I am not an RN which pushes drugs.”<sup>23</sup>

Fourth, the Board called Ms. Headley, the Director of Radiology and Radiation Oncology at WVU Hospitals. When asked whether WVU Hospitals has specific protocols that deal with a Rad Tech's response to an allergic reaction, Ms. Headley testified that the first level of assistance Rad Techs seek is to consult directly with a radiologist.<sup>24</sup> Ms. Headley further testified, however, that “in the CT scanner, every procedure is done under a protocol; how many slices, how they are to do it. Procedures are protocol based on their history”<sup>25</sup> On cross-examination, when asked on what basis the Board concluded that Mr. Harrison had acted outside the scope of his practice, Ms. Headley testified that the Board had consulted with Mr. Bower, the Board's Executive Director, and referred to the published scope of practice guidelines.<sup>26</sup> Ms. Headley acknowledged, however, that the relevant authorities outlining the scope of practice for Rad Techs do not state that a Rad Tech cannot administer medication without physician involvement.<sup>27</sup>

At this point in the January 29, 2009 hearing, the Board stated that it did not have any further witnesses, and Mr. Harrison thus began to present his case. Mr. Harrison first called Dr. Mithra Kimyai-Asadi (“Dr. Kimyai”), a radiology resident at WVU Hospitals who was involved in the underlying incident on June 22, 2008. Dr. Kimyai explained that, before Rad Techs see a patient, efforts are made to determine in advance of a procedure whether a patient will have an allergic reaction to Contrast, and that a patient's potential allergy is communicated to Rad Techs

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<sup>23</sup> (TR I, pg. 66). Ms. Godby later testified, “it was our policy that if you ran into trouble, the emergency room was the closest thing. I wouldn't have discouraged this. . . . We have a button on the wall that alerts the emergency room if we're in a situation. And then if the patient really became distressed, then I probably would have called the code.” (TR I, pg. 74-75). Ms. Godby testified that she was unaware that workers in the emergency room had told Mr. Harrison not to call the emergency room for situations involving an inpatient. (TR I, pg. 75).

<sup>24</sup> (TR I, pg. 105).

<sup>25</sup> (TR I, pg. 105-06).

<sup>26</sup> (TR I, pg. 117-18).

<sup>27</sup> (TR I, pg. 118-19).

before the Rad Techs administer Contrast.<sup>28</sup> In this case, Dr. Kimyai did not believe that the nurses communicated J.M.'s allergy to the Rad Techs.<sup>29</sup> Dr. Kimyai further testified that the administration of 50 milligrams of Benadryl is the appropriate treatment for a patient who has an allergic reaction to Contrast, and that the only protocol dealing with patients who have allergic reactions to Contrast of which she is aware requires Rad Techs to page a radiologist.<sup>30</sup> On cross-examination, when asked, in her opinion, whose call it would have been to intravenously administer 50 mg of Benadryl in this situation, Dr. Kimyai replied, "mine."<sup>31</sup> And when asked whether she knows of a reasons why a Rad Tech should make this call, Dr. Kimyai responded, "Maybe in extreme circumstances, I mean, but then it wouldn't be Benadryl."<sup>32</sup>

Second, Mr. Harrison called as a witness Kenneth J. Bragg ("Mr. Bragg") who is currently employed by WVU Hospitals to perform CAT scans, has been licensed by the Board since approximately 1992, and who was present on June 22, 2008 during the underlying incident. In relevant part, Mr. Bragg testified as follows: (1) Mr. Harrison is one of the better Rad Techs that Mr. Bragg has worked with;<sup>33</sup> (2) on weekends – which is when the June 22, 2008 incident occurred – the staff is bare-bones, consisting mostly of residents who are located "just about anywhere in the hospital";<sup>34</sup> (3) in the summer of 2008, WVU Hospitals had a Protocol Manual for Rad Techs that was located in several rooms in Ruby, and this Protocol Manual provided guidance for Rad Techs in the event that a patient had an allergic reaction to Contrast;<sup>35</sup> (4) Mr. Harrison's Exhibit 1 – which is purported to be an excerpt from the Protocol Manual, and which outlines the

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<sup>28</sup> (TR I, pg. 124-25). Dr. Kimyai further testified that she believes a failure to communicate a Contrast allergy to Rad Techs is a breakdown. (TR I, pg. 126).

<sup>29</sup> (TR I, pg. 125).

<sup>30</sup> (TR I, pg. 129-31).

<sup>31</sup> (TR I, pg. 133).

<sup>32</sup> (TR I, pg. 133).

<sup>33</sup> (TR I, pg. 137).

<sup>34</sup> When asked whether Mr. Bragg has encountered difficulties with radiologists arriving following pages, Mr. Bragg stated, "Yes. . . . One in particular, it was hours actually." (TR I, pg. 138)

<sup>35</sup> (TR I, pgs. 139-40).

procedures Rad Techs should take in the event that a patient has a Contrast reaction – is indeed located in the Protocol Manual and is available to Rad Techs (this exhibit is hereinafter referred to as “Protocol Manual Excerpt”);<sup>36</sup> (5) Mr. Bragg would feel authorized as an employee of WVU Hospitals to rely on this Protocol Manual Excerpt, and would further feel that, based on the Protocol Manual Excerpt’s language, he would be authorized to push Benadryl in the event that a patient has an allergic reaction to Contrast;<sup>37</sup> and (6) as of early January 2009, the Protocol Manual Excerpt remained in the Protocol Manuals.<sup>38</sup>

Third, Mr. Harrison testified on his own behalf. Mr. Harrison explained that on January 22, 2008, following J.M.’s scan, Mr. Harrison observed that J.M. was breaking out into hives, having belabored breathing, and had begun to hiccup.<sup>39</sup> Mr. Harrison then placed J.M. on oxygen and hooked him up to monitors to observe his vital signs.<sup>40</sup> J.M. began to break out into more hives, was having greater difficulty breathing, and “his stats had dropped a bit,” meaning that the amount of oxygen in his bloodstream was declining.<sup>41</sup> Mr. Harrison then testified that, because Ms. Shaneyfelt “led me to believe that no help was on the way, which typically happens, I gave him the Benadryl.”<sup>42</sup> When asked how he knew what dosage of Benadryl to administer, Mr. Harrison responded, “Well, it’s in our protocol manual, of course. [And] over the years . . . you work around radiology for so long and radiologists have you draw up medications for them.”<sup>43</sup>

Following Mr. Harrison’s testimony, the Board then re-called Ms. Headley for further questioning regarding the Protocol Manual Excerpt. Though Ms. Headley testified that the document’s structure looked familiar, she could not verify precisely what it is or from where it

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<sup>36</sup> (TR I, pg. 141).

<sup>37</sup> (TR I, pg. 143).

<sup>38</sup> (TR I, pg. 147).

<sup>39</sup> (TR I, pgs. 171-73).

<sup>40</sup> (TR I, pg. 173).

<sup>41</sup> (TR I, pg. 174).

<sup>42</sup> (TR I, pg. 174).

<sup>43</sup> (TR I, pg. 176).

came.<sup>44</sup> Thus, pursuant to the Hearing Examiner's March 18, 2009 Order granting a Motion to Reconvene, a second hearing was held before the aforesaid Hearing Examiner on April 2, 2009 for the stated purpose of allowing the Board to present additional evidence regarding the Protocol Manual Excerpt. The April 2, 2009 hearing was largely comprised of Ms. Headley's testimony regarding this exhibit.

Ms. Headley testified that, after the January 29, 2009 hearing, she looked for and subsequently found duplicates of the Protocol Manual Excerpt in the Protocol Manuals.<sup>45</sup> She further testified that these duplicates were "cut out and put into a plastic sleeve . . . [and] that sleeve was placed in the manuals in the AT area."<sup>46</sup> The Protocol Manuals are located in each room in which there is a CT scanner.<sup>47</sup> Handwritten notes appear in the Protocol Manuals, and, though ideally all Protocol Manuals would be identical, this is not presently the case at Ruby.<sup>48</sup>

While Ms. Headley did not dispute that the Protocol Manuals do not expressly prohibit Rad Techs from administering medication,<sup>49</sup> Ms. Headley disagreed that the provision in the Protocol Manual Excerpt, "if the allergic reaction is hives, rash, redness or itching, the treatment is Benadryl 50 mg IV or PO," expressly authorized Rad Techs to administer medication.<sup>50</sup> This provision is the second in a sequence of four, all of which address the protocol in the event a patient has an allergic reaction to Contrast:

- i. Notify the radiology resident and/or attending.
- ii. If the allergic reaction is hives, rash, redness or itching, the treatment is Benadryl 50 mg IV or PO.
- iii. Observe the patient for 30 to 60 minutes until hives or rash begin to resolve. . . .

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<sup>44</sup> (TR I, pg. 201).

<sup>45</sup> (TR II, pg. 6).

<sup>46</sup> (TR II, pgs. 6-7). Ms. Headley stated that she does not know how or why these pieces of paper were cut out and put into sleeves. (TR II, pg. 47).

<sup>47</sup> (TR II, pg. 7).

<sup>48</sup> (TR II, pgs. 12-13).

<sup>49</sup> (TR II, pgs. 35-36).

<sup>50</sup> (TR II, pg. 18).

iv. The patient must be seen by a physician prior to discharge, and must be given a copy of the contrast reaction discharge, which must be signed by the patient and by the physician.<sup>51</sup>

Ms. Headley testified that the first, third, and fourth provisions affirmatively direct the Rad Techs to act, whereas the second provision is merely informative and an inference cannot be drawn to the contrary.<sup>52</sup>

On June 30, 2009, Hearing Examiner McClung submitted to the Board his Recommended Decision. In that Recommended Decision, the Hearing Examiner made the following conclusion of law:

Because the law speaks specifically to the one drug that radiologic technologists are permitted to administer, stating that contrast media requires consultation with a physician, it can be reasonably inferred that Respondent would have minimally needed an order from a physician before administering a drug outside of that specifically permitted, like Benadryl. Therefore, Respondent's admitted independent administration of IV Benadryl without any involvement from a physician is a violation of the laws as they pertain to the scope of practice of Radiologic Technology.

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The Respondent's administering an injection of medication without the involvement of a physician constitutes practicing outside the scope of his Medical Imaging and Radiation Therapy license . . . .<sup>53</sup>

Subsequently, the Board issued its Final Administrative Order on September 25, 2009.

Based on the Hearing Examiner's findings of facts and conclusions of law contained in his Recommended Decision, the Board suspended Mr. Harrison's license for two years to be followed by a three-year probationary period. The Board further ordered that Mr. Harrison pay the Board its administrative costs and legal fees incurred in this proceeding, totaling \$8,251.63.

On October 27, 2009, Mr. Harrison filed an Appeal Petition in the Circuit Court of Monongalia County, West Virginia. On December 21, 2009, Mr. Harrison filed a Motion for Stay

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<sup>51</sup> (TR I, Harrison's Exhibit 1).

<sup>52</sup> (TR II, pgs. 17-20).

<sup>53</sup> (Hearing Examiner's Recommended Decision, pgs. 13-14).

of Administrative Order, a hearing was held on Mr. Harrison's Motion at 9:00 a.m. on January 7, 2010, and this Court entered an Order Granting Stay of Administrative Order on January 21, 2010. Pursuant to this Court's Scheduling Order, entered on February 16, 2010, the parties each submitted memoranda of law in support of their positions, and a final hearing on this matter was held on March 18, 2010 at 11:00 a.m.

At the March 18, 2010 final hearing, the Board appeared by counsel, Nicole Cofer – Assistant Attorney General for the State of West Virginia –, and Mr. Harrison appeared in person and by counsel, Jacques Williams. Counsel for Mr. Harrison argued that this Court should reverse both the Board's adoption of the Hearing Examiner's Recommended Decision and the subsequently imposed penalties because this ruling was contrary to the reliable, probative, and substantial evidence on the whole record and was thus arbitrary and capricious. Counsel for the Board argued that the Board prudently and reasonably found that Mr. Harrison violated the law as it pertains to the practice of medical imaging and radiation therapy technology, that the penalties imposed are reasonable in light of the Board's expertise in these matters, and that the ruling should be affirmed due to Mr. Harrison's inability to show that the Board acted arbitrarily and capriciously.

At this time, the Court feels compelled to note that it was impressed by both counselors' high level of competence and expertise, and by their oral and written advocacy skills at all stages during these proceedings. The Court believes that both parties received outstanding legal representation in this case.

#### **STANDARD OF REVIEW**

The West Virginia Code regarding Medical Imaging and Radiation Therapy Technology provides that any licensee adversely affected by any decision of the Board entered after a hearing

may obtain judicial review of the decision in accordance with the West Virginia Administrative Procedures Act. W. VA. CODE § 30-23-26(e).

Accordingly, the West Virginia Administrative Procedures Act provides that a court “shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner . . . have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:” (1) “Clearly wrong in view of the reliable, probative and substantial evidence on the whole record;” or (2) “Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” W. VA. CODE § 29A-5-4. In analyzing a trial court’s scope of review of administrative decisions, the West Virginia Supreme Court of Appeals has stated that, “[t]he scope of review under the arbitrary and capricious standard is narrow, and a court is not to substitute its judgment for that of the hearing examiner.” *Martin v. Randolph County Bd. of Educ.*, 465 S.E.2d 399, 406 (W. Va. 1995). Further, the “clearly wrong” and “arbitrary and capricious” standards of review “are deferential ones which presume an agency’s actions are valid as long as the decision is supported by substantial evidence or by a rational basis.” Syl. Pt. 3, *In re Queen*, 473 S.E.2d 483 (W. Va. 1996).

### ANALYSIS

At the heart of this case are the parameters of Rad Techs’ “scope of practice” in the state of West Virginia, and whether Mr. Harrison stepped outside of those parameters by intravenously administering Benadryl to a patient experiencing an allergic reaction to Contrast. In determining the contours of Mr. Harrison’s “scope of practice,” the Court must look to several relevant regulations, code sections, and institutional policies as they apply to West Virginia Rad Techs. First, the Board’s Standards of Ethics simply states, “an individual shall not . . . [p]ractice outside the scope of practice authorized by the individual’s current state permit or license.” W. VA. CODE

ST. R. § 18-5-5-1.17. Second, the West Virginia Code provides that a Rad Tech's "scope of practice" includes "[m]aintaining values congruent with the profession's Code of Ethics and scope of practice as well as adhering to national, *institutional*, and/or departmental standards, policies and procedures regarding delivery of services and patient care." W. VA. CODE § 30-23-10(11) (emphasis added). Third, and most controversially, an exhibit presented by Mr. Harrison that purports to be from WVU Hospital's internal Protocol Manual for Rad Techs explicitly states that, "If [a] patient develops a mild to moderate allergic reaction with the injection [of Contrast] . . . , if the allergic reaction is hives, rash, redness or itching, the treatment is Benadryl 50 mgm IV or PO." (TR I, Harrison's Exhibit 1). It is this evidentiary item that warrants greater discussion.

At both hearings before Hearing Examiner McClung, significant testimony was presented regarding the Protocol Manual Excerpt. Ms. Headley's testimony confirmed that copies of the Protocol Manual Excerpt were located in at least two Protocol Manuals at Ruby and in rooms in which Rad Techs regularly access. Although Ms. Headley was unsure how these copies came to be in the Protocol Manuals, no evidence was presented to suggest fraudulent activity. Ms. Headley further testified as to whom each of the provisions in the Protocol Manual Excerpt is directed, and was of the opinion that only the first, third, and fourth provisions are specific directives for Rad Techs. Ms. Headley believes that the second provision, which states, "If the allergic reaction is hives, rash, redness or itching, the treatment is Benadryl 50 mg IV or PO," does not authorize Rad Techs to act and is merely informative.

After reviewing the record in its entirety, and after hearing both counsels' eloquent arguments during the March 18, 2010 final hearing, this Court is of the opinion that the Protocol Manual Excerpt is, at best, vague. Thus, in light of the fact that (1) the record shows that there are no relevant regulations, code sections, or institutional policies that expressly prohibit Rad Techs

from administering Benadryl intravenously; and (2) that there is an applicable, but vague, institutional policy that could reasonably lead Rad Techs to believe they are authorized to intravenously administer Benadryl when a patient develops a “mild to moderate allergic reaction” to Contrast, this Court finds that the Hearing Examiner’s conclusion of law – that Mr. Harrison violated the laws as they pertain to the scope of practice of Radiologic Technology and was thus acting outside the scope of his practice – is clearly wrong in view of the reliable, probative, and substantial evidence on the whole record.

Furthermore, this Court is of the opinion that the decision regarding the penalties imposed by the Board in light of its adoption of the Hearing Examiner’s Recommended Decision was arbitrary, capricious, and an abuse of discretion. Prior to the underlying incident in question, Mr. Harrison had never been brought before the Board for disciplinary action. Subsequently, for his first alleged offense, the Board suspended his license for two years to be followed by three-years of probation, and further assessed him \$8,251.63 for the costs and legal fees associated with this proceeding. While these penalties appear severe, what concerns the Court is the lack of evidence in the record as to how the Board determined the appropriate disciplinary action. Without objective disciplinary guidelines or uniform procedures regarding discipline, the Board engages in subjective decision-making. Consequently, courts have little guidance in determining whether a particular disciplinary action is reasonable in light of the circumstances.

Under the West Virginia Code of State Rules, the Board may suspend a license if there is probable cause to believe that the licensee’s conduct constitutes “an immediate danger to the public,” or if, upon satisfactory proof, the licensee’s conduct constitutes “professional negligence or a willful departure from accepted standards of professional conduct.” W. VA. CODE ST. R. § 18-4-4, 6. Consistent with the above analysis, the Court finds and concludes that there is neither

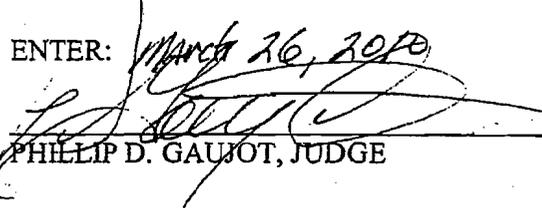
clear and convincing evidence nor a preponderance of the evidence showing that Mr. Harrison's conduct constituted either an immediate danger to the public or a willful departure of accepted standards of conduct. Accordingly, the Board's September 25, 2009 Final Administrative Order, in which it adopted the Hearing Examiner's Recommended Decision in its entirety, is arbitrary, capricious, and an abuse of discretion and should be reversed.

**ORDER**

Based on the foregoing, it is therefore **ADJUDGED** and **ORDERED** as follows:

1. The Board's September 25, 2009 Final Administrative Order is **REVERSED**; and
2. The Circuit Clerk shall provide certified copies of the Opinion Order to the named parties and counsel, and shall strike this matter from the Court's docket.

ENTER: *March 26, 2010*

  
PHILLIP D. GAUJOT, JUDGE

STATE OF WEST VIRGINIA SS:

I, Jean Friend, Clerk of the Circuit Court and Family Court of Monongalia County State aforesaid do hereby certify that the attached Order is a true copy of the original Order made and entered by said Court.

  
Circuit Clerk