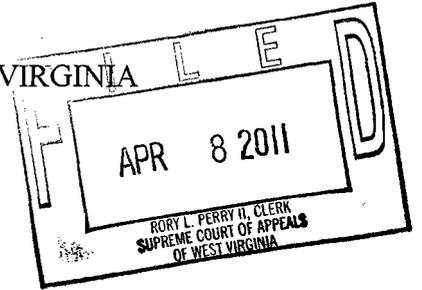


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FILED



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WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

Petitioner,

v.

Docket No. 09-AA-7

MICHELLE L. FALQUERO,

Respondent.

PETITION FOR APPEAL

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- A. The Circuit Court of Kanawha County incorrectly upheld the December 16, 2008 Decision of the West Virginia Public Employees Grievance Board that the West Virginia Department of Environmental Protection improperly refused to allow the Respondent to rescind her resignation.

- B. There is no requirement in West Virginia law that voluntary resignations must be acknowledged in writing or by any other formality except where state law otherwise provides by statute.

RELIEF PRAYED FOR 13

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KIND OF PROCEEDING AND
NATURE OF THE RULING IN THE LOWER TRIBUNAL

On or about May 15, 2008, Respondent, Michelle L. Falquero, filed a grievance with the West Virginia Public Employees' Grievance Board (hereinafter, "PEG Board) against Petitioner, the West Virginia Department of Environmental Protection (hereinafter ("DEP). Respondent asserted several complaints relative to her job duties and classification, not a issue herein, because the West Virginia Division of Personnel must be a party to such grievance.

Respondent's issues before DEP were "whether . . . [Respondent's] work environment was so intolerable that her resignation . . . [could] be construed as a constructive discharge and whether DEP properly refused to allow . . . [Respondent] to rescind her resignation." (See Ex. 1, December 16, 2008 Decision of Administrative Law Judge William McGinley (hereinafter, "ALJ's Decision.")

The Level 1 hearing on these issues was conducted on June 9, 2008 by the chief administrator's designee, Jack C. McClung. On July 28, 2008, Secretary Randy C. Huffman, the DEP's chief administrator, signed an Order adopting Mr. McClung's Recommended Order denying the grievance. On October 15, 2008, the parties attempted, unsuccessfully, to mediate the grievance. Hence, on October 16, 2008, the Level III hearing was conducted.

The ALJ rendered his Decision on December 16, 2008, denying that portion of the grievance that asserted a constructive discharge claim, but granting the grievance insofar as Respondent claimed that the DEP improperly refused to allow her to rescind her resignation. The ALJ ordered DEP to reinstate Respondent to the Secretary II position she held at the time of her separation from employment. Petitioner appealed that decision, to the Circuit Court of Kanawha County, to the extent the ALJ granted the grievance as the Decision was contrary to the statutory and common law of the state of West Virginia. On October 26, 2010, the Circuit Court of Kanawha County affirmed

the Decision of the ALJ; and it is from that Order that the DEP takes this appeal. (See, Ex. 2, Final Order.)

STATEMENT OF THE CASE

At all times relevant hereto, Respondent was a Secretary II in the Public Information Office of DEP, providing support services to the chief public information officer and others in DEP's Public Information Office. (Ex. 3, Level III Tr. at 13.)At the time of her separation from employment, Respondent had been employed by DEP for five (5) years. (Ex. 3, Level III Tr. at 16-17.)

When DEP's Kanawha City office opened in 2007, Respondent was assigned to an office in the executive office suite. (Ex. 3, Level III Tr. at 17.) Two other secretaries also were assigned to offices in the executive suite because they were tasked with providing administrative support services to the cabinet secretary, the general counsel, and at least one other manager. (Ex. 3, Level III Tr. at 17.)

One of the Respondent's complaints was that these other secretaries were mean to her and that their alleged abusive behavior created a hostile work environment of her.¹ (Ex. 3, Level III Tr. at 19.) On two separate occasions in late 2007, Respondent complained to Human Resources about the abuse she allegedly was suffering at the hands of the other two secretaries. (Ex. 3, Level III Tr. at 51.) Respondent then was informed of her right to file a grievance, by personnel in the Human Resources, who also offered to speak with Respondent's supervisor about her concerns. (Ex. 3,

¹The ALJ's decision denied Respondent's grievance on her claim of hostile work environment, a portion of the decision with which DEP had no argument; so the details of Respondent's alleged hostile work environment claim are not included here, for the sake of brevity.

Level III Tr. at 101-102.) Nonetheless, Respondent declined both offers of assistance. (Ex. 3, Level III Tr. at 109.)

Another issue Respondent raised at the above-referenced meetings with Human Resources was her desire to be reclassified as an administrative secretary. (Ex. 3, Level III Tr. at 57, 146.) On February 22, 2008, Respondent met with then Deputy Cabinet Secretary Randy Huffman² to discuss this issue as well as her concerns about her perceived hostile work environment. (Ex. 3, Level III Tr. at 22.) During that meeting, Mr. Huffman informed Respondent that he would discuss these issues with Human Resources and with Respondent's new supervisor, Kathy Cosco.³ (Ex. 3, Level III Tr. at 146.)

On February 27, 2008, Respondent met with Ms. Cosco to discuss Respondent's issues. (Ex. 3, Level III Tr. at 147.) At that time, Ms. Cosco informed Respondent that she was going to make some changes in the Public Information Office, which included moving Respondent's office from the executive suite, on the third floor, to a comparable office on the first floor, closer to the Public Information Office. (Ex. 3, Level III Tr. at 148.)

However, before these changes could be effected, on February 28, 2008, Respondent gave Ms. Cosco a copy of her letter of resignation, which stated, "This letter serves as notice that I am resigning from my position at the West Virginia Department of Environmental Protection. (Ex. 3, Level III Tr. at 148.) My last day of work will be June 15, 2008." (Ex. 3, Level III Tr. at 148.)

²On May 1, 2008, Mr. Huffman replaced Stephanie Timmermeyer as the Cabinet Secretary of DEP.

³Ms. Cosco became the Chief Public Information Officer of DEP on February 12, 2008.

Ms. Cosco took the letter and responded, "Okay." (Ex. 3, Level III Tr. at 148.) Respondent further informed Ms. Cosco that she set the date of her departure more than three months in the future so that she could look for another job. There is no testimony below whatsoever that any attempt was made to dissuade Respondent from resigning or to give her any cause to conclude that her resignation was not immediately effective.⁴

Once Ms. Cosco received Respondent's resignation, she informed the appropriate executive personnel and began the internal process of transitioning Respondent's duties to other personnel within her department. DEP forwarded Respondent's letter of resignation to the Division of Personnel as required by state rules. At a staff meeting in early March, at which Respondent was present, Ms. Cosco informed all other employees in the Public Information Office of Respondent's resignation. Respondent never uttered a word of protest or of any intent to withdraw her resignation, either in the meeting or privately afterward. Respondent cooperated in the transition until she had a change of heart. (Ex. 3, Level III Tr. at 31.)

After spending time in her new office, Respondent realized that she was no longer subject to her perceived hostile environment of the Executive Suite. (Ex. 3, Level III Tr. at 31.) Then, on March 27, 2008, she submitted a memorandum to Ms. Cosco and Human Resources that stated, "As of today I am rescinding my resignation. Thank you." (Ex. 3, Level III Tr. at 33.)

⁴On or about June 16, 2008 Respondent applied to Workforce West Virginia for unemployment benefits. Her application was denied by the Deputy on July 11, 2008. Respondent appealed this decision and a full evidentiary hearing was held before Workforce West Virginia's ALJ, who affirmed the deputy's decision on or about August 26, 2008. Respondent again appealed, and the decision of the ALJ was affirmed by the Board of Review of Workforce West Virginia on October 8, 2008.

By letter dated April 1, 2008, DEP informed Respondent that her February 28, 2008 request to rescind her resignation was denied. (Ex. 3, Level III Tr. at 150.)

After Mr. Huffman's appointment as Cabinet Secretary, he and Ms. Cosco then met to discuss Ms. Cosco's staffing plan for the Public Information Office that reflected her view about how the employees could best be utilized. (Ex. 3, Level III Tr. at 151.) In that meeting, Ms. Cosco asked Secretary Huffman if he wanted to reconsider former Secretary Timmermeyer's decision to reject Respondent's attempt to rescind her resignation. (Ex. 3, Level III Tr. at 151.) Secretary Huffman stated he would allow Respondent to rescind her based upon certain conditions. (Ex. 3, Level III Tr. at 152; Ex. 1, ALJ's Decision, ¶ 17.)

On May 8, 2008, Ms. Cosco met with Respondent and Human Resources personnel to discuss Respondent's resignation. (Ex. 3, Level III Tr. at 152.) At the meeting, Ms. Cosco gave Respondent an Employee Performance Appraisal-1 form ("EPA")⁵ that contained the duties and responsibilities that Ms. Cosco envisioned Respondent would be performing in the new staffing plan. (ALJ's Decision, ¶ 19.) Ms. Cosco informed Respondent that DEP would allow her to rescind her resignation if she agreed to two conditions: (1) Respondent would sign the EPA, indicating acceptance of her new duties under the new Public Information Office staffing plan; and (2) Respondent would draft a respectful letter acknowledging that she was no longer subject to a hostile work environment. (Ex. 3, Level III Tr. at 155.) However, Respondent refused to sign the EPA. (Ex. 1, ALJ's Decision, ¶ 24.)

⁵It was understood by all parties that the EPA given to Respondent was not intended to be an evaluation of her performance. The EPA was used solely as a vehicle for setting out Respondent's responsibilities under the new staffing plan

In an e-mail sent May 15, 2008, Human Resources informed Respondent that Secretary Huffman's position was that Respondent either was to meet the conditions discussed in the May 8th meeting or must separate from employment as stated in her February 28th letter. (Ex. 1, ALJ's Decision, ¶¶ 12, 15, 19.) Respondent then filed the a grievance on May 15, 2008. (Ex. 3, Level III Tr. at 155, ALJ's Decision, ¶ 22.)

On May 20, 2008, Secretary Huffman e-mailed a letter to Respondent withdrawing the condition that Respondent write a letter regarding her perceived hostile work environment, but informing the Respondent that she had until May 30, 2008, to sign the EPA and return it to Ms. Cosco if she wanted DEP to consider reinstating her. (Ex. 1, ALJ's Decision, ¶ 21, 23.) Secretary Huffman also informed Respondent that signing the EPA would not prejudice her rights to contest the duties listed therein through the grievance process. (Ex. 1, ALJ's Decision, ¶ 23; Ex. 3, Level III Tr. at 155-156.) Respondent still refused to sign the EPA; and, pursuant to her letter of resignation, her last day of employment at DEP was Friday, June 13, 2008. (Ex. 1, ALJ's Decision, ¶ 24.)

ASSIGNMENTS OF ERROR

1. The Circuit Court of Kanawha County erred when it affirmed the ALJ's decision, which violated the statutory, common, and administrative law of this state by finding that Respondent effectively rescinded her voluntary resignation before it had been accepted by DEP and concluding that DEP acted improperly in refusing her to rescind the same.
2. The Circuit Court of Kanawha County erred in affirming the ALJ's decision which was in error and exceeded the ALJ's authority when he endeavored to overrule the

long-standing precedent of *Copley v. Logan County Health Department*, Docket No. 90-LCHD-531 (May 22, 1991).

POINTS AND AUTHORITIES RELIED UPON

- I. The Circuit Court was incorrect in affirming the December 16, 2008 Decision of Administrative Law Judge William B. McGinley since the Decision is Fatally Affected by Errors of Law and It Must Be Overturned.
- II. The Administrative Law Judge's Decision, to Overrule *Copley*, Exceeding His Statutory Authority, Was Arbitrary and Capricious and Should Not Have Been Upheld by the Circuit Court of Kanawha County.

ARGUMENT

I. Standard of Review

The Legislature and the West Virginia Supreme Court of Appeals have set forth the standard of review for final orders of administrative agencies as follows:

Upon judicial review of a contested case under the West Virginia Administrative Procedures Act, the circuit court may affirm the order or decision of the [PEG Board] or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the [PEG Board] if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are: '(1) In violation of constitutional or statutory provisions; (2) In excess of the statutory authority or jurisdiction of the [PEG Board]; (3) Made upon unlawful procedures; (4) Affected by other error of law; (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.'

W. Va. Code § 29A-5-4(g); *Webb v. W. Va. Bd. Of Med.*, 212 W. Va. 149, 569 S.E.2d 225 (2002); *Gino's Pizza of West Hamlin, Inc. v. West Virginia Human Rights Com'n*, 187 W. Va. 312, 418 S.E.2d 758 (1992) citing Syl. Pt. 2, *Shepherdstown Volunteer Fire Dep't v. State ex rel. State Human Rights Commission*, 172 W. Va. 627, 309 S.E.2d 341 (1983). In reviewing a grievance ruling, plenary review is conducted as to the conclusions of law and application of law to facts which are reviewed *de novo*. *Reese v. West Virginia Dept. Of Transp., Div. Of Highways*, 217 W. Va. 428, 618 S.E.2d 437 (2005).

The decision of the Circuit Court of Kanawha County, upholding the PEG Board, prejudices substantial rights of the Petitioner herein; is in violation of West Virginia law; exceeds the statutory authority of the PEG Board; and should be reversed.

II. The ALJ's Decision, Upheld by the Circuit Court of Kanawha County, Is Fatally Affected by Errors of Law; and It Must Be Overturned.

Respondent's voluntary resignation was accepted by DEP the instant she placed her letter of resignation in her supervisor's hand and her supervisor said, "Okay." There is no requirement in West Virginia law that voluntary resignations must be acknowledged in writing or by any other formality. West Virginia administrative law regarding state employment has long held that "[s]ince Respondent's contract of employment was for an indefinite duration and therefore she could terminate it at will, it was not necessary for [the agency] to agree to her resigning in order to such resignation to be effective." *Copley v. Logan County Health Department*, Docket No. 90-LCHD-531 (May 22, 1991) (internal citation omitted). In the instant case, as in *Copley*:

Respondent [and the ALJ] fail [] to recognize that while a teacher's contract is for a definite term of employment, the school year, requiring the teacher to fulfill his or her duties for that year, a civil

servant's employment has no definite term and, while a formal agreement may be required to rescind a teacher's contract, 'When a contract of employment is a [sic] indefinite duration it may be terminated at any time by either party to the contract.' Syl. Pt. 2, *Wright v. Standard Ultramarine & Color Co.*, 141 W. Va. 368, 90 S.E.2d 459 (1955). . . [T]he employee has an absolute right to terminate his or her contract; i.e., no agreement by [the agency] was necessary for Respondent to resign.

Id. In even further analogy to *Copley*, "[E]ven if agreement were required, it would be found that under the circumstances Dr. Stephens' accepting Respondent's letter with a 'thank you' would constitute such agreement."

While it is true that in order to constitute a contract there must be an assent to or acceptance of an offer, it is well settled that the assent need not be given in express words but may be inferred from the acts and conduct of the offeree. . . . A contract may be formed by accepting a paper containing terms. If an offer is made by delivering to another a paper containing the terms of a proposed contract and the paper is accepted, the acceptor is bound by its terms.

Id. citing 12B, M.J., Contracts § 21. *See also, First National Bank of Gallipolis v. Marietta Mfg. Co.*, 153 W. Va. 636, 641-642, 153 S.E.2d 172, 176-177 (1967). In the instant case, Respondent's supervisor accepted her letter of resignation by saying "okay" rather than "thank you"; but the effect is the same: Respondent's resignation was accepted by DEP at the time she tendered her letter of resignation to her supervisor. The ALJ's decision, upheld by the Circuit Court of Kanawha County, is clearly wrong and must be reversed.

The ALJ's attempt to distinguish *Copley* from the instant case is nothing more than a tortured reading of irrelevant law in an attempt to justify a desired result. As noted above, the education cases and statutes relied on by the ALJ in his Decision are completely inapposite to the instant case. Public school employees (namely teachers and school administrators) have contracts for stated terms,

and their tenders of resignation have to be accepted by formal action of their county school board. By the authority of statute, a tender of resignation by a teacher under contract to teach is not binding on either party until accepted by the school board assembled as such. W. Va. Code §18A-2-2. Thus, a teacher may withdraw his or her tender of resignation at any time before acceptance by the school board. *Bailey v. The Fred W. Eberly Technical Center*, Docket No. 98-49-189 (Sept. 30, 1998); *LeMasters v. Board of Education of Grant District*, 105 W. Va. 81, 141 S.E. 515 (1928). However, there is no such requirement of formal action to accept the voluntary resignation of any other type of state employee even if that employee is covered under the civil service regime. The ALJ's attempt to bend civil service protection into some type of contract of employment with a definite term (analogous to the system for public school employees) is not only illogical, but is also contrary to law and must fail. The ALJ states that "a classified, state employee does not have an employment contract of an indefinite term as described in *Copley, supra*. Rather, the contract of employment is continuing, unless terminated for cause." (Exb. 1, ALJ's Decision, ¶ 16.) The ALJ fails to point out how long the employee's "contract" continues, if she were *not* terminated for cause; and the answer is *indefinitely*. A state employee who is protected by the civil service system is still free to resign her employment at any time she chooses.

The ALJ overlooked the Administrative Rule of the West Virginia Division of Personnel that dictates the procedure for state employee resignations, which, in its entirety, states as follows:

Resignations—An employee who resigns shall present the reasons for the resignation in writing to the appointing authority. The appointing authority shall forward a copy of the resignation to the Director of Personnel who shall record the resignation. If a written resignation cannot be obtained, the appointing authority shall notify the Director of Personnel in writing of the resignation of the employee and the circumstances of the resignation. The appointing authority shall not

treat an intra-agency not [sic] an inter-agency transfer as a resignation except when the employee is resigning from a classified position to accept employment in a classified-exempt position.

143 C.S.R. 1 § 12.1. Thus, the only thing an agency is required to do when an employee voluntarily resigns is either forward the letter of resignation to the Director of Personnel or send a letter notifying the Director of Personnel of the resignation and explaining the circumstances of the same. The requirement of oral notice, confirmed in writing, or written notice of agency action, only applies to dismissals or suspensions. *See*, 143 C.S.R. 1 §§ 12.2 and 12.3. If the Division of Personnel felt it were necessary or beneficial for voluntary resignations to be confirmed with the same formalities as dismissal or suspensions, it could have written that requirement into the rule. It did not do so, and the ALJ's attempt to impose the rules for public school employees onto all other state employees and agencies is improper and must fail.

III. The ALJ's Decision to Overrule *Copley* Exceeds His Statutory Authority, Is Arbitrary and Capricious, and Must Fail.

Neither W. Va. Code § 6C-2-1, *et seq.*, nor 156 C.S.R. 1 (Rules of Practice and Procedure of the West Virginia Public Employees Grievance Board) cloak an ALJ with the authority to overrule, clarify or otherwise amend the decision of another ALJ at Level III. PEG Board is an administrative agency within the meaning of the Administrative Procedures Act, which defines an agency as any state board; commission; department; office of officer authorized by law to make rules or adjudicate contested cases, except those in the legislative or judicial branches. W. Va. Code § 29A-1-2(a). It is axiomatic that:

Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general

or common law powers but only such as have been conferred upon them by law expressly or by implication.

Syl. Pt. 4, *McDaniel v. West Virginia Div. Of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003); Syl. Pt. 2, *Coll v. Cline*, 202 W. Va. 599, 505 S.E.2d 662 (1998); Syl. Pt. 3, *Appalachian Regional Health Care, Inc. v. W. Va. HRC*, 180 W. Va. 303, 376 S.E.2d 317 (1988); Syl. Pt. 1, *Francis O. Day Co., Inc. v. West Virginia Reclamation Bd. of Review*, 188 W. Va. 418, 427 S.E.2d 763 (1992); Syl. Pt. 3, *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973). In PEG Board's authorizing statute, the Legislature authorized ALJs to "render a decision in writing to all parties setting forth findings of fact and conclusions of law on the issues submitted." W. Va. Code 6C-2-4(c)(5). Similarly, the procedural rule imbues the ALJ with the "authority and discretion to control the processing of each grievance assigned such Judge and to take any action considered appropriate consistent with the provisions of W. Va. Code § 6C-2-1, *et seq.*" 156 C.S.R. 1 § 6.2. Further, under W. Va. Code § 6C-2-5, decisions of ALJs at Level III are final upon the parties and shall be enforceable in circuit court unless timely appealed, as authorized therein. These clear statutory provisions provide no authority for an ALJ to overrule, override, refine, clarify, change, alter or otherwise amend the decision of another ALJ at Level III in an entirely separate case. The reason for this is obvious: "*Stare decisis* rests upon the important principle that the law by which people are governed should be 'fixed, definite, and known' and not subject to frequent modification in the absence of compelling reasons." *Booth v. Sims*, 193 W. Va. 323, 350, n. 14, 456 S.E.2d 167, 194, n. 14 (1995). As *Copley* has been "the law" of PEG Board for 18-plus years, its clear and logical findings should not be cast aside now.

Any attempt to justify the ALJ's action below by arguing that the authority to overrule previous decisions is implicit in the authority "to take any action considered appropriate consistent with the provisions of W. Va. Code § 6C-2-1, *et seq.*" is also fatally infirm. This Court has held that, "[a]lthough an express grant of power to any agency will be determined to include such other powers as are necessarily or reasonably incident to the powers granted, the powers should not be extended by implication beyond what may be necessary for their just and reasonable execution." *Walter v. Ritchie*, 156 W. Va. 98, 108, 191 S.E.2d 275, 281 (1973). An ALJ does not need the authority to overrule the prior decisions of his colleagues in order to justly and reasonably decide the cases and issues before him. If a prior decision of the PEG Board suffered from fatal legal flaws, the Circuit Court of Kanawha County had the authority to remedy them. It is not within the enumerated powers of PEG Board to "heal itself."

In summary, there is no requirement that formal acceptance of a state employee's voluntary resignation must be communicated to the employee. Respondent's resignation was accepted by DEP when she handed her letter of resignation to her supervisor. The ALJ's decision to the contrary is fatally flawed and must be overturned.

RELIEF PRAYED FOR

Because the Decision of the West Virginia Public Employees' Grievance Board, upheld by Circuit Court of Kanawha County, exceeds the authority of the Grievance Board; is contradictory to the law and evidence; is arbitrary; does not protect the relevant public interests; affects the ability of the Department of Environmental Protection and other state agencies to manage their organizations; and, for reasons apparent from the record below, the Department of Environmental Protection prays that its Petition for Review be granted and that the Decision of the Public

Employees' Grievance Board, as entered December 16, 2008, and upheld by the Circuit Court of Kanawha County, be reversed. The Department of Environmental Protection should not be ordered (1) to reinstate Michelle L. Falquero to the Secretary 2 position from which she voluntarily resigned or (2) to pay her back pay in any sum.

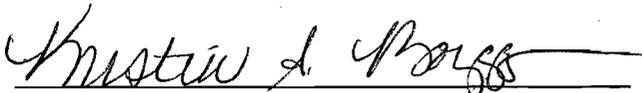
WHEREFORE, the Department of Environmental Protection respectfully petitions the Court to enter an Order granting its Petition for Review; to suspend and overturn decision of the Circuit Court of Kanawha County, affirming the Decision of the West Virginia Public Employees' Grievance Board, and for such other relief as the Court deems appropriate.

WHEREFORE, for the reasons set forth above, the Petitioner hereby respectfully requests that the Court grant its Petition for Appeal.

Respectfully submitted this 25th day of February, 2011.

WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FILED

WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

2011 FEB 25 PM 4:40

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

Handwritten initials

Petitioner,

v.

Docket No. 09-AA-7

MICHELLE L. FALQUERO,

Respondent.

CERTIFICATE OF SERVICE

I, Kristin A. Boggs, General Counsel for the W. Va. Department of Environmental Protection, hereby certify that service was made of the foregoing Petition for Appeal, upon all counsel of record, by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows on this, the 25th day of February, 2011:

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EXHIBITS

ON

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