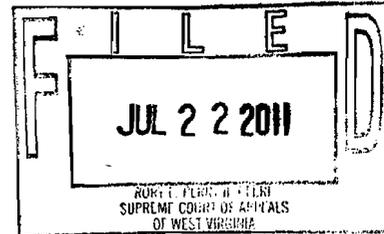


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON**



SHENANDOAH SALES & SERVICE, INC

Petitioner,

Vs.

Case No. 11-0701

ASSESSOR OF JEFFERSON COUNTY WV,

Respondent

PETITIONERS BRIEF

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III. ASSIGNMENT OF ERROR

COMES NOW the Petitioner, Shenandoah Sales & Service, Inc. by its duly nominated agent David C. Tabb, pursuant to *WV Code § 58-5-1* and *Rule 3 of the West Virginia Supreme Court Rules of Appellate Procedure*, and respectfully represents to the Court that your Petitioner is seeking an appeal from the order of March 23, 2011 whereby the Circuit Court of Jefferson County, West Virginia summarily dismissed without a hearing (appendix page 1). Petitioners Petition for Review of the Jefferson County Commission sitting as Board of Review and Equalization order of February 17, 2011 denying Petitioners appeal of his estate tax assessment (appendix page 5).

Petitioner assigns as error:

- 1) The Honorable David Sanders, Judge of the Circuit Court of Jefferson County, committed reversible and prejudicial error when the Court sua sponte and ex parte entered the order of March 23, 2011 dismissing Petitioners appeal from the action of the Jefferson County Commission sitting as a Board of Review and Equalization, thus denying the Petitioner his absolute right to an appeal hearing pursuant to W. Va. Code 11-3-25.
- 2) Petitioner says his right to Due Process of Law pursuant to the 5th and 14th Amendments to the United States Constitution and Article III 10 of the West Virginia Constitution were violated by the Circuit court of Jefferson county refusing to provide and denying to Petitioner his right to an appeal hearing pursuant to W. Va. Code 11-3-25 from the February 17, 2011 order of the Jefferson County Commission Sitting as a Board of Review and Equalization.

3) The Circuit court of Jefferson County, WV, the Honorable David Sanders presiding was without authority or jurisdiction to enter the order of March 23, 2011 dismissing petitioner's petition for appeal from the order of the Jefferson County Commission, filed with the Circuit Court on March 18, 2011.

IV. STATEMENT OF THE CASE (PROCEDURAL AND FACTUAL HISTORY)

Petitioner says because he believes the factual circumstances and procedural history of CA#09-AA-3, which is still pending in the Circuit Court of Jefferson County and 11-0248, which is pending in this court, are extremely relevant to the legal issues in this appeal, Petitioner is also including a summary of the factual and procedural history in said proceedings.

A. Case 09-AA-3

1. On March 25, 2009, a Petition for Appeal of Real Estate Assessment, in accordance with WV Code §11-3-24 and 11-3-25 was filed from the February 2, 2009 Board of Review and Equalization [hereinafter BORE] hearing.
2. On June 29, 2009, a *Status Conference* was held, for which Agent for the Petitioner, prepared the notification to all parties. At the conference, the first topic of discussion was Mr. David C. Tabb's authority to appear as an Agent for Shenandoah Sales & Service, Inc. The Jefferson County Prosecution Attorney, Ms. Stephanie Grove and the Court had no objection to wit:

THE COURT: The Petitioner is Shenandoah Sales & Service run by Mr. Tabb who is here with us today and who is representing -- it is a corporation but are you the principal officer of that corporation?

MR. TABB: Vice President

THE COURT: Are you an attorney, sir?

MR. TABB: No, sir.

THE COURT: You are not, okay, but you are representing a corporation.

MR. TABB: Yes, I am.

THE COURT: Okay,

3. Thereafter, David Tabb continued to serve in the capacity as the Agent for Shenandoah Sales & Service, Inc. in these proceedings pursuant to *WV Code § 11-3-25* and has filed hundreds of pages of Briefs, Motions, Requests and Orders for the Petitioner, one of which was signed by the Respondent the Honorable Judge Sanders.
4. On January 19, 2010, the Honorable Judge Sanders signed a Trial Court Rule 22 Scheduling Order.
5. On February 2, 2010, Agent for the Petitioner filed a Proposed Order in accordance with *Trial Court Rule 22, Scheduling Order*.
6. On March 15, 2010, Agent for the Petitioner sent the Honorable Judge Sanders a letter reminding him of the two amended orders and requesting that he please respond in accordance with the law.
7. On March 18, 2010 the Respondent the Honorable Judge Sanders responded in a letter, concluding that the Court would in the future, only accept Pleadings and Motions from a licensed practicing Attorney on behalf of Shenandoah Sales & Service, Inc.
8. On March 23, 2010, Agent for the Petitioner filed a letter in response to Judge Sanders March 18, 2010 letter, reminding the court that in both *Case No. 08-C-121* and *09-AA-3* it was determined to not be necessary or required, in accordance with *WV Code § 11-3-25* for Petitioner to be represented by a licensed, practicing Attorney Simultaneously Agent for the Petitioner filed a *Motion for Disqualification*, pursuant to *Rule 17.01 in WV Trial Court Rules*.
9. On March 24, 2010, the Respondent the Honorable Judge Sanders filed a letter in

response to the Honorable Chief Justice of the West Virginia Supreme Court.

10. On March 29, 2010 Agent for the Petitioner, filed a response to the Respondent the Honorable Judge Sanders filing.

11. On March 31, 2010 Agent for the Petitioner, filed an additional response and documents with the Honorable West Virginia Supreme Court Chief Justice.

12. On April 1, 2010, the Honorable Chief Justice Davis entered an order in Case 09-AA-3, stating,

“The evidence set out in support of the disqualification motion is insufficient to warrant such disqualification. The Honorable Judge David H. Sanders hereby is directed to continue to preside in the above referenced case in accordance with the law”.

13. On April 8, 2010, the Respondent, the Honorable Judge Sanders, sent a letter to the Agent for the Petitioner informing said agent that the Court will continue to refuse to allow a Non-Lawyer to proceed in either *Case 09-AA-3* or *10-AA-1*.

14. The Petitioner concludes that at all times in the legal proceedings pending before this Court, *WV Supreme Court of Appeals No. 082238, 08-C-121 and 10-AA-1*, below and in the proceedings pending in the Jefferson County Circuit Court, *Case No. 09-AA-3* said Corporation has been represented by a duly and properly nominated and appointed Agent pursuant to W.Va. Code § 11-3-25.

B. Case Below 10-AA-1, Supreme Court No. 11-0248

1. On March 18, 2010 a Petition for Appeal of Real Estate Assessment, in accordance with *WV Code §11-3-24 and 11-3-25* was filed from the February 23, 2010 BORE hearing. **(located in this courts file No. 11-0248)**

2. On March 23, 2010, Agent for the Petitioner filed a letter in response to the Honorable Judge Sanders March 18, 2010 letter, reminding the Court that in both *Case No. 08-C-*

121 and 09-AA-3 it was determined not to be necessary or required, in accordance with *WV Code §11-3-25*, for Petitioner to be represented by a licensed, practicing Attorney **(located in this courts file No. 11-0248)** and simultaneously therewith Agent for the Petitioner filed a *Motion for Disqualification*, pursuant to *Rule 17.01 in the WV Trial Court Rules*.

3. On March 24, 2010, the Honorable Judge Sanders filed a response to the Honorable Chief Justice of the West Virginia Supreme Court.

4. On March 29, 2010 Agent for the Petitioner, filed a response to the Honorable Judge Sanders filing. **(located in this courts file No. 11-0248)**

5. On March 31, 2010 Agent for the Petitioner, filed an additional response with the Honorable West Virginia Supreme Court Chief Justice. **(located in this courts file No. 11-0248)**

6. On April 1, 2010, the Honorable Chief Justice Davis entered an order in Case 09-AA-3, stating:

“The evidence set out in support of the disqualification motion is insufficient to warrant such disqualification. The Honorable Judge David H. Sanders Hereby is directed to continue to preside in the above referenced case in accordance with the law”. **(located in this courts file No. 11-0248)**

7. On April 8, 2010, the Respondent the Honorable Judge Sanders sent a letter to inform the Agent for the Petitioner that the Court will continue to refuse to allow a Non-Lawyer to proceed in either *Case 09-AA-3* or *10-AA-1*. **(located in this courts file No. 11-0248)**

8. On April 12, 2010 Agent for the Petitioner sent a letter to the Honorable Judge David Sanders requesting him to proceed with *Case 10-AA-1* in accordance with the law as was

directed by the Supreme Court Chief Justice in *Case 09-AA-3*. **(located in this courts file No. 11-0248)**

9. May 17, 2010 Agent for the Petitioner filed a *Motion for Judgment By Default* in *Case 10-AA-1* due to the Respondents in this matter failure to appear, plead, or otherwise defend. . **(located in this courts file No. 11-0248)**

10. On September 14, 2010 the Honorable David Sanders Judge of the Circuit Court of Jefferson County, West Virginia entered the order of September 14, 2010 that is the subject of this appeal. **(located in this courts file No. 11-0248)**

C. Procedural History in this Proceeding

1. On March 18, 2011 your Petitioner timely filed his Petition for Appeal in the Circuit Court of Jefferson County along with a Motion to Disqualify the Honorable David Sanders, Judge of the Circuit Court of Jefferson County pursuant to Trial Court Rule 17.01 (appendix page 22).

2. Without complying with the requirements of Trial Court Rule 17.01 Judge Sanders dismissed Petitioner's for Appeal without notice to your Petitioner or a hearing as set forth in Exhibits C and D of the Notice of Appeal (see appendix page 1).

3. The issue of Disqualification remained before this Court from the date of March 18, 2011 when the Motion for Disqualification was filed until the order of April 11th 2011 was entered by this Court denying Petitioners motion (appendix page 39).

4. During that time correspondence was sent or received from this Court to and from Judge Sanders as well as to and from your Petitioner.

5. Petitioner says Judge Sanders admitted he failed to comply with Trial Code Rule 17.01 due to "inadvertence" (see letter of March 31, 2011 see appendix page 33)

6. Petitioner says on April 14, 2011 he filed a motion with Judge Sanders to retract his order of Dismissal entered while he was without jurisdiction over the matter or authority to proceed in the matter due to the filing of the motion to disqualify and no action having been taken by this Court as of that date (see appendix page 35).

V. SUMMERY OF ARGUEMENT

A. THE HONORABLE DAVID SANDERS, JUDGE OF THE CIRCUIT COURT OF JEFFERSON COUNTY COMMITTED REVERSIBLE AND PREJUDICIAL ERROR WHEN THE COURT SUA SPONTE AND EX PARTE ENTERED THE ORDER OF MARCH 23, 2011 DISMISSING PETITIONERS APPEAL FROM THE ACTION OF THE JEFFERSON COUNTY COMMISSION SITTING AS A BOARD OF REVIEW AND EQUALIZATION THUS DENING TO PETITIONER HIS ABSOLUTE RIGHT TO AN APPEAL HEARING PURSUANT TO WEST VIRGINIA CODE §11-3-25

B. PETITIONER SAYS HIS RIGHT TO DUE PROCESS OF LAW PURSUANT TO THE 5TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE III § 10 OF THE WEST VIRGINIA CONSTITUTION WERE VIOLATED BY THE CIRCUIT COURT OF JEFFERSON COUNTY REFUSING TO PROVIDE AND DENYING TO PETITIONER HIS RIGHT TO AN APPEAL HEARING PURSUANT TO W.VA. CODE §11-3-25 FROM THE ORDER OF THE JEFFERSON COUNTY COMMISSION SITTING AS A BOARD OF REVIEW AND EQUALIZATION .

C. THE CIRCUIT COURT OF JEFFERSON COUNTY, WV, THE HONORABLE DAVID SANDERS PRESIDING WAS WITHOUT AUTHORITY OR JURISDICTION

TO ENTER THE ORDER OF MARCH 23, 2011 DISMISSING PETITIONER'S
PETITION FOR APPEAL FROM THE ORDER OF THE JEFFERSON COUNTY
COMMISSION, FILED WITH THE CIRCUIT COURT ON MARCH 18, 2011.

VI. STATEMENT REQUESTING ORAL ARGUMENT

Petitioner says that he is entitled to present oral argument pursuant to either/or both Rules 19 and 20 of the Rules of Appellate Procedure in that a proper resolution of the issues in this case involve a narrow issue of law; a hearing is/was required in the Circuit Court before the Court dismissed Petitioners Appeal; involve issues of fundamental public importance; involve constitutional questions regarding both the substance of and the application of a Statue, W.Va. Code 11-3-25. Petitioner does not believe a memorandum decision is appropriate unless this Courts first blush impression is that a correct application of the facts to the law in this case militates that the Circuit Court erred when it dismissed Petitioners Appeal for the reason(s) it did so in light of the language contained in W.Va. Code 11-3-25.

VII. ARGUEMENT

A. THE HONORABLE DAVID SANDERS JUDGE OF THE CIRCUIT COURT OF JEFFERSON COUNTY COMMITTED REVERSIBLE AND PREJUDICIAL ERROR WHEN THE COURT SUA SPONTE AND EX PARTE ENTERED THE ORDER OF MARCH 23, 2011 DISMISSING PETITIONERS APPEAL FROM THE ACTION OF THE JEFFERSON COUNTY COMMISSION SITTING AS A BOARD OF REVIEW AND EQUALIZATION THUS DENYING TO PETITIONER HIS

ABSOLUTE RIGHT TO AN APPEAL HEARING PURSUANT TO WEST VIRGINIA
CODE §11-3-25

**WV Code § 11-3-24 provides to property owner's in West Virginia the right
to appeal the County Assessors Assessment of Property to wit:**

(The county commission shall annually, not later than the first day of February, meet for the purpose of reviewing and equalizing the assessment made by the assessor. It shall not adjourn for longer than three days at a time until this work is completed, and shall not remain in session for a longer period than twenty-eight days and shall not adjourn sine die before the fifteenth day of February. At the first meeting, the assessor shall submit the property books for the current year, which shall be complete in every particular, except that the levies shall not be extended. The assessor and his assistants shall attend and render every assistance possible in connection with the value of property assessed by them. The commission shall proceed to examine and review the property books, and shall add on the books the names of persons, the value of personal property and the description and value of real estate liable to assessment which was omitted by the assessor. They shall correct all errors in the names of persons, in the description and valuation of property, and they shall cause to be done whatever else may be necessary to make the valuation comply with the provisions of this chapter. But in no case shall any question of classification or taxability be considered or reviewed.

If the commission determine that any property or interest is assessed at more or less than its true and actual value, it shall fix it at the true and actual value. But no assessment shall be increased without giving the property owner at least five days' notice, in writing, and signed by the president of the commission, of the intention to make the increase. Service upon the property owner shall be sufficient, or upon his agent or attorney in person, or if sent by registered mail to such property owner, his agent, or attorney, at the last known place of abode. If he be not found and have no known place of abode, then notice shall be given by publication thereof as a Class I legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code, and the publication area for such publication shall be the county. The date of the publication shall be at least five days prior to the increase. When it is desired to increase the entire valuation in any one district by a general increase, notice shall be given by publication thereof as a Class II-O legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code, and the publication area for such publication shall be the county. The date of the last publication shall be at least five days prior to the increase in valuation. When an increase is made, the same valuation shall not again be changed unless notice is again given as heretofore provided. The clerk of the county commission shall publish notice of the time, place and general purpose of the meeting as a Class II legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code, and the publication area for such publication shall be the county involved. The expense of publication shall be paid out of the county treasury. If any person fails to apply for relief at this meeting, he shall have waived his right to ask

for correction in his assessment list for the current year, and shall not thereafter be permitted to question the correctness of his list as finally fixed by the county commission, except on appeal to the circuit court. After the county commission completes the review and equalization of the property books, a majority of the commission shall sign a statement that it is the completed assessment of the county for the year; then the property books shall be delivered to the assessor and the levies extended as provided by law.)

WV Code §11-3-25 sets forth the procedure to appeal the decision of the County Commission sitting as the Board of Review and Equalization to the Circuit Court of the County:

(a) Any person claiming to be aggrieved by any assessment in any land or personal property book of any county who shall have appeared and contested the valuation as provided in section twenty-four or twenty-four-a of this article, or whose assessment has been raised by the county commission sitting as a board of equalization and review above the assessment fixed by the assessor may, at any time up to thirty days after the adjournment of the board sitting as a board of equalization and review, or at anytime up to thirty days after the order of the board of assessment appeals is served on the parties, apply for relief to the circuit court of the county in which the property books are made out; but any person applying for relief in circuit court shall, before any application is heard, give ten days' notice to the prosecuting attorney of the county, whose duty it shall be to attend to the interests of the state, county and district in the matter, and the prosecuting attorney shall give at least five days' notice of hearing to the Tax Commissioner.

(b) The right of appeal from any assessment by the board of equalization and review or order of the board of assessment appeals as provided in this section, may be taken either by the applicant or by the state, and in case the applicant, by his or her agent or attorney, or the state, by its prosecuting attorney or Tax Commissioner, desires to take an appeal from the decision of the either board, the party desiring to take an appeal shall have the evidence taken at the hearing of the application before either board, including a transcript of all testimony and all papers, motions, documents, evidence and records as were before the board, certified by the county clerk and transmitted to the circuit court as provided in section four, article three, chapter fifty-eight of this code, except that, any other provision of this code notwithstanding, the evidence shall be certified and transmitted within thirty days after the petition for appeal is filed with the court or judge, in vacation.

(c) If there was an appearance by or on behalf of the taxpayer before either board, or if actual notice, certified by the board, was given to the taxpayer, the appeal, when allowed by the court or judge, in vacation, shall be determined by the court from the record as so certified: Provided, That in cases where the court determines that the record made before the board is inadequate as a result of the parties having had insufficient time to present evidence at the hearing before the board to make a proper record, as a result of the parties having received insufficient notice of changes in the assessed value of the

property and the reason or reasons for the changes to make a proper record at the hearing before the board, as a result of irregularities in the procedures followed at the hearing before the board, or for any other reason not involving the negligence of the party alleging that the record is inadequate, the court may remand the appeal back to the county commission of the county in which the property is located, even after the county commission has adjourned sine die as a board of equalization and review or a board of assessment appeals for the tax year in which the appeal arose, for the purpose of developing an adequate record upon which the appeal can be decided. The county commission shall schedule a hearing for the purpose of taking additional evidence at any time within ninety days of the remand order that is convenient for the county commission and for the parties to the appeal. If, however, there was no actual notice to the taxpayer, and no appearance by or on behalf of the taxpayer before the board, or if a question of classification or taxability is presented, the matter shall be heard de novo by the circuit court.

(d) If, upon the hearing of appeal, it is determined that any property has been assessed at more than sixty percent of its true and actual value determined as provided in this chapter, the circuit court shall, by an order entered of record, correct the assessment, and fix the assessed value of the property at sixty percent of its true and actual value. A copy of the order or orders entered by the circuit court reducing the valuation shall be certified to the Auditor, if the order or orders pertain to real property, by the clerk within twenty days after the entering of the same, and every order or judgment shall show that the prosecuting attorney or Tax Commissioner was present and defended the interest of the state, county and district. If it be ascertained that any property has been valued too high, and that the taxpayer has paid the excess tax, it shall be refunded or credited to the taxpayer in accordance with the provisions of section twenty-five-a of this article, and if not paid, he or she shall be relieved from the payment thereof. If it is ascertained that any property is valued too low, the circuit court shall, by an order entered of record, correct the valuation and fix it at sixty percent of its true and actual value. A copy of any order entered by any circuit court increasing the valuation of property shall be certified within twenty days, if the order pertains to real property, to the Auditor, the county clerk and the sheriff. However, if the order pertains only to personal property, then the copy shall be certified within twenty days to the county clerk and to the sheriff and it shall be the duty of the Auditor, the county clerk and the sheriff to charge the taxpayer affected with the increase of taxes occasioned by the increase of valuation by applying the rate of levies for every purpose in the district where the property is situated for the current year. The order shall also be filed in the office of the Auditor and clerk of the county commission. The circuit court shall review the record submitted from the board. If the court determines that the record is adequate, it shall establish a briefing and argument schedule that will result in the appeal being submitted to the court for decision within a reasonable time, but not to exceed eight months after the appeal is filed. All final decisions or orders of the circuit court shall be issued within a reasonable time, not to exceed ninety days, from the date the last brief is filed and the case is submitted to the court for decision. The state or the aggrieved taxpayer may appeal a question of valuation to the Supreme Court of Appeals if the assessed value of the property is \$50,000 or more, and either party may appeal a question of classification or taxability.

(e) All persons applying for relief to the circuit court under this section shall be governed by the same presumptions, burdens and standards of proof as established by law for taxpayers applying for such relief).

This issue was first addressed upon Petitioner filing an appeal to the Circuit Court of Jefferson County WV in *Case No. 08-C-121*, from the decision of the Jefferson County Commission sitting as a Board of Review and Equalization. A status hearing was conducted in said matter on May 12, 2008. Ms. Stephanie Grove, Esq. a Jefferson County Assistant Prosecuting Attorney, appeared as Counsel for the Board of Review and Equalization and David C. Tabb, appeared as Agent for the Petitioner, Shenandoah Sales & Service, Inc. At the commencement of the proceedings before the presiding judge the Honorable Judge Thomas Steptoe, now retired, the Court inquired whether Mr. David C. Tabb could appear in the Circuit Court of Jefferson County as the agent for Shenandoah Sales and Service, Inc. to wit:

THE COURT: Okay. And, sir, you're here for Shenandoah Sales & Service?

MR. TABB: David Tabb.

THE COURT: Yes, sir. Is it a corporation?

MR. TABB: Yes, sir.

THE COURT: Do you have--

MR. TABB: 11-3-25 of the West Virginia Code --

THE COURT: Yes, sir.

MR. TABB: Allows me to do so, and I also have a --

THE COURT: Yes, sir. I'm just concerned about the provision that -- there is a provision in the law that suggests that a corporation must be represented by an attorney

MR. TABB: There's also regulations within the legal process, again 11-3-25, that allows me to do it myself, and if so, then it should have been recommended that I do that at the time of the hearing before the Board of Review and Equalization.

THE COURT: Well, do you or does the County object to the corporation appearing without an attorney?

Ms. Grove: No, your Honor.

THE COURT: Okay. Well, that kind of solves that I guess.

(see Transcript page 3, line 20, Exhibit XXIV)

Agent for Petitioner says thereafter in case 09-AA-3, the Honorable David

Sanders also agreed that pursuant to *WV Code §11-3-25*, David C. Tabb could appear as the duly nominated Agent for the Petitioner, Shenandoah Sales & Service, Inc., a Corporation.

THE COURT: The Petitioner is Shenandoah Sales & Service run by Mr. Tabb who is here with us today and who is representing -- it is a corporation but are you the principal officer of that corporation?

MR. TABB: Vice President

THE COURT: Are you an attorney, sir?

MR. TABB: No, sir.

THE COURT: You are not, okay, but you are representing a corporation.

MR. TABB: Yes, I am.

THE COURT: Okay,

.(see transcripts page 2, line 5,)

Petitioner and its Agent says following the above verbal exchange on June 29, 2009 that the Honorable Judge David Sanders *sua sponte* and without notice to the Petitioner and its Agent wrote the letter dated April 8, 2010 designated **(located in this courts file No. 11-0248)**. Petitioner surmises that the sending of the letter by Judge Sanders to Petitioner and the Courts refusal to proceed in *Case 09-AA-3* was triggered by the Petitioner filing an appeal of the February 23, 2010 decision of the Jefferson County BORE, *action i.e. 10-AA-1*. Petitioner notes that the date of the letter to the Petitioner from the Honorable Judge David Sanders, Respondent, is the same day Petitioners filed *Civil Action 10-AA-1*. Petitioner believes that the Respondent, the Honorable Judge David Sanders, took the position set forth in said letter of April 8, 2010 in both cases because he no longer desires or wants to participate as Judge in these two pending matters. Petitioner bases the belief on the following language that appeared in **(located in this courts file No. 11-0248)**.

"While both of us may have been disappointed that the Supreme Court denied your motion to have me disqualified in 09-AA-3".

In this proceeding on March 18, 2011 your Petitioner timely filed his Petition for Appeal in the Circuit Court of Jefferson County along with a Motion to Disqualify the Honorable David Sanders, Judge of the Circuit Court of Jefferson County pursuant to Trial Court Rule 17.01. Thereafter and without complying with the requirements of Trial Court Rule 17.01 Judge Sanders dismissed Petitioner's for Appeal without notice to your Petitioner or a hearing as set forth in Exhibits C and D of the Notice of Appeal. Petitioner says the issue of Disqualification remained before this Court from the date of March 18, 2011 when the Motion for Disqualification was filed until the order of April 11th 2011 was entered by the Court denying Petitioners motion. Petitioner further says during that time correspondence and motions were sent or received from this Court to and from Judge Sanders as well as to and from your Petitioner to wit; Petitioner says Judge Sanders admitted he failed to comply with Trial Code Rule 17.01 due to "inadvertence" (see letter of March 31, 2011, appendix page 33); Petitioner says on April 14, 2011 he filed a motion with Judge Sanders to retract his order of Dismissal entered while he was without jurisdiction over the matter or authority to proceed in the matter due to the filing of the motion to disqualify and no action having been taken by this Court as of that date (Appendix page 35).

Therefore in this proceeding below the Petitioner and its Agent, acknowledge that although it is the GENERAL RULE OF LAW that a corporation must be represented by a licensed attorney when appearing in Courts of record in the United States this does not appear to be the rule in several jurisdictions most importantly not in West Virginia. This Court in *Quarrier vs. Peabody Ins. Co.* (1877) 10 W. Va. 507; *Woodell v. W. Va. Imp.*

Co. (1893) 38 W. Va. 23, 17 SE 386; Swartzwelder v. Freeport Coal Co. (1948) 131 W.Va. 276, 46 SE2d 813 this court took the position that it was not mandatory that a corporation be represented by an attorney. These three cases lend credence to Petitioners argument West Virginia has long held there are exceptions that corporations may only appear in Court through an attorney. Petitioner acknowledges none of these three cases are directly on point as to their facts and those in your Petitioners case, but clearly support his position that according to West Virginia case law since 1877 and by statute since 1907 (See amendments to WV Code §11-3-25 Acts of Legislature 1907) a corporation may appear in Court by a non-attorney officer or agent.

Petitioner says the Courts in several other jurisdictions agree with and supports his position. See Dixon v. Reliable Loans, Inc. (1965) 112 GaApp 618, 145 SE2d 771; Knickerbocker Tax Systems, Inc. v. Texaco, Inc. (1973) 130 GaApp 383, 203 Se2d 290; Margaret Manuder Associates, Inc. v. A-Copy, Inc. (1985) 40 Conn Supp 361, 499 Ad 1172; North Miami General Hospital, Inc. v. Plaza (1982, Fla App D3) 425 So 2d 1140; Idaho State Bar, Assoc. v. Idaho Public Utilities Commission (1981) 102 Idaho 672, 637 P2d 1168; State Bar of Michigan v. Galloway (1983) 422 Mich 188, 369 N. W. 2d 839; United States v. Priority Products, Inc. (1985) 9 CIT 392, 615 Fsupp 593; Finn Hill Masonary, Inc. v. Department of Labor and Industries, 128 Wash. App. 543, 116 P. 3d 1033 (2005)

Petitioner believes the decision of Finn, supra, is extremely important as it makes clear that in a jurisdiction that would normally require a corporation to be represented in Court by an attorney said rule may be waived by the action of the opposing party or the Court itself. Petitioner and its Agent thus submit that upon the Circuit Court electing to

ignore and refusing to follow, not only an unambiguous and clearly worded statute but one that his predecessor Circuit Court judge, and the attorney representing the Respondent agreed should be followed, error was committed.

The final case Petitioner relies on in support of his position. *State ex, rel. Frieson v. Isner Magistrate* 285 SE2d 641 168 W.Va. 758 (1981) this Court held in Court “Syllabus 3. A non-lawyer who undertakes, for pay, to bring lawsuits on the claims of third persons and to perform the necessary legal services incident to such lawsuit, ... is engaged the unauthorized practice of law; Court Syllabus 4 W. Va. Code § 50-4-4a authorizing appearance of parties to civil litigation in magistrate court by lay agent, does not permit the unauthorized practice of law. Rather the statute anticipate the appearance of a party by a non-lawyer agent on a casual, non-recurring, non-pay basis as a means of assisting the party appearing pro se”.

This Court went on to further hold that “Acts of the Legislature are presumed to be constitutional, and Courts will interpret legislation in any reasonable way which will sustain its constitutionality We conclude therefore, that W. Va. Code § 50-4-4a, authorizing appearance of parties to civil litigation in magistrate court by lay agent does not permit the unauthorized practice of law. Rather the statute anticipates the appearance by a non-lawyer agent on a casual, non-recurring, non-pay basis as a means of assisting the party appearing pro se“. 285 SE2d at 655.

It is Petitioner contention that this Courts determination that W. Va. Code § 50-4-4a was not an intrusion on this Courts power to regulate the practice of law supports his position that W.Va. Code §11-3-25 is a valid statute that should have been followed by the Honorable David Sanders Judge of the Circuit Court of Jefferson County.

Petitioner further says his actions on behalf of his closely held corporation are surely no different than "...the appearance of a party by a non-lawyer agent on a casual, non-recurring, non-pay basis as a means of assisting a party appearing pro se". To summarize the grounds on which he relies to support his argument that the order of September 14, 2010 should be reversed Petitioner and its Agent rely not only the above cited cases but also on the failure of the Circuit Court to (1) set forth findings of fact (2) discuss West Virginia Law (3) merely cite a U.S. Supreme Court case from 1912 and several case from Minnesota (4) fail to permit Petitioner and its Agent to appear and argue to the Court the applicability of the above cited cases from this Court relevant to this issue.

In Argument IV-B Petitioner and it's Agent submit that the ultimate denial to your Petitioner and it's Agent of a hearing pursuant to WV Code 11-3-25, upon the Courts entry of the order of September 14, 2010 (**See Exhibit XXIII located in this Courts file No. 11-0248**) violated Petitioner right to due process of law pursuant to Articles III § 10 of the West Virginia Constitution and the 14th Amendment to the United States Constitution. In addition to setting forth said argument in Argument IV-B, Petitioner also submit's its right to due process of law was violated when the Court sua sponte entered the order of September 14, 2010 without affording to your Petitioner and it's Agent, their right to appear and argue at a hearing whether said order should be entered.

For all of these reasons your Petitioner believes if this Court elects not vacate and reverse the order of September 14, 2010 and order the Circuit Court to proceed with Petitioners appeal of the 2010 decision of the Jefferson County Commission sitting as a Board of Review and Equalization, this Court should at a minimum remand this matter to the Circuit Court to conduct a hearing on this issue and at the conclusion of the hearing

set forth in an order appropriate Finding of Fact and Conclusion of Law to support whatever decision the Court renders.

B. PETITIONER SAYS HIS RIGHT TO DUE PROCESS OF LAW PURSUANT TO THE 5TH AND 14TH AMENDMENTS CONSTITUTION ARTICLE III § 10 OF THE WEST VIRGINIA CONSTITUTION WERE VIOLATED BY THE CIRCUIT COURT OF JEFFERSON COUNTY REFUSING TO PROVIDE AND DENYING TO PETITIONER HIS RIGHT TO AN APPEAL HEARING PURSUANT TO W.VA. CODE §11-3-25 FROM THE FEBRUARY 17, 2011 ORDER OF THE JEFFERSON COUNTY COMMISSION SITTING AS A BOARD OF REVIEW AND EQUALIZATION .

If this Court agrees that the Honorable David Sanders, Judge of the Circuit Court of Jefferson County should have conducted a hearing before the entry of the order of March 23, 2011 and committed error in the entry of said order with or without a hearing, said action of the Court violated Petitioners right to Due Process of Law.

Petitioner relies on the following decisions of this Court and decisions of divers Federal Courts in making this argument. In *Bell v. Robert* 402 F. Supp. 2d 938 (N.D.Illinois 2005).

“In order to demonstrate a due process violation, Petitioner must demonstrate both the existence of a state law providing for a direct appeal as a matter of right and state action depriving him of due process of law...See *Evitts* 469 U.S. at 393, 105 S.Ct. 830”.

This Court in the following decisions, none of which specifically involved an appeal pursuant to W.Va. Code 11-3-25 all recognize that when one is denied their right to a hearing their right to due process is violated. See *North v. W. Va. Bd. of Regents* 160 W.Va. 248 233 S.E. 2d 411 (1977); *Randal v. Fairmont City Police Department* 412 S.E.

2d 737 186 W.Va. 336 (1991); *White v. Todt* 475 S.E. 2d 426 197 W.Va. 334 (1996);
Overfield v. Collins 483 S.E. 2d 27 199 W.Va. 27 (1997); *Jeanette H., the Pancake* 529
S.E. 2d 865 207 W.Va. 154 (2000); *White v. Barill* 557 S.E. 2d 374 210 W.Va. 320
(2001);

Petitioner will next discuss the decisions of this Court which recognize the parameters of the right to due process of law when one is challenging pursuant to W.Va. Code § 11-3-24 and 11-3-25 that the assessment of the real estate taxes was improperly conducted or calculated. This Court recognized first in *Assessment of Certain Real Estate of Eastern Associated Coal Corp.* 204 S.E1 157 W.Va. 749 (1974) and then in *Purple Turtle, LLC. v. Gooden* 679 S.E.2d 587 (2009) that erroneous calculation of ones real estate tax assessment which results in an excessive and incorrect real estate tax assessment is a deprivation of property and constitute a violation of ones right to due process of law. More specifically in *Eastern Associated Coal Corp.* supra this Court held “Tax provisions penal in nature, denying a taxpayer a right to a hearing on the question of whether the provisions apply to him, have been held unconstitutional. *Central of Georgia Railway Company v. Wright* 207 U.S. 127, 28 S.Ct. 47, L.Ed. 134...no person shall be deprive of life. liberty, or property without due process of law...”

See also Chief Justice Benjamin’s concurring opinion further supporting this argument but on a different underlying factual basis.

The final case from this Court upon which your Petitioner relies is *Tax Assessments Against Pocahontas Land Company* 303 S.E.2d 691 172 W.Va. 53 (1983). This Court made clear that although “it must be remembered that property assessment proceedings have historically been treated as not being subject to rigorous due process requirements... nevertheless, the right be to heard belongs under the same general

constitutional umbrella regardless of the procedural law involved. The right to be heard is fundamental to due process“. 303 S.E.2d at 697, 699.

C. The Circuit court of Jefferson County, WV, the honorable David Sanders presiding was without authority or Jurisdiction to enter the order of March 23, 2011 dismissing petitioner’s petition for appeal from the order of the Jefferson County Commission, filed with the Circuit Court on March 18, 2011.

In making this assertion Petitioner relies on the following facts to wit:

- 1) On March 18, 2011 your Petitioner timely filed his Petition for Appeal in the Circuit Court of Jefferson County along with a Motion to Disqualify the Honorable David Sanders, Judge of the Circuit Court of Jefferson County pursuant to Trial Court Rule 17.01 (appendix pages 5 and 8).
- 2) Without complying with the requirements of Trial Court Rule 17.01 Judge Sanders dismissed Petitioner’s for Appeal without notice to your Petitioner or a hearing as set forth in Exhibits C and D of the Notice of Appeal (appendix page 1).
- 3) The issue of Disqualification remained before this Court from the date of March 18, 2011 when the Motion for Disqualification was filed until the order of April 11th 2011 was entered by the Court denying Petitioners motion (appendix page 39).
- 4) During that time correspondence was sent or received from this Court to and from Judge Sanders as well as to and from your Petitioner.
- 5) Petitioner says Judge Sanders admitted he failed to comply with Trial Code Rule 17.01 due to “inadvertence” (see letter of March 31, 2011, appendix

page 33)

- 6) Petitioner says on April 14, 2011 he filed a motion with Judge Sanders to retract his order of Dismissal entered while he was without jurisdiction over the matter or authority to proceed in the matter due to the filing of the motion to disqualify and no action having been taken by this Court as of that date(appendix page 35).
- 7) Petitioners motion to retract the order of dismissal and the appeal of the original order of Dismissal entered while the motion to disqualify was pending are both based on the following language from *Myers v. Painter* 576 S.E.2d 277. (2002) to wit:

“The Supreme Court of Appeals is constitutionally empowered to enact administrative rules regarding the temporary assignment of circuit judges when another circuit judge is disqualified. We stated, in Syllabus Points 1 and 2 of *Stern Bros., Inc. v. McClure*, 160 W.Va. 567, 236 S.E.2d 222 (1977): 1. Under Article VIII, Section 8 of the Constitution of West Virginia (commonly known as the Judicial Reorganization Amendment), administrative rules promulgated by the Supreme Court of Appeals of West Virginia have the force and effect of statutory law and operate to supersede any law that is in conflict with them.[576 S.E.2d 284] 2. The administrative rule promulgated by the Supreme Court of Appeals of West Virginia, setting out a procedure for the temporary assignment of a circuit judge in the event of a disqualification of a particular circuit judge, operates to supersede the existing statutory provisions found in W.Va.Code, 51-2-9 and -10 and W.Va. Code,

56-9-2, insofar as such provisions relate to the selection of special judges and to the assignment of a case to another circuit judge when a particular circuit judge is disqualified. The Court adopted Trial Court Rule XVII [1993] to establish a formal system for the disqualification and temporary assignment of judges. 5 The rule established that motions by a party to disqualify a judge must be in the form of a "written motion." Rule XVII(a). If the circuit judge agreed to disqualify himself or herself in response to the written motion, and the parties agreed upon a particular replacement judge, the rule required the judge to contact the administrative director of the Supreme Court of Appeals, who would then communicate with the chosen replacement judge. Contact by the parties or circuit judge with the replacement judge was prohibited, and any assignment of the case to another judge was to be done solely by the Chief Justice. Rule XVII(a)(2) stated, in pertinent part: If concurrence can be reached ... the judge shall forthwith contact the Administrative Director, who shall then contact the judge to whom assignment is requested. Contact with the judge to whom assignment is requested by either the recused judge or the parties is prohibited. If the judge to whom assignment is requested consents, all parties shall sign a written stipulation designating a new judge. The original judge shall forthwith transmit the motion" .. and stipulation to the Chief Justice, who shall ... in writing approve or disapprove the recusal and stipulation. Conversely, if the circuit judge refused a parties' written motion to recuse him-or her-self, or the parties disagreed as to the replacement judge to whom the case should be assigned, or the chosen replacement judge

declined to accept the case, the case was required to be forwarded to the Chief Justice for assignment. Again, the recused judge was prohibited from acting until the Chief Justice reviewed the case. Rule XVII(a)(3) stated, in pertinent part: If concurrence cannot be reached, if the original judge does not agree to recuse himself or herself, or if the designated judge does not consent, then the judge shall: (A) Proceed no further in the matter; and (B) Transmit forthwith to the Chief Justice a copy of the motion ... asking that the Chief Justice rule on the motion[.]” 576 S.E.2d at 283-284

“ The Court further held... The circuit court in the instant habeas case concluded that the transfer of the case to Judge Steptoe was proper because the appellant's criminal case was merely reassigned within a multi-judge circuit, in accordance with Rule XVII(d). This reasoning, however, overlooks the circuit court's own finding of fact that “[t]he State and [appellant] jointly moved at hearing for Judge Wilkes' recusal,” and overlooks Rule XVII's requirement that once a motion was made for Judge Wilkes to recuse himself from the appellant's case, he was bound to follow the procedures contained in Rule XVII(a) and (b). However, this action would have been proper, had the recusal been sua sponte without any motion by a party. As we made clear in Stern Brothers, Judge Wilkes' appointment of Judge Steptoe, made in a manner contrary to the dictates of Rule XVII, was void and beyond Judge Wilkes' authority. While Judge Steptoe was not guilty of any impropriety, his appointment was contrary to the established rules designed to ensure that judicial decisions are both free from bias, and free from all appearance of

bias. The circuit court was therefore incorrect in its finding that there was no error.” 576 S.E.2d at 284-285

CONCLUSION AND RELIEF PRAYED FOR

In conclusion it is your Petitioners position that his right to due process of law pursuant to the 5th and 14th Amendments to the U.S. Constitution and Article III § 10 was violated when the Circuit Court sua sponte and ex parte and in direct contravention of W.Va. Code § 11-3-25 entered the order of September 14, 2010 dismissing Petitioners appeal from the Jefferson County Commission acting as a Board of Review and Equalization.

Petitioner therefore prays that this Court reverse the order of September 14, 2010 and direct the Circuit Court proceed with Petitioner’s appeal or order the Circuit Court to conduct a hearing on the issues raised in this appeal and at the conclusion of the hearing set forth in an order appropriate findings of fact and conclusions of law to support what ever decision the Court renders as to whether Petitioner may proceed by its agent David C. Tabb and not be required to proceed by counsel.

Respectfully Submitted,



David C. Tabb, Vice-President and Agent

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**Shenandoah Sales and Service, Inc.
Agent David C. Tabb, pro se
Petitioner**

Case No. 11-0701

v.

**Angie Banks, Assessor of
Jefferson County
Respondent**

CERTIFICATE OF SERVICE

I, David C. Tabb, Agent pro se, Shenandoah Sales and Service, Inc. do hereby certify that on this 21st day of July, 2011, I have served a true copy of the foregoing *Brief and Appendix* upon the following in the manner listed, addressed as follows:

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Assessor of Jefferson County
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June Bowers
Rusty Williams
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The Jefferson County Commission sitting as the Board of Review and Equalization
Patsy Noland, President
Dale Manuel, Vice President
Walt Pellish, Commissioner
Lyn Widmyer, Commissioner
Francis Morgan, Commissioner
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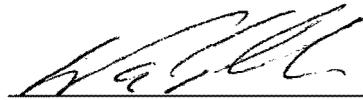
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