

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SEP 21 2011

Shenandoah Sales and Service, Inc.

By its Agent, David C. Tabb

Petitioner

Docket Number:11-0701

Assessor of Jefferson County West Virginia

Angie Banks

REPLY TO PETITIONERS BRIEF

Shenandoah Sales & Service, Inc.

David C. Tabb, Vice-President and by its Agent

107 Tabb Lane

Harpers Ferry, WV 25425

(304)725-0423 Telephone

(304)676-5976 Cellular

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Shenandoah Sales and Service, Inc.
By its agent, David C. Tabb

Petitioner

Vs.) No. 11-0701

Assessor of Jefferson County, Angie Banks,
June Bowers, Rusty Williams, the Jefferson
County Commission, sitting as Board of Review
and Equalization, Patsy Noland, President,
Dale Manuel, Vice President, Walt Pellish,
Commissioner, Lyn Widmyer, Commissioner,
Frances Morgan, Commissioner, and Stephanie
Grove, Jefferson County Prosecuting Attorney

Respondents

REPLY TO RESPONDENTS BRIEF

INTRODUCTION

Petitioner files this reply to Respondents brief pursuant to Rule 10(g) of the West Virginia Rules of Appellate Procedure and the scheduling order of this court entered on May 10, 2011.

The purpose of filing this REPLY is to specifically REFUTE what Petitioner submits are (3) three disingenuous contentions set forth in the Respondents Brief, presumably to support Respondents incorrect legal argument that the Honorable David Sanders, Judge of the Circuit of Jefferson County of West Virginia acted properly when he dismissed without a hearing Petitioner's Petition for Appeal because he believes Petitioner is/was practicing law without a license when Petitioner appeared as an agent for Shenandoah Sales and Service pursuant to *West Virginia Code 11-3-24 and 11-3-25*.

LEGAL ISSUE AND CONTENTIONS

The (3) three specific contentions, that Petitioner submits are erroneous and legally incorrect are (1) that your Petitioner is/was violating *West Virginia Code 30-2-4* i.e. practicing law without a license; (2) Petitioners right to due process of law is /was not violated when he was denied the statutory right to appeal pursuant to *West Virginia Code 11-3-25*. (3) The Circuit Court has the inherent authority to control the practice of law.

LEGAL ARGUMENTS

Petitioners will next address the substantive legal issues i.e. Respondents contentions in the order that they are set forth above.

LEGAL ISSUE #1- PETITIONER IN ACTING AS AN AGENT FOR HIS CLOSED, FAMILY CORPORATION IN THIS MATTER IS ACTING LAWFULLY PURSUANT TO WEST VIRGINIA CODE 11-3-25 AND IS NOT PRACTICING LAW WITHOUT A LICENSE IN VIOLATION OF WEST VIRGINIA 30-2-4.

Petitioner says for Respondent to rely on this courts DEFINITION OF THE PRACTICE OF LAW; on *West Virginia Code 30-2-4* and/or *30-2-5*; and on the cases cited in the Respondents Brief do not support Respondents position for the following reasons to wit: (a) inaccurately cited case authority in Respondents Brief (b) the precise language of *West Virginia Code 11-3-25* and Respondents convoluted interpretation of same; (c) the prosecutor in the case on two separate accusations while acting as an officer of this court informed the court there was no objection to Shenandoah Sales and Service appearing by its agent David C. Tabb in this administration appeal (d) the corporation Shenandoah Sales and Service is a closely held family corporation; (e) this court in the following decisions to wit: : *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; *State ex, rel. Frieson v. Isner Magistrate* 285 S.E.2d 641 168 W.Va. 758 (1981) has decided each case with language that relaxes the general rule that corporations may only appear in court if represented by a license practicing attorney.

(a) Petitioner says the (2) two cases cited by Respondents from courts outside West Virginia in support of her argument to wit: are improperly cited and the *Camille Case to wit: Camille, Inc. v. Alcoholic Beverage Control Appeals Bd.* 99Cal. App. 4th 1094 (2002) can easily be distinguished on the facts as well as the law.

Dealing first with *Clark vs. Austin* 340 MO.467, 101 S.W.2d 977 (1937) Petitioner says that on page 5 of Respondents Brief the following language appears

“this court has held that a corporation must be represented by an attorney.’ A corporation is not a natural person but is an artificial entity created by law and for that reason in legal matters it must act through duly licensed attorneys.”

Before discussing the substantive merit of the Austin case your Petitioner notes that the year of the case is 1937 and Respondent fails to list this case in the Respondents Table of Authorities. Although the 1937 *Clark vs. Austin* decision accurately sets forth the general rule of law outside West Virginia, for the reasons to follow below that rule of law is not controlling in Petitioner’s case. Further your Petitioner says the language is supportive of Petitioner position contained in *Camille*.

“B. Analysis

The issue presented is whether a corporate licensee appearing as a party in an adjudicatory administrative hearing is entitled to be represented by a non-attorney officer of that corporation. The parties to the instant writ proceeding have cited no California statutory or case authority on point, and we are aware of none.

In jurisdictions outside California, there is a split in case law authority with respect to this issue. (See generally Annot, Propriety and Effect of Corporation's Appearance Pro Se Through Agent Who Is Not An Attorney (1992) 8 A.L.R.5th 653; 19 Am.Jur.2d (1986) Corporations, § 2172, p. 89.) Courts in some jurisdictions have held that corporations are allowed to appear before administrative agencies through agents who are not attorneys. (See Liberty Mut. Ins. Co. v. Jones (1939), 344 Mo. 932, 130 S.W.2d 945, 959 & Division of Alcoholic Beverage Control v. Bruce Zane, Inc. (1968), 99 N.J.Super. 196, 239 A.2d 28, 31.) Other out-of-state courts have held that a corporation may only appear by an attorney before an administrative tribunal. (See Clark v. Austin (1937), 340 Mo. 467, 101 S.W.2d 977, 982; State ex rel. Daniel v. Wells (1939), 191 S.C. 468, 5 S.E.2d 181, 185-186; & Kyle v. Beco Corp. (1985), 109 Idaho 267, 707 P.2d 378, 382.) We thus proceed to decide this question as a matter of first impression in this state.” 99Cal.App.4th at 1101

The Camille court went on to further hold “We hold that the general common law rule requiring corporations to be represented by counsel in proceedings before courts of record other than small claims courts does not extend to proceedings before administrative agencies and their tribunals. As already discussed, courts of record are entitled to expect to be aided in resolution of contested issues by presentation of causes through qualified professionals rather than a lay person. (Merco, supra, 21 Cal.3d at p. 732, 147 Cal.Rptr. 631, 581 P.2d 636.) However, “those problems which are likely to arise when a lay[person] serves as the legal representative for a corporation in a proceeding in a court of record are greatly minimized in the more informal setting of a proceeding in a court which is not of record.” (Eckles v. Atlanta Technology Group, Inc. (1997), 267 Ga. 801, 485 S.E.2d 22, 25.) This rationale applies to administrative proceedings.

We also conclude that because the license revocation proceeding at issue here was held before an administrative tribunal, the general rule banning a non-attorney from representing a corporation in a court of record has no application here. Even were we persuaded to the contrary (and we are not), a decision rendered by an administrative body following a hearing at which a corporation was not represented by counsel would be voidable at the option of the opposing party, rather than void for lack of jurisdiction. (See Jardine Estates, Inc. v. Koppel (1957), 24 N.J. 536 [133 A.2d 1, 3].) In the instant case, we conclude the board's decision to affirm the department's revocation of Caressa's liquor license is not void for lack of jurisdiction and for reasons we now discuss does not constitute an abuse of the department's legal discretion.” 99Cal.App.4th at 1103

(b) Petitioner says Respondents argument that Petitioner in practicing law without a license because 11-3-25 includes the word "applicant" in its language but not the word "corporation " is flawed logic. Petitioner says the flaw in the logic is that an "applicant" taxpayer is either a human being or a corporation. Petitioner says if you apply this argument to the language of *West Virginia Code 11-3-25*, to wit:

"(b) The right of appeal from any assessment by the board of equalization and review or 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"

a corporation cannot be represented by an agent, thus leaving as the only possibility is that an agent can only represent a human being; which further means an actual person challenging his personal or business tax assessment pursuant to West Virginia Code 11-3-25 may be represented by an agent who is not an attorney. Although it is your Petitioner contention that this is a correct statement of the law, for Respondents to now make the argument that an "applicant" human being can be represented by an agent when pursuing a 11-3-25 appeal supports your Petitioners position and belies Respondents original argument.

(c) In support of Petitioners argument that because Respondents attorney in this case twice told (2) two separate Circuit Court Judges (the Honorables Thomas Steptoe and David Sanders)that the office of Prosecuting Attorney for Jefferson County, WV as counsel for the for Jefferson County Commission serving as a Board of Review and Equalization had no objections to David Tabb appearing in court as agent for Shenandoah Sales and Service when the court asked if there was any objections to David Tabb appearing as agent for the Corporation, at a minimum this issue should be considered waived. Petitioner relies on the following dialogue and interchange between the Court, Petitioner and Stephanie Grove the attorney in this case that took place first on May 12, 2008 at a status hearing before the Honorable Thomas Steptoe in case #08-C-121; and thereafter on June 29, 2009 at a status hearing before the Honorable David Sanders, Stephanie Grove and Petitioner.

In case #09-AA-3 on May 12, 2008 the following exchange occurred 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 XIX)"

Thereafter on June 29, 2009 the following exchange occurred

"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, Exhibit II)

Petitioner believes as a result the above exchange the language from the following case the *State of Washington Finn Hill Masonary, Inc. v. Department of Labor and Industries*, 128 Wash. App. 543, 116 P. 3d 1033 (2005) is extremely relevant on the issue of waiver;

Because lay representation is permitted at the Department and Board levels and the Daepartment did not sontest lay representation in either the superior or the

appellate court, we hold that the Department has waived any claim of inappropriate representation. Because the Department, even if unintentionally, lulled Fin Hill into presuming that it did not require an attorney, remedial action on our part, sua sponte, at this stage would be inappropriate and unfair to Fin Hill.

and which Petitioner cites for the legal principle that in a jurisdiction that would normally require a corporation to be represented in court by an attorney, said rule maybe waived by the action of the opposing party or the court itself. Petitioner submits the argument put forth by counsel for Respondents is disingenuous in that instead of acknowledging she was the Attorney present in the Circuit Court of Jefferson County when each exchange occurred that constitutes waiver, she attempts to shift the blame to the Assessor, her client, and avoid responsibility for same.

(d) Petitioner submits that the nature of the corporation in this case i.e. a closely held family corporation, also militates, in favor of relaxing the rigidity of the GENERAL RULE in making this assertion Petitioner relies on the following cases *Willheim v. Murchison* 206 F.Supp. 733 (SD NY 1962); *US v. Priority Products, Inc.* (CIT 1985); *Phoenix Mutual Life Insurance Co. v. Radcliff Inc.* 439 Pa. 159, 266 A2d 698 (1970); *Engleman, Inc. v. Briscoe* 172 Ark. 1088, 291S.W.795 (1927); *Willapa Trading Co. v. Muscanto, Inc.* 45Wash App 799, 727 P2d 687 986.

(e) The final argument of your Petitioner is a direct response to what Petitioner believes is an inaccurate and erroneous statement of law by respondent in her brief, in particular language contained on page 5, 7 and 8 of Respondents Brief as well as Respondents criticism of the following decisions previously cited by Petitioner in support of his position to wit: *Quarrier vs. Peabody Ins. Co. supra*; *Woodell v. W. Va. Imp. Co. supra*; *Swartzwelder v. Freeport Coal Co. supra*; *State ex, rel. Frieson v. Isner Magistrate, supra*. Petitioner would cite to this court the language from (3) of these four

opinions that was either inadvertently or intentionally omitted from Respondents Brief and which Petitioner believes support his position, that this court has long recognized the general rule shall not be applied in West Virginia. In *State ex rel. Frieson v. Isner Magistrate*, *supra* 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.

In *Improvement Woodell v. West Virginia Company*, *supra* the court held

" We are therefore of the opinion that the body of this plea is good, but it is proper to add that we are also of opinion that the form suggested in Quarrier v. Insurance Co., in which the corporation appears by its president in such a plea, is also good" 38 WVa. at 30.

In *Lulu v. Swartzwelder*, *supra* the court held as follows:

"10 W. Va. 507, point 1, syllabus: 'The appearance by a corporation in a plea to the jurisdiction of the court, should not be in person or by attorney, but may be by its president' "

The final reason or basis that your Petitioner relies on to refute Respondents contention that your Petitioner is violating *West Virginia code 30-2-4* when he appears as an agent for Shenandoah Sales and Service, both before the Jefferson County Commission acting as a Board of Review and Equalization in the proceedings upon

which the Circuit Court appeal was based (See minutes of hearing for the Jefferson County Commission); and in the Circuit Court; is if the action of Petitioner when acting as an agent before either tribunal is in violation of *West Virginia Code 30-2-4* then said action is a crime. Petitioner says if said appearance before the Circuit Court is a crime not only on two separate occasions criminal behavior has been approved by the office of the Prosecuting Attorney of Jefferson County, but for over two years, between 2008 and 2010 said criminal behavior has been ignored.

Petitioner believes this is an extremely important point of law because if the Assistant Prosecuting Attorney is/was aware of and/or knew that actions by your Petitioner constituted criminal behavior and she has willfully ignored same during the period 2008 – 2010 this exposes not only as she as an assistant prosecuting attorney but her current and past employers, Jefferson County Prosecuting Attorneys Michael Thompson and Ralph Lorenzetti by imputation to liability. In making this assertion Petitioner relies on this court's opinion *In re Petition to Remove John G. SIMS as Prosecuting Attorney for Logan County, West Virginia* 523 S.E.2d 273, 206 W.Va. 213 (1999) and the definition of misconduct that rises to the level of acts that could result in the removal of a prosecuting attorney for knowingly turning a blind eye criminal behavior to wit:

"We realize it can be difficult to pigeonhole specific offenses into the broad categories provided in the statute. The definitions of "misconduct in office" and "malfeasance" often overlap and some jurisdictions include malfeasance in the definition of official misconduct. For example, in Mid-South Indoor Horse Rac. v. Tenn. State Rac., 798 S.W.2d 531, 538 (Tenn. Ct. App.1990), the Court of Appeals of Tennessee states that "[official misconduct] includes (1) doing an act unlawful in itself (malfeasance), (2) doing an otherwise lawful act in an unlawful manner (misfeasance), and (3) failing to perform an act required by law or the duties of the office (nonfeasance)." (Citations omitted).

This Court has previously distinguished between the two terms by giving them the following definitions. "Misconduct in office is any unlawful behavior by a public officer in relation to the duties of his office, wilful in character." Point 2, Syllabus, Kesling v. Moore and Cain, 102 W.Va. 251, 135 S.E. 246 [1926]. "Syllabus Point 3, *Daugherty v. Day*, 145 W.Va. 592, 116 S.E.2d 131 (1960). "Malfeasance in office has been defined as 'the doing of some act which is positively unlawful or wrongful or an act which the actor has no legal right to do, or as any wrongful conduct which affects, interrupts or interferes with the performance of official duty.' *Daugherty v. Ellis*, 142 W.Va. 340, 97 S.E.2d 33 (1956)." *Kemp v. Boyd*, 166 W.Va. 471, 485, 275 S.E.2d 297, 306-07 (1981)." 523 S.E.2d at 281.

Petitioner will therefore strongly urge the assistant prosecuting attorney to rethink her position that Petitioner is committing a criminal offense for practicing law without a license for the reasons above. To blindly follow an incorrect application of the law by a circuit court judge which would demonstrate behavior by a prosecuting attorney that may rise to the level by misfeasance or malfeasance in addition to demonstrating her lack of credibility and when she twice told the court neither she nor her office objected to Petitioner representing Shenandoah Sales and Service in Circuit Court is at best disingenuous.

LEGAL ISSUE #2 - PETITIONERS RIGHT TO DUE PROCESS OF LAW WAS VIOLATED BY THE COURT'S REFUSAL TO GRANT HIM A HEARING PURSUANT TO WEST VIRGINIA CODE 11-3-25

Petitioner will now address the issue raised by Respondent in her brief that based on a decision cited therein as being a decision from this court (when the decision is from the State of Nebraska) regardless of the language contained in *West Virginia Code 11-3-25* Shenandoah Sales and Service is not entitled to an appeal hearing and due process is not violated when a court makes a decision that ultimately denies the Petitioner their statutory rights to an appeal hearing.

Petitioner addresses first the case from *Nebraska Frye v. Haas* 152N.W.2d121 (Neb1967) which Petitioner again points out is neither included in nor referred to in the Table of Authorities portion of Respondents Brief; and Petitioner submits the holding of the case is also misstated in Respondents Brief. According in the Respondents Brief the court holds as follows:

“the power to levy a general tax is inherent in the sovereign, purely legislative and character, and due process does not require at the property subject to the tax with the amount to be levied should be subjective to judicial inquiry. Frye v. Haas at Syl. Pt. 2.”

Petitioner can only assume it was inadvertence on the part of the Respondent’s counsel when she failed to include the following language from the Nebraska opinion

“At the outset we observe that this is an ad valorem [182 Neb. 76] tax, the amount depending on the value of the taxpayer’s property. Notice is given by statute, and he has a full opportunity to be heard and to appeal as to valuation and equalization. The power of the Legislature or the unit board to make the levy is not challenged. But, it is said, this power to levy may be illegally or improperly exercised and no notice and opportunity are provided and that therefore the proceedings lack due process. The statute here under consideration bypasses the statutory procedure, section 77–1601, R.S.Supp., 1965, in which the county board of equalization makes the levies for cities, school districts, and other governmental subdivisions within 14 days after the action of the State Board of Equalization and Assessment. A taxpayer may appeal from this action but it is noted that the grounds of appeal are restricted and the collection process may not be impeded. Sections 77–1606 to 77–1610, R.R.S.1943. It is this narrow or minimal deviation from established tax procedure that the plaintiffs attack. The rule is stated in Nickey v. State of Mississippi, 292 U.S. 393, 54 S.Ct. 743, 78 L.Ed. 1323, as follows: ‘There is no constitutional command that notice of the assessment of a tax, and opportunity to contest it, must be given in advance of the assessment. It is enough that all available defenses may be presented to a competent tribunal before

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exaction of the tax and before the command of the state to pay it becomes final and irrevocable. Wells Fargo & Co. v. State of Nevada, 248 U.S. 165, 39 S.Ct. 62, 63 L.Ed. 190; Bristol v. Washington County, 177 U.S. 133, 146, 20 S.Ct. 585, 44 L.Ed. 701; McMillen v. Anderson, 95 U.S. 37, 23 L.Ed. 335; see American Surety Co. v. Baldwin, 287 U.S. 156, 168, 53 S.Ct. 98, 77 L.Ed. 231, 86 A.L.R. 298.’

The application of this rule is well stated in 16A C.J.S. Constitutional Law § 650(a)(2), p. 977, as follows: ‘Due process is afforded if the taxpayer has an opportunity

to question the validity or the amount of an assessment before the amount is determined, or at any subsequent proceedings to enforce its collection, or subsequent to collection in a suit for refund of taxes paid [182 Neb. 77] under protest, or at any time before liability for the tax becomes finally and irrevocably fixed.'

We have long followed this rule in Nebraska. In County of Douglas v. State Board of Equalization & Assessment, 158 Neb. 325, 63 N.W.2d 449, a general tax case, we said: 'The following language in the case of Hacker v. Howe, 72 Neb. 385, 101 N.W. 255, 256, is also pertinent: 'An owner is not deprived of his property without due process of law by means of taxation if he has an opportunity to question its validity or the amount of such tax or assessment at some stage of the proceedings either before that amount is finally determined or in subsequent proceedings for its collection. " That the right to collateral attack alone is sufficient to constitute due process is apparent from Hacker v. Howe, 72 Neb. 385, 101 N.W. 255. The State Board of Equalization and Assessment raised values and there was no appeal provided. Said this court: 'He certainly is not denied due process of law if the courts are open to him in which he may try the question of the scope of action and the power of the state board to equalize the valuation of properties as between the different counties so as to bring about uniformity and equality of taxation.'

Any doubt in this matter is laid to rest by State v. Several Parcels of Land, supra. There the required statutory notice of the meeting of the county board of equalization was not given and the taxpayer asserted that therefore he was denied his opportunity to be heard before the levy and the right to appeal. This court said: 'Again it cannot be said that due process of law is lacking, in proceedings for taxation, although the statutory notice is omitted at some particular stage, if the maxims of the law provide an alternative remedy, which is sufficient to correct any wrong done. As a safeguard for the protection of a taxpayer, our Legislature made provisions now appearing as section 11,061, Cobbey's St. 1907, which gives to a taxpayer the right to an injunction in the event that the objectionable taxes, or some part [182 Neb. 78] thereof, be levied or assessed for an illegal or unauthorized purpose.'

The taxpayer's opportunities to be heard and his remedies have been considerably expanded since this case, both collaterally and directly. If taxes are levied without authority of law, their collection may be enjoined: Peterson v. Hancock, 155 Neb. 801, 54 N.W.2d 85. Section 77--1735, R.R.S.1943, our refund statute, creates a direct cause of action in the tax proceedings by which he may test the validity, For any reason, of a tax or any part thereof. Under this section, for example, he may test special assessments or benefits in an improvement district. Loup River Public Power Dist. v. County of Platte, 144 Neb. 600, 14 N.W.2d 210. Section 77--1736, R.R.S.1943, gives him an administrative remedy, as the treasurers of the different districts are required to refund the taxes, if, 'it appears to the satisfaction of such authorities that the tax, or a part thereof, was clearly invalid.' And, further, a suit under our statutes to enforce and collect the lien of taxes would

afford the taxpayer notice and process and a judicial hearing at to his tax liability. Nor can he complain that the tax is collected before he is afforded relief. Collection does not irrevocably fix the charge under our tax procedure. There is no requirement of due process that he be given such a hearing and notice so that he may stay the collection process or that he be given an opportunity to be heard Before any particular stage of the taxation process. Our statutes, with respect to hearings and appeals, specifically provide that collection shall not be stayed. See ss. 77--1606 to 77--1610, R.R.S.1943. The necessities of government prevail. The balance of right remains, and it is only the balance of convenience that is struck against the taxpayer. The fact that he is required to take affirmative action does not deny him due process."

Petitioner submits this language lends itself to much greater due process protection in Nebraska than is recognized or acknowledged by Respondent.

Before your petitioner discusses the language from the cases from this court which makes clear that those dissatisfied with a decision from a county commission sitting as a Board of Review and Equalization have an absolute due process right to a hearing on the issue(s) which form the basis of their appeal; Petitioner will first set forth language from *West Virginia Code 11-3-25* which he believes supports this argument ,

"...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."

Petitioner points out not only does *West Virginia Code 11-3-25* provide a circuit court hearing similar in nature to an administrative appeal pursuant to **THE WV**

ADMINISTRATIVE APPEAL ACT and the full scope of relief available to an “Applicant” pursuant to said act but when necessary a **DE NOVO** rehearing in circuit court according to the following language from *West Virginia Code 11-3-25*

“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.”

Petitioner would next cite the language from two decisions from this court specifically addressing the extent of an applicant’s right to due process of law when challenging a Tax Assessment pursuant to *West Virginia Code 11-3-24* and *11-3-25* and his comprehensive right to an appeal to the circuit court

In the decision *In re Tax Assessment Against American Bituminous Power Partners*, L.P. 539 S.E.2d 757, 208 W. Va. 250 (2000) this court held as follows:

“ A taxpayer’s initial avenue for relief from an allegedly erroneous property valuation lies with the county commission, sitting as a board of equalization and review. W. Va.Code § 11-3-24 (1979). ... Upon receiving an adverse determination before the county commission, a taxpayer has a statutory right to judicial review before the circuit court. W. Va.Code § 11-3-25 (1967). The statute provides little in the way of guidance as to the scope of judicial review, although it does expressly limit review to the record made before the county commission. Given this limitation, we have previously indicated that review before the circuit court is confined to determining whether the challenged property valuation is supported by substantial evidence, see Killen v. Logan County Comm’n, 170 W.Va. 602, 295 S.E.2d 689 (1982),⁶ or otherwise in contravention of any regulation, statute, or constitutional provision, see In re Tax Assessments Against the Southern Land Co., 14,3 W.Va. 152, 100 S.E.2d 555 (1957), overruled on other grounds, In re Kanawha Valley Bank, 14,4 W.Va. 346, 109 S.E.2d 649 (1959).⁷

[539 S.E.2d 762]

As this Court’s previous cases suggest, and as we have recognized in other contexts involving taxation, e.g., Frymier-Halloran v. Paige, 193 W.Va. 687, 695, 458 S.E.2d 780, 788 (1995), judicial review of a decision of a board of equalization and review regarding a challenged tax-assessment valuation is limited to roughly the same scope permitted

under the West Virginia Administrative Procedures Act, W. Va. Code ch. 29A” 539 S.E.2d at 761-762.

The Petitioner says this language when read in conjunction with this courts holding in Assessment of Certain Real Estate of Eastern Associated Coal Corp. 204 S.E1 157 W.Va. 749 (1974) wherein 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...” makes clear that the right to due process of law is recognized in West Virginia.

In further support of this argument Petitioner relies on a federal decision, *Bell v. Robert* 402 F.Supp. 2d 938 (N.D.Illinois 2005)

“In order 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”.

LEGEAL ISSUES #3

PETITIONER SAYS THE CIRCUIT COURTS OF THIS STATE, DO NOT HAVE THE INHERENT AUTHORITY TO CONTROL THE PRACTICE OF LAW.

Petitioner takes issues with the language contained in Respondents Argument C at page (14) and in particular with its reference to the argument contained on page (9) of Respondents brief that *West Virginia Code 11-3-25* is an unconstitutional intrusion on the power and authority of the justice to control the practice of law. Addressing first the argument that the Circuit Court has the inherit responsibility to police the practice of law. Petitioner believes this spurious argument is debunked by the following language from *State ex rel. Steven Askin v. Hon. Pierre Dostert, Judge, and Donald Giardena, Sheriff* 295 S.E. 2d 271, 170 W.Va. 562.

"We find that the common law power of inferior courts to require security for good behavior, as applied to attorneys, is obsolete and has been superseded by the modern organization of judicial power in West Virginia; we therefore hold that W. Va. Code 30-2-8 is of no force and effect....However, the professional conduct of attorneys is now regulated by rules and promulgated by this Court, which, with the enactment of W. Va. 51-1-4a, and ratification of the 1974 Judicial Reorganization Amendment, became the sole repository of authority to govern the practice of law. Therefore, to the extent the power to require security for good behavior conflicts with the rules promulgated by this Court, it must fall. See W. Va. Code 51-1-4a"

Petitioner will next address Respondents continuing argument threaded throughout her brief that the legislature's decision to permit agents to appear on behalf of parties i.e. applicants pursuant to W. Va. Code 11-3-25, Petitioner would again cite the Court to *State ex, rel. Frieson v. Isner Magistrate* 285 S.E.2d 641 168 W.Va. 758 (1981) and the following language therein,

"Any party to a civil action in a magistrate court may appear and conduct such action in person, by agent or by attorney. Appearance by an agent or [168 W.Va. 777] attorney shall have the same effect as appearance by the party represented, and the appearance by an agent shall not constitute the unlawful practice of law.....

The petitioner contends that this statute conflicts with this Court's definition of the practice of law and infringes upon our power to define and regulate the practice of law by authorizing laymen not licensed by or subject to the regulation of this Court to engage in the practice of law.

*It cannot be questioned that the Legislature cannot restrict or impair the power of the judiciary to regulate the practice of law by enacting a statute permitting or authorizing laymen to practice law. *State ex rel. Thorn v. Luff*, 154 W.Va. 350, 175 S.E. 2d 472 (19710); *West Virginia State Bar v. Early*, supra. Where, however, the intrusion upon the judicial power is minimal and inoffensive, and is consistent with and intended to be in aid of the aims of the Court with respect to the regulation of the practice of law, such legislation may be upheld as being in aid of the judicial power. After reviewing the purpose of and background surrounding the enactment of W. Va Code 50-4-4a, we conclude that the statute is legislation in aid of the goals of this court and does not unconstitutionally infringe upon the power of this Court to regulate the practice of law.....*

W.Va. Code 50-4-4a furthers this goal by permitting the casual appearance, not for pay, by laymen in a representative capacity as a form of neighborly or kindred accommodation. It anticipates and isolated or casual appearance by a non-lawyer friend or relative of a party to proceedings in magistrate courts for the purpose of assisting such party in representing himself in the litigation. The statute does not purport to authorize laymen to represent parties in magistrate court on a regular basis or to engage in such activity as a business or for pay.

We think it is clear that the purpose of W.Va Code 50-4-4a was not to authorize laymen to engage in the practice of law free from the requirements and regulation imposed by this Court upon those who wish to practice law in this State. Rather, the clear purpose and intent of the statute is to encourage parties to civil litigation in magistrate court to appear on their own behalf as a means of effecting a speedy and efficient resolution of small claims. Appearance of a party

in magistrate court by lay agent is authorized only when such appearance is an incident of the party's desire to appear pro se."285 S.E. 2d at 654,655

The final portion of LEGAL ISSUES / ARGUMENT III Petitioner will next address is the assertion that

" Although, the Circuit Court entered the order while the Motion to Disqualify was pending, because this Court found that no bias was found to exist and denied the Motion the Court's Order dismissing the case should stand".

In response petitioner would merely again repeat the following language from *Myers v. Painter* 576 S.E.2d 277. (2002) set forth in Petitioners Brief.

*"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

In conclusion, the Petitioner prays Respondents brief be given the limited due deference it deserves; the relief they pray for be denied and that the relief prayed for in Petitioners original Petition for appeal be granted.

Respectfully Submitted,



David C. Tabb, Vice-President and Agent David C. Tabb, Vice-President and Agent

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, Shenandoah Sales and Service, Inc. do hereby certify that on this 20th day of September, 2011, I have served a true copy of the foregoing *Reply Brief of Petitioner* upon the following in the manner listed, addressed as follows:

Jefferson County Prosecuting Attorney
Stephanie Grove
P. O. Box 729
Charles Town, WV 25414

U. S. Mail

Assessor of Jefferson County
Angie Banks
104 E. Washington Street
Charles Town, WV 25414

U. S. Mail

Judge David Sanders
Jefferson County Court House
100 E. Washington Street
Charles Town, WV 25414

U. S. Mail

Circuit Clerk of Jefferson County
100 E. Washington Street
Charles Town, WV 25414

U. S. Mail



Shenandoah Sales and Service, Inc.
David C. Tabb, Agent
107 Tabb Lane
Harpers Ferry, WV 25425
304-725-0423
304-725-8472