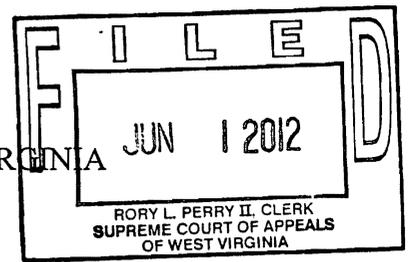


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**STATE OF WEST VIRGINIA EX REL.
TEN SOUTH MANAGEMENT
COMPANY LLC D/BA/ VISTA VIEW**

Petitioner,

v.

Petition No. 12-0678

**HONORABLE ROBERT B. WILSON
ACTING CHIEF ADMINISTRATIVE LAW
JUDGE OF THE WEST VIRGINIA HUMAN RIGHTS
COMMISSION AND MONICA ROBINSON**

Respondents.

**PETITION FOR WRIT OF MANDAMUS
WITH ORAL ARGUMENT REQUESTED**

A handwritten signature in black ink, appearing to be "Charles R. Bailey", written over a horizontal line.

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III. QUESTIONS PRESENTED

1. Is Petitioner entitled to dismissal of Respondent Monica Robinson's claims brought before the West Virginia Human Rights Commission where the Commission originally issued a finding of No Probable Cause after a full, fair and impartial investigation of her race discrimination employment claim and she did not timely request reconsideration within 10 days of service thereof in accordance with the requirements of West Virginia Code § 5-11-10, but after the passage of that deadline she untimely requested reconsideration and the Human Rights Commission thereupon reversed its finding to a Probable Cause finding?
2. If the case is not dismissed, do Petitioner's due process rights and interests entitle it to a written order, including detailed findings, setting forth how Respondent Monica Robinson met her burden set forth in 77 CSR 2.4.14.f.1. to show that an original finding of No Probable Cause after a full, fair and impartial investigation was arbitrary, capricious or not in accordance with the law, thereby serving as sufficient support for reversal of that No Probable Cause finding and issuance of a Probable Cause finding?
3. If the case is not dismissed, do the provisions of 1.12(a) of the West Virginia Rules of Professional Conduct and/or the appearance of impropriety require that Deputy Attorney General Paul Sheridan be disqualified from serving as counsel for Respondent Monica Robinson in the pursuit of her claims of racial discrimination in employment before the Human Rights Commission after having previously served as the Human Rights Commission's Administrative Review Hearing Officer to address the merits of her request for reconsideration of the Commission's original No Probable Cause determination?

IV. STATEMENT OF THE CASE

This Petition for Writ of Mandamus seeks first for this Court to compel Respondent West Virginia Human Rights Commission Acting Chief Administrative Law Judge Robert B. Wilson to issue an Order dismissing Respondent Monica Robinson's claims asserted before the West Virginia Human Rights Commission based on the Commission's original No Probable Cause determination and the fact that her request for reconsideration was not timely filed in accordance with the ten day period set forth in West Virginia Code § 5-11-10. In the alternative if that request is denied, this Petition seeks for this Court to compel Respondent ALJ Wilson to issue an Order requiring the Human Rights Commission to provide Petitioner with a written Order setting

forth specific findings and an explanation as to whether and how Respondent Monica Robinson met her burden to show that the original No Probable Cause determination was arbitrary, capricious or not in accordance with the law sufficient for judicial review to justify its reversal of the original No Probable Cause determination. Finally, this Petition seeks for this Court to compel Respondent ALJ Wilson to issue an Order finding that Deputy Attorney General Paul Sheridan is disqualified from representing Respondent Monica Robinson for her claims of racial discrimination in employment before the Human Rights Commission after having previously served as the Administrative Review Hearing Officer to determine whether her request for reconsideration of the Commission's No Probable Cause determination should result in reversal of that determination and a finding of Probable Cause.

On January 11, 2011, Respondent Monica Robinson filed a Complaint with the West Virginia Human Rights Commission alleging race discrimination against Petitioner Ten South Management, her former employer, related to her January 4, 2011 termination. *See* Complaint in Appendix at pp. 1-2. On June 10, 2011, following a full, fair and impartial investigation, the Human Rights Commission issued a No Probable Cause determination thereby dismissing her claims and served it upon Petitioner and Respondent Robinson. *See* NPC Determination in Appendix at pp. 3-6. West Virginia Code § 5-11-10 provides that a Complainant shall have ten (10) days after service of a No Probable Cause determination to file a written request with the Commission for an Administrative Review of that No Probable Cause determination, which would provide the Complainant an opportunity to show that probable cause exists for substantiating her allegations. Respondent missed that deadline, instead filing a written request for Administrative Review fourteen (14) days after service of the No Probable Cause determination on June 24, 2011. *See* Request for Reconsideration in Appendix at pp. 7-9.

Instead of denying Respondent Robinson's request and dismissing her claims on the basis of her request being untimely filed, the Human Rights Commission granted her untimely request and appointed Deputy Attorney General Paul Sheridan to serve as the Commission's representative to preside over that Administrative Review. *See* Notice of Administrative Review in Appendix at pp. 10-12. The granting of an untimely request for an Administrative Review was improper and violative of West Virginia Code § 5-11-10. Thus, Petitioner is entitled to dismissal of Respondent Robinson's claims and an Order from Respondent ALJ Wilson of such dismissal.

On September 7, 2011, Paul Sheridan held the Administrative Review. Respondent and Petitioner both appeared and participated. 77 CSR 2-4.14.f.2 of the *Rules of Practice and Procedure Before the West Virginia Human Rights Commission* details the manner in which the Administrative Review is to be conducted and provides that "the Complainant shall have the burden of showing that the dismissal of the complaint is arbitrary, capricious, or not in accordance with the law." Respondent produced no new information or evidence at the Administrative Review. Deputy Attorney General Sheridan stated on more than three occasions during the forty-five (45) minute hearing that he did not see how Respondent's race played any role in her termination or her treatment by her former employer. Despite those statements of Mr. Sheridan and the absolute failure of any showing by Respondent that the dismissal of her claims was arbitrary, capricious, or not in accordance with the law, Mr. Sheridan thereafter apparently concluded that the No Probable Cause determination should be reversed and that a finding of Probable Cause should be issued.

On October 19, 2011, the Commission issued a determination that its prior finding of No Probable Cause was reversed and that Probable Cause was found as a result of the Administrative Review. *See* Probable Cause Determination in Appendix at pp. 13-15. That

Probable Cause determination detailed no findings or explanation of Mr. Sheridan's decision, the basis for that decision, or any indication as to whether or how Respondent met her burden to show that the original dismissal was arbitrary, capricious or not in accordance with the law. *Id.* No other Order setting forth such findings has been provided. As such, there are no specific findings sufficient to allow judicial review of the decision to reverse the original determination of No Probable Cause.

It is axiomatic that a litigant in a contested case is entitled to a written Order containing detailed findings of fact and conclusions of law on any adjudicatory decision, whether before a Circuit Court or an administrative agency like the Human Rights Commission. *See W. Va. Code § 29A-5-3; See also Syl. Pt. 3 Stout v. Ravenswood Aluminum Corp.*, 207 W.Va. 427, 533 S.E.2d 359 (2000). The reasoning for such a requirement is to permit appellate review of that decision. The Supreme Court explained that the Order is to provide clear notice to all parties and the reviewing court as to the rationale applied in reaching the decision. *Id.* Thus, if the claims of Respondent Robinson are not dismissed, Petitioner is entitled to an Order from Respondent Judge Wilson requiring the Commission to provide an Order with detailed findings sufficient for judicial review regarding whether and how Respondent Robinson met her legal burden.

The October 19, 2011 Order reversing the original No Probable Cause determination further stated that if Respondent did not have counsel, she would be appointed an attorney from the Attorney General's Civil Rights Division to represent her. *Id.* Petitioner contemporaneously received an October 19, 2011 issued Notice of Public Hearing, Order, Mediation and Settlement Directives indicating that Chief Administrative Law Judge Robert B. Wilson would preside over this matter. *See* Notice of Public Hearing in Appendix at pp. 16-24. On October 31, 2011, Deputy Attorney General Paul Sheridan then filed a Notice of Appearance stating that he would

be serving as counsel for Respondent henceforth. *See* Notice of Appearance in Appendix at pp. 25-26. Petitioner timely filed its Answer to the Respondent's Complaint and in that Answer, objected to Paul Sheridan serving as Respondent's counsel after having presided over the Administrative Review Hearing to determine whether the No Probable Cause finding should be affirmed, reversed, modified or referred for additional investigation. *See* Answer in Appendix at pp. 27-35. Petitioner received no response from Mr. Sheridan, Respondent Robinson or Respondent ALJ Robert Wilson.

Having received no response or consideration of its objection regarding Paul Sheridan's service as Respondent's counsel, Petitioner's counsel raised the issue during a February 10, 2012 hearing on discovery issues, but Paul Sheridan denied there was any reason for his disqualification and Respondent ALJ Wilson agreed. On March 29, 2012, Petitioner filed a formal written Motion to Disqualify Paul Sheridan from serving as Respondent's counsel due to the fact that his service in that role violates the provisions of Rule 1.12(a) of the *West Virginia Rules of Professional Conduct* and creates an appearance of impropriety that any member of the public would recognize, which would undoubtedly cause the participants to this litigation and the public in general to lose confidence in the integrity and fairness of the West Virginia Human Rights Commission and the way it adjudicates claims. *See* Motion to Disqualify in Appendix at pp. 36-41. On April 6, 2012, Respondent ALJ Wilson denied that Motion finding that the Petitioner suffers no prejudice due to Paul Sheridan's service as counsel for Respondent. *See* April 6, 2012 Order in Appendix at pp. 42-53.

On March 29, 2012, Petitioner also filed a Motion for Issuance of a Subpoena directed to the Human Rights Commission for it to produce any documents (such as an order or opinion) outlining the basis for overturning the original No Probable Cause determination and how

Respondent Robinson met her burden and any documents that served as the evidentiary basis for Respondent having met her burden to show that the original No Probable Cause determination was arbitrary, capricious or not in accordance with the law. *See* Motion for Issuance of Subpoena in Appendix at pp. 54-57. On April 6, 2012, Judge Wilson denied that Motion finding that he has no authority to consider that Motion. *See* April 6, 2012 Order in Appendix at pp. 42-53.

On March 29, 2012, Petitioner also filed a Motion to Dismiss Respondent's claims due to her failure to timely request reconsideration of the original No Probable Cause determination. *See* Motion to Dismiss in Appendix at pp. 58-65. The formal written Motion had previously been raised orally during a February 10, 2012 status conference and had been denied that day with Judge Wilson stating that he did not believe he had authority to consider that issue. On April 6, 2012, Judge Wilson denied that formal written Motion once again finding that he has no authority to consider it. *See* April 6, 2012 Order in Appendix at pp. 42-53.

Respondent ALJ Wilson erroneously suggests in his Order of April 6, 2012 that he lacks the legal authority to issue a ruling on Petitioner's Motion to Dismiss. Clearly, Administrative Law Judges are appointed and empowered with the legal authority to evaluate the facts and the law and issue any necessary rulings of fact and law. There is nothing in the Human Rights Act or any other source which limits his legal authority to just evaluating the factual circumstances of Respondent Robinson's treatment by Petitioner to determine whether she was discriminated against on the basis of race. If the Human Rights Commission exceeds its jurisdiction by allowing a claim to proceed against an employer despite the fact that it doesn't meet the definition of an employer by not employing 12 or more persons or despite the fact that the Complainant missed his or her statute of limitations, the ALJ assigned to preside over the matter

has an absolute duty to hear and decide those jurisdictional challenges. The failure of Respondent Robinson to comply with the legal requirement to request a reconsideration within 10 days of service of the No Probable Cause determination upon her is just as much of a jurisdictional failing as the failure to file a claim before the Human Rights Commission within 365 days of the alleged discriminatory act. Respondent ALJ Wilson cannot escape the duty to address this jurisdictional challenge. If ALJ Wilson does not have the legal authority to consider such a challenge, who would? Clearly, any suggestion that this Supreme Court of Appeals would have original jurisdiction to decide those challenges without having before it an ALJ or Circuit Court decision on the matter is ludicrous.

Time is of the essence with this Petition and the issues presented within it. Paul Sheridan has just issued Notices of Depositions of several employees of the Petitioner to occur on June 11, 12 and 14. In addition, Judge Wilson has just issued an Order requiring the parties to mediate Respondent Monica Robinson's Human Rights Commission claims on June 15, 2012. Finally, the Human Rights Commission claims of Monica Robinson have been set for public hearing to occur on July 10, 11 and 12, 2012. In the absence of the requested relief, Petitioner will be forced to expend significant sums for attorneys' fees, expenses and costs to conduct discovery depositions, participate in a mediation and go through a public hearing when the law and fundamental fairness require the relief sought herein, which would result in the dismissal of Respondent Robinson's claims.

V. SUMMARY OF ARGUMENT

Petitioner is entitled to dismissal of Respondent's Robinson's claims of racial discrimination before the West Virginia Human Rights Commission due to her failure to timely request reconsideration of the Commission's original No Probable Cause determination.

Pursuant to West Virginia Code § 5-11-10, Respondent Robinson was required to file any request a reconsideration of the Commission's June 10, 2011 No Probable Cause determination within ten days of service of it, which required such a filing by June 21, 2011. Her written request filed on June 24, 2011 was untimely and should not have been granted. The law requires that her claims be dismissed due to that untimely filing.

In the event this Court finds some basis or reason or manner to excuse her untimely filing and that she should be permitted to proceed with her claims, Petitioner's due process rights require that the Commission issue a written order setting forth specific findings as to whether and how Respondent Robinson met her burden to show that the Commission's original No Probable Cause determination was arbitrary, capricious, or not in accordance with the law sufficient for judicial review. The Commission's October 19, 2011 one page notice of reversal of the No Probable Cause determination, with no explanation of the basis therefor, does not provide for any judicial review of the reversal. It is not clear from that October 19, 2011 notice whether the proper standard as set forth in 77 CSR §2-4.14.f. was used for the Administrative Review or whether she met that standard.

Petitioner's due process rights and fundamental fairness also dictate that Paul Sheridan should not be permitted to serve as Respondent Robinson's counsel to present her claims for racial discrimination to Respondent ALJ Wilson after having previously served as the Administrative Review Hearing Officer who determined that the original No Probable Cause determination should be reversed and her claims should be reinstated. It would be unthinkable to have a judge in a civil action make a ruling on a Defendants' Rule 12(b)(6) Motion and then step down and serve as Plaintiff's counsel in the pursuit of his or her claims. The Administrative Review Hearing's purpose is to determine by weighing the evidence with a No Probable Cause

finding and dismissal of a Complainant's claims was proper and if not, to reverse and reinstate those claims. There is no tangible difference between the Administrative Review Hearing's function and a hearing on a civil suit Defendants' Rule 12(b)(6) Motion to Dismiss. Thus, allowing Paul Sheridan to serve as both the Administrative Review Hearing Officer and later as Respondent Robinson's counsel violates Rule 1.12(a) of the West Virginia Rules of Professional Conduct and the general tenant to avoid the appearance of impropriety.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests oral argument of the Petition under Rule 19 of the *West Virginia Rules of Appellate Procedure*. This Petition claims an assignment of error in the application of settled law, insufficient evidence to support reversal of the No Probable Cause determination, and involves a narrow issue of law. Oral argument would also be appropriate under Rule 20 of the *West Virginia Rules of Appellate Procedure* due to this Petition presenting issues of fundamental public importance.

VII. ARGUMENT

A. Standard of review

The West Virginia Supreme Court of Appeals standard of review for proceedings in mandamus "has long been established that: A writ of mandamus will not issue unless three elements coexist--(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." *State ex rel. Burdette v. Zakaib*, 224 W. Va. 325, 331, 685 S.E.2d 903, 909 (2009) (Quotation and citations omitted). "[T]he burden of proof as to all the elements necessary to obtain mandamus is upon the party seeking the relief. . . a failure to meet any one of them is fatal." *Id.* at 331, 685 S.E.2d at 909. (Citation omitted). "To entitle one to a writ of

mandamus, the party seeking the writ must show a clear legal right thereto and a corresponding duty on the respondent to perform the act demanded.” *Dadisman v. Moore*, *Syl. Pt. 1*, 181 W. Va. 779; 384 S.E.2d 816 (1988) (Quoting *State ex rel. Cooke v. Jarrell*, *Syl. Pt. 2*, 154 W. Va. 542; 177 S.E.2d 214 1970).

B. Petitioner is entitled to dismissal of Respondent Robinson’s claims due to her failure to timely request reconsideration of the Commission’s No Probable Cause determination.

Respondent Robinson filed her claims with the Human Rights Commission January 11, 2011. On June 10, 2011, following a full, fair and impartial investigation with discovery being exchanged and a significant amount of documentation being provided to the Commission by Petitioner, the Commission issued its finding of No Probable Cause via letter sent to Respondent Robinson and Petitioner. *See* Appendix at pp. 3-6. West Virginia Code § 5-11-10 states that:

If it shall be determined after such investigation that no probable cause exists for substantiating the allegations of the complaint, the commission shall, within ten days from such determination, cause to be issued and served upon the complainant written notice of such determination, and the said complainant or his attorney may, within ten days after such service, file with the commission a written request for a meeting with the commission to show probable cause for substantiating the allegations of the complaint.

W.Va. Code § 5-11-10.

In accordance with that provision, if Respondent Robinson wished to request a reconsideration, she was required to file her written request for Administrative Review with the Commission on or before June 21, 2011. Respondent Robinson did not comply with that provision and did not file her written request with the Commission until June 24, 2011. *See* Appendix at pp. 7-9. The Commission improperly granted the untimely request, which ultimately resulted in reversal of the No Probable Cause determination and Respondent Robinson’s claims being set for public

hearing on July 10-12, 2012. *See* Appendix at pp. 16-24. The statute in question does not allow the Commission any discretion to accept untimely written requests for Administrative Reviews.

The provisions of West Virginia Code § 5-11-10, the date on which the No Probable Cause Determination was issued and mailed, and the date on which Respondent Robinson filed her written request for reconsideration make clear that Petitioner is entitled to the relief requested – dismissal of her claims. Respondent ALJ Wilson has a legal duty to grant dismissal and improperly denied Petitioner’s Motion to Dismiss filed on March 29, 2012. There is no other adequate remedy available to Petitioner besides the granting of this Petition for Writ of Mandamus.

C. If this matter is not dismissed, Petitioner is entitled to a written order setting forth specific findings as to whether and how Respondent Robinson met her burden to show that the Commission’s original No Probable Cause determination was arbitrary, capricious, or not in accordance with the law.

Petitioner was shocked to receive the Commission’s October 19, 2011 determination stating that it reversed its original No Probable Cause determination and found Probable Cause based upon Paul Sheridan’s conclusions following the Administrative Review Hearing of September 7, 2011. Given the lack of any findings or explanation regarding the basis for the reversal, Petitioner cannot determine whether the reversal was proper, because its impossible to determine whether and how Respondent Robinson met her burden to show that the No Probable Cause determination was arbitrary, capricious, or not in accordance with the law. In the interests of fundamental fairness and due process, Petitioner is entitled to such an Order. As a result, on March 29, 2012, Petitioner filed its Motion for Issuance of a Subpoena to the Human Rights Commission that would require it to produce any documents or evidence submitted by Respondent Robinson to meet her burden and any written report or explanation from Paul Sheridan as to whether and how Respondent Robinson met her burden. *See* Appendix at pp. 13-

15. Respondent ALJ Wilson denied that Motion in his Order of April 6, 2012. *See* Appendix at pp. 42-53. Respondent ALJ Wilson has the legal authority to Order such a subpoena to be issued in accordance with 77 CSR 2.7.12. Thus, Petitioner has a clear legal right to the relief sought, Respondent ALJ Wilson has a clear legal duty to issue a subpoena compelling production of the same, and there is no other adequate remedy is available to Petitioner. As a result a Writ of Mandamus should be issued compelling Respondent ALJ Wilson to grant the Motion for Issuance of Subpoena.

D. Paul Sheridan should be disqualified from continuing to serve as Respondent Robinson’s counsel for her claims pending before the Human Rights Commission.

- i. **Mr. Sheridan’s participation in the September 7, 2011 Administrative Review Hearing as Hearing and/or Adjudication Officer on behalf of the Commission and his subsequent representation of the Respondent violates Rule 1.12(a) of the West Virginia Rules of Professional Conduct.**

Pursuant to Rule 1.12(a) of the *West Virginia Rules of Professional Conduct*: “[E]xcept as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer¹, arbitrator, or law clerk to such a person, unless all parties to the proceeding consent after consultation.” Mr. Sheridan’s role as Administrative Review Hearing Officer at the September 7, 2011 hearing is unquestionable. Respondent ALJ Wilson erroneously found that: (a) the September 7, 2011 Administrative Review Hearing was not adjudicatory² in nature and, therefore, Mr. Sheridan is not subject to disqualification under West Virginia Rules of Professional Conduct, Rule 1.12(a); (b) the Petitioner did not object to Mr. Sheridan being

¹ In the Comment to Rule 1.12, the term “adjudicative officer” includes such official as ... hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges.

² Respondent Wilson found that the administrative review process is investigatory, but not adjudicatory in nature. The Respondent relies on *Jones v. Glenville State College*, 189 W.Va 546, 433 S.E.2d 49 (1993) for the proposition that the WVHRC acts as an investigatory body, not a judicial body, in ascertaining whether probable cause existed to support allegations in the complaint. *Id* at 552, 433 S.E.2d at 56.

counsel for the Commission representing Respondent's interest in terms of appearing before the ALJ; and (c) the Petitioner has not been prejudiced in any fashion by Mr. Sheridan having conducted the September 7, 2011 hearing. *See* Appendix at pp. 42-53. The Petitioner strenuously disagrees.

Respondent ALJ Wilson relied primarily on *Jones v. Glenville State College*, in which the West Virginia Supreme Court of Appeals considered whether a no probable cause determination by the Commission was an adjudication on the merits, such that the Complainant would be precluded from thereafter filing a civil claim in circuit court. *Id* at 552, 433 S.E.2d at 56. However, *Jones* is inapposite. Petitioner does not assert that the No Probable Cause determination was an adjudication on the merits or that Respondent Robinson is precluded from asserting a civil claim for alleged racial discrimination, but rather that Mr. Sheridan's role at the Administrative Review Hearing was adjudicatory in nature. As Paul Sheridan stated in his Response in Opposition to [Petitioner's] Motion to Disqualify him, the Administrative Review process "is a meeting, the purpose of which is for the Executive Director, or her designee, to listen to the Complainant, review the investigation and evaluate whether the Commission should stand with the Complainant and represent the Complainant's interest at a public hearing." *See* Response in Opposition to Respondent's Motion to Disqualify Paul Sheridan as Counsel for Complainant in Appendix at pp. 73-74. That statement makes clear that the Administrative Review Hearing is not just an investigatory act, but instead that it results in a conclusion or "adjudication" of whether the Complainant can meet his or her burden to show that the No Probable Cause determination was arbitrary, capricious or not in accordance with the law.

A review of the Commission's Rules of Procedure and Practice applicable to Administrative Review Hearings is instructive, and demonstrates conclusively that Mr.

Sheridan's role at the administrative review hearing was adjudicatory in nature.

77 CSR § 2-4.14.f. governs the review process and how the same shall be conducted.

Specifically, 77 CSR § 2-4.14.f.2. states in pertinent part:

“The Commission’s attorney or other designated person shall preside at the review and shall be provided with all information in the Commission file pertaining to the complaint under review The Complainant shall have the burden of showing that the dismissal of the complaint is arbitrary, capricious, or not in accordance with law. **The presiding person, after considering the evidence, shall file a report and recommendation with the executive director which shall recommend that the dismissal of the complaint be upheld, reversed, or modified or that the complaint be remanded for further investigation.....**

(Emphasis added)

Further, if pursuant to 77 CSR § 2-4.14.f.3.:

If, upon administrative review of a Complaint dismissed upon a finding of no probable cause, it is **determined that probable cause exists to credit the allegations of the Complaint, a recommended finding of probable cause will be made and reported to the chairperson or executive director....**

(Emphasis added).

It is unquestionable that Mr. Sheridan was the designee of the Executive Director to preside over the Administrative Review Hearing. He has also referred to himself as counsel for the Commission. As the above rules indicate, during the administrative review process, Mr. Sheridan's role is to render a determination whether there is a basis to affirm, modify or reverse the NPC finding. In presiding over the hearing, he listened to the evidence presented by the Respondent in support of her Complaint, evaluated such evidence, and ultimately determined whether there was a basis to go forward. Mr. Sheridan's decision from the Administrative Review Hearing is tantamount to a circuit court ruling on a Rule 12(b)(6) Motion to Dismiss in a civil case whether to allow the claim to go forward to a final adjudication on the merits. If such

conduct is not adjudicatory by nature, the Petitioner does not know what conduct qualifies as adjudicatory.

Respondent ALJ Wilson's indication in his April 6, 2012 Order denying Petitioner's Motion to Disqualify that the Petitioner did not object to Mr. Sheridan representing Respondent Robinson for her racial discrimination claims before the Commission after having served as the Administrative Review Hearing Officer is incorrect. First, Petitioner was neither consulted, nor did it consent to Mr. Sheridan's representation of the Complainant after acting as a Hearing Officer/Adjudicating Officer in the September 7, 2011 hearing. Second, counsel for the Petitioner objected to Mr. Sheridan's representation of the Respondent as soon he entered his appearance on behalf of the Respondent in its Answer. *See* Appendix at pp. 27-35. In its Answer, the Petitioner stated:

Worst of all, Respondent [Petitioner] is being forced to do so because Deputy Attorney General Paul Sheridan, who is not a disinterested, fair and impartial party, apparently made a determination that the full, fair and impartial investigation yielded the wrong results. Deputy Attorney General Paul Sheridan ... will now represent Complainant in this matter moving forward to a public hearing, which makes it absolutely clear that he should not have been involved in the Administrative Review and the decision to reverse the NO PROBABLE CAUSE finding. To put it simply, he is an interested party with every motivation to take the Complainant's side in reaching that decision. Thus, Respondent's due process rights have been violated and Respondent asserts the due process rights and constitutional protections afforded to it by the United States Constitution and the Constitution of the State of West Virginia.

See Appendix at p. 33. Thus, it is clear Mr. Sheridan's dual roles and the ethical implications resulting from the same was promptly and continually raised by Petitioner.

- ii. **Mr. Sheridan's participation in the September 7, 2011 Administrative Review Hearing as the Hearing Officer on behalf of the Commission and his subsequent representation of Respondent Robinson creates an impermissible appearance of impropriety.**

Mr. Sheridan's conduct also creates a very clear appearance of impropriety. Mr. Sheridan presided over Respondent Robinson's Administrative Review Hearing on September 7, 2011 to determine whether she could present evidence sufficient to meet her burden of showing that the original No Probable Cause determination was arbitrary, capricious or not in accordance with the law and in doing so, Mr. Sheridan assumed the role of a Hearing Officer to weigh the evidence. *See* Appendix at pp. 10-12. After presiding over the September 7, 2011 Administrative Review Hearing, and without any explanation or detailed basis, he overturned the results and findings of a full-blown and impartial investigation of complainant's case. *See* Appendix at pp. 13-15. Thereafter, he entered an appearance on as counsel for Respondent Robinson in the pursuit of her claims before the Commission. *See* Appendix at pp. 25-26. This is the equivalent in a civil case to either having the Plaintiff's counsel review, consider and rule on a Defendant's Rule 12(b)(6) Motion to Dismiss or having the Judge who reviewed, considered and ruled on a Defendant's Rule 12(b)(6) Motion to Dismiss then step down from the bench and undertake representation of the Plaintiff. If Mr. Sheridan's conduct as described in the above hypothetical does not create an appearance of impropriety, then what would?

In *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 108; 459 S.E.2d 374, 385 (1995), this Court explained that: "To protect against the appearance of impropriety, courts in this country consistently hold that a judge should disqualify himself or herself from any proceeding in which his or her impartiality might reasonably be questioned . . . we have repeatedly held that where "the circumstances offer a possible temptation to the average ... [person] as a judge not to hold the balance nice, clear and true" between the parties, a judge should be recused. (Citation omitted) (emphasis added). Syl. pt. 3, in part, *State ex rel. Brown v. Dietrick*, 191 W.Va. 169, 444 S.E.2d 47 (1994) . . .

In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860-61, 108 S. Ct. 2194, 2203, 100 L. Ed. 2d 855, 872-73 (1988), the United States Supreme Court described the standard for disqualification as whether a reasonable and objective person knowing all the facts would harbor doubts concerning the judge's impartiality. The Supreme Court stated: "'The goal is to avoid even the appearance of partiality.'" *Liljeberg*, 486 U.S. at 860, 108 S. Ct. at 2203, 100 L. Ed. 2d at 872. (Citation omitted). To be clear, avoiding the appearance of impropriety is as important in developing public confidence in our judicial system, including claims before the Human Rights Commission, as avoiding impropriety itself. Undoubtedly, Mr. Sheridan's dual roles of Hearing Officer for the September 7, 2011 hearing and legal advocate for the Complainant creates the appearance of impropriety that *Tennant* and *Liljeberg* clearly prohibit. Furthermore, allowing Mr. Sheridan to assume those dual roles diminishes the confidence that litigants or the general public have in the Commission and the judicial system in general.

Mr. Sheridan's conduct does not instill confidence or fairness in the legal system. His continued representation of the Respondent despite his historical role in this case violates any fundamental fairness and due process rights of the Petitioner. To be clear, the Petitioner does not argue that Mr. Sheridan could not represent the interest(s) of the Commission at any Administrative Review Hearing. See *Allen v. State Human Rights Commission*, 174 W. Va. 139; 324 S.E.2d 99 (1984) (Court noted that Office of Attorney General is to furnish legal services, including full-time staff attorneys, to the West Virginia Human Rights Commission at no cost); Or that he could not represent the interest(s) of a Complainant in prosecuting their claims. However, it is a violation of the Rules of Professional Conduct for him to do both, as he has done in this case. Accordingly, it was error for the ALJ to deny Petitioner's Motion to Disqualify Mr. Sheridan.

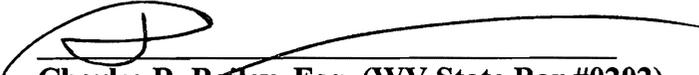
VIII. CONCLUSION

Petitioner respectfully requests that this Court grant this Petition for Writ of Mandamus, therewith issuing an Order requiring Respondent ALJ Wilson to enter an Order dismissing Respondent Robinson's claims based upon the original No Probable Cause determination and her failure to timely request an Administrative Review thereof. In the event that this Court finds Petitioner's argument regarding dismissal unpersuasive, Petitioner requests that this Court issue an Order requiring Respondent ALJ Wilson to enter an Order granting Petitioner's Motion for Issuance of Subpoena and requiring that he cause such a subpoena to be issued and require that the Commission respond to it with the requested documents to permit potential future judicial review of the reversal of the No Probable Cause determination. Finally, Petitioner requests that this Court issue an Order requiring Respondent ALJ Wilson to enter an Order disqualifying Paul Sheridan from serving as Respondent Robinson's counsel in further proceedings before the Human Rights Commission.

Respectfully Submitted by:

**TEN SOUTH MANAGEMENT CO., LLC D/BA
VISTA VIEW,**

By counsel



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David J. Mincer, Esq. (WV State Bar #7486)
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(304) 345-4222**

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TEN SOUTH MANAGEMENT
COMPANY LLC D/BA/ VISTA VIEW

Petitioner,

v.

Petition No. _____

HONORABLE ROBERT B. WILSON
ACTING CHIEF ADMINISTRATIVE LAW
JUDGE, WEST VIRGINIA HUMAN RIGHTS
COMMISSION AND MONICA ROBINSON

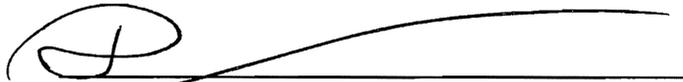
Respondents.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing “Petition for Writ of Mandamus with Oral Argument Requested” was served upon the following parties by U.S. Mail on this day, June 1, 2012:

Robert B. Wilson, Chief Administrative Law Judge
West Virginia Human Rights Commission
1321 Plaza East
Room 108A
Charleston, West Virginia 25301

Paul R. Sheridan, Esquire
WV Attorney General’s Office
812 Quarrier St., 2nd Floor
Charleston, West Virginia 25301



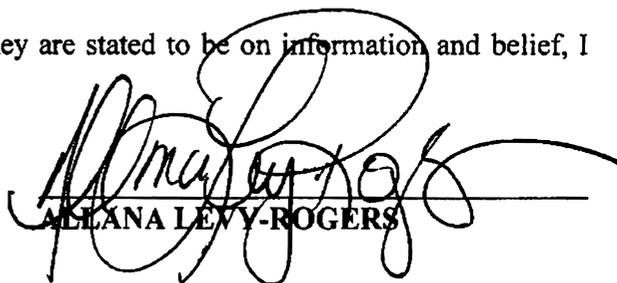
Charles R. Bailey, Esq. (WVSB #0202)
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500 Virginia Street, East, Suite 600
Post Office Box 3710
Charleston, West Virginia 25337-3710
(304) 345-4222

VERIFICATION

STATE OF ILLINOIS,

COUNTY OF COOK, to wit:

I, Allana Levy-Rogers, after first being duly sworn upon oath, state that I have read the foregoing, "**Petition for Writ of Mandamus With Oral Argument Requested,**" and that the facts and allegations contained therein are true and correct, except insofar as they are stated to be on information and belief, and that insofar as they are stated to be on information and belief, I believe them to be true.


ALLANA LEVY-ROGERS

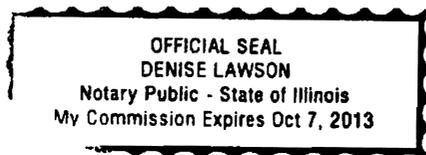
STATE OF ILLINOIS,

COUNTY OF COOK, to-wit:

Taken, subscribed and sworn to before me, the undersigned Notary Public, this date, June 1, 2012.

My commission expires: 10/7/2013.

{SEAL}




Notary Public