

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia ex rel. Jennifer A. Fillinger, RN,

Petitioner,

v.

CASE NO. 12-1055

**Laura S. Rhodes, Executive Director,
The West Virginia Board of Examiners for
Registered Professional Nurses, an
Administrative Agency of the State
West Virginia,**

Respondent.

Proposed

**REPLY TO SUMMARY RESPONSE TO
ORIGINAL JURISDICTION
PETITION FOR A WRIT OF PROHIBITION**

Presented by:

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QUESTIONS PRESENTED IN REBUTTAL

1. When the Petitioner presents a clear statutory limitation on the administrative agency’s jurisdiction and where there is no disputed issue of fact such that the jurisdictional question can be decided as a matter of law, may a writ of prohibition issue to prevent further proceedings within the agency?

2. When the Petitioner attacks the fundamental fairness of administrative process she has experienced to date, on the basis of procedural and substantive due process under the Constitution, and

where there is no disputed issue of fact such that the constitutional questions can be decided as a matter of law, may a writ of prohibition issue to prevent further flawed proceedings within the agency?

SUPPLEMENTAL STATEMENT OF THE CASE IN REBUTTAL

Respondent seeks to proceed under Rule 16(h) of the Rules of Appellate Procedure and to rely solely on the affirmative defense of exhaustion of administrative remedies, suggesting that there is no record below from a hearing or other proceeding as there would be in a traditional appeal of an administrative decision. However, Rule 16(h) requires a summary response to “contain an argument responsive to the questions presented, exhibiting clearly the points of fact and law being presented and the authorities relied on, and a conclusion, specifying the relief to which the party believes himself entitled. The Petitioner has presented a verified petition, containing three questions and 52 statements of fact, many supported by exhibits. Respondent has failed or refused to respond to any of the questions presented and to very few of the statements of fact. Instead, the Respondent asserted a blanket affirmative defense to the effect that the Petitioner had failed to exhaust her administrative remedies, notwithstanding that the Petition raised questions of subject matter jurisdiction based on a West Virginia

statute governing the power of the Agency and fundamental questions of constitutional due process as to the administrative process used by the agency.

Petitioner objects to use of the summary response process as envisioned by Respondent and repeats her request that the Court consider this petition under the 20(a) of the Rules of Appellate Procedure because it presents questions of first impression in this State and because the questions presented are important questions that affect over 30,000 nurses and other professionals governed by the Respondent agency. Not only does Petitioner seek oral argument and the issuance of a Rule to Show Cause, she also requests that this Honorable Court require the Respondent agency to respond specifically to the three questions presented and the 52 factual allegations contained in the petition.

A fundamental principle regarding the affirmative defense relied on by Respondent is that prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers. *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953). The first question presented in the Petition addresses both of these requirements and the statutory framework from which the question is derived, see WV Code 30-1-5(c). The Respondent essentially admits in the Response that the Agency did not comply with the statute. Thus, prohibition may lie in the absence of a fully developed administrative record and an appellate

process based on a final decision by a hearing examiner, the Board of Nursing, or a Circuit Judge, on appeal. There is no reason to develop the record below as to the first question presented, as there are no facts in dispute and the question can be answered as a matter of law. This is clearly an appropriate matter the issuance of a writ of prohibition.

In recent months, this court has granted a writ of prohibition in similar circumstances, though not involving an administrative agency, when it upheld the Federal Arbitration Act (FAA) as it and U. S. Supreme Court decisions interpreting it, thereby imposing severe limitations on a State Court's power to entertain contractual issues surrounding the arbitration provisions in question. *State ex rel. Johnson Controls, Inc. v. Tucker*, 229 W.Va. 486, 729 S.E.2d 808 (2012).

In actions involving the conduct of an administrative agency alleged to be acting in excess of its power or its subject matter jurisdiction, this Court has followed the principles enunciated in *Crawford* that are set forth above. See *Pugh v. Policemen's Civil Service Commission of the City of Beckley*, 214 W.Va. 498, 599 S.E.2d 691 (2003); and *State ex rel Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996), Syllabus Point 3.

This is a case that does involve an absence of jurisdiction, and it also includes a claim that the Agency exceeded its legitimate powers. The Petitioner sought to obtain a ruling from the Agency. Indeed, the Petitioner requested the

identity of an assigned hearing examiner by letter dated August 1, 2011, and the identity of witnesses to be called and exhibits to be presented if other than those already provided to Petitioner. See Appendix, page 118. There was never a response to this request, but on April 17, 2012, Petitioner by counsel sent a detailed email to Respondent herself and specifically asked that the document be treated as a motion to dismiss. See Appendix at pages 133 and 134. The motion, which in substance raises the same issues raised herein, was not favored with a response by the Respondent agency, its Executive Director, its counsel, or an appointed (but unknown to Petitioner) hearing examiner, although it specifically requested “a ruling from the Executive Director or the appropriate designee, i.e. the hearing examiner.”

Internally, there are no known agency rules or regulations designed to provide licensees against whom complaints have been made with a procedure for seeking or responding to motions for a continuance or pre-hearing motions as to dispositive matters that would or could obviate need for a hearing. Presumably, the Respondent agency holds the belief that it is the agency’s prerogative to unilaterally decide whether or not it needs a continuance, rather than to submit a motion to an impartial hearing examiner to decide whether there is good cause. There is no published process, rule or regulation to notify the licensee against whom a complaint has been made, of the identity of a hearing examiner, the

process by which the hearing examiner is chosen, or a mechanism for the responding licensee to investigate, participate in the selection, or to object to a particular hearing examiner.¹

The issues presented and the facts alleged in the Petition have nothing to do with the merits of the complaints against Petitioner. All relate to subject matter jurisdiction under the cited statute, whether or not the complaints are or have become time-barred, and whether or not there is a procedural mechanism to allow for dispositive or non-dispositive motions to be decided in advance of a hearing on the merits and whether or not the responding licensee is entitled to know the identity of the hearing examiner or to challenge the Board's selection of a hearing examiner for any reason. It is totally unnecessary and burdensome for Petitioner, or any similarly situated nurse, under these circumstances, to have to prepare for and present evidence on the merits of the underlying complaints when threshold jurisdictional and constitutional questions are in good faith presented in advance of the hearing. In the instant case, Petitioner gave Respondent ample opportunity to identify or appoint a hearing examiner and provided a detailed motion to raise the issues ultimately raised herein to challenge the Board's subject matter jurisdiction and other systemic issues of a non-substantive nature. This Court has considered

¹ In contrast, the Board of Medicine allows responding physicians to select among qualified hearing examiners well in advance of a scheduled hearing date, and that hearing examiner decides pre-hearing issues and has the power to grant or deny continuances. Likewise, the Lawyer Disciplinary Office designates a three person tribunal from among several hearing panels, at the time of issuance of a statement of charges and all pre-hearing matters are presented to the Chairman of the selected hearing panel.

and granted numerous writs of prohibition regarding constitutional challenges to agency processes or procedures. See *State ex rel. Hoover v. Berger, supra*; *State ex rel. Hoover v. Smith*, 198 W.Va. 507, 482 S.E.2d 124 (1997); *State ex rel. McGraw v. King*, 229 W.Va. 365, 729 S.E.2d 200 (2012); and *State ex rel. Riley v. Rudolph*, 212 W.Va. 767, 575 S.E.2d 377 (2002).

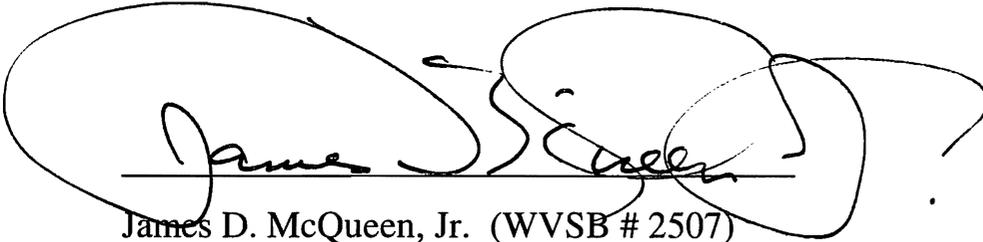
RESTATEMENT RE: ORAL ARGUMENT AND DECISION

The Petitioner believes that oral argument is necessary in this action and that said argument should be set as a Rule 20 argument. This petition presents questions that are important to all licensed professionals in the State of West Virginia, particularly those approximately 30,000 professionals governed by the Respondent agency. The questions presented herein are essentially issues of first impression that involve constitutional questions regarding the application of a statute and the absence of adequate regulations or rules by an administrative agency so to permit licensed professionals against whom complaints are made to have a constitutionally appropriate and timely level of procedural and substantive due process and fundamental fairness in administrative proceedings in which a professional license is vulnerable to suspension, revocation, or other discipline.

CONCLUSION

WHEREFORE, Petitioner, Jennifer A. Fillinger, respectfully requests that the Court issue a rule to show cause, hear argument in support of and in opposition to thereto, consider the facts alleged and established, the applicable statutory, constitutional and common law principles applicable to said facts, and issue a final order, writ, or judgment directing or compelling the Respondent to dismiss all charges against the Petitioner, with prejudice, and to grant such further legal and equitable relief as may be warranted in the premises.

**Jennifer A. Fillinger, Petitioner
By Counsel**



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