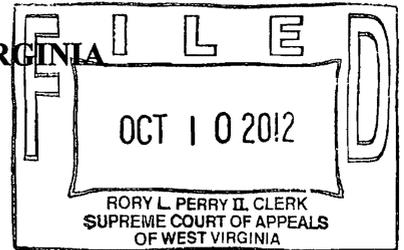

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-1055



STATE OF WEST VIRGINIA *ex rel.*
JENNIFER A. FILLINGER, RN,

Petitioner,

v.

LAURA RHODES, EXECUTIVE DIRECTOR,
THE WEST VIRGINIA BOARD OF EXAMINERS
FOR REGISTERED PROFESSIONAL NURSES,

Respondent.

SUMMARY RESPONSE TO
PETITION FOR WRIT OF PROHIBITION

DARRELL V. MCGRAW, JR.,
ATTORNEY GENERAL

GREGORY G. SKINNER
SENIOR ASSISTANT ATTORNEY GENERAL
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State Bar ID No. 7508
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Counsel for Respondent

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I.

INTRODUCTION

Come now the State Respondents, Laura Rhodes, Executive Director of the West Virginia Board of Examiners for Registered Professional Nurses, and the West Virginia Board of Examiners for Registered Professional Nurses (herein collectively referred to as “Respondent”), by counsel, Gregory G. Skinner, Senior Assistant Attorney General, and pursuant to Rule 16(g) of the Revised Rules of Appellate Procedure, submit this summary response to Petitioner’s petition for a writ of prohibition.

II.

STATEMENT OF THE CASE

The Respondent West Virginia Board of Examiners for Registered Professional Nurses is a State agency, enabled by West Virginia Code § 30-7-1 *et seq.*, and regulates the practice of registered professional nursing within the State of West Virginia.

The practice of registered professional nursing is a privilege, and any person engaged in the professional practice of registered nursing must possess the requisite experience and training, and shall be subject to the regulation and control of the Board. W. Va. Code §§ 30-1-1a and 30-7-1 *et seq.*

As a result, in order to practice registered professional nursing in the State, it is necessary to obtain and hold licensure through the Board. W. Va. Code § 30-7-2.

On July 14, 2005, Petitioner obtained full licensure, License No. 66716, by and through Respondent, and accepted employment with Charleston Area Medical Center, located in Charleston, West Virginia, as a licensed professional nurse.

On March 17, 2008, Petitioner was terminated from employment by Charleston Area Medical Center for suspected prescription drug and/or controlled substance diversion.

In October 2008, Petitioner obtained employment through Logan Regional Medical Center, located in Logan County, West Virginia, as a registered professional nurse.

In September 2009, Logan Regional Medical Center terminated Petitioner from employment for suspected prescription drug and/or controlled substance diversion.

Both Charleston Area Medical Center and Logan Regional Medical Center submitted complaints against Petitioner to Respondent, alleging that Petitioner had diverted prescription drugs and/or controlled substances from the medical facilities.

Respondent investigated the allegations against Petitioner, and offered Petitioner a consent decree in January, 2011, to resolve the complaints. Petitioner declined to accept the consent decree.

Respondent thereafter noticed a hearing for the complaints for July 26, 2011. Charleston Area Medical Center was unable to comply with a properly issued subpoena duces tecum relating to certain medical records prior to the hearing. As a result, due to Charleston Area Medical Center's inability to comply with the Board's subpoena, Respondent continued the hearing on July 25, 2011. Respondent admits that it did not provide Petitioner with a reason for the continuance.

Respondent rescheduled the hearing for September 8, 2011. Upon additional information obtained by Respondent from Charleston Area Medical Center prior to the scheduled hearing, Respondent deemed it necessary to amend the complaint and incorporate additional allegations against Petitioner in the complaints. Accordingly, Respondent continued the hearing.

The hearing was rescheduled for October 25, 2011. However, counsel for Respondent was scheduled for vacation out of the state on October 25, 2011. On September 27, 2011, counsel for Petitioner was informed that the hearing would not occur on October 25, 2011.

The hearing was rescheduled for the following week on November 1, 2011. Counsel for Respondent, however, suffered a medical emergency in late October, 2011, that required professional medical attention. As a result, the hearing scheduled for November 1, 2011, was cancelled and postponed.

Due to medical necessity, counsel for Respondent took a medical leave of absence from November, 2011, through mid-February, 2012.

Upon counsel's return to employment, Respondent set the complaints for hearing for May 22, 2012.

On May 17, 2012, Petitioner filed a Petition for a Writ of Prohibition and/or for Injunctive Relief in the Circuit Court of Kanawha County. (*See* Respondent's Exhibit 1, attached herein.) Anticipating the court would grant a stay of the hearing until such time the Petition could be ruled upon, the parties agreed to a stay of the previously scheduled hearing for the complaints against Respondent.

The court conducted oral arguments on the Petitioner's petition on June 7, 2012. Before the final entry of an Order by the court, Petitioner withdrew the petition from the court prior. A final Order by the Circuit Court of Kanawha County was not entered.

Petitioner subsequently filed the instant petition in the Supreme Court of Appeals of West Virginia.

To date, neither an administrative nor evidentiary record has yet to be established at any level below.

Given the lack of the same, Petitioner has failed to exhaust her administrative remedies before seeking extraordinary relief. Further, in the absence of an established record, Petitioner has failed to appropriately or adequately show that Respondent has abused or usurped its power or authority. For these reasons, Respondent respectfully requests the Supreme Court to deny Petitioner's petition for writ of prohibition.

III.

ARGUMENT

“The general rule is that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act.” Syl. pt. 1, *Daurette v. Traders Federal Savings & Loan Association*, 143 W. Va. 674, 104 S.E.2d 320 (1958); Syl. pt. 1, *Cowie v. Roberts*, 173 W. Va. 64, 312 S.E.2d 35 (1984); Syl. pt. 1, *Hechler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799 (1985).

Unless otherwise specifically exempted, the provisions of W. Va. Code § 30-1-1 *et seq.*, applies to every Chapter 30 board. Specifically, W. Va. Code § 30-1-1 provides that “[u]nless otherwise specifically provided, every board of examination or registration referred to in this chapter shall conform to the requirements prescribed in the following sections of this article.”

Respondent is neither excluded nor exempted from the provisions of W. Va. Code § 30-1-1 *et seq.*

Any party adversely affected by a final order or decision made by the board *after* a hearing is entitled to judicial review by a circuit court. W. Va. Code § 30-1-9.

Moreover, “the court or judge shall . . . hear and determine the case upon the record of the proceedings for the board. The court or judge may enter an order affirming, revising or reversing the decision of the board if it appears that the decision was clearly wrong.” *Id.*

“The judgment of the circuit court may be reviewed upon appeal in the supreme court of appeals.” *Id.*

In the instant matter, however, at no point during the proceedings has Respondent, by and through its appointed hearing examiner or otherwise, ruled upon any of the issues presented by Petitioner.

Although true that the hearing has been postponed a few times, Petitioner should have moved her motion to dismiss before the appointed hearing examiner on May 22, 2012. Instead, on April 17, 2012, Petitioner sent to the Executive Director of the Board, via e-mail, a list of reasons why Petitioner believed the complaints should be dismissed.

A week before the May 22, 2012, hearing, Petitioner filed a Petition for Writ of Prohibition in the Circuit Court of Kanawha County, seeking that the court prohibit Respondent from conducting the hearing against Petitioner. (*See* Respondent's Exhibit 1.)

West Virginia Code § 53-1-1 provides that a "writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers."

However, an "inferior court" has yet to exercise any authority or power in this matter. An "inferior court" has yet to develop a record based upon the facts. As a result of failing to pursue a motion to dismiss before the hearing examiner appointed by Respondent, an evidentiary record has yet to be established and developed. Moreover, the hearing examiner has yet to rule on any matters, or make any decisions relating to any issue whatsoever.

As such, a decision or order that may be reviewed by the Court pursuant to W. Va. Code § 30-1-9 has yet to be rendered. Given the lack of an order or decision by the hearing examiner, it therefore follows that Petitioner is not a party that has been adversely affected by any such order or

decision (ie, the denial of a motion to dismiss), and is therefore not entitled to judicial review by a circuit court as provided by W. Va. § 30-1-9.

Even more so, because an “inferior court” has yet to rule on any of the issues addressed Petitioner’s e-mailed request for dismissal, it cannot be argued that an “inferior court” has usurped or abused its authority or power, as contemplated by W. Va. Code § 53-1-1. Moreover, it has not been established that Respondent’s hearing examiner is without the authority to grant a motion to dismiss. The Respondent maintains that hearing examiner has such authority to recommend to the board that a matter be dismissed.

In fact, the Respondent notes that Petitioner included within the instant petition a large number of exhibits within her attached appendix. Respondent would note that no testimony has been offered or taken in regard to any of the exhibits, and that such exhibits are not a part of any record previously established before any court, tribunal, or hearing examiner.

In this regard, the entirety and full substance of Petitioner’s arguments are based upon factual allegations that have yet to be determined, proven, or otherwise placed upon any record whatsoever. Given such, the Supreme Court has no factual or evidentiary basis upon which to make any ruling at all, even if this matter was appropriately before the Court. To be absolutely clear, not one witness has been placed under oath to testify on behalf of any of the factual allegations posed by Petitioner.

Had Petitioner proceeded appropriately forward through the administrative process, step by step, as contemplated by *Daurelle*, both Petitioner and Respondent would have developed a proper record upon which this Court could review and make judgment upon.

Clearly, though, this has not happened here.

Respondent respectfully requests that the Court deny Petitioner's petition for writ of prohibition. In the event this Court denies such Petition, Respondent shall set this matter for an administrative hearing.

At such time and place, Petitioner will be free to present and argue those motions before the hearing examiner she deems fit. Should Petitioner receive an adverse ruling, at that time Petitioner may seek relief with the circuit court. In any event, in the absence of any substantive evidentiary record whatsoever, Petitioner should not be allowed to petition this Court without first properly addressing these matters below, and establishing a record upon which review may be conducted.

IV.

CONCLUSION

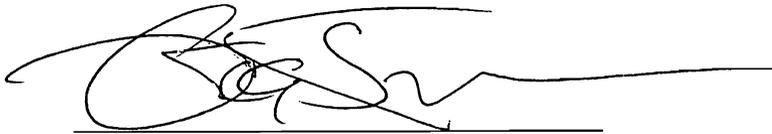
WHEREFORE, based upon the foregoing, the State Respondents respectfully request that this Court reject the Petitioner's petition.

Respectfully submitted,

LAURA RHODES, EXECUTIVE DIRECTOR,
WEST VIRGINIA BOARD OF EXAMINERS
FOR REGISTERED PROFESSIONAL
NURSES,

By Counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



GREGORY G. SKINNER
SENIOR ASSISTANT ATTORNEY GENERAL
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State Bar ID No. 7508
Telephone: (304) 558-2021
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EXHIBIT 1

CIVIL CASE INFORMATION STATEMENT
CIVIL CASES
 (Other than Domestic Relations)

In the Circuit Court, Kanawha County, West Virginia

FILED
 2012 MAY 17 PM 2:34
 GATSON, CLERK
 CO. CIRCUIT COURT

I. CASE STYLE:

Plaintiff(s)
Jennifer A. Fillinger, R.N.

Case # 12-Misc-271
Judge: Bloom

vs.

Defendant(s) The West Virginia Board of Ex
101 Dee Drive, Suite 102
Charleston, WV 25311-1620
City, State, Zip

<u>Days to Answer</u>	<u>Type of Service</u>
_____	_____
_____	_____

Street

City, State, Zip

Street

City, State, Zip

Street

City, State, Zip

Original and 3 copies of complaint enclosed/attached.

PLAINTIFF: Jennifer A. Fillinger, R.N. DEFENDANT: The West Virginia Board of Examiners for Registered	CASE NUMBER:
----------------------------------------------------------------------------------------------------------	--------------

II. TYPE OF CASE:

- | | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <input type="checkbox"/> General Civil

<input type="checkbox"/> Mass Litigation
(As defined in T.C.R. Rule XIX (c))

<input type="checkbox"/> Asbestos
<input type="checkbox"/> Carpal Tunnel Syndrome
<input type="checkbox"/> Diet Drugs
<input type="checkbox"/> Environmental
<input type="checkbox"/> Industrial Hearing Loss
<input type="checkbox"/> Silicone Implants
<input type="checkbox"/> Other: _____ | <input type="checkbox"/> Adoption

<input type="checkbox"/> Administrative Agency Appeal

<input type="checkbox"/> Civil Appeal from Magistrate Court

<input type="checkbox"/> Miscellaneous Civil Petition

<input type="checkbox"/> Mental Hygiene

<input type="checkbox"/> Guardianship

<input type="checkbox"/> Medical Malpractice |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
- Habeas Corpus/Other Extraordinary Writ
- Other: Writ of Prohibition

III. JURY DEMAND: Yes No

CASE WILL BE READY FOR TRIAL BY (MONTH/YEAR): 09 / 2012

IV. DO YOU OR ANY OF YOUR CLIENTS OR WITNESSES IN THIS CASE REQUIRE SPECIAL ACCOMMODATIONS DUE TO A DISABILITY? YES

NO

IF YES, PLEASE SPECIFY:

- Wheelchair accessible hearing room and other facilities
 Interpreter or other auxiliary aid for the hearing impaired
 Reader or other auxiliary aid for the visually impaired
 Spokesperson or other auxiliary aid for the speech impaired
 Other: _____

Attorney Name: James D. McQueen, Jr.
 Firm: McQueen Davis, PLLC
 Address: 940 4th Ave., Ste. 222, Huntington
 Telephone: 304-522-1344
 Dated: 05/17/2012

Representing:

- Plaintiff Defendant
 Cross-Complainant Cross-Defendant


 Signature

Proceeding Without an Attorney

IN THE CIRCUIT COURT OF Kanawha COUNTY, WEST VIRGINIA

JENNIFER A. FILLINGER, R.N.,

Petitioner,

v.

CIVIL ACTION NO. 12-misc-271
JUDGE Bloom

THE WEST VIRGINIA BOARD OF
EXAMINERS FOR REGISTERED
PROFESSIONAL NURSES, an
Administrative Agency of the State
West Virginia,

Respondent.

FILED
2012 MAY 17 PM 2:34
KATHY S. GATSON, CLERK
KANAWHA CO. CIRCUIT COURT

PETITION FOR A WRIT OF PROHIBITION AND/OR FOR INJUNCTIVE RELIEF

For her petition against the Respondent, the West Virginia Board Examiners for Registered Professional Nurses, “the Respondent,” Petitioner, Jennifer A. Fillinger, RN, “Fillinger” or “Petitioner,” (formerly known as Jennifer A. Vance and Jennifer A. Thompson), by counsel, James D. McQueen, Jr., Amanda J. Davis, and the firm of Baker Davis, PLLC, alleges and says as follows:

The Parties, Jurisdiction and Venue

1. The Petitioner is a resident and citizen of Harts, Lincoln County, West Virginia.
2. The Respondent is a Board established by the West Virginia Legislature and is tasked to regulate the practice of registered professional nurses, inter alia, and to follow procedures contained in Chapter 29A, Article 4 of the West Virginia Code as amended.
3. This Court has subject matter jurisdiction to hear this controversy pursuant to §29A-5-4 and §30-1-9 because Petitioner has been prejudiced by reason of Respondent’s conduct or neglect that is:

- a. In violation of constitutional or statutory provisions; or
 - b. In excess of the statutory authority or jurisdiction of the agency;
or
 - c. Made upon unlawful procedures; or
 - d. Affected by other error of law; or
 - e. Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
 - f. Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
4. Venue is appropriate in this Court pursuant to §14-2-2 of the West Virginia Code as amended.

Factual Allegations

5. Petitioner is 28 years old and resides in Harts, Lincoln County, West Virginia with her husband, Donavon Fillinger and two children, ages 3 and 8 months.
6. Petitioner graduated from Harts High School in 2002 with a 4.0 cumulative grade point average, and she received her associate degree in nursing in 2005 from the Southern West Virginia Community and Technical College in Mt. Gay, Logan County, West Virginia, with a cumulative grade point average of 3.5.
7. Petitioner was licensed as a registered professional nurse (RN) was initially issued on June 15, 2005 as Temp 001932, until passing her boards and thus receiving her full license July 14, 2005, as license no. 66716.
8. Petitioner's license has been renewed every year since 2005, without restriction, despite the complaints hereinafter described.
9. Petitioner began working at CAMC as an RN on or about June 6, 2005.
10. Petitioner was terminated from her employment at CAMC on March 17, 2008, based on data collected in a machine designed to dispense medicine to patients which

indicated that during the period between December 7, 2007 and March 13, 2008, the use of Petitioner's pass code to access the machine did not correlate with either drug inventories or patient records, by reason of which CAMC concluded that Petitioner was unlawfully obtaining prescription narcotics for personal use or distribution.

11. The machine at CAMC was managed by personnel in the pharmacy department, and Petitioner does not understand the inter-workings thereof in terms of replacement of inventory or the maintenance of records of dispensed medicine.
12. Petitioner has continuously denied any improper acquisition of drugs and any improper use or distribution of drugs to others, and on information and belief, neither of the complaining former employers nor the Respondent has any evidence relating to Petitioner's improper use or abuse or distribution of drugs.
13. Petitioner offered, at the time of termination to undergo a drug screen, but CAMC refused to administer one.
14. On March 24, 2008, a complaint was filed by CAMC, and on March 31, 2008, Petitioner was provided notice of the Complaint.
15. On or before October 8, 2009, Respondent had received all of CAMC's pertinent medical records.
16. In August or September, 2008, Petitioner moved to Beckley and was hired as an RN at Raleigh General Hospital, but shortly thereafter realized that she was pregnant and decided to move back to Harts to be near her parents and resigned that position after approximately one month of employment.
17. On September 22, 2008, Petitioner was employed by Logan Regional Medical Center as an RN.

18. On September 10, 2009, Petitioner was terminated by Logan Regional Medical Center, based on data collected from a different brand and design of a machine used to dispense medicine to patients, which indicated that during the period between August 1, 2009 until September 1, 2009 , the use of Petitioner's card to access the machine did not correlate on 7 occasions with either drug inventories or patient records, by reason of which Logan Regional Medical Center concluded that Petitioner was unlawfully obtaining prescription narcotics for personal use or distribution.
19. Prior to termination, Logan Regional Medical Center permitted Petitioner to undergo a drug screen to investigate for the presence of drugs in her urine, and on September 13, 2009, the test result was negative.
20. On September 22, 2009, Logan General Medical Center filed a complaint with Respondent.
21. On October 5, 2009, Respondent subpoenaed the pertinent records from Logan Regional Medical Center.
22. Petitioner was not scheduled for a hearing date on either or both of the two complaints until July 26, 2011.
23. On the day before the hearing, July 25, 2011, by facsimile time-stamped at 3:49 p.m., Petitioner's counsel, the undersigned, received a letter from Alice Faucett, in-house counsel for the Respondent, notifying counsel that the hearing is being continued. No reason was given for the continuance and no motion was made by or on behalf of the Respondent to allow Petitioner to object or otherwise respond to the motion. Further, there is no indication on the letter that either complainant was notified or agreed to the continuance. *See Exhibit 1.*

24. By letter dated July 29, 2011, Petition received notice that a hearing was set for September 8, 2011. *See Exhibit 2.*
25. On the day before the hearing, September 7, 2011, by facsimile time-stamped at 12:29 p.m., Petitioner's counsel, the undersigned, received a letter from Laura Rhodes, RN, Executive Director of Respondent, informing counsel that the hearing was being continued because that morning the Respondent received records on 28 new patients and that Respondent would be amending the complaint. No explanation was given as to why the records of 28 new patients had not been obtained or provided to Respondent in the years preceding the scheduled hearings. No motion was made by or on behalf of the Respondent to allow Petitioner to object or otherwise respond to the motion. Further, there is no indication on the letter that either complainant was notified or agreed to the continuance. *See Exhibit 3.*
26. By agreement, but before a notice of hearing was received, a third hearing was to be scheduled on October 25, 2011, but on September 27, 2011, Petitioner's counsel received a call from the Respondent's staff advising that the Assistant Attorney General assigned to handle the hearing on behalf of the Respondent would not be available. *See Exhibit 4.*
27. On September 28, 2011, Petitioner's counsel received additional medical records from the Respondent. *See Exhibit 5.*
28. On October 5, 2011, Respondent scheduled another hearing on November 1, 2011, and indicated that the assigned Assistant Attorney General was available at that time.
29. On October 17, 2011, Respondent received a Complaint and Notice of Hearing signed by Laura Rhodes, RN, Executive Director of Respondent, but this pleading did not

contain any new or different allegations as referred to in paragraph 25 above. *See* Exhibit 6.

30. On the day before the scheduled November 1, 2011 hearing, Petitioner's counsel received a call from an employee of the Respondent, Karen Blankenship advising that the hearing has been continued indefinitely again. No explanation was given as to why the hearing was continued. No motion was made by or on behalf of the Respondent to allow Petitioner to object or otherwise respond to the motion. Further, there is no indication that either complainant was notified or agreed to the continuance.
31. On April 16, 2012, Petitioner's counsel received a notice of hearing that had been set on May 22, 2012. *See* Exhibit 7.
32. On May 12, 2012, Petitioner moved the Respondent, by correspondence directed to Laura Rhodes, Respondent's Executive Director, to dismiss the Complaint or Complaints against Petitioner for a violation of statute, lack of subject matter jurisdiction, and/or for a failure to prosecute, reciting legal grounds and factual predicate for the motion. *See* Exhibit 8.
33. To date, there has been no notification of a hearing on the motion, no identification of the identity of a hearing examiner to hear the motion, and no response to the motion.
34. In each of the prior scheduled hearings, Petitioner incurred significant attorneys' fees to investigate and prepare her and others for the scheduled hearing, to date totaling in excess of \$15,000, all of which Petitioner has paid through gifts and loans from her husband and parents.

35. Petitioner has continuously denied any improper acquisition of drugs and any improper use or distribution of drugs to others, and on information and belief, neither of the complainant former employers nor the Respondent has any evidence relating to Petitioner's improper use or abuse or distribution of drugs.
36. Petitioner has never been accused, arrested, or investigated by any law enforcement agency in relation to any wrongdoing, but more particularly for the unlawful use or distribution of drugs.
37. Petitioner has never been treated by any medical provider for any improper use or abuse of drugs.
38. As a course of conduct, Respondent routinely treats nurses and other licensed practitioner under its regulatory control in a manner consistent with the allegations contained in paragraphs 1-37.
39. As a course of conduct, Respondent routinely continues hearings at the last minute without giving the respondent professional a reason or explanation or an opportunity to be heard in opposition to further delay in their proceeding.
40. As a regulatory agency, Respondent does not have a process or procedure to allow for pre-hearing motions or arguments or even involve a hearing examiner who could hear such motions in advance of a hearing.
41. On information and belief, from a review of Petitioner's file at the office of the Respondent, on only one occasion has Respondent provided a complaint in this case with a Status Report, on September 22, 2008, to CAMC. In Petitioner's file at the Respondent's office, no other notices, status reports or correspondence appears that is addressed to the complainants.

42. On information and belief, the complainants CAMC and Logan Regional Medical Center have not agreed in writing at any time to extend the time for a final hearing.
43. It has been more than four years since Petitioner received notice of the complaint by CAMC and nearly 3 years since Petitioner received notice of the complaint by Logan Regional Medical Center. It took the Respondent almost three years to set a time for the final ruling in this case, and then on four occasions during the last year, Respondent has set a hearing and on three of those occasions has unilaterally continued the same on the day before the scheduled hearing date.
44. West Virginia Code §30-1-5 provides as follows:

”(c) Every board referred to in this chapter has a duty to investigate and resolve complaints which it receives and shall, within six months of the complaint being filed, send a status report to the party filing the complaint by certified mail with a signed return receipt and within one year of the status report's return receipt date issue a final ruling, unless the party filing the complaint and the board agree in writing to extend the time for the final ruling.”

45. Without reason or excuse, Respondent has violated §30-1-5 repeatedly in this case, to the extent that, upon information and belief, the Respondent's conduct in this case is representative of a course of conduct by Respondent that is designed and intended to force nurses against whom complaints have been lodged to capitulate and sign a consent order disposing of the complaint, thus depriving them of an opportunity to be heard.

Causes of Action

I. Subject Matter Jurisdiction

46. By reason of the Respondent's failure to comply with the forgoing statute, §30-1-5, the Respondent no longer has jurisdiction over the subject matter of this claim.

47. The statute commands that the Respondent “shall” within six months of the complaint being filed, issue a status report to the complainant by certified mail with a signed return receipt.
48. The statute commands that the Respondent “shall” issue a final ruling within one year, unless there is an agreement in writing to extend the time for final ruling.
49. There is no conduct by Petitioner that has impeded the administrative process to allow a hearing on the complaints against Petitioner.
50. Accordingly, the Complaints against Petitioner should be dismissed with prejudice.

II. Writ of Prohibition

51. As a matter of due process under the State and Federal Constitutions, Petitioner has been deprived of fundamental rights and fairness that should be a part of the administrative process superintended by the Respondent.
52. The Respondent has failed to promulgate adequate administrative and procedural regulations to insure that nurses and other health care providers, such as Petitioner, are treated fairly, reasonably and predictably when complaints are made against their licenses.
53. The West Virginia Supreme Court of Appeals has long recognized that the right to practice a profession is a valuable franchise in the nature of a “property right.” *See West Virginia State Medical Ass’n v. Public Health Council of West Virginia*, 125 W. Va. 152, 23 S.E.2d 609 (1942). Moreover, because a license to practice a profession is considered a valuable right it will be protected by the law. *Wallington v. Zinn*, 146 W. Va. 147, 188 S.E.2d 526 (1961). As such, a person’s professional license may not be

revoked without some form of due process being accorded to that individual. *See State ex rel. Hoover v. Smith*, 198 W. Va. 507, 482 S.E.2d 124 (1997).

54. In determining whether to entertain and issue a writ of prohibition where an entity has exceeded its legitimate powers, a Court should look at five factors: (1) whether a party seeking the writ has no other adequate means, such as direct appeal to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. *Feathers v. Board of Medicine*, 211 W. Va. 96, 562 S.E.2d 488 (2001).

55. "Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syl. pt. 2, *Feathers*.

56. In *Hoover*, the Court held that "due process of law within the meaning of the State and Federal Constitutional provisions extends to actions of administrative officers and tribunals as well as to the judicial branches of governments." *See* Syl. pt. 1 of *Hoover*.

The Court also held that:

When due process applies, it must be determined what process is due and consideration of what procedures due process may require under a given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been impaired by the government action. Syl. pt. 2 of *Hoover*.

57. Accordingly, the Court should direct the Respondent to dismiss the complaints against Petitioner, with prejudice.

III. Failure to Prosecute

58. Rule 41(b) of the West Virginia Rules of Civil Procedure provides that the failure of the plaintiff (Respondent herein) to prosecute or to comply with these rules or any order of the court, a defendant (Petitioner herein) may move for dismissal of an action or of any claim against the defendant (Petitioner herein).

59. On the basis of the foregoing factual allegations and the points of law hereinabove recited or quoted, Petitioner has established sufficient grounds to avail herself of the application of said rule, and does hereby do so.

60. The rule further provides that a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or improper venue, operates as an adjudication on the merits.

61. Accordingly, the Court should dismiss the complaints filed in the Respondent agency, with prejudice, for failure to prosecute.

62. Respondent has agreed to stay all further administrative proceedings pending the entry of a final order in this action.

WHEREFORE, Petitioner, Jennifer A. Fillinger, respectfully requests that the Court hear evidence in support of this action and consider the applicable statutory and constitutional law applicable to this action, and issue a final order, writ, or judgment directing or compelling the Respondent to dismiss all charges against the Petitioner, with prejudice.



Counsel for Petitioner, Jennifer A. Fillinger, R.N.

James D. McQueen, Jr. (WVSB # 2507)

Amanda J. Davis (WVSB # 9375)

McQUEEN DAVIS, PLLC

The Frederick, Suite 222

940 Fourth Avenue

Huntington, West Virginia 25701

Phone: (304) 522-1344

Facsimile: (304) 522-1345

E-mail: jmcqueen@mcqueendavis.com

adavis@mcqueendavis.com

Of counsel for Petitioner

CERTIFICATE OF SERVICE

I, Gregory S. Skinner, Senior Assistant Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing "Summary Response to Petition for Writ of Prohibition" was served by depositing the same, postage prepaid in the United States mail, this 10th day of October, 2012 addressed as follows:

James D. McQueen, Esquire
McQueen Davis PLLC
940 4th Ave., Suite 222
Huntington, WV 25701

A handwritten signature in black ink, appearing to read 'G. S. Skinner', written over a horizontal line.

GREGORY S. SKINNER

Exhibits on File in Supreme Court Clerk's Office