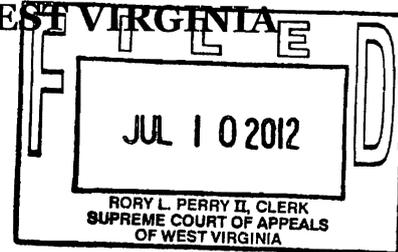


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 12-0422



Ferdinand Sorongon,

Petitioner,

v.

**West Virginia Board Of Physical
Therapy,**

Respondent.

**Appeal from a final order
of the Circuit Court of Kanawha
County (11-AA-119)**

PETITIONER'S AMENDED BRIEF

Counsel for Petitioner Ferdinand Sorongon

Charles M. Johnson (WV Bar #4262)

Counsel of Record

Donald L. Stennett (WV Bar #3593)

FROST BROWN TODD LLC

500 Lee Street East, Suite 401

Charleston, West Virginia 25301

Phone: (304) 345-0111

E-mail: cmjohnson@fbtlaw.com

dstennett@fbtlaw.com

TABLE OF CONTENTS

STATEMENT OF THE CASE.....1

- I. Mr. Sorongon Builds and Maintains a Successful Physical Therapy Practice in West Virginia..... 1
- II. The West Virginia Board of Physical Therapy Investigates Mr. Sorongon’s Practice..... 2
- III. Cynthia Fox Conducts an Inspection of Mr. Sorongon’s Dunbar Facility. 3
- IV. The Board Issues a Statement of Charges Against Mr. Sorongon. 4
- V. The Board Conducts a Hearing on the Statement of Charges and Revokes Mr. Sorongon’s License. 6
- VI. The Circuit Court Finds the Board’s Final Order to Be in Error, But Affirms the Order on More Limited Grounds.7

SUMMARY OF ARGUMENT..... 8

STATEMENT REGARDING ORAL ARGUMENT..... 10

ARGUMENT 10

- I. STANDARD OF REVIEW10
- II. THE CIRCUIT COURT ERRED IN APPLYING A “DIRECT SUPERVISION” REQUIREMENT TO THE OVERSIGHT OF A PHYSICAL THERAPIST ASSISTANT, A LICENSED PROFESSIONAL WHO DOES NOT REQUIRE DIRECT SUPERVISION..... 11
- III. THE CIRCUIT COURT ERRED IN APPLYING A “DIRECT LINE OF SIGHT” REQUIREMENT TO THE SUPERVISION OF A PHYSICAL THERAPY AIDE BECAUSE THIS REQUIREMENT WAS NOT FORMALLY ADOPTED AS THE STANDARD BY THE BOARD OF PHYSICAL THERAPY UNTIL ALMOST ONE YEAR LATER.13
 - A. The Circuit Court May Not Retrospectively Apply Legislative Rules Enacted After the Board Issued Its Statement of Charges.....13
 - B. The Board’s Ad Hoc Interpretation of “Direct Supervision” Did Not Provide Mr. Sorongon Fair Notice of His Responsibilities.....15
- III. IN REVOKING PETITIONER’S LICENSE BASED ON STANDARDS NOT YET FORMALLY ADOPTED, THE BOARD EXCEEDED ITS STATUTORY AUTHORITY.19

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

<u>C&P Tel. Co. v. Public Service Comm’n</u> , 171 W.Va 708, 301 S.E.2d 798 (1983)	16
<u>Chico Dairy Co. v. W. Va. Human Rights Comm’n</u> , 181 W.Va. 238, 382 S.E.2d 75 (1995)	19
<u>Connally v. Gen. Construction Co.</u> , 269 U.S. 385 (1926)	20
<u>Coordinating Council for Indep. Living, Inc. v. Palmer</u> , 209 W.Va. 274, 546 S.E.2d 454 (2001)	18
<u>Pressley Ridge Schs., Inc. v. Stottlemeyer</u> , 947 F. Supp. 929 (S.D.W.Va 1996)	16
<u>Shanholtz v. Monongahela Power Co.</u> , 165 W.Va. 305, 270 S.E.2d 1978 (1980)	16
<u>State ex rel. Hoover v. Smith</u> , 198 W.Va. 507, 482 S.E.2d 124 (1997)	8
<u>United States v. Caceres</u> , 440 U.S. 741, (1979)	16
<u>Wheeling-Pittsburgh Steel Corp. v. Rowing</u> , 205 W.Va. 286, 517 S.E.2d 763 (1993)	11
<u>Williams v. West Virginia Bd. of Exam’rs</u> , 215 W.Va. 237, 599 S.E.2d 660 (2004)	11

Statutes

W.Va. Code § 29A-1-2(d)	19
W.Va. Code § 29A-5-4.....	11
W.Va. Code § 29A-5-4(g)	11
W.Va. Code § 30-1-1	2
W.Va. Code § 30-20-1	2, 21
W.Va. Code § 30-20-3.....	13, 14, 15, 17

W.Va. Code § 30-20-12	17
W.Va. Code § 30-20-19	2, 23
W.Va. Code § 30-20-19(g)	22
W.Va. Code § 30-20-22.....	19

Regulations

W.Va. C.S.R. § 16-1-1.....	22
W.Va. C.S.R. § 16-1-2-2.5 (effective June 16, 2011).....	15, 20
W.Va. C.S.R. § 16-1-2-2.7 (effective June 16, 2011).....	15, 20
W.Va. C.S.R. § 16-1-8.3	13

ASSIGNMENT OF ERRORS

- I. Whether the Circuit Court erred in affirming the Board of Physical Therapy's revocation of Petitioner's physical therapist license when it applied a "direct supervision" requirement to petitioner's oversight of a physical therapist assistant, who is a licensed professional and does not require direct supervision under West Virginia law?
- II. Whether the Circuit Court erred in affirming the Board of Physical Therapy's revocation of Petitioner's physical therapist license when it applied a "direct line of sight" requirement to Petitioner's supervision of a physical therapy aide before this requirement was formally adopted as the West Virginia standard by the Board of Physical Therapy?
- III. Whether in revoking Petitioner's physical therapy license when it applied the "direct line of sight" standard that had not yet been formally adopted, the Board of Physical Therapy exceeded its statutory authority?

STATEMENT OF THE CASE

I. Mr. Sorongon Builds and Maintains a Successful Physical Therapy Practice in West Virginia.

Petitioner Ferdinand Sorongon has practiced physical therapy in West Virginia for more than twenty years. (A.R. 262.) An immigrant from the Philippines, Mr. Sorongon has dedicated his life to this profession and has helped other immigrants to become successful healthcare professionals in this country. (A.R. 262–63.) After working for a handful of nursing homes and physical therapy centers, Mr. Sorongon opened his own practice, Kanawha Valley Physical Therapy, which operated facilities in Dunbar and Teays Valley, West Virginia. (A.R. 262–63.) Mr. Sorongon has successfully

treated patients at the Kanawha Valley facilities for over fifteen years. (A.R. 262–63.) His patients are fond of him and appreciate his commitment to their well-being. (A.R. 281–312.)

II. The West Virginia Board of Physical Therapy Investigates Mr. Sorongon’s Practice.

The practice of physical therapy is regulated by the West Virginia Board of Physical Therapy, which is the administrative agency charged with licensing authority for physical therapists and physical therapist assistants under W.Va. Code § 30-1-1, et seq. and W.Va. Code § 30-20-1, et seq. In connection with this authority, the Board may investigate physical therapists and their practices to ensure compliance with statutes and regulations. W.Va. Code § 30-20-19(a). If, after concluding its investigation, the Board believes that a physical therapist has violated the statute or a duly promulgated legislative rule governing physical therapy practice or committed any of the specific infractions identified in W.Va. Code § 30-20-19(g), the Board may issue a complaint against the physical therapist outlining the charged violations. W.Va. Code. § 30-20-19(d). The matter may then proceed to a hearing and, if the Board proves a violation by a preponderance of the evidence, the Board may take a variety of disciplinary actions against the physical therapist, including revocation of his or her license and the imposition of sanctions. W.Va. Code § 30-20-19(d)(g).

In 2008, for the first time in Mr. Sorongon’s tenure as a physical therapist, the West Virginia Board of Physical Therapy inspected the Kanawha Valley facility and identified concerns about Mr. Sorongon’s supervision of an athletic trainer working at the facility. (A.R. 262–63.) Mr. Sorongon disagreed with the Board’s findings, but rather than incur the time and expense of fighting the issue, Mr. Sorongon agreed to

sign a Consent Agreement and Order. (A.R. 263, 316–22.) As part of this Agreement, the Board was to conduct random inspections of the Kanawha Valley facility for a period of two years. (A.R. 263–64, 320.)

The first year of this probationary period went by without incident, as periodic Board inspections found no violations. (A.R. 42–45.) In March, 2010, however, a disgruntled employee of Kanawha Valley called the Board to complain about Mr. Sorongon. (A.R. 45–46.) In response to this complaint, the Board sent an investigator, Shannon Sondgrass, to Kanawha Valley to conduct an unannounced inspection. (A.R. 46–47.) Sondgrass did not report any violations based upon her visit, but did suggest a follow-up investigation. (A.R. 48.)

III. Cynthia Fox Conducts an Inspection of Mr. Sorongon’s Dunbar Facility.

On May 26, 2010, Cynthia Fox visited the Kanawha Valley facility in Dunbar, West Virginia to conduct another unannounced inspection for the Board. (A.R. 98.) Ms. Fox arrived at the facility at approximately 1:35 to begin her inspection. (A.R. 99.) She was greeted by a receptionist and waited approximately five minutes before she was taken through the facility and ultimately to the office area to meet with Mr. Sorongon. (A.R. 99–100.) On the way back to the office area, Ms. Fox alleges she briefly glanced into the gym and observed a physical therapy aide, Sherry Sayre (“PT Aide Sayre”), standing next to a patient, who was “sitting on a mat table” and apparently “doing some sort of a seated exercise type thing.” (A.R. 105–07.) After a brief introduction with Mr. Sorongon, Ms. Fox walked back through the facility to the gym area. (A.R. 104–06.) At this point, PT Aide Sayre and the patient were both seated on the mat. (A.R. 109.) Ms. Fox alleges that she also saw another patient in the gym, who was using a wall ladder to

pull himself up from a wheelchair to practice standing and sitting, but PT Aide Sayre was not interacting with this patient. (A.R. 110.) Ms. Fox later confirmed that this patient was scheduled for treatment with Mr. Sorongon to begin at 2:00 p.m. that day, and records confirmed that Mr. Sorongon did provide one hour of treatment for this patient. (A.R. 129–30, 338–39.)

While observing the gym area, Stephen Jeffrey, an athletic trainer (“AT Jeffrey”), entered the gym to work on a nearby computer. (A.R. 113–14.) Ms. Fox spoke to AT Jeffrey, but did not observe AT Jeffrey interact with any patients. (A.R. 114–15.) Ms. Fox then inspected the “plinth area” of the facility.¹ Ms. Fox did not observe any staff or patients in the plinth area, but was concerned about whether someone in the gym could see or hear someone providing treatment in the plinth area. (A.R. 117.) To test her concerns, Ms. Fox stood in the plinth area and “shouted out for Mr. Sorongon.” (A.R. 117.) When no one responded, Ms. Fox alleges that she “ran back down the hall” to make sure that people were in the gym and observed Mr. Sorongon and PT Aide Sayre in the gym working with a patient. (A.R. 118.) Finally, Ms. Fox briefly introduced herself to Kate Lambdin, a licensed physical therapist assistant who was working with two patients in the facility’s pool. (A.R. 120.) Ms. Fox left the Dunbar facility around 2:30 p.m., and did not conduct any further inspections of either the Dunbar or Teays Valley facilities. (A.R. 143, 148.)

IV. The Board Issues a Statement of Charges Against Mr. Sorongon.

On July 1, 2010, the Board issued the Statement of Charges against Mr. Sorongan. (A.R. 334–37.) In the weeks following her inspection of the Dunbar facility,

¹ The “plinth area” of the facility is a space designed for treatments involving ultrasound, electronic stimulus and deep heating modalities. (A.R. 100–03.)

Ms. Fox continued her investigation by reviewing documents and interviewing other patients and employees. (A.R. 176–77.) Ms. Fox did not complete her investigation prior to the issuance of a Statement of Charges against Mr. Sorongon on July 1, 2010. (A.R. 334–37.) Ms. Fox cannot establish which portions of her interviews and document review had been completed and submitted to the Board before the Board issued the Statement of Charges. (A.R. 176–77.) Although the Statement of Charges makes vague references to interviews and document review, on its face, the Statement of Charges does not detail any factual basis for the charges except Ms. Fox’s May 26, 2010 visit to the Dunbar facility. (A.R. 334–37.) The majority of witnesses the Board presented at the hearing confirmed that they did not have any role in the Board’s investigation until months after the Board issued the Statement of Charges. (A.R. 209, 227, 251.)

The Statement of Charges contains allegations that Mr. Sorongon was improperly supervising physical therapy aides and assistants:

8. That on May 26, 2010, the Board’s Ethics Investigator, Cynthia Fox conducted an unannounced site visit.
9. That during this visit the Ethics Investigator found violations of the supervision ratio by observing the Respondent’s treatment activities that day along with interviewing staff and patients and further record review.
10. That it was discovered that the Respondent routinely supervises all three of his staff, which includes two physical therapy aides and a physical therapist assistant, while they are performing direct patient care.
11. That due to the physical layout of the Respondent’s facility that direct supervision of a physical therapy aide performing treatments in the plinth area, which are routinely performed by Aide Stephen Jeffrey, while the Respondent is in the gym would not be possible by the Respondent.

12. That Physical Therapy Aide Stephen Jeffrey is being supervised by Physical therapist assistant Kate Lambdin while he is conducting patient treatments.
13. That the Board did review all the information obtained during the investigation and based on that review, did recommend a finding of probable cause regarding the lack of appropriate supervision by a licensed physical therapist, lack of appropriate direct supervision of a physical therapy aide, and for exceeding the supervision ratio of physical therapist assistants and aides.

(A.R. 335–36.)

V. The Board Conducts a Hearing on the Statement of Charges and Revokes Mr. Sorongon’s License.

A hearing was held before Hearing Examiner Jack C. McClung, and testimony was presented between November 18, 2010 and March 16, 2011. (A.R. 1, 200.) Before testimony was received, Mr. Sorongon filed a motion in limine to exclude any evidence the Board gathered after its July 1, 2010 Statement of Charges and any evidence that does not relate to the allegations contained in the Statement of Charges. (A.R. 341–47.) The Board filed a response in opposition to Mr. Sorongon’s motion, and the Hearing Examiner ultimately denied the motion. (A.R. 348–54, 201.) The Hearing Examiner heard testimony from several witnesses, including several former employees who had no role in the Board’s investigation until several months after the Statement of Charges was filed. (A.R. 209, 227, 251.)

At the conclusion of the hearing, the parties each submitted proposed findings of fact and conclusions of law for the Hearing Examiner’s consideration. (A.R. 355–87.) On August 18, 2011, the Hearing Examiner issued his Findings of Fact, Conclusions of Law, and Recommended Order. (A.R. 388–409.) Based on evidence presented at the hearing, including the testimony of several witnesses who were identified months after the Statement of Charges was filed, the Hearing Examiner concluded that Mr. Sorongon

“did fail to properly supervise Sherry Sayre and Steven Jeffrey as physical therapy aides on a routine basis at both of his facilities and that he did exceed the supervision ratio with Sherry Sayre, Steven Jeffrey and Kate Lambdin on a routine basis at both of his facilities,” in violation of various code provisions and regulations. (A.R. 407–08.) The Board then issued a final order adopting the Hearing Examiner’s recommendations in their entirety. (A.R. 410–11.)

The Board revoked Mr. Sorongon’s license to practice physical therapy on August 29, 2011 and assessed him with the costs of the hearing, which totaled \$27,148.30. (A.R. 411.)

VI. The Circuit Court Finds the Board’s Final Order to Be in Error, But Affirms the Order on More Limited Grounds.

Mr. Sorongon filed a timely petition of appeal to the Circuit Court for Kanawha County. (A.R. 412–32.) In his appeal, Mr. Sorongon argued the Board’s collection and use of evidence gathered months after the Statement of Charge constituted a violation of the Board’s own procedures and Mr. Sorongon’s rights to due process. (A.R. 422–26.) He also argued the specific charges had not been proven and the Board’s findings lacked evidentiary support. (A.R. 426–31.) The Board filed a response opposing Mr. Sorongon’s appeal. (A.R. 436–66.) The Circuit Court then issued a Final Order Denying Petition for Appeal and Affirming the Board’s Final Order. (A.R. 468–82.)

In its Order, the Circuit Court correctly observed that in light of this Court’s decision in State ex rel. Hoover v. Smith, 198 W.Va. 507, 482 S.E.2d 124 (1997), the Board’s Statement of Charges marked the end of the investigatory stage of this proceeding, and the Board should not have been allowed to present evidence accumulated long after issuing the July 1, 2010 Statement of Charges. (A.R. 479.)

Nevertheless, the Court concluded that even relying solely on Ms. Fox's testimony about her observations on May 26, 2010, the Board presented sufficient evidence to support two of the charges leveled against Mr. Sorongon —that he failed to directly supervise a physical therapist assistant and failed to maintain a direct line of sight while supervising a physical therapy aide:

Ms. Fox's testimony about her observations at the Petitioner's facility during the May 26, 2010 visit support a finding that the Petitioner failed to provide direct supervision of a physical therapy aide and failed to provide appropriate supervision, as alleged in the Statement of Charges and as required both by the applicable code sections and the Consent Agreement and Order. Specifically, Ms. Fox saw firsthand a physical therapy aid performing patient treatment in the gym area without the physical presence of the Petitioner or any other physical therapist in the immediate treatment area. Such testimony clearly supports the Board's Final Order that the Petitioner violated the "direct supervision" section of the applicable code section, as well as the Consent Agreement and Order, as alleged in the Statement of Charges. Ms. Fox also observed a physical therapist assistant performing treatment on two patients in the pool area and testified that a person in the pool has no direct line of sight into the gym or the second treatment area ("plinth area") down the hallway from the gym area. This testimony supports the Board's allegation of lack of appropriate supervision by a physical therapist.

(A.R. 480–81.) Thus, in evaluating the evidence from the May 26, 2010 site visit and finding support for two of the three charges leveled against Mr. Sorongon, the Court affirmed the Board's order revoking Mr. Sorongon's license.² (A.R. 482.) This appeal followed.

SUMMARY OF ARGUMENT

² The third charge that Mr. Sorongon violated the supervision ratio properly was not sustained since Mr. Sorongon was only supervising a physical therapy aide and a physical therapy assistant on May 26, 2010. (A.R. 480.)

The Circuit Court's Order affirming the Board's decision correctly held that the Board should not have relied on evidence built months after the Board issued its Statement of Charges, and correctly limited its analysis to only that evidence collected before the Statement of Charges was issued. But in reviewing this more limited evidence, the Circuit Court clearly misapplied the requirements for supervision found in the statutes and rules of the Board.

First, the Court wrongly held that Kate Lambdin, a licensed physical therapist **assistant**, required "direct supervision" by Mr. Sorongon when she was treating patients in the pool, as even the Board acknowledges that physical therapist **assistants** are not subject to a direct supervision requirement. (A.R. 481.)

Second, the Court wrongly held that PT Aide Sayre, a physical therapy aide, was required to be within Mr. Sorongon's "direct line of sight," because no such requirement existed at the time of the May 26, 2010 inspection or the July 1, 2010 Statement of Charges. This regulation was not formally adopted by the Board until over a year later, and this stricter standard cannot be applied retrospectively.

Third, when the Board wrongly revoked Mr. Sorongon's license based upon a standard not yet set forth in the Board's statutes, rules or lawful orders, it did so unlawfully in excess of its statutory authority.

Because the Circuit Court affirmed the Board's decision based on these incorrect applications of the statute and regulations, the Circuit Court's order affirming the Board's decision was in clear error and should be reversed. The Board should be instructed to reinstate Mr. Sorongon's license so that he may return to earning a living in his lifelong profession.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to App.R. 18(a), Mr. Sorongon believes that oral argument is necessary because it will better illuminate the facts and legal arguments presented in this appeal, and will significantly aid the Court's decisional process. Oral argument under Rule 19 is appropriate because this appeal presents narrow issues of law and assignments of error in the application of settled law. While Mr. Sorongon believes a written decision is preferable to a Rule 21 memorandum decision since the issues will significantly impact the substantive and procedural bases that the Board applies in sanctioning Mr. Sorongon and other physical therapists in the future, Mr. Sorongon defers to the preferences of the Court.

ARGUMENT

I. STANDARD OF REVIEW

The Circuit Court's review of the Board's decision and this Court's review of the Circuit Court's decision are both governed by the standards set forth in the West Virginia Administrative Procedures Act. Williams v. West Virginia Bd. of Exam'rs, 215 W.Va. 237, 241, 599 S.E.2d 660 (2004); W.Va. Code § 29A-5-4(a). In reviewing an administrative agency's decision:

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or

- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W.Va.Code § 29A-5-4(g). “In cases where the circuit court has amended the result before the administrative agency, this Court reviews the final order of the circuit court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law *de novo*.” Wheeling-Pittsburgh Steel Corp. v. Rowing, 205 W.Va. 286, 293, 517 S.E.2d 763 (1993). “Although limited, judicial review of a contested case must nevertheless be careful, thorough, and probing.” Id. at 292.

Applying this standard of review, it is apparent that while the Circuit Court correctly reversed the portions of the Board’s order that relied on improper evidence, the Circuit Court misapplied statutory and regulatory requirements. Contrary to the Circuit Court’s conclusions, the Board’s entire order was in error, and the Circuit Court’s order affirming the Board’s revocation of Mr. Sorongon’s license should be reversed.

II. THE CIRCUIT COURT ERRED IN APPLYING A “DIRECT SUPERVISION” REQUIREMENT TO THE OVERSIGHT OF A PHYSICAL THERAPIST ASSISTANT, A LICENSED PROFESSIONAL THAT DOES NOT REQUIRE DIRECT SUPERVISION.

The Circuit Court’s first attempt to save the Board’s final order cites evidence of a supposed violation that even the Board itself did not consider a violation. Specifically, the Circuit Court cited evidence that “a physical therapist *assistant* perform[ed] treatment on two patients in the pool area . . . [which] has no direct line of sight into the gym or the second treatment area.” (A.R. 481 (emphasis added).) This is a reference to

Ms. Fox's observation of Kate Lambdin, a physical therapist assistant, while she was providing treatment to two patients in the facility's pool area. (A.R. 120.) The Circuit Court incorrectly held, based solely on this evidence, that this evidence supported the Board's claim that Mr. Sorongon did not properly supervise Ms. Lambdin's treatment of patients. (A.R. 482.)

The Circuit Court's finding of a lack of supervision is premised on a misunderstanding of the role of a physical therapist assistant. According to West Virginia Code § 30-20-3(14), the term "physical therapist assistant" means:

A person holding a license or permit issued under the provisions of this article who assists in the practice of physical therapy by performing patient related activities delegated to him or her by a physical therapist and performs under the supervision of a physical therapist and which patient related activities commensurate with his or her education and training, including physical therapy procedures, but not the performance of evaluative procedures or determination and modification of the patient plan of care.

Thus, unlike a physical therapist *aide*, who requires "direct supervision," a physical therapist *assistant* may practice without the direct supervision of a physical therapist. Thus, a physical therapist assistant may provide patient care regardless of whether a physical therapist is in the "immediate treatment area." *Cf.* W.Va. Code § 30-20-3(14) (placing physical therapy assistants under the "supervision" of a physical therapist) with § 30-20-3(12) (subjecting physical therapy aides to the "direct supervision" of a physical therapist). The rules adopted by the Board specifically permit a physical therapy assistant to provide treatment in a separate building from the supervising physical therapist under certain circumstances. W.Va. C.S.R. § 16-1-8.3.

This important distinction between a physical therapist assistant and an aide is precisely why improper supervision of a physical therapist assistant was not alleged in the Statement of Charges. Indeed, the Board's own investigator, Ms. Fox, testified that she considered Kate Lambdin, a physical therapy assistant, "working in the pool with indirect or general supervision" to be "**appropriate.**" (A.R. 135 (emphasis added).) Thus, the Circuit Court cannot rely on any claim that Mr. Sorongon failed to directly supervise Kate Lambdin as a means of supporting the Board's Order, and the Circuit Court's finding that Mr. Sorongon violated supervision requirements should be reversed.

III. THE CIRCUIT COURT ERRED IN APPLYING A "DIRECT LINE OF SIGHT" REQUIREMENT TO THE SUPERVISION OF A PHYSICAL THERAPY AIDE BECAUSE THIS REQUIREMENT WAS NOT FORMALLY ADOPTED AS THE STANDARD BY THE BOARD OF PHYSICAL THERAPY UNTIL ALMOST ONE YEAR LATER.

The second point the Circuit Court relied on to affirm the Board's order was its view that Mr. Sorongon allowed PT Aide Sayre, a physical therapy aide, to treat patients outside of Mr. Sorongon's direct supervision, in violation of W.Va. Code § 30-20-3(12). In reaching this conclusion, the Circuit Court wrongly interpreted the statute and retroactively applied a regulation promulgated *after* the Board issued its Statement of Charges, thereby unjustly holding Mr. Sorongon to an unfair and unforeseen standard.

A. The Circuit Court May Not Retrospectively Apply Legislative Rules Enacted After the Board Issued Its Statement of Charges.

The Board's charge of improper supervision of a physical therapy aide stems from Ms. Fox's brief observations of PT Aide Sayre and two patients in the gym area during her May 26, 2010 visit to the Dunbar facility. These observations include: (1) a quick glance upon entering facility, when Ms. Fox believes she saw PT Aide Sayre and an

elderly patient in the gym “doing some sort of a seated exercise type thing,” and (2) a few minutes in the gym area, where she observed PT Aide Sayre seated with one patient while another patient exercised on his own before the start of his 2:00 p.m. appointment with Mr. Sorongon. (A.R. 105–06.) But Ms. Fox testified that she walked to the gym immediately after meeting with Mr. Sorongon in the nearby office area of the facility; therefore, it is more than reasonable that Mr. Sorongon would leave his patient with his aide for a few minutes while he introduced himself to Ms. Fox. Further, during the time Ms. Fox actually spent in the gym, Ms. Fox did not see PT Aide Sayre engaging with either patient or providing treatment to either patient. (A.R. 110.) Under these circumstances, Mr. Sorongon’s brief absence from the gym area did not impact patient care, and did not undermine his overall “direct supervision” of PT Aide Sayre. Upon running to the gym area immediately after conducting the “shout test” in the “plinth area,” Ms. Fox clearly noted the presence of Mr. Sorongon in the gym. (A.R. 118.)

Nevertheless, the Board concluded that Mr. Sorongon’s brief absence from the gym prevented his “direct supervision” of PT Aide Sayre, applying a strict interpretation of this term that was not formally adopted until over a year after Ms. Fox’s May 2010 inspection. The term “direct supervision” is defined as the actual physical presence of the physical therapist in the “immediate treatment area” where the treatment is being rendered. W.Va. Code § 30-20-3(5). Under the new regulations, which did not become effective until June 16, 2011, the term “immediate treatment area” was defined to mean “the area within the physical therapist’s direct line of sight or within audible distance of the physical therapist and the ability of the physical therapist to immediately respond to calls for assistance from the patient or physical therapy aide.” W.Va. C.S.R. § 16-1-2-2.5, 2.7 (effective 6/16/11).

The Circuit Court relied upon the subsequently issued regulations in its order affirming the Board's decision, but the new standards announced in the regulations cannot be lawfully applied to retroactively hold Mr. Sorongon to this elevated supervisory requirement. The general rule is that a statute is presumed to be prospectively applied and that retroactive application is warranted only where the legislative intent to do so is clearly indicated. Shanholtz v. Monongahela Power Co., 165 W.Va. 305, 311, 270 S.E.2d 1978 (1980).

The Board is required to abide by its duly promulgated rules until they are lawfully changed. C&P Telephone Company v. Public Service Commission, 171 W.Va 708, 714, 301 S.E.2d 798 (1983). "This is especially true when an individual reasonably relied on agency rules promulgated for his guidance, and has suffered substantially because of their violation by the agency." Id. (quoting United States v. Caceres, 440 U.S. 741, 752 -53 (1979)). By relying on these regulations to affirm the Board's order, the Circuit Court effectively "changed the rules of the game once the game had begun." Pressley Ridge Schs., Inc. v. Stottlemyer, 947 F. Supp. 929, 941 (S.D.W.Va 1996). Thus, the Board's subsequent adoption of regulations requiring a direct line of sight or audible distance cannot be lawfully imposed on Mr. Sorongon's supervision of a physical therapy aide more than one year earlier, and the Circuit Court's reliance on these regulations as justification to uphold the Board's decision constitutes reversible error.

B. The Board's Ad Hoc Interpretation of "Direct Supervision" Did Not Provide Mr. Sorongon Fair Notice of His Responsibilities.

According to the West Virginia Code, a "physical therapy aide" is "a person trained under the direction of a physical therapist who performs designated and routine tasks related to physical therapy services under the direction supervision of a physical

therapist.”³ W.Va. Code § 30-20-12. The statute defines “direct supervision” as “the actual physical presence of the physical therapist in the immediate treatment area where the treatment is being rendered.” W.Va. Code § 30-20-3(5). However, at the time of Ms. Fox’s May 26, 2010, inspection, none of the statutes, rules or regulations then in effect defined “immediate treatment area” as requiring the presence of the physical therapist in the direct line of sight or within audible distance of the physical therapy aide subject to supervision. And none of the physical therapy statutes, rules or regulations then in effect offered any further clarity on the meaning of “direct supervision.”

Although the statute and regulations did not define “immediate treatment area” Ms. Fox apparently believed that the “direct supervision” meant that the Mr. Sorongon must be physically present in the same room (the gym) with PT Aide Sayre and the patients, and that his brief departure to the hallway to greet the investigator meant that he was not in the “immediate treatment area,” and therefore was in violation of the regulation. (A.R. 135, 141.) According to Ms. Fox’s own interpretation of the rules and regulations, “if you can’t see them and you can’t hear them, you’re not in the immediate treatment area.” (A.R. 141.)

However, even Ms. Fox acknowledged there was confusion as to the meaning of “immediate treatment area” in this context, as she noted that the Board received multiple phone calls from physical therapists seeking clarification on these terms and expressing confusion about a physical therapist’s supervisory responsibilities. (A.R. 139–41.) Similarly, Patricia Holstein, the Board’s Executive Secretary, also acknowledged confusion about these terms, confirming these phone calls from physical

³ This term is also defined by then-existing Board regulations, which describe a physical therapy aide as one who assists with the practice of physical therapy “under the direct supervision of [a] licensed physical therapist.” W.Va. C.S.R. § 16-1-2.4 (effective 5/15/09).

therapists seeking clarification on their supervisory responsibilities for physical therapy aides. (A.R. 51–52.) Despite this confusion, as of Ms. Fox’s own personal inspection on May 26, 2010 and as of the date of the issuance of the Statement of Charges on July 1, 2010, the Board had not promulgated any rule to provide written guidance as to the new statement, until it did so almost a year after the Statement of Charges were filed.

Any practice by the Board in developing new standards on an ad hoc basis by merely relaying its own purported interpretation of confusing rules and regulations in telephone calls to certain physical therapists who happened to call with questions, but not all licensed physical therapists, should not be condoned as establishing the legal basis upon which to revoke someone’s physical therapy license. Such a stance would undermine the Board’s formal rulemaking requirements and fails to satisfy the Board’s constitutional obligations of fair notice. *See, e.g., Coordinating Council for Indep. Living, Inc. v. Palmer, 209 W.Va. 274, 284, 546 S.E.2d 454 (2001)* (rejecting the Tax Department’s attempt to effect policy by way of a letter to affected taxpayers without adopting new legislative rules, because such “implementation, extension, application or interpretation of the laws which it was charged to execute” must follow proper rule making procedures) (internal citations omitted). Consequently, prior to duly promulgating a legislative rule, the Board cannot rely upon an informal notice or ad hoc interpretations to support the new standards as these fail to comply with legislative rule making requirements.

West Virginia statutes and regulations control the ability of physical therapist to work in this profession, and the arbitrary enforcement of these rules to revoke a therapist’s license can have a devastating effect on his or her livelihood. Moreover, these rules also contemplate the possibility of sanctions and even criminal penalties for

violations and, therefore, require demonstration of certain specific violations to support such sanctions. W.Va. Code § 30-20-22. As such, these rules are legislative in nature and must be enacted pursuant to legislative rule making requirements. W.Va. Code § 29A-1-2(d); Chico Dairy Co. v. W. Va. Human Rights Comm'n, 181 W.Va. 238, 382 S.E.2d 75 (1995). Given the severity of these consequences, due process requires clarity and consistency in the interpretation and enforcement of these rules. Connally v. Gen. Construction Co., 269 U.S. 385, 391 (1926) (“[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.”). Even if the Board’s ad hoc interpretation of “immediate treatment area” to require a direct line of sight was a reasonable interpretation of this term, it certainly is not the only reasonable interpretation, and a physical therapist should not be at the risk of losing his or her license by being forced to guess which interpretation will apply. Nor should a physical therapist first learn of the Board’s new interpretation after charges have been filed and proceedings initiated. The Circuit Court’s application of the Board’s ad hoc interpretation of “direct supervision” to the weak evidentiary findings of Ms. Fox’s May 26, 2010, inspection violated due process principles, unfairly revoked Mr. Sorongon’s license, and wrongfully ended his career.

Presumably in light of the ambiguities in the code’s definition of “direct supervision,” the Board recently amended its regulations to provide more specific guidance on the meaning of “immediate treatment area” under the direct supervision requirement. Under these new regulations that became effective June 16, 2011, the term “immediate treatment area” means “the area within the physical therapist’s direct line of sight or within audible distance of the physical therapist and the ability of the physical

therapist to immediately respond to calls for assistance from the patient or physical therapy aide.” W.Va. C.S.R. § 16-1-2-2.5, 2.7 (effective June 16, 2011).

The Circuit Court cited these recently issued regulations in its order affirming the Board’s decision, but this subsequent clarification cannot be used to retroactively hold Mr. Sorongon to this elevated supervisory requirement. The general rule is that a statute is presumed to be prospectively applied and that retroactive application is warranted only where the legislative intent to do so is clearly indicated. Shanholtz v. Monongahela Power Co., 165 W.Va. 305, 311, 270 S.E.2d 1978 (1980). By relying on these regulations to affirm the Board’s order, the Circuit Court effectively “changed the rules of the game once the game had begun.” Pressley Ridge Schs., Inc. v. Stottlemeyer, 947 F. Supp. 929, 941 (S.D.W.Va 1996). These rules expressly state they are legislative rules and are effective only as of June 16, 2011. Consequently, the Board’s subsequent adoption of regulations requiring a direct line of sight or audible distance cannot be imposed on Mr. Sorongon’s supervision of a physical therapy aide more than one year earlier, and the Circuit Court’s reliance on these regulations as justification for the Board’s decision constitutes clear error and should be reversed.

III. IN REVOKING PETITIONER’S LICENSE BASED ON STANDARDS NOT YET FORMALLY ADOPTED, THE BOARD EXCEEDED ITS STATUTORY AUTHORITY.

The Board has exceeded its statutory authority in revoking Mr. Sorongon’s license by applying standards that were not duly promulgated by statute or legislative rules, nor embodied in any lawful order of the Board, at the time. The Board is authorized by statute to investigate and to sanction a Physical Therapist only for specifically enumerated violations of West Virginia Code § 30-20-1, et seq., the legislative rules promulgated by the Board thereunder as set forth in W.Va. C.S.R. § 16-

1-1, et seq., and any applicable and lawful orders and final decisions of the Board. The Board is authorized by statute to revoke Mr. Sorongon's license to practice physical therapy in the State of West Virginia only upon finding by a preponderance of the evidence that he has violated one of the specifically enumerated provisions of W.Va. Code § 30-20-19(g), which include:

(g) The board may, after notice and opportunity for hearing, deny or refuse to renew, suspend, restrict or revoke the license or permit of, or impose probationary conditions upon or take disciplinary action against, any licensee or permittee for any of the following reasons once a violation has been proven by a preponderance of the evidence:

(1) Obtaining a license or permit by fraud, misrepresentation or concealment of material facts;

(2) Being convicted of a felony or other crime involving moral turpitude;

(3) Being guilty of unprofessional conduct which placed the public at risk, as defined by legislative rule of the board;

(4) Intentional violation of a lawful order or legislative rule of the board;

(5) Having had a license or other authorization revoked or suspended, other disciplinary action taken, or an application for licensure or other authorization revoked or suspended by the proper authorities of another jurisdiction;

(6) Aiding or abetting unlicensed practice; or

(7) Engaging in an act while acting in a professional capacity which has endangered or is likely to endanger the health, welfare or safety of the public.

W.Va. Code § 30-20-19⁴. This statute requires the Board to establish the basis for revocation of physical therapist licenses and does not authorize the Board to revoke a license based upon standards not duly promulgated or embodied in a lawful order of the Board.

Consequently, the Board lacked statutory authority to sanction Mr. Sorongon based upon informal, ad hoc interpretations of its statutes or legislative rules that had not yet been duly promulgated or based upon standards not set forth in a prior lawful order of the Board. There was no statute, rule or order in effect at the time the Statement of Charges were issued or at the time the Board conducted its hearings that required Mr. Sorongon to maintain “line of sight or within audible distance” supervision of his aide. And the new definition of “immediate treatment area” to require that Mr. Sorongon be within a direct line of sight or within an audible distance was not adopted by the Board as a legislative rule until after the Statement of the Charges in this case. In fact, the new definition did not become effective until June 16, 2011. Likewise, the prior Consent Order relied upon by the Circuit Court and Board does not set forth any requirement that “direct supervision” in the “immediate treatment area” be “line of sight or within audible distance” supervision. In applying standards not yet promulgated by statute or legislative rules, the Board’s revocation of Ferdinand Sorongon’s license unlawfully exceeded its own statutory authority, resulting in a manifest unfairness to Mr. Sorongon that must be corrected by this Court.

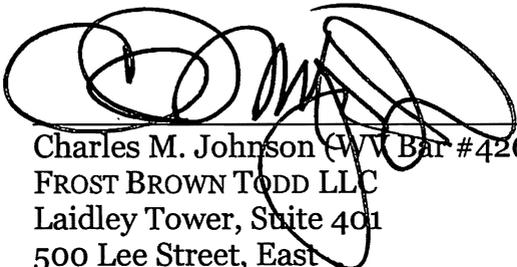
⁴ This statute establishes the seven statutory standards the Board is authorized to rely upon to revoke the Petitioner’s license to practice physical therapy. Of these seven statutory standards, W.Va. Code §§ 30-20-19(g) (1)-(2) and (5)-(7) are clearly inapplicable. W.Va. Code §§ 30-20-19(g)(3) and (4) expressly require that the basis for the sanction must be set forth in a legislative rule or lawful order of the Board.

CONCLUSION

Petitioner Ferdinand Sorongon requests that this Court grant review, reverse the January 26, 2012 Final Order of the Circuit Court of Kanawha County, and reinstate Petitioner Ferdinand Sorongon's physical therapy license retroactive to August 29, 2011.

Respectfully submitted,

FERDINAND SORONGON
By Counsel



Charles M. Johnson (WV Bar #4262)
FROST BROWN TODD LLC
Laidley Tower, Suite 401
500 Lee Street, East
Charleston, WV 25301
Phone: 304 -345-0111
Fax: 304-345-0115
Email: cmjohnson@fbtlaw.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 12-0422

Ferdinand Sorongon,

Petitioner,

v.

**Appeal from a final order
of the Circuit Court of Kanawha
County (11-AA-119)**

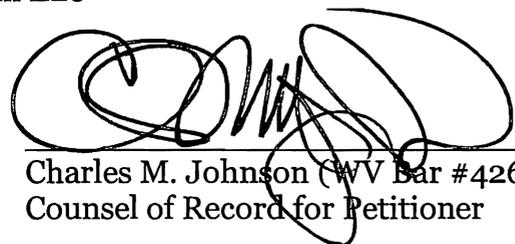
**West Virginia Board Of Physical
Therapy,**

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July, 2012, true and accurate copies of the foregoing ***Petitioner's Amended Brief*** were deposited in the U.S. Mail contained in a postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

Katherine A. Campbell
Assistant Attorney General
State Capital Complex, Building 1, Room E26
Charleston, WV 25305



Charles M. Johnson (WV Bar #4262)
Counsel of Record for Petitioner