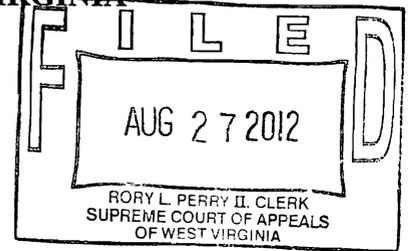

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0422



FERDINAND SORONGON,
Petitioner Below,

Petitioner,

v.

**WEST VIRGINIA BOARD OF PHYSICAL
THERAPY, Respondent Below,**

Respondent.

RESPONDENT'S RESPONSE TO PETITIONER'S AMENDED BRIEF

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

KATHERINE A. CAMPBELL
ASSISTANT ATTORNEY GENERAL
State Capitol Complex
1900 Kanawha Boulevard, East
Building 1, Room E-26
Charleston, West Virginia 25305
Telephone No. (304) 558-2021
State Bar ID No. 6654
Email: kac@wvago.gov

Counsel for Respondent

TABLE OF CONTENTS

	Page
I. STATEMENT OF THE CASE	1
II. SUMMARY OF THE ARGUMENT	8
III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION	9
IV. ARGUMENT	9
A. THE STANDARD OF REVIEW IN THIS MATTER IS AS SET FORTH IN THE ADMINISTRATIVE PROCEDURES ACT	9
B. THE CIRCUIT COURT DID ERR WHEN FINDING THAT A PHYSICAL THERAPY ASSISTANT REQUIRED DIRECT SUPERVISION	11
C. THE CIRCUIT COURT DID NOT ERR WHEN APPLYING THE STATUTORY AND REGULATORY PROVISIONS REGARDING THE SUPERVISION REQUIREMENTS OF A PHYSICAL THERAPY AIDE WHICH WERE IN EFFECT AT THE TIME OF THE ISSUANCE OF THE STATEMENT OF CHARGES	12
D. THE BOARD DID NOT EXCEED ITS STATUTORY AUTHORITY BY REVOKING THE PETITIONER’S LICENSE.	21
V. CONCLUSION	24

TABLE OF AUTHORITIES

Page

CASES:

Adkins v. West Virginia Department of Education,
210 W. Va. 105, 556 S.E.2d 72 (2001) (per curiam) 10

Berlow v. West Virginia Board of Medical, 193 W. Va. 666,
458 S.E.2d 469 (1995) (per curiam) 23

Consumer Advocate Division Of Public Service Comm 'n v.
Public Serv. Comm 'n, 182 W. Va. 152, 386 S.E.2d 650 (1989) 17

Griffith v. Frontier West Virginia, Inc., 228 W. Va. 277,
719 S.E.2d 747 (2011) 17

Modi v. West Virginia Board of Medicine, 195 W. Va. 230,
465 S.E.2d 230 (1995) 10

In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996) 23

Walker v. West Virginia Ethics Commission, 201 W. Va. 108,
492 S.E.2d 167 (1997) 10

West Virginia Department of Health v. West Virginia Civil
Service Comm 'n, 178 W. Va. 237, 358 S.E.2d 798 (1987) 23

Wheeling-Pittsburgh Steel Corp. v. Rowing, 205 W. Va. 286,
517 S.E.2d 763 (1993) 10

STATUTES:

W. Va. Code § 29A-5-4(g) 9

W. Va. Code § 30-20-1 (1999) 12

W. Va. Code § 30-20-2(h) (1999) 13, 15

W. Va. Code § 30-20-2(h)(1) (1999) 13, 15, 18

W. Va. Code § 30-20-3(5) (2010) 13

W. Va. Code § 30-20-3(12) (2010) 13

W. Va. Code § 30-20-4 (2010)	12
W. Va. Code § 30-20-5(a)(4) (1999)	12
W. Va. Code § 30-20-5(a)(4)(A) (1999)	12
W. Va. Code § 30-20-5(a)(4)(B) (1999)	13

OTHER:

W. Va. Code R. § 16-1.2.5 (2009)	11
W. Va. Code R. § 16-1-2.7 (2011)	17, 18
W. Va. Code R. § 16-1-9.1.a (2009)	11
W. Va. R. App. P. 18(a)	9

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0422

FERDINAND SORONGON,
Petitioner Below,

Petitioner,

v.

WEST VIRGINIA BOARD OF PHYSICAL
THERAPY, Respondent Below,

Respondent.

RESPONDENT'S RESPONSE TO PETITIONER'S AMENDED BRIEF

Comes now the Respondent, the West Virginia Board of Physical Therapy, by and through counsel, Katherine A. Campbell, Assistant Attorney General, and hereby responds to the Petitioner's Brief.

I.

STATEMENT OF THE CASE

This matter arises from violations of the West Virginia Board of Physical Therapy's ("Board") statutory and regulatory provisions along with violations of a *Consent Agreement and Order* entered into between Ferdinand Sorongon ("Petitioner") and the Board on February 5, 2009. *See* Amended Appendix (hereinafter "A.A., ___"), 316-22. Pursuant to this *Consent Agreement and Order*, the Board was permitted to inspect the Petitioner's facilities at random; however, the Board received a telephone call from Francisco Bicol, one of the Petitioner's employees at the time,

reporting alleged violations at the Petitioner's facilities during the month of March 2010 while this *Consent Agreement and Order* was still in effect. At the Board's March meeting it decided to conduct a random inspection. It is from this random inspection along with a more detailed investigation that prompted the *Statement of Charges* issued on July 1, 2010. See A.A., 334-37.

This matter was first heard with a partial day of testimony on November 18, 2010, wherein the Petitioner presented a written *Motion in Limine* which was argued that day.¹ The matter was ultimately set for a second day of hearing on March 17, 2011, wherein the matter was concluded with the Board calling a total of seven witnesses and Petitioner calling himself only with numerous exhibits entered for both the Respondent and Petitioner.²

Ferdinand A. Sorongon was a licensee of the West Virginia Board of Physical Therapy as a Physical Therapist prior to his license revocation, but his record was not without discipline. He entered into a *Consent Agreement and Order* on February 5, 2009, with the Board for similar actions as was investigated in this case matter. And contrary to the Petitioner's contentions he agreed with the discipline and the Board's findings at the time by entering into the *Consent Agreement and Order*. Moreover, he had counsel representing his interests and rights at the time. See A.A., 316-22.

¹It should be noted that the hearing examiner did not issue a written order denying the *Motion in Limine*, but instead issued a verbal ruling on November 18, 2010, and March 17, 2011. See A.A., 26-27 and 201-02. These oral rulings were given after oral argument on the matter.

²Between the first hearing date and the second hearing date the Petitioner filed a *Petition for Writ of Prohibition* and a *Motion for Temporary Restraining Order* in the Circuit Court of Kanawha County (hereinafter "Circuit Court"). Respondent answered the *Motion for Temporary Restraining Order*, and a hearing was heard by Judge Tod J. Kaufman who granted the restraining order insofar that the Board could not suspend the Petitioner's license to practice physical therapy until such time that the administrative proceeding had concluded and a decision rendered by the Board. Moreover, Judge Kaufman dismissed the *Petition for Writ of Prohibition*.

Further, as noted this *Consent Agreement and Order* permitted the Board to conduct random inspections of the Petitioner's facilities and that the last random inspection was conducted by Ralph Ulzman on January 18, 2010.³ However, since no patients were being seen at the time of his visit, Mr. Ulzman could only inspect records and he found no violations. *See* A.A., 42-44 and 323-29. Petitioner's statement of the case fails to note that no patients were being seen that day by the Petitioner and that this was the only inspection done prior to Mr. Bicol's telephone call.

The Board, however, received a telephone call from Mr. Bicol sometime after Mr. Ulzman's visit reporting that there were issues with the manner in which the Respondent operated his facilities. *See* A.A., 45-46. This information was reported to the Board at its March Board meeting, and the Board decided to immediately send one of its Board members, Shannon Snodgrass, to conduct a random inspection.⁴ *See* A.A., 46-47. Ms. Snodgrass spent a couple of hours at the Respondent's Dunbar facility; however, she created no written or verbal report of her visit. Yet, she did recommend that the Board retain an investigator to conduct a more thorough inspection of the Respondent's facilities. The Board, in turn, retained Cynthia Fox, a former Board member, to conduct an inspection which was conducted on May 26, 2010.⁵ *See* A.A., 47-48.

The Petitioner's statement of the case is laced with inaccuracies regarding its portrayal of the events as they occurred on May 26, 2010, during the Board's site visit of the Petitioner's Dunbar facility. Cynthia Fox did indeed enter the Petitioner's facility at approximately 1:30 p.m. on the

³Petitioner had facilities in both Dunbar and Teay's Valley.

⁴It should be noted that the Petitioner in his *Amended Brief* refers to "Shannon Snodgrass" as "Shannon Sondgrass," and it is the same individual.

⁵Ms. Fox is a licensed physical therapist herself. While on the Board she was a member of the Complaint Review Committee and completed CLEAR training, which is for those individuals serving on regulatory boards. *See* A.A., 91-94.

afternoon of May 26, 2010. Ms. Fox chose this time due to her discussions with Ms. Snodgrass. *See A.A., 99.* Ms. Fox testified that when she entered the Petitioner's Dunbar facility that she identified herself and presented her paperwork to the receptionist wherein she waited approximately five minutes for another individual to present herself. *See A.A., 100.* Ms. Fox stated that she walked right into the physical therapy gym area whereupon she observed an individual, who she later learned to be Sherry Sayre, performing some type of seated leg exercises on a mat table with an elderly female patient.⁶ Her tour of the facility continued where she was introduced to the Petitioner in his office. *See A.A., 104.* Then Ms. Fox requested that she be able to look around the facility further, and she ended up back in the gym area. *See A.A., 105.*

Upon re-entry to the gym area some five minutes later, the elderly female patient was still present along with a male patient confined to a wheelchair. *See id.* at 106-07. It appeared that Ms. Sayre had stopped treatment with the elderly female patient when Ms. Fox re-entered the gym area. *Id* at 108-09. Despite the Petitioner's characterization that the patients were only left long enough for Petitioner to greet Ms. Fox, Ms. Fox observed only that Ms. Sayre had been in the gym area from the time of her initial arrival at the facility to her return to the gym area. *See A.A., 109-10.*

Moreover, upon return to the gym area Ms. Fox observed the male patient doing some type of exercise wherein he was pulling himself out of the wheelchair with a wall ladder and standing then sitting again. *See A.A., 110.* And still the Petitioner is not present in the gym area. *See A.A., 111.* After speaking with the male patient, Ms. Fox spoke with Steven Jeffrey who had entered the gym area while Ms. Fox was speaking with the male patient. Mr. Jeffrey is an athletic trainer at the

⁶Ms. Sayre was noted to be considered an physical therapy aide pursuant to the Board's regulations and statutes. She is neither a licensed physical therapist nor a licensed physical therapy assistant. *See A.A., 34-35 and 39.*

facility, who is also considered a physical therapy aide pursuant to the Board's regulations and statutes.⁷

The Petitioner has characterized that Ms. Fox's testimony as being questionable since the Petitioner was only absent from the gym area momentarily to greet Ms. Fox. However, this characterization of the facts is inaccurate since Ms. Fox testified that she did not see the Petitioner in the gym area interacting with any patients until she was leaving the facility approximately one hour later. Moreover, this interaction was not any type of physical therapy treatments that Ms. Fox could discern, but some type of discussion with the patient instead and not the Petitioner providing physical therapy treatment. *See A.A., 142-43.*

Ms. Fox left the facility at approximately 2:30 p.m. At the time of her departure, she was unable to find the elderly female patient and the male patient who had been performing physical therapy exercises earlier in the gym area. *See A.A., 119 and 143.* So despite the S.O.A.P. note, which states that the male patient was treated from 2:00 p.m. to 3:00 p.m., it seems to be inaccurate in his time of treatment.⁸ *See A.A., 338-39.* Moreover, Ms. Fox testified that in reviewing the S.O.A.P. note that there was a correlation between the physical therapy exercises that the male patient was performing and what was indicated in the note; however, the male patient was billed for one-on-one therapy which was not occurring in her observations. And she stated that she would want someone much closer to the patient for safety reasons since the male patient was primarily wheelchair mobile. *See A.A., 145-46.*

⁷Mr. Jeffrey is neither a licensed physical therapist nor a licensed physical therapy assistant. *See A. A. at 35-36 and 39.*

⁸A S.O.A.P. note is a "Subjective Objective Assessment and Plan," which documents the treatment that occurred that day. *See A.A., 127-28.*

Ms. Fox went on to describe a second separated treatment area that is down the hallway from the gym area which has beds. Ms. Fox testified that one can see a small portion of the gym area from this second treatment area, and she testified that one cannot hear anything that is going in the gym area from the second treatment area. Ms. Fox explained that she tested this theory by shouting out for the Petitioner and no one responded to her calls. She further checked to make sure that Ms. Sayre or some other staff member was still in the gym area at the time of the test, and Ms. Sayre and now the Petitioner were in the gym area at the time of this shout test.⁹ See A.A., 114-19. Ms. Fox then testified that after her shout test she briefly introduced herself to Kate Lambdin, a physical therapy assistant, who was at that the time in the pool treating two patients. See A.A., 120.

Petitioner again inaccurately characterizes Ms. Fox's testimony at the administrative hearing by stating that there is no evidence to support the supervisory ratio violation; however, the Petitioner has failed to account for Mr. Bicol's testimony. Petitioner would argue that Mr Bicol's testimony would need to be excluded based on the Kanawha County Circuit Court's ruling; however, this analysis is incorrect. The *Final Order Denying Petition for Appeal And Affirming the Board's Final Order* stated that it found to be legal error the admission of "evidence obtained by the Board after its issuance of the Statement of Charges to prove the allegations contained within the Statement of Charges." See A.A., 480. Ms. Fox interviewed Mr. Bicol prior to the issuance of the July 1, 2010, *Statement of Charges*, and as such, Mr. Bicol's testimony would be admissible. See A.A., 130-32.

Moreover, the Petitioner failed to note that the circuit court's *Final Order* made findings of fact regarding Mr. Bicol's testimony that match those outlined below. See A.A., 473. The *Final Order* further finds that the Board did offer numerous other witnesses's testimony to support the

⁹Petitioner admitted during his testimony that he can neither hear nor see anything from his office into the gym area itself. See A.A., 275.

Board's allegations that it need not address such testimony since there was enough evidence from Ms. Fox's and Mr. Bicol's observations to support the Board's Decision. *See A.A., 474.*

Mr. Bicol is a licensed occupational therapist who worked for the Petitioner since September 2006 pursuant to an employment contract with the Petitioner. He waited until 2010 to make the complaint to the Board because he feared losing his job and being deported and felt threatened by the Petitioner. *See A.A., 229-30.* Although, he did resign in August 2010 risking deportation and now facing legal action by violating the terms of his employment contract. So contrary to the Petitioner's characterization of Mr. Bicol, he was not a disgruntled employee. Yet instead, Mr. Bicol was at the Petitioner's mercy since the Petitioner was Mr. Bicol's sponsor for employment, and, as a non-resident with a H1B visa, Mr. Bicol is required to be employed to remain in the United States. *See A.A., 228-30.*

Mr. Bicol worked full-time Monday through Friday and observed physical therapy treatments in the gym area. *See A.A., 231.* It was routine practice for Ms. Sayre to treat the patients without the Petitioner being present in the gym area such as walking a patient with a gait belt or transferring a patient from a wheelchair to the mat for exercises. *See A.A., 233-34.* Mr. Bicol testified that it was routine practice to observe Mr. Jeffrey perform patient treatments such as walking the patient, performing manual exercises, and pool therapy without Petitioner present in the gym area, the modalities area or the pool. Mr. Bicol stated that ninety percent of the time the Petitioner was not present during patient treatments by Ms. Sayre or Mr. Jeffrey. *See A.A., 233-34.*

As for the supervision issue, Mr. Bicol testified that there were times that he observed Ms. Lambdin, Mr. Jeffrey, and Ms. Sayre treating patients all at the same time which would exceed the supervision ratio. *See A.A., 238.* Moreover, the Petitioner again failed to mention that the circuit

court, in its *Final Order*, made a finding that Bicol had observed the supervision ratio issues firsthand. *See A.A.*, 473.

The Petitioner, himself, admitted in his testimony that he permitted an individual, known as J.D., who was by his own testimony to be the facility's janitor, to accompany the physical therapy staff, including physical therapy assistants on home health visits to support the treatments. *See A.A.*, 275-76. Petitioner further admitted that J.D. would be considered a physical therapy aide in that role, and Petitioner admitted that he was not present at the facility when these treatments were being conducted. *See id.* Besides, the Petitioner cannot argue that he was within the immediate treatment area when he was not even in the building at the home health visits.

II.

SUMMARY OF THE ARGUMENT

The Kanawha County Circuit Court did not err when applying the statutory and regulatory provisions in effect at the time of the issuance of the *Statement of Charges* in this case; however, the circuit court did err when applying "direct supervision" requirement to physical therapy assistants. The Board's investigator observed a physical therapy aide perform physical therapy treatments with the Petitioner not in the immediate treatment area. This fact has gone un-refuted by the Petitioner. An unskilled, uneducated, and unlicensed staff member was permitted to perform physical therapy treatments on a elderly female patient and oversee the physical therapy exercises of a wheelchair bound male patient without the Petitioner in the immediate treatment area. Moreover, the Petitioner admits that when he is in his office he can neither see nor hear into the gym area, and the Board's investigator found the Petitioner to be in his office when she inspected the Petitioner's facility.

The statutory definition of “direct supervision” was given its clear and unambiguous meaning by the Board as being in the immediate treatment area where one can see and hear the physical therapy aide. The circuit court did not apply any Board statutory or regulatory provisions retroactively, but instead applied the definition of direct supervision as it was in 2010 and still is today. Moreover, the Board did not exceed its statutory authority when revoking the Petitioner’s license to practice physical therapy. The Petitioner was still on probation from a *Consent Agreement and Order* regarding same and similar violations as occurring in this case.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rules of Appellate Procedure 18(a), the Respondent believes that no oral argument is necessary to determine this matter. The decisional process will not be significantly aided by oral argument as the dispositive issues have been decided in this matter. Moreover, the Board believes that a Rule 21 memorandum decision is the most appropriate outcome.

IV.

ARGUMENT

A. THE STANDARD OF REVIEW IN THIS MATTER IS AS SET FORTH IN THE ADMINISTRATIVE PROCEDURES ACT.

The standard of review for contested cases is set forth at West Virginia Code § 29A-5-4(g), which states as follows:

[t]he 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.

Moreover, the standard of review of administrative decisions was set forth by the West Virginia Supreme Court of Appeals in *Modi v. West Virginia Board of Medicine*, 195 W. Va. 230, 465 S.E.2d 230 (1995). In this case, the Court stated that “findings of fact made by an administrative agency will not be disturbed on appeal unless such findings are contrary to the evidence or based on a mistake of law.” *Id.* at 239, 465 S.E.2d at 239. “[T]he findings must be clearly wrong to warrant judicial interference.” *Id.*

The West Virginia Supreme Court recently reiterated this standard of review in *Adkins v. West Virginia Department of Education*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). In this case, the Court ruled that “the clearly wrong and the arbitrary and capricious standards of review are deferential ones which presume an agency’s actions are valid as long as the decision is supported by substantial evidence or by a rational basis.” *Id.* at 108, 556 S.E.2d at 75. “[A] court is not to substitute its judgment for that of the hearing examiner.” *Id.* See also *Walker v. West Virginia Ethics Commission*, 201 W. Va. 108, 492 S.E.2d 167 (1997) (stating that “[a] court may set aside an agency’s findings of fact only if such findings are clearly or plainly wrong.”).

Petitioner cites *Wheeling-Pittsburgh Steel Corp. v. Rowing*, 205 W. Va. 286, 517 S. E.2d 763 (1993), as where the standard of review changes if the lower circuit court amended the result

of the administrative agency. However, in the instant case, the Kanawha County Circuit Court did not amend the result of the administrative agency. Instead, it affirmed the Board's decision of revocation and noted that while "revocation of the Petitioner's license is a harsh penalty, in the instance case the Petitioner had previously been disciplined by the Board for the same or similar conduct and was still under the probationary period set forth in the Consent Agreement and Order." *See A.A.*, 481.

B. THE CIRCUIT COURT DID ERR WHEN FINDING THAT A PHYSICAL THERAPY ASSISTANT REQUIRED DIRECT SUPERVISION.

The circuit court did err when finding that a physical therapy assistant required "direct supervision" as opposed to "on-site supervision." When a physical therapy assistant is employed in an independent practice setting such as the Petitioner's facility in Dunbar, then a physical therapist must provide on-site supervision. *See W. Va. Code R. § 16-1-9.1.a (2009).*

On-site supervision means the supervising physical therapist is continuously on-site and present in the building where services are provided, is immediately available to the person being supervised, and maintains continued involvement in appropriate aspects of each treatment session.

W. Va. Code R. § 16-1-2.5 (2009).

In the instant case, Kate Lambdin, a licensed physical therapy assistant was performing physical therapy in the pool with two patients at the time of Ms. Fox's inspection. The Petitioner was in the building at the time of treatment, and in that case the Petitioner did not violate any supervision requirements for the physical therapy assistant.

C. THE CIRCUIT COURT DID NOT ERR WHEN APPLYING THE STATUTORY AND REGULATORY PROVISIONS REGARDING THE SUPERVISION REQUIREMENTS OF A PHYSICAL THERAPY AIDE WHICH WERE IN EFFECT AT THE TIME OF THE ISSUANCE OF THE STATEMENT OF CHARGES.

Respondent followed its statutory and regulatory provisions and the mandates of the *Consent Agreement and Order* dated February 5, 2009, while initiating and conducting the disciplinary proceeding against the Petitioner.

The legislature of the state of West Virginia . . . [found] that in the public interest persons should not engage in the practice of physical therapy or act as a physical therapy assistants without the requisite experience and training and without adequate regulation and control

W. Va. Code § 30-20-1 (1999).

As such, the West Virginia Board of Physical Therapy was created by the West Virginia State Legislature in order to protect the public from those without the necessary qualifications, training, and education. The Board is currently composed of practicing physical therapists and a physical therapy assistant along with a lay member who are all appointed by the Governor. *See* W. Va. Code § 30-20-4 (2010).

In creating the Board, the State Legislature conferred certain powers and duties upon the Board. One of the many powers and duties of the Board is to “propose rules for legislative approval . . . implementing the provisions of this article. . . .” W. Va. Code § 30-20-5(a)(4) (1999). Specifically, the Legislature granted the Board the power to promulgate reasonable rules including those requiring “that no more than two physical therapy assistants be performing under the supervision of a licensed physical therapist at any one time. . . .” W. Va. Code § 30-20-5(a)(4)(A) (1999).

Moreover, the State Legislature granted the Board the power to create “[r]easonable rules establishing standards to insure that those activities of a physical therapy aide are performed in accordance with the definitional requirements specified in subsection (h), section two of this article” W. Va. Code § 30-20-5(a)(4)(B) (1999). And a physical therapy aide was defined as

a person, other than a physical therapy assistant, who assists a licensed physical therapists in the practice of physical therapy under the direct supervision of such licensed physical therapist and performs activities supportive of but not involving assistance in the practice of physical therapy.

W. Va. Code § 30-20-2(h) (1999). Direct supervision was defined as “. . . the actual physical presence of the physical therapist in the immediate treatment area where the treatment is being rendered.” W. Va. Code § 30-20-2(h)(1) (1999).¹⁰

In the instant case, Petitioner, Ferdinand A. Sorongon, was a licensee of the Board as a physical therapist and was subject to the license requirements of said Board. Further, at the time of the violations he was on probation pursuant to a *Consent Agreement and Order* he entered into with the Board to resolve an earlier disciplinary issue. Moreover, this *Consent Agreement and Order* permitted the Board’s investigators to enter the Petitioner’s businesses unannounced to conduct random inspections. The Board contracted with a physical therapist and a former Board member to

¹⁰It should be noted that effective June 11, 2010, the statutory code sections involving definitions were revised. The definition for “direct supervision” was not revised, and the definition for a physical therapy aide was revised to

a person trained under the direction of a physical therapist who performs designated and routine tasks related to physical therapy services under the direct supervision of a physical therapist.

W. Va. Code § 30-20-3(5) and -3(12) (2010). By revising the definition of physical therapy aide it permitted these aides who are not licensed by the Board to perform “designated and routine tasks” wherein in the prior definition the aides could only assist and perform activities supportive of physical therapy.

investigate the allegations as reported in the telephone call. The investigator visited the Petitioner's business located in Dunbar, West Virginia, on May 26, 2010, for a random visit, and the findings were reported to the Board in a written report which not only included her site visit, but other investigatory interviews which included the reporting party, Francisco Bicol. The Board then determined that there was probable cause for violations, and a *Statement of Charges* was served upon the Petitioner on July 1, 2010, which generally outlined the charges pending against the Petitioner.

The charges generally outlined in the *Statement of Charges* included failure to properly supervise physical therapy aides and exceeding the supervision ratio of physical therapy aides and assistants. Moreover, Ms. Fox's testimony supports the charge of Petitioner's failure to properly supervise a physical therapy aide. Ms. Fox testified that she walked right into the physical therapy gym area where she observed an individual, who she later learned to be Sherry Sayre (a physical therapy aide), performing some type of seated leg exercises on a mat table with an elderly female patient. Her tour of the facility continued wherein she was introduced to the Petitioner in his office. *See A.A., 104.* Then Ms. Fox requested that she be able to look around the facility further, and she ended up back in the gym area. *See A.A., 105.*

Upon re-entry to the gym area some five minutes later, the elderly female patient was still present now along with a male patient confined to a wheelchair. Ms. Fox observed the male patient doing some type of exercise wherein he was pulling himself out of the wheelchair with a wall ladder and standing then sitting again. *See A.A., 106-07 and 110.* According to Ms. Fox's observations, only Ms. Sayre had been in the gym area from the time of her initial arrival at the facility to her return to the gym area. *See A.A., 109-10.*

The Kanawha County Circuit Court's *Final Order* found that "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 aide 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*.¹¹ *See A.A.*, 480-81.

The Kanawha County Circuit Court did not "wrongly" interpret the governing statute at the time nor did it retroactively apply a regulation that was promulgated after the Board issued its *Statement of Charges* on July 1, 2010. The circuit court in its *Final Order* applied the governing definition of a physical therapy aide as a person who assists a licensed physical therapist under his/her direct supervision. *See W. Va. Code* § 30-20-2(h) (1999). Direct supervision was defined as "... the actual physical presence of the physical therapist in the immediate treatment area where the treatment is being rendered." *W. Va. Code* § 30-20-2(h)(1) (1999).

¹¹The circuit court also found that

"[w]hile employed by the Petitioner, Mr. Bicol testified that about ninety-percent of the time the Petitioner was not present during patient treatments performed by physical therapy aides, Ms. Sayre and Mr. Jeffrey. 3/17/11 R. at 132, 135. He also testified that on a regular basis he would observe Mr. Jeffrey perform patient treatments without the petitioner present in the gym area, the modalities area, or the pool area. 3/17/11 R. at 133-135. Finally Mr. Bicol testified that there were times while working for the Petitioner that he observed Ms. Lambdin, Mr. Jeffrey, and Ms. Sayre all treating patients at the same time."

See A.A., 473.

The testimony revealed that Sherry Sayre was the individual identified as rendering the treatment observed by Ms. Fox who herself is a practicing physical therapist. Ms. Sayre was found not to be a licensed physical therapist nor a physical therapy assistant. *See* A.A., 34-35 and 474. As such, Ms. Sayre required “direct supervision” by the Petitioner as defined by the statute. Petitioner was not in the immediate treatment area where the treatment was being rendered at the time of the treatment. Ms. Fox had no idea where the Petitioner was at the time since she had yet to meet him when she first entered the gym area.

Petitioner seems to argue that Ms. Fox did not have enough time to observe what she saw in the gym area. Ms. Fox is a licensed physical therapist herself. *See* A.A., 91. The circuit court found her testimony credible and the Petitioner offered no testimony to refute what she observed at the time of the hearing nor has the Petitioner offered any argument to refute the testimony now.

Moreover, the Petitioner’s rendition of the Ms. Fox’s testimony is wrong and clearly self-serving. Ms. Fox’s testimony clearly shows that she entered the facility, then went into the gym area where she made her initial observations and then proceeded further around the facility meeting the Petitioner in his office whereupon she returned to the gym area and still the Petitioner was not physically present in the gym area. *See* A.A., 100-11.

So there was no “brief absence” from the gym area, the Petitioner was not ever physically present in the gym area until the conclusion of Ms. Fox’s inspection when she conducted her shout test.¹² *See* A.A., 114-19. Ms. Fox at this time only observed the Petitioner speaking with a patient and not ever actually performing any physical therapy treatment himself. *See* A.A., 142-43.

¹²It should be noted that while conducting this shout test neither the Petitioner nor anyone else in the gym area reacted to it. *See* A.A., 118.

Petitioner then argues that the circuit court applied West Virginia Code R. § 16-1-2.7(2011), which defined that “immediate treatment area” and did not go into effect until June 16, 2011. Neither parties in the lower circuit court proceeding argued that this rule was applied to the instant case. Nor does the Petitioner now cite to the record to show that the circuit court applied this Rule to the instant case. The circuit court, in its *Final Order*, did find that the Board interpreted “immediate treatment area” as an area where the physical therapist can see and hear the physical therapy aide. *See A.A.*, 478.

It is well settled law that “[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.” *Griffith v. Frontier West Virginia, Inc.*, 228 W. Va. 277, 719 S.E.2d 747 (2011), citing Syl. pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968). Moreover, “[a] statute, or an administrative rule, may not under the guise of interpretation, be modified, revised, amended or rewritten.” Syl. pt. 1, *Consumer Advocate Div. Of Pub. Serv. Comm’n v. Public Serv. Comm’n*, 182 W. Va. 152, 386 S.E.2d 650 (1989).

Petitioner argues that there was great confusion regarding the meaning of the term “direct supervision;” however, the record in the instant case does not reflect such confusion. Nowhere within the record did Ms. Fox testify to “multiple phone calls from physical therapists seeking clarification on these terms and expressing confusion about a physical therapist’s supervisory responsibilities.” *See Pet’r’s Amended Brief*, 16. Ms. Fox only responded affirmatively to a question posed to her about whether “people pose[d] questions to the Board about the supervision of aides?” *See A.A.*, 139. Moreover, Patricia Holstein, the Executive Secretary of the Board, did not actually testify at all regarding any confusion over the meaning of “direct supervision.” Instead, she testified that from “time to time” the Board received questions regarding “direct supervision.”

See A.A., 51. She was then questioned on how the Board generally answers any type of questions posed to the Board regarding the statutes and rules, and that the Board has always defined “direct supervision” to mean the immediate treatment area. See A.A., 52.

The Board applied the plain meaning of the term “direct supervision” which was defined as “. . . the actual physical presence of the physical therapist in the immediate treatment area where the treatment is being rendered.” W. Va. Code § 30-20-2(h)(1) (1999). The definitional language of “direct supervision” is clear and unambiguous. The Board merely applied the plain meaning of the words within the definition of “direct supervision” to mean that the physical therapist must be able to see and hear the physical therapy aide. This answer by the Board did not modify, revise, amend, or rewrite the statute in question.

Further, Petitioner argues that his due process rights were violated with this alleged retroactive application of West Virginia Code R. § 16-1-2.7 (2011). This argument is without merit. First, the Petitioner in his *Consent Agreement and Order* that he was under at the time of Ms. Fox’s inspection, admitted that he had permitted physical therapy treatments to be performed by unlicensed staff such as physical therapy aides. Petitioner, further admitted that an athletic trainer, who is considered a physical therapy aide, performed physical therapy treatments in the pool while the Petitioner was “not present in the immediate treatment area, but instead in another room separated by a door.”¹³ See A.A., 317-18.

The *Consent Agreement and Order* illustrates the fact that the Petitioner had actual knowledge of the plain meaning of “direct supervision.” Petitioner had been charged with the very same violation and agreed in the *Consent Agreement and Order* to rectify it. The physical therapy

¹³It should be remembered that the Petitioner had counsel, Rob J. Aliff, Esq., for that matter who signed the *Consent Agreement and Order* along with the Petitioner. See A.A., 322.

treatment as performed in the pool at the time of his *Consent Agreement and Order* was determined not to be in the immediate treatment area since the physical therapist was in another room. And the Petitioner admitted during his testimony in this case that he permitted an individual known as J.D., who was a janitor by the Petitioner's testimony, to accompany other physical therapy staff on home health visits to support and assist in physical therapy treatments. Petitioner further testified that he was not always on those home health visits which were off-site from his Dunbar facility. Petitioner admitted that J.D. would be considered a physical therapy aide.¹⁴ Under no circumstances would

¹⁴ Q. And is it correct to say that you had somebody under your employment by the name of J.D., correct?

A. Yes.

Q. And that he was also – his role was it sounds like everything. He did some work with patients but he also helped fix and clean the facility?

A. No.

Q. No?

A. No, J.D. is a maintenance specialist, which is pretty much a janitor, person that cleans, person that generally cleans up or whatever, things like that.

Q. And so your testimony is here today that J.D. never was to treat or support with the patients, is that your testimony here today?

A. J.D. is – my testimony about J.D. is his main role is the maintenance specialist, janitor of the office.

Q. Okay, And so it is correct to say your testimony is that J.D. did not support with patient treatment or do any patient treatments, is that correct?

A. J.D. never did patient treatments.

(continued...)

¹⁴(...continued)

Q. Is it correct to say your testimony is here today that J.D. never traveled to any home health sites where treatments were being performed? Is that your testimony here today?

A. My testimony today is J.D. have traveled to other sites in – but not to provide treatment.

Q. So your testimony is that J.D. is a maintenance specialist, correct?

A. Yes, yes.

Q. And your testimony is that he traveled to home health sites where treatments were done by your employees such as your physical therapist aides and your occupational individuals, correct?

A. Not occupational therapists. He never worked under occupational therapy.

Q. But with physical therapy, he did?

A. With physical therapy, for support, if needed for safety, never treatment. He never did any physical therapy treatment. He did physical – he did support and safety but never treatment.

Q. And then it is correct to say then he would be considered a physical therapy aide under the Board's Rules and Regulations, correct?

A. If that's what it's considered, but the only role he would have had to do is for support and safety.

Q. And is it correct to say you were not at those sites when J.D. traveled with your physical therapy discipline folks, correct?

A. When J.D. was with me and when he is working, I–

Q. That's not the question I asked. When he traveled to these sites, were you with J.D. on every single occasion?

A. Not on every single occasion, yes.

(continued...)

a home health visit off site be considered in the immediate treatment area.

The Circuit Court did not err when applying the statutory and regulatory provisions in effect at the time of the issuance of the *Statement of Charges*. The Circuit Court did not retroactively apply any Board regulations. Instead, the Circuit Court applied the clear and unambiguous meaning to the definition of “direct supervision” which found that the Petitioner needed to be in the room when the physical therapy treatment was being conducted. Petitioner knew what direct supervision meant for a physical therapy aide as illustrated in his 2009 *Consent Agreement and Order*. Moreover, Petitioner by his own admission admitted that physical therapy aides would accompany staff on home health visits to conduct physical therapy treatments without the proper supervision.

D. THE BOARD DID NOT EXCEED ITS STATUTORY AUTHORITY BY REVOKING THE PETITIONER’S LICENSE.

¹⁴(...continued)

Q. So your testimony is here that J.D. did travel with your physical therapy discipline folks when they were doing treatments in a supportive role?

A. Yes, he could have traveled with them for support and safety, but not for treatment.

Q. And your testimony is you understand that in a supportive role, you are considered a physical therapy aide under the Board’s Rules and Regulations, correct?

A. For support and safety, yes.

See A.A., 275-76.

The Board did not exceed its statutory authority in revoking the Petitioner's license to practice physical therapy. The Board clearly stated in its *Statement of Charges* which statutory and regulatory provisions the Petitioner violated. As noted in the *Statement of Charges* these sections were, "W. Va. Code §§ 30-20-2-(h)(1), 30-20-10(b)(9) and (b)(10), and W. Va. Code R. §§ 16-19.1.c.(3) and 16-1-2.4 along with the *Consent Agreement and Order* entered into February 5, 2009." *See* A.A., 336. There was no "informal, ad hoc interpretations of statutes" or any retroactive application of an administrative rule.

At the time of Ms. Fox's observation the Board required and still requires that a physical therapy aide be under the direct supervision of a licensed physical therapist. The Board applied the clear and unambiguous meaning to the definition of direct supervision, and found that the Petitioner violated the statutory definition by not actually being physically present in the immediate treatment area where the treatment was being rendered by an unskilled and unlicensed individual.

As noted earlier the Board exists for the protection of the public against those individuals who are uneducated, untrained and inexperienced from performing the practice of physical therapy. It goes without saying that the unlicensed individuals would require a greater degree of supervision than those with education, training and experience and who are licensed and regulated by a board. As such, physical therapy assistants do not require the level of supervision as a physical therapy aide since the aides are not licensed and not regulated by any board wherein the physical therapy assistants must meet certain qualifications such as education and training prior to becoming licensed by this Board.

Ms. Fox observed Ms. Sayre, a physical therapy aide, performing physical therapy exercises with a patient and overseeing another patient's physical therapy treatment with no direct supervision whatsoever. This observation on May 26, 2010, is exactly why the Board exists to ensure that those

receiving physical therapy receive the properly supervised physical therapy treatments by licensed individuals.

In addition, the West Virginia Supreme Court of Appeals has repeatedly pronounced that the decisions of administrative agencies that have been established to oversee particularized areas of governmental functioning must be given deference because it is within their areas of expertise to render final decisions in certain matters. *See In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996) (great deference must be given to selection of remedy by correctional officers' civil service commission because its members draw on fund of knowledge and expertise all their own); *Berlow v. West Virginia Bd. of Med.*, 193 W. Va. 666, 458 S.E.2d 469 (1995) (per curiam) (Medical Board's determination of penalty of restricted practice should not have been overturned by Circuit Court because penalty had been determined by those with special expertise regarding the standards of their own profession and those who are in superior position to determine nature and duration of discipline); *West Virginia Dep't of Health v. West Virginia Civil Serv. Comm'n*, 178 W. Va. 237, 358 S.E.2d 798 (1987) (it is the province of Civil Service Commission, not the courts, to set punishment for state employees).

There is a reason that the Legislature created the Board, and that is to not only regulate the physical therapy profession, but also to make sure that the public is presented with qualified and licensed physical therapists and physical therapy assistants. It is the Board who must give meaning to its statute and rules on a daily basis. The Petitioner has failed to show that any of the grounds for reversal, vacation, or modification exist.

V.

CONCLUSION

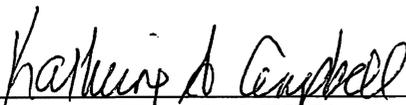
WHEREFORE, based upon the foregoing, the Respondent respectfully requests that this Court deny the Petitioner's appeal, and affirm the Kanawha County Circuit Court's *Final Order Denying Petition for Appeal and Affirming the Board's Final Order* entered on January 26, 2012.

Respectfully submitted,

WEST VIRGINIA BOARD OF PHYSICAL
THERAPY, *Respondent,*

By counsel,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



KATHERINE A. CAMPBELL
ASSISTANT ATTORNEY GENERAL
State Capitol Complex
1900 Kanawha Boulevard, East
Building 1, Room E-26
Charleston, West Virginia 25305
Telephone No. (304) 558-2021
State Bar ID No. 6654
Email: kac@wvago.gov

CERTIFICATE OF SERVICE

I, Katherine A. Campbell, Assistant Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing "Respondent's Response to Petitioner's Amended Brief" was served by depositing the same, postage prepaid in the United States mail, this 27th day of August 2012 addressed as follows:

To: Charles M. Johnson, Esq.
Frost Brown Todd LLC
Laidley Tower, Suite 401
500 Lee Street, East
Charleston, West Virginia 25301


KATHERINE A. CAMPBELL