

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

No.12-0566

PAUL W. LIGHTNER

Petitioner,

v.

JANE L. CLINE, WEST VIRGINIA INSURANCE COMMISSIONER;
CITIFINANCIAL, INC., and TRITON INSURANCE COMPANY,

Respondents.

**BRIEF OF RESPONDENTS, CITIFINANCIAL, INC.
AND TRITON INSURANCE COMPANY**

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STATEMENT OF THE CASE

Rule 10(c)(4) of the West Virginia Rules of Appellate Procedure provides that “the statement of the case must contain a concise account of the procedural history of the case and a statement of facts of the case that are relevant to the assignments of error.” The brief of Petitioner, Paul W. Lightner [“Lightner”], fails to comport with this requirement. It does not set forth an accurate procedural history and the recitation of facts is more in the order of argument. The Respondents, Citifinancial, Inc. and Triton Insurance Company [collectively “Citifinancial” or “Triton”], therefore, will provide the following statement of the case as permitted by Rule 10(d) of the West Virginia Rules of Appellate Procedure.¹

The nature of the underlying dispute and the procedural history of this matter while it was pending in the Circuit Court of Marshall County are well known to this Court. *State ex rel. Citifinancial, Inc. v. Madden*, 223 W.Va. 229, 672 S.E.2d 365 (2008). Citifinancial filed a petition for writ of prohibition to prevent the Circuit Court of Marshall County from enforcing its denial of Citifinancial’s motion for partial summary judgment. Citifinancial had asserted that it was entitled to a dismissal of the claims pending against it that involved allegations of unreasonable and excessive credit insurance charges because the rates had been approved by the Insurance Commissioner [“Commissioner”]. Alternatively, Citifinancial requested that Lightner’s claims be stayed under the doctrine of primary jurisdiction until the Commissioner determined the reasonableness of the charges.

The Commissioner submitted an *amicus curiae* brief in support of the petition. In its submission, the Commissioner made clear that the *amicus curiae* brief was filed for the limited purpose of discussing the role of the Commissioner in establishing premium rates for

¹ Throughout the brief, the Respondents will reference Triton when discussing rate filings, rate approval and the Insurance Commissioner’s investigation of Lightner’s Consumer Complaint as Triton was the insurer actually issuing any applicable policies. Citifinancial will be referenced when discussing the procedural posture of the administrative complaint, the appeal to the Circuit Court of Kanawha County and the present Petition for Appeal.

credit insurance and that it was not the intention of the Commissioner to comment upon the facts of the underlying dispute. (App. 67-81). Rather, the Commissioner wanted to remind this Court of her statutory role and to discuss the Legislature's intent in enacting a very comprehensive regulatory system for the insurance industry. The Commissioner further noted that within the statutory framework of the Insurance Code there was a remedy established to address concerns about the reasonableness of premium rates and that a person who had concerns about the reasonableness or excessiveness of rates could avail themselves of the process. In short, the Commissioner took the position that the authority reposed to the Commissioner was the available and appropriate method for determining the reasonableness of insurance rates. (App. 67-81).

This Court issued its opinion in *State ex rel. Citifinancial, Inc. v. Madden* on December 10, 2008. The opinion contained three (3) syllabus points which addressed the authority and jurisdiction of the Commissioner over insurance rates. Specifically, this Court stated:

“2. In providing for a cause of action that permits the recovery of excess charges included in a consumer credit transaction pursuant to the provisions of West Virginia Code § 46A-3-109 (1998) (Repl.Vol. 2006) and § 46A-5-101 (1996) (Repl.Vol. 2006), the Legislature did not authorize the circuit courts to invade the jurisdiction of the Insurance Commissioner and conduct a reexamination of insurance rates previously approved by the Commissioner.

3. Any challenge to an approved insurance rate by an aggrieved person or organization should be raised pursuant to the provisions of West Virginia Code § 33-20-5(d) (1967) (Repl.Vol. 2006) in a proceeding before the Insurance Commissioner.

4. The presumption of statutory compliance for approved insurance rates set forth in West Virginia Code § 33-6-30(c) (2002) (Repl.Vol. 2006) may only be rebutted in a proceeding before the Insurance Commissioner.”

This Court proceeded to grant a writ of prohibition which prevented enforcement of a May 5, 2008 Order of the Circuit Court of Marshall County denying partial summary judgment to Citifinancial with regard to claims for alleged unreasonable and excessive credit insurance charges.²

Lightner filed a Consumer Complaint ["Complaint"] before the Commissioner on or about September 29, 2009. The Complaint was filed on behalf of himself and other policyholders and challenged the rates for certain insurance products known as credit property insurance ["credit property"] and credit involuntary unemployment insurance ["IUI"].³ The Complaint, with exhibits, consisted of 347 pages. In it, Lightner contended that historically low loss ratios incurred by Triton as opposed to projections and filings were indicative of excessive rates and therefore violative of the Insurance Code. Lightner also asserted that Triton was not forthcoming with relevant information provided in filings made to the Commissioner which should, in turn, cause the filings to be rejected. Lightner requested a hearing pursuant to W.Va. Code § 33-2-13 (1957), W.Va. Code § 30-20-5d (1967), and W.Va. C.S.R. § 114-13-1, *et seq.* (2003), on the administrative complaint. Lightner also sought an order from the Commissioner withdrawing approval for the rate filings of Triton over a period of 14 years. (App. 579-923).

By letter dated November 13, 2009, the Commissioner advised that she wanted to investigate the issues raised in the Complaint for a ninety (90) day period following which the Commissioner would make the following decisions: (1) whether to appoint a hearing

² A May 12, 2008 Order of the Circuit Court of Marshall County certifying a class action was subsequently vacated. The Order further stayed all remaining claims of both Citifinancial and Lightner pending notification by Lightner of the results of the administrative proceeding before the Commissioner. (App. 947-950).

³ The Consumer Complaint named as Respondents Citifinancial and Triton because, as previously noted, Triton was the insurer actually issuing any applicable policies for credit property and IUI sold by Citifinancial.

examiner to hear issues in the matter; (2) whether to intervene in the matter; and/or (3) whether to take a final position on potentially denying a hearing in the matter on the substantive issues. (App. 490-494).

The Commissioner then undertook an independent investigation and analysis of not only Lightner's allegations, but all of Triton's rate filings in West Virginia. The investigation was conducted pursuant to W.Va. Code § 33-2-3a (2007) and W.Va. Code § 33-2-9 (2007). The purpose for conducting the independent investigation was articulated by the Commissioner as follows:

"To ascertain relevant and pertinent facts to determine if she should take immediate action as opposed to holding an administrative hearing based upon the complexity of the issues, the challenge is for the lay public to put forth effect arguments, the expertise of the Commissioner concerning these complex issues and the resources available to her for determination of these issues, for a just and clear resolution of the issues, and to make sure uniformity of judgment for all policyholders in the State occurs as opposed to a singular administrative hearing examination result which may be inconsistent with a policyholder pool as a whole in the State of West Virginia." (App. 24-25).

During the Commissioner's investigation, a data call was requested from Triton which resulted in the production of thousands of pages of documents. (App.1133-1534, 1699-1714). There were also discussions between the Commissioner and representatives of Triton concerning the information supplied and the impact of the information on the Commissioner's broad-based investigation – something clearly permitted and to be expected. (App. 1305-1306, 1454-1462, 1513-1518, 1700-1705). In connection with the pending and parallel Complaint, Lightner was likewise afforded the opportunity to provide additional information and actual argument in support of his position. In particular, Lightner supplied reports from insurance departments in California and Arizona concerning credit property and unemployment insurance and submitted a thirty-one (31) page slide presentation entitled "Summary of the Evidence." (App. 1536-1605). Lightner also supplied

an e-mail to the Commissioner indicating that he was unable to find a benchmark or minimum loss ratio for credit property or credit unemployment insurance in the State of Texas.

The Commissioner also retained the services of an independent actuary to review the filings of Triton. The actuary was asked to comment on whether the filings were complete and whether the loss ratio, expense and profit components of the rate were reasonable and typical for the coverages provided. The independent expert, Hause Actuarial Solutions, Inc., issued an eleven (11) page report dated March 29, 2010. (App. 516-527).

Following her independent investigation and consideration of Lightner's Complaint, the Commissioner filed the April 5, 2010 Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Complainant ["Order"]. The Order is sixteen (16) pages in length and contains specific findings concerning a number of filings made by Triton. Those findings include: (1) during the period contained in the Complainant's administrative complaint, Triton did not write credit property nor IUI wherein any rule was in effect concerning benchmark minimum loss ratio standards for writing either product in the State of West Virginia; (2) both parties were able to provide relevant information, data or other comment concerning their respective positions as a part of the Commissioner fulfilling her duties under W.Va. Code § 33-20-5(c) (1967); (3) no duty [is] placed upon insurers offering insurance as referenced in the Complaint to re-file rates once approved where there is no change in circumstances of the original filing; (4) rates filed by insurance companies in other states are neither necessary relevant nor dispositive as to what a rate should be in West Virginia; and (5) [h]istorically low loss ratios in relation to what is filed as anticipated loss ratios with the Commissioner concerning credit property and/or IUI do not by themselves

constitute an excessive rate violation in that claim ratios have been known to fluctuate widely from company to company, state to state and year to year. (App. 22-37). Many of these findings mirror the opinions expressed by the independent actuary retained by the Commissioner. (App. 516-527).

The Commissioner also made numerous conclusions of law in the Order. This included that Triton did comply with W.Va. Code § 33-20-3 (2006) in its filings and that Triton's rate filings did not violate W.Va. Code § 33-20-3 (2006). The Commissioner further found that there "is no factual dispute as concerning the filing and approval of the rates and forms of Triton Insurance Company" and that the rates charged by Triton were reasonable in relation to the benefits provided. Finally, the Commissioner also found and ordered that a hearing upon the administrative complaint would serve no useful purpose and, therefore, the request for a hearing was denied. (App. 22-37).

On May 5, 2010, Lightner filed his petition appealing the Commissioner's April 5, 2010 Order pursuant to W.Va. Code § 29A-5-4(a) and W.Va. Code § 33-2-14. In his petition, Lightner requested eight (8) forms of relief including a request that the Circuit Court conduct a hearing, permit discovery, take evidence, hear argument and rule on the issues presented. Lightner also submitted with his petition two (2) affidavits which were not part of the record submitted when the Complaint was filed. (App. 38-511). Citifinancial filed a response to the petition on June 7, 2010. (App. 539-546). The Commissioner filed her response on May 27, 2010. (App. 512-529). Lightner submitted his opening brief in support of the petition on August 23, 2010. (App. 1715-1746). Citifinancial and the Commissioner filed their briefs in opposition on September 22, 2010. (App. 1747-1787, 1788-1822). Lightner's reply was filed on October 12, 2010. (App. 1823-1839).

On January 31, 2011, the Circuit Court held a status conference and heard oral argument concerning the petition and the responses. (App. 1914-1965). By letter dated February 14, 2012, the Circuit Court advised the parties that the court had decided no further hearings were necessary for a determination of the issues raised in the appeal. The parties were directed to submit a proposed final order in support of their respective positions which should contain findings of fact and conclusions of law. (App. 1860-1861). All parties submitted proposed orders as per the Circuit Court's directive. On March 26, 2012, the Circuit Court entered its Order Affirming Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Complainant by the West Virginia Insurance Commissioner and Dismissing Appeal by Petitioner, Paul W. Lightner. (App. 1-21).

SUMMARY OF ARGUMENT

Lightner's Petition for Appeal should be refused and both the Circuit Court's Order of March 26, 2012 and the Commissioner's Order of April 5, 2010 should be left undisturbed. The Commissioner, after a lengthy and thorough investigation, concluded that the insurance rates charged were and are reasonable. This included a finding that there was no rule in effect concerning benchmark minimum loss ratio standards for products in West Virginia and that Triton's rate filings did not violate W.Va. Code § 33-20-3. The Circuit Court, in reviewing the Commissioner's Order, evaluated the whole record and gave requisite deference to the Commissioner's findings. This was appropriate given that the Circuit Court's role was to determine whether there was evidence in the record as a whole to support the decision and to presume that the Commissioner's actions are valid so long as the decision is supported by substantial evidence or a rational basis.

Contrary to Lightner's assertion, the claims set forth in his Complaint were fully developed and heard. Lightner filed a Complaint which consisted of hundreds of pages and

numerous exhibits. Lightner was also permitted to directly submit additional information to the Commissioner, without the knowledge and involvement of Triton, which included a slide presentation entitled "Summary of Evidence." In fact, Lightner submitted approximately 479 pages of additional evidence or arguments supporting his claim.

What Lightner's petition misses, or chooses to ignore, is that the Commissioner exercised her independent regulatory authority and conducted a parallel examination which included requiring Triton to produce substantial data and documents relative to the credit property and IUI products which were approved by the Commissioner in 1996 and 1997, respectively. The examination included a review of all Triton policies approved in West Virginia, not just those at issue in Lightner's Complaint. The Commissioner also sought and obtained an independent actuary opinion from Hause Actuarial Services which resulted in an eleven (11) page report. The investigation spanned several months and resulted in a record which contains thousands documents.

Following the extensive investigation, the Commissioner issued her Order. While a formal hearing was not conducted, the Commissioner is vested with the authority to conduct investigations whenever it is believed that a violation of any provision of Chapter 33 of the West Virginia Code has been or is being committed. W.Va. Code § 33-2-3a. In addition, W.Va. Code § 33-2-9(a) provides that the provisions of that section are intended to enable the Commissioner to adopt a flexible system of examinations which directs resources as may be considered appropriate and necessary for the administration of the insurance and insurance related laws of the state. Moreover, the Commissioner is also vested with the authority to promulgate rules and regulations. 114 C.S.R. § 13-3.3 allows the Commissioner to refuse to grant a requested hearing if the hearing "[w]ould serve no useful purpose..." The Commissioner acted consistent with this authority and made an

appropriate determination that a formal hearing would serve no useful purpose since an independent examination of the issues had been completed. In fact, one of the appeal statutes under which Lightner appealed the Commissioner's ruling to the Circuit Court, W.Va. Code § 33-2-14, recognizes that the Commissioner may not provide a formal hearing when it permits an appeal from "an order refusing a hearing."

Thus, Lightner's assertions that he was wrongfully denied a request for a hearing and any procedural rights are simply wrong. Lightner was not automatically entitled to a hearing, particularly since the Commissioner has the authority to refuse a formal hearing if it would serve no useful purpose. Nonetheless, Lightner had ample opportunity to develop and present evidence to support the claims contained in the Complaint and did so without the knowledge and involvement of Triton. His Complaint, significantly, was complimented by an independent investigation conducted by the Commissioner. His argument that he was denied the opportunity to fully present his Complaint is betrayed by his additional argument that the evidence produced to the Commissioner demonstrated that the rates charged were unreasonable and in violation of law. If the evidence produced by Lightner was as compelling as he argues – a point not conceded by Triton and rejected by the Commissioner – any purported failure to provide a hearing certainly did not prevent Lightner's evidence from being considered.

What Lightner seeks is for judicial officers to substitute their judgment with respect to the reasonableness of rates for that of the Commissioner – a result prohibited by this Court's decision in *State ex rel. Citifinancial v. Madden*. It is the Commissioner who has the authority and expertise to decide whether insurance rates are reasonable in West Virginia. Here, her decision was supported by the record, particularly given that West Virginia had *no* standard in place establishing a benchmark for minimum loss ratios and *no* requirement that

insurers re-file rates once approved when there is no change in the circumstances of the original filing. Under these circumstances, the Commissioner's Order cannot be considered arbitrary or capricious.

Because Lightner cannot overcome the results of a thorough and independent review and the Circuit Court's affirmance of the Order arising from that examination, much of Lightner's brief is devoted to an ad hominine attack against the Commissioner and Triton. Indeed, there is considerable criticism levied against the Circuit Court which affirmed the Commissioner's Order. These attacks are unwarranted. There is no evidence in the record to support any contention of an inappropriate relationship between the Commissioner and Triton and references to other agency/business relationships, including UBB, are not only irrelevant but inappropriate. These arguments are advanced in the hope that Lightner will be permitted to do that which this Court expressly held he could not do – litigate in circuit court the reasonableness of the insurance rates approved by the Commissioner. For this reason, Lightner's invitation that the administrative process be bypassed if reversal and remand should occur must be rejected.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 21(c) of the West Virginia Rules of Appellate Procedure, Citifinancial requests that this Court affirm the Circuit Court's Order of March 26, 2012 because the appeal does not present a substantial question of unsettled law and, upon consideration of the applicable standard of review and the record presented, no prejudicial error exists. Likewise, Citifinancial maintains that the basis for a request for oral argument under Rule 20 is not satisfied. The petition does not involve issues of first impression, issues of fundamental public importance, constitutional questions or inconsistencies or

conflicts among the decisions of lower tribunals. Instead, this Court can affirm the detailed and well-reasoned Order of the Circuit Court simply under Rule 21(c).

ARGUMENT

I. THE CIRCUIT COURT PROPERLY HELD THAT THE COMMISSIONER'S ORDER WAS THE PRODUCT OF A PROCEEDING MEETING STATUTORY, REGULATORY AND CONSTITUTIONAL REQUIREMENTS.

The standard of review for administrative orders from circuit courts is well established. This Court's review of the Circuit Court's ruling is governed by the statutory standard of review employed by the lower court. *Nesselroad v. State Consol. Pub. Ret. Bd.*, 225 W.Va. 397, 693 S.E.2d 471 (2010). Questions of law are reviewed *de novo* while findings of fact are accorded deference unless the reviewing court believes the findings to be clearly wrong. *Groves v. Cicchirillo*, 225 W.Va. 474, 694 S.E.2d 639 (2010). The focal point of the review is the administrative record already in existence rather than some new record made initially in the reviewing court. *Frymier-Halleron v. Paige*, 193 W.Va. 687, 458 S.E.2d 780 (1995). Application of the standard of review compels affirmance of the Circuit Court's Order which, in turn, upheld the Commissioner's April 5, 2010 Order. The Circuit Court properly concluded that the Commissioner's handling of the rate issues raised in Lightner's Complaint met statutory, regulatory and constitutional standards. The Circuit Court's Order addressed Lightner's challenges to the Commissioner's Order in detail. The Commissioner's Order, in turn, was extensive and contained findings of fact and conclusions of law which reflected not only due consideration of Lightner's Complaint but, importantly, also took into account the independent investigation the Commissioner undertook pursuant to her statutory authority.⁴

⁴ Lightner's brief contains a separate section regarding standard of review in regard to due process of law. Citifinancial submits that there is no separate standard of review in an appeal of an administrative ruling based upon allegations of a due process violation. In fact, the Administrative Procedures Act

Initially, it should be noted that Lightner repeatedly attacks the Circuit Court's Order for simply adopting counsel-crafted findings. (Petitioner's Brief, pg. 27). He further ridicules the adjectives used to describe the administrative record and the investigation conduct by the Commissioner. (Petitioner's Brief, pg. 28). Lightner's criticism is puzzling given that Lightner has previously proposed orders in this matter which were adopted by the Circuit Court of Marshall County verbatim. As this Court observed in *State ex rel. Citifinancial, Inc. v. Madden*:

"Citifinancial observes that the trial court's order is verbatim of the draft order submitted by Mr. Lightner and notes that Judge Madden failed to articulate any reasoning or findings of fact from the bench to support his rulings. When Petitioner raised this issue in reference to the draft order prepared by Mr. Lightner, the trial court stated that the reasoning set forth in the draft order was consistent with his previously unexpressed thoughts."

223 W.Va. at 233, n.10, 672 S.E.2d at 369, n.10.

It is apparently Lightner's position that it is perfectly acceptable for a court to embrace any order prepared by his counsel but it's unacceptable for a court to adopt an order prepared by the opponent. Moreover, it is difficult to understand how the use of terms such as "hundreds" or "thousands" or "extensive" or "independent" is inappropriate given the record in this case. The fact is the administrative record does contain thousands of pages. It is also a fact that the Commissioner conducted an investigation which was independent of Lightner's Complaint and pursuant to separate statutory authority. That investigation included a data call to Triton which resulted in the production of voluminous data. Lightner himself produced several hundred pages of documents as a part of his Complaint. The Commissioner's Order likewise consists of sixteen (16) pages and contains findings of fact and conclusions of law. These facts did not justify Lightner's mocking comments.

["APA"] subsumes review of constitutional issues as a part of what a reviewing court may consider in evaluating an agency's determination. See W.Va. Code § 29A-5-4(g).

Nonetheless, Lightner's attack cannot shield these facts from a conclusion that the Commissioner's Order, and the Circuit Court's affirmance, were proper.

A. The Rate Issues Were Thoroughly Reviewed And Analyzed In Compliance With Statutory And Regulatory Requirements.

One of Lightner's basic arguments is that the Circuit Court's Order erroneously upheld the Commissioner's Order without providing Lightner with a timely and formal hearing. Lightner maintains that the failure to provide a formal hearing was violative of statutory and regulatory requirements. This argument should be rejected because the record reflects that the Commissioner's Order was entered following an extensive investigation which was based not only on Lightner's Complaint, but also upon the independent investigation conducted by the Commissioner pursuant to separate statutory authority. The rate issues were the subject of parallel and complimentary proceedings – proceedings which allowed for substantial factual development and, most importantly, satisfied all statutory and regulatory requirements.

Lightner filed his Complaint on September 28, 2009. It consisted of hundreds of pages, with exhibits. He demanded a hearing which was his right to request. At that point, the Rules of Practice and Procedure for Hearings before the West Virginia Insurance Commissioner ["Rules"] were triggered. See 114 C.S.R. § 13, *et seq.* Those Rules, promulgated pursuant to express statutory authority, do not contain any provision for the conduction of discovery. The Rules also vest within the Commissioner the authority to refuse to grant a hearing if it is deemed to serve no useful purpose. 114 C.S.R. § 13-3.

Following the filing of the Complaint, the Commissioner determined that she wanted to undertake an independent investigation of the rate issues raised by Lightner. The Commissioner clearly possesses this authority. See *W.Va. Code § 33-2-3a and – 9*. The power vested in the Commissioner to examine insurers and require the production of

documents, data or other information is broader than the Rules applicable to hearings conducted at the request of a complainant. The Commissioner communicated her decision to independently investigate the issues raised in the Complaint in a letter dated November 13, 2009. In the letter, the Commissioner advised that she wanted a ninety (90) day period to investigate the issues raised in the Complaint following which the Commissioner would decide whether to appoint a hearing examiner, whether to intervene in the matter and/or whether to take a final position on potentially denying a hearing in the matter on substantive issues. The Commissioner also requested an agreement by the parties to this extension of time for the Commissioner to conduct the investigation.⁵ Lightner provided only provisional consent and insisted that any extension of time by which a hearing could be conducted had to be conditioned upon an agreement by the Commissioner to actually conduct a hearing. The Commissioner did not agree to conduct a hearing and it was clear to Lightner that whether a hearing would be held was an issue to be later resolved. Significantly, Lightner did not challenge the Commissioner's decision to use the ninety (90) day period to investigate the issues in the Complaint. Lightner could have filed a petition for a writ of mandamus contending that the provisions of the Rules were being violated or that his rights were otherwise being adversely affected. Lightner took no such course of action and, consequently, he cannot complain about the failure to provide a hearing within the requisite time period, even if it were accepted that he was entitled to any hearing.

Over the next several months, the Commissioner conducted her investigation. She compelled Triton to produce thousands of pages of documents and data. She also requested and received information from Lightner including allowing Lightner to provide a summary of the evidence which Lightner maintains supported a conclusion that the rates

⁵ The rules applicable to hearings before the Commissioner require that any hearing be conducted within forty-five (45) days of receipt of a written demand unless postponed to a later date by mutual agreement. 114 C.S.R. § 13-3.3

charged were unreasonable. The Commissioner also obtained an independent actuary opinion which was within her authority.

It was only after this extensive investigation and after having the opportunity to review the Complaint and additional submissions filed by Lightner's counsel, that the Commissioner issued her Order. The Commissioner appropriately found that there was no rule in effect setting forth benchmark minimum loss ratio standards for either credit property or IUI during the time period those products were offered. She also concluded that the filings made by Triton were complete and approved on a going forward basis at the time of filing; that Triton did in fact comply with the provisions of *W.Va. Code § 33-20-3* with respect to its filing; and that the rates charged by Triton were reasonable in relation to the benefits provided. These findings were supported, in large part, by the independent actuary opinion obtained by the Commissioner.

All actions taken by the Commissioner leading up to the entry of the April 5, 2010 Order satisfied statutory and regulatory requirements. The Commissioner is clearly vested with substantial authority to conduct an independent examination or investigation of rates even after they are in effect. *W.Va. Code § 33-20-5(c)*. The employment of an actuary to assist in conducting an investigation is also specifically authorized by statute. *W.Va. Code § 33-2-9(i)(5)*. The timeliness of issuing her Order as well as determining that a hearing would serve no useful purpose was appropriate because of the mutual agreement of the parties. Moreover, the forty-five (45) day deadline by which a hearing is supposed to be held under the rules is directory and not mandatory. See e.g. *Brock v. Pierce County*, 476 U.S. 253 (1986); *Etape v. Chertoff*, 497 F.3d 379 (4th Cir. 2007) (cases recognizing that a statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to

comply with a provision). Finally, as more fully set forth below, the Commissioner's determination that a hearing on the Complaint would serve no useful purpose was also appropriate as Lightner has no automatic right to a formal hearing and his due process rights were fully protected.

It is significant to note that Lightner's challenge to the reasonableness of the rates was a challenge to rates currently in effect. Challenges to an existing rate are addressed in W.Va. Code § 33-20-5(d). The statute provides:

“(d) Any person or organization aggrieved with respect to any filing which is in effect may demand a hearing thereon. If, after such hearing, the Commissioner finds that the filing does not meet the requirements of this article, he shall issue an order specifying in what respects he finds that such filing fails to meet the requirements of this article, in stating when, within a reasonable period thereafter, such filing shall be deemed no longer affective. Said order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in said order.”

This statute does not specifically state that a hearing shall be provided with respect to any filing in effect. A fair reading of the statute indicates that a hearing would be required if the Commissioner finds that a filing may not meet the requirements of the article and intends to take action to deem the filing no longer effective. While Lightner cites to W.Va. Code § 33-2-13 as conferring an absolute right to a hearing, that the statute must be read in conjunction with other statutes and regulations relating to hearings. Otherwise, the Commissioner would be required to grant a formal hearing upon every complaint that may be filed in West Virginia with respect to an existing rate filing.

W.Va. Code § 33-20-5(d) and W.Va. Code § 33-2-13 are not the only statutes which address whether the Commissioner is required to provide a hearing. W.Va. Code § 33-2-14, one of the appeal statutes upon which Lightner filed his petition for appeal in the Circuit Court, specifically provides that “[a]n appeal from the Commissioner shall be taken from an

order entered after a hearing *or an order refusing a hearing.*” (emphasis supplied). “A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute.” *Syl. Pt. 3, Meadows v. Wal-Mart Stores, Inc.*, 207 W.Va. 203, 537 S.E.2d 676 (1999) quoted in *Syl. Pt. 2, T. Weston v. Mineral City*, 219 W.Va. 564, 638 S.E.2d 167 (2008). “Each word of a statute should be given some effect and a statute should be construed in accordance with the import of its language.” *Syl. Pt. 6*, in part, *State ex rel. Cohen v Mansion*, 175 W.Va. 525, 336 S.E.2d 171 (1984). Most importantly, a court may not interpret with a resulting effect of making a statute meaningless as one of the basic principles of statutory construction is that the Legislature will not enact a meaningless statute. *State ex rel. Games-Neely v. Sanders*, 219 W.Va. 500, 641 S.E.2d 153 (2006) (Starcher, J. dissenting).

The only proper method by which the varying statutes concerning hearings can be reconciled is that the Commissioner may refuse a hearing when a demand is made by an aggrieved person and the issue is a challenge to a rate filing as exists here. There is an appeal right to such an order refusing a hearing. Lightner’s interpretation of the statutory scheme, which is to require a hearing anytime a demand is made, would create the unwieldy result that all aggrieved persons are entitled to a formal hearing by the mere filing of any complaint and making a demand. It would also render the language of the Insurance Code appeal statute, W.Va. Code § 33-2-14, meaningless to the extent that it provides that a right of appeal exists as to any order of the Commissioner refusing a hearing.

It is equally significant that the right of the Commissioner to determine that a hearing may not serve a useful purpose is also embedded in the Rules promulgated by the Commissioner pursuant to statutory authority. 114 C.S.R. § 13-3.3 provides:

“Hearing On Written Demand. – When the commissioner is presented with a demand for a hearing is described in subsections 3.1

and 3.2 of this section he or she shall conduct a hearing within forty-five (45) days of receipt by him or her of such written demand unless postponed to a later date by mutual agreement. However, the commissioner shall determine that the hearing demanded:

a. Would involve an exercise of authority in excess of that available to him or her under law, or

b. *Would serve no useful purpose*, the commissioner shall, within forty-five (45) days of receipt of such demand, enter an order refusing to grant the hearing as requested, incorporating therein his or her reasons for such refusal. Appeal may be taken from such order as provided in W.Va. Code § 33-2-14. (emphasis supplied)”

The regulation promulgated by the Commissioner is entirely consistent with the statutory scheme as it relates to the provision of a formal hearing where there are challenges to a rate filing in effect. The Commissioner is permitted to perform a gate-keeping function and determine that a hearing would not be useful. Again, to require a hearing every time there is a demand made by any aggrieved person would be simply unworkable.

Lightner’s argument that the Circuit Court Order upholding the Commissioner’s refusal to provide a hearing somehow runs afoul of this Court’s decision in *State ex rel. Citifinancial, Inc. v. Madden* or the position of the Commissioner in the *amicus curiae* brief is incorrect. The position advanced by the Commissioner before this Court was simply that the *process* set forth in W.Va. Code § 33-20-5(d) was available to an individual who might have concerns about the reasonableness of premium rates. Similarly, this Court’s decision in *Citifinancial* did not hold that a formal hearing was unquestionably also available. Instead, this Court merely found that the process set forth in W.Va. Code § 33-20-5(d) had to be utilized by any aggrieved person. As stated in *Syl. Pt. 3*:

“Any challenges to an approved insurance rate by an aggrieved person or organization should be raised pursuant to the provisions of W.Va. Code § 33-20-5(d) (1967) (Repl.Vol.2006) in a proceeding before the Insurance Commissioner.”

This Court indicated that a *proceeding* before the Commissioner is what would be necessary. It did not state that a formal hearing was required.⁶ In this case, Lightner's Complaint was unquestionably the subject of a proceeding before the Commissioner which resulted in the April 5, 2010 Order. Additionally, the issues raised in the Complaint also had the benefit of development through the complimentary and independent investigation undertaken by the Commissioner utilizing the broad powers provided under W.Va. Code § 33-2-9. The extensive record developed by the Commissioner more than afforded Lightner the opportunity to be "heard" well within the contemplation of any legal requirements.

B. LIGHTNER'S COMPLAINT WAS THE SUBJECT OF A PROCEEDING MEETING DUE PROCESS REQUIREMENTS.

The proceeding provided to Lightner also satisfied due process requirements. Due process does not require a formal hearing. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Due process is flexible and calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer*, 408 U.S. 471 (1972). Depending on the circumstances and the interests at stake, a fairly extensive evidentiary hearing may be constitutionally required before a legitimate claim of entitlement may be terminated.⁷ In other instances, however, the United States Supreme Court has upheld procedures affording less than a full evidentiary hearing if "some kind of a hearing" ensuring an effective "initial check against mistaken decisions" is provided before the deprivation occurs, and a prompt opportunity for completed administrative and judicial review is available. *Mathews v. Eldridge*, 424 U.S.

⁶ New points of law are announced in those points are articulated through syllabus points as required by the State Constitution. *Walker v. Doe*, 210 W.Va. 490, 598 S.E.2d 290 (2001).

⁷ There is a substantial question as to whether Lightner's right to challenge a rate rises to the level of a constitutionally protected right which is subject to due process protection. That issue was not raised or addressed by the Circuit Court in its Order of March 26, 2012.

319 (1976). Based on these principles, the United States Supreme Court has developed a three factor balancing test to determine what type of due process is due:

“First, the private interest that will be affected by the official actions; Second the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”

Mathews, 424 U.S. at 335.

The proceeding afforded Lightner, when coupled with the independent investigation conducted by the Commissioner, demonstrates that the *Mathews* factors were more than satisfied. The proceeding also satisfies this Court’s analysis of due process requirements set forth in *North v. West Virginia Bd. of Regents*, 160 W.Va. 248, 233 S.E.2d 411 (1997) given that *North* cites and relies upon *Mathews*. There, the property interest at issue, expulsion from medical school, was unquestionably a substantial property interest. Here, the interest in challenging a rate is minimal particularly when an administrative agency is empowered to regulate rates. Moreover, the Commissioner must act as a gatekeeper and assess whether the circumstances dictate a formal hearing. If the Commissioner is required to provide a formal hearing upon each request, the additional time and cost associated with a formal hearing would substantially burden the Commissioner’s ability to discharge her duties effectively. Lightner’s claim of unreasonable rates was considered by the Commissioner based upon an extensive record including detailed, expert evaluations of objective data as well as Lightner’s own significant submissions. Triton was required to produce thousands of pages of documents and data. An independent actuary was retained who submitted an eleven (11) page report. Lightner was given the opportunity to submit additional materials over and above the Complaint in an *ex parte* fashion which included a

presentation entitled "Summary of the Evidence." Clearly, all of these procedures provided adequate procedural safeguards and did not deny Lightner due process.

Other cases support the concept that less than a formal hearing, such as informal proceedings and internal reviews, provide due process. *Capitol Mortgage v. Bankers Insurance*, 222 F.3d. 151 (4th Cir. 2000); *Doolin Sec. Sav. Bank, F.S.B. v. FDIC*, 53 F.3d. 1395 (4th Cir. 1995). In *Capitol Mortgage*, the court found that the informal procedures used by an agency in its termination proceedings provided adequate procedural safeguards and did not constitute a denial of due process. 222 F.3d. at 155. Much like the proceeding before the Commissioner, the informal proceedings in *Capitol Mortgage* included the consideration of detailed expert evaluations and a review and analysis of voluminous submissions by both parties prior to rendering a decision to terminate. The Court had little problem concluding that due process was provided as the parties were given notice and an opportunity to be heard via the evidence submitted. Both parties were provided procedural due process.

Similarly, in *Doolin v. Sec. Sav. Bank F.S.B. v. FDIC*, 53 F.3d. 1395 (4th Cir. 1995), the FDIC terminated Doolin Security Savings Bank's participation in the FDIC insurance program. The bank challenged the agency's action and asserted that the informal procedures relied upon by the FDIC violated due process rights. Those procedures included advance notice of the action by the agency and an opportunity to present written submissions opposing the proposed action. After considering the *Matthews* factors, the Fourth Circuit held that the informal procedures satisfied due process.

Additionally, Lightner's brief fails to identify a single shred of evidence he was prevented from presenting to the Commissioner. Lightner does reference two (2) affidavits, from Michael Scruggs and Hanley Clark, which purportedly support a contention that the

Triton rates were unreasonable. Significantly, both affidavits were not prepared and submitted until after the entry of the Commissioner's April 5, 2012 Order.⁸ There was absolutely no reason why these affidavits could not have been prepared and submitted to the Commissioner for consideration prior to the entry of the April 5, 2010 Order. The fact this information may not have been considered by the Commissioner is exclusively the fault of Lightner. Other than these affidavits, Lightner points to no other evidence which he was prevented from submitting. In short, Lightner's claims were fully and fairly considered in the forum required by West Virginia law. His appeal of the Commissioner's adverse ruling was also fairly considered. Citifinancial imagines, though the Commissioner is in a better position to so state, that few complaints have had the treatment provided the one submitted by Lightner.

II. THE COMMISSIONER'S ORDER IS NOT ARBITRARY AND CAPRICIOUS AND WAS PROPERLY UPHeld BY THE CIRCUIT COURT.

Lightner's brief asserts that there is in this case "an overwhelming preponderance of evidence that the rates are unreasonable." He further contends that the rates "are fractions of the industry standards, below legal thresholds, oppressive and confiscatory on their face." (Petitioner's Brief, p. 32). Because the Commissioner concluded otherwise, it is asserted that the Order must necessarily be arbitrary and capricious. This argument is remarkably incongruent with Lightner's protestations that he was denied a full and complete hearing. On the one hand, he has complained that he was not given the opportunity to fully develop and present a record to support the Complaint. On the other, he maintains that the evidence in the record clearly shows that the rates are unreasonable and that the Commissioner's finding otherwise cannot be sustained.

⁸ These affidavits should not have been included in the record before the Circuit Court of Kanawha County because they were not in the administrative record and good cause was not demonstrated for the submission of additional evidence.

The finding by the Commissioner that the rates were reasonable in relation to the benefits provided is clearly to be accorded deference. One of the most significant findings in the Commissioner's Order – and one which Lightner does not and cannot dispute – is the fact that West Virginia had no rule in effect setting forth benchmark minimum loss ratio standards for either credit property or IUI during the time period those products were offered. Simply stated, there was not a single standard *adopted in West Virginia* which the rates or the resulting loss ratios violated. The significance of this finding by the Commissioner cannot be overstated since West Virginia has, in the past, enacted standards governing loss ratios for other insurance products but not involving credit property or IUI. See W.Va. Code § 33-16E-1 to -7 (Repealed in 2005).⁹ Reference to model standards or even the decisions of other states is simply irrelevant since any applicable standard would have to be adopted in West Virginia. When the indisputable fact exists that there are no benchmark minimum standards in place, the decision of the Commissioner that the rates were and are reasonable cannot be deemed arbitrary and capricious.

That adequate evidence exists in the record to support the Commissioner's finding concerning the reasonableness of the rates is further demonstrated by her employment of an independent actuary, Hause Actuarial Solutions, Inc., to review the Triton filings. Lightner criticizes the Hause Actuarial Report and goes so far as to state that it is not an actuarial report in the professional sense. (Petitioner's Brief, p. 32). This criticism is surprising given that Lightner has previously relied upon summaries of NAIC reports submitted by Triton which were prepared by Hause Actuarial Solutions, Inc. (App. 92-125). While Lightner may now wish to disagree with a report prepared by Huase Actuarial

⁹ The Limited Benefits Accident and Sickness Insurance Policies and Certificates Act was repealed in 2005. It applied only to certain accident and sickness insurance products including accident only, sickness only, disability, sickness only disability, accident only disability, hospital indemnity and specified disease in travel accident insurance policies.

Solutions, Inc., the report's presence and use by the Commissioner more than adequately support the findings set forth in the April 5, 2010 Order and, again, cannot support any conclusion that the findings are arbitrary and capricious.¹⁰

Simply stated, all Lightner points to in support of an assertion that the rates were unreasonable are model standards and decisions from other jurisdictions. Countering that evidence was the Commissioner's undisputed finding that West Virginia had no benchmark minimum loss ratio standards in place for the insurance products at issue and an actuary report relied upon by the Commissioner to support the finding of reasonableness. It is within the Commissioner's expertise and discretion to determine whether rates are reasonable, particularly when no standards have been adopted in West Virginia. Indeed, when no standards exist in West Virginia, there really isn't any conflict in the evidence. Under these circumstances, there can be no conclusion that the actions of the Commissioner were arbitrary and capricious given the need to accord deference to her findings.

III. ANY REVERSAL OF THE CIRCUIT COURT'S RULING UPHOLDING THE COMMISSIONER'S ORDER REQUIRES REMAND TO THE COMMISSIONER FOR FURTHER PROCEEDINGS.

¹⁰ Lightner improperly introduced into the record before the Circuit Court an affidavit from former Insurance Commissioner Hanley C. Clark. This affidavit was attached to the petition for appeal. It is dated April 13, 2008, eight (8) days after entry of the Commissioner's Order. This affidavit, if deemed relevant by Lightner, could have been tendered to the Commissioner with the filing of the original Complaint. Nonetheless, the affidavit is suspect for many reasons. In the first instance, Mr. Clark was the Insurance Commissioner at the time the subject rates were approved. He was also Commissioner for several years after the rates went into effect and his office would have known what the actual loss ratios were following approval. Yet, no action was taken under Mr. Clark's watch despite having this information available, a circumstance which strongly indicates that there was no problem perceived by Mr. Clark's office. Additionally, Mr. Clark states that "[d]etermining the reasonableness of Triton's rates for credit property insurance and involuntary unemployment insurance requires an examination of Triton's loss ratios and also an actuarial assessment of the loss ratio that the rates are expected to produce going forward. The Order denying Mr. Lightner a hearing does not reveal whether either has been done." After the affidavit was submitted, the record was produced and revealed that Hause Actuarial Solutions, Inc. had done a study at the request of the Commissioner. Having complained that no actuarial report was done, Lightner now resorts to attacking the integrity of the actuarial report.

Lastly, Lightner urges this Court to not only reverse the Circuit Court's Order but to remand it to the Circuit Court with a direction to enter an order upholding Lightner's Complaint. In short, Lightner resists any remand to the Commissioner in the event this Court finds error in the April 5, 2010 Order. This argument should be squarely rejected as it is unsupported by the record and contrary to this Court's decision in *State ex rel. Citifinancial, Inc. v. Madden*.

Lightner's brief is laced with attacks on the Commissioner. Those attacks are unjustified and certainly not supported by the record. Nothing within the record demonstrates any prejudgment by the Commissioner or bias against Lightner. The actions of the Commissioner, in fact, demonstrated anything but bias. Rather than decide the rate issues hurriedly, the Commissioner embarked upon an investigation covering several months. She utilized her independent statutory authority to gather data from Triton and obtained an independent actuary opinion. She permitted Lightner to submit additional evidence and argument directly to her without the knowledge and involvement of Triton. The result of this exercise was a sixteen (16) page Order which contains detailed findings. While Lightner may disagree with the findings, it cannot be justifiably argued that resort to further administrative procedures would be an exercise in futility.¹¹

The reality is that Lightner is dissatisfied with the findings of the Commissioner and he never wanted to litigate the rate challenge before that administrative agency. The rate challenge was initially brought in the Circuit Court of Marshall County. It took the issuance of an extraordinary writ by this Court to compel Lightner to pursue his challenge before the

¹¹ Recusal jurisprudence in the judicial context doesn't support Lightner's position. For example, in *Liteky v. United States*, 510 U.S. 540 (1994), the United States Supreme Court held that "[o]pinions formed by [a] judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or-antagonism that would make fair judgment impossible." *Litekey*, 510 U.S. at 555.

appropriate forum – the Insurance Commissioner. The reason rate challenges are to be handled before the Insurance Commissioner was articulated by Justice McHugh as follows:

“Whether intended or not, the position advanced by Respondent Lightner has the end result of involving the judiciary in issues of insurance rate making. As evidenced by the data Respondent Lightner introduced to defeat Citifinancial’s Motion for Summary Judgment, factual evidence on issues such as loss ratios and rates of return is required to disprove the reasonableness of an established insurance rate. These issues, due to their highly specialized nature, are typically reserved to the Commissioner’s bailiwick. [Citations omitted]. It stands to reason that if a Circuit Court is allowed to invade this administrative arena and reexamine the issue of whether a given insurance rate is reasonable or excessive, the judiciary will necessarily be substituting its determinations as to permissible insurance rates for those previously determined by the Commissioner and supplanting its opinion in matters expressly delegated to the Commissioner’s expertise and jurisdiction. A further peril that cannot be overlooked is that judicial intervention in the rate making area would open the door to conflicting decisions amongst the various circuits regarding what constitutes an unreasonable or excessive charge for credit insurance.”

223 W.Va. at 237.

In the unlikely event this Court were to reverse the Circuit Court’s affirmance of the Commissioner’s Order of April 5, 2010, the remedy would be to remand this matter to the Commissioner for further proceedings. To do otherwise would allow Lightner to achieve the goal he has always sought – litigate in Circuit Court the reasonableness of insurance rates approved by the Commissioner.¹²

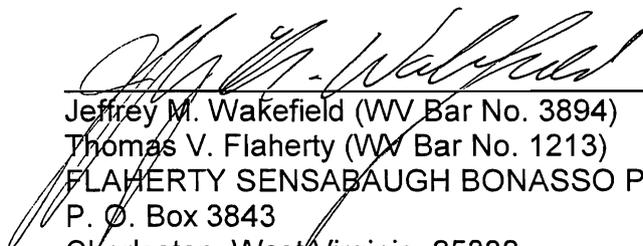
CONCLUSION

¹² Citifinancial agrees that there must be some finality to the litigation. It is not Citifinancial’s fault, however, that this matter has been pending for many years. The action was originally instituted in 2002. The rate challenge was litigated for several years in the Circuit Court of Marshall County before Citifinancial was required to obtain a writ of prohibition requiring that the rate challenge be properly brought before the Insurance Commissioner. That procedure has been followed and the rate challenge was essentially finalized by the Commissioner’s Order of April 5, 2010, subject to the right of Lightner to seek appellate review. Appellate review is now being exhausted and, if the Circuit Court’s Order is affirmed, the rate challenge will indeed be concluded.

WHEREFORE, Citifinancial, Inc. and Triton Insurance Company pray that this Court affirm the March 26, 2012 Order of the Circuit Court of Kanawha County together with such other and further relief as the Court may deem proper.

**CITIFINANCIAL, INC. AND,
TRITON INSURANCE COMPANY,**

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CERTIFICATE OF SERVICE

I, Jeffrey M. Wakefield, counsel for Citifinancial, Inc. and Triton Insurance Company, do hereby certify that I have served the foregoing ***Brief of Respondents Citifinancial, Inc. and Triton Insurance Company*** upon counsel of record this 15th day of October, 2012 by depositing true copies in the United States mail, postage prepaid, addressed as follows:

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