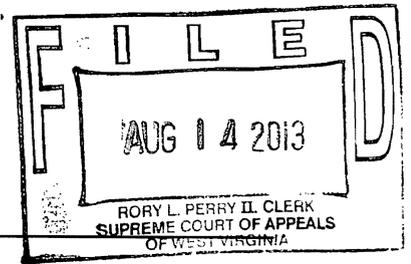


NO. 13-0827



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, *ex rel.*
LINDA YORK,

Petitioner,

v.

WEST VIRGINIA REAL ESTATE
APPRAISER LICENSING AND
CERTIFICATION BOARD,

Respondent.

PETITION FOR WRIT OF PROHIBITION

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PETITION FOR WRIT OF PROHIBITION

Pursuant to W.Va. R. App. P. 16, the State of West Virginia, upon the relation of Linda York (“Relator” or “Ms. York”), seeks a writ of prohibition pursuant the original jurisdiction of this Court. In support of this petition for relief against the actions of Respondent West Virginia Real Estate Appraiser Licensing and Certification Board (“Respondent” or “the Board”), Relator submits the following verified statement of the case and the facts, pertinent argument showing why relief should be granted, and an appendix of documentary proof.

QUESTIONS PRESENTED

1. Whether the Board has jurisdiction to “reopen” complaints against appraisers that not only have been dismissed for three years, but also involve events occurring eight and ten years before the supposed “reopening.”

Relator’s answer: No.

2. Whether the Board has abused and exceeded its jurisdiction by failing to timely process complaints, failing to afford hearings, and demanding that Relator consent to discipline for matters that the Board has dismissed and over which it has no jurisdiction.

Relator’s answer: Yes.

3. Whether the Board’s vexatious conduct warrants an award of Relator’s attorneys’ fees and litigation expenses.

Relator’s answer: Yes.

STATEMENT OF THE CASE

Facts

Ms. York lives in Morgantown and is a state-certified, general real estate appraiser. Her license number is CG014. The Board is an administrative agency created by the

Legislature to regulate the practice of real estate appraising in West Virginia. *See* W. Va. Code § 30-38-1, *et seq.* Because, among other things, real estate appraising affects commerce and the lending practices of federally chartered and regulated entities, the Board's performance of its statutorily assigned tasks is also overseen by the Federal Financial Institutions Examination Council ("Federal Council") pursuant to 12 U.S.C. § 3331 *et seq.* Ms. York was appointed to the Board by Governor Manchin in 2006 and has served continuously ever since.

The 2008 Complaints

The roots of this case go back a dozen years. In 2001, the Board appointed three appraisers, including Ms. York, to review a 1999 appraisal performed by another licensed real estate appraiser, Barbara McCracken. After receiving the three reviews, the Board initiated disciplinary proceedings against McCracken, and in 2005, the Board suspended McCracken's license for one year. The Circuit Court of Kanawha County subsequently reversed McCracken's suspension.

On April 29, 2008, in apparent retaliation for their participation in the Board review process, McCracken filed complaints with the Board against Ms. York and the two other appraisers who had participated. The Board swiftly dismissed the complaint against Ms. York in reliance on a Uniform Standards of Professional Appraisal Practice ("USPAP") rule that required appraisers to keep records for only five years. *See* APP0001-APP0007¹ (May 22, 2008 Board Minutes).

Just weeks later, on July 10, 2008, the Board received an anonymous complaint against Petitioner regarding an appraisal that she had done in October 2003 (Complaint No. 08-024). On September 23, 2008, the Board's Standards Committee voted to recommend that the

¹ References beginning with "APP" are to the appendix record submitted with this petition.

complaint be dismissed, and on December 11, 2008, the Board dismissed Complaint No. 08-024. *See* APP0008-APP0011 (December 11, 2008 Board Minutes); W.Va. C.S.R. § 190-4-5.7.a.3 (“Upon completion of the investigation, the board may . . . determine there is no probable cause to believe a disciplinary violation has occurred, and close the case[.]”).

Federal Council Review and Subsequent Board Action

In or around June 2010, a subcommittee of the Federal Council notified the Board that it planned to conduct a compliance review later that year. Following its review of West Virginia’s program, the federal subcommittee submitted its findings to the Board. Among its concerns was the Board’s strict five-year limitations period for reviewing complaints, as well as the Board’s procedures for hearing complaints filed against Board members. *See* APP0012-APP0015 (May 11, 2011, Compliance Review Report). The Board satisfied the Federal Council’s concern regarding its routine dismissal of complaints arising from events over five years old in the following manner:

On February 4, 2011, the Board reported to [Council] staff that the policy of not processing complaints involving appraisals where the date of the appraisal was five or more years old at the time the complaint was received was not a formal policy or rule, and did not require a formal rule change. The Board agreed that *in the future*, complaints involving appraisal reports that are greater than five years old will be investigated.

APP0014 (emphasis added).

Just five days later after the Federal Council’s report, the Board’s Standards Committee purported to “reopen” both of the 2008 complaints against Ms. York, notwithstanding that (i) the Board has no statutory or regulatory authority to reopen a complaint, (ii) the Federal Council had been satisfied with purely prospective application of the new policy, (iii) each complaint had been based on allegations that were already stale when brought, (iv)

each was now three years more stale, (v) each had been previously dismissed, and (vi) Ms. York had relied on the finality of these dismissals.

The Board's Standards Committee nevertheless requested that an independent appraiser review the old appraisals, and based on that subsequent review, the Standards Committee recommended to the Board that Ms. York be disciplined. The Board embraced this bizarre recommendation and presented Ms. York with an ultimatum to agree to a consent decree imposing certain discipline or to proceed with a formal hearing. *See* APP0016-APP0030 (Proposed Consent Decree 1).

Ms. York chose neither of the ultimatum's options. Instead, by letter dated December 20, 2011, she refused to sign the decree and directly challenged the Board's authority to "reopen" the 2008 complaints at all. Moreover, noting the extraordinary passage of time since the actions upon which the complaints were based, Ms. York noted pointedly and appropriately that "[t]o permit the Board to relitigate such dated matters would severely impair the ability of licensees to adequately defend themselves." *See* APP0031 (December 20, 2011, Letter to Board).

The Board has taken no further *formal* action on either of the 2008 complaints, yet, as is discussed and shown below, it continues to use them, even as the months and years continue to pass, in its attempts to coerce Ms. York into "agreeing" to be disciplined.

The Board Piles On

Following York's rebuff of the Board's initial ultimatum, on February 9, 2012, the Board presented Ms. York with a second proposed consent decree, which added a new complaint, No. 11-017, to the dismissed and "reopened" complaints No. 08-015 and 08-024. *See* APP0032-APP0061 (February 9, 2012, proposed consent decree). By letter dated March 7,

2012, the Board even represented that the matter would be set for a hearing. *See* APP0062 (March 7, 2012, Letter to Relator).

Ms. York was not easily cowed. She again refused to sign the Board's proposed decree, pointing out not only that the Board's counsel had a conflict of interest, but more importantly, that the Board continued to exceed and abuse its legal authority. Her counsel also warned that her patience was wearing thin, and that she would not tolerate a perpetual cloud on her ability to engage in her profession.

[T]wo threshold issues should be fleshed out before those sorts of discussions can begin to bear fruit: (1) your ability under the Rules to represent the Board (including Linda) while simultaneously pursuing this disciplinary action against a Board member; and (2) the Board's legal authority to relitigate matters that were considered and dismissed years ago. Absent the mutually agreeable resolution of these issues, then I fear you may be right; that is, that Linda will have to defend her livelihood through all available administrative and judicial means.

See APP0063 (March 8, 2012, Letter to the Board).

Confident that a fair, formal hearing would exonerate her, Ms. York's counsel then agreed to the Board's proposed hearing schedule. This agreement rested in part upon the Board's representation that a formal complaint against Ms. York would be immediately forthcoming. *See* APP0064 (April 19, 2012, Letter to Board). Receiving no such complaint, Ms. York's counsel wrote the Board three weeks later to again convey Ms. York's exasperation with the Board's intransigence and abuse of authority:

[Y]ou stated plainly that upon my agreement to the proposed hearing dates, the Complaint would be forthcoming. Now over three weeks later, I still have not seen any such complaint. Please let me know if you still plan on pursuing these misguided proceedings against my client.

APP0065 (May 4, 2012, Letter to Board). It is now over fifteen months later. The Board has not provided a formal complaint for No. 11-017, scheduled a hearing, or otherwise taken any further action.

The Board Piles On, Again

Instead, on July 12, 2012, the Board notified Relator that it had received another complaint (No. 12-015). APP0066-APP0068. This time, the Board made no bones about whether it intended to provide Ms. York with due process – it did not. On September 13, 2012, the Board voted to initiate disciplinary proceedings against her *without* holding a hearing. See APP0069-APP0071 (September 24, 2012 letter and September 25, 2012 email).

Ms. York of course objected forcefully. By correspondence dated October 9 and 23, 2012, she challenged the Board's ability to discipline a licensed appraiser without a hearing and requested that the Board provide meeting minutes pertaining to the initiation of the supposed disciplinary proceedings. See APP0075-APP0076 (October 9 and October 23, 2012, Letters to Board).

On November 1, 2012, counsel for Ms. York again demanded an explanation for the Board's erratic actions:

Most recently, the purported egregiousness of Linda's conduct prompted the Board to take the unprecedented and urgent step of deciding to discipline a licensed appraiser without a hearing. Yet, two months after that decision was made, the Board has yet to even schedule a meeting to take the issue up. Presumably, this delay - like the others - is attributable to the fact that the Board continues to realize (after the fact) that it is acting beyond the scope of its authority.

The trend has been that Board asserts a supposed violation, and then receives [Petitioner's] response raising good faith objections and legal defenses (namely, the inability of the Board to re-litigate cases that it dismissed a decade ago). Thereafter, my client is met with weeks and months of silence, not to mention repeated changes in the Board's AG counsel. Despite the Board having failed to

submit a formal charging document or administrative complaint, every time I advance my client's interest, I am thereafter informed that "new" complaints are being filed against her.

APP0077 (November 1, 2012, Email from Counsel to Board). The accuracy of counsel's observations has been confirmed by events, or perhaps one should say, by non-events. To date, no further action has been taken on this complaint, notwithstanding the Board's assertion of authority to discipline without due process.

The Drama Degenerates Into Farce

As noted above, Ms. York's objections to discipline without due process were sent to the Board on October 9 and 23, 2012. Less than a week after the second of these communications, the Board notified Ms. York that it had received yet another supposed complaint (No. 12-023). *See* APP0078-APP0092 (October 29, 2012, Letter to Ms. York).

Despite her frustration and indignation at the Board's persistence in denying her due process while insisting that she "admit" misconduct that she did not engage in, Ms. York approached the Board in good faith to try to remove the cloud hanging over her professional life (without resort to this litigation). In this regard, on November 1, 2012, her counsel asked the Board whether the parties "could talk and try to start considering some sort of resolution. As you know, this has been hanging over [Ms. York] for over a year, and every single time we raise questions or advance defenses, she's met with additional delay and the convenient appearance of 'new' complaints" *See* APP0077 (November 1, 2012, Email to Board). Counsel made similar inquiries on November 30, 2012, and January 22, 2013. *See* APP0093-APP0094 and APP0095 (November 30, 2012, and January 22, 2013, Email and Letter to Board).

Her good-faith attempts to achieve peace being ignored, Ms. York finally had had enough. On February 12, 2013, after reiterating her objections to the myriad of complaints, York pointedly advised the Board:

Since we are confident that any court would summarily reject this effort by the Board to prosecute matters beyond its statutory authority, Ms. York is not inclined to discuss any resolution of these particular complaints short of dismissal. As a result, the Board's continued reliance on the total number of complaints pending against Ms. York to leverage harsher disciplinary action against her is not fruitful in terms of working out a potential fair resolution. This is made even more difficult by the Board's recent removal of Ms. York from her committee assignments, which seems entirely premature.

See APP0096 – APP0097 (February 12, 2013, Letter from Counsel to Board). On June 25, 2013, Ms. York filed a formal response to the Complaint in No. 12-023, again challenging the Board's jurisdiction. *See* APP0098-APP0110 (June 25, 2013, Formal Response).²

December 2012 Federal Council Review

Meanwhile, on December 10-12, 2012, a subcommittee of the Federal Council conducted another compliance review of the Board. It submitted its final report on June 12, 2013. APP0111-APP0116 (June 12, 2013, Letter and Report). The report's findings shed considerable light on the intolerable situation confronting Ms. York.

The Federal Council subcommittee noted that *five* different assistant attorneys general had been assigned to advise the Board during a single fourteen-month period, and it concluded that this failure to provide the Board with consistent legal resources had contributed to its failure to resolve complaints timely. *Id.* Furthermore, the report found that thirty-four complaints were pending before the Board, of which fifteen had been unresolved for more than one year, in violation of 12 U.S.C. § 3347 and Appraisal Subcommittee Statement 10E. *Id.*

² The purported complaint in No. 12-023 does not even involve an appraisal. *See id.*

SUMMARY OF ARGUMENT

Ms. York denies — and has always denied — that she has engaged in any improper or deficient professional conduct, and she has been and is confident that neither the Board nor any of the individual complainants can produce any evidence warranting disciplinary action against her. But she cannot be vindicated where her accusers will not confront her.

Despite Ms. York's repeated requests, the Board will not take steps to process or resolve any of the above-referenced matters on their merits. Instead, the Board has refused to schedule hearings, delayed the administrative process, and simply bundled individually baseless complaints into a latter-day Sword of Damocles, which it apparently intends to leave dangling over Ms. York's head until she signs a coerced "consent" decree to finally remove the threat to her professional livelihood.

It has been more than *twelve* years since one of subject appraisals was performed, more than five years since the Board previously dismissed two of the complaints, and more than two years since the Board "reopened" these time-worn complaints. But because Petitioner has refused to simply surrender to the Board's unlawful threats to discipline her, the Board has refused to resolve, prosecute, or dismiss any of these actions.

The Board's attempts to exercise jurisdiction that it does not have, along with its blatant abuse and misuse of its statutory authority, fully warrant this Court's exercise of its original jurisdiction in prohibition. A rule to show cause should issue forthwith, and, upon final hearing, the writ should issue prohibiting the Board from further abuses of power directed toward Ms. York.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument should be granted in this case, and Ms. York submits that W.Va. R. App. P. 20 argument is warranted. This petition presents matters of significance to all licensed professionals in West Virginia; indeed, the Court's recent decision in *State ex rel. Fillinger v. Rhodes*, 230 W.Va. 560, 741 S.E.2d 118 (2013), suggests that the problems of appropriate administrative regulation and procedure are by no means confined to the Respondent Board. *See also id.*, 741 S.E.2d at 120 (issues raised in *Fillinger* were "deem[ed] ... to be of special importance to the public and the bar").

ARGUMENT

I. Jurisdiction and Standard of Review

This Court has subject matter jurisdiction to hear this controversy pursuant to Article VIII, Section 3 of the state's Constitution. *Fillinger*, 741 S.E.2d at 122; *see also* W.Va. R. App. P. 16; W.Va. Code §§ 51-1-3 & 53-1-2.

Prohibition lies to restrain inferior courts or tribunals from an abuse of power and from proceedings in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers. W. Va. Code § 53-1-1; Syl. Pt. 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953); Syl. Pt. 3, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12, 14 (1996). At least as regards the complaints dismissed in 2008 and resurrected three years later, the Board is plainly attempting to act without even palpable grounds to exercise jurisdiction, and the writ should issue to put a stop to it.

Moreover, even if the Board *could have* appropriately exercised jurisdiction over more recent complaints it has allegedly received against Ms. York, it has grossly abused and exceeded its legitimate powers. In deciding whether the writ should issue to prohibit a tribunal's

actions in excess of its legitimate powers, this Court generally considers five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. *See* Syl Pt. 4, *Hoover*, 483 S.E.2d at 14-15. “Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.” *Id.*

II. The Writ Should Issue

As regards the purported reopening of the 2008 complaints, no nuanced analysis or resort to the *Hoover* factors is necessary. The Board received, reviewed, and dismissed Complaint Nos. 08-015 and 08-024. Upon closing the cases, its action was final and was the end of the matter. Its own regulations say so: “If the Board determines that [a] complaint does not present facts which constitute a basis for disciplinary action, the Board *shall take no further action.*” W. Va. Code St. R. § 190-4-5.5 (emphasis added); *see also id.* at § 4-5.7.a.3 (Upon determining, after investigation, that “there is no probable cause to believe that a disciplinary violation has occurred,” the Board “close[s] the case.”).

Moreover, although Ms. York has repeatedly challenged it to do so, the Board has never identified any statutory or regulatory authority that would permit it to “reopen” an investigation of a complaint or otherwise take disciplinary action *after* it has already closed a case. *See generally* W. Va. Code § 30-38-1 *et seq.* and W.Va. C.S.R. § 190-4-1 *et seq.* Ms. York has similarly undertaken on many occasions to attempt to find for herself some legal foundation

that could explain the Board's strange course of action, and she has come up empty. The Board lacks jurisdiction to pursue the 2008 complaints, period.³

Even beyond the unauthorized resurrection of the 2008 dismissals, the writ should clearly issue under the five *Hoover* factors. First, this petition is not, of course, a mere substitute for an appeal; indeed, the Board has issued no orders from which an appeal could lie, which is, at bottom, Ms. York's whole point. The Board has forced Ms. York to seek *extraordinary* relief by systematically denying her access to the *ordinary* relief that statutes and due process guarantee her. Second, the aggravation, annoyance, and worry that Ms. York has borne cannot be corrected by any appeal, and her legal fees and expenses continue to accumulate while the Board denies her the vindication to which she is entitled.

Third, the Board's actions are plainly in violation of the law. Like every licensed professional, Ms. York "has a right to fair treatment in disciplinary proceedings before a licensing board[.]" *Fillinger*, 741 S.E.2d at 123. A part of this "fair treatment" is *prompt* attention from the state agency: "We have long recognized that administrative agencies that perform quasi-judicial functions must comply with the mandate of the *West Virginia Constitution*, Art. III, Sec. 17, that 'justice shall be administered without ... delay.'" *State ex rel. Cline v. Maxwell*, 189 W.Va. 362, 367, 432 S.E.2d 32, 36 n.5 (1993) (collecting cases). A clear statute commands the same. *See* W.Va. Code § 30-1-5(c) (establishing default time limits for

³ Thus, the Court need not even consider the many prudential and merits-based reasons why the Board should never have "reopened" these complaints. The allegations were extraordinarily stale, the dismissals themselves were three years in the past, and the Federal Council's recommendation regarding the Board's five-year policy was never intended to be applied retroactively. Finally, disciplining *any* appraiser for lending assistance to the Board in its investigation of *another* appraiser (as are the facts of No. 08-015) should be extraordinary indeed, and Ms. York respectfully submits that at least a qualified immunity should apply in such matters. *Cf. Jarvis v. State Police*, 227 W.Va. 472, 711 S.E.2d 542 (2010) (investigating police officers were entitled to qualified immunity against plaintiff's claims that they conducted investigation negligently).

administrative processing of disciplinary complaints). Moreover, just as in *Fillinger*, Ms. York has “engaged in no conduct which impeded the administrative process.” 741 S.E.2d at 125.

Fourth, the Board has persisted in its course of conduct for over two years, notwithstanding that Ms. York has repeatedly pointed out its lack of jurisdiction and other failures to comply with proper procedures.

Fifth and finally, Ms. York cannot say, especially since *Fillinger*, that the issues she now raises are in any real sense “new” or “of first impression.” Indeed, they patently are not, which is what makes the Board’s actions all the more incomprehensible. However, the issues remain every bit as *important* as this Court deemed them in *Fillinger*, *i.e.* “of special importance to the public and the bar.” 741 S.E.2d at 120. And in light of the Board’s obstinate refusal to heed the lessons of *Fillinger*, this Court’s intervention is all the more necessary to assure that all state agencies learn those lessons.

Along with issuance of the writ, Ms. York also respectfully requests that this Court direct that the Board reimburse her for her attorneys’ fees and costs. As Chief Justice Benjamin noted presciently in his *Fillinger* concurrence:

[T]he [state agency involved] engaged in excessively vexatious conduct. In past cases, such conduct has warranted awarding attorneys fees and costs to the harmed party. In the future, I believe this Court should pay special attention to such conduct and make such awards of costs and expenses as appropriate to compensate the victims of such conduct and to communicate the message that this Court expects all parties to abide by the Code and by applicable rules.

741 S.E.2d at 125-126 (Benjamin, C.J., concurring) (citations omitted). Ms. York respectfully submits that the time has come for the Court to communicate this message by awarding not only the writ prayed for, but also the fees and expenses that she has incurred — and yet will incur — in her pursuit of justice and fair treatment.

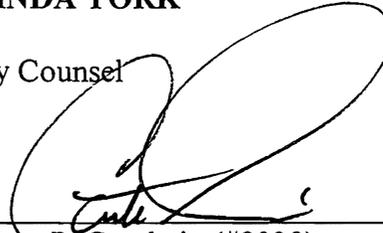
CONCLUSION

WHEREFORE, Relator Linda York respectfully requests that this Court issue a rule to the Board to show cause why the relief prayed for herein ought not be granted and, upon final hearing, to issue a writ of prohibition directing and compelling Respondent to dismiss all pending complaints against Relator with prejudice, to award Relator her attorneys' fees, expenses, and court costs, and to grant Relator such further legal and equitable relief as the Court may find just and appropriate.

Respectfully submitted,

STATE OF WEST VIRGINIA, *ex rel.*
LINDA YORK

By Counsel



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**WEST VIRGINIA REAL ESTATE
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Respondent.

CERTIFICATE OF SERVICE

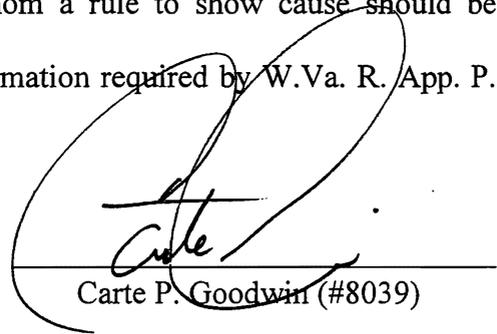
I, Carte P. Goodwin, hereby certify that I served a copy of the foregoing **PETITION FOR WRIT OF PROHIBITION** on this 14th day of August, 2013, by United States mail, postage prepaid, to the following:

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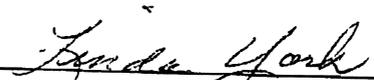
I further certify that all persons upon whom a rule to show cause should be served, if granted, are listed above, together with all information required by W.Va. R. App. P. 16(d)(10).



Carte P. Goodwin (#8039)

VERIFICATION

I, Linda York, have read the foregoing "Petition for Writ of Prohibition" and verify and affirm under oath that I am the person referred to therein as the Relator; that I am competent to give this Verification; and that the factual allegations contained therein are true based on my personal knowledge, except to the extent that they are made upon information and belief, in which case I believe such statements to be true.



Linda York

STATE OF WEST VIRGINIA

COUNTY OF MARION, To-Wit:

The foregoing Verification was acknowledged before me this 14th day of August, 2013.

My commission expires: January 22, 2023





Notary Public