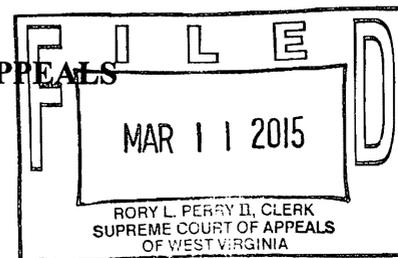

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 14-0957



WEST VIRGINIA RACING COMMISSION,

Respondent Below, Petitioner,

v.

**LAWRENCE REYNOLDS, ANTHONY MAWING,
ALEXIS RIOS-CONDE, JESUS SANCHEZ, DALE
WHITTAKER, LUIS PEREZ, AND TONY A. MARAGH**

Petitioners Below, Respondents.

PETITIONER'S REPLY BRIEF

**PATRICK MORRISEY
ATTORNEY GENERAL**

**KELLI D. TALBOTT (WVSB # 4995)
SENIOR DEPUTY ATTORNEY GENERAL
812 Quarrier Street, Second Floor
Charleston, West Virginia 25301
(304) 558-8989
Email: Kelli.D.Talbott@wvago.gov
*Counsel for Petitioner***

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT 10

 A. REGARDLESS OF HOW THE RESPONDENTS ATTEMPT TO
 COUCH THE RACING COMMISSION’S STATEMENT OF
 THE MEANING IT ATTRIBUTED TO THE WORDS
 “CONNIVE” AND “CORRUPT” IN ITS THOROUGHBRED
 RACING RULE, THE MEANING THAT THE COMMISSION
 ATTRIBUTED WAS CONSISTENT WITH THE COMMON,
 ORDINARY MEANING OF THOSE WORDS 10

 B. THE CIRCUIT COURT’S CONCLUSION THAT THE RACING
 COMMISSION’S APPLICATION OF ITS RULE WAS THE
 ENACTMENT OF AN *EX POST FACTO LAW* IS PLAINLY
 ERRONEOUS AND THE RACING COMMISSION RAISED
 THIS ISSUE BELOW. 11

 C. THE RESPONDENTS DID NOT RAISE THE ISSUE OF THE CHANGE
 IN THE RACING COMMISSION’S RULE IN CIRCUIT COURT AND
 HAVE THEREFORE WAIVED THAT ISSUE 15

 D. THE RESPONDENTS SHOULD NOT GET A PASS ON A
 RACING RULE VIOLATION BASED UPON SHEER
 SPECULATION AS TO WHY THE RACING COMMISSION
 AND THE WEST VIRGINIA LEGISLATURE CHOSE TO
 AMEND THE THOROUGHBRED RACING RULE AND/OR
 BECAUSE THERE WAS AN EXCESSIVE DELAY IN THE
 CIRCUIT COURT’S DISPOSITION OF THE APPEAL BELOW. 17

 E. THE RESPONDENTS HAVE MISCHARACTERIZED THE
 STANDARD OF REVIEW THAT IS APPLICABLE TO THIS
 COURT’S REVIEW OF WHAT HAPPENED BELOW 20

IV. CONCLUSION 21

TABLE OF AUTHORITIES

Cases

<i>Cartwright v. McComas</i> , 223 W. Va. 161, 672 S.E.2d 297 (2008) (per curiam).....	15
<i>Foreman v. Dallas County</i> , 193 F.3d 314 (5th Cir. 1999)	18
<i>Forshey v. Principi</i> , 284 F.3d 1335 (Fed. Cir.2002).....	15
<i>Haislop v. Edgell</i> , 215 W. Va. 88, 593 S.E.2d 839 (2003).....	12
<i>In re K. L.</i> , 223 W. Va. 547, 759 S.E.2d 778 (2014) (per curiam).....	15
<i>Kamen v. Kemper Financial Services, Inc.</i> , 500 U.S. 90, 111 S. Ct. 1711 (1991).....	15
<i>Lily v. Stump</i> , 217 W. Va. 313, 617 S.E.2d 860 (2005) (per curiam).....	20
<i>Morgan v. Principi</i> , 327 F.3d 1357 (Fed. Cir.2003).....	15
<i>Muscatell v. Cline</i> , 196 W. Va. 588, 474 S.E.2d 518 (1996).....	20
<i>Noble v. West Virginia Department of Motor Vehicles</i> , 223 W. Va. 818, 679 S.E.2d 650 (2009).....	16
<i>Richmond v. Levin</i> , 219 W. Va. 512, 637 S.E.2d 610 (2006) (per curiam).....	11, 12
<i>Serian v. West Virginia Board of Optometry</i> , 171 W. Va. 114, 297 S.E.2d 889 (1982).....	13
<i>Shaffer v. Acme Limestone Co., Inc.</i> , 206 W. Va. 333, 524 S.E.2d 688 (1999).....	16
<i>Tracy v. Cottrell ex rel. Cottrell</i> , 206 W. Va. 363, 524 S.E.2d 887 (1999).....	14

<i>United States National Bank of Oregon v. Independent Ins. Agents of America, Inc.</i> , 508 U.S. 439, 113 S. Ct. 2173 (1993).....	14, 15
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968).....	18
<i>Webb v. West Virginia Board of Medicine</i> , 212 W. Va. 149, 569 S.E.2d 225 (2002).....	20
<i>Whitlow v. Board of Education</i> , 190 W. Va. 223, 438 S.E.2d 15 (1993).....	16
Statutes	
West Virginia Code § 19-23-16(f).....	3, 4
West Virginia Code § 19-23-16(g)	12
West Virginia Code § 29A-3-9.....	7
West Virginia Code § 29A-3-12.....	7
Rules	
Rule 6(d) of the Rules of Procedure for Administrative Appeals.....	9
Rule 41(b) of the West Virginia Rules of Civil Procedure.....	13
178 W. Va. C.S.R. 1.....	7
178 W. Va. C.S.R. 1, § 1.5 (2011).....	17
178 W. Va. C.S.R. 1, § 24.11.d (2014).....	19
178 W. Va. C.S.R. 1, § 24.11.e (2014).....	19
178 W. Va. C.S.R. 1, § 24.14.b (2014).....	19
178 W. Va. C.S.R. 1, § 45.5 (2014).....	19
178 W. Va. C.S.R. 1, § 60.5(2007).....	8, 10, 15
Acts	
2011 W. Va. Acts c. 93 (eff. June 7, 2011)	3

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 14-0957

WEST VIRGINIA RACING COMMISSION,

Respondent Below, Petitioner,

v.

**LAWRENCE REYNOLDS, ANTHONY MAWING,
ALEXIS RIOS-CONDE, JESUS SANCHEZ, DALE
WHITTAKER, LUIS PEREZ, AND TONY A. MARAGH**

Petitioners Below, Respondents.

PETITIONER'S REPLY BRIEF

I.

INTRODUCTION

Comes now the Petitioner, the West Virginia Racing Commission, by counsel, Kelli D. Talbott, Senior Deputy Attorney General, and replies to the Respondents' Brief.

II.

STATEMENT OF THE CASE

The Petitioner's initial brief contains a thorough recitation of the facts and procedural history in this case. This reply brief addresses certain inaccuracies and omissions in Respondents' statement of the case in their brief.

The Respondents dwell on various aspects of the hearings that the Charles Board of Stewards had that preceded its rulings against them and which preceded the full-blown, *de novo* hearing that the Racing Commission conducted on the charges against the jockeys. Setting aside the fact that any

alleged defects with the Stewards' proceedings were ultimately cured with the fully due-process compliant hearing that the Racing Commission conducted, Respondents' statement that no evidence of any corrupt activities were produced at the Stewards' hearing is inaccurate. During the Stewards' hearings, each jockey was shown pertinent parts of the video footage that was captured on March 26, 2009 at the scale at weigh out time. (J.A. 16-21, 25-29, 31, 34, 37.) Given that the footage captured the weigh outs that are the heart of the rule infractions in this case and vividly demonstrate the chaotic and non-compliant conduct that gave rise to the charges against the jockeys, it is clear that evidence of their corrupt conduct was produced at the Stewards' hearings.

Respondents also inaccurately represent that the suspension and fines imposed by the Stewards held in abeyance by "agreement" of the Commission. (Respts' Br. at 4.) The Commission was ordered by the Circuit Court, and abided by that order, to stay the permit suspensions imposed by the Stewards until "the conclusion of the *de novo* hearing before the West Virginia Racing Commission." (J.A. 222.) Each of the jockeys paid the \$1,000.00 fine imposed upon them by the Stewards, presumably because the Circuit Court's restraining order did not address the fine. (J.A. 221-223.)

The Circuit Court then stayed the Racing Commission's decision, reached after the *de novo* hearing, pending the disposition of the jockeys' appeal to Circuit Court. (J.A. 1994-1995, 2040-2041.) When the Circuit Court entered its final order on September 2, 2014, reversing the Commission's decision, it ordered the Commission to repay the fines, with interest, to the jockeys within fourteen days. (J.A. 2176.) The Racing Commission complied with this order with the full knowledge of Respondents' counsel inasmuch as the check to each jockey was sent directly to Respondents' counsel for appropriate distribution. Therefore, it is incorrect to state that the

suspensions and fines were stayed by agreement of the Commission, since the suspensions were stayed by Circuit Court order and the fines were paid by the jockeys and then re-paid by the Commission pursuant to Circuit Court order directly to Respondents' counsel.

The Respondents use loaded terminology to describe the Commission's independent hearing examiner, Jack McClung, Esquire, by calling him the Commission's "chosen" hearing examiner. (Respts' Br. at 4.) What Respondents omit, however, are the circumstances that arose at the time that Mr. McClung was "chosen."

When the underlying administrative hearings were noticed and held in this matter, West Virginia Code § 19-23-16(f) required a quorum of the members of the Commission to conduct administrative hearings.¹ In an effort to ensure an orderly and fair hearing for the jockeys, Petitioner sought the Respondents' agreement to appoint Mr. McClung as a hearing examiner to regulate the course of the hearing and to make a recommended decision to it – with the understanding that a quorum of the Commission would be present at the hearing and would make the ultimate decision, all to comply with West Virginia Code § 19-23-16(f). Indeed, the record reflects that a quorum of the Commission was present at the hearing. (J.A. 739-740, 1157, 1837.) And, notably, there was no objection in the entire record of this matter to the "choice" of Mr. McClung, because the Respondents agreed to it.

The Respondents state that the record "suggests" that many jockeys, other than them, "may" have ridden either underweight or overweight. (Respts' Br. at 5.) However, that which might be "suggested" or that which "may" have happened is not sufficient to bring charges against jockeys.

¹ West Virginia Code 19-23-16(f) was amended by the Legislature in 2011, to allow the Commission to appoint a licensed attorney to conduct its administrative hearings and to make recommended decisions to it. 2011 W. Va. Acts c. 93 (eff. June 7, 2011).

Something more concrete than “suggestions” are required to prove a case. The surveillance footage shows that when any jockey stepped on and off the digital scale, the weight registering on the read-out runs up, and rests at a top number, and then down – just like it would on a needle scale, but does not read every single number on the way up and down as a needle on a scale passes every number. (J.A. 1553, 1554.) Just because multiple numbers register on the way up and down, doesn’t mean that a jockey rode underweight or overweight, as Respondents imply – particularly when the top weight registered does not equal either an underweight or overweight for the assigned weight in question.

Respondents also argue that the Stewards “were present at all disputed weighouts and failed to observe any behavior that they viewed as problematic.” (Respts’ Br. at 5.) In making this argument, the Respondents cite select testimony from Chief Steward Danny Wright that they claim proves their point. The Respondents’ representation is untrue and their selective citation is deceptive. Mr. Wright’s pertinent testimony was as follows:

Q. From January to March 25th and 26th of this year, how often would you have been in the jockeys’ room during races?

A. I try to go down at least twice a night and encourage my other stewards to do the same.

Q. Are you more diligent about that than the other stewards?

A. At one time I was but now that’s not the case.

Q. So do you think you were in that jockeys’ room while weigh-outs were going on every race night from January through March or pretty near?

A. I would say pretty near. Not every night.

Q. So you were in a position during that time to observe the weigh-out process every night, right?

A. To be honest with you, my purpose of going into the jocks' room were not necessarily watching the Clerk of Scales do his job. We always assumed he was professional in doing things right. My concern going down there to see if there were any issues that the riders wanted to discuss with the Board of Stewards. Take them upstairs and talk to the other stewards. Just to have a presence. Most of the time, yes, I do go down to the jocks' room and I walk through the jocks' room, check with the lady back at the counter and make sure everything is okay, but then – and the other purpose not only do I go to the jocks' room but I go through the paddock and make sure everything is okay there. Just making my rounds, just making my presence. I really can't honestly say I observed them making weight other than just watching the process.

Q. Did you understand my question?

A. I thought I answered it.

Q. Were you in a position to observe the weigh-out process every night that you were at those races?

A. Was I in a position to observe? Absolutely.

Q. So – and that means you were in a position to see how Mr. Garrison interacted with the jockeys, correct?

A. Correct, sir.

Q. You're in a position to observe the scale, right?

A. Yes, sir.

Q. You're in a position to observe the readout on the scale, right?

A. Correct.

Q. When you made those rounds were there places where you would go and stand and wait or did you just kind of walk through?

A. Walk through. . . .

Q. So in that period of time you didn't observe anything that made you think there was any problem with the weigh-out process, did you?

A. That's correct.

Q. If there was you would have said something or done something, right?

A. And I've been – correct, yes sir.

Q. And as far as you know there wasn't any difference in that process from January through March 24th than there was on March 25th and 26th, right?

A. I didn't take notice of it.

....

A. Yes sir. There were a lot of things going astray at that time, yes sir.

Q. That process was the same process you had seen every night for at least three months before that and maybe for years, right?

A. I never noticed these goings on, sir. I wish I had in hindsight but no, sir, I never – obviously when the Board of Stewards is present they're not going to do the things that we wind up seeing on the video in the presence of a steward. I mean, in all fairness, I did not notice these things when I went down to the jocks' room. There again, I wasn't specifically looking for weigh-outs. I was just making a presence and making my rounds.

....

Q. I mean, you – the stewards and the Track really let that process get sloppy, didn't you?

A. I don't think that we had anything to do with it. I mean, that was obviously what was going on there obviously under our nose but certainly not that we had actually observed.

....

Q. When you visit the jockeys' room do you go with the intent of standing there and watching every weigh-out?

A. I do not. . .

Q. Okay, You've seen the videos from March 25th and 26th that are the subject of this hearing?

A. Yes sir. . . .

Q. When you saw the videos from those days did you look at the video and say, oh, that's something I witnessed firsthand while I was there?

A. No, sir, I did not.

Q. When you saw the videos was that the first time you saw the weigh-outs being conducted as they were on that video?

A. Yes, it was.

(J.A. 1225-1228, 1244.)

Clearly then, there is no support in the record for the Respondents' allegation that the Stewards were present at "all disputed weighouts" and, essentially, found everything a-okay. Although Mr. Wright generally made rounds that included the jockeys' room, he could not specifically recall being there on March 25 and 26. And, even if he was, he unequivocally testified that he did not see the weigh outs and the improper conduct of the jockeys and the Clerk of Scales.

Respondents go outside of the record in this case and attempt to characterize the Commission's efforts through the legislative rule-making process, to change and update its Thoroughbred Racing Rule, 178 W. Va. C.S.R. 1, in the time period while this case was pending in the Circuit Court of Kanawha County. Without any evidence in the record to which to cite, the Respondents allege that the Commission was motivated to change one of the rules that the jockeys were found to have violated, because it was a "bad" rule. The Respondents conveniently omit the fact that it took the full West Virginia Legislature to make the rule change that they put at issue. West Virginia Code §§ 29A-3-9, 29A-3-12. The Respondents do not point to any evidence of the motivations of the Legislature in acting, nor can they.

The Thoroughbred Racing Rule that was in place in 2009 when this case arose, had been effective since April 6, 2007. (Petr's Br. at 3 n.1.) In the interminable time period that this case was

pending in the Circuit Court, the Thoroughbred Racing Rule was amended three times by the West Virginia Legislature, through the course of three separate legislative sessions. (Petr's Br. at 3 n.1.) In fact, while this matter was still pending in the Circuit Court, a fourth round of amendments were proposed by the Racing Commission for consideration during the 2015 legislative session.²

The Respondents also fail to inform this Court that had the Circuit Court decided this matter in a timely fashion, the rule in question, 178 W. Va. C.S.R. 1, § 60.5 (2007), would still have been in effect at the time of decision. Although the Racing Commission started the legislative rule-making process to amend its rules by putting proposed changes out for public comment on June 7, 2010, shortly after the jockeys filed their appeal in Circuit Court, it took over nine months and multiple additional changes to the proposal by both the Commission and the West Virginia Legislature, for the rule to be passed out of the Legislature on March 12, 2011. Thereafter, the rule did not go into effect until July 10, 2011. (See West Virginia Secretary of State's website: <http://apps.sos.wv.gov/adlaw/csr/ruleview.aspx?document=7057>.)

The scheduling order entered by the Circuit Court obligated it to enter a final order disposing of the jockeys' appeal within thirty calendar days of the filing of their reply brief. (J.A. 2043.) The jockeys' reply brief was filed on August 12, 2010 (J.A. 2091.) The Circuit Court, however, failed to enter a final order within thirty calendar days of that date.

² See West Virginia Secretary of State's website: <http://apps.sos.wv.gov/adlaw/csr/ruleview.aspx?document=9517>. The amendments that the Racing Commission proposed, were passed by the Legislature on February 28, 2015 in Enrolled Committee Substitute for Senate Bill 187. The Governor signed the bill on March 5, 2015. http://www.legis.state.wv.us/Bill_Status/bills_history.cfm?INPUT=187&year=2015&sessiontype=RS

Setting aside the Circuit Court's own scheduling order, Rule 6(d) of the Rules of Procedure for Administrative Appeals requires a final disposition to be made in administrative appeals within six months of the filing of the appeal. In this case, the jockeys filed their appeal on June 1, 2010. (J.A. 1966.) The Circuit Court, however, did not enter a final order within six months of that date.

The Circuit Court sat on the case for *four full years* after proposed orders were submitted by the parties. (J.A. 2101-2176.) The Circuit Court missed the thirty day deadline for disposition set forth in its own scheduling order by *just under four years* and, otherwise, missed the six month requirement for decision under Rule 6(d) of the Rules of Procedure for Administrative Appeals by approximately *three years and nine months*. The Petitioner did nothing to cause this inordinate delay. Had the Circuit Court decided this case either under its own thirty day deadline in September 2010 or by Rule 6(d)'s six month deadline in December 2010, the rule in question would have still been in effect, having not changed until July 10, 2011.

The Respondents claim that the record supports that they each made their horses' assigned weights solely because they all testified that they weighed themselves on a Toledo scale contained in the jockeys' room. (Respts Br. at 5.) Respondents do not explain, however, that the Toledo scale is a scale that was provided as a courtesy to the jockeys in a back area outside of a "hotbox," that the jockeys used to sweat off weight in advance of races. (J.A. 1326.) The jockeys used that scale to check their weight informally, as a convenience – on their own without any oversight by racing officials. It is not the official scale upon which they weigh out in the presence of the Clerk of Scales. The official scale at which the Clerk of Scales is to be present when a jockey weighs out, is the digital scale referred to in Petitioner's initial Brief. (Petr's Br. at 3.)

Voluntarily checking one's weight on a courtesy scale, unwitnessed by anyone and done outside of the presence of the Clerk of Scales is not what the Thoroughbred Racing Rule requires in order for a jockey to weigh out before a race. While the jockeys may have engaged in these informal weight checks of their own accord, that is not the measure of whether or not they made their assigned weights for the horses in question on the nights in question. In other words, there is nothing in the record that supports any theory that just because jockeys made self-serving statements that they had a good weight during solitary visits to a scale, that they therefore, unequivocally, made weight. As explained in the Petitioner's initial brief, the weigh out that is required by the Thoroughbred Racing Rule to be conducted as the official record as to whether the jockey makes weight is that which is conducted in the presence of the Clerk of Scales. (Petr's Br. at 2-3.)

III.

ARGUMENT

- A. REGARDLESS OF HOW THE RESPONDENTS ATTEMPT TO COUCH THE RACING COMMISSION'S STATEMENT OF THE MEANING IT ATTRIBUTED TO THE WORDS "CONNIVE" AND "CORRUPT" IN ITS THOROUGHBRED RACING RULE, THE MEANING THAT THE COMMISSION ATTRIBUTED WAS CONSISTENT WITH THE COMMON, ORDINARY MEANING OF THOSE WORDS.

The Respondents go to great lengths to try to convince this Court that what the Racing Commission did was announce wholly new, utterly unrecognizable and completely foreign meanings for the words "connive" and "corrupt" in 178 W. Va. C.S.R. 1, § 60.5. Respondents' claim spins out from this unfounded premise to the idea that these "newly" pronounced meanings constituted unlawful, retroactive rule-making. For all of the reasons previously argued in the Petitioner's initial

brief filed with this Court, nothing that the Commission did was “rule-making” and nothing that it did was “retroactive.” (Petr’s Br. at 19-30.)

Specifically, however, the reason that the Petitioner recited to this Court the numerous dictionary definitions for the words “connive” and “corrupt” in its initial brief, (Petr’s Br. at 20-21), was to demonstrate that the definitions adopted by the Commission in its decision were entirely and completely consistent with those dictionary definitions. Therefore, no matter how inartful the Commission may have couched its statements about the meanings of those words, the meaning it attributed is consistent with the common, ordinary meaning found in many dictionaries.

B. THE CIRCUIT COURT’S CONCLUSION THAT THE RACING COMMISSION’S APPLICATION OF ITS RULE WAS THE ENACTMENT OF AN *EX POST FACTO LAW* IS PLAINLY ERRONEOUS AND THE RACING COMMISSION RAISED THIS ISSUE BELOW.

Despite having no law to support their position, the Respondents persist with the notion that the Circuit Court was correct in entering Respondents’ order which concluded that the Racing Commission’s application of the common, ordinary meaning of words in a rule was the enactment of an *ex post facto* law. The Respondents cite two cases that they claim directly supports the proposition that the *ex post facto* clause has application to the retroactivity of “punitive” laws or rules, even if the laws or rules are civil. However, both of the cases cited by the Respondents stand squarely for the opposite proposition.

Richmond v. Levin, 219 W. Va. 512, 637 S.E.2d 610 (2006) (*per curiam*), one of the cases cited by the Respondents, involved a claim by a physician that a decision by the West Virginia Supreme Court striking a jury non-unanimity statute should not be applied retroactively to a civil medical malpractice case against him that was pending in circuit court when the Court’s decision

was handed down. The physician argued that to do so would violate the *ex post facto* clause. This Court squarely rejected the physician's argument, stating that the *ex post facto* doctrine had no application to the retroactivity issues in a civil medical malpractice case because the *ex post facto* doctrine only applies to criminal proceedings, not civil. *Id.* at 516-517, 614-615.

Haislop v. Edgell, 215 W. Va. 88, 593 S.E.2d 839 (2003), the other case cited by the Respondents, involved the question of whether the State's Sex Offender Registration statute was criminally punitive in nature so as to invoke application of the *ex post facto* clause. This Court held that the life registration and public disclosure of information requirements of the statute were civil, non-punitive provisions that did not implicate the *ex post facto* clause.

Accordingly, there is nothing in *Richmond* or *Haislop* that supports the notion that the *ex post facto* clause applies to the issues in the Commission's application of its civil, administrative Thoroughbred Racing rule. The only thing that the Respondents point to, otherwise, is the undersigned counsel's use of the word "prosecutor" to refer to her role below in presenting the charged rule violations and the evidence in support thereof against the jockeys in the administrative hearing. Surely, counsel's mere use of the word "prosecutor" below cannot serve as a launchpad for this case to be turned into a criminal matter.

Pursuant to West Virginia Code § 19-23-16(g), the Attorney General is required to represent the Racing Commission's interests in administrative hearings that arise from permit holder appeals of racing stewards' rulings. That is what the undersigned counsel did in this matter. It was the undersigned's responsibility to "prosecute" the rule violation charges against the jockeys in the administrative hearing. The word "prosecute" or "prosecutor," while often thought of in the context

of criminal matters, is certainly not limited to that context as is borne out by this Court's use of those words in civil contexts.

Rule 41(b) of the West Virginia Rules of Civil Procedure, promulgated by this Court, states that a court may dismiss a civil case for "failure of the plaintiff to *prosecute*." In addition, in a case before this Court that involved questions related to the West Virginia Board of Optometry's administrative proceedings against a licensee to take action against his license for violating optometry laws, this Court referred to the Board's role in bringing and presenting the evidence against the optometrist in its administrative hearing as a "*prosecutor*," and specifically called the role of the Deputy Attorney General bringing and presenting the evidence against the optometrist in the administrative hearing, the "*prosecutor*." *Serian v. West Virginia Board of Optometry*, 171 W. Va. 114, 115, 117, 121, 297 S.E.2d 889, 890, 892, 896 (1982).

Counsel's statements below about her role, then, were proper and accurately described her function in the administrative hearing below. Moreover, the broad use of the word "prosecutor" to describe the function that counsel fulfilled is certainly not enough to transform this matter into a criminal case that warrants the application of the *ex post facto* clause to the Racing Commission's civil, administrative proceeding against the Respondents. To make that leap, as the Respondents advocate, would be the height of absurdity and would elevate form over substance. This Court should reject the Respondents' argument because the proceeding against them was unquestionably civil and administrative in nature to enforce the rules of Thoroughbred Racing. The Racing Commission's proceeding was simply not criminal in nature and the use of one word by the undersigned cannot change that fact.

The Respondents also allege that the Petitioner did not raise this *ex post facto* issue below, but nothing could be further from the truth. Notably, the Respondents, who were the Petitioners below in Circuit Court, did not raise any *ex post facto* argument or assign any *ex post facto* error when they filed their appeal Petition in Circuit Court. (J.A. 1972-1983.) Thereafter, the Respondents argued the *ex post facto* issue in their Circuit Court brief. (J.A. 2060-2061.) Although the Racing Commission did not cite the cases that it cited to this Court in this brief and its initial brief, the Racing Commission *expressly* argued in its Circuit Court brief that the *ex post facto* clause was not implicated by this case. (J.A. 2084.) Moreover, the Racing Commission submitted a proposed order in this case to the Circuit Court that, had it been entered, would have expressly rejected Respondents' *ex post facto* argument. (J.A. 2143.)

Failing to cite case law on the *ex post facto* issue does not equate to a failure of the Petitioner to raise a defense against the Respondents' argument in Circuit Court. *See Tracy v. Cottrell ex rel. Cottrell*, 206 W. Va. 363, 371 n.4; 524 S.E.2d 887 n.4 (1999) (“[T]his Court has never held that failing to produce legal authority for an objection at trial, in and of itself, constitutes waiver of the issue for appeal purposes.”) And, here, the issue is not some new issue that the Racing Commission raised on its own for the first time before this Court. The issue was argued by the Respondents below in their Circuit Court brief and was put in the Respondents' proposed order that the Circuit Court entered. Therefore, the Respondents were on notice (since it was their issue) and there is no surprise.

Moreover, as an appellate court, the Circuit Court below had an obligation to refrain from indiscriminately signing the Respondents' proposed order which wrongly applied the *ex post facto* doctrine to a civil, administrative case. *United States National Bank of Oregon v. Independent Ins.*

Agents of America, Inc., 508 U.S. 439, 446, 113 S. Ct. 2173, 2178 (1993), quoting *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99, 111 S. Ct. 1711, 1718 (1991) (“ ‘When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.’ ”) *Accord Forshey v. Principi*, 284 F.3d 1335, 1356 (Fed. Cir.2002) (“[A]ppellate courts may apply the correct law even if the parties did not argue it below and the court below did not decide it, but only if an issue is properly before the court.”), *overruled on other grounds by Morgan v. Principi*, 327 F.3d 1357 (Fed. Cir.2003).

In this case, the issue was squarely before the Circuit Court and it could have and should have applied this Court’s precedent that plainly establishes that the *ex post facto* clause does not apply in civil cases, such as this one. The fact that the Circuit Court did not, is plain error which affected the Petitioner’s substantial rights and the fairness of the proceedings below. Therefore, even assuming that one can conclude that the lack of citation to case law by the Petitioner below is a “waiver” of the *ex post facto* issue, this Court can recognize the plain error that the Circuit Court’s decision represents on this issue, and address and reverse it. *In re K. L.*, 223 W. Va. 547, 759 S.E.2d 778 (2014) (*per curiam*); *Cartwright v. McComas*, 223 W. Va. 161, 672 S.E.2d 297 (2008) (*per curiam*).

C. THE RESPONDENTS DID NOT RAISE THE ISSUE OF THE CHANGE IN THE RACING COMMISSION’S RULE IN CIRCUIT COURT AND HAVE THEREFORE WAIVED THAT ISSUE.

For the first time in this case, the Respondents urge this Court to, in some manner, decline to consider whether or not they violated 178 W. Va. C.S.R. 1, § 60.5., which prohibits connivance in a corrupt act, because shortly after the Respondents lodged their petition for appeal below, the

Petitioner set the slow-moving legislative rule-making process in place to re-write the Thoroughbred Racing Rule. The Respondents had ample opportunity to brief that issue or to otherwise move the Circuit Court to consider the issue below.

Respondents were not required to and did not file their brief in Circuit Court until June 25, 2010, several weeks after the Racing Commission put proposed Thoroughbred Racing rule changes out for public comment on June 7, 2010. Therefore, if the disqualifying event in this matter was the Petitioner's proposal to make rule changes, which included taking the exact language in § 60.5. out of the rule (*see* Respts' Br. at 8-9), the Respondents had the opportunity to raise that below in their brief before the Circuit Court.

Moreover, since the specific rule language in question ultimately came out of the rule effective July 10, 2011, well before the Circuit Court disposed of this case, the Respondents had the opportunity to raise that with the Circuit Court, assuming *arguendo* that it was a basis to "moot" the parties' arguments over such rule language. But, because the Respondents failed to bring this issue to the Circuit Court, it was not briefed nor decided below.

This Court has repeatedly held that nonjurisdictional questions raised for the first time on appeal will not be considered. *Noble v. West Virginia Department of Motor Vehicles*, 223 W. Va. 818, 679 S.E.2d 650 (2009) (*per curiam*); *Shaffer v. Acme Limestone Co., Inc.*, 206 W. Va. 333, 349 n. 20, 524 S.E.2d 688, 704 n. 20 (1999). *See also, Whitlow v. Board of Education*, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993). The Respondents have not argued and indeed there is no support for the idea that the issue at hand is a jurisdictional issue warranting review by this Court for the first time. Accordingly, Respondents' argument on this issue should be disregarded by this Court.

D. THE RESPONDENTS SHOULD NOT GET A PASS ON A RACING RULE VIOLATION BASED UPON SHEER SPECULATION AS TO WHY THE RACING COMMISSION AND THE WEST VIRGINIA LEGISLATURE CHOSE TO AMEND THE THOROUGHBRED RACING RULE AND/OR BECAUSE THERE WAS AN EXCESSIVE DELAY IN THE CIRCUIT COURT'S DISPOSITION OF THE APPEAL BELOW.

Assuming that this Court decides to consider the issue of the rule change not raised below, the Court must observe that there is absolutely nothing in the record below which shows that the Commission or the Legislature was motivated to change the rule by an "admission" that the rule was bad, unclear or poorly done. A review of the rule that the Commission proposed and the Legislature passed in 2011, to replace the 2007 rule in effect when the jockeys' case arose, demonstrates that it was a major re-write of the Thoroughbred Racing Rule in which many old concepts in the rule were abandoned or altered, and many provisions were updated to conform with new industry standards. The 2011 rule did not merely make select amendments to the 2007 rule, it wholly repealed and replaced it. 178 W. Va. C.S.R. 1, § 1.5. (July 10, 2011).

Respondents attempt to take required explanatory statements submitted in connection with the filing of the proposed repeal and replace for public comment, as an express admission that the language contained in § 60.5. in the 2007 rule was bad. This, the Respondents argue, is an acknowledgment that everything that they deem wrong with § 60.5. is true. However, it is clear that neither the Racing Commission nor its counsel said anything specifically about § 60.5. Instead, the statements submitted to the Legislature regarding the need and basis for the repeal and replace, was a generic overview of the outdated provisions, poor organization and occasional lack of careful draftsmanship exhibited in the old rule.

Moreover, general observations made by the Racing Commission or its counsel about a rule as a whole is not dispositive as to whether any particular provision of the rule is bad or wrong. Respondents' attempt to connect the dots between the re-write of the rule and an alleged admission that a specific provision contained therein was "bad", is simply unworkable in a case such as this in which the change was the result of legislative action. Public officials, whether Racing Commissioners proposing a rule or legislators acting on the proposal, act for a variety of reasons. Trying to link legislative action to a specific alleged motivation fails to appreciate the diversity and dynamics that motivate legislators. *See United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("Inquiries into Congressional motives or purposes are a hazardous matter.") *See also Foreman v. Dallas County*, 193 F.3d 314, 321-22 (5th Cir. 1999) (recognizing that attribution of a causative relationship between a lawsuit and a legislative act is a hazardous undertaking as the legislative process is fraught with compromises, competing interests and unspoken motives).

Accordingly, this Court cannot make a connection between a broad statement made by the Commission in proposing a legislative rule re-write and collective action on the re-write by the West Virginia Legislature and an "admission" that one section of the rewritten rule is faulty. To do so is non sequitur.

It is also important to note that what the Respondents want this Court to do is to give them a pass on their misconduct because in the four years that this case sat in the Circuit Court, one of the rules under which the jockeys were held responsible changed. In effect, the Respondents want to benefit from the unreasonable delay attributable to the Circuit Court, through no fault of the Petitioner. As discussed herein, *supra* pp. 8-9, had the Circuit Court decided this case in a timely manner, it would have been decided years before the rule was changed.

The Respondents suggest that because it changed, no one needs “guidance” from this Court about the particular rule. The upshot, however, of Petitioner’s pursuit of this appeal is not limited to “guidance” that may or may not be instructive to the parties and others that might have an interest, it is to vindicate its lawful decision to hold the jockeys responsible *under a rule that was unquestionably in effect at the time that the acts were committed* and to right the wrong that the Circuit Court committed when it erroneously reversed the Commission’s decision.

Moreover, to suggest that this case wouldn’t have existed in the absence of § 60.5., is fallacious. The farcical and chaotic weigh-outs in which the jockeys knowingly and voluntarily participated and that deprived the betting public and the owners/trainers of an accurate and true weight for each of them is conduct violative of the Thoroughbred Racing Rule whether in 2009 or in the present. Whether couched in terms of connivance with the Clerk of Scales or otherwise, the Thoroughbred Racing Rule prohibits permit holders from engaging in misrepresentation in connection with racing. 178 W. Va. C.S.R. 1, § 24.11.d. (eff. July 9, 2014) It also forbids knowingly aiding and abetting a violation of any rule with respect to racing. 178 W. Va. C.S.R. 1, § 24.11.e. (eff. July 9, 2014). In addition, it requires permit holders to report to the Racing Commission or the stewards any knowledge that they may have that a violation of the racing rules has occurred or may occur. Failure to report, subjects a permit holder to discipline, up to and including permit revocation. 178 W. Va. C.S.R. 1, § 24.14.b. (eff. July 9, 2014).

The rule also contains, and has always contained, provisions that require the jockeys to report and weigh out and to have certain clothing on and items in hand when weighing out; and provisions that require the Clerk of Scales to weigh out jockeys and report overweights to the public and pertinent owners/trainers. 178 W. Va. C.S.R. 1, § 45.5. (eff. July 9, 2014). Because the substantial

evidence in the record supports that the jockeys did not meaningfully participate in the weigh outs at issue and did not comply with the clothing and item requirements; that the Clerk of Scales didn't do his job right before the jockeys' eyes; and, that the betting public and owners/trainers were deprived of knowing the true weights of the jockeys – it is evident that the jockeys could and would be cited even if this happened today under the aforementioned rule provisions.

E. THE RESPONDENTS HAVE MISCHARACTERIZED THE STANDARD OF REVIEW THAT IS APPLICABLE TO THIS COURT'S REVIEW OF WHAT HAPPENED BELOW.

Without citing any case law to support it, the Respondents claim that the Circuit Court's decision below is entitled to a deferential review by this Court. (Respts Br. at 29-30.) This is a misstatement of the standard of review that is applicable. This Court has no duty to give "deference" to the Circuit Court's decision. In the context of an administrative appeal, such as this, "[t]his Court applies the same standard of review that the circuit court applied to the [agency's] administrative decision, *i.e.*, giving deference to the [agency's] purely factual determinations and giving *de novo* review to legal determinations." *Lily v. Stump*, 217 W. Va. 313, 316, 617 S.E.2d 860, 863 (2005) (*per curiam*). See also *Webb v. West Virginia Board of Medicine*, 212 W. Va. 149, 155, 569 S.E.2d 225, 231 (2002) ("On appeal, this Court reviews the decisions of the circuit court under the same standard of judicial review that the lower court was required to apply to the decision of the administrative agency.") *Accord* Syl. pt. 2, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996) ("In cases where the circuit court has [reversed] the result before the administrative agency, this Court reviews the final order of the circuit court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law *de novo*.")

Accordingly, it is incumbent upon this Court to look anew at whether there is a substantial basis in the record for the Racing Commission's factual findings and whether the Circuit Court effectively abused its discretion by improperly re-weighing the evidence, by making its own findings and by substituting its judgment for that of the Racing Commission. The Petitioner's argument, then, in its initial brief (*see* Petr's Br. at 32-36) is correct, insofar as the Petitioner pointed out the Circuit Court's act of re-writing the facts and ignoring those found by the Commission was in violation of the deferential standard of review that the Circuit Court was required to apply.

IV.

CONCLUSION

Wherefore, based upon the foregoing, the West Virginia Racing Commission respectfully requests that this Court reverse the Circuit Court's September 2, 2014 order and affirm the Racing Commission's May 21, 2010 order in this matter.

WEST VIRGINIA RACING COMMISSION,

By counsel,

**PATRICK MORRISEY
ATTORNEY GENERAL**



**KELLI D. TALBOTT (WV State Bar No. 4995)
SENIOR DEPUTY ATTORNEY GENERAL
812 Quarrier Street, Second Floor
Charleston, West Virginia 25301
(304) 558-8989
Kelli.D.Talbott@wvago.gov**

CERTIFICATE OF SERVICE

I, Kelli D. Talbott, Deputy Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing Petitioner's Reply Brief was served by depositing the same postage prepaid in the United States Mail, this 11th day of March, 2015, addressed as follows:

Ben Bailey, Esq.
Christopher S. Morris, Esq.
Isaac Forman, Esq.
Bailey & Glasser, LLP
209 Capitol Street
Charleston, WV 25301



KELLI D. TALBOTT