

No. 15-0131

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

STATE EX REL.

LISA MILES

Petitioner,

v.

WEST VIRGINIA BOARD OF REGISTERED PROFESSIONAL NURSES

Respondent.

*Before the West Virginia
Board of Professional Nurses
License No. 78299*

PETITION FOR WRIT OF PROHIBITION

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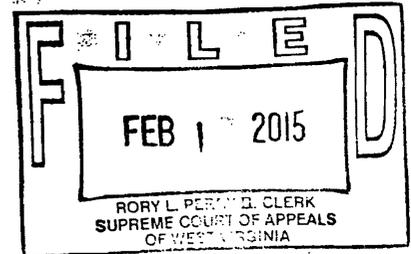


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QUESTIONS PRESENTED

1. Does the Respondent administrative agency have the power, jurisdiction or authority to schedule, notice and hold hearings on complaints against licensees after the expiration of the time limits imposed by West Virginia Code §30-1-5(c), where it has failed to provide status reports to the complainant by certified mail, return receipt required or failed to obtain the written consent of the complainant to extend the time for disposition of the complaint beyond the statutory time limits?
2. Did the Respondent administrative agency violate the constitutional due process rights of the licensee when it failed to issue a final disposition of the complaint within the statutorily imposed timeframes and by failing to provide and respond to requests for documents and exhibits until five days before the scheduled hearing, which was beyond the statutorily defined timeframe?
3. Did the Respondent administrative agency commit clear error of law when it scheduled the final disposition hearing relating to the complaint filed against the licensee beyond the time frames imposed by statute and without obtaining the written consent of the complainant?
4. When the Respondent administrative agency unreasonably delays scheduling a dispositive hearing within the time frame imposed by statute, should the complaint against the licensee be dismissed for failure to prosecute, pursuant to Rule 41, West Virginia Rules of Civil Procedure?

PETITION FOR WRIT OF PROHIBITION

I. STATEMENT OF THE CASE

Pursuant to *Rule 16 of the West Virginia Rules of Appellate Procedure*, the Petitioner seeks a Writ of Prohibition against the West Virginia Board of Examiners for Registered Professional Nurses (hereinafter the “Respondent” or “Board”), pursuant to the original jurisdiction of this Court. For her Petition against the Respondent, Petitioner Lisa Miles, R.N. (hereinafter “Petitioner” or “Miles”) by and through her counsel Lisa Lilly, Michelle Roman Fox, and the law firm of Martin & Seibert, L.C. hereby alleges and says as follows:

II. THE PARTIES, JURISDICTION AND VENUE

1. The Petitioner is a resident of Millwood, Jackson County, West Virginia.
2. The Respondent is the Executive Director of an administrative agency established by the West Virginia Legislature that is tasked to regulate the practice of registered professional nurses, *inter alia*, and to follow procedures contained in Chapter 29A, Article 4 of the West Virginia Code, as amended.
3. This Court has subject matter jurisdiction to hear this controversy pursuant to West Virginia Code § 29A-5-4 and West Virginia Code § 30-1-9 because Petitioner has been prejudiced by reason of the Respondent’s conduct or neglect that is:
 - a. In violation of constitutional or statutory provisions; or
 - b. In excess of the statutory authority or jurisdiction of the agency; or
 - c. Made upon unlawful procedures; or
 - d. Affected by other error of law; or
 - e. Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

- f. Arbitrary and capricious as characterized by abuse of discretion or clearly unwarranted exercise of discretion.

III. FACTUAL ALLEGATIONS

1. The Petitioner Lisa Miles is 45 years old and resides in Millwood, Jackson County, West Virginia with her husband Sam Miles.
2. In 2010, Lisa Miles at the age of 41 years old graduated with an Associate Degree in Nursing from West Virginia University-Parkersburg. **Appendix, pg. 000001 – 000002.**
3. Ms. Miles passed her licensing exams in June 2002 and subsequently obtained her registered professional nurse (RN) license from the state of West Virginia, License No. 78299. Petitioner's license has been renewed every year since 2010, without restriction, despite the Complaint filed against her, as hereinafter described. **Appendix pg. 000003 – 000009.**
4. Presently, Ms. Miles is employed at Jackson General Hospital and has been so employed since August 14, 2013. Mrs. Miles has been described as an excellent employee, and has not been subject to any complaints, reprimands, or discipline of any kind while employed at Jackson General Hospital. **Appendix pg. 000010 – 000013.**
5. Mrs. Miles while employed at St. Joseph's Hospital located in Parkersburg, West Virginia as an emergency room nurse was terminated on April 2, 2013 for failing to follow the hospital's medication waste policies, after inadvertently selecting the wrong medication from the hospital's new electronic health record. ("EHR"). **Appendix pg. 000014 – 000017.**

6. On the same day as her termination and pursuant to the direction from her previous supervisor, Mrs. Miles self-reported her termination to the West Virginia Board of Examiners for Registered Professional Nurses (“Board”) by telephone.
7. On or about April 12, 2013, St. Joseph’s, through its representative, Susan Abdella, filed a complaint with the Board alleging that Mrs. Miles failed to follow the medication administration policy on several occasions when she failed to properly document wasted doses of the prescription medication Dilaudid. **Appendix pg. 000014 – 000017.**
8. At no time has St. Joseph’s or any other person or entity, accused Mrs. Miles of drug diversion or drug use, but only a failure to follow proper charting and/or drug wasting policies and practices.
9. On April 12, 2013, the Board sent a Notice of Complaint to Mrs. Miles. **Appendix pg. 000018 – 000022.**
10. In response to the Complaint asserted against her, on May 23, 2013, Mrs. Miles, through her counsel Lisa Lilly provided the Board with a written response to the Complaint wherein the Petitioner denied any intentional wrong doing, specifically to include any drug diversion. Furthermore, Mrs. Miles advised that she offered to take a drug screen test at the time of her termination but the personnel at St. Joseph’s Hospital denied her request. **Appendix pg. 000023 – 000026.**
11. To explain her actions, and in response to the Complaint, Mrs. Miles advised the Board that St. Joseph’s implemented a new electronic medication dispensing system and she had not received adequate orientation, or instruction, thus, contributing to her choosing the wrong medication on the screen. **Appendix pg. 000023 – 000026.**

12. Additionally, Lisa Miles explained to the Board that the system was known to have problems with the tracking and charting of patients that were classified as “discharged” in the ER, but in actuality were still physically present in the ER awaiting transport and in the need of care. St. Joseph’s failed to provide any paper nursing notes or other method to document care or medications provided to these patients. **Appendix pg. 000023 – 000025.**
13. On March 6, 2014, Mrs. Miles through her counsel, Lisa Lilly provided a supplemental response and advised the Board that St. Joseph’s was using the “Enlight” computer system during the time at issue and that Mrs. Miles received training on this computer software system one year prior to the EHR System going online. Importantly, this initial training, given one year prior to the implementation, was for “Floor Nursing” and not “Emergency Room Nursing”, where the Petitioner was assigned at the time of her termination. **Appendix pg. 000027 – 000032.**
14. Moreover, three to four months before the “EnLight” system was implemented, Mrs. Miles received another three hour training course, but was not provided with reference manuals or take-home materials to study or use as a reference on an ongoing basis. **Appendix pg. 000027.**
15. Additionally, although online materials were available to staff, once “Enlight” went live, due to the significant passage of time between the training and the implementation of Enlight, Mrs. Miles found these online materials of little help, especially given the demands of her routinely heavy patient loads. Recognizing her difficulty in mastering this new system, Mrs. Miles, one to two weeks prior to her termination, specifically requested additional training on the appropriate use of EHR; nonetheless, this request

was denied by June Kuhn, RN, nursing supervisor at St. Joseph's Hospital. **Appendix pg. 000027.**

16. After her termination, the Petitioner sought unemployment benefits and an unemployment hearing was held before Truman Sayre, Administrative Law Judge. Judge Sayre concluded that "St. Joseph's did not prove that the claimant was stealing drugs or personally benefitting from drugs at the Hospital." He concluded that Mrs. Miles termination was a result of "simple misconduct" in failing to abide by the employer's policy and procedure of the EHR. **Appendix pg. 000033 – 000036.**
17. On August 14, 2013, four months after St. Joseph's filed their Complaint, the Board's "Discipline Department" forwarded a status report to St. Joseph's notifying the Hospital that the Complaint it had filed against Mrs. Miles was "under continued investigation and review by the Board staff." The Board has failed to produce any records to verify or substantiate that this status correspondence was sent via certified mail, return receipt required as mandated by West Virginia Code §30-1-5(c). **Appendix pg. 000037.**
18. The "Discipline Department" of the Board allegedly sent a second report to St. Joseph's on March 25, 2014, advising the Hospital that the Complaint was "currently being negotiated for settlement"; however, the Board again failed to send this correspondence, via certified mail, return receipt required, in violation of the clear mandates of West Virginia Code §30-1-5(c). **Appendix pg. 000038.**
19. The sole settlement negotiations being conducted at the time this correspondence was sent was the Board providing to Mrs. Miles a single consent agreement, via correspondence dated March 20, 2014, prepared unilaterally by the Board, which was

rejected, and, then a counter -proposal was made by Mrs. Miles which was rejected by the Board. **Appendix pg. 000049 – 000059.**

20. Importantly, on October 10, 2014, and again on December 11, 2014, Alice Faucett, General Counsel for the Board sent correspondence to Susan Abdella at Camden Clark Hospital, (Previously St. Joseph’s Hospital) wherein Mrs. Faucett clearly and unambiguously advised Ms. Abdella that “the Board has exceeded its time allotments provided in law to resolve the complaint you filed.” Furthermore, Ms. Faucett specifically cites West Virginia Code § 30-1-5(c) and the time frames enunciated therein. Ms. Faucett then notes that although the legal time frame to proceed has expired, the Complainant and the Board can agree to extend the time frame to continue pursuing the complaint against the licensee. Further, in this letter, counsel for the Board again violates the clear statutory provisions of West Virginia Code §30-1-5(c) by stating that “if you disagree with this extension, please inform the Board in writing.” The applicable statute, indeed cited by the Board in its letter, specifically requires an affirmative agreement “in writing” to extend the deadlines. **Appendix pg. 000039, 000047 – 000048.**

21. Then, on December 12, 2014, the Board issued a Complaint and Notice of Hearing setting the hearing in this matter for January 20, 2015. **Appendix, pg. 000040 – 000043.**

22. On January 15, 2015, Lisa Lilly, counsel for Mrs. Miles was contacted by Assistant West Virginia Attorney General, Gregg Foster, now acting as counsel for the Board. Mr. Foster asserted he had not previously been advised of Mrs. Miles’ multiple requests to obtain records allegedly supporting the complaint allegations. Instead, in

an effort to justify the Board's complete lack of response for production of the discovery materials, Mr. Foster said the request should have been directed towards him. This explanation for the failure of the Board to timely respond is disingenuous, at best, because counsel for Mrs. Miles had no notice that Mr. Foster was representing the Board prior to his January 15, 2015 call. Importantly, neither Mr. Foster nor the Board provided any proposed witness information, proposed exhibits, or the identity of the hearing examiner, prior to January 15, 2015, less than four days before the first scheduled hearing of January 20, 2015. **Appendix pg. 000044 – 000046.**

23. In addition, despite repeated requests for pertinent documents, they were finally produced less than five days prior to the first scheduled hearing. In this regard, Mr. Foster, on behalf of the Board, forwarded Lisa Lilly, counsel for Mrs. Miles over 500 pages of documents including well over 100 pages of technical user manuals for the subject EHR software. Included within the production were reports from the West Virginia Board of Pharmacy and St. Joseph Hospital dated "2013" which had never been produced to counsel for Mrs. Miles despite multiple requests and in-person file reviews. **Appendix pg. 000044 – 000046.**

24. Petitioner has continuously denied any improper or unlawful acquisition of drugs or any improper use or distribution of drugs to others. Moreover, neither the Petitioner's former employer nor the Respondent can produce any evidence whatsoever relating to any such improper use or abuse or distribution of drugs by the Petitioner. Indeed, Administrative Law Judge Sayre, issued a specific judicial finding, after presentation of evidence by St. Joseph's, that the Petitioner did not, in conjunction with her employment and termination from St. Joseph's engage in any such behavior.

25. Petitioner has never been accused, investigated, or arrested by any law enforcement agency in relationship to any wrongdoing, including particularly the unlawful use or distribution of drugs. Petitioner has never been treated by any medical provider or participated in any other form of counseling for any improper use or abuse of drugs.
26. As a pattern of conduct, Respondent routinely treats nurses and other licensed practitioners under its regulatory control in a manner consistent with the allegations set forth herein. Moreover, upon information and belief, Respondent frequently delays the administration process for handling of complaints against licensees in an arbitrary and capricious manner in order to pressure responding licensees to enter into consent orders for discipline, out of frustration or in the hope that by consenting they will eventually have the cloud of formal discipline removed as a likely impediment to their ability to gain employment as a nurse.
27. Upon information and belief, the Complainant Camden Clark Hospital, (formerly St. Joseph's) have never affirmatively agreed, in writing, to extend the time frames set forth in West Virginia Code §30-1-5(c) for the issuance of a final disposition of the Complaint against the Petitioner, and indisputably, did not enter into such formal written agreement prior to the time expiring for final resolution of the Complaint lodged against the Petitioner.
28. West Virginia Code § 30-1-5 provides in pertinent part, as follows:
- (c) Every Board referred to in this chapter has a duty to investigate and resolve complaints which it receives and shall within six months of the complaint being filed, send a status report to the party filing the complaint by certified mail with a signed return receipt and within one year of the status report's return receipt date issue a final ruling, unless the party filing the Complaint and the board agree in writing to extend the time for the final ruling.

29. Without written consent, justification or excuse, the Board has repeatedly violated West Virginia Code § 30-1-5(c) in this case. The Respondent's conduct is representative of a pattern and course of action by Respondent that creates a hardship for the licensee, the intent of which is seemingly to force nurses against whom complaints have been lodged to sign a consent order disposing of the complaint, "voluntarily" thus effectively depriving them of their due process rights, including an opportunity to be promptly heard and defend the allegations against them.

IV. SUMMARY OF ARGUMENT

1. The Respondent, the West Virginia Board of Examiners for Registered Professional Nurses, an Administrative Agency, exceeded its jurisdiction and regulatory powers in this case because it failed or refused to comply with W.Va. Code § 30-1-5(c) by indisputably failing to send a status report by certified mail, return receipt requested to the complainant, by failing to obtain the written consent from the complainant to extend the timeframe for disposition of the complaint against the Petitioner and by failing to schedule a dispositive hearing and issue a final disposition in this matter in compliance with the time limits set forth in the statute. Such continued and persistent non-compliance with the clear statutory requirements is an abuse of the procedure established by the Legislature to address complaints against registered professional nurses and should result in the dismissal, with prejudice, of the complaint against the Petitioner.
2. The Respondent, the West Virginia Board of Examiners for Registered Professional Nurses, an Administrative Agency violated the due process rights of the Petitioner, Lisa Miles, by failing or refusing to comply with the clearly defined requirements set forth in

West Virginia Code §30-1-5(c), and in particular, failing to send the status report to the complainant by certified mail, return receipt required, by failing to obtain the written consent of the complainant to extend the time frame for disposition, before expiration of said deadline, and by failing to conduct a hearing and issue a final disposition of said complaint within one year following the status report, all of which resulted in prejudicial delay to the Petitioner. Moreover, the Respondent has violated these statutorily prescribed procedures routinely and persistently, as evidenced by this repeated violations despite the holding and admonishment by this Court in *State ex. rel. Fillinger v. Rhodes*, 230 W.Va. 560, 741 S.E.2d 118 (2013). These failures, acts and omissions by the Board have resulted in a violation of the Petitioner's constitutional due process rights and rights of fundamental fairness and prompt disposition of the Complaint allegations.

3. The Respondent, the West Virginia Board of Examiners for Registered Professional Nurses, an Administrative Agency, has failed to prosecute the Complaint against the Petitioner within the timeframe prescribed by statute and failed to schedule a hearing and issue a final disposition within one year from the date of the status report. Thus, dismissal pursuant to Rule 41, West Virginia Rules of Civil Procedure is warranted.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner request oral argument in this case, pursuant to Rules 19 and 20, of the West Virginia Rules of Appellate Procedure. In this regard, oral argument is necessary because this case involves clear error of established law by the Respondent and by its violation of definite statutory mandates, the Respondent has acted beyond its authority and jurisdiction. Furthermore, this case also involves questions of fundamental public importance, and particularly, professional nurses subject to the authority of the Respondent Board. Finally, this case involves issues pertaining to

constitutional questions of whether the Respondent had authority to act if it violates the procedural and substantive mandates of the authoritative statute.

VI. ARGUMENT

1. This Court has original jurisdiction over this matter because the Administrative Agency has exceeded its authority and has acted in clear violation of established law.

A Writ of Prohibition is proper when the inferior tribunal is proceeding without, or in excess of jurisdiction. See, *State ex rel., Johnson v. Reed*, 219 W. Va. 289, 633 S.E.2d 234 (2006).

In addition, this Court noted in *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996) that “in determining whether to entertain and issue a writ of prohibition for cases not involving an absence of jurisdiction but where it is claimed that the lower tribunal exceeded its legitimate powers, the Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as a 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. *Syl. Pt. 4, Hoover, Id.* All five factors need not be satisfied but the third factor, the existence of clear error as a matter of law should be given substantial weight.

In the instant case, the Respondent’s unreasonable delay in issuing a final disposition of the Complaint filed against Lisa Miles is a clear violation of West Virginia Code §30-1-5(c). Moreover, the continued disregard of the mandatory requirements imposed upon

the Board, pursuant to W. Va. Code § 30-1-5 (c), is persistent and evident, as this Court plainly admonished the Board in *Fillinger v. Rhodes*, 230 W. Va. 560, 741 S.E.2d 118 (2013) for its failure to adhere to the time limits and other mandates in §30-1-5(c). Despite the unequivocal holding in *Fillinger*, the Board, again, just months later, flagrantly disregarded the statutory mandate of sending status reports, via certified mail, and timely issuing a final decision on the Complaint.

In the instant case, the Respondent's actions are clearly erroneous as a matter of law. Thus, the Petitioner requests that this Court grant the Writ and direct the West Virginia Board of Examiners for Registered Professional Nurses to dismiss with prejudice, the complaint filed against Lisa Miles.

2. The Respondent violated the due process rights, both procedurally and substantively, of the Petitioner by failing to comply with the mandates of West Virginia Code § 30-1-5(c) and failing to timely and promptly issue a final disposition of the complaint against her.

Statutory regulation of registered professional nurses is governed by West Virginia Code § 30-1-1(1996), et. seq. In this regard, West Virginia Code § 30-1-1 instructs that “every board of examination or regulation in this chapter shall conform to the requirements prescribed herein”. Thus, the directives set forth in West Virginia Code § 30-1-1, et seq. are mandatory.

Furthermore, West Virginia Code § 30-1-5(c) mandates as follows:

Every board referred to in this chapter has a duty to investigate and resolve complaints which it receives and shall, within six months of the complaint being filed, send a status report to the party filing the complaint by certified mail with a signed return receipt and within one year of the status report's return receipt date issue a final ruling, unless the party filing the complaint and the board agree in writing to extend the time for the final ruling.

In this case, it is undisputed that the West Virginia Board of Examiners for Registered Professional Nurses failed to follow the procedural and substantive mandates set forth in West Virginia Code § 30-1-5(c); thus, dismissal of the complaint against the Petitioner is warranted and this Court should grant the writ, and prohibit the Board from proceeding further on the complaint and directing the dismissal of the Complaint.

In this regard, the Complaint was filed against the Petitioner on April 12, 2013. Thereafter, on August 14, 2013, the Board sent a status report to St. Joseph's Hospital, the complainant, advising that the matter was still under investigation. However, and significantly, the Board failed to comply with the specific requirements imposed upon it by West Virginia Code § 30-1-5(c), and in particular, the Board failed to send the status report via certified mail, return receipt requested.

Since the status report was sent on August 14, 2013, albeit not in compliance with the statute, the deadline for final disposition of the complaint was on or before August 14, 2014, as clearly directed in the statute which states the final disposition must be issued within one year after the status report.¹ However, the Board indisputably, did not satisfy this statutorily imposed deadline. Instead, on October 11, 2014, the Board, through its counsel, sent a letter to St. Joseph's Hospital (now Camden Clark Hospital) and unequivocally admitted that the Board had failed to meet the statutory-imposed deadline for final disposition of the Complaint. Importantly, the Board's counsel acknowledged without doubt, that "the Board has exceeded its time allotments provided in law to resolve

¹ The Board did not send the status report, return receipt required, as directed by statute; thus, a calculation cannot be made from the return receipt date. The Board should not be able to take advantage of their failure to comply, so calculation from the date of the first status report should be used.

the complaint you filed.” Then, the Board attempted to circumvent the clear statutory requirements by suggesting to the Complainant that “although beyond a legal time frame to proceed, the Board and the Complaint can agree to extend the deadline.” However, despite its effort to cure the violation of the statute, after the time limit had already expired, the Board, again, failed to comply with the statutory requirements in that it did not secure a “written agreement” between the Board and the Complainant. Quite simply, a statement in a letter to Complainant that the time frame needs to be extended, and, then placing the burden on the Complainant to object in writing to the extension, is entirely inconsistent with the clear statutory requirements in W.V. Code §30-1-5(c). In this regard, the statute undeniably requires an affirmative written agreement to extend the timeframe, not a presumption of an extension, negated only by a written objection from the complainant. Moreover, any agreement, even if one existed, executed after expiration of the deadline would be void, as in violation of the language of West Virginia Code § 30-1-5(c). Once the deadline expires, the Board loses its authority to proceed on the Complaint.

This Court recently in *State ex rel. Fillinger v. Rhodes*, 230 W. Va. 560, 741 S.E.2d 118 (2013) granted a writ of prohibition filed by Jennifer Fillinger, a nurse who had two complaints pending against her with the West Virginia Board of Examiners for Registered Professional Nursing. In granting the writ, this Court emphasized that the Board violated West Virginia Code § 30-1-5(c) by failing to send a status report via certified mail with signed return receipt and by failing to conduct a hearing and issuing of final ruling within one year after the status report was sent to the complainant. This Court reasoned that since the Board failed to conduct a hearing and enter a final decision within the time frames prescribed in the statute, the Board effectively denied Fillinger an opportunity to be heard

in opposition of the allegations against her, and, such conduct by the Board violated the relevant statutes and rules, warranting the grant of the Writ.

In addition, the concurring opinions filed in *Fillinger, Id.* are very instructive regarding the consequences of non-compliance with the mandates of West Virginia Code § 30-1-5(c) and the appropriateness of the imposition of harsh remedies against the Board. In this regard, Justice Loughry explains “it is the responsibility of the Board to act diligently and promptly in reviewing, investigating, and conducting disciplinary hearings on complaints brought before it, not only to guarantee that nurses will be held accountable for proven misconduct, but most importantly, to ensure the safety of patients and the public. *Fillinger, Id.* at 126.

In addition, Justice Benjamin, in his concurring opinion, noted that the Board’s repeated violations of the West Virginia Code, West Virginia Code of State Rules and Ms. Fillinger’s due process rights, supported a finding that the Board engaged in excessively vexatious conduct. Justice Benjamin pointed out that “in past cases, such conduct has warranted awarding attorney’s fees and costs to the harmed party”. *Id.* at 125.

Despite the strict admonishment of the West Virginia Board of Examiners for Registered Professional Nurses by this Court in *Fillinger*, in its decision issued on March 12, 2013, the Board, again, blatantly violated the requirements of West Virginia Code §30-1-5(c) in the case, and, failed to conduct the hearing and issue a final ruling within one year after giving a status report to the complainant. In addition, the Board failed to provide the status report via certified mail return receipt requested. Both of these statutory requirements are succinctly mandated by the clear provisions of the statute, and this Court emphasized the importance of both in its decision in *Fillinger*.

Furthermore, the Board also violated the Petitioner's due process rights because of the complete failure to provide discovery materials until five days prior to the hearing, scheduled beyond the one year time frame in the statute.

The consistent failure of the West Virginia Board of Nursing Examiners to follow the direct requirements set forth in West Virginia Code §30-1-5(c) as well as to timely provide the discovery material requested, has resulted in a violation of the due process rights, under the state and federal constitution, of the Petitioner Lisa Miles. Such violations have deprived her of the fundamental right to fairness and prompt resolution of the Complaint that must be an integral part of the administrative process.

The West Virginia Supreme Court of Appeals has long recognized that the right to practice a profession is a valuable franchise in the nature of the "property right." See, *West Virginia State Medical Ass'n v. Public Health Council of West Virginia*, 125 W. Va. 152, 23 S.E.2d 609 (1942). Moreover, because the license to practice a profession is considered a valuable right, it will be protected by law. See, *Wallington v. Zinn*, 146 W. Va. 147, 188 S.E.2d 526 (1961). Thus, a person's professional license may not be revoked without adequate levels of due process being afforded to that individual. See, *State ex rel Hoover v. Smith*, 198 W. Va. 507, 482 S.E.2d 124 (1997). Furthermore, the *Hoover* Court noted that "due process of law within the meaning of the state and federal constitutional provisions extend to actions of administrative officers and tribunals as well as the judicial branches of government. See, *Syl. Pt. 1, Hoover v. Smith*. In *Hoover*, this Court held that "when due process applies, it must be determined what process is due and consideration of what procedures due process may require under a given set of circumstances must begin with a determination of the precise nature of the

government function involved as well as the private interest that has been impaired by the government action.” *Syl. Pt. 2, Hoover v. Smith, Id.*

In this case, it is undisputable that the Respondent Board failed to follow the requirements of West Virginia Code §30-1-5(c) in responding to and investigating the Complaint filed against the Petitioner Lisa Miles. The mandates and procedures which must be followed are clear and unambiguous, and despite this Court’s precisely similar decision in *State ex rel. Fillinger v. Rhodes, Id.* rendered just one month prior to the Complaint being filed in this matter the Board, yet again, ignored the procedural requirements for timely and reasonably issuing a final disposition on the case. Instead, the Board knowingly violated the due process rights of Lisa Miles. The Board should have been keenly aware of the consequences of failure to comply with the mandates of West Virginia Code § 30-1-5(c) in light of *Fillinger*; but nevertheless, continued in its persistent practice to ignore and disregard the mandates set forth therein.

Significantly, counsel for the Board in her letter to the complainant dated October 11, 2004 unequivocally acknowledged that the Board violated the statutory mandates, when she stated, that the Board “has exceeded its time allotments provided by law to resolve the complaint you filed”(emphasis added). At that point, admitting its obvious violation, the Board should have dismissed the Complaint, as it was aware it was beyond their regulatory authority to proceed further in light of the violation. Moreover, the Board provides absolutely no explanation of why it has continued to violate the provisions of West Virginia Code § 30-1-5(c), and, it is uncontested that no action by Lisa Miles contributed, in any manner, to the Board’s persistent failure to adhere to the statutory

requirements. Accordingly, this Court should grant the Writ, and direct the dismissal, with prejudice, the Complaint against Lisa Miles.

3. The Board failed to prosecute this case for more than once year; pursuant to Rule 41, W. V. R.Civ.P, thus dismissal is warranted.

Rule 41(b) of the West Virginia Rules of Civil Procedure, provides, in pertinent part, that “for failure of the Plaintiff to prosecute or to comply with any order of this Court , a defendant may move for dismissal of an action or any claim against the defendant. Petitioner is entitled to application of this Rule, pursuant to Rule 81(a), W.Va.R.Civ.P.

The Respondent Board, by its own admission, failed to conduct a hearing and issue a final disposition within one year; consequently, dismissal is appropriate. Said dismissal should operate as a dismissal of the Complaint against the Petitioner, upon the merits.

VII. CONCLUSION

The West Virginia Board of Examiners for Registered Professional Nurses indisputably failed to comply with the precise mandatory requirements set forth in West Virginia Code § 30-1-5(c) in handling the Complaint filed against the Petitioner Lisa Miles by St. Joseph’s Hospital. Specifically, the Board failed to provide a status report to the complainant by certified mail, return receipt required and failed to conduct a hearing and issue a final disposition within one year of the status report.

Accordingly, the Petitioner, Lisa Miles, respectfully requests that the Court hear argument in support of this Petition, consider the facts alleged and established, the applicable statutory, constitutional and common law principles, and grant this Writ and

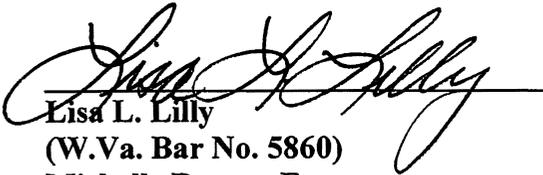
direct and compel the Respondent to dismiss, with prejudice, the complaint filed with the Board by St. Joseph's Hospital against the Petitioner, and grant such further legal and equitable relief as is warranted by the facts herein.

Respectfully submitted,

Lisa Miles, Petitioner
By Counsel

MARTIN & SEIBERT, L.C.

By:


Lisa L. Lilly

(W.Va. Bar No. 5860)

Michelle Roman Fox

(W.Va. Bar No. 5753)

300 Summers Street, Suite 610

Charleston WV

(304) 304-380-0800

Counsel for Petitioner

No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

STATE EX REL.

LISA MILES

Petitioner,

v.

WEST VIRGINIA BOARD OF PROFESSIONAL NURSES

Respondent.

VERIFICATION

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

I, Lisa Miles, after being first duly sworn, say that the statements and allegations contained in the foregoing "*Petition For Writ of Prohibition*" are true, except in-so-far as they are therein stated to be upon information and belief, and that in-so-far as they are therein stated to be upon information and belief, I believe them to be true. The word usage and sentence structure may be that of the attorney assisting in the preparation of this pleading and does not necessarily purport to be the precise language of the executing party.



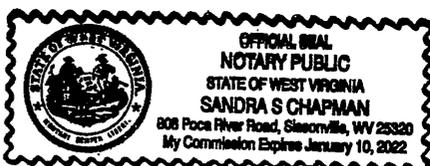
Lisa Miles

Taken, subscribed and sworn to before me this 17th day of February, 2015.

My commission expires: January 10, 2022



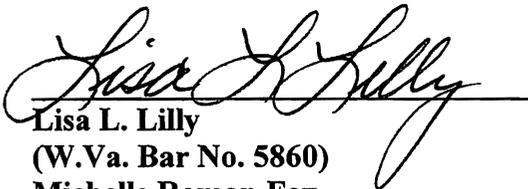
NOTARY PUBLIC



VERIFICATION

The undersigned Lisa L. Lilly hereby certifies that all factual representations herein are true to the best of her knowledge, information and belief.

MARTIN & SEIBERT, L.C.

By: 
Lisa L. Lilly
(W.Va. Bar No. 5860)
Michelle Roman Fox
(W.Va. Bar No. 5753)
300 Summers Street, Suite 610
Charleston WV
(304) 304-380-0800

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Lisa L. Lilly, counsel for Petitioner, Lisa Miles, hereby certify that I served a true copy of the foregoing Petition for Writ of Prohibition and Appendix, upon the following individuals, by placing the same in the U.S. Mail, First Class, postage prepaid, on this 17th day of February, 2015:


Lisa L. Lilly, Esquire (WVSB 5860)