Docket No. 20-0488

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

John Keener d/b/a Mountaineer Inspection Services, LLC, Petitioner,

vs.

Dale W. Steager, as State Tax Commissioner of West Virginia, Respondent.

(Circuit Court of Taylor County Civil Action No. 18-P-57)

FROM THE CIRCUIT COURT OF TAYLOR COUNTY, WEST VIRGINIA
THE HONORABLE SHAWN D. NINES

REPLY BRIEF OF PETITIONER, JOHN KEENER D/B/A MOUNTAINEER INSPECTION SERVICES, LLC, IN SUPPORT OF PETITION FOR APPEAL

Ronald G. Kramer (WV State Bar #12374)
Rkram5600@gmail.com
Kramer Legal Group, PLLC
P.O. Box 882
Bridgeport, WV 26330-0882
Telephone: (304) 777-8502
Facsimile: (304) 884-4259

Allison S. McClure (WV State Bar #10785)
allison@mcclurelawwv.com
McClure Law PLLC
215 S. 3rd Street, Suite 902
Clarksburg, WV 26301
Telephone: (304) 627-1373
Facsimile: (304) 405-2868

Counsel for Petitioner

Docket No. 20-0488

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

John Keener d/b/a Mountaineer Inspection Services, LLC, Petitioner,

vs.

Dale W. Steager, as State Tax Commissioner of West Virginia, Respondent.

(Circuit Court of Taylor County Civil Action No. 18-P-57)

FROM THE CIRCUIT COURT OF TAYLOR COUNTY, WEST VIRGINIA
THE HONORABLE SHAWN D. NINES

REPLY BRIEF OF PETITIONER, JOHN KEENER D/B/A MOUNTAINEER INSPECTION SERVICES, LLC, IN SUPPORT OF PETITION FOR APPEAL

COMES NOW the Petitioner, John Keener d/b/a Mountaineer Inspection Services, LLC, and submits this Reply Brief in support of the Petition for Appeal. As discussed more fully in the sections below, the Legislature did not create a rigid, four-part test when it codified West Virginia Code of State Rules § 110-15-8.1.1.1 (1993), and Code of State Rules § 110-15-8.1.1.1 (1993) is not ambiguous simply because it does not reference a precise level of education required. The four-year degree requirement is an inappropriate application of any gap-filling rulemaking authority not only because the section is unambiguous but also because the four-year degree rule is arbitrary and capricious. The Petitioner is a professional under West Virginia Code of State Rules § 110-15-8.1.1.1 (1993), and the Circuit Court's Order to the contrary, which adopted the Tax Department's four-part test and college degree arguments, should be reversed.

ARGUMENT

I. When West Virginia Code of State Rules § 110-15-8.1.1.1 (1993) was codified, the Legislature created factors, not a mandatory four-part test for the determination of whether a service qualified as a profession, and the Petitioner qualifies as a professional under those factors.

The Tax Department correctly refers to the legislative rule as being one containing factors. *See* Response Brief at p. 6. In the very next paragraph, in an effort to construe the plain language of the statute in a manner to fit its argument, the Tax Department contradicts itself and refers to the factors instead as "requirements." *See Id.* Non-exclusive factors that must be considered are not equivalent to elements, or requirements, of a four-part test. By including the language "such things as," the Legislature clearly intended for the determination of whether a service is a professional service to be one conducted on a case-by-case basis, not under a rigid elemental analysis. The Tax Department's four-part test argument contradicts the rules of statutory construction, including that the effect of the words used in the statute be applied as written. *See* Wooddell v. Dailey, 160 W. Va. 65, 68-69, 230 S.E.2d 466, 469 (1976).

The Tax Department has not created any bright-line rules for the other three factors because its four-year-degree rule is sufficient to eliminate the need to consider the other factors. This is precisely why the Tax Department's four-year-degree rule is an impermissible overreach of its gap-filling authority, as it thwarts the Rule's intent by eliminating the consideration of all four factors. The Tax Department's Response Brief asserts that the Legislature did not grant unfettered discretion to the Tax Department, and that it "must apply the criteria expressly authorized by the Legislature." *Id.* at pp. 6-7. The Tax Department simply cannot have it both ways. Either it considers all four factors and any other additional factors relevant to a particular case as the

Legislature promulgated, or it applies a dispositive four-year-degree rule and never looks beyond the education factor.

Petitioner notes that the Tax Department appears to confuse the factor of whether there are nationally-recognized standards with whether a national exam is required. The State Fire Marshal requires home inspectors to submit to a national exam but also reserves the right to require a different examination in the future. Notwithstanding the fact that the Tax Department admits the existence of nationally-recognized standards, it confuses the factor as requiring a specific board exam. The Tax Department argues that the National Home Inspector Examination, a four-hour exam which contains 200 multiple-choice questions, is not similar to the bar exam, which requires completion of a 200 multiple-choice question exam in six hours; however, it fails to provide any further support to aid its argument. The fact that a National Home Inspector Examination exists and is required by the West Virginia State Fire Marshal to perform home inspection services weighs in Petitioner's favor under the second factor.

Further, Petitioner initially notes that there does not exist a national law license, nor a national medical license; rather, each of these services are regulated by each and every state. As such, the fact that the State regulates licensed home inspectors cannot be ignored; however, the Tax Department attempts to do so by creating red herrings to distract from the issues at hand. For example, it argues that home inspections may be performed by individuals without a certification, such as government employees, an employee of a bank or credit union, a residential property manager, or a person regulated in another profession when acting within the scope of that person's license, registration or certificate. *See* Response Brief at p. 9. This argument has no bearing on the matter before this Court, as the categories of persons identified by the Tax Department only perform inspections for their own internal purposes, and not the public at-large. For example, a

bank employee could conduct a home inspection for the purposes of determining its value, but that same employee could not contract with a home owner to provide a report in advance of a residential real estate purchase. The fact that a government employee can perform home inspections is no different than, for example, the United States Department of Veterans Affairs permitting an in-house counsel or physician to practice in various states without having licensure. If this Court were to accept the Tax Department's argument, doctors and lawyers would also fail to satisfy the third factor.

A four-part mandatory test was not created by the Legislature's plain language when the legislative rule in question was promulgated. Instead, factors for consideration were listed, with the Legislature leaving open the opportunity for consideration of other areas relevant to the determination. Petitioner maintains that the Circuit Court's holding that a mandatory four-part test was created is in error because the holding directly contradicts the plain language of West Virginia Code of State Rules § 110-15-8.1.1.1 (1993). Because a four-part test was not created and because licensed home inspectors meet the standards imposed by the factors in the relevant section, home inspectors are, indeed, professionals, and the Circuit Court's Order to the contrary should be reversed.

II. The Tax Department's four-year degree rule is impermissible because the plain language of West Virginia Code of State Rules § 110-15-8.1.1.1 (1993) shows that the section was not intended to contain bright-line requirements.

The Tax Department asserts that the education factor is ambiguous, and, therefore, its four-year degree requirement is a lawful exercise of its gap-filling authority. If the Rule is a four-factor analysis rather than a test, it cannot be ambiguous because the Legislature intended consideration of all factors on a case-by-case basis. Thus, before one can reach the conclusion that the education factor is ambiguous, one must first conclude that the Legislature intended the Rule to be a four-

element test. In other words, if the Court were to agree with the Office of Tax Appeal and accept Petitioner's argument that the Rule is not a four-part elemental test, it cannot be ambiguous because it was not intended to be a rigid, bright-line rule. The analysis was intended to be one of totality, not rigidity; however, that intent does not fit the Tax Department's end goal. The Tax Department has exercised unfettered authority to arbitrarily rely on a non-existent rule in order to circumvent the intent of the Legislature.

The Tax Department confusingly states that it does not assert that the Rule requires a professional service to be performed by a practitioner with a minimum of a college degree. *See* Response Brief at p. 17. However, that is **precisely** the effect of the application of its argument. The first factor in the analysis is the extent of one's education. If the four-year degree rule is imposed, the analysis stops at the first factor and the remaining three factors need not be considered. This plainly contradicts the Rule, as it eliminates the intent to consider all four factors. The Tax Department has not successfully argued and cannot successfully argue how its four-year degree rule does not render meaningless the remaining factors required to be considered as a matter of law.

The fact that the Tax Department's intended application of the four-year degree rule would render the remainder of the factors meaningless is further illustrated if one extends the Tax Department's argument further. The Tax Department does not argue that the entirety of the Rule is ambiguous; it only argues that the first prong – the education element – is ambiguous because it does not specify the amount of education required. But, extending that argument further, does that not also mean that the factors regarding the "nature and extent of nationally recognized standards for performance," "licensing requirements on the State and national level," and "extent of continuing education requirements" are also ambiguous? The section does not state the precise

nationally-recognized standards that would be required for a service to be a profession. It does not state the precise licensing requirements that would be required for a service to be a profession. It does not state the precise amount of continuing education that should be required for a service to be a profession. The Tax Department acknowledges that the Petitioner "might meet part 4, the continuing education requirement, of the four-part test." *See* Respondent's Brief at p. 10. And, yet, there is no bright-line rule for the amount of continuing education required, and the Tax Department has not tried to fill the gap on that factor or the other two factors listed for consideration in West Virginia Code of State Rules § 110-15-8.1.1.1 (1993).

The first factor listed in West Virginia Code of State Rules § 110-15-8.1.1.1 (1993) is not ambiguous, but even if it is, the gap-filling rulemaking in which the Tax Department is engaging is not legally sound. The gap-filling justified by the Tax Department because of its argument that the provision in question is ambiguous is a means to an end – a way to create a hurdle that cannot be overcome. It is an inappropriate exercise of the gap-filling authority because the means created overrides consideration of the remaining factors listed by the Legislature. Gap-filling rulemaking should not stand when arbitrary, capricious, or manifestly contrary to a statute. Appalachian Power Co. v. State Tax Dept., 195 W. Va. 573, 589, 466 S.E.2d 424, 440 (1995). Therefore, the Circuit Court's Order to the contrary should be reversed.

CONCLUSION

Mr. Keener is a professional. Other licensed home inspectors in this State are professionals. They are required to have a high school diploma or its equivalent and to complete at least eighty (80) hours of instruction in the field. They must pass a national exam. They must maintain general liability insurance and be licensed by this State, meaning that their services are regulated by this State. Mr. Keener and other licensed home inspectors must complete sixteen

(16) hours of continuing education in the home inspection field every year, more than even the lawyers in this case are required to complete. West Virginia's licensed home inspectors cannot contractually limit their liability. Citizens and entities of this State rely on home inspectors' reports and professional judgment in the buying process. Not having a college degree clearly does not and should not exclude a service from being considered a professional service because other occupations, such as embalmers, real estate brokers, and real estate appraisers, can be considered professionals without such a degree.

The Legislature did not intend to promulgate a rigid, four-part test. If the Legislature had intended such a test, then it would have codified a rigid, four-part test. The Respondent's position is arbitrary and contrary to plain language of the statute. The Respondent's use of a four-part "test," its requirement of a college degree, and its determination that Mr. Keener is not a professional were improper in the face of the applicable statute, and the Circuit Court's Order to the contrary is erroneous. This Honorable Court should reverse the Circuit Court's decision ruling that Mr. Keener is not a professional because he does not have a college degree and, therefore, did not meet the requirements of the "four-part test" imposed by the Respondent.

WHEREFORE, based upon all the foregoing reasons, the Petitioner, John Keener d/b/a Mountaineer Inspection Services, LLC, respectfully requests this Honorable Court enter an Order reversing the Circuit Court of Taylor County's Final Order Denying Mountaineer Inspection's Petition for Appeal, Granting the Tax Department's Cross Assignments of Error, Affirming the Decision of the Office of Tax Appeals, in Part, and Reversing the Decision of the Office of Tax Appeals, in Part.

Respectfully submitted this 8th day of December, 2020.

Petitioner,
JOHN KEENER d/b/a
MOUNTAINEER INSPECTION
SERVICES, LLC, By Counsel:

Ronald G. Kramer (WV State Bar #12374)
Rkram5600@gmail.com
Kramer Legal Group, PLLC
P.O. Box 882
Bridgeport, WV 26330-0882
Telephone: (304) 777-8502
Facsimile: (304) 884-4259

Allison S. McClure (WV State Bar #10785)
allison@mcclurelawwv.com
McClure Law PLLC
215 S. 3rd Street, Suite 902
Clarksburg, WV 26301
Telephone: (304) 627-1373
Facsimile: (304) 405-2868

Docket No. 20-0488

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

John Keener d/b/a Mountaineer Inspection Services, LLC, Petitioner,

vs.

Dale W. Steager, as State Tax Commissioner of West Virginia, Respondent.
(Circuit Court of Taylor County Civil Action No. 18-P-57)

FROM THE CIRCUIT COURT OF TAYLOR COUNTY, WEST VIRGINIA
THE HONORABLE SHAWN D. NINES

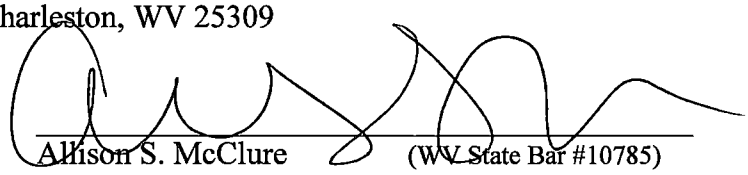
CERTIFICATE OF SERVICE

This is to certify that on this 8th day of December, 2020, the undersigned counsel served the foregoing "***Reply Brief of Petitioner, John Keener d/b/a Mountaineer Inspection Services, LLC, in Support of Petition for Appeal***" upon the following via U.S. Mail, postage prepaid, in envelopes addressed as follows:

L. Wayne Williams, Esq./Andrew L. Ellis, Esq.
State Capitol Complex
1900 Kanawha Blvd., East
Building 1, Room W-435
Charleston, WV 25305

Ronald G. Kramer, Esq.
P.O. Box 882
Bridgeport, WV 26330-0882

Henry R. Glass, III, Esq.
5215 MacCorkle Avenue, S.W.
South Charleston, WV 25309



Allison S. McClure (WV State Bar #10785)