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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0784

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STATE OF WEST VIRGINA ex rel. WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Petitioner,

v.

THE HONORABLE TERA L. SALANGO, Judge Of The Circuit Court of Kanawha County and RENE G. DENISE,

Respondents,

FILED
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EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RESPONSE TO VERIFIED PETITION FOR WRIT OF PROHIBITION

RESPECTFULLY SUBMITTED,

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I. QUESTION PRESENTED

The question presented by the instant Petition is whether a nurse-manager (Defendant Frances Stump) at a State-run hospital is a "constitutional officer" or "pubic official" on par with the Governor, legislators, Circuit Judges, Supreme Court Justices, police officers, and others who carry out the sovereign powers of government such that she constitutes a "government agency" and Respondent was required to provide pre-suit notice pursuant to *W. Va. Code* § 55-17-3 prior to instituting an action against her in order for the Respondent Judge to exercise jurisdiction over a suit against her employer, the Department of Health and Human Services ("DHHR"), where there is no dispute that pre-suit notice was properly provided to DHHR before instituting an action against it.

Because Defendant Stump is merely a public employee and not a constitutional officer or public official, she does not fit within the definition of government agency and pre-suit notice was not required prior to instituting an action against her. Accordingly, the Respondent Judge properly exercised her jurisdiction over this case such that a writ of prohibition is not proper, and the instant Petition should be denied.

II. STATEMENT OF THE CASE

This case arises from sexual harassment and retaliation suffered by the Respondent, Rene G. Denise, during her joint employment with Sunbelt Staffing, LLC ("Sunbelt") and DHHR while she was assigned to work at William R. Sharpe Jr. Hospital.[1] *See Appx.* at 0011-0020. Specifically, Ms. Denise alleges that a co-worker at the hospital engaged in unwelcomed and sexually-charged

[1] Ms. Denise signed a *Consultant Employment Agreement* with Sunbelt on August 25, 2017. *See Appx.* at 0048 – 0051. Sunbelt subsequently assigned her to work at William R. Sharpe, Jr. Hospital, which is operated under the direction of the of the DHHR. *See Appx.* at 0013. Ms. Denise has alleged that she was jointly employed by Sunbelt and DHHR. *See Appx.* at 0012 – 0013.

conduct toward her, including numerous sexually-charged comments and unwelcomed physical contact with her. *See Appx.* at 0013-0014.

Ms. Denise complained about the co-worker's sexual harassment to two of her supervisors, including Defendant below, Frances Stump. *See Appx.* at 0013-0014. Ms. Stump is alleged to be employed by DHHR as a supervisor at William R. Sharpe Jr. Hospital. *See Appx.* at 0012. Ms. Denise alleges that she was transferred to a less desirable shift and then ultimately terminated shortly after she complained about the sexual harassment to which she was subjected. *See Appx.* at 0015.

Ms. Denise sent a *Notice of Anticipated Lawsuit* to DHHR and the office of the West Virginia Attorney General on October 21, 2019, via certified mail, return receipt requested, wherein she notified the recipients that she intended to assert claims against DHHR for violation of the *West Virginia Human Rights Act* and for negligent retention, negligent supervision, and Intentional Infliction of Emotional Distress/Tort of Outrage. *See Appx.* at 0167 - 0168. She also set forth the relief that she would request. *See id.* Bill Crouch, Cabinet Secretary of DHHR, was also copied on the Notice. *See id.*

Ms. Denise subsequently filed her original Complaint on October 22, 2019, which named only Sunbelt, Scott Starcher,[2] Frances Stump, and Jane Doe as Defendants. *See Appx.* at 0001 - 0010. DHHR was *not* named as a Defendant in the original Complaint. *See id.* Rather, no action was instituted against DHHR until Ms. Denise filed an Amended Complaint on November 22, 2019, more than 30 days after first notifying DHHR of a potential claim in compliance with *W. Va. Code* § 55-17-3. *See Appx.* at 0011 – 0020.

[2] Sunbelt and Scott Starcher have been voluntarily dismissed pursuant to Rule 41(a)(1)(i) of the *West Virginia Rules of Civil Procedure*. *See Appx.* at 0023 - 0024.

After Ms. Denise filed her Amended Complaint naming DHHR as a party, DHHR moved the court below to dismiss the instant case for want of jurisdiction. *See Appx.* at 0028 – 0053. Specifically, DHHR argued, among other things, that the Respondent Judge lacked jurisdiction over the claims against it because Ms. Denise filed suit against Defendant Stump prior to providing pre-suit notice prescribed by *W. Va. Code* § 55-17-3. *See Appx.* at 0031 – 0034, 0208-0211. The Respondent Judge denied the Motion to Dismiss by an order entered on June 8, 2020. *See Appx.* at 0292 – 0314.

III. SUMMARY OF ARGUMENT

DHHR argues that the Respondent Judge lacks jurisdiction over this case because Ms. Denise did not provide pre-suit notice in compliance with *W. Va. Code* § 55-17-3 prior to instituting an action against Defendant Stump, who is a public employee employed as a nurse-manager at a State-run hospital. However, because Defendant Stump is merely a public employee, she does not fit within the definition of "government agency" and pre-suit notice was not required prior to instituting an action against her.

W. Va. Code § 55-17-3 prescribes as follows regarding the pre-suit notice required before commencing an action against a "government agency" in West Virginia:

> Notwithstanding any provision of law to the contrary, at least thirty days prior to the institution of an action against a ***government agency***, the complaining party or parties must provide the chief officer of the government agency and the Attorney General written notice, by certified mail, return receipt requested, of the alleged claim and the relief desired. Upon receipt, the chief officer of the government agency shall forthwith forward a copy of the notice to the President of the Senate and the Speaker of the House of Delegates. . . .

W.VA. CODE § 55-17-3 (a)(1) (emphasis added). *W. Va. Code* § 55-17-2(2) defines a "government agency" as "a Constitutional officer or other public official named as a Defendant or Respondent in his or her official capacity, or a department, division, bureau, board, commission or other agency or instrumentality within the executive branch of state government that has the capacity to sue or be sued." *Id.* at § 55-17-2(2).

Because Defendant Stump is a person, there can be no dispute she is not a department, division, bureau, board, commission or other agency or instrumentality within the executive branch of state government. Additionally, there can be no serious argument that she is a constitutional officer. *See Black's Law Dictionary* 1117 (8th ed. 2004) *See also e.g., State ex rel. Canterbury v. Paul,* 205 W. Va. 665, 671 520 S.E.2d 662, 668 (1999); *State ex rel. McGraw v. Burton*, 212 W. Va. 23, 27 n.1, 569 S.E.2d 99, 103 n. 1 (2002); *In re Greg H.*, 208 W. Va. 756, 759, 542 S.E.2d 919, 922 (2000).

It is equally clear that Defendant Stump is not a "public official." Although the term "public official" is not defined in Chapter 55, Article 17, its common, ordinary, and accepted meaning can easily be ascertained by referencing dictionaries, other statutes in the *West Virginia Code* that define the term, and prior case law from this Court. Upon reviewing those authorities, it is clear that the common, ordinary, and accepted meaning of the term "public official" is one who is elected or appointed to a public office or position or is otherwise vested with authority to exercise the state's sovereign powers or substantial responsibility for or control over the conduct of governmental affairs. *See Black's Law Dictionary* 1119, 1267 (8th ed. 2004); *Merriam-Webster's Collegiate Dictionary* 861 (11th Ed. 2014); W. VA. CODE §§ 6B-1-3(j) - (k), 6B-2B-1 (h), (j), 16A-15-2(c) (2019); *Hinerman v. Daily Gazette Co.*, 188 W. Va. 157, 180, 423 S.E.2d 560, 583 (1992).

There is no information before the Court to lead to the conclusion that Defendant Stump, a nurse-manager in a State-run hospital, fits within the definition of a "public official" such that she could be a "government agency" or have any official capacity in which she could be sued. Accordingly, because Defendant Stump is no more than a public employee, Ms. Denise was not required to provide pre-suit notice of her claims against Defendant Stump as a prerequisite to the exercise of jurisdiction by the Respondent Judge.

The case of *Hoback v. Cox*, No. 3:19-0460, 2020 U.S. Dist. LEXIS 81961 (S.D. W. Va. May 11, 2020), cited by DHHR, is neither binding upon this Court nor persuasive authority for the proposition that Defendant Stump is a public official. Although the *Hoback* Court ruled that a nurse-manager at a State-run hospital named as a Defendant therein could not be liable for punitive damages because she was sued in her "official capacity," the case was bereft of any substantive analysis of the common, ordinary, and plain meaning of "public official" and whether the Defendant therein actually was one because the Plaintiff in *Hoback* explicitly alleged that the nurse-manager Defendant therein was being sued in an official capacity and otherwise made no argument that the nurse-manager Defendant could not be a public official. Because the *Hoback* opinion contains no substantive analysis on the dispositive issues herein, it should not be taken as persuasive on such issues by this Court.

The other cases cited by DHHR are not on point and even less persuasive, as such cases all involve Defendants who were clearly "public officials" under the common, ordinary, and accepted meaning of the term. *See Harvey v. Cline*, Civil Action No. 15-14091, 2016 U.S. Dist. LEXIS 51481 (S.D. W. Va. Apr. 18, 2016) (Natural Resources Police Officer authorized by statute to enforce state law); *State v. Chase Sec.,* 188 W. Va. 356, 424 S.E.2d 591 (1992) (Constitutional office-holders Governor, Treasurer, and Auditor); *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995) (correctional officer charged with carrying out sovereign power of criminal punishment/deprivation of liberty).

Ultimately, because Defendant Stump does not meet the definition of "government agency," pre-suit notice was not required prior to instituting an action against her. Accordingly, the Respondent Judge properly exercised her jurisdiction in this case so long as the statutorily required pre-suit notice was provided prior to instituting an action against DHHR. And because

there is no dispute that proper pre-suit notice was provided to the DHHR, its chief officer, and the Attorney General of Ms. Denise's potential claims and desired relief more than 30 days before any action was instituted against DHHR, the Respondent Judge properly exercised her jurisdiction such that a writ of prohibition is not proper.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent Denise submits that the issues are clear and have been fully briefed by the parties. Accordingly, oral argument is unnecessary.

V. ARGUMENT

A. Standard of Review

This Court has held that the standard of review applicable to a writ of prohibition is as follows:

> A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers.
>
> A writ of prohibition "lies as a matter of right whenever the inferior court (a) has no jurisdiction or (b) has jurisdiction but exceeds its legitimate powers and it matters not if the aggrieved party some other remedy adequate or inadequate.
>
> When a court is attempting to proceed in a cause without jurisdiction, prohibition will issue as a matter of right regardless of the existence of other remedies."

State ex rel. Farber v. Mazzone, 213 W. Va. 661, 664-65, 584 S.E.2d 517, 520-21 (2003) (internal citations and quotations omitted).

B. Notice of an action against Defendant Stump was not required because she is not a "government agency" as contemplated by the *West Virginia Code*.

W. Va. Code § 55-17-3 prescribes as follows regarding the pre-suit notice required before commencing an action against a "government agency" in West Virginia:

> Notwithstanding any provision of law to the contrary, at least thirty days prior to the institution of an action against a ***government agency***, the complaining party or parties must provide the chief officer of the government agency and the Attorney General written notice, by certified mail, return receipt requested, of the alleged

> claim and the relief desired. Upon receipt, the chief officer of the government agency shall forthwith forward a copy of the notice to the President of the Senate and the Speaker of the House of Delegates. . . .

W.VA. CODE § 55-17-3(a)(1) (emphasis added). *W. Va. Code* § 55-17-2(2) defines a "government agency" as "a Constitutional officer or other public official named as a Defendant or Respondent in his or her official capacity, or a department, division, bureau, board, commission or other agency or instrumentality within the executive branch of state government that has the capacity to sue or be sued." *Id.* at § 55-17-2(2).

In the case at bar, DHHR argues that pre-suit notice was required prior to filing an action against Defendant Stump because she is a "government agency." However, such argument is quickly dispelled by a plain reading of § 55-17-2(2). Specifically, the definition of "government agency" prescribed thereby includes only three categories of persons/entities: (1) constitutional officers; (2) public officials; and (3) departments, divisions, bureaus, boards, commissions or other agencies or instrumentalities within the executive branch of state government that has the capacity to sue or be sued. As more fully set forth below, Defendant Stump does not fit into any of these categories. Therefore, she is not a government agency and pre-suit notice was not required prior to instituting an action against her.

1. Defendant Stump is not a department, division, bureau, board, commission or other agency or instrumentality within the executive branch of state government.

First, Defendant Stump is a person. Accordingly, there can be no dispute that she is not a department, division, bureau, board, commission or other agency or instrumentality within the executive branch of state government.

2. Defendant Stump is not a constitutional officer.

Likewise, Defendant Stump is clearly not a constitutional officer, as there is no allegation or evidence that she serves in an office created or defined by the *West Virginia Constitution*. *See Black's Law Dictionary* 1117 (8th ed. 2004) ("Constitutional Officer" defined as "[a] government official whose office is created by a constitution, rather than by a statute; one whose term of office

is fixed and defined by a constitution."). *See also e.g., State ex rel. Canterbury v. Paul,* 205 W. Va. 665, 671 520 S.E.2d 662, 668 (1999) (Starcher, C.J., concurring in part and dissenting in part) (recognizing a Magistrate's status as a constitutional officer because the office is created by the *West Virginia Constitution*); *State ex rel. McGraw v. Burton*, 212 W. Va. 23, 27 n.1, 569 S.E.2d 99, 103 n. 1 (2002) (citing to Article VII of the *West Virginia Constitution* for the proposition that the Attorney General is an elected constitutional officer); *In re Greg H.*, 208 W. Va. 756, 759, 542 S.E.2d 919, 922 (2000) (recognizing that a juvenile referee ***appointed by statute*** is not a constitutional officer).

3. Defendant Stump is a public employee and not a public official.

It is similarly clear that Defendant Stump is not a "public official" as contemplated by the West Virginia Legislature. Although "public official" is not defined in Chapter 55, Article 17, it is clear from dictionary definitions of the term, other statutes in the West Virginia Code, and prior cases from this Court that the common, ordinary, and accepted meaning of the term does not include public employees like Defendant Stump.

It is well-settled that "'[u]ndefined words and terms used in a legislative enactment will be given their common, ordinary and accepted meaning.'" *Syl. Pt. 2, State v. Butler*, 239 W. Va. 168, 799 S.E.2d 718 (2017) (quoting *Syl. Pt. 6, in part, State ex rel. Cohen v. Manchin*, 175 W.Va. 525, 336 S.E.2d 171 (1984).). And this Court has often looked to dictionaries to determine the common, ordinary, or accepted meanings of statutory terms that are not otherwise defined in a statute. *See e.g., Butler*, 239 W. Va. at 173-76, 799 S.E.2d at 723-26 (consulting *Black's Law Dictionary, New Oxford American Dictionary*, and *Webster's New World College Dictionary* to determine the meaning of the unambiguous statutory term "sex"); *McElroy Coal Co. v. Schoene*, 240 W. Va. 475, 490, 813 S.E.2d 128, 143 (2018) (consulting *Black's Law Dictionary* to determine the

meaning of the unambiguous statutory term "damages"); *State v. Sulick*, 232 W. Va. 717, 724-25, 753 S.E.2d 875, 882-83 (2012) (consulting *Black's Law Dictionary* to determine the plain, ordinary meaning of the unambiguous statutory terms "force" and "threat").

Black's Law Dictionary defines "public official" as "[o]ne who holds or is invested with a ***public office***; a person ***elected or appointed to carry out some portion of a government's sovereign powers.*** *Black's Law Dictionary* 1119, 1267 (8th ed. 2004) (emphasis added). Likewise, *Merriam-Webster's Collegiate Dictionary* defines the noun "official" as "one who holds or is invested with an office." *See Merriam-Webster's Collegiate Dictionary* 861 (11th Ed. 2014).

This Court has also ascertained the common, ordinary, and accepted meaning of terms by looking to other statutes where the legislature has defined the same term. For instance, in *Bowers v. Wurzburg*, 205 W. Va. 450, 519 S.E.2d 148 (1999), this Court was tasked with ascertaining the common, ordinary, and accepted meaning of the term "principle office" as used in W. Va. Code § 31-1-15. In so doing, the court observed that "[w]hile not expressly defined within the confines of § 31-1-15, the term 'principal office' is defined elsewhere in the West Virginia Code." *Bowers*, 205 W. Va. at 463, 519 S.E.2d at 161. Ultimately the *Bowers* Court applied the definition of "principle office" found elsewhere in the Code because it was consistent with the commonly accepted meaning ascribed to the term by *Black's Law Dictionary* and by the courts in other case law. *See id.* at 463, 161.

Although "public official" is not defined in the statute at issue herein, the term *is* defined elsewhere in the *West Virginia Code*. For instance, the *West Virginia Governmental Ethics Act* ("WVGEA") defines "public official" as follows:

> 'Public official' means any person who is ***elected to***, ***appointed to***, or ***given the authority to act in any state, county, or municipal office or position***, whether

> compensated or not, and who is ***responsible for the making of policy or takes official action which is either ministerial or nonministerial***, or both . . . .[3]

W. VA. CODE § 6B-1-3(k) (2019). The WVGEA explicitly distinguishes between a "public employee" and a "public official" by separately defining a "public employee" as "any full-time or part-time employee of any state, county or municipal governmental body or any political subdivision thereof, including county school boards." *Id.* at (j). *W. Va. Code* § 6B-2B-1, also part of the WVGEA, similarly defines "public official" as "any person who is ***elected or appointed*** to any state, county, or municipal office or position, including boards, agencies, departments, and commissions, or in any other regional or local governmental agency" and separately defines "public employee" as " any full-time or part-time employee of any state, or political subdivision of the state, and their respective boards, agencies, departments, and commissions, or in any other regional or local governmental agency." *Id.* at (j), (h).

These statutory definitions of "public official" and the distinguishment between "public official" and "public employee" are consistent with the definitions of "public official" found in the above-cited dictionaries.

Additionally, the dictionary and statutory definitions cited above are consistent with this Court's prior case law construing the meaning of the term "public official." Specifically, this Court has previously recognized that "the public official category 'cannot be thought to include all public employees.'" *Hinerman v. Daily Gazette Co.*, 188 W. Va. 157, 180, 423 S.E.2d 560, 583 (1992) (emphasis added) (quoting *Hutchinson v. Proxmire*, 443 U.S. 111, 119 n.8 (1979)). Rather, the Court found that "[p]ublic officials are 'those among the hierarchy of government employees who

[3] The Legislature also adopted this definition of "public official" for the *Medical Cannabis Act's* prohibition of public officials' financial or employment interest in a medical cannabis organization. See W. Va. Code § 16A-15-2(c) (2019).

have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.'" *Id.* (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 85, (1966)).

Based upon the foregoing, the plain, ordinary, accepted, and common-sensical meaning of "public official" is one who is elected or appointed to a public office or position or is otherwise vested with authority to exercise the state's sovereign powers or substantial responsibility for or control over the conduct of governmental affairs. Here, Ms. Denise has not made any allegations, and DHHR has not proffered any argument or evidence, to support the proposition that Defendant Stump is an elected or appointed official or that she otherwise has vested in her the authority to exercise the sovereign powers of the state or any substantial responsibility for or control over the conduct of governmental affairs.

The only information before the Court is that Defendant Stump is employed as a Supervisor for the DHHR at a State-run hospital. Accordingly, she is no more than a public employee. Because the subject pre-suit notice requirements include within their application public officials and not public employees, no pre-suit notice was required before commencing an action against Defendant Stump.

4. Because Defendant Stump is not a "public official" it is impossible for her to have been sued in an "official capacity."

DHHR argues that pre-suit notice was required prior to instituting an action against Defendant Stump because she was sued in her "official capacity." *See Pet. Brief* at 8 – 9. But it is impossible for Ms. Denise to have sued Defendant Stump in her "official capacity" because, as nothing more than a public employee,[4] she has no "official capacity."

DHHR cites to *63C Am. Jur. 2d Public Officers and Employees* § 385 for the proposition that a claim against a Defendant must be treated as a claim against the Defendant in his or her

[4] *See* Sections (V)(B)(1) – (3) *supra*.

official capacity if the Complaint fails to allege allegations other than those relating to the Defendant's "official duties." Therefore, DHHR argues, the claim against Defendant Stump must be construed as a claim made against her in her purported "official capacity" because "the specific factual allegations against [her] relate to actions she took within the scope of her official duties in [her employment with DHHR]."

However, DHHR's reading of the above-referenced text is much too broad. Specifically, DHHR reads this text to include all manner of public employees, but it applies only to public officials. *See* 63C Am. Jur. 2d *Public Officers and Employees* § 385 ("Complaints seeking damages against ***government officials*** are subject to a heightened standard of pleading, which requires sufficient specificity to put defendants on notice of the nature of the claim.") (emphasis added). As demonstrated above, Defendant Stump is not a public official, but merely a public employee. Accordingly, she has no "official capacity" in which she can be sued.

5. The cases cited by DHHR for the proposition that a nurse manager at a State-run hospital is a public official are not persuasive and/or are distinguishable.

DHHR is only able to cite a single slip opinion from the United States District Court for the Southern District of West Virginia, which is bereft of any substantive analysis on the question presented herein, that could even arguably lend any support to the proposition that a public employee like Defendant Stump is a "public official." Specifically, DHHR cites *Hoback v. Cox*, No. 3:19-0460, 2020 U.S. Dist. LEXIS 81961 (S.D. W. Va. May 11, 2020), in which Judge Robert C. Chambers decided that a nurse manager at a DHHR-run hospital could not be liable for punitive damages in regard to claims made against her in her "official capacity." *See id.* at 26 – 28.

Ms. Denise submits that the *Hoback* case is unpersuasive and not binding on this Court. At first blush, *Hoback* appears to be on point to the instant case and supportive of the proposition that a nurse manager at a DHHR-run hospital fits within the definition of "public official." Upon closer

examination, however, *Hoback* is revealed to be fool's gold and not persuasive as to the common, ordinary, and accepted meaning of the term "public official," which is the dispositive issue in regard to whether Ms. Denise was required to provide pre-suit notice of possible claims against Defendant Stump.

Specifically, the Plaintiff in *Hoback* conceded that the nurse manager in that case was a public official and that she intended to sue the nurse manager in her "official capacity." Plaintiff Hoback never challenged whether a public employee without the right to exercise sovereign government functions on behalf of the state can be a "public official" under the plain meaning of the term as used in W. Va. Code § 55-17-3(a)(1) *See Appx.* at 0254 - 0289. In fact, Hoback explicitly alleged in her Complaint that "Defendant[] Cox . . . [was] acting in [her] official capacit[y]" and under the color and authority of law in depriving her of her constitutional rights. *See id.* at 0254 - 0272. Accordingly, because Ms. Hoback explicitly sued the nurse manager in her "official capacity" and otherwise made no argument that the nurse manager was not a "public official," Judge Chambers had no reason to engage in any analysis of the common, ordinary, and accepted meaning of "public official" or whether a nurse manager at a state-run hospital could be one. Therefore, Judge Chambers' decision was an easy one – to the extent that Ms. Hoback was asserting claims against Defendants in an alleged official capacity, those Defendants could not be liable for claims pled against them in such capacity. The bottom line is that Judge Chambers did not have the opportunity to analyze what is the plain meaning of public official and whether a nurse manager can be one because none of the parties in *Hoback* ever raised the issue.

In this case, on the other hand, Ms. Denise has not explicitly sued Defendant Stump in an "official capacity" and has not alleged or otherwise conceded anywhere that Defendant Stump was a public official or acting in an official capacity. Quite to the contrary, Ms. Denise has vigorously

disputed that Defendant Stump can be a "public official" (and therefore has no official capacity) under the plain meaning of the term as defined by authoritative dictionaries, the *West Virginia Code*, and case law from this Court. Ms. Denise submits that this Court should not find persuasive over the significant weight of authority proffered by her as to the meaning of "public official" a single slip opinion that is bereft of any substantive analysis on the dispositive issue in this case – the common, ordinary, and accepted meaning of "public official." Ms. Denise urges the Court to undertake the analysis that is missing in *Hoback* and ultimately apply the meaning of that term which is consistent with the authorities cited herein.

Additionally, Defendants' citation to the cases of *Harvey v. Cline*, Civil Action No. 15-14091, 2016 U.S. Dist. LEXIS 51481 (S.D. W. Va. Apr. 18, 2016), *State v. Chase Sec.,* 188 W. Va. 356, 424 S.E.2d 591 (1992), and *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995), are neither on point with nor persuasive in this case because all the Defendants in those cases clearly fit into the plain meaning of public officials urged by Ms. Denise (i.e., they were elected or appointed officials or were otherwise vested with authority to exercise the state's sovereign powers).

Specifically, *State v. Chase Sec.* involved the Governor, Auditor, and Treasurer – all constitutional office holders. *See* W. VA. CONST. Art. VII.

In *Clark*, the Court determined that a Natural Resources Police Officer was a public official entitled to immunity because he was a law enforcement officer authorized to enforce state law. *Clark*, 195 W. Va. at 275, 465 S.E.2d at 377. In fact, Natural Resources Police Officer is a statutorily created position charged with the sovereign function of enforcement of the state's natural resources laws and vested with the power of arrest, search, and seizure. *See* W. Va. Code § 20-7-1, 4 (2019). Similarly, *Harvey* involved corrections officers who are charged with carrying

out the state's law enforcement power of criminal punishment/deprivation of liberty. Accordingly, such individuals would squarely fall within the plain meaning of "public official" urged by Ms. Denise. Therefore, the fact that Natural Resources Police Officers, Corrections Officers, or constitutional office holders like the Governor, Auditor, or Treasurer have been held to be public officials has no bearing on this case involving a nurse manager at a hospital without any power to exercise government authority over the public.

C. The lower court has jurisdiction over claims asserted against DHHR because there is no dispute that Ms. Denise did not file suit against DHHR until more than 30 days after she provided DHHR the required pre-suit notice of her claims in compliance with W. Va. Code 55-17-1, *et seq*.

As more fully explained above, pre-suit notice was not required before Ms. Denise instituted an action against Defendant Stump because she is not a constitutional officer, public official, or agency or instrumentality of the executive branch of State government. Thus, the only question as to the jurisdiction of the Respondent Judge is whether the required pre-suit notice was provided to DHHR at least 30 days prior to Ms. Denise instituting her action against it in compliance with *W. Va. Code* § 55-17-3.

There is no dispute that Ms. Denise did, in fact, provide such notice. Specifically, it is undisputed that Ms. Denise sent a letter to Shevona Lusk (COO of DHHR Office of Health Facilities), Bill Crouch (DHHR Cabinet Secretary), and Patrick Morrisey (Attorney General) by certified mail, return receipt requested, notifying them of her potential claims and the relief she was seeking. Ms. Denise did not commence an action against DHHR until she amended her Complaint to name it as a party Defendant on November 22, 2019. Accordingly, Plaintiff provided DHHR more than the required 30 days' notice before commencing an action against it such that the Respondent Judge has jurisdiction over this matter and a writ of prohibition is improper.

VI. CONCLUSION

In Conclusion, Defendant Stump is a public employee and, as such, does not fit within the statutory definition of government agency for purposes of pre-suit notice. Accordingly, Ms. Denise was not required to provide the pre-suit notice required by *W. Va. Code* § 55-17-3 before instituting an action against Defendant Stump. Rather, Ms. Denise was only required to provide the statutorily required pre-suit notice before instituting an action against DHHR. And because there was not an action instituted against DHHR until Plaintiff filed her Amended Complaint to name it as a party Defendant more than 30 days after she properly provided it notice of her claims and requested relief in compliance with *W. Va. Code* § 55-17-3. Therefore, pre-suit notice was properly provided such that the Respondent Judge rightfully exercised jurisdiction over this case and a writ of prohibition from this Court is not appropriate. Accordingly, Ms. Denise requests that the instant Petition be denied.

Respectfully submitted this 16th day of November, 2020

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VERIFICATION

I, Rodney A. Smith, Esquire, Being first duly sworn, state that I have read the foregoing ***Response To Verified Petition For Writ Of Prohibition***; that the factual representations contained therein are true, except so far as they are stated to be on information and belief; and that insofar as they are stated to be on information and belief, I believe them to be true.

Taken, subscribed, and sworn before me this 16th day of November, 2020.

My Commission expires: August 12, 2025

Esmeralda M. Kaestner
Notary Public

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
ESMERALDA M. KAESTNER
Baiess Smith PLLC
108 1/2 Capitol Street, Suite 300
Charleston, WV 25301
My Commission Expires Aug. 12, 2025

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of November, 2020, I caused to be served a true and correct copy of the forgoing ***Response To Verified Petition For Writ Of Prohibition*** by depositing the same in the United States Mail, postage prepaid, upon the parties in their counsel of record as follows:

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