IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 33347

STATE ex rel. WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY,
Petitioner Below, Appellant

v.

COUNTY COMMISSION OF CABELL COUNTY, WEST VIRGINIA; BOB BAILEY, as President; W. SCOTT BIAS, as Commissioner; and NANCY CARTMILL, as Commissioner,
Respondents Below, Appellees

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Hon. David M. Pancake, Judge
Circuit Court of Cabell County
Civil Action No. 05-C-590

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I. INTRODUCTION

The is the brief of the Appellees, the County Commission of Cabell County; Bob Bailey, as President; W. Scott Bias, as Commissioner; and Nancy Cartmill, as Commissioner ["Commission"], in an appeal by the Regional Jail and Correctional Facility Authority ["Authority"], from a judgment of the Circuit Court of Cabell County.

Based upon the stipulations of the parties as to the relevant facts, the Honorable David M. Pancake, Judge of the Circuit Court of Cabell County, made the following rulings:

- Because only 2 of 7 Authority members were present and one of the members voted by proxy in violation of the Authority's own regulations at a meeting on February 10, 2004, during which the per diem was increased from $45.00 to $48.50, the increase was void.

- Because the regulation under which the Authority calculates the per diem was never re-promulgated as a legislative rule as required by law and because it conflicts with the per diem statute which dictates that the per diem be based upon actual operating expenses, any charges to the Commission in excess of the $40.42 actual per diem for the Western Regional Jail since July 1, 2004, are invalid.[1]

- Where a county commission lacks sufficient funds to pay its constitutional, statutory, and contractual obligations, it must fully fund its constitutional obligations and, thereafter, if additional funds remain, to fund so much of its statutory obligations as possible and, thereafter, if additional funds remain, to fund so much of its contractual obligations as possible.

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[1]The Commission notes that although Judge Pancake's ruling effectively reduced the per diem from $48.50 to $40.42, he limited his ruling to FY05 and, thereafter, expressly provided that if the Authority's actual operating expenses for the Western Regional Jail exceed $40.42. by more than ten percent, the Authority may impose a surcharge on the Commission. Presumably, the actual operating expenses have not exceeded this amount as no surcharge has been imposed upon the Commission to date.

The Commission submits that this Court should affirm these rulings and leave for the Legislature the resolution of the competing concerns of all involved.

II. STATEMENT OF FACTS

Judge Pancake's rulings were based upon the stipulations of fact[2] by the parties as indicated in his order as follows:

> 1. The Court hereby adopts the stipulations of fact submitted by the parties, with the exceptions of clarifying that the Supreme Court of Appeals did not remand the case to the Court, but issued a rule in mandamus returnable to this Court, and that although the Cabell County jail was placed into receivership by the United States District Court for the Southern District of West Virginia in 1981, such placement was not opposed by the Cabell County Commission, and other public entities that opposed federal receivership of their jails throughout the country during this period were generally successful.
>
> 2. The Court finds that Jail Authority member Dan Huck participated and voted by telephone in a meeting conducted on February 10, 2004.
>
> 3. The Court has been presented with no evidence that the Jail Authority had adopted any rules or regulations permitting members to attend Jail Authority meetings by telephone.
>
> 4. The Court finds that Jail Authority member Tom Susman did not attend a meeting conducted on February 10, 2004, but voted by proxy.
>
> 5. The Court finds that the letter dated July 12, 2004, from John Poffenbarger, Acting Secretary of the Department of Administration, Mr. Susman's successor, appointing Donna Lipscomb, as his Jail Authority

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[2]In the Authority's "Statement of the Case," it makes many assertions of fact that were not stipulated by the parties and for which there is no evidence in the record, including extensive discussion of the actions of other counties in the wake of Judge Pancake's ruling. None of this is part of the record nor is properly before this Court. The Commission has no way of verifying or refuting factual assertions for which there is no evidence of record. Rather than belaboring this point, however, the Commission merely refers the Court to the stipulations of fact by the parties upon which Judge Pancake exclusively relied in making his rulings. Any other "facts" contained in the Appellant's brief are superfluous and/or involve matters subject to evidentiary dispute.

designee, is insufficient to establish Ms. Lipscomb's appointment by Mr. Susman five months earlier.

6. The Court finds that no evidence has been presented that Mr. Susman had officially appointed Ms. Lipscomb as his Jail Authority designee prior to the meeting of February 10, 2004.[3]

7. The Court finds that Ms. Lipscomb voted "by proxy," as indicated in official Jail Authority minutes, which is contrary to the Jail Authority's own procedural rules.

8. The Court finds that the only voting members of the Jail Authority who attended the meeting of February 10, 2004, were Christy Morris and Glen Stotler as (i) Dan Huck participated by telephone; (ii) Tom Susman did not attend and voted by proxy; (iii) Willie Akers was absent; (iv) Tennis Hatfield was absent; and (vii) John Walden was absent.

9. The Court finds that the two non-voting members, Manfred Holland and Jim Rubenstein, attended the meeting on February 10, 2004.

10. The Court finds that only two of the seven voting members of the Jail Authority were "present" at the meeting on February 10, 2004, and only four of the nine total members of the Jail Authority were "present" at the meeting on February 10, 2004.

11. The Court finds that W. Va. C.S.R. § 94-3-5 is a "procedural rule."

12. The Court finds that W. Va. C.S.R. § 94-3-5 has not been amended since 1995 and does not make reference to the Western Regional Jail.

Again, this core set of facts was undisputed. Thus, Judge Pancake properly invalidated the increase in the per diem from $45.00 to $48.50; properly invalidated the per diem rule; and Judge Pancake properly held that the Commission has a three-tiered funding obligation.

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[3]The Jail Authority's request at the hearing to supplement the record with any such evidence was rejected as the time for discovery had closed, as the parties had agreed to proceed by stipulations, and it would have been unfair to the Commission to allow the record to be supplemented following the hearing and the filing of stipulations.

III. DISCUSSION OF LAW

A. THE APPLICABLE STANDARD OF REVIEW IS *DE NOVO*.

In *Stern v. Chemtall, Inc.*,[4] this Court observed, "We have stated that a *de novo* standard of review applies to a circuit court's decision to grant or deny a writ of mandamus."[5] Based upon a *de novo* review, the Commission respectfully submits that this Court should affirm the judgment of the Circuit Court of Cabell County.

B. BECAUSE THE EVIDENCE WAS UNDISPUTED THAT ONLY TWO OF SEVEN AUTHORITY MEMBERS WERE "PRESENT" AND ONE OF THOSE TWO MEMBERS VOTED BY PROXY IN VIOLATION OF THE AUTHORITY'S OWN PROCEDURAL RULES, JUDGE PANCAKE DID NOT ERR BY INVALIDATING THE AUTHORITY'S ACTION AT THE MEETING DURING WHICH THE PER DIEM WAS INCREASED FROM $45.00 TO $48.50.[6]

The official minutes of the Authority's meeting conducted on February 10, 2004, at which it voted to increase the per diem from $45.00 to $48.50 reflect the following:

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[4]217 W. Va. 329, 617 S.E.2d 876 (2005).

[5]217 W. Va. at 334, 617 S.E.2d at 881 (quoting *McComas v. Board of Educ. of Fayette County*, 197 W. Va. 188, 193, 475 S.E.2d 280, 285 (1996)).

[6]Much of the Authority's discussion of law, like its recitation of facts, centers upon matters completely superfluous to the issues litigated below. Its obsession with impugning their motives notwithstanding, the Commission acted with fiscal responsibility not only to the Authority, but to their constitutional, statutory, and contractual obligations. The Commission had what it believed were meritorious defenses to the Authority's claims and, with one exception, prevailed upon those defenses. The Commission, likewise, could have embarked upon an effort to question the manner in which the Authority has conducted its operations, but chose, instead, to focus on the legal issues presented.

Chairman Huck[7] inquired if there was any other discussion for or against the Executive Director's recommendation for the per diem increase. None was heard. The Chairman asked for any objection to move on to a vote. Hearing no objections, he asked for a roll call vote of voting members. Hearing no objections to the roll call vote, Secretary Rubenstein called the role for a vote:

Willie Akers	absent
Tom Susman by proxy	"aye"
Tennis Hatfield	absent
Manfred Holland	non-voting
Dan Huck	"aye"
Christy Morris	"aye"
Jim Rubenstein	non-voting
Glen Stotler	"no"
John Walden	absent[8]

Thus, because it was undisputed that only two of the seven voting members of the Authority were present at the meeting and the law is clear that (1) four of seven voting members of the Authority must be "present" to constitute a "quorum" and (2) members are not permitted to vote by "proxy," Judge Pancake properly invalidated the Authority's action.

First, W. Va. Code § 31-20-3 provides, "The authority shall be governed by a board of nine members, seven of whom are entitled to vote on matters coming before the authority. . . ." [Emphasis supplied]. Second, W. Va. Code § 31-20-4(b) provides, "A majority of the members of the board constitute a quorum, and a quorum must be present for the board to conduct business. Unless the bylaws require a larger number, action may be taken by majority vote of the members present." [Emphasis supplied]. Finally, W. Va. C.S.R. § 94-1-8.1

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[7]Mr. Huck, according to the minutes, participated "via conference call." Commission's Motion for Summary Judgment, Ex. D.

[8]*See* Ex. A.

provides, "A majority of the members of the Board shall constitute a quorum. The affirmative vote of a majority of all members present at any meeting shall be sufficient to approve any action. Proxy voting is hereby prohibited; duly qualified members of the Board, or their designee as provided by W. Va. Code § 31-20-3, are permitted to vote." [Emphasis supplied].

There was no dispute in the record regarding the absence of a quorum at the meeting of the Authority conducted on February 10, 2004, nor the conclusion that such absence invalidates the Authority's decision to increase the per diem from $45.00 to $48.50.

"'Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication.'"[9] Moreover, although the statute allows certain "designees" to be appointed as members of the Authority's board, the rules prohibit proxy voting, which is invalid when a statute requires the majority vote of a quorum of members present at an official meeting.[10] Thus, action taken in the absence of a quorum is void.[11]

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[9]Syl. pt. 3, *Appalachian Regional Health Care, Inc. v. Human Rights Comm'n*, 180 W. Va. 303, 376 S.E.2d 317 (1988), *quoting* Syl. pt. 3,*Mountaineer Disposal Service, Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973).

[10]*United Mine Workers of America v. Scott*, 173 W. Va. 356, 369, 315 S.E.2d 614, 628 (1984)("Actions by committees whose composition does not comply with this mandate can be characterized only as 'unofficial.' The only committee contemplated by the statute is the Board itself which can be characterized as a committee of the whole.").

[11]*See, e.g. In re Tax Assessments Against Pocahontas Land Co.*, 172 W. Va. 53, 63, 303 S.E.2d 691, 701 (1983)("We believe that two defects occurred in the hearing before the Board

The Authority does not contest Judge Pancake's findings of fact with respect to the manner in which its meeting was conducted on February 10, 2004. Rather, its argument is: "(1) no statute or procedural regulation prohibited the presence of Board members by telephone; and (2) no statute or procedural regulation requires written evidence of the appointment of a designated representative for a Board member."[12] In fact, neither of these arguments has any merit.[13]

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which compels us to uphold the circuit court's finding that the hearing was inadequate and, therefore, void. First, there was an absence of a quorum at least in regard to the Pocahontas Land case."); *Francis O. Day Co., Inc. v. W. Va. Reclamation Bd. of Review*, 188 W. Va. 418, 421, 424 S.E.2d 763, 766 (1992)("The plain language of W. Va. Code, 22-4-1(c) [1990], states that four members of the Board must concur before an action is valid. The statute does not authorize the Board to act on a simple majority vote even when a quorum is present and we decline to modify the statute. . . . Therefore, we find that because four members did not concur, the Board was unable to take a valid action regarding the DEP's denial of Day's permit application."); Syl. pt. 2, *Ashley v. McMillian*, 184 W. Va. 590, 402 S.E.2d 259 (1991)("When a hearing before the Deputy Sheriff's Civil Service Commission involves a question of removal, discharge, suspension, or reduction in rank or pay, a quorum of the Commission must be present in order for a hearing to be held and a final decision made."); *State ex rel. Taylor v. County Court*, 154 W. Va. 558, 563, 177 S.E.2d 349, 352 (1970)("With respect to the applicable law in this case, it is first of all clear that before any action taken by a political executive committee is lawful, there must first be a quorum present at the meeting, and it is equally clear that a quorum is a majority of members."); Syl. pt. 4, *State ex rel. Bell v. County Court*, 141 W. Va. 685, 92 S.E.2d 449 (1956)("In the absence of a constitutional provision, statute, or lawfully adopted rule to the contrary by a representative body, a majority of the total members of such body is necessary to constitute a quorum for the transaction of business."); *see also* 59 Am. Jur. 2d *Parliamentary Law* § 9 (2007)("A 'quorum' is the number of members of a body who, when assembled, are legally competent to transact business; normally, a majority is considered a quorum. At common law, a majority of a body constitutes a quorum. This rule can be changed only by general law or charter, not by internal rule, even when the body in question is given general rule-making powers. If a quorum is not present, any resolution or vote by those in attendance is without effect.")(footnotes omitted).

[12]Brief of Appellant at 27-28.

[13]Indeed, the Authority's own Rule 30(b)(7) representative testified at his deposition as follows:

1. The Plain Meaning of the Term "Present," As Used in W. Va. Code § 31-20-4(b), Means Physically Present.

"A deliberative body can act only at a former meeting where a quorum is present" [14] and, as noted, W. Va. Code § 31-20-4(b) provides, "A majority of the members of the board constitute a quorum, and a quorum must be present for the board to conduct business. Unless the bylaws require a larger number, action may be taken by majority vote of the members present." [Emphasis supplied].

The term "quorum" has been defined as "the number of members of a body who, when assembled, are legally competent to transact business."[15] With respect to the definition of "present," the Authority quotes Black's Law Dictionary's definition as follows: "'[n]ow existing.'"[16] Interestingly, in its Petition for Appeal, the Authority quoted Black's Law Dictionary's definition of "present" as "'[n]ow existing; at hand '" and contended that

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Q So in fact, there wasn't a quorum as provided in these regulations, was there?

A As provided in what 8 says, it doesn't appear that way.

Q And the vote by proxy was, was also not proper as of the regulations. Isn't that correct?

A Well, I'm speculating a little bit, but I can't say I can't go wrong with that theory.

Rule 30(b)(7) Depo. at 172.

[14]59 Am. Jur. 2d *Parliamentary Law* § 6 (2007)(footnote omitted).

[15]59 Am. Jur. 2d *Parliamentary Law* § 9 (2007)(emphasis supplied and footnote omitted).

[16]Brief of Appellant at 30, *quoting* BLACK'S LAW DICTIONARY 6TH ED (1991).

"Chairman Huck was certainly 'at hand.'"[17] After the Commission pointed out in its Response that "at hand" obviously does not mean "on the telephone" as it is hard to shake someone's "hand" over the telephone, the Authority has conveniently omitted, without any indication of such omission by an ellipsis, the words "at hand" from Black's Law Dictionary's definition of "present" in its Brief.[18]

For the first time, the Authority also contends that the terms "meet" and "meeting":

> are not defined in the Regional Jail Authority Act but are defined elsewhere in the West Virginia Code. In particular, W. Va. Code § 6-9A-1*et seq.* (2006), the West Virginia Open Governmental Proceedings Act, defines what constitutes a 'meeting' for public agencies in the State of West Virginia. . . . [and] provides, in pertinent part, that a 'meeting' means the convening of a governing body of a public agency for which a quorum is required in order to make a decision on any matter which results in an official action. Meetings may be held by telephone conference or other electronic means.' W. Va. Code § 6-9A-2(4) (2006)."[19]

W. Va. Code § 31-20-4(b), however, governing what constitutes a "quorum" required for effective action by the Authority, and W. Va. Code § 6-9A-2(4), governing what constitutes a "meeting" required for public access, do not relate to the same subject matter.[20]

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[17]Petition for Appeal at 23.

[18]The Authority made representations in its Petition for Appeal regarding what Mr. Huck may have heard and understood at the meeting even though there was absolutely no evidence in the record on the issue. Petition for Appeal at 23. After the Commission noted in its Response that the only evidence is the Authority's own records, which merely indicate Mr. Huck's participation "by telephone," the Authority has removed such representations from its Brief.

[19]Brief of Appellant at 30 (emphasis added by Appellant). The Authority never cited nor relied upon W. Va. Code § 6-9A-2(4) in any of the proceedings below.

[20]*See, e.g.*, Syl. Pt. 9, *West Virginia University Bd. of Governors v. West Virginia Higher Educ. Policy Com'm*, 2007 WL 1526999 (W. Va.)("'Statutes which relate to the same subject

Moreover, even if the two statutes were related, it is a cardinal rule of statutory construction that a specific statute is to be given precedence over a general statute, [21] and, contrary to the Authority's assertion that the Regional Jail Act does not define "meeting," W. Va. C.S.R. § 94-1-3.4 defines that very term as "The convening of a governing body of a public body for the transaction of business for which a quorum is required." The rule does not provide, as in the Open Governmental Proceedings Act, that "[m]eetings may be held by telephone conference or other electronic means." Nor is there any claim in this case that Chairman Huck's participation by telephone violated West Virginia's open meeting statute.[22] Rather, a specific statute enacted to govern Authority meetings, W. Va. Code § 31-20-4(b) provides, "A majority of the members of the board constitute a quorum, and a quorum must

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subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments.' Syl. Pt. 3, *Smith v. State Workmen's Compen. Commr.*, 159 W. Va. 108, 219 S.E.2d 361 (1975).").

[21]*Tillis v. Wright*, 217 W. Va. 722, 728, 619 S.E.2d 235, 241 (2005) ("specific statutory language generally takes precedence over more general statutory provisions."); Syl. pt. 6, *Carvey v. West Virginia State Bd. of Educ.*, 206 W. Va. 720, 527 S.E.2d 831 (1999) (*quoting UMWA by Trumka v. Kingdon*); *Bowers v. Wurzburg*, 205 W. Va. 450, 462, 519 S.E.2d 148, 160 (1999) ("Typically, when two statutes govern a particular scenario, one being specific and one being general, the specific provision prevails."); *Daily Gazette Co., Inc. v. Caryl*, 181 W. Va. 42, 45, 380 S.E.2d 209, 212 (1989) ("The rules of statutory construction require that a specific statute will control over a general statute[.]").

[22]*See, e.g., McComas v. Board of Educ. of Fayette County*, 197 W. Va. 188, 475 S.E.2d 280 (1996)(Not every gathering between or among members of a public body will constitute a "meeting" in violation of the statutory mandates of the Open Governmental Proceedings Act (Sunshine Law)); *Babac v. Penn. Milk Marketing Bd.*, 531 Pa. 391, 613 A.2d 551 (1992)(use of a speakerphone in a public meeting in which only one out of three members was present at the meeting did not violate the State's open meeting act); *Freedom Oil Co. v. Illinois Pollution Control Bd.*, 275 Ill.App.3d 508, 211 Ill.Dec. 801 (1995)(telephonic participation in a meeting does not violate the State's open meeting act).

be present for the board to conduct business. Unless the bylaws require a larger number, action may be taken by majority vote of the members present. " and, although the Open Governmental Proceedings Act permits telephonic attendance, the statute governing the Authority's meetings does not.

There are many statutes governing procedures for conducting meetings of public bodies and where the Legislature has decided to allow meeting attendance by telephone, it has so provided.[23] In the Authority's case, however, it did not, instead requiring that Authority

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[23]*See, e.g.*, W. Va. Code § 5B-2C-5(a)("Any working group so created may conduct business, research and meetings by telephone, electronic mail or in person and shall not require a quorum to conduct its business.")(emphasis supplied); W. Va. Code § 6B-2-1(k)("Meetings of the Commission shall be upon the call of the chair and may be conducted by telephonic or other electronic conferencing . . . ."); W. Va. Code § 12-7-4(g)("Members of the board may participate in a meeting of the board by means of conference telephone or similar communication equipment by means of which all persons participating in the meeting can hear each other. Participation in a board meeting pursuant to this subsection constitutes presence in person at the meeting."); W. Va. Code § 28-7-1(c)("The bylaws may provide for members' participation in meetings by telephone or other means of telecommunication or electronic communication. Any voting conducted by telephone, or other means of telecommunication or electronic communication shall be subject to the same quorum requirements of meetings where members are present in person.")(emphasis supplied); W. Va. Code § 31C-5-1(g)("Board meetings may be conducted by means of telephone as provided in the bylaws in a manner consistent with state law.")(emphasis supplied); W. Va. Code § 31C-11-8 ("Board meetings may be conducted by means of telephone as provided in the bylaws in a manner consistent with state law.")(emphasis supplied); W. Va. Code § 33-26B-10(d)(3) ("Provide for regular meetings of the board of directors and establish methods by which meetings of the board of directors may be conducted, including, but not limited to, telephone conferences . . . .")(emphasis supplied); W. Va. Code § 33-47-6(b) ("Each member of the commission shall have the right and power to cast a vote to which that compacting state is entitled and to participate in the business and affairs of the commission. A member shall vote in person or by such other means as provided in the bylaws. The bylaws may provide for members' participation in meetings by telephone or other means of communication.")(emphasis supplied); W. Va. Code § 49-8A-1(g)("The bylaws may provide for members' participation in meetings by telephone or other means of telecommunication or electronic communication.")(emphasis supplied).

members be "present" if their attendance is to count towards the required quorum for official action. In this regard, the statutory maxim*expressio unius est exclusio alterius*,[24] applies and where the Legislature has provided for telephonic meetings in some statutes, but not in the Authority's statute, it is reasonable to conclude that the Legislature did not intent to allow telephonic meetings for the Authority.

"If a quorum is not present, any resolution or vote by those in attendance is without effect."[25] Other courts have invalidated official action, including rate-making action, where a required number of members was not "present" even though enough members participated by telephone in order to constitute a quorum.[26] Thus, Judge Pancake did not err by holding

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[24]*See Fitzgerald v. Fitzgerald*, 2006 WL 3454995 (W. Va.); *Savilla v. Speedway SuperAmerica LLC,* 2006 WL 3358431 (W. Va.); *T. Weston, Inc. v. Mineral County*, ___ W. Va. ___, 638 S.E.2d 167 (2006); *Gibson v. Northfield Ins. Co.* , 219 W. Va. 40, 631 S.E.2d 598 (2005); *Carroll v. Stump*, 217 W. Va. 748, 619 S.E.2d 261 (2005); *Burrows v. Nationwide Mut. Ins. Co.*, 215 W. Va. 668, 600 S.E.2d 565 (2004); *State ex rel. Stanley v. Sine*, 215 W. Va. 100, 594 S.E.2d 314 (2004); *McDaniel v. W. Va. Div. of Labor* , 214 W. Va. 719, 591 S.E.2d 277 (2003).

[25]59 Am. Jur. 2d *Parliamentary Law* § 9 (2006)(footnote omitted).

[26]*See Town of Eastchester v. New York State Bd. of Real Property Services*, 23 A.D.3d 484, 808 N.Y.S.2d 90 (2005)(meeting at which only two of five board members were actually present, with a third attending by conference call, did not satisfy quorum and majority voting requirements, and determinations made at meeting purporting to establish municipalities' final equalization rates were invalid); *City of White Plains v. New York Bd. of Property Services,* 18 A.D.3d 549, 795 N.Y.S.2d 292 (2005)(quorum requirement was not satisfied by one member's participation by telephone). *See also Roanoke City School Board v. Times-World Corp.*, 226 Va. 185, 192, 307 S.E.2d 256, 259 (1983) (physical presence is required to constitute a quorum and take action); *State v. Vermont Emergency Board*, 136 Vt. 506, 508, 394 A.2d 1360, 1361-62 (1978) (same).

that the Authority member who participated by telephone was not "present," as required by law, and could not count towards the majority required to constitute a quorum.

2. The Authority's Own Official Minutes Reflect that an Absent Board Member Voted "By Proxy" in Violation of Statute and the Authority's Own Procedural Rules.

As noted, W. Va. C.S.R. § 94-1-8.1 provides, "Proxy voting is hereby prohibited . . . ." [Emphasis supplied]. Yet, the Authority's own official minutes reflect that one of the absent members voted "by proxy" in violation of this clear prohibition. Public bodies speak or act officially only through the minutes and records made at duly organized meetings.[27] Its official minutes are binding upon a public body.[28] Otherwise, the very purpose of keeping, reviewing, approving, and maintaining official minutes would be rendered a nullity.[29] Finally, it is "'a basic notion of due process of law that a governmental agency must abide by its own stated procedures even though it is under no constitutional obligation to provide the procedures in the first place and even though it can change the procedures at any time; so long as the procedures are in place, the agency must follow them.'"[30]

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[27]*Scott v. City of Seymour*, 659 N.E.2d 585, 590 (Ind. Ct. App. 1995)("The actions of individual members of a board or commission outside a meeting cannot be substituted for the actions at a duly constituted meeting or for the minutes thereof.").

[28]*Charles River Park, Inc. v. Boston Redevelopment Auth.*, 28 Mass. App. Ct. 795, 805, 557 N.E.2d 20, 28 (1990).

[29]"Deliberative assemblies must be governed by procedural rules that make it possible for the views of the majority of their members to be ascertained and acted upon in an orderly fashion." 59 Am. Jur. 2d *Parliamentary Law* § 2 (2007)(footnote omitted).

[30]*Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 65, 459 S.E.2d 329, 342 (1995) (citations and footnote omitted).

Equally preposterous is the Authority's claim that it was unnecessary for Mr. Susman to actually appoint the person who cast what the minutes reflect as a vote "by proxy" as his designee. The Authority attempted to prove that Mr. Susman had designated the person who voted by proxy by filing with Judge Pancake a letter designating such person. The only problem, as noted by Judge Pancake, was the letter was written not by Mr. Susman, but by Mr. Susman's successor, well after the subject meeting. If, as the Authority now contends, no written document was necessary designating a representative at Authority meetings, then why did Mr. Susman's successor author such letter; why did the Authority tender it to the Court to support its claim that the person had been properly designated; and why did the Authority seek leave, after the close of discovery and at the final hearing of this matter, to tender to the Court a letter authored by Mr. Susman?[31]

The only records of the Authority which exist are its official minutes, which indicate that Mr. Susman voted not "by designated representative," but "by proxy."[32] There are no official documents indicating that Mr. Susman had appointed the person who voted "by proxy" as his representative. The Authority offered no affidavit from Mr. Susman indicating that, prior to the meeting, he had officially designated the person as his "designated representative." The Authority offered no affidavit from Ms. Lipscomb, who allegedly cast

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[31]Indeed, no such letter was ever tendered to Judge Pancake nor does the Commission believe that such letter exists.

[32]*See* Ex. A.

Mr. Susman's proxy,[33] that she had been officially appointed as his "designated representative." And, as noted, the Authority's own Rule 30(b)(7) representative testified that the voting appeared to violate its own procedural rules. Thus, Judge Pancake had no choice but to rule based upon the evidence before him and hold that Mr. Susman voted "by proxy" in violation of the Authority's own procedural rules.

It is important to note that the Authority was not just one member, but was two members shy of a quorum, and whether Chairman Huck's "telephonic" presence or Mr. Susman's "proxy" are invalid, affirming only as to one invalidates the Authority's action.

C. BECAUSE THE EVIDENCE WAS UNDISPUTED THAT THE RULES RELIED UPON BY THE AUTHORITY WERE NOT PROMULGATED AS "LEGISLATIVE RULES" AS REQUIRED BY LAW AND BECAUSE THE PER DIEM RULES CONFLICTED WITH THE ENABLING STATUTE TO THE EXTENT THAT THEY WERE BASED NOT UPON ACTUAL OPERATING EXPENSES, BUT UPON INMATE BEDS, JUDGE PANCAKE DID NOT ERR BY INVALIDATING THE RULES.

1. It is Undisputed that the Legislature Required the Authority to Promulgate "Legislative Rules" for Calculating the Per Diem and the Rules Upon Which the Authority Relies for Calculating the Per Diem Rates Charged to the Commission were not Promulgated as "Legislative Rules."

Since 1998, W. Va. Code § 31-20-10(h) has provided, "When inmates are placed in a regional jail facility pursuant to subsection (g) of this section, the county shall pay into the regional jail and correctional facility authority fund a cost per day for each incarcerated inmate

[33]Although the Authority's official minutes reflect that Mr. Susman voted "by proxy," they do not reflect whether Ms. Lipscomb cast Mr. Susman's proxy or if it was tendered in some other form, such as in writing.

to be determined by the regional jail and correctional facility authority according to criteria and by procedures established by legislative rules proposed for promulgation pursuant to article three, chapter twenty-nine-a of this code and as established in section ten-a of this article to cover the costs of operating the regional jail facilities of this state to maintain each inmate. The per diem costs for incarcerating inmates may not include the cost of construction, acquisition or renovation of the regional jail facilities . . . ." [Emphasis supplied].

The term "legislative rule" is defined by W. Va. Code § 29A-1-2(d) as "every rule, as defined in subsection (i) of this section, proposed or promulgated by an agency pursuant to this chapter. Legislative rule includes every rule which, when promulgated after or pursuant to authorization of the legislature, has (1) the force of law, or (2) supplies a basis for the imposition of civil or criminal liability, or (3) grants or denies a specific benefit. Every rule which, when effective, is determinative on any issue affecting private rights, privileges or interests is a legislative rule. Unless lawfully promulgated as an emergency rule, a legislative rule is only a proposal by the agency and has no legal force or effect until promulgated by specific authorization of the legislature."

The term "procedural rule" is defined by W. Va. Code § 29-1-2(h) as "every rule, as defined in subsection (i) of this section, which fixes rules of procedure, practice or evidence for dealings with or proceedings before an agency, including forms prescribed by the agency."

W. Va. C.S.R. § 94-3-5 provides:

> 5.1. The Authority shall sum the operational costs of each regional jail and shall divide the total of such anticipated operational expenditures by the total

anticipated number of inmate days in each of the regional jails to yield the cost per inmate day as the quotient.

5.1.1. If the Authority has revenue available for use as operational funds, the Authority may apply such revenue to the total of the schedule of operational expenditures before calculating the cost per inmate day. In such case, the net operational costs shall become the dividend.

5.1.2. The anticipated number of inmate days to be provided in a fiscal year shall be the product of the bed capacity of the regional jail multiplied by a capacity factor of ninety percent (90%), multiplied by the number of days in the fiscal year: Provided, that, the bed capacity of the regional jails shall be defined as follows:

Eastern Regional Jail 120;
Central Regional Jail 192;
South Central Regional Jail 288;
Northern Regional Jail &
Correctional Facility 192; and,
Southern Regional Jail 288.[34]

5.1.3. The Authority may, when operational history is available on any regional jail for more than two years, increase the capacity factor described in § 5.1.2. to reflect the actual population levels documented for that particular regional jail: provided, that, in no event shall the population factor be greater than one hundred per cent (100%) of the bed capacity for the regional jail.

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[34]The Court will note that the rules relied upon by the Authority for calculating the per diem charges it has assessed against the Commission for the Western Regional Jail do not even reference the Western Regional Jail. If the Authority is calculating the per diem rates for the Western Regional Jail based upon inmate beds, as it contends, it has never promulgated any rule, whether procedural or legislative, providing for such calculation. The Legislature directed the Authority to promulgate legislative rules upon which its assessments against county commissioners are to be based, but the Authority has simply failed to do so. This case started as a mandamus against the Commission to collect unpaid regional jail fees and, in order for the Authority to establish its entitlement to payment, it was required to demonstrate the legal obligation of the Commission to pay those fees. Without any valid legislative rule, however, even mentioning the Western Regional Jail, Judge Pancake correctly ruled that the Authority had not established the required elements for a writ of mandamus.

> 5.2. The Authority shall collect the cost per inmate day from each entity for which an inmate is maintained in a regional jail.

It is undisputed, however, that W. Va. C.S.R. § 94-3-5 was adopted as a "procedural rule," not a "legislative rule,"[35] and despite the Legislature's directive in 1998 that it be promulgated as "legislative rule," it was never re-adopted by the Authority as a "legislative rule."

In Judge Pancake's order, he held as follows:

> 11. Where an administrative agency is directed to promulgate a "legislative rule," requiring approval by the Legislature in order to have the force and effect of law, but fails to follow the statutory procedures for promulgation of legislative rules, any rule promulgated in violation of the legislative directive is invalid. Syl. pt. 1,*Chico Dairy Co. Store No. 22 v. Human Rights Comm'n*, 181 W. Va. 238, 382 S.E.2d 75 (1989)("The rule of the West Virginia Human Rights Commission, 6 W. Va. Code of State Rules § 77-1-2.7 (1982), defining a 'handicapped person,' for purposes of the West Virginia Human Rights Act, to include a person who does not in fact have a 'handicap,' as defined by W. Va. Code, 5-11-3(t), as amended, but who 'is regarded as having such a handicap,' is invalid. That rule is a 'legislative rule' under W. Va. Code, 29A-1-2(d), as amended, but was not submitted to the legislative rule-making review committee for its approval, as required by W. Va. Code, 29A-3-9 to 29A-3-14, as amended.").
>
> 12. The Court concludes that because W. Va. C.S.R. § 94-3-5 was adopted as a "procedural rule" in 1994 when W. Va. Code § 31-20-10(h) used the term "regulations," but was never adopted as a "legislative rule" after W. Va. Code § 31-20-10(h) was amended in 1998 to require the adoption of "legislative rules," W. Va. C.S.R. § 94-3-5 is invalid.

Chico Dairy holds that where the Legislature requires that certain rules be adopted as "legislative rules," and the failure to follow the procedures required for the adoption of such rules is fatal. In its Brief, the Authority argues that its rules are valid because they were

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[35]*See* Ex. B.

originally promulgated in 1995 prior to the requirement that they be adopted as legislative rules, but the rules have been amended since their original enactment[36] without complying with the statute and, thus, Judge Pancake correctly invalidated them.

2. The Authority's Procedural Rules, Which Base Per Diem Rates on Inmate Beds, Conflict with the Regional Jail Statute, Which Bases Per Diem Rates on Actual Operating Expenses.

Upon creating the regional jail system, the Legislature established a mechanism for its users to pay for the actual operating expenses of the regional jails so that they would be self-supporting. What the Authority has done, however, is to create a system which has allowed it to charge its users well in excess of actual operating expenses and to accumulate a huge surplus at the same time counties are struggling under the weight of their regional jail bills.[37]

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[36]Indeed, the rule makes reference to the bed capacity of the Eastern Regional Jail, which opened in September 1999, http://www.wvrja.com/, which did not open until four years after the procedural rule was originally promulgated. Moreover, the rule does not refer to the Western Regional Jail, which is the subject of this case.

[37]The Authority's financial records stand in sharp contrast to the petition for writ of mandamus filed by its former Executive Director in this Court which stated as follows: "The Authority is a zero balance agency. This means there is no cash reserve to carry County Commissions who refuse to honor their financial responsibilities." Petition at 7. [Emphasis supplied]. Prior to the discovery in this case which confirmed the Authority's large cash reserves, the Commission had long suspected that the representations of the Authority's Executive Director were untrue. Otherwise, how could the Authority continue to operate the Western Regional Jail, when the Commission was severely delinquent, not of its own volition, in its payments? Moreover, how could the Authority continue to operate other regional jails when the Mercer County Commission is on a two-year payment plan; the Mason County Commission is on a two to three-year payment plan; the Authority has entered into deferred payment plans with other county commissions; and very few entities, including the Division of Corrections, work release centers, municipalities, and other entities who receive monthly invoices for regional jail costs, pay those invoices on a monthly basis? Indeed, many entities pay quarterly, semi-annually, or simply whenever they have sufficient revenues to pay those invoices. Obviously, as the discovery in this case confirmed, the Authority has been able to continue to operate the regional jail system, despite

W. Va. Code § 31-20-10a(a) provides, "This section applies to the regional jail and correctional facility authority, counties, municipalities, the division of corrections, the United States marshal service, the United States bureau of prisons and any other entity by whose authority inmates are incarcerated and maintained in facilities operated by the authority." These entities are the users of the regional jails and include the counties.[38]

W. Va. Code § 31-20-10a(b)(1) provides, "The authority shall develop and approve a schedule of anticipated operational expenditures for each regional jail. The schedules shall include funds for personal services and fringe benefits for personnel necessary to the operation of the facilities, as well as allocations of funds for food, clothing, utilities, supplies, transportation and all other costs necessary to operate and maintain the facilities. The operational expenditure schedule shall include all costs, both direct and indirect, for operating and maintaining the regional jail. The authority shall develop and approve an operational expenditure schedule for each regional jail on an annual basis, consistent with the state fiscal year." [Emphasis supplied]. Thus, the Legislature has directed the Authority to develop an annual budget to cover the "anticipated operating expenditures for each regional jail" and to develop an "operational expenditure schedule for each regional jail on an annual basis," the purpose of which is to make each regional jail self-sufficient.

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a general business practice of deferred payment, because the per diem cost charged well exceeds the actual cost of providing the services.

[38]Further in this regard, W. Va. Code § 31-20-10a(c) provides, "The county is responsible for costs incurred by the authority for housing and maintaining inmates in its facilities who have not been committed to the custody of the commissioner of corrections."

W. Va. Code § 31-20-10a(b)(2) provides, "If the actual operational costs exceed the approved schedule of operational expenditures by more than ten percent in a line item, the authority's executive director shall add a temporary surcharge to the cost per inmate day in an amount sufficient to cover the actual expenditures." [Emphasis supplied]. Thus, if the "actual operational costs" of a regional jail exceed the projected budget "by more than ten percent in a line item," the Authority is allowed to assess a "temporary surcharge" on the jail's users, again so the jail can be self-sufficient.

As previously noted, however, the Authority's rules governing calculation of the per diem are not predicated upon "actual operational costs," but rather upon "inmate days" and "bed capacity."[39] Because the regional jails are seriously overcrowded, the Authority's per diem has been about 20 percent more than its actual operating expenses, which has allowed the Authority to accumulate a surplus of over $12 million and a fund balance of over $26 million.[40]

For example, as reflected in the record, the "bed capacity" of the Western Regional Jail which serves Cabell County is 384,[41] but its "average population" for July 2005 was 518, or 134 inmates in excess of "bed capacity."[42] For the entire regional jail system, the "bed

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[39]W. Va. C.S.R. § 94-3-5.

[40]*See* Ex. C.

[41]Again, the Commission notes that the procedural rule upon which the Authority relies references neither the Western Regional Jail nor its bed capacity.

[42]Commission's Summary Judgment Motion, Ex. F.

capacity" was 2,784 when this case was being litigated below, but the average population for July 2005, was 3,800, or 1,073 inmates in excess of bed capacity."[43] Because the system is running at about 137 percent of "bed capacity," the per diem being charged users, including counties, is well in excess of the actual operating expenses of the regional jails. Indeed, the formula contained in W. Va. C.S.R. § 94-3-5 is so inflated that not even the Authority actually uses the per diem generated by its application.

The Authority stipulated below that the actual operating expenses for the Western Regional Jail for FY05 was $40.42, but it charged the users of that jail, including the Commission, a per diem of $48.50, allegedly based upon W. Va. C.S.R. 94-3-5, <u>but the Authority conceded that a literal application of such rule would have resulted in a per diem calculation as follows</u>:

> 1. The anticipated operating expenses for the regional jail system for FY05, according to the Authority's own records, was $61,386,000.00
>
> 2. The total "bed capacity," using 90% of some facilities and 100% of other facilities, according to the Authority's own records, was 2683.
>
> 3. Thus, the Authority's records reflect a "05FY PROJECTED PER DIEM" of $62.68.

Obviously, if it actually cost the Authority $62.68 per day and it only charged $48.50 per day, the Authority would not collect sufficient revenues to cover its operating expenses. The $48.50, however, is so inflated that the Authority can operate and, in FY05, ended the year

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[43] *Id.*

with $12.4 million in cash reserves.[44] Indeed, according to its own records, the Authority's revenues exceeded its income by over $15.7 million in FY05. [45] Moreover, the Authority ended the fiscal year with a fund balance of over $26 million.[46]

Although "[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous,"[47] "[a] statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten."[48] Moreover, "[w]hile the interpretation of a statute by the agency charged with its administration should ordinarily be afforded deference, when that interpretation is unduly restrictive and in conflict with the legislative intent, the agency's interpretation is inapplicable."[49] Thus, rules which conflict with a statute are void.[50]

"It is fundamental law," this Court has held, "that the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the statute under

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[44]Commission's Motion for Summary Judgment, Ex. G.

[45]Commission's Motion for Summary Judgment, Ex. H.

[46]*Id.*

[47]Syl. pt. 4, *Security Nat'l Bank & Trust Co. v. First W. Va. Bancorp.*, 166 W. Va. 775, 277 S.E.2d 613 (1981).

[48]Syl. pt. 1, *Consumer Advocate Div. of Pub. Serv. Comm'n v. Public Serv. Comm'n of West Virginia*, 182 W. Va. 152, 386 S.E.2d 650 (1989).

[49]Syl. pt. 5, *Hodge v. Ginsberg*, 172 W. Va. 17, 303 S.E.2d 245 (1983).

[50]*See, e.g.*, Syl. pt. 2, in part, *Bays v. Police Civil Service Comm'n*, 178 W. Va. 756, 364 S.E.2d 547 (1988)("Accordingly, regulations of a police civil service commission which conflict with the statute on this point are void.").

which the agency functions. In exercising that power, howeveran administrative agency may not issue a regulation which is inconsistent with, or which alters or limits its statutory authority."[51] Moreover, this Court has observed that:

> Judicial review of an agency's legislative rule and the construction of a statute that it administers involves two separate but interrelated questions, only the second of which furnishes an occasion for deference. In deciding whether an administrative agency's position should be sustained, a reviewing court applies the standards set out by the United States Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed.2 d 694 (1984). The court first must ask whether the Legislature has directly spoken to the precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency's position only can be upheld if it conforms to the Legislature's intent. No deference is due the agency's interpretation at this stage.[52]

In this case, the Authority's per diem rules, based upon "inmate days" and "bed capacity," are clearly contrary to the Regional Jail per diem statute, which is based upon "actual operational costs" per inmate day. There is nothing in the Regional Jail statute whatsoever about calculating the per diem based upon "inmate days" and "bed capacity." Moreover, even the Authority does not follow the procedural rules it has adopted for calculating the per diem. Thus, Judge Pancake properly invalidated the rules because of their inherent conflict with statute.

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[51]Syl. pt. 3, *Rowe v. Dept. of Corrections*, 170 W. Va. 230, 292 S.E.2d 650 (1982)(emphasis supplied).

[52]Syl. pt. 3, *Appalachian Power Co. v. State Tax Dept.*, 195 W. Va. 573, 466 S.E.2d 424 (1995)(emphasis supplied).

D. THE COMMISSION'S OBLIGATION TO THE AUTHORITY TO PAY FOR REGIONAL JAIL COSTS IS PREDICATED UPON STATUTE, NOT UPON ANY CONSTITUTIONAL PROVISION, AND JUDGE PANCAKE PROPERLY HELD THAT THERE IS A THREE-TIERED HIERARCHY IN THE FISCAL OBLIGATIONS OF COUNTY COMMISSIONS.

Prior to the commencement of FY05, the Commission approved budgets for each of its constitutional officers based upon projected revenues, projected expenses, and continued discussions with the Authority over the per diem charges being assessed. [53] Each of the constitutional officers relied upon the Commission's budget in budgeting and staffing their offices to perform their constitutional and statutory duties.[54] After discussions between the Commission and the Authority were unsuccessful, the Commission directed its County Manager, Glenn A. White, to calculate the projected budget deficit if the Commission were to pay all of the anticipated charges by the Authority for the remainder of the fiscal year.[55]

On February 23, 2005, Mr. White reported to the Commission, indicating that the budget line item for the Authority had been exhausted and that an additional $1,651,469.00 would be needed, by June 30, 2005, to pay the Authority. Mr. White identified $4,413,698.00 in budget line items that for various reasons, including grant limitations, special funds created by statute, and $1,776,826.00 already paid and/or owed to the Authority, were not eligible for reduction. Mr. White also identified $1,000,000.00 in reserves needed at the end of June 30, 2005, in order to maintain sufficient cash flow for the County to meet

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[53]Commission's Motion for Summary Judgment, Ex. C.

[54]*Id.*

[55]*Id.*

payroll and pay its bills in July and August, 2005, before the County would begin receiving tax revenues for fiscal year 2005/2006. Based upon Mr. White's analysis of the County's expected revenues, expenses, and legal obligations, he calculated a projected budget deficit of $2,444,007.00 by the end of June 30, 2005. In order to balance the County's budget and leave the County with a sufficient cash balance in order to meet its obligations at the beginning of the 2005/2006 fiscal year, Mr. White calculated that a reduction of 22.10 percent of $11,057,095.00 in line items was necessary.[56]

With respect to the County's ability to generate additional revenue, W. VA. CONST. ART. X, § 7 provides:

> County authorities shall never assess taxes, in any one year, the aggregate of which shall exceed ninety-five cents per one hundred dollars valuation, except for the support of free schools; payment of indebtedness existing at the time of the adoption of this Constitution; and for the payment of any indebtedness with the interest thereon, created under the succeeding section, unless such assessment, with all questions involving the increase of such aggregate, shall have been submitted to the vote of the people of the county, and have received three fifths of all the votes cast for and against it.

[Emphasis supplied]. W. Va. Code § 7-3-13 further provides:

> Notwithstanding the provisions of general law, any county court authorized by this act to issue bonds, may become indebted for the purposes in this act authorized, to any amount, including all other indebtedness, up to but not exceeding five percent of the value of the taxable property in such county as shown by the last assessment thereof for State and county purposes next prior to the authorization of such bonds, subject to the levy limitations as provided in the Constitution. For the purpose of effectuating the provisions and purposes of this act and for the purpose of obtaining revenue to pay said bonds and their interest, or for the purpose of redeeming said bonds in whole or in part, such

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[56] *Id.*

> court may and is authorized to increase the levies on each class of property not to exceed fifty percent of the rates authorized by section ten, article eight, chapter sixty-seven, acts of the legislature, second extraordinary session, one thousand nine hundred thirty-three, not to exceed three years, and may submit to the voters of the county the question of authorizing such increase, not to exceed three years, at the same time and as a part of the scheme to issue said bonds and provide for the payment thereof. Such increase of levies shall not continue for more than three years without submission to the voters, but the question of future levy increases for such purposes may be again submitted to the voters.

[Emphasis supplied].

Applying these and other limitations imposed by law, Mr. White calculated the uncommitted excess levy rate potential for fiscal year 2004-2005 at only $250,095.00, which would only be a fraction of the revenue necessary to address a projected budget deficit of $2,444,007.00.[57] <u>There is no dispute that the Commission had no additional levying authority nor any means of raising additional revenue with the exception of liquidating county property</u>.

On March 2, 2005, a special session of the Commission was conducted at which time it considered the foregoing budget projections, the County's approximately $750,000.00 current obligation to the Authority, the County's projected obligation of $1,651,469.00 to the Authority, the absence of alternative revenue sources, and the effect of budget revisions on the ability of its county officials to perform their constitutional and statutory obligations. At this special session, the Commissioners unanimously approved a resolution providing for a revision to the County's budget, which would effectuate a 22.10 percent reduction in the following line items: Commission, County Clerk, Circuit Clerk, Sheriff, Prosecuting

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[57] *Id.*

Attorney, and Assessor. The total amount of budget reductions in these county offices would be $1,588,640.00, which would still be inadequate to pay the County's anticipated obligation to the Authority.[58]

Therefore, in addition to the reduction in the line items for the Commission and its county officials, the Commission approved budget reductions for other line items of the budget and a line item for the cash reserves needed to pay the County's current obligations at the beginning of fiscal year 2006.[59] The total amount of budget reductions was $2,444,007.00, of which $1,651,469.00 would be allocated to pay the Authority by end of the fiscal year the amount projected to be due and owing at that time.[60]

Because these budget reductions could not reasonably be implemented until the last quarter of the fiscal year, the effective budget reduction would be 88.40% for the remainder of the fiscal year, which would not be sufficient to pay the salaries of any the county officials' employees or assistants for the remainder of the fiscal year.[61]

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[58] *Id.*

[59] The amount of these reductions included: a reduction in the Medical Insurance Fund from $1,840,418.00 to $1,433,686.00; a reduction in funding for the courthouse facility from $740,262.00 to $576,664.00; a reduction in funding for other county buildings from $110,230.00 to $85,869.00; a reduction in funding for data processing from $185,956.00 to $144,860.00; a reduction in funding of the home confinement program from $461,030.00 to $363,562.00; a reduction in funding for the communications center from $10,200.00 to $7,946.00; a reduction in funding for the central garage from $97,211.00 to $75,727.00; and a reduction in funding for mental health from $29,667.00 to $23,111.00. *Id.*

[60] *Id.*

[61] *Id.*

After the Commission voted to reduce its budget in order to pay its regional jail bills, its county officials filed suit in the Circuit Court of Cabell County. Ultimately, an order was entered by the Circuit Court of Cabell County on March 23, 2005, directing the Commission to restore the cuts, as follows:

> 17. Under circumstances where a county has exhausted its constitutional and statutory revenue sources, but has insufficient funds to finance all of its constitutional, statutory, and contractual obligations, a county must first fully fund all of its constitutional obligations and, thereafter, if additional funds remain, fund so much of its statutory obligations as possible and, thereafter, if additional funds remain, fund so much of its contractual obligations as possible.
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> 18. This Court is without jurisdiction, under W. Va. Const. art. VI, § 1, to order the Respondent Commission to exercise its budgetary authority in any specific manner, but is authorized only to prevent it from exercising such budgetary authority in an unreasonable and arbitrary manner. *State ex rel. Lambert v. Cortellessi*, 182 W. Va. 142, 386 S.E.2d 640 (1989); *Meador v. County Court*, 141 W. Va. 96, 87 S.E.2d 725 (1955); *State v. Tyler County Court*, 112 W. Va. 406, 164 S.E. 515 (1932); 20 C.J.S. Counties § 200 (2004)("Courts are reluctant to interfere with the budgetary process, and the action of the county commissioners in fixing budgets may be reviewed only for abuse of discretion.")(footnotes omitted).
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> 19. Moreover, a writ of mandamus may not be used to compel the manner in which a county commission is to exercise its discretion with respect to budgetary matters. *Meador v. County Court*, 141 W. Va. 96, 87 S.E.2d 725 (1955).
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> 20. This Court does, however, have jurisdiction to enjoin the Respondents from exercising their discretion in a manner inconsistent with constitutional, statutory, regulatory, and decisional law. *State ex rel. Lambert v. Cortellessi*, 182 W. Va. 142, 386 S.E.2d 640 (1989).
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> 23. The West Virginia Constitution is silent on the obligation of county commissions to maintain jails. The obligation of county commissions to maintain jails was statutory. W. Va. Code § 7-3-2 ("The county commission

of every county, at the expense of the county, shall provide at the county seat thereof a suitable courthouse and jail . . . ."). This same statute, however, was amended to state, "Notwithstanding any other provision of this code to the contrary, any county commission providing and maintaining a jail on the effective date of this article shall not be required to provide and maintain a jail after a regional jail becomes available pursuant to the provisions of article twenty, chapter thirty-one of this code, unless the county commission determines that such a facility is necessary . . . .") (emphasis supplied). Thus, once the Western Regional Jail became available, the county commission was relieved of any constitutional or statutory obligation to maintain any jail. For example, once the Western Regional Jail became available, the Respondent Commission was under no obligation to feed or care for jail inmates under W. Va. Code § 7-8-2a. When there was a county jail, W. Va. Code § 7-8-4 required, "The jailer [who was the sheriff] shall attend the sessions of court, be amenable to its authority, and obey its orders. He shall receive into his jail all persons committed by the order of such court or a judge thereof, or justice of any district in the county, or under process issuing from such court, and all persons committed by any lawful authority.")(emphasis supplied). Once the Western Regional Jail became available, however, the county commission was relieved of this obligation. Rather, the county jail system was supplanted and its creation, supervision, and maintenance was supplanted by West Virginia Regional Jail and Correctional Facility Authority.

WHEREFORE, the Court doth hereby grant a writ of mandamus and a permanent injunction against the Respondents, directing them not to proceed with the resolution adopted at a special meeting on March 2, 2005, because to do so would be to impede the ability of the Petitioners to perform their constitutional functions, but to reconvene and take such action to balance the County's budget in a manner consistent with this Order and otherwise in accordance with the applicable law, and doth hereby award to the Petitioners' their reasonable attorney fees, litigation expenses, and court costs.[62]

Following entry of this order, the Commission restored the budget cuts and on May 25, 2005, its representatives met with the Authority's Executive Director regarding the financial inability of the Commission to meet all of its obligations to the Authority by the end of the

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[62] *Id.*

fiscal year. The Commission's representatives, however, informed Mr. Canterbury that the Commission intended to make a payment in the range of $500,000 before the end of the fiscal year. On June 16, 2005, the Commission approved a payment in the amount of $526,752.00, to the Authority. On June 15, 2005, however, on the day prior to the Commission's scheduled meeting, the Commission's Executive Director filed a petition for writ of prohibition in this Court, which issued a rule to show cause returnable in the Circuit Court of Cabell County.

The Authority does not directly address Judge Pancake's ruling that the Commission's obligation to the Authority is statutory, not constitutional.[63] Rather, the Authority attempts to bootstrap its own constitutional obligation to provide facilities which do not violate inmate rights to support its argument that the Commission's obligations to the Authority are constitutional, rather than statutory.[64] Certainly, when counties maintained the jails, they had a constitutional obligation to maintain those jails in accordance with the constitutional

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[63]"The circuit court failed to acknowledge that the obligation to care and maintain these inmates is constitutional and, therefore, must be paid before other statutory and contractual obligations." Brief of Appellant at 15.

[64]Brief of Appellant at 16-19. Obviously, there is no textual basis for any argument that county commissions have a constitutional obligation to provide jail facilities. The Authority's only argument, i.e., because the provision of inadequate jail facilities would violate constitutional prohibitions against cruel and unusual punishment, the provision of jail facilities is a constitutional obligation, is spurious. Government always has the obligation to refrain from violating the constitutional rights of its citizenry, whether in maintaining parks, libraries, sanitation service, or jails. The fact that it would be unconstitutional, for example, for a county library system to exclude minorities from its facilities does not render the provisions of libraries a constitutional obligation.

prohibitions against cruel and inhumane treatment.[65] When the Authority, however, took over the obligation to maintain the regional jail system, it is the Authority, not the Commission, that bears such constitutional responsibility.[66]

W. Va. Code § 31-20-10a(c) provides, "The county is responsible for costs incurred by the authority for housing and maintaining inmates in its facilities who have not been committed to the custody of the commissioner of corrections." It is this statute, not any constitutional provision, which establishes the legal obligation of counties to the Authority. The Authority contends, for the first time, that "[t]he care and maintenance of inmates is a constitutionally required function of the county government. . . . [because] County Commissions have the constitutional authority to administer the police and fiscal affairs of their counties [under] *W. Va. Const.*, Article IX, § 11."[67] This constitutional provision gives county commissions the ability to conduct the business of their counties "under such

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[65]For example, the Authority relies upon *Dawson v. Kendrick*, 527 F. Supp. 1252 (S.D. W. Va. 1981), where the court stated, "Once a state legitimately deprives a person of his liberty, it is required to shoulder the economic burden to preserve the constitutional rights retained by the persons within the walls of the jail or prison," Brief of Appellant at 16, and *Hickson v. Kellison*, 170 W. Va. 732, 296 S.E.2d 855 (1982), where this Court stated, "[c]ertain conditions of . . . confinement may be so lacking in the area of adequate food, clothing, shelter, sanitation, medical care and personal safety as to constitute cruel and unusual punishment under the Eighth Amendment to the United States Constitution." *Id.* at 17.

[66]Indeed, it is now the Authority, not county commissions or sheriffs, which is the defendant in suits instituted by inmates claiming the violation of their constitutional rights. *See, e.g., Chaney v. Scott*, Civil Action No. 2:00-00341 (S.D. W. Va.); *Sutphin v. Regional Jail Authority*, Civil Action No. 2:01-0588 (S.D. W. Va.); *Shuman v. South Central Regional Jail*, Civil Action No. 2:03-2249; *Gregory v. Rudloff*, Civil Action No. 1:05-103 (N.D. W. Va.).

[67]Brief of Appellant at 16.

regulations as may be prescribed by law."[68] It clearly does not bestow upon county commissions any constitutional duty to care for inmates or maintain jails.

The case cited by the Authority, *Kenny v. Webster County Court*,[69] provides a good analogy. In *Kenny*, the Court held that the Legislature had the power to enact a statute declaring it the responsibility of counties to contribute to a general relief fund for the poor. The Court recognized, however, that "[t]here is nothing in our Constitution which imposes any duty on the county court with respect to the care of the poor." Rather, "the power of the county courts, in the superintendence and administration of the internal police and fiscal affairs of their counties has, from the very beginning of our statehood, been controlled and restricted by legislative authority[.]" Because "expenditures by a county court, from the general county fund, necessary to administer constitutionally required functions of county government, are mandatory, and take precedence over those required for general relief," the Court granted mandamus only after it determined that the contribution at issue could be made without

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[68]*W. Va. Const.*, Article IX, § 11 ("The county commissions, through their clerks, shall have the custody of all deeds and other papers presented for record in their counties, and the same shall be preserved therein, or otherwise disposed of, as now is, or may be prescribed by law. They shall also, *under such regulations as may be prescribed by law*, have the superintendence and administration of the internal police and fiscal affairs of their counties, including the establishment and regulation of roads, ways, bridges, public landings, ferries and mills, with authority to lay and disburse the county levies[.]") (emphasis added); *Meador v. County Court of McDowell County*, 141 W. Va. 96, 87 S.E.2d 725 (1955) (Constitutional provision and statutes prescribing powers and duties of county courts were designed to preserve local self-government and protect financial integrity of local fiscal bodies in state in sound financial management of their respective units).

[69]124 W. Va. 519, 21 S.E.2d 385 (1942).

sacrificing any mandatory functions of the county government and without creating an overdraft in the general county fund, explaining:

> [W]e think it proper at this time to consider whether we should award mandamus in cases of this character. The answer to this question, we think, depends on whether a county court, in a given case has funds in its hands, available, or potentially available, to meet the call of the Legislature under the General Welfare Law, after the mandatory expenses, necessary to the administration of constitutional government in the county have been met. . . .
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> If this were a case where the mandatory expenses of county government, as defined above, required the entire revenues of the county, this court would not issue the writ of mandamus, when the effect would be to compel a violation of the law by the county court, with the attendant criminal and civil liabilities imposed by statute law. Both the Legislature and state officials should refrain from imposing upon county courts, and other fiscal bodies, greater burdens than their revenues justify. . . . Recent legislative policy has served to relieve the counties of a great burden in matters of relief, notwithstanding the present requirement of contribution. Prior to the enactment of these laws, the burden of the poor rested upon the counties alone. . . . We think, therefore, that it is not only the statutory duty of the county court to make the required contribution, provided it has funds available therefor, but its moral duty as well. If it has such funds available, then the relator herein has a clear legal right to have the same transferred to the county general relief fund. The only question is: Does the county court have funds available for that purpose?[70]

In this case, jails were the responsibility of county commissions prior to the creation of the Authority.[71] With the advent of the regional jail system, however, there are no more county jails and county commissions have no statutory obligation to maintain jails. The responsibility for the construction and operation of jails has been transferred, pursuant to

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[70]*Id.* at 389-92.

[71]W. Va. Code § 7-8-1 ("The jail of the county shall be the jail provided by the county court as required by law.").

statute, from the counties to the Authority. Thus, the Authority is referring to its own statutory obligation when it contends that "[t]he care and maintenance of inmates is necessary to give full effect to the authority of the other constitutional officers of the counties . . . [including] the circuit courts [W. Va. Const., Article VIII, § 5], the magistrate courts [W. Va. Const., Article VIII, § 10], Prosecuting Attorneys [W. Va Const., Article IX, § 1], and Sheriffs [W. Va. Const., Article IX, § 1]."[72]

The Authority cites *State ex rel. Bd. of Ed., Kanawha County v. Rockefeller*,[73] which held that "because of public education's constitutionally preferred status in this State, expenditures for public education cannot be reduced [by the Governor] under W. Va. Code, 5A-2-23, in the absence of a compelling factual record to demonstrate the necessity therefor," to contend that "[t]he same rationale applies to the instant situation." [74] *Rockefeller* involved a specific constitutional provision and its related financing provision imposing an affirmative obligation on the State to provide a "thorough and efficient system" and adequate funding for public education.[75] Here, there is no such constitutional provision or related financing provision imposing an affirmative obligation on the counties to provide a "thorough and efficient system" and adequate funding for jails. Indeed, the Authority concedes as much when its only position is that "the obligation of the counties to pay the *per diem* rate for care

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[72]Brief of Appellant at 17.

[73]167 W. Va. 72, 281 S.E.2d 131 (1981).

[74]Brief of Appellant at 18.

[75]*See* W. Va. Const, Article XII, §§ 1, 5.

and maintenance of the inmates they place in the regional jail should be treated as much more than a statutory obligation."[76]

The Regional Jail statute does not require counties to pay for all prisoners incarcerated in the regional jail system. Rather, W. Va. Code § 31-20-10(h) provides, "When inmates are placed in a regional jail facility pursuant to subsection (g) of this section, the county shall pay into the regional jail and correctional facility authority fund a cost per day for each incarcerated inmate to be determined by the regional jail and correctional facility authority according to criteria and by procedures established by legislative rules proposed for promulgation pursuant to article three, chapter twenty-nine-a of this code and as established in section ten-a of this article to cover the costs of operating the regional jail facilities of this state to maintain each inmate." [Emphasis supplied]. And, subsection (g) provides, "After a regional jail facility becomes available pursuant to this article for the incarceration of inmates, each county within the region shall incarcerate all persons whom the county would have incarcerated in any jail prior to the availability of the regional jail facility in the regional jail facility except those whose incarceration in a local jail facility used as a local holding facility is specified as appropriate under the standards and procedures developed pursuant to section nine of this article and who the sheriff or the circuit court elects to incarcerate therein." [Emphasis supplied].

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[76]Brief of Appellant at 17.

Finally, it is undisputed that the Commission lacked sufficient funds to pay its constitutional, statutory, and contractual obligations and that the anticipated charges by the Authority at issue could not be paid without creating a serious budget deficit.[77] Thus, Judge Pancake correctly held that the Commission's obligation to the Authority is statutory, not constitutional, and its duty to fund and pay its constitutional obligations, including those to its constitutional officers, has precedence over its statutory duty to pay the Authority.[78]

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[77]Indeed, it is telling the extent to which the Authority has mightily struggled to elevate the Commission's obligation to provide jails to one of constitutional dimension. It is undisputed that the Commission cannot maintain its constitutional officers and their functions, and pay the entire obligation asserted by the Authority. Under Judge Pancake's ruling, the Commission is properly permitted to fund the basic operations of its constitutional officers and, only then, to the extent that it has the financial ability, to fund its statutory obligations. With the reduction in the per diem by Judge Pancake, the Commission can fund both its constitutional and statutory obligations. Without the reduction, the Commission cannot and if its obligation to the Authority is purely statutory, it must suffer the same proportionate reductions as the Commission's other statutory obligations.

[78]In addition to its statutory duty to the Authority, the Commission is under a mandatory statutory obligation to fund the Cabell County Public Library and the Greater Huntington Park and Recreation District. *See* 1983 W. Va. Acts ch. 207 ("In order to provide for the support, maintenance and operation of the public library hereby created . . . the said supporting governing authorities shall, upon written request by the board of directors of the public library, levy annually as follows . . . The county court of Cabell county, for the first year of the act and annually thereafter: Class one, one and four-tenths cents; class two, two and eight-tenths cents; class three, five and six-tenths cents; class four, five and six-tenths cents."); 1983 W. Va. Acts ch. 194 ("In order to ensure adequate support for the maintenance and operation of the park district the following governing authorities shall, upon written request by the park district levy annually as follows within the respective taxing districts of the governing authorities . . . . The county commission of Cabell County, for the first year of the act and annually thereafter: Class one, .433 cents; class two, .866 cents; class three and four, 1.73 cents.").

IV. CONCLUSION

Escalating regional jail costs have placed a crippling burden upon the State's counties, forcing libraries to close, health insurance to be dropped, services to be curtailed, and employees to be subjected to layoff.[79] The Commission understands that the Authority needs

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[79]*See Calhoun Fails to Make Payroll*, Charleston Gazette, March 1, 2005, at 3A ("Elected officials in Calhoun County went without their paychecks Monday because the county didn't have the money to pay them, a county commissioner said. County Commissioner President Larry McCallister said Calhoun County is running low on money because it had to spend more than expected to jail inmates at the Central Regional Jail . . . . In January, the commission dropped the elected officials' health insurance. In February, the also told all elected officials, such as the sheriff, assessor and prosecuting attorney to lay off one employee in their offices. . . . McCallister said the jail bill accounts for roughly 20 percent of the Calhoun County's budget."); *Jail Fees Affecting County Budgets*, Charleston Gazette, March 16, 2005, at 1A ("Rising regional jail fees are leading some county commissions to cut or even eliminate funding for libraries, according to librarians lobbying at the state Legislature on Tuesday. Last month, Mason County commissioners axed their entire contribution to libraries, $40,000, because of rising jail costs. That's more than 20 percent of the library system's budget, according to county library Director Kresta Harris. . . . Sen. Don Caruth, R-Mercer, represents Summers County, whose library system is struggling with the cuts. He said the Legislature needs to do more to control rising jail costs."); *Jail Costs Threaten Fayette Budget, Charleston Gazette*, Mar. 17, 2005 ("Members of the Fayette County Commission met with a judge, magistrates and some elected officials Wednesday to explore ways to save regional jail expenses, but if Community Corrections is part of the answer, more planning is needed, a judge said. Commission President Matthew Wender opened the meeting, held in a courtroom, by saying that regional jail costs were threatening to overwhelm the county's budget."); *Two Upcoming Bills Aim to Cut Jail Costs* , Charleston Gazette, Mar. 15, 2005 ("Other counties have also complained about jail fees. Doddridge County saw its jail costs more than double over the past year, to nearly $300,000, while Calhoun County's costs rose from $65,000 last year to $145,000 this year."); *Commissioners Hear Budget Requests*, Charleston Gazette, Mar. 5, 2005, at 3A ("While they work out details of next year's budget, Commissioner John Lopez passed around copies of newspaper articles about Calhoun and Cabell counties where the commissioners in those counties were in dire financial straits because of rising costs to house inmates at regional jails. Lopez said he feared Fayette's budget will be affected by jail costs, too."); *Jail Costs a Concern for Putnam Officials*, Charleston Gazette, Mar. 10, 2005, at 3A ("Some Putnam County officials are blaming next year's budget concerns on higher-than-expected regional jail costs. County commissioners predict they will have to spend more than $1.1 million next year to house criminals in the Western Regional Jail. County officials last year budgeted about $700,000 for jail costs for this fiscal year. 'The big thing that is really hitting us like a mallet over the head (next year) is the regional jails cost,'' county Administrator

to collect sufficient funds in order to be able to cover its operating expenses at each of the regional jails. What the Commission cannot understand is how the Authority can defend operating with a 20-percent profit margin in order to accumulate cash reserves of almost $13 million and a fund balance of over $26 million.[80]

The Authority's vote to increase the per diem from $45.00 to $48.50 was invalid as it lacked a quorum and one of its members voted by proxy.[81] The Authority's rules by which it calculates the per diem are invalid because they were never adopted as legislative rules as required by law.[82] The Authority's rules are invalid because they use "inmate days" and "bed capacity," rather than the "actual operating expenses" dictated by statute. Finally, the Commission's obligation to the Authority is statutory, not constitutional, and the Commission is not required to close its county offices, which are mandated by the West Virginia

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Brian Donat said. 'That's a huge increase and that money has got to come from somewhere.'"). County services are being threatened or even eliminated as a result of the burden of regional jail costs. *See Jail Fees Affecting Library Budgets*, Charleston Gazette, March 16, 2005, at 1C ("Rising regional jail fees are leading some county commissions to cut or even eliminate funding for libraries, according to librarians lobbying at the state Legislature on Tuesday. Last month, Mason County commissioners axed their entire contribution to libraries, $40,000, because of rising jail costs. That's more than 20 percent of the library system's budget, according to county library Director Kresta Harris. The county's four libraries have slashed hours and staff time to make up for the shortage. This year, libraries in Summers County lost all of their county funding, $6,000. Commissioners also blamed increasing jail costs, said Myra Ziegler, the library's director.").

[80]*See* Ex. C.

[81]*See* Ex. A.

[82]*See* Ex. B.

Constitution, in order to pay its regional jail costs, which it has no alternative sources of revenue.

Ultimately, the solution to the problem of escalating regional jail costs is legislative, not judicial. Overcrowding caused by the lack of space in the State's correctional system must be addressed. Requiring municipalities, which generate two of every three inmates in the Western Regional Jail, to bear some of the financial burden, has been supported by both the Authority and the Commission. Unfortunately, these are matters beyond this Court's control and for which this Court should not bear responsibility. Rather, this Court should allow Judge Pancake's ruling to stand and, hopefully, serve as a catalyst for change.

WHEREFORE, the Respondents, County Commission of Cabell County; Bob Bailey, as President; W. Scott Bias, as Commissioner; and Nancy Cartmill, as Commissioner, respectfully request that this Court deny the appeal; allow Judge Pancake's ruling to be implemented on a state-wide basis; and leave for the Legislature the best method of resolving the competing concerns of all involved.

CABELL COUNTY COMMISSION; BOB BAILEY, President; W. SCOTT BIAS, Commissioner; and NANCY CARTMILL, Commissioner,

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