

NO. 33347

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE EX REL. WEST VIRGINIA REGIONAL
JAIL AND CORRECTIONAL FACILITY AUTHORITY,

Appellant,

vs.

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

Appellees.

REPLY BRIEF OF APPELLANT

Appeal From Final Order
Entered May 15, 2006
Case No. 05-C-0590
Circuit Court of Cabell County, West Virginia

Gary E. Pullin, Esquire
W.Va. State Bar I.D. #4528
J. Robert Russell, Esquire
W.Va. State Bar I.D. #7788

Pullin Fowler & Flanagan, PLLC
901 Quarrier Street
Charleston, WV 25301
(304) 344-0100
Counsel for Appellant

Chad M. Cardinal, Esquire
W.Va. State Bar I.D. #6016

General Counsel
West Virginia Regional Jail
and Correctional Facility Authority
1325 Virginia Street, East
Charleston, West Virginia 25301
Counsel for Appellant

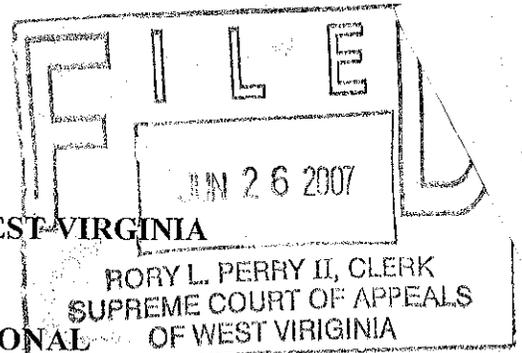


TABLE OF CONTENTS

I. INTRODUCTION1

II. DISCUSSION3

 A. STANDARD OF REVIEW3

 B. THE CIRCUIT COURT ERRED IN NOT ISSUING A WRIT OF MANDAMUS AND ORDERING THE CABELL COUNTY COMMISSION OBLIGATION TO FULFILL ITS CONSTITUTIONAL OBLIGATION AND PAY FOR THE CARE AND MAINTENANCE OF ITS INMATES.....3

 C. THE CIRCUIT COURT ERRED IN FINDING AND CONCLUDING THAT THE WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY COULD ONLY CHARGE THE CABELL COUNTY COMMISSION THE ACTUAL COST OF HOUSING AND MAINTAINING EACH INMATE COMMITTED TO THE WESTERN REGIONAL JAIL BY THE APPROPRIATE AUTHORITIES OF CABELL COUNTY, WEST VIRGINIA.....8

 D. THE CIRCUIT COURT ERRED IN FINDING AND CONCLUDING THAT THE WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY WAS WITHOUT AUTHORITY TO ENACT AN INCREASE TO THE COST PER INMATE DAY ON FEBRUARY 10, 200411

III. CONCLUSION.....16

TABLE OF AUTHORITIES

Cases

<i>Babac v. Pennsylvania Milk Marketing Bd.</i> , 531 Pa. 391, 613 A.2d 551 (1992).....	13
<i>Bell v. Wolfish</i> , 441 U.S. 520, 99 S.Ct. 1861 (1979)	6
<i>Blennerhassett Historical Park Comm'n v. Public Serv. Comm'n of W. Va.</i> , 179 W. Va. 250, 366 S.E.2d 758 (1988).....	11
<i>Boley v. Miller</i> , 187 W. Va. 242, 418 S.E.2d 352 (1992).....	11
<i>Chrystal R.M. v. Charlie A.L.</i> , 194 W. Va. 138, 459 S.E.2d 415 (1995).....	3
<i>Clinchfield Coal Co. v. FMSHRC</i> , 895 F.2d 773, 779 (D.C.Cir.1990)	14
<i>Dawson v. Kendrick</i> , 527 F.Supp. 1252 (S.D. W. Va. 1981)	6
<i>Ewing v. Board of Education</i> , 202 W. Va. 228, 503 S.E.2d 541 (1998)	3
<i>Gibson v. Northfield Ins. Co.</i> , 219 W.Va. 40, 631 S.E.2d 598 (2005)	14
<i>Hickson v. Kellison</i> , 170 W. Va. 732, 296 S.E.2d 855 (1982).....	6
<i>Hutto v. Finney</i> , 437 U.S. 678, 98 S.Ct. 2565 (1978).....	6
<i>Kenny v. Webster County Court</i> , 124 W. Va. 519, 21 S.E.2d 385 (1942).....	4, 5
<i>Lincoln County Board of Education v. Adkins</i> , 188 W. Va. 430, 424 S.E.2d 775 (1992).....	10
<i>Manchin v. Dunfee</i> , 174 W.Va. 532, 327 S.E.2d 710 (1984)	14
<i>Martin v. Randolph Co. Bd. of Education</i> , 195 W. Va. 297, 313, 465 S.E.2d 399, 415 (1995)....	10
<i>State ex rel. Bd. of Educ. v. Rockefeller</i> , 167 W. Va. 72, 281 S.E.2d 131 (1981).....	8
<i>State ex rel. Canterburv v. Mineral County Comm'n</i> , 207 W. Va. 381, 532 S.E.2d 650 (2000)....	5
<i>State ex rel. Cooke v. Jarrell</i> , 154 W. Va. 542, 177 S.E.2d 214 (1970).....	5
<i>State ex rel. County Commission of Cabell Co. v. Arthur</i> , 150 W. Va. 293, 145 S.E.2d 34 (1965)	7
<i>State ex rel. Kucera v. City of Wheeling</i> , 153 W. Va. 538, 170 S.E.2d 367 (1969)	3
<i>State ex rel. Lambert v. Cortellessi</i> , 182 W. Va. 142, 386 S.E.2d 640 (1989).....	4
<i>State ex rel. Roy Allen S. v. Stone</i> , 196 W.Va. 624, 474 S.E.2d 554 (1996)	14
<i>W. Va. DHHR/Welch Emergency Hosp. v. Blankenship</i> , 189 W. Va. 342, 431 S.E.2d 681 (1993)	10

Statutes

U.S. Const., Amend. VIII..... 6
U.S. Const., Amend. XIV 6
W. Va. Code § 6-9A-1 (2006)..... 14
W. Va. Code § 7-7-7 (1982)..... 5
W. Va. Code § 7-8-1 (1951)..... 6
W. Va. Code § 31-20-3 (2006)..... 15
W. Va. Code § 31-20-4 (2006)..... 12, 13
W. Va. Code § 31-20-10 (1993)..... 9
W. Va. Code § 31-20-10 (2006)..... 6
W. Va. Const., Article III, § 5 6
W. Va. Const., Article IX, § 11 6

Rules

W. Va. C.S.R. § 94-1-8.1 12, 13, 15
W. Va. C.S.R. § 94-3-5 9

Other Authorities

2 AM. JUR. 2D ADMINISTRATIVE LAW § 86 13
Black's Law Dictionary, 6th Ed. (1991) 13, 15

NO. 33347

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE EX REL. WEST VIRGINIA
REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY,

Appellant,

v.

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

Appellees.

REPLY BRIEF OF APPELLANT

Now Comes the Appellant, West Virginia Regional Jail and Correctional Facility Authority ("Regional Jail Authority"), pursuant to the Order of this Court dated April 4, 2007, and files the following Reply Brief in Support of Appeal:

I. INTRODUCTION

There is no denying that this Court is presented with a unique situation in the instant appeal, not only for this jurisdiction but nationwide. The regional jail system in West Virginia is an exceptional and bold attempt to provide constitutionally sufficient housing and care for the jail inmates of West Virginia to replace the dilapidated system of county jails and the attendant risk of lawsuits and the release of potential offenders and convicted persons from confinement. Nevertheless, the issues before this Court can be resolved by looking to past precedent and commonly accepted principles of jurisprudence.

While regional jails are present in many jurisdictions across the country, the West Virginia system has both unique and traditional components. The citizens of the State of West Virginia utilized their resources to construct ten (10) modern facilities across the State. Yet, the individual counties are responsible for paying for the daily care and upkeep of those incarcerated. This latter requirement is a continuation of the traditional county responsibilities for the maintenance of those individuals incarcerated for crimes allegedly committed within the jurisdictional confines of each county. However, if a single county defaults on its obligations under the system, the citizens of the other fifty-four (54) counties will be forced to bear not only their share of the costs of the construction but the costs of maintaining those incarcerated by the defaulting county.

Such is the case here. The evidence presented below, including the Stipulations of the parties, show that the Cabell County Commission has unjustifiably refused to pay, or make arrangements to pay, the jail bill for detainees and inmates committed to the West Virginia Regional Jail system by the Circuit and Magistrate Courts sitting in Cabell County, West Virginia.¹

¹ Ironically, instead of directly contesting the outstanding amounts, Cabell County accuses the Regional Jail Authority of reciting what it calls "superfluous" matters. Brief of Appellees, at p.4, n.6. The historical context of the regional jail system was briefed and argued to the Circuit Court of Cabell County and is reflected, in part, in the Stipulations submitted by the parties. In addition, the Regional Jail Authority provided the statistical information for Cabell County's obligations to the Regional Jail Authority during discovery in this proceeding. The provision of updated information hardly seems "superfluous."

Cabell County spends a substantial portion of their brief to this Court citing budgetary discussions and the advice of the County Manager. Brief of Appellees, at pp. 25-28. However, Cabell County does not put these "facts" in context. Noticeably absent from Cabell County's recitation is the fact that, in FY05, it initially budgeted less for jail expenses than it had budgeted for just six months of FY04. See, Stipulations, ¶ 17. R. 1175.

II. DISCUSSION

A. STANDARD OF REVIEW.

For a Writ of Mandamus to issue, three elements must co-exist. A “(1) clear legal right in the Petitioner to the relief sought; (2) a legal duty on the part of the Respondent to do the thing which the Petitioner seeks to compel; and (3) the absence of another adequate remedy.” Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969).

“The standard of appellate review of a circuit court’s order granting relief through the extraordinary writ of mandamus is *de novo*.” Syl. Pt. 1, *Ewing v. Board of Education*, 202 W. Va. 228, 503 S.E.2d 541 (1998). (Citations omitted). “Where an issue on an appeal from the circuit court is clearly a question of law or involving the interpretation of a statute, we apply a *de novo* standard of review.” Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

B. THE CIRCUIT COURT ERRED IN NOT ISSUING A WRIT OF MANDAMUS AND ORDERING THE CABELL COUNTY COMMISSION OBLIGATION TO FULFILL ITS CONSTITUTIONAL OBLIGATION AND PAY FOR THE CARE AND MAINTENANCE OF ITS INMATES.

Cabell County misses the point of this assignment of error. Contrary to the representation of Cabell County, the Regional Jail Authority is directly challenging the Circuit Court’s ruling that the obligation to pay the Regional Jail Authority is statutory, not constitutional. Brief of Appellees, at p. 31. The Circuit Court of Cabell County erred in not recognizing that the obligation to pay the Regional Jail Authority is on a par with the obligation to provide funding to the constitutional law enforcement officers of Cabell County. Additionally, the evidence was clear that Cabell County deliberately underfunded this item in their FY05 budget, thereby supporting a writ of mandamus.

The Circuit Court of Cabell County held that the obligation to pay the Regional Jail Authority was statutory and, by implication, secondary to the obligation to fund the constitutional officers of Cabell County. The Circuit Court cited its prior ruling in the case of *Chiles v. Bailey*, Civil Action No. 05-C-162 as authority for this finding. However, the reasoning behind that decision actually points to the inefficacy of the instant ruling. In its Order in the *Chiles* case, the Circuit Court of Cabell County held as follows:

6. "The county commission is expressly granted the power to administer the fiscal affairs of the county by W. VA. CONST. ART. IX, 6 11, and pursuant thereto, the legislature, in W. Va. Code, 7-7-7, as amended, has included the circuit clerk as a county officer whose budget is fixed by the county commission." Syl. pt. 3, *State ex rel. Lambert v. Cortellessi*, 182 W. Va. 142, 386 S.E.2d 640 (1989). This budgetary authority further extends to the other Petitioners in this proceeding. See W. Va. Code § 7-7-7 ("The county clerk, circuit clerk, joint clerk of the county commission and circuit court, if any, sheriff, county assessor and prosecuting attorney shall, prior to the second day of March of each year, file with the county commission a detailed request for appropriations for anticipated or expected expenditures for their respective offices, including the compensation for their assistants, deputies and employees, for the ensuing fiscal year. The county commission shall, prior to the twenty-ninth day of March of each year by order fix the total amount of money to be expended by the county for the ensuing fiscal year, which amount shall include the compensation of county assistants, deputies and employees. Each county commission shall enter its order upon its county commission record.") (emphasis supplied).

7. The fiscal power of a county commission is not plenary, but it is required that "the county officer's staff compensation . . . be 'reasonable and proper' in consideration of 'the duties, responsibilities and work required of the assistants, deputies and employees,' [and] W. Va. Code, 7-7-7 [1982], see supra note 4, sets a minimum standard, the clearly proved violation of which would constitute arbitrary or capricious conduct: [S]uch [statutory] language requires the county [commission] to provide such funds as will permit the [county] official . . . to properly carry out the statutory duties of his [or her] office." *Lambert, supra* at 147-148, 386 S.E.2d at 645-646 (citation omitted). Moreover, "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." Syl. pt. 2, *Kenny v. Webster County Court*, 124 W. Va. 5 19, 21 S.E.2d 385 (1942). Finally, "When the county court approves an overall sum to be expended by the sheriff [or any other elected county official] for salaries of his deputies and employees that sum must remain

available and cannot, after such approval, be reduced by the court. “*State ex rel. Cooke v. Jarrell*, 154 W. Va. 542, 177 S.E.2d 214 (1970).

8. On the other hand, because “The duty of a county court under Code, 7-7-7, amended, to fix an aggregate sum to be expended during the ensuing fiscal year for the compensation of the deputies, assistants and employees of county officials named therein is of an administrative, not a judicial, nature,” Syl. pt. 1, *State ex rel. Canterbury v. County Court of Wayne County*, 151 W. Va. 1013, 158 S.E.2d 151 (1967), “In the absence of arbitrary action on the part of a county court in the exercise of its discretion as to the sum to be allotted to the office of the county clerk for the compensation of deputies and assistants for the ensuing fiscal year, in accordance with the provisions of Code, 7-7-7, as amended, mandamus will not lie,” Syl. pt. 2, *Canterbury, supra*.

Conclusions of Law 6 – 8, Order, March 23, 2005, *Chiles v. Bailey*, Civil Action No. 05-C-162, Circuit Court of Cabell County, West Virginia.

As the circuit court noted, while the West Virginia Constitution identifies certain constitutional officers for each county, the **actual** foundation for Cabell County’s **obligation** to provide **funding** to the constitutional officers of Cabell County and the limitations to be applied is *W. Va. Code § 7-7-7* (1982). Thus, the obligation for providing funding to constitutional officers is actually statutory and indistinct from that relative to jail costs.

This is not to minimize the importance of funding the constitutional officers of each county. To the contrary, these expenditures take precedence over others because they are “necessary to administer constitutionally required **functions** of county government.” Syl. pt. 2, *Kenny, supra*. (Emphasis added). The provision of constitutionally minimum services for incarcerated individuals is, likewise, necessary to the administration of constitutionally required functions of county government. Indisputably, the law enforcement functions of county prosecutors, sheriffs, and county courts would be severely undermined if the county did not provide for the incarceration of those arrested and awaiting prosecution, as well as those subject to incarceration by virtue of a court order.

Cabell County also misconstrues the reference to *Kenny*. While the *Kenny* Court was faced with a purely statutory obligation (requiring counties to financially participate in poverty relief and welfare programs), the obligation to provide minimally sufficient jails is certainly constitutional. See, *Dawson v. Kendrick*, 527 F.Supp. 1252 (S.D. W. Va. 1981). (Citations omitted). The Eighth and Fourteenth Amendments to the United States Constitution have been consistently interpreted to require certain minimum standards of treatment. See, e.g., *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565 (1978); and *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861 (1979). Authority for the same proposition is found in Article III, Section 5 and Article IX, Section 11 of the West Virginia Constitution. In contrast to the general relief exemplified by poverty programs in *Kenny*, “[o]nce a state legitimately deprives a person of his liberty, it is required to shoulder the economic burden necessary to preserve the constitutional rights retained by the person within the walls of the jail or prison.” Syl. pt. 2, *Hickson v. Kellison*, 170 W. Va. 732, 296 S.E.2d 855 (1982). Such a constitutional requirement is to be mandatorily funded pursuant to the holding in *Kenny*.

The obligation to pay for the care and maintenance of inmates is as important to the constitutional functions of county government as the hiring and retention of law enforcement personnel. The mere fact that statutes provide the method and manner of fulfilling these obligations does not remove the underlying constitutional nature of the obligation. Cabell County implicitly recognizes this fact when it acknowledges that “jails were the responsibility of county commissions prior to the creation of the Authority.” Brief of Appellees, at p. 34. As noted in footnote 71 of the Appellees’ Brief, that obligation was mandated by *W. Va. Code* § 7-8-1 (1951). Each county still has the responsibility to provide for the care and maintenance of jaillees. *W. Va. Code* § 31-20-10(h) (2006). See also, *State ex rel. County Commission of Cabell*

Co. v. Arthur, 150 W. Va. 293, 296, 145 S.E.2d 34, 36 (1965) (“[I]n determining the powers of the county court [now County Commission],” one “must look to the constitution, which created that body, and to the laws which were enacted by the legislature pursuant to the constitutional provisions.”). There is no logical reason to distinguish between the obligations to fund the county sheriff and the jail costs. Nor is there any logical reason to distinguish between the obligations represented in *W. Va. Code* § 7-8-1 and *W. Va. Code* § 31-20-10h.

For these reasons, the Circuit Court erred in failing to order Cabell County to fund this obligation at the same priority level as the budget for the prosecutor, sheriff, circuit clerk and county courts. In addition, the evidence was sufficient to find that Cabell County had acted arbitrarily and deliberately under-funded its obligation to care for and maintain its inmates in the FY05 budget.

The circuit court declined to issue the writ of mandamus, concluding that “in the absence of arbitrary action, this Court lacks authority to order the Commission to exercise its budgetary powers in any particular manner.” Final Order, Conclusion of Law 30, at p. 11. Yet, the record clearly demonstrates that the Cabell County Commission acted arbitrarily in adopting a budget that reduced its anticipated outlay for care and upkeep of inmates by more than fifty percent (50%). Cabell County does not deny the essential facts in this regard. These facts were actually stipulated by the parties. From fiscal year 1998 to fiscal year 2003, the jail budgets for Cabell County increased from \$1,700,000.00 to \$2,100,000.00. See, Stipulations, ¶ 52. R. 1190. In the fiscal year 2003-2004, even though it operated its old county jail for five (5) months and joined the Regional Jail system for just seven (7) months, Cabell County Commission budgeted \$1,635,839.00 for regional jail fees. See, Stipulations, ¶ 17. R. 1175. Despite this historical trend, the Cabell County Commission budgeted a mere \$1,089,322.00 for jail fees and expenses

for the entire fiscal year 2004-2005. See, Stipulations, ¶ 17. R. 1175. Not only is the county constitutionally obligated to care for and maintain those individuals that it incarcerates, but the failure to budget monies for this purpose jeopardizes the ability of the various constitutional officers of Cabell County to perform their constitutional obligations. *See, e.g., State ex rel. Bd. of Educ. v. Rockefeller*, 167 W. Va. 72, 281 S.E.2d 131 (1981).

Cabell County also does not dispute that it could have easily projected the necessary amount to fulfill its jail obligations for FY05. Cabell County did not justify the initial budgetary decision at all.

For these reasons, the Circuit Court should have concluded that Cabell County acted arbitrarily and in contravention of its constitutional and statutory obligations when making the initial FY05 budget. The Circuit Court should have also issued a writ of mandamus directing Cabell County to properly budget for its jail costs.

C. THE CIRCUIT COURT ERRED IN FINDING AND CONCLUDING THAT THE WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY COULD ONLY CHARGE THE CABELL COUNTY COMMISSION THE ACTUAL COST OF HOUSING AND MAINTAINING EACH INMATE COMMITTED TO THE WESTERN REGIONAL JAIL BY THE APPROPRIATE AUTHORITIES OF CABELL COUNTY, WEST VIRGINIA.

Cabell County does not address the fundamental error of the Circuit Court of Cabell County in this regard. The “actual cost” standard adopted by the Circuit Court of Cabell County is both untenable and unsupported by the statutory scheme. Cabell County does not even discuss this error in its Brief. Brief of Appellees, at pp. 15-24.

In the Final Order, the circuit court made the following observation:

7. 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 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”

Final Order, Conclusion of Law 7. R. 1219 – 1220. The circuit court went on to discuss the differences between a legislative rule and a procedural rule. Final Order, Conclusions of Law 8 and 9. R. 1220.

The circuit court observed that *W. Va.C.S.R. § 94-3-5* was the Regional Jail Authority’s rule for calculation of the “cost per inmate day” charges. Final Order, Conclusion of Law 10. R. 1220 – 1221. The circuit court concluded that *W. Va.C.S.R. § 94-3-5* was “adopted as a ‘procedural rule,’ not a ‘legislative rule.’” Final Order, Conclusion of Law 10. R. 1221.

However, in 1995, when the rule was promulgated, the statute provided that:

[T]he county shall pay into the regional jail and correctional facility development fund a cost per day for each inmate so incarcerated to be determined by the regional jail and correctional facility authority according to criteria and by procedures established by **regulations** pursuant to article three, chapter twenty-nine-a of this code **to cover the costs of operating the regional jail facilities of this state to maintain each such inmate** which costs shall not include the cost of construction, acquisition or renovation of said regional jail facilities

W. Va. Code § 31-20-10(h) (1993). (Emphasis added).

After concluding that *W. Va.C.S.R. § 94-3-5* was not promulgated as a legislative rule (Final Order, Conclusion of Law 12. R. 1221 – 1222), the circuit court then applied its own interpretation of the statute to hold that the Regional Jail Authority could only charge counties for the “actual cost” of maintaining each inmate in **the** particular regional jail in which they were incarcerated.² As noted in the initial Brief of Appellant, *W. Va. Code § 31-20-10(h)* requires the

² Cabell County comments repeatedly about supposed overcharging by the Regional Jail Authority. Brief of Appellees, at pp. 15-24. Cabell County even comments that “the Legislature established a mechanism for its users to pay for the actual operating expenses of the regional jails

county to pay the Regional Jail Authority “a cost per day for each incarcerated inmate . . . to cover the costs of operating the regional jail facilities of this state to maintain each inmate.” *W. Va. Code* § 31-20-10(h). (Emphasis added).

While § 31-20-10 specifies what **cannot** be included in the *per diem* charge, it does not specify any additional criteria for determining how to calculate the applicable charge. *W. Va. Code* § 31-20-10a (2006), provides that “[t]he authority shall develop and approve a schedule of anticipated operational expenditures for each regional jail.” *W. Va. Code* § 31-20-10a(b)(1). Although *W. Va. Code* § 31-20-10(h) refers to “cost per day,” *W. Va. Code* § 31-20-10a(b)(2) refers to the “cost per inmate day.”

In addition, while *W. Va. Code* § 31-20-10a(b)(1) refers to a “schedule of anticipated operational expenditures for each regional jail,” it does not link this schedule of anticipated costs to the “cost per day” of *W. Va. Code* § 31-20-10(h) or specify whether the Regional Jail Authority should create a “cost per inmate day” for each regional jail facility or one “cost per inmate day” for all of the facilities. Thus, the statute is susceptible to interpretation.

As such, the circuit court should have accorded some deference to the interpretation of the agency charged with enforcement of the statute. *Martin v. Randolph Co. Bd. of Education*, 195 W. Va. 297, 313, 465 S.E.2d 399, 415 (1995); and *Lincoln County Board of Education v. Adkins*, 188 W. Va. 430, 424 S.E.2d 775 (1992). (Citations omitted). *See also*, Syl. Pt. 2, *W. Va. DHHR/Welch Emergency Hosp. v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Boley*

so that it would be self-supporting,” but does not support this statement. Brief of Appellees, at p. 19. In fact, Cabell County does not even discuss the statutory history of *W. Va. Code* § 31-20-10(h) or the fact that the statute is based upon **anticipated** operational expenses. Additionally, although completely irrelevant to the instant proceeding, the Regional Jail Authority does not maintain any more of a reserve than necessary to fulfill its financial obligations for a brief period of time.

v. *Miller*, 187 W. Va. 242, 418 S.E.2d 352 (1992); *Blennerhassett Historical Park Comm'n v. Public Serv. Comm'n of W. Va.*, 179 W. Va. 250, 366 S.E.2d 758 (1988).

The interpretation of the Regional Jail Authority is consistent with the history of the Act and its amendments and is reasonable under the circumstances. The language of *W. Va. Code* § 31-20-10 since 1993 has been consistent with the Regional Jail Authority's system of having a uniform rate for all of the regional jails in the state based upon anticipated costs. Because it is based upon projections, not "actual costs," the Regional Jail Authority's system is more consistent with the Legislature's pronouncement that the schedule of anticipated operational expenditures have some relationship to the "cost per inmate day." Such schedules would be meaningless in the system envisioned by the circuit court, as the Authority would have to wait for actual expenditures to be calculated to set a rate and charge the various entities that incarcerated individuals in the system.³ What's more, under the system envisioned by the circuit court, the counties will have no opportunity to accurately budget, as the Authority will not be able to set the rate until the end of the fiscal year. The Regional Jail Authority utilizes a reasonable process that should have been given deference by the circuit court.

For these reasons, the Regional Jail Authority is entitled to reversal of the circuit court's order and reinstatement of the *per diem* charge to \$45.00 per inmate day, based upon estimated cost of maintaining each inmate in the regional jails of the State of West Virginia.

D. THE CIRCUIT COURT ERRED IN FINDING AND CONCLUDING THAT THE WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY WAS WITHOUT AUTHORITY TO ENACT AN INCREASE TO THE COST PER INMATE DAY ON FEBRUARY 10, 2004.

³ The only reason that the parties were able to calculate the actual costs for the circuit court in this case is that the issue did not reach the court until after the fiscal year had ended. However, waiting until the end of a fiscal year to assess each county and then waiting the attendant amount of time to receive reimbursement will likely bankrupt the system in a rapid fashion.

On February 10, 2004, the West Virginia Regional Jail and Correctional Facility Authority Board met and increased the *per diem* charge from \$45.00 per inmate day to \$48.50 per inmate day. However, the circuit court held that the Regional Jail Authority Board did not have a quorum at the February 10, 2004 meeting. The circuit court's conclusion, defended by Cabell County, was based upon faulty premises, including the inability of Board members to appear by telephone and the ability of the Secretary of the Department of Administration to appear and vote by designee.

In its Brief of Appellees, Cabell County does not dispute the fact that Chairman Huck appeared at the February 10, 2004 meeting by telephone and that Donna Lipscomb appeared and voted on behalf of Tom Susman, Secretary of the Department of Administration.⁴ Cabell County does not contest that both individuals fully participated and voted. Cabell County and the circuit court merely objected that Chairman Huck was not specifically permitted to participate by conference call and Secretary Susman was not permitted to vote by proxy. Both conclusions elevate form over substance in an effort to thwart the intention of the Legislature, as well as the Regional Jail Authority Board.

With respect to the requirements for a quorum to conduct business, the relevant statute merely requires that a quorum be "present" for the board to conduct business. *W. Va. Code* § 31-20-4(b) (2006). (Emphasis added). *W. Va. C.S.R.* § 94-1-8.1 provides that:

⁴ The parties stipulated that, of the nine (9) members of the Board, the minutes of the February 10, 2004 meeting indicate that six (6) were present. Stipulations, ¶ 41. R. 1186. Of these six (6), four (4) were voting members. Stipulations, ¶ 41. R. 1186. According to the minutes, Donna Lipscomb appeared on behalf of Mr. Susman, the Secretary of the Department of Administration. Final Order, Finding of Fact 7. R. 1217. The minutes from the meeting further reflected that the Chairman of the Board, Dan Huck, appeared "via conference call." Stipulations, ¶ 41. R. 1186.

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.

Id. (Emphasis added).

The circuit court erred in presuming that a specific statute or rule was necessary to permit members of the Board to appear by conference call. Neither the statute nor the procedural rules expressly prohibit such an appearance or otherwise suggest that such an appearance is not sufficient. In the absence of a specific prohibition, the general statutes and rules must govern.

By any definition, Chairman Huck was “present.” *Black’s Law Dictionary* defines “present” as “[n]ow existing; at hand.” *Black’s Law Dictionary*, 6th Ed. (1991). Chairman Huck was certainly in existence at the February 10, 2004 meeting. In today’s world, Chairman Huck was also “at hand.” We communicate everyday and conduct business, both in private and public bodies, by electronic means. It defies common sense to suggest that, in the absence of a specific statute or rule prohibiting the same, Chairman Huck was not “present” at the February 10, 2004 meeting. The circuit court, in essence, removed the word “present” and added a requirement that members appear “in person.” Construing an applicable “sunshine” law, one other jurisdiction has held that a quorum may be found even where some members participate through a telephone conference call on a speaker telephone. 2 AM. JUR. 2D ADMINISTRATIVE LAW § 86, *citing, Babac v. Pennsylvania Milk Marketing Bd.*, 531 Pa. 391, 613 A.2d 551 (1992).

The word, “meet,” in *W. Va. Code* § 31-20-4(a) and the term, “meeting,” in *W. Va.C.S.R.* § 94-1-8.1 must also be given effect. Nevertheless, *W. Va.C.S.R.* § 94-1-8.1 does not explain what constitutes a “meeting,” other to refer to a “convening” of the governing body. *Id.* Certainly, 94-1-8.1 does not exclude the official definition of a meeting for State agencies found

in *W. Va. Code* § 6-9A-1, *et seq.* (2006), the West Virginia Open Governmental Proceedings Act.

Cabell County cites numerous statutes that specifically provide for meetings of certain organizations by telephone or other electronic means and argues for application of the doctrine of statutory interpretation of *expressio unius est exclusio alterius*. That maxim literally means that the express mention of one thing implies the exclusion of another. Syl. Pt. 3, *Manchin v. Dunfee*, 174 W.Va. 532, 327 S.E.2d 710 (1984). However, the doctrine does not apply in this instance. The doctrine generally “informs courts to exclude from operation those items not included in the list of elements that are given effect expressly by statutory language.” *State ex rel. Roy Allen S. v. Stone*, 196 W.Va. 624, 630 n. 11, 474 S.E.2d 554, 560 n. 11 (1996). The doctrine is more applicable to a single statute or related statutes where a list of items is expressed. “[E]xplicit direction for something in one provision, and its absence in a parallel provision, implies an intent to negate it in the second context.” *Clinchfield Coal Co. v. FMSHRC*, 895 F.2d 773, 779 (D.C.Cir.1990). *See also*, Syl. pt. 2, *Gibson v. Northfield Ins. Co.*, 219 W.Va. 40, 631 S.E.2d 598 (2005). There is no relationship between the statutes cited by Cabell County and the Regional Jail Authority statutes. The Open Governmental Proceedings Act specifically authorizes participation in a public body meeting by telephone. Therefore, there is no reason to presume that the Legislature intended to prohibit the participation by telephone of members of the Regional Jail Authority Board.

The Chairman, Mr. Huck, was properly present at the February 10, 2004 meeting of the Regional Jail Authority Board. His participation by conference call was not prohibited by any specific statute or rule and generally meets the definition of quorum and meeting in the governing statutes and rules.

With regard to the participation of Secretary Susman, the circuit court's conclusion and the position advocated by Cabell County calls to mind the notion of a distinction without a difference. The circuit court found that Mr. Susman "did not attend" the meeting but "voted by proxy." Final Order, Finding of Fact 4. R. 1217. Both the circuit court and Cabell County necessarily concede the fact that Donna Lipscomb (a person who has no independent standing or duties with the Board) appeared on behalf of Mr. Susman.

While the statute and applicable procedural rule both prohibit voting by proxy, both provisions permit the Secretary of the Department of Administration to appear and vote by a designee. *W. Va. Code* § 31-20-3 (2006) and *W. Va.C.S.R.* § 94-1-8.1. In fact, the Secretary of the Department of Administration is the only member of the governing board permitted to so appear and participate.

Although the minutes of the meeting incorrectly identify that the Department of Administration was represented by proxy, the Department of Administration was represented by designated representative. To the extent that *W. Va.C.S.R.* § 94-1-8.1 prohibited voting by proxy, it also permitted voting by designee.⁵

The circuit court failed to acknowledge the statutory distinction between the Secretary of the Department of Administration and the other voting members of the Board. The circuit court also failed to recognize the representative capacity with which Ms. Lipscomb participated in the

⁵ The two concepts are interchangeable. "Proxy" has been defined as "[a] person who is substituted or deputed by another to represent him and act for him, particularly in some meeting or public body. An agent representing and acting for principal. Also the instrument containing the appointment of such person." *Black's Law Dictionary*, 6th Ed. (1991). The instant situation is certainly not what one commonly thinks of when the term, "proxy," is used. Secretary Susman did not provide his "proxy" to another voting member of the governing Board to vote on his behalf, such as the practice commonly employed in shareholder meetings. Secretary Susman sent his own representative to participate and vote as an individual. Because of his special statutory status, it is only reasonable to conclude that Secretary Susman was applying the statutory provision for participation and voting by designee.

proceedings. The circuit court has also, without authority, read into the statutory and regulatory scheme a requirement for written verification of the appointment. As the Secretary of the Department of Administration is the only member permitted this option, the requirement appears unnecessary. The circuit court's action in this regard cannot be allowed to stand, as it thwarts the clear intent of the West Virginia Legislature. The net effect of the circuit court's ruling is to strip Mr. Susman of his statutory right to appoint a representative to appear on his behalf. Whether denominated as a proxy or a designee, the unavoidable conclusion is that Ms. Lipscomb appeared on behalf of Mr. Susman, the only voting member of the Board statutorily authorized to designate another individual to appear on his behalf. In this instance, form should not prevail over substance.

Therefore, applying the statutorily defined quorum analysis, a majority of the members of the Board were present on February 10, 2004. Six (6) of the nine (9) attended, either by in person, by phone or by designated representative. Of the six (6) present, four (4) were voting members. The vote taken on the rate increase was three (3) to one (1) in favor of the increase. Stipulations, ¶ 41. R. 1186. As such, the quorum and majority voting requirements were satisfied and the increase in the *per diem* rate to \$48.50 was both proper and legal.

III. CONCLUSION

The necessity for reversal of the Final Order entered by the Circuit Court of Cabell County, West Virginia on May 15, 2006 and issuance of the requested Writ of Mandamus is readily apparent. The circuit court erred in demoting the obligations of care and treatment of inmates to discretionary budgetary status. At the very least, these obligations are on a par with the other statutory obligations of Cabell County that relate to the constitutional functions of the county government. The circuit court further erred in interpreting the statutes governing the

"cost per inmate day" calculations. The circuit court failed to accord any deference or weight to the reasonable interpretation of the statutes by the West Virginia Regional Jail and Correctional Facility Authority. Finally, the circuit court erred in imposing extra-statutory requirements regarding the participation of members of the Board of the Authority in meetings and votes of the Board.

The West Virginia Regional Jail and Correctional Facility Authority is entitled to a Writ of Mandamus ordering the Cabell County Commission to fulfill its obligations and immediately remit payment to the Authority.

STATE EX REL. WEST VIRGINIA
REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY,
By Counsel,



Gary E. Pullin, Esquire
W. Va. State Bar I.D. #4528
J. Robert Russell, Esquire
W. Va. State Bar I.D. #7788
PULLIN FOWLER & FLANAGAN, PLLC
901 Quarrier Street
Charleston, WV 25301
(304) 344-0100

Chad M. Cardinal, Esquire
General Counsel
W. Va. State Bar I.D. #6016
West Virginia Regional Jail &
Correctional Facility Authority
1325 Virginia Street, East
Charleston, West Virginia 25301
(304) 558-2110

CERTIFICATE OF SERVICE

I, J. Robert Russell, hereby certify that I have this 26th day of June, 2007, given notice of the filing of the foregoing "Reply Brief of Appellant" by United States mail, first class, postage prepaid, in an envelope addressed to counsel for the Appellees as follows:

Ancil G. Ramey, Esquire
Steptoe & Johnson, PLLC
Bank One Center, Eighth Floor
P.O. Box 1588
Charleston, WV 25326-1588



J. Robert Russell
W. Va. State Bar I.D. #7788
PULLIN FOWLER & FLANAGAN, PLLC
901 Quarrier Street
Charleston, WV 25301
(304) 344-0100