

NO. 33707

IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

AT CHARLESTON

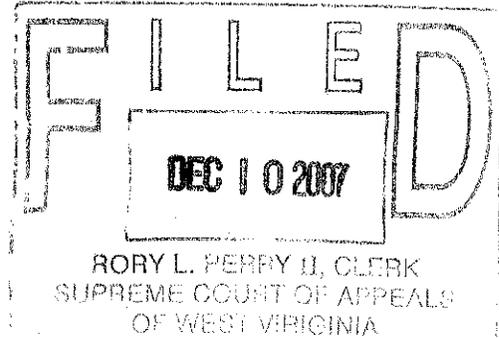
BERNARD J. FOLIO, and
GRANDEOTTO, INC.,

Appellants,

vs.

HARRISON-CLARKSBURG HEALTH
DEPARTMENT and HARRISON-
CLARKSBURG BOARD OF HEALTH,

Appellee.



FROM THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA

BRIEF OF APPELLANT ON APPEAL

Jerry Blair
Attorney At Law, WVSB No. 5924
Blair, Conner & McIntyre-Nicholson PLLC
P. O. Box 1701
Clarksburg, WV 26302-1701
(304) 622-3334

Counsel for Appellants

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BRIEF OF BERNARD J. FOLIO AND GRANDEOTTO, INC. ON APPEAL

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA

I.

KIND OF PROCEEDINGS, NATURE OF RULING OF LOWER COURT

This was a civil action in the public interest where an individual and a corporation sought public relief from the constitution and acts of the local combined city-county health department in relocating its offices. The Appellants sought review of a final order entered on March 13, 2007 by the Circuit Court dismissing all of the Appellants' claims upon the Appellee's Rule 56 Motion For Summary Judgment. The Circuit Court found that the failure of the health department to publish a legal advertisement soliciting bids for its relocation, the fact that the Board was illegally constituted as one of the city-appointed members was not a resident of the city, the fact that there was no objective standard for selecting potential locations, the fact that the selection process was (except for the final vote) delegated to the Board's executive director, and the fact that the location selected was owned by a corporation substantially owned by a member of the city attorney's law firm which firm also represented the said corporation, all did not constitute sufficient grounds for the Circuit Court to exercise oversight of this public board by allowing a trier of fact to review the actions of the Board and consider whether damages should be awarded to the citizens of the city and county. This High Court accepted review of this case by Order entered on or about November 7, 2007 and received several days thereafter by Appellants' counsel.

This brief is timely submitted within the period specified in said Order.

II. STATEMENT OF THE CASE

Your Appellant, Grandeotto, Inc. is a closely held corporation owned primarily by Bernard J. Folio and his children and holding and managing real estate in the City of Clarksburg and elsewhere throughout the State of West Virginia. Appellant Bernard J. Folio is a citizen, resident and taxpayer of the City of Clarksburg and of Harrison County, West Virginia.

The Clarksburg-Harrison Board of Health is a "combined" board of health existing under West Virginia Code § 16-2-5. It is a recipient of local, state and federal funds, and is itself a governmental statutory entity. The Clarksburg-Harrison Board of Health is composed of six members: three are appointed by the City Council of the City of Clarksburg, a West Virginia municipal corporation, and three are appointed by the County Commission of Harrison County, all pursuant to West Virginia Code § 16-2-8. Importantly, those entities forming the said Board are also recipients of local, state and federal funds governmental funds.

At the June 10, 2004 meeting of the Board of Health of the Harrison-Clarksburg Health Department, the Board announced "We will begin looking for a new home for the Health Dept." Minutes - June 10, 2004 meeting. It was also stated at that meeting "Chad [i.e. Chad Bundy, Executive Director] proposed that between 7/1 and 9/1 we would accept comments and suggestions regarding the move. Newspaper will be notified."

The Appellee never placed an advertisement regarding soliciting bids for proposed relocation properties. "Was there any advertising done to try to solicit bids for the relocation?" "No." Deposition of Bundy, p. 12, l. 11. There was no competitive bidding process effected. Nevertheless, by the July 13, 2004 meeting, the Appellee had received "10 proposals for various sites to date." Minutes - July 13, 2004 meeting. It is suggested by the Appellee that those bids/proposals came as a result of a news article published in the Clarksburg Exponent-Telegram regarding the Appellee's plans to relocate and the Appellee subsequently took the position throughout the litigation that it had no obligation to advertise

whatsoever, that a newspaper article was sufficient.

Mr. Bundy prepared a "New Location (Template)" with criteria he deemed to be important to evaluating prospective sites. Only a very few of the criteria included thereon were ever mentioned at public meetings of the Appellee. Mr. Bundy generated the remainder himself.

By September 1, 2004 Mr. Bundy had received 20 proposals: seven of "buildings for sale," three of "property for sale," and ten of "buildings for lease." Mr. Bundy prepared a two page document which is labeled "EVALUATION" at the top of the first page, which document was designed, weighted, and scored solely by Mr. Bundy. *The Board of Health members, as explicitly stated in each of their depositions, were not aware of how a point value was assigned to any particular cell on that spreadsheet. Also, they had no idea how the numerical weight (maximum point value) was given to each category.* The Board members relied solely upon Mr. Bundy's assessment and recommendations, with most members only visiting the same two of the twenty sites (the ESI site and the Toothman Rice site) and that occurred only because Mr. Bundy recommended that they visit those two sites. One Board member apparently did not visit any sites.

The meeting notes for the October 19, 2004 meeting of the Appellee states that "We have narrowed it down to three sites." However, the testimony of the Board members in each of their depositions indicated that it was Mr. Bundy who narrowed it down. The three sites were the Rite Aid Building (the relevant property of Appellants Grandeotto, Inc.), the ESI Building, and the Toothman Rice Building. The Rite Aid Building had 36,000 sq. ft. of space on four floors and was offered at \$22,800 per year. It is virtually directly across from the county courthouse and less than a stone's throw from City Hall. A customized build-out was necessary, and all lease payments were to be applied toward equity should the Appellee have desired to purchase at the end of a five year period. The Toothman Rice Building, on the other hand, having only 16,450 sq. ft. was \$71,700 per year and an "\$80,000" elevator would have to

be purchased (which elevator turned out to be over 25% more than that). Another taxpayer issue below discovered by the Appellants surrounded the fact that the Board had accumulated over One Million Dollars (\$1,000,000) in unallocated funds, as referenced and inquired about in a Board meeting by Board member and County Commissioner Ron Watson. This accumulation of funds for a local health department, in the eyes of the Appellants, seemed contrary to its assigned mission and the best interests of the citizens it was supposed to serve. Even so, the Appellee publicly announced during the pendency of this matter below that it was laying off employees and curtailing programs.

Mr. Bundy recommended that the Appellee enter into a five year lease of the Toothman Rice Building and the Board adopted his recommendation. The Appellants believe that, by all appearances, the selection of the Toothman Rice Building was a foregone conclusion and that this public board merely made a pretextual appearance of acting objectively in the public's best interest. Though Grandeotto, Inc. held a potential relocation site and sought its site to be objectively considered for the relocation, the only relief requested in its complaint which could in any way be deemed self-serving was its demand that the Board be required to do the process again in a legal and objective manner. This action was truly an aggrieved citizen-taxpayer and corporation seeking redress for what was clearly an abuse of public trust by a local governmental entity, and not profit-motivated litigation.

Though the trial court was understandably reluctant to exercise oversight of a public board, *there is no other oversight available whatsoever should such a board act in a manner contrary to law or the public interest.* Clearly, in effect, by granting summary judgment without a hearing on the facts, the lower court has declared that there is no oversight of this public board, that the Board did not even have to go through any type of selection process regarding the relocation let alone an objective one, and that it could have relocated without any process of obtaining and exercising objective considerations for the public interest at all. Under the lower court's ruling, the Board could have entertained an impromptu motion to relocate its facilities to the Toothman Rice Building and voted upon it on the spot and that would have been sufficient in the lower court's analysis of the law. Somehow, the lower court found that the Appellants' interests were not adversely affected, and other findings of fact which fly in the face of the evidence in this matter, including the finding that there was insufficient evidence of the value of selected property when the real issue was the respective values of the respective properties which are expressly of record throughout the lower court proceedings.

III.

ASSIGNMENT OF ERROR

THE HONORABLE LOWER COURT ERRED, ABUSED ITS DISCRETION, AND WAS CLEARLY ERRONEOUS IN GRANTING SUMMARY JUDGMENT BY FINDING THAT NO LEGAL ANNOUNCEMENT OF COMPETITIVE BIDDING IS NECESSARY WHEN A LOCAL COMBINED BOARD OF HEALTH SEEKS TO RELOCATE ITS FACILITIES, BY FINDING THAT NO GENUINE ISSUES OF MATERIAL FACT EXISTED REGARDING WHETHER CONSTRUCTIVE FRAUD EXISTED UNDER *MILLER*, AND BY CONSISTENTLY RULING THAT THE APPELLANTS HAD TO PROVE ACTUAL FRAUD TO MAINTAIN AN ACTION.

IV.
POINTS AND AUTHORITIES

Cases

*West Virginia Utility Contractors Association v. Laidley Field Athletic and Recreational Center
Governing Board*, 164 W.Va. 127, 260 S.E.2d 847 (1979)..... 11
Burgess v. City of Cameron, 113 W.Va. 127, 133, 166 S.E. 113 (1932)..... 12
Miller v. Huntington, etc., Bridge Co., 123 W. Va. 320, 15 S.E.2d 687 (1941)14
Davis v. West Virginia Bridge Comm., 113 W. Va. 110, 166 S.E. 819 (1932).14

Treatises

39 Am. Jur. 2d *Health* § 1617

Statutes

West Virginia Code, § 16-2-5, 8, 1113, 14

V.
DISCUSSION OF LAW

THE HONORABLE LOWER COURT ERRED, ABUSED ITS DISCRETION, AND WAS CLEARLY ERRONEOUS IN GRANTING SUMMARY JUDGMENT BY FINDING THAT NO LEGAL ANNOUNCEMENT OF COMPETITIVE BIDDING IS NECESSARY WHEN A LOCAL COMBINED BOARD OF HEALTH SEEKS TO RELOCATE ITS FACILITIES, BY FINDING THAT NO GENUINE ISSUES OF MATERIAL FACT EXISTED REGARDING WHETHER CONSTRUCTIVE FRAUD EXISTED UNDER *MILLER*, AND BY CONSISTENTLY RULING THAT THE APPELLANTS HAD TO PROVE ACTUAL FRAUD TO MAINTAIN AN ACTION.

The Absence of Competitive Bidding

The Appellee governmental entity has taken the position that it was not required to publically solicit competitive bids or even to advertise for potential properties to relocate the Health Department facilities. However, Appellants argue that there are at least three reasons why it was required to do so: 1) Procurement constraints of its sources of funding, 2) Procurement restraints of its creating agencies, and 3) Fair and open government.

Appellee is a recipient of local, state and federal funds, and is itself a governmental statutory entity. If a governmental or quasi-governmental agency receives funding from other governmental entities, it must use a procurement process that is at least as comparatively rigorous as that of the funding agency. This doctrine is seen daily across all governmental agencies including, for example, local boards of education which must

comply with attendance, nutrition, disability accommodation, and achievement standards of the federal and state governments because they receive funding from those entities. Likewise, it is apparent from the City's charter that it would be constrained to solicit competitive bids in acquiring a lease to third party owned real estate.¹ The County is or should be likewise constrained. In *West Virginia Utility*

¹ "SECTION 32. CONTRACTS AND PURCHASES" of the "CHARTER, CITY OF CLARKSBURG, WEST VIRGINIA" provides as follows:

"All contracts and purchases by any City officer, department or agency shall be void unless made in conformity with all applicable provisions of general law, this Charter, and with all rules and regulations fixed by ordinance, from time to time, concerning a dollar amount for which competitive bids shall be required for contracts for improvements or purchases of materials, supplies and equipment.

"In the case of contracts for the construction of any improvements in which competitive bids shall be required, sealed competitive bids shall be obtained by notice published at least once each week for two successive weeks in any two newspapers of opposite politics published in the City. The notice shall refer to necessary specifications and plans, shall invite the submission of bids, and shall specify the date on which the bids will be opened. In the case of contracts or purchases of supplies, materials and equipment or personal services, sealed competitive bids shall be obtained either (a) by published notice inviting bids as in the case of contracts for the construction of improvements, or (b) by mailed notice stating the necessary specification, inviting the submission of bids, and stating the date on which the bids will be opened. The first of these methods shall be used unless the Council or Water Board, as the case may be, shall enter an order of record authorizing the use of the second method and stating the reasons why such method was authorized. Whether or not it is so stated in the published mailed notice, all bids may be rejected. No City officer, department or agency shall subdivide any contract or purchase for the purpose of evading the requirements of this section with respect to competitive bidding.

"The Water Board with respect to any improvements, extensions or additions to the water system, and the Council with respect to City improvements under its jurisdiction, shall cause to be prepared accurate and complete maps, plans and specifications therefor [sic] and shall have the authority to cause such work to be done either by the employment of labor and the furnishings of material, or by entering into a contract for the performance of the labor and for the material. If a contract is let for any improvement, the Water Board or the Council, as the case may be, shall require the contractor to give a sufficient bond with corporate surety to guarantee the faithful performance of the contract and the payment for all labor performed and all materials furnished in the performance of the contract, as provided in section thirty-nine, article two, chapter thirty eight of the official code of West Virginia, as amended. Any change or alteration in the contract after it is entered into shall be made only upon resolution passed by the Water Board. or the Council, as the case may be, and shall not be effective until the price to be paid for the work and material, or both, under the altered or modified contract, shall have been agreed upon in writing and such agreement signed by the contractor and the general manager with the approval of the Water Board. or the City Manager with the approval of the Council, as the case may be.

"The Water Board with respect to contracts and purchases of the Water Department, and the City Council, with respect to contracts and purchases of other City offices, departments and agencies, may by resolution prescribe additional rules and regulations governing the making of contracts and purchases, not inconsistent with general law or with the provisions of this Charter.

"In the case of an emergency the City Council or Water Board, as the case may be, may by special resolution setting forth the facts constituting' the emergency dispense with the requirement of competitive

Contractors Association v. Laidley Field Athletic and Recreational Center Governing Board, 164 W.Va. 127, 260 S.E.2d 847 (1979), that board argued that it had no legal duty to advertise for competitive bids. However, that aggrieved plaintiff “[A]mong other points, ... prayed that the court declare that contracts entered into by the Laidley Field Athletic and Recreational Center Governing Board be awarded only after the Board complied with the competitive bidding requirements imposed by law upon the Governing Board's creating agencies, The Board of Education of the County of Kanawha, The County Commission of Kanawha County, and The State of West Virginia by the Department of Finance and Administration.” *Id* at 127 (emphasis added). The Circuit Court of Kanawha County dismissed the action, but the Supreme Court reversed and remanded the case. Also, this High Court held the City of Cameron to the use of competitive bidding regarding resurfacing streets in *Burgess v. City of Cameron*, 113 W. Va. 127, 166 S.E. 113 (1932). See Syl. Pt. 1.

In the instant case, the “creating agencies” (of the combined county-municipal Board) are the Harrison County Commission and the City of Clarksburg (and the State of West Virginia by statute), each of which would have had to advertise to lease office space or

bidding and with the requirements of its rules and regulations governing contracts and purchases.

“Any officer or employee of the City who shall be directly or indirectly interested in any contract with the City, or in the profits to be derived there from, shall forthwith forfeit his office or employment, and in addition thereto any such contract shall be void and unenforceable against the City. The acceptance by any officer or employee of any interest in such contract or of any gift or gratuity from any person, firm or corporation dealing with the City which might influence the officer or employee and in the discharge of his duties shall forever disqualify such officer or employee from holding any office or employment in the City government, and in addition he shall be subject to criminal prosecution as provided by general law or by City ordinance. (Amended February 18, 1982)”

otherwise acquire real property. The higher purpose here is to make and keep local government beyond question of impropriety. “Published notice for competitive bids was provided by the legislature as a safeguard to the taxpayer against private avidity and official indifference. This beneficial provision has no value if it can be disregarded. The evils which imperatively demand these restrictive statutes are of common notoriety. They can be held in check only by regarding as mandatory the statutory provisions designed to circumvent them.” *Burgess v. City of Cameron*, 113 W.Va. 127, 133, 166 S.E. 113 (1932). Requiring the Board of Health to comply with the competitive bidding procedures required of its creating agencies is not much of a burden compared to the return in public interest and trust. The statute which authorizes the Board to act in acquiring facilities is West Virginia Code, §16-2-11(a)(4) and imposes the power and duty to “Provide equipment and facilities for the local health department that are in compliance with federal and state law.” Certainly, the State of West Virginia and the federal government have to utilize competitive bidding processes in obtaining office space.

Further, if this Court allows newspaper articles to substitute for proper legal advertisements, the consequences will be dire, including an exponential increase in the dockets of the courts in interpreting whether a particular news article sufficiently sets forth the necessary elements in each instance. The lower court ignoring the lack of competitive bidding in this case, including any advertisement, is a question of law and, with sincere respect, constitutes an abuse of discretion.

The Imposition of the Standard of 'Actual Fraud'

The lower court's finding that the Appellants had to show actual fraud is inconsistent with the case law of this State. The leading authority under West Virginia law that stands for the proposition that this action should have been allowed to proceed to the trier of fact held that citizens and taxpayers of a county can maintain a suit to determine the validity of the purchase of a toll bridge by the county and is *Miller v. Huntington, etc., Bridge Co.*, 123 W. Va. 320, 15 S.E.2d 687 (1941). See also *Davis v. West Virginia Bridge Comm.*, 113 W. Va. 110, 166 S.E. 819 (1932). Syllabus Point 1 of that decision holds that "Where a power is vested in a public authority, and the exercise of such power is allegedly tainted by fraud, the same may be set aside at the suit of a citizen and taxpayer of the political subdivision in which such authority is permitted to function." Fraud, in *Miller*, was "constructive fraud," – not actual fraud - which was defined as "a breach of a legal or equitable duty, which, irrespective of moral guilt of the fraud feisor, the law declares fraudulent, because of its tendency to deceive

others, to violate public or private confidence, or to injure public interests.' *Miller v. Huntington & Ohio Bridge Co.*, 123 W.Va. 320, 15 S.E.2d 687 (1941)(emphasis added). See also, *Steele v. Steele*, 295 F.Supp. 1266 (S.D. W.Va. 1969); *Bowie v. Sorrell*, 113 F.Supp. 373 (W.D. Va. 1953); *Loucks v. McCormick*, 198 Kan. 351, 424 P.2d 555 (1967); *Bank v. Board of Education of City of New York*, 305 N.Y. 119, 111 N.E.2d 238 (1953); *Braselton v. Nicolas & Morris*, 557 S.W.2d 187 (Tex.Civ.App. 1977)." Particularly, in *Miller*, the constructive fraud was identified in Syllabus Point 6 to be "Where it is sought to set aside the purchase of any property which a county court may lawfully acquire, on the ground that the price paid therefor was so excessive as to constitute constructive fraud, there must be a clear showing that the amount paid therefor was in excess of the market value thereof, to the extent that it plainly appears that in fixing the price to be paid a reasonable discretion was not exercised by the court." (Emphasis added). All of which is substantially similar to the Appellants' allegations in the instant case, though the multitude of proof in the instant case is a much stronger reason to allow the Appellants to proceed than those cited and explored in *Miller*. The lower court consistently ruled that a showing of actual fraud was necessary.

In the instant case, the Appellants have set forth multiple reasons in their complaint why the transactions for the relocation of the Department of Health offices are highly suspect, including the price paid for the new facilities in contrast to the other facilities allegedly considered by the Appellee and their suitability, the fact that the Board of

Health members wholly relied upon their executive director to arbitrarily assign worth to prospective properties when the board members didn't even know what the numbers meant or how they were produced and worse yet, for which there was no standard of compilation or interpretation. The numbers on Exhibit One are, in the strictest mathematical/scientific sense, *arbitrary*. Further, the Appellants have alleged the existence of a conflict of interest existed between the successful "bidder" and the Appellee due to the relationship between the office of the city attorney and the ownership and representation of the corporation owning the selected property being a member of the law firm which represents the City of Clarksburg ((Main Street Realty, Inc., represented by Young, Morgan & Cann, and owned by Mr. Carmine Cann, Esquire).

Arbitrariness of the Selection Process

The Board of Health members did not have discretion to abdicate their responsibility to another in making the decisions regarding relocation, and this alone fits the definition of constructive fraud under *Miller*: "*a breach of a legal or equitable duty, which, irrespective of moral guilt of the fraud feason, the law declares fraudulent, because of its tendency to deceive others, to violate public or private confidence, or to injure public interests.*" (Emphasis added). "[U]nder the general rule that requires a meeting and deliberation of all members of a body appointed to perform a duty calling for the exercise of discretion, it has been held that an order is invalid when it is shown to have been made by only two or three members of an

executive committee of a board of health, when the other member was not present.” 39 Am. Jur. 2d Health § 16, citing *Wilson v. Alabama G. S. R. Co.* 77 Miss 714, 28 So. 567. In the case at bar, the decision of the Board was far more arbitrary and questionable since the decision-making was not conferred to an executive committee, but to an individual employee of the Board. The deliberation requirement – the duty - was absolutely not satisfied herein.

The Executive Director’s assignment of numeric values to variables he created with no legend, key, or standard for arriving at the values is the scientific definition of arbitrariness. It is the legal one as well. The Board members testified that they did not know the meaning of the numbers. The narrowing of the potential sites by the Executive Director was likewise arbitrary, and his “recommendation” of the site selected was contrary to reason.

The local Board of Health is a creature of statute alone, and any and all powers it has are conferred by statute. The pre-textual “bidding” process in the case at bar constitutes a deprivation of the Federal and State constitutional rights of the Appellants, violating equal protection of the law and various other necessary and proper rights and immunities owing Appellants and the citizens of this jurisdiction.

Significant Genuine Issues of Material Fact Exist

The Appellants had a definite and unequivocal right to bring, maintain and pursue this action under several theories of law and equity. There were multiple genuine issues of material fact which should have survived summary judgment, the main one

being whether the selection process was arbitrary or worse (constructive fraud). This is a factual question and not a legal question.

Therefore, the lower court acted erroneously and deprived your Appellants of significant rights by disposing of Appellants' claims on summary judgment. The question is whether a local combined board of health should be permitted to relocate its facilities in such a manner without a trier of fact being able to question it. Appellants respectfully assert that it should not be.

PRAYER FOR RELIEF

Your Appellants respectfully request that this matter be remanded to the Circuit Court of Harrison County West Virginia and be permitted to proceed to trial by jury, and that they be granted any and all other necessary relief.

BERNARD J. FOLIO and
GRANDEOTTO, INC.,
By Counsel,



Jerry Blair
Attorney At Law, WWSB No. 5924
Blair, Conner & McIntyre-Nicholson PLLC
P. O. Box 1701
Clarksburg, WV 26302-1701
(304) 622-3334

Counsel for Appellants

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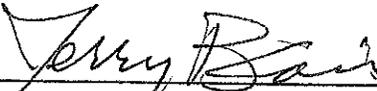
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CLARKSBURG BOARD OF HEALTH,

Appellee.

CERTIFICATE OF SERVICE

I, Jerry Blair, hereby certify that I have on this 7th day of December, 2007, given notice of the filing of the foregoing "Appellants' Brief On Appeal" by placing true copies of same, in the US mail, postage prepaid, in envelopes addressed as follows:

Michael J. Florio
Attorney At Law
333 East Main Street
Clarksburg, WV 26301



JERRY BLAIR

ATTORNEY AT LAW, WVSB NO.: 5924
BLAIR, CONNER & McINTYRE-NICHOLSON PLLC
P.O. BOX 1701
CLARKSBURG WV 26302-1701
(304) 622-3334
Counsel for Appellants