

CASE NO. 33707

**THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
(ON APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY)**

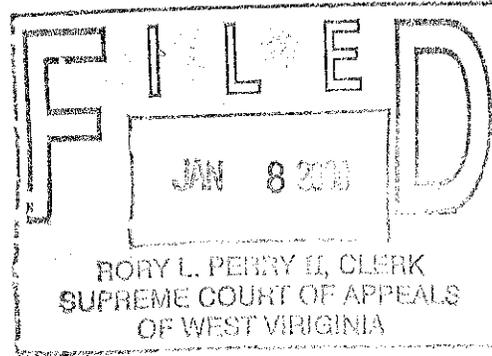
**BERNARD J. FOLIO, as individual, and
GRANDEOTTO, INC., a corporation,**

Appellants,

v.

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

Appellees.



BRIEF OF APPELLEES

Michael J. Florio (WV ID #6313)
Florio Law Offices
333 East Main Street
Clarksburg, WV 26301
(304) 626-3000

Counsel for Appellees

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TABLE OF AUTHORITIES

STATE CASES

West Virginia Utility Contractors Association v.
Laidley Athletic Field & Recreational Center Governing Board,
164 W. Va. 127, 260 S.E.2d 847 (1979) 5-6

Miller v. Huntington & Ohio Bridge Co.,
123 W. Va. 320, 15 S.E.2d 687 (1941) 6

I. RESPONSE TO DESCRIPTION OF PROCEEDINGS

After the Harrison-Clarksburg Health Department (the "Health Department") made a tentative decision to relocate its headquarters to property other than property owned by appellant Grandeotto, Inc., the appellants filed suit challenging the decision. However, Grandeotto, Inc. and Mr. Folio (collectively referred to herein as "Grandeotto") did not seek any form of preliminary relief in their suit, and made no effort to block the finalization of the decision to relocate. Thus, with no Court Order barring its move, the Health Department finalized its decision to relocate and implemented the decision in early 2005.

The Health Department promptly filed a motion to dismiss the action, as did the City of Clarksburg, which was an original defendant to the proceedings. By Order entered on June 30, 2005, the Circuit Court dismissed the claims made against the City of Clarksburg, and also dismissed a claim against the Health Department based on the composition of the organization's Board at the time that the tentative decision was made. (Order of 6/30/05.) As to the substantive challenge to the relocation decision, the Circuit Court ruled that the decision could be overturned only upon proof of: (1) fraud; (2) collusion; or (3) palpable abuse of discretion. (Order of 6/30/05 at 9-10.)

Discovery proceeded. At the close of discovery, the Health Department filed a motion for summary judgment based on the absence of evidence of fraud, collusion, or palpable abuse of discretion. The Circuit Court agreed that no such evidence existed.

II. COUNTERSTATEMENT OF THE CASE

A. The Health Department.

The Harrison-Clarksburg Health Department provides basic public health services to the citizens of Harrison County. (Bundy Aff. ¶ 4.)¹ Pursuant to express provisions of the West Virginia Code, the City of Clarksburg and Harrison County have joined together to provide these services, as the Harrison-Clarksburg Board of Health.

B. The Need For Space.

Prior to April 2001, the Harrison-Clarksburg Health Department enjoyed rent-free facilities in the Harrison County Courthouse. Due to an overall lack of space, however, the Harrison-Clarksburg Health Department was required to locate alternative offices, at its own expense. (Bundy Aff. ¶ 5.) The Harrison-Clarksburg Health Department moved to the Policano Building, located on Third Street in Clarksburg. (Bundy Aff. ¶ 6.)

C. The Search For A New Home.

With its monthly rent set to increase from \$3,200 per month to \$5,800 per month as of April 1, 2005, the Harrison-Clarksburg Board of Health decided at its June 10, 2004 meeting to search for a new home. (Bundy Aff. ¶ 8 & Ex. 1.) Consequently, the Health Department embarked on a search for alternative accommodations. The search considered multiple potential properties. Within roughly a month, ten proposals were received. (Bundy Aff. ¶ 9 & Ex.2.)²

¹ A copy of the Affidavit of Joseph C. Bundy, which was introduced below, is attached hereto as "Exhibit A."

² Eventually, more than 20 proposals were submitted.

On October 19, 2004, the Board of Health considered a list of potential destinations that had been narrowed to three. (Bundy Aff. ¶ 10 & Ex. 3.) The Health Department's Administrator, Chad Bundy, recommended that the Board of Health select the property on Main Street that previously housed the Toothman Rice accounting firm. (Bundy Aff. ¶ 11.) After discussion regarding the issue, the Board of Health unanimously accepted Mr. Bundy's recommendation. (Bundy Aff. ¶ 12.)

D. The Selection Of A New Location.

On January 11, 2005, the Harrison-Clarksburg Board of Health decided to enter into a formal and binding lease agreement with Main Street Realty, Inc. for the former Toothman Rice building. (Bundy Aff. ¶ 15 & Ex. 5.) The Grandeotto property was one of the finalists.

E. The Lawsuit.

After the tentative decision was made but before the decision was finalized, Grandeotto initiated this action. Because, however, Grandeotto did not seek preliminary relief and because the Health Department could not delay its decision, the decision to move was finalized while the action was pending.

In the lawsuit, Grandeotto has challenged the process the Board of Health utilized in selecting the new location for the Health Department's facilities. (Complaint ¶¶ 29-30.) Grandeotto also alleges that the Board of Health had an "inherent conflict of interest" in making its selection of a new location, (Complaint ¶ 31), and that the actions constitute a breach of fiduciary duty and the public trust, (Complaint ¶ 33), malfeasance, (Complaint ¶ 34), and a misuse of public funds, (Complaint ¶ 35). The lawsuit demands that the Court void the current contract, and that the Court order that the selection process be "done again," (Complaint at 9-10).

F. The Court's Order Of June 30, 2005.

In the Order dismissing separate claims relating to the composition of the Board of Directors, the Court acknowledged that the relocation decision could be set aside under certain limited circumstances. (See Order of 6/30/05 at 9-10.) As the Court observed, the three factors that can justify a reversal of a discretionary decision are: (1) fraud; (2) collusion; or (3) palpable abuse of discretion.

G. The Summary Judgment Order.

After carefully considering the arguments of the parties and giving Grandeotto multiple opportunities to present authority articulating a legal standard that the relocation decision violated, the Circuit Court entered a thorough, detailed Order granting the motion for summary judgment. The Order carefully sets forth the evidence developed during the discovery process, and concludes that there is no evidence of fraud (actual or constructive), collusion, or palpable abuse of discretion. (Order of 3/13/07 at ¶¶ 24-27.)

III. ARGUMENT

Throughout this action, Grandeotto has offered various different bases for its attack on the relocation decision, but has at no time set forth any legal authority that supports the use of the courts as a vehicle for challenging the decision.

On appeal, Grandeotto focuses its claims on the absence of formal competitive bidding, and on the alleged presence of constructive fraud. Specifically, Grandeotto claims that the Circuit Court “abused its discretion” and “was clearly erroneous” in ruling that competitive bidding was not required in this specific situation, and that the Court erred in finding that there was no evidence of constructive fraud.³

A. Competitive Bidding Was Not Required.

The Health Department acknowledges that potential candidates for the relocation were not solicited via a legal advertisement. As the Circuit Court correctly concluded, “no legal authority exists that requires the Board of Health to obtain a legal advertisement for procuring competitive bids in the purchase of a building.” (Order of 3/13/07 at 25 (¶ 19).) More importantly, any alleged deficiency in this regard was rendered moot by the fact that the decision to identify a new location received significant publicity in the local media – and by the fact that Grandeotto submitted a proposal absent a legal advertisement inviting it to do so. (Order of 3/13/07 at 5 (¶¶ 10-11).)

Grandeotto nevertheless persists in its argument that legal advertisements and competitive bidding were required, but without identifying a single statute or decision of this Court requiring the Health Department to proceed in this fashion. The case cited at pages 11 through 12 of the petition for appeal, West Virginia Utility Contractors Association v. Laidley Athletic Field &

³ A de novo standard is likely the appropriate basis for review in this case.

Recreational Center Governing Board, 164 W. Va. 127, 260 S.E.2d 847 (1979), does not compel such a procedure.⁴ Indeed, no authority cited by Grandeotto in the underlying litigation, the petition for appeal, or the initial brief on appeal requires legal advertisements or competitive bidding in these circumstances. Thus, on this point, the decision of the Circuit Court should be affirmed.

B. There Is No Evidence Of Constructive Fraud.

In support of the position that proof of “constructive fraud” may override the relocation decision, Grandeotto cites a 66-year-old decision of this Court that defines the term. (Appellants’ Brief at 14-15.) The trigger for a finding of constructive fraud is a price paid that is “so excessive as to constitute constructive fraud,” along with 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.” Miller v. Huntington & Ohio Bridge Co., 123 W. Va. 320, 15 S.E.2d 687, 687-88 (1941). Here, there simply is no evidence of constructive fraud, either through any differences between the rent paid at the Health Department’s new location or any other factors that, when considered together or in isolation, reflect the kind of clear excess or impropriety on which reasonable minds cannot differ. Id. (“Where the question of market value of property is one on which reasonable minds may differ, the purchase thereof by county court at a price within the range of differences of opinion as to its value will not be set aside as constructively fraudulent on ground of excessiveness in price paid.”).

⁴ The Laidley Field case dealt only with the availability of a declaratory judgment, and addressed no issues relating to the bidding process in that specific situation. Also, the project at issue in the Laidley Field case was for the construction of a facility, not for relocation into an existing building.

The Health Department needed a suitable location for its facilities. It assessed the options, and it selected a property other than the property owned by Grandeotto. The chosen property was essentially ready for occupation; the Grandeotto property needed to be built out, at the expense of the Health Department.⁵

The problem with paying for the build out was that, at the end of the five-year lease term, the Health Department would have had nothing to show for the investment made in improving the facility. Moreover, the Health Department would have been at risk of a dramatic increase in the rent to be paid for the remodeled property.

Most importantly, there was and is no evidence that the price paid for the Health Department's eventual location was and is in excess of market value, primarily since Grandeotto at no time introduced into the record evidence of the market value for the property. Absent such evidence, there can be no proof of constructive fraud.

The simply reality of this case is that Grandeotto believes that it was in some way "wronged" by the decision of the Health Department not to use its property. Such subjective feelings of unfair treatment arise in virtually every walk of life, because decisions between two or more options are made constantly in our society.

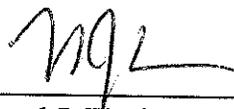
Our court system is the appropriate avenue for the review of such decisions only where there is some legal standard that has been violated. In this case, Grandeotto has had every fair and proper opportunity to assert a legal standard that would support a reversal of the decision. It has been unable to do so, because there is no standard that the Health Department violated. For these

⁵ In their petition, Grandeotto claimed that the cost of the build-out was to be paid by Grandeotto. (Petition for Appeal at 5-6.) Grandeotto's counsel subsequently informed the Court that this representation regarding build-out costs was not accurate.

reasons and for all of the reasons set forth in the Circuit Court's Order entering summary judgment, the Circuit Court's decision should be affirmed.

WHEREFORE, the appellees, Harrison-Clarksburg Health Department and Harrison-Clarksburg Board of Health, request that the Court affirm in full the decision of the Circuit Court of Harrison County.

Dated the 7th day of January, 2008.



Michael J. Florio (WV ID #6313)
Florio Law Offices
333 East Main Street
Clarksburg, WV 26301
(304) 626-3000

Counsel for Appellees

THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
(ON APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY)

CASE NO. 072431

BERNARD J. FOLIO, as individual, and
GRANDEOTTO, INC., a corporation,

Petitioners-Plaintiffs,

v.

HARRISON-CLARKSBURG HEALTH
DEPARTMENT and HARRISON-CLARKSBURG
BOARD OF HEALTH, bodies existing under
Chapter Sixteen of the Code of the State of West Virginia,
and the CITY OF CLARKSBURG, a municipal corporation
existing under the laws of the State of West Virginia,

Respondents-Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of January, 2008, I served the foregoing

“Brief of Appellees” upon counsel of record by depositing a true copy thereof in the United States
mail, postage prepaid in an envelope addressed as follows:

Gerald E. Blair, Jr., Esquire
P.O. Box 1701
Clarksburg, WV 26302



Michael J. Florio (WV ID #6313)
Florio Law Offices
333 East Main Street
Clarksburg, WV 26301
(304) 626-3000

Counsel for Appellees

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

BERNARD J. FOLIO, as individual, and
GRANDEOTTO, INC., a corporation,

Plaintiffs,

v.

CIVIL ACTION NO. 04-C-659-1
(JUDGE JOHN LEWIS MARKS, JR.)

HARRISON-CLARKSBURG HEALTH
DEPARTMENT and HARRISON-CLARKSBURG
BOARD OF HEALTH, bodies existing under
Chapter Sixteen of the Code of the State of West Virginia,
and the CITY OF CLARKSBURG, a municipal corporation
existing under the laws of the State of West Virginia,

Defendants.

AFFIDAVIT OF JOSEPH C. BUNDY

I, Joseph C. Bundy, having been duly sworn, hereby testify as follows:

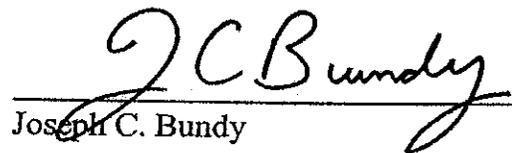
1. I am a resident of the State of West Virginia, and I am over the age of 21.
2. I am the Executive Director of the Harrison-Clarksburg Health Department.
3. I have knowledge of the matters set forth herein as a result of my own personal observations and/or as a result of the information made available to me in my professional capacity.
4. The Harrison-Clarksburg Health Department provides basic public health services to the citizens of Harrison County.
5. Prior to April 2001, the Health Department was headquartered in the Harrison County Courthouse. Due to space limitations, the Health Department was required to locate alternative office space, at its own expense.
6. The Health Department moved to the Policano Building on April 1, 2000.

EXHIBIT A

7. As of April 1, 2005, the Health Department's rent at the Policano Building will increase from \$3,200 per month to \$5,800 per month.
8. At the June 10, 2004 meeting of the Harrison-Clarksburg Board of Health, the Board of Health decided to search for a new home. The minutes of the Board's June 10, 2004 meeting are attached as "Exhibit 1."
9. The Health Department began to search for other possible locations. As noted in the minutes of the Board of Health's July 13, 2004 meeting, ten proposals were initially received. The minutes of the Board's July 13, 2004 meeting are attached as "Exhibit 2."
10. At a meeting conducted on October 19, 2004, the Board of Health considered a list of possible locations that had been narrowed to three. The minutes of the Board's October 19, 2004 meeting are attached as "Exhibit 3."
11. At the October 19, 2004 meeting of the Board of Health, I recommended that the Health Department move to the property located on Main Street in Clarksburg, where the accounting firm of Toothman & Rice previously was headquartered.
12. The Board of Health voted unanimously to accept my recommendation.
13. Mary Ann Iquinto initially was appointed to the Board of Health by the City of Clarksburg. When she moved from Clarksburg to Bridgeport, she was not removed from the Board of Health.
14. On December 14, 2004, the Harrison County Commission appointed Mrs. Iquinto to the Board of Health. At that same time, the City of Clarksburg appointed Mrs. Joyce Rabanal to position on the Board of Health previously held by Mrs Iquinto. The minutes of the Board's December 14, 2004 meeting are attached as "Exhibit 4."

15. On January 11, 2005, the Board of Health made final its decision to move the Health Department to the location that previously housed the law firm of Toothman & Rice, directing me to enter into a formal and binding lease agreement with the owner of the property. The minutes of the Board's January 11, 2005 meeting, which will be submitted for approval the Board of Health's February 8, 2005 meeting, are attached as "Exhibit 5." The Board of Health took this action after Mrs. Iquinto was appointed to the Board of Health by the Harrison County Commission.

Further the affiant sayeth naught.



Joseph C. Bundy

Taken, sworn to and subscribed before me this 20th day of January

2004. 2005.



Notary Public

My Commission Expires:

