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NO. 35288

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

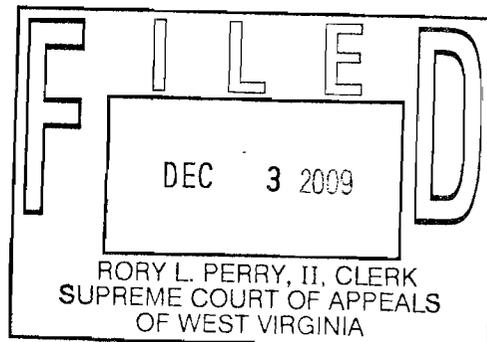
**JAMES MICHAEL CASEY, D.V.M., M.S.,**

*Petitioner below, Appellee,*

v.

**WEST VIRGINIA BOARD OF  
VETERINARY MEDICINE,**

*Respondent below, Appellant.*



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**APPELLANT'S BRIEF**

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NO. 35288

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JAMES MICHAEL CASEY, D.V.M., M.S.,

*Petitioner below, Appellee,*

v.

WEST VIRGINIA BOARD OF  
VETERINARY MEDICINE,

*Respondent below, Appellant.*

**APPELLANT'S BRIEF**

I.

**KIND OF PROCEEDING AND NATURE OF RULING BELOW**

The Appellant, the West Virginia Board of Veterinary Medicine (Board), sought to appeal an April 14, 2009, final Order Granting Writ of Mandamus by the Circuit Court of Kanawha County, West Virginia. This matter involved a determination by the Board that the Appellee's, James M. Casey, application for a veterinary license was incomplete due to a missing National Board Examination score, and as such, the Board would not issue the Appellee a veterinary license in the State of West Virginia.

The Appellee believed otherwise and filed a Petition for Writ of Mandamus and Petition for Declaratory Judgment on May 7, 2007, in the Kanawha County Circuit Court. An evidentiary

hearing was eventually held on March 14, 2008,<sup>1</sup> and the parties filed Proposed Findings of Fact and Conclusions of Law on April 7, 2008, based upon evidence that had been admitted at this hearing. Subsequently, a Motion to Strike was filed on April 14, 2008, by the Board regarding Exhibit 1 of the Appellee's Proposed Findings of Fact and Conclusions of Law; however, this *Motion* went unanswered by Appellee's counsel and the Kanawha County Circuit Court.

Finally, the Kanawha County Circuit Court issued its decision on April 14, 2009, granting a Writ of Mandamus to the Appellee, and the Board sought to appeal this final Order Granting Writ of Mandamus to this Court which accepted *Petition for Appeal* on October 29, 2009.

## II.

### **STATEMENT OF FACTS**

The Appellant, the West Virginia Board of Veterinary Medicine, was created by statute, W. Va. Code § 30-10-1 *et seq.*, to supervise the practice of veterinary medicine. Moreover, the Board has the power to issue and/or deny licenses to practice veterinary medicine within the state of West Virginia, and the Appellee, Dr. James M. Casey, D.V.M., in the instant matter had submitted an application for a license to practice veterinary medicine in the state of West Virginia.

However, the Appellee never completed his application to the Board, and as such the Board was unable to act upon the application. In February 2004, the Appellee first contacted the Board in order to obtain an application for licensure in the state of West Virginia. However, the Appellee

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<sup>1</sup>The evidentiary hearing was initially scheduled for November 29, 2007, but was continued at the request of the Appellee.

did not make an application with the Board until March 2005.<sup>2</sup> *See* March 14, 2008, Evidentiary Hearing Transcript, at 41-42 (hereinafter “3/12/08 R. at \_\_\_”).

In reviewing the Appellee’s application, the Board determined the application lacked a National Board Examination (NBE) score reported from the Veterinary Information Verification Agency (VIVA), and as such the Appellee’s application was incomplete.<sup>3</sup> The Board sent the Appellee correspondence dated May 6, 2005, to the Appellee’s address in Laurel, Maryland, which explained that his application was incomplete at that point. (3/12/08 R. at Ex. 1.) The letter specifically stated “[w]e cannot determine licensure after testing, until your file is complete.” However, based upon the Appellee’s verbal assurances that the NBE score would be forthcoming from VIVA, the Board permitted the Appellee to sit for the June 2005 West Virginia examination which he successfully passed.<sup>4</sup> (3/14/08 R. at 42, 44-45.)

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<sup>2</sup>It is interesting to note that the Appellee retained an attorney in September 2004 to represent his interests in the application process; yet, he did not file his application until March 2005.

<sup>3</sup>Please note that the national reporting service used by the Board in 1987 when the Appellee first took the National Board Examination was the Interstate Reporting Service; however the Interstate Reporting Service was replaced by VIVA in late 1999 wherein the Interstate Reporting Service transferred all of its data to VIVA. (3/14/08 R. at 37-38.)

<sup>4</sup>There were three methods of obtaining a veterinary license in the state of West Virginia when the Appellee made application in March 2005. First, one could obtain a license by examination. To be licensed by examination, the applicant needs to achieve a passing score on the national board examination as determined by the criteria developed by the Board, have the scores transmitted to the Board’s office by a national testing service, and achieve a passing score on the state jurisprudence examination. *See* W. Va. Code § 30-10-6 and W. Va. Code R. § 26-1-3.10, *amended* by W. Va. Code R. § 26-1-1 *et seq.* (2006). Second, one could obtain a license by reciprocity if the applicant meets several criteria; however this method of licensure is at the discretion of the Board. *See* W. Va. Code § 30-10-8 and W. Va. Code R. § 26-1-8.4, *amended* by W. Va. Code R. § 26-1-1 *et seq.* (2006). Finally, one could obtain a veterinary license in the state of West Virginia by applying pursuant to W. Va. Code § 30-10-8, which permits licensure without written examination. This method of licensure is also purely discretionary with the Board.

Yet, the Appellee, to date, has failed to provide the Board a NBE score from VIVA, and the only application the Appellee has submitted to the Board for consideration is the incomplete March 2005 application submitted pursuant to W. Va. Code § 30-10-6.<sup>5</sup> (3/14/08 R. at 42.) Although, Appellee argues that he has submitted his NBE test scores which showed that he passed; however, the test scores are from the state of Georgia which show only that he passed and was eligible for licensure in that state according to its testing criteria. Each state, including Georgia, at that time had different scores that were considered passing by that state. Moreover, it is unknown how Georgia calculated its passing test scores, and the fact that the Appellee may have had a score that was considered “passing” in Georgia does not mean that the Appellee would necessarily have had a “passing” test score here in West Virginia even with the two states using the same standard deviation at the time. Each state has its own methodologies in calculating test results and required different tests to be taken by the applicant.

An example of this difference is found with the state of Georgia which required the Clinical Competency Test (CCT) in addition to the NBE at the time the Appellee applied for licensure. As explained in the letter dated July 2, 2007, from Dr. John Boyce, Executive Director of the National Board of Veterinary Medical Examiners, to Wanda Goodwin, Executive Director of the Board, it states that “[s]ome agencies take average scores from more than one test. Some agencies adjust their criteria down a few points from the scores reported here. If you received converted or “percent” scores from the state or province where you took the test, they may not correspond to anything on

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<sup>5</sup>It should be noted that the passing test score for West Virginia for the December 1987 national test would have been 209.37. This passing test score is calculated by multiplying the 1.5 standard deviation used by West Virginia at the time by the standard deviation for the December 1987 tests results. This figure is then subtracted from the average test score achieved on the December 1987 test, and this results in the West Virginia passing test score for the national examination.

this page. Such scores (usually between 60-90) are for use only by the agency issuing them. This table applies only to Raw scores or z-scores.”<sup>6</sup> Georgia did not interpret the raw scores to the state of West Virginia specifications.

The Kanawha County Circuit Court clearly erred when granting the writ of mandamus since there is no clear legal right to a veterinary license in the state of West Virginia as shown by any method of licensure. Moreover, the Kanawha County Circuit Court erred when accepting the NBE test scores from the state of Georgia as passing test scores in the state of West Virginia, and finding that the Appellee met the qualifications for application by reciprocity since both of these findings are outside the jurisdiction for determining whether a writ of mandamus lies. The Kanawha County Circuit Court further erred when it made its findings based upon information not admitted into evidence as shown by the record.

### III.

#### ASSIGNMENT OF ERRORS

- A. THE CIRCUIT COURT COMMITTED CLEAR LEGAL ERROR WHEN IT FOUND THAT THERE WAS A CLEAR LEGAL RIGHT TO A VETERINARY LICENSE BY RECIPROCITY, THAT THERE IS A LEGAL DUTY BY THE BOARD TO ISSUE A VETERINARY LICENSE, AND THE ABSENCE OF ANOTHER ADEQUATE REMEDY.

A writ of mandamus will not issue unless three elements co-exist-(1) a 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.

*State ex rel. Human Resources Development and Employment v. Board of Risk and Insurance Management*, 214 W. Va. 460, 590 S.E.2d 653 (2003), citing Syl. Pt. 2, *State ex rel. Kucera v. City*

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<sup>6</sup>Please note that the score as submitted in Exhibit 1 of the Respondent’s *Findings of Fact* was actually 82.

of *Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969). See also *State ex rel. Damron v. Ferrell*, 149 W. Va. 773, 143 S.E.2d 469 (1965); *State ex rel. McLaughlin v. W. Va. Court of Claims*, 209 W. Va. 412, 549 S.E.2d 286 (2001); *State ex rel. Brown Corp. of Bolivar*, 209 W. Va. 138, 544 S.E.2d 65 (2000); *State ex rel. Rahman v. Canady*, 205 W. Va. 84, 516 S.E.2d 488 (1999); *Hickman v. Epstein*, 192 W. Va. 42, 450 S.E.2d 406 (1994).

1. There is no clear legal right to a veterinary license by reciprocity.

Pursuant to W. Va. Code § 30-10-8, it permits applicants to obtain a license to practice veterinary medicine without examination; however the issuance of such a veterinary license is discretionary by the Board. Subsection (a) states “[t]he board may issue a license without written examination, and, subject to the provisions of subsection (b) of this section, . . . .” Moreover, in subsection (b) it states “[i]n its discretion, the board may orally and practically examine any person qualifying for licensing under this section, and may enter into agreements for reciprocal licensing with other jurisdictions. . . .”

Moreover, the Code of State Rules in 1992 that were found to be in effect at the time of the Respondent’s application did have provisions for application by reciprocity; however, it is clearly stated within these rules at § 26-1-8.4, “[a]ll applicants for license by reciprocity are hereby advised that the granting of licensure by reciprocity is by privilege, not by right; and the granting of the license rests solely in the discretion of the West Virginia Board of Veterinary Medicine.”

All of this language is discretionary in nature, and it is clear from the case law that “the purpose of the writ [of mandamus] as the enforcement of an established right and the enforcement of a corresponding imperative duty created or imposed by law.” *State ex rel. Affiliated Construction Trades Foundation v. Vieweg*, 205 W. Va. 687, 693, 520 S.E.2d 854, 860 (1999). See also *State ex*

*rel. McLaughlin v. W. Va. Court of Claims*, 209 W. Va. 412, 549 S.E.2d 286 (2001)(holding that the party seeking a writ must show clear legal right thereto and a corresponding duty on the respondent to perform the act demanded). “It is axiomatic, of course, that petitioners in mandamus must have a clear legal right to the relief sought therein and such right cannot be established in the proceeding itself.” *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 542, 170 S.E.2d 367, 369 (1969) *See also State ex rel. Richey v. Hill*, 216 W. Va. 155, 603 S.E.2d 177 (2004) (holding that the right itself cannot be established in the proceeding itself).

In other words, one must already have a clear legal right to the thing that the petitioner is attempting to obtain from the governmental agency. Yet, the Kanawha County Circuit Court still found that even though “such an application is at the discretion of the board, the court concludes that the denial of Dr. Casey’s application was arbitrary and capricious because substantial evidence exists that Dr. Casey has practiced in eight other states and has surpassed the requirements for licensure in the State of West Virginia.”

There are two errors with this finding by the Kanawha County Circuit Court. First, this Court, has held that the issuance of a writ of mandamus is normally inappropriate unless the right or duty to be enforced is not discretionary. *McComas v. Bd. of Educ. of Fayette County*, 197 W. Va. 188, 475 S.E.2d 280 (1996). However, there are exceptions to this rule as it appears that the Kanawha County Circuit Court seems to be alluding to in its reference of “arbitrary and capricious.”

This Court has found:

[i]t is true that mandamus will not ordinarily lie to control the performance of a discretion on the part of an administrative or executive office but it has been repeatedly held that when the act of such officer is capricious or arbitrary or under the misapprehension of law on the part of such officer the exercise of discretion may be controlled by mandamus.

*State ex rel. West Virginia Board of Education v. Miller*, 153 W. Va. 414, 421, 168 S.E.2d 820, 825 (1969). Moreover:

[i]n line with general principles relating to the remedy of mandamus, it has been recognized that in the absence of fraud, partiality, arbitrary or capricious conduct, or some ulterior motive, a judgment of the county board of education with respect to the qualifications of an applicant will be given deference upon judicial scrutiny.

*Tenney v. Board of Education*, 183 W. Va. 632, 634, 398 S.E.2d 114, 116 (1990).

Yet, in the instant case there was no deference given to the Board's actions nor was there any evidence of any arbitrary or capricious conduct nor fraud by the Board. Instead, the Kanawha County Circuit Court states that the Board's actions were arbitrary and capricious because of evidence that the Appellee had practiced as a veterinarian in other states, and according to the Court's judgement, the Appellee had surpassed the requirements for licensure in this state.

However, the second error in the court's finding is that there was no "substantial evidence" submitted to the Kanawha County Circuit Court by the Appellee. The Appellee did not testify during the March 14, 2008, Evidentiary Hearing, nor did he offer any documentary evidence at that time regarding his licensure in other states. The only evidence of any licensure in other states was Ms. Goodwin's affirmative answer to Appellee counsel's question of "he's licensed in seven or eight other states?" (3/14/08 R. at 56-57.) There was no testimony submitted regarding the calculation and methodology used by Georgia in determining a passing score. Ms. Goodwin was not permitted to testify to the calculation methodologies used by the state of Georgia. The only evidence was that the Appellee did indeed take the CCT in Georgia which was not required in West Virginia at the time.

Yet, when the Findings of Fact and Conclusions of Law were filed by the parties, the Appellee filed with his *Findings* an Exhibit 1 which contained the Appellee's credentials and

licensing from other states along with testing data from Georgia. The Appellant immediately filed on April 14, 2008, a *Motion to Strike* such Exhibit 1; however, the Kanawha County Circuit Court failed to rule on this outstanding motion. Yet, the Kanawha County Circuit Court seems to instead base its decision on information contained within this Exhibit 1 as evidence in this matter; however, the Board did not have any opportunity to object nor question these documents.<sup>7</sup>

If one looks to the record in the instant case, one would find that the only individual who testified at the evidentiary hearing held on this matter was Wanda Goodwin, the Board's Executive Director since 1980. Ms. Goodwin testified that in her time with the Board that no applicant has been issued a license to practice veterinary medicine in the state of West Virginia based upon reciprocity without first submitting a passing NBE test score. Moreover, as Ms. Goodwin testified there were reciprocal agreements with three states. The states were Ohio, Kentucky, and Florida; however, those agreements were not in place when the Appellee submitted his application. (3/14/08 R. at 7-8.) The agreements had been cancelled by the participating state. So even though veterinary licenses have been issued to a few individuals when these agreements were in place, the Board in its discretion still required the applicant to submit a passing NBE score to West Virginia from the national reporting service. And if the Board were to grant a veterinary license in the instant case, then the Board would be seen as arbitrary because it would be breaking with its policy of only granting a reciprocal license to those from states with whom they have an agreement and to those applicants who have a passing NBE test score.

The Appellee clearly did not have an established right to a veterinary license by reciprocity and there is no evidence within the record as established that shows any arbitrary or capricious

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<sup>7</sup>Please note that similar evidence proffered by the Board during the March 14, 2008, Evidentiary Hearing was not permitted due to the Appellee's objection. (3/14/08 R. at 41.)

actions by the Board.<sup>8</sup> Just the opposite is shown within the record by the Board's actions in handling of the Appellee's application. The Board sent a correspondence to the Appellee informing him of the fact that his license was incomplete due to his failure to submit his national board examination scores through the national reporting service. The Appellee then assured the Board's Executive Director and the Board itself that those scores would be forthcoming shortly. So in good faith the Board permitted the Appellee to sit for the state jurisprudence examination which he passed; however, no national board examination scores were ever submitted by the Appellee.<sup>9</sup>

2. There was no legal duty on the part of the Board to issue the Appellee a veterinary license.

The Board had no legal duty to issue the Appellee a veterinary license based upon his application. The Board is bestowed the power and duty to "[e]xamine and determine the qualifications and fitness of any applicant for a license to practice veterinary medicine in this state . . . ." W. Va. Code § 30-10-4(a). The Board in carrying out its legal obligations determined that the Appellee's March 16, 2005, application for licensure was incomplete due to a missing national board examination test result. The Board sent the Appellee correspondence to alert him to the incomplete nature of his application in order that he may correct it. In both written and verbal communications with the Appellee the Board believed that the Appellee was addressing the issue and the test results would be arriving shortly at the Board office; however, the only test results the

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<sup>8</sup>Pursuant to W. Va. Code § 30-10-8(a), it clearly states that the "qualified applicant who is a resident of this state." The only evidence regarding the Appellee's residence is his address in Laurel, Maryland. (3/14/08 R. at Ex. 2.)

<sup>9</sup>It should be noted that if the Appellee's application was submitted by reciprocity, then the Appellee would not have been required to take the state jurisprudence examination; however, the Appellee requested that he be able to take this examination and he would have his NBE results sent to the Board.

Board ever received were those sent directly from Georgia and not the national testing service as mandated by the Board's regulations. *See* W. Va. Code R. § 26-1-3 (stating that it is the applicant's responsibility to have the national testing service forward a copy of the applicant's national board score).

3. The Appellee has another adequate remedy available to him.

Pursuant to W. Va. Code § 30-10-12, an individual who has completed an application for licensure by the Board, but whose application is denied by the Board, is entitled to an administrative hearing. In the instant case, there was no administrative hearing since the Board determined that the application itself was incomplete, and as such, there was no application to deny by the Board. Moreover, the Board argues that the Appellee is entitled no other legal remedies since he failed to complete the application as required by the Board's statutes and regulations. There can be no legal recourse if there is no completed application for the Board to review and act upon.

However, the Kanawha County Circuit Court found that the Respondent met the requirements for licensure by reciprocity; however, the Board denies the Appellee licensure by reciprocity as argued above. Therefore, the Appellee would be entitled to an administrative hearing on the basis of such a denial by the Board. As such, the Kanawha County Circuit Court should have remanded the matter back to the Board for such a hearing to be held since all three elements must co-exist for a writ of mandamus to be issued by the court.<sup>10</sup>

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<sup>10</sup>Please note that the Board disputes the Kanawha County Circuit Court's authority and jurisdiction to make a finding of fact regarding the Appellee's qualifications to be licensed as a veterinarian either by testing or reciprocity.

B. THE CIRCUIT COURT COMMITTED CLEAR ERROR WHEN IT BASED ITS DECISION ON INFORMATION THAT WAS SUBMITTED AFTER THE EVIDENTIARY HEARING CLOSED AND THE INFORMATION WAS NOT ADMITTED AS EVIDENCE IN THIS MATTER AS CLEARLY SHOWN BY THE RECORD.

The Kanawha County Circuit Court committed clear error when it based its decision for granting the writ of mandamus on information which was not made part of the evidentiary record.

“The appellate review of a ruling of a circuit court is limited to the very record there made and will not take into consideration any matter which is not a part of that record.” Syllabus point 2, *State v. Bosley*, 159 W. Va. 67, 218 S.E.2d 894 (1975). *See also* Syl. Pt. 4, *State v. Browning*, 199 W. Va. 417, 485 S.E.2d 1 (1997) (“This Court will not consider an error which is not properly preserved in the record nor apparent on the face of the record.”); *State v. Calloway*, 207 W. Va. 43, 51, 528 S.E.2d 490, 498 (1999) (“[O]ur review of the claimed error is limited to consideration of the evidence presented by defense counsel below.”); *State v. McCauley*, 130 W. Va. 401, 408, 43 S.E.2d 454, 459 (1947) (“We do not consider matters de hors the record.”); Syllabus point 9, *State v. Comstock*, 137 W. Va. 152, 70 S.E.2d 648 (1952) (finding that “under West Virginia Constitution Article VIII, Section 5, when a judgment or decree is reversed or affirmed by this Court, the Court will not consider and decide a point which does not fairly arise upon the record of the case.”)

There was an evidentiary hearing held in this matter on March 14, 2008, and only the Board offered any witnesses or exhibits of any kind.<sup>11</sup> Wanda Goodwin, Executive Director of the Board, testified regarding this case matter and the Board offered two Exhibits during this hearing which were admitted as reflected in the transcript of the proceedings that day. (3/14/08 R. at 61.) The Respondent did question Ms. Goodwin regarding a letter that had been attached as an exhibit to his

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<sup>11</sup>The Appellee was present himself along with his counsel at the March evidentiary hearing.

original Petition for Writ of Mandamus. Yet, he did not offer this letter as an exhibit during the March evidentiary hearing, and it was not admitted as evidence. Moreover, Ms. Goodwin denied the validity of these scores which had been submitted from the state of Georgia as being valid scores here in the state of West Virginia as she was being questioned by the Appellee's counsel and even by the Court. (3/14/08 R. at 58-63 and 67-68.)

At the conclusion of the hearing, a discussion was held between counsel for the parties and the Court regarding the submission of Findings of Fact and Conclusions of Law. It was determined that these Findings of Fact and Conclusions of Law would be submitted by the parties with a request by the Court for a copy of the 1992 legislative rules in effect at the time of the Appellee's application. (3/14/08 R. at 68-71.) There was no provision for any further submission of evidence regarding this case matter. Yet, when the Findings of Fact and Conclusions of Law were filed by the parties, the Appellee filed with his *Findings* an Exhibit 1 which contained the Appellee's credentials and licensing from other states along with testing data from Georgia. The Appellant immediately filed on April 14, 2008, a *Motion to Strike* such Exhibit 1; however, the Kanawha County Circuit Court failed to rule on this outstanding motion.

Instead, the Kanawha County Circuit Court based its decision on information contained within this Exhibit 1 as evidence in this matter; however, the Board did not have any opportunity to object nor question these documents.<sup>12</sup> The only evidence in this case matter that the Kanawha County Circuit Court could base its decision upon was Wanda Goodwin's testimony and the two Exhibits submitted by the Board; however, the Kanawha County Circuit Court found "that the denial of Dr. Casey's application was arbitrary and capricious because substantial evidence exists

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<sup>12</sup>Please note that similar evidence proffered by the Board during the March 14, 2008, Evidentiary Hearing was not permitted due to the Appellee's objection. (3/14/08 R. at 41.)

that Dr. Casey has practiced in eight other states and has surpassed the requirements for licensure in the State of West Virginia.” *See Order Granting Writ of Mandamus* at 5-6.

There was no evidence at all regarding the Appellee surpassing the requirements for licensure here in West Virginia. Quite the contrary, Ms. Goodwin denied the validity of the “passing” score as submitted by Georgia as noted above when pressed by the Judge herself. Moreover, Ms. Goodwin did agree that the Appellee had practiced for five years and was licensed in seven or eight other states; however, there was no discussion about his practice in those states nor any possible discipline he may have in those states. Further, the Board did not deny his application, but instead the application was deemed incomplete due to the missing NBE scores.<sup>13</sup> (3/14/08 R. at Ex. 1.) It is clearly error by the Kanawha County Circuit Court to base a decision on information that was not part of the record.

C. THE CIRCUIT COURT ERRED WHEN IT MADE A DETERMINATION THAT THE APPELLEE HAD MET THE QUALIFICATIONS OF APPLICATION BY RECIPROCITY AND THE NBE SCORES AS SUBMITTED WERE PASSING SCORES IN WEST VIRGINIA.

“The jurisdiction of writs of mandamus and prohibition (except cases whereof cognizance has been taken by the supreme court of appeals or a judge thereof in vacation), shall be in the circuit court of the county where the record or proceeding is to which the writ relates.” W. Va. Code § 53-1-2. In the instant case, the Board’s offices do lie within Kanawha County. As such, the Kanawha County Circuit Court does have jurisdiction to hear and decide the writ of mandamus itself; however, the Kanawha County Circuit Court does not have the jurisdiction to decide whether the Appellee is qualified to be a licensed veterinary in the state of West Virginia nor whether he

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<sup>13</sup>Actually, if the Board had denied the Appellee’s application, then he would be entitled to an administrative hearing. *See* W. Va. Code § 30-10-12.

meets any of the qualifications of the available licensing methods to him offered by the Board at the time of his application in March 2005.

The Kanawha County Circuit Court was only tasked with whether the Appellee met the three requirements for obtaining a writ of mandamus, not the Appellee's actual qualifications themselves for being a licensed veterinarian here in West Virginia. Instead, the Board, appointed by the Governor, is mandated with the power to "[e]xamine and determine the qualifications and fitness of any applicant for a license to practice veterinary medicine in this state. . . ." W. Va. Code § 30-10-4(a). Moreover, "[n]o person may. . . practice veterinary medicine in this state without a license or a temporary permit issued by the board in accordance with the provisions of this article . . . ." W. Va. Code § 30-10-2. Further, it is the Board who has the power to "[p]romulgate, amend or repeal reasonable rules and regulations, in accordance with the provisions of chapter twenty-nine-a of this code, to implement the provisions of this article, including rules and regulations establishing standards of professional conduct for the practice of veterinary medicine; . . . ." W. Va. Code § 30-10-4(i).

In addition, the West Virginia Supreme Court has repeatedly pronounced that the decisions of administrative agencies that have been established to oversee particularized areas of governmental functioning must be given deference because it is within their areas of expertise to render final decisions in certain matters. *See In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996) (great deference must be given to selection of remedy by correctional officers' civil service commission because its members draw on fund of knowledge and expertise all their own); *Berlow v. West Virginia Bd. of Med.*, 193 W. Va. 666, 458 S.E.2d 469 (1995) (per curiam) (Medical Board's determination of penalty of restricted practice should not have been overturned by circuit court because penalty had been determined by those with special expertise regarding the standards of their

own profession and those who are in superior position to determine nature and duration of discipline); *West Virginia Dep't of Health v. West Virginia Civil Serv. Comm'n*, 178 W. Va. 237, 358 S.E.2d 798 (1987) (holding it is the province of Civil Service Commission, not the courts, to set punishment for state employees).

Other jurisdictions have agreed with West Virginia's analysis. See *Pasco Housing Auth. v. State of Wash., Pub. Emp. Rel. Comm'n*, 991 P.2d 1177 (Wash. Ct. App. 2000) (an administrative agency's determination of sanctions receives even greater judicial deference than those of a trial court because remedies are peculiarly a matter of administrative competence); *Colorado Real Estate Comm'n v. Hanegan*, 947 P.2d 933 (Colo. 1997) (court may not substitute its judgment for that of agency vested with discretion to impose sanctions); *Boyd v. Department of Revenue*, 682 So.2d 1117 (Fla. Dist. Ct. App. 1996) (it is not the position of appeal court to reweigh evidence and come to different conclusion regarding sanctions imposed by state employee relations commission).

Yet, in the instant case, the Kanawha County Circuit Court made sweeping findings regarding the Appellee's qualifications to become a licensed veterinarian and whether he passed the NBE. The Kanawha County Circuit Court has no jurisdiction nor expertise to make such findings regarding the Appellee. There was no evidence presented that showed that the Appellee passed the NBE pursuant to West Virginia's testing criteria. Quite the contrary evidence was presented that showed that there were never any scores presented to the Board regarding his NBE test results at all. The only score received by the Board regarding any testing from the Appellee was his test score from Georgia which was received directly from the state of Georgia whose testing methodologies are unknown.

There is a reason that the legislature created the Board, and that is to not only regulate the veterinary profession, but also to make sure that the public is presented with qualified and licensed

veterinarians. The Board members are appointed by the Governor, and composed of mostly licensed veterinarians. *See* W. Va. Code § 30-10-3. These individuals have the skill and expertise necessary to determine whether an applicant meets the qualifications as cited within the state of West Virginia's statutes and regulations. It is not the place of the Kanawha County Circuit Court to circumvent these legislative mandates in order to qualify the Appellee as fit to practice veterinary medicine in the state of West Virginia.

IV.

CONCLUSION

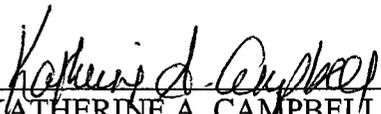
Based upon the foregoing, the Appellant, West Virginia Board of Veterinary Medicine, respectfully requests that this Court reverse the granting of the Writ of Mandamus as ordered in the Kanawha County Circuit Court's April 14, 2009, final Order.

Respectfully submitted,

WEST VIRGINIA BOARD OF  
VETERINARY MEDICINE,

By counsel

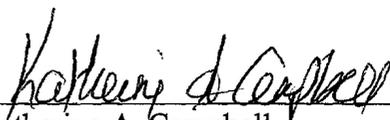
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**CERTIFICATE OF SERVICE**

I, Katherine A Campbell, Assistant Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing "Appellant's Brief" was served by depositing the same postage prepaid in the United States Mail, this 3rd day of December 2009, addressed as follows:

James M. Casey, Esq.  
Post Office Box 427  
611 Viand Street  
Point Pleasant, West Virginia 25550

  
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Katherine A. Campbell