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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 35288

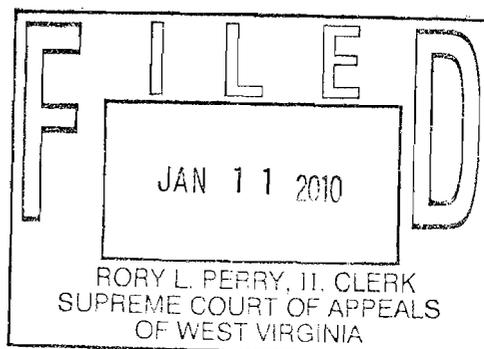
**JAMES MICHAEL CASEY, D.V.M., M.S.,**

*Appellee - Petitioner below,*

**v.**

**WEST VIRGINIA BOARD OF  
VETERINARY MEDICINE,**

*Appellant - Respondent below,*



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**JAMES MICHAEL CASEY, D.V.M., M.S. APPELLEE'S RESPONSE BRIEF TO  
APPELLANT WEST VIRGINIA BOARD OF VETERINARY MEDICINE**

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**Petitioner below, Appellee,**

**v.**

**WEST VIRGINIA BOARD OF  
VETERINARY MEDICINE,**

**Respondent below, Appellant.**

**JAMES MICHAEL CASEY, D.V.M., M.S., APPELLEE'S RESPONSE BRIEF TO  
APPELLANT WEST VIRGINIA BOARD OF VETERINARY MEDICINE**

**I.**

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

This is an appeal from a decision of the Circuit Court of Kanawha County. The Appellee filed an action seeking a declaratory judgment and asking for relief in Mandamus. Evidence was taken, the parties submitted proposals to the Circuit Court and Judge Bailey issued a ruling that the Board had acted arbitrarily and capriciously and directed the appellant to conduct the interview pursuant to the legislative rules.

## II.

### STATEMENT OF FACTS

This is an appeal of an order from the Kanawha County Circuit Court. The action arose out of a petition filed for Writ of Mandamus and Declaratory Judgment. The parties were James Michael Casey, D.V.M., M.S. and the West Virginia Board of Veterinary Medicine, hereinafter referred to as Board. Dr. Casey is a veterinarian who specializes in the treatment of race horses and equine leg injuries. He is licensed in 8 states: Maryland, Virginia, Delaware, Georgia, Pennsylvania, Florida, New Jersey and Kentucky. He was originally licensed in the State of Georgia in December of 1987 and at the time of his licensure the state of Georgia had licensure requirements which were equivalent to or more stringent than those of West Virginia. Dr. Casey received his veterinary degree from the Tuskegee Institute, an appropriate entity of credentials of veterinarians.

In February 2004 Dr. Casey contacted the Board with the hopes of applying for licensure by reciprocity. He was sent a form by the executive secretary, Wanda Goodwin. He filled out the form and included with his application certification from the Georgia Secretary of State that he, Dr. Casey, had successfully completed the testing requirements from the state of Georgia in 1987, those being the National Board Examination, hereinafter referred to as NBE and the Clinical Competency Test, hereinafter referred to as CCT. The Board does not contest receipt of that information and Dr. Casey's information regarding his licensure in good standing in the other states is not an issue. Dr. Casey requested on several occasions the opportunity to speak to the Board but was unsuccessful in doing so and after months of frustrations he employed an attorney and filed his application.

The Board has since the reception of his application in March of 2005 refused to act on the application asserting that the Board does not avail itself of the statutory provisions which permit the licensure of a veterinarian without examination nor does the Board avail itself of its procedures that it proposed and developed in the legislative rule enacted in 1992. The application form used by the Board contains requirements and specifications that are not mandated by statute or rule. In addition to the submission of the information from Georgia and the other states in which he is licensed, Dr. Casey has taken and passed the West Virginia Jurisprudence exam as required by the Board.

The testimony at the evidentiary hearing in the matter from Wanda Goodwin, Executive Director of the Board indicated that she was not aware of any adverse actions on Dr. Casey' license in any of the eight jurisdictions in which he is currently licensed.

The court took the evidence and after consideration of the evidence ruled that the refusal of the Board to consider the application and the Board's refusal to utilize the reciprocity provisions in statute and by legislative rule was arbitrary and capricious. Judge Bailey ordered the Board to conduct its interview as required by rule and proceed with the licensure process. The Board has appealed that decision and has not conducted the interview process as ordered by the Court.

### III.

A. DO THE STATUTORY DECLARATORY JUDGMENT CONFER UPON THE CIRCUIT COURT THE AUTHORITY TO REQUIRE A LICENSING BOARD TO UTILIZE STATUTES AND LEGISLATIVE RULES IN CONSIDERATION OF AN APPLICATION FOR AN INDIVIDUAL IN ANOTHER STATE?

1. The statute allows for licensure without written examination.

There are two specific statutes that would allow the Circuit Court to grant the

relief sought. The Declaratory Judgment Act, under W.Va. § 29A-4-1 *et seq* read in conjunction with W.Va. § 55-13-1 *et seq.* clearly gives the Circuit Court of Kanawha County the authority to review the statute, the legislative rules, and the actions of the Board of this case. Both West Virginia § 29A-4-2 and § 55-13-2 permit the filing of the action in Kanawha County and our Supreme Court has approved Circuit Court actions in this regard. See *Mongold v. Mayle*, 192 W.Va. 353, 452 S.E.2d 444 (1994); *Mainella v. Board of Trustees*, 126 W.Va. 183, 27 S.E. 2d 486 (1943).

The court, in *Joslin vs. Mitchell*, 213 W.Va. 771, 584 S.E. 2d 913, 2003 W. Va. LEXIS 97 (2003) held that

“Under § 55-13-9 and W. Va. R. Civ P. 38, 39, 57, when a declaratory judgment proceeding involves the determination of an issue of fact, that issue may be tried and determined by a judge or a jury, just as issues of fact are tried and determined in other civil actions, and any determination of fact made by the circuit court or jury in reaching its ultimate judgment are reviewed under a clearly erroneous standard.”

As the action below was for a Mandamus and a Declaratory Judgment, it is submitted that the court as the trier of fact made a determination, based upon the evidence presented that Dr. Casey was entitled to the relief sought and ordered the Appellant to conduct an interview and to proceed with the granting of the license. It can be therefore argued the appropriate standard of review in this matter would be the clearly erroneous standard and not a *de novo* review on the interpretation of law. *Joslin, supra*

Even if the standard is whether the acts of the Board are arbitrary and capricious given the facts in this case the ruling below is appropriate. It is the position of the Board that it is discretionary whether they will permit anyone to practice veterinary medicine without taking the written examination. The Board acknowledges that there are at least two methodologies by which a person can be licensed in West Virginia without written

examination, either by statute or by rule but the Board contends that they have never used those particular provisions. A recent West Virginia Supreme Court of Appeals case *Jones Equipment v Swenson Spreader*, September 2009 Term, No. 34745 filed on November 18, 2008 and submitted on October 7, 2009 deals with interpretations of statutes.

Syllabus point 7, *Ex parte Watson*, 82 W. Va. 201, 95 S.E. 648 (1918).

“It is presumed the legislature had a purpose in the use of every word, phrase and clause found in a statute and intended the terms so used to be effective, wherefore an interpretation of a statute which gives a word, phrase or clause there of no function to perform, or makes it, in effect, a mere repetition of another word, phrase or clause thereof must be rejected as being unsound, if it be possible so to construe the statute as a whole, as to make all of its parts operative and effective.”

The Court held in *Jones Equipment v. Swenson Spreader* that:

“The primary object in construing a statute is to ascertain and give effect to the intent of the legislature.”

The *Jones* case sets forth that the Legislature, when it creates a statute, intends the statute be utilized. The rule in question CSR 26-1-1, *et seq*, the 1992 version, contains language which allowed for reciprocity and granting of the license without the taking of the written examination. While the Board may contend that the statute is outdated and that they have attempted to amend it over the years there is no question that the rules in question were promulgated by the Board. Those rules which were approved by the Legislature in 1992 have varying provisions that allow for licensure without examination and in one of the provisions it allows for the applicant to submit documentation from his home state. That particular provision of the 1992 rules was amended out in 2005 after the application of Dr. Casey had been submitted and therefore the 2005 version of the rules would preclude any future snafu comparable to the instant matter.

2. The legislative rule permits reciprocity licensure.

In this particular case it could be argued that no other Circuit Court Judge has the wealth of experience and background with regard to the legislative rules and the rule making process. Judge Bailey, having worked as an attorney for the West Virginia House of Delegates and the West Virginia State Senate for more than twenty years, and, in that capacity having served as counsel for the rule-making review committees in both bodies is in a unique position to evaluate the legislative intent of the rules and the legislative intent of the statutes. She may very well have been one of the attorneys assigned to the rule in question in 1992. Given this background should the Supreme Court adopt the standard as *de novo* as opposed to the clearly erroneous standard for the declaratory judgment proceeding it is submitted that some recognition be made of Judge Bailey's particular expertise in the area in question.

With respect to the legislative rule in effect at the time of the application it would appear that 26 CSR 1 is the appropriate rule. Under 26.1-3.10. National Veterinary Board Examination:

"All veterinarian applicants, unless qualified for license without written examination, must have received a passing score on the National Veterinarian Boards, (emphasis supplied). The passing score for the National Veterinarian Boards will be the 1.5 standard deviation from the mean of the criterion group. It is the applicant's responsibility to have the national testing service forward a copy of his or her national board scores to the secretary-treasurer of the Board."

It is clear in this particular instance that Dr. Casey is attempting to gain licensure without written examination. The insistence by the Board for the provision that requires Dr. Casey to have the national testing service forward a copy of the national board scores to the secretary or treasurer of the board is not contemplated or required in the rule.

Again, in 26.1-4.3 of the legislative rules, the procedures are set forth. It provides ... “All examinees, unless exempted by W. Va. Code § 30-10-8, shall be tested by written examination supplemented by oral interviews and practical demonstrations as the board may deem necessary.” Again the rule talks in terms of who takes the written examination and it is clear that Dr. Casey is not proceeding under that portion of the rule.

Reviewing the rule 26.1-8 at .8, reciprocity sets forth in 8.1:

“In order for an applicant to obtain a license to practice veterinary medicine in the State of West Virginia by reciprocity, he or she must:

- a. obtain an application for the Board;
- b. complete and return the application, along with the required enclosures, to the Board within the time specified therein, and pay the reciprocal application fee set out in the schedule of fees, 26 CSR 6;
- c. provide proof that he or she has successfully passed the examination for licensure by his or her licensing state, and complied with all other provisions of the reciprocating agreement with his or her licensing state;
- d. have his or her licensing state board forward a letter or other document affixed with the seal of such reciprocating state board stating that the applicant is licensed in that state by virtue of an examination, that such applicant’s license is in good standing, and that the West Virginia Board shall further be entitled to, and be advised of, any derogatory information which exists in their licensing state’s files concerning the applicant;
- c. have each and every licensing board by which the applicant is, or has been licensed, submit a letter of good standing, or in the event applicant is no longer licensed in any state where the applicant has been licensed, submit a letter indicating that the applicant was in good standing while licensed in such other state, and the reason the applicant is no longer licensed. All letters indicating licensure or prior licensure shall be affixed with the seal of the state’s licensing board.

8.2. Upon receipt of a satisfactory application and the required enclosures, and upon receipt of the necessary information from the licensing state board, the West Virginia Board of Veterinary Medicine shall schedule a personal

interview for the applicant. This personal interview may be conducted by the Board, or by any person or persons delegated to act for the Board.

8.3 The Board may waive the requirement of National Board scores for applicants by reciprocity.”

Of particular interest is subsection d. which is as follows:

“d. Have his or her licensing state forward a letter or other document affixed with the seal of such reciprocating state board stating that the applicant is licensed in that state by virtue of examination, and that such applicant is in good standing, and that the West Virginia Board shall further be entitled to, and be advised of any derogatory information which exists in their licensing states files concerning the applicant.”

In this instance, Dr. Casey submitted a letter with the seal from the Secretary of State of Georgia.

Rule 26.1-8.2 states:

“Upon receipt of satisfactory application and the required enclosures and upon receipt of the necessary information from the state licensing board, the West Virginia Board of Veterinary Medicine shall (emphasis applied) schedule a personal interview of the applicant. This personal interview may be conducted by the board or by any person or persons delegated to act for the board.

3. Given the power vested in the court thru the declaratory judgment acts the court has the power to require the board to use the provision in the statute and rules providing for licensure without written exam and/or the reciprocity provision. Further, given the clear refusal of the Board to even consider applications such as the Appellee, there is no other remedy at law.

With respect to the relief granted by the court, W. Va. Code § 55-13-5 sets forth as follows:

“The enumeration in sections two, three, and four [§§ 55-13-2, 55-13-3 and 55-13-4] does not limit or restrict the exercise of the general powers conferred in section one [§ 55-13-1], in any proceeding where declaratory relief is sought in which a judgment or decree will terminate the controversy or remove an uncertainty.”

Accordingly the judge has the authority to order the Appellant to proceed under the reciprocity provisions of the legislative rule in question and/or the statutory provision which permits licensure without examination. It would be an exercise in futility to remand the matter to the Board to process the application under the reciprocity rule as it was clear that the evidence presented at the hearing indicated that Dr. Casey had submitted the appropriate documentation under 26 CSR 1 and/or under the statutory provisions of § 30-10-8.

The obstructive and obtrusive refusal of the Board to utilize the West Virginia statutory provisions as well as the rule which would allow for reciprocity or admission without written examination are clearly indicative of an arbitrary and capricious disregard of the law. It is clearly within the authority of the Kanawha County Circuit Court to act in the manner in which it did; the remedy was the correct remedy given the Petition for Mandamus and Declaratory Judgment; it was properly before the Kanawha County Circuit Court; the Court heard the evidence and issued its ruling. Dr. Casey had no other adequate remedy at law after having submitted the application and the obstruction by the Board and its executive secretary to his request.

Counsel for the Appellant suggests that the Appellee has another adequate remedy. That suggestion that Dr. Casey complete the application and then if Dr. Casey were to be rejected he could ask for an administrative hearing. However, counsel for the Appellant in its argument submits that the Appellee is not entitled to an administrative hearing because the Board has determined that Dr. Casey's application is incomplete notwithstanding his license to practice in eight other states and the submission from the Secretary of State of Georgia that Dr. Casey had passed their exam. This circular argument

underscores the fact that Dr. Casey needed to file the Mandamus/Declaratory Judgment action in the Circuit Court of Kanawha County. Our Court, in *Scott v. Stewart* 560 W. Va. 2<sup>nd</sup> 260 (2001) held that

“A statute does not preclude a party from seeking relief from an administrative decision through extraordinary writ; parties seeking to challenge a decision by means of a writ does so under the authority of the statutes permitting such writs. “

The fact that the Board does not want to apply reasonable rules that are applied in other states and then contend that in order for reciprocity to apply that there must be some formal documentation between the states is unrealistic. The evidence is that other states allow free transfer and does not require formalized agreements. In fact this restrictive stance by our Board would be harmful to our state’s veterinarians in the event they want to have portability of their license. The new state could restrict the West Virginia veterinarian seeking reciprocity citing our Board’s refusal to parity with their applicants.

**B. WAS THE EVIDENCE PRESENTED SUFFICIENT TO WARRANT THE ACTION OF THE COURT?**

The applicable rules of the Board did not specifically require that Dr. Casey include the national board information on his application. That was a decision by the Board when it drafted its application form. (3/14/08 R. at page 48, 66) Under West Virginia § 29A-4-2 the court has the authority to declare that particular act to be invalid because it exceeds the rule in effect at the time of Dr. Casey’s application. Ms. Goodwin, who has been the executive director since 1980, opined that the legislative rules were to expand the authority given by statute. That is clearly a misapprehension of legislative rules.

To summarize the testimony of Wanda Goodwin from the evidentiary hearing of March 14, 2008, it would appear that she was obtuse at best. She testified that she had been

with the Board as executive director for twenty-eight years. She became full time in 1992 (the same year as the legislative rules governing the licensure of veterinarians went into effect). Those rules, Series I remained unchanged until the year 2005. The change in the rules CSR 26-1 occurred after the submission of Dr. Casey's application. Therefore his application should be considered under the old rules. Ms. Goodwin in her testimony could not recall what the different qualifications and requirements were for applications for licensure. Repeatedly during the questioning, her answers were non-responsive, argumentative and obtuse. The rules that were in question were rules that had remained unchanged for thirteen some years of her tenure as the full-time executive director of the board and when she described her specific duties as the executive director, her first listed duty was handling applications. In other words, she was unable or unwilling to answer questions, quite specific, regarding rules that she had worked with for thirteen years as the executive director.

Later on in her testimony Ms. Goodwin asserts that for years the Board has attempted to modify the statute and change the rules but on further examination she could give not specific example of any instance or of any legislation that was introduced or rejected by the Legislature that would substantiate her claims of these ongoing efforts to modify the statute and the rules.

As an aside and contrary to the assertion of the executive secretary Ms. Goodwin that they were unable to achieve any success with the Legislature on statutes and rules, it would appear from a review of the W. Va. Secretary of State Code of State Rules that there are six (6) different series dealing with the West Virginia Board of Veterinary Medicine. Series 1 was amended in 2005. Series 2A was enacted by the Legislature in the year 2000. Rules

Series 2 and 2A were enacted and effective in the year 2001. Rule Series 3 was enacted with the effective date of 2002. Rule Series 4 was effective in 2003. Rule Series 5 was effective in April 1999 and Series 6 effective July 1, 2003. It would appear that the statements by Ms. Goodwin are either disingenuous or she misremembered the apparent legislative success that the Board of Veterinary Medicine has in passing its rules through the legislative process.

Wanda Goodwin did testify that it was her understanding that the minimum criteria used by Georgia in 1987 was the same as West Virginia's. (3/14/08 R. at 14) She further acknowledges that Dr. Casey as early as February 2004 requested an application and wanted to speak to the Board and made specific reference to the West Virginia practice act, more particularly West Virginia Code § 30-10-8 (3/14/08 R. at 18). Ms Goodwin acknowledged that under the code section § 30-10-5 (license without examination) that the Board did not use those provisions. Ms. Goodwin testified that § 30-10-8 does not have any reference to an examination by the National Board of Veterinary Examiners but that the Board had been trying for years to change the practice act and get it through the Legislature. At that point in her testimony she digressed into the efforts that they had made over years and years of trying to have the statute amended.

Later Ms. Goodwin acknowledged that Dr. Casey passed the state jurisprudence exam as required by the Board (3/14/08 R. at 20). She acknowledged that the Board, prior to 2005 rules, had a standard rule "We aren't going to consider anyone unless they have submitted their national boards." (3/14/08 R. at 22) In response to a question regarding whether the code or rules required submission of the national scores for non-written application Goodwin stated (3/14/08 R. at 23) "It doesn't say that they don't have to have those. It doesn't reference them at all." She acknowledged that when submitting his application in March of

2005 Dr. Casey included documentation from the State of Georgia Secretary of State which indicated that he had taken the required test and passed it. Her response was our application form was different and required from a national reporting service. There is no rule in existence which requires the submission of the national score from the official reporting service. It is a form that is used by the Board.

Another indication of the duplicity of Ms. Goodwin is that she indicates and testifies that West Virginia really had no reciprocal agreements after the eighties. Nevertheless, they had rules which were passed by the Legislature in 1992 which set up a whole procedure for reciprocity that came from the agency, from the licensing board itself that set up the criteria and allowed reciprocity. In other words the Board asked for the ability to grant reciprocity and to have discretion and to use tools such were in the statute in § 30-10-8 that specifically allowed for the submission of documentation from the issuing state rather than some national board. However, it is the position of the Board that since their application form (and no statutory or regulatory authority) has a space indicating that it must be from the national reporting agency, that no alternative is permitted. Clearly this is bureaucratic flapdoodle at its ultimate.

Legislative rules are typically rules proposed by the agency or entity regulated by the specific rule. Thus the rules passed in 1992 were the agency's rules. In other words, they asked for the ability to use the tools in the rule. The Board's absolute refusal to use the rule as it appears in Dr. Casey's application or those similarly situated indicate an arbitrary refusal to use provisions specifically included in the rule and statute. Dr. Casey complied with all rules for reciprocity under the statute and rules. Ms. Goodwin's testimony acknowledges the same.

Another relatively recent case by our West Virginia Supreme Court of Appeals, *Simpson v. West Virginia Office of Insurance Commissioner and Independence Coal*, submitted: April 8, 2009 and filed: April 30, 2009, case no. 34368 addresses legislative rules and specifically in syllabus point 11:

“Procedures and rules properly promulgated by an administrative agency with authority to enforce a law will be upheld so long as they are reasonable and do not enlarge, amend or repeal substantive rights created by statute.” Syllabus point 4, *State ex rel, Callaghan v. West Virginia Civil Service Commission*, 166 W. Va. 117, 273 S.E.2d 72 (1980).

And in point 12:

“In reviewing a rule or regulation of an administrative agency, a West Virginia court must first decide whether is interpretive or legislative. If it is interpretive, a reviewing court is to give it only the deference it commands. If it is a legislative rule, the court first must determine its validity. Assuming its validity the two-pronged analysis from *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81L. Ed. 2d 694 (1984), should be applied.” Syllabus point 2, *Appalachian Power Co v. State Tax Department of West Virginia*, 195 W. Va. 573, 466 S.E. 2d 424 (1995).”

In point 14:

“ Judicial review of an agency’s legislative rule and the construction of a statute that it administers involves two separate but interrelated questions, only the second of which furnishes an occasion for deference. In deciding whether an administrative agency’s position should be sustained, a reviewing court applies the standards set out by the United States Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

The court must first ask whether the Legislature has directly spoken to the precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency’s position can only be upheld if it conforms to the Legislature’s intent. No deference is due the agency’s interpretation of this stage. (emphasis supplied)” Syllabus point 3, *Appalachian Power Co. v. State Tax Department of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995).

C. DID THE APPELLEE SATISFY THE REQUIREMENTS UNDER THE LAW OR RULE NECESSARY FOR LICENSURE?

Goodwin acknowledged (3/14/08 R. at 26) that if Dr. Casey had been licensed in another state for five years and at the time of that licensure there is a substantial equivalent of that state to West Virginia that would satisfy the code requirement, she acknowledged that he would not necessarily be required to sit for our exams.

On examination by counsel for the Appellant, Ms. Goodwin testified that she had received documentation that West Virginia and Georgia utilized the same standards. With respect to the 1992 rules that were in effect at the time of Dr. Casey's application, she indicated that an individual seeking licensure who had been previously licensed in another state specifically allowed and permitted the applicant to "have his or her licensing state board forward a letter or other document." (3/14/08 R. at 53) So it is clear that the statute § 30-10-8 and the legislative rule, Series I, allowed for documentation from the issuing state to be utilized by the Board. The witness (3/14/08 R. 53) testified that the application (which she had with her) had attached thereto the letter from the Secretary of State, Macon, Georgia, dated April 17, 2002. It was attached to the petition. So it is clear that attached to his application for admission Dr. Casey had documentation from the issuing state that satisfied the West Virginia rule.

Another indication of the duplicity of Ms. Goodwin is that she indicates and testifies that West Virginia really had no reciprocal agreements after the eighties. Nevertheless, they had rules which were passed by the Legislature in 1992 which set up a whole procedure for reciprocity that came from the agency, from the licensing board itself set up the criteria and allowed reciprocity. In other words they asked for the ability to grant reciprocity and to have discretion and to use tools such were in the statute in § 30-10-8 and specifically allowed for

the submission of documentation from the issuing state rather than some national board. However, it is the position of the Board that since their application form (and no statutory or regulatory authority) has a space indicating that it must be from the national reporting agency; no alternative is permitted. Clearly this is bureaucratic flapdoodle at its ultimate.

The Court inquired and Ms. Goodwin, reluctantly, acknowledged that Dr. Casey took the CCT which was not required in West Virginia. It would appear from Ms. Goodwin's responses to the court that she even wants to argue with the Judge that Dr. Casey did not pass a test that West Virginia didn't require notwithstanding a letter from the records keeper at the Secretary of State's office in Georgia that said that he did pass the test. The court inquired: "Georgia certainly says he successfully passed and he was licensed under their standards in Georgia, right?" Answer of Ms. Goodwin: "Under Georgia's, whatever requirements they were". (3/14/08 R. at 67-68)

At issue is whether the acts of the Board are arbitrary and capricious given the facts in this case. It is the position of the Board that it is discretionary whether they will permit anyone to practice veterinary medicine without taking the written examination. The Board acknowledges that there are at least two methodologies by which a person can be licensed in West Virginia, either by statute or by rule but the board contends that they have never used those particular provisions. A recent West Virginia Supreme Court of Appeals case *Jones Equipment v Swenson Spreader*, September 2009 Term, No. 34745 filed on November 18, 2008 and submitted on October 7, 2009 deals with interpretations of statutes.

Additionally, as the Circuit Court noted, that provision of granting reciprocity did not require that there be a formal reciprocal agreement with another state. The applicant in this case Dr. Casey has, by the admission of the Ms. Goodwin, appropriate credentials in at least

seven or eight other states. There is no evidence whatsoever that Dr. Casey has been disciplined in any other state or that there are any adverse actions pending against him but for the contact from West Virginia executive director made to the counterpart in Maryland. The rules provide a mechanism and it is clear that the intent is to allow qualified professionals such as Dr. Casey to be licensed in West Virginia by submitting documentation.

In this particular case the Legislature passed legislation which allowed for applicants such as Dr. Casey to be licensed. The legislative rule passed in 1992 clearly allows for the licensure of Dr. Casey under the reciprocity agreement as found by the Circuit Court of Kanawha County. The agency's interpretation for refusal to use the statute and or the rule is arbitrary and capricious. There was no rationale or reason expounded by the executive director of the Board other than we have never done it or we have always done it that way and given the credentials of Dr. Casey and the fact that the Board refused to act gave the court no other remedy or option other than to grant a Writ of Mandamus through the Declaratory Judgment function.

Anticipating the argument by the Appellant that the reciprocity provisions of the code and rules aren't applicable in this matter, based upon the testimony of Ms. Goodwin, it would appear that those arguments do not reflect the practice or the status of reciprocity nationally in the practice of veterinarian medicine. With specific reference to Dr. Casey's initial state of licensure, Georgia, there is a provision in the Georgia statute which permits out of state residents to be licensed in Georgia, under Georgia code § 384-20-200 which reads as follows:

**“Issuance of license or temporary permit to persons licensed to practice in another state or territory.** (a) Notwithstanding the provision of section 20-198, the Department of Public Health may issue a license by endorsement to any veterinarian of good professional character who is currently licensed and practicing in some other

state or territory, having requirements for admission determined by the department to be at least equal to the requirements of this state, upon the payment of a fee of four hundred fifty dollars to said department. Notwithstanding the provisions of section 20-198, the department may, upon payment of a fee of four hundred fifty dollars, issue a license without examination to a currently practicing, competent veterinary in another state or territory who (1) holds a current valid license in good professional standing issued after examination by another state or territory that maintains licensing standards which, except for examination, are commensurate with this state's standards, and (2) has worked continuously as a licensed veterinarian in an academic or clinical setting in another state or territory for a period of not less than five years immediately preceding the application for licensure without examination. No license shall be issued under this section to any applicant against whom professional disciplinary action is pending or who is the subject of an unresolved complaint. The department shall inform the board annually of the number of applications it receives for licensure under this section."

A review of that statute would indicate that West Virginia veterinarian physicians who seek to be licensed in Georgia would simply have to follow the procedures outlined in that section. That section does not require the presentation of any national scores, simply that the person be in good standing in the other state and has practiced for five years preceding the application for licensure, without examination.

In various other contiguous states there are provisions for endorsements on the license. Those endorsements work in a similar manner as provided by in the process set forth in the Georgia code. Dr. Casey is also licensed in Pennsylvania. Pennsylvania has a statutory provision under § 049 of the Pennsylvania 31.11(c)

*“Reciprocal licensure.* An applicant for licensure by reciprocity who has held a valid license from another state and who has been actively engaged in clinical practice in that state for 5 years immediately preceding application for licensure in this Commonwealth, may be granted a license to practice veterinary medicine in this Commonwealth after having paid the fee required by § 31.41 (relating to schedule of fees), and submitted the following documentation to the Board: (1) An application form under subsection (a). (2) A verification of clinical practice, completed by the applicant, describing in detail the applicant's clinical practice during the immediately preceding 5 years. (3) A letter from the licensure board of the state (emphasis supplied) wherein the applicant has been actively engaged in clinical practice during the immediately preceding 5 years, certifying 5 years of continued licensure in that state. (4) Two certificates of recommendation from licensed veterinarians regarding

the applicant's character and competence and attesting to the fact that the applicant has been in active clinical practice during the immediately preceding 5 years. (5) A letter of good standing from each board office in which the applicant has held a license to practice veterinary medicine, reporting the outcome of disciplinary actions taken against the applicant, if any, in that state."

Again, while Ms. Goodwin contends that there is no reciprocal agreement by West Virginia with any surrounding states, it would appear from the language in the Pennsylvania code and the language in the Georgia code that veterinarians can be licensed in those states by submitting documentation of current good standing and licensure and practice for five years. At a minimum it is suggested that many states do not require any contemporary reciprocity agreement with the home state of the veterinarian.

Dr. Casey is also licensed in the state of Florida. The requirement in Florida for reciprocity is if your license has been active in your state for three years or more and your national board scores are more than five years old, you may apply to Florida for licensure by endorsement. The fee is \$500.00. You are required to take the Laws and Rules examination and you must submit an official transcript from your veterinary school, with proof of 15 hours of continuing education and licensure verifications from every state in which you hold or have held a license. Again, there is no requirement in Florida that you must have a reciprocity agreement between the two states. It is clear that the portability of licensures within the field of veterinary practice has evolved so to allow qualified veterinarians to apply for endorsement or reciprocity without having to move a mountain. Florida's language which speaks in terms of three or more years of active practice and a national board score of more than five years old are indicative of the philosophy of portability and endorsements.

IV.

CONCLUSION

Based on the foregoing and the record as a whole, Appellee Dr. Casey requests that the Court do affirm the final order of Kanawha County Circuit Court Judge Bailey of April 14, 2009 and that he be awarded attorney fees and costs and such further relief as this Honorable Court allow. Alternatively, Appellee requests that if this court is of the opinion that additional evidence need be taken that the matter be remanded to the Kanawha County Circuit Court of Kanawha County for further proceedings.

Respectfully submitted,  
JAMES MICHAEL CASEY, D.V.M., M.S.,  
By Counsel

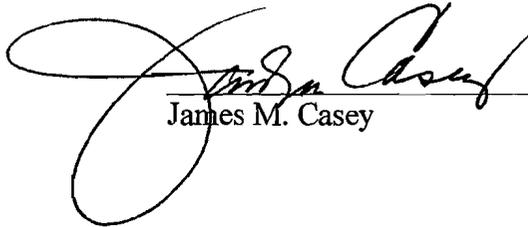


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**CERTIFICATE OF SERVICE**

I, James M. Casey, Counsel for Appellee James Michael Casey, do hereby certify that a true and exact copy of the foregoing "Appellee's Response" was served by depositing the same postage prepaid in the United States Mail, this 11<sup>th</sup> day of January, 2010, addressed as follows:

Katherine A. Campbell  
Assistant Attorney General  
State Capitol Complex  
Building 1, Room E-26  
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James M. Casey