

No. 35493  
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE *ex rel.* RONALD L. WOOTEN, Director,  
and the WEST VIRGINIA OFFICE OF MINERS'  
HEALTH, SAFETY, AND TRAINING,

Petitioners,

v.

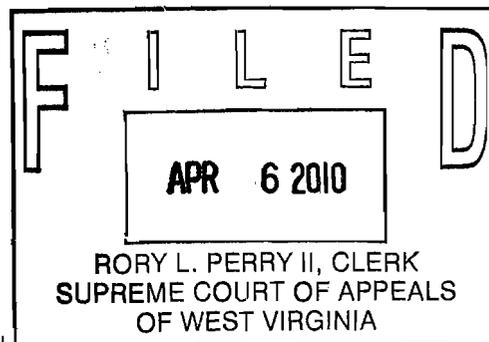
THE COAL MINE SAFETY BOARD OF APPEALS,

Respondents,

and

WILLIAM A. COULSON,

Party in interest.



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APPELLANT'S BRIEF

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and the WEST VIRGINIA OFFICE OF MINERS'  
HEALTH, SAFETY, AND TRAINING,**

**Appellant/Petitioners below,**

**v.**

**THE COAL MINE SAFETY BOARD OF APPEALS,**

**Appellee/Respondents below,**

**and**

**WILLIAM A. COULSON,**

**Appellee/Party in interest below.**

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**APPELLANT'S BRIEF**

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**II.**

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

The Appellants, Ronald L. Wooten, Director, and the West Virginia Office of Miners' Health, Safety and Training (sometimes hereinafter "Appellant" or "OMHST"), sought a writ of prohibition and a preliminary injunction against the Board of Appeals ("the Board"), and William A. Coulson, the party in the underlying proceeding. Specifically, the Appellants sought to prohibit the Board from reinstating the underground coal miner certification of Mr. Coulson prior to the final evidentiary hearing scheduled in the underlying matter before the Board. Such action is styled *In the Matter of William A. Coulson*, Docket No. 08-DEC-11.

After issuing a temporary injunction and permitting OMHST to temporarily suspend Mr. Coulson's miner certification pending final hearing on the underlying permanent decertification matter, the Circuit Court of Kanawha County ultimately granted Appellee's Motion to Dismiss and, therefore, refused to grant Appellants' Writ of Prohibition.

### III.

#### STATEMENT OF FACTS

At approximately 12:15 p.m. on October 19, 2008, at McElroy Coal Company's McElroy Mine in Marshall County, West Virginia, a fatal underground mine accident occurred inside the mine on the Fish Creek Portal Bottom area. (Record (hereinafter designated as "R. at \_\_\_\_") at 79.) The accident occurred when William A. Coulson, who was operating a 27 ton underground mine locomotive, struck and killed Mr. Victor Goudy. (R. at 80).

After the accident, McElroy Mine required Mr. Coulson to submit to a drug test. The results of the drug test showed that at the time of the accident Mr. Coulson had positive levels of Hydrocodone and Oxycodone in his system. (Transcript of the March 10, 2009, Circuit Court hearing at p. 6). Mr. Coulson did have a prescription for Hydrocodone, but did not have a prescription for Oxycodone. Id.

OMHST did not learn of the failed drug test until early December 2008 and shortly thereafter on December 29, 2008 filed, pursuant to W. Va. Code § 22A-1-31, a Petition for Withdrawal of Certifications with the Board of Appeals seeking to permanently revoke all miner certifications possessed by Mr. Coulson. (R. at 3, Ex. 1). OMHST filed a Petition for Withdrawal of Certifications asking the Board to permanently withdraw the mine certifications issued to Mr.

Coulson for his violation of certain duties which resulted in a fatal mine accident on October 19, 2008. Id.

On December 30, 2008, the Board issued an Order finding probable cause to exist for the withdrawal of Mr. Coulson's mine certifications, stating "[t]he Board having considered the same hereby finds probable cause to exist for withdrawal of said certifications of William A. Coulson of upon [sic] proper application to the Board." (R. at 3, Ex. 2). On January 6, the Board issued an Order scheduling the matter below for a full evidentiary hearing on March 17, 2009. (R. at 3, Ex. 3).

On January 20, 2009, OMHST sent notification to Mr. Coulson that his underground coal miner certificate was being temporarily suspended pursuant to W. Va. Code R. § 37-2-2.1 *et seq.* (R. at 3, Ex. 4). On January 26, 2009, Mr. Coulson sent a letter to the Board appealing OMHST's decision to temporarily suspend his underground coal miner certification pending final hearing by the Board. (R. at 3, Ex. 5). Neither OMHST nor its counsel were served with Mr. Coulson's appeal letter. On February 19, 2009, the Board acting upon Mr. Coulson's letter issued an Order reinstating Mr. Coulson's underground coal miner certification pending final hearing by the Board. (R. at 3, Ex. 6). The Board's Order stated:

Pending before the Board is the Motion of the charged party in this matter to reinstate his certifications pending a final hearing in this matter. The Board, finding that the Petitioner failed to make proper application to the Board prior to imposing the suspension complained of, does hereby grant said Motion and unanimously Order that the charged party certification be reinstated pending the final hearing in this matter.

Id.

On February 27, 2009, OMHST's counsel sent a letter to the Board's chair stating that W. Va. Code R. § 37-2-1 *et seq.*, contains no provision for making application to the Board and asking for the legal authority for said application. (R. at 3, Ex. 7). The Board failed to respond to OMHST's request, and on March 2, 2009, OMHST filed the underlying "Petition for Writ of Prohibition, Motion for Preliminary Injunction and Request for an Expedited Hearing" in the Circuit Court of Kanawha County. (R. at 3).

On March 9, 2009, the Circuit Court of Kanawha County heard arguments on the Preliminary Injunction which it granted. (R. at 43). At that time, the circuit court did not rule on Petitioners' request for a Writ of Prohibition. On March 24, 2009, the Board filed a Motion to Dismiss and Answer, and on May 4, 2009, the circuit court heard arguments on the same. The court issued its Order Granting Respondent's Motion to Dismiss on July 24, 2009.

#### IV.

##### **ASSIGNMENTS OF ERROR AND MANNER DECIDED BELOW**

- A. THE CIRCUIT COURT ERRED WHEN IT DID NOT GRANT PETITIONERS' WRIT OF PROHIBITION AND CONCLUDED THAT THE BOARD HAS THE INHERENT POWER TO REQUIRE THE DIRECTOR OF OMHST TO MAKE APPLICATION BEFORE UTILIZING THE PROCEDURES FOR TEMPORARY SUSPENSION FOUND IN TITLE 37 SERIES 2 OF THE CODE OF STATE REGULATIONS.
- B. THE CIRCUIT COURT ERRED IN DISMISSING THE MATTER BELOW AS MOOT.
- C. THE CIRCUIT COURT ERRED IN CONCLUDING THAT AN APPEAL WAS AN ADEQUATE REMEDY.

V.

**STANDARD OF REVIEW**

Before this Court is an appeal from an Order of the Circuit Court of Kanawha County granting the Respondent's Motion to Dismiss. By granting the Motion to Dismiss, the circuit court also refused to grant the relief requested by the Appellants in its Petition for Writ of Prohibition.

This Court has held:

The standard of appellate review of a circuit court's refusal to grant relief through an extraordinary writ of prohibition is *de novo*.

Syl. pt. 1, *State ex rel. Callahan v. Santucci*, 210 W. Va. 483, 557 S. E.2d 890 (2001). Since this appeal seeks this Court's review of the circuit court's refusal to grant the Writ of Prohibition, the standard of review that this Court should apply is *de novo*.

VI.

**ARGUMENT**

**A. INTRODUCTION**

West Virginia Code § 53-1-1 states:

The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.

Appellants sought a writ of prohibition in circuit court when the Board of Appeals exceeded its legitimate power by imposing an "application" process on the ability of the Director of OMSHT to temporarily suspend a miner's certification, pursuant to W. Va. Code R. § 37-2-1 *et seq.*, pending a final administrative hearing when said "application" process is not found in either the statute or the procedural rule.

**B. THE CIRCUIT COURT ERRED WHEN IT DID NOT GRANT PETITIONERS' WRIT OF PROHIBITION AND CONCLUDED THAT THE BOARD HAS THE INHERENT POWER TO REQUIRE THE DIRECTOR OF OMHST TO MAKE APPLICATION BEFORE UTILIZING THE PROCEDURES FOR TEMPORARY SUSPENSION FOUND IN TITLE 37 SERIES 2 OF THE CODE OF STATE REGULATIONS.**

The West Virginia Legislature created the Board of Appeals by virtue of W. Va. Code § 22A-5-1 *et seq.* The Legislature gave the Director of OMHST the authority to charge an individual miner and seek decertification of his/her miner certificates when a miner has neglected or failed to perform a duty mandated by article one or article two of chapter 22A. The Legislature also gave the Board the power to “evaluate the charge [filed by the Director] and determine whether or not a violation of duty has been stated.” In evaluating the charge, the Board must determine whether “probable cause exists to support the allegation that the person charged has violated his or her duty.” W. Va. Code § 22A-1-31(b).

West Virginia Code § 22A-1-31 does not address temporarily suspending a miner’s certifications pending the final administrative hearing before the Board. The Director’s authority to temporarily suspend a miner’s certifications pending a final administrative hearing first arose in *State ex rel. Perry v. Miller*, 171 W. Va. 509, 300 S. E.2d 622 (1983). In *Perry*, this Court stated:

Although it is true that there is no express statutory authority given to the Director to temporarily suspend the certificate or license of a mine foreman, it is clear from relevant statutes that the Director has the ultimate authority to license. Furthermore, we have recognized that where the Legislature has delegated to a board or agency part of its police power in the protection of public health and safety, precise legislative guidelines are not required. (Footnote omitted.)

*State ex rel. Perry v. Miller*, 171 W. Va. at 513, 300 S. E.2d at 626.

This Court then went on to state:

It would be a gross anomaly if the Director, when confronted with serious health and safety violations on the part of an individual whom he is required to certify as being competent, could not temporarily suspend such individual's license. To adopt any alternative would be not only risking the lives and safety of the employees who are protected by the statute but would expose the employer's plant and equipment to the possibility of serious damage or neglect. This would run counter to the clear and unequivocal legislative policy which we have outlined in note 3.

*State ex rel. Perry v. Miller*, 171 W. Va. at 515, 300 S. E.2d at 628.

This Court then concluded that a moulded writ would issue, "directing the Director of the Department of Mines [now OMHST] to promulgate a temporary suspension regulation not inconsistent with the standards set out herein." *State ex rel. Perry v. Miller*, 171 W. Va. at 516, 300 S. E.2d at 629.

In response to this Court's decision in *Perry*, the "Procedures for Temporary Suspension of Certificates" were promulgated at W. Va. Code R. § 37-2-1 *et seq.* These procedures require the Board to first make a probable cause finding before the Director can issue a temporary suspension. No where in these procedures is there a requirement that before issuing a temporary suspension of a miner's certifications the Director must first make "application" to the Board. Thus, the Board exceeded its legitimate powers by requiring the Director to make "application" to it before temporarily suspending a miner's certifications prior to the final administrative hearing.

Administrative agencies are not courts nor part of the judicial system and thus do not possess general judicial powers. 2 Am. Jur. 2d. Admin. Law § 27. Instead, as an administrative body, the Board's power consists of only that which is found under statute. In Syl. pt. 1, *Francis O. Day Co., Inc. v. West Virginia Reclamation Bd. of Review*, 188 W. Va. 418, 424 S.E.2d 763 (1992), this Court stated:

Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication. (Citations omitted).

Since the Board is a creature of statute, possessing only those powers granted to it by statute and possessing no general or common law powers, the Board has no inherent power as the circuit court found. Furthermore, the Board does not possess “implied powers” to a level that would allow it to alter the “Procedures for Temporary Suspension of Certificates”<sup>1</sup> and require the Director to make “application” to the Board before issuing a temporary suspension when an “application” process is not found in the rule.

Thus, the circuit court erred when it failed to grant the Writ of Prohibition and instead granted Respondent’s Motion to Dismiss.

**C. THE CIRCUIT COURT ERRED IN DISMISSING THE MATTER BELOW AS MOOT.**

In its decision, the Circuit Court found that after the evidentiary hearing was held in the underlying decertification matter below (*In the Matter of William A. Coulson*, Docket No. 08-DEC-11), the issue as to whether the Board has authority to require OMHST to apply to the Board for temporary decertification was technically moot. In Paragraph 11 of its Motion for Continuance filed with the circuit court on March 10, 2009, the Board stipulated that “the legal issues in the case need to be decided by this Court and agrees that the issues will **not be moot** even if this court hears and decides the issues herein pending after the final hearing before the Board scheduled on March 17,

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<sup>1</sup>W. Va. Code R. § 37-2-1 *et seq.*

2009.” The Board should not be able to have it both ways and had already entered its stipulation with the circuit court.

To determine mootness, the circuit court used the three prong test outlined in *Israel by Israel v. W. Va. Secondary Schools Activities Comm’n*, 182 W. Va. 454, 388 S.E.2d 480 (1989). *See also*, Syl. pt. 2, *State v. Merritt*, 221 W. Va. 141, 650 S.E.2d 240 (2007):

. . . first, the court will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief; second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public; and third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided.

The court’s findings that “there are no collateral consequences that will result from this case because it has been decided by the Board of Appeals and is the only case like it that has been filed against the Board of Appeals in the last 20 years” and “this is not a matter that will be repeatedly presented to the trial court” are wrong. Mr. Coulson’s individual case may be at its end; however, charges for decertification are filed with the Board frequently by OMHST. Each time a charge of decertification is filed with the Board, the Board must evaluate the charge and determine whether or not a breach of duty has been stated. If so, the Board issues its probable cause order. The Board utilizes the same form probable cause order containing the same “application” language that is at issue in this case. Therefore, this matter will continue to be repeated as other miners are issued temporary suspension notices because the Board does not have the inherent or implied authority to alter the procedures found in the rule and, therefore, will continue to exceed its legitimate powers.

Moreover, since the Board has not expressed in any manner what type of “application” it desires, Appellants could conceivably always fail to make “proper application” until such time as the Board is required to define what “proper application” means. To place such a “moving target” burden upon the Appellants effectively nullifies W. Va. Code R. § 37-2-1 *et seq.* Thus, this issue needed to be addressed by the circuit court as a matter of great public interest and for guidance to the local bar and the attorneys for the state who regularly handle miner decertification cases.

Therefore, the circuit court erred in concluding that this matter was moot.

**D. THE CIRCUIT COURT ERRED WHEN IT CONCLUDED THAT AN APPEAL WAS AN ADEQUATE REMEDY.**

The circuit court held in Conclusion of Law No. 9:

“In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance. . . .’ Syllabus point 1, *Hinkle v. Black*, 164 W. Va. 112, 262 S. E. 2d 744 (1979).” Syllabus point 1, *State ex rel. Stanley v. Sine*, 215 W. Va. 100, 594 S. E. 2d 314 (2004). Here Petitioners clearly had the statutory right to appeal the Board of Appeals Order reinstating Mr. Coulson’s certification to the Circuit Court and they elected not to do it.

First, OMHST submits that the Board’s February 19, 2009 Order (Feb. 19 Order) was a non-appealable interlocutory order and, therefore, would not be appealable until after the Board issued its final order. *Assuming arguendo*, that the language of W. Va. Code § 22A-1-19 could be read broadly enough to allow OMHST to appeal the Feb. 19 Order, an appeal was not an adequate remedy. By temporarily suspending Mr. Coulson’s miner certifications, OMHST was trying to

insure that Mr. Coulson did not work in any mine pending the final administrative hearing. Once the Board entered its Feb. 19 Order, Mr. Coulson could have returned to work at any mine immediately. Without the extraordinary Writ of Prohibition, Appellants would not have any method to obtain judicial review of the Board's Feb. 19 Order prior to the final administrative hearing that was scheduled for March 17, 2009.

Furthermore, Appellants submit that the Board's unilateral creation of an "application" process, when no "application" is required by the statute or rule in question, is a substantial, clear-cut, legal error plainly in contravention of the law warranting the use of a writ of prohibition.

Thus, the circuit court erred when it concluded that the appeal rights under W. Va. Code § 22A-1-19 were adequate.

## VII.

### CONCLUSION

For all the foregoing reasons, the Appellants respectfully request that this Court grant its appeal and reverse the Circuit Court's July 24, 2009 Order.

Respectfully submitted,

STATE *ex rel.* RONALD L. WOOTEN, Director,  
and the WEST VIRGINIA OFFICE OF MINERS'  
HEALTH, SAFETY, AND TRAINING,

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**CERTIFICATE OF SERVICE**

I, Elaine L. Skorich, 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 first class United States Mail, postage prepaid, this 6th day of April, 2010, addressed as follows:

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