

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,

Appellants,

v.

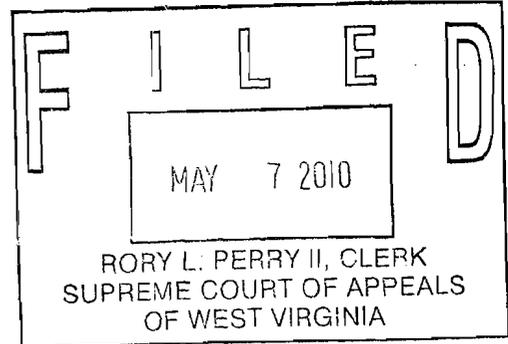
THE COAL MINE SAFETY BOARD OF APPEALS,

Appellees,

and

WILLIAM A. COULSON,

Party in interest.



THE COAL MINE SAFETY BOARD OF APPEALS' BRIEF

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THE COAL MINE SAFETY BOARD OF APPEALS' BRIEF

I.

INTRODUCTION

This case involves the questions of (1) whether the Office of Miner's Health, Safety, and Training and its Director Ron Wooten ("the Office") must make application to the Coal Mine Safety Board of Appeals ("the Board") before temporarily suspending a coal miner's mining certificate pending adjudication before the Board relating to permanent discipline against the coal miner; and, (2) the predicate question of whether this case is an appropriate vehicle to answer question number 1.

Because this case is not an appropriate vehicle to address the merits of the case, the circuit court should be affirmed. In the alternative, the Office must make application to the Board so the

Appellant is incorrect on the merits as well and the circuit court should be affirmed.

II.

FACTUAL AND PROCEDURAL HISTORY

As found by the circuit court, the facts are thus:¹

A fatal mine accident occurred inside McElroy Coal Company's McElroy Mine in Marshall County, West Virginia. The Office investigated and found that Appellee Coulson was operating a locomotive which collided with a trip of dollies causing Victor Goudy to be caught between the locomotive² and another rail car causing his death.

The Office filed a Petition for Withdrawal of Certifications on December 29, 2008, asking the Board to permanently withdraw the mine certifications issued to Mr. Coulson. The Board issued its Order finding probable cause to support the allegations in the Petition for Withdrawal of Mr. Coulson's mine certifications, *to wit*:

The Board having considered the same hereby finds probable cause to exist for withdrawal of said certifications of William A. Coulson of upon proper application to the Board.

THEREFORE, it is hereby ORDERED that a hearing on the merits will be set at a future time and all parties will be notified officially of

¹ See, e.g., *Barnett v. State Work. Comp. Comm'r*, 153 W. Va. 796, 800, 172 S.E.2d 698, 701 (1970); W. Va. R. Civ. P. 52(a); *Brown v. Gobble*, 196 W. Va. 559, 563, 474 S.E.2d 489, 493 (1996) (citation omitted) (“We will disturb only those factual findings that strike us wrong with the ‘force of a five-week-old, unrefrigerated dead fish.’”).

² The locomotive and the rail car Victor Goudy was caught between was not the locomotive being operated by Coulson. The accident was described in the “Fatal Haulage Related Report Investigation,” dated October 19, 2008, submitted by Region One - Westover Office, 14 Commerce Drive, Suite 101, Westover, WV 26501, of the West Virginia Office of Miners' Health, Safety & Training as follows: “The victim was disconnecting a drawbar between a dolly and a 27 ton locomotive. Mr. Victor Goudy, age 58, was fatally injured while standing between a trip of dollies and the locomotive, when the most inby dolly was struck by another 27 ton locomotive. [The locomotive being operated by Coulson.] The victim and the dollies were pushed into the outby locomotive.”

the hearing.

This form order has been used by the Board for finding probable cause to exist for over 20 years without any objections from any party in those two decades.

On January 6, 2009, the Board set a hearing for March 17, 2009. On January 20, 2009, the Office sent notification to Mr. Coulson that his underground coal miner certificate was being temporarily suspended pursuant to 37 C.S.R § 2-21 *et seq.* The letter provides in relevant part as follows:

This letter is to inform you that pursuant to 37 CSR § 2-2.1, *et seq.*, I am temporarily suspending your Underground Coal Miner Certificate No. 4405 effective immediately. Unless modified by the Coal Mine Safety Board of Appeals (Board of Appeals), this temporary suspension shall remain in effect until a full evidentiary hearing is held before the Board of Appeals. You are also advised that during this temporary suspension, you are prohibited from performing any job on mine property in West Virginia.

....

Pursuant to 37 CSR § 2-2.4, you may submit a request in writing to the Coal Mine Safety Board of Appeals that this temporary suspension be modified. You may submit your written request to:

Coal Mine Safety Board of Appeals
1615 Washington Street, East
Charleston, WV 25311

On January 26, 2009, Mr. Coulson sent a letter to the Board appealing the Office's decision to temporarily suspend Mr. Coulson's underground coal miner certificate pending final hearing by the Board. Mr. Coulson added to his letter the "Fatal Haulage Related Report Investigation," dated October 19, 2008, submitted by Region One - Westover Office, 14 Commerce Drive, Suite 101,

Westover, WV 26501, of the West Virginia Office of Miners' Health, Safety & Training.³ Although this letter was apparently not served on the Office, APPELLANTS BR. at 3, Mr. Coulson was not represented by counsel and was apparently following the directions provided to him by the Office in its January 20 letter—which only advised Mr. Coulson to send a modification request to the Board.

On February 19, 2009, the Board reinstated Mr. Coulson's certificate pending final hearing by the Board. The Board's Order read:

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.

The Board found that the Office did not apply to the Board before suspension, which was required by its Order finding probable cause.

On February 27, 2009, Barry L. Koerber, Assistant Attorney General, faxed and mailed a letter to Clinton W. Smith, Chairman of the Board, in which he stated:

In your February 19, 2009 Order (copy enclosed), you state that the "Petitioner failed to make proper application to the Board prior to imposing the suspension." I find no "application to the Board" requirement in 37 CSR § 2-1 *et seq.* Please provide me with the legal authority for such application at your earliest opportunity.

On March 2, 2009, the Office filed its *Petition for Writ of Prohibition and Motion for Preliminary Injunction* in the Circuit Court of Kanawha County asking for the following relief:

WHEREFORE, based upon the foregoing, the Petitioners respectfully request that this Court issue a rule directing the Respondents to show

³ Mr. Coulson, in his letter contended that the investigative report indicated that he did nothing wrong and that the lack of reflective material on the inby dolly contributed to the accident.

cause why a Writ of Prohibition should not issue to prevent them from ordering the reinstatement of the underground miner certification of William A. Coulson pending full hearing before the Coal Mine Safety Board of Appeals in the matter of William A. Coulson, Docket No. 08-DEC-11.

On March 11, 2009, the circuit court granted the Office a preliminary injunction. The Board filed a Motion to Dismiss and Answer and the circuit court heard oral arguments, after which the circuit court directed the parties to file proposed Orders containing findings of fact and conclusions of law.

The Board held the decertification evidentiary hearing and issued the following verbal order:

The Board has deliberated and considered the two charges contained in the petition. The Board finds that with regard to Charge One, the Board unanimously finds that the piece of machinery was operated in an unsafe manner and, therefore, upholds the allegations contained in Charge One contained in the petition.

The Board, by a two to one vote, member Dillon -- a two to one vote, dismisses -- finds that the -- finds that present and under the influence is not the same thing and, therefore, finds that the State has failed to uphold -- has failed to prove it burden under Charge Two, and with member Dillon dissenting, that charge is dismissed.

The Board finds that contributing factors in the accident were the lack of lighting on the back of the forward equipment and takes into consideration that the rules and practices in this mine were changed to require significantly different lighting and reflection -- reflective materials, the fact that the front motor did not communicate that they had stopped and their location when they stopped, and the fact that unfortunately the victim in this case placed himself in a dangerous and inappropriate location. Taking into consideration all of those factors, the Board decertifies Mr. Coulson for a period of 90 days, including and counting the period that he's already been decertified. The objections and exceptions of any aggrieved party is hereby preserved.

In its *Final Order*, the Board dismissed Charge Two by a two-to-one vote (Member Dillon

dissenting), finding, “There was no evidence presented at hearing to show that the quantity of drug in Mr. Coulson’s system at the time of the accident was meaningful.”

The circuit court adopted the Board’s proposed order and on July 24, 2009, the Court entered its *Order Granting Respondent’s Motion to Dismiss*.

III.

STANDARD OF REVIEW

This Court has “previously cautioned that writs of prohibition provide a drastic remedy, and should be invoked only in extraordinary situations. As a consequence, the prohibition remedy is tightly circumscribed.” *Health Mgt., Inc. v. Lindell*, 207 W. Va. 68, 72, 528 S.E.2d 762, 766 (1999) (citation omitted). *Accord State ex rel. West Virginia Nat. Auto Ins. Co., Inc. v. Bedell*, 223 W. Va. 222, 228, 672 S.E.2d 358, 364 (2008) (per curiam) (“[P]rohibition is a drastic, tightly circumscribed, remedy which should be invoked only in extraordinary situations.”). “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). *See also State ex rel. West Virginia Dep’t of Health and Human Resources v. Ruckman*, 223 W. Va. 368, 373, 674 S.E.2d 229, 234 (2009) (“This appeal involves a challenge to . . . relief denied . . . by the circuit court through a writ of prohibition. [O]ur established standard of review is de novo.”).

IV.

ARGUMENT

A. Because this case is moot, it should not be addressed by this Court.

Mootness implicates a court’s subject matter jurisdiction, *see, e.g., Eastern Associated Coal Corp. v. Doe*, 159 W. Va. 200, 208, 220 S.E.2d 672, 678 (1975), because it deals with whether a case

or controversy exists, *see, e.g., DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006); *Friends of the Earth, Inc. v. Laidlaw Environmental Serv. (TOC), Inc.*, 528 U.S. 167, 180 (2000); and “[t]he very jurisdiction of a circuit court in civil matters depends upon the existence of a ‘case’ or ‘controversy.’” *Board of Ed. v. Starcher*, 176 W. Va. 388, 392 n.3, 343 S.E.2d 673, 677 n.3 (1986). Thus, because mootness deals with subject matter jurisdiction, it is a threshold issue that must be addressed before the Court may proceed further. *See State ex rel. Orlofske v. City of Wheeling*, 212 W. Va. 538, 543, 575 S.E.2d 148, 153 (2002) (subject matter jurisdiction is a threshold issue).⁴

A moot case is one that has “lost its character as a present, live controversy[.]” *Hall v. Beals*, 396 U.S. 45, 48 (1969). A case must be live because a “decision” in a moot case will not change the legal relationship between the parties and would constitute an “advisory opinions on abstract propositions of law[.]” *id.*, and “‘Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes.’” Syl. Pt. 2, *Harshbarger v. Gainer*, 184 W. Va. 656, 403 S.E.2d 399 (1991) (quoting *Mainella v. Board of Trustees of Policemen’s Pension or Relief Fund of City of Fairmont*, 126 W.Va. 183, 185-86, 27 S.E.2d 486, 487-88 (1943)). In short, “[m]oot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or property are not properly cognizable by a court.” Syl. Pt. 1, *State ex rel. Lilly v. Carter*, 63 W. Va. 684, 60 S.E. 873 (1908). These limitations are further reinforced

⁴ While the Office argues that the Board should not be entitled to raise mootness, because of some sort of stipulation, APPELLANT’S BR. at 8-9, whether a case is moot is a legal question, *New York Civil Liberties Union v. Grandeau*, 528 F.3d 122, 128 (2d Cir. 2008); *Wisconsin Right to Life, Inc. v. Schober*, 366 F.3d 485, 489 (7th Cir. 2004) and parties cannot stipulate to legal issues. *See, e.g., U.S. Nat. Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 448 (1993); *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 114 (1939); *Sanford’s Estate v. Commissioner of Internal Revenue*, 308 U.S. 39, 51 (1939). More specifically, parties may not vest a court with subject matter jurisdiction by consent, waiver, or estoppel. *See, e.g., Bartles v. Hinkle*, 196 W. Va. 381, 388, 472 S.E.2d 827, 834 (1996) (“[I]nsofar as subject matter jurisdiction is concerned . . . [c]ourts are never bound by the acts or agreements of the parties.”).

by the recognition that “Prohibition does not lie to restrain an inferior tribunal after its judgment has been given and fully executed.” Syl., *State ex rel. Burgett v. Oakley*, 155 W. Va. 75, 181 S.E.2d 19 (1971). Here, the Board has already ruled that Mr. Coulson’s certification should be suspended for 90 days. Thus, there is nothing left to be done to which a prohibition may be directed.

However, although the matter is moot, this Court has said it may examine technically moot issues if: (1) sufficient collateral consequences will result from determination of the questions presented so as to justify relief; (2) questions of great public interest may nevertheless be addressed to guide public and the bar; and, (3) 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. Syl. Pt. 2, *Israel by Israel v. West Virginia Sec. Sch. Act. Comm’n*, 182 W. Va. 454, 388 S.E.2d 480 (1989). None of these grounds apply here.

First, collateral consequences must flow directly from the action that is moot *and in the context of that particular case*. See, e.g., *Adobe Oilfield Services, Ltd. v. PNC Bank, Nat. Ass’n*, No. 11-09-00078-CV, 2009 WL 3068391, 1 (Tex. App. Sept. 24, 2009) (“The collateral consequences exception to the mootness doctrine may only be invoked in narrow circumstances when concrete disadvantages and disabilities will persist and continue to stigmatize after dismissal of the case as moot.”). For example, where an administrative subpoena has not been complied with, but no enforcement actions or citations have been filed against the subpoenaed party, there are no collateral consequences. *Koppers Industries, Inc. v. U.S. E.P.A.*, 902 F.2d 756, 758 (9th Cir. 1990). Here, the fact that the Board might apply the application requirement in the future has nothing to do with this case.

Second, the Office argues on appeal that if the Board continues to use the same probable

cause order, containing the same “application” language requiring notice before temporarily suspending a coal miner’s certifications:

[T]his 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 . . . 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.

APPELLANT’S BR. at 9-10. However, the fact in this case is that the Office made *no* application, not that any application it made was *improper*.

The type of “application” the Board desires has been repeatedly articulated in various pleadings below, including the circuit court’s final *Order Dismissing Petitioner’s Writ of Prohibition*: “[T]he Board of Appeals has the implied authority to require the OMHST to apply to it or *give it notice* prior to temporarily suspending the certificates of a miner.”⁵ (Emphasis added.) Simply restated, by “proper application” the Board means (and desires), official notice - however stylized, formatted, colored or designed.

This is not a case capable of repetition, yet evading review on the sufficiency argument raised by the Office, because if this sufficiency issue arises in the future, it will not likely be a repetition of what actually occurred in this case.

Moreover, this is not a matter that will be repeatedly presented to the trial court. This is the first case of its kind to be filed against the Board in the current Chairman’s (of the Board of Appeals]

⁵ R., *Order Dismissing Petitioner’s Writ of Prohibition*, Conclusions of Law, #6. It also should be noted that the Office cannot temporarily suspend the certificate of a certified person until the Board has made a finding of probable cause that such person has violated statutory duties. (*See* 37 C.S.R § 2-2.2.)

experience. Here, the Board maintains that the findings of the circuit court sufficiently support its determination that the Office's *Petition for Writ of Prohibition* was properly dismissed as moot.

In conclusion, the circuit court properly dismissed the Office's *Petition for Writ of Prohibition* as moot; given all of the above, there was nothing left for the circuit court to prohibit. The circuit court should be affirmed.

B. Because there was an available legal remedy, prohibition was inappropriate.

Additionally, another "threshold question in this case is whether prohibition is the proper procedure to challenge the [Board's] orders." *Handley v. Cook*, 162 W. Va. 629, 631, 252 S.E.2d 147, 148 (1979). "It is well established that prohibition . . . cannot be allowed to usurp the functions of appeal, writ of error, or certiorari." *Id.*, 252 S.E.2d at 148. *See also State ex rel. Stanek v. Kiger*, 155 W. Va. 587, 590, 185 S.E.2d 491, 493 (1971) ("it has been well settled by decisions of this Court that prohibition does not lie to correct mere errors and cannot be allowed to usurp the functions of appeal, writ of error or certiorari."). The Office claims that the Board's order reinstating the certification was an unappealable, interlocutory order. APPELLANT'S BR. at 10. While interlocutory, the order was statutorily appealable. (*See* W. Va. Code § 22A-1-19 *et seq.* and W. Va. Code § 22A-5-2 *et seq.*)

An order is interlocutory when its is not final in that it does not dispose of the entire matter in controversy between the parties. *See, e.g., Hall v. Bank of Virginia*, 15 W. Va. 323 (1879). An non-order may be appealable when it "fall[s] within a specific class of interlocutory orders which are made appealable by statute[.]" *James M.B. v. Carolyn M.*, 193 W. Va. 289, 292, 456 S.E.2d 16, 19 (1995). This is the situation at hand.

West Virginia Code § 22A-5-2(c) provides that "[j]udicial review of decisions by the board

of appeals shall be available and conducted in the same fashion as set forth in section nineteen, article one of this chapter.” Under West Virginia Code § 22A-1-19 (emphasis added), provides, in pertinent part, “*Any* order or decision issued by the director [Board of Appeals] under this law . . . is subject to judicial review by the circuit court of the county in which the mine affected is located or the circuit court of Kanawha County” “The word ‘any,’ when used in a statute, should be construed to mean any.” Syl. Pt. 2, *Thomas v. Firestone Tire and Rubber Co.*, 164 W. Va. 763, 266 S.E.2d 905 (1980). And “the word ‘any’ means without limit and no matter what kind.” *Delaney v. Superior Court*, 789 P.2d 934, 941 (Cal. 1990). “‘Any’ includes ‘all.’” *Harward v. Commonwealth*, 330 S.E.2d 89, 91 (Va. 1985). Under West Virginia Code § 22A-5-2(c) and West Virginia Code § 22A-1-19, the order of the Board—although interlocutory—was appealable. This statute also gives the Office the opportunity to request temporary relief from any order or decision of the Board.

It seems obvious the reason the Office failed to appeal under W.Va. Code § 22A-1-19 *et seq.* was because it mistakenly⁶ believed that this statute described the Board of Review’s legitimate judicial powers of review – when instead, it described the circuit court’s judicial powers of review. As a result, the Office failed to see that W.Va. Code § 22A-1-19 *et seq.* provided it with both a speedy and adequate remedy.

Properly interpreted in light of each other, W.Va. Code § 22A-1-19 *et seq.* and W.Va. Code § 22A-5-2 *et seq.*, provide for circuit court review and temporary relief from any order or decision of the Board; thus prescribing the legislative limitations on the Office’s right to appeal.

“Where the legislature has prescribed limitations on the right to appeal, such limitations are

⁶ R., *Petition for Writ of Prohibition*, 15-19.

exclusive, and cannot be enlarged by the court.” *Syl. pt. 1, West Virginia Dept. Of Energy v. Hobet Min. and Const. Co.*, 178 W. Va. 262, 358 S.E.2d 823 (1987). Because W. Va. Code § 22A-1-19 *et seq.* and W. Va. Code § 22A-5-2 *et seq.* provide for circuit court review and temporary relief from any order or decision of the Board, it would have been an adequate remedy for the Office. Because the Office exceeded its legislatively prescribed limitations on its right to appeal, the Office’s *Petition for Writ of Prohibition* was properly dismissed by the circuit court. Thus, the circuit court should be affirmed.

C. A quasi-judicial agency enjoys implied judicial powers to preserve its jurisdiction and effect its judgments.

While administrative agencies have no inherent powers, they are vested with implied powers, those, “powers as are reasonably and necessarily implied in the exercise of its duties in accomplishing the purposes of the act [the agency must enforce].” *State Human Rights Commission v. Pauley*, 158 W. Va. 495, 498, 212 S.E.2d 77, 78 (1975) *rev’d on other grounds by State Human Rights Commission v. Pearlman Realty Agency*, 161 W. Va. 1, 239 S.E.2d 145 (1977). Moreover, the Board’s powers are even broader as its is a quasi-judicial body, in that, inter alia, it “hear[s] appeals, make determinations on questions of miners’ entitlements due to withdrawal orders and appeals from discharge or discrimination, and suspension of certification certificates [and] to administer oaths and subpoena witnesses and require production of any books, papers, records or other documents relevant or material to the appeal inquiry.” W. Va. Code § 22A-5-1. *See Syl. Pt. 1, Appalachian Power Co. v. Public Serv. Comm’n*, 170 W. Va. 757, 296 S.E.2d 887 (1982) (“The Legislature may create an administrative agency and give it quasi-judicial powers to conduct hearings and make findings of fact without violating the separation of powers doctrine.”); *Rice v.*

Underwood, 205 W. Va. 274, 280, 517 S.E.2d 751, 757 (1998) (“quasi-judicial functions [include] appeals of . . . permit revocations”), and a tribunal exercising quasi-judicial power “possess[es] incidentally judicial powers[.]” Syl. Pt. 1, *Fleming v. Kanawha County Commissioners*, 31 W. Va. 608, 8 S.E. 267 (1888). See also *Stancourt v. Worthington City School Dist.*, 841 N.E.2d 812, 830 (Ohio App. 10 Dist. 2005) (“Because a due-process hearing is quasi-judicial in nature and consists of a hearing resembling a judicial trial, we conclude that a hearing Officer in such a proceeding is vested with implied powers similar to those of a court.”).

A reasonable and necessarily implied power is the preservation of the tribunal’s jurisdiction. A “court will protect its jurisdiction by preserving the subject matter of the litigation in order to make its decrees effective.” *Ex parte Smith*, 624 S.W.2d 671, 673 (Tex. App. 1981). See also *Arey v. State*, 929 A.2d 501, 511 (Md. 2007) (“The inherent powers of the court are those powers which are necessary to exercise its jurisdiction, administer justice, and preserve its independence and integrity.”).

The circuit court did not err when it dismissed the Office’s *Writ of Prohibition* and ruled the Board acted within its legitimate powers. As noted above, the law is well settled that an adjudicatory body enjoys certain implicit powers as adjuncts to the power to be explicitly exercised. Otherwise, there would be no assurance that the Board – which has the duty to make determinations on questions of miners’ entitlements – would even be aware of a temporary suspension if a coal miner did not appeal such suspension. Such a result would be contrary to the Board’s review of temporary suspensions.

It is a “sound principle of law, as reflected by many decisions of this Court and other authorities . . . that an administrative agency possesses, in addition to the powers expressly conferred

by statute, such powers as are reasonably and necessarily implied in the exercise of its duties in accomplishing the purposes of the act.” *State Human Rights Commission v. Pauley*, 158 W. Va. 495, 498, 212 S.E.2d 77, 78 (1975), *rev’d on other grounds by State Human Rights Commission v. Pearlman Realty Agency*, 161 W. Va. 1, 239 S.E.2d 145 (1977). “[W]here the Legislature grants definite power to one of its creatures . . . there goes with the powers granted, by necessary implication, such reasonable powers as are necessary to make them effective.” *State ex rel. Bd. of Gov. v. Sims*, 133 W. Va. 239, 246, 55 S.E.2d 505, 509 (1949). It is the purpose of the Board to “hear appeals, make determinations on questions of miners’ entitlements due to withdrawal orders and appeals from discharge or discrimination, and suspension of certification certificates.” W. Va. Code § 22A-5-1. It is also the duty of the Board to “maintain the file of the charge which shall contain all documents, testimony and other matters filed which shall be open for public inspection.” W. Va. Code § 22A-1-31(b).

Within this legislative declaration is the obligation to reach fair and just conclusions on the matters before it. Yet, the Board has observed that the system does not always allow it to reach such a conclusion. Miners are often compelled into settling their cases for fear of economic hardship imposed by the threat of temporary suspensions, or permanent withdrawal of their certificates – without the Board receiving notice of this, and without the Board being able to even verify whether a miner’s temporary license suspension met the required due process standard of being “necessary for health or safety reasons.” *State ex rel. Perry v. Miller*, 171 W. Va. 509, 515, 300 S.E.2d 622, 628 (1983).

There are cases which simply fall through the cracks of judicial review due to compulsive settlement techniques under the guise of a health or a safety emergency which constitutes a due

process deprivation. *See id.* This is especially troubling when considering that the regulation⁷ for temporarily suspending a coal miner's license certification(s) was promulgated by the Office⁸ before the powers of judicial review were transferred from the Director of OMHST to the Board of Appeals.⁹ Given the Board's purpose, its duties, and the fact that the Board has the power to "[modify] the Director's suspension order after the filing of the charge and before and during the hearing[.]" *id.*, the Board has, as an adjunct to its explicitly exercised powers, the implied authority to require the Office to give it notice prior to temporarily suspending a miner's certificate; thereby, operating as a check on the Office's power to deprive a miner of meaningful review by the use of temporary suspension of miners' certificates.

Finally, the Office also argues that the Board has no power to require prior notice of the Office's temporary suspensions, because such notice is not specifically required by 37 C.S.R. § 2-2.2.¹⁰ Again, it must be noted that this regulation, for temporarily suspending a coal miner's license certification(s), was promulgated by the Office before the powers of judicial review were transferred from the Director of OMHST to the Board as an independent review body. This argument must also be considered in light of the Office's mistaken view of both the nature and source of the Board's powers of judicial review, discussed *supra*.

Further, 37 C.S.R. § 2-2.2 is a "procedural rule" and does not have the force of law of a "legislative rule." *See* W. Va. Code § 29A-1-2(d). A "procedural rule" is defined in W. Va. Code

⁷ 37 C.S.R. § 2-2 *et seq.*

⁸ Under the direction of the Court in *State ex rel. Perry v. Miller*, 171 W. Va. at 516, 300 S.E.2d at 628.

⁹ *See* W. Va. Code § 22A-5-2 *et seq.*; 1994 West Virginia Laws Ch. 61 (H.B. 4065).

¹⁰ R., Petition for Writ, 18.

§ 29A-1-2(g) as follows: "Procedural Rule" means every rule, as defined in sub-section (I) of this section, which fixes rules of procedure, practice or evidence for dealings with or proceedings before an agency, including forms prescribed by the agency." The procedural rule does not override the statutory authority and responsibility given to the Board to properly review suspensions of miners' certificates, or the implied authority to require prior notice when the Office temporarily suspends a coal miner's license certificate(s). The circuit court did not err when it dismissed *Petitioner's Writ of Prohibition* and ruled the Board of Appeals acted within its legitimate powers.

V.

CONCLUSION

For all of the above reasons, the circuit court's *Order Granting Respondent's Motion to Dismiss* should be affirmed.

Respectfully submitted,

THE COAL MINE SAFETY BOARD
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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,

Appellants,

v.

THE COAL MINE SAFETY BOARD OF APPEALS,

Appellees,

and

WILLIAM A. COULSON,

Party in interest.

CERTIFICATE OF SERVICE

I, Ronald R. Brown, Assistant Attorney General, counsel for Appellees, do hereby certify that the foregoing *The Coal Mine Safety Board of Appeals' Brief* was served upon the following individuals by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 7th day of May, 2010, addressed as follows:

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