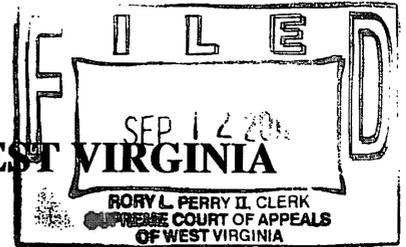


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



State of West Virginia ex rel. Jennifer A. Fillinger, RN,

Petitioner,

v.

CASE NO. 12-1055

**Laura S. Rhodes, Executive Director,
The West Virginia Board of Examiners for
Registered Professional Nurses, an
Administrative Agency of the State
West Virginia,**

Respondent.

ORIGINAL JURISDICTION

PETITION FOR A WRIT OF PROHIBITION

Presented by:

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Of Counsel for Petitioner

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QUESTIONS PRESENTED

1. Does the Respondent administrative agency have the power or subject matter jurisdiction to schedule, notice, and hold hearings on complaints against licensees after the expiration of the time limits imposed by West Virginia Code §30-1-5(c), where it has not provided status reports by certified mail to complainants or obtained the consent of the complainants to extend the time for disposition of the complaint beyond the statutory time limits?
2. Is the practice and procedure of the Respondent administrative agency constitutionally flawed so as to provide neither procedural nor substantive due process where it provides no mechanism for a hearing examiner to be designated in advance of a scheduled hearing to hear motions, where it provides no mechanism for any authority to hear and consider grounds for a continuance sought either by the agency or the responding licensee, where it decides arbitrarily to routinely continue hearings to pressure licensees subject to complaints to enter into consent orders, and where it otherwise delays scheduling hearings to effect such arbitrary and improper purpose?
3. When an administrative agency delays scheduling a dispositive hearing within the time frame required by statute, then thrice schedules hearings and on the day before each continues the hearing without stating reasons or giving either the complainants or the responding licensee an opportunity to object, should the complaints be dismissed for failure to prosecute on grounds authorized by the Rules of Civil Procedure?

STATEMENT OF THE CASE

Pursuant to Rule 16 of the Rules of Appellate Procedure, the Petitioner seeks a writ of prohibition under the original jurisdiction of the Supreme Court. For her petition against the Respondent, the West Virginia Board Examiners for Registered Professional Nurses, “the Respondent,” Petitioner, Jennifer A. Fillinger, RN, “Fillinger” or “Petitioner,” (formerly known as Jennifer A. Vance and Jennifer A. Thompson), by counsel, James D. McQueen, Jr., Amanda J. Davis, and the firm of McQueen Davis, PLLC, alleges and says as follows:

The Parties, Jurisdiction and Venue

1. The Petitioner is a resident and citizen of Harts, Lincoln County, West Virginia.
2. The Respondent¹ is the Executive Director of an administrative agency established by the West Virginia Legislature that is tasked to regulate the practice of registered professional nurses, *inter alia*, and to follow procedures contained in Chapter 29A, Article 4 of the West Virginia Code as amended.

¹ Herein, the word “Respondent” will apply interchangeably to refer to the Board and the Executive Director as one entity, without distinction.

3. This Court has subject matter jurisdiction to hear this controversy pursuant to §29A-5-4 and §30-1-9, because Petitioner has been prejudiced by reason of Respondent's conduct or neglect that is:
 - a. In violation of constitutional or statutory provisions; or
 - b. In excess of the statutory authority or jurisdiction of the agency; or
 - c. Made upon unlawful procedures; or
 - d. Affected by other error of law; or
 - e. Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
 - f. Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Factual Allegations

4. Petitioner is 28 years old and resides in Harts, Lincoln County, West Virginia with her husband, Donavon Fillinger and two children, ages 3 years and 1 year.
5. Petitioner graduated from Harts High School in 2002 with a 4.0 cumulative grade point average, and she received her associate degree in nursing in 2005 from the Southern West Virginia Community and Technical College in Mt. Gay, Logan County, West Virginia, with a cumulative grade point average of 3.5.
6. Petitioner obtained a license as a registered professional nurse (RN) that was initially issued on June 15, 2005 as Temp 001932, until

passing her boards and then received her full license July 14, 2005, as license no. 66716. Appendix, pages 1-5, 14.

7. Petitioner's license has been renewed every year since 2005, without restriction, despite the complaints hereinafter described.
8. On or about June 6, 2005, Petitioner began working at Charleston Area Medical Center, "CAMC," as an RN.
9. On March 17, 2008, Petitioner was terminated from her employment at CAMC, based on data collected in a machine designed to dispense medicine for patients which indicated that during the period between December 7, 2007 and March 13, 2008, the use of Petitioner's pass code to access the machine did not correlate with either drug inventories or patient records, by reason of which CAMC concluded that Petitioner was unlawfully obtaining prescription narcotics for personal use or distribution. Appendix, pages 29-31.
10. The machine at CAMC was managed by personnel in the pharmacy department, and Petitioner is without information as to the inter-workings thereof in terms of replacement of inventory or the maintenance of records of dispensed medicine.
11. Petitioner has continuously denied any improper acquisition of drugs and any improper use or distribution of drugs to others, and on

information and belief, neither of the complaining former employers nor the Respondent has any evidence relating to Petitioner's improper use or abuse or distribution of drugs. Appendix, pages 47-50.

12. Petitioner offered, at the time of termination to undergo a drug screen, but CAMC refused to administer one. Appendix, page 49.
13. On March 24, 2008, a complaint was filed by CAMC, and on March 31, 2008, Petitioner was provided notice of the Complaint. Appendix, page 38.
14. On or before October 8, 2009, Respondent had received all of CAMC's pertinent employment records and received various medical records thereafter through October 9, 2009. Appendix, pages 46, 93, 100, 106, and 107.
15. In August or September, 2008, Petitioner moved to Beckley and was hired as an RN at Raleigh General Hospital, but shortly thereafter realized that she was pregnant and decided to move back to Harts to be near her parents and resigned that position after approximately one month. Appendix, pages 51-70.
16. On October 6, 2008, Petitioner was employed by Logan Regional Medical Center as an RN. Appendix, page 72.

17. On September 21, 2009, Petitioner was terminated by Logan Regional Medical Center, based on data collected from a different brand and design of a similar type of machine used to dispense medicine for patients, which indicated that during the period between August 1, 2009 until September 1, 2009, the use of Petitioner's card to access the machine did not correlate on 7 occasions with either drug inventories or patient records, by reason of which Logan Regional Medical Center concluded that Petitioner was unlawfully obtaining prescription narcotics for personal use or distribution. Appendix, pages 97-99.
18. Prior to termination, Logan Regional Medical Center permitted Petitioner to undergo a drug screen to investigate for the presence of drugs in her urine, and on September 13, 2009, the test result was negative. Appendix, pages 94-96.
19. On September 22, 2009, Logan General Medical Center filed a complaint with Respondent. Appendix, pages 97-99.
20. On October 5, 2009, Respondent subpoenaed the pertinent records from Logan Regional Medical Center. Appendix, page 101.
21. Respondent mailed a Notice of Complaint to Petitioner on or about October 5, 2009, including information about the Impaired Nurse Treatment Program. Appendix, pages 102-105.

22. On or about January 20, 2011, Respondent proposed a Consent Order. Appendix, pages 109-111.
23. Petitioner was not scheduled for a hearing date on either or both of the two complaints until July 26, 2011, more than a year and nine months after the second of the two complaints. Appendix, pages 117, 124-129.
24. Shortly thereafter, Petitioner hired undersigned counsel, and on February 4, 2011, counsel rejected the proposed consent order and made a counterproposal. Appendix, pages 113-114.
25. On the day before the first hearing, on July 25, 2011, by facsimile time-stamped at 3:49 p.m., Petitioner's counsel, the undersigned, received a letter from Alice Faucett, in-house counsel for the Respondent, notifying counsel that the hearing is being continued. No reason was given for the continuance and no motion was made by or on behalf of the Respondent to allow Petitioner to object or otherwise respond to the motion. Further, there is no indication in the letter that either complainant was notified or agreed in writing to the continuance. Appendix, page 116.
26. By letter dated July 29, 2011, Petitioner received notice that a second hearing was set for September 8, 2011. Appendix, page 117.

27. On August 1, 2011, Petitioner through counsel acknowledged the notice of a new hearing date and requested the name of the assigned hearing examiner, the names of intended witnesses, and any intended exhibits not already provided. No response was ever received. Appendix, page 118.

28. On the day before the second hearing, September 7, 2011, by facsimile time-stamped at 12:29 p.m., Petitioner's counsel, the undersigned, received a letter from Respondent Laura S. Rhodes, RN, Executive Director of Respondent Board, informing counsel that the hearing was being continued because that morning the Respondent received records on 28 new patients and that Respondent would be amending the complaint. No explanation was given as to why the records of 28 new patients had not been previously obtained or provided to Respondent in the years preceding the scheduled hearings. No motion was made by or on behalf of the Respondent to allow Petitioner to object or otherwise respond to the motion. Further, there is no indication in the letter that either complainant was notified or agreed in writing to the continuance. Appendix, page 119.

29. By agreement, but before a notice of hearing was received, a hearing was to be scheduled on October 25, 2011, but on September 27, 2011,

Petitioner's counsel received a call from the Respondent's staff advising that the Assistant Attorney General assigned to handle the hearing on behalf of the Respondent would not be available. Appendix, page 120.

30. On September 28, 2011, Petitioner's counsel received additional medical records from the Respondent. Appendix, page 122.

31. On October 5, 2011, Respondent scheduled a hearing on November 1, 2011, and indicated that the assigned Assistant Attorney General was available at that time. Appendix, page 123.

32. On October 17, 2011, Respondent received a Complaint and Notice of Hearing signed by Laura Rhodes, RN, Executive Director of Respondent, scheduling a third hearing on November 1, 2011, but this pleading did not contain any new or different allegations as referred to in paragraph 28 above. Appendix, pages 127-129.

33. On the day before the scheduled hearing, October 31, 2011, Petitioner's counsel received a call from an employee of the Respondent, Karen Blankenship, advising that the hearing has been continued indefinitely again. No explanation was given as to why the hearing was continued. No motion was made by or on behalf of the Respondent to allow Petitioner to object or otherwise respond to the

motion. Further, there is no indication that either complainant was notified or agreed in writing to the continuance.

34. On April 16, 2012, Petitioner's counsel received a notice of hearing that had been set on May 22, 2012. Appendix, page 133.

35. On May 12, 2012, Petitioner moved the Respondent, by email correspondence directed to Respondent Laura S. Rhodes, Executive Director of Respondent Board, to dismiss the Complaint or Complaints against Petitioner for a violation of statute, lack of subject matter jurisdiction, and/or for a failure to prosecute, reciting legal grounds and factual predicate for the motion. Appendix, pages 133-134.

36. To date, there has been no notification of a hearing on the motion, no identification of the identity of an assigned hearing examiner to hear the motion, no response to the motion, nor has there been a summary ruling on the motion by Respondent.

37. On behalf of the Respondent, the Assistant Attorney General assigned to prosecute the Complaint or Complaints against Petitioner agreed to stay the hearing to permit Petitioner to seek a writ of prohibition.

38. For each of the three prior continued hearings, Petitioner has incurred significant attorneys' fees to investigate and prepare her and others to testify at each scheduled hearing, which fees and costs to date total in

excess of \$15,000, all of which Petitioner has paid through gifts and/or loans from her husband and parents.

39. Between September, 2008, when Petitioner was terminated by Logan General Hospital, and the spring of 2012, she was unable to obtain employment as a registered nurse because of the two pending complaints against her license. This year, she finally obtained employment working for a health insurance carrier in a job requiring RN credentials.
40. Petitioner has continuously denied any improper and unlawful acquisition of drugs and any improper use or distribution of drugs to others, and on information and belief, neither of the complainant former employers nor the Respondent can produce evidence relating to any improper use or abuse or distribution of drugs by Petitioner.
41. Petitioner has never been accused, investigated, or arrested by any law enforcement agency in relation to any wrongdoing, but more particularly, for the unlawful use or distribution of drugs.
42. Petitioner has never been treated by any medical provider or participated in any other form of counseling for any improper use or abuse of drugs.

43. As a course of conduct, Respondent routinely treats nurses and other licensed practitioners under its regulatory control in a manner consistent with the allegations contained in paragraphs 1-36 above.
44. As a course of conduct, Respondent routinely continues hearings at the last minute without giving the respondent professional a reason, an explanation or an opportunity to be heard in opposition to further delay in the proceedings.
45. On information and belief, Respondent continues hearings and otherwise delays the administrative process for handling complaints against licensees in an arbitrary and capricious manner in order to pressure responding licensees to enter into consent orders for discipline, out of frustration or in the hope that by consenting they will eventually have the cloud of formal discipline removed as an impediment to their ability to gain employment again as a nurse.
46. As a regulatory agency, Respondent does not have a process or a procedure to allow for pre-hearing motions or arguments or even to involve or hire a hearing examiner who could hear such motions in advance of a scheduled hearing. On information and belief, the assigned hearing examiner first appears in a proceeding on the date of a scheduled hearing.

47. On information and belief, from a review of Petitioner's file at the office of the Respondent, on only one occasion has Respondent provided a complainant in this case with a Status Report, on September 22, 2008, to CAMC. In Petitioner's file at the Respondent's office, no other notices, status reports or correspondence appears that is addressed to either of the complainant hospitals, and there is no indication of written consent from either complainant to delay or continue hearings beyond the statutory period.

48. On information and belief, the complainants CAMC and Logan Regional Medical Center have not agreed in writing at any time to extend the time for a final hearing.

49. It has been more than four years since Petitioner received notice of the complaint by CAMC and a few weeks shy of 3 years since Petitioner received notice of the complaint by Logan Regional Medical Center. It took the Respondent almost three years to set a time for the final ruling in this case, and then on three occasions during the last year, Respondent has set a hearing and then unilaterally continued the same on the day before the scheduled hearing date.

50. West Virginia Code §30-1-5 provides as follows:

”(c) Every board referred to in this chapter has a duty to investigate and resolve complaints which

it receives and shall, within six months of the complaint being filed, send a status report to the party filing the complaint by certified mail with a signed return receipt and within one year of the status report's return receipt date issue a final ruling, unless the party filing the complaint and the board agree in writing to extend the time for the final ruling.”

51. Without consent, reason or excuse, Respondent has violated §30-1-5 repeatedly in this case, to the extent that, upon information and belief, the Respondent’s conduct in this case is representative of a course of conduct by Respondent that is by insidious design perpetrated with the intent to force nurses against whom complaints have been lodged to capitulate and sign a consent order disposing of the complaint “voluntarily,” and thus effectively depriving them of an opportunity to be heard when they do not agree with the allegations or the arbitrarily imposed discipline.
52. From the date of the last noticed hearing, Respondent has agreed to stay all further administrative proceedings pending the entry of a final order upon this Petition.

SUMMARY OF ARGUMENT

1. Respondent administrative agency has failed or refused to comply with the requirements of West Virginia Code §30-1-5(c) by specifically failing to send a status report by certified mail return receipt requested to the complainants, by failing to obtain the consent of the complainants to extend disposition of the complaints against Petitioner, and by failing to schedule, notice, or hold a dispositive hearing and render a decision in this matter within the time limits prescribed in said statute. Rather than to comply with the statute, the Respondent administrative agency uses delay in the adjudication of complaints as a means to pressure licensees to enter into a consent orders. Such blatant abuse of the procedure established by the Legislature should result in a prejudicial dismissal of the complaints against the Petitioner.
2. In order to facilitate the use of delay as a mechanism to force licensees to enter into consent orders, the Respondent administrative agency has ignored and/or failed to provide a procedural mechanism for Petitioner's motion to dismiss the complaints against her, has failed to involve a hearing examiner to hear arguments in advance of a scheduled hearing to decide such a motion, and has failed even to acknowledge receipt of the motion or to notify Petitioner either that the motion is summarily denied or will be ruled

upon at a particular time. Moreover, Respondent administrative agency has failed to provide a procedural mechanism whereby a licensee subject to a complaint and notice of hearing may object to a (motion for a) continuance or to allow such objection to be heard and considered by a hearing examiner in advance of the hearing date. On information and belief, Respondent routinely and arbitrarily decides to continue proceedings without giving reasons or seeking permission from a hearing examiner and with no right given to the licensee to protest or to be heard regarding the grounds for the continuance. All of these failures, acts or omissions by the Respondent violate Petitioner's constitutional right to due process and fundamental fairness.

3. The Respondent administrative agency has failed to prosecute the complaints against petitioner within the time permitted by the Legislature, has failed to even schedule a final hearing for the complaints against Petitioner until after the statutory time expired, and then failed to conduct a hearing on at least three occasions when scheduled by continuing each of said hearings at the last minute without notice or an opportunity for the Petitioner to be heard or to object within a reasonable period in advance of the hearing. Under the Rules of Civil Procedure, Rule 41, through this

Petition, the said administrative complaints should be dismissed with prejudice for failure to prosecute.

STATEMENT RE: ORAL ARGUMENT AND DECISION

The Petitioner believes that oral argument is necessary in this action and that said argument should be set as a Rule 20 argument. This petition presents questions that are important to all licensed professionals in the State of West Virginia, particularly those professionals governed by the Respondent agency. The questions presented herein are essentially issues of first impression that involve constitutional questions regarding the application of a statute and the absence of adequate regulations or rules by an administrative agency so to permit licensed professionals against whom complaints are made to have a constitutionally appropriate and timely level of procedural and substantive due process and fundamental fairness in administrative proceedings in which a professional license is vulnerable to suspension, revocation, or other discipline.

ARGUMENT

I. Subject Matter Jurisdiction

1. By reason of the Respondent's failure to comply with West Virginia Code §30-1-5, the Respondent no longer has jurisdiction over the subject matter of this claim.
2. The statute commands that the Respondent "shall" within six months of the complaint being filed, issue a status report to the complainant by certified mail with a signed return receipt.
3. The statute commands that the Respondent "shall" issue a final ruling within one year of said status report, unless there is an agreement with the complainant in writing to extend the time for final ruling.
4. There is no conduct by Petitioner that has impeded the administrative process to complete a decision on the complaints against Petitioner within the time limit imposed by statute.
5. Accordingly, the Complaints against Petitioner should be dismissed with prejudice.

II. Violations of Constitutional Rights

6. As a matter of due process under the State and Federal Constitutions, Petitioner has been deprived of fundamental rights and fairness that

should be an integral part of the administrative process superintended by the Respondent.

7. The Respondent has failed to promulgate adequate administrative and procedural regulations to insure that licensed nurses and other health care providers subject to its jurisdiction are timely treated fairly, reasonably and predictably when complaints are made against their licenses.
8. Specifically, there is no mechanism in place to appoint a hearing examiner to hear motions generally in advance of a scheduled hearing or particularly with reference to a continuance of a scheduled and noticed hearing within a reasonable time in advance of the scheduled hearing.
9. Specifically, there is no provision for a responding licensee to have an opportunity to be heard or to object to a continuance sought by the Respondent agency.
10. Specifically, on information and belief, the Respondent uses arbitrary self-granted continuances to pressure responding licensees into a consent order, notwithstanding that they have requested a hearing, hired counsel to appear and to assist in preparations for such a hearing, and asked others to take off from their work to appear as witnesses at said hearing, all at considerable financial and emotional expense to the responding licensee.

11. The West Virginia Supreme Court of Appeals has long recognized that the right to practice a profession is a valuable franchise in the nature of a “property right.” See *West Virginia State Medical Ass’n v. Public Health Council of West Virginia*, 125 W. Va. 152, 23 S.E.2d 609 (1942). Moreover, because a license to practice a profession is considered a valuable right, it will be protected by the law. *Wallington v. Zinn*, 146 W. Va. 147, 188 S.E.2d 526 (1961). As such, a person’s professional license may not be revoked (or held in suspense) without adequate levels of due process being afforded to that individual. See *State ex rel. Hoover v. Smith*, 198 W. Va. 507, 482 S.E.2d 124 (1997).
12. In determining whether to entertain and issue a writ of prohibition where an entity has exceeded its legitimate powers, a Court should look at five factors: (1) whether a party seeking the writ has no other adequate means, such as direct appeal to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal’s order is clearly erroneous as a matter of law; (4) whether the lower tribunal’s order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal’s order raises new and important problems

or issues of law of first impression. *Feathers v. Board of Medicine*, 211 W. Va. 96, 562 S.E.2d 488 (2001).

13. “Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.” Syl. pt. 2, *Feathers*.

14. In *Hoover*, the Court held that “due process of law within the meaning of the State and Federal Constitutional provisions extends to actions of administrative officers and tribunals as well as to the judicial branches of governments.” See Syl. pt. 1 of *Hoover*. The Court also held that:

When due process applies, it must be determined what process is due and consideration of what procedures due process may require under a given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been impaired by the government action. Syl. pt. 2 of *Hoover*.

15. Accordingly, the Court should direct the Respondent to dismiss the complaints against Petitioner, with prejudice.

III. Failure to Prosecute

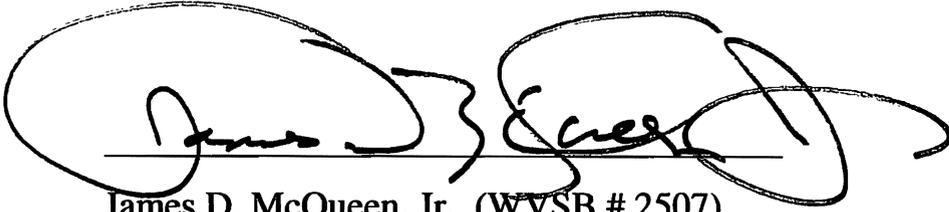
16. Rule 41(b) of the West Virginia Rules of Civil Procedure provides that the failure of the plaintiff (Respondent herein) to prosecute or to comply with these rules or any order of the court, a defendant (Petitioner herein) may move for dismissal of an action or of any claim against the defendant (Petitioner herein).

17. On the basis of the foregoing factual allegations and the points of law hereinabove cited, Petitioner has established sufficient grounds to avail herself of the application of said rule, and does hereby do so, pursuant to Rule 81(a) of the West Virginia Rules of Civil Procedure.
18. Rule 41(a) further provides that a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or improper venue, shall operate as adjudication on the merits.
19. Accordingly, the Court should dismiss the complaints filed within the Respondent agency, with prejudice, for failure to prosecute.

CONCLUSION

WHEREFORE, Petitioner, Jennifer A. Fillinger, respectfully requests that the Court hear argument in support of and in opposition to this Petition, consider the facts alleged and established, the applicable statutory, constitutional and common law principles applicable to said facts, and issue a final order, writ, or judgment directing or compelling the Respondent to dismiss all charges against the Petitioner, with prejudice, and to grant such further legal and equitable relief as may be warranted in the premises.

**Jennifer A. Fillinger, Petitioner
By Counsel**

A handwritten signature in black ink, appearing to read "James D. McQueen, Jr.", written over a horizontal line. The signature is highly stylized and cursive.

James D. McQueen, Jr. (WVSB # 2507)

Amanda J. Davis (WVSB # 9375)

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Of counsel for Petitioner

VERIFICATION PURSUANT TO §53-1-3

I, Jennifer A. Fillinger, have read the heretofore filed "*Petition for a Writ of Prohibition*" and say, under oath, that I am the person referred to therein as the Petitioner; that I am competent to give this Verification, that the statements contained therein are true based on my personal knowledge, except to the extent that they are made on information and belief, and, in that case, I believe such statements to be true.

This statement and verification is made subject to the penalties of perjury, which provides that if I make knowingly false averments, I may be subject to sanctions and penalties.

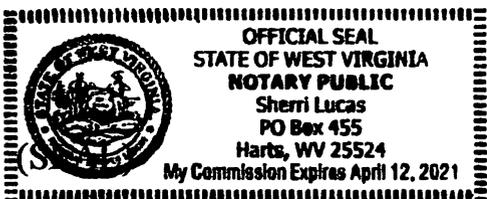
Jennifer A. Fillinger
Jennifer A. Fillinger

STATE OF WEST VIRGINIA
COUNTY OF Lincoln To-Wit:

The foregoing Verification pursuant to §53-1-3 of the West Virginia Code was acknowledged before me this 6th day of September, 2012.

My commission expires: April 12, 2021

Sherri Lucas
NOTARY PUBLIC



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia ex rel. Jennifer A. Fillinger, RN

Petitioner

v.

**Laura S. Rhodes, Executive Director,
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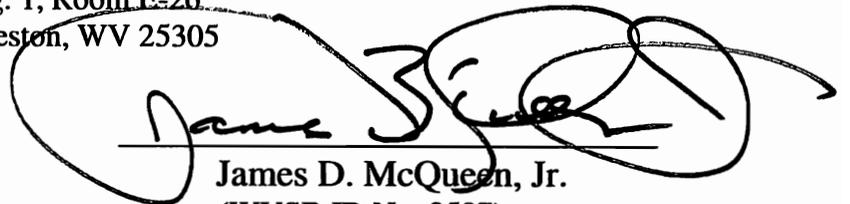
Respondent

CERTIFICATE OF SERVICE

The Petitioner, Jennifer A. Fillinger, by counsel, hereby certifies that the forgoing *Original Jurisdiction Petition For Writ of Prohibition* has been served on both the Respondent and the West Virginia Attorney General personally and by regular United States mail, this 12th day of September, 2012, addressed as follows:

Laura S. Rhodes, RN, MSN, Executive Director
The West Virginia Board of Examiners
For Registered Professional Nurses
101 Dee Drive, Suite 102
Charleston, WV 25311-1620

Greg Skinner, Esquire
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James D. McQueen, Jr.
(WVSB ID No. 2507)