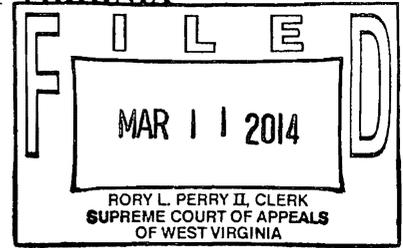

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-0233



STATE OF WEST VIRGINIA, ex rel.
WEST VIRGINIA REAL ESTATE APPRAISER
LICENSING AND CERTIFICATION BOARD,

Petitioner,

v.

THE HONORABLE CHRIS CHILES
Judge, Sixth Judicial Circuit,

and

DAVID E. BUNCH,

Respondents.

PETITION FOR WRIT OF PROHIBITION

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LICENSING AND CERTIFICATION BOARD,

Petitioner,

v.

THE HONORABLE CHRIS CHILES
Judge, Sixth Judicial Circuit,

and

DAVID E. BUNCH,

Respondents.

PETITION FOR WRIT OF PROHIBITION

The West Virginia Real Estate Appraiser Licensing and Certification Board (“Board”) requests a writ of prohibition pursuant to Rule 16 of the West Virginia Rules of Appellate Procedure to prevent the Honorable Chris Chiles,¹ Judge of the Sixth Judicial Circuit, Cabell County, West Virginia (“Circuit Court”) from enforcing an order issued on January 16, 2014, and also to restrain the Circuit Court from conducting any further proceedings in the matter.

¹ Pursuant to Rule 41 (c) of the West Virginia Rules of Appellate Procedure, the Honorable Chris Chiles, sitting judge for the Sixth Judicial Circuit, is automatically substituted for the Honorable David E. Pancake, who presided in the underlying matter but has since retired.

QUESTION PRESENTED

Did the Circuit Court of Cabell County exceed its authority by denying the West Virginia Real Estate Appraiser Licensing and Certification Board's motion to dismiss and continuing to conduct proceedings in Circuit Court of Cabell County even though the Board is a state agency entitled to the special venue provisions of West Virginia Code § 14-2-2?

STATEMENT OF CASE

The West Virginia Real Estate Appraiser Licensing and Certification Board is a state agency created and enabled by West Virginia Code § 30-38-1, *et seq.* ("The Real Estate Appraiser Licensing and Certification Act" or "Act"), which regulates the practice of real estate appraising throughout the State. Respondent David E. Bunch is licensed by the Board as a certified general real estate appraiser and holds Certified General Appraiser License No. CG166. Pet. App. 1.

On December 17, 2008, the Board initiated disciplinary procedures against Mr. Bunch pursuant to various alleged violations of the Act and served him with a complaint and a notice of hearing. Pet. App. 1-11. The Board subsequently amended its complaint and issued another notice of hearing for April 15, 2010. Pet. App. 12-51.

On March 16, 2010, Mr. Bunch filed a verified complaint² against the Board in the Circuit Court of Cabell County, seeking a writ prohibiting the Board from taking any administrative action against him. Pet. App. 52-59. On the same day, the circuit court issued an *ex parte* order enjoining the Board from pursuing further administrative action against Mr. Bunch until the Circuit Court could resolve the matter. Pet. App. 111-112. The Circuit Court also set a status conference for June

² This matter is not an administrative appeal and, therefore, is not subject to W. Va. Code § 29A-5-4.

4, 2010. *Id.*

On March 25, 2010, the Board filed a motion to dismiss and vacate the *ex parte* order. The Board asserted that venue was improper in the Circuit Court of Cabell County pursuant to West Virginia Code § 14-2-2(a)(1), which mandates that suit against a state government agency must be brought only in the Circuit Court of Kanawha County.

Due to conflicts with the Circuit Court's docket, the June 4, 2010 status conference was rescheduled for June 22, 2010, the date on which the Board originally set the hearing for its motion to dismiss. The status conference was held on June 22, 2010. By letter dated June 23, 2010, the Circuit Court issued a scheduling order, which set oral argument on the Board's motion for January 14, 2011. However, for reasons not apparent from the record, oral argument was not held until August 12, 2011.

The Circuit Court did not issue its decision on the Board's motion to dismiss until January 16, 2014. Pet. App. 113-122. In its January 16 decision—the order subject to this petition—the Circuit Court denied the Board's motion to dismiss, concluding:

[I]t is not clear whether the Board is to be considered a state agency for purposes of West Virginia Code § 14-2-2. There are strong factors that weigh in favor of each argument. Because it is not clear that the Board is a state agency, this Court finds the more prudent action is not to dismiss this action for improper venue.

Pet. App. 119.

The Board now seeks a writ to prohibit the Circuit Court's January 16, 2014 order denying the Board's motion to dismiss for improper venue under section 14-2-2, and also to restrain the Circuit Court from conducting any further proceedings in the matter.

SUMMARY OF ARGUMENT

The Circuit Court exceeded its legitimate powers by rejecting the Board's motion to dismiss and continuing proceedings in the venue of Cabell County. This Court has repeatedly held that a writ of prohibition is an appropriate remedy to preclude a circuit court from enforcing an order based on proceedings held where venue is improper under section 14-2-2. *See State ex rel. Stewart v. Alsop*, 207 W. Va. 430, 435, 533 S.E.2d 362, 367 (2000) (citing cases). Prohibition lies to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari. *See Syl. Pt. 1, id.*

The Board is entitled to the special venue provision of West Virginia Code § 14-2-2(a)(1), which mandates that suit against a state agency must be brought and prosecuted *only* in the Circuit Court of Kanawha County. The Board is plainly a "state agency" because its powers and duties are entirely created by the legislature, the composition of its governing board is prescribed by the legislature, it operates on a statewide basis, and its monies are kept in the state treasury. *See Syl. Pt. 1, Blower v. W. Va. Edu. Broadcasting Auth.*, 182 W. Va. 528, 389 S.E.2d 739 (1990). Accordingly, a writ of prohibition is necessary to preclude the Circuit Court from hearing Mr. Bunch's application for prohibition in Cabell County.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary because the facts and legal arguments are adequately presented and the decisional process will not be aided by oral argument. *See W. Va. R. App. Pro. 18(a)*. A memorandum decision is appropriate in this case. *See W. Va. R. App. Pro. 21*.

ARGUMENT

A. A WRIT OF PROHIBITION IS APPROPRIATE AGAINST THE CIRCUIT COURT OF CABELL COUNTY INASMUCH AS IT EXCEEDED ITS LEGITIMATE POWERS BY FAILING TO GRANT THE BOARD'S MOTION TO DISMISS AND CONTINUING TO CONDUCT PROCEEDINGS IN CABELL COUNTY.

A writ of prohibition should be issued against the Circuit Court because venue is improper in the Circuit Court of Cabell County inasmuch as West Virginia Code § 14-2-2(a)(1) requires that suit brought against a state agency—like the Board—must be brought and prosecuted *only* in the Circuit Court of Kanawha County. Prohibition lies to “restrain inferior courts from proceeding in causes . . . in which . . . they are exceeding their legitimate powers.” Syl. Pt. 1, *Alsop*, 207 W. Va. 430, 533 S.E.2d 362. This Court has a long history of issuing writs of prohibition to preclude a court from continuing to hear a case where venue is improper under West Virginia Code § 14-2-2. *See Alsop*, 207 W. Va. at 435, 533 S.E.2d at 367; *State ex rel. Miller v. Reed*, 203 W. Va. 673, 684-85, 510 S.E.2d 507, 518-19 (1998) (mandamus action against Division of Motor Vehicles and its Commissioner must be brought in Circuit Court of Kanawha County and not Circuit Court of Preston County); *State ex rel. Ritchie v. Triplett*, 160 W. Va. 599, 236 S.E.2d 474 (1977) (mandamus action against Commissioner of the Department of Highways must be brought in Circuit Court of Kanawha County and not Circuit Court of Randolph County).

The Circuit Court should have granted the Board's motion to dismiss for improper venue and dismissed Mr. Bunch's complaint. “Actions wherein a *state agency* or official is named, whether as a principal party or third-party defendant, may be brought *only* in the Circuit Court of Kanawha County.” Syl. Pt. 2, *Alsop*, 207 W. Va. 430, 533 S.E.2d 362 (emphasis added). When the Circuit

Court denied the Board's motion to dismiss, it exceeded its legitimate authority and retained an action over which the Circuit Court of Cabell County lacked venue. *See id.* Prohibition is therefore the appropriate remedy.

B. THE WEST VIRGINIA REAL ESTATE APPRAISER LICENSING AND CERTIFICATION BOARD IS A STATE AGENCY ENTITLED TO THE SPECIAL VENUE PROVISIONS OF WEST VIRGINIA CODE § 14-2-2.

The Board is the state agency created by West Virginia Code § 30-38-1, *et seq.*, and is empowered to regulate the practice of real estate appraisers. As a state agency, the Board is entitled to the special venue provision of section 14-2-2(a)(1), which states that any suit in which the governor, any other state officer, or a state agency, is made a party defendant, must be prosecuted only in the Circuit Court of Kanawha County. Section 14-2-3 defines "state agency" as "a state department, *board*, commission, institution, or other administrative agency of state government" (emphasis added).

To determine whether an entity is a "state agency" for purposes of applying the special venue provision in section 14-2-2, this Court applies the factors established in *Blower v. West Virginia Educational Broadcasting Authority*, 182 W. Va. 528, 389 S.E.2d 739 (1990). These factors are set forth in Syllabus Point 1:

In determining whether a particular organization is a state agency, we will examine its legislative framework. In particular, we look to see if its powers are substantially created by the legislature and whether its governing board's composition is prescribed by the legislature. Other significant factors are whether the organization can operate on a statewide basis, whether it is financially dependent on public funds, and whether it is required to deposit its funds in the state treasury.

Id.

Applying the *Blower* factors to this matter, the Board plainly constitutes a state agency for

the purposes of section 14-2-2. *First*, the Board is wholly a creation of the Legislature, *see* W. Va. Code § 30-38-1, *et seq.* *Second*, the Act regulates the practice of real estate appraising on a statewide basis. *See id.* The Board’s fundamental purpose—as declared by the Legislature—is to protect the public from unlicensed or uncertified appraisers. W. Va. Code § 30-1-1(a). *Third*, the composition of the Board is prescribed by the Legislature. Board members are appointed by the Governor, with the advice and consent of the West Virginia Senate, W. Va. Code §§ 30-38-6(a), 30-1-4a(a), and Board members may be removed for cause by the Governor. W. Va. Code § 30-38-6(b).

Fourth, the Legislature has established many other powers and duties of the Board that are key characteristics of state agencies generally. For example, the Legislature granted the Board rulemaking authority in accordance with the West Virginia Administrative Procedures Act. W. Va. Code § 30-38-9. The officers of the Board must register annually with the Governor, the Secretary of Administration, the Legislative Auditor, and the Secretary of State. W. Va. Code § 30-1-3(b). The Board is subject to audit by the Office of the Legislative Auditor, W. Va. Code § 30-1-10(b), and is required to submit reports to both the Governor and the Legislature of its transactions. W. Va. Code § 30-1-12(b). Furthermore, the Board is subject to the West Virginia Freedom of Information Act, state purchasing guidelines, and state records management requirements. W. Va. Code §§ 29B-1-2(2), 5A-3-1, 5A-8-3(c)(1). All told, the circumstances of this case are well-within the parameters established in *Blower*. 182 W. Va. at 532, 389 S.E.2d at 742 (“we find this legislative framework to be comprehensive in not only creating the entity’s structure, but in placing its control in the hands of state officials and persons appointed by the governor.”).

Although it is not entirely clear, the Circuit Court appears to have rested its decision on the fact that the Board is purportedly “not dependent on public funds,” and is thus “exclusively a self

supporting entity,” facts the Circuit Court reasoned “works against finding that the Board is a state agency.” Pet. App. 117. In so reasoning, the Circuit Court elevated the form (of the funding) over substance.

While it is true that the Board operates on funds received pursuant to its statutory duties, the monies received should still be considered “public funds” for purposes of the *Blower* test. The statutory text demonstrates why. *First*, all monies received by the Board, except as fines, must be deposited into a special fund established for the Board in *the state treasury*. W. Va. Code § 30-1-10(a). *Second*, all monies received by the Board for purposes of collecting fines are deposited into the *general revenue fund of the State*. W. Va. § 30-1-10(a). *Third*, in the event the special fund of the Board exceeds twice its annual budget, the excess amount is transferred to *the state general revenue fund*. W. Va. § 30-1-10(a). *Fourth*, and perhaps most significantly, all monies are collected *pursuant to statute*—i.e., a public law—and stored in the *state treasury*. Merely because *the Legislature* permits the Board to operate on its own collections should not weigh against concluding the Board is not operated by “public” funds.

But even if this Court believed that the “public funding” factor weighs against finding that the Board is a “state agency,” the other factors weigh far heavier in the Board’s favor—namely, that the Board’s powers and duties, governing board composition, statewide jurisdiction, and funding mechanisms are all *exclusively subject to state government control*. Accordingly, this case is on all-fours with *Blower*, which concluded that the West Virginia Educational Broadcasting Authority is a state agency under section 14-2-2 for substantially the same reasons. *See Blower* 182 W. Va. at 532, 389 S.E.2d at 742. Thus, the Board is a “state agency” for purposes of the special venue provisions of section 14-2-2, and the Circuit Court’s order to the contrary must be prohibited.

CONCLUSION

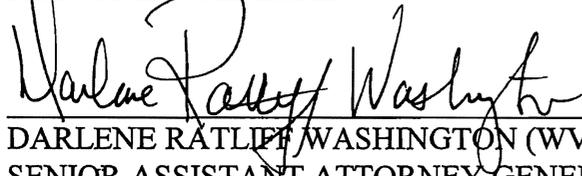
For these reasons, the Board respectfully requests this Court issue a rule to show cause to the Respondents to demonstrate why the Board's requested relief should not be granted. A writ of prohibition must be issued against the Circuit Court to prevent enforcement of the January 16, 2014 order and to prevent that court from conducting any further proceedings in this matter.

Respectfully submitted,

STATE OF WEST VIRGINIA ex rel.
WEST VIRGINIA REAL ESTATE APPRAISER
LICENSING AND CERTIFICATION BOARD,

By Counsel

PATRICK MORRISEY
ATTORNEY GENERAL



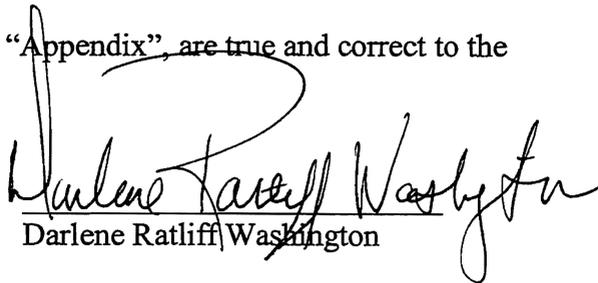
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VERIFICATION

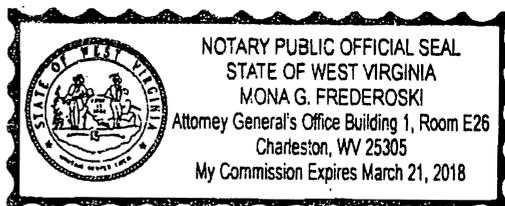
STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, to wit:

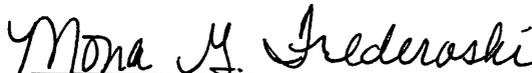
Before me, the undersigned Notary Public, personally appeared, Darlene Ratliff Washington, who after being duly sworn according to law deposes and says the facts set forth in the foregoing "Petition for Writ of Prohibition", along with the attached "Appendix", are true and correct to the best of her knowledge, information and belief.


Darlene Ratliff Washington

Taken, sworn to, and subscribed before me this 11th day of March 2014.

My commission expires: March 21, 2018.




NOTARY PUBLIC

CERTIFICATE OF SERVICE

I, Darlene Ratliff Washington, Senior Assistant Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing Petition for Writ of Prohibition and Appendix were served by depositing the same postage prepaid in the United States Mail, this 17th day of March, 2014, addressed as follows:

The Honorable Chris Chiles
Sixth Judicial Circuit
Cabell County Courthouse
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