

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOHNATHAN LOWELL MCCLANAHAN, RN,  
Petitioner Below, Petitioner

v.

Docket No. 15-1014  
(Kanawha County Circuit Court  
Civil Action No. 15-AA-58)

WEST VIRGINIA BOARD OF EXAMINERS FOR  
REGISTERED PROFESSIONAL NURSES,  
Respondent Below, Respondent.

## **PETITIONER'S** **REPLY BRIEF**

Submitted by:

Lisa L. Lilly (WVSB No. 5860)  
Francis & Lilly, PLLC  
300 Capitol Street, Suite 1520  
Charleston, WV 25301  
Telephone: 304-410-0043  
LLilly@francisandlillylaw.com  
*Counsel for Petitioner*

**TABLE OF CONTENTS**

I. THE ONEROUS NATURE OF THE FINAL ORDER AND FINAL ORDER  
ADDITION ENTERED BY THE WEST VIRGINIA BOARD OF  
REGISTERED NURSES ON MARCH 30, 2015.....1

II. PETITIONER’S EMPLOYMENT STATUS AT TIME OF PRE-HIRE  
DRUG SCREENS.....4

III. LABORATORY TESTING, TEST RESULTS AND LACKOF  
CREDIBILITY OF BOARD’S EXPERT WITNESS, DR. DOUGLAS  
AUKERMAN .....5

IV. THE EVIDENCE IS TO SHOW THAT PETITIONER VIOLATED  
W. VA. CODE § 30-7-11(f) AND W. VA. CODE § 30-7-11(c).....9

V. THE FULL EVALUATION BY BINICKI SHREWSBURY, MS, LSW,  
LPC, AADC OF FMRS HEALTH SYSTEMS, INC., WAS  
EXCULPATORY EVIDENCE.....16

VI. STATEMENT REGARDING ORAL ARGUMENT.....18

VII. CONCLUSION .....18

## TABLE OF AUTHORITIES

### Cases

<i>Daubert v. Merrell Dow Pharmaceuticals, Inc</i> , 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) .....	6, 9
<i>Owens v Missouri State Board of Nursing</i> , 2015 Mo. App. LEXIS 1185 (Nov. 2015).....	11
<i>Thornton v. Alabama Board of Nursing</i> , 973 So. 2d 1079 (Ala. Civ. App., 2007).....	17

### Statutes

W.Va. Code §30-7-11(c).....	9, 11, 14
W.Va. Code §30-7-11(f).....	9, 11, 14, 17, 19, 20
W.Va. CSR §19-3-14.....	9
W.Va. CSR §19-3-14.1.ll.....	9
W. Va. Code §30-7-11(d).....	14

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOHNATHAN LOWELL MCCLANAHAN, RN,

Petitioner Below, Petitioner

v.

Docket No. 15-1014  
(Kanawha County Circuit Court  
Civil Action No. 15-AA-58)

WEST VIRGINIA BOARD OF EXAMINERS FOR  
REGISTERED PROFESSIONAL NURSES,

Respondent Below, Respondent.

**REPLY BRIEF ON BEHALF OF PETITIONER,  
JOHNATHAN LOWELL MCCLANAHAN, RN**

Comes now Petitioner, Johnathan Lowell McClanahan, RN, by and through counsel, Lisa L. Lilly and the law firm of Francis & Lilly, PLLC and submits his *Reply Brief to Respondent's Response on Behalf of the West Virginia Board of Examiners for Registered Professional Nurses to Petitioner's Appeal Brief*. For the reasons set forth previously, as well as, those found below, this Court should grant Petitioner's request to reverse the *Final Order* entered by the Kanawha County Circuit Court on September 17, 2015 and direct Respondent to reinstate, without encumbrance, Petitioner's License to Practice Registered Professional Nursing within the State of West Virginia.

**I. THE ONEROUS NATURE OF THE FINAL ORDER AND FINAL ORDER ADDITION ENTERED BY THE WEST VIRGINIA BOARD OF REGISTERED NURSES ON MARCH 30, 2015**

*The Final Order* and *Final Order Addition* were entered by Respondent on March 30, 2015. (App. at 00067 – 00071) *The Final Order Addition* specifically states:

On the basis of the foregoing, the Board hereby suspends license number 85945, issued to McClanahan for a period of one (1) year, with such suspension hereby stayed and contingent upon McClanahan complying with the term set below, license number 85945 is placed on PROBATION for a period of two (2) years of employment as a registered nurse. The computation of such period is to begin on the date on which notice is received in the office of the Board that McClanahan is employed as a registered nurse and shall run only during such time that he is employed as a registered nurse on at least a permanent part-time basis (forty hours every two weeks) or a full time basis in the State of West Virginia.

(App. at 00068)

At the time of entry of the *Final Order* and *Final Order Addition*, Petitioner was forced to resign his RN position in a long-term care facility, as he was explicitly excluded from working in this type of healthcare environment. Due to the extremely burdensome requirements of the *Final Order* and *Final Order Addition*, Petitioner was unable to secure any employment in the field of Registered Nursing<sup>1</sup>. The burdensome requirements had such restrictive contingencies that, in effect, they completely prevented Petitioner from securing gainful employment. Potential employers were unwilling and/or unable to offer Petitioner a position which would comply with the Respondent's multitude of directives and will continue to impact Petitioner's professional advancement and employability indefinitely.

In particular, Paragraphs 7 and 8 of the *Final Order Addition* state as follows:

7. McClanahan shall report in person for an appointment with the Board staff upon request.

8. McClanahan shall submit to unannounced, witnessed drug-screening tests. Said tests shall be on demand and to the specifications of the Board and at McClanahan's expense. McClanahan shall call the Board's drug screening company

---

<sup>1</sup> On November 30, 2015, after filing the Notice of Appeal in this matter, Petitioner began employment with the Coordinating Council for Independent Living in Raleigh County, West Virginia. He is employed as an "Operational Specialist/Marketing Nurse". He does not provide traditional nursing care to his clients, but rather screens potential clients for benefit eligibility.

DAILY between the hours of 5:00 a.m. through 2:30 p.m. to see if he is selected to test. Receipt of a positive drug screen and/or not calling the drug screening program daily within the specified time frame is deemed to be a violation of this Consent Agreement, and shall result in immediate suspension of McClanahan's license. Eating products containing poppy seeds will not constitute as an accepted reason for having a positive screen for opioids. McClanahan shall not consume tonic water, quinine water, hemp tea or other products containing substances that trigger a positive drug screen.

Moreover, Respondent imposed more restrictions in the *Final Order Addition*. These additional requirements are, in part:

1. McClanahan shall not work at a Nursing Registry, Temporary Nursing Agency, Home Health Care Agency, Private Duty Nurse or an Extended Care Facility.
2. McClanahan shall not work in an autonomous or supervisor nursing position. He shall work only under the direct supervision of a registered professional nurse in a structured setting throughout the term of his probation. Such supervising registered nurse must, at the time of said supervision, hold an active, unencumbered West Virginia license until evaluation is completed and a determination regarding any requirements.  
...
5. That his employer or supervisor has to submit monthly reports to the Board describing his job performance, attendance, attitude and other behaviors during the first year of probation.

In 2013, Petitioner graduated from West Virginia University a Bachelor of Science in Nursing, successfully passed his licensing exams, and subsequently obtained his registered professional nursing ("RN") license from the State of West Virginia. Petitioner's license was renewed in 2014. He practiced nursing, without restriction, until the *Final Order* and *Final Order Addition* were entered in this disciplinary matter on or about March 30, 2015. For many months after entry of the *Final Order* and *Final Order Addition*, Petitioner attempted to obtain employment in the nursing field; however, he encountered great difficulty due to the

requirements imposed by the *Final Order Addition*, which severely limits his ability to practice and earn a living wage. To compound this effect of this requirement, Petitioner's probationary period only runs during time periods in which the Petitioner is employed as a R.N. (App. at 00067-00071).

Petitioner worked as a Graduate Nurse and then as a RN at Ruby Memorial Hospital in Morgantown, West Virginia. He is a reliable, responsible and a compassionate nurse. He has not been subject to any complaints, reprimands or discipline of any kind, other than in the instant action. Petitioner has never been arrested, convicted or charged with any criminal act. Furthermore, at all times relevant to the subject urine drug screen (hereinafter "UDS") Petitioner was neither employed in the nursing field nor did he provide any patient care; however, Respondent concluded that Petitioner was nevertheless subject to its authority. (App. at 00065). Respondent has made no allegations that Petitioner was impaired or under the influence of marijuana while working as a RN or while providing patient care. Respondent's action against Petitioner is based solely and specifically upon events alleged to have occurred outside his nursing practice.

Respondent erred by entering the *Final Order* and *Final Order Addition* for events alleged to have occurred outside Petitioner's nursing practice and further by imposing terms and conditions with such restrictive provisions and far-reaching scope that Petitioner's Constitutional due process and privacy rights were violated.

## **II. PETITIONER'S EMPLOYMENT STATUS AT TIME OF PRE-HIRE DRUG SCREEN**

Respondent's Response states in its "Statement of the Case" that Raleigh General Hospital (hereinafter "RGH") terminated Petitioner's employment due to his pre-employment "positive drug screen." This is a misstatement of the facts. Petitioner was not and has never been employed

by RGH. On October 13, 2013, Petitioner voluntarily left his RN position at Ruby Memorial Hospital to move back to his hometown of Beckley, West Virginia. Once relocated, Petitioner applied for a RN position at RGH. On November 18, 2013, as part of the RGH pre-hire process, Petitioner consented to a Pre-employment UDS. Petitioner had been conditionally offered a RN position at RGH; however, after the positive UDS, RGH rescinded said job offer. Petitioner not terminated from RGH, but rather was never employed by Raleigh General Hospital, and had, in fact, not worked as a RN since leaving his position at Ruby Memorial Hospital, more than a month before the subject UDS.

**III. LABORATORY TESTING, TEST RESULTS AND LACK OF CREDIBILITY OF RESPONDENT’S EXPERT WITNESS, DR. DOUGLAS AUKERMAN**

At hearing, Respondent qualified Douglas Aukerman, M.D. (hereinafter “Aukerman”) as an expert witness based on his knowledge, skill, experience, training and education. He provided testimony in this case related to his role as the “Medical Review Officer” for RGH and expert witness for Respondent. Aukerman testified that Aegis notified him that Petitioner’s initial UDS had tested positive for Carboxy-THC (hereinafter “THC”), a compound found in marijuana. Aukerman resides and practices medicine in Oregon. He does not hold an active license to practice medicine in the State of West Virginia. He is not employed by nor does he own either of the laboratories at issue herein, namely Aegis Sciences Corporation (hereinafter “Aegis”) and Quest Diagnostics Laboratories (hereinafter “Quest Diagnostics”). Likewise, Aukerman has no supervisory or inspection duties at either Aegis or Quest Diagnostics. Aukerman merely testified that these laboratories are “certified”; therefore, he is satisfied that all testing conducted and results reported by Aegis or Quest Diagnostics in this matter are accurate. (App. at 00019). Aukerman

was never physically in the same location as Petitioner's urine sample, nor did he have any first-hand knowledge as to the laboratory handling or processing of this UDS. (App. at 00018).

Aukerman should not be permitted to testify as to his "subjective belief" or base his opinions on upon unsupported speculation. *Daubert v. Merrell Dow Pharmaceuticals, Inc*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The testimony of an expert witness, such as Aukerman, must be based on sufficient verifiable facts or data. In this instance, the opinions of Aukerman are simply not reliable, as they are based solely upon a single laboratory report from Aegis, which may not even be admissible, as detailed further below. Neither Respondent nor Aukerman produced any laboratory report, correspondence or other document or thing which was prepared or submitted, which specifically reported the results from the Petitioner's Sample B "challenge" specimen. Likewise, Respondent also failed to disclose the report of the second gas chromatograph mass spectrometry (hereinafter "GC-MS"), which, per Aegis protocol, should have occurred automatically when Petitioner challenged the Aegis Sample A test results. (App. at 00020).

Petitioner's UDS testing results were not properly authenticated at hearing and no specificity as to testing procedures was offered by Respondent or Aukerman to support the conclusion that these out-of-state laboratory tests were reliable or admissible. The handling and processing of the Petitioner's urine sample, after it was received by Aegis, were simply not addressed at hearing. Aukerman freely admitted during his testimony that he did not personally receive the subject urine sample nor did he process the results of the laboratory testing. (App. at 00018). There was no evidence offered by Respondent explaining the procedures, protocols and security used by Aegis or Quest Diagnostics in receiving and processing Petitioner's urine sample after it left RGH for these out-of-state testing laboratories. Likewise, there was no evidence

offered establishing that the procedures used by Aegis and Quest Diagnostics processed the urine samples were reliable and in compliance in conformity with national standards for this type of testing. No testimony from employees of either Aegis or Quest Diagnostics was offered at hearing to authenticate that each laboratory testing results or to indicate that these results were identical to those reported by Aukerman.

At the hearing, Aukerman testified that a single urine sample was collected from Petitioner. The sample was then divided into two separate collection vessels. The Petitioner's split urine samples the Petitioner are known as "Sample A" and "Sample B." Testimony and the Aegis Report entered as evidence at hearing indicated that both of Petitioner's urine samples were shipped to Aegis, located in Nashville, Tennessee via Federal Express. Aukerman testified that Aegis then tested Sample A and kept Sample B in a freezer at Aegis, until Petitioner's request for challenge testing. (App. at 00018).

Aukerman testified that Aegis first tested Sample A by conducting an immunoassay. This is merely a screening test performed to determine if a class of metabolite present, but it does not identify a specific drug or the amount/concentration of said drug in a milliliter of the subject's urine. As Petitioner's urine sample is alleged to have a positive immunoassay for marijuana metabolites, this sample was then subjected to a second confirmation test via GC-MS. To conduct this GC-MS test, Aegis takes another amount of urine (or "aliquot") from Sample A to undergo this additional testing to identify the specific compound structure for each of the substances that tested positive in the immunoassay. GC-MS testing results in a numerical test result to indicate the amount of each substance in each milliliter of Petitioner's urine Sample A. In the case at hand, the Aegis report indicated that Petitioner's Sample A tested positive for THC and that the GC-MS

found the amount of THC present to be twenty-two nanograms per milliliter (22ng/ml). (Hr. Tr. pp. 42 – 44, App. at 00019).

Upon speaking with Aukerman, Petitioner continued to deny marijuana use and requested that Sample B of his urine, be used to challenge the results of Aegis' testing of Sample A. Petitioner requested that Sample B be tested at a different laboratory, at his own expense. Aukerman testified that Sample B was then sent to Quest Diagnostics for this challenge testing. (Hr. Tran. pp. 44 – 45, App. at 00019– 00020). A laboratory report prepared by Quest Diagnostics was expected to be prepared using the same protocols as Aegis used in testing Sample A. Surprisingly, a record of Quest Diagnostic's testing of Petitioner's Sample B was not produced at the hearing. All Respondent offered was a report Aukerman prepared, on his own letterhead, purporting to reflect the Quest Diagnostics testing results and advising that Sample B was "positive" for THC. Aukerman testified that no immunoassay screening test was required by Quest Diagnostics, they only performed a GC-MS test. Aukerman merely testified this result as "positive" and failed to quantify numerically the concentration of THC in the Sample B testing.

Aukerman also testified that Petitioner's challenge to Aegis' testing of Sample A, should have also resulted in Aegis running a second GC-MS of Sample A, per protocols, to confirm the results of their GC-MS testing. Also troubling is the complete lack of documentation reporting the results of this second GC-MS test by Aegis. Aukerman again merely offers that this second GC-MS by Aegis was also "positive" for marijuana. (Hr. Tran. Pg. 47, App. 00020).

As no supporting documentation were produced at hearing, it is unclear from Aukerman's testimony and from the hearing record, if Aukerman was ever provided with documents from the Aegis laboratory reflecting their second GC-MS testing of Petitioner's urine. Likewise, it was unclear from Aukerman's testimony and from the hearing record, when or if Aukerman was ever

provided with documents from the Quest Diagnostics reflecting their GC-MS testing of Petitioner's urine. (App. at 00020). Although, Dr. Aukerman reports subsequent GC-MS tests as "positive," he does not provide the actual numerical concentration readings, which should have been generated from any GC-MS testing. Moreover, Aukerman does not offer testimony as to the process or raw data which he relied on in reaching his conclusion Petitioner's urine samples were "positive." (App. at 00044 – 00045). Without this data, it is impossible to determine the accuracy of any of the testing performed.

The testimony of an expert witness must be based on sufficient facts or data. Aukerman's testimony must be the product of reliable principles and methods, and Aukerman has to reliably apply the principles and methods to the verifiable facts of the case. Aukerman cannot testify to a "subjective belief or unsupported speculation." *Daubert v. Merrell Dow Pharmaceuticals, Inc*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Aukerman's testimony appears to be based upon layer after layer of unreliable and unverifiable information purporting to be laboratory test results, with the whole being no more credible than each of the contributing parts. Therefore, the testimony of Aukerman regarding the laboratory results should be excluded as mere subjective belief or unsupported speculation.

**IV. THE EVIDENCE IS TO SHOW THAT PETITIONER VIOLATED  
W. VA. CODE §30-7-11(f) AND W. VA. CODE §30-7-11(c)**

Respondent asserts that it has the power to discipline a licensee upon proof that the licensee "is guilty of conduct derogatory to the morals or standing of the profession of registered nursing." W.Va. Code §30-7-11(f). Respondent's Administrative Rule identifies specific instances of misconduct which constitute violations of *W. Va. Code* §30-7-11(f). *W. Va. Code R.* §19-3-14 These Rules expressly provides that a licensee who "used any illicit drug" has committed professional misconduct. *W. Va. Code R.* §19-3-14.1.11

14.1. Conduct, including, but not limited to the following, if proven by a preponderance of evidence, constitutes professional misconduct subject to disciplinary action pursuant to W. Va. Code §30-7-11(f). The applicant or licensee:

...  
14.1.11. self-administered or otherwise took into his or her body any prescription drug in any way not in accordance with a legal, valid prescription or used any illicit drug.

At the hearing, Petitioner consistently denied that he had used marijuana, and testimony the Hearing Examiner found this testimony to be “plausible.” (App. at 00064). Nevertheless, in its Final Order, Respondent concluded that Petitioner was “unfit or incompetent” to practice his chosen profession, based solely on the results of the contested pre-employment urine drug testing, reporting that Petitioner tested positive for THC, a compound found in marijuana. (App. at 00066). Respondent concluded that this THC positive test result, standing alone, was sufficient to conclude that Petitioner “unlawfully” used marijuana, with said illegal act being “derogatory to the morals and standing of the nursing profession.” (App. at 00066).

Additionally, without any further support, Respondent also ruled that Petitioner’s unlawful use of marijuana rendered him “unfit or incompetent to practice registered professional nursing by reason of habits or other causes, in violation of W. Va. Code §30-7-11(c).” (App. at 00066). Moreover, at the time of the subject UDS and for several weeks prior, Petitioner was in the process of relocating from Morgantown, West Virginia, to his hometown of Beckley, West Virginia. At all times relevant hereto Petitioner was not employed in the nursing field or providing patient care. Respondent made no findings or conclusions that Petitioner was impaired by marijuana while working as a nurse or while providing patient care. Nonetheless the Respondent concluded that the Petitioner was subject to the authority of the Respondent predicated solely upon his status as a licensee. (App. at 00065).

No reasonable basis is present and no law cited to support Respondent's conclusion that Petitioner "unlawfully used marijuana" or that a positive urine drug test, from a single collection, is in and of itself sufficient to conclude that Petitioner is "guilty of conduct derogatory to the morals or standing of the professional of registered nursing, in violation of W. Va. Code §30-7-11(f)." (App. at 00066). Although the West Virginia Court has never considered this "morality" violation in relation to Registered Professional Nurses, the Missouri Court of Appeals recently held that a nurse who was guilty of driving under the influence, a criminal act, was not sufficient to revocation of a RN's license. Specifically, the Court held that the Missouri Nursing Board erred in revoking the RN's license, as a guilty plea to driving while intoxicated is not a crime of moral turpitude nor is it a crime reasonably related to the licensee's ability to practice as a nurse. *Owens v Missouri State Board of Nursing*, 2015 Mo. App. LEXIS 1185 (Nov. 2015). Therefore, Respondent's decision to suspend Petitioner's license is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; is in excess of statutory provisions, and/or is arbitrary and capricious.

Specifically, the Respondent concluded that Petitioner's unlawful use of marijuana constituted a violation of W. Va. Code §30-7-11(c), thereby Petitioner is "unfit or incompetent to practice registered professional nursing by reason of habits or other causes." (App. at 00066). Respondent has no reasonable basis and provided no specific testimony, evidence or law to support the conclusion that Petitioner is "unfit or incompetent to practice registered professional nursing by reason of habits or other causes, in violation of W. Va. Code §30-7-11(c)."

Respondent and/or Aukerman did not produce a laboratory report from Aegis reporting the results from the second testing of Sample A, as required by protocol. The Aegis Laboratory report

indicated that Sample A tested positive for THC and showed the amount of THC was 22 nanograms a milliliter. (Hr. Trans. at pp. 42 – 44, App. at 00019). If Sample A was tested twice by Aegis, Aukerman should have produced results of both Aegis reports to support his conclusions that the two (2) tests on Sample A were consistent in both the type and concentration of the identified substance. The second GC-MS in which Aegis reports the results of the second testing of Sample A was not produced at the hearing or provided by Respondent. It is just not known if whether the second Aegis testing GC-MS test, per protocol as Aukerman did not testify as to the amount of THC in the second Aegis testing nor did he produce a written report. No evidence was offered by Respondent to support their conclusion that Petitioner possessed habits sufficient to support disciplinary action. Thus, Respondent clearly did not meet the burden of proof required by preponderance of the evidence with relation to this testing. Respondent's actions were clearly wrong or arbitrary and capricious when concluding that Petitioner was unfit to practice Registered Professional Nursing in West Virginia. Thus allegations against Petitioner are improper and his request for relief be granted.

Petitioner challenged the test results of the Sample A and requested that the Sample B test be performed at a different laboratory. Aukerman testified that the Sample B was kept in a freezer at Aegis and the Sample B was sent to Quest Diagnostics. (Hr Trans. pp. 44 – 45, App. at 00019–00020). Again, the alleged laboratory report of the results from Quest Diagnostics testing of the Sample B was not produced at the hearing or provided by Respondent. It is not known if the testing performed by Quest Diagnostics was the required GC-MS test. Again, Aukerman merely reported that the Quest Diagnostics testing of Sample B was “positive.” After the hearing, Aukerman subsequently produced a written report, dated

December 5, 2013, in which he indicates that the Sample B confirmation tested positive for cannabinoids (marijuana).

Interestingly, this Aukerman report regarding Quest Diagnostics of the alleged testing performed by Quest Diagnostics only raises additional questions regarding the reliability and credibility of this report. This report states that Petitioner's urine Sample B was collected on November 18, 2013, was received on November 19, 2013, and reported on November 20, 2013. (App. at 00045). Aukerman specifically testified that, on November 19, 2013, Petitioner's Sample B was "sealed in a freezer at Aegis" in Nashville, Tennessee and, at the same time also being tested by Quest Diagnostics (Hr. Tr. p. 44, App. at 00019). It is clearly impossible as Sample B cannot be frozen in two separate and distinct laboratories at the same time. Petitioner's Sample B urine could not be both frozen in Aegis' laboratory and be undergoing testing at the same time at Quest Diagnostics, as Aukerman testimony. If, in fact, Sample B was sent to Quest Diagnostics, location unknown, it plainly could not have the same received date of "November 19, 2013" and the same report date of "November 20, 2013." Thus, the lack of authenticity and reliability of both laboratory reports from both Aegis and Quest Diagnostics should be found insufficient, especially as these tests are the sole basis for the Respondent's discipline against the Petitioner. Likewise, the credibility of Aukerman's testimony should also be found unreliable and not admissible, as his testimony is clearly not supported by documents or non-hearsay testimony and objective evidence in this matter.

There was no evidence at the hearing explaining the procedures to be followed by Aegis Laboratory and/or Quest Diagnostics in their testing of the urine samples of Petitioner, and there was no evidence establishing that the procedures and/or protocol used by these laboratories that allegedly processed Sample A and Sample B were reliable or properly tested

based on their procedures. Therefore, the testimony of Aukerman regarding the laboratory results should be excluded.

Respondent argues that a one-time positive screen for an illicit drug is sufficient to constitute a violation of §30-7-11(c), which does not require proof of prior drug history or addiction. This is demonstrated by the existence of *W. Va. Code* §30-7-11(d), that identifies separate grounds for misconduct specifically related to drug addiction. Respondent contends that regardless of these requirements, it is not necessary for the Court to address this subsection because Petitioner's violation of *W. Va. Code* §30-7-11(f) is sufficient to discipline Petitioner's license. According to Respondent, a violation of *W. Va. Code* §30-7-11(c) does not require Respondent to prove that a licensee has a history of drug use or addiction. Indeed, this distinguishes §30-7-11(c) from §30-7-11(d), separate grounds for discipline which specifically relates to drug addiction. See *W. Va. Code* §30-7-11(d), which states that a licensee may be disciplined upon proof that he or she "...is addicted to the use of habit-forming drugs." Respondent also states that Petitioner has not been alleged to have violated *W. Va. Code* §30-7-11(d). Thus, proof of an addiction or substance abuse history was not necessary or required under *W. Va. Code* §30-7-11(c). This position appears to be in conflict with the email Deanna Lane, RN, BSN, Respondent's Nurse Investigator, in an email to Petitioner's former counsel, dated February 24, 2014, she strongly suggests that Petitioner be evaluated by a Certified Addictions Counselor (CAC) of his choice and have the evaluation sent to Respondent.

At Respondent's direction, on or about March 7, 2014, Petitioner underwent an addiction evaluation by Binicki Shrewsbury, MS, LSW, LPC, AADC of FMRS Health Systems, Inc., an independent certified addictions specialist. This evaluation concluded that Petitioner had no issues with addiction and did not need alcohol or drug treatment.

Respondent then provided Petitioner a single Consent Agreement, via correspondence dated March 18, 2014. Ultimately, Petitioner rejected this consent agreement because he felt it would be dishonest to admit to an addiction problem that he simply did not have.

Respondent in its *Final Order Addition* of March 30, 2015, again required Petitioner to submit to an evaluation. The Final Order Addition states as follows:

13. McClanahan shall submit to an evaluation by a Psychiatrist certified in addictions and/or Certified Addictions Counselor (CAC) within (30) days of this Order. McClanahan shall comply with the recommendations. If it is determined that McClanahan meets the requirements of West Virginia Restore (the Board's recovery and monitoring program), he shall enter into an agreement with West Virginia and shall comply with the terms of the agreement.

14. Contingent upon the recommendations in the evaluation by the Psychiatrist and or CAC, McClanahan shall participate in a structured aftercare program. The treating Psychiatrist and or CAC shall make a monthly report to the Board about his progress and his compliance with the aftercare program.

15. Contingent upon the recommendations in the evaluation by the Psychiatrist and/or CAC, McClanahan shall participate in 12-Step meetings. Written evidence of participation in meetings shall be submitted to the Board on or before the fifth day of each month.

(App. at 00067–00070).

Petitioner was also treated by Dr. Safiullah Syed, M.D., for Attention Deficit Hyperactivity Disorder. Upon discussing with Dr. Syed, Petitioner requested a referral to Ahmed D. Faheem, M.D., D.L.F.A.P.A., M.R.C. Psych. (UK) and the President of the West Virginia Board of Medicine. This referral was solely sought as a result of Respondent's demand that Petitioner undergo yet another addiction evaluation, at his own expense, by a Board Certified Addiction Psychiatrist, this was required to comply with the terms of the Final Order. (App. at 00067–00070).

**V. THE FULL EVALUATION BY BINICKI SHREWSBURY, MS, LSW, LPC, AADC OF FMRS HEALTH SYSTEMS, INC., WAS EXCULPATORY EVIDENCE**

Respondent argues that it did not fail to produce the report of Binicki Shrewsbury's full evaluation of March 7, 2014. This evaluation was performed at the request of Ms. Lane, Respondent's Nurse Investigator on February 24, 2014. This report stated that Ms. Shrewsbury used a multiaxial diagnostic system to evaluate Petitioner, which involves an assessment on several "axes to help the clinician plan treatment and predict outcome. With potential Cannabis abuse or use of cannabis being the focus of her clinical attention, Ms. Shrewsbury's evaluation found that Petitioner had no need for alcohol or other drug treatment per the American Society for Addiction Medicine ("ASAM") criteria. Ms. Shrewsbury stated there was simply not enough information to find that Petitioner needed substance abuse treatment. (App. at 00073–00084). Petitioner disagrees and argues that this evaluation was inconclusive.

Petitioner was again evaluated by Dr. Ahmed D. Faheem, M.D, as a result of Respondent's demand that Petitioner undergo yet another addiction evaluation, at his own expense, by a Board Certified Addiction Psychiatrist, in order to comply with the terms of the Final Order. Dr. Faheem's diagnosis using the five axes included in the DSM-V multi-axial classification was the same as those reached by Ms. Shrewsbury at FMRS Health Systems, Inc. By letter dated May 4, 2015, Dr. Faheem advised Respondent of the above. Dr. Faheem also performed a UDS which did not show the presence of any marijuana or other non-prescribed controlled substances. Dr. Faheem further stated that Petitioner was fulfilling and meeting the requirements of the *Final Order*.

Thus, Respondent has no reasonable basis and has provided no specific testimony or law to support the conclusion that Petitioner is “unfit or incompetent to practice registered professional nursing by reason of habits or other causes, in violation of *W. Va. Code* §30-7-11(c).” There is no reasonable basis present and there is no law cited to support Respondent’s conclusion that Petitioner “unlawfully used marijuana” or that a positive urine drug test, from a single collection, is in and of itself sufficient to conclude that Petitioner is "guilty of conduct derogatory to the morals or standing of the professional of registered nursing, in violation of *W. Va. Code* §30-7-11(f). Therefore, the decision to suspend Petitioner’s license is clearly wrong and/or arbitrary and capricious.

In a similar case, the Alabama Supreme Court found that a lone UDS testing positive for THC, was not sufficient to conclude, standing on its own, that a licensee was addicted to a habit-forming drug. *Thornton v Alabama Board of Nursing*, 973 So. 2d 1079 (Ala. Civ. App., 2007). In that case, the Court found that the Alabama Board of Nursing presented no evidence, other than a lone positive drug test for THC, at hearing to support its position that its licensee was in violation of the addiction provisions of their rules and regulations. The Court then concluded that this lone positive drug test was not sufficient to prove their licensee “had ever suffered an addiction to a habit-forming drug, much less that she had an ongoing substance-abuse problem at the time of the hearing.” *Id.* at 1084.

Petitioner has continuously denied any improper or unlawful use of illegal drugs, including marijuana. Moreover, other than a lone, one-time urine drug screen, Respondent can produce no evidence whatsoever relating to any improper use or abuse of drugs by Petitioner.

Petitioner has never been accused, investigated, or arrested by any law enforcement agency in relationship to any wrongdoing, including the unlawful possession or use of drugs. 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.

## **VI. STATEMENT REGARDING ORAL ARGUMENT**

Respondent is requesting oral argument in this case which will significantly aid this Court in reaching a decision.

## **VII. CONCLUSION**

Testimony offered by Respondent's expert witness, Aukerman, was not reliable and supported only by a single report from Aegis. Neither Respondent or Aukerman produced a laboratory report from Aegis reporting the results from the second GC-MS testing of Sample A, per protocol. Likewise, neither Respondent or Aukerman produced a laboratory report from Quest Diagnostics reporting the results from the GC-MS challenge testing of Petitioner's Sample B urine. Aukerman reported both subsequent GC-MS tests by Aegis and Quest Diagnostics as being "positive"; however, he failed to provide the actual numerical test results, which would have been generated from any GC-MS test. Furthermore, Aukerman's testimony failed to identify the process or data upon which he relied in reaching the conclusion in his said reports. The testimony of Aukerman has failed to reliably apply the principles and methods to GC-MS testing to the facts of this case. Subsequently, the Respondent relied upon the testimony of Aukerman, which ultimately led to the *Final Order* and *Final Order Addition* that was entered by Respondent on March 30, 2015. As such, the basis for the Respondent's

decision was faulty, leading to discipline of the Petitioner which was clearly wrong at worst or arbitrary and capricious, at best.

Moreover, the terms and conditions required by Respondent's *Final Order* and *Final Order Addition* are virtually impossible for Petitioner to fulfill, despite his extraordinary attempts to do so. The terms of the *Final Order* and *Final Order Addition* are restrictive and onerous, which, in effect, have made it impossible for Petitioner to obtain gainful employment in the nursing field. Respondent's Order states that it was suspending Petitioner's license to practice as a registered nurse. Respondent then stayed the suspension, and placed his license on probation for two (2) years, which was contingent upon Petitioner complying with all the restrictive requirements of the *Final Order Addition*. Respondent can only complete the term of his probation, if he is actively working and the terms of the *Final Order Addition* are so restrictive that it took months to secure employment that would meet the Respondent's requirements. For all intents and purposes the onerous nature of the *Final Order Addition*, in essence, served to "revoke" Petitioner's registered professional nursing license.

Respondent argues that it has the power to discipline a licensee upon proof that the licensee used an illicit drug which makes the licensee guilty of professional misconduct under *W. Va. Code* §30-7-11(f). At all times relevant to the subject UDS, Petitioner was NOT employed in the nursing field nor was he providing patient care. Respondent has made no allegations that Petitioner was actually impaired by or under the influence of marijuana while working as a RN or while providing patient care. At Respondent's direction, Petitioner underwent two (2) addiction evaluations by Binicki Shrewsbury, then by Ahmed D. Faheem, M.D., both of whom concluded that Petitioner had no issues with addiction or dependency and had no need for alcohol or drug treatment. The Respondent erred in relying upon a Petitioner's single

4

verifiable UDS, which reported the presence of THC during a pre-employment drug screening to conclude that Petitioner was in violation of *W. Va. Code* §30-7-11(f). Moreover, even if the Respondent determined that this violation occurred, the *Final Order* and *Final Order Addition*, are so onerous in nature, especially compared with the nature of said violation and subsequent proof that Petitioner is not an addict, that Respondent is clearly wrong or the discipline imposed is arbitrary and capricious.

WHEREFORE, Petitioner respectfully prays that this Honorable Court vacate the *Final Order* and *Final Order Addition* of Respondent and direct Respondent to reinstate Petitioner's license to Practice Registered Professional Nursing within the State of West Virginia, without the cloud of discipline, as well as, attorney fees and costs, and any other relief that the Court deems fair and just.

Respectfully Submitted,

Petitioner, by counsel



---

Lisa L. Lilly (WV Bar No. 5860)  
Francis & Lilly, PLLC  
300 Capitol Street, Suite 1520  
Charleston, WV 25301  
304-410-0043  
LLilly@francisandlillylaw.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOHNATHAN LOWELL MCCLANAHAN, RN,  
Petitioner Below, Petitioner

v.

Docket No. 15-1014  
(Kanawha County Circuit Court  
Civil Action No. 15-AA-58)

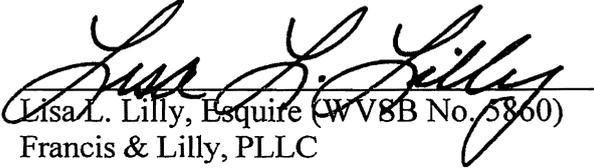
WEST VIRGINIA BOARD OF EXAMINERS FOR  
REGISTERED PROFESSIONAL NURSES,  
Respondent Below, Respondent.

**CERTIFICATE OF SERVICE**

I, Lisa L. Lilly, counsel for Petitioner, Johnathan Lowell McClanahan, hereby certify that I served a true copy of the foregoing **“Reply Brief on Behalf of Petitioner, Johnathan Lowell McClanahan, RN”** upon the following individuals, by placing the same in the U.S. Mail, First Class, postage prepaid, and via e-mail, on this 18th day of April, 2016:

Greg S. Foster  
Assistant Attorney General  
812 Quarrier Street, 2nd Floor  
Charleston, West Virginia 25301  
Phone: (681) 313-4534  
FAX: (304) 558-4509

Laura S. Rhodes, MSN, RN, Executive Director  
Alice Faucett, JD, Prosecuting Attorney  
State of West Virginia Board of Examiners  
for Registered Professional Nurses  
101 Dee Drive, Suite 102  
Charleston, WV 25311  
Phone: (304) 558-3596  
Fax: (304) 558-3666



Lisa L. Lilly, Esquire (WV8B No. 5860)

Francis & Lilly, PLLC

300 Capitol Street, Suite 1520

Charleston, WV 25301

304-410-0043

LLilly@francisandlillylaw.com