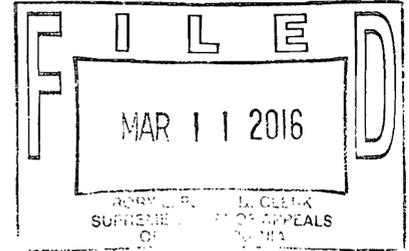


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-1014



JOHNATHAN LOWELL MCCLANAHAN, RN,

Petitioner,

v.

WEST VIRGINIA BOARD OF REGISTERED
PROFESSIONAL NURSES,

Respondent.

RESPONSE ON BEHALF OF THE WEST VIRGINIA BOARD
OF EXAMINERS FOR REGISTERED PROFESSIONAL NURSES

PATRICK MORRISEY
ATTORNEY GENERAL

GREG S. FOSTER (WVSB #10614)
ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, Second Floor
Charleston, WV 25301
(681) 313-4534
(304) 558-4509 (facsimile)
Greg.S.Foster@wvago.gov
Counsel for Respondent

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. STATEMENT OF THE CASE	2
A. Evidence Presented at the October 9, 2014 Hearing	2
B. The Hearing Examiner’s Recommended Order and the Board’s Final Order	6
C. Petitioner’s Writ of Prohibition and Appeal to Circuit Court	7
(1) The previously filed Writ of Prohibition	7
(2) The Administrative Appeal in Kanawha County Circuit Court	7
III. SUMMARY OF ARGUMENT	9
IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION	11
V. ARGUMENT	11
A. Standard of Review	11
B. The evidence unequivocally established that Petitioner was guilty of conduct derogatory to the morals or standing of the profession of registered nursing in violation of W. Va. Code § 30-7-11(f)	12
C. Petitioner’s use of an illegal drug rendered Petitioner unfit or incompetent to practice registered professional nursing in violation of W. Va. Code § 30-7-11(c). Regardless, the issue is moot because the violation of W. Va. Code § 30-7-11(f) is sufficient grounds to discipline Petitioner’s license	13
D. The Board did not fail to produce Petitioner’s substance abuse evaluation because the document was actually produced to the Board by Petitioner. Regardless, the evaluation report is in no way “exculpatory” as alleged by Petitioner	14
(1) The Board did not fail to disclose the full evaluation because this document was actually produced to the Board by Petitioner’s counsel in the underlying proceeding.	14

(2)	Petitioner’s assertion that the full evaluation is “exculpatory” is frivolous.	17
E.	Proper chain of custody was established by the evidence and was uncontested at the administrative hearing, and Petitioner has not advanced any legitimate basis to conclude that the hearing examiner abused his discretion by admitting the evidence.	17
F.	Petitioner’s argument that the Board failed to timely issue the Final Order in accordance with W. Va. Code R. § 19-5-10.1 is erroneous.	20
G.	Petitioner’s argument of ineffective assistance of counsel is meritless because this was not a criminal proceeding. Regardless, Petitioner’s misconduct was supported by indisputable evidence.	22
H.	The Board’s order for Petitioner to submit to random drug testing as a condition of probation is not an unconstitutional invasion of privacy.	22
IV.	CONCLUSION	23

TABLE OF AUTHORITIES

CASES

Baughman v. Wal-Mart Stores, 592 S.E.2d 824 (W. Va. 2003) 23

Lowe v. Cicchirillo, 672 S.E.2d 311 (W. Va. 2008). 12

Modi v. West Virginia Bd. Of Medicine, 465 S.E.2d 230 (W. Va. 1995) 12

Muscatell v. Cline, 474 S.E.2d 518 (W. Va. 1996) 12

State v. Davis, 206 S.E.2d 909 (W. Va. 1980) 17, 18, 19

State ex rel. McClanahan v. W. Va. Bd. Of Registered Professional Nurses,
Case No. 15-0407 7

Stewart v. W. Va. Bd. Of Examiners for Registered Professional Nurses,
475 S.E.2d 478 (W. Va. 1996) 12

Webb v. West Virginia Bd. Of Medicine, 569 S.E.2d 225 (W. Va. 2002) 12

STATUTES

W. Va. Code § 29A-5-4(g) 11, 12

W. Va. Code § 30-7-11(c) 7, 9, 13, 14

W. Va. Code § 30-7-11(d) 13, 14

W. Va. Code § 30-7-11(f) *passim*

OTHER

W. Va. Code R. § 19-3-14 8, 9, 13

W. Va. Code R. § 19-3-14.1 13

W. Va. Code R. § 19-5-6.1 20, 21

W. Va. Code R. § 19-5-6.3 21

W. Va. Code R. § 19-5-10.1 7, 10, 20, 21

W. Va. Code R. § 19-9-5.1.e 23

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-1014

JOHNATHAN LOWELL MCCLANAHAN, RN,

Petitioner,

v.

**(Appeal from Kanawha County Circuit
Court Civil Action 15-AA-58)**

**WEST VIRGINIA BOARD OF EXAMINERS
FOR REGISTERED PROFESSIONAL NURSES,**

Respondent.

**RESPONSE ON BEHALF OF THE WEST VIRGINIA BOARD OF
EXAMINERS FOR REGISTERED PROFESSIONAL NURSES**

COMES NOW, Respondent, the West Virginia Board of Examiners for Registered Professional Nurses (hereinafter the “Board”), by counsel, Greg S. Foster, Assistant Attorney General, and submits its Response to Petitioner’s Appeal Brief. For the reasons set forth below, this Court should deny the Petition and affirm the Final Order entered by the Kanawha County Circuit Court on September 17, 2015.

I.

INTRODUCTION

Petitioner’s appeal is devoid of merit. Petitioner tested positive for marijuana in a pre-employment drug screen. Petitioner’s urine sample, collected as a split sample, underwent three (3) separate and independent mass spectrometry tests, each of which confirmed a positive screen for marijuana. Petitioner denied he used marijuana and asserted it was a false positive caused by other medications he was taking at the time. Dr. Douglas Auckerman (“Dr. Aukerman”), the Medical Review Officer who analyzed Petitioner’s drug screen, testified at the underlying

proceeding and was qualified as an expert witness. Dr. Aukerman unequivocally testified that a false positive was medically and scientifically impossible in this case. Petitioner did not offer any expert opinion or evidence to rebut Dr. Aukerman's testimony.

The hearing examiner correctly found that Petitioner had used marijuana, an illicit drug, and such conduct violated the standards of professional conduct that govern registered professional nurses. The Board adopted the hearing examiner's findings and conclusions in their entirety, and disciplined Petitioner accordingly. The Circuit Court properly affirmed the Board's decision.

II.

STATEMENT OF THE CASE

Petitioner is a licensee, holding professional nursing license number 85945, issued by the Board. In November of 2013, Petitioner was offered a position as a registered nurse at Raleigh General Hospital ("RGH"), conditioned upon successfully passing a pre-hire drug screen. Petitioner submitted to the pre-hire urine drug screen on November 18, 2013. Petitioner's urine specimen tested positive for marijuana.

Due to Petitioner's positive drug screen, RGH terminated his employment and filed a Complaint against Petitioner with the Board on November 26, 2013. The Board commenced its investigation and the matter timely proceeded to a hearing before the hearing examiner, Administrative Law Judge Jack McClung, on October 9, 2014.

A. Evidence Presented at the October 9, 2014 Hearing

The Board subpoenaed Jessica Troche ("Ms. Troche"), a phlebotomist at RGH, to testify at the hearing. Ms. Troche regularly collects urine specimens for employee drug screens and

collected Petitioner's urine specimen on November 18, 2013.¹ Ms. Troche testified in detail regarding the protocol when collecting a urine specimen.²

Contrary to assertions in Petitioner's Brief, Ms. Troche testified that the specimen cup used to collect Petitioner's urine was sealed inside the drug test kit until it was opened in front of Petitioner. Ms. Troche testified that "this is actually opened in front of the donor as well so they know that it's a new container. I actually make them watch me open this seal, too, so they know it's not something that's been tampered with. *This is the urine sample that they initially take into the bathroom with them.*"³ [Emphasis added.]

Petitioner's urine specimen was collected as a split sample. Also contained within the sealed drug test kit are two vials which were labeled by Petitioner.⁴ Petitioner witnessed Ms. Troche transfer the urine into each vial.⁵ Petitioner then witnessed Ms. Troche package the vials, along with the chain of custody documentation, and seal the package to be mailed to Aegis Laboratory for testing.⁶ Ms. Troche testified that proper chain of custody was utilized at all times.⁷ Further, the chain of custody form was signed by Petitioner to certify that the specimen collected at RGH was not adulterated in any manner.⁸

Dr. Aukerman, a licensed physician and certified medical review officer, was called by the Board to testify at the hearing. A certified medical review officer is a licensed physician who is responsible for receiving and processing the results of a drug screen from a testing laboratory,

¹ App. at 00014 (p. 21 of Hr. Trans.)

² App. at 00013-00015.

³ App. at 00014 (pp. 23-24 of Hr. Trans.)

⁴ App. at 00014 (p. 24 of Hr. Trans.)

⁵ App. at 00014-00015.

⁶ App. at 00015.

⁷ App. at 00015 (p. 28 of Hr. Trans.)

⁸ App. at 00046.

and making a final determination as to the reasons, if any, for drug screens that reflect a positive result.⁹ Dr. Aukerman is the founder and president of AukMed, Incorporated (“Aukmed”), a company that provides medical review services for employer drug programs.¹⁰ Dr. Aukerman, through his company, AukMed, has a contract with LifePoint Hospital Systems (“LifePoint”), the parent company of RGH, to serve as the medical review officer and review and analyze drug screens for all hospitals owned by LifePoint, including RGH.¹¹ Dr. Aukerman was qualified as an expert witness at the hearing.¹²

Dr. Aukerman received the laboratory report of Petitioner’s drug screen from Aegis Laboratory and confirmed that it testified positive for marijuana.¹³ As Petitioner’s specimen was a split sample, the Aegis Laboratory drug screen contained the results of the first vial, identified as the A Bottle (“Sample A”). Sample A was tested under a mass spectrometry test to determine the specific compound structure graph of what substance is present.¹⁴ The mass spectrometry test precisely identifies the substance and the qualitative amount of the substance present in the specimen.¹⁵

Petitioner disputed the results of the Sample A drug screen, and requested that the second vial, i.e., Sample B, be tested. In accordance with protocol, Sample B was sent to a different

⁹ App. at 00017-00018 (pp. 36-37 of Hr. Trans.)

¹⁰ App. at 00017 (p. 34 of Hr. Trans.)

¹¹ App. at 00018 (pp. 37-38 of Hr. Trans.)

¹² App. at 00018 (p. 37 of Hr. Trans.) Among other things, Dr. Aukerman formerly served as medical review officer for the Big Ten Conference and Penn State University. Dr. Aukerman currently serves as medical review officer for the Big 12 Conference testing program, as well as the Nascar Professional Racing League. [App. at 00017, p. 36 of Hr. Trans.] See also Dr. Aukerman’s Resume, App. at 00047-00058.

¹³ App. at 00018 (pp. 38-40 of Hr. Trans.)

¹⁴ App. at 00019. (pp. 42-44 of Hr. Trans.)

¹⁵ *Id.*

federally certified laboratory for testing.¹⁶ Sample B underwent a mass spectrometry exam at Quest Diagnostics laboratory and the results were reported to Dr. Aukerman.¹⁷ Dr. Aukerman confirmed that Petitioner's Sample B also tested positive for marijuana.¹⁸ Dr. Aukerman prepared a report of the positive drug screen for Sample B which he provided to RGH.¹⁹

Additionally, Dr. Aukerman testified that for quality control purposes, anytime a drug screen is challenged, Aegis Laboratory retests the Sample A bottle. Dr. Aukerman testified that Petitioner's Sample A was tested a second time by Aegis Laboratory using a mass spectrometry test, which reconfirmed a positive result for marijuana.²⁰

In total, Dr. Aukerman testified that three (3) independent mass spectrometry tests confirmed a positive screen for marijuana from Petitioner's urine specimen.²¹ Dr. Aukerman testified that proper chain of custody was utilized.²² At no time did Petitioner raise any objection with respect to chain of custody at the hearing, nor did Petitioner object to the admissibility of the drug screens or any testimony offered by Dr. Aukerman.

For his defense at the hearing, Petitioner denied he used marijuana and asserted that the drug screen results were false positives caused by other medications he was taking at the time.²³ Dr. Aukerman testified that a false positive for marijuana in this case was not medically or scientifically possible because: (1) none of the medications Petitioner was taking contained THC; and (2) mass spectrometry testing was performed twice on Sample A and once on Sample B, and

¹⁶ App. at 00019-00020 (pp. 44-47 of Hr. Trans.)

¹⁷ *Id.*

¹⁸ App. at 00020 (pp. 46-47 of Hr. Trans.); See also App. at 00045.

¹⁹ *Id.*

²⁰ App. at 00020 (pp. 47-48 of Hr. Trans.)

²¹ App. at 00020 (p. 48 of Hr. Trans.)

²² *Id.*

²³ App. at 00024-00025 (pp. 64-68 of Hr. Trans.)

every test was independently positive.²⁴ Petitioner did not offer any expert testimony or evidence to dispute Dr. Aukerman's testimony that a false positive for marijuana was impossible under the circumstances.

B. The Hearing Examiner's Recommended Order and the Board's Final Order

The October 9, 2014 hearing was completed in one (1) day. At the conclusion of the hearing, the hearing examiner ordered the parties to submit their proposed findings of fact and conclusions of law (hereinafter "proposed orders") on or before November 24, 2014. Both parties timely submitted their proposed orders.

The hearing examiner issued his Recommended Order to the Board on February 24, 2015.²⁵ The hearing examiner held that the Board proved by a preponderance of the evidence that Petitioner failed the drug screen because he used marijuana, an illegal substance, and such conduct violated W. Va. Code §§ 30-7-22(c) and (f).²⁶ The hearing examiner recommended that the Board discipline Petitioner's license accordingly.

On March 30, 2015, within forty-five (45) days of receiving the hearing examiner's Recommended Order, the Board issued its Final Order and Final Order Addition.²⁷ The Board's Final Order adopted the hearing examiner's Recommended Order in its entirety. The hearing examiner's Recommended Order was expressly incorporated by reference and attached as part of the Board's Final Order. The Board's Final Order, Final Order Addition, along with the adopted Recommended Order were delivered via certified mail to Petitioner on April 2, 2015.

²⁴ App. at 00020-00021 (pp. 48-51 of Hr. Trans.)

²⁵ App. at 00059-00066.

²⁶ *Id.*

²⁷ App. at 00067-00071. Included as part of the March 30, 2015 Final Order was the "Final Order Addition", which set forth the specific terms of the discipline imposed on Petitioner's license.

C. Petitioner's Writ of Prohibition and Appeal to Circuit Court

On or about May 5, 2015, Petitioner filed his Petition of Appeal in Kanawha County Circuit Court. Simultaneously, Petitioner sought a Writ of Prohibition in this Court on the grounds that the Board failed to timely issue a Final Order. See *State ex rel. McClahanan v. W. Va. Bd. of Registered Professional Nurses*, Case No. 15-0407.

(1) The previously filed Writ of Prohibition

Petitioner's Writ incorrectly asserted that under W. Va. Code R. § 19-5-10.1, the Board's Final Order should have been issued within forty-five (45) days of the parties' submissions of their proposed orders to the hearing examiner. Under W. Va. Code R. § 19-5-10.1, the forty-five (45) day timeframe did not commence until the Board received the hearing examiner's Recommended Order. As the Board received the hearing examiner's Recommended Order on February 24, 2015, the Board's Final Order was timely issued on March 30, 2015, well within the forty-five (45) day timeframe. Accordingly, Petitioner's Writ was refused by the West Virginia Supreme Court of Appeals by Order entered on June 9, 2015.

(2) The Administrative Appeal in Kanawha County Circuit Court

Upon refusal of the Writ, the administrative appeal proceeded before Judge Louis H. Bloom in Kanawha County Circuit Court. In his original Memorandum of Law filed in Circuit Court, Petitioner alleged errors on the following grounds: (1) chain of custody; (2) the Board erred in finding Petitioner violated W. Va. Code § 30-7-11(c); (3) the Board erred in finding Petitioner violated W. Va. Code § 30-7-11(f); (4) the Board failed to timely issue the Final Order in accordance with W. Va. Code R. § 19-5-10.1; (5) that Petitioner's scientific evidence was allegedly excluded and that Petitioner was denied the request to be personally qualified as an

expert in relation to chain of custody and the interpretation of laboratory studies²⁸; and (6) that Petitioner did not receive effective assistance of counsel.²⁹

Subsequently, after Respondent filed its Response Brief,³⁰ Petitioner for the first time alleged another ground for error in his Reply Brief.³¹ Petitioner alleged, albeit erroneously, that the Board failed to disclose a substance abuse evaluation of Petitioner by Biniki Shrewsberry. On September 21, 2015, Respondent filed a Motion for Leave to file a Surreply to address the new allegation.³² At the time of filing the Motion for Leave, Respondent had not yet received in the mail the Circuit Court's Final Order, which had been entered in Respondent's favor on September 17, 2015.³³ Upon request by the Circuit Court's law clerk, Respondent withdrew its Motion for Leave due to mootness.³⁴

The Circuit Court held that the Board proved by a preponderance of the evidence that Petitioner was guilty of conduct "derogatory to the morals or standing of the profession of registered nursing" in violation of W. Va. Code § 30-7-11(f). The Circuit Court's holding was based upon W. Va. Code R. § 19-3-14, which specifically provides that using "any illicit drug" constitutes a violation of W. Va. Code § 30-7-11(f). The Circuit Court held that a violation of W. Va. Code § 30-7-11(f) was sufficient grounds for the Board to discipline Petitioner's license, and thus did not address whether sufficient evidence was presented to support the finding that

²⁸ The basis of this alleged error was unclear. At the administrative hearing Petitioner did not attempt to qualify himself as an expert witness and did not present any scientific evidence, much less have any scientific evidence excluded. Though this error was listed as the Second Assignment of Error in Petitioner's Notice of Appeal, it appears to have been abandoned.

²⁹ App. at 00089-00104.

³⁰ App. at 00105-00122.

³¹ App. at 00123-00160.

³² App. at 00161-00181.

³³ App. at 00184-00194.

³⁴ App. at 00182-00183.

Petitioner's conduct also violated W. Va. Code § 30-7-11(c). All remaining assignments of error asserted by Petitioner were deemed meritless.

III.

SUMMARY OF ARGUMENT

1. The hearing examiner correctly found that Petitioner was guilty of conduct derogatory to the morals or standing of the profession of registered nursing in violation of W. Va. Code § 30-7-11(f). Board regulation W. Va. Code R. § 19-3-14 expressly provides that a licensee who uses an illicit drug is guilty of professional misconduct under W. Va. Code § 30-7-11(f). Thus, because marijuana is an illicit drug in West Virginia, Petitioner was guilty of misconduct in violation of W. Va. Code § 30-7-11(f).

2. The hearing examiner also correctly found that Petitioner's use of an illicit drug rendered Petitioner unfit or incompetent to practice registered nursing in violation of W. Va. Code § 30-7-11(c). 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), a separate grounds for misconduct specifically related to drug addiction. Regardless, it is not necessary for the Court to address this issue because Petitioner's violation of W. Va. Code § 30-7-11(f) is sufficient to discipline Petitioner's license.

3. Petitioner's allegation that the Board failed to produce a so-called "exculpatory" substance abuse evaluation of Petitioner is erroneous and misleading. First, Petitioner's assertion that the evaluation report is somehow "exculpatory" is frivolous. Second, the allegation that the Board failed to produce it is misleading because the document was actually produced to the Board by Petitioner's counsel. The only document the Board originally received from Biniki

Shrewsberry was the March 7, 2014 one page evaluation summary, which was produced to Petitioner's counsel along with the entire file on April 14, 2014. The Board did not have and was unaware of the full evaluation report until Petitioner's counsel (who apparently was aware of it) directed Ms. Shrewsberry to produce it to the Board a few weeks before the hearing. As it was Petitioner's counsel who was aware of the document and had it produced to the Board, the Board reasonably assumed that Petitioner already had a copy and was simply disclosing it. Had the Board known otherwise, it would have happily forwarded the document upon receipt. In any case, Petitioner had access to the full evaluation report at all times and obtained a copy before the hearing.

4. Petitioner's challenge to chain of custody is pure speculation and conjecture. The evidence established that proper chain of custody was utilized at all times. There is no evidence that Petitioner's urine sample was contaminated or tampered with. There were no irregularities or concerns that brought chain of custody into question. At no time in the underlying proceeding did Petitioner contest or raise any objection to chain of custody. Even in this appeal, Petitioner does not point to any evidence that suggests the samples were tampered with or somehow contaminated. Petitioner's allegations rest entirely on speculation and no legitimate basis exists to conclude that the hearing examiner abused his discretion by admitting the evidence.

5. The Board timely issued its Final Order within forty-five (45) days of submission of all documents and materials necessary for proper resolution of the case as required by W. Va. Code R. § 19-5-10.1. Petitioner ignores that the Board did not receive the most vital document necessary for disposition of the case until February 24, 2015, when the hearing examiner issued his Recommended Order. The Board then timely issued its Final Order on March 30, 2015, well within the statutory forty-five (45) day timeframe.

6. Petitioner's argument that he did not receive effective assistance of counsel during the underlying proceeding fails as a matter of law because this was not a criminal proceeding and he does not have a constitutional right to effective assistance of counsel.

7. Petitioner's assertion that random drug testing is an unconstitutional invasion of his privacy is procedurally improper and legally erroneous. This issue was not raised before the Circuit Court or in Petitioner's Notice of Appeal. Regardless, the Board is permitted to order a licensee to submit to random drug testing as a condition of probation as a public safety measure.

IV.

STATEMENT REGARDING ORAL ARGUMENT

The Board does not believe oral argument is necessary in this case, as the facts and the legal arguments in this matter are more than adequately presented in the briefs and the record filed with the Court. Oral argument would not significantly aid the decisional process. If this Court decides, however, that oral argument is necessary, the Board stands ready to appear and present its position.

V.

ARGUMENT

A. Standard of Review

“On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4[g]³⁵ and reviews questions of law

³⁵ The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or

presented de novo; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.” Syl. Pt. 1, *Muscatell v. Cline*, 474 S.E.2d 518 (W. Va. 1996).

This Court has made clear that evidentiary and factual findings in an administrative order are accorded “substantial deference” and “must be clearly wrong to warrant judicial interference.” *Modi v. West Virginia Bd. of Medicine*, 465 S.E.2d 230, 239 (W. Va. 1995). “Evidentiary findings made at an administrative hearing should not be reversed unless they are clearly wrong.” Syl. Pt. 2, *Lowe v. Cicchirillo*, 672 S.E.2d 311 (W. Va. 2008). “We must uphold any of the administrative agency’s factual findings that are supported by substantial evidence, and we owe substantial deference to inferences drawn from these facts.” *Webb v. West Virginia Bd. of Medicine*, 569 S.E.2d 225, 232 (W. Va. 2002), citing *Martin v. Randolph County Bd. of Educ.*, 465 S.E.2d 399, 406 (W. Va. 1995). “The ‘clearly wrong’ and the ‘arbitrary and capricious’ standards of review are deferential ones which presume an agency’s actions are valid as long as the decision is supported by substantial evidence or by a rational basis.” Syl. Pt. 2, *Stewart v. W. Va. Bd. of Examiners for Registered Professional Nurses*, 475 S.E.2d 478 (W. Va. 1996).

B. The evidence unequivocally established that Petitioner was guilty of conduct derogatory to the morals or standing of the profession of registered nursing in violation of W. Va. Code § 30-7-11(f).

Pursuant to W. Va. Code § 30-7-11(f), the Board has the power to discipline a licensee upon proof that the licensee “is guilty of conduct derogatory to the morals or standing of the

(5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record;
or
(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

See W. Va. Code § 29A-5-4(g).

profession of registered nursing.” Administrative rule W. Va. Code R. § 19-3-14 identifies specific instances of misconduct which constitute violations of W. Va. Code § 30-7-11(f). W. Va. Code R. § 19-3-14 expressly provides that a licensee who uses an illicit drug is guilty of professional misconduct under W. Va. Code § 30-7-11(f):

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.ii. 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;**

W. Va. Code R. § 19-3-14.1 (Emphasis added.)

Accordingly, because marijuana is an illicit drug under the laws of West Virginia, the hearing examiner and the Circuit Court both correctly concluded that Petitioner was guilty of professional misconduct in violation of W. Va. Code § 30-7-11(f).

C. Petitioner’s use of an illegal drug rendered Petitioner unfit or incompetent to practice registered professional nursing in violation of W. Va. Code § 30-7-11(c). Regardless, the issue is moot because the violation of W. Va. Code § 30-7-11(f) is sufficient grounds to discipline Petitioner’s license.

Pursuant to W. Va. Code § 30-7-11(c), the Board may discipline a licensee upon proof that the licensee is “unfit or incompetent by reason of negligence, habits or other causes.” The hearing examiner concluded that Petitioner’s unlawful use of marijuana constituted a violation of W. Va. Code § 30-7-11(c), in that Petitioner is “unfit or incompetent to practice registered professional nursing by reason of habits or other causes” [See Recommended Order at p. 8, ¶ 8.]

A one-time positive drug screen for an illicit drug is sufficient grounds or “other cause” to conclude that a nurse is unfit or incompetent. A violation of W. Va. Code § 30-7-11(c) does not require the Board 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), a separate grounds for discipline which

specifically relates to drug addiction. *See* W. Va. Code § 30-7-11(d) (a licensee may be disciplined upon proof that he or she “...is addicted to the use of habit-forming drugs[.]”) [Emphasis added.] Petitioner was not alleged to have violated W. Va. Code § 30-7-11(d) and thus proof of an addiction or substance abuse history was not necessary or required under W. Va. Code § 30-7-11(c).

Accordingly, the evidence of Petitioner’s marijuana use supports the hearing examiner’s conclusion that Petitioner’s conduct violated W. Va. Code § 30-7-11(c). However, it is not necessary for the Court to address this issue because a violation of W. Va. Code § 30-7-11(f) is sufficient grounds to discipline Petitioner’s license.

D. The Board did not fail to produce Petitioner’s substance abuse evaluation because the document was actually produced to the Board by Petitioner. Regardless, the evaluation report is in no way “exculpatory” as alleged by Petitioner.

Petitioner’s allegation that the Board failed to produce a so-called “exculpatory” substance abuse evaluation of Petitioner is misleading and erroneous. Petitioner’s Brief inaccurately represents the events below in an attempt to create controversy where none exists. First, the document at issue was actually *produced to the Board by Petitioner*. Second, Petitioner’s assertion that the evaluation report is somehow “exculpatory” is frivolous.

(1) The Board did not fail to disclose the full evaluation because this document was actually produced to the Board by Petitioner’s counsel in the underlying proceeding.

The full evaluation report was actually produced to the Board by Petitioner. Petitioner’s current counsel was not involved in the underlying administrative proceeding, during which Petitioner was represented by Sarah Smith, Esquire (“Ms. Smith”). It appears Petitioner’s change in counsel may have created some confusion with regard to the production of the full evaluation.

At the outset, Petitioner's Brief fails to disclose that the March 7, 2014 correspondence³⁶ to the Board from Biniki Shrewsberry ("Ms. Shrewsberry") of FMRS Health Systems, Inc., was produced to Petitioner, along with the entirety of the Board's file, on April 14, 2014. The March 7, 2014 correspondence was a one page summary by Ms. Shrewsberry of her evaluation of Petitioner performed on March 5, 2014.

Where Petitioner is confused is that the full evaluation report³⁷ was not provided to the Board by Ms. Shrewsberry along with her March 7, 2014 summary. In fact, the Board was unaware of the existence of the full evaluation report *until Petitioner's counsel, Ms. Smith, directed FMRS to provide it to the Board a few weeks before the October 9, 2014 hearing.*

Thus, because Ms. Smith was the one who knew about the report and specifically directed a copy be produced to the Board, the Board believed – and reasonably so - that Petitioner was already in possession of it. As evidenced by the hearing transcript:

MS. SMITH: As far as the evidence that we wanted to present, **I had both Beckley Appalachian Regional Hospital and FMRS send some records directly to the Board, that way I wouldn't have to have them here.** And I never saw the records. They were sent directly to the Board. I'm assuming that you have a copy of them. There were three drug screens, **as well as a substance abuse evaluation** that was recommended by the Board. Did you receive that?

MR. FOSTER: Recommended by this Board, the RN?

MS. SMITH: The Nursing Board recommended whenever the complaint was filed that Mr. McClanahan undergo a substance abuse evaluation by a licensed – yes.

MR. FOSTER: You're talking about the one from FMRS?

MS. SMITH: Yes. Do you have that?

MR. FOSTER: Yeah, I have that.

³⁶ App. at 00167-00168.

³⁷ App. at 00170-00179.

MS. SMITH: I just wanted to make sure.

MR. FOSTER: Did you never receive any of those documents?

MS. SMITH: I actually received yesterday something from FMRS, so that may be identical to what you have.³⁸

After the above back and forth, the parties went off the record to confirm that both were in possession of the same documents - which they were - and the hearing continued. No accusation was made that the Board failed to produce documents. Ms. Smith knew the report existed, had access to it, and obtained a copy from FMRS prior to the hearing. Why Ms. Smith did not obtain or already have a copy of the report when she directed FMRS to provide it to the Board is unknown.

It was the Board's understanding that Petitioner was simply disclosing a document that Petitioner already had, but the Board did not.³⁹ Prior to the hearing Ms. Smith never informed the Board that she did not already have a copy of the evaluation report, nor did she request the Board to send her a copy after she directed FMRS to provide a copy to the Board. Had Petitioner's counsel simply communicated to the Board that she did not initially obtain a copy of the report the Board would have happily forwarded the document. The confusion was due to a lack of communication by Petitioner's counsel, and through no fault of the Board.

In any case, the fact remains that Petitioner's counsel had access to the document at all times and obtained a copy prior to the hearing.

³⁸ App. at 00023 (pp. 57-58 of Hr. Trans.) [Emphasis added.]

³⁹ The Board believed that Petitioner disclosed the report because Petitioner was planning to call Ms. Shrewsberry as a witness, and the report would be an exhibit referred to by Ms. Shrewsberry. The Board assumed that Petitioner directed FMRS to provide a copy to the Board (instead of Petitioner providing a copy to the Board) for authenticity purposes, so there would be no question that the full report, in its entirety, was received by the Board.

(2) Petitioner's assertion that the full evaluation is "exculpatory" is frivolous.

Petitioner's assertion that the evaluation is somehow "exculpatory" is nonsensical and factually impossible. As discussed above, Petitioner's misconduct was not premised upon addiction or a history of substance abuse. Petitioner was guilty of misconduct because he tested positive for an illicit drug, and the evaluation report does not and cannot negate this fact.

Further, a summary of the evaluation was contained in the March 7, 2014 correspondence that was produced to Petitioner along with the entire file on April 14, 2014. As stated in the March 7, 2014 summary, Ms. Shrewsberry's opinion was inconclusive because Petitioner continued to deny any marijuana use and assert the drug screen was a false positive. This was consistent with the evaluation report. There is no additional information in the evaluation report that is remotely "exculpatory."

Accordingly, for the foregoing reasons, this assignment of error should be disregarded.

E. Proper chain of custody was established by the evidence and was uncontested at the administrative hearing, and Petitioner has not advanced any legitimate basis to conclude that the hearing examiner abused his discretion by admitting the evidence.

Petitioner's attempt to dispute chain of custody and the reliability of the drug screen results is pure speculation and conjecture. There is no evidence in the record, nor does Petitioner point to any, that suggests Petitioner's sample was contaminated or tampered with. "The mere possibility or speculation that evidence could have been tampered with does not constitute sufficient grounds for exclusion." *State v. Davis*, 206 S.E.2d 909, 913 (W. Va. 1980).

Chain of custody was clearly established at the hearing. Ms. Troche, the phlebotomist who collected and packaged Petitioner's urine specimen, testified in great detail regarding the chain of custody. Petitioner's assertion that no evidence was given regarding the safekeeping of the actual specimen cup used by Petitioner is directly disputed by the record. Ms. Troche

testified that the specimen cup used by Petitioner came from the drug test kit, and was sealed until it was opened in the presence of Petitioner.

The chain of custody was uncontroverted at the hearing and Petitioner did not raise any objection with respect thereto. “It is not necessary for the State to exclude every hypothetical source of confusion when the theory of such confusion was not advanced at trial in a timely fashion and facts were not presented in support of such theory.” *Davis* at 913, fn. 9, citing *State v. Johnson*, 201 S.E.2d 309 (W. Va. 1973).

Petitioner also asserts that chain of custody was deficient because no representative from Aegis Laboratory or Quest Diagnostics testified at the hearing. This argument is meritless and contrary to the chain of custody proof requirements in criminal proceedings. This Court has explained:

...[I]t is not necessary that every moment from the time evidence comes into the possession of law enforcement agency until it is introduced at trial be accounted for by every person who could conceivably come in contact with the evidence during that period, nor is it necessary that every possibility of tampering be eliminated; **it is only necessary that the trial judge, in his discretion, be satisfied that the evidence presented is genuine and, in reasonable probability, has not been tampered with.**

Davis at 911-912. [Emphasis added.]

There is zero evidence to doubt the reliability of the drug screen results or Dr. Aukerman’s testimony. Both Aegis Laboratory and Quest Diagnostics are federally certified SAMHSHA laboratories, and Dr. Aukerman testified that proper chain of custody protocol was followed. The information identifying the specimen on the drug screens correlated to the chain of custody document. The chain of custody document identified the specimen as Sample ID

1945392.⁴⁰ The drug screen results for Sample A and Sample B each correctly identified the Sample ID number and sample information.⁴¹

Additionally, Dr. Aukerman testified that for quality control purposes, anytime a drug screen is challenged, Aegis Laboratory retests the Sample A bottle. Dr. Aukerman testified that Petitioner's Sample A bottle was tested a second time by Aegis Laboratory using a mass spectrometry test, which reconfirmed a positive result for marijuana. Dr. Aukerman testified that in total, mass spectrometry testing was performed twice on Sample A and once on Sample B, and every test was independently positive. Petitioner did not object to Dr. Aukerman's testimony nor did he offer any evidence to rebut it.

The issue of whether chain of custody is established is for the hearing examiner to resolve, and "absent abuse of discretion, that decision will not be disturbed on appeal." *Davis* at Syl. Pt. 2. Upon hearing the evidence, the hearing examiner determined that chain of custody protocol was followed and concluded that the evidence was genuine and reliable. As such, Petitioner's drug screen results were admitted into evidence, without objection.

No reasonable basis existed for exclusion because there was no irregularity in the chain of custody and no evidence of tampering or contamination, nor does Petitioner allege as much. As none of the issues raised by Petitioner herein were argued or developed at the hearing, it would be pure conjecture for this Court to reverse on such grounds.

Accordingly, the evidentiary ruling should be affirmed because Petitioner has failed to advance any legitimate grounds for this Court to conclude that the hearing examiner abused his discretion in admitting either the drug screens or Dr. Aukerman's testimony.

⁴⁰ The Sample ID number, 1945392, is located under the bar code in the top right hand corner of the chain of custody document. (See App. at 00046).

⁴¹ See Sample A results (App. at 00044), and Sample B results (App. at 00045).

F. Petitioner's argument that the Board failed to timely issue the Final Order in accordance with W. Va. Code R. § 19-5-10.1 is erroneous.

Petitioner attempts to make the same erroneous argument put forth in the previously filed Writ of Prohibition. Petitioner wrongly asserts that the Board was in possession of all documents and materials necessary for proper disposition of this case on November 24, 2014, when the parties submitted their proposed orders to the hearing examiner. Petitioner either forgets or utterly ignores that the most vital document needed to issue a Final Order – the hearing examiner's Recommended Order – was not submitted to the Board until **February 24, 2015**. Thus, the forty-five (45) day timeframe to issue a Final Order in accordance W. Va. Code R. § 19-5-10.1 did not commence until February 24, 2015, and the Board's Final Order was timely issued on **March 30, 2015**, well within the forty-five (45) day timeframe.

Petitioner's argument demonstrates a fundamental misunderstanding of W. Va. Code R. § 19-5-10.1, as well as the role of an independent hearing examiner. W. Va. Code R. § 19-5-10.1 provides as follows:

10.1. Any final order entered by the Board following a hearing conducted pursuant to these rules shall be made pursuant to the provisions of W. Va. Code §§ 29A-5-3 and 30-1-8(d). Such orders shall be entered within forty-five (45) days *following the submission of all documents and materials necessary for the proper disposition of the case*, including transcripts, and shall contain findings of fact and conclusions of law.

W. Va. Code R. § 19-5-10.1. [Emphasis added.]

Pursuant to W. Va. Code R. § 19-5-6.1, the Board is permitted to appoint an independent hearing examiner to oversee contested case hearings:

6.1. The Board may appoint a hearing examiner who shall be empowered to subpoena witnesses and documents, administer oaths and affirmations, examine witnesses under oath, rule on evidentiary matters, hold conferences for the settlement or simplification of issues by consent of the parties, cause to be prepared a record of the hearing so that the Board is able to discharge its functions and otherwise conduct hearings as provided in section 3.10 of this rule.

W. Va. Code R. § 19-5-6.1. After the close of a hearing, the hearing examiner is obligated to submit findings of fact and conclusions of law to the Board, which enables the Board to issue a Final Order. W. Va. Code R. § 19-5-6.3 provides:

6.3. The hearing examiner shall prepare recommended findings of fact and conclusions of law for submission to the Board. The Board may adopt, modify or reject such findings of fact and conclusions of law.

W. Va. Code R. § 19-5-6.3.

Indeed, the exact purpose of the hearing examiner is to oversee the hearing, consider the evidence and credibility of the witnesses, and ultimately provide the Board with recommended findings of fact and conclusions of law. The Board cannot issue a Final Order until it receives the hearing examiner's Recommended Order. The hearing examiner's Recommended Order is clearly a "document[] and material[] necessary for the proper disposition of the case" under W. Va. Code R. § 19-5-10.1. In fact, the Recommended Order is easily the most critical document needed by the Board to issue a Final Order.

Petitioner's assertion that the forty-five (45) day timeframe to issue a Final Order commenced on November 24, 2014, completely disregards the role of the hearing examiner in this process. Under Petitioner's reasoning, the Board was obligated to issue a Final Order on or about January 8, 2015, before the hearing examiner issued his Recommended Order. This defies logic and is contrary to proper procedure.

When a hearing examiner is appointed to preside over a contested case (and one always is), the Board members are not present for the proceeding. The hearing examiner is in the best position to determine the credibility of the witnesses and assign weight to the evidence. Moreover, by appointing a hearing examiner, the testimony, evidence and credibility of the witnesses are fairly evaluated and judged by an independent third party, as opposed to the Board itself.

The hearing examiner is appointed for the benefit of the licensee to remove any appearance of bias or unfairness, and to promote due process. It would be an abuse of discretion and grounds for error if the Board issued a Final Order without first receiving and considering the hearing examiner's Recommended Order, as Petitioner suggests the Board should have done.

Accordingly, this assignment of error should be dismissed.

G. Petitioner's argument of ineffective assistance of counsel is meritless because this was not a criminal proceeding. Regardless, Petitioner's misconduct was supported by indisputable evidence.

This argument automatically fails because this is not a criminal proceeding and Petitioner does not have a constitutional right to effective assistance of counsel. The Sixth Amendment to the United States Constitution and Article 3, Section 14 of the Constitution of West Virginia mandate that a defendant in a criminal proceeding receive "competent and effective assistance of counsel." This is not a criminal proceeding and Petitioner does not have a constitutional right to counsel or effective assistance of counsel. This assignment of error fails as a matter of law.

Nevertheless, Petitioner's misconduct was supported by indisputable evidence. Three (3) mass spectrometry tests independently confirmed Petitioner's positive drug screen. Dr. Aukerman testified that a false positive was medically and scientifically impossible. It is extremely unlikely that *any* attorney would have obtained a different outcome for Petitioner under the facts of this case.

H. The Board's order for Petitioner to submit to random drug testing as a condition of probation is not an unconstitutional invasion of privacy.

Petitioner briefly argues a privacy violation which appears to be based on the random urine drug testing ordered by the Board during Petitioner's probationary period. This argument was not raised in Circuit Court nor was it designated as an assignment of error in Petitioner's Notice of Appeal. There is nothing in the record to substantiate Petitioner's allegations

regarding the drug screen process, nor does Petitioner's brief cite any legal authority on the issue. This argument is procedurally and substantively improper.

Notwithstanding, the Board is vested with a statutory duty to protect the public. Nursing is inherently a safety sensitive position, and a nurse who tests positive for an illicit substance may pose a risk to patients. The Board is empowered to discipline a nurse's license for misconduct, which includes placing a licensee on probation with conditions to be met for continued practice. *See* W. Va. Code R. § 19-9-5.1.e. Here, the Board's decision to order Petitioner to submit to random drug screens as a condition of his probation is a necessary and appropriate safety measure that is in the public's best interest. In similar circumstances this Court has held:

Drug testing will not be found to be violative of public policy grounded in the potential intrusion of a person's right to privacy where is it conduct by an employer based upon reasonable good faith objective suspicion of an employee's drug usage or while an employee's job responsibility involves public safety or the safety of others.

Syl. Pt. 2, *Baughman v. Wal-Mart Stores*, 592 S.E.2d 824 (W. Va. 2003).

Accordingly, this argument lacks merit and should be disregarded.

V.

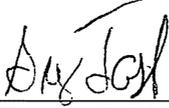
CONCLUSION

For the reasons set forth herein, the Board respectfully requests that this Court deny the Petition and affirm the Final Order entered by the Kanawha County Circuit Court.

WEST VIRGINIA BOARD OF EXAMINERS
FOR REGISTERED PROFESSIONAL NURSES,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



Greg S. Foster (WVSB #10614)
Assistant Attorney General
812 Quarrier Street, 2nd Floor
Charleston, West Virginia 25301
Telephone: (681) 313-4534
Facsimile: (304) 558-4509
Email: Greg.S.Foster@wvago.gov

CERTIFICATE OF SERVICE

I, Greg S. Foster, Assistant Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing *Response on Behalf of the West Virginia Board of Examiners for Registered Professional Nurses* was served by United States Mail, postage prepaid, this 11th day of MARCH, 2016, addressed as follows:

Lisa L. Lilly, Esquire
Lilly Law Office
PO Box 3920
Charleston, West Virginia 25339



Greg S. Foster