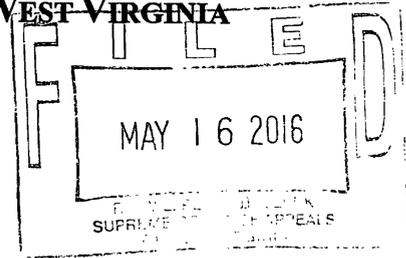


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

DOCKET No. 16-0146



**DOMESTIC VIOLENCE SURVIVORS'  
SUPPORT GROUP, INC. D/B/A  
DOMESTIC VIOLENCE COUNSELING  
CENTER,**

Petitioner,

(Appeal from a final order  
of the Circuit Court of Kanawha  
County (14-AA-40))

V.

**WEST VIRGINIA DEPARTMENT OF  
HEALTH AND HUMAN  
RESOURCES/OFFICE OF HEALTH  
FACILITY LICENSURE AND  
CERTIFICATION,**

Respondent.

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**Petitioner's Brief**

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**TABLE OF CONTENTS**

	Page
TABLE OF AUTHORITIES .....	iii
ASSIGNMENTS OF ERROR .....	1
STATEMENT OF THE CASE.....	1
SUMMARY OF ARGUMENT .....	4
STATEMENT REGARDING ORAL ARGUMENT AND DECISION .....	5
ARGUMENT.....	5
Standard of Review .....	5
I. The Circuit Court erred and exceeded its authority when it failed to recognize that, as a non-profit corporation, Petitioner’s counselors are exempt from the professional licensure requirement of West Virginia Code § 30-31-1.....	6
II. The Circuit Court erred by ruling that West Virginia Code St. R. § 64-11-5.5g requires all counselors and professional personnel at behavioral health centers to be professionally licensed.....	10
III. The Circuit Court violated Petitioner’s constitutional right to procedural due process, as well as the statutory and administrative law of this State, when it failed to recognize the Respondents’ unreasonable delay in issuing a decision in this case.....	12
CONCLUSION.....	15

## TABLE OF AUTHORITIES

### Cases

<i>Allen v. State Human Rights Commission</i> , 174 W.Va. 139, 324 S.E.2d 99 (1984).....	13
<i>Appalachian Power Co. v. State Tax Dept. of W. Va.</i> , 195 W.Va. 573, 466 S.E.2d 424 (1995)....	9
<i>Chicago and North Western Railroad v. Labor and Industry Review Commission</i> , 91 Wis.2d 462, 283 N.W.2d 603 (Wis. Ct. App. 1979) .....	14
<i>Chico Dairy Co. v. West Virginia Human Rights Comm'n</i> , 181 W.Va. 238, 382 S.E.2d 75 (1989) .....	14
<i>Clark v. W. Va. Bd. of Med.</i> , 203 W.Va. 394, 508 S.E.2d 111 (1998) .....	5
<i>Consumer Advocate Div. of Public Serv. Comm'n v. Public Serv. Comm'n of West Virginia</i> , 182 W.Va. 152, 386 S.E.2d 650 (1989).....	11
<i>Cookman Realty Group, Inc. v. Taylor</i> , 211 W.Va. 407, 566 S.E.2d 294 (2002) .....	11
<i>Crockett v. Andrews</i> , 153 W.Va. 714, 172 S.E.2d 384 (1970) .....	11
<i>Discover Bank v. Vaden</i> , 396 F.3d 366 (4th Cir. 2005).....	9
<i>English Moving &amp; Storage Co. v. Public Serv. Comm'n of West Virginia</i> , 143 W.Va. 146, 100 S.E.2d 407 (1957) .....	11
<i>Jan-Care Ambulance Services v. Public Service Commission of West Virginia</i> , 206 W.Va. 83, 522 S.E.2d 912 (1999) .....	15
<i>Lovas v. Consolidation Coal Co.</i> , 222 W.Va. 91, 662 S.E.2d 645 (2008) .....	7
<i>Mangus v. Ashley</i> , 199 W.Va. 651, 487 S.E.2d 309 (1997) .....	7
<i>Martin v. Randolph County Board of Education</i> , 195 W.Va. 297, 465 S.E.2d 399 (1995) .....	5
<i>State ex rel. Bowen v. Flowers</i> , 155 W.Va. 389, 184 S.E.2d 611 (1971).....	13, 14
<i>State ex rel. Ellis v. Kelly</i> , 145 W.Va. 70, 112 S.E.2d 641 (1953) .....	14

*T. Weston, Inc. v. Mineral Cnty.*, 219 W.Va. 564, 638 S.E.2d 167 (2006) ..... 9

**Statutes**

West Virginia Code § 29A-1-2 ..... 14, 15  
West Virginia Code § 30-31-1 ..... 1, 6, 8, 10  
West Virginia Code § 30-31-1 *et seq.* ..... 2, 6  
West Virginia Code § 30-31-11 ..... *passim*

**Regulations**

West Virginia Code State Rule § 64-11-5.5g ..... *passim*  
West Virginia Code State Rule § 64-1-1 *et seq.* ..... 5, 13, 14, 15  
West Virginia Code State Rule § 64-11-1 *et seq.* ..... 2  
West Virginia Code State Rule § 64-11-11 ..... 3, 13, 14  
West Virginia Code State Rule § 64-1-12 ..... 13, 15

## **ASSIGNMENTS OF ERROR**

1. The Circuit Court erred and exceeded its authority when it failed to recognize that, as a non-profit corporation, Petitioner's counselors are exempt from the professional licensure requirement of West Virginia Code § 30-31-1.

2. The Circuit Court erred and exceeded its authority when it ruled that West Virginia Code State Rule § 64-11-5.5g requires all counselors and professional personnel at behavioral health centers to be professionally licensed.

3. The Circuit Court violated Petitioner's constitutional right to procedural due process, as well as the statutory and administrative law of this State, when it failed to recognize the Respondents' unreasonable delay in issuing a decision in this case.

## **STATEMENT OF THE CASE**

Petitioner, Domestic Violence Survivors' Support Group, Inc. d/b/a Domestic Violence Counseling Center ("DVCC") is a 501(c)(3) non-profit corporation that provides long-term counseling services to victims of domestic violence in a one-on-one setting. (A.R. 000091 - 000092, 000098 - 000099, 000149 - 000159.) Presently, Elizabeth Crawford, DVCC's Director, is the only individual providing counseling services at DVCC. At the time the application discussed below was filed, DVCC had been providing long-term counseling services to individuals seeking assistance for eighteen years. (A.R. 000099.) Ms. Crawford has a Master of Science degree in Community Health Promotion from West Virginia University's School of Medicine and over the years has completed numerous continuing education courses related to domestic violence and counseling. (A.R. 000092, 000095 - 000096, 000160, 000175 - 000183.) Ms. Crawford does

not hold a professional counselor license under West Virginia Code § 30-31-1 *et seq.* (A.R. 000100.)

In 2011, DVCC determined that it could expand its scope of service and help more people in the community by attaining a Behavioral Health Center license, pursuant to West Virginia Code State Rule § 64-11-1 *et seq.* (A.R. 000098.) As a prerequisite to obtaining a behavioral health center license, Petitioner applied for a Certificate of Need (hereinafter “CON”) from the West Virginia Health Care Authority, which it was issued on February 1, 2012. (A.R. 000074, 000099 - 000100, 000196 - 000222.) DVCC subsequently renewed the CON multiple times and it remains in effect. (A.R. 000100, 000223 - 000226, 000662 - 000665, 000667 - 000670.)

On September 7, 2012, DVCC submitted its application for a behavioral health center license to the Office of Health Facility Licensure and Certification (“OHFLAC”). (A.R. 000074.) As part of the application process, OHFLAC conducted an onsite survey of DVCC on November 12, 2012. (A.R. 000074, 000100.) Shortly after the inspection, OHFLAC issued a Statement of Deficiencies to DVCC, setting forth five areas in which OHFLAC determined DVCC had failed to comply with OHFLAC regulations. (A.R. 000001 - 000009.) The Statement of Deficiencies directed DVCC to submit a Plan of Correction. (A.R. 000001 - 000002.) In light of the strained underpinnings of these deficiencies, Petitioner remained in frequent communication with OHFLAC, submitting several requests for clarification and multiple Plans of Correction. (A.R. 000010 - 000050.) DVCC ultimately agreed to some of OHFLAC’s requirements and convinced OHFLAC others were not justified. (A.R. 000051 - 000065.) However, one issue remained unresolved—OHFLAC’s unlawful insistence that DVCC’s counselors be licensed by the Board of Examiners in Counseling pursuant to West Virginia Code § 30-31-1 *et seq.* (A.R. 000583, 000051 - 000070.)

According to OHFLAC, Petitioner would need to employ a licensed counselor to supervise its counseling before the agency could approve a license. (A.R. 000069 - 000070.) OHFLAC cited no authority to support this claim. (A.R. 000069 - 000070.) In response to OHFLAC's contentions, Petitioner pointed out that OHFLAC's rules mandate only that counselors at a behavioral health center **comply with "applicable State professional licensure requirements."** W. Va. Code St. R. § 64-11-5.5.g (emphasis added). (A.R. 000583.) Petitioner further explained that as a non-profit corporation, DVCC's counselors are expressly exempt from the licensure requirements by operation of West Virginia Code § 30-31-11(a)(4), which states that the requirements of West Virginia Code 30-31-1 *et seq.* do not apply to "professional counselors or marriage and family therapists, whether as volunteers or for compensation or other personal gain, **in any public or private nonprofit corporations, organizations, associations or charities,**" W. Va. Code § 30-31-11(a)(4) (emphasis added). (A.R. 000583.)

Despite this unambiguous exemption, OHFLAC refused to alter its position, forcing Petitioner to file a formal request for a hearing pursuant to West Virginia Code St. R. § 64-11-11. (A.R. 000071, 000583.)

Following an administrative hearing, the parties submitted their Proposed Findings of Fact and Conclusions of Law to Administrative Law Judge Raymond Keener, III. (A.R. 000496 - 000511, 000512 - 000529.) The ALJ issued his Recommended Decision to the Secretary of the Department of Health and Human Resources ("DHHR") on December 16, 2013. (A.R. 000536 - 000556.) On April 3, 2013, four months after the parties had submitted their Proposed Findings of Fact and Conclusions of Law to the ALJ, DHHR issued its Final Administrative Order (the "Final Order"), adopting the Hearing Examiner's Recommended Findings of Fact and Conclusions of Law, which were attached to the Final Order and incorporated therein. (A.R. 000556 - 000558.)

The Final Order concluded that the law requires all counselors and professional personnel at behavioral health centers to be professionally licensed. (A.R. 000557 - 000558.) Applying the Hearing Examiner's conclusion specifically to Petitioner, the Final Order directed that the Petitioner conform to West Virginia Code St. R. Section 64-11-5.5g by having its "counselors and professional personnel be professionally licensed within thirty (30) days of receipt of this Order." (A.R. 000557 - 000558.)

Petitioner filed a timely Petition for Review of Final Order to the Circuit Court of Kanawha County, West Virginia on May 7, 2014. (A.R. 000559 - 000598.) Petitioner also filed a Motion to Stay the Final Order. (A.R. 000599 - 000605.) Respondents filed responses to both the Petition for Review of Final Order and Motion to Stay on May 23, 2014. (A.R. 000606 - 000626.) On June 24, 2014, the Circuit Court directed both parties to submit proposed orders by July 25, 2014. (A.R. 000634.) Both parties complied with the Circuit Court's Order and timely provided the Court with proposed orders. (A.R. 000635-000661.) On January 14, 2016, the Circuit Court entered a decision that affirmed the decision of the Respondents. (A.R. 000674 - 000681.) Petitioner timely filed this Appeal.

### **SUMMARY OF ARGUMENT**

The Circuit Court erred in failing to conclude that West Virginia Code § 30-33-11(a) exempts DVCC from the licensure requirements Respondents seek to impose. Specifically, West Virginia Code § 30-31-11(a) exempts from licensure, "professional counselors or marriage and family therapists, whether as volunteers or for compensation or other personal gain, in any public or private nonprofit corporations, organizations, associations or charities." W. Va. Code § 30-31-

11(a)(4). Despite this unambiguous statutory language and Petitioner's status as a nonprofit corporation, the Circuit Court affirmed the Respondent's decision to deny Petitioner's application.

The Circuit Court also erred by upholding the decision that OHFLAC's Rule requires counselors at behavioral health centers to be licensed, when, in fact, it only requires that they be in compliance with applicable State licensure requirements.

The judgment of the Circuit Court should be reversed. The Final Administrative Order of the West Virginia Department of Health and Human Resources should be suspended and overturned. OHFLAC should be directed to issue a Behavioral Health Center License to DVCC pursuant to West Virginia Code State Rule. § 64-1-1 *et seq.*

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

This case involves issues of fundamental public importance regarding the application of the laws and regulations related to the licensure of behavioral health centers. Accordingly, the Petitioner believes that this case is appropriate for Rule 20 oral argument.

### **ARGUMENT**

#### **Standard of Review**

In administrative appeals, “[t]his Court reviews decisions of the circuit [court] under the same standard as that by which the circuit [court] reviews the decision of the ALJ. . . .” *Clark v. W. Va. Bd. of Med.*, 203 W.Va. 394, 397, 508 S.E.2d 111, 114 (1998) (quoting *Martin v. Randolph County Board of Education*, 195 W.Va. 297, 304, 465 S.E.2d 399, 406 (1995)). Accordingly, the Court affords deference to the findings of fact made below while reviewing any conclusions of law and application of law to the facts *de novo*. *Martin*, 195 W.Va. at 304, 465 S.E.2d at 406.

**I. The Circuit Court erred and exceeded its authority when it failed to recognize that, as a non-profit corporation, Petitioner’s counselors are exempt from the professional licensure requirement of West Virginia Code § 30-31-1.**

In locating the “applicable State professional licensure requirements” to apply Section 5.5.g of the Rule, OHFLAC correctly referred to the provision of the West Virginia Code under which professional counselors are licensed – Article 31, Chapter 30 of the West Virginia Code, entitled *Licensed Professional Counselors*. (A.R. 000069.) Section 1 of that article sets forth the requirement that persons engaging in professional counseling must obtain a license.<sup>1</sup> The Circuit Court’s Order, however, fails to recognize that this licensure requirement is not “applicable” to Petitioner.

As a non-profit, DVCC is expressly exempted from the licensure requirement of W. Va. Code § 30-31-1. Specifically, Section 11 of Article 31 states:

(a) The following activities are exempt from the provisions of this article:

...

(4) The official duties of persons serving as professional counselors . . . whether as volunteers or for compensation or other personal gain, *in any public or private nonprofit corporations, organizations, associations or charities;*

W. Va. Code § 30-31-11(a) (emphasis supplied). There is no dispute that DVCC is a nonprofit corporation registered with the West Virginia Secretary of State. As such, the application of West Virginia Code § 30-31-11(a) would seem clear, thereby exempting DVCC from the licensure requirements of West Virginia Code § 30-31-1. In turn, because the licensure requirements of

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<sup>1</sup> “It is unlawful for any person to practice or offer to practice professional counseling or marriage and family therapy in this state without a license issued under the provisions of this article, or advertise or use any title or description tending to convey the impression that the person is a licensed professional counselor or a licensed marriage and family therapist unless the person has been licensed under the provisions of this article, and the license has not expired, been suspended, revoked or exempted.” W.Va. Code § 30-31-1.

West Virginia Code §30-31-1 do not apply to DVCC as a non-profit, they cannot constitute an “applicable State professional licensure requirement[.]” with which DVCC must comply under Section 5.5.g of the Rule.

Unfortunately, the Circuit Court, like the agency before it, erred by failing to recognize the clear interplay between these statutory and regulatory provisions, as required by law. “It is axiomatic that a court must whenever possible read statutes dealing with the same subject matter *in pari materia* so that the statutes are harmonious and congruent, giving meaning to each word of the statutes, and avoiding readings which would result in a conflict in the mandates of different statutory provisions.” *Mangus v. Ashley*, 199 W.Va. 651, 656, 487 S.E.2d 309, 314 (1997).

Apparently confused about the statutory basis for the licensure exemption, OHFLAC’s denial of Petitioner’s application incorrectly stated that the exemption in West Virginia Code § 30-31-11(a)(4) arose from the Board of Examiners in Counseling:

OHFLAC recognizes that the West Virginia Board of Examiners in Counseling, under its rules and regulations, exempts “professional counselors or marriage and family therapists, whether as volunteers or for compensation or other personal gain, in any public or private nonprofit corporations, organization, associations or charities.” W.Va. Code 30-31-11(a)(4). Although the Board of Examiners in Counseling may exempt non-profit counselors from their regulations, OHFLAC interprets its regulation as requiring licensure for all professional staff at a behavior health center.

(A.R. 000069.) Of course, the exemption in West Virginia Code § 30-31-11(a)(4) was not promulgated by the Board of Counseling Examiners, but is a statutory provision enacted by the Legislature and signed into law by the Governor that cannot be ignored or assigned any other meaning than that which is evident from its plain and unambiguous language. *See* Syl. Pt. 3, *Lovas v. Consolidation Coal Co.*, 222 W.Va. 91, 662 S.E.2d 645 (2008) (“Rules and Regulations of . . . [an agency] must faithfully reflect the intention of the legislature; when there is clear and unambiguous language in a statute, that language must be given the same clear and unambiguous

force and effect in the . . . [agency's] Rules and Regulation that it has in the statute.”) (citations omitted).

The Circuit Court's decision simply ignores the exception and declares (without any analysis or explanation) that Section 5.5.g of the Rule requires licensure and even repeats the agency's erroneous finding that the exemption for non-profit counselors flows from the Rules of the Board of Examiners in Counseling. (A.R. 000681) (“[A]lthough the Board of Examiners in Counseling exempts nonprofit counselors from its regulations; OHFLAC's behavioral health center regulations require licensure for counselors and all other professional staff.”).

The Circuit Court made this finding despite OHFLAC's own admission at the hearing that the statute does exempt Petitioner from having to obtain a license. First OHFLAC testified that where an individual is exempt from an obligation, that obligation does not apply to them.

**Q. If you have a rule and then you provide exemptions for people, okay, that rule doesn't apply for those people that fall under the exemption, isn't that correct?**

**A. As far as that rule goes, yes.**

(A.R. 000088.) Then OHFLAC acknowledged that, if the licensure requirement of West Virginia Code § 30-31-1 is not applicable to Ms. Crawford, Ms. Crawford would be in compliance with the provision of West Virginia Code St. R. § 64-11-5.5.g.

**Q. What in the regulations, Title 64, which you and your office are responsible for enforcing and administering, leads you to believe that my client is not exempt from Chapter 30, licensure requirements, but is instead subject to them and should have a license?**

...

**A. 5.5.g. All professional staff and consultants of the Center shall be in compliance with applicable State and professional licensure requirements.**

**Q. Would you agree with me that if the licensure requirement was not applicable with my client then she would be in conformance with that provision which you just read?**

**A. Yes.**

(A.R. 000089.) Indeed, given the agency's disregard for the language of the statute, its interplay with the Rule and, perhaps most egregiously, the record evidence, one cannot escape the conclusion that the agency's decision was predetermined from the outset of the proceeding.

Finally, as noted above, the language of West Virginia Code § 30-31-11 and West Virginia Code St. R. § 64-11-5.5.g are clear and unambiguous and, therefore, must be applied without interpretation. However, even if the Circuit Court were permitted to engage in interpretation, its decision essentially reads language out of both the statute and the Rule, thereby violating the bedrock principle of statutory construction that “[s]ignificance and effect must, if possible, be given to every section, clause, word or part of the statute.” *T. Weston, Inc. v. Mineral Cnty.*, 219 W.Va. 564, 568, 638 S.E.2d 167, 171 (2006) (citation omitted); *see also Discover Bank v. Vaden*, 396 F.3d 366, 369 (4th Cir. 2005) (finding court must “avoid any interpretation that may render statutory terms meaningless or superfluous”).

First, the Circuit Court ignores the word “any” in the phrase “any public or private nonprofit corporations, organizations, associations or charities” in West Virginia Code § 30-31-11(a)(4), which unquestionably prohibits limiting the types of nonprofit entities that may take advantage of the exemption. The Legislature intended for counselors at non-profit organizations not to carry the burden of professional licensure and Respondents cannot circumvent the Legislature under the guise of an interpretation. *See* Syl. Pt. 3, *Appalachian Power Co. v. State Tax Dept. of W. Va.*, 195 W.Va. 573, 466 S.E.2d 424 (1995) (if the Legislature's intent is clear, the agency's interpretation is not given deference and can only be upheld if it conforms with the Legislature's intent). To do so, would be to usurp the Legislature's authority and supplant the Legislature's policy choices with that of the agency.

Second, the Circuit Court’s decision renders the words “applicable” and “requirements” in West Virginia Code St. R. § 64-11-5.5.g meaningless. As noted above, the inclusion of these words directs the agency to determine what licensure requirements apply. In light of the exemption in West Virginia Code § 30-31-11(a)(4), the licensure requirement of West Virginia Code § 30-31-1 does not apply. The Circuit Court’s affirmation of Respondents’ position that behavioral health center counselors must be licensed irrespective of their non-profit status negates Respondent’s obligation to determine what “requirements” are in fact, “applicable,” and thereby effectively reads both terms out of the Rule.

In light of its disregard for the unambiguous statutory and regulatory language, the legislative intent underlying that language, and the unequivocal record evidence, the Circuit Court’s decision to affirm Respondents’ decision is unlawful and must be reversed.

**II. The Circuit Court erred by ruling that West Virginia Code St. R. § 64-11-5.5g requires all counselors and professional personnel at behavioral health centers to be professionally licensed.**

Section 5.5.g of the Rule states that, “[a]ll professional staff and consultants of the Center shall be in compliance with applicable State professional licensure requirements.” W. Va. C.S.R. § 64-11-5.5.g. This language is clear and unambiguous. It makes plain that professional staff and consultants at a behavioral health center must be in compliance with any professional licensure requirements **that apply to them**. Yet, the Respondents failed to recognize and apply this explicit language. Instead, in an unsupported and conclusory fashion, they found that all counselors at behavioral health centers, including those at DVCC, must be licensed. Such a reading is contrary to law and cannot stand, and the Circuit Court erred when it affirmed the unlawful decision.

It is well settled that “[w]hen a valid administrative rule is clear and unambiguous it must be given full force and effect according to its plain terms and provisions.” Syl. Pt. 1, *English*

*Moving & Storage Co. v. Public Serv. Comm'n of West Virginia*, 143 W.Va. 146, 100 S.E.2d 407 (1957). While an administrative body's interpretation of its rules normally is afforded deference; such interpretation is not permitted when the language of the administrative rule is clear and unambiguous. *Cookman Realty Group, Inc. v. Taylor*, 211 W.Va. 407, 411, 566 S.E.2d 294, 298 (2002) (quoting Syl. Pt. 3, *Crockett v. Andrews*, 153 W.Va. 714, 172 S.E.2d 384 (1970)). Furthermore, an administrative body cannot use the guise of "interpretation" to modify, revise, amend, or rewrite an administrative rule. Syl. Pt. 1, *Consumer Advocate Div. of Public Serv. Comm'n v. Public Serv. Comm'n of West Virginia*, 182 W.Va. 152, 386 S.E.2d 650 (1989)).

Applying the plain language of Section 5.5.g, the direction to the agency is clear—determine which licensure requirements are applicable and require staff members or consultants to be in compliance with those licensure requirements. The licensure obligations imposed upon these professionals is confined by what is set forth in the law – no more and no less.

Without explanation, the Circuit Court ignored the plain language of the Rule and concluded that Section 5.5.g means all counselors must be licensed. (A.R. 000673.) Of course, the rule provision states no such thing. Rather, it simply means that if a licensure requirement does apply, professional staff and consultants must be in compliance with said requirement and, as explained in above, state law does not require DVCC's counselors to be licensed.

Despite the clarity of Section 5.5.g, the Circuit Court's Order simply adopted *in toto* the flawed argument advanced by OHFLAC that the rule requires licensure because "behavioral health centers have numerous mandates that can only be accomplished by licensed personnel." (A.R. 000671.) The Circuit Court adopted this disjointed reasoning, even though OHFLAC itself conceded at the hearing—as logic compelled it—that an individual counselor could have the

requisite education, experience and training to satisfy the mandates of the Behavioral Health Center Licensure Rule without actually having a professional counselor's license.

- Q. Okay. Just so I'm clear, you are of the opinion that an individual can have the proper training, qualifications and education to meet all of those requirements set forth in Chapter 7, but not have the piece of paper acknowledging that they are a licensee of the Board of Counseling?**
- A. Well, you have – in order to get licensed you have to go through the Board. So I suppose you could graduate from college and – et cetera, et cetera, and not go through that.**
- Q. Well, you could have the education and you could have the experience and you could have the training but not go and apply for the license, correct?**
- A. True.**
- Q. And then you would have the background, the experience, the education and the knowledge to fulfill and to comply with the requirements of Section 7, is that correct?**
- A. It is possible.**

(A.R. 000083 - 000084.)

The Circuit Court disregarded this uncontrovertible testimony and the undeniable and obvious fact it confirms—a license is not needed to comply with the agency's regulations.<sup>2</sup>

**III. The Circuit Court violated Petitioner's constitutional right to procedural due process, as well as the statutory and administrative law of this State, when it failed to recognize the Respondents' unreasonable delay in issuing a decision in this case.**

DHHR's unreasonable four (4) month delay in rendering a decision in this case violated Petitioner's constitutional right to due process. The West Virginia Supreme Court of Appeals has held that "under West Virginia Constitution Art. III, § 10, which provides that 'no person shall be deprived of life, liberty or property without due process of law . . . .,'" and under West Virginia Constitution Art. III, § 17, which provides that 'justice shall be administered without . . . delay,'"

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<sup>2</sup> In addition, OHFLAC acknowledged at the hearing that it never found DVCC's proposed plan to meet those mandates deficient and that its only reason for denying the application was DVCC's lack of a licensed counselor. (A.R. 000074, 000086.)

administrative agencies performing quasi-judicial functions have an affirmative duty to dispose promptly of matters properly submitted.” *Allen v. State Human Rights Commission*, 174 W.Va. 139, 156, 324 S.E.2d 99, 118 (1984). “The procedural due process right to the prompt disposition of matters pending before administrative agencies performing quasi-judicial functions is not without corresponding duty on the part of those agencies to act within certain time constraints.” *Id.* at 157-58. The West Virginia Supreme Court of Appeals has determined that those time limitations are implicitly imposed by the demands of procedural due process. *See id.* at 158 (citing *State ex rel. Bowen v. Flowers*, 155 W.Va. 389, 394, 184 S.E.2d 611, 614 (1971)).

Here, DHHR and the Hearing Examiner were under a specific time limitation that they ignored. The legislative rule governing the issuance of behavioral health center licenses, West Virginia Code St. R. § 64-11-1 *et seq.*, expressly states that appeals of licensure decisions are to be handled pursuant to the procedural rule set forth in West Virginia Code St. R. § 64-1-1 *et seq.* *See* W. Va. Code St. R. § 64-11-11 (“Any person aggrieved by an order or other action by the Secretary based on this rule . . . may request in writing a hearing by the Secretary in accordance with the Division of Health Rule, Rules of Procedure for Contested Case Hearings and Declaratory Rulings, 64CSR1, a copy of which may be obtained from the Secretary of State.”). That procedural rule requires that the hearing examiner issue his or her final order “*within forty-five (45) days following the submission of all documents and materials necessary for the proper disposition of the case, including transcripts and proposed findings of fact and conclusions of law.*” W. Va. Code State R. § 64-1-12 (emphasis supplied).

Despite this clear regulatory directive, the Hearing Examiner waited to issue his decision until December 16, 2013, well over the forty-five (45) days within which he was required to issue a decision under the rule. (A.R. 000532.) Then, rather than provide his decision to all the parties,

the Hearing Examiner submitted it only to the DHHR Secretary for consideration. (A.R. 000532.) The Secretary then held onto the decision for another three and a half months before disclosing it as part of her Final Order. (A.R. 000556 - 000558.)

This Honorable Court, as well as the courts of our sister jurisdictions, have recognized the interrelationship between administrative promptness and procedural due process. *See State ex rel. Ellis v. Kelly*, 145 W.Va. 70, 76, 112 S.E.2d 641, 645 (1953) and *State ex rel. Bowen v. Flowers*, 155 W.Va. 389, 184 S.E.2d 611 (1971) (holding that unreasonable administrative delay warranted issuance of a writ of mandamus); *Chicago and North Western Railroad v. Labor and Industry Review Commission*, 91 Wis.2d 462, 480, 283 N.W.2d 603, 612 (Wis. Ct. App. 1979) (“Unreasonable administrative delay can deprive a party of property without due process.”).

In this case, DHHR’s delay in the issuance of a decision, caused a real and tangible harm to Petitioner. In addition to simply being deprived of an answer for four months, the delay has prejudiced DVCC with respect to its Certificate of Need (“CON”) from the Health Care Authority. While DHHR held the decision back, the amount of time allotted by the Health Care Authority under the CON program for DVCC to obtain its Behavioral Health Center license, and thus “complete the project” authorized by the CON, continued to run, causing DVCC to expend time and resources in obtaining extensions from the Health Care Authority.

DHHR also exceeded its authority by violating its own rules regarding the timing of its decision. As a statutorily created entity, DHHR’s authority is necessarily limited to the powers bestowed upon it by the Legislature. As a legislative rule, the requirement in West Virginia Code St. R. § 64-11-11 that hearings challenging licensing decisions are to be handled under West Virginia Code St. R. § 64-1-1 *et seq.* carries “the force of law.” W. Va. Code § 29A-1-2(e). *See also Chico Dairy Co. v. West Virginia Human Rights Comm’n*, 181 W.Va. 238, 244, 382 S.E.2d

75, 81 (1989) (to be valid, the promulgation of legislative rules must be authorized by the West Virginia Legislature). As a result, by disregarding the requirement of West Virginia Code 64-1-12 and failing to issue a decision within the allotted 45-day timeframe, DHHR violated the law, exceeded its legislative grant of authority and, consequently, violated DVCC's rights. *See* W. Va. Code 29A-1-2(e) (establishing that legislative rules approved by Legislature have the "force of law" and affect "constitutional, statutory or common law rights, privileges or interests").

Our Supreme Court has stated that it can review and reverse cases where essential elements of an agency order do not comply with its own rules and are not supported by the evidence. *Jan-Care Ambulance Services v. Public Service Commission of West Virginia*, 206 W.Va. 183, 189, 522 S.E.2d 912, 918 (1999) (citations omitted). The Circuit Court erred by failing to recognize this deprivation of due process guaranteed by the laws of this State.

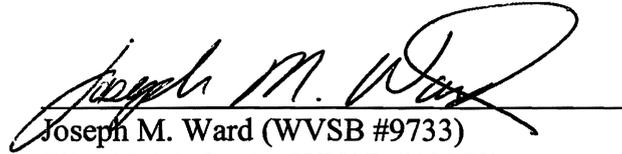
### CONCLUSION

The Circuit Court ignored the clear and unambiguous statutory language in this matter. The West Virginia Legislature enacted a law to exempt non-profit entities from being forced to comply with licensure requirements for their counselors. However, despite that clear legislative directive, the Respondents have sought to substitute their own strained interpretation of the law in order to circumvent the intent of the Legislature. The Circuit Court enabled this unlawful decision by affirming Respondents' decision without any significant legal analysis.

The judgment of the Circuit Court should be reversed. The Final Administrative Order of the West Virginia Department of Health and Human Resources should be suspended and overturned. OHFLAC should be directed immediately to issue a Behavioral Health Center License to DVCC pursuant to West Virginia Code St. R. § 64-1-1 *et seq.*

***Domestic Violence Survivors' Support  
Group, Inc. d/b/a Domestic Violence  
Counseling Center***

By Counsel,

A handwritten signature in black ink, appearing to read "Joseph M. Ward", is written over a horizontal line.

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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**DOCKET NO. 16-0146**

**DOMESTIC VIOLENCE SURVIVORS'  
SUPPORT GROUP, INC. D/B/A  
DOMESTIC VIOLENCE COUNSELING  
CENTER,**

Petitioner,

(Appeal from a final order  
of the Circuit Court of Kanawha  
County (14-AA-40))

V.

**WEST VIRGINIA DEPARTMENT OF  
HEALTH AND HUMAN  
RESOURCES/OFFICE OF HEALTH  
FACILITY LICENSURE AND  
CERTIFICATION,**

Respondent.

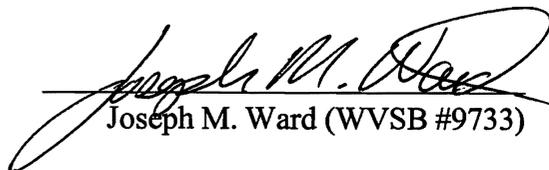
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**Certificate of Service**

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I, Joseph M. Ward, hereby certify that I served a copy of the foregoing **Petitioner's Brief** on this 16th day of May, 2016, by hand delivery, to the following:

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