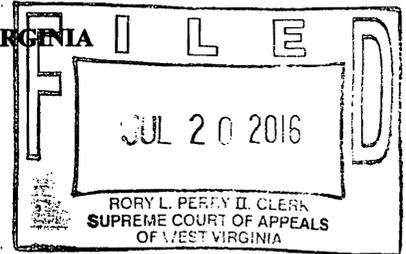


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.

Reply Brief of Petitioner

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

Joseph M. Ward (WVSB #9733)
Counsel of Record
Elise N. McQuain (WVSB #12253)
GOODWIN & GOODWIN, LLP
300 Summers Street, Suite 1500
Charleston, WV 25301-1678
Telephone: (304) 346-7000
Facsimile: (304) 344-9692
Email: jmw@goodwingoodwin.com

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ARGUMENT IN REPLY

I. Introduction and Summary

As explained in Petitioner's initial brief, Respondent's interpretation of its Behavioral Health Center Rule, West Virginia Code St. R. § 64-11-5.5.g ("the Rule"), as requiring all professional counselors to be professionally licensed, is unsupported by the language of the Rule and would re-write West Virginia Code § 30-31-11(a)(4), in which the Legislature exempted all counselors working at non-profit organizations from having to be licensed. To defend this usurpation of legislative power, Respondent advances three flawed arguments. First, Respondent argues that West Virginia Code St. R. § 64-11-5.5.g is ambiguous simply because the parties are litigating about it. Absent this circular logic that has long been rejected by this Court, Respondent points to no actual ambiguities in the Rule. Second, even if the Rule is ambiguous and Respondent is therefore entitled to deference, Respondent misstates the level of deference that is appropriate. In fact, the opinion upon which Respondent relies states exactly the opposite conclusion that Respondent contends.

Finally, Respondent argues that the additional four months that it took to rubber-stamp the ALJ decision was not a violation of Petitioner's due process rights. Respondent makes this argument based on its incorrect reading of two cases cited by Petitioner. Respondent even goes so far to argue that any harm caused by its delay in issuing a decision is the fault of Petitioner for not immediately acquiescing to Respondent's initial decision.

Because these arguments are simply wrong, the Circuit Court's ruling must be reversed.

II. Argument

A. W. Va. Code St. R. § 64-11-5.5.g is unambiguous.

Eager to argue that its interpretation of its Rule should be given deference and is consistent with the Rule's purpose, Respondent blithely declares that the language of its Rule is ambiguous. However, Respondent provides no explanation as to why the Rule is ambiguous. Instead it just announces in conclusory fashion that, because it interprets the Rule differently than Petitioner, the Rule must be ambiguous. This, however, is not enough.

It is well settled that the mere existence a dispute over the construction of a statute does not render the statute ambiguous. *See In re Estate of Resseger*, 152 W. Va. 216, 220, 161 S.E.2d 257, 260 (1968) (“That the parties disagree as to the meaning or the applicability of each provision does not of itself render either provision ambiguous or of doubtful, uncertain or obscure meaning.”). Rather, a statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning. *See State v. Louk*, ___ W. Va. ___, ___, 786 S.E.2d 219, ___ (2016) (citing *Sizemore v. State Farm Gen. Ins. Co.*, 202 W. Va. 591, 596, 505 S.E.2d 654, 659 (1998)).

Nowhere in its Response does Respondent identify any specific ambiguity in the language of the Rule. It does not explain what makes the Rule “susceptible to two or more constructions.” Nor does it demonstrate how the Rule is “of doubtful or obscure meaning such that reasonable minds might be uncertain or disagree.” It does not attempt to explain any of these things because it cannot. The Rule requires professional staff at behavioral health centers, which would include counselors, to comply with “applicable State professional licensure requirements.” There is nothing confusing about this language. The use of the word “applicable” undeniably denotes a limitation on the licensure requirements. It makes plain that professional staff and consultants at a

behavioral health center must be in compliance with only professional licensure requirements **that apply to them**. Likewise, the language articulates in a straight-forward fashion what the agency must do—determine which licensure requirements are applicable and require staff members or consultants to be in compliance with those licensure requirements.

Confronted with this clear instruction, not only does Respondent fail to explain how the provision is ambiguous, but it also does not even attempt to explain how the language supports its strained interpretation of the Rule. At no point does Respondent explain how the words of West Virginia Code St. R. § 64-11-5.5.g support its position that all counselors at behavioral health centers must be professionally licensed, irrespective of their exempt non-profit status. Likewise, Respondent never explains what language in the Rule suggests that the exemption for counselors set forth in West Virginia Code 30-31-11(a)(4) does not apply to behavioral health centers.

The glaring absence of legal or evidentiary support for these arguments reveals Respondent's position to be nothing more than a litigation position created solely to justify its denial of Petitioner's application. As such, grounds exist in addition to the Rule's clarity to find that the agency's interpretation is not entitled to any deference. *See Cookman Realty Grp., Inc. v. Taylor*, 211 W. Va. 407, 410–11, 415, 566 S.E.2d 294, 297–98, 302 (2002) (holding that deference is not to be given to agencies' litigating positions (citing *W. Va. Health Care Cost Review Auth. v. Boone Mem'l Hosp.*, 196 W. Va. 326, 334, 472 S.E.2d 411, 419 (1996))).

As was pointed out in Petitioner's initial brief to this Court, the Circuit Court below, and the ALJ before that, OHFLAC conceded at the administrative hearing—as logic compelled it—that an individual counselor could have the requisite education, experience, and training to satisfy the mandates of the Rule without actually having a professional counselor's license. *See A.R. 000083–84*. Of course, nowhere in its brief, or in the proceedings below, does Respondent address

this admission or the inconsistency it creates between its litigation position and the record evidence. Respondent's silence is all the more deafening when considered in light of its other concession that, save compliance with its supposed licensure requirement, Respondent took no issue with any other aspect of Petitioner's qualifications and considered its application complete. *See* A.R. 000583, 000051–70.

In addition to ignoring its prior testimony and the aforementioned conflict it presents, Respondent also completely ignores the plain, unambiguous language of the statutory exemption set forth in W. Va. Code § 30-31-11(a)(4) excluding counselors at non-profits from licensure, as well as the fact that its interpretation of the Rule would negate the Legislature's policy decision enshrined in that statutory provision. Instead, Respondent actually repeats—without correction—the Circuit Court's mischaracterization of the exemption as being a regulation of the Board of Examiners in Counseling. Of course, the exemption is *statutory*.

West Virginia Code § 30-21-11(a)(4) expressly exempts counselors working at non-profits, such as Petition, from professional licensure requirements. The statutory exemption is clear and unambiguous. Respondent does not—and cannot—contend otherwise. Importantly, nothing in that statute excludes from the exemption counselors working at behavioral health centers. As a result, Respondent's interpretation of its Rule is in direct conflict with this statute and, if permitted to stand, would actually nullify the statute in the context of behavioral health centers. Of course, such revisions of a statute's substantive terms through interpretation are not to be permitted. *See* Syl. Pt. 1, *Consumer Advocate Div'n. v. Pub. Serv. Comm'n*, 182 W. Va. 152, 386 S.E.2d 650 (1989) (“A statute, or an administrative rule, may not, under the guise of ‘interpretation,’ be modified, revised, amended or rewritten.”). Indeed, in the very similar case of *Syncor International Corp. v. Palmer*, 208 W. Va. 658, 542 S.E.2d 479 (2001), this Court found that a State Tax Department

rule that purported to limit the application of a statutory sales tax exemption to the sale of certain drugs was ineffective because the statutory exemption was unambiguous and, therefore, the plain meaning of the statute had to be “accepted and applied without resort to interpretation.” 182 W. Va. at 662, 386 S.E.2d at 483.¹ As in *Syncor*, the Court should invalidate Respondent’s attempt to alter the statute by rejecting its interpretation of its Rule.

B. Respondent overstates the level of deference to which it incorrectly claims it is entitled.

To date, this Court has not stated a standard to be applied in examining a state agency’s interpretation of its own rule. *See Cookman Realty Grp.*, 566 S.E.2d at 298 (refusing to “define what deference, if any, must be afforded an administrative agency’s interpretation of its own legislative rule”). Despite this absence of precedent, however, Respondent confidently asserts that its interpretation of West Virginia Code St. R. § 64-11-5.5.g must be subjected to the heightened level of deference articulated in *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410 (1945). *See Resp.* at 8. Citing Justice Starcher’s *concurrence* in *Cookman Realty Group*, Respondent argues that the agency’s interpretation should be subject to *Seminole Rock* deference, which says the interpretation should be affirmed “so long as it is ‘reasonable,’ that is, so long as the interpretation sensibly conforms to the purpose and wording of the regulations.” *Id.* at 8.

Of course, Justice Starcher reached no such conclusion in his concurrence. To the contrary, he flatly rejected the application of *Seminole Rock* deference to agency interpretations **of their own rules**, opting instead for the much lower level of deference articulated in *Skidmore v. Swift & Co.*, 323 U.S. 234 (1944). *See Cookman Realty Grp., Inc.*, 211 W. Va. at 417, 566 S.E.2d at 304

¹ The primacy of the statutory exemption over the claimed effect of the agency’s rule is likely even more pronounced in this case than in *Syncor*. In *Syncor*, the Tax Department argued that one of its legislative rules limited the application of the statutory exemption; whereas here, Respondent is relying solely on not one of its own rules, but rather only its interpretation of one of those rules. *See Syncor*, 208 W. Va. at 662, 542 S.E.2d at 483.

“I believe that *Skidmore*, rather than *Seminole Rock*, illuminates the better course for resolving the meaning of ambiguous administrative rules and the course that this Court will follow in establishing the law of West Virginia. . . . Thus, in the absence of statutory or other principles that prescribe a different standard of review, judicial review of an administrative agency’s interpretation of its own legislative rule should be governed by the standard set forth in *Skidmore*.”)

Respondent’s reliance on this concurrence is baffling, since it stands for the opposite proposition of that advanced by the agency. Indeed, a large portion of the concurrence details a number of “strong objections” to providing *Seminole Rock* level deference to agency interpretations of their own rules. Among those criticisms was that “permitting an agency to have broad power to interpret its own regulations violates constitutional separation-of-powers restrictions by uniting the law-making and law-exposition functions in the same agency hands.” *Id.* at 416, 303. In addition, such deference could incentivize agencies to draft ambiguous regulations and increasing the potential for governmental arbitrariness, “since vague regulations provide neither regulators nor regulated parties with explicit guidance.” *Id.*

Given the burden *Skidmore* places on agencies and the required findings of that standard, it is easy to see why an agency would prefer the *Seminole Rock* standard over *Skidmore*. Yet, in light of the unequivocal nature of Justice Starcher’s concurrence in *Cookman*, Petitioner is still at a loss to understand why Respondent relies on that opinion or how it so egregiously misstates the conclusion. Whatever its reasons, however, Respondent is at least consistent, if nothing else, in its refusal to acknowledge and apply clear and unambiguous provisions of law.

C. Petitioner’s due process rights were violated because it suffered “actual and substantial” prejudice as a result of Respondent’s four-month delay in issuing its decision.

With respect to Petitioner’s third assignment of error, Respondent argues that its failure to issue a decision for four months after its own regulatory deadline did not cause the “actual and

substantial” prejudice to Petitioner necessary to trigger a due process violation. *See* Resp. at 11 (quoting Syl. Pt. 5, *Miller v. Moredock*, 229 W. Va. 66, 726 S.E.2d 34 (2011)). Here too, Respondent’s arguments miss the mark.

While it concedes the delay “may have not been optimal,” Respondent argues that four months simply is not enough of a delay. *Id.* Respondent does not say how long is too long of a delay, but apparently four months does not suffice in its eyes. Respondent even goes so far as to suggest that the Circuit Court’s subsequent delay of over a year to rule somehow excuses the agency’s delay. *See id.* Of course, it unclear why a subsequent harm would erase, rather than compound, a prior harm.

Then, in one of the most circular of arguments, Respondent dismisses the impact its delay had on Petitioner retaining its Certificate of Need from the Health Care Authority by arguing that it was not actually the delay in issuing a decision that harmed Petitioner. According to Respondent, Petitioner’s harm was caused by its own refusal to concede the point and simply comply with Respondent’s interpretation that counselors at non-profits must be licensed. Respondent argues that Petitioner’s delay in receiving an answer was her fault for ever asking the question in the first place. This is akin to saying that a substantial delay in the trial of a criminal defendant is simply his own fault for not pleading guilty. Of course, this argument completely misunderstands the concept of procedural due process, which is concerned with the process by which justice is administered and not the ultimate outcome of that process.

Furthermore, Respondent’s analysis focuses entirely on the duration of the delay. Yet, the egregiousness of the delay cannot be separated from the total lack of any justification for the delay. The record shows that the DHHR Secretary’s decision was little more than a single page that simply adopted the ALJ’s ruling wholesale, revealing little, if no, deliberation on the Secretary’s

part. *See* A.R. 000557-58. Indeed, Respondent has never explained why it took so long to say so little.

Finally, Respondent criticizes Petitioner's initial brief for citing two cases it deems insufficiently on point to support the proposition that a delay of four months constitutes a violation of due process.

With respect to *Allen v. State Human Rights Commission*, 174 W. Va. 139, 324 S.E.2d 99 (1984), Respondent attempts to portray Petitioner as citing the case as a direct analogue to the instant matter. However, Petitioner's initial brief cites the case solely for the propositions that "administrative agencies performing quasi-judicial functions have an affirmative duty to dispose promptly of matters properly submitted" and that duty to act promptly imposes a corresponding duty on the agencies "to act within certain time constraints." *Allen*, 174 W. Va. at 157–58, 324 S.E.2d at 117–18.

With respect to *State ex rel. Bowen v. Flowers*, 155 W. Va. 389, 184 S.E.2d 611 (1971), Respondent argues that the case is distinguishable. Respondent's basis for categorizing the case as distinguishable rests upon an incorrect reading of the case. Respondent correctly states that the case was a mandamus action against the Department of Welfare by a pharmacist who was being investigated for dispensing practices. Yet, Respondent incorrectly states that the pharmacist was unable to conduct his business because of the agency conduct being appealed. The agency did not, as Respondent intimates, suspend the pharmacists' license to practice pharmacy. The agency had merely suspended the pharmacist from participating in a State funded program and did not schedule a hearing on the suspension. After **four months**, the pharmacist petitioned for mandamus to compel a hearing. Therefore, like Petitioner, the pharmacist in *Flowers* was able to conduct his business, but not participate in a state program, while he waited for the agency to review its initial

action. Based on that fact pattern, which is similar to the one here, the Court found the four-month delay violated the pharmacists due process rights. Accordingly, while Respondent may feel a four-month delay in this case is not “optimal,” this Court has indeed found such a delay to be a violation of due process.

Petitioner suffered actual and substantial harm as a result of Respondent’s delay in issuing a decision. Respondent’s meager attempts to minimize that harm and distinguish it from applicable precedent fails. Accordingly, the Court should find that Respondent violated Petitioner’s due process rights.

CONCLUSION

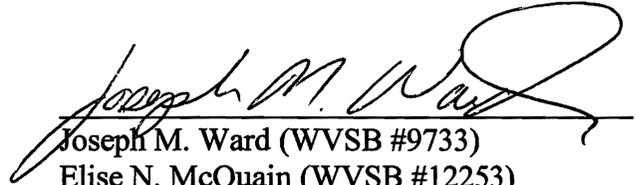
Respondent’s contentions in this Appeal are woefully meritless. Despite Respondent’s contentions, the Rule is not ambiguous simply because it spurred litigation. Rather, Respondent’s “interpretation” is simply unreasonable and, in fact, vitiates an equally clear statutory provision. Moreover, Respondent spectacularly misstates the level of deference to which it (erroneously) contends it is entitled. Finally, Respondent’s contention that its four-month delay is passable rings hollow. Respondent again misreads precedent and raises the incredibly circular logic that the delay was caused by Petitioner disagreeing with it in the first place.

In light of Petitioner’s brief, the glaring flaws in Respondent’s arguments, and the record evidence, 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.*

Respectfully submitted,

***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. The signature is fluid and cursive.

Joseph M. Ward (WVSB #9733)
Elise N. McQuain (WVSB #12253)
GOODWIN & GOODWIN, LLP
300 Summers Street, Suite 1500
Charleston, WV 25301-1678
Telephone: (304) 346-7000
Facsimile: (304) 344-9692
Email: jmw@goodwingoodwin.com

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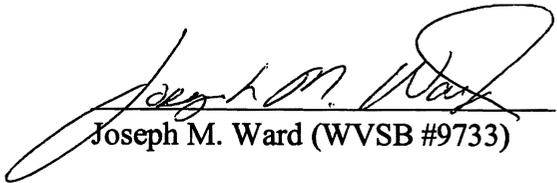
**WEST VIRGINIA DEPARTMENT OF HEALTH
AND HUMAN RESOURCES/OFFICE OF
HEALTH FACILITY LICENSURE AND
CERTIFICATION,**
Respondent.

Certificate of Service

I, Joseph M. Ward, hereby certify that I caused to be served a copy of the foregoing **Reply Brief Petitioner** on this 20th day of July, 2016, by hand delivery, to the following:

Jake Wegman, Esq.
OFFICE OF HEALTH FACILITY
LICENSURE AND CERTIFICATION
408 Leon Sullivan Way
Charleston, WV 25301
Phone: (304) 558-0050

Christopher Dodrill, Esq.
Office of the Attorney General
812 Quarrier Street, 2d Floor
Charleston, WV 25301
Phone: (304) 558-2131


Joseph M. Ward (WVSB #9733)