

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA ex rel.  
DARRELL V. MCGRAW, JR., in  
his capacity as Attorney General  
for the State of West Virginia,

*Petitioner,*

v.

Case No. 30094

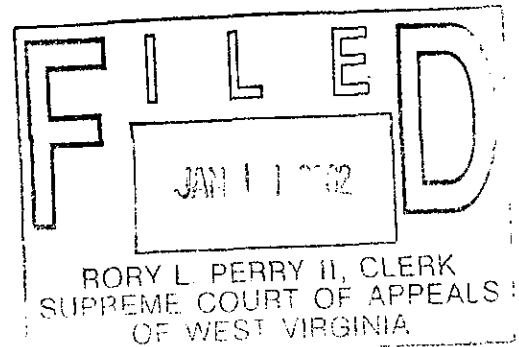
GREGORY A. BURTON, Cabinet Secretary of the  
Department of Administration;  
NICHELLE PERKINS, Director of the Division of Personnel  
of the Department of Administration;  
KAY HUFFMAN GOODWIN, Cabinet Secretary of  
the Department of Education and the Arts;  
MIKE CALLAGHAN, Cabinet Secretary of the  
Department of Environmental Protection;  
PAUL NUSBAUM, Cabinet Secretary of the  
Department of Health and Human Resources;  
JOE MARTIN, Cabinet Secretary of the  
Department of Military Affairs & Public Safety;  
BRIAN KASTICK, Cabinet Secretary of the  
Department of Tax and Revenue; and  
FRED VANKIRK, Cabinet Secretary of the  
Department of Transportation,

*Respondents,*

and

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA;  
THE WEST VIRGINIA BOARD OF EDUCATION, THE WEST VIRGINIA  
DEPARTMENT OF EDUCATION AND THE SUPERINTENDENT OF SCHOOLS;  
THE WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD; AND  
THE WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL FACILITY  
AUTHORITY,

*Intervenors.*



---

**AMICI CURIAE BRIEF OF THE WEST VIRGINIA ENVIRONMENTAL QUALITY  
BOARD AND THE WEST VIRGINIA AIR QUALITY BOARD**

---

The West Virginia Environmental Quality Board  
and the West Virginia Air Quality Board, by

Rebecca S. Charles  
Counsel for the Boards  
State Bar No. 6876  
1615 Washington St. East;  
Suite 301  
Charleston, WV 25311  
(304) 558-4002

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA ex rel.  
DARRELL V. MCGRAW, JR., in  
his capacity as Attorney General  
for the State of West Virginia,

*Petitioner,*

v.

Case No. 30094

GREGORY A. BURTON, Cabinet Secretary of the  
Department of Administration;  
NICHELLE PERKINS, Director of the Division of Personnel  
of the Department of Administration;  
KAY HUFFMAN GOODWIN, Cabinet Secretary of  
the Department of Education and the Arts;  
MIKE CALLAGHAN, Cabinet Secretary of the  
Department of Environmental Protection;  
PAUL NUSBAUM, Cabinet Secretary of the  
Department of Health and Human Resources;  
JOE MARTIN, Cabinet Secretary of the  
Department of Military Affairs & Public Safety;  
BRIAN KASTICK, Cabinet Secretary of the  
Department of Tax and Revenue; and  
FRED VANKIRK, Cabinet Secretary of the  
Department of Transportation,

*Respondents,*

and

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA;  
THE WEST VIRGINIA BOARD OF EDUCATION, THE WEST VIRGINIA  
DEPARTMENT OF EDUCATION AND THE SUPERINTENDENT OF SCHOOLS;  
THE WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD; AND  
THE WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL FACILITY  
AUTHORITY,

*Intervenors.*

---

**AMICI CURIAE BRIEF OF THE WEST VIRGINIA ENVIRONMENTAL QUALITY  
BOARD AND THE WEST VIRGINIA AIR QUALITY BOARD**

---

NOW COME the West Virginia Environmental Quality Board and the West Virginia Air Quality Board (hereinafter, "the Boards"), by and through their counsel and file this Brief as Amici Curiae pursuant to leave granted by this Court on December 6, 2001. The Boards have reviewed the Brief filed in this action on behalf of Michael Callaghan, Cabinet Secretary, Department of Environmental Protection and Brian Kastick, Cabinet Secretary, Department of Tax & Revenue. Upon review, the Boards have decided that their objections to the Petition for Writ of Mandamus, filed by the Attorney General, are addressed adequately in that Brief insofar as the legal and constitutional arguments. Therefor, in lieu of restating the legal arguments made by the Secretaries of the Department of Environmental Protection and the Department of Tax and Revenue (hereinafter, referred to as "the Cabinet Secretaries.") in their Brief, the Boards simply note their concurrence and respectfully request that this Court consider those arguments on the Boards' behalf. The Boards also concur with the facts of the case as presented in the Cabinet Secretaries' Brief and therefore the Boards will not reiterate those facts in this Brief.

The purpose of this Brief is to address some practical concerns and issues that are specific to these two Boards. These concerns are perhaps distinct from the concerns addressed in the Cabinet Secretaries' Brief. If this Court were to grant wholesale the Petition of the Attorney

General, the Boards believe that substantial conflicts of interest in representation would occur between counsel for the Boards and counsel for the Appellee that appears before these two Boards. Of primary concern is that the quasi-judicial nature of both Boards be conducted without the appearance of any impropriety and without any bias - real or perceived. Especially for the quasi-judicial functions, the Boards need legal services that are separate from their Cabinet level organization which is the Department of Environmental Protection (hereinafter, the "DEP").

The Governor appoints the Boards members to serve as part-time members and they receive per diem compensation for their service. Traditionally, the Boards comprise members who are not lawyers but who have a degree of technical expertise or are representative of the general public or industry as dictated by the statutes setting forth the requirements for each Board. *See the W. Va. Code §§ 22B-1-1 et seq.*

Both Boards function as a panel of administrative law judges. They hear appeals of permitting and enforcement actions initiated by the permitting and enforcement branches of the Division of Water Resources, Division of Waste Management and Division of Air Quality that are all agencies within the DEP. Since the Boards' members have technical expertise and are part-time members, they rely on their staff to aid them in legal matters that arise during these hearings. The Boards are organized under the DEP. If, however, the Boards did not have separate counsel from the DEP, conflicts of interest would arise under the Rules of Professional Conduct and there would be the appearance of impropriety and bias which are prohibited by the West Virginia Administrative Procedures Act and the Model Code of Judicial Conduct for State Administrative Law Judges.

Until sometime in the early 1990's, the Boards obtained counsel from the Office of the

West Virginia Attorney General. This arrangement was not satisfactory since the Attorney General's Office also supplied counsel for the Appellee before the Board, the DEP (formerly the Division of Environmental Protection and Bureau of Commerce, Labor, and Environmental Resources). Thus, both the Boards and the Appellee were represented by the Office of the Attorney General. This created a conflict of interest for the counsel and the arrangement also created the appearance of impropriety and bias in the Boards quasi-judicial functions.

Under some circumstances, methods exist legally to eliminate the conflicts of interest created by a law firm's representation of two or more parties that have potentially conflicting interests. Under the circumstances specific to the Boards, however, no legal method exists for dual representation of the Board and other agencies within the DEP by the Office of the Attorney General.

Rule 1.7 of the Rules of Professional Conduct allows dual representation by a lawyer, even if a conflict or potential conflict of interest exists, if: "1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and 2) each client consents after consultation." As found by this Court in *State ex rel. Morgan Stanley & Co., Inc. v. MacQueen*, 187 W.Va. 97,102, 416 S.E.2d 55, 60 (1992), "the State is incapable of granting its consent" to proceed with dual representation as required under Rules 1.7 and 1.13 of the Rules of Professional Conduct. The Boards and the DEP are state agencies and both are charged with acting on behalf of the public's interest. Thus, the Boards and other DEP agencies are barred from granting the consent necessary for representation to proceed, where a conflict of interest arises.

Equally troubling with dual representation in the context of these quasi-judicial Boards, is

the appearance of impropriety and bias. If the Petition of the Attorney General is granted, the Boards would be represented by the same law firm (i.e., the Office of Attorney General) as the Appellee (the DEP agency) that appears before the Board in a hearing. This undoubtedly will appear improper to the opposing party in the hearing. The Administrative Procedures Act, which governs appeals heard by the Boards, states that "all hearings shall be conducted in an impartial manner." W. Va. Code § 29A-5-1(d).

Although West Virginia does not have a comprehensive code of conduct for administrative boards, commissions and hearing officers, the American Bar Association has a Model Code of Judicial Conduct for State Administrative Law Judges endorsed in 1995. This Model Code is quite similar to the West Virginia Code of Judicial Conduct. The Model Code contains a requirement, like the West Virginia Code of Judicial Conduct, that "a state administrative law judge shall avoid impropriety and the appearance of impropriety in all activities." Model Code of Judicial Conduct for State Administrative Law Judges, endorsed in 1995, Canon I. Like the Commentary in the West Virginia Code of Judicial Conduct, the Model Code's Commentary states that "the test for appearance of impropriety is whether the conduct would create in reasonable minds the perception that the administrative law judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired." *Id.* The Boards believe that if the Attorney General's Petition is granted, there will be an appearance of impropriety to reasonable minded litigants appearing before Boards, if counsel from the Attorney General's Office serves both the Boards and one party (the DEP) appearing before them.

In fact, the Attorney General's Office, in its Memorandum in Support of its Petition for

Writ of Mandamus, states that the Office of Attorney General is to act as an "advocate for the state" and to set policy for the state agencies. *See Petitioner's Memorandum at pp. 11-12 and 27 - 30.* The goals of setting policy and promoting fair, impartial hearings are inconsistent where the Office of the Attorney General represents both a quasi-judicial body and a party appearing before it. The integrity of the judicial process will be usurped if the Attorney General's Office sets policy at the environmental permitting/enforcement level and carries it through the appeals process by also providing legal services to the administrative hearing Boards.

Another practical consideration that warrants against this Court granting the Petition is the financial hardship that will occur for these Boards, and likely others, if the Petition before this Court is granted. In addition to hearing appeals, the Environmental Quality Board (hereinafter, the "EQB") is charged with promulgating Water Quality Standards and Groundwater Quality Standards, issuing variances for these and remitting variances. Since the 1990's, the EQB's workload regarding these functions and duties has increased substantially. The need for full-time, in-house counsel is apparent. The system of obtaining counsel from the Attorney General's Office, especially if the budget for a staff attorney is removed, would be cost prohibitive to the Board. The Board would have to find the money elsewhere in its modest budget to pay for legal services, full-time, from the Attorney General's Office.

As stated in the Motion to file an Amicus Curiae Brief, the Boards usually seek counsel from the Attorney General for the State of West Virginia in cases and controversies before all courts and judicial bodies (including administrative venues) except for the appeals that are heard

by the Boards.<sup>1</sup> Thus, the Boards are familiar with the fees they incur under these limited circumstances. The Boards would not be able to afford as much legal representation as they receive currently if their budgets are reduced by the salary and benefits currently paid to their staff counsel. It would be detrimental to the citizens of West Virginia if the Boards were forced to forego much of its legal advice, research and assistance in conducting their important duties.

For these reasons, and the reasons stated in the Brief of the Cabinet Secretaries, which are adopted by the Boards, the Boards respectfully seek the Court's rejection of the Petition filed by the Office of the Attorney General.

RESPECTFULLY SUBMITTED,

THE WEST VIRGINIA AIR QUALITY  
BOARD AND WEST VIRGINIA  
ENVIRONMENTAL QUALITY BOARD

BY COUNSEL



Rebecca S. Charles, Attorney at Law  
State Bar ID # 6876  
1615 Washington St. East; Suite 301  
Charleston, WV 25311  
(304) 558-4002

---

<sup>1</sup>Under the present, unusual circumstance, the Boards have chosen to use their staff counsel to file this Brief.

## CERTIFICATE OF SERVICE

I, Rebecca Charles, Legal Counsel for the WV Air Quality Board and the WV Environmental Quality Board, do hereby certify that I, on this 11<sup>th</sup> day of January 2002, served the attached *Amici Curiae Brief* to all parties in WV Supreme Court of Appeals Case No. 30094 as follows:

by United States Mail, postage prepaid:

Kay Huffman Goodman,  
WV Dept. of Education & The Arts  
Bldg. 1, Rm: R-151  
1900 Kanawha Blvd., E.  
Charleston, WV 25305

Fred VanKirk  
WV Dept. of Transportation  
Bldg. 5, Rm: 109  
1900 Kanawha Blvd., E.  
Charleston, WV 25305

Paul Nusbaum  
WV Dept. of Health & Human Resources  
Bldg. 3, Rm: 206  
1900 Kanawha Blvd., E  
Charleston, WV 25305

Joe Martin  
WV Dept. of Military Affairs and Public Safety  
1900 Kanawha Blvd., E.  
Charleston, WV 25305

Dale Steager  
WV Dept. of Tax and Revenue  
Bldg. 1, Rm: W-300  
1900 Kanawha Blvd., E.  
Charleston, WV 25305

John T. Poffenbarger, Esq.  
Counsel for WV Dept. of Admin. & Div. Of Personnel  
Bldg. 1, Rm: E-119  
1900 Kanawha Blvd., E.  
Charleston, WV 25305

Bill Adams  
WV Dept. of Environmental Protection  
1356 Hansford Street  
Charleston, WV 25301

Deborah L. McHenry, Esq.  
810 Kanawha Blvd., E.  
Charleston, WV 25301

Silas B. Taylor, Esq.  
State Capitol Bldg., Rm: 26-E  
Charleston, WV 25312

Thomas B. Miller, Esq.  
Schrader, Byrd & Companion  
P.O. Box 6336  
Wheeling, WV 26003

Michael Crane,  
Jennifer Bailey Walker, Esquire  
Rm: 200-W, Bldg. 1  
1900 Kanawha Blvd., E.  
Charleston, WV 25305-0800

M.E. "Mike" Mowery  
Mark W. McOwen, Esquire  
Rm: 450-M, Bldg. 1  
1900 Kanawha Blvd., E.  
Charleston, WV 25305-0470

Stuart Calwell, Esq.  
Vincent Trivelli, Esq.  
P.O. Box 113  
Charleston, WV 25321-0113

Alan Drescher  
Office of Judges  
P.O. Box 2233  
Charleston, WV 25328

Charles R. McElwee  
Robert Lannan  
William Porth  
Robinson & McElwee-Charleston  
P.O. Box 1791  
Charleston, WV 25326-1791

Bruce Ray Walker  
State College & University Systems of WV  
Central Office, Legal Division  
1018 Kanawha Blvd., E., Suite 700  
Charleston, WV 25301

Chad M. Cardinal  
WV Regional Jail & Correctional Facility  
Authority  
P.O. Box 50285  
Charleston, WV 25311

Lisa Hopkins  
Auditor – General Counsel  
Bldg. 1, Rm: W-100  
1900 Kanawha Blvd., E.  
Charleston, WV 25305

Rebecca M. Tinder-Bell  
WV Department of Education  
Bldg. 6, Rm: 362  
1900 Kanawha Blvd., E.  
Charleston, WV 25305

Kimberly D. Bentley  
Bureau for Child Support Enforcement  
P.O. Box 3227  
Charleston, WV 25332-3227

Heidi L. Talmage  
Bureau for Child Support Enforcement  
P.O. Box 3227  
Charleston, WV 25332-3227

Brendan V. Sullivan, Jr.  
Mary G. Clark  
William & Connolly  
725 12<sup>th</sup> Street, N.W.  
Washington, DC 20005

Heather Connolly  
WV Dept. of Administration  
Bldg. 1, Rm: E-26  
1900 Kanawha Blvd., E.  
Charleston, WV 25305

David S. Alter, II  
Bureau for Child Support Enforcement  
P.O. Box 3227  
Charleston, WV 25332-3227

Gregory Bailey  
Howard Seufer  
Rochelle Lantz Glover  
Bowles, Rice, McDavid, Graff & Love  
P.O. Box 1386  
Charleston, WV 25325

Mary Jane V. Pickens  
WV State Insurance Commission  
P.O. Box 50540  
Charleston, WV 25305-0540

Diana Stout  
WV Treasurer's Office  
Bldg. 1, Rm: E-122  
1900 Kanawha Blvd., E.  
Charleston, WV 25305

William L. Ballard  
Bureau of Employment Programs  
Legal Services Div. Lit. Unit -3<sup>rd</sup> Fl.  
One Players Club Drive, 3<sup>rd</sup> Fl.  
Charleston, WV 25311-1638

Susan Saxe, Esq.  
WV Consolidated Public Retirement Bd  
Bldg. 5, m: 1000  
1900 Kanawha Blvd., E.  
Charleston, WV 25305-0720

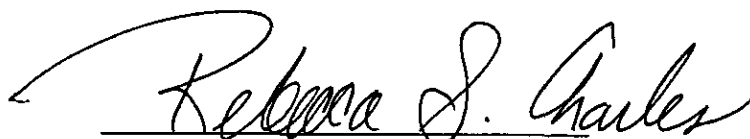
Carol Egnatoff  
Bureau for Child Support Enforcement  
P.O. Box 3227  
Charleston, WV 25332-3227

Garrett M. Jacobs  
Attorney General's Office - WVDH&HR  
350 Capitol Street, Rm: 251  
Charleston, WV 25301

Ancil G. Ramey  
Steptoe & Johnson – Charleston  
P.O. Box 1588  
Charleston, WV 25326-1588

S. Thorton Cooper, Esquire  
Public Service Commission  
P.O. Box 812  
Charleston, WV 25323

Richard E. Hitt  
Public Service Commission  
P.O. Box 812  
Charleston, WV 25323

  
Rebecca Charles, Esq.