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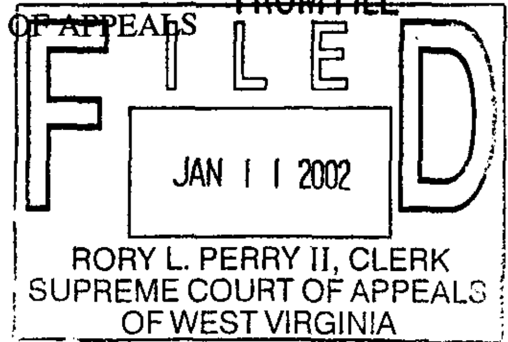
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS




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

Case No. 30094

*Petitioner,*

v.

GREGORY BURTON, Secretary of
the West Virginia Department of
Administration, and NICHELLE
PERKINS, Director of Personnel of
the Department of Administration, *et al.*

*Respondents,*

# BRIEF OF TIMOTHY G. LEACH, IN HIS CAPACITY AS CHIEF ADMINISTRATIVE LAW JUDGE OF THE WORKERS' COMPENSATION OFFICE OF JUDGES, AS AN *AMICUS CURIAE*

By Counsel

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## TABLE OF AUTHORITIES

### CASE LAW

*Appalachian Power Co. v. Public Service Commission*, 170 W.Va. 757, 296 S.E.2d 887 (1982)........................................ 8

*Barry v. Bowen*, 825 F.2d.1324 (9th Cir. 1987)........................................ 12

*Carvey v. West Virginia State Bd. of Educ.*, 206 W.Va. 720, 527 S.E.2d 831 (1999)........................................ 5

*Donley v. Bracken*, 192 W.Va. 383, 452 S.E.2d 699 (1995)........................ 5

*Graf v. Frame*, 177 W.Va. 282, 352 S.E.2d 31 (1986)............................. 11

*Manchin v. Browning*, 170 W.Va. 779, 296 S.E.2d 909 (1982)................... 6

*Schweiker v. McClure*, 456 U.S. 188 (1982)........................................ 12

*State v. Bull*, 204 W.Va. 255, 512 S.E.2d 177 (1998)............................... 5

*State v. Finn*, 158 W.Va. 111, 208 S.E.2d 538 (1974) ............................. 5

*State v. Harden*, 62 W.Va. 313, 58 S.E. 715 (1907)................................. 7

*State ex rel. Ellis v. Kelly*, 145 W.Va. 70, 112 S.E.2d 641 (1960)................ 10

*State ex rel. Frazier v. Meadows*, 193 W.Va. 20, 454 S.E.2d 65 (1994).......... 5

### CONSTITUTIONAL AND STATUTORY PROVISIONS

W. Va. Const., Art. 5, § 1........................................................ 7

W. Va. Const., Art. 7, § 1........................................................ 3

Acts of February 21, 1913, ch.9, 1913 W.Va. Acts 53............................. 6

Acts of February 21, 1913, ch.10, 1913 W.Va. Acts 64........................... 6

W. Va. Code §23-5-8(a)........................................................ 3

W. Va. Code §23-5-8(b)........................................................ 3

W. Va. Code §23-5-8(c)........................................................ 3,4

W. Va. Code §23-5-8(d)........................................................ 3

W.Va. Code §23-5-10........................................................ 9

MISCELLANEOUS

*Black's Law Dictionary* (7th Ed., 1999)........................................ 8

Matheson, Jr., Scott M., *Constitutional Status and Role of the State Attorney General,* 6 J. Law & Pub. Pol'y 1 (Fall, 1993)........................ 8

Neely, Alfred S., *Administrative Law in West Virginia* (1982)........................ 6

W.Va. R. Prof. Conduct, Scope........................................ 9

White, Penny J., *Judicial Courage and Judicial Independence,* 16 J. NAALJ-2-161 (1996)........................................ 11

<u>KIND OF PROCEEDING</u>

The Attorney General of the State of West Virginia has filed a Petition for Writ of Mandamus in an original jurisdiction proceeding. Petitioner seeks to have this Court issue an order declaring that:

1) the Attorney General is the manager of all legal services delivered to the State, its officers, and agencies;
2) the statutes listed in Exhibit 1 attached to the Petition are unconstitutional insofar as they authorize executive agencies to hire counsel other than the Attorney General;
3) the expenditure of public funds for the purpose of obtaining legal services other than those delivered or authorized by the Attorney General is unlawful;
4) the Secretary of Administration must exclude from the Governor's proposed budget for Fiscal Year 2002 all requests from state agencies for funds for the payment of legal services which are not delivered or authorized by the Attorney General;
5) the Secretary of Administration must disapprove any expenditure schedule that includes monies for the payment of legal services which are not delivered or authorized by the Attorney General;
6) the Director of Personnel of the Department of Administration must remove all legal positions from the classified and classified-exempt service;
7) all attorneys presently employed to perform legal services by the state agencies listed in Exhibit 1 attached to the Petition are employees of the

Attorney General, serving at his will and pleasure and subject to his supervision;

8) all appropriations previously authorized for the payment of such attorneys' salaries and other expenses by placed within the appropriation accounts of the Attorney General for the remainder of the current fiscal year; and

9) the Attorney General is granted any other such relief as may be necessary in the Court's judgment to enable the management and delivery of integrated legal services to the State.

Pursuant to this Court's order of November 8, 2001 issuing a rule to show cause why a writ of mandamus should not awarded and the granting of the Motion for Leave to File a Brief *Amicus Curiae* of Timothy G. Leach, in his capacity as Chief Administrative Law Judge for the Workers' Compensation Office of Judges, this brief *amicus curiae* is filed in accordance with Rule 19 of the Rules of Appellate Procedure.

## STATEMENT OF FACTS

1) Petitioner is the duly elected Attorney General of the State of West Virginia, an office of the Executive Department of the State provided for in Article 7, Section 1 of the State Constitution.

2) The Workers' Compensation Office of Judges (hereinafter referred to as "Office of Judges") is an agency of the State, created pursuant to Chapter Twelve, Acts of the Legislature, 1990, 2nd extraordinary session and is designated to be an integral part of the workers' compensation system of this State [see W.Va. Code §23-5-8(a)]. The Office of Judges is a part of the Bureau of Employment Programs for budgetary and administrative purposes [see W.Va. Code §§23-5-8(c) and (d)].

3) The administrative head of the Office of Judges is the Chief Administrative Law Judge, who is appointed to that position by the Governor, with the advice and consent of the Senate [see W.Va. Code §23-5-8(a)].

4) Only the Compensation Programs Performance Council may remove the Chief Administrative Law Judge from his position (requiring a vote of two-thirds of the nine member Council) and only for official misconduct, incompetence, neglect of duty, gross immorality or malfeasance. Such removal may take place only after the Chief Administrative Law Judge has been presented in writing with the reasons for his removal and is given an opportunity to respond and to present evidence [see W.Va. Code §23-5-8(b)].

5) By and with the consent of the Commissioner of the Bureau of Employment Programs, the Chief Administrative Law Judge employs administrative law judges and other personnel as are necessary for the proper conduct of a system of

administrative review of orders issued by the Workers' Compensation Division following the filing of an objection thereto by a party. All such employees are statutorily required to be in the classified service of the state [see W.Va. Code §23-5-8(c)].

6) The Office of Judges currently employs 22 individuals in Division of Personnel job titles of Deputy Chief Administrative Law Judge and Administrative Law Judge II. Of these individuals, 3 are located in Fairmont, 5 in Beckley, and 14 in Charleston.

## DISCUSSION OF LAW

The Workers' Compensation Office of Judges takes no position concerning the matters raised in the Petition for Writ of Mandamus regarding the constitutionality of statutes authorizing state agencies to hire attorneys as employees for the purposes of providing advice and legal representation to such agencies. These issues will undoubtedly be thoroughly briefed and argued by the named parties to this litigation. Rather, it is the purpose of this brief *amicus curiae* to demonstrate that, regardless of how the Court decides those matters, the Petitioner's position is invalid with regard to Administrative Law Judges generally, and the Office of Judges specifically.

The rule of statutory construction that legislation is presumed to be constitutional should be applied in this matter *sub judice*. A reasonable doubt as to its unconstitutionality must be resolved in favor of the validity of the law. *State v. Finn,* 158 W.Va. 111, 208 S.E.2d 538 (1974). When the constitutionality of a statute is questioned, every reasonable construction to the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment. *Donley v. Bracken,* 192 W.Va. 383, 452 S.E.2d 699 (1995); *State v. Bull, 204 W.Va. 255,* 512 S.E.2d 177 (1998); *Carvey v. West Virginia State Bd. of Educ.,* 206 W.Va. 720, 527 S.E.2d 831 (1999). Acts of legislature are presumed to be constitutional, and courts will interpret legislation in any reasonable way that will sustain its constitutionality. *State ex rel. Frazier v. Meadows,* 193 W.Va. 20, 454 S.E.2d 65 (1994).

The Petitioner maintains that "[b]y the nature of his office he is the general lawyer for the state." *Manchin v. Browning,* 170 W.Va. 779, 296 S.E.2d 909 (1982). It is his position that the general nature of the duties pertaining to the office of the Attorney General were perfectly well known to the framers of our Constitution and that they encompass all of the activities undertaken by any attorney employed by a state agency.

While this may or may not be a correct interpretation of the state Constitution concerning attorneys who provide advice or legal representation to state agencies, it is clearly not a valid interpretation as it relates to the functions of Administrative Law Judges. The administrative agency and its quasi-judicial function of hearing contested cases did not exist in West Virginia at the time of the ratification of the State Constitution in 1872. The creation of the first administrative agency in West Virginia did not occur until 1913 when the Public Service Commission was created (Acts of February 21, 1913, ch.9, 1913 W.Va. Acts 53). The original Workers' Compensation Fund was also created in 1913, with initial responsibility for its operation in the Public Service Commission. (Acts of February 21, 1913, ch.10, 1913 W.Va. Acts 64). See generally, Neely, Alfred S., *Administrative Law in West Virginia,* §1.02 (1982). Therefore, there could not have been any contemporaneous understanding or intention of the framers of our Constitution to include functions performed by Administrative Law Judges within the duties of the Attorney General.

Petitioner argues that there is a kind of separation of powers between the members of the executive branch that is Constitutionally required much like that which exists between the three main branches of government. Of course, unlike the federal Constitution, the West Virginia Constitution explicitly requires a separation of powers

between the legislative, judicial, and executive branches of state government. See W.Va. Const., Art 5, § 1. "This separation is deemed to be of the greatest importance; absolutely essential to the existence of a just and free government. This is not, however, such a separation as to make these departments wholly independent; but only so that one department shall not exercise the power nor perform the functions of another." *State v. Harden,* 62 W.Va. 313, 371-72, 58 S.E. 715, 739 (1907). Thus this Court has recognized that even with explicit language in the State Constitution separating the branches of government, such separation is not to be blindly followed to the detriment of the state government and the people. The authority asserted by the Petitioner, which does not rest upon such explicit language, likewise cannot be viewed as an absolute bar to the authority of the Legislature to authorize the Office of Judges to employ Administrative Law Judges to meet its statutorily mandated purposes.

As the *Harden* Court further explained, "[w]hen we speak of a separation of the three great departments of the government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a *limited sense*. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection and dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free Constitution."(emphasis added). This "limited sense" is what allows the Legislature to delegate to the executive branch the quasi-judicial functions performed by Administrative Law Judges. The Legislature may create an administrative agency and

give it quasi-judicial powers to conduct hearings and make findings of fact without violating the separation of powers doctrine. See, *e.g.*, syl. pt.1, *Appalachian Power Co. v. Public Service Commission*, 170 W.Va. 757, 296 S.E.2d 887 (1982).

Petitioner's assertions as to the interpretation of the meaning of Constitutional provisions concerning separation of powers between elected members of the executive branch should also be viewed in terms of this "limited sense" of which the *Harden* Court spoke. The term "attorney general" is defined as "the chief law officer of a state or of the United States, responsible for *advising* the government on legal matters and *representing* it in litigation." *Black's Law Dictionary*, 7th Ed., 1999 (emphasis added). The duties of state attorney generals generally have been described as "providing informal legal advice and formal legal opinions to the governor and other state officials and agencies and sometimes the legislature; representing the state, state agencies, and state officers in litigation; enforcing state civil and criminal law; and supervising local prosecutors in some states." *Constitutional Status and Role of the State Attorney General*, 6 J. Law & Pub. Pol'y 1 (Fall, 1993).

Administrative Law Judges generally, and at the Office of Judges specifically, neither provide advice to nor represent any state agency in litigation. Indeed, in the past, an assistant attorney general or an attorney hired with the approval of the Attorney General has always represented the Office of Judges in matters involving this office before this Court or a Circuit Court. Were it not for the perceived conflict of interest of an assistant attorney general filing a brief in opposition to an action filed by the Attorney General as a party, this office would have requested the Attorney General's Office provide representation to it in this matter. Similarly, it is for the reason of (perceived or

actual) conflict of interest that Administrative Law Judges should not be employed by and serve at the will and pleasure of the Attorney General.

While the Rules of Professional Conduct do authorize lawyers under the supervision of the Attorney General "to *represent* several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients" (*W.Va. R. Prof. Conduct, Scope)* (emphasis added), it is a far different proposition to say that these same lawyers can represent one (or several) client agencies in matters of controversy to *be decided* by another assistant attorney general. Under the Petitioner's view, in litigation of a matter in the Workers' Compensation system, the Attorney General office could:

1) Advise the (client) Workers' Compensation Division as to the initial ruling on a claim;
2) Advise the (client) employer State agency as to whether or not to protest the initial ruling of the Workers' Compensation Division, and if so, what legal position to take in the litigation.
3) Advise the (client) Workers' Compensation Division as to the position it should take in the litigation of the protested decision.
4) *Decide* the very issue in which the Attorney General has been advising two different clients. It is important to note that the decisions issued by the Office of Judges involving workers' compensation benefits are not recommended decisions as under the State Administrative Procedures Act (see generally W.Va. Code 29A), but are decisions which become final and binding if they are not appealed pursuant to W. Va. Code §23-5-10.

5) If the Administrative Law Judge fails to decide the issue in a manner consistent with the views of the Attorney General, the Administrative Law Judges' employment could be terminated immediately as a will and pleasure employee.

It is difficult to imagine how a claimant or a private employer will be able to perceive such a system as providing a fair review of the disputed issue. More importantly, when the hearing examiner is appointed by and responsible to an individual appearing before him, this Court has found that such a process could not be expected to be free and independent of undue influence. In *State ex rel. Ellis v. Kelly*, 145 W.Va. 70, 112 S.E.2d 641 (1960), the Court set aside a ruling issued by the Deputy Commissioner of the Department of Motor Vehicles where the investigation into the issue to be ruled upon was conducted by the Commissioner and the Commissioner testified at the hearing. "It can hardly be contended that the commissioner, in the making of the investigation and in testifying before the deputy commissioner appointed by him and responsible to him, beyond any reasonable probability, did not become biased and prejudiced in the matter being heard." Although the Attorney General would not be a party to the workers' compensation issue in litigation before the Office of Judges, the Workers' Compensation Division and, in those instances where the employer is an agency of the State, the employer, would be represented by employees of the same department which employed the decisionmaker as a will and pleasure employee.

This overwhelming appearance of a conflict of interest is the same kind that was the impetus for the formation of the Office of Judges over a decade ago. Prior to the existence of the Office of Judges, protests of decisions of the Workers' Compensation

Division were made to the Commissioner of the Workers Compensation Division and decided by employees of that agency. The decisions issued often consisted of only a brief procedural history of the claim followed by a conclusory statement of which party prevailed. In large part due to the perception that a conflict of interest existed in having employees of the same office that initially decided a claim decide the appeal of that decision, the Office of Judges was created as a separate entity. The Chief Administrative Law Judge was placed outside of the control of the head of the Workers' Compensation Division and given certain employment protections. Likewise, the Administrative Law Judges were given certain employment protections by being placed within the classified service of the State.

Former Tennessee Supreme Court Justice Penny White articulated why this is so important in a presentation during the annual convention of the National Association of Administrative Law Judges. "Justice is as it is perceived. We must not only do justice, we must be perceived as doing it. We must satisfy justice and we must satisfy the appearance of justice." *Judicial Courage and Judicial Independence*, XVI J.NAALJ-2-161 (Winter, 1996). This Court has previously recognized the importance of an impartial decisionmaker in the administrative law context. "It is essential that the public have absolute confidence in the integrity and impartiality of our system of justice." *Graf v. Frame*, 352 S.E.2d 31, 177 W.Va. 282 (1986).

Administrative Law Judges do not have and are not entitled to the same independence as judges of the judicial branch of government. However, the federal courts have stated "[a]dministrative decisionmakers do not bear all the badges of independence that characterize an Article III judge, but they are held to the same standard of impartial

decisionmaking." *Barry v. Bowen*, 825 F.2d 1324, 1330 (9th Cir. 1987). "As this Court repeatedly has recognized, due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities." *Schweiker v. McClure*, 456 U.S. 188, 195 (1982). The West Virginia Legislature has provided for the appearance of impartiality as well as actual impartiality by separating those executive branch employees responsible for the review of workers' compensation decisions from the direct control of those executive branch employees responsible for making that initial decision.

## CONCLUSION

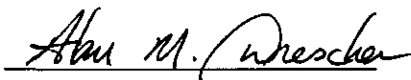
Administrative Law Judges don't provide legal advice to clients and don't represent clients before courts. When the Office of the Attorney General was under consideration by the framers of our Constitution, their quasi-judicial functions were not contemplated. Furthermore, to place the decisionmakers as will and pleasure employees under the same agency that represents parties to litigation creates a strong perception of conflict of interest and impairs their ability to remain impartial. While the Legislature may have had the right to place Administrative Law Judges within the Office of the Attorney General, they were under no Constitutional requirement to do so.

For the reasons stated herein, the Workers' Compensation Office of Judges urges this Court to deny the Petitioners request for a Writ of Mandamus as it applies to Administrative Law Judges generally and the Office of Judges specifically.

*Respectfully submitted,*

Timothy G. Leach, Chief
Administrative Law Judge

*By counsel,*



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CERTIFICATE OF SERVICE

On behalf of Timothy G. Leach, Chief Administrative Law Judge of the Workers' Compensation Office of Judges, I, Alan M. Drescher, do hereby certify that a copy of the "Brief of Timothy G. Leach, in his capacity as Chief Administrative Law Judge for the Workers' Compensation Office of Judges, as an *Amicus Curiae*" was served upon all parties or their counsel by mailing the same by United States mail, first class postage pre-paid, on this 11th day of January, 2002 addressed as follows:

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