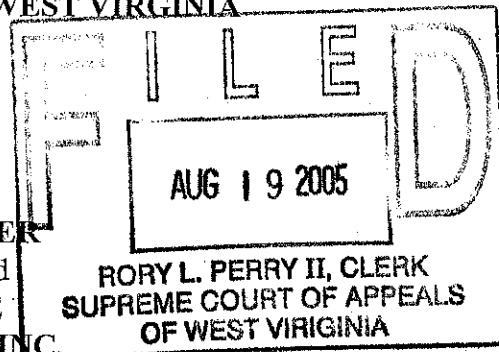


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 32721



WEIRTON HEIGHTS VOLUNTEER  
FIRE DEPARTMENT, INC., and  
WEIRTON VOLUNTEER FIRE  
DEPARTMENT COMPANY NO. 1, INC.

Appellants,

v.

STATE FIRE COMMISSION,

Appellee

BRIEF OF APPELLEE

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## BRIEF OF APPELLEE

Now comes the Appellee, West Virginia State Fire Commission, by counsel, and pursuant to Rule 10(b) of the West Virginia Rules of Appellate Procedure, respectfully submits this brief of legal argument to the Court. The Appellee contends that the Circuit Court of Hancock County was essentially correct in affirming the Appellee's administrative decision and the Circuit Court's order should therefore be affirmed. However, the Circuit Court went beyond its authority when it also modified the administrative order. For this reason, the Appellee brings cross-assignments of error.

### KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

The Circuit Court proceeding was an action for judicial review of a decision of a state agency. The action was brought pursuant to the provisions of *West Virginia Code* §29A-5-4 in the state Administrative Procedures Act. The West Virginia State Fire Commission, after public hearing, voted to withdraw its official recognition<sup>1</sup> of three volunteer fire companies situated within the territory of the City of Weirton, West Virginia. One of these companies consolidated with the municipal fire department of the City of Weirton, but the other two companies brought an appeal in the Circuit Court of Hancock County, West Virginia. The Appellants alleged that the State Fire Commission lacked a legal basis to withdraw recognition of their companies.

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<sup>1</sup> The West Virginia Code is inconsistent in its use of the terms "recognition" and "certification," but it is apparent that these terms apply to the same legal action. For purposes of this Brief, the Appellee will use the term "recognition," except when quoting directly from a pertinent statute or the Circuit Court Order.

The matter was heard by Judge Arthur Recht of the First Judicial Circuit. After a hearing on the merits and an additional hearing upon cross motions for clarification, Judge Recht entered an order on September 14, 2004, holding that the State Fire Commission did have the authority to withdraw recognition of the Appellants' companies. However, Judge Recht limited the scope of the Appellee's action by holding that the withdrawal of recognition was only for a limited purpose. The Judge went on to find the Appellants "to be certified by virtue of judicial fiat" for all other purposes and ordered the Appellee to provide them "with the means to be in a position to fight fires when requested" by a recognized department.

Your Appellee respectfully asserts that the Circuit Court was correct in upholding the authority of the State Fire Commission to withdraw recognition of the Appellants' companies because they lacked a fixed territory in which to exercise the exclusive powers specified in *W. Va. Code* § 29-3A-1 *et seq.* Therefore, this Court should deny the relief requested by the Appellants.

However, the Circuit Court did exceed its legitimate authority in its "certification by judicial fiat" and its order to provide the Appellants with "the means necessary" to fight fires. The Appellee originally chose not to appeal these rulings, but, as the entire proceeding is now before the Supreme Court of Appeals, the Appellee asks that the Court also consider these errors and reverse those portions of the lower court's order that are in violation of the West Virginia Administrative Procedures Act and the Constitution's principal of separation of powers.

## STATEMENT OF FACTS

The pertinent events in this case began when the City of Weirton sought to reorganize the fire fighting services within its territorial jurisdiction. When originally created, the Appellants were independently-chartered, volunteer, fire departments located outside of the Weirton city limits. Through the city's expansion and annexation over time, these volunteer fire departments eventually found themselves within the territorial boundaries and jurisdiction of the city. Then, apparently the City of Weirton chose to establish a single, consolidated fire department in lieu of the arrangement of one, paid, fire department and three, independently organized, volunteer departments. In 2002, the Mayor of Weirton requested that the State Fire Commission withdraw recognition of the independent volunteer fire departments as a result of this reorganization.

As the city's action appeared to be a legitimate exercise of the city's statutory authority to organize of fire companies and departments within the city's jurisdiction and to prescribe their powers and duties, the State Fire Commission took up the Mayor's request in a public meeting before the Commission on October 4, 2002. Notice of the meeting and of the request was given to the three volunteer fire departments affected. One of the volunteer departments elected to consolidate with the City of Weirton's fire department, but the other two contested the action and had legal counsel present at the meeting to represent them.<sup>2</sup>

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<sup>2</sup> This proceeding did not follow the form of a traditional hearing with testimony and cross-examination under oath, but all concerned parties were given an opportunity to be heard, including the attorney appearing on behalf of the Appellants. The Appellants did not object to the form of the proceedings below and, in filing the action as a proceeding for judicial review of a contested case under W. Va. Code §29A-5-4, the Appellants have treated the Commission's decision as that arising from a contested case hearing.

The State Fire Commission heard from a number of witnesses, including the Mayor of Weirton and the State Fire Marshal, and counsel for the volunteer departments presented arguments on behalf of these two departments who now appear before this Court as Appellants. Since the City of Weirton had chosen not to allow the Appellants to act independently within the city limits, the Appellants were obliged to look for other territories where they could provide fire-fighting services. Other fire departments with territories immediately adjoining the City of Weirton also appeared at the meeting and indicated that they would not be willing to give up some of their own territories in favor of the Appellants. (Transcript of the Meeting of October 4, 2002, pp.51-52, 79-80.) Following the request of the counsel for the Appellants, the Commission voted to allow the Appellants additional time to investigate the availability of other areas where they might act and serve as independent fire departments. The Commission also imposed a condition upon this grant of additional time: the Appellants would have to have all necessary phases of any relocation or territory assignment completed by the next Commission meeting in order to be ready for a final vote at that meeting. (Transcript of the Meeting of October 4, 2002, p. 88.)

Two months later, a proposed plan was submitted to the State Fire Marshal just one day prior to the following meeting of the Commission. This proposal indicated that several details still needed to be worked out and it requested that the Commission extend recognition for another year to allow the completion of such arrangements. (Transcript of the Meeting of December 13, 2002, pp. 2-3.) Other fire-fighting organizations in Hancock County voiced their opposition to this proposal. (Ibid., pp 2, 13-14.)

The Appellants allege that they were not informed that "Fire Commission [actually the Fire Marshal's] approval was needed prior to the hearing" (Brief for Appellants, page 2.) The Appellee disagrees with this assertion because the Appellants, by their own acknowledgment, were told to complete "all phases of relocation" by the December 12, 2002, meeting of the State Fire Commission.

The Commission found that the proposal, submitted on behalf of the Appellants, was incomplete and then voted to withdraw recognition of the three independently-incorporated volunteer departments now located within the Weirton City limits. Noting that there was other litigation pending between the City of Weirton and the Appellants, the Commission's order permitted the Appellants to apply again for recognition once such issues were resolved.

The subsequent procedural history as alleged in the Brief for Appellants concerning the appeal before the Circuit Court of Hancock County is essentially correct.

However, the Appellee disputes two of the factual assertions of the Appellant and objects to the insertion of some matters that were not contained in the record below. In their Brief, the Appellees make factual claims and representations that are not contained in the record. These claims appear in footnotes 2 and 3 on page 2 of the Brief of Appellants. The Appellee specifically disputes the allegation that "the lack of recognition of Appellant departments now poses a road block to reaching this agreement" as stated in footnote 3. The Brief also makes reference to an exhibit included with the Appellants' Petition for Appeal, Exhibit B, that was not offered into evidence in the original administrative proceeding. Because these matters are not part of the record, as required by *W. Va. Code* §29A-5-4(f), the Appellee objects to these representations.

## ARGUMENT

- A. The Circuit Court correctly ruled that the State Fire Commission had the authority to withdraw recognition of the Appellants' companies.

The decision facing the West Virginia State Fire Commission was whether the Commission should continue to give recognition to the Appellants' companies as fire departments. The West Virginia Fire Prevention and Control Act, *West Virginia Code* §29-3-1 *et seq.*, makes it clear that the Commission's "recognition" or "certification" is an important requirement for local fire departments<sup>3</sup>, but the Act does not define those terms or how recognition may be given or denied. Though the Appellants have asserted that the Commission does not have authority to withdraw its own recognition, the Circuit Court determined that the Commission does have this authority.

The only statutory reference to the Commission's authority is set out in *W. Va. Code* §29-3-9(e), which states as follows:

"The formation of any new fire department, including volunteer fire departments, requires the concurrence of the state fire commission. The state fire commission shall develop a method of certification which can be applied to all fire departments and volunteer fire departments."

There are several implications that necessarily flow from these brief sentences. First, since new departments may only be formed with the Commission's concurrence, there is a presumed

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<sup>3</sup> Local fire departments recognized by the Commission may request aid and assistance from the State Fire Marshal, *West Virginia Code* §29-3-12(b); receive emergency vehicle permits and display red, flashing lights on vehicles, *W. Va. Code* §17C-15-26(d); receive distributions from the State Treasurer, *West Virginia Code* §33-3-33; and are entitled to representation in county fire associations, *West Virginia Code* §7-17-4. Members of recognized local fire departments may be deputized by the State Fire Marshal, *W. Va. Code* §29-3-12(j), and may be authorized to issue citations for fire safety violations, *W. Va. Code* §29-3-12(n).

recognition or approval of those departments that existed at the time of the passage of the Fire Prevention and Control Act in 1976. The second implication is that, since the Commission is to develop a method of certification to be applied to all departments, the Legislature did not intend that the presumption of acceptance would continue for eternity. The method of certification must apply to "all fire departments and volunteer fire departments," which provision would necessarily include those already in existence.

This section grants an implied power to the Appellee to deny recognition if a local fire department does not satisfy the "method of certification" at some point after the Act's enactment. Common sense recognizes that, over time, conditions may change and, potentially, a fire company may even exist in the future. In such case, or in circumstances where a department ceases to be responsive or effective for public protection, the Commission should not be required to bestow its stamp of approval on a moribund organization. Such a requirement would completely undercut the utility of state recognition. In order to carry out the purposes behind the recognition requirement, the Commission must necessarily have the discretionary authority to deny or withdraw its own recognition of a local fire department.

The Circuit Court recognized this logic and ruled that the statutory language gave the State Fire Commission the implied authority to withdraw its recognition of local fire departments under certain circumstances.

- B. The Appellants' lack of a fixed territory to exercise their command authority and to conduct fire-fighting operations was a logical, valid basis to withdraw recognition of those volunteer fire companies.

Since the authority to withdraw recognition is necessary to promote the purposes for the recognition requirement, it is logical to look to those purposes to determine when recognition may be denied. As cited in footnote 3 herein, there are a number of circumstances where recognition is an express requirement. In this case, the Commission just considered the provisions of *W. Va. Code* §29-3A-1 *et seq.* This article grants extraordinary and exclusive powers to the fire chief or line officer of a local fire department. The first section grants authority to control fire-fighting activities at the scene, to give certain orders to the public, to inspect any building and to enter any building for the purpose of protecting life or property and eliminate fire emergencies. The article gives a fire department broad authority to do what is necessary to eliminate fire emergencies and identifies who will exercise that authority. It specifically authorizes a commanding officer to control and direct fire-fighting and fire control activities.

In the proceeding below, the Commission argued and the Circuit Court concurred, that only one officer may take charge at the scene of a fire. It would be impractical to have more than one chief directing the fire fighting activities at the scene. This is one of the reasons for the assignment of fire protection areas (also known as "run zones" or "first due areas") contemplated by *W. Va. Code* §29-3-9(g). Though other fire departments may respond and assist in fire emergencies, primary responsibility for the control of the fire fighting activities is assigned to the department within whose area the fire occurs.

The statute expressly conditions the exercise of such powers on the recognition of the State Fire Commission, "While any fire department *recognized or approved by the West Virginia state fire commission* is responding to, operating at or returning from a fire, fire hazard, service call or other emergency, . . . ." *W. Va. Code §29-3A-1* (emphasis added). The Circuit Court specifically found that "it is inherent and implicit within the provisions of Article 3A, Chapter 29, that the power provided therein can only be exercised by one, local authority with a territorial jurisdiction," Paragraph 5, Order of September 13, 2004. The lower court thus determined that if a company lacks its own area or jurisdiction in which to act, the State Fire Commission is not required to grant authority to a company that has no basis to exercise that authority.

It is important to note that the Appellants lost more than their command authority within a territorial jurisdiction. Due to the actions of the City of Weirton, the Appellants did not have permission to conduct any fire-fighting operations in the territory where they were located. The City of Weirton exercised its exclusive power to dictate how fire service would be provided in the City's territory and thereby terminated the Appellants' activities in that jurisdiction.

Under the provisions of *W. Va. Code §8-15-1*, the City of Weirton had the statutory authority to do so.

"The governing body of every municipality shall have plenary power and authority to provide for the prevention and extinguishment of fires, and, for this purpose, it may, among other things, regulate how buildings shall be constructed, procure proper engines and implements, *provide for the organization, equipment and government of volunteer fire companies* or of a paid fire department, *prescribe the powers and duties of such companies* or department and of the several officers, . . ." (emphasis added.)

In the exercise of its plenary power to prescribe the powers and duties of volunteer fire companies within its jurisdiction, the City of Weirton could lawfully direct that the Appellants would not provide fire service within the city's territory.

Thus, the State Fire Commission was presented with a situation in which the Appellants had no jurisdiction to exercise their own authority and were barred from fighting fires within the jurisdiction where they were located. According to the facts then before the Commission, the Appellants were without a capability to provide significant fire service. Since the Appellants had no territory in which to act as a fire department, the Commission had no basis to recognize them to be fire departments. The lack of a territory in which to exercise fire-fighting authority and conduct fire-fighting operations was therefore a valid and logical basis for the Commission, acting within its discretion, to withdraw its recognition of the Appellants as local fire departments.

C. The State Fire Commission could lawfully require the Appellants to define and submit a proposed fire service area, accepted by other local jurisdictions.

When the State Fire Commission granted the Appellants additional time to locate another area over which they could exercise command authority and act as an independent fire department, the Commission required that the Appellants' proposal include a map indicating the territory in which the Appellants would provide their fire service as well as the territories of adjoining fire departments. The Commission indicated that all other affected fire departments or local government authorities would have to be in agreement with this assumption of territory.

The Appellants claim that the Commission did not have the right to impose this requirement, arguing that the Commission has the duty to assign fire protection areas and not the Appellants. This argument masks the real purpose of what was required of the Appellants.

It is true that the duty to establish fire protection areas rests with the Commission, pursuant to the provisions of W. Va. Code §29-3-9(g), but it is not unreasonable for the Commission to require a local fire department to propose boundaries for the area that the local department intends to serve. Just as a court has the responsibility to issue written orders of its decisions and yet still may require a party in the litigation to draft the order for the court's adoption, it is likewise reasonable and appropriate for the State Fire Commission to require fire department to submit a proposed fire protection area for the Commission's approval.

It was also reasonable and necessary for the Commission to require the consent and agreement of other authorities in the area. Due to the small size of Hancock County, it was unlikely that the Appellants would be able to define a service area or "run zone" that would not tread on the established territories of other fire departments. Also, if the Commission attempted to establish a territory for the Appellants by unilaterally taking away portions of other departments' territories, that action would be subject to challenge as an arbitrary and capricious act. Under these circumstances, it was reasonable and proper for the State Fire Commission to require the Appellants to work with their potential neighbors to propose a service area that would be acceptable to all.

D. The State Fire Commission only acted within the limits of its statutory authority.

In reviewing the issues in this case, it is important that this Court not confuse the respective powers of the State Fire Commission and the City of Weirton. In the proceedings below, there was mention of the "dissolution" of the Petitioners' companies. The State Fire Commission did not order that the Petitioners be "dissolved" or "disbanded" because the Commission does not have that authority.

The State Fire Commission does not have, and did not exercise, any power to dissolve or to prohibit the operation of the Petitioners as fire fighting companies. The only authority that the Commission did have in this instance was the power to grant or withdraw its recognition of these companies. Such recognition does carry with it certain rights and privileges, such as the use of special emergency vehicle permits, but the Commission did not take any action that prohibited the Appellants from continuing to exist as companies.

## CROSS-ASSIGNMENTS OF ERROR

### Introduction

The Circuit Court correctly determined that the State Fire Commission had the authority to withdraw its recognition of the Appellants and that ruling should be upheld. It is unfortunate, though, that the Circuit Court then went on to carve up the administrative decision and to reshape it in ways that the court had no authority to do. As a result of those actions, the Commission brings the following cross-assignments of error:

A. The Circuit Court exceeded its jurisdiction and legal authority in certification of the Appellants by “judicial fiat.”

Although the Circuit Court found that the State Fire Commission had the authority to withdraw official recognition of the Appellants, the Judge held that this withdrawal was limited. Under it, the Commission could only deny Appellants the authority to exercise the powers granted to local fire departments in Article 3A, Chapter 29. The Court specifically found the Appellants to be “certified by virtue of judicial fiat” for all other fire-fighting purposes, *see* Paragraph 8, Order of September 13, 2004. This ruling clearly exceeds the powers granted to circuit courts by the Administrative Procedures Act.

West Virginia Code §29A-5-4(g) provides:

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

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”

Under this statute, a circuit court may modify an agency’s ruling, but the court may not assume the functions of the agency for itself. In this case, the lower court did not merely reverse the agency;

the court issued its own certification of the Appellants. The Administrative Procedures Act does not give circuit courts the “fiat” to exercise the administrative functions of an agency in substitution of the agency’s own decision. The Circuit Court did not have the authority to certify or recognize a local fire department independently of the judgment of the State Fire Commission.

The Circuit Court could have reversed the decision of the State Fire Commission or remanded the case for additional determinations, but the court did not have the power to supercede the agency and become a “super-certifying” authority. It was therefore an error of the Circuit Court to issue certification or recognition to the Appellants, under color of judicial authority, that only the State Fire Commission had the power to grant. This action exceeded the judicial function of the court in violation of the Constitutional principal of separation of powers. For this reason, this portion of the lower court’s ruling must be overturned.

- B. The Circuit Court exceeded its jurisdiction and legal authority in ordering the State Fire Commission to provide the Appellants with the means to fight fires.

In addition to the ruling cited above, the Circuit Court ordered the State Fire Commission to “provide petitioners with the means to be in a position to fight fires when requested by a certified fire department,” Paragraph 11, Order of September 13, 2004. The Circuit Court based this requirement upon the erroneous conclusion that the Commission could only withdraw its recognition for a limited purpose. According to the court below, the Commission was required to recognize the Appellants for all other purposes. This position is flawed because there is no statutory provision for “limited recognition” or “partial grant of recognition.” The lower court’s requirement also places the Commission in an absurd position that may overstep the Commission’s lawful powers.

The general power of a circuit court to modify an administrative decision is restricted. Though a circuit court may “reverse, vacate or modify” the decision of an administrative agency, the circuit court may not modify the decision to impose a sanction or remedy that is not provided by statute or contemplated by the Legislature. *See Johnson v. Commissioner, Department of Motor Vehicles*, 178 W. Va. 675, 363 S.E.2d 752 (1987). In a judicial review proceeding, a circuit court may not make modifications to the administrative decision to compel acts that the agency could not have itself performed or ordered. In the circumstances of the current case, there is nothing in the *West Virginia Code* to allow the State Fire Commission to grant recognition of a local fire department for a limited purpose. The statutes, *W. Va. Code* §29-3-9(e) and §29-3A-1, only speak of certification or recognition without any qualification of those terms. There is, for example, no conditional language phrased as “recognized for the purposes of . . .” The State Fire Commission only had the power to grant or deny recognition and, by extension, this was all that the Circuit Court could have ordered.

The judge’s ruling not only exceeds the authority of the Circuit Court and the Commission, it places the Commission in the absurd position of not recognizing the authority of the Appellants in one context, but compelling acts that denote or convey public recognition and official approval of them for other purposes. Presumably the court’s directive to “provide petitioners with the means to be in a position to fight fires” relates to the Court’s holding that the State Fire Commission must provide emergency vehicle permits to the Appellants, but it is phrased in much broader terms. What is the extent of the means which the Commission must provide to the Appellants? Is the Commission required to provide all the departments’ equipment? Training? Personnel? These would far exceed the Commission’s lawful powers or duties.

Still more absurd for the Commission and, yet more substantial, is that the lower court's directive requires the Commission to act in ways that connote the Commission's recognition and *imprimatur* at the same time that the Commission does not recognize the authority of the Appellants to use the extraordinary powers granted to local fire departments for effective fire fighting. Under this directive, the State Fire Commission was compelled to provide emergency vehicle permits to two companies that had no territory in which to act independently and which were not permitted even to make fire service runs in the city where they were located.

The State Fire Commission has a right to carry out its functions free from unlawful oversight by a judicial authority. When the Circuit Court of Hancock County acted in excess of its statutory authority and overstepped the separation of executive and judicial power, this prejudiced the substantial rights of the Commission. Therefore, this Honorable Court should reverse those portions of the ruling of the court below that exceed that court's authority.

## CONCLUSION

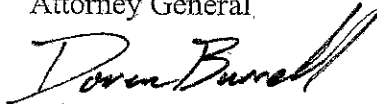
When the Circuit Court upheld the Appellee's authority to withdraw official recognition of the Appellants, this was a correct ruling grounded in the statutory provisions relating to the powers and purposes of such recognition. This portion of the lower court's ruling should, therefore, be affirmed.

However, when the lower court modified the administrative order and effected a judicial, partial certification of the Appellants, the lower court exceeded its lawful authority. This portion of the lower tribunal's order should be reversed.

Respectfully submitted,  
WEST VIRGINIA STATE FIRE COMMISSION

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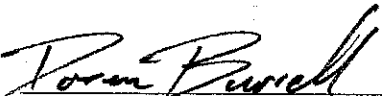
**STATE FIRE COMMISSION,**

Appellee

**CERTIFICATE OF SERVICE**

I, Doren Burrell, the undersigned counsel for the Appellee in the above-styled action, do hereby certify that a true copy of the foregoing "Brief of Appellee" has been served upon counsel for the Appellants by depositing said copy in the United States mail, with first class postage prepaid, this 19th day of August, 2005, addressed as follows:

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