

No. 14-1264

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

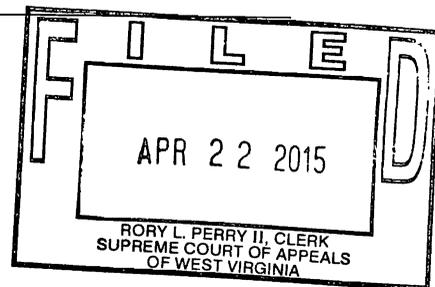
WEST VIRGINIA BOARD OF EDUCATION
and L. WADE LINGER, JR.,

Defendants Below, Petitioners,

v.

JOREA M. MARPLE

Plaintiff Below, Respondent.



From the Circuit Court of Kanawha County, West Virginia
The Honorable James C. Stucky
Civil Action No. 14-C-731

RESPONDENT'S RESPONSE TO PETITIONERS' BRIEF TO ORDER DENYING
DEFENDANTS MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A
CLAIM UPON WHICH RELIEF CAN BE GRANTED PURSUANT TO R.C.P. 12(b)(6)

TIMOTHY N. BARBER (WVSB #231)
P.O. Box 11746
Charleston, West Virginia 25339-1746
Telephone: 304-744-4400

THOMAS PATRICK MARONEY (WVSB #2326)
608 Virginia Street, East
Charleston, West Virginia 25301
Telephone: 304-346-9629

A. ANDREW MacQUEEN, III (WVSB #2289)
2025 Arundel Pl.
Mt. Pleasant, SC 29464
Telephone: 843-972-8026

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STANDARD OF REVIEW

The standard of review for an Order under 12(b)(6) is de novo. Highmark W.Va., Inc. v. Jamie, 221 W.Va. 487 at 491, 655 S.E.2d 508 (2007). (Citations omitted.)

A trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief. Syl. Pt. 3, Chapman v. Kane Transfer, 160 W.Va. 530, 236 S.E.2d 207 (1977). The complaint is to be construed in light most favorably to the plaintiff. Price v. Halstead, 177 W.Va. 592, 355 S.E.2d 380 (1987) and Chapman, Id. at 538. Highmark W. Va., Inc. v. Jamie, Id.

“All the pleader is required to do is set forth sufficient information to outline the elements of her claim or to prevent inference to draw that these elements exist.”

The trial court should not dismiss a claim merely because it doubts that the plaintiff will prevail in the action, and whether the plaintiff can prevail is a matter properly determined on the basis of proof and not merely on pleadings. John W. Lodge Distrib. Co., Inc. v. Texaco Inc., 161 W.Va. 603, 605, 245 S.E.2d 157 (1978), Highmark W.Va., Inc. v. Jamie, Id. at 491, and Dunn v. Consolidation Coal Co., 180 W.Va. 681 at 694, 379 S.E.2d 485 (1989).

In Moran v. Fagan, 176 W.Va. 196, 242 S.E.2d 162 (1986), the Supreme Court of Appeals reversed the decision of the circuit court which had granted partial summary judgment dismissing an at-will state employee where the record had not been developed holding:

“Thus the government cannot dismiss an employee on charges that call into question her good name, or that imposes stigma upon an employee which could foreclose her freedom to pursue other employment opportunities, without providing the employee notice of the charges against her and a hearing in which the factual basis of the charges can be contested.” citing Major v. DeFrench, 169 W.Va. 241, Board of Regents v. Roth, 408 U.S. 564.

In Harrison v. Davis, 197 W. Va. 651,478 S. E. 2d 104 (1996), Justice Cleckley

writing for a unanimous court stated:

“The West Virginia Rules of Civil Procedure should be construed liberally to promote justice. Consistent with this liberal approach, a circuit court may look beyond the technical nomenclature of the complaint when ruling on a motion to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure to reach the substance of the parties' positions. This approach is particularly proper where the plaintiff attempts orally to explain the allegations of the complaint because such explanations may constitute an admission against the plaintiff.” Syllabus 1 at 652.¹

The record is bare of discovery or any filings to permit a conversion to a motion for a 12(b)(6) ruling. As found in Forshey v. Jackson, 222 W. Va. 743,671 S. E. 2d 748 (2008) "motions to dismiss are viewed with disfavor, and we counsel lower courts to rarely grant such motions." Forshey also stands for the proposition (also advanced by defendants at trial court) that consideration of a R. C. P. 12 (b)(6) motion can include material extrinsic to the complaint itself without converting the motion into one for summary judgment. Citing approval of other jurisdictions, the court ruled that extrinsic material to include "Exhibits attached to the complaint (which) are properly considered part of the pleading... Additionally, we have noted that 'when... a complaint's factual allegations are expressly linked to and admittedly dependent upon a document the authenticity of which is not challenged, that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12 (b)(6) .'" Further, "in evaluating a motion to dismiss, we may consider documents that are attached to or submitted with the complaint and any matters incorporated by reference or integral to the claim,

¹“Whether a complaint states a claim upon which relief can be granted is to be determined solely from the provisions of such complaint” See Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, Jr., Litigation Handbook on West Virginia Rules of Civil Procedure §12(b)(6)(2), at 349 (3d ed. 2008, (herein “Litigation Handbook”).

items subject to judicial notice, matters of public record, orders, and items appearing in the record of the case."

ASSIGNMENT of ERRORS

Petitioners base this interlocutory appeal on three related aspects of the holding by the Circuit Court below denying a defense that the claims asserted in the Complaint are barred from consideration by the Court or jury by the application of qualified immunity. The assertion of absolute immunity has been abandoned and apparently conceded with the recognition of foundational jurisprudence relative to the state securing insurance coverage with coverage clear. Those three aspects of qualified immunity which were litigated at the hearing on the petitioners R. C. P. 12(b)(6) motion to dismissed held September 3, 2014 and decided adverse to the terms and prayer of the motion by order entered November 3, 2014 are:

ASSIGNMENT OF ERROR 1:

Put succinctly, this assignment complains that the entered order expands the clear prohibition for assertions of absolute (sovereign) immunity because of the existence of insurance coverage to the concept of qualified immunity was an improper extension.

ASSIGNMENT OF ERROR 2:

This assignment claims that the defendant Board of Education "is entitled to qualified immunity as a State Agency for the discretionary actions it undertook related to the decision to terminate Respondent's at-will employment as all of the respondents' allegations against the Board arise from its exercise of its duties, government functions, and authority to retain a Superintendent as its will and pleasure.

That declared exercise is claimed to be the subject of “qualified immunity.”

ASSIGNMENT OF ERROR 3:

This assignment mimics number 2 above but relates it to petitioner Linger claiming his “discretionary” acts were in the firing of respondent were protected by “qualified immunity.”

STATEMENT OF THE CASE

FACTS

The plaintiff, Dr. Jorea M. Marple, was employed in January 2011 as the Superintendent of Schools for the State of West Virginia and was illegally terminated by five members of the nine-member West Virginia Board of Education (hereinafter “Board”) on November 14, 2014. Dr. Marple has a forty-three year record as a distinguished professional educator. Prior to becoming Superintendent, she was Assistant Superintendent for the West Virginia Department of Education for School Improvement from 2004 to 2007, Assistant Superintendent for Curriculum and Instruction from 2007 to 2010, and Deputy State Superintendent from 2010 to the time she became Superintendent.

Select members of the Board, including Petitioner Linger, violated the West Virginia Open Meetings Law, Chapter 6-9A-1, et seq., and its own regulations 126 CSR 3.2.3, by holding secret meetings discussing the termination of Dr. Marple prior to the Board meeting on November 15, 2012. The rules of the Board require that the public be provided accurate and proper copies of the agenda of the meeting prior to the meeting. The Board violated this rule by not placing the suspension or discharge of Dr. Marple on the agenda. (A.R. 4.) In an attempt to cure its violations, the Board held a second meeting on November 29, 2012, and again terminated

Dr. Marple where Respondent Linger made derogatory and public statements reflecting on her good name, reputation and potential for future employment. (A.R. 16-17.)

In the executive session on November 14, 2012, President Linger announced that Dr. Marple was going to be asked to resign or be fired. This was the first time that at least two of the Board members had any knowledge that other members of the Board wanted to replace her. It was obvious that President Linger and a select group of other members outside of Board meetings had met in secret in violation of the open meeting laws of West Virginia and its own regulations to arrange for the dismissal of Dr. Marple. President Linger on November 29, 2014, made the following statement:

“We are not saying that Superintendent Marple is any more responsible than governors, legislators, educators or board members for these shortcomings. We are not here to affix blame today. However, we are charged with the general supervision of schools in West Virginia and we think the people of West Virginia deserve to have these problems fixed. The board determined that in order to fix these problems we needed to head in a new direction with new leadership.”

The statements by President Linger, and adopted by six members of the Board, were false, defamatory and disparaging by expressing that Superintendent Marple was responsible, along with others, by stating:

“Everyone is familiar with the situation we find ourselves in regarding the literary of statistics related to student achievement and our rankings.

- West Virginia students rank below the national average in 21 of 24 categories measured by the National Assessment of Education Progress (NAEP).
- As a matter of fact, over the last decade, many of our NAEP scores have slipped instead of improving.

- Education Wee’s most recent Quality Counts Report gave West Virginia an F in K-12 achievement.
 - The statewide graduation rate is only 78 percent.
 - 1 in 4 of our high schools students in West Virginia do not graduate on time.
- And these are just a few of our concerns.”

These statistics were for years prior to Dr. Marple’s tenure as Superintendent.

These statements are defamatory and disparaging and have affected Dr. Marple’s good name and reputation in her field of employment and prospects for future employment. The Board met in executive session to discharge Dr. Marple, and in so doing, denied her due process by not allowing her to respond to any accusation Board members had concerning her job performance.

During Dr. Marple’s twenty-one months as Superintendent, she had one annual performance evaluation where she had received high marks. President Wade Linger stated on July 13, 2012:

“State Supt. Jorea Marple has received high marks in her first job evaluation as the leader of West Virginia’s public education system.

‘Dr. Marple approaches all of her work with an unwavering commitment to students and educators,’ West Virginia Board of Education president Wade Linger said. ‘She is an outstanding visionary and leader. In just over a year, she has brought national recognition to our state and worked diligently regarding teacher quality, school nutrition, pre-K education and organizational leadership.’” (A.R. 384)

This performance evaluation demonstrates that Dr. Marple’s performance was at an

extremely high level and could not be held accountable for any low performance prior to her becoming Superintendent.

Dr. Marple's Complaint alleges that petitioners' statutory and regulatory violations have denied her due process under Article 111, Section 10, of the West Virginia Constitution which affects her liberty and property interests, irreparable harm to her name and reputation and ability for future employment (A.R. 10, ¶ 47), good faith and fair dealing of her contract of employment (A.R. 8, ¶ 36), the statements by Petitioner Linger were false, defamatory and disparaging and adopted by the Board (A.R. 7, ¶ 31 and 34), resulting in damages to Dr. Marple's good name and reputation.

SUMMARY of ARGUMENT

Respondent addresses the separate facets of petitioners' claims of immunity to the claims set out in the Complaint.

Those are that the court below wrongly denied petitioners' motion under R.C.P. 12(b)(6) to dismiss the Complaint in three ways:

(1) By holding that the clear denial of absolute immunity (a claim abandoned by petitioners) extended to qualified (good faith) immunity.

(2) By not considering that respondent was an at-will employee of the Board, and, as such, was placed in a category of employees that excused her summary dismissal by a concept of qualified (good faith) immunity.

(3) By failing to recognize that the actions of Linger detailed in the Complaint were discretionary in nature as a part of his legitimate role with the Board thereby allowing

qualified (good faith) immunity to shield him from liability for such discretionary acts

STATEMENT REGARDING ORAL ARGUMENT

Respondent believes that the ten-minute maximum time for argument is sufficient.

W.Va. R. App. P. 19(e).

Prior decisions of this Court on Motions to Dismiss under Rule 12(b)(6) and liberty and property interest and due process afforded Dr. Marple under Article III, § 10 of the West Virginia Constitution, and denial of immunity to the State and its officials where insurance coverage is available, fully support the lower Court's ruling denying Petitioners' Motion to Dismiss. Petitioners' assertion that in allowing the case to proceed, the State and taxpayers "incur further prohibition and unnecessary expenditures of costs" is not correct. Petitioners' Brief, p. 6. The costs and expenditures and any recovery are fully borne by National Union Fire Insurance Company of Pittsburgh, Pennsylvania, who issued the Commercial General Liability Declarations policy. (A.R. 455-515 at 477, 1,000,000 limit of liability and 477 Allocated Claims Expenses.)

Even with this clear prohibition for the assertion of qualified immunity, the penetration of petitioners argument on that subject fails.

ARGUMENT

As stated, all three assignments of the errors contained in petitioner's objection to the holding of the trial court in denying its blanket defense to the claims in the Complaint as

placed in the motion to dismiss stem from a common source: qualified immunity. Therefore an introduction to consideration of that concept is in order.

Petitioners' motion under R. C. P. 12 (b)(6) to dismiss the Complaint for failure to state a claim upon which relief could be granted (A. R. 23-89) was made in advance of an answer which would require the expression of qualified immunity as an affirmative defense under R. C. P. 8.²

A review of the motion itself reveals a single reference to any claim for immunity among the eight grounds alleged. The first assertion is that the Board (not Linger) "is immune from liability" pursuant to the state constitutional provisions allowing absolute immunity upon a proper advancement.³

Then in the body of the "Memorandum of Law" again the absolute immunity of the constitution is postulated and some version of "qualified immunity" (not privilege) is disclosed to excuse Linger from any resultant damage occasioned by "discretionary actions he undertook in his official capacity." Further, the wordage goes on to submit that "Plaintiff's Complaint does not state any specific allegation that the actions of defendant Linger were non-discretionary and outside the scope of his position as former president of the Board of Education." That phraseology despite claims in the Complaint of malice, ignoring, established

²When the answer was filed as set out in A. R. 399-410, the Fourth Defense states: "Defendants assert and preserve the defenses and immunities contained in (the provision of the State Constitution for absolute immunity). Fifth Defense cites both the constitutional provision and the Federal Constitution and the state code for "the defenses of absolute immunity, qualified immunity and any other immunity available to Defendants. Finally the Tenth Defense, allows: "Defendants assert that (they) may be immune from the claims in the Complaint.

³Item numbered 6 as grounds for the motion suggests that Linger "is entitled to qualified privilege" as protection for his comments. That term is never defined.

procedural and substantive law and secret conspiracy to rid the Board and himself of respondent's presence. Of course, references in a brief without any antecedent in the body of a motion or pleading are not the basis for a court ruling even if premised on legal precepts – which those are not.

Without foundation in the record to have adequately presented the qualified immunity measure as a factor in ruling on the R. C. P. 12 (b)(6) motion, petitioners now advance that theory on the three fronts. That the court below erred in denying the motion by:

(1) Holding that the clear denial of absolute immunity (abandoned by petitioner) extended to qualified immunity.

(2) Not considering that respondent was an at-will employee and, as such, placed her into a category that excused her summary dismissal by a concept of qualified immunity.

(3) Failing to recognize that the actions of Linger detailed in the Complaint were discretionary in nature as a part of his legitimate role with the board.

While the three issues share common elements, each has a distinct aspect both in underlying factual settings and the application of authority.

ASSIGNMENT OF ERROR 1:

That the court below erred in denying the motion by holding that the clear denial of absolute immunity (abandoned by petitioners) extended to qualified immunity.

The extension of the unavailability of absolute immunity in the present context to qualified immunity is clearly a legitimate act. Dr. Marple seeks damages resulting from the actions of Linger and the Board. The entire body of law including statutory enactments and

dispositive decisions reason that a government entity can not claim any immunity (absolute or qualified) if an insurance policy protects the state's assets. A simple examination of the policy emplaced here is stated in clear terms at (A. R. 455-515):

“COVERAGE B. PERSONAL INJURY LIABILITY INSURANCE

1. Coverage - Personal Injury Liability

The Company will pay on behalf of the ‘insured’ all sums which the ‘insured’ shall become legally obligated to pay as ‘damages’ because of injury (herein called ‘personal injury’) sustained by any person or organization and arising out of one or more of the following ‘offenses’ committed in the conduct of the ‘Named Insured’s’ business:...

Group B - The publication or utterance of a libel or slander or of other defamatory or disparaging material, or a publication or utterance in violation of an individual's right of privacy...” [Emphasis added.] (A.R. 465)

Clear terms show Dr. Marple’s claims are fully covered by this language thus denying any immunity and engaging the estoppel aspects of the controlling statute.

As pointed out in Plaintiff’s Supplemental Response to Defendants’ Motion to Dismiss (A. R. 205-207):

“The petitioners in this action are named insured under a policy of insurance provided by the West Virginia Board of Risk and Insurance Management under the authority of Chapter 29, Article 12; and Chapter 33, Article 30 of the West Virginia Code. W. Va. Code § 29-12-5(a)(4) states:

‘Any policy of insurance purchased or contracted for by the Board shall provide that the insurer shall be barred and estopped from relying upon the constitutional immunity of the State of West Virginia against claims or suits: Provided, That nothing herein shall bar a state agency or state instrumentality from relying on the constitutional immunity granted the State of West Virginia against claims or suits arising from or out of any

state property, activity or responsibility not covered by a policy or policies of insurance; Provided, however, That nothing herein shall bar the insurer of political subdivisions from relying upon any statutory immunity granted such political subdivisions against claims or suits.’

In their motion to dismiss the petitioners have never asserted that they are not insured for their conduct as alleged in the Complaint. Therefore, to the extent that the petitioners’ answer and motion to dismiss purport to assert the sovereign immunity created by the West Virginia Constitution Article VI, section 35, they violate the express terms of §29-12-5(a)(4) as well as the provisions of the insurance policy. See e.g., *Clark v. Dunn*, 195 W. Va. 272, 465 S.E. 2nd 374 (1995).”

This concept is reflected in the first and second syllabus points in Parkulo, *infra*:

Syllabus by the Court:

1. “Suits which seek no recovery from state funds, but rather allege that recovery is sought under and up to the limits of the State's liability insurance coverage, fall outside the traditional constitutional bar to suits against the State.” Syl. pt. 2, *Pittsburgh Elevator v. W.Va. Board of Regents*, 172 W.Va. 743, 310 S.E.2d 675 (1983).
2. “W.Va. Code, 29-12-5(a) (1986), provides an exception for the State's constitutional immunity found in Section 35 of Article VI of the West Virginia Constitution. It requires the State Board of Risk and Insurance Management to purchase or contract for insurance and requires that such insurance policy ‘shall provide that the insurer shall be barred and estopped from relying upon the constitutional immunity of the State of West Virginia against claims or suits.’ ” Syl. pt. 1, *Eggleston v. W.Va. Dept. of Highways*, 189 W.Va. 230, 429 S.E.2d 636 (1993).

With undeniable insurance coverage, petitioners have abandoned the absolute immunity claim. Of course, qualified immunity possesses different parameters than the blanket constitutional barrier. With no stated affirmative defense of qualified immunity, petitioners face an impenetrable barrier.

The rule is clearly set out in Litigation Handbook on the West Virginia Rules of Civil Procedure, Fourth Ed. 2012, page 389:

“A defendant presenting an immunity defense on a Rule 12(b)(6) motion, instead of a motion for summary judgement must accept the more stringent standard applicable to this procedural route. Not only must the facts supporting the defense appear on the face of the complaint, but, as with all Rule 12(b)(6) motions, the motion may be granted only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *McKenna v. Wright*, 286 F. 3de 432 (2d Cir. 2004).”

Addressing the requisites for consideration of an affirmative defense (of any nature but certainly that of qualified immunity) to the rule set out above, drawn from the Handbook page 388 prohibits any consideration. The first test that “the facts establish the defense must be definitely ascertainable from the allegations in the Complaint” results in a full loss to petitioners. There is nothing in the Complaint to supply the defense. The second test slams the door “the facts so gleaned (from the Complaint) must conclusively establish the affirmative defense.” No such “facts.” Thus the absolute immunity is resolved against petitioners by clear terms of a statute. The remaining qualified immunity is not supported by the record and is not even pled in the motion.

The individual defendant, Linger, is claimed in an internal clause of paragraph 2 in the motion to dismiss as being “immune from suit.” No claim of qualified immunity is set out. The demands of that affirmative defense is detailed above and was available to any pleader. If that unadorned statement is, in fact, a claim of qualified immunity, it is addressed below. How that clause could possibly satiate the reference to the Handbook p. 388 relative to affirmative defenses is not apparent. Even without the basic reading of the rule, any respondent would ask:

What immunity? Under what facts? Applying to whom? No answers here.

That issue is disposed of in the seminal case Chase, *infra*, which quotes Harlow v. Fitzgerald, 457 U. S. at 815, 102 S. Ct. at 2736, 73 L. Ed. 2d at 408 (1982) in footnote 19: “Qualified or ‘good faith’ immunity is an affirmative defense that must be plead by a defendant official.”

The pole star case on this subject is State v. Chase Securities, Inc., 188 W. Va. 356, 424 S. E. 2d 591 (1992).⁴ Justice Miller writing for the court placed in the only syllabus point: “There is no immunity for an executive official whose acts are fraudulent, malicious, or otherwise oppressive.” The paragraphs in the Complaint are replete with charges of the exactly defined necessary allegations. Linger and his allies violated every rule of open meetings, corruptly designed charges against plaintiff, worked the system albeit profoundly with ineptitude to dump her without assigning why. Linger and many of his minions on the board knew why. They acted with malice and their success was most certainly “oppressive.” As alleged in paragraph 47 of the Complaint: “The actions performed and adopted by petitioners were, and are, willful, wanton and in reckless disregard of plaintiff’s rights allowing a recovery for compensatory damages as permitted by the evidence and punitive damages.” Proof of those allegations await discovery, investigation and trial. Those factual underpinnings are known now by plaintiff and her counsel. Discovery has been served on petitioners who have prevented disclosure on the basis that the results of this Court’s ruling on this pending appeal may alleviate a full airing of this fetid stain on our state.

⁴As pointed out in footnote 30 of Chase the ruling below was on a motion to dismiss but “it appears that the court had the benefit of discovery materials filed in the case. In this sense, the motion to dismiss may be likened to a summary judgement.” (Emphasis supplied)

Yet a claim of qualified immunity has failed aside from not being pled and even if petitioners are not found to have been “fraudulent, malicious, or otherwise oppressive.”

Even if the concept of qualified or good faith immunity was properly pled here, its availability to avoid the contentions in the Complaint is denied by the terms of the admitted insurance policy, the clear language of the statute and the language of cited authority – the assets of the state are not in jeopardy so no immunity is available through the sovereign immunity or qualified immunity thus rendering the finding by the court below valid.

ASSIGNMENT OF ERROR 2:

The court below erred in denying petitioner’ R.C.P. 12(b)(6) motion by not considering that respondent was an at-will employee, and, as such, placed her into a category that excused her summary dismissal by a concept of qualified immunity.

This issue directly relates to whether any at-will employee of any government entity including the Board, enjoys protection from discharge when no basis is given and no avenue available to question the action such as a due-process proceeding.

Of course, the threshold question is whether either of the substantive rights – liberty and/or property – exist in the context of plaintiff’s employment as the Superintendent of Schools. The procedure to protect those rights – due process – awaits that threshold determination.

Petitioners simplify the inquiry as to property rights down into an elementary issue: As an “at will” employee without any defined term of office, plaintiff had no property rights for the due process application. The liberty rights are similarly dismissed since it is

claimed that plaintiff was not harmed in a diminution of her reputation by the kind words of Linger at her firing.

The two rights are the subject of extensive jurisprudence after conjoining them although they plumb different aspects of constitutional guarantees. In any case, petitioners' posture does not reflect the facts or emplaced law on either subject.

West Virginia has long recognized the liberty and property rights that an individual has in pursuit of employment. In State v. Goodwill, 33 W. Va. 179, 183, 10 S. E. 285 (1889), the Supreme Court of Appeals held:

“The term ‘liberty’ as used in the Constitution is not dwarfed into mere freedom from physical restraint of the person of the citizen as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. ‘Liberty,’ in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation.” ...

“The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing these in what manner he may think proper, without injury to his neighbor, is a plain violation of this most sacred property.” Cited with approval in Lawrence v. Barlow, 77 W.Va. 289, 292 (1915). [Emphasis added.]

Liberty and property interests of employment and license holdings were further expanded in North v. West Virginia Board of Regents, 160 W.Va. 248, 233 S.E.2d 411, (1977), where the Supreme Court of Appeals held that good name, reputation and integrity are part of liberty

and are entitled to due process protection in removal proceedings, (Const. art. 3, § 10; U.S.C.A.Const. Amends. 5, 14), and that protected property interests includes dismissal from government employment, and that as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause.” Citing Goss v. Lopez, 419 U.S. at 576.⁵

In Waite v. Civil Service Commission, 161 W.Va. 154, 241 S.E.2d 164 (1977), the Supreme Court of Appeals further expanded North, supra, by holding in Syllabus Points 1, 2, 3, and 5:

“1. The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest.

“2. The ‘liberty interest’ includes an individual's right to freely move about, live and work at his chosen vocation, without the burden of an unjustified label of infamy. A liberty interest is implicated when the State makes a charge against an individual that might seriously damage his standing and associations in his community or places a stigma or other disability on him that forecloses future employment opportunities. [Emphasis added]

“3. A ‘property interest’ includes not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings.

“5. The extent of due process protection affordable for a property interest

⁵In North v. W. Va. Board of Regents, 160 W. Va. 248, 233 S. E. 2d 411, (1977) the Court gave general guidance for determining the procedure appropriate for due process in syllabus pt. 2:

“Applicable standards for procedural due process, outside the criminal area, may depend upon the particular circumstances of a given case. However, there are certain fundamental principles in regard to procedural due process embodied in article III, §10 of the W. Va. Const., which are: First, the more valuable the rights sought to be deprived, the more safeguards will be interposed. Second, due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise. Third, a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation.”

requires consideration of three distinct factors: first, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of a property interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”

In Waite, 161 W.Va. 154 at 158-159, the Court stated:

“...in analyzing our State's constitutional due process standard, we are free to consider the applicable federal constitutional standards. Ultimately, however, we must be guided by our own principles in establishing our State standards, recognizing that so long as we do not fall short of the federal standard our determination is final.”

In Waite, the Supreme Court of Appeals adopted a two-step analysis: “First determining whether the individual interest rises to the level of a “liberty” or “property” interest, and if the answer is no, the second step becomes unnecessary because he has no claim warranting constitutional protection. If, however, either a liberty or property interest is at stake, then the competing interest of the individual and the State agency must be weighed to determine what due process is constitutionally required, first determining whether individual’s claim involved is interest in liberty, and, secondly, considering whether a property interest is involved.” Waite at 159.

Further in Waite: The Supreme Court of Appeals held:

“The concept of a ‘liberty’ interest is grounded in the Due Process Clause of both our State and Federal Constitutions, which prohibit the deprivation of ‘. . . life, liberty or property, without due process of law.’ United States Constitution, Amendment V; and West Virginia Constitution, Article III, Section 10,” and “The liberty interest concept ...is the interest an individual has in being free to move about, live and work at his chosen vocation without the burden of an unjustified label of infamy.... A liberty interest is implicated when the state makes a ‘charge against him that might seriously damage his standing and associations in his community,’” and ...that a

charge of dishonesty or immorality would implicate an individual's liberty interests.”⁶

“We follow these principles and find that an accusation or label given the individual by his employer which belittles his worth and dignity as an individual and, as a consequence, is likely to have severe repercussions outside his work world, infringes one's liberty interest. Moreover, an individual has an interest in avoiding ‘a stigma or other disability’ that forecloses future employment opportunities... [Citations omitted]

“... [and] that the truth or falsity of the charge does not enhance or diminish the impairment of the liberty interest. It is the nature of the charge that determines the scope of procedure required where the ‘liberty’ interest is involved. The one purpose of the procedural safeguard is to provide a mechanism to establish the truth or falsity of the charge.” [Citations omitted]

In addressing the property interest involved regarding employment, the

Court also held:

“It is clear from the Supreme Court decision in Roth, supra, that the Constitution protects property interests beyond the traditional concept of real or personal property. The Court indicated that a benefit which merits protection as a property interest must be one to which there is more than a ‘unilateral expectation....”

Both property and liberty rights are clearly recognized as derived from the federal and state constitutions and subject to procedural due process to protect them both.

PROPERTY RIGHTS

The central issue of the property rights claim is whether an at-will employee has a reasonable expectation of continued government employment. Petitioners focus on two narrow aspects of this issue. Cited is Barbor v. County Court, 85 W. Va. 359, 101 S. E. 721 (1920) for the

⁶Citing Board of Regents v. Roth, 408 U.S. 564 at 572 (1972).

proposition that if the employment is for “no definite term of office” it automatically makes the employee at-will with certain exceptions not applicable here. Of course the present case leaves no doubt the constitution and statute declare the position to be “at-will.” However, at-will employees do have a property interest in continued government employment under certain circumstances. Instead reliance is focused on the elementary principle outlined in ancient Barbor that if no term of office is specified in a government employment setting an employee (or employer) cannot impose such a term. In the allegations in her Complaint. Respondent does not posit such a position.

Her claim to a property right to continue government employment protected by due process is based on the judicial holdings cited above and refined subsequently. When the demands of these cases are matched to Dr. Marple’s situation, it is clear she had the named property rights taken from her without due process of law.

Major v. DeFrench, 169 W, Va. 241, 286 S. E. 2d 688 (1982) involved a non-jury trial to a circuit judge in a suit brought by a former probationary police officer claiming she was terminated in part because she was not afforded a due process hearing in violation of her constitutional property rights.⁷ She claimed to have served her probationary period and was terminated on the aegis of a statute that, in effect, rendered her at-will. The appointing authority simply was required to notify the probationer at the end of the term that she “will not receive an absolute appointment.” The basis for that notice is not given. The requisites of that basis was defined by statute: That the “conduct or capacity of the probationer has not been satisfactory to the appointing officer.” However, that stated foundation needs no expansion and is not provided the probationer.

⁷Unlike the R. C. P. 12 (b)(6) issue here, a full evidentiary picture was presented.

The court found “ both a ‘property’ and a ‘liberty’ interest in continued government employment requiring the state to afford the employee due process protection before employment can be terminated.” Further, the statute “creates in the employee a reasonable expectation that if she satisfied all the eligibility requirements and has performed well in the job, her employment will be continued.” (Emphasis supplied)

“This court has traditionally shown great sensitivity toward the due process interests of the government employee by requiring substantial due process protections and imposing rational decision-making on the state employer.” Citing past authority: “The protection afforded by these decisions . . . extends beyond traditional contract law. Rather they implicitly recognize a due process interest in continued government employment and freedom from an arbitrary non-retention devoid of protective procedures. This purpose would be frustrated if the appointing officer has unbridled discretion to make arbitrary employment decisions.” The specifics of the due process procedure are then outlined. This “reasonable expectation” of continued government employment is not predicated upon a term of employment but, instead, is an emolument of the position.

In Orr v. Crowder, 173 W. Va. 335, 315 S. E. 2d 593 (1984), Justice Miller addressed this issue of “reasonable expectation” in the review of a trial in which a librarian as an employee at-will sought tenure protection.⁸ A review of the two basic United States Supreme Court cases cited in State ex rel McLendon v. Norton 249 S.E. 2d 919 (W. Va. 1978) yielded recognition “that property interests cannot be withdrawn by government action without appropriate due process protection.” Board of Regents v. Roth, 408 U. S. 564, 92 St. Ct. 2701 (1972) is quoted as pointing out “that a benefit which merits protection as a property interest is one to which there is more than a ‘unilateral

⁸Again, this case reviews full evidence provided in a trial not the lean consideration of a R. C. P. 12(b)(6) motion.

expectation,’ and there must exist rules or understandings which can be characterized as giving the claimant ‘a legitimate claim of entitlement to [the benefit].’ (Emphasis supplied)

The cited Perry v. Sinderman 498 U. S. 593, 92 S. Ct. 2674 (1972) case adds further dimension to the underlying issue. There a college professor claimed the institution had a “defacto tenure” to which he would be entitled allowing the property interest. Reciting that holding: “The United States Supreme Court concluded that his claim had been improperly dismissed since he was not given the opportunity to prove the existence of and his eligibility for the defacto tenure program. It concluded that if the professor could establish these facts, then he would have shown a legitimate claim of entitlement to tenure and would be entitled to procedural due process protection.” (Emphasis supplied)

While this defacto contract derived from the private sector, it is recognized in West Virginia University v. Sauvgeot, 185 W. Va. 534, 408 S. E. 2d 286 (1991) , where the sole syllabus point states:

“A ‘property interest’ includes not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules and understandings.”

Citing Roth and Waite the opinion recites again the necessity of some “understanding or relationship between the employee and the institution which give rise to a claim of entitlement.” Then: “There must be some understanding by the employer which gives rise to an objective expectation on the part of the employee” citing numerous West Virginia authority, that opinion posits: “Such understanding, however, does not have to be in writing, it may evolve in a de facto fashion.”

Again citing our court's earlier cases, Saurvgeat found "[th]ere was a recognition that arbitrary and capricious behavior on the part of a public employer is synonymous with a lack of procedural due process, and the Court, in effect, ruled that where an employee has obtained a property interest in employment with a public employer, he is entitled to nonarbitrary and non-capricious treatment by that employer."

That employee was deemed to have "a reasonably objective expectation that her employment would continue" and that "expectation was not of a subjective nature and did not arise from unilateral circumstances . . ."

The application of these rulings to the present motion and attendant order are obvious. Dr. Marple must have had more than an unilateral expectation of continued employment but that expectation can be based on factors adduced in evidence at a trial which may show an "understanding" derived from the Board's history. Further, understanding can be based upon "defacto" consideration of previous actions not premised on announced rules. Failure to afford a claimant the opportunity to develop such a position is fatal to a court considering the issue.

At-will employees in the private sector may not enjoy the constitutional protections of government positions, yet there are factors that are common, and the law transporting an at-will into a protected class is the same. In Adkins v INCO, 187 W. Va. 219, 417 S. E. 2d 910 (1992), again Justice Miller wrote the opinion which involved an appeal of a jury verdict, in favor of the plaintiffs below whose claim was that "INCO had terminated the plaintiff's employment in violation of implied contractual rights."⁹ The position of the parties

⁹Here again in a full trial with all adduced evidence available to the appellate court. Of some interest is that Justice Cleckley in his earlier days represented the plaintiff below and appellees.

was noted: “it is undisputed that the plaintiffs had no written contract of employment. The plaintiff’s breach of contract claim is, instead, premised on their assertion that INCO’s conduct and prior dealings with them gave rise to an implied contract of employment requiring INCO to use seniority in making all employment decisions. INCO insists that the plaintiffs were all at-will employees and that there were no enforceable contractual limitations of its right to fire them.” (Emphasis supplied)

While the court recognized that such an “implied contract” can be proven by “clear and convincing evidence” of “custom and usage” the full evidentiary record before it did not support those plaintiffs’ claim. Petitioners’ R. C. P. 12 (b)(6) motion would have denied the respondent here an opportunity to offer her clear and convincing evidence of the custom and usage facilitated without question by the Board which afforded her the reasonable expectation of continued government employment.

In Wilhelm v. West Virginia Lottery, 198 W. Va. 92, 479 S. E. 2d 602 (1996) the opinion postulated:

“Although Mr. Wilhelm, as a deputy director of the Lottery, was an at-will employee, the Lottery Director’s ability to discharge him is not unfettered.” (Emphasis supplied)

The imposition of all these holdings must be considered in the context of Dr. Marple’s situation with what prospective evidence she will submit to substantiate her claim of a property right protected by due process.

First, on June 11, 2012, the first West Virginia State Superintendent’s Annual Performance Evaluation of Dr. Marple was submitted to the Board as per the dictates of statute. The direct involvement of the Board and every level of the Department is evident from its

thoroughness. One hundred and sixty-eight (168) pages of laudatory statements, analysis of programs, initiatives and prospects all relating directly to this plaintiff appear.

Second, at the Board meeting to receive the report in concert with its contents, a unanimous vote raised her annual salary \$2,000.00 to \$167,000.00.

Third, on June 14, 2012, the Board issued a press release concerning her “first job evaluation as the state’s top educational leader.” It is Linger who states “Dr. Marple approaches all of her work with an unwavering commitment to students and educators. She is an outstanding visionary and leader. In just over a year, she has brought national recognition to our state and worked diligently regarding teacher quality, school nutrition, pre-K education and organizational leadership.”

Placed in relief in this applause is the fact that Dr. Marple has been deeply involved in the West Virginia school system since 1969 and had been in the executive front seat of the West Virginia Department of Education since 2004. During the entire span of her experience with the administration of the department, no superintendent of school has ever been terminated until an adverse evaluation occurs.

Therefore, amid all the accolades, without dissent, with a pay raise on an annual basis, further with the wholesale adoption of her initiatives, Dr. Marple most certainly was entitled to a “reasonable objective expectation” not “subjective” or “based on unilateral expectancy” that her annual employment would continue at least until the next annual evaluation. Instead five (5) months after her first glowing evaluation with Linger singing her praises, somehow her tenancy is blamed for a score of statistics derived from years past and claims that she was an obstacle to a “new direction” with no definition of that target.

If someone were to be found in her posture from this extolling and salary raise and bowing by Linger and not be expecting a continuation of employment as guaranteed by these constitutional principles, then it is difficult to perceive what other factors would be needed to perfect such a perception.

LIBERTY RIGHTS

While the basic jurisprudence associated with respondent's "liberty rights" have been addressed above, the specific formulation of that right and the facts of this case in the petitioners' R. C. P. 12(b)(6) context require some expansion in considering petitioners' proposed order.

In Major v. DeFrench, supra, the court addressed the development of both the property and liberty rights and their due process protection. As to the liberty interest, the opinion finds:

"It has long been recognized that one of the liberty interests protected by due process is a person's interest in the pursuit of a lawful occupation." (Citing numerous federal and state cases)

"The due process concerns for fair, rational decision making and for protection of the right to pursue lawful occupations merge when, as in the case of probationary police civil service employees, an individual seeks retention in public employment.¹⁰ Because government is the employer in such cases, there will necessarily be a state derived decision directly affecting an individual's ability to pursue her chosen occupation.

. . .

"This liberty interest in continued public employment encompasses two of the employee's most basic interests, her good name and her prospects for future employment. Thus the government cannot dismiss an employee on charges that

¹⁰It bears repeating that the claimant there had completed the probationary period, the applicable statute only required the appointing authority, at the end of the period, to give a notice in writing "that he will not receive absolute employment, whereupon his employment will cease . . ." No reasons are given, thus rendering the claimant in this case an employee at-will.

call into question her good name, or that impose a stigma upon an employee which could foreclose her freedom to pursue other employment opportunities without providing the employee notice of the charges against her and a hearing on which the factual basis of the charges can be contested.” (Citing Roth and North supra)

In Moran v. Fagan, 176 W. Va. 196, 342 S. E. 2d 162 (1986), the appellant and plaintiff below was the Director of Historical Preservation in the West Virginia Department of Culture and History. His complaint included the deprivation of his liberty interest bringing “damage to his ability to find employment and loss of earnings and earning capacity.” The appeal was from the circuit court’s granting of a motion for summary judgment since he was an at-will employee. “He was given a letter setting forth the grounds for his termination but he was not afforded an adversarial hearing in which to present his position or develop a record on the reasons for his discharge.” The court found “a question of material fact” defeated the motion and remanded it for a factual determination:

“If, in fact, the appellant was discharged for reasons which impact on his good name and his prospects for future employment Major and Roth require he be given a hearing.”

The present case of Dr. Marple is a classic case of what occurs when liberty rights are violated and due process to protect them is abandoned. In their filing below, petitioners noted, only Linger’s discussion of “the Board’s desire to go in a new direction with new leadership, including a recitation of the State’s education statistics” is offered as an introduction to a carefully worded recitation by Linger at the November 29, 2012 “reconsideration” meeting where he gives the “only once” reference to Dr. Marple with this duplicitous statement: “We are not saying that Superintendent Marple is any more responsible than governors, legislators,

educators or board members for these shortcomings. We are not here to affix blame today.”

Absent from those filings is what Linger actually stated at the conclusion of the meeting. The material quoted comprises four (4) sentences in a compilation of what Linger states are “the reasons” for and the “explanation” of Dr. Marple’s termination “to be as open as possible to the public.”

Linger begins with “a few of my thoughts” citing “a litany of statistics related to student achievement and our rankings” winding up with: “And these are just a few of our concerns.” There follows a listing of every type of social gatherings from business to parents to students to friends and family all are “as frustrated as we are” by the statistics.

Then Linger sets out “the issues that caused board members” to dump Dr. Marple for this “new direction.” Number 1 through 4, are direct accusations aimed directly at the superintendent’s administration.

Lest one would suggest this diatribe of fiction is only attributable to Linger, he “requested a motion from the Board to adopt the statement as the Board’s position.” That motion was made, seconded and the “statement” was, in fact “adopted.”

In assessing Linger’s (and the Board’s) proclamation that they were “not saying Dr. Marple was more to blame that “governors, legislators, educators or board members for these shortcomings,” it must be emphasized that only Dr. Marple was terminated. No other “educator” and most certainly no board member was accused of complicity in the laundry list of complaints. The governor rendered no statement of guilt in the supposed terrible state of education and no committee report or resolution from “legislators” was referenced. Only Dr. Jorea Marple.

To fit with the demands of a liberty interest being violated requiring due process

to support an at-will termination, as clearly resourced in the above cases, respondent is now fully stigmatized by the firing. She has dutifully applied for positions in numerous jurisdictions with the wealth of her history of accolades, tributes and awards included. She has never been seriously considered because of the Linger-Board assignment of a massive failure in the educational structure of this State to no one besides the plaintiff.

Respondent's constitutional rights were in place at her baseless dismissal. Those rights were clearly established and the subject of counsel's advice. No qualified or good faith immunity or "privilege" is available to petitioners.

ASSIGNMENT OF ERROR 3:

The court below erred in denying petitioners' R.C.P. 12(b)(6) motion by failing to recognize that the actions of Linger detailed in the Complaint were discretionary in nature as part of his legitimate role with the Board thereby providing him with qualified immunity.

This issue deals with the boundaries of discretion when applied to "clearly established statutory or constitutional rights" such as those rights of property and liberty that clad Dr. Marple when she was fired.

As a preface to the following discussion, some weight is accorded those excusing illegal behavior with the screen of qualified immunity because the party asserting it is a police officer or some other local functionary faced with immediate peril or urgent decision making with legal consequences of unknown dimensions including statutory or constitutional directives.

Here we have a deliberative body with meetings, notices, agendas prepared, lawyers in tow, advice available at no cost, not a single actor but a group with unlimited

resources in this matter and populated with at least one lawyer on the board.

Petitioners citation of selected quotes relating to qualified immunity never places those supposed precepts into any act or even conceived act of Linger or the Board. Stand-alone rules without an introduction to the local facts is a meaningless exercise.

In the present case, the Complaint clearly alleges overt violations of constitutional and statutory provisions by petitioners:

(a) Holding secret meetings between board members on the subject of plaintiff's termination in violation of the applicable open meeting statutes and rules.

(b) Denying plaintiff's right to due process of law in the violation of her liberty rights as guaranteed in the state and federal constitutions.

(c) Denying plaintiff's right to due process of law in the violation of her property rights as guaranteed in the state and federal constitutions.

The Chase holding basics describing the boundaries of the pled defense have been repeated in virtually all subsequent jurisprudence on qualified immunity. It held:

“To recast the Harlow test, a public official may be found personally liable for his or her official acts if it is shown that the official, in the exercise of discretionary powers, has injured a party through a violation of clearly established statutory or constitutional rights of which a reasonable person would have known.”

A “reasonable person” was defined in footnote 16: “The term ‘reasonable person’ has been taken to mean a reasonable public official occupying the same position as the defendant public official.”

In discussing “the violation of clearly established” statutory or constitutional rights, Chase referred to an earlier opinion in City of Fairmont v. Hawkins, 172 W. Va. 240, 304

S. E. 2d 824 (1983) where the mayor of Fairmont signed a check “expressly contrary to the city charter” and found that “the long-standing charter provision regarding disbursement of funds was a provision that (the mayor) should reasonably know.”

Here the record is replete with recognition by petitioners of their duties under the open meetings statute and rules. The liberty and property rights held by respondent, directly denied due process application by petitioners, date to 1899 and 1915 with many defining cases to date all are certainly charged to petitioners as an elevated academic entity populated by educated, often professional, members with the full capacity to either know of their duties and restrictions or their powers or are properly charged with that knowledge as the mayor of Fairmont was not to mention advice of counsel at the time.

In 1996, Justice Albright addressed the immunity issue in a protracted opinion concerning the distinction between immunity afforded a specific official and that granted the government agency providing the source of his/her power of decision resulting in the cause of action by an aggrieved plaintiff. Parkulo v. West Virginia Board of Probation and Parole, 199 W. Va. 161, 483 S. E. 2d 507 (1996).¹¹

The opinion recognized Chase as the “leading case” determining the immunity issues and reciting the holdings and its nuances extensively. Also noted was the Hawkins case, supra, noting the mayor’s “act was unlawful and, therefore, caused personal liability to accrue.”

“However, on occasion, the State will be entitled to immunity when the official is not entitled to the same immunity; in others the official will be entitled to immunity when the State is not. The existence of the State’s immunity of the State must be determined on a case-by-case basis.

¹¹While this case devolved into issues not appropriate here, it began as a motion to dismiss then morphed into a summary judgment by the course of the proceedings.

Because we do not have before us a factual situation requiring further development of this approach to the scope of qualified immunity for the governmental entities represented by public officials entitled to its benefit, we leave the full development of that approach to another day. FN14

FN14. A guideline for use in the case-by-case approach to the problem of the interplay of governmental and public officer personal tort liability, seemingly endorsed by the Restatement (Second) of Torts, has been well-stated in an article addressing the subject, as follows:

Unless the government's exposure to liability can genuinely be expected to impair seriously the official's performance of duty, the government should not enjoy immunity from liability simply because the official is immune.

George A. Bernann, *Integrating Governmental and Officer Tort Liability*, 77 col. L.Rev. 1175, 1187 (1997).

Eighth, we do not disturb the holding in *Higginbotham*, commented upon in *Benson*, (both cases dealing with municipal government) that an action against a governmental body otherwise entitled to immunity, be it absolute or qualified, may be predicated on the violation of a "distinctive statute" which imposes a duty on the government which is owed to the claimant. As noted in the Restatement comment:

[D]uties or obligations may be placed on the government that are not imposed on the officer, and statutes sometime make the government liable when its employees are immune

Restatement (Second) of Torts §895D,cmt. J (1979)."

Applied here, the interplay between the official Linger, and his principle, the Board, would appear to deny both the qualified immunity defense if somehow it were to be applied.

After Chase the refining opinion of our court as to qualified immunity came from Justice Cleckley in Hutchinson v. City of Huntington, supra.¹² At the outset of consideration of

¹²Hutchinson was based upon an initial motion to dismiss for grounds of qualified immunity which was denied then a trial proceeded. The appeal included on assertion that the denial of the motion was error plus other Complaints of the conduct of the trial. The appellate consideration of the motion denial was the subject of footnote 8: "This case proceeded beyond the point of the

qualified immunity, the opinion states: “Nevertheless, qualified immunity, as opposed to absolute immunity is not an impenetrable shield that requires toleration of all manner of constitutional and statutory violations’ by public officials. Indeed, the only realistic avenue for vindication of statutory and constitutional guarantees when public servants abuse their offices in an action for damages.”

Returning to the Chase rule, Hutchinson finds:

“ State v. Chase Securities, Inc., adds an additional element to our immunity jurisprudence: “There is no immunity for an executive official whose acts are fraudulent, malicious, or otherwise oppressive.” Id. 188 W.Va. at 365, 424 S.E.2d at 600. Therefore, in the absence of any wilful or intentional wrongdoing, to establish whether public officials are entitled to qualified immunity, we ask whether an objectively reasonable official, situated similarly to the defendant, could have believed that his conduct did not violate the plaintiff’s constitutional rights, in light of clearly established law and the information possessed by the defendant at the time of the allegedly wrongful conduct? FN11 When broken down, it can be said that we follow a two-part test: (1) does the alleged conduct set out a constitutional or statutory violation, and (2) were the constitutional standards clearly established at the time in question? FN12

FN11. The threshold inquiry is, assuming that the plaintiff’s assertions of facts are true, whether any allegedly violated right was clearly established. To prove that a clearly established right has been infringed upon, a plaintiff must do more than allege that an abstract right has been violated. Instead, the plaintiff must make a “particularized showing” that a “reasonable official would understand that what he is doing violated that right or that in the light of preexisting law the unlawfulness” of the action was “apparent.” Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). Indeed, some courts hold that an “official may not be charged with knowledge that his or her conduct was unlawful unless it has been previously identified as such.” Warner v. Graham, 845 F.2d 179, 182 (8th Cir.1988). But, for a right to be clearly established, it is not necessary that the very actions in question previously have been held unlawful. Anderson v. Creighton, 483 U.S. at 640, 107 S.Ct. at 3039. To define the law in question too narrowly would be to allow defendants “to define away all potential claims.” Kelley v. Borg, 60

pleading stage, and the issue of pleading sufficiency has been lost. Although our review must now focus on the entire trial and the evidence, we believe future guidance is warranted.”

F.3d 664, 667 (9th Cir.1995). (Emphasis supplied)

FN12. Of course, “a necessary concomitant to the determination of whether the constitutional [or statutory] right asserted by the plaintiff is ‘clearly established’ at the time the [public official] acted is the determination of whether the plaintiff has asserted a violation of a constitutional [or statutory] right at all.” *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S.Ct. 1789, 1792, 114 L.Ed.2d 277 (1991). Moreover, the right the official is alleged to have violated must be specific in regard to the kind of action complained of for the constitutional or statutory right at issue to have been clearly established. When dealing with broad rights, the plaintiff bears the burden of particularizing such a right before those rights are subject to the qualified immunity test of being clearly established. Thus, where a plaintiff’s complaint, even when accepted as true does not state a cognizable violation of constitutional or statutory rights, then the plaintiff’s claim fails. If the complaint fails to allege a cognizable violation of constitutional or statutory rights it also has failed to state a claim upon which relief can be granted.

“Though it is the province of the jury to determine disputed predicate facts, the question of whether the constitutional or statutory right was clearly established is one of law for the court. In this connection, it is the jury, not the judge, who must decide the disputed “foundational” or “historical” facts that underlie the immunity determination, but it is solely the prerogative of the court to make the ultimate legal conclusion. What this means is that unless there is a dispute of facts, the ultimate question of qualified or statutory immunity is ripe for summary disposition.FN13

FN13. An assertion of qualified or absolute immunity should be heard and resolved prior to any trial because, if the claim of immunity is proper and valid, the very thing from which the defendant is immune—a trial—will absent a pretrial ruling occur and cannot be remedied by a later appeal. On the other hand, the trial judge must understand that a grant of summary judgment based on immunity does not lead to loss of right that cannot be corrected on appeal.” (Emphasis supplied)

In the present case, violations of the constitutional rights as well as the statutory demands of the open meetings laws are clearly outlined in the Complaint

The Chase rule was confirmed again in J. H. V. West Virginia Division of

Rehabilitation Services, 224 W. Va. 247, 680 S. E. 2d 392 (2009). More recently, our Court addressed the Chase/Hutchinson matrix in evaluating qualified immunity in the context of a police officer making instantaneous decisions about constitutional precepts in the face of perceived present threat. In City of St. Albans v. Botkins, 228 W. Va. 393, 719 S. E. 2d 883 (2011) the same rule albeit in different words was announced again:

“In keeping with the guidance the Court previously provided in *Hutchison* regarding the two-part inquiry inherent in qualified immunity determinations. Accordingly, we hold that a public officer is entitled to qualified immunity from civil damages for performance of discretionary functions where: (1) a trial court finds the alleged facts, taken in the light most favorable to the party asserting injury, do not demonstrate that the officer's conduct violated a constitutional right; or (2) a trial court finds that the submissions of the parties could establish the officer's conduct violated a constitutional right but further finds that it would be clear to any reasonable officer that such conduct was lawful in the situation confronted. Whenever the public officer's conduct appears to infringe on constitutional protections, the lower court must consider both whether the officer's conduct violated a constitutional right as well as whether the officer's conduct was unlawful.”

As to (1) above, Count 1 of the Complaint details the violation of plaintiff's constitutional rights in six loaded paragraphs.

With respect to (2) above, as pointed out earlier, the petitioners in the present case were not policemen with limited education, or time to become educated in a presented peril, or required to act by circumstance in a precipitous setting with limited options. Here were supposedly sophisticated board members selected for their knowledge of and dedication to the history and present posture of the field of education. Their work allowed full advice of counsel, unlimited access to any aspect of the practical and legal underpinnings of their assigned duties. Their knowledge of the long established constitutional provisions and the open meeting constraints on their deliberations, behavior, and actions are certainly attributable. Distant from a

cop on the beat these petitioners must be charged with full knowledge of the violations ascribed. If not who would not be so charged? What governmental entity would not be held responsible as set out in the cases cited?

In the end, no qualified immunity is before this court. If somehow consideration is to be allowed its application, it does not work to excuse petitioners' behavior and this case must proceed.

CONCLUSION

A review of the three aspects claimed to invoke qualified immunity for petitioners compels:

(1) The claim for damages by respondent is fully covered by in place insurance rendering no exposure of the state's assets. In that circumstance the jurisprudence and clear statutory assertion of sovereign immunity as announced in the state constitution but also qualified or good faith immunity.

(2) Respondent's status as an at-will employee of the Board invests her with both property and liberty rights rooted in the state constitution. An effort to curtail those rights or either of them demands to availing to her of a due process proceeding with the ingredients of such a requirement.

(3) In the exercise of discretionary acts attendant to fulfilling duties prescribed by an office, that discretion does not permit the violation of established constitutional and/or statutory rights. Such exercise does not afford the shield of qualified or any immunity and the actor (here Linger and the Board) accountable.

No absolute or qualified immunity protects these petitioners from the infliction by

these petitioners on the rights and reputation of Dr. Marple.

DATE

TIMOTHY N. BARBER (WVSB #231)
P. O. Box 11746
Charleston, West Virginia 25339
(304) 744-4400
Counsel for Jorea Marple

THOMAS PATRICK MARONEY (WVSB #2326)
608 Virginia Street, East
Charleston, West Virginia 25301
Telephone: 304-346-9629
Counsel for Jorea Marple

A. ANDREW MacQUEEN, III (WVSB #2289)
2025 Arundel Pl.
Mt. Pleasant, SC 29464
Telephone: 843-972-8026
Counsel for Jorea Marple

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOREA M. MARPLE,

Plaintiff,

v.

No. 14-1264

**WEST VIRGINIA BOARD of EDUCATION
and L. WADE LINGER, Jr.,**

Defendants.

CERTIFICATE OF SERVICE

I, Timothy N. Barber, counsel of record herein, do hereby certify that I have served a true and exact copy of the forgoing Respondent's Response to Petitioners' Brief to Order Denying Defendants Motion to Dismiss the Complaint for Failure to State a Claim upon Which Relief can be Granted Pursuant to R.C.P. 12(b)(6) on the parties herein by hand delivery the same, to counsel of record this 22st day of April, 2015 as follows:

J. Victor Flanagan
Attorney at Law
901 Quarrier Street
Charleston, West Virginia 25301
FAX: (304) 342-1545

DATE

TIMOTHY N. BARBER (WVSB #231)
P. O. Box 11746
Charleston, West Virginia 25339
(304) 744-4400
Counsel of Record