

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

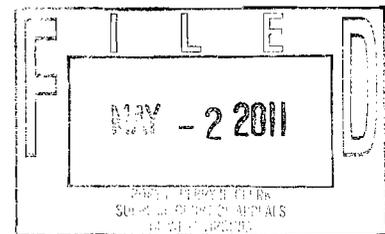
Docket No. 11-0191

William Watson, Jr., Respondent Below,
Petitioner,

vs.) No. 11-0191

Appeal from a final order of
the Circuit Court of Kanawha
County (10-AA-34)

West Virginia Department of Health and
Human Resources/ Bureau for Behavioral
Health and Health Facilities/ Mildred
Mitchell-Bateman Hospital, Petitioners Below,
Respondents.



PETITIONER'S BRIEF

Counsel for Petitioner, William Watson, Jr.,

Kevin Baker (WV Bar No. 10815)
Baker & Brown, PLLC
707 Virginia Street East, Suite 230
Charleston, West Virginia 25301
phone: 304-344-5400
fax: 304-344-5401
kevin@bakerandbrownlaw.com

TABLE OF CONTENTS

Assignments of Error 1

Statement of the Case 1

Summary of Argument 6

Statement Regarding Oral Argument and Decision 7

Argument 8

THE CIRCUIT COURT ERRED BY MISINTERPRETING THE
UNITED STATES AND WEST VIRGINIA CONSTITUTIONS
BY HOLDING THAT THE DIRECTIVE FROM THE EMPLOYER
THAT THE PETITIONER HAVE NO CONTACT WITH ANY
OF HIS COWORKERS DID NOT VIOLATE HIS FUNDAMENTAL
RIGHT TO FREEDOM OF ASSOCIATION AND HIS RIGHT TO
PRIVACY 8

THE CIRCUIT COURT PLAINLY ERRED IN CONCLUDING
THAT THE RESPONDENT MET ITS BURDEN OF PROOF
TO SHOW THAT THE PETITIONER WAS INSUBORDINATE
TO THE DIRECTION THAT HE NOT CONTACT ANY OF HIS
COWORKERS 15

THE CIRCUIT COURT ERRED IN REVERSING THE
ADMINISTRATIVE LAW JUDGE’S CONCLUSION THAT
THE DISCIPLINE OF THE PETITIONER WAS
DISPROPORTIONATE TO THE PETITIONER’S OFFENSE,
WHERE THE CIRCUIT COURT DID NOT GIVE PROPER
DEFERENCE TO THE ADMINISTRATIVE LAW JUDGE’S
FINDING OF FACTS 17

Conclusion 20

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Akers v. McGinnis</u> 352 F.3d 1030 (6th Cir. 2003)	10, 11, 12
<u>Alderman v. Pocahontas County Bd. of Educ.</u> 223 W. Va. 431 (2009)	11
<u>Anderson v. City of LaVergne</u> 371 F.3d 879 (6th Cir. 2004)	10
<u>Bd. of Directors of Rotary International v. Rotary Club of Duarte</u> 481 U.S. 537 (1987)	10
<u>Butts v. Higher Educ. Interim Governing Bd.</u> 212 W. Va. 209 (2002)	8, 14, 15, 16
<u>Cahill v. Mercer County Bd. of Educ.</u> 208 W. Va. 177 (2000)	19
<u>Conner v. Barbour County Bd. of Educ.</u> Docket No. 95-01-031 (Sept. 29, 1995)	18
<u>Golden v. Bd. of Educ.</u> 169 W.Va. 63 (1981)	14
<u>Martin v. W. Va. Fire Comm'n</u> Docket No. 89-SFC-145 (Aug. 8, 1989)	17
<u>McVay v. Wood County Bd. of Educ.</u> Docket No. 95-54-041 (May 18, 1995)	17-18
<u>Muscatell v. Cline</u> 196 W. Va. 588 (1996)	9
<u>Myers v. W. Va. Consol. Public Retirement Bd.</u> 226 W. Va. 738 (2010)	9
<u>Overbee v. Dep't of Health & Human Res.</u> Docket No. 96-HHR-183 (Oct. 3, 1996)	5, 17

<u>Roach v. Harper</u>	14
143 W.Va. 869 (1958)	
<u>Roberts v. U.S. Jaycees</u>	9, 10
468 U.S. 609 (1984)	
<u>Zablocki v. Redhail</u>	12
434 U.S. 374 (1978)	
<u>Other Authorities</u>	
Annotation, <u>Dismissal of Teacher—"Insubordination"</u>	16
73 A.L.R.3d § 3 (1977)	

ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT ERRED BY MISINTERPRETING THE UNITED STATES AND WEST VIRGINIA CONSTITUTIONS BY HOLDING THAT THE DIRECTIVE FROM THE EMPLOYER THAT THE PETITIONER HAVE NO CONTACT WITH ANY OF HIS COWORKERS DID NOT VIOLATE HIS FUNDAMENTAL RIGHT TO FREEDOM OF ASSOCIATION OR HIS RIGHT TO PRIVACY
2. THE CIRCUIT COURT PLAINLY ERRED IN CONCLUDING THAT THE RESPONDENT MET ITS BURDEN OF PROOF TO SHOW THAT THE PETITIONER WAS INSUBORDINATE TO THE DIRECTION THAT HE NOT CONTACT ANY OF HIS COWORKERS
3. THE CIRCUIT COURT ERRED IN REVERSING THE ADMINISTRATIVE LAW JUDGE'S CONCLUSION THAT THE DISCIPLINE OF THE PETITIONER WAS DISPROPORTIONATE TO THE PETITIONER'S OFFENSE, WHERE THE CIRCUIT COURT DID NOT GIVE PROPER DEFERENCE TO THE ADMINISTRATIVE LAW JUDGE'S FINDING OF FACTS

STATEMENT OF THE CASE

The Petitioner, William Watson, Jr., was wrongfully accused of, and later found not guilty of, either knowing about or participating in copper theft from Mildred Mitchell-Bateman Hospital ("Hospital"). (A.R. 8-9.) During the course of the investigation, the Petitioner was interviewed and admitted that he had "dozed off" during the midnight shift on occasion. (A.R. 10.) The Petitioner also spoke to three Hospital employees during the investigation, despite an order that he have no contact with any of his coworkers. (A.R. 10-11.) Despite being cleared of wrongdoing in the copper theft, the Petitioner was disciplined for admitting that he "dozed off" on occasion and being insubordinate to the order that he have no contact with coworkers during the investigation. (A.R. 7.) The Respondent disciplined the Petitioner for these infractions on or about October 8, 2008, with a five-day suspension and reassignment from his position of Guard in the Safety and Security Department to a position of Food Service Worker in the Dietary

Department. (A.R. 102-03.) Although this change of position did not involve a change in pay grade, it was a functional demotion. (A.R. 9.)

In response to the functional demotion, the Petitioner filed a grievance on or about October 23, 2008, seeking reinstatement as a security guard and expungement of all references to the copper theft from his record. (A.R. 6.) The Petitioner's grievance was denied at Level One by a decision dated February 17, 2009. (A.R. 6.) On July 23, 2009, the parties held a Level Two mediation, which was unsuccessful in resolving the grievance. (A.R. 7.) On September 30, 2009, a Level Three hearing was held before Mark Barney, Administrative Law Judge ("ALJ"), wherein both parties were permitted to call witnesses, examine or cross-examine witnesses, and introduce exhibits. (A.R. 6; see also generally A.R. 26-93.) On December 31, 2009, the ALJ held in favor of the Petitioner, granted the grievance, and ordered the Petitioner reinstated to his position as security guard. (See generally A.R. 6-24.) In reaching the decision, the ALJ made a number of findings of fact relating to the grievance, a summary of which is included in this statement of the case. (A.R. 8-11.)

The Petitioner was employed at the Hospital as a Security Guard for over nine years where he worked the midnight shift. (A.R. 8.) As such, the Petitioner was responsible for ensuring the safety and security of all hospital grounds, including patients and staff. (A.R. 8.) In September 2008, an employee who apparently disliked the Petitioner reported that the Petitioner "may have been involved in a copper theft that occurred on hospital property." (A.R. 8.) In light of this accusation, the Petitioner was suspended on September 16, 2008 pending the outcome of an investigation. (A.R. 8.) The suspension letter stated, in part, that the Petitioner was not to have any contact with staff members, other than the CEO, the Human Resources Director, and

the Petitioner's union representative. (A.R. 8.) An investigation was conducted and the Petitioner was found to not be involved in the copper theft. (A.R. 9.) On October 8, 2008, the Hospital rescinded the Petitioner's suspension regarding copper theft, but issued him a five-day suspension and demotion to Food Service Worker in light of information that was revealed during the copper theft investigation. (A.R. 9.)

The Respondent cited two reasons for demoting the Petitioner: (1) he admitted to dozing off while working night shift and (2) he contacted three coworkers during the investigation despite the order that he have no contact with his coworkers during the investigation. (A.R. 9.) The ALJ found that "[n]o one has ever reported or complained that the [Petitioner] was 'dozing off' on the job" and that the Petitioner's supervisor never observed the Petitioner dozing off on the job. (A.R. 10.) However, the Petitioner admitted that he had dozed off on occasion while working midnight shift during a meeting with Hospital administration held pursuant to the copper investigation. (A.R. 10.) The ALJ found that the Petitioner contacted coworker Karen Bledsoe during his suspension to ask what was "going on" in regard to the investigation, but that the Petitioner and Ms. Bledsoe did not discuss the copper theft incident. (A.R. 10.) The ALJ found that the Petitioner contacted coworker Milissa Parker during his suspension to inform her that he would not be able to make a payment that he owed her for purchase of an automobile because he was not receiving a paycheck. (A.R. 10.) The ALJ found that the Petitioner contacted coworker John A. Albright, who lives down the street from the Petitioner and who he sees outside of work "pretty often," and asked whether Mr. Albright had been interviewed, but that Mr. Albright and the Petitioner did not discuss the investigation. (A.R. 10-11.) The ALJ further found that "[w]hen speaking with Ms. Bledsoe, Ms. Parker and Mr. Albright, [the

Petitioner] did not attempt to coerce or threaten any coworker for participating in the investigation. Nor did he attempt to alter their statements or testimony.” (A.R. 11.)

The ALJ also found that the Petitioner has received positive performance evaluations throughout his tenure at the Hospital, that he was and still is a good employee for the Hospital, and that in over nine years of service, he was disciplined only once prior to the incidents at issue in this appeal. (A.R. 11.) In particular, the Petitioner was disciplined with a written reprimand for horseplay when several employees, including a nurse supervisor, were disciplined for their activities. (A.R. 11.) Finally, the ALJ found that other employees have received a suspension or less for sleeping on the job. (A.R. 11.)

After hearing the testimony and considering the record as a whole, the ALJ concluded that the Respondent did not meet its burden of proof for disciplining the Petitioner. (generally ALJ decision) In particular, the ALJ held that the Petitioner’s interactions with his coworkers during the investigation were from “friendships and social contacts” that were protected by the First Amendment’s freedom of association. (A.R. 14-17.) The ALJ concluded that the Respondent’s policy forbidding any contact with coworkers was “void, unenforceable and contrary to law.” (A.R. 17.) The ALJ also held that the Petitioner’s privacy interests at issue in the case substantially and significantly outweighed the Respondent’s interest. (A.R. 17-18.) Accordingly, the ALJ concluded that the Petitioner could not be disciplined for exercising his First Amendment rights and, therefore, the only remaining reason to discipline the Petitioner was his admission that he occasionally dozed off during midnight shift.

The ALJ held that a suspension of five days and a demotion from security guard to food service employee is disproportionate to the offense. (A.R. 19.) In support of this conclusion, the

ALJ considered the offense committed, the Petitioner's extensive work history and consistently positive evaluations, the Petitioner's only reprimand, and the penalty imposed on other employees for like offenses. (A.R. 20.) The ALJ relied on testimony and exhibits showing that suspension and reprimand, rather than a functional demotion, are common punishments for dozing off on the job. (A.R. 20.) The ALJ also held that, in light of the totality of the evidence, mitigation was appropriate, and therefore "[t]he penalty of five-days suspension and demotion to Food Service Worker 'is clearly disproportionate to the employee's offense[.]'" (A.R. 21 (quoting Overbee v. Dep't of Health & Human Res., Docket No. 96-HHR-183 (Oct. 3, 1996))). The ALJ, therefore, granted the grievance, and ordered the Respondent to reinstate the Petitioner to his position as Security Guard at the Hospital and remove any mention or allegations of copper theft from the Grievant's personnel file.

The Respondent appealed the ALJ's decision to the Circuit Court of Kanawha County on February 17, 2010. Following submission of written briefs, Kanawha County Circuit Court Judge Stucky entered a Final Order in this matter on December 30, 2010, reversing the decision of the ALJ on the grounds that "[t]he ALJ was clearly wrong in view of the reliable, probative and substantial evidence on the whole record in his findings." (A.R. 4; see also generally A.R. 1-5.) With regard to the constitutional questions, Judge Stucky held, concisely, that "[h]ere, [the Petitioner] contacted three co-workers. The topics discussed did not rise to level of public concern. [The Petitioner] does not have a claim of a violation of his First Amendment rights." (A.R. 3.) Judge Stucky then rejected the premise that the Petitioner's right to freedom of association was even an issue in the case. (A.R. 3.) Judge Stucky then found that the Petitioner was insubordinate to a valid order that he not contact any coworkers. (A.R. 3-4.) In

addressing mitigation of the Petitioner's punishment, Judge Stucky stated that it was an extraordinary remedy and that the Petitioner "did not establish by a preponderance of the evidence that his discipline was so disproportionate to his offense that the Hospital abused its discretion by its issuance." (A.R. 4.) In reaching this conclusion, Judge Stucky relies on testimony at the Level Three hearing that two other security officers were terminated for sleeping on the job, although the ALJ did not find this as a matter of fact in the underlying decision. (A.R. 4.)

The Petitioner filed a timely appeal on January 28, 2011.

SUMMARY OF ARGUMENT

The United States and West Virginia Constitutions protect an individual's freedom of intimate association, which is separate and distinct from the freedom of expressive association. The Constitutional freedom of intimate association permits citizens to form intimate associations of their choosing, including friendship, without the Government infringing unless the infringement is supported by sufficiently important state interests and is closely tailored to effectuate only those interests. The Respondent's broad order that the Petitioner have no contact on any topic with any of his coworkers infringed his constitutional freedom of intimate association and was neither supported by sufficiently important state interests or closely tailored to effectuate only those interests. Accordingly, the order was invalid and the Petitioner cannot be punished for insubordination to that order.

In the alternative, if the Court determines that the order does not violate the Petitioner's freedom of intimate association, the clear and uncontroverted facts of the case demonstrate that the Petitioner did not act willfully in violating the order. Although the Administrative Law Judge

and the Circuit Court did not address this argument directly, the record of the underlying grievance clearly shows that the Petitioner did not act with defiance or contempt. Accordingly, this Court should conclude that the undisputed facts show that the Petitioner did not violate the order willfully and, therefore, cannot be punished for insubordination. If the Court determines that the facts are not clear, the Petitioner respectfully requests that the matter be remanded to the Administrative Law Judge for further fact finding and argument as to the question of willfulness.

Finally, the Court should reject the Circuit Court's attempt to substitute its judgment for that of the Administrative Law Judge with respect to the factual and credibility determinations made in finding that the Petitioner's discipline was disproportionate to his offense. Such a determination is made on a case-by-case basis and is highly fact driven. The Circuit Court merely pointed to one item of conflicting testimony in reversing the Administrative Law Judge and concluding that the Petitioner did not meet his burden to show by a preponderance of the evidence that his discipline was disproportionate. Although the Circuit Court states that the Administrative Law Judge was clearly wrong in view of the reliable, probative and substantial evidence on the whole record, no such evidence is referenced. Rather, the Circuit Court is merely attempting to substitute its judgment for that of the Administrative Law Judge.

For all these reasons, the Circuit Court's decision should be reversed and the Administrative Law Judge's Opinion should be reinstated by this Court.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because one or more of the legal arguments contained in this appeal involves an issue of first impression for this Court, oral argument under Rev. R.A.P. 20 is appropriate. If the Court determines that the decisional process would not be significantly aided by oral argument and the

facts and legal arguments are adequately presented in the briefs and record on appeal, the Court may, in its discretion, declare that oral argument is not necessary, pursuant to Rev. R.A.P. 18(a).

ARGUMENT

I. THE CIRCUIT COURT ERRED BY MISINTERPRETING THE UNITED STATES AND WEST VIRGINIA CONSTITUTIONS BY HOLDING THAT THE DIRECTIVE FROM THE EMPLOYER THAT THE PETITIONER HAVE NO CONTACT WITH ANY OF HIS COWORKERS DID NOT VIOLATE HIS FUNDAMENTAL RIGHT TO FREEDOM OF ASSOCIATION OR HIS RIGHT TO PRIVACY

Respondent argues that the Petitioner was insubordinate to an order of his employer, by violating the order that he not have any contact with his coworkers during the investigation into the alleged copper theft. (A.R. 13.) In order to discipline the Petitioner for insubordination, the Respondent must prove: “(a) an employee must refuse to obey an order (or rule or regulation; (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid.” Butts v. Higher Educ. Interim Governing Bd., 212 W. Va. 209, 212 (2002). The ALJ held that the order itself was overly broad and violated the West Virginia and United States Constitutions, and, therefore, the ALJ declared the order void and unenforceable. (A.R. 17; 19.) Accordingly, the ALJ held that the Respondent did not meet its burden of proof with respect to the allegation of insubordination. In reversing this portion of the ALJ’s decision, the Circuit Court held that the topics discussed by the Petitioner did not rise to the level of public concern and that the case was not about “association” and, therefore, no freedom of association was at issue. (A.R. 3.) Thus, the Circuit Court found the order valid. (A.R. 4.)

The facts with respect to this assignment of error are not in dispute. The order is contained in the September 16, 2008 letter to the Petitioner from the CEO of the Hospital, which stated, “You are not to contact any staff member other than the Director of Human Resources,

your union representative (if he or she is an employee), or myself.” (A.R. 100 (emphasis in original).) The ALJ found that while the Petitioner was suspended, he contacted three coworkers: Karen Bledsoe, Milissa Parker, and John A. Albright. (A.R. 10-11.) The ALJ found that the content of those conversations related to general questions regarding what was “going on” in relation to his investigation or whether a person had been interviewed, personal finances, and general conversation. (A.R. 10-11.) The ALJ found that at no time did the Petitioner attempt to coerce or threaten any of his coworkers for participating in the investigation and he did not attempt to alter the statements or testimony of the coworkers. (A.R. 11.) The question in this assignment of error, therefore, is one of law. Namely, to what extent, if any, do the United States and West Virginia Constitutions limit the enforcement of the order contained in the September 16, 2008 letter. Such a question is to be reviewed *de novo*. Myers v. W. Va. Consol. Public Retirement Bd., 226 W. Va. 738, Syl. Pt. 1 (2010) (“On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in [West Virginia Code] and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.”) (quoting Muscatell v. Cline, 196 W. Va. 588, Syl. Pt. 1 (1996)).

The United States Supreme Court has identified two types of “freedom of association.” See Roberts v. U.S. Jaycees, 468 U.S. 609, 617 (1984). One type, known as “expressive association” protects the “right to association for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.” Id. at 618. The other type, known as “intimate association,” protects “choices to enter into and maintain certain intimate human relations [and] must be secured

against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.” *Id.* at 617-18. Intimate association “receives protection as a fundamental element of personal liberty.” *Id.* at 618. Furthermore, “because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.” *Id.* (citing various Supreme Court opinions). Relationships with “such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship[.]” such as family relationships and other similar relationships contain freedom of association as an element of personal liberty. *Id.* at 620; see also Bd. of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987). “Therefore, . . . courts have recognized both personal friendships and non-marital romantic relationships as the types of ‘highly personal relationships’ within the ambit of intimate associations contemplated by Roberts.” Anderson v. City of LaVergne, 371 F.3d 879, 882 (6th Cir. 2004) (citing Akers v. McGinnis, 352 F.3d 1030, 1039-40 (6th Cir. 2003)).

The Petitioner has a freedom of intimate association, which allows him to be in contact with people with whom he has personal friendships, and this freedom protects him from encroachment by the State. Because the Petitioner has personal friendships with many of his coworkers, the State’s attempt to preclude him from communicating in any way with any of his coworkers violated his freedom of intimate association. In addressing the ALJ’s opinion on this question, the Circuit Court incorrectly states that communications protected by the right to intimate association must be on matters of public concern. (A.R. 3.) In making this conclusion,

the Circuit Court relied on a recent decision by this Court addressing public employee's rights to free speech as they relate to publicly berating a school official. See generally Alderman v. Pocahontas County Bd. of Educ., 223 W. Va. 431 (2009). The Alderman Court stated that in order for speech to be protected, a public employee must speak as a citizen on a matter of public concern. Id. at 441. This analysis clearly applies to the freedom of expressive association, but it does not apply to intimate association, which by its very nature includes discussion of matters not of public concern, but rather of private concern.

The Supreme Court of Appeals of West Virginia has not addressed the "intimate association" protected by the United States Constitution. Accordingly, there is no case law on point in West Virginia as to when intimate association applies and on what conditions, if ever, the State can intrude on that intimate association. At least one federal Court has determined that the State can infringe upon an intimate association only if the policy doing so is not a "direct and substantial interference" with the intimate association. See Akers, 352 F.3d at 1040. The Akers Court held that a "direct and substantial interference" with intimate associations is subject to strict scrutiny, while lesser interferences are subject to rational basis review. Id. The Akers Court further explained that direct and substantial burdens exist "only where a large portion of those affected by the rule are absolutely or largely prevented from [forming intimate associations], or where those affected by the rule are absolutely or largely prevented from [forming intimate associations] with a large portion of the otherwise eligible population of [people with whom they could form intimate associations]." Id.

In applying the standard articulated in Akers, it is clear that the State's order in this case is a "direct and substantial interference" with the Petitioner's freedom of intimate association.

The order states that the Petitioner was to have no contact with any employee of the Hospital. (A.R. 100.) The Petitioner worked for the previous nine years at the Hospital and, it is safe to assume, many of his coworkers were also friends. (A.R. 8; see A.R. 39; 71-72; 78 (discussing a “horseplay” incident that was the Petitioner’s only reprimand in his file after nine years and showing that the Petitioner had a friendship, or, at least, a jovial relationship, with many of his coworkers).) Such a restriction absolutely prevented the Petitioner from forming or furthering intimate associations with everyone who worked at his place of employment. (A.R. 100.) Accordingly, under the standard stated in Akers, the order from the State must withstand strict scrutiny in order to be constitutional. See Akers, 352 F.3d at 1040.

In order to satisfy strict scrutiny under this type of case, the State has the burden of showing that the infringing order is “supported by sufficiently important state interests and is closely tailored to effectuate only those interests.” Zablocki v. Redhail, 434 U.S. 374, 388 (1978). Applying that standard to the facts in this case, it is clear that the State has a sufficiently important interest in investigating theft of state property—in this case copper. In conducting such an investigation, the State has an additional interest to ensure that its investigation is free from coercion, intimidation, and any other attempt to alter the outcome of its investigation. The Respondent cannot, however, demonstrate that they have a sufficiently important state interest in cutting off all communication between the Petitioner and his coworkers.

The broad restriction on the Petitioner that he have no contact with any of his coworkers was in no way closely tailored to effectuate only the sufficiently important interests of the State. Instead, the restriction was so broad as to prohibit the Petitioner from discussing anything with any of his coworkers. The State attempted to preclude the Petitioner from having any conduct

whatsoever with every single employee of the Hospital, regardless of whether that employee was involved in the investigation or whether the Petitioner wanted to speak with the employee about something completely unrelated to the investigation. (A.R. 100.) The State could have issued a much more closely tailored order by either prohibiting the Petitioner from discussing the investigation with any coworker or prohibiting the Petitioner from discussing anything with a coworker who he knew to be involved in the investigation. Accordingly, the State's restriction on the Petitioner's freedom of intimate association was not closely tailored to the State's interests and, therefore, the restriction must be held unconstitutional on its face.

Furthermore, the interactions held by the Petitioner in this case show that the Petitioner's actual contacts with three coworkers did not in any way hinder or compromise the State's investigation. As the ALJ found, the Petitioner contacted three employees outside of work at their homes. (A.R. 16.) The Petitioner contacted Ms. Bledsoe, his friend who he has known for eight years, by telephoning her at home, a number he presumably already had, and asking her "what was going on." (A.R. 16.) The Petitioner contacted Ms. Parker, his friend who he had purchased an automobile from, at home and after work hours, by telephone in order to tell her that his next payment on the automobile would be late. (A.R. 16.) The Petitioner spoke in person with Mr. Albright, his friend who lives down the street from the Petitioner, and the only item they discussed relating to the investigation was whether Mr. Albright had been interviewed. (A.R. 16-17.) The ALJ concluded that the Petitioner "had the type of friendships and social contacts with Ms. Bledsoe, Ms. Anderson and Mr. Albright that are protected under the hybrid right to intimate association." (A.R. 17.) These facts, as found by the ALJ, show that the Petitioner's interactions with his friends were personal in nature and that the State cannot show a

closely tailored interest in restricting the communications.¹ Accordingly, the Court should hold the restrictions are unconstitutional as applied to the Petitioner in this case.

In addition to the protections provided by the freedom of intimate association contained in the United States Constitution, state employees in West Virginia enjoy a right to privacy guaranteed by the U.S. Constitution, the West Virginia Constitution, and common law. See, e.g., Golden v. Bd. of Educ., 169 W.Va. 63 (1981). Specifically, employees are afforded the “right of an individual to be let alone and to keep secret his private communications, conversations and affairs.” Roach v. Harper, 143 W.Va. 869, Syl. Pt. 1 (1958). This right provides further support for the finding that the Respondent’s total restriction of the Petitioner’s ability to communicate with any of his coworkers improperly infringes upon the Petitioner’s constitutional rights, in this case his right to privacy.

Because the order restricting the Petitioner from contacting any of his coworkers is unconstitutional, the Petitioner cannot be punished for insubordination due to violating that order. In order to discipline an employee for insubordination, the Respondent must prove “(a) an employee must refuse to obey an order (or rule or regulation; (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid.” Butts, 212 W. Va. at 212. For the reasons discussed above, the Respondent cannot prove element (c) as articulated in Butts and, therefore, any punishment received by the Petitioner for insubordination must be vacated.

¹ There is admittedly a gray area in this argument with respect to discussions about the incident itself, but a restriction that limited the Petitioner’s communications with his coworkers more narrowly is not at issue here. Rather, the order at issue in this case was a total ban on communications and that is the only order that the Court must address in determining the appropriate standard and analysis of this case.

II. THE CIRCUIT COURT PLAINLY ERRED IN CONCLUDING THAT THE RESPONDENT MET ITS BURDEN OF PROOF TO SHOW THAT THE PETITIONER WAS INSUBORDINATE TO THE DIRECTION THAT HE NOT CONTACT ANY OF HIS COWORKERS

If the Court determines that the order prohibiting the Petitioner from communicating with any of his coworkers about any matter is constitutional, reasonable, and valid, the Court can still rule in favor of the Petitioner on the question of insubordination if it finds that the Petitioner's violation of that order was not willful. As noted previously, in order to discipline an employee for insubordination, the Respondent must prove "(a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be willful; and (c) the order (or rule or regulation) must be reasonable and valid." Butts, 212 W. Va. at 212. The Petitioner's second assignment of error is that he did not willfully refuse to obey the order. Whether or not the Petitioner willfully disobeyed the order was not addressed by the ALJ, because he ruled that the order itself was unconstitutional. Furthermore, the Circuit Court did not analyze the question of willfulness, but rather included the conclusory statement that the Petitioner "willfully contacted three co-workers after receiving the letter." (A.R. 4.)

This assignment of error clearly raises a question of fact as to the willfulness of the Petitioner's conduct. Although this question of fact was not addressed specifically by the ALJ, the findings of fact and the opinion generally show that the ALJ did not think that the Petitioner violated the order out of any sort of defiance or contempt for authority. In fact, the ALJ stated that "[w]hen speaking with Ms. Bledsoe, Ms. Parker and Mr. Albright, [the Petitioner] did not attempt to coerce or threaten any coworker for participating in the investigation. Nor did he attempt to alter their statements or testimony." (A.R. 11.) Furthermore, although the ALJ did not

address the question of whether the Petitioner's violation was willful, the ALJ did insert a footnote after the element was stated. (A.R. 14 & n.6.) That footnote stated:

[F]or a refusal to obey to be 'wilful,' the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order. When one acts with willfulness there is purpose or design, actual or constructive. Willfulness is not mere inattention or heedlessness. Willfulness implies a conscious purpose to do wrong. Doing a thing knowingly and willfully implies not only a knowledge of the thing done, but a determination to do it with evil purpose or motive.

(A.R. 14, n.6 (internal citations and quotations omitted).) By defining willfulness so clearly and then concluding that the order itself was unlawful and the Petitioner's actions were proper, the ALJ indicates that the facts as concluded by him do not establish any type of defiance or contempt for authority on behalf of the Petitioner.

As this Court stated, precedent "suggest[s] that for a refusal to obey to be 'wilful,' the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." Butts, 212 W. Va. at 213 (citing Annotation, Dismissal of Teacher—"Insubordination", 73 A.L.R.3d § 3 (1977)). The undisputed facts in this case do not show anything more than a disagreement or misunderstanding over the reach of an order. The Petitioner contacted three of his friends, who happened to be three of his coworkers. In doing so, the Petitioner spoke about money owed to one friend, general topics that included whether or not another friend had been interviewed in the investigation but did not discuss details of the investigation, and what was "going on" in relation to the investigation with another friend. (A.R. 16-17.) Nothing in the record shows that the Petitioner acted with defiance or contempt. Accordingly, this Court should conclude that the undisputed facts show that the Petitioner did not violate the order willfully and,

therefore, cannot be punished for insubordination. If the Court determines that the facts are in dispute, the Petitioner respectfully requests that the matter be remanded to the ALJ for further fact finding and argument as to the question of willfulness.

III. THE CIRCUIT COURT ERRED IN REVERSING THE ADMINISTRATIVE LAW JUDGE'S CONCLUSION THAT THE DISCIPLINE OF THE PETITIONER WAS DISPROPORTIONATE TO THE PETITIONER'S OFFENSE, WHERE THE CIRCUIT COURT DID NOT GIVE PROPER DEFERENCE TO THE ADMINISTRATIVE LAW JUDGE'S FINDING OF FACTS

Regardless of whether the Court finds that the Petitioner can be reprimanded for insubordination, the Court can still find that the discipline handed down to the Petitioner was disproportionate to the Petitioner's offense. Whether or not discipline is excessive given the facts of a situation is an affirmative defense. Accordingly, at the grievance level, the Petitioner bore the burden of demonstrating that the penalty was clearly excessive and reflected an abuse of the Hospital's discretion. See Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989). "Mitigation of the punishment imposed by an employer is [an] extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion." Overbee v. Dep't of Health & Human Res., Docket No. 96-HHR-183 (Oct. 3, 1996). The Overbee decision went on to state that "[c]onsiderable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Id. "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case-by-case basis." McVay v. Wood County Bd. of Educ., Docket No.

95-54-041 (May 18, 1995) (internal citations omitted). Mitigating circumstances include any condition that supports a reduction in the penalty or level of discipline based on the interests of general fairness and objectivity, and can include consideration of the employee's history of employment for the employer. See Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept. 29, 1995). This legal standard is settled.

Taking the legal standard into consideration, the ALJ concluded that the Petitioner's offense was relatively minor. First, the ALJ noted that Petitioner was not found asleep on the job, but instead honestly admitted that he occasionally dozed off on the midnight shift. (A.R. 20.) Second, the Petitioner's contact with his coworkers was done innocently and without any intention to disrupt the investigation in any way. (A.R. 20.) The ALJ also considered the Petitioner's work history and noted that he had worked at the Hospital for over nine years and had consistently good performance evaluations. (A.R. 20.) Furthermore, the ALJ noted that many witnesses testified to the high quality of the Petitioner's work. (A.R. 20.) Although the ALJ noted one blemish on his record, the reprimand for horseplay, the ALJ concluded that the Petitioner's overall record of service was exemplary. (A.R. 20.) Lastly, the ALJ considered the penalty imposed on other employees for like offenses. (A.R. 20.) The ALJ found that "other employees have only received a suspension (or less) for sleeping on the job" and noted that a nurse supervisor at the Hospital "testified that mere reprimand was the most appropriate course of action." (A.R. 11; 20.) The ALJ concluded that the totality of the evidence made mitigation appropriate and ordered the penalty of five days suspension and demotion to Food Service Worker mitigated to five days suspension. (A.R. 21; 23-24.)

In overturning the ALJ's decision, the Circuit Court stated that "[t]he ALJ was clearly wrong in view of the reliable, probative and substantial evidence on the whole record in his findings." (A.R. 4.) With respect to the issue of mitigation, the Circuit Court stated that "[g]iven the totality of the evidence, [the Petitioner] did not establish by a preponderance of the evidence that his discipline was so disproportionate to his offense and that the Hospital abused its discretion by its issuance." (A.R. 4.) In support of this conclusion, the Circuit Court stated that "[t]here was testimony at the Level III hearing that two other security officers had been terminated for sleeping on the job." (A.R. 4.) The Circuit Court then made the conclusory statement that "[t]he Hospital did not discipline [the Petitioner] in a disproportionate manner." (A.R. 4.) Finally, the Circuit Court supported its conclusion with the assertion that "[a] security guard sleeping on duty in a high-crime area is a serious matter."

The Circuit Court's opinion improperly weighs the evidence and fails to establish that the ALJ was clearly wrong. The Circuit Court attempts to substitute its judgment for the ALJ's judgment, which this Court has strictly prohibited. See Cahill v. Mercer County Bd. of Educ., 208 W. Va. 177, Syl Pt. 1 (2000). The ALJ relied on testimony of witnesses and exhibits in concluding that other employees received only a suspension or even less for dozing off on the job. (A.R. 11; 20.) Although the Circuit Court is correct that there was testimony saying two security guards were terminated for falling asleep on the job, the ALJ, whose role is to weigh the evidence, failed to credit that testimony. (See A.R. 61.) Factual findings and credibility determinations made by an ALJ are entitled to deference by the Circuit Court and this Court. While the credibility conclusion of the ALJ can be displaced by a showing that reliable, probative and substantial evidence on the whole record shows that the ALJ was clearly wrong, it

cannot be displaced merely because the Circuit Court disagrees with the ALJ. In this case, the record does not contain reliable, probative and substantial evidence that the Petitioner failed to establish by a preponderance of the evidence that his discipline was so disproportionate to his offense that the Hospital abused its discretion. Rather, the record supports the conclusion of the ALJ and the Circuit Court erred by substituting its interpretation of the evidence. Accordingly, the Court should reverse the decision of the Circuit Court with regard to mitigation and reinstate the mitigation imposed by the ALJ.

CONCLUSION

For the reasons stated above, the Circuit Court's Final Order should be reversed, and the Court should reinstate the decision of the Administrative Law Judge in full or remand this matter for further proceedings, as appropriate.

Signed: _____


Kevin Baker (WV Bar No. 10815)
Baker & Brown, PLLC
707 Virginia Street East, Suite 230
Charleston, West Virginia 25301
phone: 304-344-5400
fax: 304-344-5401
kevin@bakerandbrownlaw.com
Counsel of Record for Petitioner

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 11-0191

William Watson, Jr., Respondent Below,
Petitioner,

vs.) No. 11-0191

Appeal from a final order of
the Circuit Court of Kanawha
County (10-AA-34)

West Virginia Department of Health and
Human Resources/ Bureau for Behavioral
Health and Health Facilities/ Mildred
Mitchell-Bateman Hospital, Petitioners Below,
Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 2011, true and accurate copies of the foregoing **PETITIONER'S BRIEF** and the **APPENDIX** in this case were delivered by hand to counsel for all other parties to this appeal as follows:

Jennifer K. Akers
Assistant Attorney General
West Virginia DHHR
812 Quarrier St., 2nd Floor
Charleston, WV 25305

Signed: 

Kevin Baker (WV Bar No. 10815)
Counsel of Record for Petitioner