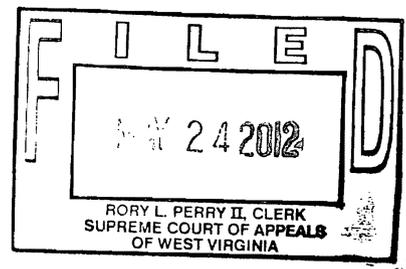


No. 12-0287



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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

At Charleston

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WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,  
DIVISION OF HIGHWAYS, a West Virginia agency,

Petitioner

v.

KENNETH R. LITTEN

Respondent

From the Circuit Court of  
Kanawha County, West Virginia  
(Civil Action No. 11-AA-132)

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**BRIEF FOR THE PETITIONER**

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## ASSIGNMENTS OF ERROR

1. **The Grievance Board Improperly Required the DOH to Present Direct Evidence to Show that Respondent Litten was the Offending Employee and Held the DOH to a Higher Standard of Proof than the Applicable Preponderance of the Evidence Standard.**
2. **The ALJ Abused Her Discretion and the Circuit Court Erred in Affirming Her Rulings When She Held That Evidence Showing That Respondent Litten Accessed Pornographic Websites on Other Occasions Had No Relevance to Whether It Was More Likely than Not that He Committed the Offense Detailed in the Network Violation Report; This Evidence Was Directly Relevant to the Issue of Identity, which Respondent Litten had Challenged.**
3. **Although the Circuit Court Found that the ALJ “Was Mistaken” in Her Understanding of Clear and Unambiguous Technological Evidence, It Failed to Reverse the Board’s Decision Based Upon the Substantial Evidence Relating to Respondent Litten’s Availability to Commit the Offenses.**

## STATEMENT OF THE CASE

The Decision below substantially increases the burden placed on all State executive branch agencies in disciplinary grievance hearings by altering well-settled standards of due process and burdens of proof. These modifications, which conflict with settled law, inhibit State executive branch agencies from appropriately resolving conflicts that involve fundamentally important State functions, including personnel administration and network security.

The Governor’s Office of Technology (“OT”) is statutorily charged with oversight of various issues in the executive branch of State government, including information security. *W. Va. Code* § 5A-6-4(a). In carrying out this statutory mandate, the Chief Technology Officer (“CTO”) issued an Information Security Policy, which provides a number of unacceptable uses of State technological resources, including viewing sexually explicit material. (App. vol. II, 472-490). The Information Security Policy also makes employees responsible for “any actions that can be identified to have originated from [their] computers.” (*Id.* at 476).

The actions taken on a single State computer can compromise the security of the entire State network because each computer presents a point of entry into the network through which malware may be dispensed, including but not limited to viruses and worms. (*See generally* App. vol. I, 195-432). Risks presented by malware to the State's information technology resources include the compromise of confidential data, not only to the Division of Highways ("DOH"), but also to "all the executive branch agencies" because they are all on the same network. (App. vol. III, 1074-075). Obviously, such risks can be costly to identify and fix; they can also result in breaches of personal information, including health and financial information, retained by State agencies; and they can result in costly litigation. (App. vol. III, 1074-1075).

The OT's representative opined that exposing the State's network by leaving a computer logged on, or by sharing or failing to protect a User ID and password, presents potentially more risk than navigating purposefully to a few possibly risky websites. (App. vol. III, 1074). This is because if viruses or other malicious software is introduced into the system, there is no "audit trail" to allow the OT from being able to "stop it before it's done an excessive amount of damage." (App. vol. III, 1074).

Training given to State employees, such as Respondent, is effective: The general understanding of mechanics in his district, trained using the same Cyber Security training program taken by Respondent, was that State technological resources were for "official state use," (App. vol. III, 1102), and that it was not "all right to access adult-oriented material." (*Id.* at 1103, 1131). Based on the training provided to them, some mechanics also understood that adult-oriented websites could cause damage to State technological resources due to the introduction of malware. (*See* App. vol. III, 1131, 1146).

Respondent is classified as a Transportation Worker 3 Mechanic. He is assigned to the District 5 headquarters. (App. vol. III, 1184). Respondent began working for the DOH permanently on or about November 8, 1999. (App. vol. I, 176-177). He worked in a district-level shop with several other mechanics. (App. vol. III, 1090-1091). There was a break room in the back of the shop containing a computer shared by the mechanics for work-related use. (App. vol. III, 1091). However, each mechanic had his own unique User ID and password. (App. vol. III, 1096).

Respondent was trained extensively concerning the proper use of State-and DOT-owned technological resources, and he received Certificates of Completion regarding his understanding of the same, both with regard to the OT's Information Security Policy and the DOT's Privacy Policy Training. (App. vol. III, 1076, 1166, 1190). The online training taken by Respondent is replete with descriptions of threats to the State's network, and it emphasizes each user's responsibility for the safeguarding of confidential data. (*See generally* App. vol. I, 195-432). Likewise, the Privacy Policy Training taken by Respondent in April 2010 discussed the importance of safeguarding the information system, locking computers, and keeping passwords private. (*See id.*)

Shortly after August 27, 2010, the OT automated system found that the User ID assigned to Respondent had requested literally hundreds of websites that "were categorized as known pornography or offensive search engine keywords." (App. vol. I, 185-194, 169-172; vol. II-III, 513-1044). After this initial risk to the State's computer network was detected, the OT examined Respondent's User ID computer records for a 24-hour period surrounding the offense date to determine whether the inappropriate searches were intentional. (App. vol. III, 1055).

The OT issued an Network Violation Report (“NVR”) to the Department of Transportation for conduct traced back to Respondent’s unique User ID. (App. vol. III, 1060). On three different occasions on August 27, 2010, searches for adult-oriented material were performed *within minutes of Respondent logging in*:

- Respondent logged in at 7:25, and by 7:43, searches for “crotchless,” for example, were performed. (App. vol. I, 169-172; vol. II, 456).
- Respondent logged in at 10:02, and within two minutes, a search for a particular actress “nude” was performed. (*Id.*)
- In these cases, as well as at one other time on the day of the offense, images of naked women were obtained. (App. vol. II-III, 513-1044).

In addition to these searches being performed shortly after Respondent logged in, testimonial and documentary evidence presented to the Grievance Board clearly demonstrated that Respondent was personally responsible for executing searches designed to obtain inappropriate, adult-oriented images:

- All searches were performed under his User ID. (App. vol. III, 1060).
- Several employees at the shop saw adult-oriented images displayed on the computer when Respondent was manning the keyboard. (*See* App. vol. III, 1104, 1133, 1137, 1145, 1147).<sup>1</sup>
- No one ever saw anyone other than Respondent manning the keyboard when adult-oriented images were displayed. (*See* App. vol. III, 1106-1107, 1133, 1143, 1145).

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<sup>1</sup>Note that the ALJ prohibited the Petitioner DOH from presenting detailed accounts of this testimony. Despite this prohibition, counsel for the Petitioner was able to solicit from the witnesses that they had seen Respondent viewing adult-oriented images on the shared machine in the break room, but solely for the purposes of rebutting Respondent’s claims of mitigation and discrimination.

- Respondent described to his coworkers methods he used to circumvent system security and access adult-oriented images on the break room computer. (*See, e.g.*, App. vol. III, 1106).
- The search terms typed into the computer demonstrated the intent to obtain adult-oriented images, such as “crotchless,” “blackzilla,” “dildo,” and “nude.” (App. vol. I, 169-172).

Evidence that was excluded at the hearing (but which was marked for appeal as Respondent’s Exhibits 17, 23, and 24) demonstrated that on several other occasions, Respondent had conducted searches for sexually explicit material. This evidence corroborated that offered by the Petitioner’s witnesses, who testified, albeit minimally due to the ALJ’s rulings, that they had seen Respondent access such material on multiple occasions and that they had never seen anyone else do so.

At least four witnesses were prepared to present detailed testimony that they had personally seen Respondent, and only Respondent, viewing pornography on the same computer on multiple occasions. (*See* App. vol. III, 1106-1109) (Mr. Van Meter saw Respondent view adult-oriented images on the computer); (App. vol. III, 1133-1134) (Mr. Morton saw inappropriate images on the computer while Respondent was manning the keyboard); (App. vol. III, 1139-1140, 1143) (on 5 or 6 occasions, Mr. Streets saw Respondent displaying topless women on the computer); (App. vol. III, 1145) (Mr. Riggleman saw Respondent displaying naked women on the computer).<sup>2</sup>

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<sup>2</sup>While counsel for Petitioner DOH was able to elicit the basics of this testimony, the ALJ refused to admit more detailed information to consider what was admitted for any purpose other than combating Respondent’s claims of mitigation or discrimination; that is, whether Respondent was treated differently than anyone else who might have displayed such images and whether his penalty should be reduced.

Technological evidence regarding usage of the break room computer paralleled the evidence proffered by the witnesses: On several occasions, even though many mechanics shared the break room computer, only Respondent's User ID was in use when sexually oriented sites were visited. Some of the searches he conducted were "voyeur g string," "what boys want," and "upskirt." (App. vol. II, 442-447) (not admitted).

In response to these serious charges, Respondent asserted that someone else must have accessed the websites. He claimed that he did not access the prohibited information and that he wrote his password on the back of a piece of paper on the bulletin board because he could not remember it. (App. vol. III, 1185, 1191). Even accepting his assertion that his password was posted on the back of the sheet of paper, the password that he would have used the day of the offense, August 27, 2010, was not written on the paper. (App. vol. III, 1215).

All District 5 shop employees had ample opportunity to see the material on the bulletin board because it was directly behind the computer monitor located in the break room that they shared. (App. vol. III, 1103, 1135, 1139, 1145, 1148), and many could describe the contents of the board. However, no one had ever seen numbers or letters fitting the format of a State-issued User ID or Respondent's password. (*See* App. vol. III, 1103, 1139).

The Respondent spent much time at the hearing attempting to show that he could not have been away from other mechanics long enough to have conducted the searches at hand. On August 27, 2010, Respondent worked on three projects with three different mechanics. It was the practice of the mechanics to estimate their time in one-half hour increments. (*See* App. vol. III, 1132-1133, 1141). Respondent conceded that the times logged for the equipment repair of the date of the violation were not exact. (App. vol. III, 1194). He also conceded that he did not write down breaks, bathroom breaks, or smoke breaks. (App. vol. III, 1195). In fact, he agreed that at

times, what he recorded could have been off as much as 15 minutes in either direction, resulting in a 30 minute range. (App. vol. III, 1172).

Unfortunately, the ALJ misconstrued critical technological evidence before her. The OT representative, Jim Weathersbee, clearly testified that *logoff information was not present in the log files*:

Q. Now does Respondent's 21 – it says “log on/log off.” Does this also show logoffs, because it looks like there are double entries for this row?

A. No, no. It doesn't show logoffs. Like I said, when we pull this report, we only pull logon attempts, and that's a type 528. A logoff attempt is a type 540, which we do not pull, so there will be no logoffs on here, on this report, and the reason why we do that is because logoffs - - there's a lot of different things that it logs off at various times, and we don't have a mechanism to show when the individual actually logged off the PC.

(App. vol. III, 1141).

Despite this straightforward testimony, the ALJ misinterpreted the log files to determine that, for each of the three violations on August 27, the user was “logged in” for 45 minutes, approximately one-half hour, and 45 minutes, respectively. (*See* App. vol. I, 20-21). There is no basis in the record for these Findings of Fact. As a result of this fundamental misunderstanding, the ALJ was under the impression that Respondent would have had to have been absent from his assignments for 30-45 minutes at a stretch. This is simply not the case.

In fact, no witness could testify regarding Respondent's whereabouts before 7:30 a.m. on the date of the offense. *See, e.g.*, (App. vol. III, 1143). Likewise, no employee could testify to Respondent's whereabouts between the times he worked on machinery that day or during breaks, lunches, or other rest periods.

Respondent had previously been suspended by the Petitioner DOH for 10 days due to a misuse of State resources that stemmed from an incident involving a missing crank sensor.

Respondent did not challenge the suspension. (App. vol. III, 1161). Because of his existing prior offenses, he was dismissed, consistent with DOT's practice of progressive discipline and the discipline imposed on other employees who engaged in second major offenses for related conduct. (App. vol. III, 1163, 1168).

### **SUMMARY OF ARGUMENT**

The ALJ's Decision, and the Circuit Court's affirmance, will effectively stymie State executive branch agencies' ability to discipline employees who violate important State policies by raising the burden of proof in disciplinary matters presented to the Grievance Board. Grievances are already presented in an environment replete with constitutional, statutory, and administrative protections of due process, and to effectively increase those requirements is to tear away at the due process protections owed to agencies in receiving fair adjudications. In other words, increasing these protections further inhibits employers' right to a fair hearing. Further, these increases in standards would detrimentally increase litigation and other costs to State agencies by requiring criminal-like investigations any time identity was challenged. These increased standards are not cognizable under the laws of this State, and to recognize them would be to restrain the fundamentally important governmental activities that are entrusted to State executive branch agencies.

Public policy favors an operational and protected State computer network. Executive branch agencies are entrusted, and expected, to maintain millions of sensitive and confidential files on behalf of West Virginia citizens and employees, including health and financial records. Malware, viruses, worms, and other intrusions place the network at great risk of corruption and information theft. Therefore, the State has a fundamental obligation to secure this information to

the greatest extent reasonable, and it had done so by establishing statutes and policies to safeguard the network.

The ALJ's Decision effectively raises the standard of proof for State employers in disciplinary grievances and requires direct evidence of identity. All a grievant need do is commit the offense in private and then deny all of his actions to escape disciplinary action.

In this case, there was significant circumstantial evidence that easily demonstrated that it was more likely than not that Respondent Litten was the individual conducting the adult-oriented searches on August 27. The searches were conducted with the Respondent's unique, State-issued User ID and password; testimonial evidence was available that coworkers had seen adult-oriented images displayed on the break room computer while Respondent was manning the keyboard; testimonial evidence was available that Respondent was the only employee that others had seen viewing adult-oriented materials on the computer; and testimony was admitted that Respondent had informed other employees of his various methods for circumventing the network security blocks.

The Grievance Board ALJ abused her discretion when she refused to admit or consider evidence that Respondent had violated the Information Security Policy by accessing pornographic materials on the computer on many other occasions. Her ruling clashes against the liberal nature of Rule 401 of the Rules of Evidence regarding relevant evidence because the excluded witness testimony bore directly on the issue of the identity of the user who committed the searches. It was clearly relevant and offered for a proper purpose under Rule 404(b). Further, her ruling is not in line with Grievance Board precedent that allows after-acquired evidence to be admitted.

In restricting the evidence that Petitioner was able to enter into evidence, the ALJ limited the Petitioner by effectively requiring direct proof of identity. Requiring Petitioner to put on direct proof is violative of the Grievance Board's own Administrative Rule and of its past precedent. Additionally, requiring Petitioner to put on direct proof is violative of Petitioner's due process rights, which include the right to present its case in an administrative setting adjudicating the rights of the parties.<sup>3</sup>

Petitioner offered the evidence to show that it was more likely than not that Respondent Litten had conducted the searches on August 27: eyewitness testimony stating that Respondent had viewed adult-oriented material on other occasions and documentary evidence of adult-oriented searches he conducted on other dates. This should have been admissible under Evidence Rule 404(b) to show identity. Further, the Respondent cannot be heard to claim that he could not put on a proper defense because he was not properly informed of the testimonial "accusations" against him. This is settled by the fact that Respondent was served Petitioner's witness list and was put on notice of the individuals that would be testifying, which is all that is required by the Board. Additionally, as Respondent was at the hearing, his due process rights would not have been violated because he clearly would have had an opportunity to properly cross-examine his accusers – where the ALJ would make findings as to credibility. Instead, it was Petitioner's due process rights that were slashed away by the ALJ's decision to not consider relevant witness testimony and documentary evidence.

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<sup>3</sup> In *McJunkin Corporation v. West Virginia Human Rights Commission*, 179 W. Va. 417, 369 S.E.2d 720 (1988), this Honorable Court held that "[d]ue process of law, within the meaning of the State and Federal constitutional provisions, extends to actions of administrative officers and tribunals, as well as to the judicial branches of the governments." *Id.* at 417. Additionally, *W. Va. Code* § 6C-2-4(c)(2) states that "[t]he administrative law judge shall conduct all proceedings in an impartial manner and *shall ensure that all parties are accorded procedural and substantive dues process.*" *Id.*

The ALJ committed substantial and prejudicial error by misconstruing clear and substantial evidence. Mr. Weathersbee, a representative of OT, clearly and unambiguously stated that logoff information is not collected for Network Violation Reports, and he gave precise reasons for why this is so. Despite this testimony, the ALJ supported the majority of her conclusions on her misconstruction of the evidence: Namely, she concluded that Respondent could not have been the individual logged in because to do so would have required him to be gone from his repair work for anywhere from 45 minutes to one and one half hour. The ALJ's conclusions are clearly wrong, and the Circuit Court Judge agreed with Petitioner that the ALJ's Decision relied on logoff information was wrong. The ALJ's ill-conceived conclusions caused her to disregard other persuasive and substantial evidence that would have supported a finding that Petitioner DOH had met its burden of proof.

Finally, the ALJ's clear error was so substantial that it unfairly prejudiced Petitioner. The ALJ placed so much weight on her misunderstanding that she discredited the other factual and evidentiary considerations associated with the time of the searches. In addition, the ALJ's conclusion that Respondent lacked opportunity to perform the searches tainted her reasoning as to highly probative evidence before her. It is clear that the ALJ's reasoning was clouded by her misunderstandings, and her Decision should, therefore, be REVERSED.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

This case is one of fundamental public importance because it represents a growing trend of the Grievance Board effectively increasing the standard of proof and altering the type of evidence required by its own administrative rule and precedent. If this trend is to continue, there is a real danger that State employers' ability to hold employees accountable for their actions will be stymied. Current disciplinary and grievance procedure already contains significant

constitutional and statutory due process rights for State employees. Due process rights also exist for State employers, however, and the trend exhibited in the Decision below is impinging upon these rights.

Under the Grievance Board Decision in this case, the Governor's Office of Technology and State agencies also will be severely hampered in securing and maintaining the State-wide network, including personally identifiable information of employees and citizens. Additionally, the case at bar involves the issues of just how far agencies must go to justify disciplining employees whose behavior presents a danger to the State's network and technological resources. This is not a simple appeal from a disciplinary grievance; rather, State tax dollars are at stake due to the security of the State's computer network and the data present therein.

As this case presents questions of fundamental public importance, Petitioner DOH requests Rule 20 argument.

### **ARGUMENT**

The Circuit Court's Order affirming the Grievance Board Decision should be reversed because the Grievance Board Decision is clearly wrong in view of the reliable, probative, and substantial evidence on the whole record and is characterized by clearly unwarranted exercise of discretion.

"A final order of the hearing examiner for the West Virginia [Public] Employees Grievance Board, made pursuant to W. Va. Code, 6C-2-1, *et seq.*, and based upon findings of fact, should not be reversed unless clearly wrong." *Martin v. Barbour County Bd. of Educ.*, 228 W. Va. 238, 719 S.E.2d 406, 407 (2011).

When reviewing the appeal of a public employee's grievance, this Court reviews decisions of the circuit court under the same standard as that by which the circuit court reviews the decision of the administrative law judge. . . . Grievance rulings

involve a combination of both deferential and plenary review. Since a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. Credibility determinations made by an administrative law judge are similarly entitled to deference. Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed de novo.

*Shanklin v. Bd. of Educ. of County of Kanawha*, 228 W. Va. 374, 719 S.E.2d 844, 848 (2011).

The Court's review is governed by *W. Va. Code* § 6C-2-5, which states that a party may appeal the decision of the Grievance Board if the decision is defective for the following reasons:

- (1) *Is contrary to law or a lawfully adopted rule or written policy of the employer;*
- (2) *Exceeds the administrative law judge's statutory authority;*
- (3) *Is the result of fraud or deceit;*
- (4) *Is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or*
- (5) *Is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.*

*W. Va. Code* § 6C-2-5 (emphasis added). Additionally, "[t]he court may reverse, vacate or modify the decision of the administrative law judge, or may remand the grievance to the administrative law judge or the chief administrator for further proceedings." *W. Va. Code* § 6C-2-5(d).

**I. The Grievance Board Improperly Required the DOH to Present Direct Evidence to Show that Respondent Litten was the Offending Employee and Held the DOH to a Higher Standard of Proof than the Applicable Preponderance of the Evidence Standard.**

The ALJ erroneously held Petitioner DOH to a higher standard of proof than what is cognizable under the law of this State and required direct evidence of Respondent's identity. The proper standard of proof in public employee grievance hearings is preponderance of the evidence. *W. Va. C.S.R. §153-1-3, Nicholson v. Logan County Bd. of Educ.*, 1995 WL 917751 (*W. Va. Educ. & St. Empl. Griev. Bd. Docket No. 95-23-129*.Oct. 18, 1995); *Landy v. Raleigh*

*County Bd. of Educ.*, (W. Va. Educ. Empl. Griev. Bd. Docket No. 89-41-232, Dec. 14, 1989). “The grievant bears the burden of proving the grievant's case by a preponderance of the evidence, except in disciplinary matters, where the burden is on the employer to prove that the action taken was justified.” *W. Va. C.S.R.* § 153-1-3. “A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” *Jones v. Fayette County Bd. of Educ.*, 2009 WL 2569623, at \*2 (W. Va. Pub. Empl. Griev. Bd. Docket No. 2009-1075-FayED, Aug. 5, 2009). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Resources*, (W. Va. Educ. & St. Empl. Griev. Bd. Docket No. 92-HHR-486, May 17, 1993). By its own administrative rule and precedent, the Public Employees Grievance Board must apply a preponderance of the evidence standard of proof in reaching its decisions; it did not do so here.

**A. The Grievance Board erroneously required the DOH to show direct evidence to meet its burden of showing that Respondent Litten more likely than not committed the offense.**

The Grievance Board ALJ disregarded powerful circumstantial evidence that Respondent Litten was responsible for the August 27 searches. As this case arose regarding a disciplinary matter, the Petitioner DOH had the burden of showing, by a preponderance of the evidence, that Respondent Litten had committed the August 27 searches. *See W.Va. C.S.R.* § 156-1-3. The Grievance Board has long considered circumstantial evidence in its determinations, *see, e.g., Coleman v. Dept' of Health & Hum. Res.*, 2004 WL 231827, at \*4 (W. Va. Educ. & St. Empl. Griev. Bd. Docket No. 03-HHR-318, Jan. 27, 2004); *see also Marple v. W. Va. Bd. of Trustees*, 1992 WL 802015, at \*2 (W. Va. Educ. & St. Empl. Griev. Bd. Docket No. 91-BOT-190, July 27, 1992), yet it refused to do so in this case.

Respondent was extensively trained concerning the proper use of State technological resources, and he received various Certificates of Completion to indicate his understanding of the training. In his training exercises, Respondent was made well aware that an action on a single State computer can compromise the security of the entire State network because each computer represents a point of entry into the network through which malware, viruses, worms, and other harmful and malicious programs can corrupt or steal sensitive records, such as health and financial records. Importantly, the general understanding among mechanics who had completed the same Cyber Security training program considered use of State technological resources to be only for “official state use.” (App. vol. III, 1102).

Despite Respondent’s extensive training in Cyber Security, the Petitioner DOH put on evidence that exceedingly showed that Respondent Litten was the individual who was logged into the computer on August 27 when the offending searches were conducted:

- The Network Violation Report created by the Governor’s Office of Technology, which listed Respondent’s User ID on the computer when the searches were performed. This Report went through multiple levels of review to weed out false positives.<sup>4</sup>
- Documentary evidence showing that all searches were performed under Respondent’s User ID.

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<sup>4</sup>The OT representative, Jim Weathersbee, testified that computer records for Respondent’s User ID were examined over a 24-hour period surrounding the date of the offense, August 27, 2010. This was done to ensure that the inappropriate searches were conducted with intent, as opposed to innocent or inadvertent searches.

- Testimonial evidence that coworkers had seen adult-oriented images displayed on the break room computer when Respondent was manning the keyboard.<sup>5</sup>
- Testimonial evidence that at no time was anyone other than Respondent seen sitting at the break room computer when adult-oriented images were displayed.
- Testimonial evidence that Respondent described to his coworkers methods he used to circumvent system security and access adult-oriented images on the work computer.<sup>6</sup>

The Office of Technology's documentation showed that Respondent's User ID was the *only* network access ID used to search for pornographic materials over a 2-month period. (App. vol. II, 442-447) (exhibit excluded). Witnesses specifically identified Respondent as the only individual seen manning the break room keyboard while pornographic materials were displayed on the computer screen. While the ALJ highlights her finding that Respondent had posted his User ID and password on the back of a sheet of paper on the break room bulletin board, and, thus, "anyone could have used his identification number and password to log onto the computer," this flies in the face of the fact that no one saw the Respondent's login information posted on the back of a sheet of paper on the bulletin board. (App. vol. I, 25).

Even if the User ID and password had been posted on the bulletin board, Respondent's complete login information was conclusively not posted on the bulletin board on August 27. As Respondent was required to change his password every 30 days, he updated his password by changing the end-numbers monthly. Respondent Litten's Exhibit 1 shows that the password stopped being updated at "Sissy13." (App. vol. III, 1215). Respondent testified at the grievance

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<sup>5</sup>The ALJ prohibited the DOH from presenting much of this testimony. Despite this prohibition, counsel was able to solicit that the witnesses had seen Respondent viewing adult-oriented images on the computer, but solely for the purposes of rebutting Litten's claims of mitigation and discrimination.

<sup>6</sup>For example, he would "type in a word the program [did not] recognize, such as 'waif.'" He also described using "different languages" to circumvent the web-filtering blocks.

hearing that at the time he left his employment with the DOH in November of 2010, his password was up to Sissy25 or Sissy26. (See App. vol. III, 1192). As Respondent only changed his password every 30 days, it was clearly demonstrated to the ALJ that on August 27, Respondent's password had an end-number very different from what was last written on Respondent's Exhibit 1.<sup>7</sup> This indicates that no individual had access to the correct login information on August 27 other than the person to whom the User ID was assigned, Respondent Litten.

The Grievance Board ALJ was in error when she refused to admit witness testimony that expressly identified Respondent Litten as not only an individual who has looked at adult-oriented materials on the break room computer, but that *he was the only individual ever seen displaying adult-oriented materials on the computer*. The question goes to the issue of credibility; in the case at bar, the issue is the credibility of multiple witnesses versus that of Respondent Litten, who had an obvious motive to lie.

“In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required.” *Jones v. W. Va. Dep't of Health & Human Res.*, (W. Va. Educ. & St. Empl. Griev. Bd. Docket No. 96-HHR-371, Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, (W. Va. Educ. & St. Empl. Griev. Bd. Docket No. 95-HHR-066, May 12, 1995). “An Administrative Law Judge is charged with assessing the credibility of the witnesses.” *See Lanehart v. Logan County Bd. of Educ.*, (W. Va. Educ. & St. Empl. Griev. Bd. Docket No. 95-23-235, Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, (W. Va. Educ. & St. Empl.

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<sup>7</sup> Even the ALJ acknowledged, and went no further than acknowledgment, that this fact “raises the question of how someone else knew [Respondent's] password when the last password posted on the bulletin board was Sissy13, and the [Respondent's] password in August of 2010 would have been somewhere between Sissy13 and Sissy25.” (App. vol. I, 27).

Griev. Bd. Docket No. 93-HHR-050, Feb. 4, 1993). “The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Crouserv. Tax Dep’t*, 2008 WL 3821783 (W. Va. Pub. Empl. Griev. Bd. Docket No. 2008-0982-DOR, July 25, 2008), *See Holmes v. Bd. of Directors/W. Va. State College*, (W. Va. Educ. & St. Empl. Griev. Bd. Docket No. 99-BOD- 216, Dec. 28, 1999); *Perdue, supra*.

The ALJ concluded that “[Respondent has consistently denied the allegations against him. In this case, there was nothing in [Respondent’s] demeanor or attitude which would lead the undersigned to conclude that he was lying when he denie[d] the allegations.” (App. vol. III, 26). The ALJ’s decision to severely restrict the testimony of Petitioner’s witnesses allowed her to assess only the credibility of the Respondent and found him credible despite him having a clear motive to lie.

In applying the Grievance Board’s own precedent, the ALJ’s decision to give credence to the Respondent’s denials of responsibility, despite having multiple witnesses testify that they had seen him observing pornographic sites on other occasions, is clearly wrong in view of the reliable, probative, and substantial available evidence. Respondent had a motive to be untruthful, as he faced disciplinary action.

The Board has previously recognized the inherent desire for grievants to lie when challenging disciplinary action. In *Young v. Division of Natural Resources*, the Grievance Board

held that, because the grievant's career was being threatened, he had a motive to lie. *Young v. Div. of Natural Res.*, 2009 WL 4093310, at \*6 (W. Va. Pub. Empl. Griev. Bd. Docket No. 2009-0540-DOC, Nov. 13, 2009). "When taking this into consideration with a prior reprimand for being untruthful during an internal investigation, Grievant is not a credible witness." *Id.* at \*6.

In this case, Respondent Litten had been reprimanded for misuse/theft of a crank sensor, and his employment was obviously at risk when he engaged in gross misconduct by violating relevant policies. The other testifying witnesses had no bias or motive to lie, and there were no questions raised by the Respondent concerning the witnesses having a motive, or a propensity, to lie. Instead, the ALJ concluded that she would not admit the witness' testimony to support an answer to the question of whether the Respondent more likely than not performed the Internet searches on August 27.

Witnesses saw him viewing sexually-oriented images. The Office of Technology documentation showed that he was the only one logged in when pornography was accessed on several occasions. The ALJ credited Respondent's denial despite an obvious motive to lie and despite the consistent testimony of multiple credible witnesses that they had seen him produce pornographic images on other occasions. The ALJ made no credibility determinations as to any witnesses other than Respondent, and she never mentioned that his coworkers had seen him accessing pornography on other occasions. These are material omissions in the Decision.

Even without the testimony of multiple witnesses stating that Respondent had viewed pornographic materials on the break room computer, the Petitioner DOH easily met its burden by a preponderance of the evidence. Petitioner showed that Respondent's unique access User ID was the only one used to search for pornographic images. Also, although Respondent claims that his password was posted on the back of a sheet of paper, no one saw it, and the ALJ even

acknowledged that the password posted on the bulletin board was not current on August 27. Therefore, the ALJ was clearly wrong in view of the reliable, probative, and substantial evidence on the whole record in concluding that Petitioner had not met its burden in showing that it was more likely than not that Respondent had conducted the searches, and she exceeded her authority by requiring the production of direct evidence on the issue of identity.

**B. The ALJ erred in failing to apply the preponderance of the evidence standard when she relied heavily on her misunderstanding of the technological evidence.**

Despite clear and substantial evidence that showed that logoff data was not collected for August 27, the ALJ made findings of fact that Respondent logged off the computer at specific times. The OT Representative, Jim Weathersbee, clearly testified to the fact that logoff data was not available. (App. vol. III, 1141). The ALJ's error prejudiced Petitioner DOH by further increasing the burden of proof based on misconstrued evidence. The ALJ concluded that Respondent could not have conducted the pornographic searches because he would "have had to have left in the middle of working on the box truck and been away for more than one half hour in order to have been on the computer at this time." (App. vol. I, 28). Further, she concluded that "[s]omeone logged onto the community computer using [Respondent's] identification number and password at 12:30 p.m., and logged off almost 45 minutes later at 1:13 p.m., right in the middle of the time [Respondent] was helping [a coworker]." (*Id.*). Logoff data was never introduced into evidence, and, indeed, the data was not even available. By concluding that Respondent logged off at specific times, the ALJ prejudiced Petitioner DOH by failing to recognize clear and substantial evidence, thus increasing Petitioner's burden of proof to something far more stringent than a preponderance of the evidence standard.

**C. The case at bar is indicative of the Grievance Board's growing trend in holding employers to a higher burden of proof in disciplinary grievances.**

If this case is affirmed, the Decision below sets forth a standard that requires government agencies to supply direct evidence to meet their burden in disciplinary grievances involving identity, and that requires them to proffer proof substantially greater than that required by a preponderance of the evidence standard. Indeed, a review of other Grievance Board decisions relating to information security discipline shows that direct evidence is always required unless the employee admits to conducting the searches. Based on the Grievance Board's decision, all a grievant need do is deny that he ever performed the inappropriate searches to avoid disciplinary action. This concept is not limited, however, to information security issues – basic issues such as the type of evidence and burden of proof will permeate all disciplinary grievances.

In *Matney v. Department of Health & Human Resources/Welch Community Hospital*, 2012 WL 1494646 (W. Va. Pub. Empl. Griev. Bd. Docket No. 2011-0972-DHHR, Mar. 30, 2012), the grievant was a shopkeeper at Welch Community Hospital, and he was dismissed after his employer found that his computer had been used to access pornography. *Id.* at \*1. The grievant admitted that he left his computer on and unattended each morning for between 90 minutes to 2 hours each morning while he made copies, but he denied that he conducted the searches. *Id.* at \*2. Grievant's computer was in a locked office, but he claimed that multiple people had "universal keys." *Id.* at \*2. The NVR stated that grievant logged onto his computer at approximately 6:30 a.m. on the day of the computer misuse, which was when his normal workday began. *Id.* at \*2. The Information Technology staff adjusted the settings on the computer so that it could not automatically shut down during long user absences because the computer was old and slow. *Id.* at \*3. The grievant's computer was only used to search for adult-oriented materials during a window of one hour and twenty minutes. *Id.* at \*5. The Grievance

Board concluded that the grievant could not have performed the searches due to his work routine:

It is undisputed that Grievant's computer was utilized on October 28, 2010, between 6:40 a.m. and 8:00 a.m. to access prohibited internet sites. However, Grievant was able to demonstrate that his regular work schedule routinely takes him away from his computer during that period each day. [DHHR] did not prove that Grievant violated any policy relating to accessing and viewing prohibited webs-sites. [DHHR] did prove that Grievant left his computer logged on every day while he was away from it for more than an hour. This practice did violate the DHHR Information Security Policy.

*Id.* at \*5. Thus, the Grievance Board decided that the grievant could not have conducted the searches because he would have been away from his computer when the searches were performed.

In *Matney*, the decision makes no reference to witnesses seeing the grievant making his copies at the time of the searches, and there was no indication that he necessarily makes the copies at exactly the same time every single day. *See generally id.* Further, despite the ALJ's focus on the fact that the grievant's computer was set so that it would not automatically shut-down, there was no mention of the fact that grievant could have simply "locked" or "logged off" his computer without shutting it down while he was away. The searches were performed during his normal working hours, and the searches were conducted using his unique User ID and password. The grievant consistently violated relevant Information Security Policy relating to securing his computer before stepping out, and the searches were performed within a small 1 hour and 20 minute window. Lastly, there was no indication that he made copies at exactly the same time each day. Thus, the Grievance Board was clearly holding DHHR to a higher burden of proof than preponderance of the evidence.

Another case that demonstrates the increased burden of proof being applied by the Grievance Board is *Henry v. Division of Highways*, 2011 WL 3970408 (W. Va. Pub. Empl.

Griev. Bd. Docket No. 2011-0944-DOT, August 31, 2011). In that case, the grievant was suspended for twenty days for his first offense of attempting to access pornographic materials on his state computer. *Id.* at \*1. The grievant listened to the Howard Stern show every morning in his office, and one morning, Raven Alexis, a “porn star,” was a guest on the show. *Id.* at \*3. Between the hours of 6:00 a.m. to 9:00 a.m., 12:00 p.m. to 2:00 p.m., and after 3:00 p.m., the grievant’s computer was used to access pornographic material. *Id.* at \*2. Several of the searches online were for Raven Alexis, specifically “raven alexis on sybian” and “raven alexis.” *Id.* at \*3. These searches were made at 7:54 a.m. Just a few minutes later, at 8:00 a.m., two searches were made for “howard stern” and one for “sal the stockbroker.” *Id.* at \*3. Throughout the day, searches for “vag pic cell phone” and “puss pics” were conducted. *Id.* at \*3. Just as in the case at bar and *Matney*, no eyewitness saw the grievant viewing the images, and the grievant denied that he conducted the searches.

In *Henry*, the ALJ made a finding of fact that it was, indeed, the grievant who performed the search for “Raven Alexis,” a known pornography star who was a guest on the Howard Stern Show. *Id.* at \*5. However, the ALJ concluded that the “Grievant did not run any of the other inappropriate searches identified in the Network Violation Report,” *id.* at \*5, including one only six minutes later, for the same star mounted on a female masturbation device. This conclusion is at odds with, and requires more than, the preponderance of the evidence standard given that the ALJ concluded that “Respondent clearly demonstrated that someone used Grievant’s computer to access, and attempt to access, sexually explicit websites on August 27, 2010.” Incredibly, the ALJ found that the agency “*produced no proof, however, that it was Grievant who did so.*” *Id.* at \*5 (emphasis added).

It is clear that the ALJ in *Henry* required direct evidence in making her conclusions, and no camera or eyewitness testimony was available to satisfy this requirement. While the grievant admitted to listening to the Howard Stern Show *every morning*, Raven Alexis was a guest on the show during the morning of the searches, and the grievant had admitted to searching for “Raven Alexis,” the ALJ only made a finding that grievant conducted searches regarding Raven Alexis, not even “Howard Stern.” *See generally id.* In fact, the ALJ failed to conclude that Grievant had searched for “raven alexis on sybian,” despite the fact that both searches for “raven alexis” and “raven alexis on sybian” were searched for between 7:54 a.m. and 8:00 a.m. Had the review been conducted under the applicable preponderance of the evidence standard, the necessary conclusion was that the two searches were performed by the same person. The ALJ supported her conclusion that grievant had searched for Raven Alexis by pointing to testimony that he had previously admitted to conducting the search to his supervisor. *Id.* at \*5. That the searches were conducted using the grievant’s User ID and password, that the grievant admitted to searching for the pornography star, that the searches corresponded with grievant’s interest in the Howard Stern Show, and that the searches involved the same pornography star (appearing on the Howard Stern Show) using a masturbation device should have easily and clearly satisfied the preponderance of the evidence standard, yet the ALJ concluded that these highly probative facts did not meet that minimal burden of proof.

As in the case at bar, the ALJ accepted the grievant’s testimony that he did not conduct the searches, contrary to the substantial evidence. She placed undue weight on that fact that no one testified to seeing the grievant viewing the materials and that the surveillance video was no longer available, as it was only retained for thirty days. *Id.* at \*4. While it is true that video surveillance or eyewitness witness testimony would have greatly, if not conclusively, supported

the agency's action in *Henry*, there has never been a requirement for such direct evidence of identity, not only in computer and network misuse cases, but in any disciplinary grievance. The Grievance Board has long considered circumstantial evidence in evaluating the satisfaction of the preponderance standard. *See, e.g., Coleman v. Dept' of Health & Hum. Res.*, 2004 WL 231827, at \*4 (W. Va. Educ. & St. Empl. Griev. Bd. Docket No. 03-HHR-318, Jan. 27, 2004); *see also Marple v. W. Va. Bd. of Trustees*, 1992 WL 802015, at \*2 (W. Va. Educ. & St. Empl. Griev. Bd. Docket No. 91-BOT-190, July 27, 1992). The ALJ in the case at bar is necessarily requiring direct evidence.<sup>8</sup>

The decisions in *Matney*, *Henry*, and the case at bar demonstrate a growing trend by the Grievance Board in effectively raising the standard of proof for State employers in disciplinary grievances by requiring direct evidence of identity. Under this higher standard, all a grievant need do is commit an offense in private and then deny that it was he who did it when confronted. Further, under this higher standard, if a grievant can demonstrate that he leaves his computer logged on continuously, and if no eyewitness testimony or video surveillance is available, then a State employer would necessarily be unable to meet its burden of proof.

If the executive branch is to have any hope of protecting the State-wide computer network from corruptive and expensive malware and virus attacks or to prove the justification of individual agency disciplinary actions, cameras must be placed at every computing station.<sup>9</sup> Every employee would be constantly under video surveillance while accessing the network. Petitioner asks, "Where would the burden stop?" Would State employers next have to detail how the time stamp on a surveillance system is maintained, or would employers need to dust

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<sup>8</sup> It should be noted that although the same ALJ issued the Decision below and the *Henry* decision, a different ALJ issued the decision in *Matney*.

<sup>9</sup> Indeed, Respondent's counsel below stated, "If [Petitioner] had to put a camera out there, [Petitioner] should have put a camera out there. [Petitioner] should have put his butt in that seat on the date and time with witnesses so that [Petitioner] could bring it before this tribunal." (App. vol. III, 1104).

computers and other equipment for fingerprints?<sup>10</sup> The hypothetical questions demonstrate the ridiculousness of applying a criminal standard to the appeal of a State employment administrative matter. Not only are they not required by administrative rule and prior precedent, such requirements are highly expensive and intrusive and involve serious potential privacy breaches. In the case at bar, and in the two cases cited above, the preponderance standard was cited but not applied. The Grievance Board has effectively mandated more than what a preponderance of the evidence standard of proof requires, and this increased standard will require State employers to overextend their resources to adequately protect the highly confidential and personal records that the State network maintains and to hold employees accountable for their actions. This increased standard of proof is contrary to the law of this State, and the Petitioner DOH requests that the Decision of the Grievance Board and the Circuit Court's Order be reversed.

**II. The ALJ Abused Her Discretion and the Circuit Court Erred in Affirming Her Rulings When She Held That Evidence Showing That Respondent Litten Accessed Pornographic Websites on Other Occasions Had No Relevance to Whether It Was More Likely than Not that He Committed the Offense Detailed in the Network Violation Report; This Evidence Was Directly Relevant to the Issue of Identity, which Respondent Litten had Challenged.**

The Grievance Board ALJ abused her discretion when she refused to admit or consider evidence that Respondent Litten had accessed pornographic websites on dates other than that charged. The West Virginia Rules of Evidence and the Grievance Board's procedure impose a minimal standard of relevance. To be relevant, evidence need only "hav[e] any tendency to make

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<sup>10</sup> Fingerprinting was *actually suggested* by Respondent's counsel in Respondent's "Appellee's Brief" to the Circuit Court.

the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence.” *W. Va. R. Evid.* 401.

Commensurate with the principles articulated in the Rules, the Grievance Board had previously considered evidence outside of charged conduct in adjudicating disciplinary grievances, and counsel cited these cases to the ALJ in the hearing below. In *Tompa v. Department of Administration*, for example, the Grievance Board admitted and considered after-acquired evidence, finding it relevant to show a continuing pattern of behavior in conformity with a disciplinary document. *See generally Tompa*, 2002 WL 32105190 (W. Va. Educ. & St. Empl. Griev. Bd. Docket No. 02-ADMN-138, Sept. 19, 2002). Similarly, in *Bias v. Division of Highways*, the ALJ properly considered after-acquired evidence, the facts of which did not even occur until many months after the dismissal, at the actual grievance hearing, in upholding his non-retention. *Bias*, 2009 WL 4093302, at \*5-6 (W. Va. Pub. Empl. Griev. Bd. Docket No. 2009-1518-DOT, Nov. 4, 2009).

The identity of the user responsible for placing the State’s network at risk on August 27, 2010, was the very core of the case below. Under the very minimal standards of relevance envisioned by Rule 401 or the Grievance Board’s general procedure and precedent described above, any evidence that might have been helpful in determining the user’s identity should have been admitted and considered by the ALJ. This did not happen.

The two categories of evidence that were excluded, wholesale, were the following:

- Testimonial evidence of at least three eyewitnesses who saw Respondent Litten accessing pornography on the same computer, in the same location; and
- Documentary evidence provided by the Office of Technology that showed that Respondent Litten’s User ID, and only Respondent Litten’s User ID, had

accessed pornography on the identical computer in the break room on multiple occasions.

Not only was the evidence relevant pursuant to Rule 401, it was also highly probative and allowable under Rule 404(b). “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, *identity, or absence of mistake or accident.*” *W. Va. R. Evid.* 404(b) (emphasis added). “Thus, Rule 404(b) permits the introduction of specific crimes, wrongs, or acts for ‘other purposes’ when character is not, at least overtly, a link in the logical chain of proof. Rule 404(b); therefore, is not a rule of character at all; but, to the contrary, it merely codifies the various means available for admitting the evidence for reasons other than character.” *State v. McGinnis*, 193 W. Va. 147, 154, 455 S.E.2d 516, 523 (1994).

In the case at bar, the Petitioner sought to introduce eyewitness evidence showing that Respondent Litten had, on other occasions, viewed pornographic material on the computer. This evidence would have shown that he was the only individual ever seen viewing pornographic materials on the computer. This evidence was offered to show identity and to demonstrate that Respondent had intent to view the materials, a clearly 404(b) purpose.

The admission of the relevant eyewitness testimony on the issue of identity more than outweighs any potential prejudicial harm under a Rule 403 balancing. Rule 403 states that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *W. Va. R. Evid.* 403. “Under Rule 403, evidence of prior acts to prove the charged conduct may

not be admitted simply because the extraneous conduct is relevant or because it falls within one or more of the traditional exceptions to the general exclusionary rule; to be admissible, the probative value of such evidence must outweigh risks that its admission will create substantial danger of unfair prejudice. The balancing necessary under Rule 403 must affirmatively appear on the record.” *McGinnis*, 193 W. Va. 147, 156, 455 S.E.2d 516, 525 (1994).

The admission of eyewitness testimony placing Respondent Litten at the computer while viewing pornography was outweighed by the danger of unfair prejudicial harm to the Respondent. The Respondent was served a copy of Petitioner’s witness list, and, thus, was put on notice as to who would be testifying for the Petitioner. Also, Respondent, who was physically present during the hearing, would have been given his due process right of cross-examination to call into question and defend against the testimonial evidence. Further, the admission of the evidence would not have confused the issues because it was clear from the record that Petitioner was offering the evidence merely to show identity. Finally, there was no other danger of unfair prejudice because no additional sanctions were imposed due to conduct stemming from the circumstantial evidence, and the Petitioner did neither attempt nor suggest that other acts were to be considered part of Respondent’s disciplinary action. *In toto*, the evidence was admissible under W. Va. Rule of Evidence 404(b), and the admission of the evidence would not have been outweighed by the danger of unfair prejudice.

The excluded Office of Technology documents demonstrated that Respondent Litten had conducted inappropriate searches on other occasions, thus corroborating the Petitioner’s available witness testimony. The OT provided a summary report that showed searches that Respondent Litten had conducted over a 2-month period. (App. vol. II, 442-447) (not admitted). Importantly, the OT’s documentation shows that during the 2-month period, *only Respondent’s*

User ID was used to perform inappropriate searches. (*See id.*). Further, the OT documentation showed the actual search terms typed by Respondent and the interactive login data for the 2-month period. (*See App. vol. II, 457-471*). Thus, the OT documentary evidence supported the Petitioner's available witness testimony in proving that it was Respondent Litten who performed the searches on August 27.

The ALJ abused her discretion in not admitting this clearly relevant evidence. "This Court recognized the trial court's discretion in ruling on the admissibility of evidence in syllabus point 2 of *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983): Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion." *State v. McKenzie*, 197 W. Va. 429, 445-46, 475 S.E.2d 521, 537-38 (1996) (internal quotation omitted). In the case at bar, the offering of this circumstantial evidence went to the core issue of the case: the identity of the person conducting the searches. The ALJ did not exclude this evidence because it was insufficient to show that the conduct occurred. Nor did she exclude it because it failed to show that Respondent committed the acts. She did not even exclude it under a basic Rule 403 analysis, finding that the presence of some danger outweighed its probative value. *See W. Va. R. Evid. 403*. Instead, she determined, contrary to reason and evidentiary analysis, that it lacked *any relevance whatsoever* in determining who committed the August 27 searches.

This was a clear abuse of discretion that was fatal to the Petitioner meeting its burden of proof regarding the identity of Respondent as the computer user, at least in the mind of the ALJ, and the Decision should therefore be reversed. The excluded evidence would have corroborated the NVR and other substantial evidence listed above, showing that Respondent had accessed

such material on multiple occasions, that no one else had accessed such material, and that it was more likely than not that Respondent accessed the material on the date of the violation.

By excluding the relevant evidence that would have shown that only Respondent had ever been seen viewing pornographic materials on the computer on other occasions, the Petitioner was unfairly prejudiced by effectively being required to present direct proof. This Court should find that the ALJ abused her discretion in failing to admit this probative testimonial and documentary evidence.

**III. Although the Circuit Court Found that the ALJ “Was Mistaken” in Her Understanding of Clear and Unambiguous Technological Evidence, It Failed to Reverse the Board’s Decision Based Upon the Substantial Evidence Relating to Respondent Litten’s Availability to Commit the Offenses.**

The Grievance Board ALJ committed prejudicial error when she misconstrued evidence introduced by Petitioner DOH that clearly and substantially demonstrated that logoff data was not available. This error further increased, unjustifiably, Petitioner’s burden to show that Respondent Litten had committed the searches by a preponderance of the evidence. In the case at bar, Jim Weathersbee, a security/privacy officer and computer forensic investigator for the Governor’s Office of Technology, was a key witness to Petitioner DOH because of his duty to keep the State network safe. (App. vol. III, 1053). Mr. Weathersbee unambiguously stated that Respondent’s Exhibit 21 did not include logoff information because that information is not pulled during investigations. (App. vol. III, 1060). Mr. Weathersbee stated that this information is not recorded because “there’s a lot of different things that it logs off at various times, and we don’t have a mechanism to show when the individual actually logged off the PC.” *Id.* at 1060.

Despite clear and unambiguous testimony from Mr. Weathersbee, the ALJ based a majority of the support for her conclusion that Petitioner had not met its burden upon a complete

misconstruction of documentary evidence. The ALJ made these findings of fact that Respondent Litten's User ID was logged off at specific times:

- "Someone logged onto the computer in the break room using [Respondent's] identification number and password at 7:16 a.m., and logged off almost 45 minutes later, at approximately 7:54 a.m. (App. vol. I, 20).
- "Someone logged onto the computer in the break room using [Respondent's] identification number and password at 9:53 a.m., and logged off over one half hour later at 10:26 a.m." (*Id.*).
- "Someone logged onto the computer in the break room using [Respondent's] identification number and password at 12:30 p.m., and logged off almost 45 minutes later at 1:13 p.m." (*Id.* at 21).

Considering Mr. Weathersbee's testimony, which clearly explained that logoff information was not available and not present in the documentary evidence, there was no basis on the record for the ALJ to conclude that Respondent Litten logged off the computer network at any specific time. These flawed findings of fact were instrumental in the ALJ's conclusions, as they provided the opportunity for Respondent Litten to commit the offenses without being seen — they established his "alibi."

The ALJ's misunderstanding and/or misconstruction of the technological evidence made it nearly impossible for the Petitioner DOH to meet its burden without direct proof of identity, such as eyewitness testimony or video surveillance of the break room area. The ALJ's Decision stated that the "work orders, . . . testimony of the employees [Respondent] was working with on equipment, and the fact that the person conducting the inappropriate searches did so for a total of around two hours . . ." supported Respondent Litten's denial that he ran the searches. (App. vol.

I, 27). This conclusion from the ALJ is clearly wrong and prevented the Petitioner from receiving due consideration of its evidence regarding the timing of the searches in regards to the work orders and other coworkers' testimony. For instance, as Respondent's Exhibit 19 shows, one of the search-strings lasted only 1 minute, at 7:37 a.m., and another search-string lasted 14 minutes, from 10:04 a.m. to 10:18 a.m. (App. vol. II, 452). Another series of searches only lasted 5 minutes, from 12:45 p.m. to 12:50 p.m. (*Id.*). These searches are well under 45 minutes or 2 hours. Further, the brevity of these searches shows that Respondent Litten clearly had the opportunity to conduct the searches because even Respondent Litten admitted to having to step away from his work on the equipment to retrieve tools and to take smoke breaks. (App. vol. III, 1195). Furthermore, Respondent's testimony demonstrated that work orders are not an exact accounting of time spent actually working; they can vary up to 15 minutes in either direction, a range of 30 minutes. (App. vol. III, 1172).

All of the inappropriate search-strings took place during small windows of time: 14 minutes, 5 minutes, and 1 minute. As indicated *supra*, employees did not write down when they took bathroom or smoke breaks. Further, employees do not typically check on one another to see where they are during these types of short breaks. Petitioner DOH was prejudiced by having relevant and highly probative circumstantial evidence be given absolutely no weight because the ALJ erroneously concluded that Respondent's User ID was "logged off" at specific times.

In the case at bar, the Circuit Court recognized that the ALJ was incorrect in her assessment of the evidence presented. The Circuit Court found that "the ALJ was mistaken when she assumed the Respondent would need to be missing from work for approximately two hours on August 27, 2010 in order to be the user accessing or attempting to access pornographic websites." (App. vol. I, 12). Despite this concession, the Circuit Court failed to reverse the ALJ's

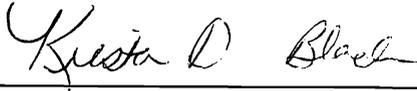
decision, at the core of which was Respondent Litten's opportunity to conduct the offensive searches. (*Id.* at 12). The Circuit Court was correct in finding that the ALJ had misunderstood the technological evidence, but the Court below erred in holding that this constituted harmless error because the ALJ's mistake permeated her evaluation of the entire case. Indeed, the evidence admitted by the ALJ demonstrated that Respondent Litten was the user responsible for the searches.

In her evaluation of the evidence, it is clear that the ALJ is applying some standard higher than a preponderance of the evidence, and her evaluation of the case was completely tainted by her misconstruing of the technological evidence. Other than offering direct proof shown by video evidence or eyewitness testimony, Petitioner would not have been able to meet its mere preponderance standard under the ALJ's improper application. This Honorable Court has decided that "[a] final order of the hearing examiner for the West Virginia [Public] Employees Grievance Board, made pursuant to W. Va. Code, 6C-2-1, *et seq.*, and based upon findings of fact, should not be reversed unless clearly wrong." *Martin*, 228 W. Va. 238, 719 S.E.2d 406, 407 (2011). This Court should hold that the Circuit Court erred in holding that the ALJ's mistake was essentially harmless error because these errors did, in fact, substantially adversely impacted the balance of how Petitioner's evidence was considered.

### CONCLUSION

Because the Circuit Court Judge and the Grievance Board's ALJ failed to apply the proper burden of proof, incorrectly required direct evidence of identity, excluded highly probative evidence on the core issue in the case, and failed to properly comprehend the evidence before them, the Petitioner DOH requests that this Court REVERSE the Circuit Court's Order and enter judgment for the Petitioner.

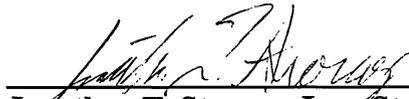
Respectfully submitted,



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*In the Supreme Court of Appeals of West Virginia*



**CERTIFICATE**

I, Rory L. Perry II, Clerk of the Supreme Court of Appeals of West Virginia, do hereby certify that, as of this date,

*Jonathan T. Storage*

complied with all of the requirements of Rule 10.0, et seq., of the Rules for Admission to the Practice of Law, Relating to Legal Assistance by law Students to Persons Unable to Pay for Legal Services, and that his supervising attorney is

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A handwritten signature in cursive script, reading "Rory L. Perry II".

Rory L. Perry II, Clerk

Dated: May 17, 2012

**BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/  
DIVISION OF HIGHWAYS,**

**Petitioner,**

**v.**

**Docket No. 12-0287**

**KENNETH R. LITTEN,**

**Respondent.**

**CERTIFICATE OF SERVICE**

I, Krista D. Black, do hereby certify that I have, this 24<sup>th</sup> day of May, 2012, served a true and accurate copy of the foregoing Brief for the Petitioner, Appendix, and Rule 10 Certificate by hand delivery to the following party:

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