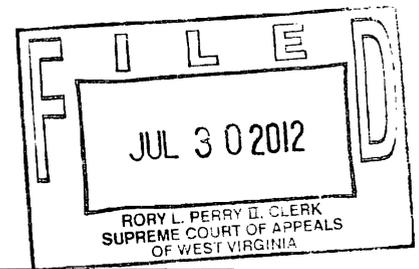


No. 12-0287



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

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)

REPLY BRIEF FOR THE PETITIONER

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I. INTRODUCTION

The Petitioner West Virginia Department of Transportation, Division of Highways hereafter (“DOH”) hereby replies to the Brief of the Respondent hereafter (“Response Brief”). As set forth in more detail below, nothing in the Response Brief changes the DOH’s entitlement to reversal of the Circuit Court’s Order and the entry of judgment in its favor. Indeed, as will be demonstrated below, direct evidence of identity was required, with the result that the ALJ misapplied the preponderance of the evidence standard; substantial evidence demonstrating that Respondent Litten was the offending employee was improperly excluded; and the comparators selected by Respondent Litten to prove discrimination were clearly not similarly situated to Respondent Litten.

II. 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, will inhibit State executive branch agencies from appropriately resolving conflicts that involve fundamentally important State functions, including personnel administration and network security.

Shortly after August 27, 2010, the Governor’s Office of Technology’s (hereinafter “OT”) automated system found that the Respondent Litten’s State-issued computer network account was used to conduct numerous searches for 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 risk to the State’s computer network was discovered, the OT conducted a three-level investigation of Respondent’s network account records by examining a 24-hour

period surrounding the offense date to determine whether the inappropriate searches were intentional. (App. vol. III, 1055).

The OT issued a detailed Network Violation Report (hereinafter “NVR”) to the Department of Transportation (hereinafter “DOT”). (App. vol. III, 1060). The NVR demonstrated that on three different occasions on August 27, 2010, searches for adult-oriented material were performed *within minutes of Respondent logging in*. (App. vol. I, 169-172; vol. II, 456; vol. II-III, 513-1044). On that day, *three* different people logged in at different times of the day; however, only Respondent Litten was logged in when inappropriate searches were conducted.¹

In addition to these searches being performed shortly after the 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 UserID. (App. vol. III, 1060).
- Respondent described to his coworkers methods he used to circumvent system security. (See App. vol. III, 1106).
- 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).

¹ Respondent’s Brief supposes that only Litten was logged in on August 27, 2010. This is clearly incorrect. Two other employees also logged in on that day, Messrs. Evans and Eversole. (See App. vol. II, 452-53; App. vol. III, 1064-65.)

- 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).²

As a result of his conduct, Respondent Litten was disciplined for using the State computer network to access adult-oriented material. (App. vol. I, 178-180). Mr. Litten was not disciplined for supposedly sharing his login information or posting login information on the break room bulletin board. (*Id.*).

Respondent Litten's basic argument is that he merely posted his password on the back of a piece of paper on the bulletin board in the break room and that someone else must have used his UserID and password to conduct these searches. (App. vol. III, 1193). First, it should be noted that even if this were true, even Respondent does not assert that his UserID or current password was present on the bulletin board on August 27, 2010, and both a UserID and password are needed to log in. (App. vol. III, 1192). Second, none of Respondent Litten's coworkers saw the password on the back of a piece of paper on the bulletin board, although many of them used the same computer and others were often present in the break room. (App. vol. III, 1103, 1135, 1139, 1145, 1148). Third, as the record shows and the ALJ briefly mentions, the Respondent's password as it would have been on August 27, 2010, was not posted on the bulletin board. (*See* App. vol. III, 1193, 1215; vol. I, 27). Under a true preponderance of the evidence standard, the clear conclusion is that information posted on the bulletin board, if any, could not have been used by anyone else to successfully log into the State network, and that Respondent Litten conducted the searches at issue.

Testimony was given by the OT representative, Jim Weathersby, that logoff information was not present in the log files. (App. vol. III, 1141). Despite this straightforward testimony, the

² The ALJ prohibited the DOH from presenting detailed testimony on the last two bullets. However, summary information was placed into the record.

ALJ misinterpreted the log files to conclude that the Respondent was “logged in” for appreciable periods of time. (App. vol. I, 20-21). There is no basis in the record for the ALJ’s conclusion, and thus any discussion by her of specific “login” periods is clearly wrong. (App. vol. III, 1141). Likewise, any conclusions drawn by her that relate to Litten’s availability to commit the offenses are fundamentally flawed. Indeed, Respondent Litten’s unavailability to conduct the searches was the lynchpin for the entire decision. Although the Circuit Court Judge recognized this factual error, he incorrectly determined that it did not permeate the ALJ’s understanding of the technological evidence. (App. vol. I, 12-13).

The two instances of password sharing noted in the Response Brief are easily distinguishable from the conduct engaged in by Respondent Litten.³ In April 2010, employees in the District 5 shop completed Job Content Questionnaires (hereinafter “JCQs”) required by the West Virginia Division of Personnel as part of a statewide reclassification program. (App. vol. III, 1149). The JCQs were filled out by each employee using paper forms and were filed away until requested by the DOT’s Human Resources (“HR”) Division. (*Id.*). At the end of October 2010, Debra Aman was informed by HR that the JCQs had to be submitted electronically through each employee’s individual State-issued UserID. (App. vol. I, 145). Ms. Aman is the secretary to Bob Pritts, the manager of the Burlington shop where Respondent worked, and she is responsible for maintaining employee records and files that contain personally identifiable information such as Social Security numbers and financial information. (App. vol. III, 1148, 150).

Many of the employees at the Burlington shop do not know how to type or use computers because they are mechanics, laborers, and welders. (App. vol. III, 1149). Ms. Aman offered to

³ This will be discussed in more detail *infra* at Argument § C.

submit the JCQs on behalf of these employees. (*Id.*). With the permission of the employees, Ms. Aman entered their JCQs through the appropriate State software. (App. vol. III, 1149-1150). Because of network malfunctions and the closeness of the deadline for submission, Ms. Aman permitted Gary Eye, Assistant Equipment Supervisor, (App. vol. III, 1090) an employee also responsible for maintaining other employees' personally identifiable information, to enter a couple of JCQs. (App. vol. III, 1149-1150). (*Id.*). Just before the deadline passed, Ms. Aman also allowed D.J. Streets to enter just one JCQ to ensure that the JCQs were timely submitted. (*Id.*). Ms. Aman shredded all of the employees' passwords immediately after the JCQs were submitted. (App. vol. III, 1150).⁴

The second instance of password sharing is also easily distinguishable from the Respondent Litten's conduct. Because there were typically delays from OT in issuing UserIDs to temporary and summer employees, the personnel manager in District Five decided to allow five temporary employees to use five unused accounts of permanent employees to enter time into the State network. (*Id.*). One unused UserID was provided to each temporary employee, and each temporary employee worked in a different organization. (*Id.*). Mr. Jeff Black, Director of HR for the DOT, recognized that the sharing of passwords for entering JCQs and for temporary employee use was controlled and done for a legitimate reason, but he stated that the practice should stop. (*Id.*). In fact, Mr. Black contacted Leslie Staggars personally and counseled her to revoke the passwords and to make sure it would not happen again. (*Id.*). Both of these instances are in sharp contrast to the risk presented by Respondent Litten, who navigated purposefully to untrusted websites to view pornography.

⁴ It should be noted that the JCQ event occurred approximately three months after Respondent Litten's violation, so this would not have provided a basis for anyone to have known Mr. Litten's password on the date of the violation.

III. ARGUMENT

A. The ALJ Incorrectly Required Direct Evidence of Identity and Improperly Applied the Preponderance of the Evidence Standard.

The substantial circumstantial evidence offered by the DOH and admitted by the ALJ was more than sufficient to meet the DOH's burden of proving that Respondent Litten engaged in the conduct detailed in his dismissal letter. However, not only did the ALJ find this substantial evidence insufficient, she compounded her error by refusing to admit testimony and documentary evidence of events that occurred on other dates, evidence that was clearly relevant and probative on the issue of the identity of the employee who conducted the searches on August 27, 2010 and to show a common scheme or plan. For the DOH to meet its burden of proof under the standards applied by the ALJ, either an eyewitness fortunate enough to remember the day on which he had seen Respondent Litten viewing pornography or date-stamped surveillance camera evidence would have been required.

Other than in an argument heading and yet another assertion that there was no "eyewitness" to the offense, the Response Brief does not even attempt to address the ALJ's improper requirement that direct evidence be used to identify the offending employee. The Response Brief is also completely devoid of relevant case law or citations on the direct evidence issue; it consists only of little to no argument on this core issue in the case.

The Grievance Board is bound by its prior decisions, as it follows the doctrine of *stare decisis*. See *Kiger v. Monongalia Co. Bd. of Educ.*, 2005 WL 3805487, at *3 (W. Va. Educ. & St. Empl. Griev. Bd. Docket No. 05-30-062, May 31, 2005). The DOH's Brief cited to Grievance Board decisions that demonstrate the routine use of circumstantial evidence to prove state of

mind, such as a political motivation or a retaliatory motive.⁵ See Petitioner's Brief at p. 14. However, the Response Brief failed to discuss or distinguish this clear precedent of the Board, which shows the repeated and proper use of circumstantial, rather than direct, evidence.

Much circumstantial evidence was presented to, but excluded by, the ALJ that went directly to a core issue in the case—the identity of the employee who conducted the offending searches:

- The Network Violation Report provided by the Governor's Office of Technology.
- Documentary evidence showing that all searches on August 27, 2010 were performed under Respondent's UserID and password.
- Documentary evidence demonstrating that Respondent Litten's UserID and password were used on other occasions to access sexually-oriented websites (excluded).
- Documentary evidence showing that, although several UserIDs typically logged into the computer every day, only Respondent Litten's UserID and password were even used to access adult images (excluded).
- Testimonial evidence that coworkers had seen Respondent Litten displaying adult-oriented images on the break room computer (excluded).

⁵ See *Coleman v. Dep't of Health & Hum. Res.*, 2004 WL 231827, at *4 (W. Va. Educ. & St. Empl. Griev. Bd. Docket No. 03-HHR-318, Jan. 27, 2004); *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 Board has also considered circumstantial evidence to prove other facts, such as the occurrence of facts underlying discipline and discriminatory motive. See, e.g., *Spaulding v. Fayette Co. Bd. of Educ.*, 1995 WL 917731, at *2-3 (W. Va. Educ. & St. Empl. Griev. Bd. Docket No. 95-10-181, August 3, 1995) and *Van Parks v. Dep't of Tax & Rev.*, 1998 WL 856595, at *5-6 (W. Va. Educ. & St. Empl. Griev. Bd. Docket No. 97-ABCC-567, 1998). Indeed, under the law of this State, even a verdict of guilt in a murder trial can be supported by circumstantial evidence. See, e.g., *State v. Walker*, 188 W. Va. 661, 667, 425 S.E.2d 616, 622 (1992).

- Testimonial evidence that coworkers had never seen anyone other than Respondent Litten displaying such images (excluded).
- Testimonial evidence that Respondent Litten had described to his coworkers methods of circumventing system security for the purpose of accessing adult-oriented images (excluded).

In the face of this overwhelming circumstantial evidence of identity, most of which was excluded by the ALJ, the Response Brief actually states that the “only evidence that the DOH could produce . . . was that Litten’s password was used to access the computer at the times in question,” *see* Response Brief at pp. 7-8, and that it was “not the function of the Court to fill in the gaps for State agencies who fail to present creditable evidence to support their cases.” *See id.* at p. 11.

These statements could not be further from the truth. Indeed, “gaps” in the evidence, if any, were created by the ALJ’s abuse of her discretion in requiring direct evidence, by eyewitness or camera, that Respondent Litten was sitting at the computer when the offending searches were conducted.

The bottom line is that Respondent Litten had more than ample opportunity to conduct the brief searches, which lasted only 1 minute, 14 minutes, and 5 minutes;⁶ witnesses saw him viewing adult-oriented images on other occasions; and he had described how he was able to circumvent the system security. (App. vol. I, 169-172; vol. II 452-455; *see* App. vol. III, 1104, 1133, 1137, 1145, 1147; *see also* App. vol. III, 1106). The hearing took place 11 months (nearly one year) after the offense occurred, yet the ALJ omitted testimonial evidence because the witnesses were truthful in saying that they could not remember the specific day of August 27,

⁶ Such brief searches easily could have been conducted on a smoke or bathroom break or a more formal break from work.

2010. Interestingly, Mr. Litten testified that he did remember that specific day, which suggests both his motive to lie (to avoid discipline) and also his propensity to do so.⁷ (App. vol. III, 1188). Similarly, the ALJ omitted technological evidence demonstrating Respondent Litten’s pattern of accessing inappropriate images, offered on the issue of identity, because the events detailed did not occur on August 27, 2010.

Given the evidence actually admitted, the ALJ committed reversible error in finding that Respondent Litten did not access inappropriate, adult-oriented images. Further intensifying the error, the ALJ refused to consider significant evidence on the issue of identity unless it was direct, and not circumstantial. This resulted in holding the DOH to a higher standard of proof than the requisite preponderance of the evidence standard. Therefore, the DOH is entitled to reversal of the Decision below and the entry of judgment in its favor.

B. The ALJ Committed Reversible Evidentiary Error When She Held that Testimonial and Documentary Evidence Showing that Respondent Litten Accessed Pornography on Other Dates Had No Relevance on the Issue of Identity.⁸

In addition to requiring direct evidence of identity and effectively raising the burden of proof, the ALJ’s refusal to admit testimonial and documentary evidence on the issue of identity was reversible evidentiary error. As with the issue of direct evidence discussed above, the

⁷ Respondent Litten stipulated that he had previously been disciplined for theft of a crank sensor. Theft is clearly an honesty-related offense, yet this was not discussed by the ALJ in her assessment of Litten’s credibility. Indeed, as discussed in more detail in Petitioner’s Brief at pages 17-19, the ALJ simply drew the conclusion that Litten “had consistently denied the allegations against him” and that there was nothing in his “demeanor or attitude” that caused her to disbelieve him. She did not discuss, as would be suggested by the credibility factors considered by the Board, his “reputation for honesty” or “presence or absence of bias, interest, or motive.” Additionally, despite significant conflicting testimony on several issues, such as the presence or absence of Litten’s password on the back of a posted piece of paper, she failed to evaluate any other witness’ testimony at all.

⁸ It should be noted that this evidence should also have been admitted as demonstrating Respondent Litten’s common plan or scheme, although identity was the forces of counsel’s objection.

Response Brief makes no substantive reply on this critical issue. No cases are cited,⁹ and, in fact, the Rules of Evidence are mentioned only once in passing. *See* Response Brief at p. 15. The extent of Respondent Litten's argument on this issue is that the excluded evidence did not "correspond[] to the day in question." *See* Response Brief at p. 16.

Despite this conclusory assertion, which of course parallels the extent of reasoning behind the ALJ's rulings, there is no requirement that relevant evidence or admissible "bad acts" evidence occur on the same day as the act in question. The Respondent's overly simplified, and ultimately incorrect, argument flies in the face of both the liberally-applied analysis of relevant evidence required by *West Virginia Rule of Evidence* 401 and the reasoned factorial balancing envisioned by *West Virginia Rule of Evidence* 403. This simplistic and misapplied view of the relevancy of the evidence clearly operated to the detriment of the DOH despite the fact that any potential prejudice to Respondent Litten could have been prevented by the ALJ, who was better equipped to evaluate the weight of the evidence presented to her than a jury.

Indeed, the ALJ determined that the proffered evidence lacked any relevance whatsoever in determining who committed the searches on August 27, 2010. She did not cite, nor refer to, *West Virginia Rule of Evidence* 403. Neither did she cite, nor refer to, *West Virginia Rule of Evidence* 404(b). Instead, she simply held that evidence relating to conduct on days other than August 27, 2010 was not relevant.¹⁰

⁹ With the exception of a few relating to due process rights of public employees.

¹⁰ The ALJ did not discuss the complaint of Respondent's counsel that the proffered evidence was a "trial by ambush." Nevertheless, the Respondent makes the complaint, and it is without merit. First, the DOH provided Respondent's counsel with literally hundreds of documents in response to a discovery request. All of these documents related to conduct occurring on August 27, 2010, applicable policies, and so on because that is all counsel requested. Second, unlike civil matters, the grievance statute and Rule do not require disclosure of evidence in advance of hearing, other than policies on which the employer will rely and documents requested by the grievant in writing. *See W. Va. Code* § 6C-2-3(k); *see also* 156 *W. Va. C.S.R.* 1 § 6.12. Thus, while Respondent may not have realized evidence was available to show identity

The evidence actually admitted by the ALJ was entirely sufficient to meet the DOH's burden of proof, and the ALJ's decision is therefore clearly wrong in view of the reliable, probative, and substantial evidence on the record. However, to the extent the ALJ refused to admit the challenged evidence, this reversible error was magnified tenfold, as the evidence was directly relevant on the issues of identity and common plan or scheme.

C. Respondent Litten Cannot Prove that He Was Discriminated Against because He Is Not Similarly Situated to the Employees to Whom He Seeks to Compare Himself.

Respondent Litten is not similarly situated to the two individuals to whom he seeks to compare himself for at least two reasons. First, he was the only employee who viewed adult-oriented material on the State network or who allegedly posted his login information in a public place. Second, viewing inappropriate, adult-oriented material was both unrelated to a legitimate State purpose and presented a direct threat to the State network.

According to the organic statute establishing the Public Employees Grievance Board, "discrimination" means "any difference in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." *W. Va. Code* § 6C-2-2(d). "In order to establish a discrimination claim asserted under the grievance statute, an employee must prove: (a) that she has been treated differently from one or more similarly-situated employee(s); (b) that the different treatment is not related to the actual job responsibilities of the employees; and, c) that she did not agree in writing to the difference in treatment." *Roush v. West Virginia Dep't of Transp./Div. of Hys.*, 2008 WL 5042892, at *4 (W. Va. Pub. Empl. Griev. Bd. Docket No. 2008-0782-DOT, Oct. 31, 2008). Respondent Litten is unable to show that he is similarly situated to the employees to

and/or common plan and scheme, its production at hearing was not unfair surprise, but rather was clearly allowable under applicable law.

whom he compares himself because no other employee viewed adult-oriented material on the State network.

The Response Brief correctly notes that the burden of showing discrimination in the application of discipline is an affirmative defense that must be proven by a Grievant. *See* Response Brief at p. 16; *see also Palmer v. W. Va. Dep't of Trans./Div. of High.*, 2007 WL 1454396, at *4 (W. Va. Pub. Empl. Griev. Bd. Docket No. 06-DOH-340, Mar. 19, 2007).

1. The passwords that were shared in November 2010 were in the furtherance of a legitimate State purpose and did not pose a threat to the State computer network.

The passwords that were shared in November of 2010 were given to an administrative secretary, whose responsibility entailed maintaining other employees' personally identifiable information, for the narrow and sole purpose of completing job content questionnaires ("JCQs") for employees who were inept at typing or data entry. (App. vol. III, 1148-1150).

As an administrative secretary for the District 5 shop, Ms. Debra Aman is entrusted daily with managing the sensitive and confidential personally identifiable information contained in employee files, such as Social Security numbers and financial information. One of her many responsibilities is to see that documents, such as JCQs, are properly completed and submitted to appropriate personnel. (App. vol. III, 1148-1150). After being informed that the JCQs would need to be submitted electronically via each employee's State-issued UserID, Ms. Aman found many of the District 5 mechanics frustrated, as they could not type or were not otherwise computer-literate. (*Id.*). As the November 17th deadline for the JCQs approached, most of the mechanics indicated that they wished for Ms. Aman to complete the electronic forms. (*Id.*).

Ms. Aman only received passwords from those employees who wished for her to complete the electronic forms, and Ms. Aman used those voluntarily-given passwords for only

that very specific and narrow legitimate State purpose. (*Id.*) On November 17, 2010, due to the imminence of the JCQ deadline and the various computer network malfunctions, Ms. Aman allowed Mr. Gary Eye, the Assistant Equipment Supervisor, who also occupies a position that requires the maintenance of personally identifiable employee information, to complete a small number of JCQ forms. (*Id.*) Ms. Aman allowed only one other employee, Mr. D.J. Streets, to complete just one JCQ form for another employee, to ensure that the submission deadline was met. (*Id.*) After all of the JCQ forms were complete, Ms. Aman shredded the employees' passwords. (*Id.*)

The controlled and one-time use of employee passwords for the purpose of submitting the JCQ forms did not pose a direct threat to the State's computer network, as usage could easily be tracked back to the responsible employee. Filling out and submitting the JCQ forms did not require, nor result in, the access of websites or other content that placed the State's network at risk of being infiltrated by viruses, worms, or other harmful malware. Instead, only the appropriately authorized State software was used to input and submit the JCQ information. Because the incidence of password sharing related to the completion of JCQs was narrow and for a legitimate State purpose, the employees who shared their passwords with Ms. Aman cannot properly be considered similarly situated to Respondent Litten for the purpose of a discrimination analysis. The ALJ committed reversible error in finding otherwise.

2. The unused UserIDs and passwords of five permanent employees that were shared for use by five corresponding summer employees was controlled and legitimate and did not pose a threat to the State computer network.

The separate login information of five permanent employees given to five separate temporary or summer employees was accomplished in a controlled and specific manner for a legitimate State purpose to allow the latter to enter employee time on the computer. (App. vol.

III, 1178-1179). The login information of the chosen five permanent employees was used because those employees either could not or did not use the State network. (*Id.*) Because receiving State-issued User IDs for temporary employees from the Office of Technology takes time, a decision was made at the District level to allow the controlled use of the five unused login accounts to continue the DOH's business without delay. (*Id.*)

As the permanent employees never used their accounts, any and all inappropriate uses would have been directly attributable only to the temporary employees, so proper accountability was maintained in this situation. (*Id.*) This specific incident occurred under controlled and narrow circumstances, again, in the furtherance of legitimate State business.¹¹ Because the sharing of passwords in this instance was again narrow, traceable to the user, and for a legitimate State purpose, the employees at issue are not similarly situated to Respondent Litten for the purpose of a discrimination analysis and the ALJ erred in finding otherwise.

- 3. While Mr. Litten also violated the Information Security Policy by his sharing and posting of his network User ID on the break room bulletin board, he was not disciplined for that violation; instead, he was disciplined for causing a direct threat to the State computer network by accessing adult-oriented materials on untrusted websites.**

Respondent Litten cannot compare himself to either the JCQ or the time entry password-sharing incidents because he was not disciplined for a narrow instance of password sharing. He was not even disciplined for posting his password in a public area. Rather, he was dismissed under the DOH's progressive discipline policy for accessing adult-oriented material on the State computer network. (App. vol. I, 178-184). Both witness testimony and excluded testimonial and

¹¹ Further, Jeff Black, Director of Human Resources for the DOT, informed Leslie Stagers, the District 5 Administrative Services Manager, that sharing login information was a violation of policy and that she should take immediate steps to stop and correct the violations and to ensure this did not occur again. However, Mr. Black recognized that this use of login information was accomplished in a controlled manner for a legitimate reason.

documentary evidence demonstrated that only Respondent Litten accessed adult-oriented websites.

Accessing adult-oriented materials on a State computer is wholly dissimilar to the instances of controlled use of login information described above. First, the uses described above were not for personal or prurient interests but rather to achieve proper State objectives: the electronic entry of required JCQ data and the entry of State employee time so employees would be paid. Second, the uses described above were extremely narrow and controlled, such that they were entirely traceable to the user with whom the password had been shared. Conversely, Respondent Litten's violation was uncontrolled and irresponsible because viruses, worms, and other malware could have easily infiltrated State computer systems simply by him visiting untrusted, risky websites.

The same could not be said for the mere use of login information to access State-authorized software for State business. It was the accessing of adult-oriented materials that caused a direct threat to the State network and brought about Mr. Litten's dismissal. Therefore, as Mr. Litten was disciplined for accessing adult-oriented material, a behavior only attributable to him, he cannot be considered similarly situated to any other employee to which he seeks to compare himself, and the ALJ's finding to the contrary is reversible error.

IV. CONCLUSION

If left intact, the ALJ's Decision will significantly alter the landscape of employee grievances in many ways. First, it will stymie State executive branch agencies' ability to discipline employees by effectively raising the burden of proof and by requiring direct evidence of identity when in issue. The increased difficulty in upholding basic disciplinary decisions due to these major procedural changes will inevitably lead to fewer disciplinary actions, thereby

placing the State's computer network, and all of its contents, in jeopardy. These effects will not be limited to the Division of Highways and "pornography" cases, however. Rather, they will resonate across all State agencies and all grievances challenging disciplinary actions.

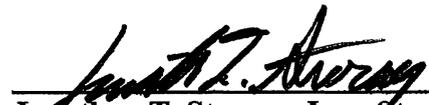
Clear error committed by both the Circuit Court Judge and the Grievance Board ALJ entitle the DOH to reversal. The ALJ's Decision failed to apply the proper burden of proof, incorrectly required direct evidence of identity, excluded highly probative evidence on the core issue in the case, and failed to properly comprehend the evidence before it. For these reasons, 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

**WEST VIRGINIA DEPARTMENT OF
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Respondent.

CERTIFICATE OF SERVICE

I, Krista D. Black do hereby certify that I have, this 30th day of July, 2012, served a true and accurate copy of *Petitioner's Reply Brief* by depositing a copy of the same in the regular United States Mail, postage prepaid, to the following:

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By Counsel,



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