

No. 12-0287

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

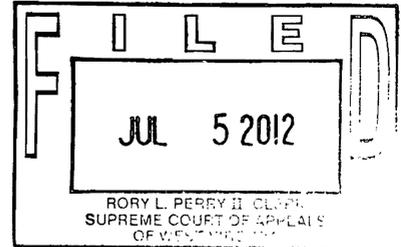
WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS, a West Virginia agency,

Petitioner

v.

KENNETH R. LITTEN

Respondent



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

BRIEF FOR THE RESPONDENT

BY COUNSEL

A handwritten signature in black ink, appearing to read "K. Dooley", written over a horizontal line.

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	1
SUMMARY OF ARGUMENT.....	4
STATEMENT REGARDING ORAL ARGUMENT AND DECISION	4
ARGUMENT	4
I. The Grievance Board did not require the DOH to Present Direct Evidence to show that Litten was the Offending Employee thereby holding it to a Higher Standard of Proof than a Preponderance of the Evidence.	
A. The DOH was not required to show direct evidence to prove its case.	
B. Any error regarding the evidence by the ALJ does not support a decision to overturn her ruling.	
C. This case is not about all state agencies. The facts in this case are particular to the Respondent to termination of his employment. DOH’s many failures cannot be its conspiracy theory regarding decisions which it deems unfavorable to agencies by The Public Employee Grievance Board’s decisions.	
II. The ALJ Neither Abused Her Discretion nor did the Circuit Court Err in Affirming Her ruling Because she refused to admit witness testimony that identified Litten as looking at adult oriented-material on the break room computer.	
III. The ALJ’s mistake Regarding log out information is not a Basis to overturn her decision.	
CONCLUSION	16

TABLE OF AUTHORITIES

Cases

Cahill v. Mercer Cnty. Bd. of Educ., 208 W. Va. 177,539 S.E.2d 437 (2000)5

Alderman v. Pocahontas County Bd. of Educ., 223 W. Va. 431,675 S.E.2d 907 (2009).....5

North v. West Virginia Bd. Of Regents, 160 W. Va. 248, 233 S.E 2d 411 (1977).....15

U. S. Supreme Court Kremer v. Chemical Constr. Corp., 456 U.S. 461, 483,102 S. Ct. 1883, 1898, 72 L.Ed.2d 262 (1982)15

Jackson v. State Farm Mut.Auto. Ins. Co., 215 W.Va. 634, 640, 600 S.E.2d 346, 352 (2004).....5

McJunkin Corp. v. Human Rights Comm'n, 179 W. Va. 417, 369 S.E.2d 720 (1988)13

Clarke v. West Virginia Bd. of Regents ("Clarke I"), 166 W. Va. 702,710, 279 S.E.2d 169, 175 (1981).
.....14

Waite v. Civil Service Commission, 161 W. Va. 154, 241 S.E.2d 164 (1977).....14

Statutes

W. Va. Code 18-29-615

W. Va. Code § 29-6A-615

Administrative Decisions

Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).....6

Harvey v. Summers County Bd. of Educ., Docket No. 01-45-360 (Sept. 20, 2001).....6

Gross v. Kanawha County Bd. of Educ., Docket No. 02-20-090 (Aug. 30, 2002)..... 6

Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993) 6

Jones v. W. Va. Dep't of Health and Human Resources, Docket No. 96-HHR-371.....15
(Oct. 30, 1996)

Court Rules

Rule 18(a) of the R. App. P. of the West Virginia Supreme Court.....4

W.V. R. of Evid. 403.....18

West Virginia Constitution

Article III, Section 10.....18

STATEMENT OF THE CASE

The decision below in this case was absolutely correct and did not, as the West Virginia Department of Transportation, Divisions of Highways (hereafter “DOH”) alleges, substantially increase the burden on State executive branch agencies in disciplinary grievances. The decision below simply advises State executive branch agencies that they must comply with the law that requires them to meet the burden of proving by a preponderance of the evidence those facts supporting termination of long-term employees in the classified service. Moreover, it stands for the clear principle that due process of the law is applicable to state employees. Here, the DOH had no real evidence that Mr. Litten accessed websites which contained inappropriate adult material. They had evidence that his password had been used to access certain websites from a computer the use of which was not dedicated to Mr. Litten, but which was used by anyone who happened to be in the break room for the Burlington, West Virginia shop.

What, in fact, was established was that Mr. Litten wrote his password on a piece of paper that was attached on a bulletin board above the break room computer. In addition, it was clear at the Level 3 hearing in this case that computer user IDs passwords were not sacrosanct at the DOH District 5 office or the adjacent shop. Testimony at the hearing revealed that multiple user IDs and passwords were shared among at least three employees who were inputting a report required by Central Office. In addition, Leslie Stagers, Administrative Services Manager for District 5 of the Division of Highways, provided DOH employees’ user identifications and passwords to summer interns for their use.

Jim Weathersby of The Governor's Office of Technology testified that the sharing of a user identification and password are more egregious than accessing adult websites.

Yet, no one was disciplined in anyway whatsoever for these breaches of security that were proven by uncontroverted evidence.

The Respondent alleged that on August 27, 2010 during the hours of 10:00 a.m. and 2:00 p.m. that Litten visited or attempted to visit numerous known pornographic websites. Mr. Litten wholly denied the allegations.

John Black, Human Resources Manager for the Division of Transportation, noted that he completed the letter termination to Mr. Litten based on his 30 plus years of human resources experience and his education. Black testified that they undertook no investigation into the allegations raised against Mr. Litten other than the facts presented by the Office of Technology because they saw no reason to conduct additional investigation. Mr. Black assumed that Mr. Litten was guilty. (App. Vol. III, Page 1071)

Black also called upon his 30 plus years of human resources experience when he wrote the letter of termination for Mr. Litten. That letter referenced only allegations of access to inappropriate websites on August 27, 2010. The DOH had no testimonial evidence of accessing inappropriate websites on August 27, 2010. However, the DOH wanted to introduce alleged evidence of access to inappropriate websites by Mr. Litten which were alleged to have occurred on other days. Allegations of misuse of DOH computers on days other than August 27, 2010 were not in the letter of termination provided to Mr. Litten. He was provided no notice of these allegations prior to the hearing and the inclusion of the allegations would clearly have violated the Respondent's right to due process.

The DOH sought to prove its case by ambush and the Administrative Law Judge in the fair exercise of her authority simply would not allow trial by ambush. She made the correct decision.

Jim Weathersby, with the Office of Technology indicated that none of the information to which he testified could put Mr. Litten at the terminal and on the computer for the dates and times when pornographic sites were accessed or attempts at access were made. (App. Vol. III, 1082) Mr. Weathersby testified that sharing passwords with third-parties was a greater infringement upon system security than accessing or attempting to access pornographic web sites. (App. Vol. III, 1083)

Turning the Court's attention to the date in question, on that day Litten's work orders for placed him working from 6:30 a.m. until 3:30 p.m. No witnesses of the Respondent placed Mr. Litten at the break room computer on August 27, 2010 accessing or attempting to access pornographic websites between 10:00 a.m. and 2:00 p.m.

Any number of people had access to the break room computer on any given day at any given time. The Petitioner has made a big deal of the fact that once someone was logged in, there was no way to determine when there was a log out event. If the logout event could not be detected, it cannot be determined by a preponderance of the evidence who accessed the websites in question.

The Respondent along with everyone else in the District Office had training regarding proper use of technological resources. The only evidence in this record that he violated those policies would have been his writing down of his password on the back of a sheet of paper tacked to a bulletin board. However, others at the DOH clearly violated security regulations without disciplinary action of any kind being taken against them.

Here, the DOH simply does not like the result in this case and wants this Court to overturn a decision of the lower courts that was neither a violation of their discretionary powers or against the clear weight of the evidence.

SUMMARY OF ARGUMENT

The Administrative Law Judge Properly decided this case at Level 3 and the Circuit Court of Kanawha County properly affirmed that well-reasoned decision by the trier of fact based on the weight of the evidence, creditability of the witnesses and constitutional considerations of due process of law. These decisions should not be disturbed by this Court.

STATEMENT REGARDING ORAL ARGUMENT

The Respondent does not believe that Oral Argument is necessary in this case based on the requirements set forth in *Rule 18(a) (3) and (4)* of the Rules of Appellate Procedure, West Virginia Supreme Court of Appeals inasmuch as the dispositive issues have been authoritatively decided and the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be greatly aided by oral argument.

ARGUMENT

This Court should affirm and not disturb the rulings of the Level 3 Administrative Law Judge or the Circuit Court Judge below.

This Court has held, "When reviewing the appeal of a public employees 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." Syl. pt. 1, *Martin v. Barbour Cnty. Bd. of Educ.*, W. Va. 719 S.E.2d 406 (2011).

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. Syl. pt. 1, *Cahill v. Mercer Cnty. Bd. of Educ.*, 208 W. Va. 177, 539 S.E.2d 437 (2000). Syl. Pt. 1, *Alderman v. Pocahontas County Bd. of Educ.*, 223 W. Va. 431, 675 S.E.2d 907 (2009).

The Petitioner for its arguments to overturn the previous decision relies entirely on determinations of fact which are clearly due deference from this Court. The ALJ's decision was not clearly wrong in view of the evidence and the Circuit Court Decision Affirming the decision is correct.

- 1. The Grievance Board did not require the DOH to Present Direct Evidence to show that Litten was the Offending Employee thereby Holding it to a Higher Standard of Proof than a Preponderance of the Evidence.**

The DOH was not held to a higher standard of proof than a preponderance of the evidence. The DOH failed to offer creditable evidence that it was more likely than not that Litten committed the acts alleged against him. As the trier of fact, the Judge did not believe that the DOH met its burden. This determination should not be overturned as a result of this appeal.

The generally accepted meaning of preponderance of the evidence is "more likely than not." *Jackson v. State Farm Mut.Auto. Ins. Co.*, 215 W.Va. 634, 640, 600 S.E.2d 346, 352 (2004).

"The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Phrased differently, preponderance "is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997)." *Harvey v. Summers County Bd. of Educ.*, Docket No. 01-45-360 (Sept. 20, 2001).

Black's Law Dictionary defines preponderance of the evidence in the following ways:

... something more than 'weight;' it denotes a superiority of weight, or outweighing, words are not synonymous, but substantially different. There is generally a "weight" of evidence on each side in case of contested facts. But juries cannot properly act upon the degree, weight of evidence, in favor of the one having the onus, unless it overbear, in some the weight upon the other side. (Citations omitted) With respect to burden of proof in civil actions, means greater weight of evidence, or evidence which is more credible and convincing to the mind. That which best accords with reason and probability. The word "preponderance" means something more than "weight"; it denotes a superiority of weight, or outweighing. The words are not synonymous, but substantially different. There is generally a "weight" of evidence on each side in case of contested facts. But juries cannot properly act upon weight of evidence, in favor of the one having the onus, unless it overbear, in some degree, the weight upon the other side. Preponderance of evidence may not be determined by the number of witnesses, but by the greater weight of all evidence, which does not necessarily mean the greater number of witnesses, but opportunity for knowledge, information possessed, and manner of testifying determines the weight of testimony.

The DOH bears the burden of establishing, by a preponderance of the evidence, the charges upon which Grievant's dismissal was based. *W. Va. Code 18- 29-6, Gross v. Kanawha County Bd. of Educ.*, Docket No. 02-20-090 (Aug. 30, 2002).

The trier of fact after hearing all the witnesses and the evidence determined that the DOH clearly did not prove its case, the basis of its termination of the employment of the Appellant, by a preponderance of the evidence.

The ALJ below heard the witness testimony, evaluated the creditability of the testifying witnesses and made a determination based on the same.

A. The DOH was not required to show direct evidence to prove its case.

The DOH does not argue that it had the burden of proving its case, it is simply critical that the Courts below did not agree with its determination to terminate the employment of a long-term civil service employee on insufficient evidence.

Close examination of the evidence reveals that the DOH indicated in its letter of termination that the specific reason for his termination was noted to be the following “[o]n August 27, 2010 during the hours of 10:00 a.m. and 2:00 p.m., you visited and attempted to visit numerous known pornographic websites.” The letter erroneously states that the Office of Technology traced these activities to “your” [Mr. Litten’s] computer. Mr. Litten did not have an assigned computer. The Burlington office of the DOH had a computer in the break room that any and every one could use—not just Mr. Litten.

The DOH with the assistance of its Human Resources Director with more than 30 years of experience chose to limit the basis for Litten’s termination to a four-hour period on one day in August 2010. For the timeframe selected by the DOH referenced in the letter of termination given to Mr. Litten, the only evidence that the DOH could produce

to support its allegations was that Litten's password was used to access the computer at the times in question. (App. Vol. III, 1082) DOH was unable to rebut the fact that that Litten had, in fact, kept his password tacked to a board above the computer—in plain view—for easy reference. None of the witnesses produced by the DOH could place Litten at the computer at the times relevant to the termination information. In fact, the other mechanics with whom he worked on the day in question, testified that they did not recall any inordinate amounts of time that he was away and his supervisor credited him for the time spent on equipment repaired for the day in question.

Litten testified creditably regarding his whereabouts on the day in question. (App. Vol. III, 1187-1189) That testimony was not rebutted by any witness for the DOH. Robert Pritts the equipment supervisor at the District 5 garage, the person in charge of the shop, testified as to the work sheets submitted by Mr. Litten on the day in question. He indicated that Litten had provided his time and assignment sheets to his direct supervisor, Tim Umstot. He further testified that Mr. Umstot had not reported to him any issues or problems with the times reported by Mr. Litten on August 27, 2012 when he was working on certain pieces of equipment. (App. Vol. III, 1098).

None of Litten's co-workers saw him displaying adult material on the break room computer on August 23, 2010.

Edward VanMeter, a mechanic at the Burlington District 5 headquarters when specifically asked if he saw any inappropriate material displayed on the computer on August 27, 2010. He indicated that there was "no way I can answer that question." (App. Vol. III, 1105). Charles Morton, another DOH employee, testified that he was most likely in Martinsburg, West Virginia on August 27, 2010. (App. Vol. III, 1132) Delbert

Streets a mechanic at the District 5 shop also testified. He indicated that Litten worked with him between 7:30 a.m. and 9:30 a.m. and then went to work with another co-worker, Shane Dolly. Streets recalls August 27, 2012 because it was his birthday. He left work at 10:00 a.m. on that day and did not see Litten on the breakroom computer that day. (App. Vol. III, 1144). Mr. Dolly was called to testify and said that he worked with Mr. Litten on August 27, 2010 and actually recalls noticing that he worked on the crane earlier. He said that when Litten finished with the crane he came to help him. Michael Eversole testified that Mr. Litten actually worked with him on a pickup truck from 12:00 noon until 3:30 p.m. Eversole could not recall whether Litten left his job for an extended period of time or not. (App. Vol. III, 1183) Larry Riggleman works in the District 5 body shop. He testified that he did not work on August 27, 2010. He did not know what happened on that particular day. (App. Vol. III Page 1147).

Mr. Litten's testimony that he had neither used the computer nor accessed inappropriate websites on the day in question was un rebutted.

It is no surprise that none of Litten's co-workers would testify to knowing that his password was posted on the bulletin board. Despite any training that any DOH employee had regarding user identification and password security, few at the District 5 headquarters and shop adhered to those standards based on the clear un rebutted testimony that employees shared their passwords with an office worker who shared some with another mechanic. Debra Aman, Mr. Pritt's secretary, testified that she obtained passwords of approximately fifteen (15) employees to complete JCQ's for the workers. She, in turn, shared at least one (1) employee's password with one of his co-workers. (App. Vol. III, 1149-1150)

This type of condoned behavior on the part of DOH employees does not confidence build regarding whether employee user identifications and passwords are truly confidential. Aman also testified that she reported getting the passwords of co-workers to Ms. Stagers or her assistant. (App. Vol. III, 1151) The DOH's system to protect passwords was severely lacking and leads to serious questions about the reliability of its computer system security generally and more particularly raises the questions of whether someone unbeknownst to Mr. Litten could have been provided his password and user identification.

In light of these facts, the Network Violation Report does little to further the evidence of the DOH. As Mr. Weathersbee testified, none of his reports actually puts Litten in the seat and at the computer conducting searches at the time noted on the letter of termination.

The DOH is quick to criticize the factual determinations of the Grievance Board, but fails to see that the DOH did not conduct an independent investigation into the allegations which were only the determination of a paper trail with no conclusive information.

As previously stated, DOH's protection of employee user identifications and passwords is a farce. The DOH determined, based on records provided by the Governor's Office of Technology that it would conduct no further investigation into the claims made against Mr. Litten. It may have been better served—had it been so certain of the outcome—to conduct such an investigation, to insure that user I.D.s and passwords were not being compromised in District 5, to find an eyewitness to the allegations of inappropriate use of the break room computer. Instead, DOH presented a flimsy case

with flimsy evidence and are now here hat-in-hand asking this Court to make a case for it where none exists.

It is not the function of the Court to fill in the gaps for State agencies who fail to present creditable evidence to support their cases when the law requires that they and they alone prove their allegations against long-term State employees.

The Grievance Board allowed the DOH a full and fair opportunity, in keeping with due process principles, to present the evidence which it alleged supported its actions.

B. Any error regarding the evidence by the ALJ does not support a decision to overturn her ruling.

The ALJ's insertion of log off times in her decision neither prejudices the Petitioner nor does it somehow heighten the burden of proof of the DOH. The ALJ simply misconstrued non activity on the computer logs presented as logout times. Despite that fact, her discussion of the time that Mr. Litten would have had to have been actively at the computer searching is correct. According to the logs, as she correctly opined, Litten would have had to have been at the computer from around 6:33 a.m. to 6:45 a.m., 7:20 a.m.-7:45 a.m., 9:55 a.m.-10:10 a.m., 10:24a.m.- 10:26a.m., and 12:42 p.m.-12:49 p.m. Ironically enough the references made by the Petitioner to searches such as "blackzilla", "crotchless" and "hushpass" are not made during the times of 10:00 a.m. to 2:00 p.m. on August 27, 2010. (App. Vol. 1, 169-171)

In fact, Appendix Vol. II, 513-635 was accessed before 10:00 a.m. Consequently, they should not be part of this Court's consideration.

Mr. Litten's worksheet for August 27, 2010 indicated that he worked approximately 6:30 a.m. to 9:00 a.m. on a crane, from 9:00 a.m. till 11:30 a.m. on a box truck and from 12 p.m. until 3:30 on a pick-up truck. (App. Vol. II, 433-437) While all

employees testified that these times were approximate, none of Litten's co-workers testified that he was gone from the jobs they shared on inordinate periods of time. The Petitioner has submitted pages and pages of materials that Litten supposedly accessed. Based on the amount of work he completed on the day in question, it is not even reasonable to believe that he would have been able to access the sites and information produced by the Petitioner.

Moreover, it is peculiar that no one reported seeing adult material on the break room computer on August 27, 2010 particularly when a portion of the timeframe of concern was clearly during the time when most employees would have been having lunch. It would appear from the login sheet that only Mr. Litten's password was being used at the breakroom computer. Entries for the login sheet began as early as 6:30 a.m. and continued through 3:31 p.m. The DOH discussed searches which were alleged to have occurred at 7:25 and 7:43 a.m. when Litten testified that he was already working. Yet, the times relevant to this grievance based on the letter of termination was between 10:00 a.m. and 2:00 p.m.

The ALJ did not get it wrong. The fact that there are no logout times mitigates in favor of Litten. If his password and used ID were logged in all day, anyone could come along and search any site. Consequently, there was more than enough evidence or lack of evidence to support her ruling.

C. This case is not about all state agencies. The facts in this case are particular to the Respondent to termination of his employment. DOH's many failures cannot be its conspiracy theory regarding decisions which it deems unfavorable to agencies by The Public Employee Grievance Board's decisions.

The DOH wants to make this case about all State government. It is attempting, without sitting in the seat of the trier of the fact, to pass judgment on the Administrative

Law Judge deciding cases involving State Employees. This Court should not countenance such conspiracy theories.

This case is not about all of state government. It is about the way that the DOH mishandled an investigation, gave a terminated notice of the rationale for his termination and then—at the hearing on the matter and attempted to violate his due process rights by presenting evidence of allegations of wrongdoing which were not included within the four corners of his letter of termination.

II. The ALJ neither Abused Her Discretion nor did the Circuit Court Err in Affirming her ruling because she refused to admit witness testimony that identified Litten as looking at adult oriented-material on the break room computer.

As this Court is aware, this was not a case tried before a jury but rather a judge. The judge heard the testimony that the DOH placed into evidence regarding allegations of seeing Mr. Litten viewing adult oriented-material on the break room computer. The fallacy in this argument is that these other allegations were not referenced in the letter of termination as a basis for his dismissal. Again, one would think that if such evidence was available to the DOH it would have been referenced in the letter of termination to Litten. The allegations in the complaint were dated August 27, 2010. Litten's letter of termination was dated November 29, 2010. One is only left to wonder how the DOH failed to learn of its employees who were alleged to have seen him accessing adult web sites in the ensuing three months' time to add this information to its letter of termination.

Obviously, this would have provided notice to him that these facts were the basis of the termination of his employment and allowed him a full and fair opportunity to meet the evidence.

The DOH in its letter of termination referenced one day, and one day only, including specific times of alleged infractions which formed the basis for the termination of Mr. Litten.

The truth is and what the ALJ and the Circuit Court realized was that DOH ran a less than stellar operation. They were attempting to hold the grievant to a standard that no one else in the organization had to meet, including the Administrative Services Manager for the Region, Mr. Staggers, who gave summer interns email passwords of other employees, breaching State internet policies, without any repercussions. (App. Vol. III, 1174)

The Petitioner's reliance upon *McJunkin Corp. v. Human Rights Comm'n*, 179 W. Va. 417, 369 S.E.2d 720 (1988) is misplaced here. In this instance the due process belongs to the Respondent. In *McJunkin*, the employer complained when the complainant attempt to raise an issue of rehire at the hearing which had not theretofore been raised in the complaint or an amended complaint thereby providing the Respondent Corporation with notice of the allegation.

Here, the State actor was attempting to place into evidence allegations of access to adult web sites for Mr. Litten on days other than the date for which he was given notice in the letter of termination. The Petitioner's argument that identification of the witnesses and notice of their supposed testimony was sufficient notice. However, none of the witnesses were testifying to the date in question, August 27, 2010. None of them knew when they allegedly witnesses pornographic material on the computer in the breakroom, none of them spoke to a supervisor about the alleged incident and none of them were able to corroborate the other's story. In fact, because it is his position that these incidents did

not take place, the Respondent was not in a position to defend himself. What the Petitioner did is liken to trial by ambush.

Likewise, the Petitioners Arguments citing the Rules of Evident must fail as well. The sole trier of fact weighed the evidence and within her discretion pursuant to *Rule 403 of the West Virginia Rules of Evidence* to exclude evident of other alleged wrongs.

This Court held in in syllabus point one of *Waite v. Civil Service Commission*, 161 W. Va. 154, 241 S.E.2d 164 (1977), that "[t]he Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest." It is well-settled that a tenured employee,...has both property and liberty interests in continued employment that warrant due process protections. See *Clarke v. West Virginia Bd. of Regents ("Clarke I")*, 166 W. Va. 702,710, 279 S.E.2d 169, 175 (1981).

This Court in *Clarke I* that due process in the civil context "is a flexible concept which requires courts to balance competing interests in determining the protections to be accorded one facing a deprivation of rights." *Id.* at 710, 279 S.E.2d at 175; accord *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 483,102 S. Ct. 1883, 1898, 72 L.Ed.2d 262 (1982) (commenting that "no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause"). Despite the inherent need to embrace due process issues with flexibility, certain fundamentals concerning the minimal procedural protections that must be employed are well-established. Those requirements were identified in *Clarke I* as a " formal written notice of charges; sufficient opportunity to prepare to rebut the charges; opportunity to have

retained counsel at any hearings on the charges, to confront his accusers, and to present evidence on his own behalf; an unbiased hearing tribunal; and an adequate record of the proceedings." 166 W. Va. at 710, 279 S.E.2d at 175(quoting Syl. Pt. 3, in part, *North v. West Virginia Bd. Of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977)).

What cannot be overlooked here is the fact that the ALJ heard testimony regarding allegations of inappropriate use of the computer. Oddly, none of this testimony corresponded to the day in question. As a result, the DOH failed to make its case.

In disciplinary matters, the burden of establishing the charges against a grievant falls on the employer. *W. Va. Code* § 29-6A-6. An allegation that a particular disciplinary measure is disproportionate to the offense or otherwise arbitrary and capricious is an affirmative defense, and Grievant bears the burden of demonstrating that the penalty was clearly excessive or reflects an abuse of agency discretion, or an inherent disproportion between the offense and the personnel action. *Jones v. W. Va. Dep't of Health and Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996).

The DOH has the burden of proving the fact upon which his termination was based.

They simply could not carry their burden of proof here.

III. The ALJ's mistake Regarding log out information is not a Basis to overturn her decision¹.

CONCLUSION

Your Respondent prays that this Honorable Court Affirm the Decisions below in their entirety, that he be fully reinstated to his position with back pay and benefits from

¹ This argument is discussed in I(B) above.

the date of his wrongful termination, until his return to work date, that he be awarded his cost and attorney fees incurred in the Circuit Court and supreme Court Appeals and any and all such remedies that will make him whole.

The grievant established that other employees of the DOH shared or otherwise made computer information available to others without any discipline. Consequently, meeting his burden of proving that his discipline was discriminatory when compared to how other, similarly situated, employees were handled for the same or a similar infraction.

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IN THE SUPREME COURT OF APPEALS, WEST VIRGINIA

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

PETITIONER

v.

DOCKET NO.: 12-0287

KENNETH LITTEN,

RESPONDENT.

CERTIFICATE OF SERVICE

I, Katherine L. Dooley, hereby certify that service of the foregoing, **Respondent's Brief** been served upon the parties of record by placing a true copy thereof in an envelope deposited in the regular course of the United States Mail, with postage prepaid, on this 5th day of July, 2012 addressed as follows:

Krista D. Black, Esq.
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West Virginia Department of Highways
1900 Kanawha Boulevard East
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