IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

DEREK R. WALKER,
Petitioner,

v. **Civil Action No. 19-AA-3**

WEST VIRGINIA STATE POLICE,
Respondent.

ORDER REVERSING THE DECISION OF THE HEARING EXAMINER

Introduction and Procedural Background

On February 12, 2020, the parties appeared before this Court for oral argument on Petitioner Derek Walker's ("Walker") administrative appeal of the decision of Hearing Examiner Jeffrey G. Blaydes, Esq., that denied Walker's grievance challenging his suspension and discharge from employment as a Trooper with Respondent West Virginia State Police ("WVSP"). Based on the record developed below, the applicable standard of review, and the arguments of the parties, this Court REVERSES the Hearing Examiner's decision.

Standard of Review

The standard of review to be applied in a circuit court's review of a contested case under the Administrative Procedures Act is as follows:

> (g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:
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> (1) In violation of constitutional or statutory provisions; or
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> (2) In excess of the statutory authority or jurisdiction of the agency; or
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> (3) Made upon unlawful procedures; or
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> (4) Affected by other error of law; or
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> (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W.Va. Code § 29A-5-4(g).

"The 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume the agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." *Frymier-Halloran v. Paige*, 193 W.Va. 687, 695, 458 S.E.2d 780, 788 (1995). "A finding is clearly erroneous if there is *no* substantial evidence in the record supporting it or, when there is evidence to support the finding, the circuit court, on review of the record, is left with a definite and firm conviction that a mistake has been made. *Board of Educ. of County of Mercer v. Wirt*, 192 W.Va. 568, 579 n. 14, 453 S.E.2d 402, 413 n. 14 (1994)(emphasis added). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City, N.C.*, 470 U.S. 564, 574, 105 S. Ct. 1504, 1511, 84 L.Ed.2d 518, 528 (1985). (Citation omitted). The Court has further held that

> [a] reviewing court must evaluate the record of an administrative agency's proceeding to determine whether there is evidence on the record as a whole to support the agency's decision. The evaluation is conducted pursuant to the administrative body's findings of fact, regardless of whether the court would have reached a different conclusion on the same set of facts.

Syl. Pt. 1, *Walker v. W. Virginia Ethics Comm'n*, 201 W.Va. 108, 109–10, 492 S.E.2d 167, 168–69 (1997). Our Court has observed that

> " 'Substantial evidence' requires more than a mere scintilla. It is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. If an administrative agency's factual finding is supported by substantial evidence, it is conclusive." Syl. pt. 4, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483.

Hasan v. W. Virginia Bd. of Med., 835 S.E.2d 147, 157 (W. Va. 2019).

The West Virginia Supreme Court has consistently held that this standard of review of is narrow:

> The Commission's adjudicative decision should not be overturned by either court unless it was clearly erroneous, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See Randolph County Bd. of Educ. v. Scalia,* 182 W.Va. 289, 292, 387 S.E.2d 524, 527 (1989). Review under this standard is narrow and the reviewing court looks to the Commission's action to determine whether the record reveals that a substantial and rational basis exists

> for its decision. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376–77, 109 S.Ct. 1851, 1860–61, 104 L.Ed.2d 377, 394 (1989). We may reverse the Commission's decision as clearly wrong or arbitrary or capricious only if the Commission used a misapplication of the law, entirely failed to consider an important aspect of the problem, offered an explanation that ran counter to the evidence before the Commission, or offered one that is so implausible that it could not be ascribed to a difference in view or the product of Commission expertise. *See generally Martin v. Randolph County Bd. of Educ.*, 195 W.Va. 297, 304, 465 S.E.2d 399, 406 (1995).

In re Queen, 196 W. Va. 442, 446, 473 S.E.2d 483, 487 (1996); cited by *Burner v. Martinsburg Police Civil Service Comm.*, 241 W. Va. 677 (2019).

Just recently, the Court reiterated the following long-standing principle in administrative appeals:

> 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 facts, which are reviewed de novo.

Syl. Pt. 4, *Everett Frazier, Commissioner W.Va. Div. of Motor Vehicles v. S.P.*, 2020 WL 874286, No. 18-0785 (W.Va. Feb. 18, 2020), quoting Syllabus point 1, in part, *Cahill v. Mercer County Board of Education*, 208 W.Va. 177, 539 S.E.2d 437 (2000).

But the narrow standard of review and the presumption of validity applied to agency decisions do not mean that a reviewing court is merely a "rubber stamp" – a reviewing court has discretion to "consider and decide" errors not assigned or argued. "Errors not argued by brief may be disregarded, but the court may consider and decide errors which are not assigned or argued." W. Va. Code § 29A-5-4 (e). "A reviewing court may affirm a lower tribunal's decision on any grounds. *See GTE South, Inc. v. Morrison*, 199 F.3d 733, 742 (4th Cir., 1999) ('if the administrative order reaches the correct result and can be sustained as a matter of law, we may affirm on the legal ground even though the agency relied on a different rationale')." Footnote 12, *Fairmont Gen. Hosp., Inc. v. United Hosp. Ctr., Inc.*, 218 W. Va. 360, 365, 624 S.E.2d 797, 802 (2005).

With this standard in mind, this Court makes the following factual findings.

Findings of Fact

In the early morning hours of November 19, 2018, a Berkeley County Sheriff's cruiser, stationary but occupied by Deputy Merson, was struck in the rear by another vehicle.[1] The speed at the time of the impact was estimated to be 20 - 25 mph and the force of the impact bent the back bumper, trunk lid, and damaged the tail lights.[2] Deputy Merson apparently did not at first realize that he had been injured by the collision, but as discussed below, he later collapsed[3] on the ground from back pain and was transported via ambulance to a hospital for treatment.

The colliding vehicle was being driven by Jayce Holben. Although it was not known at the moment of impact or during the subsequent pursuit, Holben was then a juvenile who was likely engaged that evening in the use and distribution of unlawful drugs. After Holben's arrest, Trooper Walker smelled marijuana coming from Holben's vehicle[4] and found drug paraphernalia, a scale, and approximately $2,000[5] cash.[6] Holben's impairment was confirmed by the post-accident observations of a certified drug recognition expert.[7] Holben refused to consent to a blood specimen.[8]

After striking Deputy Merson's vehicle, Holben fled from law enforcement in his vehicle on Route 11 North, a two lane road with painted centerlines along which are a mix of homes and small businesses. West Virginia State Police Trooper Walker, among other law enforcement personnel, followed behind Deputy Merson during the pursuit. The gross recklessness of Holben's flight, recorded by Deputy Merson's dash cam, is still frightening to watch to this day: Holben was clearly driving at speeds far beyond his motoring skill, at times driving at double or more of the posted speed limit of 45 m.p.h.[9] Holben very nearly collided head-on with two oncoming vehicles traveling southbound.

Predictably, given such reckless speed at night on a two lane road, Holben lost control of his vehicle, veered left, and in a spectacular crash just out of view of the dash cam, but which lit-up the night sky with a shower of sparks and an explosion visible in the dash cam video, struck a double utility pole, snapped it in half[10], and came to rest; the serious front and driver-side damage to Holben's car is evident on the video, but remarkably, it came to rest on its four wheels. Immediately after

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[1] Tr. 67 – 68.
[2] Tr. 239.
[3] Tr. 91.
[4] There was a smell of marijuana coming from the vehicle. Tr. 199.
[5] Respondent's Exhibit 1, p. 7 of 17.
[6] A Ziploc bag containing drug residue, marijuana, a scale, and a large amount of cash were recovered from Holben's vehicle. Tr. 165.
[7] *See* Trooper David Simerly's testimony at tr. 163 – 164.
[8] Resp.'s Ex. 1, p. 10 of 17.
[9] A 45 mph speed limit sign is briefly visible during the pursuit. Trooper Walker testified that they reached speeds of up to 110 mph.
[10] Tr. 232.

coming to rest, thick gray smoke is seen pouring out of the engine compartment and also apparently flowing through the engine compartment firewall into the passenger cabin - filling Holben's cabin to the point that visibility inside the car was poor. It is obvious from the dash cam video that anyone inside Holben's vehicle was in imminent danger of smoke inhalation and also at risk of being burned alive if flames erupted from the smoking car.

Deputy Merson's and Trooper Walker's actions are also evident from the video, but not their words, because the dash cam did not record audio: Deputy Merson approached and drew his pistol. Trooper Walker, kept his pistol holstered. Instead and visibly faced with a smoldering, high speed crash scene with the obvious potential for fire, sharp metal and broken glass, put on black gloves[11] which is consistent with the need to possibly extricate one or more occupants of the vehicle. Walker testified: "I'm putting my gloves on because we've had a situation before where the glass is broken and your hands get all cut up. So I anticipated that happening and went ahead and put my gloves on."[12]

There is no independent record of what was said or by whom, but Deputy Merson can be seen breaking out the driver's side window of Holben's car with his baton, and Trooper Walker, with some assistance from Deputy Merson, pulled Holben through the broken-out window and out of danger from the still smoking car. Walker testified that Holben was conscious and looking at him, but was not obeying the command to exit the vehicle.[13] Walker explained that given the circumstances of the high speed pursuit and Holben's attempted escape, and not knowing whether Holben possessed a knife or gun, Holben needed to be placed under arrest immediately so he "[didn't] do anything else" – a goal plainly consistent with officer safety[14] because as Trooper Walker explains, as long as Holben is in the car, he's dangerous to the officers because they can't see underneath the car seat or the far-side of Holben to determine whether he possesses a weapon.[15]

It is at the moment of extrication and upon seeing Holben land on the ground that a viewer of the dash cam video, in hindsight, can't help but notice that Holben is small and light as compared to the officers; Sergeant Cole testified that Holben said he was between 5'3" and 5'5" and weighed between 115 lbs. and 125 lbs. But as Major White conceded during the hearing, someone of small stature with a weapon is just as dangerous as someone of larger stature.[16]

It is also obvious from the video that in the next 16 seconds,[17] Trooper Walker, Deputy Merson, Deputy Ennis, and Trooper Kennedy, surrounded Holben. In the

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[11] Tr. 85 – 86.
[12] Tr. 191.
[13] Tr. 193.
[14] Tr. 190, 193.
[15] Tr. 194.
[16] Tr. 112.
[17] Dash cam at 5:22 to 5:38.

first seconds of this video sequence, it was the two deputies, not Trooper Walker, who were delivering blows to Holben's head. At the same time, Trooper Kennedy was holding Holben by the ankles and kicking him. Trooper Walker first tried to restrain Holben's hand, and on losing his grip, delivered a single kick to Holben's side. Although Trooper Walker dropped his knee as if to strike Holben, his knee did not touch Holben. Trooper Walker then delivered what the WVSP Director of Professional Standards, Major Joe White, called a "small kick"[18] (it was called a "half-kick" by other witnesses) and tried to handcuff Holben. As to his reason for kicking Trooper Walker testified that Holben was still not compliant and was resisting by pulling away from Walker's right arm and that is why Trooper Walker administered compliance strikes with his foot.[19] Three of the officers then stood and moved away from Holben leaving Trooper Walker to finish cuffing Holben.

But Trooper Kennedy, after perhaps checking on Deputy Merson, circled back to where Trooper Walker is visibly attempting to finish cuffing Holben and placed his right knee onto Holben's back. Holben then sought to free his right hand[20] by pulling away from Trooper Walker and by trying to extend it out in front of him as Trooper Walker sought to regain control of the hand.[21] In response, Trooper Kennedy delivers successive, closed fist blows to Holben's upper back in the area of his right shoulder. Trooper Walker did not strike Holben; he regained control of Holben's hands and completed cuffing him.

While this was going on, at about the 5:56 mark of the dash cam, Deputy Merson first goes down on one knee, then turned and lies flat on his back. At nearly the same time, Trooper Walker attempted to hoist Holben to his feet, but does so by lifting Holben by the cuffs from behind and against the rotational limits of Holben's shoulders. Trooper Walker testified that he uses this technique when someone is non-compliant, as Holben was here, according to Trooper Walker, because Holben stiffened his body in resistance to Trooper Walker's attempt to lift him.[22] Trooper Walker's legs then became entangled with Holben's legs and they fell to the ground. Trooper Kennedy then hoisted Holben from Holben's front side and visibly shoved Holben to the ground, with no cause for the shove apparent from the video.[23]

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[18] Tr. 87.

[19] Tr. 195.

[20] Holben didn't testify but his act is obvious from the video. Of this action Lieutenant Smouse wrote: As Trooper First Class Walker is attempting to cuff the perpetrator, the perpetrator looks up and frees his right arm." (Underline added). Respondent's Exhibit 1, p. 3 of 17.

[21] Tr. 91.

[22] Tr. 196 – 197.

[23] Trooper Kennedy was indicted in federal court on one count of Deprivation of Rights Under Color of Law, in violation of 18 U.S.C. § 242, as a result of his conduct on the roadside. At the time of Walker's grievance hearing, Kennedy's criminal charges were pending and Kennedy did not testify at the grievance hearing. However, following two days of bench trial in October of 2019, the Honorable Gina Groh, Judge, United States District Court for the Northern District of West Virginia, acquitted Kennedy of the charge. Both parties to the instant petition requested that the Court take judicial notice of Kennedy's acquittal. The Court agrees with the WVSP that no collateral

From the two dimensional view of the dash cam, it appears that Trooper Walker looked in the direction of Trooper Kennedy as Trooper Kennedy shoved Holben to the ground. Trooper Walker testified that he didn't see Trooper Kennedy shove Holben to the ground. He said that he was actually looking at Merson slightly to the foreground because he thought Deputy Merson may have been injured.[24] Beyond the difficulty of trying to assess viewing angle and depth of field from a video, the Court observes Deputy Merson's cruiser's headlights illuminated the scene. Obviously, the view from the dash cam's perspective, behind the headlights, is far better than from the view of a person looking anywhere in the general direction of the cruiser's bright headlights.

At the grievance hearing before the ALJ, the WVSP called an internal affairs investigator employed by the WVSP, First Lieutenant Smouse, and also his superior, Major White. Counsel did not request that these two witnesses be recognized by the tribunal as experts and they were not so recognized by the ALJ.

First Lieutenant Kevin Smouse is a Troop 2 Inspector assigned to the Professional Standards Section. He conducted an internal investigation of the Holben arrest, that included witness interviews, and his report was admitted as Respondent's Exhibit 1. He interviewed Trooper Walker and, according to Walker, Walker told him about Holben "tensing up", physically breaking Walker's grip three times, and refusing verbal commands.[25] Lieutenant Smouse did not sustain[26] four of the five charges lodged against Trooper Walker, including specifically finding that Trooper Walker did not use unnecessary force against Holben.[27] He did, however, conclude that Trooper Walker committed conduct not becoming a police officer.[28] Lieutenant Smouse said he reached this conclusion

> It – just the totality of everything that happened, the – I believe the technique that Trooper Walker used, I wasn't comfortable saying it was excessive, but I believe it looked – it was a poor decision to utilize a foot and strike somebody with it. I believe it looked bad when it was on video.[29]

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estoppel or fact preclusion arise from the federal trial and therefore, the Court does not give any consideration or weight to Judge Groh's findings beyond the simple fact of "acquittal".

[24] Tr. 198.

[25] Tr. 205 – 207.

[26] The four relevant dispositions are as follows: "Sustained," means the validity of the complaint has been established and proven by a preponderance of the evidence. W.Va. Code R. § 81-10-7.8.1; "Not Sustained," means the complaint is not established by the evidence and can be neither proven nor disproved by the evidence available. W.Va. Code R. § 81-10-7.8.2; "Unfounded," which means the complaint is without foundation, basis, is false, or not factual. W.Va. Code R. § 81-10-7.8.3; or "Exonerated," which means the incident occurred, but the employee acted lawfully and properly. W.Va. Code R. § 81-10-7.8.5.

[27] Tr. 40; 47 – 48.

[28] Tr. 55.

[29] Tr. 55 – 56.

The WVSP also called Major Christopher White, Director of Professional Standards. Major White became involved in this case following a telephone call from the WVSP Chief of Field Operations for Northern West Virginia who advised that an incident had occurred several days earlier but that it had not been reported or documented.[30] Major White explained that a use of force incident report must be timely filed regardless of whether the WVSP is primary, or as in this case, secondary to another law enforcement agency.[31]

Major White explained that Lieutenant Smouse's investigation was completed on an accelerated schedule ("Actually, a lot faster than normal"[32]) because the dash cam video had already been publicly released and that the Governor's office put out a press release mid-day on Thursday, November 29, 2018.[33] It was Major White who selected the five charges against Trooper Walker that were to be investigated by Lieutenant Smouse. Although Major White did not interview any witnesses or perform any investigation beyond reviewing the dash cam video and reading Lieutenant Smouse's report, Major White dissented from Lieutenant Smouse's findings. Major White recommended to Superintendent Cahill that, with the exception of the finding of no criminal culpability by Trooper White, all of Major White's suggested charges be sustained.[34]

In addition to finding that Trooper Walker had used unnecessary or excessive force, Major White also found that Trooper Walker had conducted himself in a manner unbecoming of a state trooper when he failed to report to his supervising officer the scope and extent of the force used, as well as the actions and inactions of Kennedy, at the scene of the arrest; that Walker failed to comply with WVSP's policy based upon his conduct during the arrest and in the subsequent investigation; and that Walker interfered with the rights of Holben based upon his conduct during the arrest. Major White agreed that Walker had not engaged in criminal conduct.[35]

Importantly to this Court's review, Major White testified that in his role of evaluating the events of November 19, 2018 he had to take into consideration first, the severity of the crime at issue; second, whether Holben presented an imminent threat to the safety of the officers or others; and third, whether Holben was resisting arrest or attempting to evade arrest by flight.[36]

Despite presenting these three criteria, no evidence was adduced as to the first factor, the severity of the crime at issue. Instead, Major White applied a standard that he had not articulated as a relevant test: whether at the conclusion of the

[30] Tr. 63.
[31] Tr. 64.
[32] Tr. 81.
[33] Tr. 80.
[34] Tr. 83 – 84.
[35] Tr. 101 – 103.
[36] Tr. 95.

pursuit "the officers" – not focusing on Trooper Walker who Major White conceded was "the least culpable of the four [officers involved]",[37] had acted as "first responders and caretakers."[38] Major White further testified that although he had watched the video numerous times, he had "never been able to discern any aggression or any resistance at all" by Holben.[39] This statement by Major White is unequivocally controverted by the dash cam video at the point where Holben struggles and frees his right hand while Trooper Walker is attempting to place handcuffs on Holben. Indeed, Walker testified that Holben resisted by tensing up and pulling away from Walker's grip.[40] Afterward at a hospital, Holben told Trooper Simerly "that it was a good thing there was a bunch of cops because if it was just one on one he could've taken him."[41] This statement is relevant to Holben's state of mind during the arrest.

On cross-examination, Major White claimed that he had considered the severity of Holben's crime and that Holben had fled, but, and as discussed below, the WVSP did not introduce evidence of that "consideration" and the ALJ completely failed to analyze Holben's conduct under pertinent West Virginia law.

Major White also conceded that before dissenting from Lieutenant Smouse's conclusions, he did not interview Trooper Walker to ascertain what verbal commands Trooper Walker gave to Holben but that knowledge of those commands would be relevant.[42] Obviously, such information is relevant to Major White's third criterion: whether Holben was resisting arrest. Moreover, Major White's minimization of the relevance of the information he did not know, including whether Deputy Merson and Trooper Walker knew whether Holben possessed a firearm before he was extricated from the burning vehicle and his misleading statement about visibility into Holben's vehicle[43], severely undermines any weight that the ALJ should have accorded Major White's testimony on issues of the amount of force used. Indeed, the ALJ inquired of Major White whether he had Trooper Walker's statement, admitted as Grievant's 2, in which Trooper Walker explains his conduct in light of Holben's resistance. Major White was unable to state with any confidence whether he considered that evidence in dissenting from Lieutenant Smouse's findings.[44] Lastly, and this is important to anyone viewing the dash cam, kicking an arrestee is not a *per se* violation of the WVSP's use of force policy; as Major White conceded in response to the ALJ's

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[37] Tr. 95.
[38] Tr. 96.
[39] Tr. 97.
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[41] Tr. 167, 172.
[42] Tr. 109 – 110.
[43] Major White said in response to a cross-examination question regarding the danger as officers approached Holben's vehicle: "No, but from the video it appears they had a clear sight into the vehicle, that they could see." Tr. 111, lns 19 – 20. This is not credible testimony. *See* dash cam video beginning at 4:50.
[44] Tr. 140 – 141.

question, there are circumstances "where one kick, one and a half kicks, could be a proper response."[45]

Trooper Walker testified to his family's legacy of service to the WVSP; his father, one of the first Black officers in the WVSP, served for 26 years.[46] Trooper Walker attended the WVSP Academy when he was age 21, worked in the area of drug interdiction, and made over 300 arrests and seized over a million dollars of guns, drugs, and illicit cash.[47] He was the first Black K-9 officer in WV history. He was in his eighth year of service and had no history of discipline before the events of November 19, 2018.

Trooper Walker was trained in, among other things, appropriate use of force. It was consistent with his training and the practice at his detachment to make a verbal report of the use of force to the commanding sergeant and after questioning by the sergeant, the sergeant would instruct a trooper whether a written report had to be filed. Trooper Walker followed that procedure in Holben's case.[48] Trooper Walker told Sergeant Cole that they had "tuned this guy up and put hands on him."[49] Walker explained that in his "vocabulary that means we put hands on somebody and we had to use force to put them in handcuffs."[50] He also reported Holben had a gash on his head but it was unknown whether it resulted from the crash or the arrest.[51]

That Trooper Walker did report use of force was independently confirmed by Sergeant Cole. Both Sgt. Cole and Walker were clear that after the conversation between Walker and Sgt. Cole, that Sgt. Cole did not order Walker to complete a use of force report. Sgt. Cole acknowledges that he wished he would have asked more clarifying questions but that Walker followed the directives Sgt. Cole provided him after their conversation about the incident. Sgt. Cole testified that he felt the issue of the communication regarding the use of force was a "miscommunication." Sgt. Cole testified that based upon his experience with Walker that he does not believe that Walker was attempting to deceive him. Sgt. Cole concluded that he takes equal if not more responsibility for the miscommunication between he and Walker regarding the use of force. Sgt. Cole received no discipline related to this incident. Sgt. Cole acknowledged that he wished he would have asked more

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[45] Tr. 148.
[46] Tr. 179.
[47] Tr. 180.
[48] Tr. 183 – 184.
[49] Tr. 202.
[50] Tr. 224.
[51] Tr. 202 – 203.

clarifying questions but that Walker "definitely" followed the directives Sgt. Cole provided him after their conversation about the incident.[52]

LEGAL ANALYSIS

I. WVSP has the Authority to Take Disciplinary Action

The WVSP Superintendent's authority to discipline a trooper is set forth in West Virginia Code § 15-2-21, which provides

> The superintendent may suspend, demote in rank discharge from the service any member of the department of public safety for any of the following causes: Refusing to obey the lawful orders of his superior officer, neglect of duty, drunkenness, immorality, inefficiency, abuse of his authority, interference with the lawful right of any person, participation in political activities, primaries, conventions or elections, conviction for a crime or any action proscribed under this article.

The Superintendent's authority to suspend a trooper pending investigation is set forth in relevant part in the following regulation:

> By virtue of W. Va. Code § 15-2-21, the Superintendent has the sole discretion to demote, discharge, and suspend employees from duty. The Superintendent, upon receiving a complaint against an employee or upon otherwise learning of misconduct by an employee may temporarily relieve the employee from duty pending further investigation, with or without compensation, pursuant to State Police operating policy and procedure.

W.Va. Code R. § 81-10-7.2.

The WVSP has elaborated on the causes for discipline in Legislative Rule, W.Va. Code R. § 81-10-11.3. This section provides for three categories of offenses in escalating severity. Group I offenses are generally the least serious, and include infractions like absenteeism. *See* W.Va. Code R. § 81-10-11.3.1. Group II offenses are more severe than Group I offenses, and include infractions such as failure to perform assigned work or failure to comply with policy. *See* W.Va. Code R. § 81-10-11.3.2. Group III offenses are the most severe, and include infractions such as use of excessive force, conduct unbecoming a State Trooper, and interference with the rights or property of others. Group III offenses warrant the most severe discipline, including discharge. *See* W.Va. Code R. 81-10-§ 11.3.3. The WVSP bears the burden of proof in disciplinary matters. *See* W.Va. Code R. § 81-8-6.5. However, the WVSP bears the burden of proof in disciplinary matters. *See* W.Va. Code R. § 81-8-6.5.

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[52] Tr. 26 – 29.

II. "Objectively Reasonable" Force

The United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968), established the right of law enforcement to make an investigatory stop or arrest with some degree of physical coercion or threat thereof. The Supreme Court in *Terry* addressed the "objectively reasonable" standard as follows:

> And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inference from those facts, reasonably warrant that intrusion. [footnote omitted]. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the law can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. [footnote omitted].

The Court should then inquire whether the facts:

> available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? [citations omitted]. Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. [citations omitted]. And simple "good faith on the part of the arresting officer is not enough." If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers and effects," only in the discretion of the police [citations omitted].

Id. at 21-22. "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447 (1979), however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

"As in other Fourth Amendment contexts, however, the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."

Graham v. Connor, 490 U.S. 386, 397, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 443 (1989). In *Graham* the United States Supreme Court held that "among the factors to be considered under the Fourth Amendment's "objective reasonableness" standard are "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Graham, 490 U.S. at 396.

Major White's explanation of the applicable WVSP standard is consistent with *Graham*. Likewise, the WVSP's "Response to Resistance or Aggression" policy mirrors *Graham*. The policy defines "objectively reasonable response" as

> [t]he action taken by a member that is reasonable in light of the facts and circumstances confronting the member. These circumstances include, but are not limited to: 1) the severity of the crime at issue; 2) whether the suspect poses an immediate threat to the safety of the member or others; and 3) whether the subject is actively resisting arrest or attempting to evade arrest by flight.

(Resp. Ex.4)(Emphasis added).

This Court will consider each of the these three factors.

A. The First Prong: The Severity of the Crime at Issue

Nowhere in the WVSP's case-in-chief, including in the testimony of Major White, the termination decision by Superintendent Cahill, or in the Decision of the Hearing Examiner, or in the WVSP's briefing in this appeal is any crime identified or its severity discussed. This is a glaring omission which the mere vague, passing references in the Decision do not cure.[53]

The West Virginia Legislature has determined that maliciously assaulting a law enforcement officer causing injury is a felony and upon conviction, shall be confined in a penitentiary for three to fifteen years:

> W. Va. Code 61-2-10b (b) Malicious assault. — Any person who maliciously shoots, stabs, cuts or wounds or *by any means causes bodily injury* with *intent* to maim, disfigure, disable or kill a government representative, health care worker, utility worker,

[53] The ALJ says that Holben "acted recklessly" and "extremely dangerously." Decision at fn 18. He goes on to say that "Holben's actions placed Walker, his colleagues and the public at risk." *Id.* at 17.

> emergency service personnel, correctional employee or *law-enforcement officer acting in his or her official capacity, and the person committing the malicious assault knows or has reason to know that the victim is acting in his or her official capacity* is guilty of a felony and, upon conviction thereof, shall be confined in a correctional facility for not less than three nor more than fifteen years.

In this case, it is sufficient for officers to believe they are pursuing a dangerous felon, intent on malice, from the moment Holben fled after hitting and injuring Deputy Merson. *See also* W. Va. Code § 61-2-10 (c) Unlawful assault ("Any person who unlawfully but not maliciously shoots, stabs, cuts or wounds or by any means causes a government representative, health care worker, utility worker, emergency service personnel, correctional employee or law-enforcement officer acting in his or her official capacity bodily injury with intent to maim, disfigure, disable or kill him or her and the person committing the unlawful assault knows or has reason to know that the victim is acting in his or her official capacity is guilty of a felony and, upon conviction thereof, shall be confined in a correctional facility for not less than two nor more than five years.") [54]

Furthermore, the West Virginia Legislature rightly seeks to protect the public from the obvious dangers posed by reckless flight in a vehicle, such as Holben did while being pursued by, among others, Trooper Walker. The law provides that upon conviction a person shall be imprisoned not less than one nor more than five years:

> A person who *intentionally flees* or attempts to flee in a vehicle *from a law-enforcement officer*, probation officer, or parole officer *acting in his or her official capacity after the officer has given a clear visual or audible signal directing the person to stop*, and *who operates the vehicle in a manner showing a reckless indifference to the safety of others*, is guilty of a felony and, upon conviction thereof, shall be fined not less than $1,000 nor more than $2,000 and shall be imprisoned in a state correctional facility not less than one nor more than five years.

W. Va. Code §61-5-17(f).

Moreover, the law enforcement officers in pursuit clearly had a reasonable suspicion, given the extraordinarily dangerous driving through a mixed residential and commercial area at speeds exceeding 100 mph, that the driver was impaired.

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[54] Holben did not testify. Thus, this Court is mystified as to how it could be concluded that Holben was merely reckless, and not malicious, when he drove off after a hard collision with Deputy Merson. Flight is ordinarily evidence of guilty conscience or knowledge, not mere negligence. Syl. Pt. 3, *State v. Meade*, 196 W. Va. 551, 474 S.E.2d 481 (1996).

That is yet another serious crime for which the Legislature has enacted a felony punishable on conviction by 3 to 10 years:

> A person who *intentionally flees* or attempts to flee *in a vehicle from a law-enforcement officer*, probation officer, or parole officer *acting in his or her official capacity after the officer has given a clear visual or audible signal directing the person to stop*, and who is under the influence of alcohol, controlled substances or *drugs*, is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility not less than three nor more than 10 years.

Indeed, Trooper Walker smelled marijuana emanating from Holben's vehicle and the WVSP's drug recognition expert who interviewed Holben that evening at the hospital, confirmed that Holben was, in fact, using drugs.[55]

The failure of the WVSP's proof in regards to the severity of the crime prong of the objective reasonableness standard, and the failure of the Decision to address the same, is a clear error of law. The Decision, by failing to analyze the severity of the crimes that the officers witnessed before arresting Holben, sapped the objective analysis below of any rigor. That failure resulted in Trooper Walker's use of force being assessed in a vacuum devoid of the context in which it arose and thus, clearly violated the holding of *Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 443 (1989). This error mandates reversal per W.Va. Code § 29A-5-4(g). Nonetheless, the Court will proceed to the second and third prongs of the required analysis.

B. The Second Prong: Whether the Suspect Posed an Immediate Threat

The second prong of the test of the reasonableness of the force used is whether the suspect poses an immediate threat to the safety of the member or others? Here, again, the risk analysis must begin in the context of what the arresting officers knew of the suspect.

First, the officers knew that Holben had struck Deputy Merson's vehicle and then fled at extraordinary speeds through an area of Route 11 N populated with businesses and residences. The dash cam video depicts what the officers saw: Holben losing directional control of his vehicle and nearly colliding head-on with

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[55] Whether Holben was ultimately charged with a felony and if so, with which felony, is a matter of prosecutorial discretion, and in any event, is wholly irrelevant to the law enforcement officers making an arrest. What is important is an officer's knowledge of the severity of the suspect's criminal behavior at the time of a suspect's arrest.

two south-bound vehicles. A suspect willing to risk the lives of innocent occupants of other cars plainly has no regard for the lives of the officers.

Next, Holben's dangerous driving resulted in him colliding with a utility pole. Again, from an officer's perspective in assessing the risk that a suspect poses, Holben demonstrated he was willing to endanger his own life. Officers could reasonably infer from Holben's conduct that he would also be willing to endanger their lives.

It is within this context that the Court considers 1) the extrication of Holben; 2) subduing Holben once extricated; and, 3) Walker's hoisting of Holben to his feet.

1. Extrication

After Holben crashed, the dash cam shows Deputy Merson ahead of Trooper Walker walking toward Holben's smashed car. On arrival at the car, the driver's window is closed and the cabin is filled with smoke. Deputy Merson used his baton to break the driver's window and clear broken glass. Smoke streamed from the window.

According to Trooper Walker's testimony, Holben, despite being conscious and looking at the officers, did not obey the command to exit the vehicle. Deputy's Merson's concern for officer safety at this moment is evident by him having his pistol in-hand. The officers could not have known at that moment whether Holben had a pistol, knife, capsaicin spray or other weapon either beside him, or within reach of a pocket in the driver's door, or under the seat. It is at this moment that the officers are in the most danger; the suspect is close to the officers but not in custody, his hands are not clearly visible in the smoke, and a weapon may be nearby. That is why is it was essential for officer safety, and, frankly, the safety of the suspect, that the officers act decisively to quickly end this moment fraught with danger.

And that is precisely what the officers did; they rapidly extricated Holben from the vehicle by propelling him through the driver's side window that Deputy Merson had just broken out. The officers at that moment could not have known Holben's weight or height. As it turned out, Holben was relatively light and so he was propelled quickly when the officer's removed him. Had he been 75 lbs heavier he might have been dragged across the broken window frame glass instead of being propelled.

In these circumstances, it was clearly contrary to law and clearly wrong in view of the reliable, probative and substantial evidence on the whole record to conclude that excessive force was used to remove Holben from the vehicle.

2. Subduing Holben

Whether Holben had a weapon concealed on him could not be known in the first seconds when four officers surrounded Holben as he was prone on the ground. Thus, the risk posed by Holben to the officers in this circumstance is still high. The purpose of subduing Holben is to reduce risk and then, by putting handcuffs on him, to mostly eliminate and maintain a low level of risk.

The dash cam video cannot show one way or the other whether Holben was tensing to avoid being cuffed. But the Court can see that Trooper Walker loses his first grip on Holben's hand; should Holben's hand be freed, the risk posed by Holben climbs again rapidly. That is when Trooper Walker kicked Holben. A kick is permissible in certain circumstances and there is no doubt here that without knowing yet whether Holben has a concealed weapon, and viewed in the context of the entire pursuit, Trooper Walker's single kick is not excessive. Indeed, Lieutenant Smouse said as much.

That Holben was in fact resisting is beyond conjecture: later in the sequence and while Trooper Kennedy is forcing the suspect down with his knee, Holben again freed his hand and attempted to reach it out in front of him to prevent Trooper Walker from handcuffing him. Holben's "reach" didn't succeed for long because Trooper Walker captured Holben's hand again and this time succeeded in handcuffing Holben. But Holben's own words at the hospital later that evening are confirmatory of his earlier, resistant state of mind: he spoke with bravado about would have happened if the arrest had been a one-on-one encounter with an officer instead of four on one.

To be clear, Trooper Walker did kick at Holben second time, but the second time it was a small, or half kick of no consequence to Holben. This Court is not going to second guess an officer, in the moment of subduing a potentially dangerous suspect, for a trifling contact of no consequence to the suspect. "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 396–97, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 443 (1989) (internal citation omitted).

3. Hoisting Holben to his Feet by his Handcuffs

At the point when Trooper Walker attempted to lift Holben to his feet, Holben's hands were handcuffed behind. Therefore, the risk posed by Holben was lower than it had been before he was handcuffed. The WVSP did not introduce a policy prohibiting this type of lifting and Trooper Walker testified that it was not punitive, but rather, he did it because Holben was tensing-up again. Whether that "tensing-up" was Holben splaying his legs to make it difficult to roll him over and pick him up from the front is not discussed in the record and the dash cam video is not clear. All that is clear is that both Trooper Walker and Holben fell to the ground nearly immediately – obviously not a desired result from Trooper Walker's perspective.

Given the absence of proof of a policy forbidding such hoists, Holben's conduct to this point as well, his subsequent braggadocio, and in light of the complete failure below to consider objective reasonableness, the Court is convinced that the Decision is clearly wrong in upholding a discharge on this basis.

C. The Third Prong: Whether Holben was Actively Resisting Arrest or Attempting to Evade Arrest by Flight

This prong warrants little analysis because it is beyond dispute that from the collision with Deputy Merson's cruiser, the high speed pursuit, the refusal to comply with a command to exit the vehicle, Holben's tussling over control of his wrist to prevent being handcuffed, and slipping-out a hand to "reach" were all one continuous flow of events leading inexorably to the conclusion that Holben was resisting and evading arrest.

Trooper Walker's limited use of force (one and ½ kicks) was objectively reasonable under these circumstances. Indeed, the WVSP does not cite to any case in the nation that would hold otherwise. The Decision is erroneous as a matter of law in failing to consider this prong within the totality of the circumstances and clearly wrong in view of the reliable, probative and substantial evidence on the whole record.

III. Other Issues

The Court briefly addresses the remaining issues.

A. Public Disclosure of the Investigation

The Court listened to the audio recording of a radio show in which Superintendent Cahill was interviewed about Holben's arrest following the public release of the dash cam video and a press release by the Governor. The interviewer already knew of Trooper Walker's identity and used his name in a question to the Superintendent. It is not this Court's prerogative to question the wisdom of submitting to such an interview before the WVSP investigation was complete, but in terms of the technical issue of improper public disclosure of Trooper Walker's identity, Superintendent Cahill was not the source. Trooper Walker essentially abandoned this issue at oral argument.

B. Plain Error: The ALJ's Improper Reliance on "urbandictionary.com"

The plain error doctrine allows an appellate court, in the interest of justice, the authority to notice error to which no objection has been made. It has been explained as follows:

> To trigger application of the "plain error" doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.

State v. White, 231 W. Va. 270, 280, 744 S.E.2d 668, 678 (2013) (internal citation omitted). In this case, the ALJ committed plain error when he relied, in part, upon hearsay from urbandictionary.com to hold that Trooper Walker was not credible.

Courts may admit the contents of authoritative sources as an exception to the hearsay rule if judicial notice is taken of the learned treatise, periodical, or pamphlet. WVRE 803(18). A ruling taking judicial notice, of course, must be done in the presence of the parties and their counsel to ensure due process.

In the "Findings of Fact" section of the Decision the ALJ acknowledges going outside of the record of the case when he searched an internet site called urbandictionary.com for a colloquial definition of "tune up".[56] The ALJ found a definition that referenced the police "beating up" or "beating down" someone in order to give them an "attitude adjustment". As the ALJ noted, the urban dictionary definition he found was not consistent with Trooper Walker's explanation of his usage of this term.[57] The ALJ then concluded in his analysis that "[t]o be

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[56] Decision, p. 5, fn 9.
[57] *Id.* at ¶ 23.

clear, the facts and circumstances of the case do not support Walker's testimony as credible."[58]

First, the urban dictionary is not a learned treatise; just because the internet provides a definition of a slang term does not mean that definition is consistently used by speakers. Indeed, slang, more so than standard English, is inherently malleable in its meaning as its usage is not generally accepted or fixed by, for instance, a learned treatise.

Second, it was plain error to search outside the record and rely upon hearsay that does not fall within an exception.

Third, the error was not only plain, but it prejudiced Trooper Walker's procedural due process right to have notice of the Court's consideration of urban dictionary and a meaningful opportunity to object, and it prejudiced his substantive due process rights because, at least in part, it appears from the Decision to have played a part in the ALJ's assessment of Trooper Walker's overall credibility.

This error, arising from a search outside the record and without notice to the parties, seriously affects the fairness and integrity of the underlying proceeding and is an independent basis to reverse the Decision in its entirety.

CONCLUSION

The Respondent has not established, by a preponderance of the evidence that Trooper Walker:

- failed to perform assigned work, or otherwise comply with WVSP policy, procedure, or administrative rules;
- used unnecessary force during an arrest;
- committed conduct unbecoming an officer; or
- failed to abide by WVSP policy when he verbally reported the incident to Sergeant Cole and then followed the instructions provide to him by his commanding officer.

To the contrary, the Decision must be reversed because, as discussed *supra,* it was in clear error of law, infected by plain error, and clearly wrong in view of the reliable, probative and substantial evidence on the whole record.

WHEREFORE, based upon the foregoing, the Decision is REVERSED. The WVSP is ORDERED to restore Trooper Walker to his rank and active duty position that he held at the time of his unlawful termination and he is to be MADE WHOLE

[58] *Id.* at p. 13.

for his lost pay, benefits and seniority. Further, Trooper Walker may recover his attorney fees in this matter up to the statutory authorized limit of $1,000.00.

The Court notes the objections of the Agency to all adverse findings and rulings herein.

Honorable David Hammer
Circuit Court Judge
23rd Judicial Circuit