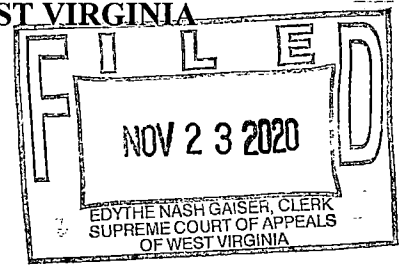


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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**No. 20-0558**



**WEST VIRGINIA STATE POLICE,**

*Respondent Below, Petitioner,*

**V.**

**DEREK R. WALKER,**

*Petitioner Below, Respondent.*

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**BRIEF OF PETITIONER  
WEST VIRGINIA STATE POLICE**

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On appeal from the Circuit Court of Jefferson County  
Civil Action No. 19-AA-3  
The Honorable David M. Hammer

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## **ASSIGNMENTS OF ERROR**

I. The circuit court disregarded the hearing examiner's findings of fact and credibility determinations for key witnesses, including the State Police's Director of Professional Standards, Major Joe White, and Respondent Derek Walker, and substituted its own judgment for that of the hearing examiner with respect to the relevant and credible evidence gleaned from the dash camera footage of the incident.

II. The circuit court erroneously emphasized the conduct of the juvenile before the high-speed chase began and after he was transported to the hospital, and in doing so, crafted a version of the facts that ignored the importance of the horrific crash sustained by the juvenile and its impact on Respondent Derek Walker's use of force on the juvenile after the crash.

## **STATEMENT OF THE CASE**

### **I. Introduction and Procedural Background**

On November 19, 2018, Respondent Derek R. Walker ("Walker"), while employed as a West Virginia State Police Trooper, participated in the beating of a sixteen-year-old male who had just violently crashed his vehicle after leading the State Police and the Berkeley County Sheriff's Department on a high-speed chase. The events were captured on video from a deputy sheriff's cruiser. The video revealed that, after the juvenile's vehicle crashed into a pole, exploded, flipped and landed on its wheels, Walker violently yanked the juvenile from his vehicle through the driver's side window that had been broken by the deputy sheriff's asp baton; kicked the juvenile two times while he was on the ground; and once he handcuffed the juvenile, jerked the juvenile upward from the ground by handcuffs that were binding the juvenile's hands behind his back. Walker claimed the force was necessary to overcome resistance from the roughly 5'4'', 120 pound,

juvenile. When Walker called his supervisor to report the incident as required, he said only that the juvenile fled and the officers “tuned him up,” a phrase that refers to beating someone up.

State Police Superintendent Jan Cahill learned of the video ten days later. After reviewing the video, Superintendent Cahill placed Walker on unpaid administrative leave the following day, pending further investigation. The State Police’s investigation substantiated allegations that warranted Walker’s discharge under the agency’s regulations. On January 17, 2019, Superintendent Cahill discharged Walker from his employment as a Trooper.<sup>1</sup>

Walker filed grievances challenging his suspension and discharge, which proceeded to an evidentiary hearing on July 22, 2019, before Hearing Examiner Jeffrey G. Blaydes, Esquire. Walker appeared in person and with counsel. The State Police presented the testimony of Sergeant Michael Cole, who was the Officer-in-Charge on the night of the incident; Lieutenant Kevin Smouse, State Police Professional Standards Section, who conducted the initial investigation; and Major Joe White, State Police Director of Professional Standards, who reviewed and dissented, in part, from Lieutenant Smouse’s conclusions. Walker presented the testimony of Trooper David Simerly, who observed the juvenile at the hospital after the incident. Walker also testified. The parties introduced several exhibits, including the dash camera video of the incident.

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<sup>1</sup> Walker was not the only trooper involved in the November 19, 2018, beating incident who was discharged as a result. The State Police also discharged former Trooper Michael Kennedy (“Kennedy”). Unlike Walker, however, Kennedy was also 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. At the time of Walker’s grievance hearing, Kennedy’s criminal charges were pending. 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. (AR 373). Walker attached Judge Groh’s *Order of Bench Trial* to his reply brief filed with the circuit court. Therefore, the circuit court was aware of Kennedy’s acquittal when it reversed the Hearing Examiner’s decision denying Walker’s grievance. Indeed, the circuit court asked the parties to address the extent to which the doctrine of collateral estoppel should be applied to its review of Walker’s grievance appeal based on Kennedy’s acquittal, even though Walker never raised the issue in his administrative appeal. (AR 407). The circuit court ultimately agreed with the State Police that there was no fact or issue preclusion stemming from Kennedy’s acquittal. (AR 510-511).

Hearing Examiner Blaydes viewed the video of the event, observed Walker's demeanor on the stand, and found that Walker's testimony purportedly justifying his actions "lack[ed] the hallmarks of credibility." On the other hand, Hearing Examiner Blaydes found the testimony of Major White and his analysis of the incident to be credible. On September 30, 2019, Hearing Examiner Blaydes issued his decision upholding Walker's suspension and discharge. (AR 305).

Walker timely appealed Hearing Examiner Blaydes' decision to the Circuit Court of Jefferson County. The circuit court received briefs from the parties and heard argument on February 12, 2020. (AR 327-406; 409-462). On July 24, 2020, the circuit court entered its *Order Reversing the Decision of the Hearing Examiner*, in which the circuit court -- sitting as an appellate court -- essentially re-tried the case, made its own findings of fact and credibility determinations, and substituted its own judgment for that of the hearing examiner and the agency to conclude that Walker should not have been discharged. (AR 505). The State Police filed its Notice of Appeal with this Court on July 29, 2020. On September 3, 2020, this Court granted the State Police's motion to stay the circuit court's order pending disposition of this appeal.

## **II. Statement of Facts**

Prior to his discharge, Walker was employed as a trooper for approximately 7 years, beginning his service in November 2011. (AR 183). The events giving rise to Walker's suspension and subsequent discharge occurred in the early morning hours of November 19, 2018. Walker and former trooper Kennedy, along with Berkeley County deputy sheriffs, engaged in a high-speed chase of a sixteen-year-old male, J.H., who bumped a deputy sheriff's cruiser from the rear with his vehicle and fled. The events were captured on the deputy sheriff's cruiser's dash camera, of

copy of which was entered into evidence at the hearing. (AR 265A)<sup>2</sup>. There is no audio on the recording, only video.

The chase occurred on Route 11, a two-lane highway. Walker testified that they reached speeds of up to 110 miles per hour (AR 191), and the video shows J.H. weaving through traffic unsafely at a high rate of speed before veering left and crashing into a utility pole, causing an explosion. J.H.'s damaged vehicle flipped and rested on its tires. (AR 190-191; 265A). Walker testified that, as he and Sheriff Deputy Merson approached J.H.'s vehicle, they verbally commanded him to exit the vehicle. Walker testified that Deputy Merson stated twice, "Get out of the car." (AR 194). Despite the apparent smoke inside J.H.'s vehicle, Walker testified that he could see that J.H. was conscious, sitting in the driver's seat. (AR 194). Deputy Merson did not testify at the grievance hearing.

Deputy Merson drew a firearm and flashlight as he approached J.H.'s vehicle. Walker approached the vehicle as well, but did not draw a firearm. Rather, he put on black gloves because he anticipated having to remove J.H. from the vehicle with broken glass present. (AR 191-192). Both Deputy Merson and Walker approached the vehicle so that they were very close to it, and, in the case of Deputy Merson, could break the driver-side window. (AR 193). Walker testified that he was concerned for his safety because he could not clearly see J.H. inside the vehicle because of the smoke and did not know if J.H. had a weapon. (AR 192). Despite this purported fear of J.H., the video shows that both Deputy Merson and Walker stood next to J.H.'s drivers-side window. (AR 265A). And, while he testified that he could not see into the vehicle because of the smoke, Walker later testified that he could see that J.H. was conscious and looking at him. (AR 194).

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<sup>2</sup> A copy of the video was admitted at the July 22, 2019, administrative hearing as State Police's Exhibit #2 and is included in a sleeve in the Appendix Record between pages 265 and 266.



Deputy Merson used his asp baton to break J.H.'s driver-side window. (AR 193). At that point, Walker forcefully and violently pulled J.H. through the broken car window. (AR 265A). As a result of the force used by Walker, J.H. was propelled horizontally through the car window, into the air, and landed approximately a body-and-a-half-length or more from the vehicle. (*Id.*). J.H. landed face down on the ground, and Walker proceeded to place handcuffs on him. (*Id.*).

J.H. was estimated to be between 5'3" to 5'5" and 115 to 125 pounds. (AR 21). Although the video reflects that he squirmed momentarily on the ground, he was quickly surrounded by two sheriff's deputies and two State troopers who easily overpowered him. (AR 265A). The officers hit and kicked J.H. while forcing his head to the ground. (*Id.*). The video clearly shows that Walker kicked J.H. two times while J.H. was face down on the ground with multiple officers on top of him. (*Id.*). Although Walker testified that J.H. resisted by tensing up, pulling away from Walker's grip, and flailing his legs (AR 206-207), J.H.'s resistance was not evident from the video.

Walker ultimately handcuffed J.H.'s hands behind his back. At that point, Walker jerked J.H. from the ground by the handcuffs, resulting in J.H. being momentarily dragged and turned over. (AR 265A). Kennedy then picked up J.H. in the same manner and slung J.H. to the side of the road. Walker testified that he did not recall seeing Kennedy toss J.H. to the side of the road (AR 222-223), even though the video shows Walker looking in that direction.

After the arrest, Walker contacted Sergeant Michael Cole, who was serving as the officer-in-charge, to report the incident. Walker and Sergeant Cole testified that Walker contacted Sergeant Cole just after the use of force as they were leaving the scene to report that J.H. fled and that the officers had "tuned him up." (AR 16; 185). Walker testified that the phrase "tuned him up" was commonly used to indicate that the officers had to lay hands on the perpetrator during the course of the arrest. (AR 185). Unfamiliar with the definition of the term, Hearing Examiner

Blaydes researched the term and wrote in his decision that an online definition of colloquial terms defines "tune up" as an act of physical violence, specifically, giving "someone an attitude adjustment" by beating them up. Its secondary definition is "a beat down especially when administered by the police." (AR 309).

During his conversation with Sergeant Cole, Walker did not report the manner in which he pulled J.H. from the vehicle; the fact that he and other officers kicked J.H. multiple times; the fact that other officers hit J.H. multiple times; or the fact that Walker (and then Kennedy) jerked J.H. up from the ground by the handcuffs. In fact, Walker did not advise Sergeant Cole that Kennedy was present. Rather, Walker simply stated that the officers had "tuned him up" and Sergeant Cole asked no follow-up questions. (AR 16-18). Based on the limited information Walker provided and the fact that Sergeant Cole asked no follow-up questions, Sergeant Cole determined that the pursuit of J.H. and the subsequent use of force did not need to be reported any further. (AR 16).

As for J.H.'s condition following the incident, Sergeant Cole spoke with him and J.H. complained of upper back, neck and rib injuries. (AR 21). J.H. further indicated he had staples in his neck, ear, and hairline, and abrasions on his hands. (AR 23). Walker also observed that J.H. had "a gash" on his head and he observed blood on the ground. (AR 203-204). Trooper Simerly testified that J.H. had tremors, short term memory issues, and difficulty concentrating on one task when speaking with J.H. at the hospital. (AR 165).

Trooper Simerly further testified that he believed J.H. had been using marijuana, an opinion he supported by the fact that the arresting officers retrieved a small bag of marijuana, a scale, and cash from J.H.'s vehicle. (AR 165-166). Finally, Trooper Simerly testified that J.H.'s general attitude at the hospital was "cocky," and that J.H. claimed that "it was a good thing there was a bunch of cops because if it was one on one he could've taken him." (AR 168).

Because the Berkeley County Sheriff's Department was the lead agency on the arrest, the State Police did not learn of the existence of the video until November 28, 2018. (AR 37; 64). The State Police reviewed the video the following day, and placed Walker on unpaid administrative leave as of 5:00 p.m. by Special Order 552 executed by Superintendent Jan Cahill. (AR 266). Superintendent Cahill suspended Walker prior to questioning him about the arrest and the use of force depicted in the video. On November 30, 2018, the State Police referred the matter to Lieutenant Kevin Smouse of the Professional Standards Section to complete a Report of Investigation or Inquiry. (AR 37).

The Legislative Rule governing the discipline of State Police employees identifies three levels of misconduct. Group I offenses are generally "less severe in nature" and include infractions such as absenteeism, use of leave, and use of abusive language. Group II offenses are more severe than Group I and include infractions such as failure to perform assigned work, violation of safety rules, and failure to comply with a policy. Group III offenses are the most serious and a single occurrence "would warrant" discharge of an employee. Examples of Group III offenses are use of unnecessary force, criminal conduct, and conduct unbecoming of a state trooper. *See* W.Va. Code R. § 81-10-11.3.

The State Police alleged that Walker committed five violations: one Group II Offense for failure to perform assigned work, or otherwise comply with State Police policy and procedure set forth in the administrative rules; and four Group III Offenses: violation of law or engaging in criminal conduct on or off the job; use of unnecessary force during an arrest/custody procedure; conduct unbecoming a state trooper; and interference with the rights and property of others. (AR 247).

Lieutenant Smouse concluded his investigation on December 4, 2018, and sustained one Group III allegation (conduct unbecoming a state trooper) and did not sustain the remaining four allegations. (AR 39-41; 259-260). To be clear, regulations required that Lieutenant Smouse use specific dispositions for each allegation. The four relevant dispositions are as follows: "Sustained," which 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," which 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. Lieutenant Smouse did not "exonerate" Walker of any of the allegations.

Lieutenant Smouse based his finding of conduct unbecoming of an officer upon the "totality of everything that happened." He believed that Walker made a "poor decision" by kicking J.H. on two occasions. He further indicated that Walker's report of the incident was "vague" and that both Walker and Sergeant Cole shared fault in this regard. He then generally concluded, "just everything in its totality, and what you see in the video does cast aspersions on the officers' conduct." (AR 56-57). Lieutenant Smouse's report did not make a recommendation as to specific discipline for Walker.

Major Joe White is the State Police's Director of Professional Standards with nearly twenty-four years of service with the agency and approximately eight years of service as Director of Professional Standards. (AR 63). In his role as Director of Professional Standards, Major White looks at the totality of the initial investigation, and either concurs with or dissents from the recommendation resulting from the initial investigation before a recommendation is submitted to

the Superintendent for a final decision. (AR 84). Major White reviewed Lt Smouse's report, viewed the video of the incident, and dissented, in part, from Lieutenant Smouse's recommendations with respect to Walker. Unlike Lieutenant Smouse, Major White sustained four of the five allegations against Walker. He did not find that Walker had committed a criminal act. (AR 84-85).

Major White testified to the three instances during which he believed Walker violated the State Police's prohibition against excessive force. At the hearing, the parties first viewed the video in its entirety at regular speed, then re-played the video with stoppages to allow testimony about specific parts. (AR 67). First, Major White found that the extraction of J.H. from the vehicle was excessive. He noted that J.H. had just experienced a very significant car wreck involving a collision with a telephone pole that caused his car to flip before coming to a stop. (AR 87). Major White observed that both Walker and Deputy Merson felt safe enough to get very close to the vehicle and that Walker had not drawn a weapon at this time. He concluded that Walker must have believed it safe enough to approach or had some level of certainty that J.H. would not draw a weapon. (AR 140).

Second, Major White observed that Walker kicked J.H. twice and attempted to knee him in the head. Major White observed, and even Walker agreed, that J.H.'s body was fairly limp at this point; that there were four officers handling a sixteen-year-old who was approximately 5'4", 120 pounds; and that J.H. was displaying no aggression or resistance while lying on the ground. Major White concluded that the officers were "beating the kid up, quite frankly." (AR 89).

Third, Major White determined that Walker utilized excessive force when he jerked J.H. off the ground by J.H.'s hands while they were handcuffed behind his back. (AR 93). Major White also concluded that Walker was looking at J.H. and Kennedy when Kennedy used the same method

to pick up J.H. and sling him to the side of the road, contrary to Walker's contention that he did not see Kennedy do such a thing. (AR 93).

In reaching his conclusions, Major White considered the statements of Walker, Kennedy, and Sergeant Cole, as well as the video. He observed that it was a "tough call" and noted that Walker was less culpable than Kennedy. (AR 96). However, he found that lifting a suspect by the handcuffs as Walker did was not objectively reasonable. He further concluded that none of the kicks delivered by Walker nor Walker's failure to report Kennedy's actions were objectively reasonable. (AR 128-129).

Consistent with the State Police's Response to Resistance or Aggression Policy (AR 274), Major White testified that he considered the severity of the crime committed by J.H.; whether J.H. was an imminent threat to the safety of the officers or anyone else; whether J.H. was resisting arrest; and whether J.H. was evading arrest by flight. (AR 96). In assessing those factors, Major White concluded as follows:

[A]ny of the actions taken by Trooper Walker or Walker at this point, with the force that he used, in my opinion is contrary to our written policy on use of force, because it was not objectively reasonable in light of the facts and circumstances due to the fact [J.H.] had just went through a horrific car crash. And not taking up for [J.H.], let me be clear on that. He's equally wrong in his actions.

However, the actions of the officers here at the conclusion of this pursuit, *instead of acting as first responders and caretakers*, essentially beat him up, from the looks of the video, which was contrary to . . . our written rules and regulations as it relates to the use of force.

(AR 97)(Emphasis added).

In addition to finding that Walker used unnecessary or excessive force, Major White also found that Walker 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 the State Police's

policy based upon his conduct during the arrest and in the subsequent investigation; and that Walker interfered with the rights of J.H. based upon his conduct during the arrest. Major White did not determine that Walker engaged in criminal conduct. (AR 101-104).

Major White testified that he did not observe J.H. resisting arrest, as Walker contended in his testimony. Major White further testified that he tried to find some act of resistance committed by J.H., but was unable to. (AR 117). Therefore, he concluded that the State Police had no other choice but termination of Walker's employment. (AR 118). As noted above, only one substantiated Group III offense is necessary to warrant Walker's discharge under the State Police's regulations. Based on the Report of Inquiry, Superintendent Cahill issued Special Order 047 in which he discharged Walker from employment effective January 17, 2019. (AR 264).

Walker believed his use of force was appropriate to effectuate J.H.'s arrest because J.H. resisted the officers' efforts to put handcuffs on him and because J.H. refused lawful commands to exit the vehicle. Given the opportunity to reflect on his conduct, Walker testified that he would have done nothing differently. (AR 240-241).

Hearing Examiner Blaydes viewed the video of the incident; heard all of the witness testimony, including Walker's justifications for his conduct displayed in the video; observed the witnesses first-hand; and found that Walker's testimony lacked credibility. As Hearing Examiner Blaydes properly concluded in a thorough twenty-two page decision, Walker's conduct warranted his discharge from the State Police. The circuit court reversed that decision and directed that Walker be reinstated.

### **SUMMARY OF ARGUMENT**

The State Police's argument is straightforward. The circuit court re-tried this case on appeal. The circuit court is bound by a limited and narrow standard of review in an appeal from a

contested case under the Administrative Procedures Act. This standard of review allows for rejection of factual findings only where those findings are “clearly wrong in view of the reliable, probative and substantial evidence on the whole record.” Additionally, the circuit court is not permitted to substitute its own judgment for that of the hearing examiner. A circuit court’s disagreement with the outcome below, without more, is not sufficient to reverse the hearing examiner’s decision.

In this case, the circuit court not only failed to give due deference to the hearing examiner’s findings of fact and credibility determinations, it completely disregarded them, found the opposite to be true, and crafted its own version of the roadside beating incident. The circuit court not only disregarded the hearing examiner’s finding that Walker’s testimony was not credible, the circuit court found the opposite and believed his testimony. Likewise, the circuit court disregarded the hearing examiner’s agreement with Major White’s testimony following his review of the video and analysis of Walker’s use of force demonstrated in that video, and discredited Major White’s testimony. From its skewed factual findings, the circuit court was able to conclude that Walker violated no policy and should not have been discharged.

To make matters worse, the circuit court’s crafted version of the incident and ultimate decision exonerating Walker on appeal failed to properly consider the importance of the horrific crash sustained by the juvenile victim and how that crash impacts the excessive force analysis, as Major White explained in his testimony. This was not a case of a high-speed chase that ended with the perpetrator calmly pulling onto the shoulder and refusing to exit his vehicle. Not to minimize the juvenile’s inexcusable misconduct in causing the chase, but the fact of the matter is that he flipped his vehicle and violently crashed into a pole causing an explosion. This crash changes the



analysis of whether he posed an imminent danger to the officers involved once they approached the vehicle and had him face-down on the pavement.

Moreover, the circuit court erroneously emphasized the juvenile's conduct before he crashed his vehicle (he was carrying marijuana, a scale, and cash) and after he was taken to the hospital for treatment for his injuries (he was "cocky" and defiant). In the end, the circuit court directed the State Police to reinstate Walker to duty, regardless of the credible evidence that Walker violated multiple offenses warranting discharge and testified he would do nothing differently if he had to do it over again. The State Police respectfully asks this Court to reverse the circuit court's order and uphold Walker's discharge.

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

Rule 21(d) of the West Virginia Rules of Appellate Procedure states, in part, that "[a] memorandum decision reversing the decision of the circuit court should be issued in limited circumstances." This case presents one of those limited circumstances, and, thus, oral argument is not necessary. However, if the Court desires argument, this case is appropriate for argument under Rule 19 because it involves the application of settled law.

#### **ARGUMENT**

##### **I. 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:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or

- (4) Affected by other error of law; or
- (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).

This Court recently 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).

The above-referenced standard of review is not in dispute. In its *Order Reversing the Decision of the Hearing Examiner*, the circuit court cited the correct standard for its review of Walker's administrative appeal; it just failed to follow it.

**II. The circuit court disregarded the hearing examiner's findings of fact and credibility determinations for key witnesses, including the State Police's Director of Professional Standards, Major Joe White, and Respondent Derek R. Walker, and substituted its own judgment for that of the hearing examiner with respect to the relevant and credible evidence gleaned from the dash camera footage of the incident.**

The circuit court's order should be reversed because, as Hearing Examiner Blaydes properly found, the reliable, probative and substantial evidence at the July 22, 2019, hearing demonstrated that Walker's use of force on J.H. was excessive; Walker engaged in conduct unbecoming of a State Police Trooper; and that Walker interfered with J.H.'s rights. Any of these offenses individually warrant Walker's discharge from employment.

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

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 State Police 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 State Police bears the burden of proof in disciplinary matters. *See* W.Va. Code R. § 81-8-6.5.

Contrary to the circuit court's findings, the video from the deputy's cruiser clearly demonstrates that Walker used excessive force in the arrest of J.H. First, Walker's violent extraction of J.H. from the vehicle through a broken window was excessive. J.H. was involved in a serious car accident. His vehicle violently struck a telephone pole causing a significant explosion; the car flipped, and then came to an abrupt stop. His car was significantly damaged and J.H. did not emerge on his own accord when the vehicle came to a stop.

At this point, Walker yanked J.H. through the window and tossed him approximately a body-length-and-a-half to two body lengths to the ground. In defense of his actions, Walker testified that he was concerned about the lack of visibility into the car because of the smoke. And, Walker was concerned that J.H. may have been armed. The video evidence contradicts Walker's purported concerns. Walker stood next to the car and did not draw a weapon. He simply yanked J.H. from the vehicle once the deputy shattered it with his asp baton. Thus, the video evidence supports the hearing examiner's finding that Walker's justifications for his actions were not credible. This finding is entitled to deference by the circuit court on review. Because J.H. had just crashed his car and Walker's actions did not evidence concern for a potential attack from J.H., it was proper for the hearing examiner to conclude that the force Walker used to remove J.H. from his car was excessive.

Relying on its own view of the dash camera video, but with no support from witness testimony, the circuit court made the following finding of fact:

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

(AR 508-509). Then, to justify Walker yanking J.H. through the shattered window, the circuit court found as follows: "...Walker, with some assistance from Deputy Merson, pulled J.H. through the broken-out window *and out of danger from the still smoking car.*" (AR 509)(emphasis added). There was insufficient evidence introduced at the hearing for the circuit court to find that Walker's violent extraction of J.H. from the vehicle was intended to save J.H.'s life.

The second instance of Walker using excessive force occurred when he kicked J.H. while J.H. was subdued and on the ground. As the video indicates, four officers successfully surrounded

and controlled J.H. during the arrest. The video further demonstrates little to no resistance on the part of J.H. Walker disputes this fact because the video does not contain audio. However, one need not *hear* Walker or J.H. to *see* that J.H. did not resist.

The officers involved continually punched and kicked J.H. while he lay face down on the ground. Walker participated in the beating by kicking J.H. twice, but used the term “compliance strike” to justify his actions. As the hearing examiner found, the use of the term is simply a euphemism in this case. Major White accurately described the activity on the video when he stated that the officers were “beating the kid up, quite frankly.” (AR 89). The evidence does not support Walker’s testimony that his two kicks were “compliance strikes” on J.H. What more compliance was needed given that J.H. was face-down on the pavement surrounded by four large officers? Indeed, Walker offered no plausible explanation for needing to kick J.H. at this moment. Thus, the hearing examiner was correct to find that Walker’s testimony lacked credibility on this point, too.

However, again, contrary to the hearing examiner’s findings of fact, the circuit court found as follows:

As to his reason for kicking Trooper Walker testified that [J.H.] 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. Three of the officers then stood and moved away from [J.H.] leaving Trooper Walker to finish cuffing [J.H.].

(AR 510). This finding by the circuit court flatly contradicts the finding of the hearing examiner, who viewed Walker on the stand and, in conjunction with his own view of the video during the hearing, did not believe Walker’s claims that J.H. resisted arrest once he was on the ground. As noted above, “[w]here 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 circuit court clearly re-tried this case on appeal.

Walker used excessive force *for the third time* when he yanked J.H. up from the ground by handcuffs that were securing his hands behind his back. By this point in the incident, Walker had handcuffed J.H. and there was no evidence of resistance or potential flight. Still, Walker determined it appropriate to jerk J.H. to his feet by the handcuffs. He then fell to the ground with J.H. There is no demonstrable, lawful reason why Walker chose to use this method to get J.H. off the ground and onto his feet.

And, again contrary to the hearing examiner's findings, the circuit court found as follows to justify Walker's conduct:

At nearly the same time, Trooper Walker attempted to hoist [J.H.] to his feet, but does so by lifting [J.H.] by the cuffs from behind and against the rotational limits of [J.H.]'s shoulders. Trooper Walker testified that he uses this technique when someone is non-compliant, as [J.H.] was here, according to Trooper Walker, because [J.H.] stiffened his body in resistance to Trooper Walker's attempt to lift him.

(AR 510). Resistance by J.H. is not evident from the video. The circuit court's finding depends on the existence of resistance by J.H., and the only support for that finding is Walker's self-serving testimony, which the hearing examiner did not believe. At the heart of the circuit court's order is its belief that Walker always told the truth, even though Hearing Examiner Blaydes did not find him credible. Hearing Examiner Blaydes' factual findings and credibility determinations are entitled to deference by the circuit court, but no such deference was given.

Walker relied on *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968), to support his contention that law enforcement has the right 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 then asks would 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.

In applying *Terry* to the facts in this case, and consistent with Major White’s testimony, Walker’s actions were not, in any manner, appropriate. Walker violently yanked J.H. through the broken car window and threw him almost two body lengths onto the ground, then proceeded to kick J.H. twice on the ground, then finally picked J.H. up by his handcuffs that were binding his hands behind his back. Major White directly addressed the objectively reasonable standard in his testimony. Major White applied the standard in *Terry* and the State Police’s Response to Resistance or Aggression Policy and observed that the factors of this policy do not support Walker’s actions. This 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.

The policy further states:



In order to ensure the safety of the general public and members, while at the same time preserving citizens' civil rights, members shall only respond to resistance or aggression utilizing the response option that is *objectively reasonable* to bring the situation or subject under control.

(AR 274)(Emphasis added).

In applying this standard, Major White credibly testified that he was unable to discern from the video that J.H. acted aggressively. Rather, J.H. did not pose an immediate threat to the safety of Walker or the other officers. J.H. never attempted to evade arrest once his car came to a stop after the crash and did not actively resist arrest after he initially hit the ground after Walker yanked him from his vehicle. Given the horrific crash, the presence of four officers at the scene, and J.H.'s lack of aggression and relative diminutive size in comparison to the officers, Walker's response was in no way objectively reasonable. In sum, the evidence established three instances of excessive force by Walker, each of which could form the foundation for his discharge under State Police policy.

The circuit court concluded that the State Police failed to present evidence concerning the "severity of the crime at issue," stating that this is a "glaring omission." (AR 517). However, the evidence plainly demonstrated that J.H. bumped Deputy Merson's cruiser with his vehicle and fled recklessly. (AR 265A). The hearing examiner noted the recklessness and dangerousness of J.H.'s conduct in his decision. (AR 319; 321). The circuit court erred by ruling that there was no evidence of the "severity of the crime at issue."

The circuit court then compounded its error when it concluded that J.H.'s rear-end collision with the deputy's cruiser amounted to the felony offense of malicious assault of a law enforcement officer, in violation of West Virginia Code § 61-2-10b(b). (AR 517-518). In relevant part, this statute makes it is a felony for any person to maliciously shoot, stab, cut or wound or by any means cause bodily injury with the intent to maim, disfigure, disable or kill a law enforcement officer

acting in his official capacity, where the person knows the officer is acting in his official capacity. From this somewhat far-fetched conclusion, the circuit found that it was reasonable for the officers to believe they were pursuing a dangerous felon intent on engaging in some form of malice toward them as officers. (AR 518).

However, even Walker did not ascribe to the far-fetched idea that J.H.'s rear-end collision with the deputy's cruiser was malicious assault of a law enforcement officer. When asked about the severity of J.H.'s crime, Walker testified: "We had leaving the scene of the accident, which is a misdemeanor. We had felony evading there, with reckless indifference, because he almost struck somebody head-on. He also passed somebody northbound in the opposite lane of a blind curve." (AR 208).

The bottom line is that the State Police introduced ample evidence of J.H.'s conduct that gave rise to the chase. That point should be undisputed. Major White's testimony and excessive force analysis clearly took into account the severity of J.H.'s *conduct* that caused the chase, regardless of whether he specified the actual statutory crime J.H. may have committed.

Furthermore, the hearing examiner also found that the evidence demonstrated conduct unbecoming of a state trooper on Walker's part. The Legislative Rule states that the following conduct is a Group III offense, warranting discharge in and of itself: "The employee committed conduct unbecoming; misconduct of a substantial nature affecting the rights and interests of the public, or that casts aspersions or doubt upon a law enforcement officer's honesty and/or integrity and that directly affects the rights and interests of the public." W.Va. Code R. § 81-10-11.3.3.33.

The excessive use of force by Walker does not reflect one of the agency's "better moments," as Major White observed. Additionally, Walker clearly under-reported the events that occurred that night which calls his credibility further into question. Walker mentioned to Sergeant

Cole that he and others had “tuned-up” J.H. While this should have provided some indication to Sergeant Cole that there was a physical altercation, it hardly captures what actually occurred. Remarkably, Walker fails to mention Kennedy’s actions, which, by any estimation, would warrant a report. In this respect, Walker also failed to abide by his employer’s policies when he utilized excessive force during the arrest and when he failed to accurately and completely report the events related to this arrest to his supervising officer, thus supporting the conclusion that Walker also committed the alleged Group II offense.

In his brief to the circuit court, Walker emphasized that Lieutenant Smouse substantiated only one of five allegations, while Major White substantiated four. (AR 334). However, Lieutenant Smouse substantiated the Group III offense of conduct unbecoming of a state trooper, an offense that warrants discharge alone. For his part, Major White noted that he had more time than Lieutenant Smouse to view the video. In his brief to the circuit court, Walker urged the court to ignore the testimony of Major White, a twenty-four year veteran of the State Police, simply because he took *longer* to review the video by slowing down the replay on several occasions during his investigation. (AR 340). Major White’s careful review of the video demonstrates a conscious effort by the State Police to accurately assess what happened on the roadside on November 19, 2018. Major White slowing down the video may have very well revealed the resistance by J.H. that Walker claimed existed, which would have benefitted Walker. Unfortunately for Walker, the resistance was not there; it was not there *even when Major White slowed the video to look for it*.

While the circuit court found Walker’s testimony credible despite contrary findings by the hearing examiner, the circuit court -- again contrary to the hearing examiner -- completely discredited the testimony of Major White, a twenty-four year veteran of the State Police. The circuit court took issue with Major White’s testimony that he was unable to discern aggression or

resistance by J.H. on the video. The circuit court disagreed with Major White, finding that the video shows J.H. struggling and freeing his hand. (AR 513). Respectfully, the circuit court does not bring twenty-four years of law enforcement experience to its review of a roadside beating. One cannot question that it requires testimony from experienced officers to fully understand what is happening on the video. More troubling, however, is that the circuit court discredited Major White's testimony *because it was inconsistent with Walker's testimony*. (AR 513). Not to beat the proverbial dead horse, but it is readily apparent that the circuit court re-tried this case on appeal.

There are two additional final issues that Walker raised in his administrative appeal that warrant mentioning: the Superintendent's authority to suspend a trooper pending investigation and the Superintendent's participation in a radio broadcast about the incident when the video became public. First, Walker claimed that it was improper to suspend him prior to being interviewed. In this regard, Legislative Rule provides, in relevant part, that "[t]he 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[.]" W.Va. Code R. § 81-10-7.2. Therefore, contrary to Walker's argument, the State Police clearly has the authority to suspend an employee pending an investigation.

Walker also claimed that Superintendent Cahill violated the Legislative Rule in his public comments to the press after the video was revealed. The rule at issue provides as follows:

As part of an internal investigation or inquiry, the State Police shall, to the degree possible, protect an employee from exposure to the news media with or without the employee's consent. The State Police shall not, pursuant to an internal investigation or inquiry, release an employee's home address, home telephone number, or photograph without the employee's consent.

W.Va. Code R. § 81-10-8.12.

As support, Walker asserted that the Superintendent used his name in a radio show. (AR 283A).<sup>3</sup> There is no evidence that the State Police released Walker's home address, telephone number, or a photograph. As the hearing examiner concluded, there was no evidence to even suggest that the publication of Walker's name on the radio impacted his grievance. Indeed, Lieutenant Smouse and Major White based their findings on the dash-camera video and interviews conducted. Both investigators grounded their factual determinations in the evidence presented to them, not a radio broadcast. It goes without saying that release of Walker's name subsequent to the incident did not cause, justify, or excuse Walker's conduct on November 19, 2018. For the sake of argument without conceding a violation, even if the disclosure of Walker's name alone was improper under the above-cited rule, that disclosure has no bearing on, and is wholly irrelevant to, whether Walker committed an offense or offenses warranting his discharge.

Based on the reliable, probative, and substantial evidence admitted at the July 22, 2019, hearing and credibility determinations made by Hearing Examiner Blaydes, the State Police met its burden of proving by a preponderance of the evidence that Walker failed to comply with its policies in his report of the incident to Sergeant Cole; that Walker used excessive force against J.H.; that Walker engaged in conduct unbecoming a State Police trooper; and that Walker interfered with J.H.'s rights. Thus, this Court should reverse the circuit court's order and uphold Walker's discharge from employment.

**III. The circuit court erroneously emphasized the conduct of the juvenile before the high-speed chase began and after he was transported to the hospital, and in doing so, crafted a version of the facts that ignored the importance of the horrific crash sustained by the juvenile and its impact on Respondent Derek Walker's use of force on the juvenile after the crash.**

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<sup>3</sup> The audio disc of the interview was admitted at the July 22, 2019, hearing as Grievant's Exhibit #5. It is included in the Appendix Record in a sleeve between pages 283 and 284.

In the present case, the hearing examiner properly found that the State Police met its burden of proving that Walker committed one or more violations warranting his discharge. However, the State Police wishes to make clear that nothing in this brief should be construed as justifying, excusing, or minimizing J.H.'s conduct prior to him crashing his vehicle. As the hearing examiner found, J.H.'s actions in leading the police on a high-speed chase put everyone at risk. However, once he crashed, the risk he posed to the officers greatly diminished. Once he was handcuffed and face-down on the ground, any risk he posed was practically non-existent. Nevertheless, the circuit court went to great lengths to point out the recklessness of J.H.'s conduct. The State Police agrees inasmuch as it is relevant to the recklessness of the chase; however, the circuit court ignored the impact that the crash had on the reasonableness of Walker's use of force.

For example, the circuit court made the following finding of fact:

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

(AR 508)(internal footnotes omitted).

In addition, the circuit court made the following finding of fact about J.H.'s statement to Trooper Simerly at the hospital: "Afterward at the hospital, [J.H.] told Trooper Simerly 'that it was a good thing there were a bunch of cops because if it was just one on one he could've taken him.' This statement is relevant to [J.H.]'s state of mind during the arrest." (AR 513). The circuit court then used J.H.'s post-accident statement in the hospital to justify Walker kicking J.H. after J.H. was removed from the car and was on the ground. (AR 521). The court referred to J.H.'s

“subsequent braggadocio” for a third time in its conclusion that Walker did nothing wrong by hoisting J.H. to his feet by his handcuffs. (AR 522).

The State Police questions the relevance of these findings by the circuit court. The State Police did not, and does not now on appeal, contend that J.H. was a model citizen on the evening of November 19, 2018. Indeed, Hearing Examiner Blaydes made it abundantly clear in his decision that J.H.’s conduct in causing the chase was reckless and put the public at risk. (AR 319; 321). However, the officers did not know J.H.’s identity when he bumped Deputy Merson’s cruiser or whether he had been using or selling marijuana. J.H. fled, and the officers pursued him. Once J.H. crashed, they still did not know who he was or if he was on or selling marijuana. When Walker yanked J.H. through the car window, kicked him twice on the ground, and yanked him to his feet by his handcuffs, Walker still did not know whether J.H. was on or selling marijuana. It seems clear that the circuit court viewed J.H.’s marijuana activity and subsequent defiant attitude as relevant to the abuse he endured on the roadside. It is not. As Major White testified, the officers “were beating the kid up, frankly.” The State Police should not be required to employ officers who take part in such conduct.

### **CONCLUSION**

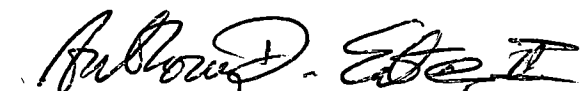
For the foregoing reasons, the State Police requests that this Court reverse the Circuit Court of Jefferson County’s July 24, 2020, *Order Reversing the Decision of the Hearing Examiner*, and uphold the State Police’s discharge of Walker from employment.

Respectfully Submitted

WEST VIRGINIA STATE POLICE

By Counsel

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A handwritten signature in black ink, appearing to read "Anthony D. Eates II", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Anthony D. Eates II, Deputy Attorney General, counsel for the West Virginia State Police, do hereby certify that service of the *Brief of Petitioner West Virginia State Police and Appendix Record* was made upon the following individuals by depositing a true copy in the United State Mail on November 23, 2020:

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