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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0558

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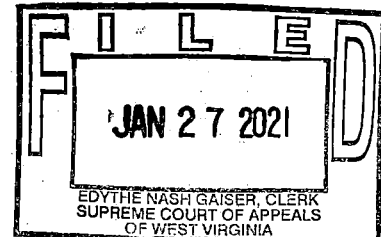
WEST VIRGINIA STATE POLICE,

Respondent Below, Petitioner,

V.

DEREK R. WALKER,

Petitioner Below, Respondent.



**REPLY BRIEF OF PETITIONER
WEST VIRGINIA STATE POLICE**

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

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INTRODUCTION

Consistent with Rule 10(g) of the West Virginia Rules of Appellate Procedure, Petitioner West Virginia State Police ("State Police"), by counsel, Anthony D. Eates II, Deputy Attorney General, submits the following Reply to the Summary Response filed by Respondent Derek R. Walker ("Walker").

STATEMENT OF THE CASE

The State Police reiterates the Introduction, Procedural Background, and the Statement of Facts set forth in its initial Brief.

ARGUMENT IN REPLY TO SUMMARY RESPONSE

The State Police reiterates the Standard of Review and the Argument in support of its two assignments of error set forth in its initial Brief. In addition, the State Police argues the following in reply to the Summary Response filed by Walker:

There is no dispute between the parties as to the applicable standard of review in this appeal. (*See* Petitioner's Brief, p. 13-15; *See generally*, Respondent's Summary Response). Rather, the dispute in this appeal lies in whether the Circuit Court of Jefferson County adhered to it when it reversed the hearing examiner's decision. It did not. The evidentiary hearing in this case did not hinge on an interpretation of a statute or rule; it hinged on facts and which witnesses told the truth and which witnesses did not. The circuit court disregarded Hearing Examiner Blaydes' findings of fact and credibility determinations for key witnesses, including the State Police's Director of Professional Standards, Major Joe White, and Walker, and substituted its own judgment for that of the hearing examiner and the State Police with respect to the relevant and credible evidence gleaned from the dash camera video of the incident. In so doing, the circuit court retried the case on appeal, and such a blatant breach of the standard of review should not stand.

Specifically, this case centers squarely on the circuit court's substitution of its judgment for that of the State Police, whose Director of Professional Standards viewed the dash camera video of the incident in question and found multiple instances of Walker's use of excessive force, conduct unbecoming an trooper, and interference with the rights of the juvenile. The hearing examiner viewed the video, listened to the witnesses describe what was happening on that video, found Major White's testimony to be credible, and found that Walker's justifications for his conduct were simply not credible. On appeal, the circuit court made its own findings of fact, as if it was engaging in *de novo* review.

It is beyond cavil that credibility determinations are reserved for the fact finder in an evidentiary proceeding, such at the Level IV grievance hearing conducted by the Hearing Examiner Blaydes that ultimately gave rise to this appeal. To be blunt, Hearing Examiner Blaydes believed Major Joe White told the truth at the hearing, and that Walker did not. The circuit court paid too little mind to such findings. In an effort to excuse the circuit court's error, Walker notes that "[a] unique aspect to the appellate review of this incident is that it was captured by a dash cam video. The circuit court is well within its authority to reject findings and conclusions that are contradicted by video evidence." (Summary Response, p. 8. n. 4).

To be clear, the State Police in no way suggests that the circuit court, or this Court, should not consider the dash camera video as part of its review of this appeal; the video was an integral piece of evidence in the evidentiary hearing. But, appellate review in this case must go beyond just watching the video and crafting findings from scratch, as the circuit court did. Contrary to the circuit court's version of the incident, the video -- coupled with the testimony of the witnesses -- demonstrates that Walker violently yanked a 5'4" juvenile from his vehicle through a 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.

The record shows that, in his investigation, Major White watched the video multiple times, even slowing the video to determine if the juvenile resisted Walker as Walker claimed, but Major White saw no evidence of resistance that warranted Walker's actions. As argued in more detail in the State Police's initial Brief, not only did the circuit court improperly discredit Major White's testimony, but it went to great lengths to craft its own findings in support of Walker with insufficient basis in the record to do so.

Accordingly, the State Police Superintendent Cahill was justified in discharging Walker from employment. West Virginia Code § 15-2-21 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.

By Legislative Rule, the State Police categorized disciplinary offenses in escalating levels of severity, Group III offenses warranting the most severe discipline, including discharge. *See* W.Va. Code R. § 81-10-11.3. The State Police determined, and Hearing Examiner Blaydes affirmed, that Walker had committed three separate Group III offenses on the night of November 19, 2018: use of excessive force, conduct unbecoming a state trooper, and interference with the rights or property of others. Any one of these offenses individually is sufficient to sustain Walker's discharge. Based on the record, the State Police should not have to return Walker to duty.

CONCLUSION

For the reasons stated in its initial Brief and this Reply Brief, 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

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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 *Reply Brief of Petitioner West Virginia State Police* was made upon the following individuals by depositing a true copy in the United States Mail on January 27, 2021:

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