

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 24-757**

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**The West Virginia Division of Corrections
and Rehabilitation,**

Defendant Below, Petitioner,

vs.)

**Appeal from Order of the
Circuit Court of Kanawha County
(Civil Action No. 21-C-537)**

**CONNIE HARDY, Personal Representative
of the Estate of Franklin Barnhouse,**

Plaintiff Below, Respondent.

PETITIONER'S REPLY BRIEF

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I. ASSIGNMENT OF ERROR

The circuit court erred when it denied Petitioner's Motion for Summary Judgment because the Petitioner is entitled to summary judgment on the basis of qualified immunity.

II. ARGUMENT

Petitioner is entitled to qualified immunity and, subsequently, summary judgment. Thus, the circuit court exceeded its authority in failing to recognize qualified immunity in this matter.

1. Petitioner's actions constituted discretionary acts and, as such, the circuit court erred in its failure to recognize the Petitioner's right to qualified immunity.

Qualified immunity is appropriate when the purported conduct is discretionary and whether the subject conduct violated a "clearly established right." "[T]he "discretionary" versus "ministerial" nomenclature [is] "highly arbitrary and difficult to apply." *Moorehead v. W. Va. Army National Guard, et al.*, 2025 W. Va. LEXIS 151 at *11 (May 2, 2025) (quoting *State v. Chase Securities, Inc.*, 188 W. Va. 356, 364, 424 S.E.2d 591, 599 (1992)). A ministerial function, or non-discretionary, is one that is ""so well prescribed, certain, and imperative that *nothing* is left to the public official's discretion."" *Id.* (quoting *W. Va. Reg'l Jail v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014))(emphasis added).

Respondent asserts that Petitioner's acts were ministerial and not discretionary. In support, Respondent has presented an expert, Edward Sweeney, who opined that Petitioner's actions fell short of industry expectations and standards. (JA0120-JA0131). Mr. Sweeney is essentially alleging negligence on the part of the officers and fails to assert any clearly established constitutional or statutory requirements which were violated. However, any deviation from standards, as recommended by policies, procedures and/or guidelines, is at the public official's discretion. Conversely, a ministerial act is one that requires strict adherence and no deviation, and

is not applicable in this case. Mr. Sweeney fails to identify any act not taken by the jail staff which would have been a ministerial function.

In regard to Mr. Barnhouse's booking, all policies and procedures were properly followed. Pursuant to the applicable policy regarding inmate admissions, "[i]nmates that have not yet been arraigned for their charges will remain in Holding until they have been arraigned and a commitment order is received." (JA0099, ¶ 4). Thus, it was appropriate for all those being held with Mr. Barnhouse to remain in their civilian clothing. At this time in their incarceration, neither Mr. Barnhouse, nor those housed with him, were required to be strip searched as they were temporary commitments.

Respondent also contends that, due to his intoxication, Mr. Barnhouse should have been housed, alone, in an observation cell. Policy requires that, during the booking procedure, the inmate's health and physical condition are evaluated. (JA0096). During Mr. Barnhouse's booking, he was evaluated by a nurse at least two (2) times. (JA0235, ERJ Intake 2200-2359, 22:37, 22:43). The applicable video clearly shows that Mr. Barnhouse was able to speak, walk unaided, was compliant and able to follow commands. (JA0235, ERJ Intake 2200-2359).

Correctional Officer Strider Ouimet testified that an inmate's holding placement is "dictated by their behavior. If they are able to make it through the booking process and they don't present any behaviors that would be considered indicative of a potential issue, they would be placed in a standard holding cell." (JA0217, 43: 24-44: 6). The booking video shows Mr. Barnhouse talking and walking without difficulty. (JA0235, ERJ Intake 2200-2359 hours, 22:35-23:59). Regardless of Mr. Barnhouse's alleged BAC, there was nothing to indicate that he was suffering from any health problems which would have required special placement. Indeed, the

booking video clearly shows that Mr. Barnhouse is able to respond to commands, such as placing his head on the wall for a pat-search. (*Id.* 22:37).

The Petitioner’s actions were clearly discretionary. These decisions included the housing and cell assignments of the various inmates including Mr. Barnhouse, the conducting of searches and body scans (which were performed), and the conducting of the various cell checks. While guided by policy, these decisions were left to the individual officers’ discretion to perform. Thus, qualified immunity is appropriate.

2. The Respondent has failed to identify any violation of a clearly established right. Thus, the circuit court erred in failing to apply qualified immunity.

“[Q]ualified immunity cares about violations of clearly established constitutional law, not clearly established prison policy.” *King v. Riley*, 76 F.4th 259, 267-268 (4th Cir. 2023). This Court recently clarified that “[f]or purposes of qualified immunity, internal agency policies, procedures, manuals, guidelines, or similar documents that have not been legislatively approved are not, and cannot be used to create clearly established statutory rights or law of which a reasonable person would have known.” *Moorehead*, 2025 W. Va. LEXIS 2025 at **15-16 (quoting *W. Va. Dept. of Human Services v. David B., next friend of J.B.*, 911 S.E.2d 884 (W. Va. 2024)).

In dismissing Petitioner’s entitlement to qualified immunity, the circuit court merely ruled that:

11. That in this instance, Plaintiff has provided an affidavit of an agent indicating that several separate written policies regarding Mr. Barnhouse’s placement which carries at least a question of fact sufficient to overcome Defendant’s Motion for Summary Judgment.

(JA0173, ¶¶ 10-11).

Respondent “assumes that because he claims violation of a constitutional right,” Petitioner “may not rightfully claim qualified immunity, or, alternatively, that pointing to a statutory duty is, of itself, sufficient. But qualified immunity is not so fickle as to abandon state actors upon mere

mention of a constitutional provision or statute.” *Moorehead*, 2025 W. Va. LEXIS 2025 at **16-17.

In her Response, Respondent continues to assert that Petitioner violated 95 CSR 1 *et seq.* However, as has been pointed out, prior to Mr. Barnhouse’s incarceration, this provision was repealed in February of 2019. *See* W. Va. S. 240, Reg. Sess. (Feb. 11, 2019). A repealed regulation has no force of law and, thus, cannot form the basis of overcoming qualified immunity. The circuit court erred by giving effect to a regulation that had been repealed and was not in effect. As Senate Bill 240 repealed 95 CSR 1 in February of 2019, it does not serve as clearly established law.

Additionally of note, in Respondent’s *Response Introduction*, she claims that the Petitioner is not entitled to qualified immunity “because the Respondent has shown that Petitioners violated his Eighth Amendment constitutional rights when it acted with deliberate indifference toward his safety by failing to observe Respondent and other inmates in time period which he was beaten while the Petitioners had knowledge that Respondent was in danger because of his sexual abuse charges. (Ap. 170-175).” *Respondent’s Response*, p. 6, ¶ 3. Petitioner feels it important to clarify that this statement is not applicable to the current matter and pertains to a different case. Thus, Petitioner will not rebut allegations that do not relate to the current appeal.

In the instant matter, Respondent relies heavily on the contention that, because some internal policies and procedures were allegedly not followed, this equates to a constitutional violation. This assertion is misplaced. Respondent has failed to and cannot identify, with any specificity, what clearly established right was violated.

In *King*, the Court addressed the alleged violation of internal policies relating to the failure to conduct cell checks which has been raised by Respondent in this case. *King*, 76 F.4th 259. The Court recognized that a knowing violation of a prison policy did not amount to deliberate

indifference. (*Id.* at 267). Further, the Court did not recognize that failure of the officer to conduct cell checks violated a constitutional right. (*Id.* at 268). Indeed, the Court clarified that the right to be “protected” is too broad and that the standard remains whether the officer knew that their conduct was constitutionally deficient. (*Id.* n. 8). Respondent has failed to articulate what clearly established right of Mr. Barnhouse was violated in this case.

III. CONCLUSION

For the reasons set forth above, Petitioner is entitled to summary judgment on Respondent’s claims on the basis of qualified immunity. The circuit court failed to set forth any conduct of Petitioner which violated any statutory or constitutional right of Mr. Barnhouse. The circuit court’s Order relied solely on violations of internal policies and procedures, which does not give rise to constitutional violations. As a result, summary judgment should have been granted in favor of Petitioner and the circuit court’s denial was in error.

Petitioner respectfully moves this Honorable Court to reverse the circuit court’s order denying summary judgment and that the matter be remanded with instructions that Petitioner is entitled to qualified immunity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing “**Petitioner’s Reply Brief**” was filed through the Court’s File&ServeXpress website and served upon the following parties on this day, May 29, 2025:

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