

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

TYLER FERNANDES,
Appellant Below, Petitioner,

No. 26-ICA-93

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Action No. 25-BOR-2872

v.

WEST VIRGINIA DEPARTMENT OF
HUMAN SERVICES,
BUREAU FOR SOCIAL SERVICES,
Respondent Below, Respondent.

PETITIONER'S REPLY BRIEF

Appeal from the West Virginia Office of Inspector General, Board of Review
Action No. 25-BOR-2872 - Decision entered January 30, 2026

CONFIDENTIAL MATERIAL INCLUDED

Filed pursuant to W. Va. R. App. P. 40(c); juvenile initials are used under Rule 40(e).

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ARGUMENT

Respondent's brief confirms the central point of this appeal: the substantiation does not rest on a finding that Mr. Fernandes used excessive force after C.B. assaulted him. It rests on an inference drawn from what Respondent says he should have done earlier. Respondent identifies profanity, failure to contact a therapist or officer in charge, failure to summon backup before entry, and lack of immediacy. Resp. Br. 6-10. Those assertions may support an employment-training debate, but they are not substantial evidence that a correctional officer knowingly or intentionally inflicted injury in a manner that constitutes abuse under W. Va. Code § 49-1-201.

I. Respondent's brief confirms that the abuse finding rests on pre-entry tactics and but-for causation, not statutory intent.

The Department's theory is telling. It argues that Mr. Fernandes 'verbally and profanely instigated' C.B., did not call staff professionals, did not request officer assistance before entry, and did not act with immediacy. Resp. Br. 6-7. It then repeats the Board's causation theory that the fight and injuries 'would not have occurred but for' Mr. Fernandes's alleged instigating actions. Resp. Br. 9. That is the very legal error Petitioner identified. But-for causation is not the same thing as statutory intent to inflict physical injury.

A juvenile-corrections officer's duties necessarily include lawful physical control in some circumstances. The Board found that, once C.B. was engaged in active aggression, WVDOC policy allowed empty-hand hard control responses, including straight punches, counterstrikes, and front thrust kicks. D.R. 069. The Response never identifies a finding that the force used after C.B. punched Mr. Fernandes was excessive, continued after the threat subsided, or was outside the category of force the Board found policy-authorized. Instead, the Department asks the Court to infer intent to injure from pre-entry choices. That inference rewrites W. Va. Code § 49-1-201

into a rule that treats alleged poor tactics as child abuse whenever a resident is later injured during authorized defensive force.

Even if the Court credits the resident statements about profanity, those statements do not fill the statutory gap. Unprofessional or retaliatory language is not itself intentional physical injury. Nor does it prove that, after C.B. initiated the physical assault, Mr. Fernandes's responsive force was abusive rather than defensive. The Response therefore confirms that the agency's proof turns on speculation about motive, not reliable evidence of unlawful intent to inflict injury.

II. Deference to credibility determinations does not save a legal conclusion that expands W. Va. Code § 49-1-201.

Respondent relies on *Martin*, *Adkins*, *Cahill*, *In re Queen*, and *Dale* to argue deference. Petitioner does not ask this Court to retry every factual dispute or decide which witness was more credible. The problem is legal sufficiency. Even assuming the Board accepted the resident statements and rejected portions of Mr. Fernandes's testimony, the accepted facts still do not establish the mens rea required by W. Va. Code § 49-1-201.

The cases cited by Respondent preserve, rather than defeat, Petitioner's argument. *Cahill* confirms plenary review of conclusions of law and the application of law to facts. *Cahill v. Mercer Cnty. Bd. of Educ.*, 208 W. Va. 177, 539 S.E.2d 437 (2000). Section 29A-5-4(g) allows reversal where an agency decision is affected by error of law, is clearly wrong in view of the reliable, probative, and substantial evidence on the whole record, or is arbitrary and capricious. And *In re Queen* recognizes that deferential review still requires a rational basis supported by substantial evidence. Syl. Pt. 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996). Deference to a credibility choice does not permit the Board to convert a non-mandatory practice preference into statutory abuse.

Respondent points to a resident's statement that officers in similar situations usually talk through the door and wait for help, and to Superintendent Scarbro's testimony that he encourages assistance for room-entry de-escalation. Resp. Br. 8. As to such, encouragement and usual practice are not the same as a mandatory rule whose violation is abuse. More importantly, even violation of a preferred procedure would be evidence of negligence, discipline, or training, not proof that Mr. Fernandes knowingly or intentionally inflicted physical injury.

III. Respondent's self-harm and immediacy arguments are internally inconsistent and speculative.

Respondent argues there is no reliable corroboration that C.B. was striking his head on the door. Resp. Br. 8-9. That assertion overlooks record evidence that IIU Supervisor Cutright confirmed the reports reflected the juvenile was banging his head off the door and kicking the door. D.R. 094. Mr. Fernandes testified that C.B. was hitting his head against the door window, and that he secured the other residents so he could de-escalate the situation. D.R. 096-097. Superintendent Scarbro testified that when a resident is actively injuring himself, he would not tell officers to wait; he would have opened the door and stopped the self-injury. D.R. 0101-0102.

In any event, Respondent's argument defeats itself. If C.B. was not self-injuring, then the Board's criticism that Mr. Fernandes failed to act with immediacy cannot support an inference that he intended harm; there was no immediate self-harm emergency that he supposedly delayed addressing. If C.B. was self-injuring, then entry was tied to a protective purpose, consistent with the Superintendent's testimony. Either way, the lack of immediacy point does not prove an intent to injure.

Furthermore, the same is true of Respondent's 34-second arithmetic. Respondent says that because officers arrived just over 30 seconds after Mr. Fernandes radioed during the fight, C.B. would have been stopped sooner had Mr. Fernandes called at the start. Resp. Br. 8. That is

hindsight speculation. It assumes the same response time before any fight; assumes C.B. would have remained behind the door without changing behavior; and ignores the legitimate safety step of first securing the other residents. It may be an argument about best practices. It is not substantial evidence of subjective intent to commit child abuse.

IV. The undisputed record shows authorized defensive force and not child abuse.

The Response does not dispute the core facts that matter most. The Board found that C.B. punched Mr. Fernandes twice, including in the left eye, causing injury; that C.B. continued fighting; and that C.B. and Mr. Fernandes traded punches. D.R. 069-070. The Board also found that Mr. Fernandes radioed for assistance during the fight, that eight officers responded, and that approximately 34 seconds elapsed between the beginning of the fight and the first assisting officers' arrival. D.R. 070.

Nor does Respondent dispute that State Police brought no criminal charges against Mr. Fernandes, that criminal charges were filed against C.B., and that WVDOC did not cite Mr. Fernandes for excessive force. D.R. 070. Those facts do not conclusively control the appeal, but they are powerful evidence that the incident was treated by the entities charged with institutional and criminal review as an assaultive, use-of-force event, not as intentional child abuse by Mr. Fernandes. The Board's decision acknowledged these facts but gave them no meaningful weight.

Respondent's focus on C.B.'s injuries does not cure the error. Petitioner has never argued that no injury occurred. The statutory question is whether the injury was knowingly or intentionally inflicted in a manner that constitutes abuse. Where the Board found resident-initiated active aggression, policy-authorized defensive force, prompt radioed assistance once the fight began, no excessive-force finding, and no criminal charge against the officer, the remaining

evidence of profanity and disputed pre-entry tactics is legally insufficient to sustain a substantiated abuse finding.

CONCLUSION

Respondent asks this Court to defer to an inference that pre-entry decisions and alleged profanity established intent to injure. Deference does not authorize expanding W. Va. Code § 49-1-201 beyond its text. At most, the record supports an argument about tactics, training, or internal discipline. It does not support a substantiated finding of physical abuse. Petitioner therefore respectfully requests that this Court reverse the Board of Review's Decision and vacate the substantiated finding of abuse against him.

Respectfully submitted,

TYLER FERNANDES,
By Counsel

/s/ Matthew A. Bradford

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CERTIFICATE OF SERVICE

I, Matthew A. Bradford and the law firm of Bradford & Gray, PLLC, Counsel for the Petitioner, Tyler Fernandes, do hereby certify that on the 10th day of June, 2026, I electronically filed the foregoing "PETITIONER'S REPLY BRIEF" with the Clerk of the Intermediate Court of Appeals of West Virginia using the E-Filing System, which will serve all registered counsel of record, including Respondent's counsel of record, Angela M. Alexander, Assistant Attorney General.

/s/ Matthew A. Bradford, Esq.
Matthew A. Bradford (WVSB No.: 11323)