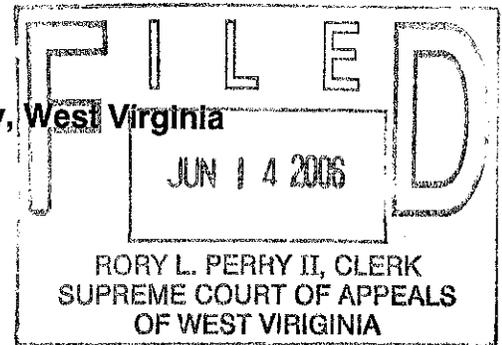


IN THE SUPREME COURT OF THE STATE OF WEST VIRGINIA

at Charleston

Appeal from the Circuit Court of Cabell County, West Virginia



MICHAEL GIANNINI,

Plaintiff-Appellee

v.

SUPREME COURT CASE NO. 33074

CABELL COUNTY CIVIL ACTION NO: 05C-0126

The Honorable John L. Cummings, Judge

**THE FIREMEN'S CIVIL SERVICE
COMMISSION OF THE CITY OF
HUNTINGTON, and DAVID A
FELINTON, Mayor of the City of
Huntington.**

Defendants-Appellants.

BRIEF OF THE APPELLANTS

Scott McClure, WVSB #7747
Counsel for Appellants
City of Huntington
P.O. Box 1659
Huntington, WV 25717-1659
(304) 696-4480

R. Matthew Vital, WVSB #7246
Counsel for Appellee
Vital & Vital, L.C.
536 Fifth Avenue
Huntington, WV 25701
(304) 525-0320

QUESTION PRESENTED

I. Did the Circuit Court of Cabell County, West Virginia err in holding that the City of Huntington did not have "just cause" to terminate fireman Michael Giannini from his employment with the City of Huntington?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED. i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
STATEMENT OF THE CASE. 1
ARGUMENT 6

PROPOSITION OF LAW NUMBER ONE

I. The Circuit Court of Cabell County, West Virginia erred in holding that the City of Huntington did not have "just cause" to terminate Fireman Michael Giannini from his employment with the City of Huntington.

CONCLUSION.....14
CERTIFICATE OF SERVICE 16

TABLE OF AUTHORITIES

| CASES | PAGE |
|---|-------------|
| <u>Appeal of Prezkop.</u> , 154 W.Va. 759, 179 S.E.2d 331 (1971) | 6, 14, 15 |
| <u>City of Minneapolis v. Moe</u> , 450 N.W.2d 367 (Minn. App. 1990) | 12 |
| <u>Collins v. City of Bridgeport</u> , 206 W.Va. 467, 525 S.E.2d 658 (1999) | 6 |
| <u>In Re Queen</u> , 196 W.Va. 442, 473 S.E.2d 483 (1996) | 6, 14, 15 |
| <u>Johnson v. Ashley</u> , 190 W.Va. 678, 441 S.E.2d 483 (1994) | 11 |
| <u>Johnson v. City of Welch</u> , 182 W.Va. 410, 388 S.E.2d 284 (1989) | 8 |
| <u>Magnum v. Lambert</u> , 183 W.Va. 184, 394 S.E.2d 879 (1990) | 10, 11 |
| <u>Neely v. Mangum</u> , 183 W.Va. 393, 396 S.E.2d 160 (1990) | 11 |
| <u>Recommendation for Discharge of Kelvie</u> , 384 N.W. 2d 901 (Minn. App. 1986) | 11 |
| OTHER | |
| West Virginia Code §8-14A-3(b) | 4 |
| West Virginia Code §8-15-25 | 4 |

STATEMENT OF THE CASE

On April 10, 2004 Firefighter Michael Giannini was arrested for possession of crack cocaine. (Fire Civil Service Commission Transcript, hereinafter "FCSC transcript" p. 19, 23). Huntington Police Officer Levi Livingston testified that on that date at approximately 4:00 a.m., he was on patrol in the area of the 2300 block of Lincoln Avenue in Huntington, West Virginia. (FCSC Transcript pg. 19). He stated that on that particular street there is a known "crack house." Id. Officer Livingston was sitting, at first, down on about the 800 block of 23rd Street watching as people were going into the alley. Id. At that time, he noticed a red Chevrolet truck come down 23rd street and turn down Lincoln Avenue. Id. Then, a few minutes later he saw the same truck come back down 23rd Street again. Id.

Officer Livingston testified that the person driving the red truck (which he subsequently identifies as Fireman Michael Giannini, hereinafter "Fireman Giannini") came back down Lincoln Avenue in the 2300 block. Officer Livingston repositioned himself in about the 2200 block of Lincoln Avenue, sat back in the shadows and watched. Id. He observed the "red truck" parked out in front of the known crack house. After a few minutes of observation, Officer Livingston observed Fireman Giannini come out of the crack house and get back into his red truck. (FCSC Transcript, p. 20). At that time, Officer Livingston wanted to check him out and run his tag to make sure the vehicle wasn't stolen.¹

Officer Livingston testified that he got behind the vehicle and began following him. Id. While following, he observed the vehicle crossing the center line on at least two occasions. Id.

¹Officer Livingston testified that when police officers observed people coming to and from known crack houses they will often run the license plate to see if the vehicle is stolen. He stated, "[i]n these incidents. . . when the people are in around crack houses or drug houses, there's a lot of stolen vehicles or unauthorized use of vehicles or improper vehicles that are around these areas."

As Officer Livingston continued to follow Fireman Giannini, he observed him traveling in two lanes of traffic (i.e. "He was not in his lane of traffic"). Id. Officer Livingston testified that when a vehicle has crossed the center line on several occasions and when an officer observes a vehicle traveling in the other lane of traffic, it is often a sign of a drunk driver. (FCSC Transcript p. 21). At that point, Officer Livingston conducted a traffic stop of Fireman Giannini. Id. The traffic stop occurred at approximately 4:20 a.m. (FCSC Transcript p. 20).

After the stop, Officer Livingston approached the vehicle and asked for a driver's license, registration and proof of insurance. (FCSC Transcript p. 21). He then proceeded to ask Fireman Giannini what was the reason he was at the residence of the known crack house.² In response, Fireman Giannini advised that he was there to see a friend. Id. However, upon further inquiry by Officer Livingston, Fireman Giannini wasn't able to tell the officer his "friend's" last name. Id. Officer Livingston subsequently asked Fireman Giannini to step out of the vehicle. Id.

After Fireman Giannini exited the vehicle, Officer Livingston asked permission to search his vehicle. At that time, Fireman Giannini consented to the search of his vehicle by Officer Livingston.³ (FCSC Transcript p. 22). Upon a search of the vehicle, Officer Livingston found five pieces of a "tan chunky substance" which field tested positive for crack cocaine. (FCSC Transcript p. 22). Fireman Giannini was arrested and charged with misdemeanor possession of a controlled substance (the cocaine weighed out to be .3 grams). Id. While at the police station and during booking, Fireman Giannini stated that "this (i.e. his arrest) was probably the best thing for him to get himself straightened up." Furthermore, Officer Livingston testified that Fireman Giannini had admitted to him that he had used crack cocaine before. (FCSC Transcript

²Fireman Giannini has never challenged the validity of the initial traffic stop.

³Fireman Giannini consented to the search of his vehicle and has never challenged the validity of the search and/or contested the fact that he consented to the search of the vehicle.

p. 26-27).

Additionally, it is significant to note that although the Appellee contests the testing of the crack cocaine, Fireman Giannini admitted into evidence that after this incident he enrolled himself in a rehabilitation and treatment program for substance abuse issues (specifically drugs) at St. Mary's Hospital and has therefore acknowledged his drug problem. (FCSC Transcript p. 53-54 and Fireman's Hearing Board Transcript, hereinafter, "FHB Transcript p. 39). More importantly, Fireman Giannini's counsel candidly admits that **"they are going to have uncontested evidence of possession of a small amount of an illegal substance. However, we will also have uncontested evidence that he's been under rehabilitation since the spring, which is ongoing."** (Emphasis Added) (FCSC Transcript p. 13). How can the Appellee be heard to deny the nature of the "illegal substance" before this Court now?

On April 12, 2004, Fire Chief Greg Fuller called Fireman Giannini and advised him that he had been made aware of his arrest with regard to possession of crack cocaine. (FCSC Transcript p. 34). At that time, he advised Fireman Giannini that he was under investigation, informed him of the charges and advised him that he would meet with him in a few days to discuss the matter further after he had been able to obtain additional information. (FCSC Transcript, p. 34-35). Fireman Giannini was charged with violation of the City of Huntington Fire Department General Rules and Regulations, Paragraph 2, which reads:

... personnel shall be governed by the ordinary rules of good behavior observed by self respecting, law-abiding citizens and shall conduct themselves in such a manner as will bring no reproach or reflection upon the Department, the company or themselves."

On April 14, 2004, Fireman Giannini was suspended from duty, without pay, pursuant to West Virginia Code §8-14A-3 (b) due to exigent circumstances pending termination by the Mayor.⁴

Subsequently, on July 14, 2004, a hearing was held before the Fireman's Hearing Board regarding the charges against Fireman Giannini.⁵ See generally, FHB Transcript. The Hearing Board determined that Fireman Giannini should be reinstated. However, no findings of fact or conclusions of law were ever issued by the Hearing Board. *Id.*

Upon appeal of the decision by the City of Huntington, a hearing was held before the Firemen's Civil Service Commission on August 26, 2004. See generally, FCSC Transcript. By Order dated November 19, 2004, the Firemen's Civil Service Commission found that Fireman Giannini was found to be in possession of a "tan chunky substance" that field tested positive as a cocaine based substance. The Commission further found that Fireman Giannini violated paragraph 2 of the General Rules and Regulations of the Fire Department and that Chief Fuller acted with just cause in suspending him. See Order of the Firemen's Civil Service Commission attached as Exhibit A.

On February 14, 2005, Fireman Giannini filed an appeal of the decision of the Firemen's Civil Service Commission with the Circuit Court of Cabell County, West Virginia. See Petition for

⁴On Appeal, Fireman Giannini did not raise the issue whether or not there were exigent circumstances to suspend him without pay pending a hearing. The Fireman's Civil Service Commission specifically held that Chief Fuller acted with just cause in suspending Fireman Giannini and that exigent circumstances existed due to the safety sensitive nature of a firefighter's duties. Likewise, the Circuit Court did not base its decision on whether or not there were exigent circumstances to suspend Fireman Giannini prior to a hearing.

⁵Your Appellant believes that this hearing before the Hearing Board was likely unnecessary but was given out of an abundance of caution for the constitutional rights of the accused. Inasmuch as the Appellee was suspended, pending termination, due to exigent circumstances, only a post-deprivation hearing pursuant to §8-15-25 of the West Virginia Code would appear to have been necessary.

Writ of Certiorari. The Circuit Court of Cabell County reversed the decision of the Firemen's Civil Service Commission and held that the City of Huntington did not have "just cause" to terminate Fireman Giannini. The City of Huntington now appeals the decision of the Circuit Court of Cabell County, West Virginia.

ARGUMENT

PROPOSITION OF LAW NUMBER ONE

I. The Circuit Court of Cabell County, West Virginia erred in holding that the City did not have "just cause" to terminate Fireman Michael Giannini from his employment with the City of Huntington.

In Appeal of Prezkop, the West Virginia Supreme Court of Appeals held that a **final order of a police civil service commission based upon a finding of fact will not be reversed by a circuit court upon appeal unless it is clearly wrong or is based upon a mistake of law. (Emphasis Added)** 154 W.Va. 759, 179 S.E.2d 331 (1971). Furthermore, in In Re Queen, the West Virginia Supreme Court stated that the Supreme Court's review of the circuit court's decision is made in view of the Commission's action is *de novo*. 196 W.Va. 442, 473 S.E.2d 483 (1996). Thus, the Supreme Court reviews the Commission's adjudicative decision from the same position as the circuit court.

In In Re Queen, the Supreme Court went on to state that "[t]he 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." *Id.* 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. *Id.* See also Collins v. City of Bridgeport, 206 W.Va. 467, 525 S.E.2d 658 (1999). A Court may reverse the Commission's decision as clearly wrong or arbitrary and 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 difference in view or the product of the Commission's expertise. Id.

In assessing whether the Civil Service Commission's decision was based upon substantial evidence, the court is obliged to give reasonable deference to the Commission's factual findings. The "clearly wrong" and "arbitrary and capricious" standards of review are deferential one which presume the agency's actions are valid as long as the decision is supported by substantial evidence. Id.

Thus a reviewing Court must first determine whether the Civil Service Commission's decision was based upon "substantial evidence" and secondly, whether its findings and conclusions were adequately explained. **If they were, the circuit court's order reversing the Commission must be set aside as a matter of law.** (Emphasis added) Id.

"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 the Commission's factual findings is supported by substantial evidence, it is conclusive.** (Emphasis added) Id. Neither the West Virginia Supreme Court nor the circuit court may supplant a factual finding of the Commission merely by identifying an alternative conclusion that could be supported by substantial evidence. Id. Thus, if the Civil Service Commission's factual finding is supported by substantial evidence, it is conclusive.

In the case at bar, the Firemen's Civil Service Commission had substantial evidence to support its finding that there existed "just cause" to terminate Fireman Giannini from employment with the City of Huntington. This decision of the Firemen's Civil Service Commission is not clearly wrong nor is it based upon a mistake of law. As such, the decision of the Civil Service Commission must be upheld. The circuit court cannot supplant the factual finding of the

Commission merely by identifying an alternative conclusion. The Commission clearly had a substantial and rational basis for its decision.

The Firemen's Civil Service Commission found that "just cause" existed to terminate Fireman Giannini. Specifically, the Firemen's Civil Service Commission found that on April 10, 2004, Fireman Giannini was arrested in the City of Huntington. The Commission further found that during the arrest of Fireman Giannini, he was found to be in possession of a tan chunky substance that field tested positive as a cocaine based substance, specifically, "crack cocaine." Exhibit A. Officer Livingston credibly testified as to the results of the field tests and as to the reliability of said tests. (FCSC Transcript p. 31-32). As such, the Commission held that Fireman Giannini violated the General Rules and Regulations of the Fire Department by conducting himself in a manner as to bring reproach and negative reflection upon the Department and that he failed to observe the ordinary rules of good behavior observed by self respecting, law-abiding citizens. *Id.* The Commission further held that Chief Fuller acted with "just cause" in suspending Fireman Giannini, pending termination.

In Johnson v. City of Welch, the West Virginia Supreme Court of Appeals addressed the issue of just cause for termination of employment for police pursuant to the Civil Service provisions. 182 W.Va. 410, 388 S.E.2d 284 (1989). Specifically, the Court stated that just cause has been defined as a substantial cause "which specially relates to and affects the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interest of the public." The Court went on to quote that an officer should not be removed from office for matters which are trivial, inconsequential, or hypothetical, or for mere wrongful intention. *Id.*

In *Johnson*, the West Virginia Supreme Court of Appeals considered three separate incidents where officers had been terminated. First, the Court considered whether just cause

existed to terminate the employment of Albert Johnson. Johnson was discharged as a result of unexcused absences. Specifically, Johnson had been warned on prior occasions about unexcused absences. The record reflected at least four unexcused absences on separate occasions. Furthermore, Johnson failed to report to work from January 19, 1985 to January 27, 1985. It was alleged that he was ill during this time and was treating with a physician, but he failed to call in sick to the department during the duration of his illness, and never produced a doctor's excuse. Id.

Secondly, the Court considered whether just cause existed to terminate the employment of Joseph Jones. Jones was terminated from employment for unexcused absences and failure to complete paperwork concerning an investigation. From January 1, 1984 to February 6, 1985, Jones had 17 unexcused absences. One of the absences was because he was too inebriated to perform his duties. Id.

Third, the Court considered whether there was just cause to terminate the employment of Joseph Lyons. Lyons was discharged because he consumed alcohol while on duty and in uniform. He ordered a beer in a restaurant. He claims he did not drink the beer, but ordered it for his co-worker, Albert Johnson, who was off duty at the time. Both Johnson and Lyons testified to this effect, but Johnson was never seen in the restaurant that evening by employees. Id.

In all three cases, the West Virginia Supreme Court of Appeals found that the infractions committed were substantial enough to amount to just cause. Specifically, the Court held that Johnson and Jones could be terminated for unexcused absences. Furthermore, the Court held that Lyons could be discharged because he consumed alcohol in a public restaurant while on duty and in uniform. The Court stated that these "acts and omissions were of a substantial nature, and showed disregard for the police department and the citizens these officers were hired

to protect." *Id.* If unexcused absences and consuming an alcoholic beverage at a restaurant while in uniform are sufficient to establish just cause, then surely "just cause" can exist to terminate a Fireman who is **admittedly** found to have "crack cocaine" in his possession and admits to a substance abuse problem.

Similarly, in Mangum v. Lambert, the West Virginia Supreme Court again addressed the issue of "just cause" to terminate an officer covered by the civil service provisions. 183 W.Va. 184, 394 S.E.2d 879 (1990). In *Mangum*, the Court held that seriously wrongful conduct by a civil service employee can lead to dismissal even if it is not a technical violation of any statute. The Court stated that the question is not whether the conduct breaks a specific law, but rather whether it is potentially damaging to the rights and interests of the public. The Court found that a police officer's attempt to persuade a fellow officer to dismiss a criminal charge for personal reasons meets the test of just cause. *Id.*

In the case at bar, the Firemen's Civil Service Commission found that "just cause" existed to terminate Fireman Giannini. Furthermore, this holding is supported by the evidence in the case. Specifically, Officer Livingston testified that Fireman Giannini was arrested for possession of crack cocaine. He testified that he made a lawful traffic stop of Fireman Giannini. Furthermore, Fireman Giannini consented to a search of his vehicle. As a result of this search, Officer Livingston recovered several "rocks" which tested positive for cocaine. Officer Livingston clearly identified the controlled substance as "crack cocaine."⁶ Counsel for Fireman Giannini acknowledged that his client was in possession of an "illegal substance."

⁶Although the "crack cocaine" was never tested by a lab, the drugs did field test positive for cocaine. Furthermore, Officer Livingston who has been an officer for eight years and works in the K-9 unit indentified the substance as "crack cocaine" and stated that he has never had a situation where a substance field tested positive for cocaine and did not come back "actual."

The Cabell County Circuit Court, in reversing the decision of the Firemen's Civil Service Commission, held that the City of Huntington did not have just cause to terminate Fireman Giannini based solely on an arrest. Furthermore, the Court held that "termination based solely on an arrest for possession of a controlled substance is inconsistent with past disciplinary actions taken by the Huntington Fire Department. . . wherein firefighters were not terminated when not only arrested for, but found guilty of, misdemeanor DUI."⁷

However, as previously stated, a Fireman may be terminated for "acts and omissions which are substantial in nature, and showed disregard for the police department and the citizens these officers were hired to protect." See Mangum v. Lambert, supra. Even off-duty conduct may be considered when determining whether there is just cause to terminate an employee. See Johnson v. Ashley, 190 W.Va. 678, 441 S.E.2d 399 (1994) (wherein the Supreme Court held that the act of domestic battery by an off-duty officer was "just cause" to terminate employment).

Additionally, the Circuit Court's ruling fails to recognize the clear distinction that must be made between those firemen who may have had a DUI (an act which involves a legal substance) and those who are found to possess "crack cocaine" (an illegal and highly addictive substance).

In its Order granting Petitioner's Writ of Certiorari, the Circuit Court cites the case of Recommendation for Discharge of Kelvie, 384 N.W. 2d 901 (Minn.App. 1986). Copy attached as Exhibit B. The Court finds the case to be persuasive and believes the case to be very similar to the case at bar. Specifically, the Court states,

⁷It is important to note that a criminal conviction is not needed to terminate Fireman Giannini. It is generally recognized that the dismissal of criminal charges that prompted initial disciplinary action against a public employee does not preclude a public official from administering further disciplinary action, including discharge. Neely v. Mangum, 183 W.Va. 393, 396 S.E.2d 160 (1990). The standard of proof in a criminal case is proof beyond a reasonable doubt. The standard of proof in the administrative hearing is preponderance of the evidence; a much lower standard.

John Kelvie, a firefighter, was arrested and charged with three Misdemeanor counts of possession of marijuana, injection equipment, and drugs not in an original container. Mr. Kelvie was then discharged as a firefighter because he allegedly violated his oath of office and sections of the Minneapolis Civil Service Commission rules. In affirming the Commission's decision that no just cause exists for Mr. Kelvie's discharge, the Court found that the Commission's findings that Mr. Kelvie possessed a small quantity of marijuana and there was no relationship between his job performance were supported by substantial evidence. *Id.*

However, the Circuit Court has misinterpreted the holding in Kelvie. Specifically, the decision to discharge Kelvie was principally based upon the firefighter's assertion of his Fifth Amendment rights, not necessarily on the misdemeanor charges. As such, the decision is distinguishable from the case at bar. Inexplicably, the Circuit Court ignored the most analogous decision of the Minnesota Court. See City of Minneapolis v. Moe, 450 N.W.2d 367 (Minn.App. 1990). Copy Attached as Exhibit C. In *Moe*, the Minnesota Court of Appeals subsequently held that even off duty charges of possession of cocaine can be sufficient basis for a finding of "just cause" to terminate employment. *Id.*

In City of Minneapolis v. Moe, the Minnesota Court of Appeals held that off duty charges of felonious possession of cocaine can be a sufficient basis for a finding of just cause to terminate the employment of a police officer. In doing so, the Court appropriately acknowledged the severity of possession of cocaine. Specifically, the Court stated,

The image of integrity and trust is essential to the performance of a police officer's duties. There must be public confidence in law enforcement, and to ignore felonious possession of cocaine by a police officer could only serve to undermine public confidence in that office. This is a time in our society when the scourge of cocaine is running rampant in many parts of our country. We cannot be blind to society's concern about the adverse influence of cocaine in our midst. To some, the result in *Moe* might seem harsh. He is redirecting his life and this is commendable, but his efforts to rehabilitate are irrelevant to the issue of good cause to discharge. The issue here is the integrity of the police department and under our scope of review we must affirm.

See also Kelly v. Civil Service Commission, 691 N.E.2d 557 (Mass. 1998) (upholding termination for possession of "crack cocaine").

In the case at bar, a clear distinction must be made between the offense of driving under the influence and possession of "crack cocaine." As the Minnesota Court of Appeals stated, "this is a time in our society when the scourge of cocaine is running rampant in many parts of our country. We cannot be blind to society's concern about the adverse influence of cocaine in our midst." Crack cocaine is very harmful, serious and devastating controlled substance whereas alcohol, although sometimes potentially harmful, is entirely legal to possess and consume. The Court's attempt to compare the two is like comparing apples and oranges. The Huntington Fire Department is entirely justified in treating the two offenses differently.

In its decision the Circuit Court notes that "termination of the petitioner would depend upon credible evidence that he was in possession or under the influence of a controlled substance." Circuit Court Order, p. 4, Copy Attached as Exhibit D. Apparently the Court did not find "credible" the testimony of a sworn police officer or the admission of possession of an "illegal substance" by Appellee's own counsel. Not one witness was called by the Appellee to refute the nature of the "illegal substance." Thus, there were NO facts in the record contradicting the testimony of Officer Livingston as to the nature of the "illegal substance." Even if such facts did exist, the Circuit Court would not be permitted to adopt an alternative factual scenario if ANY facts supporting the decision are found in the record.

CONCLUSION

First and foremost, the Firemen's Civil Service Commission specifically held that "just cause" existed for the termination of Fireman Giannini. This decision was based upon uncontradicted evidence of Fireman Giannini's possession of "crack" cocaine. The decision of the Firemen's Civil Service Commission is not clearly wrong nor is it based upon a mistake of law and must be upheld. See Appeal of Prezkop, 154 W.Va. 759, 179 S.E.2d 331 (1971).

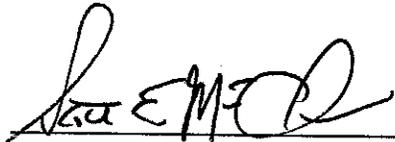
Furthermore, the Commission's adjudicative decision should not be overturned by either court unless it was clearly erroneous, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. In Re Queen, supra. Review under this standard is narrow and the reviewing court looks to the Commission's action to determine whether the record reveals that a substantial and rational basis exists. Likewise, 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. 196 W.Va. 442, 473 S.E.2d 483 (1996). The decision of the Civil Service Commission is well-founded and based upon the testimony and evidence presented at the underlying hearing and must be presumed to be valid.

The uncontroverted testimony in this matter is that there was just cause to terminate Fireman Giannini. Officer Livingston testified that he made a lawful traffic stop of Fireman Giannini. Furthermore, Fireman Giannini consented to a search of his vehicle. As a result of that search, Officer Livingston recovered several "rocks" which he clearly identified as "crack cocaine" and which field tested positive for cocaine. After his arrest, Fireman Giannini admitted to Officer Livingston that "this (i.e. his arrest) was probably the best thing for him to get himself straightened up" and admitted to using crack cocaine on prior occasions. (Transcript p. 26-27).

Likewise, Fireman Giannini admitted into evidence that he has a drug problem and sought rehabilitation at St. Mary's Hospital. Fireman Giannini's counsel admitted during the Firemen's Civil Service Commission hearing that his client possessed an "illegal substance."

Based on the foregoing, the decision of the Firemen's Civil Service Commission is not clearly wrong nor is it based upon a mistake of law and must be upheld. See Appeal of Prezkop, 154 W.Va. 759, 179 S.E. 2d 331 (1971) and In Re Queen, 196 W.Va. 442, 473 S.E.2d 483 (1996).

Respectfully Submitted,
Appellants By Counsel



Scott E. McClure, WV Bar #7747
City Attorney
Post Office Box 1659
Huntington, WV 25717-1659
Telephone No. (304) 696-4480

IN THE SUPREME COURT OF THE STATE OF WEST VIRGINIA

at Charleston

Appeal from the Circuit Court of Cabell County, West Virginia

MICHAEL GIANNINI,

Plaintiff-Appellee

v.

SUPREME COURT CASE NO. 33074

CABELL COUNTY CIVIL ACTION NO: 05C-0126

The Honorable John L. Cummings, Judge

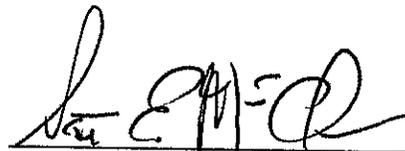
**THE FIREMEN'S CIVIL SERVICE
COMMISSION OF THE CITY OF
HUNTINGTON, and DAVID A
FELINTON, Mayor of the City of
Huntington.**

Defendants-Appellants

CERTIFICATE OF SERVICE

I, Scott E. McClure, City Attorney for the City of Huntington, hereby certify that a copy of the Brief of the Appellants was served on the following person this 13th day of June, 2006 by United State mail, postage prepaid:

R. Matthew Vital
Vital & Vital, L.C.
536 Fifth Avenue
Huntington, WV 25701



Scott E. McClure, WV Bar #7747
City Attorney