

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PAMELA GAINER,  
Appellee,  
Plaintiff below,

vs.

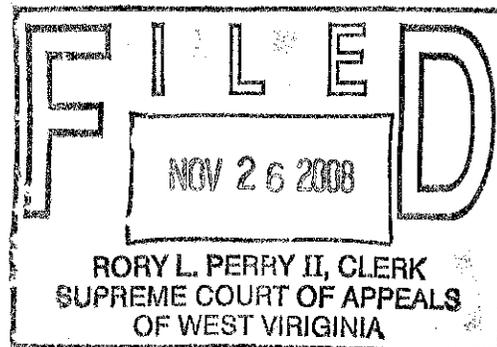
WEST VIRGINIA DEPARTMENT OF HEALTH  
AND HUMAN RESOURCES, BUREAU FOR CHILDREN  
AND FAMILIES,  
Appellant,  
Defendant below.

CASE NO. 34401  
ON APPEAL FROM THE CIRCUIT COURT OF CALHOUN COUNTY, WEST VIRGINIA  
CALHOUN COUNTY CIRCUIT COURT CASE NO. 07-P-3

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**RESPONDENT'S BRIEF**

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November 25, 2008

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

INTRODUCTION

The appellee Pamela Gainer, plaintiff below, hereafter "Pam Gainer" or "appellee," urges this Court to deny the relief requested in the petition for appeal of the West Virginia Department of Health and Human Resources, Bureau for Children and Families, defendant below, hereafter "the Department" or "appellant." The circuit court reached the correct conclusions that (1) the appellee Pam Gainer met her burden of proof that her limited release of confidential records was necessary and justified in order to prevent serious, foreseeable, imminent and ongoing harm to a minor child client in a child abuse and neglect proceeding, (2) the Level IV grievance decision is clearly wrong in view of the reliable, probative and substantial evidence on the whole record, (3) the appellant Department deprived the appellee Pam Gainer of due process of law, and (4) the appellee Pam Gainer is entitled to an award of attorney fees and costs incurred in the prosecution of her grievance. Furthermore, the appellant's petition should be dismissed because its petition for appeal to this Court was not timely filed.

NATURE OF PROCEEDINGS BELOW

The appellee Pam Gainer is employed by the appellant

Department as a Social Service Worker III in the Calhoun County office in Grantsville. She filed a grievance to contest a four-day suspension without pay which the Department imposed on her on July 10, 2006. In its letter of suspension, the Department advised Pam Gainer that she had "breached the confidentiality of sensitive social service case records" because she had "accessed confidential and sensitive client information from a case record, thus compromising the Department's ability to effectively provide services to children as required by law." The notice of disciplinary action did not contain any more specific information regarding what alleged information Pam Gainer had disclosed, or to whom she had made the alleged inappropriate disclosure, or whose confidentiality interest had been breached, or even the name of the accuser who had brought the charges against her.

Pam Gainer was required to serve her four-day suspension while her grievance was pending. In her grievance, she requested the following relief: that her record be purged of the contested disciplinary action, reinstatement of her pay for the four-day period, and attorney fees and costs as allowed by law. She initiated this grievance at Level II on July 17, 2006. The grievance was denied on Level II, and Pam Gainer appealed to Level III on July 28, 2006.

Following a Level III evidentiary hearing on September 5, 2006, Christopher B. Amos, Acting Chief Level III Grievance

Evaluator, issued a written decision on October 27, 2006, denying the grievance. Pam Gainer appealed to Level IV on October 31, 2006.

During a telephonic scheduling conference before ALJ Denise Spatafore on January 8, 2007, the parties by counsel agreed to submit this case for decision based on the Level III hearing record, without additional witness testimony. The appellee reserved the right to submit additional documentary exhibits, and the ALJ deferred ruling on the relevancy of any such exhibits. The ALJ required the attorneys to submit their proposed findings of fact and conclusions of law, or briefs, by February 16, 2007, and any responses thereto by February 23, 2007.

On March 16, 2007, ALJ Denise Spatafore issued a decision which denied the appellee's grievance. Pam Gainer appealed this decision to the Circuit Court of Calhoun County, West Virginia on April 13, 2007, and served a copy of her petition for appeal and brief in support thereof on the Department's attorney. The Department filed and served a document entitled "Preliminary Response to Petition for Appeal" on May 17, 2007, but did not timely file a proper response.

At a status conference on July 30, 2007, the circuit court awarded the Department the right to file an additional response to Pam Gainer's petition for appeal and brief by August 13, 2007, and allowed Pam Gainer until August 20, 2007 to file any

reply thereto. The Department served its Response Brief on August 10, 2007, and Pam Gainer did not file any reply after that.

By Order entered on November 2, 2007, the circuit court issued its ruling based on the parties' pleadings and briefs and also a review of the record. The circuit court found that the Level IV grievance decision was clearly wrong in view of the reliable, probative and substantial evidence on the whole record. The circuit court also found that the Department had deprived Pam Gainer of due process of law, but that Pam Gainer had been able to adequately present her grievance despite this problem so there was no need to remand the case for further proceedings. The Level IV grievance decision was reversed, and the court ordered that the Department purge any reference to its disciplinary action against Pam Gainer from her personnel records and pay Pam Gainer for her back wages as well as her attorney fees in the grievance matter as allowed by W.Va. Code §6C-2-6.

Thereafter, Pam Gainer's attorney submitted an affidavit with attached itemized account to support her claim for an award of attorney fees and costs, which she served on November 15, 2007. The Department did not file any objection to the affidavit or the specific amount of attorney fees and costs requested. By Order entered on December 26, 2007, the circuit court awarded Pam Gainer judgment for attorney fees and costs in the amount she requested, which was \$9,045.

### STATEMENT OF FACTS

Pam Gainer has been employed by the Department in its Calhoun County office since September 2, 1975, and has worked as a social worker since April 1976. She was promoted to Social Service Worker II in 1978 and to Social Service Worker III in 1984. Since 1991 or 1992, she has worked as a foster care worker. (Level III Transcript, hereafter "Tr.," p. 145) The Department never took any prior disciplinary action against her, and she always received good evaluations.

In order to understand Pam Gainer's grievance and her defense to the Department's disciplinary action, it is necessary to understand the case in which the alleged breach of confidentiality occurred. Pam Gainer was the foster care worker for a male child here referred to as C.S., born November 29, 2002, and later for his half sibling, a female child here referred to as H.T., born January 19, 2004.

C.S. was taken into custody in March 2004, when he was a young infant with special medical needs ready to leave the hospital. The Department placed him in the foster home of a single mother, here referred to as S.B., in Clarksburg, because it was close to the hospital in Morgantown in case he should need further hospitalization. (Tr. p. 124)

Pam Gainer was assigned as C.S.'s case worker shortly after his placement in S.B.'s home, and made four home visits there

between April 19 and August 4, 2004. On each of these home visits, Pam Gainer noted that C.S., who was developmentally delayed, was always in a playpen, and did not seem to be getting the attention necessary for his optimal development. She was concerned that C.S. did not have good large muscle control, did not walk well, and was not learning to speak properly. Pam Gainer believed that S.B. was not spending the time with C.S. which was necessary to help him develop. She regularly discussed her concerns with other social workers in her office, but decided she would not move C.S. because he was in the only home he had ever known and there is a Department policy which discourages moving foster children. (Tr. pp. 129, 142-143, 148-149)

The Circuit Court of Calhoun County, West Virginia terminated the parental rights of C.S.'s biological parents. The Department transferred his case to the adoption unit, and assigned Jennifer Hogue, an adoption specialist in the Harrison County office, as his new worker.

When H.T. was born in January 2005, C.S.'s parents' rights had already been terminated. The Department was required, both by statute and its own policy, to file a petition for removal of H.T. from her parents because their parental rights to a sibling had been terminated previously. The Department requested that the Calhoun County Prosecuting Attorney file the necessary petition for custody of H.T., but the local prosecutor refused to do it.

Crystal Kendall, the Child Protective Services, or "CPS," supervisor in Grantsville, perceived this as a problem. She requested that the prosecutor provide the Department with a written memo that he would not file the petition, and the prosecutor did so. (Tr. pp. 137-138)

When H.T. was a couple months old, an emergency situation developed in her home, and the local prosecutor finally agreed to file a custody petition for the Department. Nonetheless, the Department continued to experience problems with the local prosecutor in H.T.'s case. These problems included the local prosecutor's decisions to not file a petition for authorization to separate siblings and affirm the Department's decision to place H.T. in a different foster home than her brother C.S. was in, and also his refusal or failure to call witnesses and subpoena documents which the Department wanted to use as evidence in the case. The CPS supervisor contacted the Department's regional attorney and submitted an 8-page report to the court stating the Department's issues with the prosecutor. (Tr. pp. 138-139, 142, 149; Respondent's Exhibit 7 filed in Level III grievance proceeding. See also paragraph 23 of the Findings of Fact on page 7 of the Calhoun County Circuit Court order authorizing separation of siblings, a copy of which is attached as Exhibit A.)

The Department placed H.T. in the foster home of C.H. The Department did not place H.T. with her sibling C.S. in S.B.'s

home for several reasons. At about that time, there was a referral of child neglect against S.B., which led to an investigation of S.B. by the Department's Internal Investigations Unit, "IIU," and it is against Department policy to place a child in a foster home while such an investigation is pending. The investigation involved allegations made by a former foster child in S.B.'s home that S.B. had left children outside in the rain, refused to allow children to eat when hungry, was distracted from caring for the children in her home because she was drinking beer with friends, left the complaining child's sibling in a high chair, and left C.S. in a playpen. The homefinder in Clarksburg, which was S.B.'s area, advised the social workers in Calhoun County that they should not place any more children in S.B.'s home.

The Calhoun County social workers involved in H.T.'s placement were aware of Pam Gainer's concerns that S.B. was not providing adequate attention to C.S. and C.S. was not progressing optimally in her home as a result. In addition, Pam Gainer was concerned that S.B. was simply overextended and unable to care properly for another child. S.B. is a single mother in her 50's, has had cancer; already had five children in her home, and several of her children have special needs. (Tr. pp. 125, 127, 129, 139-141. See also paragraphs 29 through 31 of the Findings of Fact on pages 11 and 12 of the Calhoun County Circuit Court order authorizing separation of siblings, a copy of which is attached as

Exhibit A.)

The opinion of all the Department's workers involved in H.T.'s case, including Pam Gainer, the CPS supervisor, and the homefinder in the Calhoun County office, was unanimous that there would be imminent and ongoing harm to both H.T. and C.S. if H.T. were placed in S.B.'s home. These Department workers directly involved in protection of the welfare of abused and neglected children in Calhoun County were concerned that S.B. would not be able to provide adequate attention to H.T., an infant, and also to C.S., a young child with developmental delays and special medical needs, if another child were placed in her home. (Tr. pp. 134, 143, 148, 158-159)

After S.B. learned that C.S. had a sibling whom the Department had placed in a different foster home, she moved to intervene in H.T.'s case and for custody of H.T. At that time, Pam Gainer learned that the Clarksburg area social workers monitoring C.S.'s placement with S.B. disagreed with their colleagues in the Calhoun County office regarding H.T.'s placement. The Calhoun County social workers and CPS supervisor responsible for H.T.'s case recommended that H.T. should not be placed in S.B.'s home, because they believed it would be harmful to both H.T. and C.S. to place another child in that home. H.T.'s multi-disciplinary team, or "MDT," recommended sibling separation in H.T.'s case, as well.

The Harrison County social workers responsible for C.S.'s

case took the position that H.T. should be placed with her sibling, C.S., in S.B.'s home, even though the homefinder from that area had initially advised the Calhoun County office to not place H.T. there. Pursuant to Department policy when there is a conflict among its social workers, there was a staffing of all concerned social workers on this issue, but they did not reach a consensus. Calhoun County had jurisdiction over H.T.'s case. Therefore the Department in Calhoun County was able to continue to take a firm position, despite the difference of opinion of the Harrison County social workers, that H.T. should not be placed in S.B.'s home and sibling separation should be approved. (Tr. pp. 129-132, 139-140, 151)

Pam Gainer understood that she would be called as a witness in the hearing on S.B.'s motion to intervene and for custody of H.T.<sup>1</sup> Because she had not worked on the case for about a year, Pam Gainer felt that she needed to review her own

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<sup>1</sup>The appellant's brief erroneously states that Pam Gainer "claimed that she had also been subpoenaed for this hearing," and implies that this is another "lie." (See Appellant's brief, p. 4 and also p. 6) In fact, Pam Gainer was not subpoenaed, and she never claimed that she was. She attended the court hearings because she was H.T.'s case worker; she expected to be called as a witness; and she did in fact testify at the hearing on sibling separation. Furthermore, the OIG report of investigator Trina Smith, attached to the Appellant's brief as Exhibit 3, states on p. 6, "MS. GAINER stated SHE was not subpoenaed for the hearings but SHE was in attendance at both and was in the courtroom the entire time." This is just one of several of appellant's misstatements made in an effort to wrongfully imply that Pam Gainer was deceitful.

recordings regarding her visits to S.B.'s home in C.S.'s case in order to prepare for her testimony. She no longer had access to her own recordings, however, because after C.S.'s case was transferred to the adoption unit, his record was restricted pursuant to Department policy. Therefore, Pam Gainer requested access to the restricted record in order to review her own notes. Sarah Bleigh, the regional adoption supervisor, responded by releasing the record to her. (Tr. pp. 53-66, 153; Respondent's Exhibits 5, 6 and 7 filed in Level III grievance proceeding.)<sup>2</sup>

When Pam Gainer obtained access to the Department's restricted file on C.S., she obtained the entire file, which included recordings of Jennifer Hogue, C.S.'s adoption worker, as well as her own recordings. Sarah Bleigh testified that it is only

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The appellee repeatedly requested disclosure of copies of the e-mails between herself and Sarah Bleigh, the Region I Social Service Supervisor for the Adoption Unit, which were in the custody of the Department, but the Department failed to disclose these records. This request was made in the 10-31-06 cover letter from the grievant's attorney, sent with the Level IV grievance form; discussed at the scheduling conference on 1-8-07; discussed in several e-mails from the grievant's attorney; and discussed in several phone conversations between the grievant's attorney and the respondent's attorney, as well as a phone call with the ALJ's assistant on 1-25-07. Finally, the Department claimed that the e-mails had all been deleted and were no longer available, although the Department did not claim that the e-mails had already been deleted when the grievant first requested their disclosure. The plaintiff proffers that the undisclosed e-mails would corroborate that she requested access to the restricted file, and Sarah Bleigh provided it to her, before she was informed by Chris Spiker, Child Welfare Consultant, that she could not have access to the restricted file.

possible to unlock the entire file, and not just a portion of it. When she reviewed the file, Pam Gainer noticed that Jennifer Hogue had expressed similar observations and concerns about S.B. in her recordings. Jennifer Hogue had noted that C.S. was spending a lot of time in a playpen and she was concerned about his progress as a developmentally delayed child. Pam Gainer printed the record, which included Hogue's notes along with her own recordings, to review to prepare for her court testimony.

Pam Gainer testified that she did not know how to print only a select portion of the record which contained her own recordings, so she printed the entire record along with her own recordings. At the time, Pam Gainer did not select Hogue's recordings to print. Pam Gainer had no reason to expect that she would ever have a use for Jennifer Hogue's recordings or even that Jennifer Hogue would be a witness in H.T.'s case. (Tr. pp. 65-66, 153-155)

The Circuit Court of Calhoun County conducted a hearing on S.B.'s motion to intervene and for custody of H.T. on August 8, 2005. At the conclusion of the hearing, the court granted S.B.'s motions, and directed the Department to immediately place H.T. with S.B. At that point, S.B. requested that the placement be deferred for a week, until she returned from a vacation, and the Department agreed. During that week, C.H., H.T.'s foster mother, filed a motion to intervene and for an emergency stay of that order, which

the court granted. Therefore, the Department did not place H.T. with S.B., pending another hearing. (Tr. pp. 151-153. See also Calhoun County Circuit Court order authorizing separation of siblings, a copy of which is attached as Exhibit A.)

During a recess at the second circuit court hearing on H.T.'s placement, on September 8, 2005, Pam Gainer was surprised to notice Jennifer Hogue in the courthouse. Pam Gainer was even more surprised when Jennifer Hogue, called as a witness for S.B., testified on direct examination that she did not recall that she had ever seen C.S. in a playpen in S.B.'s home, and that she had no concerns about his care in S.B.'s home. Pam Gainer deemed it essential that the court understand that Jennifer Hogue had in fact been concerned about S.B.'s ability to provide adequate attention to C.S., which corroborated Pam Gainer's own testimony, after Jennifer Hogue undermined Pam Gainer's testimony by denying the evidence in Hogue's own recordings.<sup>3</sup>

The local prosecutor had advised Pam Gainer, "We'll just sit back and let these foster parents duke it out," thereby indicating he was abdicating his responsibility to aggressively advocate the Department's position in this case. This comment followed a history of the prosecutor's refusal to cooperate with

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<sup>3</sup>The petitioner is wrong when she alleges on page 5 of her petition for appeal that Pam Gainer did not testify at the circuit court hearing on the issue of sibling separation. Pam Gainer had testified at the first of two hearings on this issue, on August 8, 2005.

the Department in this case, as detailed above. Therefore, Pam Gainer did not give the prosecutor the evidence necessary to correct the misleading direct examination testimony of Jennifer Hogue. Instead, Pam Gainer gave the information to the two attorneys who were aggressively advocating the Department's position regarding the children's best interests, the guardian *ad litem* and the attorney for H.T.'s foster mother, C.H.<sup>4</sup>

The information which Pam Gainer gave to the attorneys advocating the Department's position at the hearing consisted of copies of Hogue's two recordings indicating Hogue also had concerns about S.B.'s care of C.S. The attorney for C.H. used this information for cross-examination of Hogue, effectively supporting the Department's position in the hearing. (Tr. pp. 155-157. See also paragraph 28 of the Findings of Fact on page 10 of the Calhoun County Circuit Court order authorizing separation of siblings, a copy of which is attached as Exhibit A.)

The two recordings by Jennifer Hogue which Pam Gainer disclosed included Hogues's notes from (1) October 7, 2004, stating that C.S. could not focus and could not communicate, except by

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<sup>4</sup>Again, the appellant's brief is simply wrong when it states on page 5 that Pam Gainer provided copies of Hogue's two short case notes to counsel at the hearing "not as a DHHR representative but on her own volition . . ." Pam Gainer acted in her role as a social worker concerned for the welfare of the children, and not as some sort of rogue as implied by the appellant. This is yet another unnecessary attack on Pam Gainer's credibility and good faith, which is unjustified and unfair.

grunting, and (2) November 17, 2004, stating that C.S. had made very little progress with his delays and appeared to spend a lot of time in his playpen. Jennifer Hogue testified at the Level III hearing that she did not recall whether or not she had testified on direct examination at the circuit court hearing that she did not recall seeing C.S. in a playpen and had no concerns about the amount of attention he was getting in S.B.'s home, but she did not deny that she had testified to that effect. Pam Gainer's Level III hearing testimony that Hogue's direct examination testimony had contradicted Hogue's own recordings was uncontested, and is corroborated by the Calhoun County Circuit Court order authorizing separation of siblings. (Tr. pp. 46, 156.)

The circuit court made a specific finding that acknowledged Hogue's conflicting testimony in her direct and cross-examinations regarding this critical issue in paragraph 28 of the Findings of Fact on page 10 of the Calhoun County Circuit Court order authorizing separation of siblings, a copy of which is attached as Exhibit A, as follows:

"Pam Gainer's concern about C. was corroborated by other Department workers from Harrison County, who also noticed that C. spent a lot of time in his playpen. **Although she did not recall it when she testified on direct examination, adoption specialist Jennifer Hogue had a concern that C. spent too much time in his playpen and was otherwise confined to a small portion of the house, as shown by her case notes after her home visit on November 17, 2004. (H. Exhibit #4)**" (emphasis added)

Pam Gainer, as the social worker responsible for H.T.'s placement, was required to protect H.T.'s interests at the placement hearing in circuit court on September 8, 2005.<sup>5</sup> Pam Gainer made a decision that it was critically important to adduce the evidence of Hogue's recordings so the circuit court would be able to make the correct decision to protect H.T. from imminent and ongoing harm that would result if H.T. were moved to S.B.'s home. She made this disclosure to the attorneys who were effectively advocating the Department's position regarding the child's welfare in a court proceeding.

There was no time to obtain a subpoena for these records in the middle of an ongoing hearing, when she was surprised by the testimony of another Department social worker, Jennifer Hogue, which contradicted Hogue's own recordings as well as Pam Gainer's testimony. It was necessary to correct the misleading testimony of Jennifer Hogue. Pam Gainer's decision to share the case notes with the attorneys who were advocating the Department's position at the court hearing was supported by the Department's other Calhoun County social workers involved in H.T.'s case.

It was not practical to expect the circuit court to suspend proceedings in order to allow time to subpoena the

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<sup>5</sup>As noted in footnote 4 above, Pam Gainer was acting as a DHHR representative, in her role as social worker assigned to protect the welfare of H.T., a minor child in a child abuse and neglect case, and not "on her own volition" as some sort of rogue.

Department's case record and then cross-examine Jennifer Hogue at a later hearing. It should be noted that there were both a practical and a policy reason why such a continuance was not feasible. As a practical matter, Jennifer Hogue had traveled from the Clarksburg office to Grantsville for the court hearing, and it would not have made sense to continue the case and bring her back to testify again on another day. As a policy consideration, the circuit court has a compelling legal obligation to conduct proceedings expeditiously, without any unnecessary delays, in child abuse and neglect proceedings, in order to achieve permanency for the affected children.

There was no evidence that Pam Gainer obtained copies of Hogue's recordings with the intention of disclosing them to other persons, as suggested by the investigation report which preceded the Department's disciplinary action. Pam Gainer obtained Hogue's recordings along with her own recordings, because they were part of an inseparable record, and Pam Gainer disclosed Hogue's recordings only when she perceived exigent circumstances after Hogue appeared and testified in contradiction to Hogue's own recordings. (Tr. pp. 134, 143, 158-159)

Jennifer Hogue was embarrassed at the circuit court hearing on September 8, 2005 when she was confronted on cross-examination with her own recordings, which contradicted her direct examination testimony. She testified at the Level III hearing that

she felt like she had been "slapped in the face," and she filed the complaint against Pam Gainer which led to the subject disciplinary action. There was no evidence that Pam Gainer acted with malice towards Jennifer Hogue, however. The evidence was uncontested that Pam Gainer disclosed the information for the sole purpose of providing evidence she deemed essential to protect children in the Department's custody, and not to embarrass a co-worker. (Tr. pp. 44, 158-159; Respondent's Exhibit 3 filed in Level III grievance proceeding)

The two short recordings by another social worker which Pam Gainer disclosed to attorneys advocating the Department's position at a contested hearing involving the welfare of a vulnerable infant child did not actually contain any information which violated a client's right to confidentiality. The information was disclosed only to the judge and attorneys, all of whom were officers of the court, in a contested court case involving that child client's welfare. All persons who received the alleged confidential information were already aware of the facts which could be gleaned from that information: (1) C.S. was in S.B.'s foster home; (2) S.B. consummated the adoption of C.S. a few days before the September 8, 2005 court hearing; (3) the Department had concerns about S.B.'s home as a suitable placement for H.T.; and (4) the Department's concerns included the specific information in the recordings, that S.B. left C.S. in a playpen too much and

did not give him enough attention, and therefore C.S., who is developmentally delayed, was not making optimal progress.

Finally, it should be noted that the appellant's allegations that Pam Gainer lied to the investigator from the Department's Office of Inspector General are simply not true.<sup>6</sup> Pam Gainer cooperated fully and honestly with the investigation.

#### STANDARD OF REVIEW

The standard of review of a grievance decision is set forth in Syllabus Point 1, *Cahill v. Mercer County Board of Education*, 208 W.Va. 177, 539 S.E.2d 437 (2000), as follows:

"Grievance rulings involve a combination of both deferential and plenary review. 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

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<sup>6</sup>On p. 5 of Appellant's brief, it states that Pam Gainer lied to the investigator when she said she put the case notes in a folder and took the notes to court, then shredded the notes afterwards; and that Pam Gainer lied again when she stated the case notes were not presented in court. Actually, the investigator asked Pam Gainer if she presented the case notes in court, and Pam Gainer accurately responded that she did not present the case notes directly to the court but that she gave the information to attorneys and one of the attorneys used the case notes in the hearing. Pam Gainer also told the investigator that she shredded the case notes after the hearings were completed, and that was true. These are yet more examples of the appellant's effort to use character assassination of Pam Gainer to try to prejudice this Court and gain unfair advantage in its appeal.

judge are similarly entitled to deference. Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed de novo."

Pursuant to W.Va. Code §29-6A-7, grounds for appeal include that the hearing examiner's decision ". . .(4) Is clearly wrong in view of the reliable, probative and substantial evidence on the whole record." The circuit court found that the Level IV grievance decision was clearly wrong in view of the reliable, probative and substantial evidence on the whole record. It also found that Pam Gainer had been deprived of due process of law.

The relevant standard of review in this case is a plenary review *de novo* involving the application of law to the facts.

POINTS IN RESPONSE TO ASSIGNMENTS OF ERROR

- I. THE CIRCUIT COURT CORRECTLY RULED THAT THE LEVEL IV GRIEVANCE DECISION WAS CLEARLY WRONG IN VIEW OF THE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD.
- II. THE CIRCUIT COURT CORRECTLY FOUND THAT THE APPELLANT DEPARTMENT FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT ITS DISCIPLINARY ACTION AGAINST THE APPELLEE PAM GAINER WAS JUSTIFIED, INASMUCH AS THE RECORD SHOWED THAT THE APPELLEE PAM GAINER MADE A

LIMITED DISCLOSURE OF CONFIDENTIAL INFORMATION FOR THE SOLE PURPOSE OF PROTECTION OF A MINOR CHILD FROM IMMINENT HARM IN A CHILD ABUSE AND NEGLECT PROCEEDING, WHICH WAS NOT A WRONGFUL VIOLATION OF THE APPELLANT DEPARTMENT'S CONFIDENTIALITY POLICY.

III. THE CIRCUIT COURT CORRECTLY FOUND THAT THE APPELLANT DEPARTMENT DEPRIVED THE APPELLEE PAM GAINER OF DUE PROCESS OF LAW.

IV. THE CIRCUIT COURT CORRECTLY FOUND THAT THE APPELLEE PAM GAINER IS ENTITLED TO ATTORNEY FEES AND COSTS INCURRED IN THE SUCCESSFUL PROSECUTION OF HER GRIEVANCE.

V. THE APPELLANT DEPARTMENT'S PETITION FOR APPEAL WAS NOT TIMELY FILED AND SHOULD BE DISMISSED.

#### DISCUSSION OF THE LAW AND ARGUMENT

##### I and II:

THE CIRCUIT COURT CORRECTLY FOUND THAT THE LEVEL IV GRIEVANCE DECISION WAS CLEARLY WRONG IN VIEW OF THE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD, BECAUSE THE APPELLANT DEPARTMENT FAILED TO

PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT ITS DISCIPLINARY ACTION AGAINST THE APPELLEE PAM GAINER WAS JUSTIFIED, INASMUCH AS THE RECORD SHOWED THAT THE APPELLEE PAM GAINER MADE A LIMITED DISCLOSURE OF CONFIDENTIAL INFORMATION FOR THE SOLE PURPOSE OF PROTECTION OF A MINOR CHILD FROM IMMINENT HARM IN A CHILD ABUSE AND NEGLECT PROCEEDING, WHICH WAS NOT A WRONGFUL VIOLATION OF THE APPELLANT DEPARTMENT'S CONFIDENTIALITY POLICY.

Because Pam Gainer's grievance involved a disciplinary matter, the Department had the burden of proving by a preponderance of the evidence that its disciplinary action was appropriate and justified. W.Va. Code §29-6A-6. In this case, the Department had the burden of proving by a preponderance of the evidence that Pam Gainer intentionally violated confidentiality and privacy policies by disclosing confidential information to a third party, and that therefore the Department's disciplinary action to subject her to a four-day suspension without pay was justified.

Pam Gainer acknowledged that there is a confidentiality policy which generally prohibits disclosure of information from a restricted record to a third party. She also acknowledged that she disclosed information from the Department's file on C.S., after C.S.'s case was referred to the adoption unit and his file was

restricted, to two attorneys involved in a circuit court hearing regarding separation of C.S. and his half-sibling H.T.

Nonetheless, Pam Gainer disputed that she had violated the confidentiality policy, and maintained that her actions were warranted by the confidentiality policy. Pam Gainer relied on an exception to the non-disclosure rule, which is also part of the confidentiality policy. The confidentiality policy allows disclosure of sensitive information from the Department's pre-adoption case records when it is necessary to prevent imminent harm to a child.

There is no West Virginia Supreme Court holding which defines "imminent harm," and the term must be interpreted according to the plain meaning of the words. A dictionary definition of "imminent" is "ready to take place, esp: hanging threateningly over one's head." (*Webster's Ninth New Collegiate Dictionary*, 1987; *The Merriam-Webster Dictionary*, 1997) The phrase "imminent harm" clearly refers to harm which is foreseeable in the near future. This can include chronic, ongoing harm as well as an acute, isolated incident of harm.

Pam Gainer had a reasonable basis to believe that H.T. would suffer imminent and ongoing harm if the court required H.T. to be united with her sibling C.S. in the home of S.B., because there was substantial evidence that S.B. simply could not give adequate attention to another child in her home. The Department

workers involved in H.T.'s case, including Pam Gainer, were all aware that S.B. was a single mother, in her 50's, in remission from cancer, with five other children in the home, and that at least two children in her home had special needs.

There were allegations that S.B. had neglected other children in her home, and the IIU was conducting an investigation of those allegations. Pam Gainer had personally observed that S.B. seemed to leave C.S. in his playpen an inordinate amount of time, and that C.S. was not progressing as rapidly as he might have if S.B. were paying more attention to his developmental needs. Because H.T. was a very young infant, she needed plenty of attention herself, and there was good reason to believe she would not receive it in S.B.'s home.

Furthermore, Pam Gainer had probable cause to believe that C.S. would also suffer imminent and ongoing harm if H.T. was also placed in S.B.'s home. Pam Gainer was concerned that C.S. was not getting adequate attention even when he was the only pre-school age child in S.B.'s home. Consequently, she was justifiably worried that C.S. would get even less attention if his infant sister was in the same home demanding S.B.'s parental attention.

The Level IV decision included a finding that Pam Gainer's decision to leave C.S. in S.B.'s home despite her concerns that he was not getting adequate attention "is nonsensical if she truly believed the child was ever in danger of 'serious' or

'imminent' harm. (See Level IV decision, pp. 7-8.) The circuit court understood that this finding was based on a complete misunderstanding of the undisputed evidence at the hearing.

The circuit court correctly noted that "the ALJ's view of the harm to a client that Ms. Gainer saw as justifying the release of the confidential information is misplaced." The circuit court understood that Ms. Gainer's concern was not that C.S. was in imminent danger in S.B.'s home, but rather that imminent danger would occur to C.S. or H.T. or both children if H.T. were added to that home. This evidence is fully discussed in the circuit court decision, which also includes a reference to 17 findings in the circuit court order entered on December 6, 2005 by Judge Evans in the child abuse and neglect case. (See Exhibit A.)

Pam Gainer testified that, when she was still C.S.'s case worker, she left him in S.B.'s home despite her concerns because it was the only home he had ever known, there was a countervailing risk of harm to him if he were removed from a stable placement, and Department policy discourages moving foster children. She further testified, however, that she had a deep concern that both C.S. and H.T. would suffer imminent harm if H.T. were placed in the same home, because then C.S. would get *even less* attention and there would not be adequate attention for H.T. Her concerns were corroborated by the other social workers involved in this case, who testified at her Level III grievance hearing. The circuit court

found that there was nothing inconsistent or nonsensical about her professional judgment that the children would suffer imminent harm if H.T. were moved into S.B.'s home, which would be a major change in C.S.'s home situation since she had been his caseworker.

When Pam Gainer requested access to the Department's restricted adoption case record on C.S., she was H.T.'s social worker. She intended to use access to C.S.'s record for the sole purpose of refreshing her own memory regarding her visits to S.B.'s home when she had been C.S.'s social worker. She needed to refresh her memory in order to prepare to testify, at a court hearing on the issue of sibling separation and placement of H.T., about her concerns about placement of H.T. in S.B.'s home. There was no evidence to substantiate the Department's claim that Pam Gainer requested access to the record for an improper or malicious purpose, as suggested by the investigative report by the Office of Inspector General which led to the subject disciplinary action.

Because the Department cannot separate portions of its record, it released the entire record and not just Pam Gainer's recordings to her. Pam Gainer inevitably noticed that her successor as C.S.'s social worker, Jennifer Hogue, had made similar observations about his condition in S.B.'s home, which corroborated Pam Gainer's own concerns. Pam Gainer printed the record, with the intention of destroying the hard copy after the hearing at which she would testify.

During a recess in the circuit court hearing on H.T.'s placement on September 8, 2005, Pam Gainer discovered that Jennifer Hogue had appeared to testify on behalf of S.B. Pam Gainer was somewhat surprised, but she was even more surprised when Jennifer Hogue offered sworn testimony on direct examination that contradicted Hogue's own recordings and Pam Gainer's testimony.<sup>7</sup> Pam Gainer was deeply concerned that Hogue's misleading direct examination testimony had undermined the Department's position, and would cause the court to make the wrong decision about H.T.'s placement, resulting in imminent and continuing harm to both H.T. and C.S.

Therefore, in the middle of the evidentiary hearing, Pam Gainer disclosed copies of two short recordings which Hogue had made in C.S.'s record, and which Pam Gainer had obtained when she printed the record for her own use to prepare for the hearing. Because the Department's counsel of record, the Calhoun County Prosecuting Attorney, had repeatedly and consistently refused to

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The entire situation would never have occurred if Hogue had simply taken the same steps that Pam Gainer did before the hearing, and reviewed her own notes to refresh her recollection before she testified about her work as C.S.'s social worker. It is ironic that the Department disciplined Pam Gainer for actions taken under exigent circumstances in order to protect abused and neglected children who are the Department's clients, based on the complaint of Jennifer Hogue. It would have been more appropriate for the Department to discipline Hogue, the social worker who created the exigent circumstances by failing to review her own notes and testifying in a misleading manner on direct examination in a court case involving placement of the children.

advocate the Department's position in H.T.'s case, Pam Gainer was forced to rely on two other attorneys in the case who were aggressively advocating the Department's position. Pam Gainer gave those two attorneys, the guardian *ad litem* and the attorney for H.T.'s foster mother, the information to use for cross-examination of Hogue.

The evidence supports Pam Gainer's contention that she made a limited disclosure of information from the Department's pre-adoption case record to two attorneys who were officers of the court and advocating the Department's own position regarding the child's welfare. One of the attorneys used the information to cross-examine Jennifer Hogue in the case. This effectively released the information to all the attorneys and the judge, all of whom were officers of the court participating in a case involving the welfare of the child. None of the information was truly sensitive or confidential, inasmuch as every single person who received it already knew the child's allegedly confidential status. This disclosure was justified in order to protect the child, whose welfare was the subject of a child abuse and neglect case, from imminent and ongoing harm.

The applicable confidentiality policy exists to protect the interests of the Department's clients, particularly children. In this case, it was necessary to disclose the confidential information in order to protect the children. Failure to disclose

the information could have caused imminent harm to the children. The circuit court correctly noted that this disclosure of confidential records occurred in the context of a contested and close case, in which the trial court ended up reversing its earlier decision, and that the trial court decision includes findings which show that the disclosed records were important considerations in the ultimate decision regarding the children's welfare.

Ironically, the Department's letter of suspension states that the Department was disciplining Pam Gainer because she had "breached the confidentiality of sensitive social service case records" when she "accessed confidential and sensitive client information from a case record, thus compromising the Department's ability to effectively provide services to children as required by law." On the contrary, the record is undisputed that Pam Gainer used the case record information *in order to* effectively protect children in the Department's custody.

The only person who felt harmed by the disclosure was Jennifer Hogue, who was embarrassed because her recordings contradicted her own sworn testimony on direct examination. Needless to say, Jennifer Hogue could have avoided this embarrassment by reviewing her own recordings to prepare for her testimony, just like Pam Gainer did, and by testifying accurately and consistently with her own recordings on direct examination. In any event, the purpose of the confidentiality policy is not to

shield social workers from embarrassment at the expense of vulnerable children in child abuse and neglect cases.

The appellant's argument that the circuit court order in the underlying child abuse and neglect case was irrelevant and should not have been considered by the circuit court is bogus. The December 6, 2005 circuit court order in the underlying child abuse and neglect case is material, relevant and critically important evidence which the ALJ should have considered in order to reach a fair decision on the whole record. It is clear from the record, including that order, that Pam Gainer acted appropriately and in compliance with the applicable confidentiality policy. Not only was there no harm to anyone protected by the confidentiality policy, but also her actions were necessary to prevent harm to the Department's clients, two vulnerable children in a child abuse and neglect case. The circuit court correctly found that the Level IV decision was clearly wrong in view of the reliable, probative and substantial evidence on the whole record.

The appellant is misleading the Court when it argues that the circuit court applied the wrong standard to its review of the Level IV decision. The circuit court reviewed the ALJ's application of law to facts *de novo*, as it was required to do. The circuit court correctly found that the Department had not met its burden of proof that its disciplinary action was appropriate, because Pam Gainer's actions were within the Department's policy,

which included an exception to the general confidentiality rule when necessary to protect children from imminent harm. Although Pam Gainer had disclosed a small portion of a child's confidential records, she had made that disclosure to protect that child and that child's sibling from imminent harm. Her actions were well within an established exception to the general confidentiality rule, and therefore appropriate.

The circuit court decision clearly stated its reasoning as follows:

"The failure of the ALJ to recognize the potential harm to these children which concerned Ms. Gainer lead the ALJ to arrive at the conclusion that Ms. Gainer's actions in revealing the confidential information was not within Department policy . . . the [ALJ] Decision in this matter is clearly wrong in view of the reliable, probative and substantial evidence on the whole record. Ms. Gainer's actions, in this instance, were entirely appropriate to prevent serious, foreseeable and imminent harm to H, certainly, and to C as well."

The appellant's claim that the circuit court substituted its judgment for that of the ALJ on factual issues is simply wrong. The circuit court decision contains a closely reasoned explanation why the ALJ's application of the law to the facts was wrong. The circuit court understood that Pam Gainer's actions were taken to protect a child from imminent harm, and that is an exception to strict application of the confidentiality policy. The circuit court was clearly applying the correct law to the facts, rather

than misunderstanding the underlying facts as claimed by the appellant. This was a correct application of the *de novo* standard of plenary review of application of the law to the facts.

The Department failed to prove by a preponderance of the evidence that its disciplinary action against Pam Gainer was justified because she wrongfully violated the Department's confidentiality policy. Pam Gainer clearly proved her defense that the limited disclosure of two short case recordings by another social worker, from a child's pre-adoption case record, was necessary to prevent imminent harm to that child and another child. The testimony of the Department's own social workers with first-hand knowledge of the underlying case, including the CPS supervisor and a local home finder, corroborated Pam Gainer's professional judgment: There was a substantial risk of imminent harm to both children if H.T. were placed in S.B.'s home along with C.S. The circuit court needed the information which Pam Gainer disclosed in order to make the correct decision and avoid imminent harm to the two children. The Department did not present any evidence to the contrary.

The Level IV decision suggests that Pam Gainer reacted ". . . 'in the heat of the moment,' when other options for revealing the information could have been pursued, which would not have violated DHHR policies or the Social Workers' Code." (Level IV decision, p. 8) The circuit court correctly found that the ALJ's

finding was simply wrong. Pam Gainer had already testified about her own observations, as the Level IV decision acknowledges. Pam Gainer was justifiably concerned when Jennifer Hogue offered inaccurate testimony, contradicted by Hogue's own case notes, which undermined her own testimony. The Level IV decision further states that ". . . she could have suggested to the appropriate parties that the information from the FACTS file should be subpoenaed." This was not a practical or viable option in the middle of the hearing, since there was no time to issue a subpoena and thereby obtain the same records that she already had in her possession. Furthermore, the trial court in the child abuse and neglect case had an affirmative duty to process the case and achieve permanency for the children as expeditiously as possible. The circuit court correctly understood that it was not practical to disrupt the hearing to try to subpoena the records already in hand, in order to cross-examine a witness from Harrison County who was already there and would have to return to Grantsville to testify at a subsequent hearing, and that the trial court was unlikely to allow such a disruption even if it had been requested.

The disciplinary action against Pam Gainer was arbitrary and capricious in light of the full record. The Department imposed discipline against Pam Gainer for an alleged technical violation of a confidentiality policy which harmed no one. In fact, Pam Gainer's action was necessary to prevent harm to the Department's

clients. Despite its insistence that its disciplinary action was necessary to uphold its confidentiality policy, the Department violated its own confidentiality policy in the course of Pam Gainer's grievance proceedings.<sup>8</sup>

III:

THE CIRCUIT COURT CORRECTLY FOUND THAT THE  
DEPARTMENT DEPRIVED PAM GAINER OF DUE PROCESS  
OF LAW.

After the circuit court hearing at which Pam Gainer made the contested disclosure, Jennifer Hogue made a complaint against Pam Gainer. The Department conducted an investigation, and then imposed the subject disciplinary action on Pam Gainer.

In its letter of suspension, the Department advised Pam Gainer that she had "breached the confidentiality of sensitive social service case records" because she had "accessed confidential and sensitive client information from a case record, thus compromising the Department's ability to effectively provide services to children as required by law." The notice of

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<sup>8</sup>As noted in the Level III transcript, the respondent disclosed Respondent's Exhibit 3, Jennifer Hogue's complaint against Pam Gainer, with 18 redactions of the names of the Department's clients and 18 names of the Department's clients not redacted. This is an inexplicable oversight in a case involving disciplinary action against an employee social worker for alleged violation of confidentiality policies based on disclosure of two short recordings by another social worker. The Department violated its own confidentiality policy 18 times in this one exhibit.

disciplinary action did not contain any more specific information regarding (1) what alleged information Pam Gainer had disclosed, or (2) to whom she had made the alleged inappropriate disclosure, or (3) whose confidentiality interest had been breached, or even (4) who had brought the charges against her.

The Department's Policy Memo 2104 requires the Department to provide an employee with meaningful notice of disciplinary action, "including specific charges (WHO, WHAT, WHEN, WHERE, HOW)." When she filed her grievance, Pam Gainer noted that she had never seen the complaint against her, nor been informed of the identity of her accuser. She complained that this was a violation of her constitutional rights to notice and due process, as well as a violation of Department policy.

The Department did not provide the necessary information to Pam Gainer even after she filed her grievance and raised this issue. Shortly before the Level III hearing, her attorney was able to get disclosure of the body of the investigative report which the Department relied on when it made its disciplinary decision, but not the exhibits attached to that report. The appellee did not get an opportunity to see all the exhibits before the evidentiary hearing in her grievance proceedings.

Pam Gainer did not learn the identity of her accuser until shortly before the Level III hearing. Even after the Level III hearing commenced, the Department was not clear about whose

confidentiality interest had been breached. Some Department witnesses testified that Pam Gainer had breached a presumed confidentiality interest of Jennifer Hogue, and other witnesses agreed that the relevant confidentiality policy did not exist to protect social workers but rather clients. None of the Department's witnesses could explain how the interests of C.S., the child client whose record excerpts were disclosed in a hearing that would directly affect his placement and welfare, were harmed by the alleged breach of confidentiality.

Due process of law, within the meaning of both federal and West Virginia constitutional provisions, extends to actions of administrative officers and tribunals, as well as to the judicial branches of the governments. *State ex rel. Bowen vs. Flowers*, 155 W. Va. 389, 184 S.E.2d 611 (1971); *State ex rel. Ellis vs. Kelly*, 145 W. Va. 70, 112 S.E.2d 641 (1960). Applicable standards for procedural due process, outside the criminal area, may depend upon the particular circumstances of a given case. However, there are certain fundamental principles in regard to procedural due process embodied in Article III, Section 10 of the West Virginia Constitution, which include the following: (1) The more valuable the right sought to be deprived, the more safeguards will be interposed, (2) due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise, and (3) a temporary deprivation of rights may not

require as large a measure of procedural due process protection as a permanent deprivation. *North vs. West Virginia Board of Regents et al.*, 160 W. Va. 248, 233 S.E.2d 411 (1977).

In this case, Pam Gainer was suspended for four days without pay. Her unblemished 30-year record and reputation as a social worker have been tarnished by disciplinary action. Not only is her personal reputation among her peers damaged, but she also lost four days of income. To the extent that her "liberty interest" or reputation was jeopardized and to the extent that her "property interest" or family income was jeopardized, she is constitutionally entitled to procedural due process.

The Department imposed disciplinary action against Pam Gainer without affording her full notice of the charges against her. After she filed a grievance and expressly requested specific information which she should have already received, the Department failed to provide her with all such necessary information. Pam Gainer had to defend her actions at the evidentiary hearing on the Level III grievance, without full notice and disclosure of the charges against her, including the most basic information as to whose confidentiality interest she allegedly violated. This was a denial of her due process rights.

The circuit court correctly found that the record supported Pam Gainer's claim that the Department had deprived her

of due process of law.<sup>9</sup>

IV:

THE CIRCUIT COURT CORRECTLY AWARDED PAM GAINER  
ATTORNEY FEES INCURRED IN THE SUCCESSFUL  
PROSECUTION OF HER GRIEVANCE.

The Department has not raised any issues regarding the validity of Pam Gainer's attorney fee claim. Its appeal is limited to the amount of attorney fees awarded, and it claims that the circuit court lacked authority under W.Va. Code §29-6A-10 to award more than \$1,500. As noted in the circuit court decision entered on November 2, 2007, however, the applicable statute is W.Va. Code §6C-2-6, which imposes no limit on the amount of attorney fees that the circuit court may award to a successful grievant.

It is true that the statutory scheme for processing grievance appeals changed in 2007. This case was initiated under the former statutory scheme and processed accordingly. Nonetheless, by the time the circuit court had made its decision in the case, the new statute was in effect. The new statute, W.Va. Code §6C-2-6, provides for fee awards to successful grievants and

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<sup>9</sup>It should be noted that the appellant has continued to deny due process to the appellee, even at the pending appellate level. For instance, on March 17, 2008, the appellant filed a motion with this Court for leave to file its petition for appeal late, as reflected by this Court's Order granting that motion on March 19, 2008. The appellant never served the appellee with a copy of that motion, however, so the appellee never had an opportunity to register her objection to it.

does not impose a cap on the amount of such awards.

The appellee Pam Gainer maintains that the circuit court decision on the amount of her attorney fee award was proper for a couple reasons. First, the appellant Department failed to register a timely objection to her motion for attorney fees and the affidavit of her attorney requesting a specific amount. The appellant's failure to register a timely objection constituted a waiver and the appellant's belated objections should not be considered.

Second, throughout the grievance process the Department failed to respect Pam Gainer's due process rights, and the Department conducted itself in an unreasonable manner calculated to derive unfair procedural advantage for itself at Pam Gainer's expense. This unnecessarily caused Pam Gainer to incur substantial additional attorney fees. There is no question that the Department officials who make decisions in grievance cases have the great advantage of free legal services provided at taxpayer expense. The Department should not be allowed to leverage this advantage in an effort to wear down hapless employees with legitimate grievances who cannot afford to pay an attorney to deal with the Department's dilatory and obfuscatory tactics.

The Department's failure to object to Pam Gainer's request for attorney fees is just one of several examples of its general neglect and dilatory conduct in the processing of this

grievance. As noted in Section III above, the Department initiated its disciplinary action without giving Pam Gainer adequate notice of the charges against her. Even after she filed her grievance, up to the time of her Level III evidentiary hearing, the Department did not provide full disclosure to her.

As noted in footnote 2 above, the appellee repeatedly requested disclosure of e-mail correspondence which was in the custody of the Department, but the Department failed to disclose these records. This request was made in the October 31, 2006 cover letter from the grievant's attorney, sent with the Level IV grievance form; discussed at the scheduling conference on January 8, 2007; discussed in several e-mails from the grievant's attorney; and discussed in several phone conversations between the grievant's attorney and the Department's attorney, as well as a phone call with the ALJ's assistant on 1-25-07. Finally, the Department claimed that the e-mails had all been deleted and were no longer available, although the Department did not claim that the e-mails had already been deleted when the grievant first requested their disclosure.

After Pam Gainer filed her petition for appeal in circuit court and served it on the Department on April 13, 2007, the Department was required by the applicable rules to file a timely response. On May 11, 2007, the Department requested an extension of time to May 18, 2007, and Pam Gainer did not object to this

modest request. Despite this accommodation, the Department did not file a normal response to the petition for appeal, but instead filed a "Preliminary Response to Petition for Appeal" and served it on May 17, 2007. The Department made no good faith effort to file a full response, or even to state when it intended to do so, in order to fairly litigate and resolve the issues. Instead, the Department left the grievance to languish in limbo. Finally, the grievant scheduled a status conference for July 30, 2007. At the status conference, the circuit court generously gave the Department an additional two weeks, until August 13, 2007, to file its full response to the petition for appeal, which the Department should have filed in May.

The circuit court issued its decision on Pam Gainer's petition for appeal by order entered November 2, 2007. That order provided that Pam Gainer would be awarded reasonable attorney fees and costs expended pursuant to W.Va. Code §6C-2-6, and directed her attorney to submit an itemized statement with a copy to counsel for the Department. The Department did not object to the circuit court's decision, which expressly provided that it would award attorney fees pursuant to the new statute, W.Va. Code §6C-2-6.

The appellee's attorney submitted her itemized statement by affidavit served on the Department on November 15, 2007. Again, the Department did not take the opportunity to object to the request for uncapped attorney fees. The Department had plenty of

opportunity to register a timely objection. The circuit court judge waited over five weeks, until December 21, 2007, before he signed an order awarding the appellee's request for uncapped attorney fees.<sup>10</sup> In fact, the Department actually had longer than five weeks to register its objection. There were seven weeks after the circuit court order entered November 2, 2007 provided that it would award attorney fees pursuant to W.Va. Code §6C-2-6 before the circuit court actually granted judgment for a specific amount of attorney fees by order signed by the judge on December 21, 2007.

Pursuant to Rule 3(a) of the West Virginia Rules of Appellate Procedure, the Department's appeal period expired on March 2, 2008. The Department again disregarded the rules and filed its petition for appeal on March 6, 2008. The appellee filed her response to petition for appeal and served it on March 17, 2008. Unbeknownst to the appellee, the Department had filed an *ex parte* motion for leave to file its petition for appeal late. To date, the Department still has not served a copy of that motion on the appellee.

This Court granted the Department's motion and allowed the Department to prosecute its appeal despite the missed deadline. The appellee's response to petition for appeal was rendered moot,

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<sup>10</sup> The Order granting Pam Gainer judgment for attorney fees and costs in the amount she requested was signed by the circuit court judge on December 21, 2007 but was not entered by the clerk until December 26, 2007, probably because of the intervening holiday.

and she had to file a motion for leave to file an amended response along with an amended response.

In summary, the Department has been a long history of missed deadlines, overlooked discovery requests and destruction of requested evidence, and generally obfuscatory tactics. The Department's unfair tactics created a dilemma for the appellee because if she continued with her grievance she would have to pay excessive legal costs necessitated by the Department's unfair tactics. Whether or not this was a deliberate tactic of Department officials in charge of grievance decisions who are determined to win at all costs, it certainly tilts the playing field unfairly since they have the great advantage of legal services at taxpayer expense. Such tactics can easily force state employees to give up legitimate grievances due to the economic pressure the Department's actions create for them. The only fair and equitable remedy under these circumstances is to require the Department to pay the grievant appellee's full costs.

The purpose of statutes governing state employee grievance procedures is to protect the interests of employees. Such statutes must be construed in favor of the employees, as noted in cases involving the similar grievance statutes for school employees. Furthermore, when there is a conflict between two statutes relating to the employee grievant's right to uncapped attorney fees, the more recent statute providing for uncapped

attorney fees should be applied. *Stanley v. Dept. of Tax and Revenue, etc.*, 217 W.Va. 65, 614 S.E.2d 712 (2005), citing Syl. Pt. 1, *Morgan v. Pizzino*, 163 W.Va. 454, 256 S.E.2d 592 (1979).

The test of what is a reasonable amount of attorney fees and costs has been well established since this Court's holding in *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986). Based on the factors set forth therein, there can be no question that the appellee's attorney fee award was reasonable. Her attorney's affidavit contained an itemized statement of services and costs, and the record supported the claims for work performed. She prevailed on appeal despite adverse decisions at Levels III and IV, due to skillful legal services. Her attorney billed at an hourly rate which was reasonable in the legal market where this case arose. Although her attorney had to do extra work to deal with the appellant's dilatory and obfuscatory tactics, as noted above, her attorney met all deadlines imposed on her. In fact, the appellant has not challenged the appellee's claim that the amount of her attorney fee claim represented the accurate and reasonable costs she incurred.

In light of all circumstances in this case, the attorney fee award was not only fair but also proper, and the circuit court order should be affirmed.

V.

THE APPEAL SHOULD BE DISMISSED BECAUSE IT WAS  
NOT TIMELY FILED.

The petition for appeal was not filed until March 6, 2008, more than four months after entry of the final order of the circuit court. Because the petition for appeal was not timely filed, it should be dismissed.

The Circuit Court of Calhoun County, West Virginia entered the final order in this matter on November 2, 2007.<sup>11</sup> Rule 3(a) of the West Virginia Rules of Appellate Procedure clearly states:

**"No petition shall be presented for an appeal from, or a writ of supersedeas to, a judgment, decree or order, which shall have been entered more than four months before such petition is filed in the office of the clerk of the circuit court where the judgment, decree or order being appealed was entered, whether the State be a party thereto or not . . ."**  
(emphasis added)

The rule contains mandatory rather than permissive language. This Court has previously decided that it does not exercise jurisdiction to consider an appeal unless the petition is

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<sup>11</sup>The petition for appeal alleges that the final order was entered on October 30, 2007. Actually, the judge signed the final order on October 30, 2007, but it was not entered by the Clerk until November 2, 2007. This 3-day difference does not change the basic fact that the petition for appeal to this Court was filed more than four months after the date of entry of the final order by the circuit court.

filed within the prescribed appeal period. *State v. Legg*, 151 W.Va. 401, 151 S.E.2d 215 (1966), rehearing denied. Exceptions are allowed when the appellant files a motion for extension of time in which to file the appeal, for good cause. Even then, exceptions are rarely granted unless the appellant files that motion before the four-month appeal period expires. *Rose v. Thomas Memorial Hosp. Foundation, Inc.*, 208 W.Va. 406, 541 S.E.2d 1 (2000).

The Department did not timely file a motion for extension of time in which to file its petition for appeal in this case. The Department could not have alleged any good cause for its delay, because there was no good cause for it. The Department's appeal, which was not taken within the time prescribed by law, should be dismissed. *Morrison v. Leach*, 75 W.Va. 468, 84 S.E. 177 (1915).

As noted by the ALJ, the Department's original disciplinary action against Pam Gainer was based on the premise that "rules are rules." The Department has insisted that it properly imposed discipline for a violation of a rule even if there were extenuating circumstances and no harm was done. This position is hypocritical at best when the Department has failed to follow the most basic rules of due process throughout this case, and failed to perfect its appeal by the deadline imposed by the applicable rules. It would work a grave injustice on the appellee if this Court relaxes significant rules for the Department in order to enable the Department to penalize its employees for alleged

harm to H, certainly, and to C as well." The circuit court order should be affirmed.

The Department's disciplinary action against Pam Gainer should be reversed not only because it is wrong on the merits, but also because the Department denied Pam Gainer due process of law. Its appeal should be denied and dismissed because it was not timely filed. The Department did not timely file any objection to Pam Gainer's request for judgment for her attorney fees and costs incurred, without any cap on the amount, and the Department should be held liable for the high litigation costs incurred as a direct result of its dilatory and unfair tactics during the entire grievance process.

Therefore, the respondent Pamela Gainer respectfully urges this Court to deny the petition for appeal, affirm the circuit court orders, and award her additional attorney fees and costs incurred in this appeal case.

Respectfully submitted,



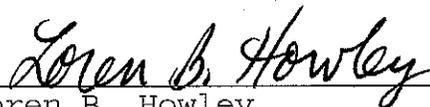
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CERTIFICATE OF SERVICE

I, Loren B. Howley, counsel for the respondent Pamela Gainer, plaintiff below, certify that I have served a true copy of the attached Respondent's Brief on the petitioner, defendant below, by sending a copy of same by first class mail, postage prepaid, this 25<sup>th</sup> day of November, 2008, to its attorney of record at the following address:

Jennifer K. Akers, Esq.  
Assistant Attorney General  
West Virginia Department of Health and Human Resources  
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