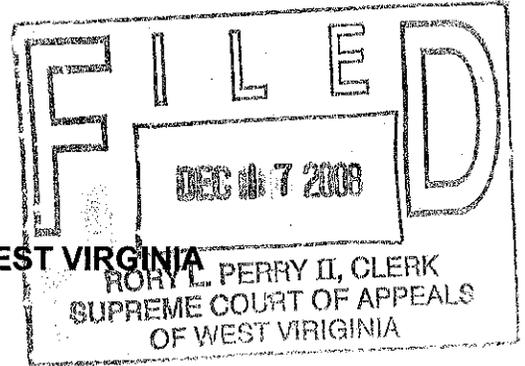


No. 34401



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PAMELA GAINER,

**Appellee,
Plaintiff below,**

v.

**WEST VIRGINIA DEPARTMENT OF HEALTH
AND HUMAN RESOURCES/BUREAU FOR
CHILDREN AND FAMILIES,**

**Appellant,
Defendant below.**

**FROM THE CIRCUIT COURT OF CALHOUN COUNTY, WEST VIRGINIA
CIVIL ACTION NO. 07-P-3**

APPELLANT'S REPLY BRIEF

**DARRELL V. McGRAW JR.
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TABLE OF AUTHORITIES

Page

Cases

<i>Cleveland Board of Education v. Loudermill</i> 470, U.S. 532, 105 S.Ct. 1487, 84 L.Ed. 411 (1977)-----	5
<i>Gilbert v. Homar</i> 520 U.S. 924, (1997)-----	5
<i>North v. Bd. Of Regents</i> 160 W. Va. 248, 233 S.E.2d 411 (1977)-----	5
<i>Stanley v. Dept. of Tax and Revenue</i> 217 W. Va. 65, 614 S.E.2d 712 (2005)-----	6,7
<i>State ex rel. Pinson v. Varney</i> 142 W. Va. 105, 109, 96 S.E.2d 72, 74 (1956)-----	7

Statutes

West Virginia Code §6C-2-1-----	6, 7
West Virginia Code §6C-2-6(b)-----	6
West Virginia Code §18-29-8-----	7
West Virginia Code §18A-2-11-----	7
West Virginia Code §29-6A-1-----	7

West Virginia Code §29-6A-10-----6

Policies

Child Protective Services Policy §3.16-----4

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APPELLANT'S REPLY BRIEF

Now Comes the Appellant, West Virginia Department of Health and Human Resources/Bureau for Children and Families, in Reply to Appellee's Response Brief and states as follows:

Appellee's Response Brief contains numerous factual inaccuracies.

Beginning on page 3, Appellee falsely states that "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." This statement is untrue.

On May 11, 2007, Appellant filed a "Motion for Extension of Time to File Response" in Calhoun County Circuit Court, explaining that Appellant's counsel

had been ill. The Motion requested an extension from May 15, 2007, when a response was due, until May 18, 2007. See Exhibit 1. Appellant proceeded to file a Preliminary Response on May 17, requesting a briefing schedule, as is the norm in every response to an appeal of a grievance decision. See Exhibit 2.

During a phone conference on July 30, 2007, Appellee stated that she had no objection to the extension of time requested in the motion, but objected to a briefing schedule because her appeal brief contained all of the information she intended to present. Over Appellee's objection, Circuit Court Judge David Nibert set August 13, 2007 as the filing deadline for Appellant's Brief. Appellant's brief was filed by this date.

Another inaccurate statement can be found in the "Statement of Facts" on page 11, in footnote 2. This footnote discusses the request of e-mails by the Appellee. During the Level IV Scheduling Conference with Administrative Law Judge Denise Spatafore, Appellant agreed that it would try to locate the requested e-mails. Appellant also agreed to stipulate to the information Appellee claimed was in the e-mails, as it was not relevant to Appellant's case.

On January 18, 2007, Appellant provided copies of the only e-mails that it could find. See Exhibit 3. Appellee contacted Appellant and stated that these were not the e-mails that Appellee wanted. However, the information contained in the e-mails requested by Appellee is contained in the report from the Office of the Inspector General (hereinafter "OIG") on page 4. See Exhibit 4. Additionally, Appellee should have had copies of these e-mails herself, since she was involved in the e-mail exchanges.

Appellee's brief at footnote 6, page 19 inaccurately accuses Appellant of misstating evidence in its brief regarding Appellee's lie to the OIG investigator. However, Appellant's information came directly from the OIG report, which was admitted into evidence at the Level III hearing. See Exhibit 4, page 6, second paragraph. The OIG report states on this page

When asked what SHE did once SHE received access to the case, SHE stated SHE printed off the contacts so that SHE could read them and SHE put them in a folder that SHE takes to court with HER. SHE further stated SHE shredded them afterwards. When asked if these contacts were presented in court, SHE responded they were not. Upon reviewing the evidence, i.e., copies of the client contact report marked "#3" and "#4", MS. GAINER admitted that SHE did give the contacts to the attorney Aaron Boone.

Appellee's brief contains another false assertion in footnote 9 on page 38. Appellee claims that Appellant denied her due process at the appellate level by filing an ex parte motion with this Court. This is untrue. Appellant filed its Petition for Appeal on March 5, 2008. On March 12, 2008, Appellant received a letter from the Office of the Clerk stating that the petition may have been untimely. See Exhibit 5. Upon receipt of this letter, Appellant's counsel contacted the clerk's office with the explanation for the date of the Petition. Subsequent to the phone call, Appellant also provided the same information in a letter dated March 13, 2008. See Exhibit 6. On March 25, 2008 Appellant received an Order stating that the Petition for Appeal was considered filed by this Court. Appellant did not file an ex parte "Motion in Writing for Leave to File a Petition for Appeal Out of Time". In fact, Appellant's counsel called Appellee's counsel. Appellee's counsel was unavailable, but Appellant's counsel spoke with an office employee. Appellant's

counsel explained to this employee what had occurred and stated with specificity that no ex parte motion had been filed. Appellee's counsel never returned this phone call.

Appellee claims that Appellant failed to register a timely objection to the Court's award of \$9045.00 in attorney's fees. This is inaccurate. On December 27, 2007 Appellant filed a Motion to Reconsider the amount of its award of attorney's fees in Calhoun County Circuit Court. See Exhibit 6. This motion explained that the wrong statute had been applied. The motion was served on Appellee. However, the circuit court failed to address Appellant's motion.

Therefore, Appellant proceeded with its Petition for Appeal.

A. THE CIRCUIT COURT ERRED IN ITS DECISION THAT THE LEVEL IV GRIEVANCE DECISION WAS CLEARLY WRONG IN VIEW OF THE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE ON THE RECORD.

Appellee incorrectly argues that Appellant failed to establish by a preponderance of the evidence that its discipline against her was proper. She fails to recognize that she admitted her wrongdoing, but claimed the affirmative defense that she acted to prevent imminent harm. Appellee had the burden to establish her defense by a preponderance of the evidence. Appellee failed to meet that burden.

Imminent danger is described in Child Protective Service ("CPS") policy § 3.16.

Imminent danger to the physical well-being of a child means an emergency situation in which the welfare or life of the child is threatened. Such an emergency situation exists when there is reasonable cause to believe that any child in the home is or has been sexually abused or sexually exploited or reasonable cause to believe that the following conditions threaten the health or life of any child in the home.

Non accidental trauma inflicted by a parent, guardian, custodian,

sibling, babysitter or other caretaker which can include intentionally inflicted major bodily damage such as broken bones, major burns or lacerations or bodily beatings. This condition also includes the medical diagnosis of battered child syndrome which is a combination of physical and other signs indicating a pattern of abuse; or Nutritional deprivation; or Abandonment by the parents, guardian or custodian; or Inadequate treatment of serious illness or disease; or Substantial emotional injury inflicted by a parent, guardian or custodian; or Sale or attempted sale of the child by the parent, guardian or custodian.

The Level III grievance hearing was the only hearing held, and thus the only time when testimony was taken. Appellee failed to establish that any situation remotely related to the above-listed situations existed or would have existed had she not disclosed the confidential documents. Therefore, Appellee failed to establish an affirmative defense for her unauthorized disclosure of confidential information by a preponderance of the evidence.

Appellee also argues that Appellant denied her due process when issuing her disciplinary action. However, this is not true. The due process rights afforded an individual for less than a termination, or "a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation." *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 241 S.E.2d 164 (1978) (citing *North v. Bd. of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977)).

A full-blown hearing is generally not required before an employee may be terminated, but that employee has the minimum pre-deprivation right to at least have an opportunity to respond to the charges either orally or in writing. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Notice of the charges, explanation of the evidence, and an opportunity to respond is all the due process that must be provided. The purpose of a pre-

suspension hearing or opportunity to respond is to assure that there are reasonable grounds to support the suspension. *Gilbert v. Homar*, 520 U.S. 924, (1997); *Loudermill, supra*.

Appellee received this opportunity. She met with James Morford, Community Services Manager, on June 19, 2006 regarding her actions and the possibility of disciplinary action. Appellee indicated that she was remorseful for her confidentiality policy violations, and that when faced with a similar situation, she would inquire as to the proper procedure for bringing information to the Court. See Exhibit 7.

Appellee requested a meeting with Regional Director, Louis Palma. On June 30, 2006 she was given the opportunity to meet with both Mr. Palma and Mr. Morford. She explained her reasons for violating the confidentiality policies. She was given two opportunities to share her side of the story. However, Mr. Palma determined that the suspension was warranted. No "complaint" was filed against her, as is claimed. Her "accuser" was the Appellant. Any claim that she did not know why she was suspended is absurd. Appellee received proper due process.

B. THE CIRCUIT COURT ERRED IN ITS AWARD OF ATTORNEY'S FEES TO APPELLEE IN THE AMOUNT OF \$9045.00 PLUS INTEREST.

Appellee argues that the circuit court's award of attorney's fees in the amount of \$9045.00 plus interest was proper. This argument is also without merit. In 2007, the Legislature promulgated a new grievance procedure for public employees. The new statute, found at West Virginia Code § 6C-2-1 *et seq.* became effective July 1, 2007. All grievances filed on or after that date follow the

procedures set forth in the new statute. Grievances filed prior to July 1, 2007 follow the procedures found in the old statute. Under the old statute, attorney fees were governed by § 29-6A-10. This statute limited attorney fees to a maximum of \$1500.00. Under the new statute, attorney fees are addressed at West Virginia Code § 6C-2-6(b). The new statute places no limit on attorney's fees.

Appellee's grievance was filed under and followed the former grievance procedure. Appellee cites *Stanley v. the Department of Tax and Revenue*, 217 W. Va. 65, 614 S.E.2d 712 (2005) in her argument that the newer grievance statute should apply to her award of attorney's fees. However, Appellee's reliance on this case is misplaced.

In *Stanley*, two statutes co-existed, each proscribing a different amount of attorney's fees which could be awarded upon a successful appeal by a school employee. West Virginia Code § 18A-2-11(1985) capped attorney fees at \$1000 for grievances involving school personnel. However West Virginia Code § 18-29-8(1992) specifically authorized "reasonable" attorney's fees, imposing no dollar limitation. In *Stanley*, this Court cited *State ex rel. Pinson v. Varney*, 142 W.Va. 105, 109, 96 S.E.2d 72, 74 (1956), stating "where two distinct statutes stand in *pari materia*, and sections thereof are in irreconcilable conflict, that section must prevail which can properly be considered as the last expression of the law making power."

The case at hand involves a different situation. West Virginia Code §6C-2-1 replaced §29-6A-1. The new statute changed the whole grievance process, and

not just the section addressing attorney's fees. Although, the newer statute allows reasonable attorney fees, it was intended to apply only to grievances filed after July 1, 2007. Therefore, attorney's fees in Appellee's case should follow the former statute.

CONCLUSION

Based on the foregoing Reply Brief and Appellant's previously filed Petition for Appeal and Brief, Appellant respectfully asks this Court to reverse the October 30, 2007 Circuit Court Order granting Appellee's appeal.

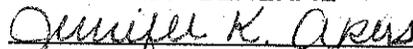
Respectfully submitted,

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,

APPELLANT

By Counsel

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CERTIFICATE OF SERVICE

I, Jennifer K. Akers, Assistant Attorney General, certify that I have this 17th day of December, 2008, served a true copy of the foregoing **APPELLANT'S REPLY BRIEF** upon the following individual(s) by depositing the same in the United States Mail, postage prepaid, addressed as follows:

Loren B. Howley, Esq.
P.O. Box 580
Grantsville, WV 26147



JENNIFER K. AKERS
ASSISTANT ATTORNEY GENERAL