C. LYNN EARNEST,

Grievant,

v.

DOCKET NOS. 98-BOD-273/00-HE-396

BOARD OF DIRECTORS/SOUTHERN WEST

VIRGINIA COMMUNITY AND TECHNICAL COLLEGE,

Respondent.

D E C I S I O N

Grievant, C. Lynn Earnest, filed this grievance against her employer, Board of Directors/Southern West Virginia Community and Technical College ("Southern"), on February 9, 1998, when she alleged a violation of W. Va. Code §§ 18-29-2(a), (m), (n), (o), and (p), as follows:

> I am grieving the unprecedented and unreasonable four campus teaching assignment for this spring semester 1998 along with the four listed events which caused, combined with, and lead to this grueling schedule to do damage and to negatively impact;
>
> 1) a series of scheduling decisions, errors and events which lead to, and resulted in my spring 1998 four campus teaching assignment.
>
> 2) the refusal of my release time proposal and classes canceled in the fall 1997 semester.
>
> 3) the additional uncompensated faculty work load and conditions imposed by the four campus assignment spring 1998.
>
> 4) the proposed appropriation of the art lab.

I am grieving these with all their combined effects and impacts.

> Relief sought: I am seeking monetary compensation for additional work load and increased risk with the four campus assignment along with a written guarantee that this is not a permanent nor acceptable assignment, and any other relief as is warranted.

Amended Grievance Filing I ("Grievance I"). (See footnote 1)

Grievance I was appealed to the Grievance Board on July 30, 1998, and a level four hearing commenced on August 26, 1999, and continued on February 23 and 24, 2000, October 10, 2000, and November 28, 2000. In the meantime, Grievant filed a second grievance on October 2, 2000, alleging as follows:

> Violation of WV Code 18-29-2(a)(m)(n)(p). SWVCTC is openly canceling grievant's classes and admittedly because grievant has a grievance filed. SWVCTC refuses to allow grievant to schedule classes and is retaliating because of that grievance. SWVCTC is trying to extort a settlement.
>
> Relief sought: Grievant asks that all retaliation, reprisal, extortion, discrimination cease immediately and grievant be allowed to teach the classes that the students need, especially on Logan campus re students requests.

Grievance Filing II ("Grievance II"). (See footnote 2)

Grievance II was appealed to level four on December 13, 2000, and was consolidated with Grievance I by Order dated February 1, 2001. The level four hearing reconvened on May 21 and 22, 2001, and concluded on December 6, 2001. This matter became mature for decision on August 1, 2002, the deadline for the parties' proposed findings of fact and conclusions of law.

Grievant was represented at level two by Anita Mitter, West Virginia Education Association, and at level four by Joan G. Hill, Esq. and Henry M. Hills, III, Esq., Crandall,Pyles, Haviland & Turner. Southern was represented at level two by Patricia Clay, Human Resources Administrator, and at level four by Kristi A. McWhirter, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

See Attached Addendum A.

The following material Findings of Fact are made based upon the evidence presented at Levels II and IV.

FINDINGS OF FACT

1. Southern is a two-year community and technical college with its primary purpose being undergraduate, technical, and work-force training education. *See* W. Va. Code § 18B-3-3a(f)(1996).

Southern maintains four campuses located at: (a) Mount Gay in Logan County; (b) Saulsville in Wyoming County; (c) Williamson in Mingo County; and (d) Madison in Boone County. Southern also offers classes at other learning centers, such as county high schools, throughout its service area.

2. Grievant is employed as a full-time tenured member of the faculty assigned to Southern's Humanities Division. She holds the academic rank of Professor and her salary for the 1997-98 academic year was $42,342.00. Grievant is an exempt employee. As a member of the faculty, her primary responsibility is to teach classes and advise students. Grievant also participates in the college governance structure and is required to attend Southern's commencement ceremonies.

3. Joanne Tomblin is the President of Southern and has held that position since November 16, 1999. Dr. Travis Kirkland held the position of President immediately prior to Ms. Tomblin, and Dr. Harry Boyer held that position before Mr. Kirkland. Patricia Clayis Southern's Human Resources Administrator and has been employed in that capacity since 1986.

4. In Fall 1996, Grievant settled a sexual harassment lawsuit with Southern, resulting from acts of former President Boyer, arising from a complaint originally filed under the West Virginia Human Rights Act.

5. By the terms of the settlement agreement, Grievant was to go on sabbatical leave and not have contact with Southern until Fall 1997. The settlement agreement further provided that:

> [Grievant] acknowledges that this agreement does not guarantee-as there are no guarantees with other faculty members-a full-time teaching position forevermore...Enrollment changes may result in the institution reducing the number of courses taught in any area at [Southern]. Southern will not be bound to maintain instructors if there is no student enrollment to support the position.....noting the cautionary language above, [Southern] agrees to arrange a reasonable teaching schedule with respect to hours, class times and campus locations.

LII, April 28, 1998, Southern Ex. 6.

6. Pursuant to the settlement agreement, Grievant took a leave of absence beginning mid-Fall 1996. She agreed not to participate in the affairs of the College, nor have any contact with the College until she returned to her employment in August 1997.

7. Yearly course scheduling at Southern for the 1997-98 year began with Southern's faculty. Instructors from each of the four campuses submitted course suggestions to the respective Campus Deans. The Deans in turn submitted course suggestions to the individual Division Coordinators.

Subject to the review and final approval of the Vice President of Academic Affairs, the two Associate Vice Presidents of Academic Affairs and the individual Campus Deans were then given the responsibility oforganizing all of the faculty suggestions, making final decisions regarding which classes would be offered, on which campus and at what time.

8. As Grievant was on leave of absence during the 1996-97 academic year, Pam Alderman, the Interim Associate Vice President for Academic Affairs and Dean for the Logan Campus, and the three other Campus Deans, were responsible for choosing which art classes to offer for Grievant for the 1997-98 academic year. Scheduling meetings to determine the College's entire campus schedule, including Grievant's schedule, took place on November 21, 1996, December 17, 1996, January 27, 1997, and February 11, 1997. LIV Southern Ex. 14.

9. Pursuant to Southern's Faculty Handbook and Chapter 29A-1 Series IV of the West Virginia Administrative Regulations for Southern West Virginia Community and Technical College ("Series IV"), in order to maintain full time status, Southern's faculty are required to teach thirty credit hours, or its equivalent, per year (fifteen credit hours per semester), and to maintain a minimum of 7-1/2 posted office hours per week for student advising. LII, July 21, 1998, Southern Exs. 3, 4.

10. Prior to the 1997-98 academic year, it was the usual practice for Grievant to offer five art classes on the Logan campus, and one other class on another campus, per semester, to ensure that even if one class did not go due to lack of enrollment or some other cause, Grievant would still have a full teaching load of 15 credit hours.

12. During the Fall 1996 semester, before she was required to leave on sabbatical, Grievant tried to teach an Art Appreciation course using an interactive televised ("ICR") classroom format between the Logan and Williamson campuses. Southern facultywere encouraged to use ICR teaching where conducive. Grievant informed Pam Alderman that semester that teaching Art Appreciation through ICR was not working well.

13. For Grievant's Fall 1997 schedule, Ms. Alderman determined that two sections of Art Appreciation and one section of Drawing I would be offered on the Logan campus. One of the Art Appreciation courses was again scheduled as an ICR for the Logan and Williamson campuses. In addition to the Logan campus courses, Ms. Alderman also scheduled separate sections of Drawing I and Art Appreciation for the Boone County campus, and one Art Appreciation course to be taught by an adjunct professor at the Wyoming County campus. LIV G. Exs. 10, 24. Drawing had never been

taught on the Boone County campus before, and normally professors had an opportunity to promote new classes with students and faculty. As Grievant was on sabbatical, she did not have this opportunity.

14. For Grievant's Spring 1998 schedule, Ms. Alderman determined that two sections of Art Appreciation and one section each of Art for Elementary Education and Drawing II would be offered in Logan, as well as one section of Art Appreciation for Williamson, an Art for Elementary Education for Boone, and an Art Appreciation course, to be taught by an adjunct, for the Wyoming campus.

15. Although Ms. Alderman reviewed a five-year history of art classes in making up the schedules, she departed from Grievant's normal course offerings in developing the 1997-98 schedules at a time when she could not consult with Grievant, due to her being on sabbatical, listing fewer classes, including only three in Logan (first time ever).

16. Pre-registration for the Fall 1997 semester took place during April 1997, and general registration took place August 14-15, 1997. Due to low enrollment (four students),the Boone County Drawing class was canceled before general registration, and before Grievant had an opportunity to talk to students to generate interest in the new course offering.

17. While it is Southern's policy that all classes will have a minimum of 15 students, it is Southern's practice to allow classes with a minimum of 10. It is also not unusual for classes to go forward with less than 10 students, especially where students need a particular course to get their degree, or where a faculty member needs a course to maintain a 15-credit course load. Indeed, classes have gone forward with only one student enrolled.

18. The cancellation of the Boone County Drawing class left Grievant with only 9 credits for the Fall 1997 semester, therefore, Grievant was permitted to teach Art Appreciation on the Williamson campus as a separate section, instead of an ICR course. This brought Grievant's course load up to 12 credits, still short of a full course load. Therefore, in order for Grievant to meet the annual 30-credit requirement, she would have to either teach 18 credits in the Spring 1998 semester, or have a “release time” project approved.

19. The President may grant faculty release time from teaching responsibilities for the purpose of working on other meritorious projects. The purpose of release time is to allow faculty to substitute work on a project for actual time in the classroom. Normally, professors are able to make up for a course load shortfall by working on a “release time project.”

20. In lieu of teaching 18 credits in the Spring 1998 semester, Grievant applied for a release time project developing a cultural immersion class to be taught overseas, asshe had twice previously done as a credited class for extra pay. The class she proposed was on an even broader scope than those she had taught before, with the potential of satisfying not only undergraduate level credits, but also graduate level credits, all of which would be transferable to Marshall University.

21. Dr. Robert Driscoll was hired as the Associate Vice President of Academic Affairs for the Logan Campus, and entered into his duties in August 1997, taking over from Ms. Alderman.

22. Grievant informally requested release time from Dr. Driscoll in late August 1997, and submitted a two-page written proposal to him on or about September 23, 1997. Dr. Driscoll had concerns about the details as well as its overall benefit to Southern. Dr. Driscoll shared the proposal with Merle Dempsey, Vice-President of Academic Affairs, and responded to Grievant with some questions for development on September 24, 1997.

23. On October 2, 1997, Dr. Driscoll recommended Grievant expand upon her original proposal by responding to his concerns.

24. On October 20, 1997, Grievant submitted an expanded proposal to Dr. Driscoll, and they worked together on the proposal.

25. On November 20, 1997, Dr. Driscoll forwarded the proposal to Dr. Kirkland with a recommendation that it not be approved. Dr. Driscoll's reasons for not recommending the proposal were that he was not convinced the project would consume enough time to warrant release from a teaching assignment, and he questioned how many Southern students would be able to take advantage of the opportunity. (See footnote 3) 26. Dr. Kirkland did not grant the release time, and by that time, the Fall 1997 semester had come to an end.

27. Another professor, Connie White, who had submitted via e-mail a release time proposal to develop a web-based class, had her proposal granted in a week's time.

28. Grievant received her proposed schedule for Spring 1998 shortly before classes were scheduled to begin in January 1998. Pre-registration for the Spring 1998 semester began November 3, 1997, general registration took place January 14-15, 1998, and the first day of classes was January 15, 1998. Again Southern canceled classes with low course enrollment, and as a result of cancellations, one section of Art Appreciation, Drawing II, and Art for Elementary Education on the Logan campus were canceled.

29. In order to get Grievant a full teaching load, the adjunct professor on the Wyoming campus was bumped, and Grievant was given that Art Appreciation class, and Grievant added a Painting class on the Logan campus. In addition, Grievant was instructed by Dr. Driscoll and Dr. Dempsey to teach a Ceramics class on the Williamson campus.

30. Grievant objected to teaching the Ceramics class because the equipment had not been used for awhile and had not been tested. (See footnote 4) In order to fire a kiln, it must be full, and it would take an entire semester to produce enough work to fill the kiln. Grievant proposed she be given release time to prepare for the Ceramics class and to fire and test the kiln. That proposal was rejected, and Grievant was instructed to “just teach” the class. 31. As a result, Grievant had an unheard-of, four-campus assignment for the Spring 1998 semester. It was rare for a professor to have a three-campus assignment, and no professor had ever had a four-campus assignment in Southern's history. Three of the classes were night classes (6:30 to 9:00 p.m.), on three different campuses.

32. Due to this schedule, Grievant was unable to maintain office hour schedules which would adequately accommodate students on all four campuses. Grievant had to deal with four sets of administrators, facilities, equipment, and staff, and computer and telephone access were inadequate outside of Logan.

33. Because the kiln could not be fired until it was full, it was not until the end of the semester that Grievant discovered it was not functioning properly, and could not be heated to its maximum temperature. As a result, the students' work was not able to be properly completed. Also, it was discovered that sulfur fumes generated by the kiln were not properly vented from the facility. All this resulted in student and staff complaints and dissatisfaction with Grievant.

34. At the same time Grievant was dealing with the four-campus assignment, she learned in January 1998 that Dr. Driscoll had recommended to the Facilities and Finance Committee that her art lab on the Logan campus be divided to make room for an ICR classroom. Neither Dr. Driscoll, nor anyone in administration, had consulted with her prior to his making this recommendation. Grievant was a member of the Facilities and Finance Committee.

35. Grievant had designed the art lab for Southern, with the aid of hired architects, and had been teaching in that designated classroom since 1974. 36. Grievant drafted her own proposal for submission to the Facilities and Finance Committee regarding the art lab, including a sketch of the

existing art lab and its dimensions. Grievant, of course, preferred to keep the art lab intact, but also offered as alternatives moving the art lab to the adjunct faculty room, or the “green” room located by the theater.

37. Dr. Driscoll's proposal offered no alternative for the art lab, other than to divide it. Responding to Grievant's proposal, Dr. Driscoll offered as a solution that she be given the “smoking” room outside the library, which was downstairs from the existing art lab. The “smoking” room was just that; a space adjacent to the library designated as a smoking room for students. Thus, she would have part of the original art lab, plus the “smoking” room.

38. The Finance and Facilities Committee discussed the proposals, and decided to hire architects to come in and review the Logan campus space, and come up with some suggestions. Kreps and Kreps performed a site review and drew up blueprints incorporating Dr. Driscoll's plan to use part of the art lab as an ICR classroom. The architects recommended the art lab be moved to the adjunct faculty room.

39. The Logan campus space discussion took place the entire Spring 1998 semester, and no decision had been made by the end of the semester by the Finance and Facilities Committee. At the last meeting of the semester in April 1998, the committee had received the recommendations from the architects that the art lab be moved to the adjunct faculty room. (See footnote 5)

40. Grievant travels and studies abroad in the summer when school is adjourned, and did so in the Summer of 1998, a fact well known to the Southern administration.

41. Dr. Driscoll called an open meeting in June 1998 to discuss the space proposals on the Logan campus. Several members of the faculty spoke in favor of Grievant's proposal, and voiced their opinions that a faculty's designated space should not be taken away.

42. The Facilities and Finance Committee met on June 17, 1998, and the subdivision of the art lab was discussed. (See footnote 6) According to the minutes, the Committee approved the subdivision of the art lab. No alternative space for the art lab was recommended.

43. Normally, the Facilities and Finance Committee makes recommendations to the College Council, which in turn, makes recommendations to the President. However, because the College Council did not meet after May 1998, the Facilities and Finance Committee made its space allocation recommendations directly to Dr. Kirkland. Dr. Kirkland approved the subdivision of the art lab.

44. Division of the art lab and creation of the new ICR classroom took place during the

Summer of 1998. On Grievant's return in the Fall of 1998, she found two-thirds of the original art lab had been appropriated for the ICR classroom. Southern assignedGrievant what was left of the subdivided art lab and the “smoking” room for her studio art classes. Dr. Driscoll represented that this arrangement was not meant to be permanent, although he had no alternatives in mind.

45. Grievant expressed concerns about her newly-divided art lab to the Finance and Facilities Committee during its September 18, 1998, meeting and asked that they consider relocating the art lab to the adjunct faculty room. Her concerns included the following:

a) smoking/painting room was too hot and she had been forced to cancel class as a result;

b) students lost instructional time because they were required to transport their art materials from the upstairs art room to the downstairs smoking/painting area; and

c) there was an odor of “questionable origin” that lingered in the room.

LIV R. Ex. 10.

46. The smoking room was a glassed-in area which, at the beginning of the Fall 1998 semester, had no air conditioning. The sun beating down through the windows created a very hot, stuffy work space for the students.

47. What was left of the original art lab, now called the “sink strip,” was a long, narrow room with sinks and cabinets along one side. Painting was now being held in the smoking room, which had no sink, so students had to carry water from the sink strip downstairs to the smoking room, and return upstairs to clean their brushes and other equipment.

48. An unpleasant odor of raw sewage lingered in the smoking room. At first, maintenance believed the problem was in the sewer line, but the odor remained. Finally,it was discovered that the men's restroom, located in the library, vented directly into the smoking room. Once discovered, that problem was corrected.

49. Students were unhappy with this situation, and one student wrote a letter and spoke to Dr. Driscoll about the situation. Dr. Driscoll responded to the student that, among other things, Grievant was being too negative in front of the students, and that she just needed to use the space that was allocated to her.

50. The Facilities and Finance Committee voted to recommend the smoking/painting rooms be switched with the adjunct faculty room. One member voted against Grievant's suggestion because she would not state that the adjunct faculty room would fully satisfy her needs. LIV Tr., Oretha Baker. The Committee requested input from Dr. Driscoll on the recommendation.

51. During the October 16, 1998 meeting, the Committee voted to recommend “switch[ing] the Painting Room with the Adjunct Faculty Room on the Logan Campus” to the College Council on October 23, 1998.” (LIV R. Ex. 11). Pursuant to the written recommendation, the studio art “teaching and learning environment would be greatly improved” and the switch could be made at “little cost” to the Institution. LIV R. Ex. 12. The Committee also noted that Dr. Driscoll recommended that no action be taken this year.

52. Grievant presented the Finance and Facilities Committee proposal to the College Council. Dr. Driscoll voiced his concerns about the cost of making the switch as well as whether the adjunct faculty space was large enough to meet Grievant's needs. Despite Dr. Driscoll's concerns, the College Council voted in favor of the Finance and Facilities proposal “with the codicil that a long term solution” be explored. LIV R. Ex. 34. 53. On or about November 4, 1998, Dr. Kirkland denied the College Council's recommendation to switch the adjunct faculty room with the smoking/painting room because it did not include an assessment of actual costs. LIV R. Exs. 12, 35.

54. Dr. Kirkland's response was never communicated to the Finance and Facilities Committee, so no action was taken to develop a cost proposal.

55. Subsequently, although Grievant was not permitted to switch rooms, she was at first allowed to move her classes to other rooms on the Logan campus, including the adjunct faculty room, so long as she followed the proper procedure for requesting the room, and the room was free. Later, Dr. Driscoll wrote her a certified letter telling her she could not use the maintenance staff anymore to find space, and had to go directly through him. He was not amenable to finding Grievant other space.

56. Grievant taught her courses in Logan in this manner for most of the 1998-99 academic

year.

57. In the Spring of 1999, Grievant was notified that all of her studio art classes for the next year would be moved to the Williamson campus. She appealed to President Kirkland, but was denied. Upon her return in Fall 1999, the classes had been moved. Grievant did not have adequate computer access in Williamson, and could not access her e-mail. Fall class lists were lost between campuses, as were Spring mid-term grades because of the computer difficulties.

58. In the Summer of 1999, President Kirkland left Southern, and Dr. Dempsey was Interim President until November 1999, when President Tomblin was appointed.

59. In the Fall of 1999, Dr. Cindy McCoy became the Chair of the Humanities Division, and Grievant's immediate superior. Dr. McCoy wondered why a studio art classcould not be offered in the theater workshop, and made this suggestion to Grievant. Together, they studied the space, came up with a plan, and Dr. McCoy as Division Chair, placed a studio painting class on the Spring 2001 schedule.

60. Dr. Dempsey, in going through the schedule process, learned that the painting class had been scheduled for Spring 2001 on the Logan campus. He knew former President Kirkland had moved all studio art classes to Williamson, and discussed the matter with Dr. McCoy and President Tomblin. He brought President Tomblin up to date on the situation involving Grievant, and asked Dr. McCoy if she was aware Grievant had submitted space specifications with her grievance.

61. Dr. Dempsey told Dr. McCoy that if Grievant would put in writing that the theater workshop met her requirements for an art lab, he would consider letting the painting class go for Spring 2001.

62. Dr. McCoy relayed the request to Grievant, who believed Southern was attempting to get her to drop her grievance in order for the painting class to go forward. She expressed her concerns to Professor McCoy.

63. After more discussion, Dr. Dempsey decided not to allow the painting class, and President Tomblin concurred.

64. In Spring 2000, Dr. Driscoll attempted to add english and math prerequisites to Grievant's art classes which would have lowered class enrollments, but that recommendation did not pass.

DISCUSSION

___The grievant bears the burden of proving her case by a preponderance of the evidence, except in

disciplinary matters, where the burden is on the employer to prove theaction taken was justified. 156 C.S.R. 1 § 4.21 (2000). A preponderance of the evidence is "evidence which is of greater weight or more convincing that the evidence which is offered in opposition to it; that is, evidence which as a whole shows the fact sought to be proved is more probable than not." Rider v. Marshall Univ./Bd. of Trustees, Docket No. 99- BOR-348 (Apr. 7, 2000)(*citing* Black's Law Dictionary (6th ed. 1991) and Leichliter v. W. Va. Dept. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993)).

Grievant alleges Southern engaged in harassment, discrimination, favoritism, and retaliation, by failing to schedule enough classes on the Logan campus for the Fall 1997 semester; dividing the art lab on the Logan Campus to create a distance learning classroom; canceling some of her Fall 1997 and Spring 1998 classes due to low enrollment; denying her October 1998 request for release time; requiring her to teach on four campuses for the Spring 1998 semester; moving all studio art classes to Williamson in Fall 2000; and denying her request to schedule a studio art class in Logan for the Spring 2001 semester. Grievant further alleges Southern violated the terms of her Settlement Agreement by not providing her with a reasonable class schedule upon her return from sabbatical.

Grievant seeks as relief "monetary compensation for additional work load and increased risk with the four campus assignment along with a written guarantee that this is not a permanent nor acceptable assignment and any other relief as warranted." Grievant further requests that "all retaliation, reprisal extortion, discrimination cease immediately" and that she "be allowed to teach classes that the students need" on the Logan campus. Southern contends the majority of Grievant's claims are untimely, maintains she has not met her burden of proof on the viable claims, and asserts that all decisions made by it in this case were based upon the best interests of the Institution.

Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Butts v. Higher Educ. Interim Governing Bd./Shepherd College, Docket No. 01-HE-021/01-HEPC-515; Casey v. Mason County Bd. of Educ., Docket No. 01-26-394 (Sept. 25, 2001); Hawranick v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998). Should the employer demonstrate that a grievance has not been timely filed, the employee may demonstrate a

proper basis to excuse her failure to file in a timely manner. Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991). If, proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997).

W. Va. Code §§ 18-29-4(a)(1) provides in pertinent part:

> Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule aconference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Harvey, supra; Kessler v. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-445 (July 28, 1997). See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989).

Southern asserts the only claims that are timely are those regarding the four- campus teaching assignment and the denial of Grievant's request to place a studio art class in Logan on the Spring 2001 schedule. As to all other events, specifically, Grievant's Fall 1997 schedule and release time proposal, Southern claims they were not grieved at the time of their occurrence, and thus must be accepted as legitimate actions. In cases alleging discrimination, favoritism, harassment, and retaliation, such as this one, while certain events may not have been grieved individually, those events can certainly be looked to in terms of evidence of the disparate treatment. Thus, while Grievant may not have challenged her Fall 1997 schedule at the time she came back from sabbatical, it can be looked to in retrospect as evidence of a continuing pattern of treatment she did not fully appreciate until the events of the Spring 1998 semester began to unfold. She does not ask for any relief specific to the Fall 1997 semester, only that which flows from the Spring 1998 semester

and forward. Therefore, the events surrounding the Fall 1997 semester will certainly be analyzed and addressed in terms of a showing a continuing pattern of treatment adverse to Grievant. "Discrimination" means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees. W. Va. Code § 18-29-2(m).

"Favoritism" means unfair treatment of an employee as demonstrated by preferential, exceptional, or advantageous treatment of another or other employees. W. Va. Code § 18-29-2(o).

To demonstrate a prima facie case of discrimination or favoritism a grievant must establish by a preponderance of the evidence the following elements:

> that she is similarly situated, in a pertinent way, to one or more other employee(s);
>
> that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and
>
> that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

George v. W. Va. Univ./Bd. of Trustees, Docket No. 99-BOT-429 (Mar. 20, 2000); Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Kirchner v. W. Va. Dept. of Educ., Docket No. 94-DOE-569 (Sept. 26, 1995); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). See also Flint v. Harrison County Bd. of Educ., 207 W. Va. 251, 531 S.E.2d 76 (1999); Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 365 S.E.2d 251 (1986).

If a grievant establishes a prima facie case of discrimination or favoritism, the employer may then offer a legitimate reason to substantiate its actions. Thereafter, the grievant may establish by a preponderance of the evidence that the offered reasons arepretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See also Texas Dept. of Community Affairs v.

Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986).

"Harassment" means repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession. W. Va. Code § 18-29-2(n). Harassment has been found in cases in which a supervisor has constantly criticized an employee and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. See Moreland v. Bd. of Trustees, Docket No. 96-BOT-462 (Aug. 29, 1997. See also Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22-495 (Jan. 29, 1999)(disallowing such a claim because it was based on an isolated incident); Thacker v. Bd. of Trustees/Marshall Univ., Docket No. 98-BOT-400 (June 24, 1999)(distinguishing a situation where the employer established legitimate reasons for all of its actions).

"Reprisal" means the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it. W. Va. Code § 18-29-2(p). To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

that she engaged in a protected activity, e.g., filing or participating in a grievance;

that she was subsequently treated in an adverse manner by the employer or an agent;

that the employer's official or agent had actual or constructive knowledge that the grievant engaged in the protected activity;

that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and

> that the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

See W. Va. Dept. of Natural Resources v. Myers, 443 S.E.2d 229 (W. Va. 1994); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). See also Frank's Shoe Store, supra; Gruen v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997).

If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Frank's, supra; Myers, supra; Webb, supra.

In the present case, Grievant has established a prima facie case of reprisal, discrimination, favoritism and harassment. She filed a lawsuit against Southern, resulting in the afore-mentioned Settlement Agreement, requiring her to take a sabbatical from Fall 1996 until Fall 1997. When she returned to Southern in Fall 1997, she found that not enough classes had been scheduled for her that semester. Despite her success with teaching art classes abroad in the past, her release time proposal was denied, but only after she was required to rewrite it several times over the course of the semester. The scheduling problems in Fall 1997 led to a disastrous schedule in Spring 1998, when Grievant had to pick up 18 hours to meet the required teaching contact hours. She was directed to teach a ceramics class on the Williamson campus, despite the fact the kiln hadnot been fired or tested, and again, her proposal to use the time required to prepare for the ceramics class as release time was denied. Another professor, Connie White, who had submitted via e-mail a release time proposal to develop a web-based class, had her proposal granted in a week's time.

Grievant's Spring 1998 schedule required her to teach on all four Southern campuses, something that had never been required or expected of any professor in Southern's history. At the same time Grievant was juggling the four campuses, Dr. Driscoll proposed taking what amounted to two-thirds of her designated art studio away for use as an interactive classroom, without so much as the benefit or courtesy of talking to Grievant about it beforehand.

While Grievant was abroad during the Summer of 1998, her art lab was divided, and she came back to the prospect of teaching studio art classes on two floors and inadequate space. Finally, Grievant's studio art classes were moved completely off of the Logan campus to Williamson by

President Kirkland, and when a new administration came in, and Grievant and her Division Chair attempted to work out a temporary solution to the problem of no art classes on Logan, those attempts were thwarted, solely because Grievant had a pending grievance over the space issue.

Clearly, Grievant meets all of the elements required to make a prima facie case of reprisal, harassment, discrimination, and favoritism. Southern maintains it had legitimate reasons for all of its actions involving Grievant following her return in Fall 1997.

Southern explains that Ms. Alderman used the same process and procedure in setting Grievant's 1997-1998 schedules as was used for the entire college, including a five- year review of campus-wide enrollment statistics. Southern maintains that studentenrollment did not support Grievant's classes on the Logan campus. The fact that Grievant did not end up with enough teaching hours in Fall 1997 was simply due to low student enrollment for some of the offered courses, requiring cancellation of those classes. Southern points to the Faculty Workload Policy, which only allows approval of classes below fifteen students when they are upper level courses required for graduation. Gr. Ex. 19.

Southern explains that Grievant's release time proposal was denied because of the questionable benefit an international course could bring to Southern's students. Some mention was made that only a select few students would be able to take advantage of such a course, especially given Southern's constituency. Furthermore, as Grievant's international course would also benefit graduate students, Southern believed it did not meet the needs of Southern students as a whole.

Southern explains that because Grievant lost teaching hours in the Fall of 1997, she necessarily had to make them up in the Spring of 1998, and in an attempt to aid her in achieving this goal, it was determined that Grievant could teach a ceramics class in Williamson. As to the four-campus schedule, it just worked out that way, again, due to low enrollments and the need to cancel some classes. Southern denies it is “in the habit” of granting release time to faculty for the sole purpose of making a teaching schedule more convenient. Southern did grant release time to one instructor for the purpose of filling out his full-time teaching load, because “enrollment did not support a full-time teaching load for this instructor on any campus,” unlike Grievant, who could achieve a full-time load by teaching on four campuses. Southern simply refused to grant Grievant release time to prepare the ceramics class on the Williamson campus, asserting she just needed to teach it.

Southern explains that its spatial needs controlled the division of the art lab and the move of the

art studio to Williamson. Beginning in the Spring 1998 semester, Southern was faced with a need to reallocate space on the Logan campus. The Allied Health program added two new degree granting programs and hired more faculty. Additional office personnel and staff were hired that required additional office space. Southern's administration also felt it necessary to provide its adjunct faculty members with a collective space where they could meet with students and complete course preparation. Southern also needed to allocate space for an interactive classroom whose equipment was purchased by Marshall University, which would be used by Southern for its distance learning courses, and that had to be installed for the Fall 1998 semester.

Pursuant to proper procedure, the Finance and Facilities Committee addressed Southern's need for space. After examining all of the options throughout the entire Spring 1998 semester, the Committee determined that division of the art lab represented the least expensive method of utilizing its limited space. After the division of the art lab, Dr. Kirkland determined that the remaining space was not adequate for studio art classes, and ordered all studio art classes moved to the Williamson campus.

Finally, when Grievant and Dr. McCoy attempted to place a painting class on the Logan campus in Spring 2001, Southern's administration determined that having a studio art class on Logan “would not serve the best interests of the Institution.” Moreover, Dr. Dempsey was concerned that Grievant's space needs, as set forth in her initial grievance over the divided art lab, would not be met in the theater workshop, and he would notconsider the proposal unless she stated in writing that the theater workshop met her spatial needs.

Southern, of course, denies any intent to harass, discriminate, or retaliate against Grievant, or to show favoritism to other faculty, through its actions and decisions from Fall 1997 through Spring 2001.

Given the length of the hearing in this matter, and the number of exhibits, and without going into excruciating detail, Southern has sufficiently articulated legitimate reasons for the actions which gave rise to the underlying grievances in this case. The decision in this case rests upon whether Grievant has presented sufficient evidence to prove, by a preponderance, that Southern's articulated reasons are merely pretextual.

There is a level of hostility, in-fighting, and political maneuvering that is accepted as normal behavior inherent in the halls of higher education or “academia.” The fact that Grievant has been

teaching in higher education since 1974 (but did not file a grievance (or lawsuit) until 1994), demonstrates not only that she was quite familiar with the behavior associated with academia, but functioned, and no doubt participated, in it during her tenure at Southern. Looking at what can only be considered as a Series of Unfortunate Events (to borrow from the popular children's books) which befell Grievant upon her return to Southern in the Fall of 1997, the question becomes what, if any, of those events were simply the result of normal, accepted, machinizations of academia, and what, if any, were precipitated perhaps, by a conscious or unconscious desire to put Grievant in her place for filing a lawsuit. Because *intent* is not an essential element of proof in grievances involving discrimination, favoritism, harassment, or reprisal, it is the *effect* of the actions taken, andthe inferences which can be drawn from those actions, which are determinative in analyzing whether articulated reasons for the actions are proven to be pretextual.

Let's begin with the Fall of 1997, when Grievant returned to Southern to find the schedule prepared on her behalf by Ms. Alderman to be significantly different from the schedules Grievant had offered in the past, with only three courses being offered on the Logan campus, and one course offered on the Boone campus which had never been offered there before. One can certainly wonder why Ms. Alderman decided to completely change the courses Grievant had traditionally offered in the past, and develop a new schedule when Grievant was not available for consultation. She testified she developed the schedule based upon a review of five previous years' schedules and enrollment figures. Just as there is no reason to doubt that testimony, there is no reason to suspect that Ms. Alderman knew one of the classes would be canceled, leaving Grievant with only four classes for the Fall 1997 semester. The adverse action here did not begin with Ms. Alderman's scheduling, but rather, with Southern's response, or lack thereof, once that Fall 1997 schedule became a problem. For the determinative factor in this case is not Southern's *actions*, but it's *inaction*. The evidence demonstrates a pattern of Southern almost stubbornly refusing to accommodate Grievant in any way, beginning with the Fall 1997 semester, when she ended up short one class.

Given the fact that Grievant had been away from the campus for one year, in conformance with the Settlement Agreement, and Southern's agreement to provide her a reasonable schedule upon her return, it simply boggles the mind that Southern would not give her a break in the Fall of 1997, either by accepting her international class as release time, or in Spring of 1998, accepting her preparation of the ceramics class as release time. As faculty members are required to teach 30 hours

per academic year, or 15 hours per semester, anything less than that cannot be considered "reasonable." The cataclysmic 18- hour schedule on four different campuses in Spring 1998 clearly was the direct result of Southern's refusal to help Grievant out the semester before.

As to the subdivision of the art lab, there is no dispute that Southern has the authority to assign space and determine the manner in which its facilities will be used. Dr. Driscoll proceeded through the proper committee structure with his space proposals, which included taking a portion of the studio art lab, and Grievant had an opportunity to respond with her own proposal. However, the timing of that decision could not have been worse in terms of the cumulative effect on Grievant, who was just back from sabbatical.

The problem with the art lab situation is that, although Dr. Driscoll, President Kirkland, and others, insisted the division of the lab, and placement of Grievant's studio on two different floors, was only temporary, there was really no further discussion or evidence of an intent to actually find a permanent solution on the Logan campus. The adjunct faculty room, which Grievant proposed as an alternative site, was recommended by the architects, the Facilities and Finance Committee, and the College Council. President Kirkland sent it back to the College Council, asking for a more definite cost estimate, and it died there, although no one can explain why. It never got sent back to the Facilities and Finance Committee, and no further discussion was ever had of that proposal. It appears Dr. Driscoll just decided unilaterally that the adjunct faculty room was not going to be turned into a studio art lab, and that was the end of it. Finally, and acknowledging that the division of the art lab, with studio classes on two floors, was unworkable, President Kirklanddecided to move the studio art classes in toto to Williamson, again, with no consideration of the alternative use of the adjunct faculty room.

The avalanche of events culminated in the Fall of 2000, when Grievant and her new Division Chair, Dr. McCoy, actually sat down and attempted to find a workable way to offer studio art classes on Logan again. They succeeded, but that proposal was shot down because of the ongoing grievance. Although Southern argues it did not offer Grievant a quid pro quo, that if she agreed in writing the theater workshop met her specifications as set forth in her grievance, it *might* consider the proposal, that is, of course, exactly what it did. Southern explains it was concerned that the theater space did not meet Grievant's specifications and was reluctant to let her back on Logan because of that. I am not sure what Southern thought would happen if it did - that Grievant could say, "Aha!

Look! There *is* workable space on Logan after all!" Well - the fact of the matter is - there *is* adequate, workable space on Logan. So whether Southern let her use it or not is of no consequence, and its decision not to let her use it, simply because she had filed a grievance over space, was retaliatory. Most interesting here is that Southern did not offer an explanation that it had simply made an administrative decision to only offer studio art classes on Williamson and not Logan anymore. The decision not to let Grievant use the Logan theater space was made because of her grievance, and that is not a legitimate, non-retaliatory reason.

Which leads to the present, and what to do in terms of fashioning some equitable relief for Grievant. Grievant asks for attorneys fees, which are not awarded by the Grievance Board. The Grievance Board may not award attorney fees, and costs may only be awarded with a finding of bad faith. Spencer v. W. Va. Bureau of Empl. Programs, Docket No. 97-BEP-139R (Aug. 31, 2000); W. Va. Code §§ 29-6A-7, 9, & 10. Grievant has also asked for damages relative to having to drive to four separate campuses in the Spring of 1998, including mileage and car damage, as well as damages for medical conditions which allegedly have been exacerbated by this ordeal. The Grievance Board does not have the authority to award medical damages and damages to Grievant's car. An administrative law judge may "provide such relief as is deemed fair and equitable in accordance with the provisions of this article . . . ." W. Va. Code § 29-6A-5(b). This Grievance Board has applied this above-cited Code Section to encompass such issues as back pay, travel reimbursement, seniority, and overtime, to make grievants whole. It has not utilized this Section to award "tort-like" damages for pain and suffering, and will not choose to do so in this case. Spencer, supra; Walls v. Kanawha County Bd. of Educ., Docket No. 98-20-325 (Dec. 30, 1998); Snodgrass v. Kanawha County Board of Education, Docket No. 97-20-007 (June 30, 1998). Accord, Vest v. Bd. of Educ. of County of Nicholas, 193 W. Va. 222, 455 S.E.2d 781 (1995). However, the Grievance Board can award her mileage for having to drive to those four different campuses.

Grievant also asks for “overage” compensation for teaching 18 hours in the Spring of 1998, which she would not have had to do had Southern reasonably accommodated her in the Fall of 1997. Southern faculty are compensated for any classes they teach beyond the requisite 30 hours per academic year, comparable to an adjunct salary. Thus, Grievant could be awarded what she would have earned for a normal “overage” class that semester.

Finally, Grievant asks that studio art space be restored on the Logan campus. The undersigned is

hard pressed to tell Southern how it should utilize its space, as that clearly falls within the domain of administrative discretion and authority. Moreover, it is unknown what changes have taken place on Southern's Logan campus since the level four hearingsin the case concluded in December 2001. At that time, the theater workshop was still available as an alternative space. If the theater workshop is still available, in that it is still being used for storage and theater construction, then I propose that Southern assist Grievant in outfitting the theater workshop according to the original proposal created by her and Dr. McCoy, and agree to offer a studio art class in that space for one semester, on a trial basis. It will then be up to the parties to determine if they want to continue with that arrangement in the future. I will not order Southern to reinstate a permanent studio art lab on the Logan campus, but strongly encourage the parties to try to move past this ordeal and work together with open minds.

CONCLUSIONS OF LAW

1. Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88- 130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Ooten v. Mingo County Bd. of Educ., Docket No. 96- 29-122 (July 31, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

3. A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered inopposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

4. Southern asserts any claims relating to Grievant's Fall 1997 schedule are time-barred; however, Grievant does not seek any relief with respect to the Fall 1997, and only asks that the events of Fall 1997 be considered in determining whether a pattern of disparate and/or adverse treatment can be established. Thus, Southern's claim of untimeliness is not applicable.

5. W. Va. Code § 18-29-2(m) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or

agreed to in writing by the employees."

6. Favoritism is similarly defined by W. Va. Code § 18-29-2(o) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

7. In order to establish a claim of discrimination and/or favoritism, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, Grievant must show:

(a)

that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of Grievant and/or the other employee(s) and were not agreed to by Grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

8. Once Grievant establishes a prima facie case of discrimination or favoritism, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reasonfor the employment decision. Thereafter, Grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986).

9. W. Va. Code § 18-29-2(n) defines harassment as "repeated or continued disturbance, irritation,or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession."

10. W. Va. Code § 18-29-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." A grievant claiming retaliation may establish a prima facie case of reprisal by establishing:

(1) that she engaged in protected activity, e.g., filing a grievance;

(2) that she was subsequently treated in an adverse manner by the employer or an agent;

(3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 94-BOT- 088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

11. If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, nonretailatoryreasons for its actions. See Mace v. Pizza Hut, Inc., 180 W. Va. 469, 377 S.E.2d 461 (1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983); Webb, supra.

12. Grievant has successfully established a prima facie case of discrimination, favoritism, harassment, and reprisal against Southern.

13. Southern articulated legitimate reasons for its action.

14. Grievant successfully demonstrated through testimony and evidence that Southern's articulated reasons were a mere pretext for a pattern of adverse treatment against Grievant.

Accordingly, this grievance is **GRANTED**. Pursuant to the discussion, supra, Southern is hereby **ORDERED** to compensate Grievant for mileage, at the allowable rate at that time, incurred during the Spring 1998 semester in driving to and from the Boone and Wyoming County campuses (acknowledging that it was not uncommon for Grievant to teach on both Logan and Williamson per semester). Southern is hereby **ORDERED** to compensate Grievant for the amount of one “overage” teaching assignment during the Spring of 1998, at the normal adjunct rate of pay applicable at that time. Southern is hereby **ORDERED** to compensate Grievant additionally the amount of ten-percent (10%) interest calculated on those sums paid as directed above. Southern is hereby **ORDERED** to assist Grievant and Dr. McCoy in preparing the theater workshop for use as a studio art lab for the next semester, Fall 2003, **PROVIDED THAT**, the theater workshop is still available for use as an art

lab as it was in the Spring of 2001, and that Dr. McCoy is still amenable to attempting that experiment. Neither party is obligated to pursue thatexperiment past the Fall 2003 semester, but both are encouraged to do so if it appears to be a viable solution to art lab space on the Logan campus.

This decision is in no way meant to be interpreted as reestablishing Grievant's home campus on Logan, or affecting in any way the art studio on the Williamson campus.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: February 7, 2003

ADDENDUM A

SUMMARY OF EVIDENCE

LIV Joint Exhibits

Ex. 1 -

Senate Bill No. 547.

Ex. 2 -

Senate Bill No. 591.

Ex. 3 -

College Wide Course Enrollments Fall 1997.

Ex. 4 -

Student Profile Analysis Fall 1994 -Fall 1998.

Ex. 5 -

1994 Master Plan Report.

LIV Grievant's Exhibits

Ex. 1 -

January 7, 1997 letter from Travis P. Kirkland to Dr. Clifford Trump.

Ex. 2 -

February 9, 1999 letter from Christopher Carrere to Dr. Driscol re: art lab.

Ex. 3 -

67 photographs

A1-12 - Classroom.

B1-7 - Stairwell.

C1-9 - Sink Room (½ half of old art lab space).

D1-9 - Adjunct Faculty Room.

E1-12 - Painting Studio (old smoking lounge).

F1 -8 - Stairwell to sink room.

G1-3 - Grievant's office.

H1-7 - Interactive classroom (½ of old art lab space).

Ex. 4 -

First Floor Plan, Logan Campus, developed by Kreps & Kreps, May 13, 1998.

Ex. 5 -

Second Floor Plan, Logan Campus, developed by Kreps & Kreps, May 13, 1998.

Ex. 6 -

College Wide Course Enrollments Fall 1997.

Ex. 7 -

College Wide Course Enrollments Spring 1998.

Ex. 8 -

June 9, 1998 handwritten letter from Ron Thompson to Lynn Earnest re: Finance and Facilities Committee meeting.

Ex. 9 -

Marshall University pamphlet, “The Marshall Plan.”

Ex. 10 -

Schedule of Classes Fall 1990 through Spring 1999.

Ex. 11 -

Summary of Course Offerings in Printed Schedule for Legal Campus Fall Semester, 1990-1999.

Ex. 12 -

September 3, 1997 memorandum from Merle Dempsey to Humanities Division Faculty re: Attached General Education Goals Document.

Ex. 13 -

Series of correspondence re: release time proposal, August through October 1997.

Ex. 14 -

July 22, 1997 appointment letter.

Ex. 15 -

Settlement Agreement and General Release, fully executed on October 2, 1996.

Ex. 16 -

Class Rosters, Fall 1997-Spring 1999.Ex. 17 -

W. Va. Administrative Regulations, Southern West Virginia Community College, Chapter 29A-2, Series IV, Home Campus Assignment and Campus/Center Requirements for Faculty, July 1, 1985.

Ex. 18 -

Faculty Office & Class Schedule, Spring 1998.

Ex. 19 -

Southern WV Community College Management Issuance, Workload Requirements for Full-Time Faculty, January 28, 1991.

Ex. 20 -

Class Schedule, April-May, Spring 1998.

Ex. 21 -

Calculation of uncompensated extra work for Spring 1998.

Ex. 22 -

Videotape.

Ex. 23 -

Deposition of Travis P. Kirkland, July 15, 1999.

Ex. 24 -

Deposition of Merle Dempsey, August 17, 19, 1999.

Ex. 25 -

Ex. 26 -

January 14, 1998 email from Ron Thompson to Lynn Earnest; January 15, 1998 email from Lynn Earnest to Ron Thompson re: Facilities and Finance Committee meeting.

Ex. 27 -

February 19, 1999 letter from Professor Lynn Earnest to Dr. Bob Driscoll.

Ex. 28 -

November 6, 2000 letter from Cindy McCoy, Ed.D. to Professor Lynn Earnest.

LIV Southern Exhibits

Ex. 1 -

February 10, 1999 letter from R. F. Driscoll, Ph.D. to Christopher Carrere.

Ex. 2 -

February 2, 1998 letter from Jeffry A. Kreps to Ronald G. Thompson re: Facilities Fit Analysis/Master Plan Update, with attachments.

Ex. 3 -

January 15, 1998 memorandum from R. F. Driscoll to Oretha Baker re: Modification of the Art Lab on the Logan Campus.

Ex. 4 -

Agenda and Minutes of Finance and Facilities Committee Meeting, January 21, 1998.

Ex. 5 -

Agenda and Minutes of Finance and Facilities Committee Meeting, February 18, 1998.

Ex. 6 -

Agenda and Minutes of Finance and Facilities Committee Meeting, March 18, 1998.

Ex. 7 -

Agenda and Minutes of Finance and Facilities Committee Meeting, April 15, 1998.

Ex. 8 -

Minutes of Finance and Facilities Committee, June 17, 1998.

Ex. 8a -

Minutes of Finance and Facilities Committee, June 17, 1998.

Ex. 9 -

Summary of Logan Campus Facilities Modifications, prepared by Ron Thompson, February 16, 2000.

Ex. 10 -

Agenda and Minutes of Finance and Facilities Committee Meeting, September 18, 1998.

Ex. 11 -

Minutes of Finance and Facilities Committee, October 16, 1998.

Ex. 12 -

Institutional Recommendation Form by Finance and Facilities Committee, November 1998.

Ex. 13 -

Space Utilization Notes, Campus Meeting, June 2, 1998.

Ex. 14 -

Handwritten 1997-99 Schedule Planning Meetings.Ex. 15 -
April 29, 1997 memorandum from Pamela L. Alderman to Lynn Earnest re: Tentative Course Assignments Fall 1997.

Ex. 16 -

Faculty Office & Class Schedule, Spring 1993 through Fall 1998.

Ex. 17 -

March-April 1998 Time Cards for Susan Bragg.

Ex. 18 -

January 12, 1999 letter from R. F. Driscoll to Lynn Earnest.

Ex. 19 -

May 13, 1998 handwritten notes re: Kiln.

Ex. 20 -

Fall 1999 - Fall 2000 schedule planning materials.

Ex. 21 -

Spring 2001 schedule planning materials.

Ex. 22 -

Southern Position Description, Division Chair.

Ex. 23 -

Southern Position Description, Vice-President for Academic Affairs.

Ex. 24 -

May 29, 1998 fax transmittal from Drema Vance to Lynn Earnest re: meeting; June 16, 1998 fax transmittal from Drema Vance to Lynn Earnest re: Facilities Committee meeting.

Ex. 25 -

December 9, 1996 memorandum from Travis P. Kirkland to All College Faculty, Associate Vice Presidents, Vice Presidents re: Change at Southern.

Ex. 26 -

February 2, 1998 letter from Jerry Cole to Tony Turner re: air quality of ceramics lab.

Ex. 27 -

March 19, 1998 letter from Anthony Turner to Jerry Cole.

Ex. 28 -

April 23, 1998 letter from Anthony Turner to Jerry Cole.

Ex. 29 -

April 29, 1997 memoranda from Pamela Alderman to various faculty members re: Tentative Course Assignments, Fall 1997.

Ex. 30 -

April 14, 1998 email from Ron Thompson to recipients, including Lynn Earnest, re: Finance and Facilities Committee Meeting.

Ex. 31 -

May 19, 1998 email from Debbie Fields to recipients, including Lynn Earnest, re: Facilities meeting.

Ex. 32 -

State of West Virginia Travel Expense Account Settlement dated April 22, 1998, for Beverly Chafin.

Ex. 33 -

October 1, 1998 email from Beverly Chafin to recipients, including Lynn Earnest, re: Finance & Facilities Secretary.

Ex. 34 -

October 23, 1998 College Council Minutes.

Ex. 35 -

March 25, 1998 memorandum from Travis P. Kirkland to Beverly Chafin and Randy Skeens re: committee memberships.

Ex. 36 -

September/October 1998 series of emails between Beverly Chafin and Emma Baisden re: Minutes of Finance and Facilities Committee Meeting.

Ex. 37 -

November 30,1998 email from Ron Thompson to Emma Baisden re: Committee Meeting Minutes.

Ex. 38 -

March 25, 1998 memorandum from Travis P. Kirkland to *Those Listed, re: Governance Structure Handbook, with attachment.

Ex. 39 -

Seven photographs of Williamson Art Lab.

Ex. 40 -

May 10, 1999 memorandum from Ron Thompson to Travis P. Kirkland re: Williamson Art Lab.

Ex. 41 -

Spring 1997 packet of documents relating to search for new Associate Vice President for Academic Affairs.

Ex. 42 -

Second Floor Plan, Williamson campus.Ex. 43 -
August 11, 1997 memorandum from Travis Kirkland to Logan and Williamson Campus Employees re: Telephone Account Codes.

Ex. 44 -

Respondent's Summary of Grievant's Exhibit 16, with attachments.

Ex. 45 -

Spring 1991 through Spring 1999 College Wide Course Enrollments.

Ex. 46 -

Fall 1992 through Spring 2001 Credit Hour Production Report Full-Time Faculty.

Ex. 47 -

Spring 1997, Spring 1997 Schedule of Classes.

Ex. 48 -

Summer 1997, Fall 1997, Spring 1998 Schedule of Classes.

Ex. 49 -

Spring 1997 Schedule of Classes.

Ex. 50 -

April 15, 1998 Finance and Facilities Committee Meeting minutes, with attached computer screen menus.

Ex. 51 -

September 18, 1998 Finance and Facilities Committee Meeting agenda; June 17, 1998 minutes; computer screen menus; September 18, 1998 Finance and Facilities Committee Meeting agenda; June 17, 1998 minutes; computer screen menus.

Ex. 52 -

April 25, 2001 Deposition of C. Lynn Earnest, Earnest v. Southern W. Va. Community and Tech. College, Circuit Court of Kanawha County, Civil Action No. 00-C-92.

Ex. 53 -

August 2, 2001 Board of Review Decision re: Beverly A. Chafin.

Testimony

Grievant testified in her own behalf, and presented the testimony of Connie White, Cindy McCoy, David F. Moore, Paula Loggins, Christopher Carrere, Robin Butcher, Jeffrey Kreps, Ron Thompson, Donna Burgraff, Joanne Tomblin, Robert Driscoll, Pamela Alderman, Mary Holder, Linda Varnatter,

Patricia Clay, Katia Loggins, Jon Lay, Beverly Chafin, Merle Dempsey, and Drema Vance. Southern presented the testimony of Pamela Alderman, Oretha Baker, Emma Baisden, and Patricia Clay.

Footnote: 1

Grievance I was denied at level one on March 3, 1998, proceeded to hearing at level two on April 28, 1998, and concluded on July 21, 1998, and was denied by President Travis P. Kirkland, Ph.D., on July 23, 1998.

Footnote: 2

Grievance II was denied at level one on October 10, 2000, proceeded to hearing at level two on December 6, 2000, and was denied by President Joanne Tomblin on December 11, 2000.

Footnote: 3

Grievant had successfully taken Southern students abroad twice in the past, in class groups of approximately 15.

Footnote: 4

Prior to the 1996-97 academic year, there had been one other full-time art professor located on the Williamson campus. The kiln had not been fired since her retirement in 1996.

Footnote: 5

The Committee did not meet in May 1998 because of graduation exercises, and other end of term activities.

Footnote: 6

Beverly Chafin, a member of the Facilities and Finance Committee, was elected as Secretary at the June 17, 1998, meeting. She took notes at the meeting, but did not prepare the minutes; another member, Ron Thompson prepared the minutes. Ms. Chafin testified she did not remember a vote being taken on the art lab at the June meeting, but rather, recalled the committee had voted to "table" the issue, or wait until a later date to decide the issue. The minutes were read and approved at the next meeting, in September 1998, after which Ms. Chafin resigned as Secretary.