WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

GASTON CAPERTON
Governor

Offices
240 Capitol Street
Suite 515
Charleston, WV 25301
Telephone 348-3361

WILLIAM WEBB

v. Docket No. 89-26-56

MASON COUNTY
BOARD OF EDUCATION

D E C I S I O N

Grievant William Webb was employed by Respondent Mason County Board of Education as a mathematics teacher at Point Pleasant High School (PPH) until he was dismissed December 21, 1988, for insubordination for refusal to comply with a dress code for professional employees of Respondent Mason County Board of Education.[1] Grievant alleges in this case that, because of his perseverance in wearing blue jeans and no tie and his pursuing grievances on the dismissal and an earlier suspension on the same charges,[2] which resulted in much media interest, Respondent retaliated against him by billing him out-of-state tuition for his children and

---

[1]Grievant's dismissal was upheld in Webb v. Mason Co. Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). Grievant appealed that decision to the Circuit Court of Kanawha County, where the matter is pending.

[2]Webb v. Mason Co. Bd. of Educ., Docket No. 88-26-206 (Jan. 5, 1989).

therefore engaged in reprisal, as defined at W.Va. Code §18-29-2(p).[3] Alternatively, Grievant contends that he is entitled to relief for breach of contract, denial of due process and under the doctrines of equitable estoppel and quantum meruit.

This matter has a complex procedural history. On November 24, 1988, Grievant received a bill for $1,791.37 for unpaid out-of-state tuition for his daughter's attendance at PPH during the 1988-89 school year.[4] On December 2, 1989, a letter from George E. Miller, Director of Finance/Treasurer for Respondent, demanded payment of the previous bill and stated, "If payment is not received by January 1, 1989, your child may be denied enrollment at Point Pleasant High School." A few days thereafter two grievances on the matter were filed,[5] which were denied apparently at Level I[6] and at Level II. A lengthy Level III hearing was conducted on January 5, 1989, at the end of which Respondent ruled that, while Superintendent Charles

---

[3]Grievant's brief further states, "In addition, W.Va. Code §§18-29-2(m), (n) and (o), respectively addressing 'discrimination,' 'harassment,' and 'favoritism,' apply to this situation[,]" but makes no further argument on these contentions. Due to the outcome herein, these contentions require no discussion.

[4]The Webbs live in Gallipolis, Ohio.

[5]At the same time other actions were also grieved.

[6]Not all documents pertaining to this procedural history have been submitted into the record.

Chambers did not intend to harass Grievant, he should not have sent an accounting to Grievant until such time as directed to do so. Respondent "tabled" out-of-state tuition and, ruling that it "granted" the grievance, further determined, "If the board later determines tuition is owed a proper accounting will be given to Mr. Webb."

Five days later, by letter of January 10, Mr. Miller advised Grievant that Respondent, at its meeting the previous day, had directed him to bill for all out-of-state tuition for the previous two years, in addition to the 1988-89 school year, and that Grievant accordingly owed $4468.70.[7] Grievant paid the bill but filed a grievance directly at Level III, which was denied February 6, 1989, on the grounds that, while pursuant to W.Va. Code §18-29-3(c) a grievant may file a grievance at the level vested with authority to grant the requested relief, that provision also requires that each lower level agree thereto in writing and Grievant failed to obtain such agreement.[8] Grievant

---

[7]The letter also informed Grievant that, beginning January 1st, monthly payments of $179.13 would be required.

[8]In Bumgardner v. Ritchie Co. Bd. of Educ., Docket Nos. 89-43-222 etc. (June 12, 1989), it was held that W.Va. Code §18-29-3(c) allows for filing at a higher level than Level I only if that level is the lowest level with authority to grant the relief and, while it is not clear from Respondent's ruling, apparently that requirement was complied with. It should be noted, however, that failure on Grievant's part to fulfill the further requirement of Code §18-29-3(c) did not justify denial of his grievance; rather, the proper disposition would have been to allow
(Footnote Continued)

appealed to Level IV on February 17, 1989. On March 1, 1989, the undersigned notified the parties that, in that a decision regarding whether Grievant's dismissal was proper could control whether this matter may be considered under the grievance procedures of W.Va. Code §18-29-1 et seq., this matter was to be held in abeyance until issuance of a decision on the dismissal. On May 5, 1989, the parties were further notified that jurisdictional concerns were raised by the fact that the sending of the January 10th invoice postdated Grievant's dismissal, which had been upheld by decision of May 1st. A conference was held July 11, 1989, at which the undersigned was informed about the sending of the first invoice and the parties agreed that the Level III hearing held in January would serve as the Level III hearing in this matter.[9] A Level IV hearing was held July 24 and 28, 1989.[10] With receipt of proposed findings of fact and conclusions of law plus briefs from both parties on August 29, 1989, this matter may be decided.

(Footnote Continued)
Grievant to get agreement of the lower levels or to remand the grievance.

[9]The undersigned ruled at the conference that, because of the special facts of this matter, the case would not be remanded for further hearing(s) or determination(s) at the lower levels. It was also ruled that a determination on jurisdiction would be made in decision after hearing.

[10]At the hearing the parties agreed that the evidentiary record would consist of the evidence submitted at Level III, supplemented at Level IV.

The jurisdictional issue whether this matter is properly the subject of a grievance proceeding initially must be addressed. Respondent contends as follows:

> The West Virginia Education and State Employees Grievance Board lacks the jurisdiction to rule upon said grievance, however, since at the time it was filed, William Webb was no longer an employee of the Mason County Board of Education. West Virginia Code §18-29-2(d) specifically defines a grievant as being one who is an employee of the educational institution against which his grievance is filed. An employee is further defined as any person hired by an institution either full or part time. Since William Webb had been terminated from his employment with the Mason County Board of Education prior to the filing of his grievance in January of 1989, he cannot be either an employee or a grievant.
>
> Furthermore, West Virginia Code §18-29-2(a) defines a grievance as being a claim by an affected "employee" alleging a violation, misapplication or misinterpretation of statutes, policies, rules, etc. Since the action of which William Webb [complains] occurred after his employment with the Mason County Board of Education had been terminated, the West Virginia Education and State Employees Grievance Board cannot properly rule upon said action.
>
> Grievant attempts to bring this matter within the jurisdiction of the grievance procedure by claiming said grievance is a continuation of a prior grievance. However, the issues raised by Mr. Webb in his previous grievances were all resolved at a hearing held for those purposes. Apparently Mr. Webb was satisfied with that resolution inasmuch as the decisions rendered therein were never appealed to this grievance board. Therefore, the invoice for tuition received by Mr. Webb on the 11th day of January, 1989, could not be, and was not a continuation of his prior grievance.
>
> Given that Mr. Webb was no longer an employee of the Mason County Board of Education at the time he filed this grievance, the West Virginia Education and State Employee Grievance Board lacks the jurisdiction to consider the issues raised therein pursuant to West Virginia Code §§18-29-1, et seq.

Respondent's Brief.

Respondent's primary contention, given in the first and fourth paragraphs above, may be readily rejected, for it has been held that whether a grievant is employed by Respondent at the time of filing the grievance does not control whether the matter is properly the subject of a grievance proceeding. The issue was fully addressed in Hamlin v. W.Va. Dept. of Health, Docket No. H-88-036 (May 15, 1989), where it was held that, since the definition of "employee" requires only that the individual had been "hired," "it does not require a currently extant working relationship," id. 6, and therefore the definition of "grievant" was also met. Accordingly, that the grievance was filed after the employee retired did not defeat jurisdiction. While Hamlin arose under the grievance procedures of W.Va. Code §§29-6A-1 et seq., involving state employee grievances, since the definitions of that statute are parallel to the education statute's,[11] the holding has equal applicability here.

Respondent's further argument that, because the invoice was sent after Mr. Webb's dismissal, there is no jurisdiction, raises the closer issue of whether a grievable act occurred during Mr. Webb's employment. However, it too must be rejected, for the particular facts of this matter lead to the conclusion that the January sending of the second invoice did not give rise to a second grievance but was a

---

[11] I.e., W.Va. Code §§18-29-1 et seq.

continuation of the original grievance, which was filed after the sending of the invoice in November while Grievant was still employed by Respondent. The contentions of Grievant have been from the first that any billing for out-of-state tuition was illegal and evidence on whether the initial billing was harassment or retaliation or a breach of contract was presented at the January 5th hearing. It was not crucial that at the end of the hearing Respondent passed a motion that it "granted" the grievance, for merely tabling whether out-of-state tuition was owed was not a ruling on the grievance. Respondent rejected Grievant's contentions, thereby denying the grievance, when four days later it directed Mr. Miller to bill Grievant again. Accordingly, jurisdiction has been established[12] and the merits may be addressed.

In Frank's Shoe Store v. West Virginia Human Rights Com'n, 365 S.E.2d 251, 259 (1986), the West Virginia Supreme Court of Appeals adopted the following evidentiary standards for establishing a prima facie case in an action for redress of unlawful retaliatory discharge:

> [T]he burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3)

---

[12]While it need not be analyzed, there may be merit to another argument made by Grievant, that this case is properly the subject of a grievance proceeding because it involves specifically "terms and conditions of employment," W.Va. Code §18-29-2(a), and, more generally, "employment-related matters." Brief of Grievant 5.

> that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation) (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

See also Mace v. Pizza Hut, Inc., 377 S.E.2d 461, 463 (W.Va. 1988). While these cases involved actions brought before the West Virginia Human Rights Commission, there is no reason not to take a similar approach in cases such as this where the grievant is alleging reprisal.[13]

W.Va. Code §18-29-2(p) provides in pertinent part, "'Reprisal' means the retaliation of an employer or agent toward a grievant. . .either for an alleged injury itself or any lawful attempt to redress it." The definition actually refers to two types of "injury": the first is an injury to the employer caused by some action of the employee and the second is an injury to the employee caused by the employer for which the employee is attempting to get redress, e.g., through the grievance procedures.[14] Only minimal modifications to the Frank's Shoe Store standards are required by the definition of "reprisal," i.e., the "injury" to the employer or the employee's "attempt to redress" an "injury"

---

[13]The standards were based on accepted principles applied in discrimination cases.

[14]The definition is poorly drafted in that it indicates that only one type of injury is involved. However, clearly an employer would not retaliate for an injury to an employee nor would an employee attempt to redress an injury to the employer.

to himself must be considered like "protected activity" and the action by the employer giving rise to the cause of action of course need not be a dismissal but can be such adverse action as sending the invoices in this case.

There can be no dispute that the first two elements are fulfilled. Widespread publicity, much of it adverse to Respondent, resulted from Grievant's refusal to comply with the dress code and therefore may be considered an injury to Respondent. Moreover, of course Respondent knew of both the media attention and Grievant's attempts at redressing having been suspended and dismissed by filing the grievances. The following chronology[15] must be considered in determining whether the final two requirements are fulfilled: The dress code, requiring the wearing of ties by men and disallowing the wearing of blue jeans, was unilaterally issued in August 1988 by Superintendent Chambers. Refusing to comply with the code, Grievant was suspended in September and on two different occasions in October. A grievance was brought on the last suspension and a Level IV hearing on it was held November 15. The day before the hearing Grievant was formally informed that charges to be brought at a December 1 meeting of Respondent might result in dismissal. On November 21 the code was revised to not require ties but the wearing of blue jeans was still proscribed and Grievant did

---

[15]Some of the dates here provided have been officially noticed from the decisions cited at n. 1, 2.

not comply. At the meeting on December 1 Grievant presented to Respondent a case against the dress code but Respondent stayed any further decision until December 19, when it decided to dismiss him. On January 4 the grievance on the dismissal was filed.

The initial invoice was sent a little more than a week after Grievant had filed a grievance on his last suspension and no more than three days after Grievant had refused to comply with the modified dress code. The threatening letter from Mr. Miller was sent on the very day after Grievant had made his case before Respondent, which brought much media attention. The final invoice was sent five days after the grievance on the dismissal was filed. It is clear that the third requirement of Frank's Shoe Store is fulfilled and it is further concluded that this chronology raises an inference of retaliatory motive.[16] Accordingly, Grievant established a prima facie case.

An employer may rebut the presumption of retaliatory action raised upon establishment of a prima facie case by offering a "legitimate nondiscriminatory [i.e., nonretaliatory] reason" for its adverse action. Mace; see also Shepherdstown Volunteer Fire Dept. v. West Virginia Human Rights Com'n, 309 S.E.2d 342 (W.Va. 1983). Upon

---

[16]It is therefore not necessary to consider any other evidence tending to establish a retaliatory motivation in deciding whether a prima facie showing has been made.

rebuttal the burden of persuasion never shifts to the employer; rather, the employer merely needs to raise a "genuine issue of fact," Shepherdstown citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981), as to whether it retaliated against the employee. Should the employer succeed in rebutting the presumption, the employee has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer were merely a pretext for unlawful discrimination. See Shepherdstown, Syl. Pt. 3.[17]

Respondent readily offered a legitimate nonretaliatory reason for billing Grievant: that its policy number 427 and an Attorney General's December 22, 1969, Opinion[18] require that tuition be paid for students living out-of-state but attending Mason County schools and Respondent sent invoices like those sent Grievant to all parents of such students. Accordingly, the evidence must be examined to determine whether Grievant established pretext.

---

[17]There is also caselaw indicating that, if the employee can establish that his protected conduct was a "substantial" or "motivating factor" for the employer's adverse action, he has also fulfilled his overall burden. See Orr v. Crowder, 315 S.E.2d 593 (W.Va. 1983). However, Orr also noted the holding in Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977), that in such a case the employer may nevertheless prevail upon establishing by a preponderance of the evidence that, even in the absence of the protected conduct, it would have reached the same decision.

[18]Copies of these were not submitted into the record.

It is uncontroverted that Grievant's children have been attending Mason County schools since Spring 1981 and prior to the billings at issue here Grievant had never been billed for out-of-state tuition. Grievant testified that since the early seventies he had been teaching extra courses, without additional pay, before school or during his homeroom or planning periods.[19] When he was going to enroll his children, he talked to four out of five of the members of the Mason County Board of Education, who were all aware that he had been teaching for years and all said to bring the children to Mason County. He stated that the day after he transferred them he also talked to then-Superintendent Jerry Brewster and told him he had already talked to the Board Members. Later, Michael Whalen, at that time Director of Secondary Education for the Mason County schools, relayed to him the message from Mr. Brewster that, because he had been teaching the extra classes, he would not be required to pay any tuition on his children. Similarly, when William Barker, Jr., took over from Mr. Brewster as Superintendent, he also approved the waiver.

---

[19]Grievant determined that from Fall 1975 through Spring 1988 he taught extra classes every year except 1978-1979 and 1985-1986 and often taught as many as two extra classes at a time. He calculated that payment for his extra teaching, if made according to Respondent's accepted methods, would total $35,580.52, while payment of all tuition for his children from 1981 through 1989 would total $15,743.57. See Gr. Ex. 8 and 9.

Grievant testified further that when he received the bill in November he thought it was a mistake. However, two days later his attorney informed him that Respondent had sent him a proposal for compromise on the grievance on the suspension: that he drop his grievance in exchange for being allowed to return to work.[20] Having received the letter of December 2, he met with Respondent on December 5 and explained his position. The next day he went to PPH, where Mr. Whalen was principal, to look at his old grade books in order to get an accurate listing of what he had taught. Mr. Whalen refused to let him see the books. Similarly, the next day Mr. Whalen also refused to give him a grievance form. When he had gotten the proper grievance form from a member of the board of education and completed it, Mr. Whalen also refused to accept it.

Grievant's daughter Jerrod, a senior during the 1988-1989 school year, testified at Level II. She stated that during the first week in December 1988 she signed up for the last slot on an academic team for which she was qualified and for which no one else applied. When the list of team members was announced she was surprised to find out her name was not on it. Her testimony was that she spoke to Mr. Whalen, and

---

[20]He surmised that he may have been sent the bill in order to force him to compromise since he was not being paid his salary.

> the main thing he told me was he is the boss and he can take my name off the list if he wishes. So, needless to say, I was pretty upset [but] I thought I'd let it go 'cause I figure[d] Mr. Whalen had enough problems. But the next day, which was December 9th, I believe, there was an announcement made that morning that the academic teams would be cancelled until the end of January because some problem had arisen. Mr. Whalen made a nice speech about how he intended for them to be fun but someone had caused trouble and disrupted the teams. And, of course, the entire school knew he was talking about me.

Tr. 73-74.[21]

Mr. Whalen, Mr. Barker, and Mr. Chambers only testified at Level II. Mr. Whalen admitted that there was a written agreement with Grievant but stated that it was only for the first year.[22] He stated that he had not known that Grievant continued to teach extra classes. He was not questioned on the incident with Grievant's daughter.

Mr. Barker, who was Superintendent from 1982 through the 1987-1988 school year, was aware that Grievant was

---

[21]She also testified,

> The day that I spoke with Mr. Whalen I had picked up a student grievance form. I was going to file it against Mr. Whalen but I thought better of it because I thought it would probably cause more trouble than it was worth. And, the next morning after they announced the cancellation of the teams, another student came to me and said Mr. Whalen had had a meeting with him and he asked why the teams were cancelled and Mr. Whalen said that they were because a student had filed a grievance against him. And, it had not been filed.

Tr. 74-75.

[22]Grievant has not contended the agreement was written, although he testified that Mr. Whalen had repeatedly assured him that a notation of the agreement would be put in his file.

teaching extra classes and he also stated that he was aware that Mr. Webb was "doing some type of special arrangement with some students who needed special math requirements." Tr. 95-98. He moreover stated that

> it was the responsibility of the principal to notify the central office, usually the secondary director, or the business office of any student who was attending from out-of-state and attending our West Virginia schools.

Tr. 97.

Mr. Chambers, upon questioning by Grievant's representative whether the individual members of Respondent Board of Education knew of the November billing, initially did not respond, simply stating that it is his duty to implement policy of the Board of Education, but later stated he was "not sure." Tr. 81-84.

Mr. Brewster testified at Level IV. He did not remember talking to Grievant about any tuition waiver and he said that not to his knowledge was there any agreement for Grievant to teach extra courses in exchange for such waiver and he was not even aware that Grievant was teaching the classes. He acknowledged that as Superintendent he had had to rely on his subordinates to carry out duties delegated to them and that he gave discretion to his subordinates. He stated that a principal, as the "chief" at a school, has the delegated authority to operate his school on behalf of the Board of Education within its policies and guidelines.

Respondent's final witness at Level IV was George Miller, who has been Director of Finance since 1983. He

concurred with Mr. Barker's testimony, for he stated he got names of students who lived out of state from the principals. He said that unless he is given a name in that way he has no way of knowing whom to bill. He said that when he sent the January 10 letter to Grievant he also billed the parents of three other children thought to live out of state. He stated that because legal custody of one of the children remained with a parent who lived in state, that billing was nullified, but the parents of the other two children, although they have been billed since, have made no payments.

On cross-examination, Mr. Miller stated that he had been instructed to send the bill at a meeting of Respondent. He stated that Grievant's name had been mentioned but he was not asked and did not say what that "mention" was. He testified that in 1983 or 1984 he had questioned why Grievant was not paying out-of-state tuition and was told by Mr. Whalen that Grievant was not to be billed therefor. He testified that the superintendent said that there was an agreement, that Mr. Webb was teaching special classes. No one ever said the agreement had been changed or terminated. When asked who submitted Grievant's name in November 1988, he stated that Mr. Whalen had given him the name November 1. He testified,

> This was brought up in a board meeting that there were a lot of students living out of state that were not paying tuition, not by the board, but by a citizen, a busdriver. And the Board said they should all be investigated, who owes tuition and who doesn't, so in November I sent a letter to the schools stating that I

> wanted the names of all the students who were registered in their schools residing out-of-state and names were given to me.

Regarding the parents who have not paid, he stated that on January 27th he sent out further letters, thereafter reported to Respondent that no payment had been made in response, and Respondent turned the names over to the prosecuting attorney for possible legal action to collect the tuition owed.[23] He stated that no child has been denied schooling because of nonpayment. He finally stated that the bills were only for the prior two years because the statute of limitations did not allow billing for tuition owed from previous years.

Respondent's own witnesses Mr. Barker and Mr. Miller clearly contradicted Mr. Whalen's testimony, supporting that during Mr. Whalen's tenure as Director of Secondary Education he knew and approved waiver of tuition for Grievant's children in exchange for Grievant's continuing to teach special classes. Moreover, since Mr. Whalen was not questioned at Level II on the incident with Jerrod Webb and was not called to testify at Level IV, Ms. Webb's testimony is

---

[23]Respondent's brief states that one parent billed

> is in the process of providing proof of guardianship to the county board. Other persons owing out-of-state tuition monies are either paying upon said amounts, or, civil actions are being prepared against those persons to collect the monies due and owing to the Mason County Board of Education.

There is no evidence supporting these statements.

uncontradicted and accepted as showing antipathy to her. By inference it must be accepted that the antipathy was really directed at Grievant and, consistent therewith, Mr. Whalen showed hostility to him by refusing to process the grievances. Finally, Mr. Whalen, as principal at PPH, was the individual who turned Grievant's name in to Respondent and therefore caused him to be billed for the tuition.

Such findings may not have been sufficient to support a charge of reprisal if Respondent had not been so vague in its evidence on how the initial decision to solicit the names of out-of-state students was made after apparently failing to comply for years with the 1969 Attorney General's Opinion it relies on here, or, more importantly, if Respondent had not further considered the matter and proceeded to bill Grievant after he had explained the situation at the December 5 meeting. If Respondent had been convinced that it was mandated by law to bill Grievant for the tuition, it could have offered to pay him for the extra teaching he had done in the years 1986-1989, those covered by the billing. That it simply had him billed again supports reprisal. Finally, Respondent's treatment of the other out-of-state parents supports finding reprisal, for its professed movement on pressing legal action against them appears more bluster than fact. Even in its brief Respondent does not say it is actually prosecuting them but merely states that it is "preparing" civil actions against them after nonpayment of more than eight months, and no out-of-state child

has been denied schooling, as threatened by the January letters.

It is accordingly concluded that a preponderance of the evidence establishes pretext and therefore reprisal has been shown.

Since Grievant's remaining contentions are alternative, they need not be addressed.[24]

In addition to the foregoing, the following conclusions of law are appropriate:

1. "'Reprisal' means the retaliation of an employer or agent toward a grievant. . .either for an alleged injury itself or any lawful attempt to redress it." W.Va. Code §18-29-2(p).

2. A grievant may make a prima facie showing of reprisal under Code §18-29-2(p) by establishing by a preponderance of the evidence (1) a protected activity of causing

---

[24]It may be noted, however, that there may be merit to Respondent's contention that any oral contract that may have been entered into would be largely barred by the Statute of Frauds, W.Va. Code §55-1-1. Moreover, contrary to Grievant's contention, even if all the elements of the doctrine of promissory estoppel are fulfilled, a promise of a government official may not be enforceable thereunder if the promise was contrary to law or ultra vires. See Freeman v. Poling, 338 S.E.2d 415 (W.Va. 1985). Finally, it is questionable whether equitable principles would require payment under the doctrine of quantum meruit anytime a school employee renders an unrequested service from which his or her employer benefits.

an injury to Respondent or lawfully attempting to get redress from the employer for an injury to him or her, (2) that the employer was aware of the protected activity, (3) that the employer subsequently took adverse action against the employee and (4) retaliatory motivation or that the adverse action followed the employee's protected activity within such period of time that retaliatory motivation can be inferred. See Frank's Shoe Store v. West Virginia Human Rights Com'n, 365 S.E.2d 25, 259 (1986).

3. Respondent can rebut a prima facie showing of reprisal by offering a legitimate nonretaliatory reason for the adverse action. Mace v. Pizza Hut, Inc., 377 S.E.2d 461, 463 (W.Va. 1988); see also Shepherdstown Volunteer Fire Dept. v. West Virginia Human Rights Com'n, 309 S.E.2d 342 (W.Va. 1983).

4. Should the employer succeed in rebutting the prima facie showing, the employee has the opportunity to prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for unlawful reprisal. See Shepherdstown.

5. Grievant made a prima facie showing of reprisal, which Respondent rebutted by offering the legitimate nonretaliatory reason for billing Grievant for out-of-state tuition that it was required to bill for all such tuition by its policies and a 1969 Attorney General's Opinion.

6. Grievant established by a preponderance of the evidence that the reason offered was pretextual. Accordingly, Grievant established reprisal under Code 18-29-2(p).

The Grievance is accordingly **GRANTED**. Respondent is hereby **ORDERED** to pay Grievant $4647.83.[25]

---

[25]The amount equals the total amount Grievant paid Respondent, the $4468.70 billed in January plus one monthly payment of $179.13. This decision makes no ruling on whether payment of tuition for each out-of-state student is required by law but merely holds that the motivation for billing Grievant for out-of-state tuition in this instance was retaliatory. Moreover, while it is not necessary to determine the value of Grievant's services since this case is decided on the basis of reprisal, it is noted that those services had a greater value than the $4647.83 awarded by this decision.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mason County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.

Sunya Anderson

SUNYA ANDERSON
HEARING EXAMINER

DATED: September 29, 1989