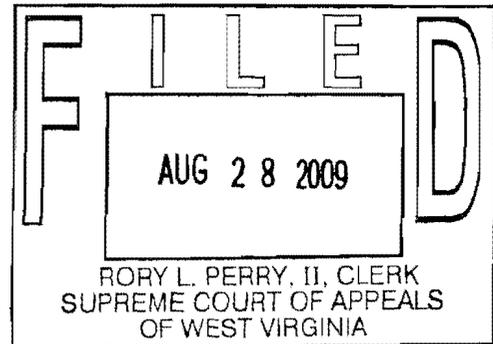


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**BRIAN M. POWELL, Petitioner Below,  
Appellant,**

v.

**STEVEN L. PAINE, State Superintendent of Schools,  
Respondent Below,  
Appellee.**



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**APPELLANT'S BRIEF  
IN SUPPORT OF APPEAL**

**From the Circuit Court of Kanawha County, West Virginia  
Civil Action No. 06-AA-3**

**No. 34946**

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**Submitted by:**

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**APPELLANT'S MEMORANDUM OF LAW  
IN SUPPORT OF APPEAL**

**I.**

**KIND OF PROCEEDING AND NATURE OF THE RULING**

This Appeal arises from the circuit court's September 17, 2008 dismissal Order denying the Appellant/Petitioner Below, Brian M. Powell's, motion for entry of a proposed order providing for make-whole remedies under his West Virginia Code §18A-2-2(c) continuing contract, consistent with W.Va. Code §18-29-5, as well as reasonable attorneys fees, pursuant to W.Va. Code §18-29-8. Mr. Powell submitted the proposed order, at issue, subsequent to a successful appeal to this Honorable Court of the circuit court's erroneous affirmance of an unlawful West Virginia Department of Education administrative decision rescinding his teaching license for a period of four years.<sup>1</sup> This proposed order specifically provided for reinstatement of Mr. Powell's teaching license, employee related benefits Mr. Powell "otherwise would have received" and attorney's fees incurred in connection with his successful appeal of the adverse administrative decision. 9/17/08 Order, 2.

The circuit court erroneously held that it might not enter the proposed order because the relief requested by the order was beyond the scope of this Honorable Court's remand order in Powell v. Paine, 221 W.Va. 458, 655 S.E.2d 204 (2007) (Powell I). The circuit court so held because it found the remand order to be "clearly limited in scope." Therefore, reasoned the circuit court, although Mr. Powell "is clearly entitled to reinstatement of his teaching license . . . [his] entitlement to employment related benefits and attorney fees is not within 'the narrow

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<sup>1</sup>See Powell v. Paine, 221 W.Va. 458, 461, 655 S.E.2d 204, 207 (2007) (Powell I).

framework within which [the Court] must operate' on remand in this case." 9/17/08 Order, 3  
citing Syl. pt. 2, *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W.Va. 802, 591 S.E. 2d  
728 (2003) (Frazier & Oxley II).

## II.

### STATEMENT OF THE FACTS OF THE CASE

Appellant/Petitioner Brian Powell was a science teacher and head football coach at Moorefield High School in Hardy County, West Virginia. His teaching career began in 1990 and continued without incident until 2004. Powell I, 221 W.Va. at 460, 655 S.E.2d at 206 & n.1.

On October 21, 2004, Mr. Powell pled guilty to one count of domestic battery involving his son. He was initially charged with a felony offense. Powell I, 221 W.Va. at 460, 655 S.E.2d at 206. When first charged, Mr. Powell, a high school teacher at Moorefield High School, immediately informed the Hardy County Superintendent of Schools. Powell I, 221 W.Va. at 460, 655 S.E.2d at 206. He also promptly advised his high school principle of the charges brought against him. Powell I, 221 W.Va. at 460, 655 S.E.2d at 206.

On October 15, 2004, after learning of the pending felony charge, the Hardy County Superintendent of Schools suspended Mr. Powell, with pay, pending an investigation by the school district. Powell I, 221 W.Va. at 460, 655 S.E.2d at 206. At the time of his suspension, Mr. Powell had a "continuing contract" with the Board of Education, within the meaning of W.Va. Code §18A-2-2(c). Once Mr. Powell pled guilty to the misdemeanor offense<sup>2</sup>, the County

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<sup>2</sup>With respect to these charges, it is apparent that on one occasion, Mr. Powell exhibited "poor judgment and a loss of control in dealing with his youngest son." Powell I, 221 W.Va. at 465, 655 S.E.2d at 211. Nonetheless, as noted by the majority opinion in Powell I, Mr. Powell "exhibited a great deal of commitment to his family." He complied with every request made by DHHR, including those involving various types of counseling and anger management instruction,

Superintendent converted the suspension to one without pay. Powell I, 221 W.Va. At 460, 655 S.E.2d at 206. Thereafter, the County Superintendent forwarded a disciplinary recommendation to the Hardy County Board of Education in which he called for Mr. Powell's discharge from his teaching position. Powell I, 221 W.Va. at 460, 655 S.E.2d at 206.

After a §18A-2-8(c) Level III (§18-29-4(c)) hearing, the Board did not adopt the County Superintendent's recommended discipline of discharge. Instead, on November 18, 2004, the Board developed its own disciplinary plan and ordered that Mr. Powell should remain suspended until evaluated by a psychiatrist so as to ascertain whether he would prove a danger to any county school children. In addition, he was to remain suspended until at least, January 1, 2005. Powell I, 221 W.Va. at 461, 655 S.E.2d at 207. Mr. Powell grieved the Hardy County Board of Education decision to Level IV, on November 23, 2004. *See* Response Memorandum in Support of Entry of Petitioner's Order, Ex A.

While his grievance was pending, Mr. Powell was evaluated by a psychiatrist chosen by the Hardy County Board of Education. Powell I, 221 W.Va. at 461-462, 655 S.E.2d at 207-208.

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in order to have his family reunited. He entered the plea agreement so that he could have all of the children returned to their home as soon as possible. As a result of his cooperation, the children were all returned to the family unit roughly within two months of the corporal punishment incident. Moreover, both parents took initiative to start counseling even before an improvement plan was put into place. Mr. Powell accepted his punishment. Simply put, Mr. Powell complied with all redemptive measures established in our society to rehabilitate his behavior. Powell I, 221 W.Va. at 465, 655 S.E.2d at 211.

After review of the psychiatrist's report, the Board returned Mr. Powell to his classroom duties, on January 12, 2005. Powell I, 221 W.Va. at 461, 655 S.E.2d at 207.<sup>3</sup> Accordingly, Mr. Powell returned to teaching, under his §18A-2-2(c) "continuing contract," on January 12, 2005.

After he returned to his teaching position the Administrative Law Judge assigned to hear his Level IV grievance, upheld the Hardy County School Board's November 18, 2004 suspension order. This decision was rendered on April 4, 2005. *See* Response Memorandum in Support of Entry of Petitioner's Order, Ex A. & Ex B. As he had already returned to work, Mr. Powell did not appeal the short, completed, three month suspension upheld by the Administrative Law Judge.

Mr. Powell, would, however, be required to traverse yet a second layer of the West Virginia Department of Education administrative disciplinary process in which the validity of his continuing contract with the Hardy County Board of Education might be called into question. As mandated by §18A-3-6, the Hardy County Superintendent notified the Appellee/Respondent Paine, State Superintendent of Schools, of the Hardy County School Board's disciplinary actions against Mr. Powell. Powell I, 221 W.Va. at 461, 655 S.E.2d at 207. Subsequently, in or about April 2005, the West Virginia Department of Education began an investigation into whether Mr. Powell might be further disciplined through revocation or suspension of his certification to teach. In connection with this investigation, Mr. Powell was interviewed by a representative of the Department of Education, on April 21, 2005. *See* DOE Exhibit 14. During the course of this interview, Mr. Powell was advised by the investigator that the investigator was not charged with

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<sup>3</sup>Mr. Powell was actually reinstated effective January 11, 2004 by letter from the Hardy County Superintendent of Schools, dated January 13, 2005.

the responsibility of determining whether his teaching certificates might be revoked. Instead, his only obligation was to collect materials for submission in a legal meeting, at which time a determination would be made as to whether (or not) there might be a recommendation issued to the Respondent Paine for revocation. *See* DOE Exhibit 14, at 29.

On October 6, 2005, the Respondent Paine issued a “Notice of Proceeding Against Certification.” Powell I, 221 W.Va. at 461, 655 S.E.2d at 207. Through this “Notice” the Respondent Paine sought to “pile on” “additional penalties” against Mr. Powell not imposed by the Hardy County Board of Education. *See* Powell I, 221 W.Va. at 466, 655 S.E.2d at 212 (Starcher concurring).

A hearing before the “Professional Practices Panel” (PPP) concerning the “Notice of Proceeding” was held on October 25, 2005. At the close of the hearing, the PPP “announc[ed] its decision to recommend suspension of [Mr. Powell’s] license to teach for four years.” Powell I, 422 W.Va. at 461, 655 S.E.2d at 207. The PPP’s written Recommended Decision to discipline Mr. Powell by suspending his license (certification) to teach for four years, however, was not submitted to the Respondent Paine until December 5, 2005. Nonetheless, the PPP’s October 25, 2005 announcement must have been communicated to the Superintendent of the Hardy County Schools for shortly thereafter, on November 9, 2005, the Superintendent suspended Mr. Powell, without pay, for the sole reason that Mr. Powell would no longer hold a valid West Virginia Teachers License.

Thereafter, the Respondent adopted the PPP’s Recommended Decision for further discipline, by Order dated December 9, 2005. In the December 9, 2005 Order the Respondent Paine effectuated the suspension of Mr. Powell’s license to teach effective immediately (the

Respondent is further **ORDERED** to cause his teaching certificates to be immediately returned to the West Virginia Department of Education). At a Special Board Meeting held on January 3, 2006, the Hardy County Board of Education dismissed Mr. Powell. The sole rationale for dismissal was that Mr. Powell was not licensed to teach in West Virginia.

### III.

#### **PROCEEDINGS BEFORE THE CIRCUIT COURT AND THIS HONORABLE COURT**

Mr. Powell timely appealed the suspension of his license to teach to the Circuit Court of Kanawha County, on January 6, 2006. In his Petition, Mr. Powell requested that: (1) his license be reinstated *nunc pro tunc*; (2) in conformance with the provisions of W.Va. Code §18-29-8, that he be awarded attorneys fees and costs; and, (3) in conformance with the language of W.Va. Code §18-29-5, that he be awarded any other form of relief the Court deems “fair and equitable.” Petition, ¶49. By Order dated May 26, 2006, the Respondent’s decision to discipline Mr. Powell via suspension of his license was affirmed by the circuit court. An appeal to this Court followed. By decision rendered November 21, 2007, this Court reversed the circuit court’s affirmance and remanded the case to the circuit court for “reinstatement of [Mr. Powell’s] teaching license.” Powell I, 655 S.E.2d at 211. As a consequence, the November 18, 2004 disciplinary decision (never judicially appealed), which the Respondent Paine sought to alter, must necessarily be reinstated. *See Powell I*, 655 S.E.2d at 213 (Benjamin concurring) (the punishment set by the county board of education therefore should be reinstated).

As the circuit court had yet to enter an order effectuating this Court’s remand Order, on April 25, 2008, Mr. Powell submitted a proposed order to the circuit court. This order, in keeping with the prayer for relief of his Petition, would return the *status quo* of the terms of Mr.

Powell's "continuing contract" which was interrupted by the unlawful suspension of his teaching license, on December 9, 2005. In addition, the proposed order would provide for payment of attorney fees incurred by Mr. Powell in connection with his successful appeal of the adverse administrative decision.

On April 28, 2008, the Respondent Paine moved the circuit court to deny the proposed order. In support of the motion only two grounds were asserted: (1) the West Virginia Administrative Procedures Act (APA) does not contain a provision for the award of attorney's fees;<sup>4</sup> and, (2) the Respondent Paine is not the petitioner's employer.

Mr. Powell responded to the specific grounds raised in the Respondent Paine's motion in a memorandum, filed June 23, 2008. *See* Response Memorandum in Support of Entry of Petitioner's Proposed Order. In this memorandum, Mr. Powell explained that: (1) because the APA is nothing save a compendium of procedural rules, the substantive remedy law of West Virginia Code Chapters 18 and 18A governed the relief requested by Mr. Powell's petition; and, (2) the fact that the Respondent Paine did not directly employ Mr. Powell was of no moment because the administrative remedies available to aggrieved education employees, under W.Va. Code §§18-29-5 and 8, include the "back pay" and attorneys fees sought by Mr. Powell in his Petition.

On July 27, 2008 the Respondent Paine filed his reply in further support of his motion. *See* Respondent's Response to Response Memorandum in Support of Entry of Petitioner's Proposed Order. In this reply memorandum, the Respondent reasserted his arguments that: (1) he

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<sup>4</sup>Respondent avers in his motion that Mr. Powell never requested attorney's fees. Respondent's Motion, ¶3. This averment is not supported by the procedural history of this case as Paragraph 49 of Mr. Powell's Petition unequivocally seeks attorney's fees.

did not employ Mr. Powell, therefore, the relief requested by the Petition was not available; and, (2) the APA does not provide for relief in the form of attorney's fees. However, the Respondent also raised, **for the first time in reply**, the defense of sovereign immunity, attaching the 2007 Comprehensive Liability Policy providing coverage to the Respondent (rather than the relevant 2005 policy) and additionally argued that pursuant to Frazier & Oxley II the relief requested by Mr. Powell's Petition exceeded the mandate of this Court in Powell I.

Thereafter, without benefit of oral argument, and by Order entered September 17, 2008, the circuit court adopted the Frazier & Oxley II argument belatedly asserted by the Respondent and held that it might not enter Mr. Powell's proposed order because the relief requested by the order was beyond the scope of this Court's remand order in Powell I. The circuit court so held because it found the Powell I remand order to be "clearly limited in scope," within the meaning of Frazier & Oxley II. Notably, the circuit court made no findings of fact or conclusions of law regarding any of the remaining arguments asserted by the Respondent Paine in opposition to entry of the proposed order submitted by Mr. Powell.

Mr. Powell timely filed a Petition for Appeal seeking this Court's review of the circuit court's final Order denying the relief requested by his Petition. The Petition raised a single issue on review, whether the circuit court erred, as a matter of law, when it held that it might not enter the proposed order, which would have granted to Mr. Powell the relief specifically requested by the Petition, because the Powell I mandate was "clearly limited in scope" within the meaning of Frazier & Oxley II.

In his Response to the Petition, the Respondent Paine went beyond the single issue raised therein and reargued all of those issues asserted below, in addition to the Frazier & Oxley II, argument, even though they were not addressed by the circuit court's order that is the subject of Mr. Powell's appeal. This Court granted Mr. Powell's Petition for Appeal. Mr. Powell now timely submits his brief in support of his appeal.

## II.

### POINTS AND AUTHORITIES

#### A. Standard of Review

A circuit court's interpretation of a mandate of the Supreme Court of Appeals of West Virginia as well as whether the circuit court complied with such mandate are questions of law. Therefore, the standard of review is *de novo*. Syl pt. 4, Frazier & Oxley II, 214 W.Va. at 805, 591 S.E.2d at 731.

#### B. Authority

When the case is returned to the lower court after issuance of an appellate decision, it is necessarily remanded "for such proceedings as may be appropriate." Frazier & Oxley II, 214 W.Va. at 808, n.6, 591 S.E.2d at 734, n. 6.

In the absence of explicit instructions, a remand order is presumptively general." Frazier & Oxley II, 214 W.Va. at 809, 591 S.E.2d at 735.

The corollary of "the proposition that a trial court must adhere to the decision and mandate of an appellate court" is the rule "that upon remand [the trial court] may consider, as a matter of first impression, those issues not expressly or implicitly disposed of by the appellate decision [citations omitted]. As such, "a trial court is . . . free to make any order or direction in

further progress of the case, not inconsistent with the decision of the appellate court, as to any question not settled by the decision.” Bankers Trust Company v. Bethlehem Steel Corporation, 761 F.2d 943, 950 (3<sup>rd</sup> Cir. 1985).

Hearing examiners may consolidate grievances, allocate costs among the parties in accordance with section eight of this article, subpoena witnesses and documents in accordance with the provisions of section one, article five, chapter twenty-nine-a of this code, provide relief found *fair and equitable* in accordance with the provisions of this article, and exercise other powers as provides for the effective resolution of grievances not inconsistent with any rules of the board or the provisions of this article. W.Va. Code §18-29-5(b) [1998] (emphasis added).

By providing for “fair and equitable” relief to education employees “the Legislature intended to give the examiners who hear the grievances the power to fashion any relief they deem necessary *to remedy wrongs done to educational employees by state agencies*” Graf v. West Virginia University, 189 W.Va. 214, 429 S.E.2d 496 (1992)(Graf I) (emphasis added).

In the event an employee or employer appeals an adverse level four decision to the circuit court or an adverse circuit court decision to the supreme court, and the employee substantially prevails upon such appeal, the employee, or the organization representing the employee is entitled to recover court costs and reasonable attorney fees, to be set by the court, from the employer. W.Va. Code §18-29-8.

Statutes relating to the same subject matter, whether enacted at the same time or a different times, and regardless of whether the later statute refers to the former statute *are to be read and applied together as a single statute* the parts of which had been enacted at the same

time. Syl pt. 5, Ewing. v The Board of Education of the County of Summers, 202 W.Va. 228, 503 S.E.2d 541 (1998) (emphasis added).

Where the State or a direct governmental agency thereof institutes an action at law or a notice of motion for judgment proceeding against a citizen, Article VI, Section 35, of the West Virginia Constitution, furnishes no defense to a counterclaim growing out of the same transaction as the claim pleaded. Syl pt. 2, State v Ruthbell Coal Co., 133 W.Va. 319 56 S.E.2d 549 (1949).

In certain instances a suit may be maintained against a State Official in his individual capacity, notwithstanding the constitutional immunity provision found in Article VI, Section 35 of the West Virginia Constitution, where the relief sought involves a prospective declaration of the parties' rights. However, where the relief sought involves an attempt to obtain a retroactive monetary recovery against the official based on his prior acts and which recovery is payable from State funds, the constitutional immunity provision bars such relief. Syl pt. 1, Gribben v. Kirk, 195 W.Va. 488, 466 S.E.2d 147 (1995).

The crucial date for drawing a line between prospective and retroactive relief should be the initiation of the relevant mandamus action and not the date of judgment. Syl pt. 3, Gribben, 195 W.Va. at 490, 466 S.E.2d at 149.

W.Va. Code, 29-12-5(a), provides an exception for the State's constitutional immunity found in Section 35 of Article VI of the West Virginia Constitution. It requires the State Board of Risk and Insurance Management to purchase a contract for insurance and requires that such insurance 'shall provide that the insurer shall be barred and estopped from relying upon the constitutional immunity of the State of West Virginia against a claims or suits. Syl pt., 9, Shaffer v. Stanley, 215 W.Va. 58, 593 S.E.2d 629 (2003).

V.

ARGUMENT

**A. The Prayer for Relief in the Petition Appealing the Respondent's Order, as Filed in the Circuit Court, Includes Both "Back Pay" and Attorney's Fees and Such Relief is Available to Mr. Powell, Pursuant to W.Va. Code §§18-29-5(b) and 8.**

Paragraph 49 of the Petition filed in the circuit court, by Mr. Powell, seeks the following relief:

Wherefore, Petitioner requests:

- a. That the decision of the State Superintendent of Schools be reversed and the license of the Petitioner re (sic) [be] reinstated nunc pro tunc.
- b. Attorneys fees and costs; and
- c. Any other form of relief the Court deems fair and equitable.

Petition Below, 16, ¶49. Subparagraph "b" expressly requests that Mr. Powell be awarded attorneys fees. Moreover, subparagraph "c" of this prayer for relief employs the phrase "fair and equitable relief." In the context of education employment law, this phrase is a term of art which includes administrative relief in the form of "back pay." The genesis of this term of art is W.Va. Code 18-29-5 (1998)<sup>5</sup>:

Hearing examiners may consolidate grievances, allocate costs among the parties in accordance with section eight of this article, subpoena witnesses and documents in accordance with the provisions of section one, article five, chapter twenty-nine-a of this code, provide relief found *fair and equitable* in accordance with the provisions of this article, and exercise other powers as provides for the effective resolution of grievances not inconsistent with any rules of the board or the provisions of this article.

W.Va. Code §18-29-5(b) [1998] (emphasis added). This Court has construed the term "fair and

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<sup>5</sup>W.Va. Code §§18-29-1 *et seq.* was repealed by the Legislature and replaced by W.Va. Code §§6C-3-1 *et seq.* effective March 7, 2007. However, as Mr. Powell's appeal of the Respondent Paine's administrative decision commenced on January 6, 2006, the former statutory provisions govern.

equitable,” as affording a broad range of relief to education employees adversely affected by administrative agency decisions.

In Graf v. West Virginia University, 189 W.Va. 214, 429 S.E.2d 496 (1992)(Graf I) the Court examined the legislative intent for providing “fair and equitable” relief to education employees and found that “the Legislature intended to give the examiners who hear the grievances the power to fashion any relief they deem necessary *to remedy wrongs done to educational employees by state agencies*”<sup>6</sup> Graf I, 189 W.Va. at 221, 429 S.E.2d at 503 (emphasis added). Accordingly, the Graf I Court held, pursuant to §18-29-5(b), that “fair and equitable” administrative relief embraced lost wages not only from the agency employer but from a non-agency moonlighting job which the education employee was wrongfully prevented from performing by an administrative agency decision prohibiting such moonlighting. Graf, 189 W.Va. at 221, 429 S.E.2d at 503. Accordingly, the state agency was required to pay the education employee all those lost wages he would have earned from his non-agency moonlighting employment but for the agency’s wrongful denial of the opportunity to do so.

Given the holding and reasoning of Graf I, it is apparent that the term, “fair and equitable” administrative relief, must necessarily include “back pay” lost by an education

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<sup>6</sup>The Graf Court examined an earlier version of the statute. However, the 1998 version of the statute does not differ substantively from the 1992 statutory version directly at issue in Graf. Hearing examiners are hereby authorized and shall have the power to consolidate grievances, allocate costs among the parties in accordance with section eight [§ 18-29-8] of this article, subpoena witnesses and documents in accordance with the provisions of section one [§ 29A-5-1], article five, chapter twenty-nine-a of this code, provide such relief as is deemed fair and equitable in accordance with the provisions of this article, and such other powers as will provide for the effective resolution of grievances not inconsistent with any rules or regulations of the board or the provisions of this article.  
W.Va. Code §18-29-5(b) [1992]

employee because of the wrongful administrative decision of a state agency. *See e.g., University of West Virginia Board of Trustees v. Graf*, 205 W.Va. 118, 124, 516 S.E.2d 741, 747 (1998) (Graf II) (*per curiam*). Therefore, it is equally apparent that the Petition includes a request for prospective administrative relief in the form of “back pay,” such as that included within the proposed order, at issue, in the administrative appeal successfully pursued by Mr. Powell.

Similarly, the Education and State Employee Grievance Act provides for the payment of reasonable attorneys fees to a prevailing employee:

In the event an employee or employer appeals an adverse level four decision to the circuit court or an adverse circuit court decision to the supreme court, and the employee substantially prevails upon such appeal, the employee, or the organization representing the employee is entitled to recover court costs and reasonable attorney fees, to be set by the court, from the employer.

W.Va. Code §18-29-8. Thus, pursuant to express statutory language, an education employee is entitled to costs and reasonable attorney fees in the event that he substantially prevails in an administrative appeal to this Court. In this case, Mr. Powell prevailed in his challenge to the December 9, 2005 administrative decision of the Respondent Paine before this Court. *See Powell I*, 221 W.Va. at 211, 655 S.E.2d at 465. Therefore, he is entitled to the attorneys fees requested by his Petition, pursuant to §18-29-8.

Despite the clear statutory allowance for the administrative relief requested by his Petition, in connection with his successful administrative appeal, the Respondent Paine argues that because he did not directly employ Mr. Powell and only indirectly occasioned his dismissal through the wrongful revocation of his license (certificates) to teach, the administrative relief afforded education employees, pursuant to §18-29-5(b) and 8, is not available to Mr. Powell. In making this argument the Respondent Paine, in error, ignores a well settled statutory

rule which this Court has specifically applied to Chapters 18A and 18.

In Ewing. v The Board of Education of the County of Summers, 202 W.Va. 228, 503 S.E.2d 541 (1998) this Court explored the interrelatedness of Chapters 18 and 18A and determined that the two West Virginia Code Chapters should be read in *pari materia*, as a single statute because the two statutes relate to the same subject matter.

Statutes relating to the same subject matter, whether enacted at the same time or a different times, and regardless of whether the later statute refers to the former statute ***are to be read and applied together as a single statute*** the parts of which had been enacted at the same time.

Syl pt. 5, Ewing, 202 W.Va. at 230, 503 S.E.2d at 543 (emphasis added). Applying this maxim in Ewing, the Court concluded that an education employee who is adversely affected by an administrative decision under §18A-4-7a may seek relief through the educational employee's grievance procedures of §§18-29-1 to 18-29-11; Ewing, 202 W.Va. at 239, 503 S.E.2d at 552. (emphasis added); *see also* Smith v Siders, 155 W.Va. 193, 201, 183 S.E.2d 433, 437 (1971) (Chapters 18 and 18A relate to public schools, county boards of education, personnel employed by such boards and other related matters and therefore are read in *pari materia*).

Thus, because Chapters 18A and 18 must be read and applied together as a single statute it is pellucid that the administrative remedies of §§18-29-5(b) and 8, are available to employees who successfully challenge an adverse administrative decision instituted against them, without regard to whether that decision was rendered pursuant to a provision of Chapter 18A or Chapter 18.

In the case *sub judice*, the Respondent Paine instituted an administrative action against Mr. Powell, pursuant to §18A-3-6. Mr. Powell administratively appealed that action, by Petition,

to the circuit court of Kanawha County. In so doing he invoked protections accorded him under the educational employee's grievance procedures of §§18-29-1 to 18-29-11 in the Petition's prayer for relief. In particular, as with any other adverse administrative decision, Mr. Powell properly invoked the relief accorded educational employees under §§18-29-5(b) and 8 through his request for "fair and equitable" relief and attorneys fees.<sup>7</sup> Thus, in keeping with both Graf I and Ewing, he is eligible for the relief requested in the Petition's prayer and he should be awarded both "back pay" and attorneys fees because he successfully appealed the wrongful administrative action taken against him.

Respondent Paine also avers in response to the Petition filed in this Court that Mr. Powell erred procedurally because he did not seek a §29A-5-4 stay of the December 9, 2005 Order revoking his license nor did he grieve his termination by the Hardy County Board of Education occasioned solely by the license revocation. Initially, as the December 9, 2005 Order was effective immediately, a stay could not have served any purpose. This holds true because a stay "does not reverse, annul, undo, or suspend what already had been done." *See* BLACK'S LAW DICTIONARY (6<sup>th</sup> ed) 1413. Accordingly, a stay could not reinstate his license. Furthermore, even assuming a stay might undo that which already had been done, it is unlikely that an

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<sup>7</sup>After careful review of the record as a whole, it is apparent from the financial documents in said records that prior counsel requested back pay and all fees before the grievance board. The first opportunity for administrative appeal in relation to license revocation was the Petition for Appeal filed in the Kanawha County Circuit Court. In that Petition, Mr. Powell requested all "fair and equitable" relief, pursuant to W. Va. Code §18-29-5 and attorneys fees, pursuant to W. Va. Code §18-29-8.

employer board of education, whether current or prospective, would be unwilling to permit Mr. Powell to teach knowing that his license had been suspended and that he continued to retain said license only because he could technically do so pending an appeal.

As for an administrative appeal of his termination by the Hardy County Board of education, this begs the question of what non-frivolous grounds might be mounted in the context of such a grievance. The sole reason given for Mr. Powell's termination by the Hardy County Board of Education was the revocation of his license to teach for four years. It is beyond dispute that Mr. Powell's license to teach was indeed revoked. Accordingly, any such grievance would have been pursued for an improper purpose as Mr. Powell might not teach while his license was revoked. Furthermore, it is disingenuous for the Petitioner Paine to assert that the Hardy County Board of Education should be held responsible for the wrongful revocation of Mr. Powell's teaching license as the Board Members took no part in that wrongful administrative decision. In truth, the Board Members continued Mr. Powell's employment on the basis of the very same evidence that the Respondent Paine erroneously invoked to wrongfully effectuate the adverse administrative decision to revoke Mr. Powell's license to teach.

The foregoing demonstrates that Mr. Powell pursued the proper procedural course in his appeal of the Respondent Paine's wrongful administrative decision revoking his license to teach. Therefore, notwithstanding the arguments made in Response to his Petition, this Court should remand this case to the circuit court with instructions to enter an order granting Mr. Powell all "fair and equitable" relief, as well as, all reasonable attorney's fees and court costs incurred in the prosecution of his appeal, pursuant to §§18-29-5(b) and 8.

**B. The Circuit Court Erred, as a Matter of Law, When it Applied the Exceptional Limited Holding of Frazier & Oxley II to the General Mandate of Powell I, and Thereby Refused to Consider the Administrative Relief Specifically Pled in Mr. Powell's Petition.**

“The mandate of an appellate court is its order formally advising the lower court of its decision” Frazier & Oxley II, 214 W.Va. at 808, n.6, 591 S.E.2d at 734, n. 6 (citations omitted). Accordingly, issuance of the mandate marks the end of appellate jurisdiction. Frazier & Oxley II, 214 W.Va. at 808, n.6, 591 S.E.2d at 734, n. 6 (citations omitted). As a consequence, when the case is returned to the lower court after issuance of an appellate decision, it is necessarily remanded “for such proceedings as may be appropriate.” Frazier & Oxley II, 214 W.Va. at 808, n.6, 591 S.E.2d at 734, n. 6 (citations omitted). Thus, the corollary of “the proposition that a trial court must adhere to the decision and mandate of an appellate court” is the rule “that upon remand [the trial court] may consider, as a matter of first impression, those issues not expressly or implicitly disposed of by the appellate decision [citations omitted]. As such, “a trial court is . . . free to make any order or direction in further progress of the case, not inconsistent with the decision of the appellate court, as to any question not settled by the decision.” Bankers Trust Company v. Bethlehem Steel Corporation, 761 F.2d 943, 950 (3<sup>rd</sup> Cir. 1985) *citing* Quern v. Jordan, 440 U.S. 332, 347 n. 18 (1979); Sprague v. Ticonic National Bank, 307 U.S. 161, 168 (1939); United States ex rel. Johnson, 531 F.2d 169, 172 (3d Cir.1976); Piambino v. Bailey, 757 F.2d 1112, 1120 (11th Cir.1985); Stevens v. F/V Bonnie Doon, 731 F.2d 1433, 1435 (9th Cir.1984).; Beltran v. Myers, 701 F.2d 91, 93 (9th Cir.1983) cert. denied sub. nom. Rank v. Beltran, 462 U.S. 1134 (1983); United States v. Cirami, 563 F.2d 26, 33 (2d Cir.1977) on

remand 92 F.R.D. 483. In other words, “while a mandate is controlling as to matters within its compass [scope], on the remand a lower court is free as to other issues.” Quern, 440 U.S. at 347, n. 18.

A trial court interpreting a mandate so as to ascertain its scope, “must look to the entire mandate, examining every part of the opinion to determine if a remand is general or limited, as ‘[t]he relevant language could appear anywhere in an opinion or order, including a designated paragraph or section, or certain key identifiable language.’” Frazier & Oxley II, 214 W.Va. at 809, 591 S.E.2d at 735. Furthermore, “in determining the scope of an appellate mandate, the majority, concurring, and dissenting opinions may be consulted.” Jones v. Lewis, 957 F.2d 260, 262 (6<sup>th</sup> Cir. 1992). Moreover, in the absence of explicit instructions, a remand order is presumptively general. Frazier & Oxley II, 214 W.Va. at 809, 591 S.E.2d at 735.

In Frazier & Oxley I, this Court addressed a petition for a writ of prohibition presented in an exceptionally unusual factual and procedural context. In that case, only one claim was brought against the Petitioner, Frazier & Oxley, concerning whether the end of a prime lease agreement between a lessor and lessee terminated a Frazier & Oxley sublease. Frazier & Oxley II, 214 W.Va. at 817, 591 S.E.2d at 743 (Maynard concurring). When the matter was brought before the Court, the Respondent lessor as remainder man “emphasized the need to rapidly resolve [the case]” because it was receiving what it believed to be below market rent from the sublease. Frazier & Oxley II, 214 W.Va. at 817, 591 S.E.2d at 743 (Maynard concurring).

Because of this plea for rapid resolution of the controversy, this Court, broke with its usual practice of not imposing limits on trial courts outside the context of the specific issue upon which a writ is granted. Frazier & Oxley II, 214 W.Va. at 809, 591 S.E.2d at 735, n. 9.

Accordingly, “even though [this court] issued a prohibition against [the circuit court’s] grant of partial summary judgment” to the lessor, it nonetheless issued a limited mandate for the sole “purpose of ‘a factual determination of whether a surrender of the prime lease occurred.’” Frazier & Oxley II, 214 W.Va. at 817, 591 S.E.2d at 743 (Maynard concurring). Despite the clearly limited mandate of Frazier & Oxley I, in the companion opinion, the Court was careful to warn both bench and bar that future more general applications of the holding ought be the exception rather than the rule:

We realize that, as a general matter, when we issue writs we do not typically impose limits on the trial courts outside the context of the specific issue upon which the writ was granted. However, in Frazier & Oxley I, the parties presented the case to this Court in a way that required us to go beyond the narrow issue presented in prohibition to decide the case. Stated simply, any remand issued by this Court in a prohibition action *will ordinarily be a general remand*.

Frazier & Oxley II, 214 W.Va. at 809, 591 S.E.2d at 735, n. 9 (emphasis added). In his concurrence, Justice Maynard, the author of Frazier & Oxley I, echoed the majority’s warning: “no one should take the majority opinion in *Frazier & Oxley II* out of the factual and procedural context of Frazier & Oxley I.” Frazier & Oxley II, 214 W.Va. at 817, 591 S.E.2d at 743 (Maynard concurring).

No such exceptional factual and procedural context was present in Powell I. Accordingly, the circuit court erroneously relied upon Frazier & Oxley II to foreclose consideration of relief specifically requested by Mr. Powell in his original Petition to the circuit court.

In Powell I, the issue raised on appeal was whether the circuit court erred by finding that the West Virginia Department of Education’s disciplinary decision to suspend Mr. Powell’s

teaching license, for four years, comported with the legislatively prescribed prerequisites for such suspension, as set forth in West Virginia Code §18A-3-6. Powell I, 221 W.Va. at 462, 655 S.E.2d at 208. This Court, after carefully parsing the statute at issue, as well as reviewing relevant precedent, established under W.Va. Code §18A-2-8, determined that the State Department of Education, through the Superintendent (Respondent herein), might not lawfully revoke or suspend a teacher's license "when a county board of education has disciplined but not dismissed an employee for certain misconduct *unless* the misconduct is shown by clear and convincing evidence to render the person unfit to teach." Powell I, 221 W.Va. at 463, 655 S.E.2d at 209 (emphasis in original). And further, as the employee misconduct, at issue, was performed outside the context of the teaching job, that there be a rational nexus between that misconduct and fitness to teach. Powell I, 221 W.Va. at 463-464, 655 S.E.2d at 209-210.

Upon establishing the applicable legal standard, this Court applied the law to the case. After so doing, the Court was left "with the definite and firm conviction that a mistake had been made in suspending [Mr. Powell's] license to teach" as "specificity was woefully lacking in the findings submitted as support of the suspension decision." Powell I, 221 W.Va. at 464, 655 S.E.2d at 210. The findings were woefully lacking because they "did not satisfy the plain meaning of the license revocation statute with regard to establishing a rational nexus." Powell I, 221 W.Va. at 464, 655 S.E.2d at 210. The Court so found because the State Department of Education, through its Superintendent, did not state how the misconduct, at issue, "will or even may be anticipated to affect [Mr. Powell's] performance of his school job." Powell I, 221 W.Va. at 464, 655 S.E.2d at 210.

Of particular significance to the instant appeal, this Court summed up its findings as follows: “this Court believes that the four-year suspension in this case is not supported by clear and convincing evidence, is the result of a fundamental misapplication of the law governing revocation and suspension of teaching licenses, is clearly wrong in light of the ‘reliable, probative and substantial evidence’ and represents the unwarranted exercise of discretion of the State Superintendent of Schools. W.Va. Code §29A-5-4(g).” Powell I, 221 W.Va. at 465, 655 S.E.2d at 211. Accordingly, this Court reversed the circuit court’s order which had erroneously affirmed the State Department of Education’s administrative disciplinary decision to revoke Mr. Powell’s teaching certificates. Therefore, Powell I was remanded to the circuit court for reinstatement of Mr. Powell’s teaching license. Powell I, 221 W.Va. at 464, 655 S.E.2d at 210.

As noted, *supra*, Mr. Powell’s petition appealing the Department of Education’s administrative decision to the circuit court was not restricted solely to a request for a determination as to whether the agency decision revoking his license was in error. To the contrary, the original Petition sought reinstatement of his license with retroactive effect (*nunc pro tunc*) as well as all fair and equitable relief. Accordingly, the relief sought by the original Petition was a return to the pre-deprivation *status quo* of Mr. Powell’s §18A-2-2(c) “continuing contract.” In addition, the original Petition to the circuit court sought reasonable attorney’s fees and costs incurred on appeal.

Before the appeal in Powell I was filed, the circuit court never considered to what relief Mr. Powell might be entitled as a consequence of the unlawful revocation of his teaching license. The circuit court did not reach issues of relief asserted by the original Petition because it erroneously upheld the unlawful Department of Education license revocation. Consequently,

significant factual and legal issues specifically raised within the original Petition were neither embraced nor even considered by the Powell I Court in its mandate. As a result, the relief sought by the original petition remains a matter of “first impression,” neither expressly or implicitly disposed of by the Powell I decision. *See Bankers Trust*, 761 F.2d at 950. Thus, contrary to the circuit court’s holding *sub judice*, it was free to consider and make any “order or direction in further progress of the case” upon remand which might be associated with the original Petition’s prayer for relief. *See Bankers Trust*, 761 F.2d at 950.

In its September 17, 2008 Order, the circuit court fails to identify any language or explicit instruction of the Powell I opinion which might arguably distinguish it from the expected category of presumptively general mandates. *See Frazier & Oxley II*, 214 W.Va. at 809, 591 S.E.2d at 735. Nor does the circuit court endeavor to explain how administrative remedy issues upon which it never issued a ruling before appeal and upon which this Court never rendered an opinion are barred, *ab initio*, by the Powell I mandate. *See Frazier & Oxley II*, 214 W.Va. at 809, 591 S.E.2d at 735 (the trial court must look to the entire mandate and examine every part of the opinion to determine if a remand is general or limited). Instead, without discussion or explanation, the circuit court simply declares that the mandate it received from this Court in Powell I “is clearly limited in scope.” The circuit court’s opinion as to the scope of the Powell I mandate is not supported by an examination of the opinion.

Initially, the majority opinion in Powell I determined that the Respondent’s decision to revoke Mr. Powell’s license resulted from “a fundamental misapplication of the law governing revocation and suspension of teaching licenses, is clearly wrong in light of the ‘reliable, probative and substantial evidence’ and represents the unwarranted exercise of discretion of the

State Superintendent of Schools.” Powell I, 221 W.Va. at 465, 655 S.E.2d at 211. As a direct result of this “unwarranted exercise of discretion” the Department of Education, through its Superintendent of Schools arbitrarily deprived Mr. Powell of the benefit of a constitutionally protected property interest in his §18A-2-2(c) “continuing contract.” *See generally*, Syl pt., 3 Waite v. Civil Service Commission, 161 W.Va. 154, 241 S.E.2d 164 (1978).

Accordingly, if this Court’s Powell I, mandate were so narrow as to foreclose the circuit court from considering the relief requested by his original petition, there would be inadequate procedural safeguards to protect against the erroneous and unjust deprivation to which Mr. Powell was subjected as there would be no means available to correct the same through a return to the pre-deprivation *status quo*, despite the clear remedies available under the Educational Employees Grievance Process. Such an unwarranted and unfair result would fly in the face of this Court’s “long held principle” that “a teacher may not be lightly shorn of the privileges for which he or she fairly contacted.” Trimble v West Virginia Board of Directors, 209 W.Va. 420, 431, 549 S.E.2d 294, 305 (2001) *citing* Fox v Board of Ed. of Doddridge County, 160 W.Va. 668, 672, 236 S.E.2d 243, 246 (1977). Thus, it is not only consistent with Powell I for the circuit court to consider the relief requested by Mr. Powell’s original Petition, it is indeed a manifest result of this Court’s finding that disciplining Mr. Powell by revocation of his license to teach was an “unwarranted exercise of discretion” by the respondent Superintendent of Schools.

Further support for the conclusion that the circuit court was free to consider the relief requested by Mr. Powell in his original Petition after remand is found in Justice Benjamin’s Powell I concurrence. *See* Jones, 957 F.2d at 262 (in determining the scope of a mandate, the majority, concurring, and dissenting opinions may be consulted). In his concurrence, Justice

Benjamin concluded that “the punishment set by the county board of education therefore should be reinstated.” Powell I, 221 W.Va. at 467, 655 S.E.2d at 213 (Benjamin concurring).

Reinstatement of the punishment set by the county board of education would necessarily result in a return of Mr. Powell to the pre-deprivation *status quo*. Under that punishment Mr. Powell returned to teaching and was afforded the full benefit of his §18A-2-2(c) “continuing contract,” on January 12, 2005. Thus, pursuant to this concurring opinion it is apparent this Court would not consider the relief sought by Mr. Powell to be inconsistent with its mandate. Therefore, the circuit court erroneously concluded that the Powell I mandate was so limited in scope as to preclude remedies specifically pled and yet never considered either prior to appeal or on appeal. Thus as, the circuit court clearly erred when it refused to consider such relief in furtherance of this Court’s mandate, upon remand the circuit court should be instructed to enter an order granting Mr. Powell all “fair and equitable” relief, as well as, all reasonable attorney’s fees and court costs incurred in the prosecution of his appeal, pursuant to §§18-29-5(b) and 8.

**C. The Administrative Relief Mr. Powell Seeks Under §§18-29-5(b) and 8 is Not Barred by Article VI Section 35 of the West Virginia Constitution Because Such relief Falls Within Two Recognized Exceptions to Sovereign Immunity.**

In response to Mr. Powell’s Petition, the Respondent Paine argues that this Court lacks jurisdiction to hear this appeal because the administrative relief requested by Mr. Powell’s Petition is barred by the State’s sovereign immunity as set fourth in Article VI, Section 35 of the West Virginia Constitution. In making this argument, the Respondent Paine ignores two firmly entrenched exceptions to the State’s invocation of that immunity. First, the Respondent Paine

ignores the rule of exception enunciated in State v Ruthbell Coal Co., 133 W.Va. 319, 56 S.E.2d 549 (1949). Second, the Respondent Paine ignores the exception to sovereign immunity established in Gribben v. Kirk, 195 W.Va. 488, 466 S.E.2d 147 (1995).

In Ruthbell Coal, the State by its Director of Unemployment Compensation sought judgment against Ruthbell Coal in the amount of \$3680.55 for contribution payments to the unemployment fund, alleged to have been delinquent. The delinquency arose because Ruthbell Coal's unemployment compensation account was erroneously charged for benefits paid to its employees by the State. In defending the action, Ruthbell Coal not only averred that the State could not collect the monies allegedly owed because erroneously charged to its account but also counterclaimed for a refund of monies paid under an erroneous contribution rate. In its counterclaim, Ruth Bell Coal sought judgment against the State in the amount of \$2,544.90. Ruthbell Coal, 133 W.Va. at 321-323, 56 S.E.2d at 551-552. In response to the counterclaim, the State asserted the defense of sovereign immunity. As reformulated by this Court the questions presented on appeal were: "(1) Did the counterclaim set forth in the amended special plea constitute a suit prohibited under the immunity clause, Article VI, Section 35, of the West Virginia Constitution; and (2) if it does not, is defendant's account not chargeable for the amount of benefits paid [under the statute]?" Ruthbell Coal, 133 W.Va. at 326, 56 S.E.2d at 553.

With respect to the questions presented this Court held that the counterclaim did not constitute a suit prohibited by the immunity clause and that Ruthbell Coal's account was illegally charged. Ruthbell Coal, 133 W.Va. at 331-332, 56 S.E.2d at 556. In holding that the counterclaim was not barred by sovereign immunity, this Court announced the following rule by syllabus point:

Where the State or a direct governmental agency thereof institutes an action at law or a notice of motion for judgment proceeding against a citizen, Article VI, Section 35, of the West Virginia Constitution, furnishes no defense to a counterclaim growing out of the same transaction as the claim pleaded.

Syl pt. 2, Ruthbell Coal, 133 W.Va. at 329, 56 S.E.2d at 550. The rationale supporting this Syllabus Point is that when “the State has instituted a suit or action against a citizen, it thereby lays aside its sovereignty and is subject to all procedural rules which govern any other party litigant.” Ruthbell Coal, 133 W.Va. at 329, 56 S.E.2d at 555. Moreover, when the State obtains an “erroneous judgment or decree in its favor, the error may be so corrected notwithstanding the provision of section 35, of article 6, of the Constitution.” Ruthbell Coal, 133 W.Va. at 330, 56 S.E.2d at 555-556. Accordingly, “by herself suing, the State subjects herself to all appropriate process to correct errors in judgments or decrees in her favor.” Ruthbell Coal, 133 W.Va. at 331, 56 S.E.2d at 556. This Court then concluded:

We think it would be unconscionable and contrary to the due process clauses contained in the Fourteenth Amendment to the Constitution of the United States, and Article III, Section 10, of the West Virginia Constitution, to permit the State, as a plaintiff, to bring a citizen into court for the purpose of asserting liability against such citizen, and then strip that citizen of all of the procedural rights and defenses which he would have if the State had not been a party plaintiff.

Ruthbell Coal, 133 W.Va. at 331, 56 S.E.2d at 556.

In the case *sub judice*, the Respondent Paine instituted an administrative action against Mr. Powell, pursuant to §18A-3-6, so as to revoke his license to teach. Mr. Powell administratively appealed that action, by Petition, to the circuit court of Kanawha County. In so doing he invoked procedural rights and defenses accorded him under the educational employee’s

grievance procedures of §§18-29-1 to 18-29-11. The administrative procedural rights and defenses asserted by Mr. Powell in his Petition arose from the same adverse administrative action taken against him – grew out of the same transaction as the claim pleaded – by the Respondent Paine.

Thus, when the Respondent Paine commenced the §18A-3-6 action against Mr. Powell he, like the Director of Unemployment Compensation in Ruthbell Coal, laid aside any claim he might have to sovereign immunity, under Art. VI, §35 of the West Virginia Constitution, and subjected himself to all of those procedural rights and defenses available to Mr. Powell under the educational employee's grievance procedures, including relief in the form of back pay, under §18-29-5(b), and attorneys fees and costs under §18-29-8. Therefore, Mr. Powell, like Ruthbell Coal Company ought be permitted to both defend against the action taken against him by the Respondent Paine and assert his claims for relief to which he is entitled under the educational employee's grievance procedures, including back pay and attorneys fees, without offense to the sovereign immunity clause.

Mr. Powell's administrative claim for back pay also satisfies the exception enunciated in Gribben. This Court held in Gribben, that the sovereign immunity doctrine stands as a bar to retroactive "back pay" relief but would not operate as a bar to an award of "back pay" which is prospective. *See* Syl pt. 1, Gribben, 195 W.Va. at 149, 466 S.E.2d at 490. The ultimate rationale supporting the Gribben exception to sovereign immunity is that there is no bar to an award of "back pay" where there has been a legislatively anticipated liability. Gribben, 195 W.Va. at 155, 466 S.E.2d at 496 (On the other hand, when a court is asked to impose retroactive liability for noncompliance with a statute where there has not been a legislatively anticipated liability . . .

Section 35 bars recovery for damages). In further discussing the rationale for the rule developed in Gribben this Court opined that Ables v. Mooney, 164 W.Va. 19, 264 S.E.2d 424 (1979) (the case on which Respondent relies in response to the Petition filed herein) “is different because of the unanticipated nature of the liability sought to be imposed.” Moreover, this Court’s discussion of awards of “back pay” in the context of civil service appeals indicates that such “unanticipated liability” is likely not present in because such appeals involve “judicial review of an administrative decision from a tribunal specifically authorized by the Legislature to resolve employee grievance and render awards for back pay.” Gribben, 195 W.Va. at 156, 466 S.E.2d at 497. Finally, in Syllabus Point 3, the Gribben Court made clear that the line of demarcation between permissible “back pay” in the form of prospective relief and impermissible retroactive relief lies in the date at which the action, at issue, was initiated. Syl pt. 3, Gribben, 195 W.Va. at 149, 466 S.E.2d at 490 (the crucial date for drawing a line between prospective and retroactive relief should be the initiation of the relevant mandamus action and not the date of judgment); *see also* Skaff v. Pridemore, 200 W.Va. 700, 705-706, 490 S.E.2d 787, 792-793 (1997) (*per curiam*) *applying* Gribben to an Education and State Employees Grievance Board award of back pay (the initiation of the appellees’ Level IV grievance board complaint on August 16, 1991 is the crucial date and conclude that pay awarded from that date is prospective and not barred any sovereign immunity) and Graff II, 205 W.Va. at 124, 516 S.E.2d at 747 (we emphasize that the interaction of constitutional immunity and back pay awards concerns a separate line of cases, the controlling factor is whether the relief sought is prospective).

In the case *sub judice*, Mr. Powell initiated his administrative appeal of the Respondent Paine's adverse administrative decision, on January 6, 2006. Accordingly, the "back pay" sought by Mr. Powell, under §18-29-5(b) after January 6, 2006, is prospective in nature and might be awarded to him in connection with his administrative appeal without fear of offending the sovereign immunity clause, pursuant to Gribben. Therefore, assuming *arguendo* that Ruthbell Coal does not apply, Mr. Powell ought nonetheless be permitted to pursue his claim for "back pay."

**D. Alternatively, Without Regard to Whether the 2007 Policy Declarations Setting Forth a Policy Period of July 1, 2007 to July 1, 2008 is the Applicable Policy for the December 9, 2005 Wrongful Act Which Constitutes the Occurrence at Issue, Assuming Arguendo There is No Coverage, Then Shaffer Establishes that the Pittsburgh Elevator Exception to Sovereign Immunity Still Applies.**

Respondent Paine attached as "Exhibit 1" to his reply memorandum, filed in the circuit court, an insurance contract issued by National Union Fire Insurance Company of Pittsburgh with an issuance date of July 7, 2007. The policy period runs from July 1, 2007 to July 1, 2008. However, the "wrongful act" which gave rise to an "occurrence" was the December 9, 2005 revocation of Mr. Powell's license to teach by the Respondent Paine. Consequently, the applicable policy period is 2005. Accordingly, it cannot be determined on the current record whether there is in fact no coverage under any applicable policy and endorsements for the December 9, 2005 occurrence, at issue. Therefore, this case should, at the very least, be remanded to the circuit court for the purpose of ascertaining whether the former policy covering the Respondent Paine for "wrongful acts" excluded the administrative relief requested by Mr. Powell's Petition.

That said, even assuming *arguendo* that there is no insurance coverage for the relief requested by Mr. Powell's Petition, the Respondent Paine is not entitled to the sovereign immunity which he claims, pursuant to Shaffer v. Stanley, 215 W.Va. 58, 593 S.E.2d 629 (2003). In Shaffer, this Court invoked Syl pt., 1, Eggleston v W.Va. Dept. Of Highways, 189 W.Va. 230, 429 S.E.2d 636 (1993).

W.Va. Code, 29-12-5(a), provides an exception for the State's constitutional immunity found in Section 35 of Article VI of the West Virginia Constitution. It requires the State Board of Risk and Insurance Management to purchase a contract for insurance and requires that such insurance 'shall provide that the insurer shall be barred and estopped from relying upon the constitutional immunity of the State of West Virginia against a claims or suits.

Syl pt., 9, Shaffer, 215 W.Va. at 61, 593 S.E.2d at 632. At issue in Shaffer was the wrongful interception of lump sum disability payments by the Child Support Enforcement (BCSE) in an attempt to recoup delinquent child support payments. However, in an action brought by the obligor father it was determined that there was instead an overpayment of child support payments made and that the obligor father was owed a refund in the amount of \$17, 855.49. The BCSE was ordered to repay the monies overpaid and judgment was entered against it. *See* Shaffer, 215 W.Va. at 61-63, 593 S.E.2d at 632-634.

The BCSE asserted on appeal that the "circuit court erred in granting judgment against it because it was constitutionally immune from suit" as "it is a State instrumentality established within the Department of Health and Human Resources(DHHR) and any money it is compelled to refund to [the obligor father] would come directly from public funds." Shaffer, 215 W.Va. at 67, 593 S.E.2d at 638. In addition, BCSE argued that the obligor father had not pled recovery

from the State's liability insurance carrier, in his complaint seeking repayment, and thereby did not conform with Pittsburgh Elevator v. W.Va. Bd. of Regents, 172 W.Va. 743, 310 S.E.2d 675 (1983). This Court disagreed.

The Shaffer Court found that, contrary to the averments of BCSE, the Pittsburgh Elevator exception to constitutional immunity applied. The Court explained that the exception applied because "the Board of Risk and Insurance Management had a statutory duty to purchase or contract for insurance to provide coverage for all of the DHHR's activities and responsibilities." Shaffer, 215 W.Va. at 68, 593 S.E.2d at 639. "The DHHR has a *responsibility* to refund to an obligor money collected in excess of what is owed." Shaffer, 215 W.Va. at 68, 593 S.E.2d at 639. Consequently, the obligor father was entitled to a refund of his overpayment "under and up to the limits of the State's liability insurance coverage for the loss on account of the DHHR's activities and responsibilities" Shaffer, 215 W.Va. at 68, 593 S.E.2d at 639. Finally, the Shaffer Court made clear that:

Due to the fact that the Board of Risk and Insurance Management had a statutory duty under W.Va. Code §29-12-5(a), as stated in Eggleston, to purchase a contract for insurance for all of the DHHR's responsibilities, ***this Court wishes to make clear that the absence of any such coverage may not be used by the DHHR to deprive the appellee of a refund of his overpayment.***

Shaffer, 215 W.Va. at 68, n.14, 593 S.E.2d at 639, n.14 (emphasis added). In other words, when the BCSE/DHHR invoked the statutory provision for recoupment of an arrearage from the obligor father it had the responsibility of repaying any overpayment it might wrongfully recoup, pursuant to a corresponding provision within the statutory scheme.

In the case *sub judice*, the Respondent Paine, asserts that the Pittsburgh Elevator exception to sovereign immunity cannot be relied upon under the circumstances of this case

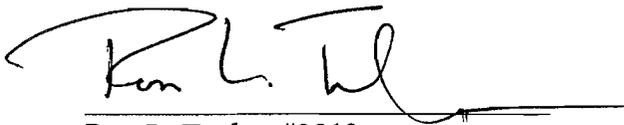
because its responsibility for payment of “back pay,” under §18-29-5(b), is not covered by the 2007 BRIM policy as said policy “excludes claims attributable to wages, salaries and benefits. Shaffer, however, forecloses this argument. This holds true because when the Petitioner Paine invoked a provision of the educational employee administrative procedure to wrongfully deprive Mr. Powell of his license to teach he, like the BCSE/DHHR had the responsibility to comply with the corresponding statutory provision for relief afforded to educational employees, under §18-29-5(b). Therefore, the absence of coverage under the 2007 BRIM policy matters not and the Pittsburgh Elevator exception to sovereign immunity applies.

## VI.

### CONCLUSION

For the foregoing reasons, Appellant Brian M. Powell, respectfully requests this Honorable Court to grant his Appeal and remand the matter to the circuit court for an order or direction in further progress of the case including but not limited to all proceedings necessary to a determination of all back pay, costs and attorneys fees to which he is entitled as a consequence of his successful challenge to the administrative decision at issue. Mr. Powell further prays for all such additional relief as this Court may deem proper in the interests of justice, including but not limited to all costs and attorneys fees incurred in connection with the instant appeal.

Respectfully Submitted,  
Petitioner by Counsel



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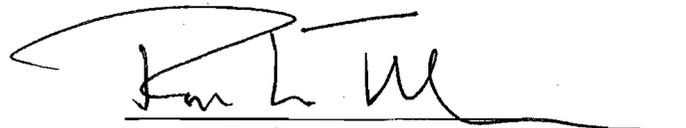
**APPELLANT'S BRIEF  
IN SUPPORT OF APPEAL  
CERTIFICATE OF SERVICE**

**Appeal From the Circuit Court of Kanawha County, West Virginia  
Civil Action No. 06-AA-3**

I hereby certify that on the 27th day of August, 2009 I served a true copy of the foregoing *Appellant's Brief in Support of Appeal* upon opposing counsel by depositing the same in the United States mail, postage prepaid, to the following address:

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