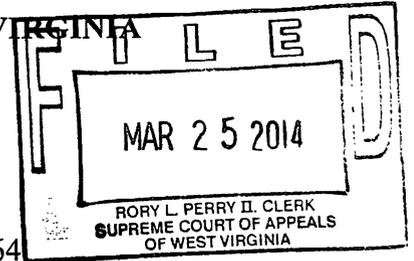


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 13-1086



THE BOARD OF EDUCATION OF  
WEBSTER COUNTY,

Petitioner

Civil Action No. 13-AA-64  
Honorable Tod J. Kaufman  
Circuit Court of Kanawha County, West Virginia

v.

DAWN J. HANNA; RUSSELL FRY, Acting  
Executive Director, WorkForce West Virginia;  
JACK CANFIELD, Chairman, Board of Review;  
GINO COLUMBO, Member, Board of Review;  
and LES FACEMYER, Member, Board of  
Review,

Respondents.

\*\*\*\*\*  
**BRIEF OF RESPONDENT DAWN J. HANNA**  
\*\*\*\*\*

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## I. STATEMENT OF THE CASE

Dawn Hanna was employed by the Webster County Board of Education as an elementary school teacher from May 24, 1989 to January 2, 2013. (App. 4). Ms. Hanna, during the 2011-2012 school year had been in charge of a student fundraiser. (App. 1). Ms. Hanna accounted for those funds at the end of the 2011-2012 school year. (App. 9). When the 2012-2013 school year began, she returned to work after the summer break and worked until September 28, 2012, with no question being raised about the accounting from the prior year's fundraiser. (*Id.*). On September 28, 2012, Ms. Hanna became seriously ill. (*Id.*). Ms. Hanna returned to work on December 10, 2012, where she was confronted by a West Virginia State Trooper and accused of embezzling \$1,005.00 from the student fundraiser, just enough to qualify as a felony. (*Id.*).

Martha Dean, the Superintendent of the Webster County School Board, and Jeremy Pyle, the principal of the school where Ms. Hanna was employed, contacted Webster County Assistant Prosecutor Dara Acord and requested that her office investigate the allegations of theft made by them against Ms. Hanna. (App. 17). At that time, Superintendent Dean advised the assistant prosecutor that the Board would prefer that Ms. Hanna not be prosecuted but, rather, "offered" the option to resign and repay the alleged missing funds. (*Id.*). The prosecutor and the Board had handled other employees in a similar manner by obtaining their resignation under threat of criminal prosecution. (*Id.*).

Earlier in 2012, the wife of Principal Pyle, Allison Pyle, also an employee of the Webster County Board of Education, had told co-workers that she had told her husband, Principal Pyle, the he had "until Isaac gets to fifth grade to get rid of her [Dawn Hanna]." (App. 16). Isaac is the son of Principal and Allison Pyle and is presently in the second or third grade. (*Id.*). Ms. Hanna taught

fifth grade. (App. 15).

On the afternoon of Thursday, December 13, 2012 Ms. Hanna had a note in her box at work that the Assistant Prosecutor, Dara Acord, wanted to meet with her at the Prosecutor's Office. (App. 11). Ms. Acord and Ms. Hanna met at the Prosecuting Attorney's office that evening after Ms. Hanna had finished her day at work. (App. 17). Ms. Acord explained the potential charges to Ms. Hanna, including that she would be charged with a felony and could be arrested. (Id., App. 11). Following the directions of Superintendent Dean and Principal Pyle, she offered Ms. Hanna the "option" of resigning. (App. 17). She gave her four days, until the following Monday, to make her decision, advising her that she and the Board wanted her resignation by December 17, 2012. (Id.). Ms. Hanna did not have time to seek counsel before she was required to make a decision. (App. 10).

On December 17, 2012, Ms. Hanna tendered her resignation to the School Board as required by the Board's directions to Ms. Hanna as conveyed by the assistant prosecutor. (App. 10, 11, 17). Ms. Hanna testified that she did not believe that she had any option other than to resign. (App. 23). Additional factual discussion appears as necessary in the following argument.

## II. SUMMARY OF ARGUMENT

The decision of the Circuit Court of Kanawha County in this case should be affirmed. The decision of the ALJ, which was adopted by the Board of Review, was clearly wrong in that it was not only against the weight of the evidence of record, it also disregarded the uncontradicted evidence of record that indicates that Ms. Hanna did not act voluntarily to resign and did so only because of the misconduct of her employer in subverting the rights afforded to, and the public policy expressed in, Article 2 of Chapter 18C and Article 2 of Chapter 6C of the West Virginia Code.

### III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent agrees with Petitioner that this case presents significant public policy issues as well as being a case of first impression on a narrow issue of law and is, therefore, appropriate for either Rule 19 or Rule 20 argument.

### IV. STANDARD OF REVIEW

Petitioner's correctly state the standard of review in unemployment compensation cases such as this:

The findings of fact of the Board of Review of ... [WorkForce West Virginia] are entitled to substantial deference unless a reviewing court believes the findings are clearly wrong. If the question on review is one purely of law, no deference is given and the standard of judicial review by the court is de novo.

Syl. Pt. 3, *Adkins v. Gatson*, 192 W.Va. 561, 453 S.E.2d 395 (1994).

### V. ARGUMENT

The law related to this case must be understood in the context of both teacher employment statues, W.Va. Code §§ 18A-2-1, et seq., and the unemployment laws, W.Va. Code §§ 21A-1-1, et seq. W.Va. Code § 18A-2-2(c)(1) provides that a continuing contract of a teacher, such as Ms. Hanna, cannot be terminated except for cause or by written resignation. Being charged with a felony is not, by itself, cause under the provisions of W.Va. Code § 18A-2-8 which requires a conviction of, or a plea of guilty or a plea of *nolo contendere* to, a felony charge before it is cause for dismissal or suspension. W.Va. Code § 18A-2-8(a). That section further requires that a teacher charged with a felony is to remain employed but "may be reassigned to duties which do not involve direct interaction with pupils pending final disposition of the charges." W.Va. Code § 18A-2-8(c).

W.Va. Code § 21A-6-3(1) provides for the indefinite disqualification for unemployment

compensation if the employee voluntarily quits unless the employee's reason for quitting was for good cause involving fault on the part of the employer. The issues presented in this case are whether Ms. Hanna's resignation was voluntary and, if so, whether her reason for resigning was for good cause involving fault on the part of the employer and whether the Board of Review was clearly wrong in its findings on these issues. It is Respondent's position that her resignation was not voluntary and, even were it to be found to have been legally voluntary, under the unique facts of this case, it was for good cause involving fault on the part of the employer. It is Respondent's further position that the ALJ and the Board of Review were clearly wrong in their findings and the Circuit Court of Kanawha County properly reversed the decision of the Board of Review.

While the Circuit Court did reverse the decision of the Board of Review on the basis that its findings were clearly wrong, as Petitioner notes this case presents a case of first impression in this jurisdiction. Pt. Br. 5. As such, review de novo is also appropriate in this case. Syl. Pt. 3, *Adkins*.

**A. The Circuit Court Correctly Found That the Decision of the Board of Review of Workforce West Virginia Was Clearly Wrong.**

The Circuit Court was correct in finding that the Board of Review was clearly wrong in deciding that Ms. Hanna's choice to resign or risk prosecution was a real choice presenting her with an opportunity to exercise her free will under the facts and circumstances of this case. There is no evidence of record that Ms. Hanna, as phrased by the ALJ, "risked prosecution" if she remained employed. (App. 19, 23). The uncontroverted facts were, rather, that she would be prosecuted for a felony if she did not resign in four days. Ms. Hanna consistently stated that "they were going to prosecute." (App. 1). The Board, apparently, chose to lie initially in telling the WorkForce Deputy that Ms. Hanna "chose to quit and did not give a reason" although they did admit that they gave her

the option of quitting or being discharged. (App. 2). Not only was Ms. Hanna told that she would be prosecuted, she was told that she would be arrested. (App. 11). That was not an idle threat as a State Trooper had been waiting for her at school on December 10, 2012, when she returned to work after a long illness. (App. 9, 15). The Trooper threatened to arrest her at school. (App. 15). Ms. Hanna testified that the assistant prosecutor told her she would be arrested and prosecuted if she did not resign by Monday, December 17, 2012. (App. 11). The assistant prosecutor did not deny telling Ms. Hanna that she would be arrested and prosecuting, averring affirmatively that she told her she would not be prosecuted if she resigned. (App. 17). At no point has the Petitioner offered any evidence in contradiction of this evidence. The ALJ was clearly wrong in totally disregarding this evidence, and the Board of Review was clearly wrong in adopting the ALJ's fact finding, when there was no evidence in the record to support the finding.

While the Petitioner would argue that the threat to Ms. Hanna was made by the assistant prosecutor and not the School Board, Ms. Acord was clear in her statement that she was making the offer, and the threat, at the direction of the Superintendent of the School Board. She stated, “”Superintendent Dean ... would prefer that Ms. Hanna not be prosecuted but that she be asked to resign ... in lieu of a criminal prosecution.” (App. 17). She also acknowledged that, “Other situations involving the School Board and employees have been so handled in the past.” (*Id.*). Ms. Hanna remembered, and testified, that on December 13, 2012, she had been told by Ms. Acord that the Superintendent of the Board of Education “needed my answer what to do on Monday, December 17<sup>th</sup>.” (App. 11). While Ms. Hanna was threatened by the State Trooper on the December 10, she did not learn that the Board was requesting her resignation, and that she would be arrested and prosecuted if she did not resign, until meeting with the assistant prosecutor on December 13, 2012.

(App. 11). Again, this evidence is uncontradicted by any other evidence in the record. The ALJ findings in this case adopted by the Board of Review were not only clearly wrong and not supported by the evidence, they were contrary to the evidence.

Petitioner tries to argue that the evidence is ambiguous, and, therefore, not a basis for the Circuit Court's decision, due to the initial statement of Respondent Dawn Hanna to the Deputy. On the day after Ms. Hanna submitted her forced resignation, she gave a statement to Interviewer Elizabeth O'Dell with WorkForce West Virginia. Ms. O'Dell reported that Ms. Hanna stated: "I was given the option to quit or be discharged. I was given this option by Dara Accord, assistant prosecutor. I chose to quit." (App. 15). This statement, seen in the context of the facts surrounding it, indicate that it is an accurate report of what happened but in no wise may be considered to be an admission of voluntariness. She stated that, of the two "options" given to her, she chose the option to resign. She gave no indication that the "choice" was voluntary and not coerced nor whether there was any real choice at all. Indeed, the context of the rest of her statement on that date indicates that the choice was coerced and was not voluntary. To argue that the choice was voluntary you have to assume, against the evidence, that Ms. Hanna actually thought that there was any other real option other than resignation. It is clear that she did not.

It is clear from Ms. Acord's uncontradicted statement in the record that she was acting as an agent of the Board seeking to obtain the result the Board desired and instructed her to obtain. (App. 17). That Ms. Acord was acting as the agent of Ms. Hanna's employer was understood not only by Ms. Acord, but was also communicated to, and understood by, Ms. Hanna. (App. 11, 17). The State Trooper, when meeting with Ms. Hanna in the school principal's office on December 10, 2012, threatened Ms. Hanna with the humiliation of being arrested at school. (App. 15). December 10,

2012, was the first time Ms. Hanna had heard of a problem with the fundraiser from the previous school year although seven months had passed. (App. 8).

In these circumstances it is understandable that Ms. Hanna thought her arrest and discharge were imminent and would occur if she did not submit her letter of resignation on Monday morning, December 17, 2012. (App. 11). The way this matter was handled by the employer in this case evidences a clear intent to subvert and avoid the provisions of Article 2 of Chapter 18A of the West Virginia Code. The employer initially told the WorkForce West Virginia Deputy that Ms. Hanna would be discharged had she not resigned. (App. 3). The Board, however, does not have an absolute free hand in the discharge of a permanent contract teacher such as Ms. Hanna. Such discharge is governed by W.Va. Code §§ 18A-2-2 and 18A-2-8. W.Va. Code §18A-2-8(a), which covers “cause” for discharge, provides that the Board may discharge a teacher for “immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge.” In this case, it is clear that, at the time of her forced resignation, Ms. Hanna did not fall into any of the specified categories of causes. Being charged with a felony is not grounds for discharge under W.Va. Code §18A-2-8(a). Being charged with a felony, however, prior to any conviction, or plea, does provide the grounds for the Board to have Ms. Hanna removed from her classroom duties and “reassigned to duties which do not involve direct interaction with pupils pending final disposition of the charges.” W.Va. Code § 18A-2-8(c). But, had that happened, Ms. Hanna would have had to have been “given an opportunity, within five days of receiving the written notice, to request, in writing, a level three hearing and appeals pursuant to the provisions of article two, chapter six-c of this code.” *Id.*

The Board's use of the assistant prosecutor to serve as its agent in threatening prosecution is only understandable in the context of the statutory provisions relating to the discharge of a teacher for cause. In that context the timing and structure of the threat made, and ultimatum given, to Ms. Hanna becomes even more readily seen as what it was: coercion designed to force her to act against her best interests before she could be informed of her rights, thereby allowing the Board to avoid its legal obligations under the statutes intended to govern the employer's conduct in cases such as this. Had Ms. Hanna been given time to seek counsel from an attorney or her union representative, she would have been advised that such charges could not lead to her discharge unless she was actually convicted of a felony and that she would be retained in employment pending resolution of any charges that may have been brought thereby providing her with the income necessary for her to live and fight the charges. W.Va. Code § 18A-2-8. It is clear that the confrontation on a Thursday with demand for a resignation by Monday morning was designed specifically to prevent Ms. Hanna from obtaining counsel, advice or representation so as to assure that the Board could avoid its legal obligations under W.Va. Code § 18A-2-8. This statutory context was pointed out to the ALJ and the Board of Review and was totally disregarded by them. (App. 12, 18-19, 22-23).

In this case, it is also apparent from the record that it was important to the Board to avoid giving the coerced employee an opportunity to be fully apprised of the nature and details of the charges and an opportunity to respond to them because, had she had opportunity to do so, the charges would not have stood up. Ms. Hanna testified that she had turned in all the records of the fundraiser to Jeremy Pyle, but could not locate her copy of the records after being given the threat and ultimatum by the assistant prosecutor. (App. 8, 15). She was threatened with a felony charge because there was, allegedly, \$1,005.00 in missing funds and/or books. (App. 15). It should be noted

that amount is \$5.00 over the minimum necessary to make it a felony. W.Va. Code § 61-3-13. A misdemeanor conviction would not have been grounds for a discharge from employment. W.Va. Code § 18A-2-8. By this threat and ultimatum, and by giving Ms. Hanna one weekend to make her decision under the cloud of such a threat, the Board avoided providing the notice, continued employment, and access to the grievance process, required by W.Va. Code § 18A-2-8 pending resolution of the questionable allegations made against Ms. Hanna. W.Va. Code § 6C-2-1, *et seq.*

It is suggested that the employer knew they could not risk a challenge to the charges. The records from the fundraiser had been in the custody and control of Jeremy Pyle since the end of the 2011-2102 school year. (App. 15). No questions about her records were directed to Ms. Hanna by Mr. Pyle, or any other representative of the Board, between May 2012 and December 2012. (App. 8-9). Ms. Hanna's copies of the records were missing from her room when she returned to work seven months later. (App. 8, 15). It is uncontradicted that the wife of Ms. Hanna's immediate supervisor, Principal Jeremy Pyle, had been given him a deadline "get rid of" Ms. Hanna before their son got to fifth grade. (App. 16). After her discharge, Ms. Hanna was allowed to return to the school to look for any additional records she may have had relating to the fundraiser. (App. 8). She found two unsold books in her locker at the school. These two books would have brought the "missing" funds amount below the threshold necessary for a felony charge. (App. 8-9). The confrontation, and forced resignation, in this case was timed so as to assure that Ms. Hanna had no opportunity to even see, let alone consider and get counsel about, the nature and details of the accusations made against her. Instead, the emphasis was on resignation or imminent arrest and she had been told that the arrest could be made in the most humiliating manner.

So, if you consider Ms. Hanna's initial statement, "I chose to quit," as reported by the

Deputy, in the abstract, you may be able to consider it as an admission of voluntary resignation. But the ALJ and the Board of Review are not free to disregard all the evidence before it and to take that one statement out of the context of all the evidence before it and base its findings on that one statement. Doing so creates a clearly wrong factual finding made in contradiction of the weight of the clear and uncontested facts of record. The Circuit Court properly concluded that such fact finding by the ALJ and the Board of Review was clearly wrong.

**B. The Circuit Court Properly Applied West Virginia Code Section 21A-6-3(1) in Concluding That Ms. Hanna Resigned under Duress Rather than Voluntarily.**

“Voluntary”, as used in W.Va. Code § 21A-6-3(1) means by the free exercise of a person’s will. Syl. Pt. 3, *Childress v. Muzzle*, 222 W.Va. 129, 663 S.E.2d 583 (2008). It is a well settled principle of law that a decision made under duress is not a voluntary decision. *See, e.g., State v. Buzzard*, 194 W.Va. 544, 461 S.E.2d 50 (1995). Duress by threat involving imprisonment was sufficient to void contracts under common law. *Machinery Hauling, Inc. v. Steel of W.Va.*, 181 W.Va. 694, 696-697, 384 S.E.2d 139, 141-142 (1989), citing Restatement (Second) of Torts § 871, comment f (1979); 25 Am.Jur.2d Duress & Undue Influence § 11 (1966). Duress is defined as “the use of force, false imprisonment or *threats*... to compel someone to act contrary to his/her wishes or *interests*.” Law.com, “Duress” <http://dictionary.law.com/Default.aspx?selected=597>. [Emphasis added].

In *Machinery Hauling* this Court quoted with approval the discussion of duress in 13 C.J. § 319, 402 (1917):

[T]he question of duress is one of fact in the particular case, to be determined on consideration of the surrounding circumstances, such as age, sex, capacity, situation, and relation of the parties; and that duress may exist whether or not the threat is sufficient to overcome

the mind of a man of ordinary courage, it being sufficient to constitute duress that one party to the transaction is prevented from exercising his free will by reason of threats made by the other, and that the contract is obtained by reason of such fact. Unless these elements are present, however, duress does not exist. The test is not so much the means by which the party was compelled to execute the contract as it is the state of mind induced by the means employed--the fear of which made it impossible for him to exercise his own free will.

394 S.E.2d at 143-144, 181 W.Va. at 698-699.

Under this standard, it is clear that Respondent's resignation was obtained involuntarily by duress. She had been absent from employment with a serious illness from September 28 until December 10. On her first day back to work she was called to Principal Pyle's office and was confronted by a State Trooper who threatened her with arrest and a felony prosecution. Just three days later she was called to the office of the assistant prosecuting attorney on a Thursday evening, at the direction of her employer, and told that she would be arrested and prosecuted unless she resigned by the following Monday. Ms. Hanna testified, when asked whether she thought she had any alternative to resignation: "I know I felt that was it, that the whole weekend from Thursday to Monday I was just -- I kept looking out my windows because I just knew that they were going to come and take me away at any time. So as soon as I could on Monday the letter was sent straight to the Board." (App. 11). Ms. Hanna's resignation was not voluntary. Under the facts and circumstances -- Ms. Hanna's physical condition, the relation of the parties, the authority of the police and prosecutor, the practice of the School Board in using such threats to obtain resignations, the short time span given Ms. Hanna to make a decision, the state of mind induced by the threat, her immobilizing fear, for example -- made it impossible for Ms. Hanna to exercise rational reflection, let alone free will. The motivation for the employer to use such tactics is easily seen when it is

realized that by doing so they avoided all their obligations under Article 2 of Chapter 18A of the West Virginia Code. Their motivation to do so is seen by the facts surrounding the chain of custody of the evidence against Ms. Hanna, the private, personal motivation of her immediate supervisor, their use of the assistant prosecutor to deliver their threat and ultimatum, and the time limit they imposed.

This case presents a question of first impression concerning the voluntariness of a resignation from employment coerced by the employer's threat of a criminal prosecution because *Philyaw v. Gatson*, 195 W.Va. 474, 466 S.E.2d 133 (1995), cannot be considered as controlling precedent. There is no real world correspondence between a well-considered choice to run for an elective office, as in *Philyaw*, and the threat of an imminent and humiliating arrest and criminal prosecution as in this case.

In *Philyaw*, this Court noted that the employee had a real choice "between running for elective office or retaining her employment." 195 W.Va. at 479, 466 S.E.2d at 138. This Court also recognized that the result may have been different if the employee had been faced with a real Hobson's choice which was defined as a "choice of taking either that which is offered or nothing; *the absence of a real alternative.*" *Id.* (Citing Random House Dictionary of the English Language, 909 (2<sup>nd</sup> Ed. 1987)(emphasis added)). Respondent submits that, even generally, the "choice" between resigning and imminent arrest and prosecution on criminal charges is a Hobson's choice. More particularly where, as in this case, the decision on the choice is demanded in a time frame that denies the employee a chance to see, understand or respond to the charges and evidence or to obtain advice or counsel, under threat of imminent humiliating arrest there is "the absence of a real alternative." *Id.*

Petitioner argues that the employer was not responsible for the “choice” given to Ms. Hanna in this case because the actual threat and ultimatum was delivered to Ms. Hanna by the assistant prosecutor. Again, superficially, if you disregard the uncontradicted evidence of record, the Petitioner’s argument might be considered to have some merit. But the assistant prosecutor not only acknowledged that she was the one who communicated the choice to the Ms. Hanna, she also clearly indicates that it was done at the direction of the Superintendent of the Board of Education and Ms. Hanna’s immediate supervisor, Jeremy Pyle. She also indicates that this case is not the first in which the prosecutor’s office has acted as an agent for the Board in obtaining a resignation from a Board employee by threatening criminal prosecution. Ms. Hanna testified that the assistant prosecutor “explained to me that ... what the board wanted was my resignation.” (App. 11). Dara Acord, the assistant prosecutor stated, “I met with Superintendent Dean and Jeremy Pyle.... At this time it was made clear that ... Superintendent Dean and Mr. Pyle would prefer that Ms. Hanna not be prosecuted but that she be asked to resign ... in lieu of a criminal prosecution. This option was definitely discussed and it was my understanding that this was the way the School Board preferred the matter to be handled. Other situations involving the School Board and employees have been so handled in the past.” (App. 17). In light of these uncontradicted facts, to argue that the employer in this case is not responsible for the choice Ms. Hanna was forced to make is an absurd elevation of form over substance. Where, as here, the employer has recruited the prosecutor’s office to act as its agent, the employer should not then be allowed to insulate its actions by claiming it was not responsible for the agent’s actions.

While *Childress v. Muzzle*, 222 W.Va. 129, 663 S.E.2d 583 (2008), was decided in the context of early retirement, the holding of which was later codified at W.Va. Code § 21A-6-3(11)

this Court nonetheless addressed the general issue of voluntariness under W.Va. Code § 21A-6-3(1). “The word voluntary as used in W.Va. Code, 21A-6-3(1) means the free exercise of the will.” Syl. Pt. 3, *Childress* (Emphasis added). The discussion of voluntariness and good cause as used in W.Va. Code § 21A-6-3(1) in *Childress*, is still controlling precedent in this case. *Childress’s* definitions and application to W.Va. Code § 21A-6-3(1), was reaffirmed in *Verizon Servs. Corp. v. Epling*, 230 W.Va. 439, 739 S.E.2d 290 (2013).

Cases from other jurisdictions cited by the Petitioner in this case are inapposite. Had the employer in this case followed the procedures required of them under Article 2 of Chapter 18A of the West Virginia Code, and Ms. Hanna had resigned rather than accept reassignment under W.Va. Code § 18A-2-8(c), and the right to file a grievance under Article 2 of Chapter 6C of the West Virginia Code, then the cases cited might have some applicability. But here, the employer subverted that process by not following the relevant statutes but, rather, recruited a powerful agent to deliver a threat of a felony prosecution with an ultimatum containing an unreasonable time limit. It is suggested that this situation is totally different from those in the cases cited by Petitioner.

In *Glenn v. Florida Unemployment Appeals Commission*, 516 So.2d 88, 12 Fla. L. Weekly 2758 (Fla. 3<sup>rd</sup> DCA 1987), the employer followed the applicable disciplinary provisions usually observed by the private employer and provided the employee with notice and an opportunity to respond to the charges against him. The employee did not exercise his rights to respond and filed no administrative appeal. In the case before this Court, Ms. Hanna received no written notice of charges as required by W.Va. Code § 18A-2-8(b), had no opportunity to respond except by defending felony charges in a criminal proceeding, was not given any time to inspect, or even see, evidence against her or to seek counsel, and was never told of her right to file a grievance. The situation is

totally different. The employer's actions here were clearly designed to avoid giving the employee the rights to which she should have been entitled under Article 2 of Chapter 18A, and Article 2 of Chapter 6C, of the West Virginia Code as well as her right to be represented in a situation such as this by her union representative and, if necessary, an attorney.

Similar considerations apply to *Seacrist v. City of Cottage Grove*, 344 N.W.2d 889 (Minn. Ct. App. 1984), where a municipal police sergeant was given the opportunity to resign after a long period of documented misconduct and repeated confrontation by his supervisors. If he had not resigned, he was threatened with administrative procedures: first a disciplinary proceeding and then a termination proceeding. The sergeant resigned because he had an application pending for a job as Chief of Police in another municipality which he thought he would obtain. When he did not, he filed for unemployment. It is clear in that situation that the sergeant had a free choice and made it. The situation in this case is, again, totally different, including, but not limited to the avoidance of administrative procedures by the employer, the immediate application for benefits by Ms. Hanna, the threat of a felony charge, Ms. Hanna's understanding that she had no choice but to resign or face a possible felony trial, the difference in the charges against the employee and the opportunity the employee had to have notice of the charges and to respond to them.

Again, in *Scott v. Com. Unemployment Comp. Bd. of Review*, 437 A.2d 1304 (Pa. Cmwlth. 1981), the employee resigned in the face of an internal investigation. In the case before this Court, Ms. Hanna did not learn there was an investigation until December 10, 2012. She was never informed of the details. On December 13, 2012, she was told she had to resign or be arrested and charged with a felony and that she had to make that decision over one weekend or face the felony charges.

Under the *Childress* standard there are abundant facts, which were ignored by the Board of Review, of the involuntariness of Ms. Hanna's "choice" in this case. The "options" presented to the Ms. Hanna by the employer through the assistant prosecutor were coercive in nature and, under the circumstances shown in the record, presented Ms. Hanna with nothing but a Hobson's choice. The employer designed it so there would not be a real choice. The Board could have provided a real choice by following the statutory process. The assistant prosecutor acted at the employer's direction and request. The employer choose the time for the confrontation of the Ms. Hanna. They chose to have her confronted on the first day she returned to work after a long serious illness. She was confronted by a State Trooper that threatened her with immediate humiliating arrest. The employer elected to not give her the opportunity to review the facts alleged against her or to respond to them. They did not give her an opportunity to check for books that may not have been turned in. Rather, the employer put her in a position where she was forced into an immediate Hobson's choice, a practice that had been used before in the county, thereby avoiding any due process, notice, opportunity to be heard, the ability to seek counsel, etc. These are objective facts uncontradicted in the record

**C. The Circuit Court Properly Applied West Virginia Code Section 21A-6-3(1) and the Evidence in the Record Supports a Finding That the Circuit Court Was Correct in Finding Fault on the Part of the Webster County Board of Education in the Forced Termination of Ms. Hanna.**

Assuming *arguendo* that Ms. Hanna's resignation was voluntary, it was made for good cause involving the fault of the employer. This Court, in *Childress*, considered good cause under W.Va. Code § 21A-6-3(1) in the context of early retirement. "The term 'good cause' as used in W.Va.Code, 21A-6-3(1) means cause involving fault on the part of the employer sufficient to justify

an employee's voluntarily leaving the ranks of the employed and joining the ranks of the unemployed.” Syl. Pt. 4, *Childress*.

This Court discussed, with approval, a two part test of good cause in the context of forced early retirement found in *Brady v. Board of Review*, 152 N.J. 197, 704 A.2d 547 (1997), requiring a claimant in that context to “(1) establish a well grounded fear of imminent layoff supported by definitive objective facts involving fault on the part of the employer and (2) establish that they would suffer a substantial loss by not accepting the early retirement incentive package.” 663 S.E.2d at 588. By analogy, in the present case, the evidence clearly shows that Ms. Hanna had a well-grounded imminent fear of being arrested, losing her job and her employability, and spending Christmas in jail due to an established practice of threat and coercion on the part of her employer. The testimony that the Principal of the school where she taught was under domestic pressure to “get rid of” Ms. Hanna was uncontradicted. The Board’s involvement in obtaining the resignation, as well as the existence of that regular practice on the part of the Board and the prosecutor’s office, as averred by Ms. Acord, was uncontradicted. It cannot be questioned that Ms. Hanna would have suffered substantial loss by not accepting the demand to resign by the deadline imposed. She could not see herself in a position to bargain. She was not given time to seek counsel. All she could do was seek relief from the fear of imminent arrest by resigning. There is clear fault here on the part of the employer. That fault is further exacerbated by the employer’s clear intent, and success, in avoiding statutory procedures designed for the protection of teachers found in Article 2 of Chapter 18A, and Article 2 of Chapter 6C, of the West Virginia Code.

Finally, it is also suggested that fault on the part of the employer is found in the very tactic of using the prosecutor’s officer to deliver the employer’s threat of prosecution. To illustrate that,

let's consider this threat in what might have been its proper context had lawful processes not been subverted. Let's assume the employer had given Ms. Hanna written notice, pursuant to W.Va. Code § 18A-2-8(b), that charges were being made against her of misappropriation of funds, that she was being relieved of teaching duties pending resolution of the charges, and that she had five days to request a level three grievance hearing pursuant to W.Va. Code § 18A-2-8(c). If, during the pendency of that statutory process, the attorney for the employer, or any other representative for that matter, made the representation to the employee that the Board had a very good relationship with the prosecutor's office and that if she did not immediately resign, the employer would make sure she would be arrested and charged with a felony, would there be any question of the Board's misconduct? If the threat had been made by an attorney for the Board it would have been a clear violation of Rule 8.4(e) of the West Virginia Rules of Professional Conduct. If it had been made by any other representative of the Board, while not constituting an ethical violation, it still would have been an action in clear contravention of the public policy recognized by the Rule. So, should the Board be said to not be at fault because they exercised its influence to recruit the prosecutor's office in this case instead of threatening to do so? The Board was at fault in subverting the statutory processes put in place by the legislature to protect the rights of teachers in situations such as this. The special treatment in W.Va. § 18A-2-8 afforded to charges of felonies leveled against teachers, as opposed to convictions, pleas or other misconduct, recognizes school boards should not be able to benefit by mere threats of such prosecution as was done in this case. The public policy expressed in this statutory provision recognizes that teachers should have the right to have their reputations, employment and employability protected, in the face of such serious charges, by the procedures set forth in the statute. It recognizes that without such statutory protections, the unequal bargaining

positions and the unequal influence of the parties, is likely to lead to miscarriages of justice where a teacher can lose without even having an opportunity to avail herself of the protection of the legislatively mandated administrative provisions. As such, it is clear that the Board's conduct in this case constitutes fault within the meaning of W.Va.Code, 21A-6-3(1) and *Childress*.

While it is true that most cases where fault on the part of the employer has been found arise in the context of changes in the terms of employment or unilateral changes in the conditions of employment, that does not mean that those are the only causes that are good cause. The general rule, as stated in *Amherst Coal Co. V. Hix*, 128 W.Va. 119, 35 S.E.2d 733 (1945), however, recognizes implicitly that "deceit or other wrongful conduct on the part of the employer" may constitute cause. In this case the employer's conduct in employing the process it did to subvert Ms. Hanna's statutory rights and the public policy of the State as expressed by the Legislature was deceitful and wrongful. The Board's recruiting the prosecutor's office as its agent to threaten Ms. Hanna compounded their fault. The time frame demanded prohibited any possibility that Ms. Hanna could timely find the missing books or records so as to avoid the felony charges and emphasizes the fault. Under the facts and circumstances of this case, the Board's actions constitute deceitful and wrongful conduct, a finding that is clearly supported by the record in this case.

## **VI. CONCLUSION**

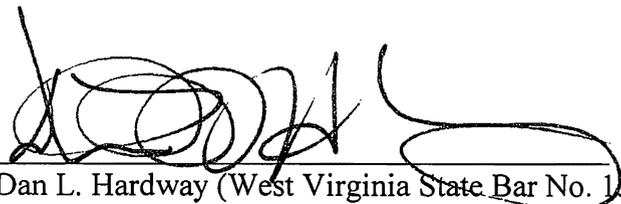
The Board of Review erred in finding as a fact that Ms. Hanna left work voluntarily and in failing to make a finding of fact as to whether there was fault on the part of the employer based upon the record in this case and the law applicable to the facts therein established by uncontradicted evidence. Similarly, the Board erred in concluding that, under the facts and circumstances of this case, the actions of the Petitioner in obtaining Ms. Hanna's resignation did not constitute good cause

involving fault on its part.

The Circuit Court of Kanawha County correctly reversed the decision as being clearly wrong on the facts as reflected in the record in the case. Ms. Hanna had nothing but a Hobson's choice of taking either that which the Board offered or a felony prosecution. She had no real alternative under the circumstances. The Petitioner's actions were deceitful and wrongful, constituting good cause involving fault on its part. The Circuit Court, consequently, properly applied the relevant State statutes and decisional law in reversing the Board of Review.

For the foregoing reasons, and others appearing of record in this matter, the Respondent Dawn Hanna respectfully requests this Court to affirm the ruling of the Circuit Court of Kanawha County.

Respectfully submitted this the 24<sup>th</sup> day of March, 2014.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 13-1086

THE BOARD OF EDUCATION OF  
WEBSTER COUNTY,

Petitioner and  
Respondent Below

Civil Action No. 13-AA-64  
Honorable Tod J. Kaufman  
Circuit Court of Kanawha County, West Virginia

v.

DAWN J. HANNA; RUSSELL FRY, Acting  
Executive Director, WorkForce West Virginia;  
JACK CANFIELD, Chairman, Board of Review;  
GINO COLUMBO, Member, Board of Review;  
and LES FACEMYER, Member, Board of  
Review,

(Dawn J. Hanna, Petitioner  
Below), Respondents.

**CERTIFICATE OF SERVICE**

I, Dan L. Hardway, counsel for the Respondent and Petitioner Below, Dawn J. Hanna, do hereby certify that the foregoing **Brief of Respondent Dawn J. Hanna** has been served upon the following persons by placing a true copy thereof into an envelope addressed to them as follows and depositing said envelope in a repository of the United States Postal Service with sufficient First Class postage thereon for delivery on this the 24<sup>th</sup> day of March, 2014:

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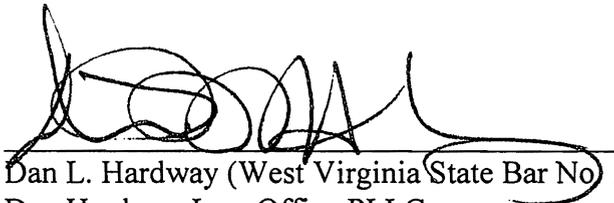
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