

**STATE OF WEST VIRGINIA  
SUPREME COURT OF APPEALS**

**Charleston Academy of Beauty Culture, Inc.,  
Judy Hall, Owner, and Cherie Bishop,  
Instructor, in their individual capacities,  
Petitioners below, Petitioners**

**FILED**  
**May 25, 2012**  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**vs) No. 11-1286** (Kanawha County 09-AA-168 & 169)

**West Virginia Human Rights Commission, and  
Harry Walter Robinson and Tyleemah Edwards,  
Respondents below, Respondents**

**MEMORANDUM DECISION**

Petitioners, Charleston Academy of Beauty Culture, Inc. (“the beauty school”), Judy Hall, and Cherie Bishop, by counsel, Stephen L. Hall, appeal from the Kanawha County Circuit Court’s order dated August 8, 2011, upholding the Final Order of respondent, the West Virginia Human Rights Commission (“the Commission”), finding that petitioners were liable for unlawful race discrimination and reprisal. The Commission, on behalf of respondents Harry Walter Robinson (“Robinson”) and Tyleemah Edwards (“Edwards”), has responded, by counsel, Jamie S. Alley and Paul R. Sheridan.

This Court has considered the parties’ briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Robinson (now deceased) and Edwards are former students of the beauty school, and they are both African-American. Robinson and Edwards filed complaints with the Commission asserting various claims against petitioners related to racial discrimination and racial harassment. Edwards also alleged that she was a target of retaliation by Hall and the beauty school in reprisal for having filed a complaint of race discrimination with the West Virginia Board of Barbers and Cosmetologists. Petitioners denied all allegations.

The Commission found the beauty school to be a place of public accommodation with regard to the customers who receive services in the area of cosmetology and for the students enrolled in its

educational programs. In its Final Order dated September 2, 2009,<sup>1</sup> the Commission affirmed the Chief Administrative Law Judge's Final Decision dated May 29, 2009, finding in favor of Robinson and Edwards. Petitioners appealed the Commission's Final Order to the Kanawha County Circuit Court. In its order dated August 8, 2011, the Circuit Court affirmed the Commission's Final Order.

In appeals of an administrative order from a circuit court, “[t]his Court is bound by the statutory standards contained in W.Va. Code § 29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.’ Syl. pt. 2, *Erps v. West Virginia Human Rights Comm’n*, 224 W.Va. 126, 680 S.E.2d 371 (2009) (citing Syl. pt. 1, in part, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996)).” *Ford Motor Credit Co. v. West Virginia Human Rights Comm’n*, 225 W.Va. 766, 775, 696 S.E.2d 282, 291 (2010). With these standards in mind, and having considered the parties’ arguments, the appendix record, and the supplemental appendix record, the Court finds no error and incorporates, adopts, and attaches hereto the Circuit Court’s “Opinion and Order Affirming the Final Administrative Order of the West Virginia Human Rights Commission” dated August 8, 2011.

Affirmed.

**ISSUED:** May 25, 2012

**CONCURRED IN BY:**

Justice Robin Jean Davis  
Justice Brent D. Benjamin  
Justice Margaret L. Workman  
Justice Thomas E. McHugh

**DISSENTING:**

Chief Justice Menis E. Ketchum

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<sup>1</sup> Because the Commission's Final Order was not in either the appendix record or the supplemental appendix record, this Court relies on the information provided in the Circuit Court's opinion and order.

FILED

2011 AUG -8 PM 2:35  
CATHY S. GATSON, CLERK  
KANAWHA COUNTY CIRCUIT COURT

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

CHARLESTON ACADEMY OF BEAUTY  
CULTURE, INC., d/b/a CHARLESTON  
SCHOOL OF BEAUTY CULTURE, INC.,  
JUDY HALL, Owner, and CHERIE BISHOP,  
Instructor, in their individual capacities,

Petitioners,

v.

CIVIL ACTION NO. 09-AA-168  
(The Honorable Charles E. King, Jr.)

TYLEEMAH EDWARDS,

Respondent.

AS DECIDED BY THE WEST VIRGINIA  
HUMAN RIGHTS COMMISSION

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and

CHARLESTON ACADEMY OF BEAUTY  
CULTURE, INC., d/b/a CHARLESTON  
SCHOOL OF BEAUTY CULTURE, INC.,  
JUDY HALL, Owner, and CHERIE BISHOP,  
Instructor, in their individual capacities,

Petitioners,

v.

CIVIL ACTION NO. 09-AA-169  
(The Honorable Charles E. King, Jr.)

HARRY WALTER ROBINSON,

Respondent.

AS DECIDED BY THE WEST VIRGINIA  
HUMAN RIGHTS COMMISSION

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**OPINION AND ORDER AFFIRMING THE  
FINAL ADMINISTRATIVE ORDER OF THE  
WEST VIRGINIA HUMAN RIGHTS COMMISSION**

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These matters came before the Court on appeal from a consolidated Final Order of the West Virginia Human Rights Commission [hereafter referred to as Human Rights Commission or Commission] dated September 2, 2009, pursuant to West Virginia Code § 5-11-11(a).

The underlying cases involve the administrative litigation and appeal of two separate human rights complaints filed by Tyleemah Edwards and Harry Walter Robinson [hereinafter referred to individually as Complainant Edwards and Complainant Robinson and collectively as Complainants] against the Petitioners, Charleston Academy of Beauty Culture, Inc., d/b/a Charleston School of Beauty Culture, Inc., Judy Hall, Owner, and Cherie Bishop, Instructor, in their individual capacities [hereinafter referred to individually as Petitioner beauty school or CABC, Petitioner Bishop and Petitioner Hall and collectively as Petitioners].

The Complainants below are former students at the Petitioner beauty school. They each filed complaints at the Commission alleging that while they were students at CABC, they were subjected to race discrimination and racial harassment. Complainant Edwards'

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human rights complaint included an allegation that she was unlawfully expelled from CABC in reprisal for engaging in the protected activity of complaining about race discrimination at CABC to the West Virginia Board of Barbers and Cosmetologists.

The Commission docketed complaints on behalf of Robinson and Edwards. Multiple amendments of the complaints occurred in accord with the requirements of the Rules of Practice and Procedure Before the West Virginia Human Rights Commission. The amendments operated to properly name the Petitioner beauty school and to amplify and provide content to the Complainants' allegations. Ultimately, the Commission issued a probable cause determination in both cases, and they were transferred to an administrative law judge for adjudication. The two complaints, styled Tyleemah Edwards v. Charleston Academy of Beauty Culture, Inc., d/b/a Charleston School of Beauty Culture, Inc., Judy Hall, Owner, and Cherie Bishop, Instructor, Docket No. PAR-454-04, and Harry Walter Robinson v. Charleston Academy of Beauty Culture, Inc., d/b/a Charleston School of Beauty Culture, Inc., Judy Hall, Owner, and Cherie Bishop, Instructor, Docket No. PAR-351-04, were consolidated for public hearing.

In the administrative proceeding below, Petitioners contended that CABC is a place of public accommodations within the meaning of the West Virginia Human Rights Act only with respect to its patrons, and that it is not a place of public accommodations with regard to its enrolled students. On that basis, Petitioners asserted that the Commission lacked

jurisdiction to act upon the Complainants' allegations. Petitioners also denied that either Complainant experienced a racially hostile environment, race discrimination, or reprisal during their enrollment at CABC. Petitioners also raised procedural and constitutional challenges to the Commission proceeding.

In her May 29, 2009, consolidated Final Decision, Chief Administrative Law Judge Phyllis H. Carter [hereinafter referred to as ALJ] determined that CABC is a "place of public accommodations" within the meaning of the West Virginia Human Rights Act with regard to both patrons and students. She concluded that the Commission had established by a preponderance of the evidence that the Petitioners violated the West Virginia Human Rights Act and engaged in race discrimination. The ALJ determined that this "discriminatory conduct infringed upon the Complainants' enjoyment of the accommodations, privileges, advantages and services which are available to students at CABC and deprived Complainant Robinson and Complainant Edwards of the educational opportunities to which they were entitled." (Final Decision, p. 6). The ALJ also determined that Petitioners Hall and CABC failed to conduct a meaningful investigation into Mr. Robinson's complaint of racial harassment and facilitated the existence of a racially hostile environment. (Final Decision, p. 105). The Final Decision further found that Petitioner Bishop violated the West Virginia Human Rights Act by "engaging in racial threats, harassment and discrimination" toward the Complainants. Id. Finally, the ALJ found that Petitioners Hall and CABC retaliated against Complainant Edwards for making a complaint about the race discrimination she experienced to the West Virginia Board of Barbers and Cosmetologists. The retaliation included unlawfully expelling Complainant Edwards and retaining her property. Id.

In accord with her determination, the ALJ issued a cease and desist order against the Petitioners ordering them to cease engaging in unlawful discriminatory conduct. The Final Decision also awarded Mr. Robinson and Ms. Edwards each incidental damages, as well as other relief. Petitioners were ordered to pay the Commission's court reporting and witness fee costs incurred in conducting the public hearing.

Petitioners filed an agency-level appeal contesting the ALJ's Final Decision. On review, the Commission affirmed the consolidated Final Decision and incorporated by

reference the factual findings and conclusions of law set forth by the ALJ into the September 2, 2009, Final Order of the agency. It is from this Final Order that the instant appeal is taken.

This Court has reviewed the Petition of Appeal, the Response of the West Virginia Human Rights Commission, the Petitioners' Reply, the record of the West Virginia Human Rights Commission, including the Final Decision of the ALJ and the Final Order of the HRC, as well as pertinent legal authorities. After a careful review of the issues raised by the Petitioners and the HRC's Response, this Court upholds and affirms the Final Order of the West Virginia Human Rights Commission.

### **STANDARD OF REVIEW**

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The West Virginia Administrative Procedures Act, W. Va. Code § 29A-5-4, sets out the parameters for the review of a final order of the Human Rights Commission.

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

W. Va. Code § 29A-5-4(g) (1998).

With regard to factual findings, an agency's decision may be reversed only where the decision is clearly wrong. Mayflower Vehicle Systems v. Cheeks, 218 W. Va. 703, 629

S.E.2d 762 (2006). Courts are bound to give significant deference to the agency's factual findings. Smith v. West Virginia Human Rights Commission, 216 W. Va. 2, 602 S.E.2d 445 (2004); Tom's Convenient Food Mart, Inc. v. West Virginia Human Rights Commission, 206 W. Va. 611, 527 S.E.2d 155 (1999); Childress v. West Virginia Human Rights Commission, 190 W. Va. 58, 436 S.E.2d 293 (1993). Where there is conflicting evidence, or conflicting inferences which may be drawn from the evidence, deference must be given to the resolution arrived at by the ALJ. Brammer v. West Virginia Human Rights Commission, 183 W. Va. 108, 394 S.E.2d 340, 343 (1990). Where there is sufficient evidence to support the ALJ's findings, these findings of fact must be affirmed "regardless of whether the [reviewer] would have reached a different conclusion on the same facts." Plumley v. West Virginia Dep't of Health and Human Resources/Office of Health Facility Licensure and Certification, 221 W. Va. 549, 655 S.E.2d 765 (2007); Gino's Pizza of West Hamlin v. West Virginia Human Rights Commission, 187 W. Va. 312, 418 S.E.2d 758 (1992); Bloss & Dillard v. West Virginia Human Rights Commission, 183 W. Va. 702, 398 S.E.2d 528, 531 (1990); Frank's Shoe Store v. West Virginia Human Rights Commission, 179 W. Va. 53, 365 S.E.2d 251 (1986).

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This Court is not bound to give such extensive deference to the ALJ regarding the interpretation of the law or the application of the law. Questions of law are reviewed *de novo*. Mayflower Vehicle Systems v. Cheeks, 218 W. Va. 703, 629 S.E.2d 762 (2006); Fairmont Specialty Services v. West Virginia Human Rights Commission, 206 W. Va. 86, 522 S.E.2d 180 (1999); Wheeling-Pittsburgh Steel Corp. v. Rowing, 205 W. Va. 286, 517 S.E.2d 763 (1999). If aspects of the agency's decision are shown to deviate from the applicable law, they are to be corrected upon review.

#### **DISCUSSION AND ANALYSIS OF PETITIONERS' ASSIGNMENTS OF ERROR**

As the basis for their Petition of Appeal before this Court, Petitioners assert twenty-one assignments of error. The majority of the assignments do not raise legal errors with the decision of the ALJ or of the Commission, but rather assert philosophical differences with the Commission, raise ideological objections to the imposition of the West Virginia

Human Rights Act and its anti-discrimination constraints upon West Virginia businesses, and criticize the conduct of the ALJ and Commission's counsel. Other assignments challenge the Commission's procedures and identify procedural defects and delays which occurred in these matters below. Many of the assignments of error asserted are not based upon the record, but refer to extrajudicial information and/or documentation. To the extent the Petitioners have articulated legitimate assignments of error grounded within the record below, this Order shall address the same.

#### **Assignment No. 1**

Petitioners' first assignment of error contends that the West Virginia Human Rights Commission ceased to exist as of July 1, 2007, and therefore any action taken by the Commission after that date, such as the rendering of the Final Decision and Final Order in these matters, is "illegal" and "criminal." (Assignment of Error No. 1; Petition of Appeal, pp. 6-11). This claim is based upon the abandoned legislative scheme for agency reauthorization which was known as the "West Virginia Sunset Law," and the associated terminal date included in the West Virginia Human Rights Act prior to the legislative overhaul of the agency reauthorization process. See W. Va. Code § 4-10-1 *et seq.* (2006); W. Va. Code § 5-11-21 (2001).

Effective March 7, 2007, the Legislature replaced the West Virginia Sunset Law with the "West Virginia Performance Review Act." The reformulation of the old Sunset Law into the Performance Review Act eliminated the sunset, or termination, process for State agencies. Specifically, the new formulation of Chapter 4 states that "[n]o agency or regulatory board terminates pursuant to references to this article." W. Va. Code § 4-10-14. Accordingly, the terminal date included in the West Virginia Human Rights Act, which established the termination of the Commission "pursuant to the provisions" of the West Virginia Sunset Law, became null and void.

Petitioners' assertion that the Commission ceased to exist on July 1, 2007, is both factually and legally incorrect. The Human Rights Commission was and is fully authorized to conduct the business of seeking to eliminate discrimination in West Virginia. The Court finds that, pursuant to this authority, the Commission acted lawfully in adjudicating and judging this case.



### **Assignment No. 2**

Petitioners' second assignment of error asserts that the participation by Commission's counsel in the litigation of these matters violated the Equal Protection Clause of the Constitution and created a conflict of interest. (Assignment of Error No. 2; Petition of Appeal, pp 11-20). The Court finds no constitutional defect or conflict of interest.

At the explicit direction of the Legislature and the West Virginia Supreme Court of Appeals, the Civil Rights Division of the West Virginia Attorney General's Office represents the Human Rights Commission in public hearings and presents the case on behalf of the Commission and unrepresented complainants. W. Va. Code § 5-11-10; see also Allen v. West Virginia Human Rights Commission, 174 W. Va. 139, 324 S.E.2d 99 (1984). Each complaint which merits a probable cause finding is prosecuted on behalf of the individual complainant and on behalf of the citizens of the State of West Virginia. The Court finds that in this case the Human Rights Commission has followed the legislatively-prescribed scheme; and further finds that this scheme is rationally related to the legislative objective of eliminating discrimination. Accordingly, the Court finds that there is no equal protection violation.

Participation in Commission hearings by Commission's counsel does not create a conflict of interest. The housing of both prosecutorial and adjudicative functions within the same agency is not an inherent conflict of interest if the functions are independent. The Commission's administrative law judges are independent by design and function. The Civil Rights Division provides legal representation to the executive director of the West Virginia Human Rights Commission and to complainants, not to Commission administrative law judges.

This Court is unpersuaded by Petitioners' assertion that the Commission's statutory scheme is not impartial. Moreover, no basis exists upon which to conclude that the statutory scheme of the West Virginia Human Rights Act violates the Equal Protection Clause.

### **Assignment No. 3**

Petitioners next assert that the Complainants' claims should be dismissed because the Commission's investigation and adjudication of the complaints were not completed

within the established time lines. (Assignment of Error No. 3; Petition of Appeal, pp. 20-29). It is clear and uncontested that the investigation and adjudication of these claims were protracted, apparently for many reasons. The matters before the ALJ included some complex legal issues. Some confusion and deliberation occurred over the continuing role of Petitioners' counsel in the litigation below after the Petitioners disclosed through the discovery process that counsel was also an employee of CABC school and a potential witness at the public hearing. Discovery was extensive and contentious.

There has been no claim that the delay which occurred in this matter was sought by the Complainants. This Court recognizes that to the extent the Petitioners experienced delay, so did the Complainants. A complainant should not be penalized because the Commission's process has exceeded procedural guidelines. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

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The Petitioners' claim of delay in the HRC process and disposition of the administrative matter below does not vitiate the Commission's Final Order. Kanawha Valley Transportation Co. v. Public Service Commission, 159 W. Va. 88, 219 S.E.2d 332 (1975). Any due process claim Petitioners seek to raise should have been brought in mandamus, and prior to the issuance of the Final Decision. In Allen v. West Virginia Human Rights Commission, 174 W. Va. 139, 324 S.E.2d 99 (1984), the West Virginia Supreme Court of Appeals found in favor of several petitioners who filed a mandamus action complaining of delay by the Commission. The Court ordered the HRC to proceed with those cases. Likewise, a mandamus action would have been the appropriate manner for the Petitioners to address their procedural due process rights. Here, the issuance of the Final Decision by the ALJ cured the procedural due process violation experienced equally by Petitioners and Complainants.

In West Virginia Human Rights Commission v. Garretson, 196 W. Va. 118, 468 S.E.2d 733 (1996), the West Virginia Supreme Court of Appeals reversed the circuit court's dismissal of a housing complaint, filed by the Commission on behalf of a complainant after the thirty-day filing deadline, explaining that to dismiss the claim "because of an agency failure to meet a time deadline is equivalent to extinguishing [the complainant's] property interests without a hearing." Garretson, 198 W. Va. at 124, 468 S.E.2d at 739. A similar

argument was also rejected by this Court in an appeal of a Commission Final Order filed by the employer in a gender discrimination and retaliation claim. (See Total Distribution, Inc. v. West Virginia Human Rights Commission and Deborah L. Miller, Civil Action No. 07-AA-15, *Opinion and Final Order Affirming the Final Administrative Decision of the West Virginia Human Rights Commission* (Nov. 18, 2008, The Hon. James C. Stucky)).

The Court finds that the Commission's investigation and adjudication of these matters exceeded the established time frames. The Court recognizes that there were legitimate reasons for the protracted nature of the proceedings. The delay experienced by the Complainants and Petitioners does not compel dismissal of these matters and does not invalidate the Commission's Final Order.

#### **Assignment No. 4**

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Petitioners' fourth assignment of error asserts that the ALJ's assessment of the \$5,215.75 in costs of the proceedings to the Petitioners was an unconstitutional "fine." (Assignment of Error No. 4; Petition of Appeal, pp. 29-31). Petitioners cite no legal authority for their contention that the ALJ's assessment of costs violates the prohibition on excessive bail, excessive fines, and cruel and unusual punishment articulated in the Eighth Amendment of the United States Constitution.

It is clear from the record that this \$5,215.75 charge was, in fact, the costs of the proceedings; in particular, the out-of-pocket court reporting and witness fee costs incurred by the HRC on behalf of all the parties, and not a "fine." Given the nature of these proceedings, there is nothing excessive about this charge.

The Court notes that the awarding of costs is specifically authorized by the West Virginia Human Rights Act. W. Va. Code § 5-11-13(c). Petitioners argue that the statute authorizes the assessment of costs only when they are awarded to the complainant; however, this narrow interpretation of the language illogically immunizes wrongdoing respondents when complainants in Commission proceedings are not represented by private counsel. The Court affirms the ALJ's assessment of costs against the Petitioners.

#### **Assignment No. 5**

The Petitioners' fifth assignment of error asserts that "the West Virginia Human Rights Act. . .is unconstitutional in its entirety as the law violates the fundamental and

natural rights of every citizen to that *Freedom of Association* guaranteed by the Constitution of the United States[.]” (Assignment of Error No. 5; Petition of Appeal, pp. 31-41) (*italics in original*). Petitioners cite not a single case, from West Virginia or any other jurisdiction, in support of this claim, which, if credited, would strike down a state law that has been in the West Virginia Code for half a century and has been construed and applied in scores of Supreme Court decisions. Instead, The Petitioners rely solely upon the “independent reason and sound judgment” of their counsel. (Petition of Appeal, p. 31).

It is the further contention of counsel, that all of those laws commonly termed *civil rights laws* actually violate the *civil rights* of the individual citizen by violating that sacred right to associate with, or disassociate from, whomever he wishes for whatever reason that citizen deems appropriate.

Petition of Appeal, p. 32 (*italics in original*).

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The Court is not persuaded by this argument and finds no constitutional defect of the nature Petitioners describe within the West Virginia Human Rights Act.

#### **Assignment No. 6**

The Petitioners next allege that the ALJ “failed to execute her duties as ALJ for the HRC in a fair an (sic) impartial manner in direct conflict with the Code of Judicial Conduct[.]” (Assignment of Error No. 6, Petition of Appeal, pp. 41-46). There is no evidence in the record to support this very weighty charge.

Petitioners contend that the ALJ once was a customer at CABC, and that she willfully failed to disclose this alleged information to the parties, and “imposed herself on the proceedings” in the administrative cases below. (Petition of Appeal, pp. 42, 45). The Petitioners conclude that the ALJ had “personal knowledge that the primary allegation in the cases was fraudulent” and that she “should have disqualified herself.” (Petition of Appeal, p. 45). Petitioners have included extrajudicial documents in their appeal in support of their assertion that the ALJ was once a patron at CABC. They provide no support for their contentions that the ALJ secreted her alleged visit to the beauty school or that she knew the Complainants’ allegations to be fraudulent.

There is nothing in the record which suggests that the ALJ was ever a patron of CABC, and no support anywhere for the proposition that if she ever was a patron, that she

recalled the occasion. There is no evidence or reason to believe that the ALJ engaged in any kind of deception or that she conducted the hearing with anything other than the highest respect for her ethical obligations and a commitment to fairness toward the parties. In contrast to the Petitioners' allegations, the record demonstrates that the ALJ disclosed even insignificant contacts to the parties, and gave the parties an opportunity to raise objections based upon such contacts. (Tr. Vol. III, pp. 68-69).

The Rules of Practice and Procedure Before the West Virginia Human Rights Commission provide that recusal motions be made initially to the presiding ALJ. W. Va. Code R. § 77-2-7.4.b. This gives the ALJ an opportunity to consider and respond to the motion.

The Petitioners stepped forward with purported evidence they contend demonstrates ALJ bias and accusations that the ALJ should have recused herself only after the ALJ rendered her Final Decision. The unverified documents offered by the Petitioners are outside the record of this case. Because such evidence was never presented to the ALJ, she never had the opportunity to respond to it. Petitioners never raised the issue of the ALJ's recusal prior to their appeal. The Petitioners' unsubstantiated accusations of misconduct are unpersuasive and do not provide an appropriate basis for reversal of the Commission Final Order.

#### **Assignment No. 7**

Petitioners also assert that there was "willful and knowing introduction of fraudulent evidence by the AG's Office," which the ALJ "incorporated. . .into her *Decision*["] (Assignment of Error No. 7; Petition of Appeal, pp. 46-56). Petitioners refer here to testimony about a harassing note left on Walter Robinson's student work station. Petitioners allege that this note was "a complete and total fabrication, and the AG's Office knew it["] (Petition of Appeal, p. 48). This assertion by the Petitioners is unpersuasive, unsupported by the record of this case and does not establish a basis for reversing the HRC decision.

At the public hearing in these matters, evidence was introduced related to an offensive note left on Complainant Robinson's work station which he contended he brought to the attention of the Petitioners. At the public hearing, two of Petitioners' own witnesses

testified about the note. On cross-examination, Petitioners' witness and assistant manager, Sandra Richardson, testified that she recalled an incident involving a note left on Complainant Robinson's station that said "fa##@t n\*&&#r." (Tr. Vol. III, p. 462). Petitioner Hall also recalled the note, and testified about it. Among other things, she claimed that she did not keep the note, that she gave it back to Complainant Robinson.

Petitioners included a copy of an offensive image in their Petition of Appeal that was not admitted into evidence at the public hearing. Having failed to introduce the offensive image into evidence at the public hearing, the Petitioners now contend that this image is the note Complainant Robinson complained about. To credit the claim that this document was the same document referred to by Ms. Richardson and Petitioner Hall would be to completely discount and contradict the testimony of Petitioner Hall in the record.

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This Court rejects Petitioners' baseless claim that evidence was fabricated by counsel for the Commission. Moreover, nothing in this assignment of error provides a legitimate basis for reversing the Final Order of the West Virginia Human Rights Commission.

#### **Assignment No. 8**

Petitioners' eighth assignment of error contends that the Commission engaged in racism in determining that probable cause exists to credit the Complainants' allegations. (Assignment of Error No. 8; Petition of Appeal, pp. 56-57). This argument goes well beyond the record, and attempts to discredit the Commission's Final Order by shifting the focus from the facts and evidence of the cases properly before this Court. Petitioners assert that another student at CABC, who is white, filed a discrimination complaint with the Commission on or around the time period that the Complainants filed their claims, and that this white complainant received a no probable cause determination because she is white. Nothing in the record or in Petitioners' appeal substantiates this claim. Whatever the facts are of this other case, they are not a sound legal basis for disturbing the HRC Final Order in this case. The issues before this Court are whether the HRC's Order is in accordance with the law and is supported by the record.

### **Assignment No. 9**

Petitioners contend that during the investigation and litigation of these matters they were not properly named or served in a timely fashion. They also contend that the individual Respondents below, Ms. Hall and Ms. Bishop, were not proper Respondents to the Complainants' complaints. (Assignments of Error No. 9 ; Petition of Appeal, pp. 57-60).

This Court notes that the complaints in these matters were amended multiple times. These amendments amplify the allegations of the complaints and correct the corporate name of the Petitioner beauty school. Some reasonable confusion existed regarding the proper legal name for CABC, particularly in light of the fact that the doing business as designation used by the Petitioner was registered to a different legal entity with the West Virginia Secretary of State's Office. The amendments and revisions conform with the requirements of the Rules of Practice and Procedure Before the West Virginia Human Rights Commission. Moreover, given the undisputed participation of the Petitioners in responding to the Complainants' complaints in the investigatory process, filing motions and preparing this matter for litigation, and appearing at the public hearing, there can be no dispute but that the Petitioners received timely actual and constructive notice of the allegations of the Complainants' complaints.

Petitioners Hall and Bishop are appropriate Respondents before the Human Rights Commission. The West Virginia Human Rights Act expressly authorizes claims against "the owner, lessee, proprietor, manager, superintendent or employee of any place of public accommodations." W. Va. Code § 5-11-9(6). Claims are also authorized against individuals who aid and abet in discriminatory conduct and who engage in unlawful retaliation. See W. Va. Code § 5-11-9(7); Holstein v. Norandex, 194 W. Va. 727, 461 S.E.2d 473 (1995); see also Michael v. Appalachian Heating LLC, No. 35127, slip op. at Syl. pt. 5 (W. Va. Sup. Ct., June 11, 2010).

### **Assignment No. 10**

The tenth assignment of error seeks reversal of the Commission's Final Order because of a clerical error that occurred during the investigation of Complainant Edwards' complaint. (Assignment of Error No. 10; Petition of Appeal, pp. 60-61). The Commission closed and then administratively reopened the investigation of Complainant Edwards'

public accommodations discrimination complaint because the Commission misfiled and then located a written reply to the Petitioners' position statement submitted by Complainant Edwards. The record contains no evidence to suggest that the misfiling of Complainant Edwards' response was anything other than an inadvertent agency error. Believing that Complainant Edwards had not provided the required response, the Commission erroneously closed the investigation. Almost immediately thereafter, Complainant Edwards' reply was located. When the Commission realized they had erred, the investigation was properly revived. The Commission's actions in this regard are consistent with the principles adopted by the United States Supreme Court of Appeals in Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), and do not provide a legitimate basis to extinguish Complainant Edwards' Human Rights Act complaint.

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#### **Assignment No. 11**

Petitioners assert that the ALJ erred in concluding that CABC is a "place of public accommodations" within the meaning of the West Virginia Human Rights Act with regard to its students. (Assignment of Error No. 11; Petition of Appeal, pp. 61-65). The Court finds no error here. The West Virginia Supreme Court of Appeals set out criteria in Israel v. West Virginia Secondary Schools Activities Commission, 182 W. Va. 454, 388 S.E.2d 480 (1989), for determining whether or not an entity is a "place of public accommodations." The ALJ properly applied these criteria to the characteristics of CABC as established in the record, including the fact that it provides vocational training to members of the public who qualify as students, provides barber and cosmetology services to members of the public, is regulated by the West Virginia Board of Barbers and Cosmetologists, and receives the benefits of publicly-funded student loan programs.

This Court concurs with the ALJ's conclusion that CABC is a "place of public accommodations" within the meaning of the West Virginia Human Rights Act, W. Va. Code § 5-11-3(j).

#### **Assignment No. 12**

Petitioners assert that the claim of Complainant Walter Robinson abated as a result of his death. (Assignment of Error No. 12; Petition of Appeal, pp. 65-68). Petitioners note that on January 16, 2009, more than a year after the completion of the hearing of this case,



but several months before the issuance of the Final Decision, Complainant Harry Walter Robinson died. The Petitioners argue that W. Va. Code § 55-7-8a(b) compels this Court to find that the Final Order in favor of Complainant Robinson, "can not stand and must be ABATED[.]" (Petition of Appeal, p. 65) (emphasis in original). Although not disclosed by the record of the case, which was closed in August 2007, it is undisputed that Complainant Robinson passed away in 2009. Complainant Robinson's claim survives his death and can be revived and prosecuted to judgment and execution by his representative. W. Va. Code § 55-7-8a(a).

The Court notes that there is no special procedure for reviving a claim, especially where there is no contest over the decedent's estate. Complainant Robinson's mother, Ella J. Martin, has reportedly sought appointment as executor of Robinson's estate and has agreed to serve in the capacity of personal representative. This Court is reluctant to abate Complainant Robinson's claim, given this representation. Moreover, the Human Rights Commission is a party to the case brought on behalf of Complainant Robinson. The Commission represents the interests of the citizens of West Virginia in eliminating discrimination. The Petitioners have articulated no basis upon which to abate the claim with respect to the Human Rights Commission.

### **Assignment No. 13**

The Petitioners next claim that the Commission did not actually investigate the complaints of the Complainants and failed to engage in or seek conciliation. (Assignment of Error No. 13, Petition of Appeal, pp. 68-70). Nothing in the record supports these contentions or reversing the Final Order on these alleged grounds.

Petitioners assert, without support in the record, that none of their employees were contacted by the Commission during the investigatory process. It is well taken that Petitioners would not necessarily have known if their current or former employees had been contacted by the Commission during the investigation. Regardless, this is not a legitimate basis for reversing the ALJ's Final Decision. The HRC investigation is the basis for the finding of probable cause, which prompts the conduct of a public hearing. W. Va. Code § 5-11-10; see Currey v. State of West Virginia Human Rights Commission, 166 W. Va. 163, 273 S.E.2d 77 (1980); see also Perry v. Miller, 166 W. Va. 138, 272 S.E.2d 678

(1980). Now that there has been a public hearing and the ALJ has built a record, this record is the legitimate basis upon which this Court reviews the Commission's final agency action.

The Court is unable to determine from the record whether a formal conciliation process occurred in these cases; however, it appears that informal resolution was attempted, that settlement discussions were not fruitful, and that it was necessary to proceed to public hearing. Nothing in the record reflects that the Petitioners were ever prevented in any way from pursuing conciliation. In any event, a lack of conciliation is not a proper basis to reverse the Final Order of the Commission.

#### **Assignment No. 14**

The Petitioners assert that the Commission is collaterally estopped from hearing Complainant Robinson's claim of disparate treatment with regard to educational opportunities because he made similar complaints to the West Virginia Board of Barbers and Cosmetologists [hereinafter referred to as WVBBC]. (Assignment of Error No. 14; Petition of Appeal, pp. 70-74).

Collateral estoppel is a legal doctrine which can prohibit the relitigation of issues that have already been fully litigated, where the issues previously decided were identical and the previous determination was based upon an actual adjudication by a court or an agency acting in a judicial capacity. Syl. pt. 9, Peters v. Rivers Edge Mining, Inc., 224 W. Va. 160, 680 S.E.2d 791 (2009), *citing* Syl. pt. 1, State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995; Jones v. Glenville State College, 189 W. Va. 546, 553, 433 S.E.2d 49, 56 (1993), *citing* McCulty v. Rockefeller, 570 F. Supp. 1455, 1459 (S.D. W. Va. 1983).

In this case, Petitioners' own witness from the WVBBC testified that the WVBBC did not have jurisdiction to consider Complainant Robinson's discrimination complaint. (Tr. Vol. III, pp. 315-316). Accordingly, the issues decided by the WVBBC could not have been identical to the issues considered by the ALJ in Complainant Robinson's Human Rights Act race discrimination complaint. Even if there were some overlapping jurisdiction, there was no true adjudication of any issue. Liller v. West Virginia Human Rights Commission, 180 W. Va. 433, 376 S.E.2d 639 (1988). Complainant Robinson's complaint of discrimination

was properly before the Commission, and was not barred by the doctrine of collateral estoppel.

### **Assignment No. 15**

Petitioners' next assignment of error is that the allegations of the complaint were "too vague, ambiguous, not noticed, illegal and hypothetical." (Assignment of Error No. 15; Petition of Appeal, pp. 74-81).

Petitioners contend that the Commission and the ALJ proceeded upon ambiguous and amorphous allegations which made defending against the complaints akin to "trying to hit a moving target." (Petition of Appeal, p. 77). This contention is not supported by the substantial evidence of the record. The record is replete with evidence that the Petitioners received clearly defined contentions in the complaints, but also received additional information regarding the specific allegations through the discovery process.

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Petitioners also suggest that the ALJ's conclusions regarding racial steering and segregation are legal error. Petitioners cite a 1969 case from the Northern District of Mississippi, Coleman v. Aycock, 304 F. Supp. 132 (N.D. Miss. 1969), for the proposition that only "forced segregation" is unconstitutional. (See Petition of Appeal, p. 76, *citing Coleman*, 304 F. Supp. at 142). The administrative matters below do not involve self-segregation practices; they involve allegations that the Petitioners actively and purposefully paired up students with customers of similar racial backgrounds. Five witnesses provided testimony at the public hearing which supports the ALJ's conclusion that segregation and racial steering occurred. The ALJ properly found that the credible evidence of the record is that steering and segregation occurred, and that such practice was detrimental to the educational opportunities of the Complainants.

There is a relationship between the ALJ's findings of inadequate instruction, insufficient products, and racial steering. All three of these unlawful discriminatory practices infringed upon the Complainants' educational opportunities in a meaningful way and operated to deprive the Complainants of their use and enjoyment of the public accommodation operated by Petitioners. The ALJ found that, under such circumstances, the Complainants did not receive equivalent educational opportunities as compared to their

white fellow students. This Court finds that the Commission's determination in this regard is appropriate.

### **Assignment No. 16**

In their sixteenth assignment of error, Petitioners argue that "the [tribunal's] *Decision* must be overturned because the ALJ improperly used standard (sic) which were inapplicable and irrational[.]" (Petition of Appeal, p. 81) (italics in original). In particular, the Petitioners argue that the ALJ erred "by bizarrely and inappropriately importing *employment* discrimination standards such as a *disparate treatment* analysis to the present claims of a denial of *public accommodation*." (Petition of Appeal, p. 84) (italics in original). Similarly, the Petitioners challenged the ALJ's application of law to the extent that it treated segregation and a racially hostile environment as unlawful forms of public accommodation discrimination.

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The Court concludes that the ALJ applied the appropriate law in considering these matters. First, the West Virginia Supreme Court has, from its earliest Human Rights Act cases, permitted a classic disparate treatment analysis, developed for application in *employment* discrimination cases, to be used in public accommodation contexts. See Shepherdstown Volunteer Fire Dep't v. West Virginia Human Rights Commission, 172 W. Va. 627, 309 S.E.2d 342 (1983), which first recognized the three-step inferential proof test set out by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and applied it in a public accommodation context.

Second, the Court finds that the West Virginia Human Rights Act prohibits racial segregation and unequal provision of services in the context of public accommodations. The Court rejects Petitioners' contention that there is no violation of the Human Rights Act unless there is a complete withholding of privileges or services. The Court notes that the term *discriminate* or *discrimination* is defined by the Human Rights Act to mean "to exclude from, or fail or extend to a person equal opportunities because of race," and explicitly includes "to separate or segregate." W. Va. Code § 5-11-3(h).

Third, the Court rules that the West Virginia Human Rights Act does prohibit a "place of public accommodations" from creating or facilitating a racially hostile environment.

Petitioners also argue in connection with their Assignment No. 16 that "[t]here is no credible evidence upon which former ALJ Carter could base her conclusion that the Petitioner beauty school was a *racially hostile work environment*." (Petition of Appeal, p. 90) (italics in original). The record reveals that Complainant Robinson received a note at his station which read "faggot nigger" (Final Decision, pp. 5, 34; Tr. Vol. III, pp. 462-464) about which there was no investigation. (Final Decision, p. 35). Petitioner Bishop made racist comments to students. (Final Decision, pp. 29, 32, 33; Tr. Vol. I, pp. 273, 274, 281, 282-283, 284; Tr. Vol. II, pp. 15-16; Tr. Vol. III, pp. 256-261, 695, 696). When these comments were reported to management, the harassment was ignored. (Final Decision, p. 31; Tr. Vol. II, pp. 562-563, 647-649). There was also racist graffiti in the CABC bathroom. (Final Decision, p. 30; Tr. Vol. I, pp. 275, 280, 436).

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The Court finds that there is ample evidence to support the ALJ's conclusion that the Petitioners were "fostering a racially hostile environment." (Final Decision, pp. 78-85, 105).

#### **Assignment No. 17**

Petitioners assert that "[t]he ALJ improperly, erroneously and prejudicially engaged in a willful and systematic misrepresentation of witness credibility, in direct contradiction to the testimony and evidence in a herculean effort to justify her predetermined conclusions." (Assignment of Error No 17; Petition of Appeal, pp. 90-104). This is an unsupported *ad hominem* charge against the ALJ, and the Court finds that it is baseless.

The Court sustains the ALJ's credibility findings. The ALJ's credibility findings are factual findings, and are reviewable by the Court under the same standard applicable to other factual findings. They are not to be reversed unless they are clearly wrong in light of the evidence in the record. Smith v. West Virginia Human Rights Commission, 216 W. Va. 2, 602 S.E.2d 445 (2004); Tom's Convenient Food Mart v. West Virginia Human Rights Commission, 206 W. Va. 611, 527 S.E.2d 155 (1999); Brammer v. West Virginia Human Rights Commission, 183 W. Va. 108, 394 S.E.2d 340 (1990).

The ALJ's Final Decision not only makes explicit credibility assessments, but it generally *explains* them and provides citations to the record which permits them to be evaluated in relation to the evidence in the record. After careful consideration, and

pursuant to the appropriate standard of review, this Court concludes that the ALJ's credibility determinations are not clearly wrong, are supported by the substantial evidence in the record and are, therefore, affirmed.

#### **Assignment No. 18**

Petitioners next assert that the ALJ's conclusion that Complainant Edwards was the victim of unlawful retaliation is not sustainable. (Assignment of Error No. 18; Petition of Appeal, pp. 104-111). Upon review of the ALJ's detailed findings of fact and her explanations of the application of the law to those facts (Final Decision, pp. 89-99), and review of the record, the Court determines that the ALJ's conclusions regarding retaliation are well supported by substantial evidence and are in accordance with the law.

The elements of a reprisal claim pursuant to W. Va. Code § 5-11-9(7) are discussed in Frank's Shoe Store v. West Virginia Human Rights Commission, 179 W. Va. 53, 365 S.E.2d 251 (1986). Ms. Edwards testified that she believed the discriminatory and harassing conduct which she experienced at CABC and about which she complained to the Board of Barbers and Cosmetologists was related to her race and was unlawful. The ALJ properly recognized that Complainant Edwards' good faith complaints of race discrimination to the WVBBC constituted protected activity pursuant to the West Virginia Human Rights Act. W. Va. Code § 5-11-9(7)(C). There is no basis in the record to overrule the ALJ's legal determination on this issue.

It is undisputed that Petitioners were aware of Complainant Edwards' complaints to the WVBBC. The ALJ's legal determination that Ms. Edwards' expulsion from CABC was causally connected to her complaint is supported by the preponderance of the evidence in the record.

The ALJ determined that Petitioners' alleged "legitimate, nondiscriminatory" reason for expelling Complainant Edwards is not supported by the record. Complainant Edwards and Petitioner Hall were the only witnesses who testified at the public hearing who actually know how the May 18, 2004, incident began. The ALJ found the testimony of Complainant Edwards more credible than that of Petitioner Hall. The testimony of other witnesses and the timing and manner of Complainant Edwards' expulsion also support the ALJ's determination that Petitioners' proffered explanation is pretextual. The Court finds that

there was substantial evidence that the Petitioners' articulated reason for the expulsion was pretextual.

It is not necessary that the evidence establish that Complainant Edwards' protected activity was the *only* factor considered in the determination to expel her. The law recognizes that employers and other respondents in discrimination cases may have mixed motives for making decisions. Skaggs v. Elk Run Coal Co., 198 W. Va. 51, 479 S.E.2d 561 (1996). The evidence must only establish that the discriminatory motive is at least a motivating factor in the expulsion decision.

The ALJ's findings and conclusions that the Commission has proved by a preponderance of the evidence that Complainant Edwards was the victim of unlawful retaliation are well supported by the evidence of record and are in conformity with the law.

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They are, therefore, affirmed.

#### **Assignment No. 19**

For their nineteenth assignment of error, Petitioners allege that the ALJ incorporates numerous lies and falsehoods into her Final Decision. (Assignment of Error No. 19; Petition of Appeal, pp. 111-117). In this assignment, the Petitioners allege that the ALJ's treatments regarding delay, amendments of the complaint, and the Complainants' claims of racial segregation and racial harassment were not merely erroneous, but that the errors were made by the ALJ "gratuitously and fraudulently." (Petition of Appeal, p. 117).

The substantive aspects of this assignment are raised in other assignments, and they are addressed in other portions of this Order. However, upon review of the Petitioners' claims, of the ALJ's Final Decision, and of the record of the case, the Court finds nothing to support Petitioners' contention that the ALJ misstated the evidence, let alone that she did so "gratuitously or fraudulently."

#### **Assignment No. 20**

The Petitioners have asserted the ALJ twice relied upon "inadmissible hearsay." (Assignment of Error No. 20; Petition of Appeal, pp. 118-120). The Court finds no error here.

The first alleged hearsay involves the official record of Petitioner Bishop's unemployment benefits application following her termination from CABC. The document,

which was prepared by a State official based upon information provided by Petitioner Bishop, reflects that "the claimant stated that this employment was from 10/01/1999 to 01/21/2004 and separation was due to: DISCHARGE. USING VULGAR AND RACIAL LANGUAGE." (Commission's Exhibit No. 39) (emphasis in original). Petitioner Bishop testified that she did not recall the reasons she gave for her termination, but she did not deny that she was discharged for using vulgar and racial language. (Tr. Vol. III, pp. 289-290). This document, including the contents, was properly admitted under both the Records of Regularly Conducted Activity (Business Records) and the Public Records and Reports exceptions to the hearsay rule, W. Va. R. Evid. 803(6)&(8)), without objection by the Petitioners. (Tr. Vol. II, pp. 175-176). The ALJ's reliance on this document to find that Petitioner Bishop was discharged for using vulgar and racial language (Final Decision, p.

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34, Finding of Fact No. 203) was reasonable and proper.

Petitioners also allege that the written report of Ralph Reed, Investigator for the West Virginia Board of Barbers and Cosmetologists, was inappropriately admitted hearsay. (Petition of Appeal, pp. 119-120). Initially, Petitioners objected to the exhibit, but not on hearsay grounds. (Tr. Vol. II, p. 160). Paradoxically, on appeal, the Petitioners also cite to this very exhibit (Commission's Exhibit No. 32) as evidence in support of their argument that Complainant Robinson's claim is barred by the doctrine of collateral estoppel. (Petition of Appeal, p. 71). This document was properly admitted into evidence and considered by the ALJ under the Public Records and Reports exception to the hearsay rule. W. Va. R. Evid. 803(a).

#### **Assignment No. 21**

In their last assignment of error, Petitioners assert that the ALJ blatantly ignored the plain language of the contract between Complainant Edwards and CABC, and impaired the "rights of contract," by ordering Petitioners to return Complainant Edwards' kit and refund her part of her tuition. (Assignment of Error No. 21; Petition of Appeal, pp. 120-123).

The Human Rights Commission is empowered to award complainants such relief as will effectuate the purposes of the Human Rights Act and "make persons whole for injuries suffered on account of unlawful . . . discrimination." Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). Under the make whole rule, complainants are to be placed, as near



as possible, into the position they would have been in had they not experienced unlawful discrimination. The Court is persuaded that the ALJ appropriately applied the make whole rule to the facts of this case in fashioning the remedy.

Petitioners assert that Complainant Edwards' student kit, which was paid for out of her Pell grant, is the property of CABC because Complainant Edwards failed to pay her full tuition after her discriminatory expulsion. CABC claims it is the rightful owner of the kit, pursuant to the written contract, and alleges that the ALJ erred by awarding Complainant Edwards the kit or its value. However, the ALJ properly determined that, having been charged an unrefundable fee for the kit and having been expelled because of Petitioners' unlawful discrimination, Complainant Edwards was entitled to the return of her kit and/or the value of her kit, pursuant to the make whole rule.

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Petitioners also object to the ALJ's award of tuition reimbursement to Complainant Edwards. In reaching the conclusion to make Complainant Edwards whole by awarding her a partial tuition reimbursement, the ALJ explained why a tuition credit was reasonable and appropriate:

The reprisal actions of CABC and Respondent Hall deprived Complainant Edwards of access to the accommodations, advantages, facilities, privileges or services of the CABC program. Complainant Edwards essentially was required to pay full tuition but limited to attending school for half of the enrollment term. CABC should not be enriched as a result of its own discriminatory conduct. Accordingly, Complainant Edwards is entitled to a refund of half the tuition charged to her. Complainant Edwards' final bill included a tuition charge in the amount of \$6500.00.

Final Decision, pp. 101-102.

Accordingly, the ALJ ordered Petitioner CABC to refund \$3250.00 of that charge to Complainant Edwards. In the alternative, CABC was ordered to hold Complainant Edwards harmless for \$3250 of the tuition fee it claims she owes. In reaching this conclusion, the ALJ properly utilized Complainant Edwards' final bill from CABC to determine the amount of tuition charged by CABC.

The Court affirms the ALJ's determination that Complainant Edwards is entitled to a make whole remedy. The ALJ's approach to making Complainant Edwards whole is reasonable and appropriate given the facts and evidence in the record of this case.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After a careful review of the issues raised by the Petitioners and the West Virginia Human Rights Commission's Response, and based upon the foregoing discussion and analysis of the Petitioners' Assignments of Error, the Court hereby makes the following findings:

1. Complainant Tyleemah Edwards filed a timely public accommodation discrimination complaint with the West Virginia Human Rights Commission against Petitioners alleging race discrimination and reprisal against Petitioners.

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2. Complainant Walter Robinson filed a timely public accommodation discrimination complaint with the West Virginia Human Rights Commission against Petitioners alleging race discrimination.

3. Petitioner Charleston Academy of Beauty Culture, Inc., d/b/a Charleston School of Beauty Culture, Inc., is a beauty culture trade school which operates in Charleston, West Virginia, pursuant to regulation by the West Virginia Board of Barbers and Cosmetologists. Complainants were students at CABC. During the Complainants' tenure at CABC, Petitioner Cherie Bishop was an instructor at the beauty school. Petitioner Hall is an owner and manager of CABC. All are proper Respondents to the underlying administrative Human Rights Act complaints.

4. The complaints in these matters were amended several times to amplify allegations and to properly name the Petitioner beauty school. The amendments were made in conformity with the requirements of the Rules of Practice and Procedure Before the West Virginia Human Rights Commission.

5. The Commission conducted an investigation and concluded that probable cause existed to credit the allegations of the Complainants.

6. Petitioners had notice of the Complainants' complaints and participated in the investigation and litigation of these matters.

7. The investigation and adjudication of the Complainants' complaints were protracted and exceeded the established time frames for conducting investigations and issuing final decisions. Both the Petitioners and the Complainants experienced this delay.

8. This Court adopts and incorporates by reference the Commission's factual findings and determinations which are not challenged by the Petitioners.

9. This Court has evaluated the credibility determinations of the ALJ in light of the record and the appropriate standard of review and finds no basis to disturb the ALJ's conclusions with regard to credibility. Accordingly, this Court adopts the credibility determinations of the ALJ.

10. The Court incorporates by reference all factual findings and determinations discussed and articulated herein above in the Court's analysis of the Petitioners' Assignments of Error.

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Based upon the foregoing findings and discussion, this Court makes the following conclusions of law:

1. This Court has jurisdiction to hear the instant Petition pursuant to W. Va. Code § 5-11-11(a).

2. This Court adopts and incorporates by reference the Commission's unchallenged findings of fact and conclusions of law without modification.

3. This Court adopts and incorporates by reference those uncontested portions of the Commission's damages award without modification.

4. At all times relevant to the investigation and adjudication of the underlying administrative matters, the West Virginia Human Rights Commission was fully authorized to undertake its statutory obligation of eliminating discrimination in West Virginia by docketing, investigating, and adjudicating complaints of unlawful discrimination. The Commission's Final Decision and Final Order are valid exercises of the Commission's statutory authority and are neither criminal nor illegal.

5. The West Virginia Human Rights Act's directive that Commission's counsel present cases on behalf of complainants at public hearings does not create an inherent conflict of interest, as Commission ALJs are independent.

6. West Virginia Code § 5-11-10 does not violate the Equal Protection Clause of the United States Constitution.

7. To the extent that the delay in the Commission's process violated the procedural due process rights of the Petitioners, the Complainants' procedural due process rights were similarly violated. Any such violations were remedied by the issuance of the ALJ's Final Decision on May 29, 2009.

8. The award of costs by the ALJ was reasonable, appropriate, and consistent with the West Virginia Human Rights Act. Such costs do not constitute an unconstitutional excessive fine.

9. The anti-discrimination prohibitions of the West Virginia Human Rights Act do not unconstitutionally violate the freedom of association as established in the United States Constitution.

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10. The record reflects that the ALJ conducted a fair and impartial hearing and did not misstate the evidence introduced at public hearing.

11. The Petitioners failed to utilize the proper method for seeking recusal of the ALJ. This Court concludes that there is no basis developed within the record to reverse the Commission's Final Order related to the conduct of the ALJ.

12. The record does not contain any evidence of fraudulent conduct by Commission's counsel.

13. The record is devoid of any evidence to support the Petitioners' allegation that the Commission's handling of the Complainants' complaints was motivated by bias or race.

14. The Petitioners had adequate and timely notice of the Complainants' complaints and the allegations contained therein.

15. The Commission's inadvertent error in closing the investigation into Complainant Edwards' complaint was cured by rescinding the closure when the clerical error was discovered. Such error is an insufficient basis upon which to dismiss Ms. Edwards' claim.

16. Petitioner Charleston Academy of Beauty Culture, Inc., d/b/a Charleston School of Beauty Culture, Inc., is a place of public accommodations within the meaning

of the West Virginia Human Rights Act, W. Va. Code § 5-11-3(j), with regard to its patrons and its students.

17. Complainant Robinson's complaint is not abated, nor is the independent interest of the West Virginia Human Rights Commission in eliminating race discrimination at the Petitioner beauty school.

18. Complainant Robinson's complaint to the West Virginia Board of Barbers and Cosmetologists does not operate to collaterally estop his West Virginia Human Rights Act complaint.

19. The Commission properly determined that the race discrimination at CABC infringed upon the Complainants' educational opportunities in a meaningful way and operated to deprive the Complainants of their use and enjoyment of the Petitioners' place of public accommodations.

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20. The ALJ applied the appropriate legal standards to reach the proper conclusion that the Petitioners engaged in race discrimination and fostered a racially hostile environment at the Petitioner beauty school.

21. The ALJ applied the appropriate legal standards and properly concluded that Complainant Edwards was the victim of unlawful reprisal.

22. The ALJ did not commit error by admitting hearsay into evidence. The Court concludes that with respect to the two exhibits Petitioners claim to be hearsay, the exhibits were not, in fact hearsay. Even if they were, the Petitioners failed to properly preserve their objections.

23. Complainant Edwards is entitled to a make whole remedy, and the Commission did not err in awarding her a partial tuition reimbursement and her personal property which was confiscated by the Petitioners. Such awards were clearly designed to place Complainant Edwards into the position she would have been in had the illegal discrimination not occurred.

24. The Commission's Final Order, which adopted in whole the ALJ's Final Decision, is consistent with the Commission's statutory authority.

25. The Commission's finding of liability is supported by a preponderance of the evidence and properly applies the applicable law. It is, therefore, affirmed with respect to both Complainants.

26. The Commission's award of damages is within the authority of the Commission, is well supported by the evidence, and is consistent with the institutional practice of the agency, the public interest, and the West Virginia court system. It is, therefore, affirmed with respect to both Complainants.

To the extent that the Commission's findings of fact and conclusions of law are consistent with this Order, this Court hereby adopts the findings of fact and conclusions of law of the West Virginia Human Rights Commission in its decision and **ORDERS**:

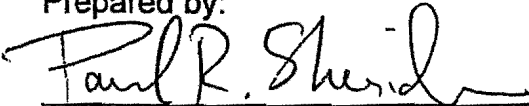
The Final Order of the West Virginia Human Rights Commission, dated the 2nd day of September 2009, is **AFFIRMED**, and this Appeal shall be **DISMISSED** and **STRICKEN** from the docket of this Court.

It is further **ORDERED** that the Circuit Clerk shall distribute certified copies of this Order to all parties or counsel of record. The Court notes the objection of the parties aggrieved by this Order.

Entered this 8<sup>TH</sup> day of Aug., 2010

  
THE HONORABLE CHARLES E. KING, JR.  
CIRCUIT JUDGE

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STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS  
DAY OF Aug. 2010  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA  
