# STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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CERTIFIED MAIL
RETURN RECEIPT REQUESTED

January 14, 1997

Kathryn S. Keene
2518 B Spring Street
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West Virginia Credit Bureau
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Re: Keene v. West Virginia Credit Bureau
ES-81-93

Dear Parties:

Enclosed, please find the final decision of the undersigned administrative law judge in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective July 1, 1990, sets forth the appeal procedure governing a final decision as follows:

"§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the administrative law judge's final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the judge, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

10.2. The filing of an appeal to the commission from the administrative law judge shall not operate as a stay of the decision of the administrative law judge unless a stay is specifically requested by the appellant in a separate application for the same and approved by the commission or its executive director.

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the administrative law judge, or an order remanding the matter for further proceedings before a administrative law judge, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before a administrative law judge, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the judge on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the administrative law judge's decision is:

10.8.1. In conformity with the Constitution and laws of the state and the United States;

10.8.2. Within the commission's statutory jurisdiction or authority;

10.8.3. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

10.8.4. Supported by substantial evidence on the whole record; or

10.8.5. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

10.9. In the event that a notice of appeal from a administrative law judge's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the judge's final decision; provided, that the commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the commission. The final order of the commission shall be served in accordance with Rule 9.5."

If you have any questions, you are advised to contact the executive director of the commission at the above address.

Yours truly,

Robert B. Wilson
Administrative Law Judge

RW/mst

Enclosure

cc: Mary C. Buchmelter, Deputy Attorney General

# BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

KATHYRN S. KEENE,

Complainant,

v. DOCKET NUMBER(S): ES-81-93

WEST VIRGINIA CREDIT BUREAU,

Respondent.

## FINAL DECISION

A public hearing, in the above-captioned matter, was convened on September 5, 1996, in Kanawha County, at the Human Rights Commission Office, Conference Room B, 1321 Plaza East, Charleston, West Virginia, before Robert B. Wilson, Administrative Law Judge.

The complainant, Kathryn S. Keene, appeared in person and by counsel, Patrick Cottrell. The respondent, West Virginia Credit Bureau, appeared by its representative, James Faehnle, Bureau Manager and by counsel, Rebecca A. Spainhoward, appearing pro hac vice. Andrew Cooke, with Flaherty, Sensabaugh & Bonasso, was responsible local attorney for respondent.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record

developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the administrative law judge and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

## A.

## FINDINGS OF FACT

1. The complainant, Kathryn Sue Keene, is a twenty-eight year old woman, residing in Dunbar, West Virginia. Complainant filed a sex discrimination complaint against the respondent under the West Virginia Human Rights Act alleging that the respondent fired her on June 30, 1992 due to her pregnancy. Complaint, Transcript pages 114 and 115.

2. The respondent, West Virginia Credit Bureau, is a person and an employer as those terms are defined by W. Va. Code §§ 5-11-3(a) and 5-11-3(d), respectively. Tr. page 308.

3. Complainant was employed by the respondent in its Collection Department from April 8, 1991 until she was discharged for alleged substandard level of performance on June 30, 1992. Respondent's Exhibit No. 6.

4. Jim Faehnle is and was at the relevant time the general manager of West Virginia Credit Bureau. Tr. page 303.

5. At the time of complainant's discharge, the respondent employed a collection manager, Regina Thaxton. Tr. page 306 and 309.

6. Complainant was hired as a check collector and performed data entry as well. Complainant was the sole employee working on the check collections and was the first to hold this position as the check collecting service was new. Tr. pages 118 and 119.

7. Complainant performed check collections well for the respondent during this time, with the Charleston office ranked third out of ten in check recovery fees through September 1, 1991. Complainant was also recognized by the parent company for her role in helping to secure a contract for check collections for Pizza Hut. Mr. Faehnle found her efforts highly commendable and of great benefit to the company. Complainant's Exhibit No. 3.

8. Previously, complainant had received a generally favorable evaluation dated July 16, 1991 with the only critical notations regarding the need for less idle chit-chat and greater organization of her work station. Complainant's Exhibit No. 1.

9. Regina Thaxton, as collections manager, oversaw the everyday collection functions, hiring and firing of employees, talking to clients, making sure the office ran smoothly. Ms. Thaxton interacted on an everyday basis with Mr. Faehnle, the general manager, discussing

collections, how the office was running or if either wanted to make any changes. Ms. Thaxton performed employee evaluations which she would then go over with Mr. Faehnle and the employee. Tr. pages 18-21.

10. In February 1992, complainant was told that she would be transferred from check collections to debt collections by Ms. Thaxton. Ms. Thaxton told her at the time that if it did not work out she could go back to check collections. Tr. pages 26, 27 and 134-136.

11. In 1992 Mr. Faehnle had set a goal of $7,000.00 in fees for the seasoned debt collectors. Tr. pages 25 and 27.

12. The goal set for complainant upon initially being moved into debt collections would have been around $4,000.00 because it took time to build up the unit over a period of from one to one and a half years, where the contacts would start bringing the payments and fees in to the respondent on older accounts that had been worked over that longer period. Tr. pages 92 and 93.

13. Newer accounts also required more skip tracing and time to explain to contacts why they were being contacted, therefore making it more difficult to make 30 contacts per day required of the debt collectors. Tr. pages 237 and 241.

14. Newer accounts were no more likely to be paid than any others. Accounts as old as 56 weeks were often paid, accounts as old as four and five years would pay. Tr. pages 233 and 234.

15. Complainant received no reprimands or oral or written warnings regarding her performance until June 1992. Tr. pages 24 and 25.

16. The complainant told Ms. Thaxton that she was pregnant in March 1992, which Ms. Thaxton reported to Mr. Faehnle. Tr. pages 30-34.

17. Ms. Thaxton testified credibly that sometime thereafter, Mr. Faehnle and she had a conversation in his office, at which time Mr. Faehnle stated that he was upset that complainant was pregnant and not married, and that complainant's child would be another one on welfare. Mr. Faehnle did not however make any comments regarding complainant's pregnancy in relation to her employment with the respondent. Tr. page 36.

18. Mr. Faehnle stopped talking to complainant after learning of her pregnancy. Tr. pages 32, 140, 242 and 243.

19. Complainant collected fees of $3,986.00 in March 1992, $4,549.00 in April 1992, $3,635 in May 1992 and $5,693 in June 1992. Complainant's fees collected for June 1992 were close to those collected by seasoned debt collectors, Linda Anderson and Vivian Sheider, who were working established units during that same month and greater than those collected by Linda Anderson in the months of April and May 1992 at $4,779.00 in April 1992 and $5,662.00 in May 1992. Complainant's Exhibit No. 2.

20. Ms. Thaxton issued written Employee Performance Incident Records on June 9, 1992, for a lengthy personal call and an abusive attitude to others; and on June 10, 1996, for substandard fee collections and not enough contacts, which was discussed with complainant who was told to make her goal by the end of June, or be terminated. Ms. Thaxton testified credibly that the personal calls stopped after this discussion and that the abusive attitude to

clericals referred to only one incident when the complainant had snapped at a clerical worker. Respondent's Exhibit No. 4, Respondent's Exhibit No. 5, Tr. pages 51, 52 and 103.

21. The only specific goal set for complainant was for June 1992, when her goal was set at $5,000.00 in fees. Tr. pages 144 and 145.

22. A yearly review was performed by Ms. Thaxton of the complainant's performance which was discussed between the two on June 18, 1992. That review indicated under work performance or areas needing improvement, that complainant's attitude to her work continued to decline. In the course of their conversation, Ms. Thaxton indicated that they believed this may have been due to complainant's pregnancy. Respondent's Exhibit No. 2, Tr. pages 141 and 142.

23. Complainant met her goal for June and exceeded it by several hundred dollars. Tr. pages 150 and 348.

24. Complainant next met with Ms. Thaxton on June 30, 1992 shortly before quitting time, at which time she was informed that she was being terminated for not meeting her commission goal. Complainant asked, "You mean that I hit my commission goal and your terminating me anyway. You've got other people out there who did not meet commission goal." Ms. Thaxton responded to this by shrugging her shoulders and nodding her head affirmatively. Tr. pages 151 and 152.

25. Ms. Thaxton testified credibly that Mr. Faehnle instructed her to fire complainant anyway even though she had met the goals set for her. Ms. Thaxton did not make the recommendation that complainant be terminated although in ever other case it was she that was normally the one to recommend termination. Tr. pages 61 and 100.

26. Ms. Thaxton was subsequently let go from her employment with respondent when it was discovered that she had been embezzling money from the respondent and had intercepted her own personal checks when they were received by respondent for bad check collection from respondent's client. Ms. Thaxton subsequently pled guilty to criminal charges of misappropriating funds. Ms. Thaxton testified credibly that although respondent's agents were upset with her, she had no right to be upset with them. Tr. pages 41-47.

27. Other individuals were never terminated for failing to meet their goals. A Cindy Chandler had been terminated in August 1991 because she was constantly late, with no evidence introduced indicating that this was the result of her failure to meet goal. Tr. pages 99, 101 and 258.

28. Two other women employed by the respondent under the credit reporting manager, became pregnant out of wedlock during the same general time, Cheryl House and Julie Carr. These employees were not terminated and returned from their maternity leave to employment with the respondent. Mr. Faehnle was not aware of the marital status of these employees at the time of their pregnancies. Tr. pages 281-286, and 346.

29. Ms. Thaxton credibly testified that Denise Jarvis, credit reporting manager had told her that she had called Ms. House at the hospital during her pregnancy and told her that she would have to report back to work in six weeks or they would not hold her job for her. Ms. Jarvis's testimony that she did not call Ms. House at the hospital is not credible as she admitted that Ms. House was out longer than 12 weeks with her problem pregnancy and the respondent's policy

on maternity leave provides only for a 12 week unpaid maternity leave. Tr. pages 40, and 293-295.

30. Mr. Faehnle testified credibly that children being born out of wedlock is something he disagrees with on a personal basis due to his personal relationship with and faith in Jesus Christ, but that he does not judge others as it is not his place to do so. Tr. pages 330 and 331.

31. Mr. Faehnle performed no investigations, nor did he talk to any employees regarding the allegations of poor attitude or the abusive attitude toward clericals. Mr. Faehnle made no other investigations of any sort regarding the complainant, and relied solely upon Ms. Thaxton's reports and experience. Tr. pages 344 and 345.

32. Despite Mr. Faehnle's denials that he instructed his manager to ever terminate an employee for failing to meet their goal, Mr. Faehnle did review the incident report which was specific in its instruction that complainant was to be terminated for failing to reach her goal if she could not reach it in the month of June; and Mr. Faehnle specifically approved that Ms. Thaxton make such a statement to the complainant, telling her to go ahead. Tr. pages 331-334.

33. Complainant was terminated for failing to reach her goal. There is no evidence to support the contention that either complainant's attitude or any other permissible factor entered into the decision to terminate her. Despite reaching her goal, complainant was nevertheless terminated by the respondent.

34. Complainant is a member of the protected class of women.

35. Complainant became pregnant and informed respondent of that fact.

36. Complainant was terminated from employment by the respondent during the course of her pregnancy.

37. Respondent has offered as its permissible reason for the discharge of the complainant, her failure to attain her goal. Complainant met her goal, which was known by the respondent at the time it terminated her employment. The reasons offered as to the termination of the complainant are pretextual.

38. Complainant has proven by a preponderance of the evidence that the respondent unlawfully discriminated against her on the basis of her pregnancy, when it terminated her employment on June 30, 1992.

39. According to the decision of the Bureau of Employment Programs, complainant was unable to work due to her pregnancy until September 17, 1992. Complainant worked for General Recovery Services from sometime in October 1992 through December 1992, was let go and rehired again by General Recovery Services in May 1993 through October 1993 when she was again let go. Thereafter she worked for Women's World and as a temporary and became a full-time employee of Huntington Banks. Tr. pages 161-172.

40. Complainant has made reasonable attempts to mitigate her damages following her termination from respondent's employ.

41. Complainant made $6.00 per hour working for the respondent plus commissions and had insurance. Tr. page 133.

42. Complainant earned gross earnings from other employment for the following years as follows: $1,907 for the remainder of 1992 following her termination; $7,181 in 1993; $9,979 in 1994 and $14,317

in 1995. Complainant's Exhibit No. 6, Complainant's Exhibit No. 7, Complainant's Exhibit No. 8 and Complainant's Exhibit No. 9.

43. It is found that complainant's lost back wages amounted to $1,533 in 1992; $7,181 in 1993 and $2,501 in 1994; based upon an assumed 52 weeks of forty hours at $6.00 per hour.

44. Complainant was disappointed but not angry as a result of the respondent's unlawful discriminatory conduct. Tr. pages 383 and 384.

45. Complainant has not proven that she suffered humiliation, emotional distress or loss of personal dignity as a result of respondent's unlawful sex discrimination, as she offered no testimony to establish incidental damages of this nature.

## B.

## DISCUSSION

To make a prima facia case of employment discrimination under the West Virginia Human Rights Act, a complainant must offer proof that:

1. The complainant is a member of a protected class;

2. the employer made an adverse decision concerning the complainant; and,

3. but for the complainant's protected status, the adverse decision would not have been made. Conaway v. Eastern Associated Coal Corp., 178 W.Va. 475, 358 S.E.2d 423 (1986).

The "but for" test of discriminatory motive making up the third prong of the Conaway test is merely a threshold inquiry, requiring only that a complainant show an inference of discrimination. Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 457 S.E.2d 152 (1995). The West Virginia Supreme Court has held that discrimination on the basis of pregnancy constitutes sex discrimination under the West Virginia Human Rights Act, W. Va. Code §5-11-9(a). Frank's Shoe Store v. Human Rights Com'n, 365 S.E.2d 251 at 257 (W.Va. 1986).

A discrimination case may be proven under a disparate treatment theory which requires that the complainant prove a discriminatory intent on the part of the respondent. The complainant may prove discriminatory intent by a three step inferential proof formula first articulated in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and adopted by the West Virginia Supreme Court in Shepardstown Volunteer Fire Department v. West Virginia Human Rights Commission, 172 W.Va. 627, 309 S.E.2d 342 (1983). Under this formula, the complainant must first establish a prima facia case of discrimination; the respondent then has the opportunity to articulate a legitimate nondiscriminatory reason for its action; and finally the complainant must show that the reason proffered by the respondent was not the true reason for the employment decision, but rather pretext for discrimination.

The term "pretext" has been held to mean an ostensible reason or motive assigned as a color or cover for the real motive; false appearance, or pretense. West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W.Va. 525, 383 S.E.2d 490 (1989). A proffered reason is pretext if it is not the true reason

for the decision. Conaway, supra. Pretext may be shown through direct or circumstantial evidence of falsity or discrimination. Barefoot, supra. Where pretext is shown discrimination may be inferred, Barefoot, supra, though discrimination need not be found as a matter of law. St. Mary's Honor Society v. Hicks, 509 U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

There is also the "mixed motive" analysis under which a complainant may proceed to show pretext, as established by the United States Supreme Court in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); and recognized by the West Virginia Supreme Court in West Virginia Institute of Technology, supra. "Mixed motive" applies where the respondent articulates a legitimate nondiscriminatory reason for its decision which is not pretextual, but where a discriminatory motive plays a part in the adverse decision. Under the "mixed motive" analysis, the complainant need only show that complainant's pregnancy played some role in the decision, and the employer can avoid liability only by proving that it would have made the same decision even if it had not considered the complainant's pregnancy. Barefoot, 457 S.E.2d at 162, n. 16; 457 S.E.2d at 164, n. 18.

The complainant is a member of a protected class in that she is female and was pregnant at the time of her termination. An adverse employment action was taken against her on June 30, 1992 when she was discharged by the respondent. Within three months of being informed that complainant was pregnant, respondent terminated complainant from employment as complainant entered the later stages of her pregnancy; from this fact it may be inferred that the respondent would not have

terminated complainant but for her pregnancy. It is therefore found that the complainant has established a prima facie case of employment discrimination on the basis of sex under the West Virginia Human Rights Act.

The respondent has articulated a legitimate nondiscriminatory reason for complainant's termination; that being that the complainant failed to make her goal for fee collections and substandard performance. This reason is deemed to be pretextual in that respondent admits that complainant did make her goal for the month of June 1992, but was fired anyway. Respondent's contention that complainant was discharged anyway because she made that goal on the strength of one large account that generated a large collection fee is not credible. The testimony established that there was no policy that such a consideration entered into the determination of whether or not someone was achieving their collection goal. Furthermore, it is not believed that complainant's failure to make goal played any part in her discharge as her collections for June compared very favorably to those of the other two collectors at that time who were working established units. No other collectors were every discharged for failure to meet collection goals. It was clearly understood that complainant would be building up her collections as she took over a newer unit for collections. All of these facts lead to the conclusion that failure to meet collection goals was not the true reason for respondent's decision to terminate the complainant and was thus merely pretext for discrimination against the complainant because of her pregnancy.

The respondent contends that because much of the case of the complainant is based on the testimony of Ms. Thaxton that it should be disregarded because of her conviction for misappropriating funds. It is found that Ms. Thaxton testified credibly both on the basis of her demeanor, but more importantly because the nature of her testimony was not anywhere as negative or damaging to the respondent's position as it could have been or would have been should Ms. Thaxton have desired to get even with the respondent. Ms. Thaxton could just as easily testified that Mr. Faehnle made numerous references to complainant's pregnancy out of wedlock, or stated that she was instructed to fire complainant because she was pregnant.

Regardless of whose idea it was to fire the complainant even after she had made her goal for collections, the complainant's testimony that she was counseled by Ms. Thaxton in regard to the incident reports, that her attitude needed to improve, and that they thought it may be due to her pregnancy, was credible. It proves by a preponderance of the evidence that respondent considered her pregnant condition in deciding to set a goal for collections for complainant for that month and making her attainment of that goal a condition of her continued employment. To the extent that Ms. Thaxton considered attitude in her decision to terminate the complainant, that consideration was tied in Ms. Thaxton's mind to complainant's pregnancy. The fact of the matter is that both Ms. Thaxton and Mr. Faehnle were aware that complainant had met her goal and fired her anyway. Both were aware of the fact that complainant was pregnant. The respondent's agents in management were aware that pregnancy could be a major headache for them in terms of scheduling replacements to

get the job done as demonstrated by the problems they had had surrounding Ms. House's problem pregnancy. It is therefore found as fact that the respondent was motivated by its desire to avoid similar problems in the collection unit when complainant became pregnant, first in deciding to set a collection fees goal for complainant which she had to attain or be fired, and then in firing complainant even though she attained that goal. Thus the complainant has proven by a preponderance of the evidence that the reasons articulated by the respondent for her termination are pretext and that she was discharged by the respondent unlawfully in violation of the West Virginia Human Rights Act because of her pregnancy.

C.

## CONCLUSIONS OF LAW

1. The complainant, Kathryn S. Keene, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the Virginia Human Rights Act, W.Va. Code §5-11-10.

2. The respondent, West Virginia Credit Bureau, is an employer as defined by W.Va. Code §5-11-1 et seq., and is subject to the provisions of the West Virginia Human Rights Act.

3. The complaint in this matter was properly and timely filed in accordance with W.Va. Code §5-11-10.

4. The Human Rights Commission has proper jurisdiction over the parties and the subject matter of this action pursuant to W.Va. Code §5-11-9 et seq.

5. Complainant has established a prima facie case of sex discrimination, on the basis of her pregnancy.

6. The respondent has articulated a legitimate nondiscriminatory reason for its action toward the complainant, which the complainant has established, by a preponderance of the evidence, to be pretext for unlawful sex discrimination.

7. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to backpay in the amount of $11,215.00, plus statutory interest.

8. Complainant is not entitled to any award for the humiliation, embarrassment and emotional and mental distress and loss of personal dignity resulting from respondent's unlawful sex discrimination because there was no testimony as to incidental damages by the complainant.

9. As a result of the unlawful discriminatory action of the respondent, complainant is entitled to an award of reasonable attorneys fees and cost.

## D.

## RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The respondent shall cease and desist from engaging in unlawful discriminatory practices.

2. Within 31 days of receipt of this decision, the respondent shall pay to the complainant back pay of $11,215.00, plus prejudgment interest.

3. Within 31 days of receipt of this decision, the complainant's counsel shall prepare an affidavit and fee petition detailing his hours spent on this litigation and costs incurred, which shall be served upon respondent's counsel and filed with the undersigned. Counsel for respondent shall submit any objections thereto, to the undersigned and counsel for complainant within 14 days of its receipt.

4. The respondent shall pay ten percent per annum interest on all monetary relief.

5. In the event of failure of respondent to perform any of the obligations hereinbefore set forth, complainant is directed to immediately so advise the West Virginia Human Rights Commission, Norman Lindell, Deputy Director, Room 106, 1321 Plaza East, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so **ORDERED**.

Entered this 14th day of January, 1997.

**WV HUMAN RIGHTS COMMISSION**

BY: _____
**ROBERT B. WILSON**
**ADMINISTRATIVE LAW JUDGE**

# CERTIFICATE OF SERVICE

I, Robert B. Wilson, Administrative Law Judge for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing FINAL DECISION by depositing a true copy thereof in the U.S. Mail, postage prepaid, this 14th day of January, 1997, to the following:

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South Charleston, WV 25303

West Virginia Credit Bureau
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ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE