# THE WEST VIRGINIA PUBLIC EMPLOYEES

# GRIEVANCE BOARD

**BILL HARDEE,**

**Grievant,**

**v. Docket No. 07-HE-019**

**CONCORD UNIVERSITY,**

**Respondent.**

## D E C I S I O N

**Grievant Bill Hardee filed this grievance at Level One on January 17, 2006, challenging the decision of the Respondent, Concord University ("Concord," "University," or "Respondent"), (See footnote 1) to award its Manager Physical Plant I position (a non-classified _ sometimes called "exempt" or "classified exempt" _ position) to a different applicant. He alleged that he was more senior and better qualified. His Statement of Grievance was:**

> **On or about January 6, 2006, Concord University arbitrarily and capriciously awarded the position of Manager Physical Plant I to another internal applicant. Grievant was not only more senior than the successful applicant, but also equally or better qualified for the position. Concord University violated policies, procedures and/or WV Code, including but not limited to Higher Education Policy Commission's Procedural Rule Title 133, Series 39, and WV Code § 18B-7-1.**

**Grievant seeks instatement to the position and retroactive back pay, experience credit, and benefits. Respondent's post-hearing submission can be characterized as maintaining, alternatively, that it was not required to observe any procedure or standard to fill this exempt position, or that it observed proper procedures and standards in selectinga different**

**applicant. The case proceeded through Levels One and Two below, and when Grievant's former representative apparently withdrew without taking the case to Level Three, the Grievant appealed to this Board's predecessor, the West Virginia Education and State Employees Grievance Board.** **(See footnote 2)**

**The parties then agreed to pursue the case at Level Three, and it was remanded to that level by order of former Administrative Law Judge ("ALJ") Marteney on September 19, 2006. A hearing was conducted at Level Three on December 13, 2006. The Level Three Decision, dated January 18, 2007, went against the Grievant, and he appealed to this Board at Level Four. The undersigned ALJ conducted a Level Four hearing at Concord University on November 16, 2007. Grievant appeared in person with his brother, Fred Hardee, as his representative. The University was represented by Assistant Attorney General Elaine L. Skorich.**

**The case became mature for decision on December 10, 2007, the deadline for the parties to submit proposed findings of fact and conclusions of law.**

## Respondent's Motions to Dismiss

**Respondent filed two motions to dismiss:**

### *The Jurisdictional Motion*

**On May 16, 2007, Respondent filed an "Objection . . . to Jurisdiction of Grievance After July 1, 2007," seeking dismissal on the basis that the Public Employees Grievance Board lacks jurisdiction. Respondent's position is based on the fact that the grievance was pending before this Board's predecessor, the Education and State Employees Grievance Board, on July 1, 2007, when by operation of law the current Board came into existence, and the former Board ceased to exist. Since Respondent's "Objection" in this case seeks dismissal, it will be treated as a motion to dismiss.** **(See footnote 3)**

**Respondent's motion is premised entirely on its interpretation of current W. Va. Code § 6C-2-1(e) (2007):**

> **Any grievance proceeding which is in process on the effective date** **(See footnote 4)** **of the enactment of this article will be completed as expeditiously as possible, and all outstanding orders for hearings must be completed by [July 1, 2007]. Parties to grievances for which a hearing has not been held may, by agreement, proceed to either level two or level three.**

**[Footnote added.] Respondent would have this Board interpret the second sentence of subsection (e) to mean that, unless both parties to a grievance not yet heard on July 1, 2007, agree to have it decided by the Public Employees Grievance Board, the grievanceceases to exist, or in Respondent's words, "should be deemed to have expired on July 1, 2007." (See footnote 5)**

**Respondent's motion does not discuss the more logical interpretation of that language: that it gives parties who had grievances pending on July 1, 2007, the choice of proceeding under the "old system" or the "new system," and in the latter case the choice of proceeding to current Level Two (mediation) or Level Three (hearing before one of the Public Employees Grievance Board's administrative law judges). Nor does Respondent explain how or why it concludes that the Legislature intended to deprive grievants such as the one in this case of a remedy.**

**Since the enactment of Senate Bill 442, 2007 Acts ch. 207, now codified at W. Va. Code § 6C-2-1 through 6C-3- 6 (2007) ("PEG Board Act"), this Board has consistently taken the position that the former statutes and rules continue to control proceedings in cases pending when the statute took effect. The following portions of the PEG Board Act _ in addition to § 6C-2-1(e) itself _ demonstrate that the Legislature intended such continuity:**

> **Effective [July 1, 2007], any reference in this code to the education grievance procedure, the state grievance procedure, [§§ 18-29-1 et seq.], chapter eighteen of this code or [§§ 29-6A-1 et seq.], or any subsection thereof, shall be considered to refer to the appropriate grievance procedure pursuant to this article.**

**W. Va. Code § 6C-2-1(d) (2007)**

> **Resolving grievances in a fair, efficient, cost-effective and consistent manner will maintain good employee morale, enhance employee job performance and better serve the citizens of the State of West Virginia.**

**W. Va. Code § 6C-2-1(b) (2007)**

**Respondent's interpretation of § 6C-2-1(e) is also contrary to basic principles of statutory construction long followed by the West Virginia Supreme Court of Appeals.**

> **It is well-established that "in expounding a statute, we must not be guided by**

> **a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." [Citations omitted.] In addition, the plain meaning of a statute is normally controlling, except in the rare case in which literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters. *See* Norman J. Singer, 2A *Sutherland Statutory Construction* § 46.07 at 126-27 (5th ed. 1992). In such case, it is the intentions of the legislators, rather than the strict language, that control.**

***W. Va. Human Rights Comm'n v. Garretson*, 196 W. Va. 118, 123, 468 S.E.2d 733,**

**738 (1996), n. 5.**

> **When interpreting a statute, this Court stated in the Syllabus of *Snider v. West Virginia Department of Commerce*, 190 W. Va. 642, 441 S.E.2d 363 (1994), quoting *Smith v. State Workmen's Comp. Com'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975): "'The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.'" To determine the true intent of the legislature, we are to examine the statute in its entirety and not select "any single part, provision, section, sentence, phrase or word." Syllabus Point 3, in part, *Pristavec v. Westfield Ins. Co.*, 184 W. Va. 331, 400 S.E.2d 575 (1990).**

***Mills v. Van Kirk*, 192 W. Va. 695, 699, 453 S.E.2d 678, 682 (1994).**

**The statutory interpretation advanced by Respondent does not survive analysis under the rules of statutory construction applicable in West Virginia, by which this Board is bound. A statute intended to afford West Virginia's public employees a "fair, efficient, cost-effective and consistent,"** (See footnote 6) **process for resolution of their grievances cannot be construed to deprive an arbitrarily identified class of employees (those whose grievanceshad not yet been heard on July 1, 2007) of a remedy. The Legislature was careful to link its 2007 public employee grievance bill to the statutes it replaced,** (See footnote 7) **commanding that the enactments be read consistently. It is readily apparent from such evidence of legislative intent that the Legislature did not intend to deprive grievants of a remedy.**

**Accordingly, Respondent's motion to dismiss for lack of jurisdiction is DENIED.**

***The Motion Asserting Lack of Authority to Grant Relief Requested***

**On November 6, 2007, the Respondent filed a "Motion to Dismiss," which argued that because seniority was not a legitimate consideration for filling a non-exempt position such as the one involved in this case, the Grievant's argument to the contrary must be rejected. The**

**Respondent's point on the relevance of seniority is well taken. However, in addition to raising seniority, the Statement of Grievance alleges that the Grievant was better qualified for the job, and at the Level Three hearing, the Grievant maintained that placement of the incumbent in the posted position on an acting basis gave the incumbent an unfair advantage in the selection process.**

**Although Respondent's motion calls the latter assertion a "red herring," the existence of the unfair-advantage claim and the better-qualified claim means that facts are at issue. Even if granted, Respondent's motion would not dispose of the separate claims just described. Dismissal is appropriate only when the Grievant can prove no set of facts which would entitled him to relief. While this may be the case with respect to his seniority claim, it is not so with respect to the balance of his case.**

**Accordingly, Respondent's motion to dismiss for lack of authority to grant the reliefrequested is also DENIED.**

## Summary

**A grievant who challenges a selection decision for an exempt position must prove by a preponderance of the evidence that his non-selection resulted from an arbitrary and capricious process, or that it was clearly wrong. This is a difficult undertaking, and Grievant failed to meet his burden to establish such flaws in Concord's decision-making process.**

**Those defects or shortcomings in the selection process which the Grievant did identify do not amount to arbitrariness, and Grievant failed to show that the selection made was clearly wrong. In the absence of such a showing, this Board is not permitted to substitute its judgment for that of the administrators responsible for making the selection. The grievance must therefore be denied.**

**After thorough review of the record, the undersigned makes the following Findings of Fact:**

## Findings of Fact

**1 1. Respondent posted its Manager Physical Plant I position, a full-time, pay grade 16, benefits eligible, non-classified _ sometimes called "exempt" or "classified exempt" _**

**position, open to internal applicants until September 7, 2005. Respondent's Exhibit 1.**

**2 2. Respondent appointed former Intervenor Larry Mann to the position on an acting basis, and Mr. Mann occupied the position at the time of the interviews for the permanent appointment.**

**3 3. The selection committee asked the applicants for the position, including theGrievant and Mr. Mann, identical or similar questions and had them perform substantially the same exercises as part of the selection process.**

**4 4. Both the Grievant and Mr. Mann were qualified for the position.**

**5 5. The committee selected Mr. Mann for the permanent appointment rather than the Grievant.**

## Discussion

### Issues Not Considered

**Although the Grievant argued at Level Three that he should have been selected for the position based on seniority, by the time of the Level Four hearing, the Grievant appeared to concede that the legal authority he had relied on for the seniority issue does not apply to exempt positions. W. Va. CSR § 133-39-5 and W. Va. Code § 18B-7-1 (2007) apply only to classified positions. To the extent there is any question that Grievant may continue to rely on his seniority argument, it is rejected as unsupported by statute or regulation in the case of this exempt position.**

**At the Level Four hearing the Grievant contended for the first time that his employer had retaliated or discriminated against him in the selection process due to his prior union (organized labor) activity. Because this claim was not included in his Statement of Grievance, and because the employer did not consent to its consideration for the first time at Level Four, it will not be considered. "[T]he final level of the grievance procedure where alteration of the substance of a grievance under W. Va. Code, 29-6A-3(j),** (See footnote 8) **can occur is atLevel III." Syl. Pt. 5 (in part)*, West Virginia Department of Health and Human Resources v. Hess*, 189 W. Va. 357, 432 S.E.2d 27 (1993).**

### Burden of Proof

**Because this grievance does not involve a disciplinary matter, the Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2007); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). Recognized in *State v. Miller*; 194 W.Va. 3, 459 S.E.2d 114 (1995) (*see* Section II of opinion). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).**

**<u>The Law on Selection</u>**

**It is unlikely that Concord University is not bound by any constraints in selecting for an exempt position, as it has argued.** **(See footnote 9)** **This decision will subject Concord's selectionprocess for the Manager Physical Plant I position to the arbitrary and capricious standard which has been extensively developed in decisions by this Board and the West Virginia Supreme Court of Appeals. If the selection process was not arbitrary and capricious, and if it was not clearly wrong, there will be no need to determine whether some different standard should be applied because the case involves a classified exempt job.**

**In a selection case, the grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehab. Serv*., Docket No. 93-RS-489 (July 29, 1994). This Board recognizes that selection decisions are largely the prerogatives of management. While the candidate chosen should be qualified and able to perform the duties of the position, in the absence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will not generally be overturned. *Skeens-Mihaliak v. Div. of Rehab. Serv*., Docket No. 98- RS-126 (Aug. 3, 1998); *Ashley v. W. Va. Dep't of Health and Human Res.*, Docket No. 94- HHR-070 (June 2, 1995); *McClure v. W. Va. Workers' Compensation Fund*, Docket Nos. 89-WCF-208/209 (Aug. 7, 1989). An agency's decision as to who is the best qualified applicant will be upheld unless**

**shown by the grievant to be arbitrary and capricious or clearly wrong. *Thibault, supra*.**

**A grievant challenging a selection decision must prove that the employer violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision. *Surbaugh v. Dep't of Health and Human Serv.*, Docket No. 97- HHR-235 (Sept. 29, 1997). If a grievant can demonstrate that the selection process was so significantly flawed that he or she might reasonably have been the successful applicantif the process had been conducted in a proper fashion, this Board can require the employer to review the qualifications of the grievant versus those of the successful applicant. *Thibault, supra*; *Jones v. Bd. of Trustees / W. Va. Univ.*, Docket No. 90-BOT-283 (Mar. 28, 1991).**

**In *In re: Queen, Executrix*, 196 W. Va. 442, 473 S.E.2d 483, 487 (1996), a case involving a civil service commission, the Supreme Court (Justice Cleckley) said that the commission's actions could be considered arbitrary or capricious:**

> **if the Commission used a misapplication of the law, entirely failed to consider an important aspect of the problem, offered an explanation that ran counter to the evidence before the Commission, or offered one that is so implausible that it could not be ascribed to a difference in view or the product of Commission expertise. *See generally Martin v. Randolph County Bd. of Educ*., 195 W.Va. 297, 304, 465 S.E.2d 399, 406 (1995).**

***See Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996). *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997). While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of the official or body whose action is challenged. *See Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).**

**Both witnesses with direct knowledge of the selection process who testified at the Level Four hearing in this case, Mr. Dillon and Mr. Cannon, testified that it was conducted fairly and impartially. Although the Grievant suggested that the appointment of Mr. Mann to the position on an acting basis gave Mr. Mann an unfair advantage, no evidence supporting this assertion was presented. The Grievant proved that the selection committee did not succeed in contacting all of the references he provided, but there was no evidencefrom which to conclude that it would have changed the selection decision if his references had been reached.**

**Grievant's difficulty in this case is that, without his seniority argument, he is up against the legal standards described above, which give an appointing authority wide latitude in selecting among job applicants. There was no evidence presented at the Level Four hearing that the hiring process which Concord used in this case was arbitrary and capricious, or that its selection decision was clearly wrong.**

**Because the Grievant has failed to meet his burden of proof, or to overcome the admittedly difficult legal standard described above, his grievance must be denied.**

## Conclusions of Law

**1 1. To the extent Grievant continues to argue that this grievance should be granted on the basis that he was more senior than the applicant selected for the position, that argument is rejected as unsupported by statute or regulation for the exempt position. W. Va. CSR § 133-39-5 and W. Va. Code § 18B-7-1 (2007).**

**2 2. Because the Grievant asserted his claim of retaliation or discrimination for the first time at Level Four, and because the employer did not consent to its consideration, it will not be considered. "[T]he final level of the grievance procedure where alteration of the substance of a grievance under W. Va. Code, 29-6A-3(j), can occur is at Level III." Syl. Pt. 5 (in part)*, West Virginia Department of Health and Human Resources v. Hess*, 189 W. Va. 357, 432 S.E.2d 27 (1993).**

**3 3. Because this grievance does not involve a disciplinary matter, the Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2007); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). Recognized in *State v. Miller*; 194 W.Va. 3, 459 S.E.2d 114 (1995) (*see* Section II of opinion). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).**

**4 4. In a selection case, the grievance procedure is not intended to be a “super**

**interview," but rather, allows a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehabilitation Serv*., Docket No. 93-RS-489 (July 29, 1994). This Board recognizes that selection decisions are largely the prerogatives of management. While the individuals who are chosen should be qualified and able to perform the duties of their new position, absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will not generally be overturned. *Skeens-Mihaliak v. Div. of Rehabilitation Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998); *Ashley v. W. Va. Dep't of Health and Human Resources*, Docket No. 94-HHR-070 (June 2, 1995); *McClure v. W. Va. Workers' Compensation Fund*, Docket Nos. 89-WCF-208/209 (Aug. 7, 1989). An agency's decision as to who is the best qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. *Thibault, supra*.**

**5 5. A grievant challenging a selection decision must prove that the employer violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision. *Surbaugh v. Dep't of Health and Human Serv.*,Docket No. 97-HHR-235 (Sept. 29, 1997). If a grievant can demonstrate that the selection process was so significantly flawed that he or she might reasonably have been the successful applicant if the process had been conducted in a proper fashion, this Board can require the employer to review the qualifications of the grievant versus those of the successful applicant. *Thibault, supra*; *Jones v. Bd. of Trustees / W. Va. Univ.*, Docket No. 90-BOT-283 (Mar. 28, 1991).**

**6 6. In *In re: Queen, Executrix*, 196 W. Va. 442, 473 S.E.2d 483, 487 (1996), a case involving a civil service commission, the Supreme Court (Justice Cleckley) said that the commission's actions could be considered arbitrary or capricious:**

> **if the Commission used a misapplication of the law, entirely failed to consider an important aspect of the problem, offered an explanation that ran counter to the evidence before the Commission, or offered one that is so implausible that it could not be ascribed to a difference in view or the product of Commission expertise. *See generally Martin v. Randolph County Bd. of Educ*., 195 W.Va. 297, 304, 465 S.E.2d 399, 406 (1995).**

***See Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996). *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997). While a searching inquiry into the facts is required to determine if an action was arbitrary and**

**capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of the official or body whose action is challenged. *See Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).**

**7 7. There was no evidence presented at the Level Four hearing that the hiring process which Concord used in this case was arbitrary and capricious, or that its selection decision was clearly wrong. The Grievant therefore failed to carry his burden of proof or persuasion on this essential point. Accordingly, the grievance is DENIED.**

**Any party may appeal this decision to the Circuit Court of Kanawha County or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7 (2006) (repealed, *see* fn. 2 above). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and they should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.**

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**Thomas J. Gillooly**

**Administrative Law Judge**

**Date: January 28, 2008**

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***Footnote: 1***

***Larry Mann, who joined this case as an Intervenor, advised this Board by email transmitted November 7, 2007, that he wished to withdraw as a party. He had occupied the position involved in this grievance but apparently left it. He is no longer a party, and his name does not appear in the style of the case for that reason.***

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***Footnote: 2***

***In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-***

***6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case. Procedural Rules of the Public Employees Grievance Board took effect December 27, 2007, and apply to all cases.***

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***Footnote: 3***

***The respondent in Ward and Higley v. West Virginia State University, Docket No. 07-HE-332, which is represented by the same counsel as the Respondent in this case, filed an "Objection of Respondent to Jurisdiction of Grievance" which is virtually identical and is based on the same legal argument. That "objection," also treated as a motion to dismiss, was denied on December 20, 2007.***

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***Footnote: 4***

***For a discussion of the statute's effective date, see Executive Order No. 2-07, May 8, 2007.***

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***Footnote: 5***

***Although Respondent participated in a Level Four hearing before this Board in this case, it apparently maintains that it has not consented to have the grievance proceed in this forum.***

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***Footnote: 6***

***W. Va. Code § 6C-2-1(b) (2007).***

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***Footnote: 7***

***W. Va. Code § 6C-2-1(d) (2007).***

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***Footnote: 8***

***W. Va. Code § 29-6A-3(j) (2007) provides: "Once a grievance has been filed, supportive or corroborative evidence may be presented at any conference or hearing conducted pursuant to the provisions of this article. Whether evidence substantially alters the original grievance and renders it a different grievance is within the discretion of thegrievance evaluator at the level where the new evidence is presented. If the grievance evaluator rules that the evidence renders it a different grievance, the party offering the evidence may withdraw it, the parties may consent to the evidence, or the grievance evaluator may decide to hear the evidence or rule that the grievant must file a new grievance. The time limitation for filing the new grievance is measured from the date of the ruling."***

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***Footnote: 9***

***If Respondent's position is accepted, then it is free to fill an exempt position in a completely arbitrary fashion, and its selection decisions for such positions are effectively unreviewable by any tribunal. It is improbable that any state government institution possesses such immunity for an official act.***