# WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**DAVID ELLISON, ET AL.,**
**Grievant,**

**v.** **Docket No. 2009-0940-CONS**

**FAYETTE COUNTY BOARD OF EDUCATION,**
**Respondent.**

## D E C I S I O N

Grievant, David Ellison, initiated a grievance against Fayette County Board of Education ("FCBE"), Respondent on or about September 18, 2008. The grievance statement alleges:

1. Improper posting of extracurricular posting for Bridge Day drivers to serve on Saturday, October 18, 2008; and
2. Inappropriate assignment of extracurricular trip to Marshall University on September 9, 2008.[1]

The matter proceeded to a level one hearing on November 3, 2008. By agreement, the matter was consolidated[2] and further level one proceedings were conducted on December 1, 2008. The Bridge Day Assignment Grievance was denied at level one on January 13, 2009. Grievants appealed the Bridge Day Assignment to level two on January 26, 2009. Grievants appealed to level three on June 1, 2009. Respondent filed a motion to dismiss

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[1] Grievance concerning inappropriate assignment of extracurricular Marshall trip was settled and is not a continuing part of this Grievance proceeding.

[2] It was determined at the November 3, 2008, level one hearing, that there were five named Grievants involved in this grievance: Curtis Cody, Dennis Cody, David Ellison, Paul Wehrle and Mark Harper. All Grievants are or were employed by the Respondent as bus operators and assigned to the Mount Hope Bus Center. However, bus operator Harper died some time during the course of litigation (after level one but prior to level three proceedings).

the grievance on the basis of an untimely appeal to level three, but later withdrew the motion. A level three hearing was held before the undersigned Administrative Law Judge on September 2, 2009, in Beckley, West Virginia. All of the Grievants were represented by counsel, John E. Roush, Esq., West Virginia School Service Personnel Association. Grievants David Ellison and Paul Wehrle also appeared in person. Respondent appeared by Margaret Pennington, Director of Personnel, and its counsel, Erwin L. Conrad, Esq. During the litigation of this Grievance, the following people testified: 1) Grievants David Ellison, Mark Harper, Dennis Cody and Paul Wehrle; 2) Bryan Parsons (former Director of Personnel and Safety and current Principal of Mount Hope Elementary School); 3) David Null, (former Principal of Mount Hope High School and current Principal of Fayetteville High School); 4) April Miller (secretary of Transportation Department); and 5) David Seay (Transportation Director).

This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about October 1, 2009. Both parties submitted fact/law proposals.

## Synopsis

Grievants allege improper posting of an extracurricular assignment opportunity for bus drivers to serve on Bridge Day (October 18, 2008). Grievants contend misapplication of various West Virginia Code provisions and, individually, seek compensation with interest for the extra-duty assignment each contend was improperly denied them.

Respondent maintains the assignment in discussion was lawfully posted and the Grievants are not entitled to the relief requested. Grievants failed to establish by a preponderance of the evidence that they were denied the opportunity to apply for Bridge

Day extra-duty driving assignments of 2008 or that the posting relevant to said assignments was improperly posted. This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

## Findings of Fact

1. Grievants are Bus Operators assigned to Mount Hope Bus Center at Mount Hope High School.[3]

2. The Bus Center from which Grievants and the other drivers operate is Mount Hope High School. The meeting place where some, but not all of the drivers park their buses is the old Greyhound bus area which the drivers now use as a lounge (referred to by some incorrectly as the Mount Hope bus center).[4]

3. At the relevant time of this grievance, the Superintendent's designee, responsible for assigning all drivers on a rotating basis according to seniority with the Bus Center, was David Null, former Principal of Mount Hope High School.

4. All Vacancy Postings are to be posted for a minimum of five days. The Posting of extra-duty assignments and vacancies are to be placed in conspicuous places.

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[3] There were five individuals who collectively comprise the Grievants of this grievance: Curtis Cody, Dennis Cody, David Ellison, Paul Wehrle and Mark Harper (deceased).

[4] In the facts of this case the terms are more than semantics. It is somewhat problematic to distinguish the common usage of the terms, the accepted locations and the legal definitions. The old Greyhound bus area is not the Bus Center and not the Bus garage but is a recognized area where the Bus Operators, who operate out of Mount Hope High School, meet and where certain drivers operating out of the Mount Hope Bus Center park their particular buses.

Further, Respondent has implemented policy which specifically addresses certain required posting locations. (Respondent's Exhibit 1, Policy B-23, 2.1)

5. Bridge Day is a local holiday generally celebrated on the third Saturday in October. It occurs one day a year. In 2008, the event was celebrated on October 18, 2008. A large number of bus operators are employed to provide transportation services to participants, shuttling them from the parking area to the site of the event(s).

6. Grievants (other than Ellison and Wehrle) were made aware of the Bridge Day Bus Driver Posting on September 10, 2008, the deadline for application.

7. Grievant Ellison was made aware that the Bridge Day positions had been posted and initiated a conversation with Bryan Parsons, Respondent's personnel director, on or about September 15, 2008.

8. Prior to September 15, 2008, Grievant Ellison had made several inquires concerning when the Bridge Day bus operator positions would be posted. During the approximately three week period between the date in-service began for bus operators in late August 2008 until September 2008, Grievant had spoken with April Miller and David Seay regarding the Bridge Day bus operator positions.

9. Grievant Ellison had performed Bridge Day assignments in past years and intended to apply for such assignment in 2008.

10. Bridge Day Bus Driver Posting for 20 positions commenced on September 3 with an application deadline of September 10. (Respondent's Exhibit 2)

11. The Bridge Day assignments were not posted at the old Greyhound bus area, which the drivers now use as a lounge. It is not clear whether this area is commonly referred to as the Mount Hope bus center and/or lounge.

12. Respondent posted the Bridge Day extra-duty assignment notice for bus operators at Mount Hope High School from September 3 through September 19, 2008.[5]

13. There is a customary posting spot at Mount Hope High School. Said spot is on the bulletin board in the Main Office just left of the Principal's Office at Mount Hope High School. This posting spot is not in dispute, it is recognized, and acknowledged by the parties of this Grievance.

14. Vacancies within the Fayette County School system are traditionally posted after regularly scheduled Board meetings for a minimum of five days. Fayette County Board of Education Policy B-23, 2.1 identifies that job vacancies are posted in the following locations: all schools within the County, Fayette County Job Vacancy Hotline, Fayette County Board of Education website and on the West Virginia Board of Education website. Job vacancies are also posted in the front lobby of the Central Office, the bulletin board beside the Personnel Department in the Central Office.

15. Additionally, it is acknowledged that for the convenience of the drivers, one driver would get any postings from the school and bring it to the old Greyhound bus area to the other Bus Operators and it was typically Rosie Legg or Curtis Cody. This custom was not an official or assigned duty.

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[5] At level one, Principal David Null specified a date identified as Wednesday (Sept. 3, 2008) as the first day the posting was posted. Later, testimony of Null at level three and Respondent's Exhibit 4, an E-mail of September 19, 2008 @ 2:41p.m. to Bryan Parsons, Respondent's personnel director from David Null then Principal of Mount Hope High School, will be discussed, infra.

16. Grievant Wehrle was made aware of the Bridge Day Bus Driver Posting on or about September 20, 2008, past the deadline for application, by written notice received in the mail.

17. Rosemary ('Rosie') Legg, one of the drivers at the Mt. Hope Bus Center, actually applied in a timely fashion (September 10, 2008) for one of the Bridge Day driving assignments. (Respondent's Exhibit 3)

18. Grievant Dennis Cody worked on October 18, 2008, driving for another employer. Grievant Wehrle is not sure whether or not he worked on Bridge Day.

## Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Individually, Grievants seek compensation for an extra-duty assignment which they contend was unduly denied them. Grievants allege improper posting of an extracurricular assignment opportunity for bus drivers to serve on Bridge Day (October 18, 2008) and contend lost wages.[6] Grievants' counsel cites violation of WEST VIRGINIA CODE §§ 18A-4-8b, 18A-4-8g and 6C-2-2(g)(1). Admittedly, Grievants did not apply for the assignment in that they didn't see the posting for the 2008 Bridge Day Assignments, and said individuals had relied upon a formal and informal communication process to alert them to prospective job announcements. What is being contested is whether Grievants were denied an extra-duty assignment opportunity. Grievants' counsel artfully articulated the following inquiry: 1) Was Respondent required to post the extra-duty assignment in discussion at the Mount Hope Bus lounge (the old Greyhound bus area)? and 2) Were the extra-duty positions in discussion properly posted at the Mount Hope High School (the official work station)? (Mount is also referenced herein as Mt.).

West Virginia Code § 18A-4-8b requires boards of education to post all vacancies in conspicuous places. In pertinent part, W. VA. CODE §18A-4-8b provides the following:

> (g) County boards shall post and date notices of all job vacancies of established existing or newly created positions in conspicuous places for all school service personnel to observe for at least five working days.

Grievants contend that a practice of posting bus operator vacancies at the Mount Hope bus center has been established. The drivers argue that they are entitled to rely

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[6] Grievants reference the Bridge Day assignments as an extracurricular assignment; however, the terms "extra-duty assignment" and "extracurricular assignment" are not synonymous in West Virginia School Law. *See* W. VA. CODE §§ 18A-4-8b (f) and §18A-4-16. A relevant distinction is the procedure used to fill such job opportunity and the accompanying retention rights an employee may or may not have with one or the other type of assignment. *See* discussion infra, pp 12-13.

upon the statutory language, requiring boards of education to post vacancies in conspicuous places and pursuant to the established practice. Further, they allege that the positions were only posted at Mount Hope for four working days, i.e. September 5 (a Friday), September 8, 9, and 10 (Monday through Wednesday respectively).

Although posting information may have been relayed, at times, to the drivers of the Mt. Hope Center by senior driver, Rosie Legg, to the Bus Lounge, there is no designation of such duty as Bus Supervisor or lead driver for the Mt. Hope Bus Center or any other Bus Center in Fayette County which establishes this conduct. The Mount Hope bus lounge is clearly a conspicuous place and it seems an appropriate and obvious site to post bus operator positions for drivers in that area. But Respondent is and/or was not required to post at this site pursuant to WEST VIRGINIA CODE or county policy. Applicable Board Policy B-23, 2.1 provides that:

> All Vacancy Postings are to be posted after each regularly scheduled Board meeting when the vacancy is created for a minimum of five days with the postings to be in the front lobby of the Central Office, the bulletin board beside the Personnel Department in the Central Office, all schools within the County, Fayette County Job Vacancy Hotline, Fayette County Board of Education's Web Site and Board of Education's Web Site.

(Respondent Exhibit 1). The Bus Center from which Grievants and the other drivers operate is Mount Hope High School. It is the undersigned's finding that the failure to post at the drivers current lounge area, in the facts of this case, does not establish a cause of action. Further, the undersigned does find it intriguing that the bus driver, who allegedly customarily transports assignment postings to the lounge area, timely applied, and did indeed participate in Bridge Day 2008 activity.

With regard to proper posting at Mount Hope High School, it is not readily clear when and for how long the posting was indeed functionally posted. There is some discord with regard to when the announcement was first posted. At level one, former Principal of Mount Hope High School, David Null, specified a date identified as Wednesday (Sept. 3, 2008) as the first day the assignment in discussion was posted. While Respondent's Exhibit 4, an E-mail of September 19, 2008 @ 2:41p.m. from then Principal Null to Bryan Parsons, Respondent's personnel director states "I can without hesitation say that the posting in question was in place from Sept.5, 08- Sept. 19, 08."

Principal Null testified that job opportunity postings for Mt. Hope High School are always posted in the same location (for eight years of his assignment) which is at the Main Office just left of the Principal's Office. He confirmed that on September 19, he had just taken down the posting which had been there since its initial posting of Wednesday, September 3, 2008, but no later than September 5, 2008 through September 19, 2008. The deadline for application was September 10, 2008. Grievants Wehrle and Ellison indicated that they did not see the Bridge Day assignment posting at Mount Hope High School. The undersigned does not determine this testimony to be an unreconcilable factual dispute with the testimony provided by former Principal Null.[7]

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[7] The fact that Grievants didn't see the posting does not truly dispute credible evidence that the posting was placed at the customary posting spot at Mount Hope High School. There exists a host of facts and rationale which provide for the accurate co-existence of both positions. It is acknowledged that previous postings were hung one on top of another, layered. It is possible that another job opportunity covered the posting in discussion or documents were rearranged inadvertently by an individual in review of the postings. The practice of stacking postings has been discontinued subsequent to this grievance.

Nevertheless, in situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371; *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066. An Administrative Law Judge is charged with assessing the credibility of the witnesses. *Lanehart v. Logan County Board of Education*, Docket No. 95-23-235; *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050.

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Rodriques v. Grant County Board of Education and Berg*, Docket No. 2008-0960-GraED.

In accessing Principal Null's testimony at both level one and level three, it is clear he was attempting to present accurate and reliable facts. He presented the facts in a direct and trustworthy manner. His demeanor was that of an individual attempting to relay pertinent and strictly correct information. He was aware of the issue(s) and did not overstate his actions or provide evasive responses. While there may be some ambiguity with regard to the exact date the posting was initially placed on the bulletin board, the fact that the extra-duty 2008 Bridge Day assignments were posted is established. At level one, Principal Null specified a date identified as "Wednesday" (Sept. 3, 2008) as the first day

the assignment was posted. *See* December 1, 2008, Level one Transcript, p8. The September 19, 2008 E-mail, (Respondent's Exhibit 4) drafted at a time in close proximity of relevant events does not impeach Principal Null's testimony. It serves to fortify the fact of posting. Principal Null authored the E-mail at approximable 2:41 pm noting among other facts his conversation with Bryan Parsons and an unidentified driver. Principal Null verified that he personally had taken down the September 10, 2008 deadline sheets, thirty minutes prior to his conversation with then Director of Personnel Parsons, and that during the conversation with Mr. Parsons, he "pulled the Sept. 10th sheets out of the trash and found the Bus driver posting in question." Principal Null wrote that "we [he and the driver] discussed job posting. [T]he issue is not the posting at the school, but the mailing that went out to notify them [bus drivers] after the deadline." Principal Null's testimony providing that the 2008 Bridge Day Bus Driver Posting for 20 positions was posted at Mount Hope High School is found to be credible. The fact that two of the Grievants did not see the Mt. Hope High School posting does not dispute credible evidence that the posting was posted. *See* footnote 7, supra.

Grievants rely heavily on discrediting the posting at Mount Hope High School and lack of posting at their lounge. It is noticed that Grievants do not acknowledge acquaintance with the other locations where Fayette County School system job postings may be observed. Job vacancies are posted in the front lobby of the central office, the bulletin board beside the Personnel Department in the Central Office, Fayette County Job Vacancy Hotline, Fayette County Board of Education website and the West Virginia Board of Education website. *See* Board Policy B-23, 2.1 (Respondent's Exhibit 1)

Grievants relied on word of mouth and customary practices more than prudent thought would recommend. While Grievant Ellison had spoken with April Miller (secretary of Transportation Department) and David Seay (Transportation Director) prior to September 2008 regarding the Bridge Day bus operator assignments, he neglected various posting sites where Respondent is required to post job opportunities. The September 3, 2008 Posting (Respondent's Exhibit 2) indicates it was posted in Central Office locations and sent to all Fayette County Schools. The record indicates that 2008 Bridge Day postings for Bridge Day Bus Drivers were posted at several locations and although for the convenience of the drivers information is relayed, at times, to the drivers of the Mt. Hope Center at the old Greyhound Bus area Respondent is not obligated, at this time, to post job opportunities at that meeting area. The undersigned finds that Grievants had ample opportunity to be aware of and properly make application to the Bridge Day 2008 assignment.

Lastly, it is not established that Respondent was obligated to contact Grievant Ellison and ascertain whether or not he, specifically, wished to work Bridge Day 2008. Grievant Ellison by Counsel infers a right to retain the Bridge Day assignment as a result of his performance of this assignment in years past. The undersigned disagrees with the extent that Grievant contends his right of first refusal extends with the instant extra-duty assignment. Pursuant to W. VA. CODE §18A-4-8b (f), "extra-duty assignments" are defined as irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips. Bridge Day is a local holiday generally celebrated on the third Saturday in October. It occurs one day a year. The driving opportunity for bus operators in association with this event is an extra-duty assignment.

Grievants' counsel directed the undersigned's attention to the fact that summer service personnel positions carry a "right to retain" proviso, W. VA. CODE §18-5-39(f), which is similar to the "right to retain" proviso applicable to extracurricular assignments, pursuant to W. VA. CODE §18A-4-16(6). Counsel notes further, the grievance board has held that this "right to retain" summer positions outweighs failure of an employee to reapply for such a position.[8] Duly noted, however, the undersigned is not prepared to rule that the principle ought to be applied in the current situation, an extra-duty assignment, thus establishing a duty on Respondent. The job assignments in discussion are not regulated as extra-curricular assignments pursuant to W. VA. CODE §18A-4-16.[9]

In other words, it is not established that Respondent was obligated to independently contact Grievant Ellison and ascertain whether or not he wished to work Bridge Day 2008. Any service employee of Fayette County Schools wishing to apply for an assignment within Fayette County must complete an employment application. It is the responsibility of the applicant to timely submit said application to the Personnel Department. Electronic applications are accepted; however, it is the responsibility of the applicant to make sure

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[8] See *Leishman v. Monongalia County Board of Education*, Docket No. 03-30-070.

[9] W. VA. CODE § 18A-4-16 Extracurricular assignments: Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis: . . [A]ll school service personnel assignments shall be considered extracurricular assignments, **except such assignments as are considered either regular positions, as provided by section eight [§ 18A-4-8] of this article, or extra-duty assignments, as provided by section eight-b [§ 18A-4-8b] of this article.** Emphasis added. The driving assignment for bus operators in association with Bridge Day are "extra-duty assignments." *See* W. VA. CODE §18A-4-8b (f)

that the Personnel Department has received the application. Fayette County Board of Education Policy B-23, 4.1.

The above-discussion will be supplemented by the following Conclusions of Law.

**Conclusions of Law**

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

2. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371; *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066. An Administrative Law Judge is charged with assessing the credibility of the witnesses. *Lanehart v. Logan County Board of Education*, Docket No. 95-23-235; *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050.

3. The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness.

Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Rodriques v. Grant County Board of Education and Berg*, Docket No. 2008-0960-GraED.

4. WEST VIRGINIA CODE §18A-4-8b provides, in pertinent part, the following:

> (g) County boards shall post and date notices of all job vacancies of established existing or newly created positions in conspicuous places for all school service personnel to observe for at least five working days.

5. A preponderance of the evidence indicates that the 2008 Bridge Day postings for Bridge Day Bus Drivers were timely posted and correctly posted at several locations.

6. Respondent proved that it was more likely than not that the opening was posted at Mount Hope High School for five working days in compliance with Board Policy B-23 2.1 and WEST VIRGINIA CODE §18A-4-8b.

7. It is not established by a preponderance of the evidence that the posting as posted unlawfully denied Grievants the opportunity to apply for Bridge Day Assignments 2008.

8. "Extra-duty assignments" are defined pursuant to W. VA. CODE §18A-4-8b as irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips. Bridge Day is a local holiday generally celebrated on the third Saturday in October. It occurs one day a year. The driving opportunity for bus operators in association with Bridge Day is an extra-duty assignment.

9. Grievant Ellison did not file a timely application for extra-duty assignment Bridge Day 2008.

10. WEST VIRGINIA CODE §18A-4-16(6) provides the following:

> An employee who was employed in any service personnel extracurricular assignment during the previous school year shall have the option of retaining the assignment if it continues to exist in any succeeding school year. A county board of education may terminate any school service personnel extracurricular assignment for lack of need pursuant to section seven [ 18A-2-7], article two of this chapter. If an extracurricular contract has been terminated and is reestablished in any succeeding school year, it shall be offered to the employee who held the assignment at the time of its termination. If the employee declines the assignment, the extracurricular assignment shall be posted and filled pursuant to section eight-b [ 18A-4-8b] of this article.

11. W. VA. CODE §18A-4-16(6) is applicable to extracurricular assignments. It is not established that Grievant Ellison had a statutory right to retain the extra-duty assignment associated with Bridge Day, without proper application, as a result of his performance of this assignment in prior years.

12. It is not established that Respondent had a duty to contact Grievant Ellison and independently ascertain whether or not he wished to work Bridge Day 2008.

13. Grievants failed to establish by a preponderance of the evidence that they were denied the opportunity to apply for Bridge Day Assignments 2008.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

**Date:** March 10, 2009

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**Landon R. Brown**
**Administrative Law Judge**