

# THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

# ANNUAL REPORT TO THE GOVERNOR AND LEGISLATURE FISCAL YEAR 2006

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# THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

## BACKGROUND AND OVERVIEW OF THE AGENCY

#### THE MISSION

To provide a fair, consistent and expedient administrative process for the resolution of employment-related disputes between the employers and employees of the State's executive branch, county educational systems and system of higher education

The Grievance Board employs a panel of administrative law judges who have the quasi-judicial role of hearing and deciding cases at level four, which is the final administrative step in the State and Educational Grievance Process established under the West Virginia Code. The decisions of the individual law judges are subject to only a limited review by a court of law. While the Board does not review any of the decisions of its administrative law judges, it does set the procedural rules for the grievance process. The Board also publishes all opinions at level four through the Secretary of State and on its own web-based library. The level four decisions of the Board's administrative law judges make up the body of administrative law which governs employment rights and procedures for all covered employees, including classified State employees, employees of the County Boards of Education and of the State's institutions of higher education.

#### FUNCTIONS, OPERATIONS AND AUTHORITY

- The Board employs administrative law judges who decide all cases filed at level four either as original cases, such as dismissals from employment, or as appeals from a lower level grievance proceeding, or are a review of a lower level default proceeding.<sup>1</sup>
- The opinions of all level four proceedings are published for the purpose of establishing the legal precedent governing state and educational employment law subject only to limited judicial review.<sup>2</sup>
- The Board establishes the procedures and procedural rules to be followed at levels two, three and four of the grievance process for educational employees, and at levels one through four for higher education and state employees.<sup>3</sup>
- The Board provides mediation services to the employers and employees of the state's executive branch, county boards of education and higher education systems as a means of alternative dispute resolution for resolving employment conflicts, not only at level four, but at any level, even before the filing of a grievance.<sup>4</sup>
- The Board provides official transcripts and records of grievance proceedings to the judicial branch regarding any decisions appealed to the courts for review.<sup>5</sup>

<sup>&</sup>lt;sup>1</sup>W. Va. Code, §§18-29-4 and 29-6A-4 (d)

<sup>&</sup>lt;sup>2</sup>W. Va. Code, §§18-29-4 and 29-5-4

<sup>&</sup>lt;sup>3</sup>W. Va. Code, §§18-29-5(a) and §29-6A-5(a)

<sup>&</sup>lt;sup>4</sup>W. Va. Code, §§18-29-10 and 29-6A-12

<sup>&</sup>lt;sup>5</sup>W. Va. Code, §§18-29-6 and 29-6A-6 (d)

#### **OFFICE LOCATIONS**

The Board currently leases four locations for holding hearings and housing operations. Two staffed offices are located at Charleston and in Westover, and two additional hearing facilities are located in Elkins and Beckley. The main office for the Board is located in Charleston at 808 Greenbrier Street, and houses the administrative office, as well as the offices of three administrative law judges serving the southern half of the State. The Westover office is in the Wes-Mon center in Westover on Fairmont Road, and houses two administrative law judges and one staff person serving the northern and eastern panhandles and northern half of the State.

The Elkins office is located in the Elkins City Hall on Davis Street, on the third floor and provides a dedicated hearing room and office space. The Beckley facility is a hearing room only which is leased from an engineering firm. During fiscal year 2006, the Board leased an office in Wheeling, however that lease was not renewed in 2007.

# ORGANIZATIONAL STRUCTURE AND PERSONNEL

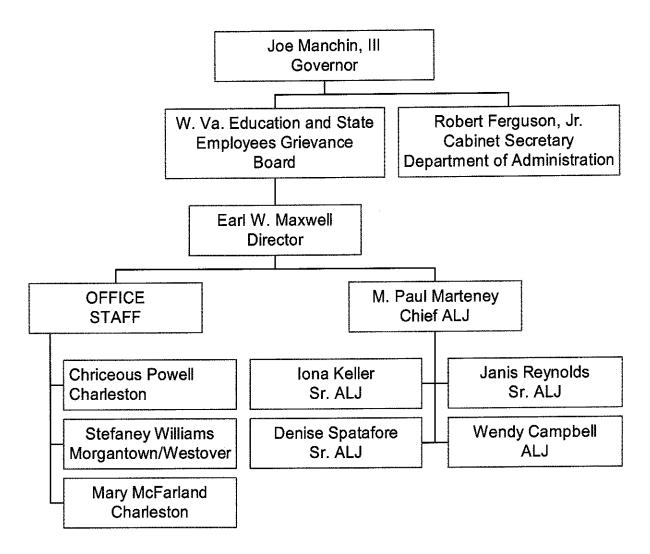
The Board consists of three people, appointed by the Governor for staggered three year terms, with advice and consent of the Senate.<sup>6</sup> No more than two members may be from the same political party and each must be from a different Congressional District.

The Board employs a Director who is responsible for the day to day administrative operations and supervision of the staff and administrative law judges. The Director is charged with employing all staff, with the advice and consent of the Board, and all staff personnel serve at the will and pleasure of the Director.

The administrative law judges are selected by the Board and are employed at the will and pleasure of the Board, one of whom is appointed by the Board as the Chief Administrative Law Judge.

<sup>&</sup>lt;sup>6</sup> W. Va. Code, §18-29-5 (a)

Organizational Chart
W. Va. Education and State Employees Grievance Board



Pursuant to Article 2, Chapter 5F of the State Code, the Board is organizationally under the Cabinet Secretary for Administration for the purposes of being included in the budget and for providing governmental services to the Board. For the purposes of personnel matters, policy and procedure, the Board is an independent entity whose membership is appointed by the Governor for a three year term, with the advice and consent of the Senate.

# FISCAL YEAR 2006 BOARD AND STAFF:

<u>David Hendrickson</u> - Chair of the Board, 2<sup>nd</sup> Congressional District, Charleston

Edgar Morano - Board member, 1st Congressional District, Wheeling

Cam Lewis - Board member, 3rd Congressional District, Beckley

<u>Earl W. Maxwell</u>- Director, formerly an Attorney in private practice and Prosecuting Attorney of Randolph County for three terms, and was appointed Director in January of 2006.

M. Paul Marteney - Chief Administrative Law Judge, who has served five years as an Administrative Law Judge for the Board, and sits in the Charleston office. Previously, he served as Associate General Counsel for the Insurance Commissioner and as a Grievance evaluator for the Department of Health and Human Resources. Prior to public service, Mr. Marteney had a private practice in his home town of Buckhannon and was an associate of Shaffer and Shaffer in Madison, WV.

<u>Iona Sue Keller</u> - Senior Administrative Law Judge, has served as an Administrative Law Judge with the Board since 1986. Currently she serves in the Westover office. Prior to joining the Board she was a staff attorney for the W. Va. Tax Department's Legal Division.

<u>Denise Spatafore</u> - Senior Administrative Law Judge based in the Westover Office, has served as an Administrative Law Judge with the Board for ten years. Previously, she had been a litigation attorney in Charleston, served as law clerk to Judge Andrew MacQueen in Kanawha County, and worked as counsel to the House Judiciary Committee. She also served as an Administrative Law Judge for the Workers Compensation Commission before joining the Board.

Janis Reynolds - Senior Administrative Law Judge for the Board in the Charleston Office since 1993. Previously, she was a psychiatric nurse and professor of nursing at the University of Virginia and University of Louisville with a Masters Degree in Psychiatric Nursing. She has served as a law clerk for both the Kanawha County Circuit Court and the West Virginia Supreme Court of Appeals.

<u>Wendy Campbell</u> - Administrative Law Judge for the board since February of 2006 and serves in the Charleston Office. Prior to joining the Board she was an Assistant Public Defender for the Kanawha County Public Defender Office with an extensive trial and appellate practice.

Chriceous D. Powell - A staff person with the Board in the Charleston office since 1993, who in addition to performing regular support duties is primarily responsible for maintaining the Board's data base of cases and the Board's web-page. She is currently a contract employee with the Office of Tax Appeals developing an updated user-friendly database system, and previously worked for the Post Office in their data management system. She has also been an accountant for both H&R Block, and W. Va. Steel Corporation.

<u>Stefaney Williams</u> - The only support staff for two Administrative Law Judges located in the Westover Office, and has been with the Board since March of 2005. Previously, she worked for several lawyers in the Fairmont / Clarksburg area from 1989. She also served as Area Operations Coordinator for the North Central W. Va. VOCA Corporation and was a freelance transcriptionist and editor/proofreader before joining the Board.

Mary McFarland - Employed since 2005 as a staff support person in the Charleston office, she was previously employed in the Department of Administration. Prior to joining the State she worked in the private sector as a legal secretary and prior to that worked for the National Institute for Chemical Studies as an administrator.

#### **FISCAL YEAR 2006**

#### **FISCAL YEAR 2006 IN SUMMARY**

Fiscal year 2006 was a year of significant change for the Board. In August 2005 the Governor appointed an entirely new Board, the prior memberships having elapsed during the previous years.

Over the prior two years, the Legislature's Joint Committee on Government Organization completed a long and extensive review of the grievance procedure in response to an expressed interest in reform and improvement. In 2006 the Grievance Board took an aggressive and active role in this review. Lead by the Co-chairs of the Joint Committee on Government Organization and the Governor, a study group was established during fiscal year 2006, along with a special legislative subcommittee. Subsequently, the Board submitted a proposed bill that was developed during Fiscal Year 2006 for discussion. While the bill prepared by the Board was not adopted, it served as a basis for discussion in the work group and the subcommittee such that in early fiscal year 2007, the work group drafted a proposed bill that will likely go to the legislature during the 2007 session. The Board throughout the process was directly involved in the many discussions that were held with not only the clients of the Board, but other interested parties, providing thoughts, ideas and data needed to advance the effort to improve the grievance process. Going into fiscal year 2007, the Board remains steadfastly committed to any improvements in the grievance process that will increase our customer's satisfaction with the operations, and benefit the citizens of the State.

#### STAFFING FISCAL YEAR 2006

The fiscal year saw significant changes in its personnel and organization. The Board created the new position of Chief Administrative Law Judge in January 2006 and appointed M. Paul Marteney to that post. In January of 2006 the Board hired a new Director, Earl W. Maxwell, a former Prosecuting Attorney, to replace the former director who retired in October of 2005. The Board hired a new administrative law judge, Wendy Campbell, to fill a vacant position in February of 2006. In August of 2006, the position of administrative officer, who had

been responsible for the accounting functions, was eliminated, and the functions of that position were contracted with the Governor's Administrative Office at a cost savings of more than \$30,000 per year. In October of 2006 the Board authorized a search to hire another administrative law judge to fill a position that had been vacant for some time, in order to address a case load issue. This search is still underway.

In January of 2006, the Board, upon hiring a new director, set forth a policy that the director would no longer serve as an administrative law judge, rendering decisions in cases. The director's role as administrator, manager and conduit to the Department of Administration and through the Secretary to the executive branch was deemed to make the position inappropriate for hearing cases or participating in case discussions with the administrative law judges. While the director was still responsible for setting employment and office policy, and maintaining oversight of administrative law judges, the role of overseeing the activity of the administrative law judges in terms of rendering decisions and hearing cases was shifted to the chief administrative law judge, who then reported to the director. This created a barrier of administration intended to minimize any appearance that the director or Board was in any way involved in the writing of decisions, and was intended to protect the independence of the administrative law judges in the rendering of decisions.

While this administrative change has been effective, it did reduce the number of available administrative law judges to hear cases by one. As indicated in the table below, the number of administrative law judges fell from six to five over the last four years. The removal of the director as an administrative law judge reduced that by one more.

FISCAL YEAR	2003	2004	2005	2006
# of ALJ's	6	6	5	5
# of Staff Personnel	5	4	4	3
# of Offices	5	5	5	4

Table of Staff and Offices by Fiscal Year

During this same period the number of cases has remained constant. Consequently, the case load of the administrative law judges increased proportionately. For this reason, the Board has decided that an additional administrative law judge is needed and has directed that one be hired in the upcoming year.

#### **BUDGET FISCAL YEAR 2006**

The annual budget for the grievance board has been reduced over the years. The Board has followed a program of cost control, and as a result has consistently underspent its budget each year. The Board continues to pursue areas of improvement and greater efficiency, though at this point there appears little more that can be cut from expenses without sacrificing the mission and goals of the agency. It is also apparent that there is an urgent need for capital improvements within the very near future. In discussions with the Office of Technology, it has been determined that these needed improvements include the replacement of aging computers and upgrading of certain components of the telephone and internet systems to avoid larger expenses and disruptions of service. It is also apparent that the Board needs to consider upgrading its systems to allow for new available technologies aimed at reducing the cost to customers of participating in the grievance process, such as video conferencing. This change would allow witnesses to appear at hearings without necessitating travel and reduce lost work time while attending hearings. This option is being studied, along with the option of utilizing teleconferencing facilities owned by other agencies.

Fiscal Year	2002	2003	2004	2005	2006
Allocated	\$1,032,467	\$1,011,955	\$905,169	\$938,668	\$900,540
Expended	\$849,883	\$878,476	\$864,539	\$849,035	\$835,985

Table of Budget and Expenditure by Fiscal Year

As part of its overall cost control planning, the Board has been reviewing the utilization of the various offices leased by the Board. In fiscal year 2006, the Board made the determination to discontinue the leasing of an office in Wheeling, and is reviewing the remaining offices. The

Beckley office lease is the next lease that will come to term, and the Board is considering whether to renew that lease.

Location	Charleston	Morgantown	Elkins	Beckley	Wheeling
# of Hearings	157	48	15	36	11
and Mediation					
Rent Paid	\$22,896	\$16,500	\$6,352.54	\$3,837.50	\$4,200
Cost per use	\$146	\$344	\$425	\$107	\$382

**Table of Office Rental Costs** 

This year the Board, on the recommendation of several of our clients, is experimenting with and pursuing a procedure of making the administrative law judges more mobile, taking the hearing to the parties by equipping the administrative law judges with mobile technology that will allow the administrative law judges to travel to a location where a hearing can be held rather than limiting the hearings to Board offices. This is intended to reduce the travel cost and out of office time of witnesses and parties when attending hearings and mediation.

#### **CASE ACTIVITY FISCAL YEAR 2006**

#### Case Activity Generally:

The number of cases filed with the Board at level four in any fiscal year has remained steady, averaging approximately 460 new level four cases each year.

The number of cases appealed to Circuit Court has decreased over time, from 22% of total decisions in 2002 to 12% of all decisions in 2006. In part this decrease is attributable to the fact that many of the legal issues that were in question now have case law that has resolved the matter.

Mediation as a component of the grievance process has increased since it became a priority goal in Fiscal Year 2004 and shows signs of continuing to increase as clients become more accustomed to its use and availability.

DURING FISCAL YEAR	2002	2003	2004	2005	2006
CASES FILED	426	445	530	443	461
DECISIONS ISSUED	407	436	397	468	501
Dismissal Orders	147	148	127	187	187
Default Orders	23	29	29	24	18
Settled without mediation	57	55	33	73	46
Mediated at level 4	17	16	13	22	22
Iediated at lower level	n/a	n/a	10	18	23
Appealed to Circuit Court	90	92	83	57	59

Table of Case Activity at Level Four by Fiscal Year

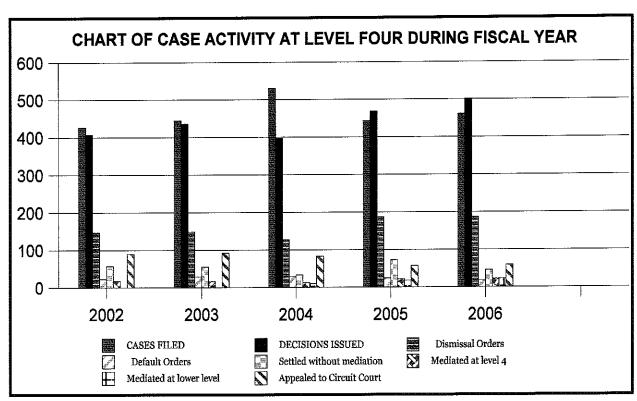


Chart of Case Activity at Level Four by Fiscal Year

#### Mediation:

Mediation has been a growing component of the grievance process over the past three years since it has become a priority for the Board. It is now required that all administrative law judges complete both the basic and advanced mediation training provided by the West Virginia State Bar, and as of fiscal year 2006 all administrative law judges have received advanced certification in mediation from the State Bar.

As indicated in the Tables above, there is more participation in mediation each year, and there has been a growing interest in early mediation, prior to level four. Though no records are kept with regard to the success or failure of mediation, as it is it is the policy of the Board that all such agreements or even participation in mediation are private, the general success rate of mediation has been estimated at around 90%, with greater success anticipated the earlier mediation is initiated in the dispute. It should also be noted that mediation is more often much less costly than other forms of dispute resolution, both for the employer and employee.

The Board has promoted mediation, providing administrative law judges to serve as mediators, free of any costs and at any level, even before a grievance is filed. Once an administrative law judge has participated in a mediation, that administrative law judge will have no involvement in the case should it ever reach level four. The Board also began a program in cooperation with the Division of Personnel, to educate employers and employees about the mediation process and expects to continue this program into the future in hopes that the mediation alternative will be utilized more frequently.

It is an accepted general principal of human relations, that when two parties are in disagreement, it is preferable, whenever possible, to resolve disputes through discussion and by agreement, rather than through a forced determination made by an outside party through an adversarial process. The Board has taken the position that in the context of the employer/employee relationship, the outcome of any dispute, with the general exception of dismissal, must consider the on-going nature of the relationship. Mediation provides an alternative form of dispute resolution which avoids negative feelings that often arise from more adversarial methods such as hearings, or arbitration.

# Cases by Types of Employees:

State Employees continue to make up a majority of the new cases filed at level four, and the data indicates a rather consistent level and proportion with regard to the number of cases filed over the years by type of employee.

Type of Employee	FY	FY	FY	FY	FY
	2002	2003	2004	2005	2006
STATE	211	210	319	243	254
Higher Ed	51	37	32	39	42
Dept of Education	2	6	5	4	3
Education Professional	43	43	54	56	65
Education Service	78	89	73	83	80
Education Service and Professional	1	1	0	0	0
Educational Employee Unknown	40	59	47	18	17

Table of Level Four Cases Filed by Type of Employee

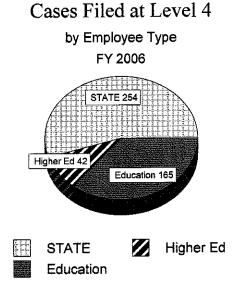


Chart of Cases Filed FY 2006 by Type of Employee

#### **DECISIONS FISCAL YEAR 2006**

#### **Decisions Performance:**

Over the past two fiscal years, the Board has had a concern with getting written opinions out in a timely manner, the goal being within 30 days of all material being submitted by the parties. It has addressed this problem and anticipates significant improvement in the forthcoming fiscal year. Despite having fewer administrative law judges, the Board has generally increased its efficiency in handling cases over the past several fiscal years. The seniority and experience of the judges serving the Board have allowed for greater efficiency in assigning and managing cases. Greater efficiency is also attributable to more cases being heard on the underlying record and greater use of mediation as an alternative means of dispute resolution.

Fiscal year >	2002	2003	2004	2005	2006
Number of Cases	426	446	545	476	494
Assigned to an ALJ					
Number of Cases Heard	45	43	34	45	56
on Record					
No. of Cases Settled at	57	55	33	73	46
Level 4 - no Mediation					
No. of Mediation after	17	16	13	22	22
filing at level 4	!				

Table of Level Four Cases Heard on Record and Mediated

Written Decisions arising from appeal cases challenging a lower level decision or being a appealed directly to level four such as in a dismissal, make up the majority of the types of decisions rendered by administrative law judges. Other types of decisions arise from default issues or motions to dismiss for procedural reasons make up the balance. While the time

between filing and decision for such non-appeal cases seem very prompt, with regard to appeal cases the time between filing and decision is growing longer, mostly as a result of it taking longer for the cases to reach maturity.

Obviously, no case can be decided prior to becoming mature, (maturity being that point in time when all parties have submitted all of the material and evidence they wish to have considered by the judge), and the time required for the case to reach maturity varies as a result of factors outside the judges control, such as the complexity of the case and the performance of the parties and their representatives. Once mature, data indicates that the decisions were being rendered more quickly in fiscal year 2006 than the past fiscal year, and that trend is even more improved in the coming fiscal year 2007. The statutory goal of a decision being rendered within 30 days of maturity is generally being met.

Fiscal Year >	2002	2003	2004	2005	2006
Total Written Decisions	237	259	233	232	263
Within 30 days of Maturity	208	230	208	168	199
% w/in 30 days of Maturity	87.76	88.80	89.27	72.41	75.67

Table of Written Opinions Decided within 30 days

The assertion that the goal is being met is revealed more clearly when one looks not at the total performance of the agency, but the individual performance of the administrative law judges. The following table indicates that the judges currently employed are demonstrating good performance under the criteria of producing decisions within 30 days of maturity.

Administrative Law Judge	# of Decisions	# of Decisions	% issued within
	Rendered in	within 30 days	30 days of
	FY 2006		maturity
DMS	56	56	100%
JIC (ended employment 10/05)	24	7	29.17%
JIR	50	46	92%
MPM	47	47	100%
SK	67	65	97.01%
WAC (employed 2/06)	19	18	94.74%

## Table of Individual Performance by ALJs in FY 2006

The evaluation of individual performance must consider the case load of the individual judge as well as the complexity and demands of the individual cases assigned them. This consideration is very apparent when one compares the same statistics by administrative law judge during the best performance year FY 2004, where 89.27% of cases had decisions within 30 days of maturity.

Administrative Law Judge	# of Decisions	# of Decisions	% issued within
	Rendered in	within 30 days	30 days of
	FY 2004		maturity
BLG	10	9	90 %
DMS	48	47	97.2 %
ЛС	4	2	50 %
JIR	49	32	65.31 %
MPM	47	46	97.87 %
SK	46	44	95.65 %
MJS	29	28	96.55 %

Table of Individual Performance by ALJ for FY 2004

At that time there were seven administrative law judges as opposed to five, and case loads were almost two thirds of what they were in 2006 when the percentage of cases decided within 30 days dropped to 75.67%. It is however noteworthy that those administrative law judges employed at the end of the fiscal year 2006 had better overall individual performance than those in 2004. It is only the average of the performances that was better in that year.

As stated earlier it is taking longer for appeal cases to reach maturity, and this is of concern to the Board. The subsequent table demonstrates that the total time from filing to decision is lengthening, in no small part to an obvious increase in the time from filing to maturity. While each case must be considered on its own merits and character, and the proper administration of justice cannot be ceded to mere numbers in a quest for shorter time frames, the Board is nonetheless looking at the reasons for and means to address this disturbing trend.

Fiscal Year >	2002	2003	2004	2005	2006
Average time to Maturity in days	124	149	157	164	155
Average days to Decision after Maturity	26	27	25	36	44
Average total days from filing to Decision	151	175	179	200	198

**Table - Average Time from Filing to Decision** 

#### **Decisions results:**

The outcome of any case should only be attributed to the merits of the cause of action, and therefore is generally unsuitable for statistical analysis. Over time the variation in the number of granted verses denied grievances runs a considerable spectrum. That considered, it should also be apparent that a case which reaches level four has usually been considered in at least two other levels. The level four proceeding is the last level of the administrative process, but the first level where a truly impartial evaluator hears the case. The employer at all prior levels has substantial control over the outcome, and therefore an opportunity to become aware of a mistake or error at a lower level. This fact combined with the establishment over the years of a body of law to which the employer may refer to and make an informed determination of the likely outcome at level four, would lead one to the logical conclusion that few cases arise to level four where an employer lacks the information necessary to determine the legal merits of the case. Therefore, the employer should generally resolve cases which have merit at earlier stages.

Given this analysis, combined with the stated goal of the grievance process, that grievances are to be resolved at the lowest possible level, it should come as some surprise that as many grievances are granted at level four as there are. Nonetheless, in many cases there still remain legal issues to be decided, often issues which the existing body of law lack any prior guidance in their ultimate determination. Many of the cases reaching the Board have such issues, and the relatively small number of cases which are overturned once appealed to the courts of law would indicate that the decisions of the Board are consistent with balanced legal principals.

Hence, it is the position of the Board that the statistical analysis of grievances granted would indicate a generally healthy system in place.

This is not to say that improvements cannot be made, and certainly should be made to improve the appearance of fairness, and to secure the confidence of employers and employees alike in this important process.

Fiscal Year >	2002	2003	2004	2005	2006
Total # of Decisions	237	259	233	232	263
Total Granted in Favor of Employee	37	55	35	38	37
Percent Granted	16%	21%	13%	16%	14%
Total # of Cases Appealed	90	92	83	57	59
# of Appeals Overturning Decision	8	16	11	7	6

Table of Decision Outcomes and Appeals

# **Decision Outcomes by Employee Type**

Fiscal Year >	2002	2003	2004	2005	2006
# of Decisions	79	96	110	93	113
# Granted	10	17	11	16	17
% Granted	13	18	10	17	15

# Table of Decision outcomes for State Employees

Fiscal Year >	2002	2003	2004	2005	2006
# of Decisions	27	29	18	20	25
# Granted	4	9	3	2	0
% Granted	15	31	17	10	0

**Table of Decision Outcomes for Higher Education Employees** 

Fiscal Year >	2002	2003	2004	2005	2006
# of Decisions	1	4	3	3	1
# Granted	0	0	1	0	1
% Granted	0	0	33	0	100

Table of Decision Outcomes for Department of Education Employees

Fiscal Year >	2002	2003	2004	2005	2006
# of Decisions	83	86	62	69	74
# Granted	14	16	12	6	11
% Granted	17	19	19	9	15

**Table of Decision Outcomes for Education Service Employees** 

Fiscal Year >	2002	2003	2004	2005	2006
# of Decisions	47	42	40	47	50
# Granted	9	13	8	14	8
% Granted	19	31	20	30	16

**Table of Outcomes for Professional Education Employees** 

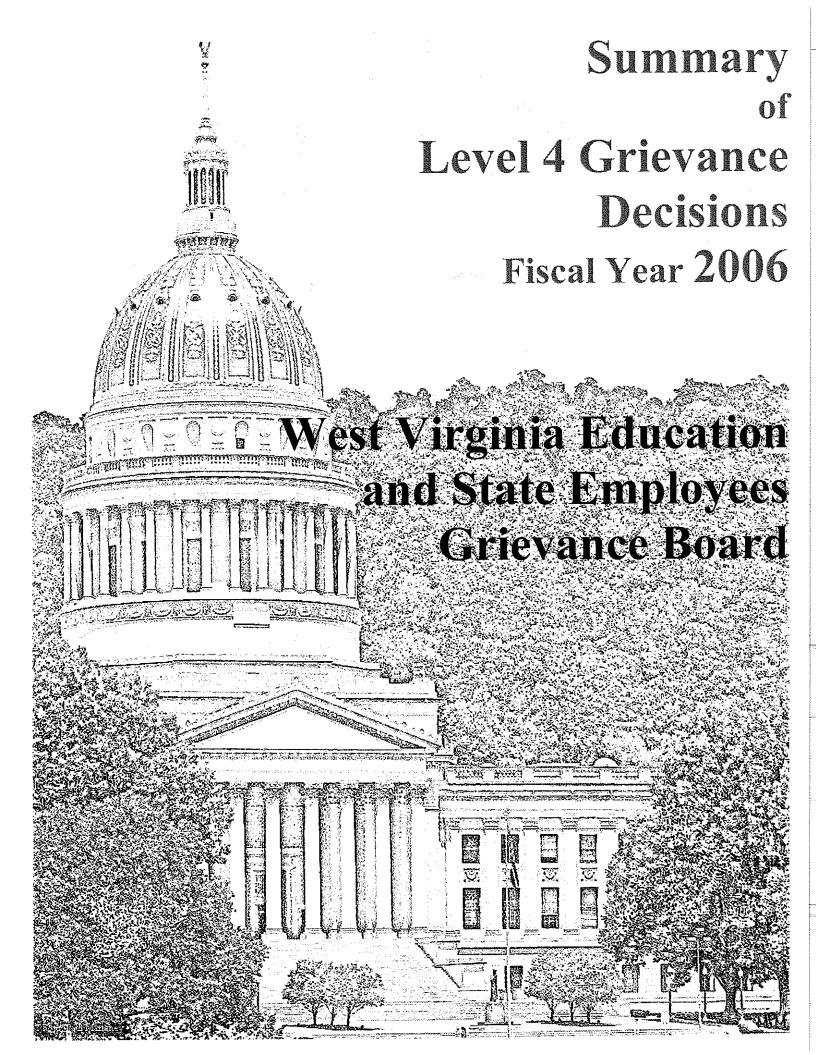
#### CONCLUSION

Fiscal year 2006 was a landmark year for the West Virginia Education and State Employees Grievance Board. A year marked by significant change and the anticipation of even greater changes thanks to the leadership of the Legislators and the Governor, who have invested considerable energy and time into the problems facing the grievance process.

The criticisms of the process cannot and have not been ignored. It is a cumbersome process that has grown more complicated and expensive than originally intended. And while the truth underlying the concern can be debated, it is nonetheless a concern that many of those who are clients of the grievance process have the perception that it is biased and unfair. A system such as the grievance process cannot allow these types of concerns to go unaddressed and expect to serve its purpose and mission. It is the position of the Board that with the guidance and aid of the Legislature and the Governor's office, fiscal year 2007 will be a followup to the year of change 2006 has been, promising even more positive improvement in the process.

That aside, it is apparent that in 2006, the staff and administrative law judges of the Board have worked diligently as public servants to perform the mission they have been assigned. There has been improvement in the timeliness of decisions, and a trend established towards better improvement. Fewer cases are being appealed, and fewer of those appealed to the courts are being reversed. The Board has made substantial contributions to the body of employment law in the fiscal year and stands ready to face the greater challenges of the new year. The individual performance of the personnel of the Grievance Board has proven them to be a credit to the public sector.

The Board has sought to make improvements in its procedures to reduce the cost to those using the grievance process and make it more open and accessible. Given the necessary resources those programs will continue to be pursued into the next year, as well as other more significant changes that may come from the work of the Legislature. Work which the Board will participate in, along with those organizations and individuals who are equally dedicated to the important mission of better employer and employee relations in the public sector.



# STATE OF WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

The West Virginia Education and State Employees Grievance Board presents this Summary of Decisions rendered in the Fiscal Year 2006. This report is a compilation of a summary of all of the decisions of the Administrative Law Judges rendered at Level Four and published during the fiscal year. The decisions are presented in alphabetical order by Topic. Each summary is a basic abstract of the decision. A complete copy of all of the decisions are available at the Office of the Secretary of State for the State of West Virginia, or on line, along with a copy of this report, at the Grievance Board website at <a href="https://www.state.wv.us/admin/grievanc">www.state.wv.us/admin/grievanc</a>.

David K. Hendrickson, Chairman of the Board

Earl W. Maxwell, Director

M. Paul Marteney, Chief Administrative Law Judge

# FY 2006 Grievance Summaries

**Topics** 

ADMINISTRATIVE TRANSFER; POSTING

Docket No.

05-HE-397

Synopsis

A position was filled by administrative transfer and was not posted. Grievant asserted the position must be posted, and the university president did not have the authority to take the action of administrative transfer.

In special cases, to assist long-term employees in difficult situations, a university president has the authority to act in an equitable manner to assist a long-term employee. Grievance

**Topics** 

**ASSIGNMENTS** 

Docket No.

05-23-068

Synopsis

The grievant complained about not receiving one of two bus driving assignments that became available on an emergency basis. The normal rotation used for making substitute bus operator assignments did not have to be followed due to the emergency nature of the assignments at

**Topics** 

CHANGE TO SCHEDULE; WRITTEN CONSENT

Docket No.

05-40-225

Synopsis

The grievant drove a supplemental run to which one student was added at the time two students were removed and placed on a different bus run. The grievant claimed that this was a change to his schedule to which he had to agree in writing. It was not. Minor changes to the grievant's bus run to accommodate the addition of new students does not fall within the scope of daily work schedule changes requiring written agreement by the bus operator within the meaning of W. Va. Code section 18A-4-8a(8).

The grievant's additional claim that he was required to drive outside of the designated geographic area was untimely and, thus, not addressed on the merits. Grievance DENIED.

**Topics** 

CLASSIFICATION

Docket No.

01-HE-338

Synopsis

Grievants argue they should have been promoted to Technician III in 1997 when their coworkers prevailed in a grievance. Grievants assert they perform the same duties and responsibilities.

DECISION: Grievants established their duties and responsibilities are the same as those employees classified at Technician III, and in fact, they were originally all placed in the Technician II classification. Subsequent to the Liston decision, all but one employee has since been promoted to Technician III. Grievance GRANTED, but back pay limited to 15 days prior to filing at level one.

**Topics** 

CLASSIFICATION

Docket No.

01-HE-481

Synopsis

Grievant argued that he should have been classified as a Trades Worker, pay grade 12, because he did not assist another worker, and was responsible for appliance repair. WVU asserted that Grievant was properly classified.

DECISION: Grievant challenged a number of point factors, but failed to prove that the JEC's determination based on the information available at that time was clearly wrong. Grievance

**Topics** 

CLASSIFICATION

Docket No.

05-39-308

Synopsis

Grievant argues that she would be correctly classified as a Coordinator. PCBE argues that it is allowed only one employee in pay grade H, by statute, and that Grievant is properly classified. DECISION: Grievant does not meet the definition of Coordinator because she does not direct a department or division. Further, PCBE is limited to one employee in pay grade H, and that slot is assigned to the Director of Transportation. Grievance DENIED.

**Topics** 

CLASSIFICATION

Docket No.

05-HHR-329

Synopsis

Grievant sought to be classified as an Information Systems Manager 1 instead of a Specialist 1. Work for "Agency" distinction urged by DOP was meaningless, given both classifications use the same term, even though MMBH is not an agency, Grievant met his burden of proving the ISM1 specification was a better fit for his duties. Grievance GRANTED.

**Topics** 

CLASSIFICATION

Docket No.

01-HE-417

Synopsis

Grievants argued that their duties and responsibilities entitled them to the same pay grade as that granted to plumbers. WVU asserts that Grievants are properly compensated. DECISION: Grievants challenged the degree levels of numerous point factors, but did not prove by a preponderance of the evidence that the JEC determination based on the information available was clearly wrong. Grievance DENIED.

**Topics** 

CLASSIFICATION; DISCRIMINATION

Docket No.

05-DOH-088

Synopsis

Grievant was informally advised by his supervisor that his request for an upgrade to TW4 had been approved. DOP had approved the request based on the position description submitted. However, DOH administrators asked the county administrators to recheck the work completed by Grievant, and found that the time he was assigned welding duties was much less than that on the position description. DOH asked DOP to review the request with the revised information. DOP determined that Grievant was properly classified as a TW3. DECISION: Grievant does not weld more than 50 % of the time, and is not entitled to an upgrade on that basis. Grievant also compares himself to another employee who was upgraded. It is not known whether this individual is correctly classified, and if so, it does not constitute discrimination for Grievant. Grievance DENIED.

**Topics** 

CLASSIFICATION; OUT-OF-CLASSIFICATION; BACK PAY; TEMPORARY UPGRADE; SETTLEMENT AGREEMENT; SETTLEMENT; FINALITY

Docket No.

05-HHR-156

Synopsis

The grievant failed to prove that he had been working out of classification. The duties he cited in support of this argument properly fell within the catch-all provision of "performs related work as required" in the specifications for the grievant's position as a Food Service Worker. Therefore, he was not entitled to back pay for performing such duties.

The grievant's signature on a settlement agreement, and his receipt of the stated amount of money in settlement of an earlier grievance, foreclosed the grievant's demand for an additional sum of money in relation to that settlement.

The grievant failed to demonstrate any flaws in the selection process for a Food Service Supervisor. A three-member interview committee relied upon scripted questions to insure fairness during the interview process. The grievant was twelfth on a register consisting of twelve names. He did not present himself well during the interview process and, as a consequence, received the lowest interview score. The selection process passed muster. Grievance DENIED.

Topics

CLASSIFICATION; PROMOTION; PERFORMANCE

Docket No.

06-HHR-052

**Synopsis** 

Grievant applied for promotion from Child Support Specialist 2 to 3, and the promotion was recommended by his management team. However, before the action was processed by DOP, Grievant's number of legal referrals dropped below the required amount for the CSS 3 classification, so the request for reallocation was rescinded. Per the class specification for CSS 3, the recommendation of the employee's supervisors is required for advancement, so it was not arbitrary and capricious for the management team to deny Grievant's request for promotion,

due to his failure to perform at the required level. Grievance DENIED.

**Topics** 

CLASSIFICATION; REALLOCATION

Docket No.

05-DOH-385

**Synopsis** 

Grievant sought reallocation to a Transportation Services Manager 2. He did not demonstrate a substantial change in his duties since his last promotion. Grievance DENIED.

**Topics** 

COMPENSATION

Docket No.

05-29-413

**Synopsis** 

Because of an error, Grievant was initially paid for her travel time to and from the location where the bus picked up her first student, and she began her work for the day. When this error was discovered, MCBOE quit paying Grievant for this travel time. Grievant sought continuation of this compensation.

Grievant was not entitled to this compensation, as the door to door, free travel was offered to her as a courtesy, and mistakes in compensation do not create an entitlement to continued incorrect reimbursement. Grievance DENIED

Topics

COMPENSATION

Docket No.

01-HE-459

**Synopsis** 

Grievant argued that he was entitled to be classified as a Plasterer/Mason Lead, pay grade 15 which more accurately reflects his duties in the asbestos abatement shop. WVU asserted that Grievant was properly classified.

DECISION: Grievant challenged the degree levels assigned to a number of point factors, but failed to prove the decision of the JEC was clearly wrong. Grievance DENIED.

Topics

COMPENSATION

Docket No.

05-41-236

Synopsis

Grievants were paid an incorrect salary. When the error was discovered, their salary was changed to reflect the correct salary. Grievants assert this error cannot be corrected. Grievants did not meet their burden of proof. A school board is allowed fix its errors and to correct overpayment. Grievance DENIED.

**Topics** 

COMPENSATION; BACK PAY

Docket No.

01-HE-357

**Synopsis** 

A standard Mercer classification issue, Grievant challenged a number of point factors in his effort to prove that he was entitled to placement in pay grade 14, rather than pay grade 13. WVU asserts that Grievant was properly placed in pay grade 13.

DECISION: A review of the point factors, the degree levels assigned to Grievant's position, and the degree levels he requested, it was determined that the JEC's determination was not clearly wrong. Grievance DENIED.

**Topics** 

COMPENSATION; FAVORITISM

Docket No.

05-HHR-315

Synopsis

Grievant, who is paid within his pay grade and receives greater compensation than his peers, asserted he should receive more compensation because his work is more complex, and his supervisees are in a higher pay grade than the other employees' supervisees.

Grievant did not meet his burden of proof. He is compensation within his pay grade and LARGENT is controlling. Additionally, the complexity of his cases are offset by the volume of the other employees cases. Grievance DENIED.

**Topics** 

COMPENSATION; PRIOR CREDIT; LACHES

Docket No.

05-50-256

Synopsis

WCBE had failed to properly compensate Grievant for experience earned outside the county.

Over a period of years, he inquired as to whether his salary was correct and employees in the Treasurer's office assured him that it was. His correct years of experience was listed in the faculty directory, and he only learned of the discrepancy when salary information was provided by a new Treasurer. WCBE compensated Grievant for one calendar year, but argued that any additional back pay was barred by laches. Grievant asserted that he had made multiple attempts to learn the facts of the situation, and should not be denied full back pay. DECISION: Grievant had exercised due diligence over the years to confirm his salary and promptly filed this grievance upon learning of the error. Therefore, laches will not bar full recovery. Grievance GRANTED.

**Topics** 

COMPENSATION; PRIOR EXPERIENCE CREDIT; DISCRIMINATION

Docket No.

03-CORR-239

Synopsis

Grievant Rider had been receiving credit for salary and leave accrual purposes, until June 2003, when they were rescinded. Both Grievants argue their experience in county sheriffs' departments should be credited, and alleged that two other HCC employees had received similar credit. It is the position of DOC/DOP that the credit cannot be carried to their current positions because they were not employed under the State Civil Service System. DECISION: Grievants were previously employed by the county civil service commission while they worked in the sheriffs' departments. As a separate entity, Grievants are only entitled to carry their years of service for retirement purposes to their DOC employment because they contributed to that fund. The two individuals who were cited as having been allowed the credit were shown to have not received it in one case, and to have received it by Executive Order when a county jail was closed, in the second case. Grievance DENIED.

**Topics** 

COMPENSATION; REALLOCATION

Docket No.

05-WCC-235

Synopsis

Grievant agreed he was properly classified, but stated he should be reallocated within his pay grade with a ten percent increase in pay because he now does more duties, and they are more complex. He also asserted his classification specification should list all his duties.

Grievant is properly classified, thus he is not entitled to be reallocated to a pay increase. Reallocation requires a change of classification. The listing of all duties is not required.

**Topics** 

COMPENSATION; TIMELINESS

Docket No.

05-HE-187

Synopsis

Grievant performed some portion of the Certification Officer's position for WVUIT without being requested, promised compensation, or signing a contract. Later he requested compensation and this request was denied in October 2004. Grievant filed this grievance in March 2005. Grievance DENIED as UNTIMELY.

**Topics** 

COMPETENCY TEST; IN-SERVICE TRAINING

Docket No.

06-20-108

Synopsis

Grievant applied for a glazier position, and attended a one-day in-service training session prior to the test. He became frustrated toward the end of the training session and left, and did not take the test. He complained that he has a learning disability that makes reading difficult, and that the instructor for the training was not qualified. Grievant failed to prove the training was inadequate, and he never requested an oral test, nor did he attempt to take the test. Grievance DENIED.

**Topics** 

CONSTRUCTIVE DISCHARGE; DEMOTION; HARASSMENT; HOSTILE WORK ENVIRONMENT; CREDIBILITY

Docket No.

02-ADMN-165

Synopsis

Grievant was demoted for misconduct and insubordination, and she filed this grievance, then resigned. Grievance was amended to include constructive discharge. Respondent met its burden of proving charges upon which demotion was based. Grievant's version of events was not credible. Resignation was not necessary under circumstances, as Grievant created own

hostile work environment, which to a reasonable person, would not have been unbearable. Grievance DENIED.

**Topics** 

**DEFAULT** 

Docket No.

05-HE-452DEF

Synopsis

Respondent did not respond to the filing of a grievance at Level III in a timely manner and asserted this failure was due to excusable neglect.

Excusable neglect was not found. Default GRANTED

**Topics** 

**DEFAULT** 

Docket No.

05-DOH-358DEF

Synopsis

Due to a very heavy workload, the Level III decision was issued a few days late. Default GRANTED.

**Topics** 

DEFAULT

Docket No.

05-22-331DEF

**Synopsis** 

The Level II hearing was held on August 1, 2004, and the Level II decision was to be issued on August 18, 2004. When Grievant received no response, he filed for default on September 28, 2004. Default GRANTED as the Grievance Evaluator was not prevented from issuing the decision due to sickness or illness.

Topics

DEFAULT

Docket No.

05-DOH-290DEF

**Synopsis** 

Grievant filed his grievance during a large influx of grievances, and appeared to have partially completed a time frame waiver, but did not sign it. When the Level III Hearing Office reviewed the file, it saw the waiver date but did not notice the form was not signed. Default DENIED due to excusable neglect.

**Topics** 

**DEFAULT** 

Docket No.

05-DOH-094DEF

Synopsis

Grievant refused to waive the timelines for holding a level three hearing. It was decided that the hearing would be held telephonically, and it was subsequently rescheduled twice. Respondent then attempted to schedule the hearing for the seventh working day, but Grievant refused and claimed default. Grievant was the cause of the hearing not being held in time, so he was not entitled to relief by default. Default DENIED.

**Topics** 

DEFAULT

Docket No.

05-BEP-080DEF

Synopsis

Grievants asserted default occurred at Level III. Although Grievants believed they had correctly filed to Level III, they had not completed the grievance form and BEP did not know Grievants had filed the grievance.

Request for default is DENIED, and case remanded to Level III for hearing.

**Topics** 

DEFAULT

Docket No.

06-HHR-087DEF

Synopsis

Respondent delivered the Level II decision to Grievant and her representative in the afternoon hours of the 5th day. Grievant and her representative had left work for the day, so the decision was not received until the morning of the 6th day. Two days after receipt of the decision, Grievant filed for default. Default DENIFD

**Topics** 

**DEFAULT REMEDY** 

Docket No.

05-DOH-150D

Synopsis

Grievant prevailed by virtue of a default claim in this case, and Respondent averred the remedy he requested was contrary to law or clearly wrong. He sought a pay increase as remedy for a pay discrimination claim. In light of such presumption, Respondent did not show by clear and convincing evidence the remedy requested was contrary to law or clearly wrong. Remedy GRANTED.

**Topics** 

DEFAULT REMEDY; COMPENSATION; LENGTH OF CONTRACT

Docket No.

05-22-331D

Synopsis

Grievant only worked 11 months a year, a 240 day contract, but wanted to be paid for a 12 month contract, a 261 day contract. No other employee with LCBOE with the exception of the Superintendent had a 12 month contract. An employee cannot be paid for time not worked. Grievance DENIED.

Topics

**DEFAULT REMEDY; TIMELINESS** 

Docket No.

05-HE-228D

Synopsis

Grievant prevailed in a previous determination that Respondent had defaulted at level one. Respondent successfully rebutted the presumption that Grievant prevailed on the merits of the matter by showing that it was untrue that the decision to deny Grievant tenure was based on false information or was otherwise an abuse of discretion. Grievance DENIED.

**Topics** 

DEFAULT; EXCUSABLE NEGLECT

Docket No.

05-HE-209DEF

Synopsis

Grievant filed a level one grievance on June 8, 2005, challenging a disciplinary letter that had been placed in his personnel file. On June 24, 2005, Grievant notified Shepherd that a default had occurred. Shepherd concedes that it did not hold a conference within the statutory time lines, but asserts that the error was corrected on the same day it was discovered, and absent a showing of bad faith, the omission was simply excusable neglect.

DISCUSSION: Shepherd offered no reasonable basis for the noncompliance, i.e., that events outside its control contributed to the failure. Simple inadvertence or mistake does not constitute excusable neglect. Default GRANTED.

**Topics** 

DEFAULT; EXCUSABLE NEGLECT

Docket No.

05-HE-228DEF

**Synopsis** 

Grievant did not file at level one with his immediate supervisor, but instead followed the instruction of Respondent's personnel department because his supervisor was not on campus. His supervisor was immediately notified of the filing, but made no response. Supervisor's neglect was not excusable because she was still under contract for the period of time in question and had actual knowledge of the grievance. Default GRANTED.

**Topics** 

DEFAULT; EXCUSABLE NEGLECT

Docket No.

05-DOH-150DEF

Synopsis

Respondent claimed excusable neglect when level two evaluator failed to issue decision within required time, due to misunderstanding of which days counted as "days." Held it was not excusable neglect because Respondent had lost similar default claim before and should have known that working days referred to days evaluator was working, not the grievant. Default GRANTED.

Topics

DEFAULT; INFORMAL CONFERENCE; WAIVER

Docket No.

05-DOH-133DEF

Synopsis

Grievant handed his supervisor a written grievance and asked for an informal conference. Supervisor was leaving town and asked Grievant if they could schedule the conference when he returned three days later, and informed Grievant he was unsure of the required time limit. Grievant agreed, then filed a default claim upon the supervisor's return. Parties may agree to waive the statutory time limits, which is what occurred here. Grievant's decision to deny the

agreement and claim default prohibits him from obtaining default relief. Default DENIED.

Topics

DEFAULT; LEVEL TWO CONFERENCE

Docket No.

05-DJS-303DEF

**Synopsis** 

Grievant's level two supervisor found Grievant's grievance forms on her desk after returning from a trip. She immediately issued level two decisions on the grievances without attempting to schedule a level two conference. Per the discussion in Little v. AGO, the level two conference is a "required response" under the grievance statute, and failure to hold it constitutes default.

**Topics** 

DEFAULT; MAILBOX RULE

Docket No.

05-DOH-402DEF

Synopsis

The DOH Hearing Examiner placed the level three decision in the post office bin at 9:30 p.m. on the fifth day following the level three hearing. The documents were date stamped for the following day by the U.S. Postal Service. Grievants argued that DOH defaulted, DOH asserted the decision was timely issued under the mailbox rule.

DECISION: Grievants did not dispute the assertion that the decision was placed in the mail late in the evening of the fifth day following their hearing. Accordingly, they have failed to prove that DOH defaulted at level three. Default DENIED.

DEFAULT; MOOTNESS

Docket No.

05-DJS-205DEF

Synopsis

**Topics** 

The respondent acquiesced and afforded the grievant all of the relief she requested. Therefore, the grievance became moot and the failure of the respondent to schedule a Level III hearing in this grievance was not a default. Default DENIED and grievance DISMISSED.

**Topics** 

DEFAULT; SETTLEMENT AGREEMENT; MOTION TO DISMISS

Docket No.

05-20-285D

Synopsis

Grievant applied for a principal's position after she signed a settlement agreement in which she agreed she would only serve as an assistant principal or dean of students for the next several years.

Grievant did not file her default claim in a timely manner. Respondent filed a Motion to Dismiss as settled. Motion GRANTED, grievance DISMISSED.

**Topics** 

DEFAULT; WAIVER

Docket No.

05-DOH-288DEF

Synopsis

After filing a level three appeal on June 24, 2005, Grievant agreed to waive the time lines for a hearing until August 31. Subsequently, the parties requested a mediation. After DOH counsel for default on August 12, 2005, asserting that DOH never intended to mediate.

DECISION: Grievant agreed to waive the time lines to a date certain. There was no indication that DOH had acted in bad faith regarding the mediation, and in any case, the waiver agreement remained in place. Default DENIED.

Topics

DEFAULT; WAIVER

Docket No.

05-DOH-123DEF

Synopsis

Grievants alleged a default occurred at level two, but did not raise the issue until they had appealed to level three. Also, at the conclusion of the level two conference, the hearing evaluator stated it would take him awhile to put a decision together, and Grievants agreed. They did not request a decision within any specific time frame, so they voluntarily waived their right to a decision within the statutory time limit. Also, they failed to raise the issue of default as received. Default DENIED

**Topics** 

DEFAULT; WAIVER

Docket No.

05-DOH-311DEF

Synopsis

Grievant received a phone call from the level three hearing examiner's office, requesting an additional day to issue the decision. He made statements to the effect of "why not," and "I'll wait until tomorrow," and did not refuse the extension. After receiving the decision, he filed a default claim. Through his statements, Grievant waived his right to claim default, and also failed to raise the default claim in a timely fashion. Default DENIED.

**Topics** 

DEFAULT; WORKING DAYS; LEVEL II

Docket No.

06-CORR-066DEF

Synopsis

Grievant does not work Monday-Friday because he is a Canine Unit Officer. Respondent did not schedule his level II hearing within the 5 days required by statute because Grievant was not scheduled to come in for several days during the week, and when calculating the time frame those days were not considered. Default GRANTED.

**Topics** 

**DEMOTION** 

Docket No.

05-DJS-297

Synopsis

Grievant was demoted following an EEO investigation and an internal DJS investigation which revealed a number of unacceptable practices at the Industrial Home for Youth. Grievant was found to have touched and spoken to employees in an inappropriate manner, failed to consistently record her hours on the time clock, and work irregular hours. DECISION: While Grievant's interaction with some employees was considered inappropriate by others, no formal complaint had been filed by anyone, and the EEO investigation had been conducted at the request of DJS after receiving an anonymous letter. Grievant's failure to consistently clock in and out, and the adjustment of her work hours was with the knowledge and approval of the Superintendent. Based upon her years of service and no prior disciplinary record, mitigation was appropriate in this case. A letter of reprimand would be appropriate for a first offense. Grievance GRANTED

Topics

DEMOTION; DISCRIMINATION

Docket No.

05-CORR-149

Synopsis

Grievant was demoted. Grievant asserted Respondent took issue with who she was dating and her off duty behavior. Respondent argued Grievant's romantic relationship with a subordinate had become a problem in the facility and Grievant was continually late and tardy. Grievance DENIED.

Topics

DEMOTION; DISCRIMINATION; PAY INEQUITY; UNFAIR LABOR PRACTICE

Docket No.

05-HHR-322

Synopsis

Grievant asserts he was discriminated against when he was forced to take a pay decrease upon voluntarily leaving his position as a Protective Service Worker (pay grade 13) and accepting the position Social Service Worker III (pay grade 12) in July, 2003. Respondent first argues this grievance is untimely. Respondent also argues that the voluntary decrease in salary was its practice at the time Grievant accepted the new position. Grievance DENIED.

Topics

DEMOTION; POLICY; DISCRIMINATION; PAY ON DEMOTION

Docket No.

05-HHR-105

Synopsis

The grievant accepted a voluntary demotion to a job in a lower pay grade but was told that agency policy required him to accept a reduction in pay. This policy was not being applied consistently throughout the agency. Therefore, the grievant was being treated differently than other similarly situated employees, which is discrimination. Grievance GRANTED.

**Topics** 

DEMOTION; PROMOTION; COMPENSATION; SALARY

Docket No.

05-DJS-373

**Synopsis** 

Grievant had accepted a voluntary demotion, and then, ten months later, applied for and received a promotion. He asserted his pay increase on promotion should have been greater, and he was receiving less pay than other Correctional Officers.

On his promotion, Grievant signed a letter agreeing to the salary he would receive. This letter notified Grievant that although he was receiving a promotion, he was also receiving a demotion in pay. Grievant agreed to accept the position. Additionally, he did not prove that his salary was discriminatory as his compensation was within his pay grade. Grievance DENIED.

Topics

DISABILITY

Docket No.

05-CORR-340

**Synopsis** 

Grievant was injured on the job and was off work on disability. After making maximum recovery, Respondent ordered him to return to work. Grievant claimed he was unable to perform some functions of his job without accommodation, and Respondent implemented some restrictions. Grievant failed to prove his injury prevent him from performing his job as modified. Grievance DENIED.

**Topics** 

DISCIPLINE; UNWRITTEN POLICY; INSUBORDINATION

Docket No.

05-PEDTA-166

Synopsis

Grievant called in less than 2 hours prior to start of his shift to report his absence for jury duty. Respondent had unwritten policy requiring 2-hour lead for toll workers. New COL: "For a state employer to discipline an employee for failure to follow an unwritten policy or rule, the employer must show that 1) the unwritten policy or practice was lawful and established through consistent past practice; 2) that the employee had actual knowledge of and understood the unwritten policy's requirements; and 3) that the employee failed to comply with the unwritten policy without good reason."

DECISION: Grievant was not insubordinate, but Respondent did prove its unwritten policy existed and was enforceable, so written warning was appropriate. Grievance DENIED.

**Topics** 

DISCRIMINATION

Docket No.

05-DJS-223

Synopsis

The grievant failed to prove that he was treated differently from any similarly situated employees in that none of the Youth Specialists working for DJS are permitted direct access to the Internet. Grievance DENIED.

**Topics** 

DISCRIMINATION

Docket No.

03-HHR-062

Synopsis

The grievants established a case of discrimination in their exclusion from the holiday bonus plan that was implemented by their employer. Although they work a unique schedule, Baylor nurses perform the same duties as other nurses. When a Baylor nurse is on duty, they are filling a position that would otherwise be filled by a non-Baylor nurse. Therefore, the grievants are similarly situated, in terms of job responsibilities, to the other nurses who are eligible for the holiday bonus pay. Exclusion of the grievants from eligibility for such bonus pay is discrimination within the meaning of West Virginia Code section 29-6A-2(d). Grievance GRANTED.

Topics

DISCRIMINATION

Docket No.

05-CORR-346

Synopsis

Grievant argued that the dress code was discriminatory since correctional officers are provided uniforms, while program staff are not, and in violation of DOP policy, which requires that restrictions on attire must be reasonably related to a legitimate business need. DOC asserts that program staff are not similarly situated to correctional staff, and that the ban on certain clothing and accessories is intended to provide a positive image for the inmates regarding appropriate behavior for responsible and respectful employees.

DECISION: Grievant failed to prove that the dress restrictions were discriminatory, and DOC established a valid, business-related reason for the dress code. Grievance DENIED.

**Topics** 

DISCRIMINATION

Docket No.

05-RJA-361

**Synopsis** 

Grievant presented Respondent with orders from her doctor that she could not be around inmates or work overtime while pregnant. Respondent placed her on medical leave, pending release from her doctor. Grievant alleged discrimination. Respondent asserted Grievant could not perform the essential functions of the job. Grievance DENIED.

**Topics** 

DISCRIMINATION WITH RESPECT TO MERIT RAISES

Docket No.

05-DOH-130

Synopsis

The grievant could not establish a case of discrimination because he could not prove that he was similarly situated to the employees who received merit raises, in the grievant's evaluation score was lower than the score of any of the employees who were awarded merit raises.

**Topics** 

DISCRIMINATION; FAVORITISM

Docket No.

05-DOH-070

**Synopsis** 

Grievant claimed a policy existed requiring a salary advancement upon completion of a sixmonth probationary period, but failed to evidence such policy or any other employee who had been given such a raise. Raise would have been violation of DOP policy. Grievant did not meet his burden of proof. Grievance DENIED.

**Topics** 

DISCRIMINATION; FAVORITISM

Docket No.

06-06-018

Synopsis

Grievant argues that as Assistant Principal of Cabell County Career Technology Center ("Career Center") she is due a county supplement based on enrollment, as is provided to assistant principals of elementary, middle, and high schools. Respondent asserts the Career Center differs significantly from its other schools, and therefore, Grievant is not similarly situated to assistant principals in the other schools throughout the county. Grievance DENIED.

**Topics** 

DISCRIMINATION; HOSTILE WORK ENVIRONMENT

Docket No.

05-DOH-119

Synopsis

Grievant alleged she received fewer overtime opportunities due to sex discrimination, and that her work environment was generally hostile. Grievant actually had more overtime that similar employees and failed to produce any evidence of a hostile work environment. Grievance DENIED.

**Topics** 

DISCRIMINATION; REMEDY

Docket No.

05-40-332

Synopsis

Grievant alleged discrimination because he was not paid the same amount as the new hire for doing a supplemental run. At Level I, Respondent agreed to increase his pay, as well as all other similarly situated bus operators. Grievant accepted, but then appealed to Level II, requesting to be compensated at the new rate for every supplemental run he had completed since September 2004, and for an additional 8 days that a substitute drove the bus route. DECISION This request for relief amounted to a change to which the parties did not consent. Administrative law judges may provide the relief they believe to be fair and equitable. The remedy provided at Level I was fair and equitable. Grievance DENIED.

**Topics** 

DISCRIMINATION; TIMELINESS

Docket No.

05-20-406

Synopsis

Grievant was accidentally struck and hit with a basketball while on duty. On that day she completed a liability form requesting for payment of her glasses. Respondent denied that request, and subsequently Grievant received new glasses through Workers' Compensation. Grievant became aware that Respondent replaced a substitute teacher's glasses that were

broken, but did not file a grievance until almost two months after the discovery. Grievant did not file within the appropriate time frame. Grievance DENIED.

**Topics** 

DISCRIMINATION; TIMELINESS

Docket No.

05-50-451

**Synopsis** 

Grievance was found to be untimely because it complained of contract terms set at beginning of the year for several prior years. Contract status was held to be continuing damage, because Grievant knew of terms of employment at beginning of year, and nothing changed after that. Grievance denied on timeliness grounds despite possible merits of claim had it been timely.

Note: Initially issued with incorrect final page stating grievance was granted; errata issued later corrected this error.

**Topics** 

DISCRMINATION; FAVORITISM; JOB DUTIES

Docket No.

05-HHR-179

Synopsis

Grievants are employed at the Northern Customer Service Center, which is an office where employees field phone calls from clients receiving public assistance. Grievants answer questions and provide information, and deal with processing any changes in circumstances for the clients which could affect their benefits. This grievance arose from Grievants' claim that, because the grievants in Bailey v. DHHR, who are also Economic Service Workers, had certain duties removed from their positions--involving "child only" West Virginia Works cases--Grievants should receive the same relief. However, Grievants' claim of discrimination and favoritism failed, because they are not similarly situated to the "Bailey" grievants. Those individuals are employed in county offices and carry a full caseload of hundreds of clients, and they were able to prove that the addition of the child only cases significantly impaired their performance. Grievants in this case, on the other hand, do not handle an individual caseload, and the child only cases represent only a small portion of the numerous inquiries they must deal with. Grievance DENIED.

Topics

DISMISSAL

Docket No.

05-31-192

Synopsis

Grievant was terminated from his coaching position for failure to follow the SSAC rules during a playoff game for the second time in three years. This failure resulted in forfeiture of both games. Respondent demonstrated Grievant's actions were noncorrectable, insubordinate and a willful neglect of duty. Grievance DENIED

**Topics** 

DISMISSAL

Docket No.

04-HHR-367

Synopsis

Grievant was dismissed for abuse of sick leave. His main problem was tardiness. He had numerous counseling sessions, and had been given a verbal warning, a written warning, and two suspensions about this same subject prior to his dismissal. Grievant appeared to have several disabilities (only one was proven), and HHR worked with Grievant and his care givers to assist him in getting to work on time and filling out the required paperwork. Numerous accommodations were tried with little success. Finally, HHR dismissed Grievant. Grievance DENIED.

**Topics** 

DISMISSAL

Docket No.

05-HHR-281

Synopsis

When Grievant was hired, HHR did not check its records properly. Because of this failure to check, HHR did not see Grievant listed as a maltreating parent in its records. If HHR had found this information, before Grievant was hired, the agency would never have offered Grievant the position. Once HHR found out Grievant's status, it terminated her employment.

Grievant asserted HHR did not have the right to look at her files, but Grievant gave HHR that right on her application. Grievant also asserted because HHR did not find the data earlier, it could not terminate her now.

Grievant should never have been hired, and HHR acted to correct this problem. Grievance DENIED.

**Topics** 

DISMISSAL

Docket No.

05-DMV-174

Synopsis

Grievant was dismissed for unsatisfactory performance which did not improve with counselings, warnings, and additional training. Grievant did not prove there was a hostile work environment, discrimination, or that her requested accommodation was not given. Grievance DENIED.

**Topics** 

DISMISSAL

Docket No.

06-HHR-103

Synopsis

Grievant engaged in verbal and physical abuse of a mentally retarded resident and was terminated for same.

Respondent proved Grievant engaged in gross misconduct, and the dismissal was upheld.

Topics

DISMISSAL

Docket No.

06-45-002

**Synopsis** 

Grievant was convicted of the misdemeanor crimes of passing bad checks and of impersonating a conservation officer. Respondent terminated his employment as a probationary substitute custodian based on these convictions, on the basis that his criminal activity was immoral.

DECISION: That Respondent did establish a rational nexus between Grievant's off-duty misconduct and his job, as his duties placed him in a position of trust, and his crimes involved dishonesty. Grievance DENIED.

Topics

DISMISSAL; AT WILL EMPLOYMENT; PUBLIC POLICY VIOLATION

Docket No.

05-RJA-420

**Synopsis** 

Respondent filed a motion to dismiss, due to Grievant's failure to allege a public policy violation in the termination of his at will employment. Pursuant to prior cases, Grievant failed to state a claim upon which relief could be granted, so dismissal of the grievance was appropriate. Grievance DISMISSED.

**Topics** 

DISMISSAL; AT WILL; FMLA

Docket No.

05-EBA-422

Synopsis

Grievant, an at will employee, was terminated from her position as a receptionist for consistently coming to work late and for not calling in. Grievant had received a written warning and a three day suspension in the past for these infractions. When she was late again and did not call in, she was terminated

Grievant asserted her termination violated the FMLA, but did not meet her burden of proof on this issue. Grievance DENIED

**Topics** 

DISMISSAL; AT-WILL EMPLOYEE; CLASSIFIED-EXEMPT EMPLOYEE; SUBSTANTIAL PUBLIC POLICY; EMPLOYEE HANDBOOK

Docket No.

05-RJA-116

Synopsis

The Employee Handbook did not alter the grievant's status as an at-will employee. As such he bore the burden of proving that his dismissal violated a substantial public policy. In light of the grievant's failure to allege such violation and his concession that no such policy had been violated, the respondent's motion to dismiss was granted. Grievance DISMISSED.

**Topics** 

DISMISSAL; AT-WILL; DEMOTION

Docket No.

05-HE-352

Synopsis

Grievant, an Associate Professor at WVU, has also held the assignment of Director of the ILSR

for many years. In 2005, this annual appointment was not renewed by WVU.

DECISION: Grievant was neither demoted nor dismissed as Director, his contract was simply not renewed. Although the evidence established that the reason for the non-renewal may have been based on erroneous information, Grievant had no expectation of continued employment beyond the term of his contract. Grievance DENIED.

**Topics** 

DISMISSAL; AT-WILL; DUE PROCESS

Docket No.

06-DOTR-071

Synopsis

Grievant alleged he was denied his due process rights when he was terminated from his at-will position without being given a reason. He alleged not being given a reason for the termination prevented him from asserting it violated a substantial public policy. Respondent filed a Motion to Dismiss for Failure to State a Claim. The Motion was GRANTED and the case was DISMISSED.

**Topics** 

DISMISSAL; DISCRIMINATION

Docket No.

05-24-362

Synopsis

Grievant requested, but did not receive, an educational leave of absence to attend the W. Va. Police Academy. Grievant attended the Academy anyway. MCBE dismissed Grievant from his employment for willful neglect of duty. Grievant argues that dismissal is discriminatory because another employee who called in sick and was found to be repairing his roof, received only a brief suspension. MCBE argues that dismissal was appropriate in this case. DECISION: Grievant failed to show that he was similarly situated to another employee, or that dismissal was disproportionate to the offense to be an abuse of discretion. Grievance DENIED.

**Topics** 

DISMISSAL; DISCRIMINATION; JOB ABANDONMENT

Docket No.

05-DEP-248

Synopsis

Grievant was off work on workers' compensation and did not return to work after his TTD benefit eligibility concluded. Grievant did not request additional leave, was told to report to work, and did not produce a doctor's statement saying he could return to work. Grievant did not prove he was discriminated against due to his workers' compensation claim, and effectively abandoned his job after Respondent made every effort to return him to work. Grievance

Topics

DISMISSAL; DISCRIMINATION; MITIGATION

Docket No.

05-DJS-291

**Synopsis** 

Grievant's employment was terminated after a urine test showed her positive for marijuana. Grievant did not challenge the test results but argued discrimination and mitigation. DJS asserted dismissal was proper in light of residents' own problems with drug abuse. DECISION: Grievant did not prove discrimination because she compared herself to employees who consume liquor; therefore, they were not similarly situated. Mitigation was not found to be appropriate in this situation since Grievant was aware of the State Drug-Free Policy. Grievance

Topics

DISMISSAL; INSUBORDINATION

Docket No.

06-HHR-078

Synopsis

Grievant was terminated for gross misconduct and insubordination following an argument/altercation with her supervisor and another supervisor. Held Grievant should be disciplined, but termination should be mitigated to suspension due to supervisor's overreaction and grievant's prior good record. Grievance GRANTED, in part, and DENIED, in part.

Topics

DISMISSAL; INSUBORDINATION; PROBATIONARY; TIMELINESS; CONTINUING CONTRACT; VOLUNTARY SEPARATION

Docket No.

05-40-169

Synopsis

Found Grievant need not assert continuing contract status for it to attach, so defense on that

point was moot; Grievant's prior voluntary separation from employment required a new probationary period to be served, so Grievant was probationary at time of dismissal. Per stipulation, dismissal was proper if that was the case, so Grievance is DENIED.

**Topics** 

DISMISSAL; INSUBORDINATION; WILLFUL NEGLECT OF DUTY; IMPROVEMENT PLAN

Docket No.

05-14-144

Synopsis

Grievant, a legislator and chair of the House education committee, was employed by Respondent in an administrative position. When first placed in the position, Grievant was given a "Resolution and Directive" by the board of education, stating that he would not solicit or be involved with state grant money for the Hampshire County Board of Education. In 1993, Grievant violated this directive by directly requesting state education funding for a county workshop facility, stating that it would specifically benefit Hampshire County students. The grant was then given to the Hampshire County BOE to distribute. Later, the same funds were redistributed to volunteer fire departments and other entities, pursuant to a specific reallocation request from Hampshire County's superintendent. However, the funds were ultimately given to specific entities not covered by the authorization, at Grievant's direction. The BOE was eventually cited for this misappropriation and required to pay back \$35,000 of the funds. Grievant's conduct in these affairs was insubordinate and constituted willful neglect of duty. Also, Grievant's conduct was not correctable professional incompetence, so he was not entitled to an improvement plan for his wrongful acts. Grievance DENIED.

Topics

DISMISSAL; JOB ABANDONMENT; REPRISAL

Docket No.

05-HHR-175

Synopsis

Grievant failed to prove she timely requested an extension of her medical leave of absence or that she was entitled to such extension. She did not return to work when her leave expired, and did not demonstrate in advance that she was still entitled to medical leave. Respondent met its burden of proving Grievant abandoned her job. Grievant failed to prove dismissal was retaliatory. Grievance DENIED.

**Topics** 

DISMISSAL; JOB ABANDONMENT; SELECTION

Docket No.

05-DOH-319

Synopsis

Grievant was terminated after he failed to return to work after his medical leave of absence expired and he was no longer eligible for TTD benefits. Grievant never provided evidence he was physically able to work and did not request an extended leave of absence. Termination was proper for job abandonment.

On the selection issue, Grievant told the interviewers he was not interested in the job, so their selection of another qualified candidate was proper. Grievance DENIED.

**Topics** 

DISMISSAL; JOB ABANDONMENT; TERMINATION; FIRE; FIRING; DISMISSING; FAILURE TO RETURN TO WORK; INSUBORDINATION

Docket No.

05-TD-064

Synopsis

The grievant did not report to work, as directed, after her medical leave without pay had expired. Such failure to return is grounds for dismissal under W. Va. Code of State Rules § 143-01-14.8(d)(3). The grievant had been cautioned that failure to return to work by the specified date would result in her dismissal. She was properly afforded notice of the consequences and failed to take the appropriate measures to prevent her dismissal. The grievant's challenge to her dismissal lacked merit. Grievance DENIED.

**Topics** 

DISMISSAL; MITIGATION

Docket No.

05-HE-092

Synopsis

Grievant was terminated after he was absent from work for the better part of two months without providing proper medical verification of illness. Grievant argued that he had reported off work, and that termination was too severe a penalty in this case. WVU asserted that Grievant had been given numerous opportunities to provide medical verification, and the termination was justified.

DECISION: The evidence supports a finding that Grievant acted in violation of several WVU

policies by failing to report off work and to provide medical verification of illness. Mitigation is not warranted in this situation. Grievance DENIED.

**Topics** 

DISMISSAL; MITIGATION

Docket No.

06-HHR-126

**Synopsis** 

Grievant was terminated as the final step of a long-term progressive disciplinary action for failure to report to work on time or follow attendance directives. Grievant did not prove attendance data was unreliable. Grievant had a good work record otherwise, but found termination should not be mitigated due to history of non-compliance with directives and failure of prior disciplinary actions to correct behavior. Grievance DENIED.

**Topics** 

DISMISSAL; TERMINATION; ABANDONMENT; MOTION TO DISMISS

Docket No.

05-DJS-275

**Synopsis** 

Grievant's employment as a correctional officer at the Industrial Home for Youth was terminated for excessive tardiness and absenteeism. Her level four hearing was scheduled in January of 2006, and she failed to appear because she forgot about the hearing. The hearing was rescheduled for March 27, 2006. A prehearing conference call was held on March 17 to discuss Grievant's request for documents, and Respondent's legal office spoke with her regarding these documents on March 23 and 24, in preparation for the hearing. Grievant again failed to appear for the March 27 hearing, at which time Respondent moved to dismiss due to Grievant's abandonment of her grievance. Grievance DISMISSED.

**Topics** 

DISMISSAL; TERMINATION; LAWFUL ORDER; REPRISAL; HARASSMENT

Docket No.

05-CORR-165

Synopsis

Grievant was terminated for failing to follow orders related to his over-familiarity with female inmates. Grievant did not prove orders were unlawful, retaliatory or discriminatory. Respondent met its burden of proving orders were violated. Grievant had a long history of repeated similar conduct and so had no real hope of improving behavior. Termination was proper. Grievance

**Topics** 

DISMISSAL; THREATS; UNPROFESSIONAL CONDUCT

Docket No.

04-CORR-315

Synopsis

Grievant and another employee of St. Mary's entered into a romantic relationship, which ultimately ended. After the breakup, Grievant repeatedly engaged in threatening and unprofessional behavior, including arguing with the woman at work, threatening her and other employees, and crying in front of coworkers and inmates. Grievance DENIED.

**Topics** 

DISMISSAL; TIMELINESS; CONTINUING DAMAGE

Docket No.

06-HE-127

**Synopsis** 

Grievants filed a second grievance on the exact same issues dismissed as untimely in March and claimed that pay disparity was a continuing violation. DECISION: Pay disparity is continuing damage, not a continuing violation. Grievance DENIED as untimely.

**Topics** 

DISMISSAL; WILLFUL NEGLECT OF DUTY

Docket No.

05-30-295

Synopsis

Grievant began the 2004-2005 school year with unexplained absences due to personal difficulties. Administration officials allowed Grievant to take some time off and get assistance for his drinking problem. In January of 2005, Grievant was arrested for driving while intoxicated and placed in jail for four months. Due to his unavailability for work and because he had exhausted his personal leave, he was terminated for willful neglect of duty. Boards of education are allowed to terminate substitutes who are unavailable for similar reasons, and it is well DENIED.

**Topics** 

DISMISSAL; WILLFUL NEGLECT OF DUTY; REASONABLE ACCOMMODATION; PRETERMINATION HEARING

Docket No.

05-27-099

Synopsis

The grievant was off of her job as a classroom teacher for nearly five years due to a compensable injury. After she reached her maximum degree of medical improvement, the grievant refused the superintendent's directive to return to work. The grievant insisted she could not return to the classroom, with or without any sort of accommodation. Rather, she demanded a promotion to a central office position. This was not a reasonable accommodation. The grievant never asked to return to her former position, so there was no discrimination against her for having obtained her Worker's Compensation benefits. Her refusal to fulfill her contractual role as a classroom teacher constituted willful neglect of duty and supported the board of education's action in terminating the grievant's employment contract. Grievance

Topics

DRESS CODE; DISCRIMINATION; UNIFORMS

Docket No.

05-CORR-155

**Synopsis** 

Grievant claimed it was discriminatory for him not to be provided a uniform like other correctional employees, like officers and maintenance employees. He also alleged the newly-implemented dress code standard, as set forth in a memorandum from the Warden to all employees, was overly restrictive. As to uniforms, Grievant was not similarly situated to employees who are provided them, which is based upon their specific job duties. As to the dress code, the policy was not overly restrictive as applied to Grievant, a male unit manager, who would essentially only be prohibited from wearing t-shirts, jeans, and sandals. However, it was noted that most of the prohibited items contained in the dress code are traditionally worn by DENIED.

Topics

DRESS CODE; RATIONAL BASIS

Docket No.

05-HHR-419

**Synopsis** 

Grievants complained about the dress code restricting the wearing of blue denim. Others types of denim were acceptable. There was no rational basis for restricting the wearing of blue denim, while the wearing of other colors of denim was acceptable. Grievance GRANTED.

**Topics** 

DRESS CODE; RATIONAL BASIS

Docket No.

05-HHR-424

Synopsis

Grievants are health care workers who question DHHR's dress code ban on blue, but not other colors, of denim pants. They also assert that shorts are necessary during summer months, as parts of the facility are not adequately air conditioned. DHHR asserts that the dress code is appropriate to create a professional image of the staff.

DECISION: The ban on blue denim fails to meet the rational basis test that restrictions have a direct effect on production, safety considerations, or relationships with the public, i.e., a reasonable and rational basis to meet a legitimate end. The hospital administrator may allow the wearing of shorts as a reasonable accommodation to employees who work in very warm conditions. Grievance GRANTED.

**Topics** 

**EVALUATION** 

Docket No.

05-HE-229

Synopsis

Grievant did not believe the evaluation he received in two areas from the Peer Review Committee was accurate. He requested these rating both be changed to excellent.

The Peer Review Committee had told Grievant for the two years prior to this evaluation that his self-evaluation was poorly organized, incomplete, and without sufficient explanations. The information he submitted for the year in question was again poorly organized, incomplete, and without sufficient explanations. The Peer Review Committee is not allowed to go beyond the documents submitted to them.

Given the data before them, the Peer Review Committee decisions were not arbitrary and capricious. Grievance DENIED.

**Topics** 

EVALUATION; HARASSMENT; RETALIATION; DISCRIMINATION

Docket No.

04-DEP-374

Synopsis

Grievant asserted that his Feb. 2004 performance evaluation was not completed pursuant to instructions, and that he was subjected to harassment, retaliation, and discrimination in his June 2004 evaluation. Respondent denies that any significant breaches in the evaluation process occurred, or that Grievant was subject to discrimination, harassment, or retaliation. DECISION: Grievant's complaints regarding his first evaluation were either invalid, or were minor discrepancies which in no way affected the outcome of his evaluation. Grievant's complaints relating to the second evaluation were unproven. Grievance DENIED.

**Topics** 

**EVALUATION**; IMPROVEMENT PLAN

Docket No.

05-03-278

**Synopsis** 

Grievant received an unsatisfactory evaluation and was placed on an improvement plan. She believed this plan was unwarranted and she had been treated differently than other similarly situated teachers.

Grievant did not meet her burden of proof. Grievance DENIED.

Topics

**EVALUATION; TIMELINESS** 

Docket No.

05-52-468

Synopsis

Grievant was given his annual performance evaluation on May 27, 2005. At that time he was notified that he was rated as does not meet expectations in one category, and that a plan of improvement would be required. Grievant did not file a level one grievance until October 2005. Grievant's incorrect assumption that things were going to get worked out in the interim was not supported by the evidence.

DECISION: Absent any evidence that the delay was caused by WCBE, or any other valid reason, the grievance was not timely filed. Grievance DENIED.

Topics

**EVALUATION**; TIMELINESS

Docket No.

05-HE-261

**Synopsis** 

Grievant received his 2004 performance evaluation on April 5, 2005. A level one grievance was filed on May 5, 2005. WVU argued that the grievance was not timely filed. Grievant asserts that WVU did not raise the issue at level two, as required by statutute.

DECISION: The Grievance Board has held that since higher education employees have been transferred to the state employees grievance procedure, where no hearing is required at level two, addressing the issue in the decision is acceptable. Grievant did not file within 10 days of the grievable event, and there was no action by WVU to prevent Grievant from doing so. The Motion to Dismiss is GRANTED.

Topics

**EVALUATIONS; PROBATIONARY** 

Docket No.

05-27-307

Synopsis

Grievant was a cook working under a probationary contract that was not renewed, following a year of poor evaluations and an improvement plan. Grievant argued the evaluations were not reliable because her supervisor held a personal grudge. However, Grievant did not challenge the evaluations or improvement plan when made, so it was not unreasonable or arbitrary for the Superintendent to rely on that information when making the non-renewal decision. Grievance DENIED.

**Topics** 

**EVALUATIONS**; TIMELINESS

Docket No.

05-DOH-069

**Synopsis** 

Grievants filed two grievances over the failure of DOH to complete midpoint reviews on their evaluations in 2002 and 2003, as required. DOH stipulated it did not perform the midpoint reviews, but contended the relief sought, to redo both years final evaluations, would be wrong. Additionally, DOH asserted the grievances were untimely filed.

The first set of grievances were timely filed and one of the second set was timely filed on the harassment and retaliation issues. No harassment and retaliation were found.

On the first set of evaluations unusual relief was ordered, and DOH was ordered to change certain portion of Grievants' evaluations. Grievance GRANTED, in part, and DENIED, in part,

**Topics** 

EXPERIENCE CREDIT; SALARY

Docket No.

06-50-005

Synopsis

Grievant worked for a time as administrator of a private educational facility in Ohio, where she was not certified as a teacher or administrator. She claimed Respondent should credit her with teaching experience for this time for pay purposes, but failed to meet her burden of proving entitlement to the credit, as she was not certified to teach during the time and did not teach.

**Topics** 

**EXTRACURRICULAR ASSIGNMENTS** 

Docket No.

05-40-033

**Synopsis** 

Grievant believed a plan for the rotation of extracurricular trips was in place and had not been followed.

Only one plan had been approved by the board of education, it was not the one Grievant relied on, and the plan followed was the approved one. Grievance DENIED.

Topics

**EXTRACURRICULAR ASSIGNMENTS** 

Docket No.

06-31-047

Synopsis

Grievant asserts she held an extracurricular position for the 2004-2005 school year and she should have been allowed to continue in that position for the 2005-2006 school year. She also argues Respondent does not regularly post its extracurricular positions.

Respondent asserts Grievant is not qualified for the extra curricular position, and was only allowed to remain in that position during the 2004-2005 school year because it was near the end of program when it was determined her qualifications did not meet the requirements. Respondent also contends it posts extracurricular positions. Grievance DENIED

**Topics** 

**EXTRACURRICULAR ASSIGNMENTS** 

Docket No.

05-30-411

Synopsis

Grievant works in out of the Blacksville transportation area, a considerable distance from the central transportation office. Extra-curricular assignments are posted on Monday of each week, and bid sheets must be in the central office by Thursday at 10 a.m. MCBE employs a courier to deliver and return mail from the Blacksville station, but has also installed a fax machine, which bus operators may use to file their bid sheets. Grievant elects to send her sheets by courier. On the week in question, the employee was absent on a pivotal day, and the mail was not delivered. Grievant did not lose an assignment that week, but claims that she would have been first to select the following week. MCBE did give Grievant an emergency run the following week, but she seeks the difference in salary between the run she recived and the one she would have selected.

DECISION: Grievant has failed to assert a violation of any rule, regulation, or policy. Additionally, she must bear some responsibility in that the documents could have been faxed to the office. No relief may be granted. Grievance DENIED.

**Topics** 

**EXTRACURRICULAR ASSIGNMENTS** 

Docket No.

06-40-031

Synopsis

Grievant held an extracurricular contract for a football coaching position. Normally, he only has to play 8 games in a 9-week season, but due to a rescheduled game, he had to work during the 9th week. Grievant sought extra pay for the 9th week. Although his contract did not comply with the statutory requirements, it did not entitle him to extra pay for work within the contract term. Grievance DENIED.

Topics

EXTRACURRICULAR ASSIGNMENTS; DISCRIMINATION

Docket No.

05-23-426

Synopsis

Grievants assert they are being discriminated against because they are required to go to the Ralph R. Willis Career Technical Center ("Vocational Center") to drop off and pick up a student, but receive no extra pay. They argue that every other bus operator who is required to travel to the Vocational Center gets paid a supplemental rate. Respondent argues Grievants' stop at the Vocational Center is not supplemental, but instead is part of their bus run. The following material facts have been proven by a preponderance of the credible evidence of the record.

**Topics** 

EXTRACURRICULAR ASSIGNMENTS; OVERTIME; DISCRIMINATION

Docket No.

05-42-216

**Synopsis** 

Grievant claimed discrimination when another softball coach, who was a service employee, began receiving overtime as a result of his combined regular and coaching duties. Unfortunately, as a teacher, Grievant is a professional employee who is not allowed to use his regular daily duties to calculate overtime. As a service employee, the other softball coach is entitled to overtime for any week he works over 40 hours as a result of his combined duties. Therefore, Grievant is not similarly situated to a service employee in this situation, and he is not entitled to overtime. Grievance DENIED.

Topics

**EXTRA-DUTY ASSIGNMENTS** 

Docket No.

05-10-380

Synopsis

FCBE allowed the Fayette area bus operators vote on whether transporting the track team to and from meets would be considered one assignment or two. The bus operators voted for it to be one assignment to keep it consistent with other sports-related runs. Nonetheless, the assignments were posted separately. When the same operator was given both runs, Grievant filed this complaint.

DECISION: A mistaken posting does not entitle Grievant to the assignments. Even if FCBE erred in allowing the bus operators to vote, Grievant was not next on the rotation list to be called. Grievance DENIED

Topics

EXTRA-DUTY ASSIGNMENTS; FAVORITISM; ALTERNATIVE POLICY

Docket No.

05-40-075

Synopsis

The grievants allege a misapplication of the alternative procedure that had been adopted by the bus operators and approved by the Board of Education for making extra-duty assignments to bus operators. The grievants failed to establish that the Board of Education did not abide by the terms of the policy except for one emergency situation and a mistake that was corrected as soon as it was discovered. They failed to establish favoritism because they could not point to any similarly-situated bus operators to whom the policy had not been uniformly applied.

**Topics** 

FACIAL HAIR

Docket No.

06-DJS-055

Synopsis

Grievant's working title was a Youth Specialist, but his official title was a Correctional Officer. At the time he filed this grievance, some youth facilities let their correctional officers have beards in contradiction of the written policy. This policy was rewritten prior to the mature date for this decision. This new policy further clarified that correctional officers were not allowed to grow beards.

Grievance DENIED.

**Topics** 

**FAVORITISM** 

Docket No.

05-HHR-240

Synopsis

Grievants argue that DHHR engaged in favoritism when employees in other units were reclassified to DHHR Specialist, Senior, and they were not. Respondents asserts that there was no favoritism, and Grievants have failed to prove they are misclassified. DECISION: Classification is determined by the class specifications which best fit the duties of

an employee. Grievants argue they should be reclassified simply because other employees were reclassified. Grievants failed to show they were misclassified, or that the reclassification of other employees constituted favoritism. Grievance DENIED.

**Topics** 

FAVORITISM; DISCRIMINATION; TEMPORARY UPGRADE

Docket No.

05-DOH-366

Synopsis

Respondent gave another employee a temporary upgrade, but allowed him to work part-time in another position as well so he could earn overtime. Grievant proved this was unusual and highly suspect, but failed to show how he was prejudiced. He did not meet his burden of proving favoritism.

New COL:

3. To prevail in a claim for favoritism under W. Va. Code § 29-6A-2(h), a grievant must show by a preponderance of the evidence that:

(a) one or more appositely similarly-situated employee(s) have been granted preferential,

exceptional or advantageous treatment that the grievant has not; and

(b) that the different treatment is not related to the actual job responsibilities of the employees; If the employees have differing job responsibilities that justify the difference in treatment, then they are not similarly-situated. Once a claim is established, an employer cannot escape liability by asserting a justification, such as financial necessity, for the favoritism. See Bd. of Educ. of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004). Grievance DENIED.

Topics

HARASSMENT; HOSTILE WORK ENVIRONMENT.

Docket No.

05-06-345

Synopsis

Grievant alleged she had been subjected to harassment by her Assistant Principal, and this harassment had created a hostile work environment. The evidence showed the Assistant Principal had made numerous complaints about Grievant and others, several evaluations had been completed, and no wrong doing had been proven. Additionally, several of the complaints were found to be false or exaggerations. Respondent asserted the harassment had ceased, but this was incorrect. Grievance GRANTED and Respondent was directed to follow the directions given.

**Topics** 

HARASSMENT; RETALIATION; DISCRIMINATION

Docket No.

05-31-463

Synopsis

Grievant claims requiring her to work an eight hour day as opposed to a seven and a half hour day constitutes harassment, retaliation, and discrimination. She argued Respondent retaliated against her for filing an earlier grievance. However, Grievant was asked to work an eight hour day because all guidance counselors in the county work eight hours. Grievance DENIED.

**Topics** 

HARASSMENT; RETALIATION; DISCRIMINATION

Docket No.

05-HHR-247

Synopsis

Grievant asserted she had been subjected to discrimination, harassment, and retaliation. Respondent asserted Grievant had exhibited a pattern of leave abuse, and this pattern must be noted on her evaluation and dealt with through a counseling session.

Grievant did not meet her burden of proof and establish any wrong doing by Respondent. Pursuant to the Absence Control Policy Grievant did appear to be having leave abuse issues. Grievance DENIED.

**Topics** 

INCREMENT PAY; TIMELINESS; RES JUDICATA

Docket No.

06-DOH-004

Synopsis

Grievant suffered a work-related injury in 2001, and was absent for a period because of it. When Grievant became eligible for increment pay in 2003, the absence was deducted from his years of service, so he did not receive his first increment check until 2004. He filed a grievance in 2004, challenging his increment pay calculation, which he lost and did not appeal. Again in 2005, he filed this grievance, challenging the calculation. This grievance is barred by res

judicata and timeliness. Grievance DENIED.

**Topics** 

INTEREST; TIMELINESS

Docket No.

05-HE-115

Synopsis

Pursuant to a level four decision issued in April 2004, Grievants were awarded back pay as the result of a change in their classifications. There was no award of interest on the back pay. Grievants did not appeal the decision to circuit court, but filed a subsequent grievance in January 2005 seeking interest. Grievants argue they are entitled to the interest. WVU asserts that the claim was not timely filed. Grievants explained they requested the interest upon learning that a coworker had been granted interest upon review by a circuit court.

DECISION: The grievance was not filed within the ten-day time lines set forth in the grievance statute. The discovery exception to the time frame does not apply since Grievants knew the facts giving rise to the grievance in April 2004. Grievance DENIED.

Topics

LOCALITY PAY INCREASE; FAILURE TO STATE A CLAIM

Docket No.

05-HHR-383

Synopsis

Grievants filed this case after employees of the Division of Highways, residing in the Eastern Panhandle area of the state, were granted a pay increase because of the higher cost of living in the area. As recently ruled in Brining v. DOC, the action of a separate agency is not grievable for employees of a different agency, and does not result in discrimination. Grievance

Topics

LOCALITY PAY INCREASE; JURISDICTION; DISCRIMINATION

Docket No.

05-CORR-284

Synopsis

After the Division of Highways granted a "locality pay increase" to certain employees living and working in the Eastern Panhandle area, Grievants claimed entitlement to a similar pay increase. However, Grievants are not employed by Highways, and the action of a separate agency does not require similar action by Grievants' employer. This is not a grievable issue, and does not result in discrimination, because Grievants are not similarly situated to employees of a separate agency. Grievance DENIED.

**Topics** 

MANAGEMENT DECISION; SICK LEAVE

Docket No.

05-PEDTA-025

Synopsis

Grievant filed two grievances. One, stating she was being discriminated against because she was not allowed to cross multiple lanes of moving traffic, and two, seeking the return of 4-1/2

Grievant was assigned to work as a toll collector in the lanes nearest the building because she could not use the underground tunnel and stairs. Management decided it was unsafe for her to cross moving lanes of traffic, and it was also unsafe for her foreman to cross these lanes of traffic carrying her special chair. Grievant asserted one of the special chairs obtained for her caused her to use 4-1/2 days of sick leave. Grievant did not meet her burden of proof on these issues. Grievances DENIED.

Topics

MANDATORY OVERTIME

Docket No.

05-CORR-325

Synopsis

Grievant wanted to do away with mandatory overtime at Mount Olive Correctional Center stating the practice was unfair and unsafe. Grievant did not meet his burden of proof. Grievance

**Topics** 

MERIT INCREASE

Docket No.

05-CORR-243

Synopsis

Grievant was on military leave when merit increases were given out. He questioned whether these merit increases were properly done, if he was considered for one of these increases, and Grievant was considered for these increases based on an evaluation completed before he left. He did not receive this increase because his evaluation score was lower than those receiving increases. Grievant did not prove the merit increase process was improperly done.

**Topics** 

MERIT INCREASE; LEAVE ABUSE

Docket No.

05-DOH-320

Synopsis

Grievant was denied a merit increase after a Record of Significant Occurrence, noting his excessive use of sick leave, was placed in his file. Any problem with sick leave abuse had not been noted in his performance evaluation, and he had used no sick leave in the period after his evaluation through the time the increases were granted. Grievant argues that his evaluation score was higher than at least one other recipient. DOH argues that attendance is a factor that may be utilized in awarding merit increases.

DECISION: While an employer may consider attendance when awarding merit increases, it must do so in compliance with its own rules. DOH had not advised Grievant there was a problem with his leave usage, it could not deny him a merit increase when his evaluation score would have otherwise entitled him to the raise. Grievance GRANTED.

**Topics** 

MERIT RAISE; DISCRIMINATION

Docket No.

06-RJA-027

Synopsis

Grievant was selected as employee of the year, an accolade which had been accompanied by a 5% merit increase for past recipients. However, in 2005, the governor had placed a ban on all merit raises for state employees. Despite its reason, a gubernatorial directive cannot justify unlawful discrimination, which occurred here. Grievant's selection as employee of the year was a proper "indicator of performance," which entitled him to the merit increase given to similarly situated employees. Grievance GRANTED.

**Topics** 

MERIT RAISE; SALARY

Docket No.

03-DOH-281

Synopsis

Grievant received one salary increase in 2000 and was recommended for another in 2003. The 2003 raise was then placed on hold during a budgetary freeze. After this grievance was underway, Grievant did receive the recommended salary increase. As to Grievant's failure to receive other increases over the years, evidence showed Grievant and disciplinary actions in his record and had not received favorable evaluations, so he was unable to prove he should have been recommended for previous raises. Grievance DENIED.

**Topics** 

MILEAGE REIMBURSEMENT; EMERGENCY WORK

Docket No.

05-CORR-201

Synopsis

Grievant is sometimes called in to work when emergency repairs must be made on the weekend. He believes he is entitled to mileage reimbursement for these trips. Per the state travel rules, employees cannot be paid for their normal daily commute. Because this work occurs as part of Grievant's regular job duties, he cannot be reimbursed for mileage. Grievance DENIED.

**Topics** 

**MISCLASSIFICATION** 

Docket No.

05-DJS-272

Synopsis

The grievant was reallocated to the Correctional Counselor 1 classification only by a stretch of Personnel's interpretation of the class specifications. His skills and job duties would not support placing him in the higher classification of Correctional Counselor 2 in this class series, where heightened skills characterize the higher classification. Grievance DENIED.

**Topics** 

**MISCLASSIFICATION** 

Docket No.

05-HHR-159

Synopsis

Grievant does not have "responsibility related to entire programmatic or operational systems,"

so he is not entitled to the higher classification in his series. Grievance DENIED.

**Topics** 

**MISCLASSIFICATION** 

Docket No.

06-HHR-058

Synopsis

Grievant did not prove by a preponderance of the evidence that the work she is doing is a better fit in a different classification than the one her position is currently in. Grievance DENIED.

Topics

NEPOTISM; MOOTNESS; ADVISORY OPINION

Docket No.

04-DOH-173

Synopsis

Grievant claimed a nepotism violation in a department he used to work in, but failed to state a claim upon which relief could be granted to him, as he showed no harm had been done. Grievance DENIED.

**Topics** 

NON-RETENTION; DISCRIMINATION

Docket No.

05-05-210

**Synopsis** 

After Grievant failed to successfully complete a plan of improvement during the 2004-2005 school year, she was notified that she would not be recommended for re-employment the following year. Grievant asserts that the decision was based on age and gender discrimination. DECISION: BCBE presented documentation supporting the fact that Grievant had not completed the duties of Custodian in a satisfactory manner throughout the year, even with the assistance of a plan of improvement. Thus, the decision not to re-employ her for the following year was not arbitrary and capricious. Grievant did not prove the action was based on discrimination. Grievance DENIED.

Topics

NON-SELECTION; REALLOCATION

Docket No.

05-CORR-182

Synopsis

Grievant challenged the reallocation of a Correctional Officer 3 position to that of Inspector 2. Grievant, who was injured in 2002, asserts the Inspector position would be a suitable assignment to accommodate his injury, and that he was entitled to the position under Code § 23-5A-3. DOC denies any statutory violation.

DECISION: Because the position of CO3 was reallocated, there was no budgeted job opening or vacancy which required posting. Grievant was not entitled to have the Correctional Counselor position reallocated to accommodate his condition. Grievance DENIED.

**Topics** 

**OVERTIME** 

Docket No.

05-DOH-293

**Synopsis** 

Grievant had won his prior grievance, and DOH was ordered to place Grievant in the highway administrator's position. This instatement did not result in any additional compensation. Shortly after he was placed in the position, he requested the overtime the position usually earns. When no compensation was forthcoming, Grievant filed this grievance.

The purpose of the prior decision was to place Grievant in the position he would have had if he had been originally granted the position. This position would have included overtime. Grievant presented evidence to demonstrate the amount of overtime the position worked, and this information was used as a guide in deciding the amount that should be paid. Grievance GRANTED.

**Topics** 

OVERTIME; CONTRACT WORKERS; RES JUDICATA

Docket No.

05-HE-437

**Synopsis** 

Grievants argue that FSU was improperly employing contract workers in food service areas, and were allowed overtime assignments. FSU granted the grievance, in part, at level two, stating that regular employees would be offered the opportunity to work overtime before the contract employees. Employees would also be given instructions as to where and how to review online job advertisements. FSU asserted the issue of outsourcing work had been ruled on in a prior grievance, and was barred from further consideration by res judicata.

DECISION: The only remaining issue was barred by res judicata. Grievance DENIED.

**Topics** 

OVERTIME; SUPPLEMENT; UNIFORMITY

Docket No.

05-14-466

Synopsis

Grievant had two claims, one for numerous hours of alleged overtime work which occurred over a period exceeding a year, and a second claim of entitlement to the same salary supplement as the director of purchasing. As to the overtime, Grievant failed to establish her employer knew about or authorized her overtime work, it was not substantiated by reliable records, and evidence showed that overtime had been prohibited for all employees. Grievant also failed to follow established procedures and submit proper forms for overtime authorization at the time it occurred, which forms she admitted knowledge of.

As to the salary supplement, Grievant failed to establish she was performing like duties as compared to the director of purchasing. Grievance DENIED.

Topics

PAY EQUITY; LATERAL TRANSFER

Docket No.

06-DOH-043

Synopsis

Grievant was a lateral transfer from DOC to DOH. DOH paid her the same salary as she was making at DOC. Grievant was not eligible for a merit increase under DOH policy and was not eligible for an increase under the Pilot Strategic Compensation Plan. However, Grievant asserted her salary was one of the lowest for her position within DOH. Yet, she was paid within the pay grade established for an Office Assistant 2. Grievance DENIED.

**Topics** 

**PAY INCREASE** 

Docket No.

05-DPS-168

Synopsis

Grievant were recently promoted and are currently classified as Forensic Analysts 4. They are paid within their pay grade. Their pay is less than someone in a lower pay grade. They sought compensation greater than the other employee.

Pursuant to Largent, if an employee is paid within his pay grade there is no violation of the Division of Personnel Rules. Grievance DENIED.

**Topics** 

PAY INEQUALITY; FAIR LABOR STANDARDS ACT; OVERTIME

Docket No.

05-20-446

Synopsis

Grievant asserts he is not equal with his subordinates because he does not get paid overtime. He also argues he is not exempt from overtime under the Fair Labor Standards Act. Grievant is exempt from overtime pay under the Fair Labor Standards Act. Grievance DENIED.

Topics

PERFORMANCE EVALUATION

Docket No.

06-DOH-019

Synopsis

Grievant was a good employee when she was at work, but she missed approximately 25% of her work time and frequently had to go off payroll. Many of these absences were connected to weekends and holidays. On her evaluation DOH gave her credit for her good work, but also noted she needed to improve her leave balance. Grievant did not meet her burden of proof that she was harassed about her leave abuse as an employer is required to notify an employee about problems in her evaluation. Grievance DENIED.

Topics

PERSONNEL POLICES; SALARY ADJUSTMENTS

Docket No.

05-HHR-218

Synopsis

Grievant received a memorandum stating her employer was proposing a salary advance for her position, but the proposal as approved by DOP did not include raises for her classification. Grievant failed to prove the memorandum entitled her to a raise, and she did not challenge the Personnel Board's decision. Grievance DENIED.

Topics

PLANNING PERIOD

Docket No.

06-21-063

Synopsis

After English and Math classes were increased to 90 minutes, while the remaining classes were 45 minutes, and teachers were required to tutor students two days a week during their team planning time, Grievants filed this complaint. LCBE asserts that Grievants have a 45 minute planning period, and three days a week they have an additional team planning period. DECISION: Teachers must be provided an uninterrupted planning period which is the length of the usual class period in the school. In this case, the usual class period was 45 minutes in length. Grievants were actually given more planning time than is required. Grievance DENIED.

**Topics** 

POSTING; BUS RUNS

Docket No.

05-20-071

Synopsis

Respondent modified and existing bus run by switching the afternoon portion with a run assigned to a vacant position, then posting the old afternoon portion as a new run. Grievants contended both should have been posted, but failed to prove modified run was a new run. Grievance DENIED.

**Topics** 

POSTING; ITINERANT; RETALIATION; DISCRIMINATION

Docket No.

05-42-396

Synopsis

Grievant was put on transfer, and subsequently bid on one of several aide positions, which were designated as itinerant. Board had decided to make all special education aides itinerant, so that they would be required to move with the student, if needed. Grievant claimed retaliation and discrimination, and alleged other aide positions were not posted as itinerant. There was no evidence of retaliation presented, and the other aide positions not posted as itinerant were done so in error, and the board had reposted them to correct their mistake. Also cases have held that boards have discretion to designate aide positions as itinerant when posted. Grievance

**Topics** 

POSTING; STANDING

Docket No.

06-03-075

Synopsis

Grievants were certified professional educators who sought to have a coaching position held by a citizen coach posted.

DECISION: Grievants had standing to grieve. The position was held by a non-employee who was not a certified professional educator. Grievants were certified professional educators. This issue had already been addressed in two prior decisions and in a State Superintendent's Opinion, which held these positions must be posted yearly as long as they are filled by citizen coaches. Grievance GRANTED.

**Topics** 

PREFERRED RECALL; VOLUNTEER WORKERS

Docket No.

05-11-126

Synopsis

Grievant had been RIF'd from her cook position and placed on preferred recall. The following school year, a welfare worker, unpaid by the school board, was placed as a "cook's assistant" at one of the county's elementary schools. Grievant alleged entitlement to the "position," but evidence did not establish that there was an actual vacant position, and the welfare worker was only there for a few months. Additionally, even if there had been a position, it would have been posted, and Grievant provided no evidence regarding seniority of cooks on preferred recall, so evidence as to her entitlement to it was speculative. Grievance DENIED.

Topics

PRIOR EXPERIENCE CREDIT; TIMELINESS; UNIFORMITY

Docket No.

05-11-072

Synopsis

Grievant argues that GCBE's failure to credit her for prior experience credit results in a violation of the uniformity clause. GCBE asserts that Grievant did not comply with policy and request the credit at the time she was employed in 1999, and is prohibited from doing so now. DECISION: The evidence of Grievant's work from 1972-1985 is sparse, and credit was requested 5 years after her employment as a regular employee began. Grievant testified that she had discussed the issue in 1999, but took no action at that time. Grievant did cite examples of employees who had received the benefit long after they began work; however, one was due

to an accounting error. The one case shown to have been awarded after a period of time was over the recommendation of the superintendent, and contrary to policy. Violation of a policy does not entitle another employee to the same benefits that were improperly awarded. Grievance DENIED.

**Topics** 

PRIOR WORK EXPERIENCE CREDIT; TIMELINESS; DISCRIMINATION

Docket No.

05-17-121

Synopsis

HCBE had previously granted experience credit to secretaries who had worked for government agencies. Effective November 3, 2003, HCBE adopted a policy limiting the prior experience credit to that earned in other public school systems or the State Department of Education. Current employees were allowed to remain under the prior practice. Grievant is a substitute employee, but has worked as a temporary, regular employee. Grievant argues that as a substitute employee she should have been allowed to be grandfathered in under the prior practice. HCBE asserts that only regular employees who had already received the credit were allowed to keep it.

DECISION: Based upon the reasoning in Crock v. HCBE, Grievant has not been discriminated against, nor has there been a violation of the uniformity requirement since the policy was applied prospectively. Grievance DENIED.

**Topics** 

REALLOCATION; CLASSIFICATION

Docket No.

05-RS-188

Synopsis

Grievant was assigned two additional areas of responsibility, prompting her to request to be reclassified to an Administrative Services Assistant position. Evidence established that all of Grievant's current job duties are encompassed within the job description for her accounting technician classification. An increase in duties alone does not cause the need for reallocation, if those duties are still adequately described by one's current job classification. Grievance DENIED.

**Topics** 

REALLOCATION; EQUAL PAY FOR EQUAL WORK

Docket No.

05-HHR-392

**Synopsis** 

Grievants sought reallocation to a Administrative Services Managers 1. They did not demonstrate a substantial change in their duties and Respondents established that their current classifications were the best fit for their duties. Grievance DENIED.

**Topics** 

REALLOCATION; INCREASED COMPENSATION

Docket No.

05-WCC-286

**Synopsis** 

During a reorganization, Grievants were reclassified like almost all other WCC employees. Their reclassification did not result in a pay increase. Grievants also had an increase in the volume of work, but the complexity of their work did not change. Grievants sought to be reallocated to their new classification, instead of reclassified, and this reallocation would result in a pay increase.

The duties Grievants now perform have always been within their job description, and their reclassification did not result in an increase in complexity. Grievance DENIED.

**Topics** 

REALLOCATION; WORKERS' COMPENSATION; DISCRIMINATION; DEFAULT

Docket No.

04-DJS-404

**Synopsis** 

Grievant was assigned to the K-9 unit, which is a specialized group of officers who are trained to handle dogs, which are used in searches, during escapes, and are used throughout the corrections system. After she was off work for some time due to a work-related injury, Respondent contended there were no available positions in the K-9 unit and assigned her as a "line office," working with security issues involving the residents of the facility. Despite employer's contentions of no available positions, positions in the K-9 unit were posted after Grievant's return, and she was not placed in any of them. Per W. Va. Code §29-5A-3, she was entitled to reinstatement in her previous position, and K-9 positions were available. In addition, since other officers who had worked in the K-9 unit at the same time as Grievant were

reallocated to CO III without having to be tested and interviewed, she was entitled to the same reallocation. Grievant did not prove reallocation dating back to 2002, so it was granted as of her return to work. Grievance GRANTED, in part, and DENIED, in part.

As to default, Grievant attempted to raise the issue after her grievance had reached level four. She had caused considerable confusion by filing two related grievances and allowing them to be addressed together at level two. Therefore, she was prohibited from claiming default.

Topics

REASSIGNMENT

Docket No.

04-DOH-155

Synopsis

The grievant was unhappy working at the Beckley location of his organizational unit. When an opening appeared at the Bolt location, the grievant was reassigned to Bolt without loss of title, seniority or pay. The grievant's work has improved since the reassignment and he has a better relationship with his supervisor at Bolt than he previously enjoyed with a different supervisor at Beckley. There was no adverse action against the grievant in reassigning him to Bolt. Therefore, he failed to prove reprisal. Grievance DENIED

**Topics** 

RECLASSIFICATION; POSTING; STANDING

Docket No.

04-54-438

**Synopsis** 

There was no violation of the posting requirement because there was no vacancy when a fellow employee was reclassified in recognition of the changes in his duties that had evolved over time. The grievant lacked standing to challenge his fellow employee's reclassification because the grievant was not adversely affected thereby. The grievant failed to prove that he should be reclassified, as well, because his duties still remain most closely aligned with his current classification. Grievance DENIED.

**Topics** 

RELIEF

Docket No.

04-DOH-397D

Synopsis

Grievant prevailed on a default claim and was therefore presumed to have proven that he was entitled to a merit raise. Based on a number of factors, it appeared that Grievant should have

DECISION: DOH failed to establish that granting the merit raise would be contrary to law or clearly wrong. Grievance GRANTED.

Topics

REMAND; CONTINUING PRACTICE; TIMELINESS

Docket No.

03-T&R-416R

Synopsis

This is a remand of Blethen, et al. v. Dep't of Revenue and Div. of Personnel, Docket No. 03-T&R-416, (Sept. 15, 2004). Grievant challenged a previous dismissal of their action for timeliness, arguing pay disparity claims under the wage payment collection act were continuing practice claims. Grievants did bring a claim under that act, and prior Grievance Board decisions held this was not a continuing practice. Grievances were untimely and were dismissed.

**Topics** 

REMAND; SELECTION; EXTRACURRICULAR ASSIGNMENTS

Docket No.

02-20-362R

Synopsis

This case was remanded to consider any additional evidence on the nonselection of Grievant for a coaching position, and to consider any "statute-based issues." Grievant was not selected to fill a coaching position, and she asserted multiple arguments: 1) her nonselection was really a termination; 2) the actions of the Board Members was incorrect; 3) the prior administrative law judge committed error; 4) the prior administrative law judge could not reframe the issues from the board meeting.

Grievant did not meet her burden of proof on any of the above issues. She was never hired for the position, and had only been not selected. No error were found on the part of the prior administrative law judge. Grievance DENIED.

**Topics** 

REMEDY; REALLOCATION

Docket No.

04-HHR-306D

Synopsis

The clerical nature of the grievants' duties support their current allocation to the Office Assistant 2 classification. They perform a pass-through function of directing agency clients to the appropriate type of employee to address each client's problem or needs. It would be clearly wrong and contrary to law to reallocate the grievants to Office Assistant 3 or Customer Service Assistant classifications, neither of which constitutes the best fit for the grievants' predominant duties. Grievance DENIED.

**Topics** 

REMOVAL OF DOCUMENTS

Docket No.

05-22-399

Synopsis

Grievant had previously requested certain documents be removed from her personnel file and this request was granted. Later, Grievant requested more documents be removed from her file and Respondent refused. Grievant knew of these documents when they were placed in file and did not grieve this issue until 18 months to 30 months later. Grievant offered no proper excuse for late filing of this grievance. Grievance DENIED.

**Topics** 

REPRIMAND

Docket No.

05-HE-455

Synopsis

The Chair of the Mathematics Department issued a memorandum to Grievant in August 2005, in which he reviewed an incident involving Grievant's graduate student advising undergraduate students in an IML class to slide their papers under Grievant's office door. Grievant was charged with undercutting the authority of IML administrators. The Chair did not speak with Grievant prior to placing the letter in his personnel file, but advised him of the opportunity to place a response to the memo in his file as well. This act was consistent with WVU practice. DECISION: The failure of the Chair to address his concerns with Grievant prior to issuing what is essentially a disciplinary letter is in violation of the most basic right of due process. Grievance GRANTED.

**Topics** 

REPRIMAND; WORKPLACE CONDUCT

Docket No.

05-HE-443

Synopsis

An unusual case in that a letter of reprimand citing two events was placed in Grievant's file. Grievant filed a grievance disputing one issue, and a week later filed a separate grievance addressing the second event. In the meantime, a default claim had been filed. SU conceded a default occurred at level one, and voluntarily removed the letter. A second letter, addressing the remaining issue, was then placed in Grievant's file. Grievant argued that the second letter was improper because he had prevailed on the default issue. SU argued that the default applied only to the first grievance.

DECISION: The timing of the default claim limited it to the first grievance filed, and SU properly revised the letter, limiting it to the second issue. At hearing, SU proved by a preponderance of the evidence, that Grievant had engaged in an unprofessional manner by raising his voice to his supervisor and slamming his office door. Grievance DENIED.

**Topics** 

REPRISAL; DISCRIMINATION; RELIEF

Docket No.

05-HE-271

Synopsis

Grievant filed a grievance asserting reprisal and discrimination when WVU would not give him a copy of the resignation letter submitted by a colleague. By the time the matter had progressed to level four, Grievant had been sent the letter by the individual in question, at WVU's request. DECISION: Having received the letter, the issues were moot, and the Motion to Dismiss GRANTED.

**Topics** 

RES JUDICATA; COLLATERAL ESTOPPEL; TIMELINESS

Docket No.

05-DJS-306

Synopsis

Grievant had previously fully litigated claims of harassment and hostile work environment,

winning her prior grievance, so those issues are barred from relitigation. Grievant's clam she should have received a raise 12 months before filing a grievance on the claim was untimely.

**Topics** 

RIF; SENIORITY

Docket No.

05-47-221

Synopsis

Grievant was RIF'd, because she was the least senior aide. She alleged that she should not have been the least senior, because another aide had been allowed to "bridge" her seniority earned during the 1970s when she was reemployed in 2002. Although there was no preferred recall during the 1970s, the employee's break in service was clearly involuntary. Under these circumstances, the Supreme Court and Grievance Board have held that the employee is allowed to retain the previously earned seniority upon later reemployment. Therefore, the other aide was more senior than Grievant, and the board's actions were proper. Grievance DENIED.

**Topics** 

RIF; SENIORITY; MULTICLASSIFICATION

Docket No.

05-38-213

**Synopsis** 

Grievant was RIF'd when the county needed to reduce the total number of aides, because she was the least senior aide. She argues that another aide, who was multiclassified and working as an autism mentor, should have been RIF'd because she was less senior than Grievant. Aides who become employed in autism mentor positions, by statute, automatically become multiclassified as aide/autism mentor. Per statute and previous cases, multiclassified employees may be RIF'd in any of their classifications, but can retain employment in the remaining category. In the case of autism mentors, it would be inappropriate and would not achieve the goal of reducing the number of aides to RIF the least senior aide/autism mentor, because the autistic student remained (in this case) and continued to need services from a certified autism mentor. Therefore, it was held that, when a board must reduce the total number of aides, it should not include multiclassified aide/autism mentors who are working in autism mentor positions. Grievance DENIED.

**Topics** 

RIF; TIMELINESS

Docket No.

05-46-376

Synopsis

In February 2005, Grievant was advised that she would likely be bumped from her position of teaching principal as the result of a reduction in force. Grievant promptly applied for, and received a teaching assignment. On May 24, 2005, TCBE hired another individual to be Assistant Principal at Taylor Middle School. Grievant filed this grievance on June 22, 2005. Grievant argues that she filed this matter within days of learning the assistant principalship had been filled. However, her complaint is not her nonselection for that position. DECISION: Grievant knew in February that she would not be transferred to an administrative position, therefore, the grievance was not timely filed. Grievance DENIED as untimely filed.

**Topics** 

RIF; TRANSFER; SALARY; RELEGATION

Docket No.

05-49-239

Synopsis

Grievant argues that she should retain her salary as a Cook III following her transfer to a Cook II because UCBE did not terminate her prior contract, and because it has relegated her to a condition of employment resulting in a salary loss, without her consent. UCBE argues that termination of her contract is not required since she remains in the same Cook classification with the same employment term.

DECISION: The relegation clause does not apply in cases where an employee is transferred due to a reduction in force. Grievant could have elected to remain on the preferred recall list, if the slightly lower salary was unacceptable. UCBE was not required to terminate her contract, as only her assignment was changed. Grievance DENIED.

Topics

SAFETY; DETRIMENT; WELFARE

Docket No.

06-CORR-057

Synopsis

Grievants assert the Commissioner of Corrections has the authority to create additional

correctional officer positions and take back the six correctional officer positions that were given to Huttonsville Correctional Center. Grievants also argue that legislative intent is being abused so as to provide manpower at correctional facilities other than Anthony Correctional Center ("ACC").

Respondents counter by arguing ACC cannot increase its overall manpower because funding is controlled by the state legislature. Grievance DENIED

Topics

SALARY ADJUSTMENT; RAISE; ELIGIBILITY; DISCRIMINATION; GRIEVABLE EVENT

Docket No.

05-HHR-408

Synopsis

In the fall of 2005, the legislature approved a salary increase for state employees, setting the eligibility date as May 2, 2005, being the date by which employees had to have begun state employment. The reasoning for the date was that most state agencies have a six-month probationary period, so employees receiving the raise would have completed their probation. Grievants were not employed as of May 2, and did not receive the raise. They protested because DHHR uses a one-year probationary period, so some of their coworkers received the raise, even though they were still on probation.

DECISION: Held that there had to be an eligibility date, and the date chosen was not arbitrary and capricious. Also, DHHR did not make the decision which caused the grievable event, so it was not a grievable issue with Grievants' employer. Grievance DENIED.

Topics

SALARY; CERTIFICATION; DISCRIMINATION

Docket No.

05-DOH-231

Synopsis

Grievant claimed other employees received pay increase just because they became certified on particular equipment, so he requested a pay raise for obtaining his grader certification. Evidence did not support Grievant's allegations. Other employees received merit raises or raises upon reallocation, but not solely for obtaining certification. Grievance DENIED.

**Topics** 

SALARY; EXPERIENCE CREDIT

Docket No.

05-43-301

Synopsis

Grievant worked 35 years for Respondent as a regular bus operator, then retired. He returned to work as a substitute, and Respondent credited him with "zero" years of experience for incremental pay purposes. This was incorrect, because retirement does not extinguish previous experience credit, but only seniority rights. Accordingly, as a substitute, Grievant is entitled to experience credit for all previous years of work as a bus operator. Grievance GRANTED.

**Topics** 

SALARY; MERIT INCREASES; EVALUATIONS; TIMELINESS

Docket No.

05-DOH-054

Synopsis

Grievants made two main allegations in this grievance. First, they claimed that their performance evaluations were performed incorrectly and in violation of a settlement agreement with a prior grievant. Second, they claimed that merit increases were not based upon proper evaluations, so they were awarded unfairly. Grievant's claims regarding the evaluations themselves were untimely. As to the merit increases, evidence indicated that raises were based upon the highest evaluations, and the evaluations appeared to be based upon proper performance factors. Grievance DENIED.

**Topics** 

SALARY; TRAINING CREDIT; TIMELINESS

Docket No.

05-21-112

Synopsis

Grievant sought to obtain a salary credit for hours spent on the job as an aide for the BOE as part of a Department of Labor apprenticeship program. After she completed the program and was given credit for her classroom work, she sought an explanation for how the credit was calculated. She then waited almost six months to file a grievance. There was no evidence of any misrepresentation on the part of BOE personnel which should have led Grievant to believe she did not need to file a grievance. DISMISSED as untimely.

Topics

SECOND POSITION

Docket No.

05-15-160

Synopsis

Grievant, a half-time cook, applied for a second, half-time position at another school. The position was given to an applicant with less seniority. Grievant argues that she was entitled to the position. WCBE asserted there was some overlap in the schedules so that Grievant could not get to the second job on time.

DECISION: It is not arbitrary and capricious for a board of education to deny a position to an employee when scheduling conflicts exist. The agreement of a principal to flex his schedule to accommodate the employee is not binding upon the board. Grievance DENIED.

**Topics** 

**SELECTION** 

Docket No.

05-DOH-230

Synopsis

Grievant and other applicants for a supervisory position were each given the opportunity to temporarily serve in the position for a few months. They were also interviewed for the position. Based upon his demonstrated supervisory abilities, another applicant was selected. Grievant was not selected, due to a history of failing to take initiatives and make decisions. The reasons for the decision were valid, and were not arbitrary and capricious. Grievance DENIED.

**Topics** 

SELECTION, NON-SELECTION

Docket No.

04-HHR-284

Synopsis

The grievant was not selected for a position as a Family Support Specialist despite the fact that she had more relevant experience and a better evaluation than the successful applicant. DHHR could not or would not explain why the selection committee considered the successful applicant to be the "best fit" for the position. DHHR Policy 2106 expressly states that "[s]ignificant factors in the employment decision should be documented." The inability or the reluctance of the Interview Committee to clearly articulate the grounds for selecting the successful applicant when the grievant's qualifications were objectively superior makes the non-selection of the grievant arbitrary and capricious. As such, DHHR's decision in this matter is not entitled to the deference that is usually accorded an employer in making an employment decision. Grievance GRANTED.

**Topics** 

SELECTION, TIMELINESS

Docket No.

05-29-200

Synopsis

Grievant improperly filed for a coaching position and then failed to correct his error and file properly once he was informed of his error.

Grievance untimely filed. Grievance DENIED.

**Topics** 

SELECTION; APPLICATION TIMELINESS

Docket No.

06-22-038

Synopsis

Respondent posted several service personnel positions and supplied an application that allowed employees to enumerate their preferences. Grievant chose the Accountant/Secretary II position as her first choice, with Secretary II as her second. Grievant was originally told she would be recommended for the Accountant/Secretary II position. However, another individual with more seniority stepped forward and explained that her first choice was for Accountant/Secretary II, but she had mislabeled it on the application. Grievant was then hired for the Secretary II position, her second choice, and she grieved. Grievance DENIED.

**Topics** 

SELECTION; ARBITRARY AND CAPRICIOUS; FAVORITISM

Docket No.

05-DOH-416

Synopsis

Grievant applied for the position of TCCMain, but did not receive it. Instead it went to another employee who had volunteered to temporarily fill that position when it became vacant. Grievant argued that he was not given the opportunity to volunteer to fill that position on a temporary basis and that constituted favoritism. Grievant also asserted that he was more qualified for the position of TCCMain because he was able to operate equipment. It was determined that everyone on the job site was given an opportunity to volunteer to temporarily serve as TCCMain, but one employee did. It was also determined that operating equipment at this

particular job site was not necessary as the equipment was not needed to perform the work at the site. Grievance DENIED

**Topics** 

SELECTION; CERTIFICATIONS; QUALIFICATIONS

Docket No.

05-24-440

Synopsis

Grievants contended that Respondent did not need the individual hired to fill this librarian position to also have English certification. Intervenor was successful applicant and had certifications in both library and English. She teaches two English classes each day and supervises the library the remainder of the day. Although there are two other English teachers at the school, if they covered the classes Grievant is teaching, the school would have been required to eliminate its drama and speech programs. Boards of education have ample discretion in assigning duties, and that discretion was not abused here. Grievance DENIED.

**Topics** 

SELECTION; COMPETENCY TEST

Docket No.

05-40-333

Synopsis

Grievant asserted he should have been selected to fill a mechanic's position as he passed the competency exam and had greater seniority than the successful applicant. Grievant argued Respondent could not add the requirement for training to the requirements for the position. Grievant also maintained the successful applicant's substitute position was not filled correctly. Grievant did not meet his burden of proof on any of the above issues. As to the additional

training issue, the recent case of Chewning stated it was within the discretion of a board of education to hire an applicant with additional qualifications as needed when filling a position. In this case Respondent did not abuse its discretion. Grievance DENIED.

**Topics** 

SELECTION; CURRENT EMPLOYEE

Docket No.

05-15-154

Synopsis

Two individuals applied for the position of head football coach at Weir High School, Grievant and the successful applicant, who is a teacher in Ohio. Grievant argued that as a currently employed professional, he was entitled to the position. HCBE asserted that it hired the best qualified applicant.

DECISION: Code § 18A-3-2a(4) provides that the State Superintendent may issue certificates for individuals to serves as athletic coaches if no currently employed professional educator has not applied. In this case, Grievant was currently employed. Grievance GRANTED.

Topics

SELECTION; DISCRIMINATION

Docket No.

05-CORR-350

Synopsis

Grievant filed several grievances over a series of failures by his supervisor to hire him for a position for which he was qualified. Respondent posted a position, then reposted it several times to increase the applicant pool. Grievant claimed the job was reposted as discrimination due to age, in order to keep from hiring him. Finally, the job was filled after a posting for which Grievant did not apply, but assumed Respondent knew of his interest due to his grievance activity. Grievant did not prove discrimination, and did not prove he applied for the job in its final posting. Grievance DENIED.

**Topics** 

SELECTION; EXPERIENCE

Docket No.

05-29-219

Synopsis

Grievant grieved his non-selection for an administrative position. While Grievant proved he had greater administrative experience, he did not compare himself to the successful applicant in the other factors to be considered. Accordingly, he did not meet his burden of proof. Grievance DENIED.

Topics

SELECTION; EXPERIENCE

Docket No.

05-26-367

Synopsis

Grievant was not selected for a coaching position although he had vastly greater experience

than person who was selected; however, he failed to show Respondent abused its discretion by placing more weight in the selection decision on other factors such as attitude, interview performance and related education and training. Grievance DENIED.

**Topics** 

SELECTION; EXPERIENCE

Docket No.

06-22-051

Synopsis

Grievant argues he should have been hired as the principal of the new Harts Primary School because he has more years of experience as an administrator than Intervenor. Respondents assert that it considered all the required criteria, and found Intervenor performed better in the interview, which was a key factor. Grievance DENIED.

Topics

SELECTION; EXTRACURRICULAR ASSIGNMENTS

Docket No.

05-30-217

Synopsis

Grievant argued that she was entitled to an extracurricular assignment posted in January 2005, because it was a re-established run she had held in 2003-2004. MCBE asserts that it was a new run, created to meet the needs of a new program. DECISION: The 2005 run was similar to that held by Grievant the prior school year in that it

involved the transportation of young students to Easton Elementary School. However, the program was new, and the run was new. The prior Head Start run was not re-established. Grievance DENIED.

**Topics** 

SELECTION, EXTRACURRICULAR ASSIGNMENTS

Docket No.

05-30-164

Synopsis

Grievant was the most senior applicant for a mid-day extracurricular bus run. However, due to another mid-day assignment he had, it was questionable whether Grievant could reach the Headstart building in time to pick up students. Although Grievant demonstrated it was possible, he would have to cut it very close to get there in time. Per past decisions, boards have discretion in awarding such assignments, and legitimate concerns existed. Grievance DENIED.

**Topics** 

SELECTION; EXTRACURRICULAR ASSIGNMENTS

Docket No.

06-54-025

Synopsis

Grievant claims that he should have been awarded the position as head football coach because of his years of experience in coaching. He argues that choosing someone with no coaching experience was arbitrary and capricious. Grievant asserts he was asked different interview questions than the other candidates and that the interview was not fair. DECISION: Respondent's decision to hire another individual with no coaching experience is not

arbitrary and capricious because coaching experience was only one of the qualifications Respondent considered when deciding to fill the position. Grievance DENIED.

**Topics** 

SELECTION; EXTRA-DUTY ASSIGNMENTS

Docket No.

06-40-080

Synopsis

Grievant challenged Respondent's assignment of a truck driving trip to a half-time bus operator. The trip was to pick up a greenhouse and deliver it to a school. The employee selected had previously worked in the warehouse and had experience driving this particular truck. While it was improper for an extra duty assignment to be given to an employee who was not in the pertinent classification, the assignment occurred during Grievant's regular working hours. Therefore, it would not be an extra duty assignment for him, and he would not be entitled to additional pay. Grievance DENIED.

**Topics** 

SELECTION; HIRING; TIMELINESS

Docket No.

05-DOH-021

Synopsis

Grievant applied for a posted position he had previously worked in temporarily, but was not selected. Instead, a personal friend of the supervisor was selected, even though he had not worked for Respondent for many years. Nevertheless, Grievant did not meet his burden of

proving he was more qualified. Respondent had waived timeliness defense by not asserting it earlier. Grievance DENIED.

**Topics** 

SELECTION; NEPOTISM; DISCRIMINATION

Docket No.

05-20-252

Synopsis

Grievant applied for a position indirectly supervised by his mother-in-law, and was most senior qualified applicant. Respondent nevertheless refused to instate Grievant because of its policy against nepotism. Grievant did fit the policy, and it was proper for Respondent to deny the position. Grievance DENIED.

Topics

SELECTION; NON-EMPLOYEE

Docket No.

05-HE-276

**Synopsis** 

Grievant applied and was interviewed for position of Accounting Assistant. The successful applicant was not an employee of WVU. Grievant asserts that she was entitled to the position, having been found to be minimally qualified by Human Resources. WVU argues that HR completes only a very general review of applicants, and the hiring administrator must determine if the candidate is minimally qualified.

DECISION: Under Code § 18B-7-1(d) a current employee who applies and meets the minimum qualifications for a position, is to be transferred or promoted before a new person is hired. In this instance, Grievant appeared to possibly meet the minimum qualifications on paper, but failed to demonstrate a working knowledge of accounting during the interview. Grievance DENIED.

Topics

SELECTION; NON-RENEWAL; POSTING; TIMELINESS; DISCRIMINATION; PERMIT

Docket No.

05-19-347

Synopsis

Grievant was a probationary employee teaching special education classes on a temporary permit. For the year and a half that she was employed in this position, she failed to obtain the required college credits toward finishing her education, which are required by the State Department of Education for permit renewal. Therefore, her contract was not renewed. She did not grieve her non-renewal until many months after being notified, so that claim was deemed to be untimely.

Several special education positions were posted during the summer, and Grievant applied for them, but was not selected. Per Policy 5202 and state department regulations, a permit cannot be renewed if the applicant has not obtained the required credit hours, which Grievant had not done. Therefore, she was not qualified for the positions, and the Board had no obligation to seek a permit for her to serve in the positions. Grievance DENIED.

**Topics** 

SELECTION; NON-SELECTION; MOST QUALIFIED; SENIORITY; GROOMING A SUCCESSOR

Docket No.

05-TD-095

Synopsis

The grievant failed to establish by a preponderance of the evidence that she was the best qualified applicant for the position at issue. The grievant's greater seniority did not enter into the matter because the grievant and the successful applicant were not similarly qualified. Nor did the grievant's familiarity with the inner workings of the office that would be under the successful applicant's supervision entitle her to the position, where the successful applicant had broad working knowledge of West Virginia taxes, a college degree in a pertinent field, was impressive in the interview, demonstrated good written and oral communication skills, and presented a resume that indicated he had good management skills, as well. The employer did not abuse its discretion in choosing the successful applicant. Grievance DENIED.

Topics

SELECTION; PREFERRED RECALL; QUALIFICATIONS

Docket No.

06-10-146

Synopsis

Grievant, an aide on preferred recall, was not selected for an aide vacancy. The successful applicant was a regularly employed cook applied for the position, passed the competency test, and was placed in the position. As held in numerous cases, the hiring priority of 18A-4-8b provides a regular employee with hiring preference over an employee on preferred recall.

Grievance DENIED.

**Topics** 

SELECTION; QUALIFICATIONS

Docket No.

06-06-022

Synopsis

Grievant applied for a position, but did not check to see if her personnel file was correct or up-todate. It wasn't. The data Grievant placed on her application conflicted with her data in her personnel file. She was deemed not to be the most qualified applicant. Grievant has a duty to check her personnel file and to inform the board of education of her qualifications. Grievance DENIED.

**Topics** 

SELECTION; QUALIFICATIONS

Docket No.

05-34-043

Synopsis

The Board of Education properly applied the statutory criteria in assessing the relative strengths of the applicants for the principalship at Richwood High School, with the exception of giving administrative credit for his service as Dean of Students. Even without this credit, the successful applicant still achieved more points than the grievant on the hiring matrix. The grievant failed to establish that he was the highest qualified applicant or that the Board of Education abused its discretion in weighting the dispositive factors as it did, particularly in light of the fact that the grievant characterized himself as opinionated and hard-headed. Grievance

**Topics** 

SELECTION; QUALIFICATIONS

Docket No.

04-06-439

Synopsis

The selection committee relied upon the successful applicant's greater "level of innovation" and more "current knowledge" in selecting him from among the other applicants, such as the grievant, who were minimally qualified for the position of Coordinator of Student Services. All of the appropriate factors were given due consideration in the selection process. The weight accorded the factors was within the discretion of the board of education. There was no abuse of such discretion and the selection was not arbitrary and capricious. The grievant failed to prove that she was the best qualified applicant. Grievance DENIED.

**Topics** 

SELECTION; QUALIFICATIONS

Docket No.

06-06-032

Synopsis

Both Grievant and Intervenor were closely matched in terms of qualifications, but Respondent in a reasonable exercise of discretion chose to give more weight to relevant administrative experience, in which category Intervenor was better qualified. Grievant did not meet her burden of proving selection was an abuse of discretion or arbitrary and capricious. Grievance DENIED.

Topics

SELECTION; QUALIFICATIONS

Docket No.

05-CORR-197

Synopsis

Grievant grieved her nonselection for a secretary position. Although she raised many issues she did not demonstrate the selection process was not followed or that the selection was arbitrary and capricious. Grievance DENIED

**Topics** 

SELECTION; QUALIFICATIONS

Docket No.

05-22-111

**Synopsis** 

The grievant failed to prove that he was the applicant with the highest qualifications for the newly created central office position of Instructional Math Coach. The successful applicant performed better in the interview and documented extensive relevant specialized training, whereas the grievant did not identify with specificity any applicable advanced training. The grievant barely made an effort to obtain the position, relying upon his longevity with the school system and a master's degree in math to carry the day for him. The successful applicant made a concerted, professional effort and established himself as the applicant with the highest qualifications. Grievance DENIED.

**Topics** 

SELECTION; QUALIFICATIONS

Docket No.

05-50-280

**Synopsis** 

Grievant alleged she was more qualified than the selected applicant. She failed to meet her burden on this issue. Respondent's decision evaluating the candidates on the appropriate factors was within its discretion. Grievance DENIED.

**Topics** 

SELECTION; QUALIFICATIONS

Docket No.

05-DOH-445

Synopsis

Grievant challenges his nonselection for the position of Storekeeper, claiming that he met the minimum qualifications, and had more seniority, than Intervenor. DOH asserts that Intervenor had more relevant, and more recent experience for the position.

DECISION: DOH administrators mistakenly determined that Grievant did not meet the minimum qualifications for the position. However, Grievant was given an interview, and the administrators were aware of his past experience. The determination that Intervenor had more relevant experience for the position was not arbitrary and capricious. Grievance DENIED.

Topics

SELECTION; QUALIFICATIONS

Docket No.

05-06-078

Synopsis

Grievant alleged he was the most qualified applicant for an administrative position. While Grievant was qualified for the position, he did not meet his burden of proof and demonstrate he was the most qualified. Grievance DENIED.

Topics

SELECTION; QUALIFICATIONS

Docket No.

05-31-048

**Synopsis** 

Grievant grieved the failure of the Monroe County Board of Education to select her for the position of Special Education Director. She asserted numerous arguments: the successful applicant was not qualified; Grievant was more qualified; the make-up of the Interview Committee was flawed; the scoring of the Matrix was flawed; one recommendation was not valid; and discrimination occurred.

Grievant did not meet her burden of proof on these issues, and did not demonstrate she should have been selected for the position. Grievance DENIED.

**Topics** 

SELECTION; QUALIFICATIONS

Docket No.

05-55-372

Synopsis

Grievant contended that he should have been selected for principal position instead of Intervenor. Evidence established that each of the statutory criteria was applied to the applicants' qualifications, and Respondent gave the greatest weight to the interview. This is within Respondent's purview to do, and its selection of Intervenor was not an abuse of discretion. Grievance DENIED.

**Topics** 

SELECTION; QUALIFICATIONS

Docket No.

05-26-139

**Synopsis** 

Grievant alleged he was the most qualified applicant for an administrative position. He based the majority of his argument of the fact that he had served as a principal before, and the successful applicant had not. Grievant's prior administrative performance was judged as unsatisfactory, and Grievant did not successfully complete his improvement plan. Grievant chose to step down from this previous administrative position.

Grievant did not meet his burden of proof. Grievance DENIED.

**Topics** 

SELECTION; QUALIFICATIONS

Docket No.

05-05-237

Synopsis

Grievant argues that the selection of the spouse of a board member as assistant softball coach was the result of favoritism. BCBE denies that favoritism played a role, and the successful

applicant demonstrated that he was far more qualified than Grievant for the position. DECISION: Employment of a spouse is not unlawful, and the testimony supports BCBE's claim that the successful applicant was more qualified for the position than Grievant. Grievance DENIED.

**Topics** 

SELECTION; QUALIFICATIONS; ARBITRARY AND CAPRICIOUS

Docket No.

05-29-193

Synopsis

Grievant was most qualified for the position and was recommended by the superintendent, but the State Department of Education (DOE), which had intervened in the operation of the school system, directed that he not be hired. DOE failed to explain why the least qualified applicant, Intervenor, should be hired instead, and therefore did not rebut the inference suggested by Grievant's evidence that the reason was arbitrary.

Intervenor did not show he should have been selected, notwithstanding he had been the solitary applicant under a previous posting for the same position. Grievance GRANTED.

Topics

SELECTION; QUALIFICATIONS; CERTIFICATION

Docket No.

05-54-140

**Synopsis** 

Grievant was most senior applicant for an aide position that required paraprofessional certification. Her certification was pending when she applied, and was issued before the actual hiring; however Respondent hired a less senior aide whose certification was in place at the time the posting closed. Held that since Respondent knew Grievant's certification had been issued prior to actual hiring decision, it should have hired Grievant. Grievance GRANTED.

**Topics** 

SELECTION; QUALIFICATIONS; COMPETENCY EXAM

Docket No.

05-30-434

**Synopsis** 

Grievant applied for the vacant position, which was posted in August and was to take effect October 17 (per the posting). None of the applicants had passed all the competency tests needed. Grievant was told by Human Resources Manager that all requirements needed to be met by October 24, as the board had not yet selected anyone by mid-October. Grievant completed all requirements by October 22, and Intervenor met the requirements as of October 29. The Board did not meet to vote on this position until November 1. As of that date, Intervenor was the most senior, qualified applicant, and was the proper choice for the position. Grievance DENIED.

**Topics** 

SELECTION; QUALIFICATIONS; SUMMER SUBSTITUTE WORK

Docket No.

05-30-338

Synopsis

Grievant and several other secretaries volunteered to be placed on a "summer substitute" list, to be called in a seniority-based rotating order to substitute for full-time, year-round secretaries. Grievant and a few others were never called, based upon the board's perception that they were not fully qualified to operate central office systems. Nevertheless, Grievant did not prove entitlement to relief, because there were others ahead of her on the seniority list, who would have been called before her. When relief is speculative, a grievance cannot be granted. Grievance DENIED.

**Topics** 

SELECTION; QUALIFICATIONS; TIMELINESS

Docket No.

05-DOH-298

Synopsis

Grievant alleged he was more qualified than the successful applicant for a position driving a tractor trailer. Grievance was deemed untimely, but also evidence revealed that the successful applicant had numerous years of experience doing exactly what this job entailed, so his selection was not arbitrary and capricious or an abuse of discretion. Grievance DISMISSED.

Topics

SELECTION; QUALIFICATIONS; TIMELINESS

Docket No.

04-DOH-308

Synopsis

Grievant applied for three positions and grieved her non-selection for these positions.

This filing was not timely for two of the three positions, and Grievant did not meet the minimum qualifications for the other position. Grievance DENIED.

**Topics** 

SELECTION; RIF; PREFERRED RECALL

Docket No.

06-18-034

**Synopsis** 

JCBE posted a position vacancy for Sixth Grade Computers/Career Awareness. Elementary certification and six hours of computer training were required. Grievant holds certification in Mathematics, grades 5-9, and argues that she was entitled to the position. JCBE asserted that it acted within its discretion to determine the qualifications for the position, and the elementary certification allowed greater flexibility in scheduling.

DECISION: Grievant failed to prove that JCBE acted in violation of the cited statutes, or acted

in an arbitrary and capricious manner. Grievance DENIED.

Topics

SELECTION; SENIORITY

Docket No.

05-25-259

Synopsis

Grievant argued that he had more summer school seniority than the successful applicant, and was entitled to the position of principal for the summer session. MCBE asserted that several years of Grievant's summer experience was limited to a number of days as a substitute, while the successful applicant had worked as a regular summer employee those years. DECISION: The Grievance Board has previously determined that the statute makes no distinction between regular and substitute work for summer sessions, therefore, Grievant was entitled to the position. Grievance GRANTED.

SELECTION; SENIORITY; ASSIGNMENT

Docket No.

Topics

05-20-342

Synopsis

Grievant was the most senior mechanic when an early-shift position came open, but it was not offered to Grievant because the position was for a multi-classified mechanic/bus operator, and grievant had no bus operator certification. Held Grievant did not establish he was discriminated against on this set of facts, as he was not similarly-situated to multi-classified employees. New Conclusion of Law: "West Virginia Code § 18A-4-8b, requires a county board of education to make hiring decisions for service personnel based on "seniority, qualifications, and evaluation of past service," where "qualifications" means the service employee "holds a classification title in his category of employment." The most senior, qualified employee with acceptable evaluations must be given the first opportunity for promotion and filling vacancies, unless the board shows valid cause why the employee is not considered." Grievance DENIED.

**Topics** 

SELECTION; SENIORITY; QUALIFICATIONS

Docket No.

05-DOH-241

**Synopsis** 

Grievants believed that the successful applicant for the position at issue should not have been selected over them, due to their greater seniority and qualifications. Evidence established the successful applicant had several years of supervisory experience in maintenance, which was the pertinent area, and displayed superior interpersonal skills during the interview. Past decisions have established that such qualifications are relevant to supervisory positions, and the applicant with the greatest seniority is not necessarily entitled to the position. Grievance DENIED.

Topics

SELECTION; TIMELINESS

Docket No.

05-27-374

Synopsis

Grievants claimed posting required Respondent to hire someone from in-county. Posting was flawed, and there was no such requirement. One of the grievants filed untimely, but the merits were heard on the other grievant's claim. There was no evidence best-qualified candidate was not chosen. Grievance DENIED.

**Topics** 

SELECTION; TIMELINESS

Docket No.

05-41-389

Synopsis

RCBE filled a Title I Reading position in December 2004. After her request for a permit was denied, the successful applicant was retained as a substitute for the remainder of the school year. Grievant, who was eligible for a permit, and an unsuccessful applicant for the position, was unequivocally notified of the situation on May 13, 2005, but did not file a grievance at level one until July 5, 2005. RCBE raised the issue of timeliness at level two. Grievant offered no reason for the delay in filing.

DECISION: The grievance was filed well beyond the statutory time lines, and no reason was given for the delay. Grievance DENIED.

**Topics** 

SELECTION; TWO POSITIONS; SUMMER EMPLOYMENT

Docket No.

05-30-341

Synopsis

MCBE appealed a level three decision which granted the relief requested in a complaint filed by Grievant after he was forced to select one of two summer positions. In Summer 2005 Grievant was employed on the grass cutting crew, a regular full-time position he had held in prior summers. The job was reduced to 20 hours a week and Grievant applied for a position on the carpet crew. Because the carpet crew was a 40-hour per week position, MCBE required that he select one position, based on the statutory provision that a service personnel employee may not hold more than one regular position. Grievant asserts that he could perform the duties of both positions since the grass was cut on the weekends.

DECISION: Although the grass cutting crew had been reduced to part-time, it remained a regular position, and Grievant was statutorily prohibited from holding two regular positions. Grievance DENIED.

Topics

SELECTION; VIOLATION OF SSAC REGULATIONS

Docket No.

05-27-431

Synopsis

In Spring 2005, MCBE advertised the vacancy of Head Boys' Varsity Basketball Coach. Grievants applied, but a teacher from Fayette County was offered the position. Prior to the successful applicant signing a contract, approval was obtained from FCBE. Grievants argue that MCBE acted in violation of SSAC Regulations, Section 6.2 which requires the approval of both boards in such situations. MCBE denies any wrongdoing.

DECISION: Approval was secured prior to employment. SSAC regulations require nothing further. Grievance DENIED.

Topics

SENIORITY; CONTRACT EMPLOYMENT; STANDING

Docket No.

05-42-377

Synopsis

Grievants contended that Respondent should not have granted back seniority to Intervenors, who had been employed as contract employees for approximately 11 years, without accumulating seniority or other benefits. First, Grievants did not have standing to challenge the issue, because Intervenors' seniority dates had yet to impact Grievants' personal situations. In addition, prior cases support the award of seniority to employees who have been improperly employed on a contract basis. Grievance DENIED.

**Topics** 

SETTLEMENT AGREEMENT; REALLOCATION

Docket No.

05-HHR-226

Synopsis

Grievants filed a prior grievance in April 2004, seeking reallocation. This grievance was settled by agreement dated March 2005. Grievants filed this grievance on May 5, 2005, seeking reallocation. This grievance was dismissed at Level III, based on the language of the settlement agreement which reallocated Grievants to Child Support Specialist 3 and resulted in

The discovery of alternate relief does create a new grievance, and the mere filing of this grievance violates the terms of the prior agreement. Grievance DENIED.

**Topics** 

SETTLEMENT; DISCRIMINATION

Docket No.

05-DOH-439

Synopsis

Grievant claimed discrimination, because she did not receive part of a class action civil lawsuit

settlement that was given to another employee whom she works with often, but who is in a different classification. No information was given regarding the lawsuit or its basis. Grievant failed to prove she was similarly situated to the employee who received the settlement. Grievance DENIED.

**Topics** 

STANDING; SENIORITY; CONTRACT EMPLOYEES

Docket No.

05-14-093

Synopsis

Grievant contested the seniority dates given to other clerks who passed the competency test at the same time she did. These other employees had worked for many years as "contract employees" without receiving seniority or benefits, which was later corrected by the BOE. After they were issued regular contracts, they were credited with seniority for all the time they worked as contract employees. Evidence showed Grievant had suffered no harm as a result of the respective seniority dates, so she did not have standing. However, as discussed in Ganoe decision, contract employees who are deprived of benefits are entitled to seniority for all work as full-time board employees. Grievance DENIED.

Topics

STEP-UP; COMPENSATION

Docket No.

05-30-412

Synopsis

MCBE delayed implementation, from March until October 2004, of a statutory revision which allows bus operators to step-up into positions held by absent regular employees. Grievant seeks back pay for the opportunities lost during that time period, but concedes that it is not possible to calculate an exact amount.

DECISION: When the requested relief is speculative or otherwise legally insufficient, the claim must be denied. Grievance DENIED.

**Topics** 

**SUBSTITUTES** 

Docket No.

05-22-313

Synopsis

Grievant was selected as a summer substitute, but the first sub needed was at a different school than her first preference. Respondent offered job to a less senior substitute first, but should have offered it to Grievant. Respondent cannot post school-specific substitute openings, but must use one pool of substitutes. Grievance DENIED.

**Topics** 

SUPPLEMENT; UNIFORMITY; DISCRIMINATION; FAVORITISM

Docket No.

05-14-267

Synopsis

Grievants received a smaller county salary supplement than the Coordinator of Purchasing. Evidence established differences in Grievants' job duties and those of the purchasing coordinator, so Grievants failed to prove legal entitlement to the same salary. Grievance DENIED.

**Topics** 

SUSPENSION

Docket No.

05-53-110

Synopsis

The grievant school bus operator stopped his bus without fully pulling it off the road, creating a hazard to his students and those on the buses that had to pull around his bus on a two-lane road. The grievant addressed the students in an angry manner, directing inappropriate language toward them. All of this was in response to a squawking noise that a student had been making on the bus that did not need to be addressed immediately. The grievant had heard the noise several times before and know it did not indicate that a student was in pain or was being accosted. The grievant's actions violated the student disciplinary policy and the Employee Code of Conduct, of which the grievant was aware and thus constituted insubordination. In addition, his failure to comply with the appropriate safety procedures constituted willful neglect of duty. The two-day suspension was thus supportable. The grievant failed to establish any grounds for mitigation of the suspension. Grievance DENIED.

Topics

SUSPENSION

Docket No.

05-13-433

Synopsis

Grievant played a tape given to him by a student that had racial slurs and promoted drug usage. Once he was aware of the contents of the tape, he did not take proper corrective action and did not report the incident.

Respondent proved Grievant was guilty of willful neglect of duty and insubordination, as well as in violation of the Employee Code of Conduct. Respondent had already reduced Grievant's suspension form thirty days to eighteen days. No further mitigation was found to be appropriate. Grievance DENIED.

Topics

SUSPENSION

Docket No.

06-25-112

Synopsis

Grievant was suspended for one day after she had enlarged and posted pictures of one of her students throughout the school. The picture had been taken from the Valentine's Day edition of the local newspaper, and the student had received some ribbing from other students. Grievant argues that it was only meant to be a joke, and she thought the student would find it humorous. MCBE asserts that the action was contrary to the teachers' Code of Conduct, and the suspension was appropriate.

DECISION: Grievant testified credibly that no harm was meant. Consideration of her 27 years of teaching with no prior disciplinary record supported a reduction of the discipline to a letter of reprimand. Grievance GRANTED.

**Topics** 

SUSPENSION

Docket No.

05-30-203

Synopsis

Grievant was suspended for two days after it was determined that she had used improper or excessive force when removing a student from a school bus. Grievant denies that she slapped the child, and the teacher, who was standing on the bus steps, did not see her act inappropriately.

DECISION: Grievant was using a procedure whereby she moved her arm around the student, placed her hand on the waistband of his trousers, and lifted him up to get him moving off the bus. There was no evidence that Grievant had acted improperly in this situation. Grievance GRANTED.

**Topics** 

SUSPENSION

Docket No.

05-49-436

Synopsis

Grievant challenged a six-month plus suspension for having scratched the hands of special education student. Grievant argues that it was an accident, and that the suspension was too long. UCBE asserts that the matter has been mitigated since the original recommendation was for Grievant's termination.

DECISION: Grievant's claim that the scratching was accidental was not credible given the nature of the injuries. Grievant had also been heard to say that the student needed to be "taken to the woodshed." Although a long suspension, UCBE did not abuse its discretion. Further mitigation would not be appropriate. Grievance DENIED.

Topics

SUSPENSION; ALCOHOL; PROGRESSIVE DISCIPLINE

Docket No.

05-CORR-423

Synopsis

Grievant, while attending W. Va. Corrections Academy, consumed alcohol at dinner in violation of Academy rules. Grievant argued that consuming alcohol did not relate to having alcohol in the system. He also argued that he consumed alcohol away from the Academy, while in civilian attire. Grievant was not to consume alcohol while attending the Academy. Grievance DENIED.

Topics

SUSPENSION; DISCIPLINARY; HARASSMENT

Docket No.

06-27-008

Synopsis

Respondent asserts Grievant was suspended for insubordination, willful neglect of duty and intemperate behavior. Grievant asserts he was a good employee until the 2005-2006 school year when Mr. Bailey, his direct supervisor, began to leave him notes containing false accusations that he was not performing his duties properly. Grievance DENIED

**Topics** 

SUSPENSION; IMPROVEMENT PLAN

Docket No.

05-23-265

Synopsis

Grievant, a probationary custodian, was evaluated and told her performance was unsatisfactory. She received a verbal warning and a written warning. She was given a list of areas that needed improvement, but not placed on a formal improvement plan. She was then suspended toward the end of the school year, and was to receive a formal improvement plan upon her return to work at the start of the next semester.

Grievant was given notice repeatedly that her performance was unsatisfactory. She did not improve. Although the board of education could have placed her on a formal improvement plan prior to the suspension, in this set of facts it did not have to do so. Grievance DENIED.

**Topics** 

SUSPENSION; INDICTMENT

Docket No.

05-HHR-441

Synopsis

Grievant was suspended pending the outcome of a felony indictment on charges of operating a "meth" lab. Employer established a rational nexus with Grievant's job duties, because, as a receptionist, she is the initial contact for many drug-related complaints which affect or result in child abuse and neglect cases. Grievance DENIED.

**Topics** 

SUSPENSION; INSUBORDINATION

Docket No.

05-DOE-198

Synopsis

Grievant was the teacher of a hearing impaired child with Down Syndrome for one class period each day. The student often fell asleep or would not leave the classroom at the end of the period. On previous occasions, Grievant could not get the child to leave, and she would inform the principal, who would then deal with the situation. Earlier in the school year, another teacher had removed the child from Grievant's room on one of these occasions by dragging him by the feet, resulting in his suspension and Grievant receiving a written reprimand. In the reprimand, Grievant was advised that, if a child needs to be physically removed, in the absence of an emergency, an administrator should be informed. A second incident occurred after the reprimand, wherein the child crawled under a table and refused to leave. Grievant sent a student to inform the principal, then she waited for him to arrive. Meanwhile, a substitute teacher who was deaf came into the room, along with another student, and they proceeded to pull the child up and remove him from the room. Confused as to what to do, Grievant yelled to the second student to stop what they were doing, but she was ignored. She did not feel comfortable going over to the deaf teacher and touching him to get his attention. Under these circumstances, Respondent failed to prove insubordination, which requires a willful defiance of authority. Grievant was understandably confused as to what to do, and had sent for the principal as she had been told, so her conduct was not insubordinate. Grievance GRANTED.

**Topics** 

SUSPENSION; LEAVE ABUSE

Docket No.

04-51-429

Synopsis

The grievant bus operator went on a hunting trip to Colorado, then claimed eight days of sick leave, for which he was paid. When confronted by the Superintendent, the grievant refused to withdraw his sick leave request for the days he had been on his hunting trip. Instead, he belatedly produced a doctor's excuse for exact days he had been on the hunting trip. This was given little credence in light of the fact that the grievant had boasted that he could obtain a doctor's excuse any time he wanted one. The grievant was given a ten-day disciplinary suspension for abusing leave but he was not required to repay the school system for the eight days he had claimed as sick leave.

The grievant failed to prove his claim that he was wrongfully suspended. Grievance DENIED.

**Topics** 

SUSPENSION; LENGTH OF SUSPENSION; OVERTIME WHILE ON SUSPENSION; TIMELINESS

Docket No.

05-CORR-141

**Synopsis** 

Grievant asserted his suspension, which he had grieved previously, should be based on calendar days, and believed he should have been offered overtime if it was based on work days. Grievant's suspensions occurred 2003, and he filed this grievance in 2005. This Grievance

**DENIED** as untimely

**Topics** 

SUSPENSION; MITIGATION; DISCRIMINATION; COMPUTER ABUSE; COMPUTER MISUSE; E-MAIL ABUSE; E-MAIL MISUSE; PERSONAL BUSINESS

Docket No.

04-BEP-352

Synopsis

An audit revealed computer and e-mail abuse by the grievant and others, in violation of a number of her employer's explicit policies. These abuses included such things as forwarding improper e-mails and using the state-owned computer to conduct business relating to the grievant's private, candle-making business. The various types of abuse discovered during the audit were assigned values on a matrix, and the level of discipline imposed was based upon the numeric value of each employee's misconduct. The grievant was initially slated for dismissal, but her discipline was reduced to a 30-day suspension. She claimed that she was the victim of discrimination but was unable to sustain this allegation. The grievant was also unable to establish the predicates for mitigation of the discipline imposed upon her. Grievance DENIED.

**Topics** 

SUSPENSION; TRANSFER; DISCIPLINE; CREDIBILITY

Docket No.

05-20-220

**Synopsis** 

While Respondent's suspension and disciplinary transfer likely would have been appropriate punishment had it proved its case, Respondent did not meet its burden of proving the incident occurred as alleged, owing to the lack of credibility of its witnesses. New COL: "Where a definitive credibility determination cannot reliably be made from the evidence related to the material facts in a disciplinary hearing, the employer cannot meet its burden of proof." Grievance GRANTED.

**Topics** 

TEMPORARY UPGRADE; TIMELINESS; ABANDONED GRIEVANCE

Docket No.

05-DOH-145

Synopsis

For many years Grievant was upgraded to temporary crew leader during the SRIC season. This upgrade was without pay, and he did not fill out the required reports. None of the other upgraded crew leaders filled out the required report either. Grievant learned other districts paid their employees when they were temporarily upgraded, and Grievant asked about this. Grievant could not read or write, but could do some mathematical calculations.

The parties reached a decision that for the next SRIC season, he and another employee would share the duties, while Grievant learned to complete the forms. Grievant did not learn to complete the forms, and DOH gave him another SRIC season to learn how to complete them. Since Grievant did not learn to complete the forms, and, in fact, did not even try to complete them, he was not upgraded the following SRIC season. The Class Specification requires that a crew leader be able to complete routine records. Grievance DENIED.

**Topics** 

TERMINATION; AT-WILL

Docket No.

05-DJS-289

Synopsis

DJS dismissed Grievant as Superintendent of IHY for a number of reasons, but asserts that he was an at-will employee, and demonstrated no violation of a substantial public policy. Grievant denies that he serves as an at-will employee, but if so, his dismissal was based on his refusal to issue a warning letter for which there was no cause, thereby causing the employee harm. This defamation of another's character, Grievant argues, constitutes a substantial public policy. DECISION: Notwithstanding a statutory provision stating that all employees at DJS facilities were classified, the Superintendent's position was exemp as a policy-making position, and by Executive Order. As an at-will employee, Grievant could be dismissed for any reason which was not a violation of a substantial public policy. Grievant's determination that he would not follow an order based on his personal moral standards does not constitute a substantial public policy. Grievance DENIED.

**Topics** 

TERMINATION; UNAUTHORIZED LEAVE; JOB ABANDONMENT; DISCRIMINATION

Docket No.

06-DOH-015

Synopsis

Grievant's termination was based on documented extensive use of unauthorized leave, failure to report in, and job abandonment. Grievant argued the action was discriminatory because

other employees use excessive amounts of sick leave and their employment is not terminated. DECISION: Despite numerous counseling sessions regarding reporting off from work, Grievant continued to be absent without notifying DOH he would be absent. After exhausting all accrued sick and annual leave, Grievant continued to be absent. Dismissal was based on job abandonment, which constitutes good cause for the termination of a state employee's employment. Grievant failed to establish that any other employee with a absenteeism record similar to his remained employed by DOH. Grievance DENIED.

**Topics** 

**TIMELINESS** 

Docket No.

05-HE-162

Synopsis

Grievants prevailed on a compensation claim and were awarded back pay. They were not awarded interest on the back pay in the decision dated April 6, 2004. In January 2005 Grievants learned of another employee who had been awarded interest, and filed this claim. WVU argues the grievance was not timely filed. Grievants assert they promptly filed upon learning they were entitled.

DECISION: Grievants failed to file this grievance within 10 days of learning they would not receive interest. The statutory time frame begins to run when an employee knows the facts giving rise to a grievance, not upon the discovery of a legal theory or the success of another employee's grievance. Grievance DENIED.

**Topics** 

**TIMELINESS** 

Docket No.

05-22-348

Synopsis

Grievant appealed a dismissal order from level two, where her grievance was denied and dismissed as untimely. Finding Grievant substantially complied with filling requirements, and relied on assurances of Respondent while delaying her filing, the Grievance was found to be timely despite the late filing. At the request of the parties, the merits of the grievance were remanded to level two.

**Topics** 

**TIMELINESS** 

Docket No.

05-27-310

Synopsis

Grievant did not timely file at level one, even though he timely requested an informal conference. At level one, the grievance process begins with the filing of a written grievance with the Grievant's immediate supervisor, following an informal conference with the supervisor. The informal conference must be requested within fifteen days after the Grievant learns of the facts giving rise to the grievance, and the written grievance must be filed within ten days after receiving the supervisor's response to the informal conference. See W. Va. Code § 18-29-4(a). To make a timely filing at level one, Grievant must meet both time limits for filing. Grievance DENIED as untimely filed.

**Topics** 

**TIMELINESS** 

Docket No.

05-39-417

Synopsis

Grievants accepted an extra-duty assignment for June 8, 2005, which was an Instructional Support and Enhancement Day for other PCBE employees. This left Grievants with only one day to complete their year end duties of cleaning their buses and completing paperwork. Neither complained they were unable to complete their duties in one day. On July 18 and August 10, grievances were filed seeking compensation for the second day they did not have to complete their year-end duties. PCBE argued the grievances were not timely filed, and they were not entitled to additional compensation.

DECISION: The grievances were not timely filed, and Grievants offered no acceptable reason for the delay. In any case, Grievants offered no authority supporting their claim to the additional compensation. Grievance DENIED.

**Topics** 

**TIMELINESS** 

Docket No.

05-HE-081

Synopsis

On or about October 16, 2004, WVU offered a monetary settlement to employees who had level

four classification grievances pending. Grievants did not receive a settlement offer, and did not file a grievance until December 21, 2004.

DECISION: Grievant claim they filed upon learning that the offers had been made, but did not indicate that it was anytime later than mid-October. There is no discovery rule exception for the delay in filing. Grievance DENIED.

Topics

**TIMELINESS** 

Docket No.

05-22-349

**Synopsis** 

Grievant appealed a dismissal order from level two, where her grievance was denied and dismissed as untimely. Finding Grievant substantially complied with filing requirements, and relied on assurances of Respondent while delaying her filing, the Grievance was found to be timely despite the late filing. At the request of the parties, the merits of the grievance were remanded to level two. Grievance GRANTED; Remanded to Level II.

**Topics** 

TIMELINESS; APPEAL; MOTION TO DISMISS

Docket No.

06-HE-054

Synopsis

Respondent filed Motion to Dismiss for timeliness. Respondent alleges Grievants had not filed at Level I in a timely manner, and that, even if the Level I filing was timely, the Level IV appeal was not.

DECISION: Respondent's Motion to Dismiss was GRANTED.

Topics

TIMELINESS; COMPENSATION

Docket No.

05-HE-277

Synopsis

Grievants seek the same financial settlement awarded to co-workers who had filed grievances challenging their classification in 2001. WVU argues that the grievance was not timely filed, and grievants are not similarly situated.

DECISION: Grievants are not entitled to a settlement received by employees who had asserted their rights through the grievance procedure. Grievance DENIED.

**Topics** 

TIMELINESS; DISCOVERY

Docket No.

05-55-462

**Synopsis** 

Grievant challenged the award of a summer bus run to another driver, without going through the seniority list. He did not file his grievance until at least 17 days after his alleged "discovery" that this had occurred. Grievant claimed he requested an informal conference a few days after his discovery of the facts about the bus run, but there was no other evidence to support this. Grievance DISMISSED as untimely.

**Topics** 

TIMELINESS; DISCOVERY OF LEGAL THEORY

Docket No.

05-01-444

Synopsis

Grievants filed this claim in late September of 2005, alleging they were entitled to compensation for time spent traveling to and taking their required annual physicals. However, the grievance was untimely, because Grievants knew when they took the physicals in July and August that they would not be paid. In late August, during a staff development session, new board policies adopting the Fair Labor Standards Act were discussed. Grievants inquired whether they should be paid for their physicals and were advised they would not be, but that the physicals would be scheduled on a work day in future years. Grievants knew at time of the physicals they would not be paid, and that was the grievable event. Grievance DISMISSED as untimely.

**Topics** 

TIMELINESS; DISCOVERY RULE

Docket No.

05-HHR-378

Synopsis

Grievant was required to take a salary cut upon a voluntary demotion, and later learned that someone else, years later, was not required to do so, and Grievant claimed discrimination. DECISION: Grievance is untimely, as discrimination was a legal theory, rather than a fact, and did not trigger the discovery rule exception. Grievance DENIED.

**Topics** 

TIMELINESS; DISCRIMINATION; EMERGENCY BUS RUNS

Docket No.

05-32-190

Synopsis

Grievant, while employed as a cook, was allowed by the Board to occasionally work as a substitute bus operator when no substitutes were available. In spring of 2005, the Board informed Grievant this practice would no longer continue, but later allowed a half-time cook to work as an emergency substitute bus operator. Grievant claimed discrimination, but there was no evidence whether other employees working in this capacity had a contract to do so or how it came about that they served in such positions, so Grievant could not show she was similarly situated. Relief requested was speculative, also, because Grievant has since become employed as a full time bus operator. Grievance DENIED.

Topics

TIMELINESS; EQUITY INCREASE; PROMOTION

Docket No.

05-HE-394

Synopsis

Grievant was promoted effective July 1, 2005, and given a 5% pay increase. Grievant's salary was later rounded-up to the next salary step contrary to HE policy, but no back pay was awarded. Grievant did not receive an equity increase since both equity and promotional increases are not awarded simultaneously.

DECISION: Grievant was aware in July that his promotional salary was not rounded up and that he did not receive an equity pay increase, but did not file this grievance until September 27, 2005. The grievance was not timely filed pursuant to the statutory time lines. Grievance DENIED.

**Topics** 

TIMELINESS; EXTRA-DUTY ASSIGNMENTS; COMPENSATION

Docket No.

05-30-114

Synopsis

Grievants filed a grievance relating to their compensation for extra-duty runs in past two summers, but didn't do so until they learned of the success of another employee in making a similar claim. By then, the time for filing had passed and learning legal theory on which to make the claim was not "discovery" of the event, so time limit was not tolled and grievance was untimely. Grievance DENIED.

**Topics** 

TIMELINESS; LEAVE; SERVICE CREDIT

Docket No.

05-CORR-400

Synopsis

Grievant filed a grievance to restore leave and service time he had been denied while on TTD in 2002, shortly after learning that other employees had prevailed on this issue in a decision issued by the W. Va. Supreme Court of Appeal on July 6, 2005. Respondent filed a Motion to Dismiss the grievance as it was not timely filed in 2002. Grievant conceded that he did not take any action until learning of the success of other employees.

DECISION: It is not the discovery of a legal theory, or the success of others, that triggers the statutory time lines, but the event which is the basis of the grievance. Grievant could have taken the same action as those employees in the Canfield case, but did not do so. Motion to Dismiss granted. Grievance DENIED as untimely filed.

**Topics** 

TIMELINESS; REDUCTION OF EMPLOYMENT TERM; OUTSOURCING; CONTRACT **EMPLOYEES** 

Docket No.

05-HE-458

Synopsis

Grievant was notified in October 2003 that her employment contract would be reduced from 12 to 9 months, effective July 1, 2005. A letter confirming the reduction was sent on June 1, 2005. Grievant filed a grievance on September 19, 2005, asserting that her employment term had been improperly reduced. FSU argues the grievance was not timely filed. DECISION: Grievant does not deny receiving the letters notifying her of the change in her

employment term, nor does she offer any excuse for the delay in filing. Grievance DENIED.

**Topics** 

TIMELINESS; SALARY REDUCTION

Docket No.

05-HHR-260

Synopsis

In 2003, Grievant requested a transfer from the position of Social Service Supervisor, pay grade 14, to Human Resource Specialist, pay grade 15. The request was approved with the attendant reduction in salary. In June 2004, BCF administrators changed their practice of imposing salary reductions in cases of voluntary demotions. In June 2005, Grievant learned of the change in practice, and filed this claim to recover his higher salary. DHHR argued that the grievance was not timely filed.

DECISION: Grievant knew that his salary was to be reduced in 2003, and that was the grievable event. This claim filed in 2005 was well past the statutory time lines. Grievance

DENIED.

**Topics** 

TIMELINESS; SALARY; CONTINUING PRACTICE

Docket No.

05-DNR-430

Synopsis

Grievants challenged the fact that another technician is provided with on-premises housing, while receiving the same salary and other benefits as they do. They sought an addition to their salary to compensate for not receiving free housing. Grievance was held to be untimely, because the other technician was hired in 2001, and Grievants had known since that time that he received housing, while they did not. Although Grievants contended this was a continuing practice, it was a single event which occurred several years ago, so the grievance was untimely. Grievance DENIED.

**Topics** 

TIMELINESS; SALARY; YEARS OF SERVICE

Docket No.

05-HE-447

Synopsis

FSU uses CUPA guidelines to establish salaries for faculty members. Those more recently hired are sometimes compensated at higher rates that long-term faculty. Because this is an ongoing practice, the grievance was timely filed. Grievant failed to prove that FSU engaged in discrimination or acted in an arbitrary and capricious manner regarding salary determinations. Grievance DENIED.

**Topics** 

TIMELINESS; TEMPORARY TOTAL DISABILITY BENEFITS; RETURN OF LOST BENEFITS

Docket No.

06-HHR-046

Synopsis

Grievant filed a grievance to restore leave and service time she had been denied while on TTD's in 2004 -2005, after learning that other employees had prevailed on this issue in a decision issued by the W. Va. Supreme Court of Appeals on July 6, 2005. Respondent filed a Motion to Dismiss the grievance as it was not timely filed. Grievant conceded she did not take any action until learning of the success of other employees.

DECISION: It is not the discovery of a legal theory, or the success of others, that triggers the statutory time lines, but the event which is the basis of the grievance. Grievant could have taken the same action as those employees in the Canfield case, but did not do so. Motion to Dismiss granted. Grievance DISMISSED as untimely filed.

**Topics** 

TIMELINESS, TTD

Docket No.

05-DOH-402

Synopsis

Grievants were absent from work during various periods of time from 1990 through 2005. Grievants filed this complaint after learning of the success of Division of Corrections employees regarding these issues in the Canfield case. Respondents argue that Grievants did not timely file their complaint.

DECISION: Grievants knew of the facts giving rise to this grievance at the time of the occurrences, but did not file a grievance following any of the events. The discovery of a legal theory, or the success of another employee's grievance does not constitute a "discovery rule exception" to the statutory time lines. Grievance DENIED.

Topics

TIMELINESS; UNAUTHORIZED OVERTIME; EXEMPT EMPLOYEE; CONTINUING PRACTICE; GRIEVABLE EVENT

Docket No.

05-TD-042

Synopsis

The grievant claimed her practice of coming in early should entitle her to overtime pay despite the fact that the grievant was well aware that any time she voluntarily arrived early was not

authorized overtime and the fact that she was in an exempt position, meaning she was not entitled to monetary payment even for authorized overtime. This grievance was not timely in any event because the grievant did not prove that she worked any overtime during the ten days preceding the filing of this grievance, which occurred on the same day the grievant retired. The grievant failed to prove that the untimely filing was excusable. Grievance DENIED.

**Topics** 

TIMELINESS; UNIFORMITY; CONTRACT

Docket No.

05-21-335

Synopsis

Grievant contended he was performing the same work as another custodian, who held a 250day contract term with paid vacation days, while Grievant had only a 200-day contract term with no vacation. Evidence established that, while the other employee was a custodian during the school year and a maintenance employee in the summer, Grievant performed the exact same work as a custodian holding a summer contract for maintenance work. Therefore, Grievant is entitled to the same contract term with vacation benefits. Per Supreme Court cases, this is a continuing practice, and Grievant is entitled to back pay and benefits for a year prior to filing of the grievance. Grievance GRANTED.

Topics

TIMELINESS; UNIFORMITY; SUPPLEMENT

Docket No.

05-22-387

Synopsis

Grievants and the Superintendent's secretary are all similarly classified as Executive Secretaries. Respondent had established a supplemental salary schedule that gave the superintendent's secretary a greater supplement than it gave other executive secretaries. DECISION: This was not discrimination, because uniformity requirement is based on "like assignments and duties" rather than like classifications, and superintendent's secretary had different duties than other executive secretaries, therefore Grievants were not similarly situated in a pertinent way.

Grievance was timely even though filed more than fifteen days after implementation of supplemental salary schedule, as Respondent failed to prove the discovery rule did not apply in Grievants' favor. Grievance DENIED.

Topics

TRAINING

Docket No.

05-DJS-300

**Synopsis** 

Grievant was not required to complete DJS training at the time of her employment because Correctional Officers were a priority at that time. Grievant is now required to complete a number of hours of training, and complains that she received similar training while employed by the Division of Corrections, and it would be a waste of her time. She also complains that other employees are not being required to complete the training. DJS asserts that the waiver of the training was temporary, and will not be a waste of time since it is geared toward juveniles rather than adults. Other than those employees grandfathered in at the time DJS was created, all employees will eventually complete the training.

DECISION: Grievant has failed to prove that she received any permanent waiver from completing training, or that she has been subject to discrimination. Grievance DENIED.

**Topics** 

**TRANSFER** 

Docket No.

05-52-151

Synopsis

A sixth grade teacher was scheduled to be eliminated at Short Line School, Grievant, the least senior 6th grade teacher was to bump the least senior teacher at the school. WCBE voted not to approve the termination of the least senior teacher, and Grievant was placed on the transfer list. Grievant argues that he should have remained at SLS. WCBE asserts that the statute only requires the least senior teacher be recommended for transfer, but does not automatically require that person be transferred.

DECISION: WCBE is correct that a recommended transfer need not be approved by a board of education; however, it does require the least senior classroom teacher be transferred during a reduction in force at a particular school. Grievant was improperly placed on the transfer list.

Grievance GRANTED.

**Topics** 

TRANSFER; BURDEN OF PROOF

Docket No.

05-DNR-030

**Synopsis** 

Grievant was transferred from Grant County to Raleigh County, after allegations surfaced about him illegally feeding bear, allowing members of the public to do the same, and illegally transporting a fawn deer to private citizens. First, it was determined that the transfer was, in fact, disciplinary, so Respondent bore the burden of proof. However, evidence established that the transfer was not arbitrary and capricious in light of Grievant's misconduct. Grievance DENIED.

Topics

TRANSFER; CERTIFICATION

Docket No.

05-24-233

Synopsis

Grievant was the only journalism teacher at her particular school, and she was placed on transfer when that subject was eliminated. Although Grievant had the same certifications as other language arts teachers who were less senior, and Respondent had used a seniority-based transfer process in the past, it was not arbitrary and capricious for it to transfer Grievant, when she was the only teacher of the subject being eliminated. Grievance DENIED.

**Topics** 

TRANSFER; RESCISSION

Docket No.

05-39-268

Synopsis

Due to low projected enrollment figures for the upcoming school year, Grievant was placed on transfer in the spring of 2005, due to her status as the least senior kindergarten aide at her school. The enrollment numbers fluctuated throughout the summer, hovering just under the number needed for a fourth kindergarten aide. The number was not officially reached until the end of August, just as school was starting, so a fourth class with an aide was needed. The reason for Grievant's transfer still existed as of August 1, so board acted properly by not rescinding it. Grievance DENIED.

**Topics** 

TRANSFER; RIF

Docket No.

06-22-132

**Synopsis** 

After Grievant was advised in February 2006 that her position would be reduced to one-half time, she requested and received a transfer to another school. By May LCBE had determined that her position at Guyan Valley would remain full-time for the upcoming school year, but refused to rescind the transfer, citing multiple subsequent personnel changes. DECISION: Although Grievant requested the transfer, it was in contemplation of LCBE's projected reduction in force at the Guyan Valley school. Accordingly, since the reason for the transfer no longer existed prior to August, the transfer should be rescinded. Grievance GRANTED.

**Topics** 

TRANSFER; SCHEDULE CHANGE

Docket No.

05-27-208

Synopsis

Changing Grievant's work schedule from starting at 6:00 a.m. to starting at 3:00 p.m., without utilizing the transfer procedure, violates W. Va. Code § 18A-2-7. Respondent should have followed the procedure therein for transferring Grievant in order to make the desired schedule change. Grievance GRANTED.

**Topics** 

TRANSFER; SHIFT ASSIGNMENT

Docket No.

05-43-450

Synopsis

Grievant alleged that, based on past practice, custodians at this particular school had a meeting at which they picked their shift assignments for each school year. For 2005-2006, all the custodians were placed on transfer in the spring, so that shift assignments could be changed, and more custodians would be working at night, so the school would be cleaner. Grievant did not protest his transfer, but filed this grievance after receiving a night shift assignment at the beginning of the school year. Since Grievant did not contest his transfer, he had no basis for receiving a specific assignment. Evidence did not support his allegation that custodians picked

their own assignments in previous years. Employees are not entitled to any specific position or assignment. Grievance DENIED.

**Topics** 

TRAVEL REIMBURSEMENT

Docket No.

06-BECHD-125

**Synopsis** 

Grievant waited until he had resigned his position with Respondent, then submitted three years' worth of travel reimbursement requests, totaling several thousand dollars. Per state travel rules, reimbursement requests are to be submitted within two weeks of travel. Also, Grievant knew that the Department administrator went around to all the offices twice a month, reminding everyone to submit travel reimbursement requests. Grievant was not entitled to reimbursement for travel that occurred in previous fiscal years. Grievance DENIED.

**Topics** 

TRAVEL REIMBURSEMENT; LICENSE RENEWAL

Docket No.

05-39-264

Synopsis

Grievant claimed entitlement to mileage reimbursement for his travel to and from the nearest office of the DMV to renew his commercial driver's license. Although 18A-2-4 requires a board of education to pay for the "cost" of any license which is required as a condition of employment, this does not include mileage reimbursement. Grievance DENIED.

**Topics** 

TRAVEL REIMBURSEMENT; MOOTNESS

Docket No.

06-38-076

Synopsis

Grievant claimed mileage reimbursement for travel to state athletic tournaments. At a regular Board meeting, the Board did not refuse the request, but required Grievant to obtain his money from proceeds received from the Secondary Schools Athletic Commission, which would go directly to the school. In the past, such expenses had been paid from general county funds, rather than the school's athletic account, so Grievant protested. Grievant failed to prove any legal violation, and the grievance became moot once he received money to reimburse himself.

**Topics** 

UPGRADE; CLASSIFICATION

Docket No.

01-HE-439

**Synopsis** 

Grievant argued that a number of point factors had been allocated incorrect degree levels, and that with proper credit he would be entitled to pay grade 15. WVU asserted that Grievant was correctly classified and compensated.

DECISION: In a classic Mercer classification case, Grievant attempted to prove the degree levels assigned to a number of point factors were incorrect. However, based upon the information available to the JEC at the time of the review, it could not be determined that their decision was clearly wrong. Grievance DENIED.