

WV EDUCATION & STATE EMPLOYEES GRIEVANCE BOARD

WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

SIXTEENTH ANNUAL REPORT

TO THE

GOVERNOR AND THE LEGISLATURE

FOR CALENDAR YEAR 2001

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History, Mission and Operations

In 1985 the Legislature created the West Virginia Education Employees Grievance Board and established a grievance procedure for educational employees. W. Va. Code §§ 18-29-1, et seq. The procedure is intended to provide a simple, expeditious and fair process for resolving grievances at the lowest possible administrative level.

In 1988 the Legislature enlarged the Grievance Board's jurisdiction considerably by enacting a Grievance Procedure for State Employees, which covers most state employees.⁽¹⁾ The purpose of this law is to establish a procedure for the equitable and consistent resolution of employment disputes. This law also changed the agency's name to the West Virginia Education and State Employees Grievance Board (hereinafter Board). W. Va. Code §§ 29-6A-1, et seq.

In 1998, the Legislature made several changes to the law governing state employee grievances.⁽²⁾ One of the most significant changes was the inclusion of a default provision by which an employee may prevail in his or her grievance, if the grievance evaluator at Level One, Two or Three fails to respond to the grievance in the time required by law. Another notable change gives the Board

jurisdiction over procedural matters at Levels Two and Three of the grievance procedure in both state and education employee grievances. Until this change in the law, the Board's authority was limited to administering Level Four of the procedure. In addition, the law gave the Board the authority to require mediation at the request of any party in cases involving state agencies. W. Va. Code §29-6A-12 (1998).⁽³⁾

In 2001, the Legislature amended W. Va. Code §18B-2A-4(k) by passing Senate Bill 703. The effect of this amendment is that grievances filed by higher education employees after July 1, 2001, must be processed under the grievance procedure statute for state employees contained in W. Va. Code §29-6A-1 et seq.

The Board consists of three members appointed by the Governor, with the advice and consent of the Senate, for three year terms. In March 1997, Governor Cecil H. Underwood appointed three new members to the Board. Billy Coffindaffer, a Republican from Monongalia County, was appointed for a term ending July 1, 1998, and was subsequently reappointed for a term that expires on July 1, 2001. After Mr. Coffindaffer's second term expired, Governor Bob Wise appointed Walt Auvil, Esq., a Democrat from Parkersburg, to a term expiring on July 1, 2004. Roger Smith, II, Esq., a Democrat from Cabell County, was appointed to a term that expired on July 1, 1999, and was reappointed to a term expiring on July 1, 2002. The third new member, Lowell Witters, a Republican from Kanawha County, was appointed to a term expiring on July 1, 2000, and was reappointed for a term expiring on July 1, 2003.

The Board's mission is to equitably, consistently and quickly resolve employment disputes between employees and county boards of education, higher education institutions, and state agencies so that good morale may be maintained, effective job performance may be enhanced, and the citizens of this State may be better served.

The Board employs attorneys to preside over grievances that reach Level Four of the grievance procedure and to serve as mediators. These employees are designated as "hearing examiners" in the grievance procedure laws, but the Board refers to them as administrative law judges (ALJs) because of the nature of their duties and responsibilities.⁽⁴⁾ The Board requires its ALJs to be licensed to practice law in West Virginia, and does not permit them to have an outside law practice.

The Board employs a Director, an Administrative Officer, six ALJs, and three Secretaries in a flat organizational structure. See Appendix A. The Board's principal office is in Charleston, and it maintains hearing offices in Beckley,

Elkins, Westover, and Wheeling.⁽⁵⁾ Neither the Wheeling nor Beckley hearing offices are staffed with employees, and the Board has no plans to hire personnel to work out of those offices.

The Board's primary activities are to: (1) Schedule and conduct Level Four hearings and prehearing conferences in public employee grievances; (2) Issue binding, written decisions with findings of fact and conclusions of law, subject to limited judicial review in the circuit courts; (3) Provide mediation services to actively assist employers and employees in identifying, clarifying and resolving issues anytime before a Level Four hearing; (4) Administer Levels Two, Three and Four of both the education and state employees grievance procedure; and (5) Prepare transcripts and certify records to circuit courts when decisions are appealed.

The Board has identified the following goals and objectives: (1) Issue timely and prompt decisions; (2) Issue decisions within thirty working days after the cases are ready for decision; (3) Process grievances in a fair, objective manner, according respect and courtesy to all parties; (4) Assist the parties in settling grievances through prehearing conferences and mediation; (5) Issue readable decisions based upon a consistent application and interpretation of law and policy; and (6) Promptly publish decisions and case summaries on the Internet for all interested persons.

Both grievance procedure laws contain a broad definition of what can be grieved. Employees may grieve nearly any employer action affecting their compensation, hours, terms, and conditions of employment, including allegations of discrimination, favoritism and harassment. W. Va. Code §§ 18-29-2 (1985) & 29-6A-2 (1988).⁽⁶⁾ The Board also exercises jurisdiction over claims based upon alleged violations or misinterpretations of federal and state wage and hour laws, and claims that may also be filed under the West Virginia Human Rights Act. The most common types of grievances by far are challenges to promotion and hiring decisions, dismissal and other lesser disciplinary measures, and classification/compensation matters.

In accordance with the State Administrative Procedures Act, the Board adopted new Procedural Rules effective December 1, 2000, governing the practice and procedure for handling grievances at Level Four. The new Procedural Rules substantially amended the prior rules to conform to statutory changes and current practice. The Rules were promulgated under the authority granted by W. Va. Code §§ 18-29-5(a) & 29-6A-5(a), and are codified at 156 Code of State Regulations 1 (156 CSR. 1).

Annual Open Meeting and Fifth Customer Satisfaction Survey

The Board, after proper notice, conducted its annual open meeting in Charleston on January 23, 2002, as required by W. Va. Code § 18-29-5 (1985), and W. Va. Code § 29-6A-5 (1988). The purpose of the open meeting is to help the Board evaluate the functioning of the grievance process, the performance of its ALJs, and to prepare an annual report to the Governor and the Legislature.

The Board mailed eight hundred forty-seven (847) notices of the open meeting, the largest number in several years. All Grievants whose cases were completed in 2001 were mailed a notice. State agencies, educational institutions, county superintendents, employee organizations, union representatives, attorneys, and the Director of the West Virginia Division of Personnel (Personnel) were also invited to attend or to submit written comments. A Customer Satisfaction Survey form was mailed with the open meeting notice. In addition, the Annual Meeting was announced on the Board's web site and the customer satisfaction survey form was made available for printing.

Fourteen people attended the public meeting. Many of those in attendance either work for public employee unions that represent public employees in grievance proceedings or were public employees who had been involved in a grievance in 2001. The comments were overwhelming negative in nature, and covered a wide range of perceived concerns with the agency's adjudication services. The primary complaints were that the percentage of grievances granted is too low, and too many lawyers are involved in the grievance process.

The Board has used a Customer Satisfaction Survey for the past five years to help in the evaluative process, to identify areas in which our customers think we need to improve, and to serve as a benchmark for future evaluations. (Appendix B). In designing the survey questions, the Board reviewed customer satisfaction surveys used by agencies in other states that perform similar functions, and customer survey forms used by agencies within the Department of Administration. Ninety-three (93) customers responded to the survey by January 29, 2002.

Customers are grouped into five categories on the form: Grievant, Employer, Employee Representative, Counsel, and Other. The survey results are analyzed based on these customer categories. Ratings for most questions on the Survey are as follows: (5) Excellent; (4) Good; (3) Fair; (2) Poor; (1) Very Poor, or Not Applicable. Appendix C contains two reports showing the survey results for 2001 and 2000. The first report gives the average rating of the Board's adjudication services, and the second report shows the average rating of administrative procedures and staff. A brief summary of customer survey responses is set forth below.

Customers were asked to give their Overall Satisfaction rating of the Board on a scale from 100% to 0%. Grievants expressed an average overall satisfaction rating of about 38% for 2001, which is comparable to prior years. About 27% of Grievants responding gave the agency an overall satisfaction rating of 0%, while 9% gave a 100% satisfaction level. A strong correlation obviously exists between satisfaction ratings and whether the grievant won or lost their grievance.

The Board plans to review thoroughly the customer survey results, and the recommendations, suggestions and complaints at its next meeting. The Board will meet with staff to discuss the results and to consider goals and projects to improve the agency's performance. The Board always receives comments and suggestions about which the Board has little or no control, or which would require changes in the law. In that regard the Board must emphasize that it does not generally make legislative recommendations or take positions on public policy questions. The reason for this practice is the Board's concern that its role as the neutral third party would be jeopardized if it did so. Nonetheless, the Board and its staff will carefully consider all testimony and information submitted and will make a good faith effort to improve its services.

Grievances Filed at Level Four and Adjudication Activities in 2001

Until last year when the number of grievances dropped significantly, the number of grievances filed at Level Four had not fluctuated significantly for several years. (7) The number of grievances filed in 2001 increased significantly compared to last year, but this numerical increase is misleading and can largely be accounted for by looking closely at the nature of the grievances filed. For example, nearly one hundred forty employees individually filed the same grievance against the Department of Health and Human Resources. Similarly, approximately forty higher education employees, most of whom are employed by West Virginia University, filed the same grievance. Considered in this light, the number of grievances filed in 2001 was still lower than many prior years. The table below shows the number of grievances filed for seven years by major category of employer.

| Grievances filed at Level Four | 2001 | 2000 | 1999 | 1998 | 1997 | 1996 | 1995 |
|---------------------------------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| State | 358 | 206 | 281 | 301 | 261 | 200 | 265 |
| Higher Education | 94 | 31 | 56 | 36 | 56 | 57 | 38 |

| | | | | | | | |
|-----------------------------------|------------|------------|------------|------------|------------|------------|------------|
| County Boards of Education | 182 | 174 | 213 | 186 | 269 | 277 | 283 |
| Totals | 634 | 411 | 550 | 523 | 586 | 534 | 586 |

Due to a number of circumstances, including the number of ALJs working and a low caseload, the Board issued fewer Decisions and Orders than in any year since at least 1988, as partially reflected in the table below.⁽⁸⁾ As noted earlier, however, the number of employees whose cases were processed this year was relatively large due to the consolidation of grievances by employees into one case and the filing of group grievances.

| | | | | | | | | |
|--|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| All Decisions and Orders | 2001 | 2000 | 1999 | 1998 | 1997 | 1996 | 1995 | 1994 |
| Decisions Issued | 260 | 293 | 329 | 366 | 422 | 339 | 349 | 313 |
| Dismissal Orders and Default Orders | 163 | 161 | 194 | 184 | 240 | 389 | 266 | 201 |
| Totals | 423 | 454 | 523 | 550 | 662 | 728 | 615 | 514 |

In 2001, as shown in the table below, ALJs issued their decisions more quickly than ever before. The law requires decisions to be issued within thirty working days. Average decision-making time was twenty working days. Average decision-making time was reduced another 5 percent in 2001, following a 28 percent reduction in 2000, and a 26 percent reduction in 1999. Only one case involving the dismissal of an employee was not issued within thirty working days. Further, 98 percent of all decisions were issued within sixty working days of becoming mature for decision. The table below shows the average number of working days it took to issue decisions after the cases became mature, average total case processing time at Level Four, the percentage of all cases issued within thirty working days, and the percentage of dismissal cases issued within thirty working days.⁽⁹⁾

| | | | | | | | |
|---|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| Decision-Making Time by Average Number of Working Days | 2001 | 2000 | 1999 | 1998 | 1997 | 1996 | 1995 |
| Decision-Making Time | 20 | 21 | 29 | 39 | 69 | 44 | 39 |

| | | | | | | | |
|---|-----|-----|-----|-----|-----|-----|-----|
| Total Processing Time | 122 | 115 | 168 | 149 | 181 | 145 | 136 |
| Percentage of Cases Decided within 30 Working Days | 80 | 79% | 81% | 52% | 19% | 38% | 40% |
| Dismissal Cases Decided within 30 Working Days | 96% | 75% | 89% | 71% | 37% | 41% | 60% |

The percentage of decisions appealed to circuit court has not fluctuated much from year to year, as shown in the table below. About 27 percent of all decisions issued by the Board since 1985 have been appealed. The Board has been notified that sixty-two (62) decisions issued in 2001, or 24%, have been appealed to circuit court.⁽¹⁰⁾

| | | | | | | | | | |
|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| 2001 | 2000 | 1999 | 1998 | 1997 | 1996 | 1995 | 1994 | 1993 | 1992 |
| 24% | 25% | 23% | 23% | 17% | 22% | 17% | 20% | 26% | 23% |

The overall percentage of grievances granted has not fluctuated greatly in the past several years, but did decline again in 2001, following a decline in 2000, as reflected in the table below.⁽¹¹⁾

| | | | | | | | |
|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| 2001 | 2000 | 1999 | 1998 | 1997 | 1996 | 1995 | 1994 |
| 18% | 23% | 29% | 29% | 26% | 26% | 24% | 27% |

Employees were represented by public employee unions or associations in 132 grievances, or 51%, of the 260 cases in which decisions were issued in 2001. Employees with union representation prevailed in 32 of 132 cases, or 24%. Employees with counsel prevailed in 10 of 53 cases, for 19%. Employees represented by a coworker or friend prevailed in one of eleven cases, or 9%. Employees representing themselves prevailed in 5 of 64 cases, or 8%.⁽¹²⁾

Of the 48 grievances granted in 2001, 32 or 67% were grievances against county boards of education. 13 or 27% of the cases granted were against state agencies, and one case or 2% were against the state department of education, and remaining two cases or 4% were against higher education institutions.

Appendix G contains a synopsis of the forty-eight grievances granted in 2001. In thirty-two of those cases, or 67%, employees were represented by a public

employee union or employee association. In ten of those cases, or 21%, employees were represented by an attorney. Employees representing themselves accounted for 10% of the grievances granted.

A breakdown by employment category for 2001 is set forth in the table below.

| 2001 DECISIONS | DECISIONS ISSUED | GRIEVANCES GRANTED | PERCENT GRANTED |
|---|-----------------------------|-------------------------------|----------------------------|
| Higher Education | 21 | 2 | 9.5% |
| State | 99 | 13 | 13% |
| Boards of Education -Professional Personnel (13) | 50 | 11 | 22% |
| Boards of Education -Service Personnel | 87 | 21 | 24% |
| State Department of Education | 3 | 1 | 33% |
| TOTALS | 260 | 48 | 18% |

The Board gives high priority to grievances in which employees were dismissed from employment to expedite the disposition of those cases. The number of dismissal grievances filed in 2001 was about equal to average number of dismissal grievances filed during the last five years, as is reflected in the table below. (14)

| Dismissal Cases | Cases Filed | Decisions Issued | Grievances Granted |
|----------------------------|------------------------|-----------------------------|-------------------------------|
| 2001 | 61 | 26 | 5 |
| 2000 | 42 | 28 | 5 |
| 1999 | 72 | 45 | 15 |
| 1998 | 65 | 41 | 12 |
| 1997 | 69 | 34 | 9 |

| | | | |
|------|----|----|---|
| 1996 | 61 | 21 | 6 |
|------|----|----|---|

The percentage of cases decided based upon the record made at lower levels of the grievance procedure, without a Level Four hearing, has remained relatively constant over the last several years, as shown in the following table.⁽¹⁵⁾

| Submitted on Record (SOR) Cases | 2001 | 2000 | 1999 | 1998 | 1997 | 1996 |
|---|-------------|-------------|-------------|-------------|-------------|-------------|
| Decisions Issued in SOR Cases | 39 | 48 | 60 | 63 | 82 | 53 |
| Working Days to Issue Decisions | 17 | 16 | 11 | 33 | 63 | 31 |
| Percentage of All Decisions Issued | 15% | 16% | 18% | 17% | 23% | 18% |

It is appropriate to note that the Board has tried a number of approaches for setting Level Four hearings. Experience has shown that scheduling the Level Four hearing within fifteen days of the request for a hearing, as required by law, works very poorly. The parties will usually request a continuance for one or more good reasons, such as they are trying to settle the dispute, they cannot get prepared that quickly, or key witnesses cannot be available on the date the hearing is set.

The Board has found that the most effective and efficient approach to setting hearings is to require the parties to confer with each other, and agree on three or four hearing dates. The hearing is then scheduled on the first date when the ALJ and a hearing room are available. Although the hearing date is ordinarily one the parties have agreed upon, the Board receives at least one request for a continuance in a large percentage of the cases. These continuance requests are generally not objected to by the other parties and are therefore routinely granted. Consequently, the number of hearings held, as shown in the table below, has always been much lower than the number of hearings scheduled.

| Hearing Activity | 2001 | 2000 | 1999 | 1998 | 1997 | 1996 | 1995 |
|---------------------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| Hearings Scheduled | 597 | 503 | 713 | 758 | 688 | 789 | 988 |
| Hearings Held | 275 | 279 | 329 | 337 | 313 | 303 | 386 |

Administrative Support Activities and Use of the Internet

The Board's secretarial staff assembled and transmitted seventy-five certified records to circuit clerk's offices throughout around the state in cases appealed to circuit court. This was fewer than any of the last five years.

| Records Certified to Circuit Court | 2001 | 2000 | 1999 | 1998 | 1997 | 1996 | 1995 |
|---|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| | 75 | 89 | 93 | 86 | 90 | 82 | 66 |

The Board's secretarial staff typed the transcripts in most of the decisions appealed. The Board contracts out for transcription services when its secretarial staff becomes backlogged and cannot meet court deadlines. This is happening somewhat more frequently as the Board employed fewer secretaries during 2001 than in the past several years. The Board decided not to fill two secretarial vacancies in branch offices after carefully reviewing the need for these positions and other legitimate business reasons.

Producing transcripts in grievances appealed to circuit court continues to be a substantial task for the Board's limited secretarial staff. Nonetheless, in 2001 the certified record was transmitted to the circuit clerk's office in most cases within thirty (30) days of receipt of the circuit court order requiring submission of the record.⁽¹⁶⁾

Hearings held at the Board's offices are mechanically recorded on four-track audio tapes. A transcript is not normally prepared, unless the decision is appealed to circuit court. The Board has equipped its hearing offices with high-speed tape duplicator reformatters and, upon request, it promptly gives the parties audio tapes of the hearing, instead of a transcript. In addition, when a case is appealed, the Board does give the parties a copy of the transcript in electronic form upon request when the transcript was prepared in-house.⁽¹⁷⁾ This approach has worked satisfactorily.

Since 1997 the Board has used the Internet to provide public employers and employees with access to its decisions and to improve its services. The Board's staff created a Home Page, on the State of West Virginia's Home Page, with the assistance of the Information Services and Communications Division of the Department of Administration (IS&C). In 2001 the Board's staff, as a part of its strategic plan, redesigned and improved the web page. The address is www.state.wv.us/admin/grievanc/grievanc.htm.

The web site is now the Board's primary method of distributing information. All decisions issued since January 1994 are on-line and fully searchable. New decisions are published twice a month. All decisions can be downloaded by year

in Rich Text Format, a format compatible with most word-processing software. The Board also publishes selected older decisions on the web. The Secretary of State's office is also provided copies of all decisions in electronic form twice a month.⁽¹⁸⁾

The Board's staff uses a Microsoft Access database, called Boardlaw, containing case summaries and pertinent information on more than four thousand seven hundred (4,700) decisions issued since 1985. The database is updated monthly with summaries of new decisions rendered and with any information received about decisions appealed to the courts. All the information in the database is published on the web page, and it can be quickly and easily searched.⁽¹⁹⁾ In addition, the database can be downloaded in a compressed form for use with Microsoft Access.⁽²⁰⁾

In 2001, the Board's staff designed a new grievance form for higher education employee grievances and made the other grievance forms more informative. The new forms are available on the web site in WordPerfect and Adobe Acrobat (PDF) format. The Board's Procedural Rules are also available on the web site in PDF and HTML format.

Customers have responded very positively to the web site, and are continuing to use it. According to monthly IS&C WebTrends reports, during the period from September through November 2001, the average number of user sessions per day was 432, lasting approximately twenty-one (21) minutes per session.

As required by W. Va. Code § 18-29-11 (1992), the Board provides a statewide quarterly report to inform the higher education governing boards, the county boards of education and employee organizations of current personnel-related issues. The Board issues the report monthly to disseminate the information more quickly. These reports have been redesigned and are now distributed primarily via the web page.

In accordance with W. Va Code § 18-29-11 (2000)(House Bill 4785), the Board sends an annual report to each county board of education within thirty days of the end of each school year. The report lists the number of grievances granted, denied, or otherwise disposed of during that school year. This report is also posted on the web site for each county board of education.

The Public Records Management and Preservation Act, W. Va. Code § 5A-8-9, requires, among other things, that all state agencies adopt and maintain a continuing program for efficient management of state records. This law requires all agencies to submit schedules for the retention and orderly disposal of each type of state record in their possession. The Board received approval of its

proposed retention and disposal plan in 2000, and some of its oldest records and grievance files were shredded and recycled in 2001. Each year old records will be disposed of in accordance with this plan.

This summary of administrative activities is not comprehensive. The Board does not keep data on all activities performed by its employees the administrative staff to assist customers and to keep the agency operating effectively and efficiently. For example, the Board's staff answers procedural questions about the grievance process on a daily basis.

Grievance Mediation Services

Mediation can be defined as a process in which a trained, neutral third party helps the parties negotiate a mutually acceptable agreement to resolve their dispute. Mediation emphasizes solutions that satisfy the interests of the parties, rather than litigation to decide which party has the "correct" legal position. Mediation may include the use of various problem-solving techniques to help the parties resolve future conflicts on their own, thus preventing future grievances.

The Board has been a leader in the use of mediation in state government. It began an experimental mediation project in 1991. The Legislature endorsed that project and passed W. Va. Code § 18-29-10, which required the Board to engage in mediation and other dispute resolution techniques to actively help the parties in identifying, clarifying and resolving issues prior to the Level Four hearing, to the extent feasible with existing personnel and resources. After the enactment of this law, the Board expanded its mediation program.⁽²¹⁾

A report on the progress of the mediation project was filed with the Legislature on December 23, 1992. In that report the Board recommended the grievance procedure laws be revised to give ALJs the authority to compel the parties to participate in settlement conferences. Under the law then in existence, ALJs could conduct settlement conferences only with the consent of the parties. W. Va. Code §§ 18-29-6 & 29-6A-6. In 1998, the Legislature adopted this recommendation for state employee grievances by amending W. Va. Code § 29-6A-6.

The Board continued to strongly encourage the use of mediation in 2001, emphasizing it would provide a mediator early in the grievance process, before an evidentiary hearing had been held. The Board publicized this free service in several ways, including speaking at seminars and distributing publications about mediation.

The ALJs hold prehearing conferences frequently, typically by a recorded telephone conference call, to identify and clarify issues, to encourage settlement discussions and explore the possibility of mediation. At least ninety-eight (89) prehearing conferences were held in 2001, compared with eighty-four (84) conferences the previous year.

The Board believes its mediation program works well, although the number of formal mediation sessions conducted in 2001 remained small.

| Mediation Sessions Conducted | 2001 | 2000 | 1999 | 1998 | 1997 | 1996 |
|--|-------------|-------------|-------------|-------------|-------------|-------------|
| After Cases Reached Level Four | 15 | 16 | 20 | 13 | 11 | 4 |
| Before Cases Reached Level Four | 2 | 5 | 7 | 0 | 0 | 0 |

It is very important to recognize that, although the overall percentage of grievances mediated remains small, the parties frequently settle grievances on their own without using the formal mediation process, even after the cases are appealed to Level Four.⁽²²⁾ One hundred forty-three (141), or 33 percent, of all grievances processed in 2001, were concluded by the issuance of a dismissal order. Many of these dismissal orders were issued after the parties settled the matter. What generally happens when a grievance is settled is the grievant will submit a written request to withdraw the case, and the case is then closed with the issuance of a dismissal order. Employees have the right to withdraw a grievance at any time.⁽²³⁾

About 53 percent of the cases mediated after reaching Level Four in 2001 were resolved satisfactorily, without the Board issuing a decision. This compares to a settlement rate of about 64 percent in 2000. In the two cases mediated prior to reaching Level Four in 2001, 50 percent, settled, while 80 percent settled in 2000. Disciplinary cases are the most frequently mediated type of case.

The Board continues to believe mediation is the single, most cost-effective means of resolving grievances. The proper use of mediation promotes equitable settlements to the benefit of all parties. Delay and costly litigation are eliminated. Public employers can clearly use mediation to save money, make more efficient use of their resources, retain some control over the outcome of grievances, and, most importantly, preserve the integrity of ongoing working relationships. The Board also believes that public employees clearly benefit from the use of grievance mediation, and it is not aware of any negative consequences resulting from its use.

The Board's mediation efforts have fostered a climate in which the parties discuss problems, consider possible solutions to problems and engage in settlement activity more frequently. Nonetheless, the Board's experience with mediation shows that only a relatively small percentage of its cases will be resolved through mediation. This is partly because the grievance procedure is itself a form of alternative dispute resolution, and therefore the incentives for settlement are not as great as in civil litigation. Moreover, the Board believes that settling workplace grievances in the public sector is more difficult and time consuming than in the private sector for a number of reasons.⁽²⁴⁾

Evaluation of Level Four Grievance Process and ALJ Performance

Based upon its observations and all available information, the Board believes the grievance procedure at Level Four continued to function well in 2001. By any objective measure, the Board's overall performance continued to improve. The ALJs were successful in reducing decision-making time, as discussed earlier, while the quality of decisions remained high. The Board believes the continuing efforts made to encourage the use of mediation early in the grievance process produced beneficial results to all parties and to the general public. The Board will continue to promote mediation in 2002. The Board believes its ALJs performed well. They adhered to the neutral and impartial role envisioned by the Legislature, provided fair hearings to all parties, and issued prompt high-quality decisions.⁽²⁵⁾ Grievances were decided based upon the law and the evidence, not on politics or any other impermissible factor.

The percentage of grievances granted or denied simply reflects the merits of the individual cases. ALJs deny grievances frequently because employees must meet a high legal standard to prevail. For example, in certain cases in which the grievant contends he should have been selected for a position rather than the successful applicant, the grievant cannot prevail unless he can prove the employer's decision was in violation of a statute, was arbitrary and capricious, or the selection process was significantly flawed.⁽²⁶⁾ Proving an employer abused its discretion or acted unreasonably is a heavy burden and is not frequently met. Similarly, certain types of employees, such as at-will or probationary employees, have only limited rights to continued employment and, therefore, grievances by these employees concerning the termination of their employment must frequently be denied.

Likewise, many compensation and classification grievances filed by state employees, and other types of cases as well, the real dispute concerns a determination made by the West Virginia Division of Personnel that adversely

affects an employee, rather than a dispute between the employee and his or her employer. Personnel's determinations are ordinarily not subject to reversal, unless the determination was clearly wrong. See W. Va. Dept. of Health and Human Resources v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993).⁽²⁷⁾ The same high standard applies where the State Superintendent of Schools has issued an interpretation of state school law, and Grievants request the ALJ to issue a decision contrary to the superintendent interpretation of the law. See Wood County Bd. of Educ. v. Smith 202 W. Va. 117, 120, 502 S.E.2d 214, 217 (1998) (discussing issue of conflicting state superintendent positions and stating that current interpretation should be accorded great weight unless such interpretation is clearly wrong).

In addition, ALJs have a limited role under the law. It is not the job of an ALJ to manage the agency or to substitute their judgment or management philosophy for agency personnel who have the responsibility to make personnel decisions. See Skaff v. Pridemore, 200 W. Va. 700, 709, 490 S.E.2d 787, 796 (1997) (ALJ found to have exceeded his authority in ordering employer to adopt a specific personnel policy).⁽²⁸⁾

The percentage of grievances granted by the Board's ALJs is similar to the results reported by the agency that handles federal employee grievances. The Annual Report of the Merit Systems Protection Board (MSPB) for Fiscal Year 2001 is available on its website at www.mspb.org. A chart on page 31 of that report shows the MSPB's Administrative Judges granted relief in about 26 percent of the cases decided on the merits that fiscal year, while the Grievance Board granted relief in about 18 percent of the decisions rendered in 2001. Furthermore, if the Grievance Board excluded from its calculation the number of grievances denied for lack of jurisdiction and as untimely filed, as the MSPB does, the Grievance Board's percentage of grievances granting relief would be higher.⁽²⁹⁾ According to a separate report, the MSPB granted about 20% of the grievances involving the discipline of federal employees in fiscal year 2001. In disciplinary cases, the Grievance Board's ALJs granted 10 of 46, or 22% of the grievances decided in 2001.

Furthermore, the Board staff contacted the Ohio State Personnel Board of Review (OSPBR) concerning the percentage of cases in which employees were granted relief in cases decided on the merits. The OSPBR covers both state and county public employees. From 1990 through 1999, the OSPBR reported that it granted about 13.7 percent of state employee cases, and 18 percent of county employee cases.

The low percentage of decisions reversed by the Courts is a good indicator that the ALJs are properly applying the law to diverse factual situations and are

rendering legally sound and fair decisions. By December 31, 2001, the Board had issued 4,739 decisions.⁽³⁰⁾ One thousand two-hundred fifteen (1,288), or 27%, of those decisions have been appealed to circuit court. The Board's records contain the following known results of judicial review: the courts have reversed about 166, or 13%, of the cases appealed.⁽³¹⁾

The Board continues to be concerned about lengthy delay in the processing of grievances at the lower levels. This problem, however, appears to be limited to a small number of state agencies and to stem from recruitment and retention problems of grievance evaluators, rather than an absence of good faith by management. The Board believes it vital for public employers to devote the time and resources necessary to address employee grievances in an expeditious manner.⁽³²⁾

Fiscal Summary

The Board exercises fiscal responsibility and is frugal in the expenditure of taxpayer funds. At the same time, the Board earnestly strives to comply with its legal duties and responsibilities under the law, and to provide quality customer service for employers and employees who utilize our services. The Board's actual expenditures have not increased in recent years, as shown in the table below.

| | |
|-----------------------------|-----------|
| Actual Expenditures FY 2001 | \$861,443 |
| Actual Expenditures FY 2000 | \$920,469 |
| Actual Expenditures FY 1999 | \$938,611 |
| Actual Expenditures FY 1998 | \$913,483 |
| Actual Expenditures FY 1997 | \$960,913 |

The Board does not charge for its services and generates no revenue.

Recommendations

Because of its role as the neutral third party, and its limited statutory duties and responsibilities, the Board, as noted earlier, generally does not take positions on public policy questions or make legislative suggestions.⁽³³⁾ The Board, however, will make two recommendations to the Governor and the Legislature.

First, the Board recommends, as it has numerous times before, that the Legislature revise the grievance procedure laws to help insure its complete neutrality. When the Executive Branch of State government was reorganized in 1989, the Board was placed within the Department of Administration, along with the West Virginia Division of Personnel. The Board objected to this change at the time. The Board continues to believe this organizational structure creates a conflict of interest, and creates an appearance of impropriety. For example, the Board must hear and decide grievances filed by employees who work for agencies that are within the Department of Administration. Some of these cases involve personnel decisions made by the Secretary of this Department, who has substantial control over the Board's budget. Public employees have expressed, and continue to express, a distrust of this agency partly because of this structural arrangement. It should be made clear, however, that no attempt has been made by anyone in authority to exert any influence or penalize the Board or its ALJs for performing their duties.

From a structural or organizational standpoint, the Board should be in a more autonomous position. Consequently, the Board favors an amendment to Chapter 5F of the West Virginia Code removing the Board from the Department of Administration, and making it an independent agency within the Executive Branch of government.

Second, the Board repeats last years recommendation that the grievance procedure for education employees be amended to give it the authority to require mediation when one party requests it. The Board was provided that power in state employee grievances in 1998,⁽³⁴⁾ and the Legislature should extend this change to education employee grievances to make the laws uniform. In addition, both grievance procedure laws should be amended to give ALJs the authority to compel the parties to participate in mediation, even without a request from a party. This authority might not need to be exercised frequently, but the selective use of compulsory mediation may achieve significant benefits in individual cases.

Final Comments about Level Four and Philosophy About Handling Grievances

The Board expects its ALJs to be fair and impartial in the performance of their duties.⁽³⁵⁾ Its ALJs and staff, of course, cannot please everyone. We know that as well as anybody. In most instances, the ALJs must rule for one party and against the other, in matters frequently of great importance, particularly to employees.

The Board believes a properly functioning employee grievance procedure is vital to any organization, and it may be especially important in the public sector. This State has good grievance laws designed to facilitate the settlement of grievances as soon as possible after they arise. This is important because grievances become magnified in importance and increasingly difficult to settle as they progress through the steps in the process.⁽³⁶⁾ Good grievance procedures are important but they alone do not insure the goals of these procedures will be achieved. The good faith attitude of everyone handling grievances is of paramount importance. The Legislature has recognized this by expressly requiring both employers and employees to act in good faith at all times and make every possible effort to resolve disputes at the lowest level. W. Va. Code § 29-6A-7.

The Board has little control and information about grievances at the lower levels that never reach the Board. For the grievance procedure to be effective at the lower levels, the Board feels the comments it made last year in the annual report should be reiterated. Public employers, employees, unions, and employee organizations should keep certain guiding principles firmly in mind. First, it should be stressed that the basic objective of the grievance procedure is not "winning" grievances, but resolving disputes in a fair and equitable manner. Second, supervisors and managers at all levels should consider grievances as aids to discovering and eliminating or reducing the underlying causes of discontent whenever possible. Third, when wrong decisions have been made, these mistakes should be acknowledged and corrected promptly. Fourth, everyone involved must be willing to devote adequate resources, time and attention to the handling and disposition of grievances. Fifth, if grievances are to be handled properly everyone must be thoroughly familiar with the governing personnel laws and regulations and Board decisions. See F. Elkouri, *How Arbitration Works* 154-155 (4th ed. 1985)(outlining recommendations made by the President's National Labor-Management Conference of 1945).

The Board intends to continue focusing on prompt decision making and avoiding unreasonable delay at Level Four, particularly unreasonable delay by ALJs in issuing decisions.⁽³⁷⁾ It will continue to promote the use of mediation and to provide mediators early in the grievance process. Finally, the Board will strive to continue improving the grievance process and meeting its statutory duties and responsibilities.

1. Employees of constitutional officers are not covered, unless they are in the classified service, and apparently none of these employees is in the classified service. Employees of the Legislature and uniformed members of the State Police are also expressly excluded. W. Va. Code § 29-6A-2(e). County health department employees covered by a merit system are entitled to use the

grievance procedure. W. Va. Dept. of Admin. v. W. Va. Dept. of Health and Human Resources/Boone County Health Dept., 192 W. Va. 202, 451 S.E.2d 768 (1994).

2. House Bill 4314, effective July 1, 1998.

3. The Board first made this recommendation to the Legislature in 1992. The law was also amended to make it clear that ALJs can require the parties in a state employee grievance to participate in settlement conferences. W. Va. Code § 29-6A-6 (1998).

4. The West Virginia Division of Personnel has placed these positions in the class title of ALJ II in its classified-exempt plan.

5. The Director performs administrative duties and functions as the chief administrative law judge.

6. For example, "Grievance" is defined by W. Va. Code § 29-6A-2(i) (1988) as:

"Any claim by one or more affected state employees alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of their employer; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees."

Pension, retirement and medical insurance matters, however, are expressly excluded, and not grievable.

7. Appendix D shows the number of grievances filed at Level Four against particular county boards of education, the State Department of Education and other entities for several years. Likewise, Appendix E shows the number of grievances filed at Level Four against particular higher education institutions, and Appendix F shows the number of grievances filed at Level Four against State bureaus and departments.

8. Dismissal orders are often entered when grievances have been prematurely appealed to Level Four without a required lower level hearing having been held, or when cases are settled and the grievant requests that the grievance be

dismissed. Occasionally, however, these rulings involve complicated procedural or substantive issues.

9. A case is considered mature for decision on the date the ALJ has everything he or she needs to render a decision. For example, a case is not considered mature for decision until proposed findings of fact and conclusions of law are filed, or the time for filing proposed findings and conclusions has expired. On the other hand, where the parties agree to submit the case for decision at the close of the hearing without filing briefs, the case is counted as mature on that date. The law states that ALJs must render their decisions within thirty (30) working days after the Level Four hearing.

10. Two Dismissal Orders issued in 2001 are known to have been appealed. None of the twenty-two Default Orders issued in 2001 are known to have been appealed to circuit court.

11. Cases were counted as granted, if the grievance was granted in any part. Cases were counted as denied, if the grievance was dismissed or denied without reaching the merits of the grievance. This would include grievances dismissed on jurisdictional grounds and cases that were denied on procedural grounds, such as being untimely filed. Approximately fourteen grievances, or 7% of all cases denied in 2001, were denied as untimely.

12. In calendar year 2000, self-represented employees prevailed in 22% of the cases. Perhaps surprisingly, employees with legal representation also prevailed about 22% of the time. Employees with union assistance prevailed in 24% of the decisions issued. Union representation was provided in 63% of the grievances granted that year.

13. One grievance was filed by a group consisting of both professional and school service personnel employed by a county board of education. For purposes of this report, that grievance has been counted as a case filed by professional personnel.

14. In 2001, the Board disposed of an additional twenty-two (22) dismissal cases and twelve (12) suspension cases by Dismissal Order, due to such factors as settlement agreements, withdrawals and failure to appear.

15. Twenty-three percent of these cases decided in 2001 were granted.

16. The Administrative Procedures Act, specifically W. Va. Code § 29A-5-4(d), provides that an agency shall transmit, within fifteen days of receipt of the petition for appeal or within such further time as the court may allow, a certified copy of the record to the circuit court. Circuit courts must decide cases on appeal

based only upon the evidentiary record developed in the grievance procedure. See W. Va. Code §§ 18-29-7 & 26-6A-7.

17. The Board's staff has devised a method of preparing digital transcripts that enables the parties to pinpoint cite to the page numbers where testimony appears in the official, paper transcript certified to the circuit court. This innovative technique has been well received by attorneys who handle grievance appeals.

18. Final decisions are filed with the Secretary of State's office in accordance with W. Va. Code § 29A-2-9.

19. This Board began using ColdFusion software this year to make it easier for everyone to search the database. The Board considers this a significant enhancement to the web page.

20. This database is a valuable research tool for the ALJs and all interested persons who need to be aware of new precedent interpreting and applying personnel laws and regulations applicable to public employees.

21. The ALJs serve as mediators and are generally able to schedule mediation sessions so as not to delay the processing of the case. All ALJs have received either one or two days of intensive mediation training sponsored by the United States District Court for the Northern District of West Virginia and/or the West Virginia State Bar. The Board has also held in-house mediation training for its ALJs, focusing on recent trends in workplace mediation. Individual ALJs have pursued additional training in conflict management, problem-solving and mediation.

22. One hundred forty-three (143), or 32%, of all grievances processed in 2000, were concluded by the issuance of a dismissal order.

23. See W. Va. Code §§ 18-29-3(d) & 29-6A-3(d).

24. One reason is that public employers have fewer settlement options in certain types of cases due to statutory and policy requirements.

25. Since at least 1989, the Board has required its ALJs to adhere to the general principles contained in the Code of Judicial Conduct, although this code, by its terms, applies only to the judicial branch, not ALJs in the executive branch.

26. See, Syl. pt. 3, *Dillon v. Wyoming County Board of Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986).

27. According to the Division of Personnel's Annual Report for Fiscal Year 2000, 317 back pay awards were granted that year totaling \$593,488.00. The report states that back pay awards may be granted as the result of a grievance decision, a court order, or an order from the United States Department of Labor. See Pages 6 & 21. The report is available on the web at www.state.wv.us/admin/personnel/empcom/annrpt00.pdf.

28. The Board's staff made a comparison of the rate it grants grievances with two other government agencies performing similar functions: the federal Merit Systems Protection Board and the Ohio State Personnel Board of Review. This limited comparison revealed the Board granted grievances more frequently than either of these agencies.

29. Meaningful and reliable comparisons of the results of grievances and civil service appeals is, of course, difficult due to the wide variety of laws that exist in other jurisdictions.

30. By the end of 2001, the Board had also issued more than eighty 80 default orders.

31. A decision is counted as reversed, if the Court reverses in whole or in part.

32. The Legislative has put short time periods for the completion of every step in the grievance process. In addition, employees have the right to bypass or skip steps in the grievance procedure where the employer has not complied with the time limits for holding hearings. See W. Va. Code § 29-6A-3(a). Employees may also seek to prevail by default on the grounds the employer failed to comply with the time limits for holding hearings and issuing decisions. W. Va. Code §§ 18-29-3(a) & 29-6A-3(a)(2).

33. The Board does not have statutory authority to make studies of this state's employment policies.

34. W. Va. Code § 29-6A-12 (1998).

35. For several years the Board has required its ALJs to adhere to the general principles contained in the Code of Judicial Conduct, although this code, by its terms, applies only to the judicial branch, not ALJs in the executive branch.

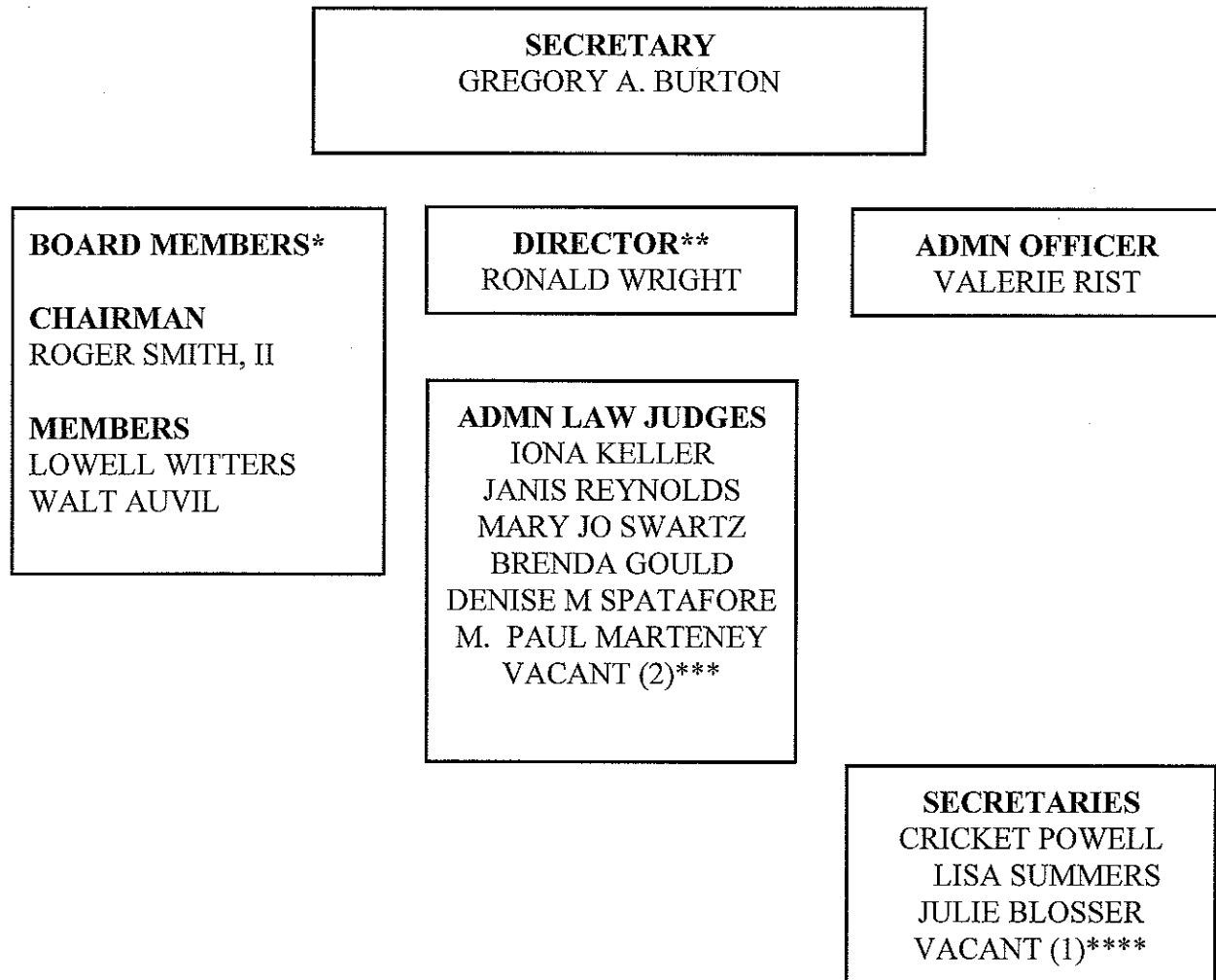
36. See F. Elkouri, *How Arbitration Works* 157 (4th ed. 1985)

37. Parties frequently delay cases for legitimate reasons. Delay caused by the parties' desire to submit findings of fact and conclusions of law is not considered

unnecessary delay. Many circumstances can contribute to delay, including the complexity of the legal and factual issues presented, fluctuating caseloads, turnover in ALJ positions, performance problems, and other human factors present in any agency.

ORGANIZATIONAL CHART

WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

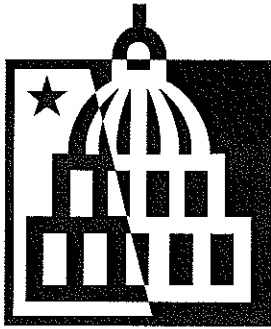


* Board appointed by Governor, Code, 18-29-5,
Board part of DOA, Code, 5F-2-1 (a) (7)

** No statutory provision for a Director

*** One ALJ position eliminated in Oct. 2000 to
provide for merit increases.

**** A part-time Secretary I position eliminated
in October 2001 for budgetary reasons.



State of West Virginia

Education and State Employees Grievance Board

www.state.wv.us/admin/grievanc/grievanc.htm

Customer Satisfaction Survey

We would appreciate your help in telling us how we can improve the services provided by the Education and State Employees Grievance Board. Please respond to the questions below and mail your completed survey to: Customer Survey; 808 Greenbrier Street, Charleston, WV 25311. **All surveys must be postmarked no later than January 19, 2002.** You may also fax this information by that date to (304) 558-1106. If you have any questions regarding this survey, please feel free to contact Ron Wright of the Grievance Board at (304) 558-3361 or toll-free at 866-747-6743.

I. Adjudication Services: Administrative Law Judge Performance

| | Excellent | Good | Fair | Poor | Very Poor | Not Applicable |
|--|-----------|------|------|------|-----------|----------------|
| 1. Promptness in deciding cases | 5 | 4 | 3 | 2 | 1 | N/A |
| 2. Quality of written decisions, e.g., readability, proper discussion of legal and factual issues | 5 | 4 | 3 | 2 | 1 | N/A |
| 3. Ability to conduct orderly and fair hearings | 5 | 4 | 3 | 2 | 1 | N/A |
| 4. Knowledge of law applicable to the hearing | 5 | 4 | 3 | 2 | 1 | N/A |
| 5. Conscientiousness in finding facts and interpreting the law without regard to public criticism | 5 | 4 | 3 | 2 | 1 | N/A |
| 6. Courtesy to parties and witnesses | 5 | 4 | 3 | 2 | 1 | N/A |
| 7. Please rank the top three (3) qualities, by question number listed above, which you find most important. For example, if promptness in deciding cases is the most important, you would place a "1" in the first blank space. (most important) _____ (second most important) _____ (third most important) _____ | | | | | | |

II. Level Four of Grievance Procedure: Administrative and Secretarial Staff

| | | | | | | |
|--|---|---|---|---|---|-----|
| 8. Simplicity of forms utilized to file grievance | 5 | 4 | 3 | 2 | 1 | N/A |
| 9. Simplicity of procedure | 5 | 4 | 3 | 2 | 1 | N/A |
| 10. Promptness in obtaining a hearing date | 5 | 4 | 3 | 2 | 1 | N/A |
| 11. Promptness in responding to requests for information about the grievance procedure | 5 | 4 | 3 | 2 | 1 | N/A |
| 12. Accuracy of information provided | 5 | 4 | 3 | 2 | 1 | N/A |
| 13. Courtesy of staff | 5 | 4 | 3 | 2 | 1 | N/A |

See Reverse Side for Continuation of Customer Survey

III. General Comments:

14. Circle the percentage of your overall satisfaction in doing business with the Grievance Board 100% 90% 80% 70% 60% 50% 40% 30% 20% 10% 0%
15. During 2001, has your overall satisfaction with the Grievance Board:
☐ Increased ☐ Decreased ☐ Remained the Same ☐ Not Applicable
16. What are your top three (3) recommendations to improve the services provided by the Grievance Board?
-
-
-
-
-
-
-
-
-
-
17. Is there anything else you want to tell us?

IV. Customer Information

Please check the box that best describes your role in the grievance procedure:

- | | |
|--|-----------------------------------|
| <input type="checkbox"/> Grievant | <input type="checkbox"/> Employer |
| <input type="checkbox"/> Employee Representative | <input type="checkbox"/> Counsel |
| <input type="checkbox"/> Other _____ | |

(Completing the information below is *optional*, although it may assist us in following up on your comments or complaints)

Name: _____

Agency: _____

Address: _____

Thank You for Your Response

Average Rating by Customer of Adjudication Services for 2001

| Customer Type | # of Responses | Overall | Prompt Decision | Quality Decision | Orderly Hearing | Know Law re Hearing | Public Criticism | Courtesy |
|---------------|----------------|---------|-----------------|------------------|-----------------|------------------------|------------------|----------|
| COUNSEL | 15 | 84.33 | 4.13 | 4.07 | 4.27 | 4.33 | 4.07 | 4.47 |
| EMPLOYEE REP | 12 | 40.83 | 2.92 | 2.92 | 3.08 | 2.67 | 2.58 | 3.50 |
| EMPLOYER | 20 | 87.50 | 3.85 | 4.45 | 4.45 | 4.45 | 4.35 | 4.65 |
| GRIEVANT | 44 | 38.37 | 2.80 | 2.32 | 2.68 | 2.79 | 2.05 | 3.11 |
| OTHER | 2 | 95.00 | 4.50 | 4.50 | 4.50 | 4.50 | 4.50 | 4.50 |

Average Rating by Customer of Adjudication Services for 2000

| Customer Type | # of Responses | Overall | Prompt Decision | Quality Decision | Orderly Hearing | Know Law re Hearing | Public Criticism | Courtesy |
|---------------|----------------|---------|-----------------|------------------|-----------------|------------------------|------------------|----------|
| COUNSEL | 15 | 94.00 | 4.27 | 4.40 | 4.47 | 4.53 | 4.53 | 4.87 |
| EMPLOYEE REP | 3 | 93.33 | 5.00 | 5.00 | 5.00 | 4.67 | 5.00 | 4.67 |
| EMPLOYER | 19 | 82.63 | 3.84 | 4.22 | 4.68 | 4.58 | 4.50 | 4.68 |
| GRIEVANT | 37 | 40.23 | 3.08 | 2.95 | 2.94 | 3.20 | 2.71 | 3.83 |
| OTHER | 4 | 75.00 | 3.33 | 4.33 | 4.33 | 4.33 | 4.33 | 4.67 |

Average Rating by Customer of Administrative Procedures and Staff For 2001

| Customer Type | # of Responses | Overall Satisfaction | Forms Simple | Procedure Simple | Prompt Hearing Date | Prompt Info Response | Info Accuracy | Staff Courtesy |
|---------------|----------------|----------------------|--------------|------------------|------------------------|-------------------------|---------------|----------------|
| COUNSEL | 15 | 84.33 | 4.60 | 4.47 | 4.40 | 3.60 | 4.20 | 4.20 |
| EMPLOYEE REP | 12 | 40.83 | 3.33 | 2.58 | 3.33 | 3.08 | 3.33 | 3.75 |
| EMPLOYER | 20 | 87.50 | 3.55 | 3.55 | 3.90 | 3.60 | 3.70 | 4.40 |
| GRIEVANT | 44 | 38.37 | 2.68 | 2.40 | 2.32 | 2.32 | 2.52 | 3.07 |
| OTHER | 2 | 95.00 | 4.50 | 4.50 | 4.50 | 4.50 | 4.50 | 4.50 |

Average Rating by Customer of Administrative Procedures and Staff For 2000

| Customer Type | # of Responses | Overall Satisfaction | Forms Simple | Procedure Simple | Prompt Hearing Date | Prompt Info Response | Info Accuracy | Staff Courtesy |
|---------------|----------------|----------------------|--------------|------------------|------------------------|-------------------------|---------------|----------------|
| COUNSEL | 15 | 94.00 | 4.60 | 4.47 | 4.93 | 4.93 | 4.60 | 4.53 |
| EMPLOYEE REP | 3 | 93.33 | 4.33 | 4.00 | 4.50 | 4.67 | 4.67 | 4.67 |
| EMPLOYER | 19 | 82.63 | 4.11 | 4.00 | 4.22 | 4.29 | 4.26 | 4.21 |
| GRIEVANT | 37 | 40.23 | 3.53 | 3.32 | 2.92 | 3.09 | 3.22 | 3.97 |
| OTHER | 4 | 75.00 | 3.33 | 3.33 | 3.50 | 3.75 | 4.00 | 4.50 |

APPENDIX D

GRIEVANCES FILED AT LEVEL FOUR AGAINST COUNTY BOARDS OF EDUCATION, THE STATE DEPARTMENT OF EDUCATION AND OTHER ENTITIES

CALENDAR YEARS 2001 THROUGH 1995

| County Boards of Education: | 2001 | 2000 | 1999 | 1998 | 1997 | 1996 | 1995 |
|------------------------------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| Barbour County Board | 2 | 0 | 2 | 0 | 0 | 2 | 3 |
| Berkeley County Board | 2 | 4 | 2 | 1 | 7 | 5 | 1 |
| Boone County Board | 1 | 6 | 6 | 6 | 1 | 5 | 10 |
| Braxton County Board | 0 | 2 | 0 | 2 | 1 | 1 | 1 |
| Brooke County Board | 0 | 1 | 2 | 1 | 0 | 3 | 4 |
| Cabell County Board | 9 | 9 | 7 | 0 | 11 | 9 | 9 |
| Calhoun County Board | 0 | 1 | 1 | 3 | 0 | 0 | 0 |
| Clay County Board | 0 | 0 | 2 | 0 | 1 | 1 | 0 |
| Doddridge County Board | 0 | 0 | 2 | 0 | 0 | 0 | 0 |
| Fayette County Board | 3 | 1 | 1 | 3 | 7 | 8 | 5 |
| Gilmer County Board | 0 | 0 | 0 | 1 | 0 | 0 | 4 |
| Grant County Board | 0 | 1 | 2 | 1 | 3 | 2 | 2 |
| Greenbrier County Board | 4 | 2 | 2 | 1 | 5 | 7 | 5 |
| Hampshire County Board | 1 | 1 | 1 | 0 | 3 | 1 | 1 |
| Hancock County Board | 3 | 5 | 7 | 9 | 12 | 11 | 10 |
| Hardy County Board | 1 | 0 | 1 | 0 | 0 | 1 | 1 |
| Harrison County Board | 15 | 4 | 8 | 4 | 4 | 5 | 4 |
| Jackson County Board | 2 | 1 | 4 | 1 | 3 | 2 | 3 |
| Jefferson County Board | 6 | 3 | 1 | 4 | 2 | 2 | 3 |
| Kanawha County Board | 20 | 22 | 25 | 13 | 17 | 19 | 17 |
| Lewis County Board | 1 | 0 | 4 | 2 | 4 | 3 | 0 |
| Lincoln County Board | 5 | 7 | 20 | 30 | 33 | 7 | 9 |
| Logan County Board | 5 | 8 | 7 | 7 | 18 | 15 | 21 |
| Marion County Board | 5 | 4 | 1 | 3 | 2 | 5 | 5 |
| Marshall County Board | 2 | 1 | 2 | 1 | 3 | 0 | 0 |

| | | | | | | | |
|---------------------------------|----|----|----|----|----|----|----|
| Mason County Board | 2 | 3 | 5 | 4 | 5 | 9 | 7 |
| McDowell County Board | 3 | 1 | 5 | 0 | 2 | 5 | 7 |
| Mercer County Board | 2 | 1 | 1 | 2 | 10 | 3 | 8 |
| Mineral County Board | 1 | 4 | 3 | 5 | 3 | 2 | 3 |
| Mingo County Board | 3 | 5 | 6 | 15 | 40 | 49 | 67 |
| Monongalia County Board | 12 | 20 | 14 | 11 | 0 | 8 | 4 |
| Monroe County Board | 2 | 1 | 5 | 3 | 2 | 6 | 5 |
| Morgan County Board | 1 | 0 | 1 | 3 | 3 | 4 | 1 |
| Nicholas County Board | 3 | 1 | 5 | 4 | 3 | 3 | 2 |
| Ohio County Board | 3 | 1 | 2 | 1 | 2 | 3 | 3 |
| Pendleton County Board | 1 | 0 | 0 | 2 | 1 | 0 | 4 |
| Pleasants County Board | 0 | 0 | 0 | 1 | 0 | 0 | 0 |
| Pocahontas County Board | 1 | 4 | 0 | 0 | 2 | 0 | 0 |
| Preston County Board | 3 | 8 | 4 | 1 | 0 | 0 | 4 |
| Putnam County Board | 5 | 7 | 13 | 6 | 12 | 3 | 4 |
| Raleigh County Board | 16 | 5 | 3 | 2 | 10 | 12 | 9 |
| Randolph County Board | 2 | 7 | 3 | 5 | 3 | 7 | 4 |
| Ritchie County Board | 4 | 0 | 0 | 2 | 1 | 1 | 0 |
| Roane County Board | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Summers County Board | 3 | 1 | 1 | 3 | 2 | 6 | 5 |
| Taylor County Board | 1 | 0 | 0 | 0 | 0 | 1 | 2 |
| Tucker County Board | 5 | 0 | 1 | 1 | 1 | 3 | 0 |
| Tyler County Board | 0 | 1 | 0 | 0 | 0 | 3 | 0 |
| Upshur County Board | 0 | 2 | 1 | 2 | 1 | 2 | 1 |
| Wayne County Board | 5 | 6 | 11 | 6 | 6 | 5 | 4 |
| Webster County Board | 1 | 2 | 1 | 0 | 3 | 4 | 2 |
| Wetzel County Board | 4 | 2 | 1 | 2 | 3 | 6 | 2 |
| Wirt County Board | 0 | 0 | 0 | 1 | 1 | 0 | 0 |
| Wood County Board | 4 | 0 | 5 | 3 | 5 | 6 | 4 |
| Wyoming County Board | 3 | 2 | 4 | 1 | 4 | 2 | 5 |
| Multi-County Vocational Centers | 1 | 0 | 1 | 0 | 0 | 2 | 3 |
| Regional Educ. Serv. Agencies | 0 | 0 | 0 | 1 | 2 | 1 | 0 |
| W. Va. Department of Education | 4 | 7 | 7 | 6 | 5 | 6 | 4 |

| | | | | | | | |
|---------------|------------|------------|------------|------------|------------|------------|------------|
| Totals | 182 | 174 | 213 | 186 | 268 | 276 | 283 |
|---------------|------------|------------|------------|------------|------------|------------|------------|

APPENDIX E

GRIEVANCES FILED AT LEVEL FOUR AGAINST HIGHER EDUCATION INSTITUTIONS

CALENDAR YEARS 2001 THROUGH 1997

| STATE COLLEGES | 2001 | 2000 | 1999 | 1998 | 1997 |
|---|-------------|-------------|-------------|-------------|-------------|
| Bluefield State College | 5 | 0 | 0 | 1 | 2 |
| Concord State College | 2 | 0 | 0 | 2 | 1 |
| Fairmont State College | 2 | 2 | 1 | 0 | 2 |
| Glenville State College | 0 | 0 | 0 | 0 | 0 |
| Potomac State College | 1 | 0 | 0 | 0 | 1 |
| Shepherd College | 7 | 2 | 4 | 1 | 7 |
| West Liberty State College | 1 | 1 | 3 | 4 | 4 |
| W. Va. Univ. Institute of Technology | 0 | 0 | 0 | 0 | 0 |
| W. Va. Northern Community College | 0 | 3 | 0 | 2 | 2 |
| W. Va. Southern Community & Technical College | 1 | 1 | 1 | 1 | 6 |
| W. Va. State College | 1 | 1 | 8 | 2 | 3 |
| STATE UNIVERSITIES | 0 | | | | |
| Marshall University | 14 | 10 | 11 | 10 | 8 |
| W. Va. University | 60 | 10 | 28 | 13 | 18 |
| W. Va. University Hospitals | 0 | 0 | 0 | 0 | 0 |
| W. Va. School of Osteopathic Med. | 0 | 0 | 0 | 0 | 2 |
| WVNET | 0 | 1 | 0 | 0 | 0 |
| Totals | 94 | 31 | 56 | 36 | 56 |

APPENDIX F

GRIEVANCES FILED AT LEVEL FOUR AGAINST STATE AGENCIES

CALENDAR YEARS 2001 THROUGH 1997

| | 2001 | 2000 | 1999 | 1998 | 1997 |
|--|------|------|------|------|------|
| Administration, Department of | | | | | |
| Consolidated Public Retirement Bd. | 0 | 1 | 0 | 0 | 0 |
| General Services | 2 | 0 | 3 | 1 | 4 |
| Grievance Board | 0 | 0 | 0 | 0 | 0 |
| Personnel | 0 | 0 | 0 | 3 | 0 |
| Public Employees Insurance Agency | 0 | 3 | 0 | 0 | 0 |
| Purchasing | 1 | 0 | 0 | 1 | 0 |
| Risk & Insurance Management | 0 | 0 | 0 | 0 | 1 |
| Agriculture, Department of | 0 | 0 | 0 | 0 | 0 |
| Attorney General's Office | 0 | 1 | 0 | 0 | 0 |
| Auditor's Office | 0 | 0 | 1 | 0 | 0 |
| Commerce, Bureau of | | | | | |
| Forestry | 0 | 0 | 0 | 0 | 1 |
| Labor | 0 | 3 | 3 | 1 | 4 |
| Miners' Health, Safety & Training | 0 | 0 | 0 | 0 | 2 |
| Natural Resources | 1 | 4 | 2 | 6 | 2 |
| Tourism & Parks | 0 | 2 | 0 | 0 | 0 |
| Education & the Arts, Department of | | | | | |
| Culture and History | 0 | 0 | 0 | 2 | 2 |
| Educational Broadcasting Authority | 0 | 0 | 1 | 1 | 0 |
| Library Commission | 1 | 1 | 0 | 0 | 0 |
| Rehabilitation Services | 5 | 6 | 5 | 13 | 3 |
| Employment Programs, Bureau of | 20 | 9 | 6 | 14 | 13 |
| Environment Protection, Department of | 12 | 2 | 2 | 3 | 6 |
| Health and Human Resources, Department of | 212 | 76 | 77 | 70 | 67 |
| Military Affairs & Public Safety, Department of | | | | | |
| Adjutant General | 0 | 0 | 1 | 0 | 4 |

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|---|------------|------------|------------|------------|------------|
| Corrections | 28 | 40 | 94 | 65 | 48 |
| Juvenile Services | 8 | 3 | 8 | 15 | NA |
| Public Safety | 2 | 1 | 2 | 12 | 1 |
| Regional Jail Authority | 2 | 5 | 4 | 11 | 7 |
| Veteran's Affairs | 3 | 3 | 3 | 1 | 2 |
| Public Service Commission | 1 | 0 | 1 | 3 | 1 |
| Senior Services, Bureau of | 1 | 1 | 0 | 2 | NA |
| Tax & Revenue, Department of | 2 | 3 | 7 | 5 | 0 |
| Alcohol Beverage Control Administration | 1 | 1 | 0 | 2 | 5 |
| Transportation, Department of | | | | | |
| Highways | 46 | 24 | 32 | 40 | 62 |
| Motor Vehicles | 1 | 0 | 5 | 4 | 4 |
| Parkways, Economic Dev. & Tourism Authority | 7 | 15 | 14 | 19 | 14 |
| County Health Departments | | | 9 | 4 | 6 |
| Berkeley County | 1 | 0 | | | |
| Clay County | 1 | 0 | | | |
| Preston County | 0 | 1 | | | |
| Monongalia County | 1 | 0 | | | |
| Morgan County | 1 | 1 | | | |
| Totals | 360 | 206 | 281 | 301 | 262 |

This table reflects the current organizational structure of State government. Please note that although employees of constitutional officers occasionally file grievances, the Board does not have jurisdiction over grievances filed by such employees. See Footnote 1 of this report. Please also note that the Board's electronic docketing system does not always enable it to identify the specific division or organizational unit within a department or bureau where the grievances arose. Starting with last year's annual report, the Board lists the county health departments where grievances arose.

2001 Decisions Granted

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| Topics | APPRENTICESHIP; SALARY INCREASE | Docket No. 01-CORR-009 |
| Synopsis | <p>Grievants completed apprenticeship program on various dates in June 2000, but their</p> <p>certificates indicated they completed the program in September 2000. Likewise,</p> <p>Corrections delayed submission of Grievants' certificate of completion and they did not</p> <p>receive their 5% salary increase until October, 2000. Grievants successfully proved</p> <p>Corrections did not comply with its own policy and unnecessarily delayed processing</p> <p>Grievants certificates of completion. Grievants are entitled to back pay from their various</p> <p>dates of completion of the apprenticeship program. Grievance GRANTED.</p> | |
| Topics | COMPETENCY TEST | Docket No. 01-54-427 |
| Synopsis | <p>Grievant took and passed a state competency test for the carpenter classification several</p> <p>years ago, but did not get the job he applied for then. After applying for new posting, he</p> <p>was required to retake the test because a portion of the test had been changed.</p> <p>DECISION: Once taken and passed, he need not take test again even if test changes.</p> <p>Grievance GRANTED.</p> | |
| Topics | DEFAULT | Docket No. 01-CORR-011D |
| Synopsis | <p>Grievant filed a claim seeking a promotion from corporal to sergeant. Grievant established</p> <p>that Respondent was in default in processing his grievance. Accordingly, an Order was</p> <p>issued on February 13, 2001, giving Respondent five days from receipt to request a</p> <p>hearing to establish the remedy sought was contrary to law or clearly wrong. The ALJ</p> <p>found that Respondent did not make a timely request for such a hearing, and</p> | |

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| | ordered | |
| | Grievant promoted as requested, with back pay, interest, and seniority. | |
| | Grievance | |
| | GRANTED. | |
| Topics | DEFAULT; REMEDY; WRITTEN REPRIMAND | Docket No. 01-HHR-104D |
| Synopsis | Grievant claimed a default occurred, and Respondent conceded the issue of default. | |
| | Respondent declined to present evidence to prove the charges against Grievant as stated | |
| | in the written reprimand Grievant received, or to otherwise dispute that the remedy | |
| | requested was clearly wrong or contrary to law. Grievance GRANTED. | |
| Topics | DISMISSAL | Docket No. 01-HHR-508 |
| Synopsis | Grievant was charged with patient abuse, specifically, choking a patient, hanging up the | |
| | telephone while the patient was trying to use it, and using an improper restraint | |
| | technique. Respondent did not prove Grievant choked a patient. While he did use an | |
| | improper restraint technique, he acted appropriately in his efforts to protect a co-worker | |
| | from harm, and he could not use a proper restraint technique without the co-worker's | |
| | assistance. The co-worker was ducking to avoid being hit with the telephone receiver, | |
| | and could not assist Grievant at that time. Grievant did hang up the telephone while the | |
| | patient was attempting to use it; however, Respondent did not demonstrate this was | |
| | patient abuse or was otherwise improper under the circumstances. Grievance | |
| | GRANTED. | |
| Topics | DISMISSAL | Docket No. 98-52-337 |
| Synopsis | Grievant was convicted of a felony in the Marion County Circuit Court in July 1998. In | |
| | August 1998 Respondent dismissed Grievant, and Superintendent Dean notified | |

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| | the State | |
| | Superintendent of Schools so that Grievant's teaching license might be revoked. In July | |
| | 2000, the W. Va. Supreme Ct. of Appeals reversed the decision and remanded the case | |
| | to Circuit Court for a new trial. Subsequently, Grievant entered into a plea agreement in | |
| | which he pled no contest to the misdemeanor charges, and the felony charge was | |
| | dropped by the Prosecuting Attorney. Grievant seeks reinstatement to his teaching | |
| | position; however, Respondent asserts that the dismissal was proper since Grievant was | |
| | found guilty of a felony. | |
| | DECISION: The provision allowing dismissal of an employee found guilty of a felony, set | |
| | forth in W. Va. Code § 18A-2-8, was not intended to apply until the appeal process was | |
| | complete. Grievance GRANTED. | |
| Topics | DISMISSAL; CAUSE; INVESTIGATION; NUDE | Docket No. 00-COMM-128 |
| | PHOTOGRAPH; CREDIBILITY | |
| Synopsis | Grievant was wrongly fired while on workers compensation leave when her three | |
| | subordinates invented stories about her which were accepted without investigation by her | |
| | superiors. Grievance GRANTED. | |
| Topics | DISMISSAL; GOOD CAUSE; PORNOGRAPHY; | Docket No. 00-HHR-224 |
| | OBSCENITY; INVESTIGATION | |
| Synopsis | Grievant's dismissal for insubordination was improper where the photograph he printed | |
| | was not obscene, Grievant was charged with insubordination for failing to obey conflicting | |
| | orders, the policy relied on by employer was not in effect or known to grievant, and | |

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| | employer's investigation was shoddy. Grievance GRANTED. | | |
| Topics | DISMISSAL; SEXUAL HARASSMENT/ABUSE; | Docket No. | 01-54-115 |
| | IMMORALITY; WILLFUL NEGLECT OF DUTY | | |
| Synopsis | Grievant was dismissed from employment, based upon allegations from a seventh grade | | |
| | student that, on several separate occasions, he hugged her, kissed her, touched her | | |
| | buttocks, and touched her crotch. Only one of these incidents was corroborated by | | |
| | another witness, whose testimony was somewhat inconsistent with the alleged victim's, | | |
| | although some of the events took place in crowded hallways during school. The student | | |
| | who made the allegations was a troubled child with some mental and emotional problems, | | |
| | and teachers testified that they would question her truthfulness. Grievant's testimony | | |
| | was more credible than hers, so a preponderance of the evidence did not establish his | | |
| | guilt. Also, it was found that an allegation by a student in 1994 could not be used to | | |
| | show a pattern or practice of conduct, nor could it be used solely to boost the credibility | | |
| | of Respondent's witness, because it was too far removed from current events. Grievant is | | |
| | to be reinstated. Grievance GRANTED. | | |
| Topics | EVALUATION; ABUSE OF DISCRETION | Docket No. | 00-HHR-375 |
| Synopsis | Grievant's immediate supervisor prepared Grievant's yearly performance evaluation, rating | | |
| | him as an overall "exceeds expectations." When submitted for approval by the managing | | |
| | supervisor, she demanded that Grievant's rating be lowered. When Grievant's supervisor | | |
| | refused, she lowered the ratings herself in several categories, resulting in overall "meets | | |
| | expectations." Other than the rating in one category, the manager failed to explain or | | |

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| | justify the ratings she gave, and she did not work with Grievant on a daily basis. | | |
| | Accordingly, her changes in those categories constituted an abuse of discretion and | | |
| | Respondent was ordered to restore the original ratings. Grievance GRANTED. | | |
| Topics | EXPENSE REIMBURSEMENT; EDUCATIONAL | Docket No. | 00-HHR-123 |
| | EXPENSES | | |
| Synopsis | Grievant, employed as a Driver at Sharpe Hospital, received approval to have the | | |
| | expenses paid for his courses in a Criminal Justice degree program. He received tuition | | |
| | reimbursement for the course entitled "Crime Scene Management," but Sharpe | | |
| | administrators refused to pay for the textbook for the course, citing a Division of | | |
| | Personnel policy prohibiting expense reimbursement for textbooks. This conflicts with | | |
| | provisions of the Hartley Plan, giving facility administrators discretion to pay for books. | | |
| | Accordingly, Respondent was ordered to review Grievant's request for the book stipend, in | | |
| | view of the discretion granted by Hartley. Grievance GRANTED. | | |
| Topics | EXPERIENCE; SALARY; BACK PAY | Docket No. | 00-17-398 |
| Synopsis | Grievant had completed two years of teaching at a parochial school when she was | | |
| | regularly employed by Respondent in 1995. Respondent compensates professional | | |
| | personnel for experience earned in parochial schools, but in this case, Grievant was not | | |
| | required to complete a job application, and Respondent did not apply the credit. Grievant | | |
| | knew she was not being paid for the two years' experience, but did not learn that | | |
| | Respondent had compensated another teacher for the same experience until August | | |
| | 2000. Grievant promptly applied, and Respondent paid her the increment retroactive to | | |

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| | July 1, 2000. Grievant argues that she is entitled to the back pay to the effective date of | | |
| | her regular employment. Respondent asserted that Grievant was not entitled to any | | |
| | additional back pay, and that it had been her obligation to make application for the credit, | | |
| | which she did not do until 2000. | | |
| | DECISION: Because Respondent did not have Grievant complete an application, or | | |
| | take any other measures to ascertain her background at the time she was hired, Grievant | | |
| | is entitled to back pay effective the date of her employment. Grievance GRANTED. | | |
| Topics | EXTRACURRICULAR COMPENSATION | Docket No. | 01-17-341 |
| Synopsis | Grievants argue that HCBE compensates teachers who perform Bus Duty Supervision | | |
| | \$3,600.00 per year, but a teacher who act as Lunch Duty Supervisors are paid only | | |
| | \$862.00 per year, resulting in discrimination and a violation of the uniformity provision of | | |
| | W. Va. Code §18A-4-5a. HCBE asserted the duties were significantly different since the | | |
| | Bus Duty Supervisors were responsible for children from another school who were | | |
| | transferring to another bus, while Lunch Duty Supervisors were responsible only for | | |
| | children at that school. | | |
| | DECISION: Grievants have proven that they engage in "like assignments and duties" | | |
| | as School Bus Supervisors, and must be compensated equitably. Grievance GRANTED. | | |
| Topics | EXTRA-DUTY ASSIGNMENTS; WORK HOURS | Docket No. | 00-40-331 |
| Synopsis | Grievant, a bus operator for the extended summer program, argued that field trips which | | |
| | went outside the county line during the day were extra-duty assignments, and should | | |
| | have been assigned according to W. Va. Code §18A-4-8b. As previously decided by this | | |

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| | Grievance Board, field trips which occur between the employee's morning and evening bus | |
| | run are within the employee's regular work day, and are not extra-duty assignments. All | |
| | the field trips in this case occurred during the regular work day, although one resulted in | |
| | Grievant working 10 minutes beyond 8 hours. The fact that the county line was crossed | |
| | during some of the trips did not convert these field trips into extra-duty assignments. | |
| | These field trips were part of Grievant's summer position. He was entitled to | |
| | compensation for the 10 minutes he worked beyond 8 hours on one day. Grievance | |
| | GRANTED, IN PART and DENIED, IN PART. | |
| Topics | FAVORITISM; PRESELECTION | Docket No. 01-29-120 |
| Synopsis | Grievant alleged MCBOE had posted positions with requirements only one individual | |
| | possessed in order to ensure a specific employee would be selected for the position. | |
| | Grievant also alleged favoritism and discrimination in the posting and selection process. | |
| | Grievant met her burden of proof and demonstrated that not all the required | |
| | qualifications were not reasonably necessary to meet the responsibilities of the position. | |
| | Grievance GRANTED. | |
| Topics | FLUORIDE TREATMENT | Docket No. 00-05-370 |
| Synopsis | Grievants complain that fluoride treatments are a medical procedure and that they should | |
| | not be required to administer a product procured by prescription. Respondent asserts | |
| | that the process is administered in compliance with the West Virginia Department of | |
| | Health, and provides a benefit for the students. | |
| | Although the testimony indicates that no harm has ever come to any of the students, | |

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| | disputing the alleged fears of the Grievants, the fluoride is available only by prescription, | |
| | and is technically a medical procedure. W. Va. Code §18-5-22 provides that no school | |
| | employee shall be required to administer medications. Grievance GRANTED. | |
| Topics | LEAVE | Docket No. 00-DOE-343 |
| Synopsis | Grievant's leave was calculated according to the method promulgated by the Division of | |
| | Personnel for state employees, meaning that she earned one and a half days per month. | |
| | Several times during the 1999-2000 school year, Grievant did not have sufficient leave | |
| | accumulated to cover her absences, so her pay was docked. Grievant believes she is | |
| | entitled to have her leave calculated per the method applicable to board of education | |
| | employees in W. Va. § 18A-4-10, which gives board employees 15 days at the beginning | |
| | of each school term. Under this method, Grievant would likely not have exhausted her | |
| | leave and had her pay docked. Interpretation of the statutes involved leads to the | |
| | conclusion that employees of the Schools for the Deaf and the Blind are to be given all | |
| | benefits conferred upon professional employees of county boards of education, including | |
| | leave. Respondent ordered to recalculate Grievant's leave pursuant to the method | |
| | contained in 18A-4-10. Grievance GRANTED. | |
| Topics | MERIT PAY; FAVORITISM | Docket No. 97-DOH-306 |
| Synopsis | The ALJ ruled that Grievant's supervisor engaged in favoritism when he gave three merit | |
| | pay increases to a subordinate with whom he was having an intimate relationship. As | |
| | relief, Grievant was awarded merit increases equal to the salary increases given the | |
| | employee who was improperly favored. Grievance GRANTED. | |

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| Topics | MISCLASSIFICATION | Docket No. | 01-HE-095 |
| Synopsis | <p>Grievant, a Trades Worker, pay grade 12, argued he should be classified as a Trades Worker Lead, pay grade 14. Respondent did not dispute that his duties were such that he should be in a pay grade 14. The Human Resources Director at Bluefield State did not believe she could slot Grievant's position in a Trades Worker Lead Job Title, however, because he did not lead other employees. She had asked the Job Evaluation Committee to review the Trades Worker classification, which it had agreed to do. Grievant pointed to the temporary employees who assist him on occasion in support of his contention that he should be a Lead; however, these employees are not formally assigned to Grievant, nor do they assist him on a regular basis. He does not lead the temporary employees. The parties placed a benchmark PIQ into the record for a Trades Worker Lead who did not lead any other employee, demonstrating that, under the facts presented here, leading other employees, while a characteristic of a Trades Worker Lead, is not a requirement. Grievant should have been classified as a Trades Worker Lead, pay grade 14. Grievance</p> <p>GRANTED.</p> | | |
| Topics | POSTING | Docket No. | 01-24-025 |
| Synopsis | <p>Respondent employed 21 aides under extended day contracts, which allowed them to work from one-half to two and one-half additional hours per day. Grievant argued that the extended contract of one aide which was two and one-half hours in duration, was actually either a separate position, or extracurricular in nature. Respondent asserted that all of the aides agreed to the changes in their schedules, and that the extended assignments</p> | | |

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| | <p>were not extracurricular in nature, but was an economical alternative to provide necessary</p> <p>transportation services.</p> <p>DECISION: The position was not sufficient in length, at 2 1/2 hours, to be considered</p> <p>a regular assignment. These runs are extracurricular in nature and must be filled</p> <p>pursuant to W. Va. Code §18A-4-8b. Grievance GRANTED.</p> |
| Topics | <p>PREFERRED RECALL</p> <p>Docket No. 00-39-390</p> |
| Synopsis | <p>Grievant was a probationary employee assigned as a Cook/Custodian when her</p> <p>employment was terminated for lack of need. Grievant was not placed on the preferred</p> <p>recall list, and subsequently another substitute employee was placed into a regular</p> <p>position prior to Grievant. Respondent argued that it was not required to place a</p> <p>probationary employee on the preferred recall list; however, W. Va. Code §18A-4-8b</p> <p>states that ALL employees are to be placed on the preferred recall list, with no</p> <p>distinctions as to probationary or permanent. Language which is clear and unambiguous</p> <p>must be applied and not interpreted. Grievance GRANTED.</p> |
| Topics | <p>PREFERRED RECALL; REDUCTION IN FORCE</p> <p>Docket No. 00-39-387</p> |
| Synopsis | <p>Grievant was employed for the first time in the fall of 1999 in a regular service personnel</p> <p>position, under probationary contract. At the conclusion of the school year, she was</p> <p>reduced for lack of need and returned to substitute status. Consistent with recent</p> <p>Grievance Board decision in Dakon v. Preston, it was held that Grievant was entitled to be</p> <p>placed on preferred recall. Evidence showed Grievant had applied for two service</p> <p>positions in the fall of 2000, which she lost to employees who had more substitute</p> |

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| | seniority. Because Grievant should have been on preferred recall, she proved she would | | |
| | have received one of the positions. Note--the relief in this case was partially overruled in | | |
| | Schaffer v. Preston. Grievance GRANTED. | | |
| Topics | REALIGNMENT; POSTING | Docket No. | 00-30-292 |
| Synopsis | When a teaching position was eliminated at MDES, Intervenor was rified and placed on | | |
| | the transfer list. When another teacher transferred in August, Respondent "realigned" the | | |
| | MDES staff and placed Intervenor into the vacancy. Grievant argues that the vacancy | | |
| | was not created as part of the RIF process and should have been posted and filled. | | |
| | Decision: Pursuant to previous decisions, a transfer may be rescinded when the reason | | |
| | for the action is no longer valid. In this case, the reason for Intervenor's transfer was a | | |
| | loss of funding, and that had not changed. Since she was already on the transfer list, | | |
| | realignment was not appropriate and the position should have been posted. Grievance | | |
| | GRANTED. | | |
| Topics | RECLASSIFICATION; TIMELINESS | Docket No. | 01-20-057 |
| Synopsis | Grievant proved she was misclassified as a Secretary II, and had been performing the | | |
| | duties of a Secretary III since 1997. However, while misclassification is a continuing | | |
| | grievance, Grievants are limited to back pay to fifteen days prior to the filing of their | | |
| | grievance. Thus, Grievant was entitled to back pay in the Secretary III classification to | | |
| | fifteen days prior to filing her grievance. Grievance GRANTED, IN PART and DENIED, IN | | |
| | PART. | | |
| Topics | REDUCTION IN FORCE; SENIORITY | Docket No. | 01-39-019 |

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| Synopsis | Grievant, a probationary employee whose employment was terminated due to a reduction | |
| | in force, asserted that she was entitled to be placed on the preferred recall list, and | |
| | assigned to a position awarded to another substitute who had no regular seniority. | |
| | Respondent argued that probationary employees are not entitled to preferred recall status. | |
| | | |
| | DECISION: Following the holding in Dakon v. Preston Co. BOE, Grievant was entitled to | |
| | placement on the preferred recall list, and the position awarded to another substitute. | |
| | Grievance GRANTED. | |
| Topics | REMAND; EXTRA-DUTY ASSIGNMENTS | Docket No. 99-30-263R |
| Synopsis | On remand, Grievant argued that she applied for all the extra-duty positions in the | |
| | Morgantown area which were posted by MCBOE on September 21, 1998, and that she | |
| | was more senior than some successful applicants. MCBOE asserted that it had no | |
| | application from Grievant for a number of the positions, and those for which she did apply, | |
| | she was either not the most senior applicant, or the position was awarded to the | |
| | individual who held the position the previous year, consistent with Board practice. | |
| | DECISION: Given the disarray of MCBOE's records, Grievant's representation that she | |
| | applied for all of the positions posted is accepted. Grievant did not challenge the practice | |
| | of reassigning runs to those who held them the previous year, therefore, there was only | |
| | one run to which she was entitled, #666. This run was never filled, and Grievant was the | |
| | most senior applicant after another individual rejected the assignment. | |
| | Grievance | |
| | GRANTED. | |

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| Topics | REPRIMAND | Docket No. | 00-CORR-350 |
| Synopsis | <p>Grievant received documentation of a verbal counseling session, warning him about an incident which occurred on his unit. An unidentified party had drawn on a posted incident report, defacing it. Grievant's superiors contended this was his responsibility, because it showed that employees under his management behaved unprofessionally. Respondent contended this was not a disciplinary measure, but evidence showed it constituted a verbal reprimand under DOC's progressive discipline policy, and it could be used against Grievant if further infractions occurred within a year. Respondent failed to prove the discipline was proper, because there was no misconduct for Grievant to correct. The incident was never investigated, and it was unknown who committed the act, so it was not possible for Grievant to have prevented it or done anything about it. Grievance GRANTED.</p> | | |
| Topics | SALARY INCREASE; DISCRIMINATION | Docket No. | 01-CORR-080 |
| Synopsis | <p>Grievants alleged entitlement to a 5% salary increase upon transferring to unit management when they worked at other institutions in 1998. They compared themselves to employees at Huttonsville who received the 5% increase in 1996 and 1997 upon transferring to unit management. As to those employees, Grievants did not prove discrimination, because (as discussed in Channell) those increases were peculiar to Huttonsville as an incentive for the transfers. There was no evidence of a similar program at St. Mary's or Denmar in 1998. However, Grievant Akins did establish that another employee who transferred into unit management around the same time as he did at St.</p> | | |

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| | Mary's received a 5% increase. No explanation was given for why this employee received | | |
| | the raise and Grievant Akins did not, so he met his burden of proof. Grievance DENIED, | | |
| | IN PART as to Smith and GRANTED, IN PART as to Akins. | | |
| Topics | SELECTION; CLASSIFICATION; QUALIFICATIONS | Docket No. | 01-42-071 |
| Synopsis | Grievants, both aides, protested when aide position was posted as requiring an LPN | | |
| | license. The aide was needed to assist two diabetic students, whose conditions were | | |
| | unstable, required constant monitoring, and injection/administration of insulin. Board | | |
| | determined only a medically licensed person could do this, and the students also needed | | |
| | academic assistance. Pursuant to W. Va. Code §18-5-22, such procedures can only be | | |
| | performed by a trained aide or teacher or a school nurse, i.e. a registered nurse. There is | | |
| | no provision for an LPN in the statute. Therefore, Board was ordered to repost the | | |
| | position as school nurse, or use an existing school nurse, and also repost the aide | | |
| | position without the license requirement. Grievance GRANTED. | | |
| Topics | SELECTION; COMPETENCY TESTING; IN SERVICE | Docket No. | 01-06-028 |
| | TRAINING | | |
| Synopsis | Grievant applied for an Inventory Supervisor position. At the time of the competency | | |
| | examination, the State Department of Education had not yet developed a competency | | |
| | examination for this area. Grievant took a county developed competency examination. | | |
| | No in-service was given prior to this examination. Respondent argued there was no | | |
| | requirement for the eight hours of in-service if the test did not come from the State. | | |
| | In-service is required whether the exam is developed by the State or the County. | | |

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| | Grievance GRANTED. | | |
| Topics | SELECTION; MINIMUM QUALIFICATIONS; FIRST | Docket No. | 99-55-289 |
| | SET OF FACTORS; ABANDONMENT; ARBITRARY | | |
| | AND CAPRICIOUS | | |
| Synopsis | Board of Education failed its legal duty to apply first set of factors where board members | | |
| | testified that other criteria were used, including political favor trading, willingness to ignore | | |
| | the minimum qualifications of the position, reliance on disciplinary actions not imposed, | | |
| | and paternalism. Failure to select Grievant, who met the minimum qualifications and was | | |
| | most qualified, was arbitrary and capricious. Grievance GRANTED. | | |
| Topics | SELECTION; MOOTNESS; FIRST SET OF FACTORS; | Docket No. | 99-55-290 |
| | ARBITRARY AND CAPRICIOUS | | |
| Synopsis | Board failed to apply first set of factors when selecting candidate for Principal position, | | |
| | instead relying on political favor trading, reliance on disciplinary actions not taken, and | | |
| | paternalism. Its failure to select Grievant, the most qualified candidate, was arbitrary and | | |
| | capricious. Grievance GRANTED. | | |
| Topics | SELECTION; POSTING | Docket No. | 00-30-276 |
| Synopsis | Grievant claimed that she was entitled to a Title I summer bus run at Cass Elementary | | |
| | School. She established that she had more seniority than the individual who was placed | | |
| | in the assignment, and that the position had not been filled pursuant to W. Va. Code § | | |
| | 1818-5-39(f). Grievant failed to prove that had the position been filled properly, that she | | |
| | would have been awarded the position. Grievance GRANTED, and MCBOE ordered to | | |

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| | post and fill position pursuant to W. Va. Code § 18A-4-8b for Summer of 2001, if it exists. | | |
| Topics | SELECTION; PREFERRED RECALL; SENIORITY | Docket No. | 00-26-368 |
| Synopsis | Grievant and the successful applicant were placed on the preferred recall list at the end of | | |
| | the 1999-2000 school year. Grievant had thirty-three days more seniority than the | | |
| | successful applicant. During the summer, the successful applicant applied for and | | |
| | received a position for the 2000-2001 school year. Also before the school year started, | | |
| | another position was posted. Both Grievant and the successful applicant applied for the | | |
| | position. When MCBOE completed the matrix, it found Grievant and the applicant tied for | | |
| | the position because it did not give Grievant credit for her prior seniority as she was still | | |
| | on the preferred recall list. MCBOE did give the successful applicant credit for her prior | | |
| | seniority. | | |
| | DECISION: Pursuant to W. Va. Code § 18A-4-7a, Grievant should have her seniority | | |
| | counted, and if it is, there would be no tie, and Grievant would be awarded the position. | | |
| | Grievance GRANTED. | | |
| Topics | SELECTION; SUMMER SCHOOL ASSIGNMENT; | Docket No. | 00-03-265 |
| | ARBITRARY; CAPRICIOUS | | |
| Synopsis | Grievant was one of two applicants for summer bus runs, both of whom had identical | | |
| | seniority dates, requiring a random drawing. Rather than proceeding with random | | |
| | drawing, however, the Board told grievant she was not eligible for the assignments | | |
| | because she held a night job, and hiring her would be a violation of W. Va. School | | |
| | Transportation regulations. Held: The cited regulations specify a bus operator must have | | |

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| | a minimum of six (6) consecutive off-duty hours between the conclusion of the previous | | |
| | day's regularly scheduled afternoon run and the beginning of the next day's regularly | | |
| | scheduled morning run. The regulations do not specify when this six hours must occur, | | |
| | i.e., immediately preceding the morning run. Grievant proved she would receive the | | |
| | minimum six hours rest and the Board acted in an arbitrary and capricious manner in | | |
| | disqualifying her from applying for the job based upon her night job. The Board was | | |
| | ordered to conduct the random drawing, and if Grievant was successful, she was to be | | |
| | compensated for the summer bus run. Grievance GRANTED. | | |
| Topics | SENIORITY | Docket No. | 01-43-465 |
| Synopsis | Grievant was employed as a half-day teacher beginning September 14, 1998, and | | |
| | continuing throughout the school year. Respondent argued that Grievant was entitled to | | |
| | no seniority since she did not work full-time, or for the complete school year. Grievant | | |
| | asserts that she was entitled to pro-rated seniority. | | |
| | DECISION: Grievant is entitled to seniority for the 143 days she worked half-time. | | |
| | Thus, the seniority must be pro-rated on both the number of hours and number of days | | |
| | worked during the 1998-99 school year. Grievance GRANTED. | | |
| Topics | SENIORITY; ADMINISTRATIVE CERTIFICATE; | Docket No. | 01-20-377 |
| | TIMELINESS | | |
| Synopsis | I. Grievant knew years ago that she was not accruing administrative seniority, but | | |
| | Respondent failed to assert its timeliness defense at or before the Level II hearing, and it | | |
| | is barred. An assertion requires a positive identification and articulation of the defense. | | |

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| | II. Lead Teacher Facilitator position, as performed by this particular Grievant was | | |
| | comprised predominately of administrative duties, for which Grievant is entitled to | | |
| | administrative seniority while she was performing duties with an administrative certificate. | | |
| | Grievance GRANTED, IN PART, and DENIED, IN PART. | | |
| Topics | SENIORITY; OVERTIME; STANDING | Docket No. | 01-HE-370 |
| Synopsis | Grievant's seniority date was erroneously calculated, which led to wrong placement on | | |
| | overtime roster. Grievant proved he was entitled to six hours overtime for missed | | |
| | assignment, but failed to prove entitlement to another 11 hours. Grievance | | |
| | GRANTED/DENIED. | | |
| Topics | SHIFT ASSIGNMENT POLICY; CONSECUTIVE DAYS | Docket No. | 99-PEDTA-247 |
| | OFF | | |
| Synopsis | Parkways has the authority to set shift assignment policy, not grievants. However, | | |
| | Parkways' policy mandates that grievants get two consecutive days off during a normal | | |
| | work week. Grievance GRANTED, IN PART, and DENIED, IN PART. | | |
| Topics | SUMMER ASSIGNMENT | Docket No. | 00-34-341 |
| Synopsis | Grievant, a regular employee with no summer seniority, requested to be assigned as a | | |
| | substitute Bus/Instructional Aide in Summer 2000. When a new position was needed, | | |
| | pending posting, Respondent assigned an Aide with less regular seniority than Grievant , | | |
| | but with summer seniority. Grievant was ultimately assigned to the position pursuant to | | |
| | the posting. | | |
| | DECISION: Effective July 1, 2000, W. Va. Code §18-5-39 was amended to allow regular | | |

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| | employees the opportunity to work as substitutes for summer assignments. Because the | | |
| | substitute assignment in this case was filled on June 12, Grievant was not entitled to the | | |
| | assignment. However, the position was regularly filled effective July 18, and Grievant did | | |
| | not begin her duties until July 27, 2000. Grievant is entitled to any lost wages, interest, | | |
| | and benefits for the period of July 18 through July 27, 2000. Grievance GRANTED. | | |
| Topics | SUMMER ASSIGNMENTS; BUMPING | Docket No. | 01-20-058 |
| Synopsis | Grievant had worked five summers, from 1994-99, at Clendenin Elementary School as a | | |
| | cook in a federally-funded lunch program. The program was not scheduled at CES in | | |
| | summer 2000, and Grievant argued that she should have been assigned to a position | | |
| | elsewhere since she had more summer seniority than ten of the summer employees. | | |
| | Respondent argued that Grievant was only entitled to the same position she held the | | |
| | previous summer, and that it no longer existed. | | |
| | DECISION: W. Va. Code §18-5-39 provides that when a county reduces the number of | | |
| | employees in a particular summer program or classification from that employed the | | |
| | previous summer, the reductions shall be based upon the length of service time in the | | |
| | particular program or classification. Grievant had more service time in the cook | | |
| | classification than several other employees. Further, there was no evidence that each | | |
| | school was a separate program. Grievance GRANTED. | | |
| Topics | SUMMER EMPLOYMENT; SENIORITY; | Docket No. | 01-30-016 |
| | ASSIGNMENT; POSITION | | |
| Synopsis | Grievant, a transportation aide, was not employed during Summer 2000 after the bus run | | |

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| | she was assigned in Summer 1999 was discontinued. Grievant argued that as the aide |
| | with most summer seniority, she should have been offered employment. Respondent |
| | asserted that Grievant was only entitled to retain her specific assignment from 1999, and |
| | it no longer existed. |
| | DECISION: Respondent supports a single program with bus routes which vary from year |
| | to year. If one less aide was needed in Summer 2000, the decision regarding |
| | re-employment should have been determined by summer seniority, and Grievant given an |
| | assignment. Grievance GRANTED. |
| Topics | SUMMER POSITIONS; SUMMER SENIORITY |
| | Docket No. 01-54-111 |
| Synopsis | Grievants had worked previous summers, then for several summers there was |
| | insufficient work for them to be rehired. Later, there was a greater need for summer |
| | workers, but Grievants were not called back to their summer positions, employees with |
| | greater regular seniority, but less summer seniority were hired to fill these positions. |
| | Pursuant to W. Va. Code §18-5-39, Grievants were entitled to receive the positions |
| | they had previously held. Grievance DENIED. |
| Topics | SUSPENSION; CURSING; LANGUAGE |
| | Docket No. 00-39-355 |
| Synopsis | Grievant, a bus operator, was suspended for two days for saying "shit" while conversing |
| | with a student. Board alleged Grievant had been previously warned about using foul |
| | language in front of students. However, evidence showed that Grievant had not been |
| | specifically warned about this, and the only discussion of bad language resulted in |
| | Grievant being told that it "depended on the context" as to whether certain words were |

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| | considered cursing. Grievant knew it was inappropriate to use the word involved before a |
| | student. However, Grievant was not angry or directing the language toward the student in |
| | any threatening manner. Therefore, it was determined that the punishment should be |
| | mitigated, and the suspension will be reduced to a reprimand. Grievance GRANTED. |
| Topics | SUSPENSION; DUE PROCESS; INTERNET; Docket No. 01-HHR-344/388 |
| | DISCRIMINATION; REPRISAL; MITIGATION; |
| | HARASSMENT |
| Synopsis | Grievant was suspended for 30 days without pay for violating agency's Internet use |
| | policies pending investigation. Agency extended Grievant's suspension for another 30 |
| | days without pay. Agency proved Grievant violated its Internet use policies. Grievant |
| | argued as affirmative defenses that he was denied due process with respect to |
| | suspension; that the discipline was act of discrimination, reprisal, and harassment, and |
| | that discipline should be mitigated. Held that second 30-day suspension was arbitrary |
| | and capricious, and Grievant did not receive due process. Held that initial 30-day |
| | suspension was warranted, and did not constitute discrimination, reprisal, or harassment. |
| | Further, mitigation was not warranted. Agency is ordered to compensate Grievant for |
| | second 30-day suspension without pay. Grievance GRANTED, IN PART and DENIED, IN |
| | PART. |
| Topics | SUSPENSION; INSUBORDINATION; Docket No. 01-15-023 |
| | INCOMPETENCE |
| Synopsis | Grievant was suspended for three days after he was provoked into referring to a student |

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| | as an "asshole". Respondent argued that despite the provocation, Grievant was the adult, |
| | and must not engage in such language. The discipline applied was that which would |
| | have been enforced had the student referred to the Grievant as such. |
| | Respondent is correct that employees should not engage in calling students such |
| | names, and that Grievant should have properly referred the matter to the principal. |
| | However, given the nature of this situation, and that Grievant did not threaten or approach |
| | the student, mitigation is appropriate, and the suspension was reduced to a written |
| | reprimand. Grievance GRANTED. |
| Topics | TIMELINESS; CONTINUING PRACTICE; STEP-UP |
| | Docket No. 01-13-143/234 |
| Synopsis | Grievant's complaint about her workload was untimely, as her duties had not changed |
| | since the beginning of the school year, and she did not file her grievance within 15 days of |
| | learning her schedule. Her argument that this grievance fell within the continuing practice |
| | exception was rejected. |
| | Grievant demonstrated that she was entitled to step-up into a full-time custodial |
| | position when that person was absent, even though Grievant held two half-time positions. |
| | The step-up provisions do not exclude such employees from receiving its benefits. |
| | Grievance GRANTED, IN PART, and DENIED, IN PART. |
| Topics | TRANSFER |
| | Docket No. 00-39-388 |
| Synopsis | Grievant was employed as a regular classroom aide. She worked at Central Preston |
| | Middle School during the last two school years. During the 2000-2001 school year, she |
| | was assigned to a particular disabled student. The student transferred to another school, |

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| | and Grievant was ultimately transferred so she could continue to work with him. Grievant |
| | did not want to go, and was threatened with discipline if she did not accept the transfer. |
| | Grievant was not notified the prior school year that she was going to be transferred, and |
| | her transfer took place in the middle of the year. This contradicts the provisions of W. |
| | Va. Code §18A-4-7, requiring notice the previous school year. Grievant's position was not |
| | itinerant, and she was assigned to the school, not the student. Therefore, her transfer |
| | was improper. Grievance GRANTED. |