

**STATE OF WEST VIRGINIA**  
**EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD**

**ANNUAL REPORT**

**TO THE**

**GOVERNOR AND THE LEGISLATURE**

**CALENDAR YEAR 2003**

**STATE OF WEST VIRGINIA**  
**EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD**

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**CALENDAR YEAR 2003**



**MEMBERS**  
Walt Auvil  
Debra Kilgore  
Lowell Witters

**DIRECTOR**  
Ronald Wright

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STATE EMPLOYEES GRIEVANCE BOARD**  
**BOB WISE**  
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February 27, 2004

**THE HONORABLE BOB WISE**  
**GOVERNOR, STATE OF WEST VIRGINIA**

and

**MEMBERS OF THE LEGISLATURE**

Dear Governor and Members of the Legislature:

On behalf of the Grievance Board, I am pleased to submit the Grievance Board's Annual Report for Calendar Year 2003. This report contains detailed information concerning grievances and mediation covering several years, including the number of grievances filed against each employer covered by the grievance procedure, the number of Level Four hearings scheduled and held, the number of grievances settled after reaching Level Four, a synopsis of grievance decisions in which employees were granted relief, an evaluation of the grievance process at Level Four and the performance of the Board's administrative law judges.

Respectfully submitted,

*Ronald Wright*  
RONALD WRIGHT

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### **Administrative Highlights of 2003**

One of the Board's primary responsibilities is to provide suitable office space for its Administrative Law Judges (ALJs) and support staff. Unfortunately, one of the highlights of 2003 was the Board's Charleston Office was flooded twice, forcing the agency and its staff to move out of its office for over a month. While these disruptions were handled well, many work hours were wrapped up in handling these events, and expenses were incurred that were not reimbursed. Although the landlord improved the facility while making necessary repairs, the potential for future flooding remains; therefore, the Board is considering all available alternatives. Because the agency's hearing offices must be in a neutral location, the Board does not have the option of moving into the State Capitol Complex or into a state office building. See, W. Va. Code § 29-6A-5(a)(1985).

The Board continued to work on outreach and education activities, while striving to improve customer and employee satisfaction. Last year the Board established a new strategic goal of educating public employers and employees about the value and need for a properly functioning grievance procedure. With that goal in mind, the agency's director met with several employee organizations, and, in cooperation with the Division of Personnel, made several presentations to managers and supervisors in State government. In January 2004, the Director and the Board's Chair appeared on The Law Works, a West Virginia Public Television Program, to discuss the agency's operations. The Board also continued to collect information and comments about how the grievance procedure is working at the lower levels.

It is also notable that representatives from employee organizations regularly attended the Board's meetings. Their participation led the Board to begin including a public comment topic on its meeting agendas, and to add a feature to its web site enabling interested persons to receive email notice when the Board schedules meetings. The Board also began drafting new procedural rules governing procedural matters at the lower levels of the procedure. This initiative is the result of legitimate concerns expressed by employee representatives during the last two years.

The Board plans to change its schedule of activities for 2004 and in the future. The Board will hold its next Annual Public Meeting in the fall of 2004, rather than in January

2005, and will submit the next Annual Report to the Governor and the Legislature between December 1, 2004, and January 5, 2005, before the Legislature convenes its next regular session. The next annual report will be on a fiscal year basis, covering grievance information and statistics from July 1, 2003 to June 30, 2004. This schedule change will benefit customers and will save administrative staff time by eliminating the need to report agency performance on both a calendar year and fiscal year basis.

Finally, the 10% budget cut in FY04, and particularly the impending 9% budget reduction for FY05, has begun to impair the agency's performance. Due to the budget cuts, the Board has not been able to fill an ALJ position that became vacant in August 2003, and another ALJ position that became vacant in January 2004.

### **Legislative History, Mission and Operations**

The Grievance Board was created in 1985 when the Legislature established a grievance procedure for educational employees. W. Va. Code §§ 18-29-1, et seq. In 1988 the Legislature expanded the Board's jurisdiction by enacting a Grievance Procedure for State Employees.<sup>1</sup> W. Va. Code §§ 29-6A-1, et seq. The intended purpose of these laws was to create a simple, expeditious and fair process for resolving employee grievances at the lowest possible administrative level, and to establish a procedure for the equitable and consistent resolution of these employment disputes.

Ten years later in 1998, the Legislature made several changes to the law governing grievances by state employees. Perhaps most significant is a new default provision by which an employee may prevail in a grievance, if the grievance evaluator at Level One, Two or Three fails to respond to the grievance in the time required by law. The Board was also given jurisdiction over procedural matters at Levels Two and Three of the procedure. Until then the Board's authority was limited to administering Level Four of the procedure. In addition, the Board was empowered to require mediation at the request of any party in

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<sup>1</sup> Employees of constitutional officers are not covered, unless they are 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).

grievances by state employees. W. Va. Code § 29-6A-12 (1998).<sup>2</sup> In 2001 the Legislature changed the law for higher education employees so that all grievances filed after July 1, 2001, must be processed under the Grievance Procedure for State Employees. See W. Va. Code § 18B-2A-4(k).

Under these laws covered employees can 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 (1992) & 29-6A-2 (1988).<sup>3</sup> The Board has 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 concern promotion and hiring decisions, disciplinary actions, classification, and compensation matters.

In accordance with the State Administrative Procedures Act, the Board adopted new Procedural Rules governing the practice and procedure for handling grievances at Level Four effective December 1, 2000, under the authority granted by W. Va. Code §§ 18-29-5(a) & 29-6A-5(a). The new Procedural Rules substantially amended the prior rules to conform to statutory changes and current practice. The Rules are codified at 156 Code of State Regulations 1 (156 C.S.R. 1). In 2002 the Board adopted a Procedural Rule to

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<sup>2</sup> 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).

<sup>3</sup> "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 thus not grievable.

satisfy the requirements of the Open Governmental Proceedings Law, W. Va. Code §§ 6-9A-1 et seq., commonly called the Open Meetings or "Sunshine" law. 156 C.S.R. 2 (Aug. 11, 2002). This law specifies the manner in which governing bodies must give notice to the public of meetings, and provides general rules for conducting meetings.

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 grievance procedure laws cast the Board in the role of protecting the rights of covered public employees. The Board has three members appointed by the Governor, with the advice and consent of the Senate, for three year terms. In December 2001, Governor Bob Wise appointed Walt Auvil, Esq., a Democrat from Wood County, to a term expiring July 1, 2004. He will serve as the Chair of the Board until July 1, 2004. On January 24, 2003, Governor Wise, also appointed Debra A. Kilgore, Esq., a Democrat from Mercer County, to a term ending July 1, 2005. The third member of the Board is Lowell Witters, a Republican from Kanawha County, who is serving a term that expired July 1, 2003.

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 calls them ALJs because of the nature of their duties and responsibilities.<sup>4</sup> 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.<sup>5</sup>

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

<sup>5</sup> For many years the Board has required its ALJs to adhere to certain provisions of the Code of Judicial Conduct, although this code only applies to judicial officers in the judicial branch, not ALJs in the executive branch.

As of February 1, 2004, the Board employed only nine people: a Director, an Administrative Officer, four ALJs, and three Secretaries in a flat organizational structure.<sup>6</sup> See Appendix A. The Board's principal office is in Charleston, and it maintains hearing offices in Beckley, Elkins, Westover, and Wheeling. All but one of the agency's employees work in the Charleston or Westover Office. The Beckley and Wheeling offices are not staffed with employees, but ALJs conduct hearings and mediation sessions there.

The Board's primary activities are as follows: (1) scheduling and conducting Level Four hearings and prehearing conferences in public employee grievances; (2) issuing binding, written decisions with findings of fact and conclusions of law; (3) providing mediation services to actively assist employers and employees in identifying, clarifying and resolving issues any time before a Level Four hearing; (4) administering Level Four of the grievance procedure and handling procedural matters at Level Two and Three; and (5) preparing transcripts and certifying records to circuit courts when decisions are appealed.

The Board has established the following customer-service 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 fairly, 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) publish decisions and case summaries promptly on the Internet for all interested persons.

### **Annual Public Meeting and Seventh Customer Satisfaction Survey**

The Board, after proper notice, conducted its annual public meeting in Charleston on January 23, 2004, as required by W. Va. Code § 18-29-5(a) (1998), and W. Va. Code § 29-6A-5(a) (1998). The purpose of the annual meeting is to help the Board evaluate the

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<sup>6</sup> As recently as 1997, the Board employed seventeen people, but through attrition had reduced its staff to eleven positions by 2001. The Director performs administrative duties and also functions as the chief administrative law judge. After an ALJ resigned in August 2003, the Board was not able to fill that position due to the impending 9 percent budget cut for FY05. Another ALJ resigned in January 2004, leaving the Board with only four ALJs.

functioning of the grievance process at Level Four, the performance of its ALJs, and to prepare an annual report to the Governor and the Legislature.

The Board mailed seven hundred seventy-eight (778) notices of the annual meeting, along with a Customer Satisfaction Survey form, to Grievants whose cases had been completed by November 2003. State agencies, educational institutions, county superintendents, employee organizations, union representatives, attorneys, and the Director of the West Virginia Division of Personnel (Personnel) were also notified of the meeting. In addition, the annual meeting was announced on the Board's web site and the customer satisfaction survey form was made available online. Fifteen people attended the public meeting. Several people who attended addressed the Board.

The Board has used the Customer Satisfaction Survey form since 1997 to help in the evaluative process, to identify areas that may need improvement, and to serve as a benchmark for future evaluations. (Appendix B). Appendix C contains two reports showing the survey results for 2003 and 2002. 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. Grievants expressed an average overall satisfaction rating of about 43% for 2003, higher than the 2002 rating of 39%, and higher than the first rating in 1997 of 40%.

The Board and staff will thoroughly review and consider the annual meeting testimony and exhibits, and the responses to the customer satisfaction survey. The Board will meet with all staff members to discuss this information and to consider ways in which to improve the agency's performance.

### **Grievances Filed at Level Four and Adjudication Activities in 2003**

The number of grievances filed at Level Four has remained steady during the last four years, as shown in the following table.<sup>7</sup>

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<sup>7</sup> The number of grievances filed in 2003 includes six cases remanded to the Board by the courts.

<b>Grievances filed at Level Four</b>	<b>2003</b>	<b>2002</b>	<b>2001</b>	<b>2000</b>	<b>1999</b>	<b>1998</b>	<b>1997</b>	<b>1996</b>
<b>State</b>	209	219	358	206	281	301	261	200
<b>Higher Education</b>	30	40	94	31	56	36	56	57
<b>County Boards of Education</b>	190	186	182	174	213	186	269	277
<b>Totals</b>	<b>429</b>	<b>445</b>	<b>634</b>	<b>411</b>	<b>550</b>	<b>523</b>	<b>586</b>	<b>534</b>

The number of hearings scheduled and the number of hearings held was higher than the last three years, as shown below.

<b>Hearing Activity</b>	<b>2003</b>	<b>2002</b>	<b>2001</b>	<b>2000</b>	<b>1999</b>	<b>1998</b>	<b>1997</b>	<b>1996</b>
<b>Hearings Scheduled</b>	632	567	597	503	713	758	688	789
<b>Hearings Held</b>	292	257	275	279	329	337	313	303

Grievances submitted on the record made at the lower levels of the procedure, without a Level Four hearing, are processed more quickly than cases in which a Level Four hearing is held. The percentage of cases submitted on the record developed below has averaged about 18 percent during the last ten years.

The number of Decisions and Orders issued was higher than in the previous two years, as shown in the next table.

<b>All Decisions and Orders</b>	<b>2003</b>	<b>2002</b>	<b>2001</b>	<b>2000</b>
<b>Decisions Issued</b>	265	223	260	293
<b>Default Orders</b>	27	33	22	19
<b>Dismissal Orders</b>	144	134	141	142
<b>Totals</b>	<b>436</b>	<b>390</b>	<b>423</b>	<b>454</b>

As shown in the next table, ALJs continued issuing decisions promptly, often in less time than required by law, which requires decisions to be issued within thirty working days. Indeed, average decision-making time was only eighteen working days. Furthermore, about 97 percent of decisions were issued within sixty working days of becoming mature for decision.

<b>Grievance Processing Time in Working Days</b>	<b>2003</b>	<b>2002</b>	<b>2001</b>	<b>2000</b>	<b>1999</b>	<b>1998</b>	<b>1997</b>
<b>Decision-Making Time</b>	18	15	20	21	29	39	69
<b>Total Processing Time</b>	123	101	122	115	168	149	181
<b>Percentage of Cases Decided within 30 Working Days</b>	89%	92%	80%	79%	81%	52%	9%

A breakdown of decisions issued by type of employment is set forth in the table below.

<b>2003 DECISIONS</b>	<b>DECISIONS ISSUED</b>	<b>GRIEVANCES GRANTED</b>	<b>PERCENT GRANTED</b>
<b>Higher Education</b>	26	7	27%
<b>State</b>	116 <sup>8</sup>	13	11%
<b>Boards of Education - Professional Personnel</b>	39	12	31%
<b>Boards of Education - Service Personnel</b>	78	12	15%
<b>State Department of Education</b>	6	1	17%
<b>TOTALS</b>	265	45	17%

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<sup>8</sup> This figure includes one Order issued on remand from circuit court involving the computation of attorney fees for four Grievants.

Appendix G contains a synopsis of all grievances granted in 2003, as well as three grievances in which employers were found in default because the grievances were not processed within the time limits set by law.<sup>9</sup>

The overall percentage of grievances granted decreased in 2003, following an increase the previous year, as reflected in the table below.<sup>10</sup>

2003	2002	2001	2000	1999	1998	1997	1996	1995
17%	20%	18%	23%	29%	29%	26%	26%	24%

ALJs issued one hundred forty-four (144) Dismissal Orders in 2003. An employee may withdraw a grievance at any step in the grievance procedure by written notice. W. Va. Code §§ 18-29-3(d) & 29-6A-3(d). This is the most frequent reason grievances are dismissed from the docket at Level Four.<sup>11</sup> Fifty-one (51) grievances were dismissed in 2003 on written request of the grievant, with no explanation for the withdrawal. In another fifty (50) grievances, the employees reported that they had reached a settlement as the reason for withdrawing their grievance.<sup>12</sup> The table below shows the number of grievances known to have been settled by employer type.

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<sup>9</sup> In one default matter, relief was granted to one Grievant. A final Decision, rather than a Default Order, was issued in that case.

<sup>10</sup> 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, including grievances dismissed on jurisdictional grounds and cases denied on procedural grounds, such as being untimely filed.

<sup>11</sup> Grievances are also routinely dismissed and remanded to a lower level, because the case was improperly filed at Level Four without going through the lower level steps in the procedure. Grievances are also dismissed for other reasons, such as lack of jurisdiction or mootness. Four grievances were dismissed for those reasons in 2003.

<sup>12</sup> This figure does not include five cases resolved through mediation at Level Four.

<b>Grievances Settled at Level Four</b>	<b>2003</b>
<b>State</b>	26
<b>Higher Education</b>	5
<b>County Boards of Education</b>	19
<b>Totals</b>	<b>50</b>

### **Administrative Support Activities and Use of the Internet**

The workload of the Board's limited secretarial staff continued to increase in 2003. In decisions appealed to circuit court, the secretarial staff must assemble and mail a certified record to circuit courts around the state. The table below shows the number of certified records transmitted to the courts during the last three years.

<b>Records Certified to Circuit Court</b>	<b>2003</b>	<b>2002</b>	<b>2001</b>
	91	81	75

The 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, and this is happening more frequently because the Board has substantially reduced its secretarial staff in recent years. Producing transcripts and certifying records to circuit court continue to be primary tasks for the secretarial staff. Usually the certified record is transmitted to circuit court within thirty (30) days of receipt of the court order notifying the Board of the appeal.

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. However, upon request the Board promptly supplies the parties with copies of the hearing tapes, instead of a transcript. In addition, when a decision is appealed and the transcript is prepared in-house, the Board will provide the parties a copy of the transcript

in electronic form.<sup>13</sup> When transcripts are prepared by a transcription service, the parties may purchase a copy from the service.

In 2003 the Board purchased a digital recording system called FTR Gold for one hearing room in the Charleston Office. Digital recording systems have several advantages over traditional analog tape-recording systems, including improved sound quality and electronic storage. Upon request the Board provides the parties a copy of the hearing on a CD that will hold up to twenty hours of testimony. The parties can listen to the hearing on a personal computer using free player software available for downloading at [www.FTRGold.com](http://www.FTRGold.com).

Since 1997 the Board has used its web site to provide public employers and employees with access to its decisions and to improve its services. The web site is now the Board's primary method of distributing information. New decisions are published twice a month. All decisions can be downloaded by calendar year in Rich Text Format, a format compatible with most word-processing applications. The Secretary of State's office is also provided copies of all decisions in electronic form twice a month.<sup>14</sup>

The Board's staff uses a Microsoft Access database, called Boardlaw, containing case summaries and pertinent information on more than five thousand three hundred (5,300) decisions issued since 1985. This database is a valuable research tool for the ALJs and all interested persons who need to be aware of precedent regarding the numerous personnel laws and regulations applicable to public employees. The Board updates the database every month with summaries of the new decisions and with information about court rulings in decisions that were appealed. All the information in the database is published on the web page, and it can be quickly and easily searched. In

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<sup>13</sup> The Board's staff has devised a method of preparing electronic transcripts that enables the parties to 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.

<sup>14</sup> Final decisions are filed with the Secretary of State's office in accordance with W. Va. Code § 29A-2-9.

addition, the database can be downloaded in a compressed form for use with Microsoft Access.

The law requires the Board to provide a statewide quarterly report to inform higher education governing boards, county boards of education and employee organizations of current personnel-related issues. W. Va. Code § 18-29-11 (1992). The Board issues the report on a monthly basis to make the information available more quickly. In accordance with W. Va Code § 18-29-11 (2000), the Board also sends an annual report to each county board of education within thirty days of the end of each school year. This report lists the number of grievances granted, denied, or otherwise disposed of during that school year. This report is available on the Board's web site for the last four school years.

This summary of administrative activities is not comprehensive, as the Board does not document all activities performed by its staff. For example, the Board's staff answers procedural questions about the grievance process frequently but does not keep records concerning that activity.

### **Grievance Mediation Services**

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 (1992), which required the Board to engage in mediation and other dispute resolution techniques to actively help the parties in identifying, clarifying and resolving issues before the Level Four hearing, to the extent feasible with existing personnel and resources.<sup>15</sup>

In 2003 the Board continued to encourage and to promote the use of mediation early in the grievance process, emphasizing that it will provide a mediator, without charge, before an evidentiary hearing is held at the lower levels. ALJs also hold prehearing conferences

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<sup>15</sup> 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 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.

frequently, typically by a recorded telephone conference call, to identify and clarify issues, to encourage settlement discussions and to explore the possibility of mediation.

The Board conducted seventeen mediation sessions in 2003. Although the total number of mediation sessions conducted by the Board was less than last year, a record number of grievances were mediated at the lower levels of the grievance procedure. The parties resolved their dispute in all but one of those cases, and in that case settlement discussions are continuing.

<b>Mediation Sessions Conducted</b>	<b>2003</b>	<b>2002</b>	<b>2001</b>	<b>2000</b>
<b>Grievances Mediated After Reaching Level Four</b>	9	20	15	16
<b>Percentage Resolved At or After Mediation</b>	55%	35%	53%	64%
<b>Grievances Mediated At the Lower Levels</b>	8	2	2	5
<b>Percentage Resolved At or After Mediation</b>	87%	0%	50%	80%

Although the percentage of grievances mediated after reaching Level Four is small, it is important to remember that employers and employees frequently settle the disputes on their own. One hundred forty-four (144), or 33%, of all grievances processed in 2003 were closed by issuance of a dismissal order.<sup>16</sup> At least fifty cases were dismissed from the docket because the parties reached a settlement.

The Board believes its efforts to encourage the use of mediation have helped foster a climate in which the parties discuss problems and engage in settlement activity more frequently. Likewise, the Board continues to believe mediation is an effective and efficient means of resolving grievances. Delay and costly litigation are eliminated. Equitable settlements benefit the parties and the public. Employers can use mediation to make more efficient use of their resources, retain some control over the outcome of grievances, and, most important, preserve the integrity of ongoing working relationships. The Board

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<sup>16</sup> This number includes five cases resolved through mediation after reaching Level Four.

believes public employees benefit from the use of grievance mediation, and it is not aware of any negative consequences resulting from its use.

Nonetheless, many grievances cannot be, and should not be, resolved through mediation or otherwise. This is partly because the grievance procedure is itself a form of alternative dispute resolution, and, thus, the incentives for settlement are not as great as in civil litigation. Moreover, many grievances, such as hiring and promotions disputes, cannot be lawfully settled because state personnel laws and regulations limit management's ability to make valid promises concerning future hiring decisions.

### **Evaluation of Level Four Grievance Process and ALJ Performance**

The Board believes it is fulfilling its mission of equitably and consistently resolving grievances, and of providing a simple, expeditious and fair process for resolving employee grievances at the lowest possible administrative level. The Board believes the grievance procedure at Level Four continued to function well in 2003. The Board is providing prompt hearings and timely decisions, and is thereby causing the prompt resolution and settlement of many other grievances. The Board's continuing efforts to encourage the use of mediation has produced beneficial results to all parties and the public. Furthermore, from the information the Board obtained from the Division of Personnel, it appears state agencies are settling many claims before they reach Level Four.<sup>17</sup>

The Board believes its ALJs performed well this year. They issued more decisions this year than last, even with one less ALJ for about half the year, and despite the flooding problems at the Charleston Office. On appeal, the courts uphold grievance decisions most of the time. The Board's records show that about 27% of all decisions issued since 1985

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<sup>17</sup> The Board does not know how many grievances employees file at the lower levels, or what percentage of those cases are resolved before reaching Level Four. The Division of Personnel was able, however, to provide information on back pay awards made to state employees for several fiscal years. In the last two fiscal years, state agencies made one hundred fifty-five (155) back pay awards to state employees in FY03, which totaled about \$460,094. This was down from 198 awards the prior year, totaling \$698,757. Most of these back pay awards resulted from settlement agreements reached at Level Three of the grievance procedure. This information is incomplete and understates both the number of back pay awards and total amount of back pay awarded. This information relates to state employees only, not higher education or county board of education employees.

have been appealed, and only about 13% of those cases have been reversed. This low reversal rate is an indicator that ALJs are properly applying the law and rendering legally sound and fair decisions.

### **Fiscal Summary**

The Board operates in a sound fiscal manner and is frugal with its limited resources. At the same time, the Board earnestly strives to comply with its legal duties and responsibilities and to provide high quality customer service. The Board's actual expenditures are shown in the table below.

FY 2003	FY 2002	FY 2001	FY 2000	FY 1999	FY 1998	FY 1997
\$877,245	\$849,883	\$861,443	\$920,469	\$938,611	\$913,483	\$960,913

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

### **Recommendations**

Because of its role as the neutral third party, the Board makes few legislative recommendations. The Board, however, will make three recommendations to the Governor and the Legislature this year. First, the Board recommends, as it has often before, that the Legislature revise the grievance procedure laws to help insure its complete neutrality and the appearance of impartiality. When the Legislature reorganized the Executive Branch of State government 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. 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 Cabinet Secretary, who has substantial control over the Board's budget. Because of this structural problem, 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, as it was prior the 1989 reorganization.

Second, the Board recommends the Legislature pass legislation creating a special revenue fund for operation of the agency. See House Bill 4005 and Senate Bill 142. Passage of this legislation would reduce the state's general revenue obligations and provide a stable funding source so the agency can meet its legal duties and responsibilities.

Third, the Board recommends the Legislature raise the compensation paid to members by passing House Bill 2076. The per diem of seventy-five dollars per meeting has not been changed since 1985. The bill provides that Board members would be paid the same amount as currently paid to legislators for interim duties, that is, one hundred fifty dollars per meeting. The existing cap of seven hundred fifty dollars per fiscal year would not be removed by the bill.

#### **Final Comments about Level Four** **and the Philosophy for Handling Grievances**

During the past nineteen years, the Board has created a large body of law or precedent to be followed in many areas of public employment. Early on the Board and all stakeholders recognized the value of consistency in grievance decisions and the importance of making information about its decisions readily available to employers and employees. The premise was that making this information readily available would serve the interests of both management and labor and promote better employer-employee relations. The Internet made it possible to disseminate this information promptly, and the Board readily embraced this technology. The ready availability of precedent likely has contributed to the gradual decline in grievances reaching Level Four, and has helped the parties in the informal resolution and settlement of grievances at the lower levels.

The Board believes a properly functioning grievance procedure is vital to any organization, and it is especially important in the public sector. This State's grievance laws are well 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. F. Elkouri,

How Arbitration Works 157 (4<sup>th</sup> ed. 1985) Good grievance procedures are important but they alone do not ensure 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 possible level. W. Va. Code § 29-6A-7.

For the grievance procedure to be effective at the lower levels, the Board feels the comments made the last three years should be repeated. Public employers, employees, unions, employee organizations, and all interested persons should keep certain guiding principles firmly in mind. First, it must be clearly understood 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, 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. F. Elkouri, How Arbitration Works 154-155 (outlining recommendations made by the President's National Labor-Management Conference of 1945).

In conclusion, the Board will continue to focus on prompt decision making at Level Four, strive to improve the quality of its decisions and the fairness of its hearings, and promote the use of mediation early in the grievance process before a hearing is held. It will continue to engage in outreach and education activities, try to improve the lower levels of the grievance process, and work to make the process as simple as possible, especially for employees who represent themselves.

APPENDIX A

ORGANIZATIONAL CHART

**WEST VIRGINIA EDUCATION AND  
STATE EMPLOYEES GRIEVANCE BOARD**

**ACTING CABINET SECRETARY**  
**WV Department of Administration**

TOM SUSMAN

**BOARD MEMBERS\***

**CHAIR**

WALT AUVIL, Esq.

**MEMBERS**

DEBRA A. KILGORE, Esq.

LOWELL WITTERS

**DIRECTOR**  
RONALD WRIGHT

**ADMN OFFICER**  
VALERIE RIST

**ADMN LAW JUDGES**  
IONA KELLER  
JANIS REYNOLDS  
DENISE M SPATAFORE  
M. PAUL MARTENEY  
ALJ Vacancy (2003)  
ALJ Vacancy (2004)

**SECRETARIES\*\*\*\***  
CRICKET POWELL  
TINA BREWER  
JULIE BLOSSER

Grievance Board included in DOA, Code, 5F-2-1 (a) (7).

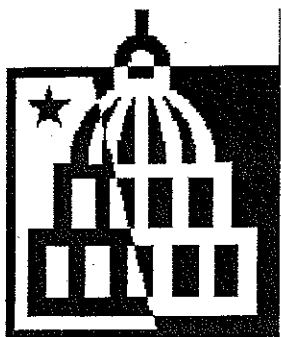
Board members appointed by Governor, Code, 18-29-5 (a).

No statutory provision for a Director.

One vacant ALJ position was eliminated in Oct. 2000 to provide for merit increases. Another ALJ position was eliminated in December 2002.

Two Secretary II positions eliminated in recent years, one in the Beckley Office and the other in the Wheeling Office.

## APPENDIX B



State of West Virginia

# Education and State Employees Grievance Board

[www.state.wv.us/admin/grievanc/grievanc.htm](http://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 16, 2004.** 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 2003, 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:

☐ Grievant      ☐ Employer  
☐ Employee Representative      ☐ Counsel  
☐ 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**

## Appendix C

### **Average Rating by Customer of Administrative Procedures and Staff For 2002**

<b>Customer Type</b>	<b># of Responses</b>	<b>Overall Satisfaction</b>	<b>Forms Simple</b>	<b>Procedure Simple</b>	<b>Prompt Hearing Date</b>	<b>Prompt Info Response</b>	<b>Info Accuracy</b>	<b>Staff Courtesy</b>
COUNSEL	17	78.13	3.76	3.76	4.24	4.24	4.12	4.53
EMPLOYEE REP	8	66.25	3.88	3.13	3.88	3.50	3.71	4.13
EMPLOYER	23	90.22	4.30	4.13	4.30	4.57	4.35	4.78
GRIEVANT	27	39.26	3.11	2.70	2.37	2.59	2.81	3.26
OTHER	5	32.00	3.60	3.20	3.00	2.80	2.60	3.60

### **Average Rating by Customer of Administrative Procedures and Staff For 2003**

<b>Customer Type</b>	<b># of Responses</b>	<b>Overall Satisfaction</b>	<b>Forms Simple</b>	<b>Procedure Simple</b>	<b>Prompt Hearing Date</b>	<b>Prompt Info Response</b>	<b>Info Accuracy</b>	<b>Staff Courtesy</b>
COUNSEL	14	94.29	4.57	4.50	4.71	4.14	4.43	4.86
EMPLOYEE REP	7	61.43	4.00	3.71	2.86	3.43	3.86	4.57
EMPLOYER	23	72.96	4.17	4.09	4.26	3.91	4.17	4.26
GRIEVANT	31	43.06	3.13	2.71	2.90	2.81	2.94	3.55
OTHER	2	90.00	3.50	3.00	4.00	4.50	4.50	4.50

## Average Rating by Customer of Adjudication Services for 2002

Customer Type	# of Responses	Overall Satisfaction	Prompt Decision	Quality Decision	Orderly Hearing	Know Law re Hearing	Public Criticism	Courtesy
COUNSEL	17	78.13	4.18	3.94	4.24	4.12	3.88	4.47
EMPLOYEE REP	8	66.25	3.63	3.57	4.00	3.75	3.14	4.13
EMPLOYER	23	90.22	4.30	4.30	4.30	4.39	4.48	4.43
GRIEVANT	27	39.26	2.56	2.44	2.81	2.63	2.41	3.63
OTHER	5	32.00	3.80	3.00	3.60	2.40	2.60	4.50

## Average Rating by Customer of Adjudication Services for 2003

Customer Type	# of Responses	Overall Satisfaction	Prompt Decision	Quality Decision	Orderly Hearing	Know Law re Hearing	Public Criticism	Courtesy
COUNSEL	14	94.29	4.21	4.21	4.14	4.43	4.29	4.14
EMPLOYEE REP	7	61.43	3.57	3.86	4.00	4.00	3.14	4.14
EMPLOYER	23	72.96	3.91	4.09	4.26	4.09	3.87	4.48
GRIEVANT	31	43.06	2.68	2.90	2.90	3.00	2.58	3.68
OTHER	2	90.00	4.00	4.50	4.50	4.50	4.50	4.50

**APPENDIX D**

**GRIEVANCES FILED AT LEVEL FOUR AGAINST COUNTY BOARDS OF EDUCATION, THE STATE DEPARTMENT  
OF EDUCATION AND OTHER ENTITIES  
CALENDAR YEARS 2003 THROUGH 1996**

<b>County Boards of Education:</b>	<b>2003</b>	<b>2002</b>	<b>2001</b>	<b>2000</b>	<b>1999</b>	<b>1998</b>	<b>1997</b>	<b>1996</b>
Barbour County Board	1	1	2	0	2	0	0	2
Berkeley County Board	1	2	2	4	2	1	7	5
Boone County Board	4	2	1	6	6	6	1	5
Braxton County Board	0	0	0	2	0	2	1	1
Brooke County Board	1	1	0	1	2	1	0	3
Cabell County Board	7	3	9	9	7	0	11	9
Calhoun County Board	4	0	0	1	1	3	0	0
Clay County Board	0	0	0	0	2	0	1	1
Doddridge County Board	1	0	0	0	2	0	0	0
Fayette County Board	6	5	3	1	1	3	7	8
Gilmer County Board	2	1	0	0	0	1	0	0
Grant County Board	4	3	0	1	2	1	3	2
Greenbrier County Board	2	2	4	2	2	1	5	7
Hampshire County Board	2	3	1	1	1	0	3	1

Hancock County Board	4	4	3	5	7	9	12	11
Hardy County Board	1	0	1	0	1	0	0	1
Harrison County Board	7	9	15	4	8	4	4	5
Jackson County Board	2	1	2	1	4	1	3	2
Jefferson County Board	4	9	6	3	1	4	2	2
Kanawha County Board	24	24	20	22	25	13	17	19
Lewis County Board	0	2	1	0	4	2	4	3
Lincoln County Board	3	8	5	7	20	30	33	7
Logan County Board	6	5	5	8	7	7	18	15
Marion County Board	1	3	5	4	1	3	2	5
Marshall County Board	1	3	2	1	2	1	3	0
Mason County Board	5	4	2	3	5	4	5	9
McDowell County Board	13	5	3	1	5	0	2	5
Mercer County Board	2	1	2	1	1	2	10	3
Mineral County Board	0	1	1	4	3	5	3	2
Mingo County Board	4	8	3	5	6	15	40	49
Monongalia County Board	11	13	12	20	14	11	0	8
Monroe County Board	0	1	2	1	5	3	2	6
Morgan County Board	0	1	1	0	1	3	3	4

Nicholas County Board	6	4	3	1	5	4	3	3
Ohio County Board	0	3	3	1	2	1	2	3
Pendleton County Board	2	0	1	0	0	2	1	0
Pleasants County Board	1	1	0	0	0	1	0	0
Pocahontas County Board	2	0	1	4	0	0	2	0
Preston County Board	3	2	3	8	4	1	0	0
Putnam County Board	6	11	5	7	13	6	12	3
Raleigh County Board	7	10	16	5	3	2	10	12
Randolph County Board	2	3	2	7	3	5	3	7
Ritchie County Board	0	0	4	0	0	2	1	1
Roane County Board	0	0	0	0	0	0	0	0
Summers County Board	2	0	3	1	1	3	2	6
Taylor County Board	1	1	1	0	0	0	0	1
Tucker County Board	0	4	5	0	1	1	1	3
Tyler County Board	0	0	0	1	0	0	0	3
Upshur County Board	1	2	0	2	1	2	1	2
Wayne County Board	6	1	5	6	11	6	6	5
Webster County Board	1	1	1	2	1	0	3	4
Wetzel County Board	7	4	4	2	1	2	3	6

Wirt County Board	0	0	0	0	0	1	1	0
Wood County Board	9	5	4	0	5	3	5	6
Wyoming County Board	2	2	3	2	4	1	4	2
Multi-County Vocational Centers	3	3	1	0	1	0	0	2
Regional Educ. Serv. Agencies	0	0	0	0	0	1	2	1
W. Va. Department of Education	6	4	4	7	7	6	5	6
<b>Totals</b>	<b>190</b>	<b>186</b>	<b>182</b>	<b>174</b>	<b>213</b>	<b>186</b>	<b>268</b>	<b>276</b>

## APPENDIX E

### GRIEVANCES FILED AT LEVEL FOUR AGAINST HIGHER EDUCATION INSTITUTIONS CALENDAR YEARS 2003 THROUGH 1998

<b>STATE COLLEGES</b>	<b>2003</b>	<b>2002</b>	<b>2001</b>	<b>2000</b>	<b>1999</b>	<b>1998</b>
Bluefield State College	0	3	5	0	0	1
Concord State College	1	1	2	0	0	2
Fairmont State College	2	4	2	2	1	0
Glenville State College	1	0	0	0	0	0
Potomac State College	1	1	1	0	0	0
Shepherd College	2	1	7	2	4	1
West Liberty State College	7	0	1	1	3	4
W. Va. Univ. Institute of Technology	1	1	0	0	0	0
W. Va. Northern Community College	0	0	0	3	0	2
W. Va. Southern Community & Technical College	0	3	1	1	1	1
W. Va. State College	1	1	1	1	8	2
<b>STATE UNIVERSITIES</b>						
Marshall University	11	13	14	10	11	10
W. Va. University	3	9	60	10	28	13

W. Va. University Hospitals	0	1	0	0	0	0
W. Va. School of Osteopathic Med.	0	1	0	0	0	0
WVNET	0	0	0	1	0	0
Higher Education Policy Commission	0	1				
<b>Totals</b>	<b>30</b>	<b>40</b>	<b>94</b>	<b>31</b>	<b>56</b>	<b>36</b>

## APPENDIX F

### GRIEVANCES FILED AT LEVEL FOUR AGAINST STATE AGENCIES CALENDAR YEARS 2003 THROUGH 1998

	2003	2002	2001	2000	1999	1998
<b>Administration, Department of</b>						
Board of Risk & Insurance Management	0	0	0	0	0	0
Consolidated Public Retirement Bd.	0	1	0	1	0	0
Finance	0	1	0	0	0	0
General Services	0	4	2	0	3	1
Personnel	0	2	0	0	0	3
Public Employees Insurance Agency	0	1	0	3	0	0
Purchasing	1	0	1	0	0	1
Surplus Property	2	1	0	0	0	0
<b>Commerce, Bureau of</b>						
Forestry	1	1	0	0	0	0
Labor	0	0	0	3	3	1
Miners' Health, Safety & Training	0	1	0	0	0	0
Natural Resources	4	1	1	4	2	6
Tourism & Parks	0	0	0	2	0	0

<b>Education &amp; the Arts, Department of</b>						
Culture and History	2	0	0	0	0	2
Educational Broadcasting Authority	0	1	0	0	1	1
Library Commission	0	1	1	1	0	0
Rehabilitation Services	5	7	5	6	5	13
<b>Employment Programs, Bureau of</b>	13	10	20	9	6	14
<b>Environmental Protection, Department of</b>	9	11	12	2	2	3
<b>Health and Human Resources, Department of</b>	69	56	212	76	77	70
<b>Military Affairs &amp; Public Safety, Department of</b>						
Adjutant General	0	0	0	0	1	0
Corrections	29	34	28	40	94	65
Juvenile Services	5	6	8	3	8	15
Public Safety	1	1	2	1	2	12
Regional Jail Authority	3	5	2	5	4	11
Veteran's Affairs	0	1	3	3	3	1
<b>Public Service Commission</b>	0	2	1	0	1	3
<b>Senior Services, Bureau of</b>	0	0	1	1	0	2
<b>Supreme Court of Appeals</b>	1	1				

<b>Tax &amp; Revenue, Department of</b>			2	3	7	5
Alcohol Beverage Control Administration	1	0	1	1	0	2
Insurance Commission	0	3	0	0	0	0
Lottery Commission	1	1	0	0	0	0
State Tax Department	26	2	0	0	0	0
<b>Transportation, Department of</b>						
Highways	26	59	46	24	32	40
Motor Vehicles	1	2	1	0	5	4
Parkways, Economic Dev. & Tourism Authority	1	0	7	15	14	19
<b>Workers' Compensation Commission**</b>	1					
<b>County Health Departments</b>					9	4
Beckley-Raleigh County Health Department	0	1	0	0		
Berkeley County	0	0	1	0		
Clay County	0	0	1	0		
Hampshire County Health Department	1	0	0	0		
Kanawha-Charleston	1	1	0	0		
Monongalia County	1	1	1	0		
Morgan County	2	0	1	1		
Preston County	0	0	0	1		

Webster County Health Department	2	0	0	0		
<b>Totals</b>	<b>209</b>	<b>219</b>	<b>360</b>	<b>206</b>	<b>281</b>	<b>183</b>

\*\* Created by the legislature as an independent organization in 2003.

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 docketing system does not always enable it to identify the specific division or organizational unit within a department or bureau from which the grievances arose. Starting with the 2000 report, the Board began listing the specific county health department from which grievances were filed.

## APPENDIX G

### 2003 Grievances Granted and Defaults Found

**Topics** 12-HOUR SHIFTS; OVERTIME; MEAL BREAKS; REST BREAKS; PAY; LEAVE USE; HOLIDAY TIME

**Docket No.** 03-RJA-188

**Synopsis** Grievants raised a number of issues related to Respondent's change-over to a 12-hour workday. Grievants failed to prove they were entitled to compensation for lunch periods or to rest breaks during the day. Grievants did prove they were improperly required to use more than 40 hours of leave to cover a work week; but not that they should not have 4 hours of annual leave deducted when taking an alternate holiday. Grievance GRANTED, IN PART and DENIED, IN PART.

**Topics** CLASSIFICATION; BACK PAY

**Docket No.** 01-HE-132

**Synopsis** After this grievance was filed, the Job Evaluation Committee reviewed the entire Physical Plant Job Family, which took 2 years. This grievance was placed in abeyance during that time, at Respondent's request. Grievants completed new Position Information Questionnaires as part of the Job Family review. Effective July 1, 2003, Grievants were placed in the Trade Specialist Job Title, pay grade 13. They had previously been classified as Electricians, pay grade 12. Grievants were satisfied with their new classification, but felt they should receive back pay to a date in January 2001. One of the Grievants was deemed to have abandoned his grievance, and his grievance was dismissed. One of the Grievants was first classified as an Electrician on January 1, 1994, the date the Mercer classification system became effective. This was his initial classification. His duties had not changed significantly since that time. The applicable legislative rule provides that if an employee did not grieve his initial classification in 1994, he is thereafter precluded from filing a grievance challenging his initial classification. This Grievant's grievance was dismissed. Respondent's argument that this same legislative rule should apply to the remaining Grievants, precluding them from grieving because they did not first seek an internal review, was rejected. The legislative rule clearly applies only to the procedure to be followed to contest the employee's initial classification on January 1, 1994. Grievants were not required to submit a Position Information Questionnaire for internal review before filing a grievance. The remaining Grievants were awarded back pay to January 2001. Grievance GRANTED, IN PART, and DISMISSED, IN PART.

**Topics** CLASSIFICATION; TIMELINESS

**Docket No.** 01-HE-392

**Synopsis** Grievant filed a request for an informal review of his Mercer classification in February 1994. The JEC response was misplaced and never received by Grievant or Respondent. Consequently, Grievant did not file a level one grievance. When he learned that other plumbers had received a favorable ruling he inquired about his case, but was told it was not received, and was too late. Grievant took no further action, but was reclassified as a Certified Skilled Craft Specialist. He requested a review of his position for salary purposes, but was told there was no money for an upgrade. At level two, Grievant was awarded the same relief granted in Creel. Grievant appealed to level four seeking additional relief, stating that he had continued to work in a lead capacity. Respondent argued that the grievance was not timely filed, and that Grievant's PIQ did not support an upgrade. DECISION: Level two award was upheld since Respondent did not file appeal, and because relief was fair and equitable. Grievant's claims for additional relief were not

timely filed and were not supported by the evidence. Grievance GRANTED, IN PART and DENIED, IN PART.

**Topics** COMPENSATION; DISCRIMINATION

**Docket No.** 02-HEPC-365

**Synopsis** Grievant and a colleague agreed to teach summer courses for a set amount of compensation. That amount was later reduced due to budgetary reasons. Grievant's colleague was paid the original amount while Grievant was not. Respondent argues there was no discrimination because the two were not similarly situated the other instructor had already begun teaching when the reduction was made. DECISION: While Grievant had not yet met with his class, he had also begun working by preparing for lectures and discussions. The reduction was made 3 working days before his class met. Respondent's reason for the difference in treatment was shown to be pre-textual. Grievance GRANTED.

**Topics** COMPENSATION; EXTRACURRICULAR ASSIGNMENT

**Docket No.** 03-42-148

**Synopsis** Grievant's position as a bus operator included a mid-day vo-tech "shuttle" run, which was posted with the regular position. Grievant contended the vo-tech run should have been a separate extracurricular assignment with a separate contract, and that he was entitled to the "extra duty" rate of pay for it. Evidence established that, because Grievant had to return to work in the middle of the day on what would have otherwise been his "own time," this was an extracurricular run, which should have been contracted separately. Grievant was granted back pay at the extracurricular rate, and also given the option to resign only the vo-tech run, if he so chooses. Grievant was denied pay at the extra duty rate, because this run was extracurricular. Grievance GRANTED IN PART.

**Topics** DEFAULT REMEDY; SELECTION; EXTRA DUTY

**Docket No.** 02-30-242D

**Synopsis** For a summer basketball tournament which lasted three days, Respondent posted "positions" for six bus drivers, who would drive six-hour shifts for the duration of the tournament. Grievants proved by preponderance of the evidence that these were not summer jobs, but extra duty assignments, which should have been distributed pursuant to Respondent's "long trip" roster. However, the only Grievant whose name appeared on the roster who would definitely have received one of the runs was Grievant Gerard, and remaining Grievants could not prove they would have received the runs--six positions could not be given to 14 Grievants. Grievance GRANTED, IN PART and DENIED, IN PART.

**Topics** DEFAULT; EXCUSABLE NEGLECT; CERTIFIED MAIL

**Docket No.** 03-CORR-295D (DEFAULT ORDER)

**Synopsis** Grievant sent his level three appeal by certified mail to the commissioner's office for the Division of Corrections. It was received in the central mail room at the state capitol complex and signed for by an unidentified individual. Mail room employees do not work for the agencies whose mail they receive. DOC claimed it never received the appeal and had no record of it, which was their reason for not scheduling a hearing. Although DOC cannot control mail room employees, this was not excusable neglect. It defeats the purpose of certified mail if the person who signs for the item is not employed by the recipient. Default GRANTED.

**Topics** DEFAULT; EXCUSABLE NEGLECT; EXTENSION OF TIMELINES

**Docket No.** 03-DEP-235D (DEFAULT ORDER)

**Synopsis** At level three hearing, Grievant agreed to a 30-day extension of the time limit for issuance of the decision. Although the hearing was not concluded that day, and reconvened two weeks later, Grievant made it clear to hearing examiner that he expected the decision within 30 days of the initial hearing. Respondent did not issue decision within that time limit. After hearing examiner completed it, it sat in the office of their human resources manager without action for several days. Respondent's delay was not the result of excusable neglect. Default GRANTED.

**Topics** DEMOTION; SUSPENSION; UNPROFESSIONAL CONDUCT; MITIGATION

**Docket No.** 02-CORR-268

**Synopsis** On June 17, 2002, Grievant was encountered with a random pat-down search upon arriving at work. He did not immediately comply, but did so after smoking a cigarette outside the facility. Shortly after this event, Grievant angrily slammed a door in the presence of his subordinate officers. Evidence established that Grievant's conduct was unprofessional, disruptive, and unacceptable, but mitigation was found appropriate. His demotion was reversed, and the suspension of 40 days was allowed to stand. Grievance GRANTED, IN PART and DENIED, IN PART.

**Topics** DISCRIMINATION; REPRISAL

**Docket No.** 98-BOD-273/00-HE-396

**Synopsis** Grievant filed a lawsuit against Southern, which resulted in a settlement agreement providing Grievant take a sabbatical and have no contact with Southern for approximately one year. Upon Grievant's return, she was given a schedule prepared by administrators which resulted in being 3 credits short one semester. She was denied the opportunity to make up the credits with release time. The next semester she had 18 credit hours on 4 campuses, an unworkable schedule. No relief was given to her, despite another request for release time. A proposal to divide Grievant's dedicated art lab proceeded through the committee system and was approved by the President, resulting in Grievant losing 2/3 of her studio art lab. She was not given adequate replacement space. Finally, her art lab was moved entirely to Williamson campus, and when she and her new supervisor attempted to offer one studio art class on Logan in space they agreed upon, she was refused, because of her ongoing grievance. Overall, these incidents led to the conclusion that Southern engaged in discrimination and reprisal against Grievant, and her grievance was GRANTED, IN PART and DENIED, IN PART.

**Topics** DISMISSAL

**Docket No.** 03-52-191

**Synopsis** Respondent voted to terminate Grievant's employment after her performance did not improve following several plans of improvement. Grievant argued that the action was arbitrary and capricious given that she was absent due to illness nearly one-third of the school year.

DECISION: Because the academic and behavioral problems presented in Grievant's classroom was likely due to her frequent absences, the fact that Grievant was requested not to leave the class after she had prevailed in a grievance to transfer to another position, and evidence that the Superintendent and principal both wanted her to resign, the dismissal was arbitrary and capricious. Grievance GRANTED.

**Topics** DISMISSAL

**Docket No.** 02-49-162

**Synopsis** Respondent suspended, and then dismissed, Grievant after finding that she had altered physician leave slips. Grievant admits that she changed the most recent form upon which the action was primarily based, but asserts that she believed it was

permissible since she had called the doctor's office for permission. DECISION: Grievant's testimony was credible. Also considered was the fact that she had exhausted her leave for the year, and was not paid for the time off. Grievant had an unblemished 23 year work record with Respondent, which warranted mitigation to the suspension which preceded the dismissal. Grievant's claim of reprisal was without merit since she had not filed a grievance. Grievance GRANTED.

**Topics** DISMISSAL

**Docket No.** 02-20-381

**Synopsis** Grievant was an excellent custodial employee of 27 years, who was dismissed after he offered a co-worker, who was an Aide, money if she would engage in oral sex with him. The Aide approached Grievant every day at his work station in the cafeteria, and talked to him for up to 30 minutes at a time. She laughed with him, touched him, told him her personal problems, and asked him to loan her money. This behavior continued after Grievant had made the offer of money for sex. Grievant thought the co-worker was interested in having a sexual relationship with him. Respondent did not demonstrate Grievant had created a hostile work environment or that his offer was unwelcome, so there was no violation of Respondent's sexual harassment policy. Grievant's offer did constitute immorality. However, Grievant demonstrated that dismissal was too severe a penalty under these circumstances, and that he was treated differently than another similarly situated employee. Grievance GRANTED.

**Topics** DISMISSAL

**Docket No.** 02-HEPC-293

**Synopsis** Grievant was dismissed for telling a friend that a person she knew was in the emergency dental clinic. Grievant had not been clearly told that such a statement would result in her dismissal.

While Grievant did commit a breach of confidentiality, this statement did not rise to the level of gross misconduct identified in Respondent's Employee Handbook. Additionally, Respondent did not prove Grievant had been informed such a statement could result in her dismissal. Grievance GRANTED.

**Topics** DISMISSAL; DRUG TESTING

**Docket No.** 02-23-395

**Synopsis** Grievant was dismissed from his employment after he tested positive for marijuana in his system in a random drug test. Respondent's random drug testing policy applied to employees in safety sensitive positions. Grievant did not have to have a CDL for his job, nor did he transport students or other personnel. By definition, Grievant was not in a safety sensitive position, and was not subject to Respondent's random drug testing policy.

In addition, Respondent did not prove Grievant had used any illegal drug. Grievant presented evidence that he had been in a small room for an extended period of time with a group of people who were smoking marijuana. Grievant demonstrated the exposure was so concentrated that it showed up in his system on the drug test even though he did not use marijuana, and that this was medically possible. Grievance GRANTED.

**Topics** DISMISSAL; INSUBORDINATION; IMMORALITY; DISCRIMINATION

**Docket No.** 02-29-216/257

**Synopsis** Grievant was terminated for insubordination, immorality, and violation of Board's Sexual Harassment Policy, for incident involving an argument with her boyfriend, the Board's Treasurer, on Board property. Grievant was insubordinate to her supervisor when she refused to leave the building, and made derogatory comments to her.

Grievant did not threaten to kill her supervisor. Grievant did not engage in immorality; she had a fight with her boyfriend. Grievant proved at least one other professional employed by the Board had punched a parent of a student while performing his duties of a coach, but was not dismissed. Grievant did not prove she was entitled to an improvement plan, as her conduct was completely unrelated to her performance as a classroom teacher. The weight of the evidence convinced the ALJ that dismissal was too severe a punishment for Grievant's infraction, and the dismissal was reduced to a 20-day suspension without pay. Grievance GRANTED.

**Topics** DISMISSAL; MITIGATION

**Docket No.** 03-HHR-007

**Synopsis** Grievant was terminated for violating hospital's patient confidentiality policy after she copied documents containing patient names and offered them as evidence at a level four grievance hearing. Respondent's policy was explicit and Grievant admitted violation, but claimed she did not understand it was a violation. Policy did not specify disciplinary consequences.  
DECISION: Termination was disproportionate for violation, mitigated to 60-day suspension. Grievance GRANTED.

**Topics** DISMISSAL; UNSATISFACTORY PERFORMANCE

**Docket No.** 02-ADMN-389

**Synopsis** Grievant, a 16 year employee of the State of West Virginia, was fired for unsatisfactory performance, when errors were found in a project on which she had worked. The record did not reflect how many errors were found. Further, there was no evidence that the errors were made by Grievant. Temporary workers had also worked on the project, and Grievant's supervisor could not distinguish between their work and Grievant's. Grievant had not been told that she would be held responsible for the work of the temporaries, nor did the record reflect that this was appropriate. It was further found that Grievant's supervisors placed unreasonable demands on Grievant, were not clear in their instructions to her, and were not fair to her. Grievance GRANTED.

**Topics** EXTRACURRICULAR ASSIGNMENT; EXTRA-DUTY ASSIGNMENT

**Docket No.** 03-50-178

**Synopsis** Respondent added students and a stop to Grievant's regular evening route, so that Grievant transported students who were not previously on her evening run, from the elementary school to a stop 6 to 8 blocks away, to attend an after-school program. The stop was located along Grievant's evening route. The stop added 5 to 7 minutes to the time it took Grievant to complete her route. Grievant argued this was an extracurricular assignment. This is not an extracurricular assignment, as it occurs during Grievant's regularly scheduled working hours, and does not extend her work day. Likewise, it was not an extra duty assignment. Grievant did demonstrate she was entitled to a list of the names of the students she was transporting to the after school program, and that, on occasion, these added students resulted in overcrowding on her bus. Respondent was directed to prepare a list of the students attending the after school program who would be riding Grievant's bus, and when the addition of these students reached the point where there would be 90 students on the bus, no more students could be added to the list or to Grievant's bus. Grievance GRANTED, IN PART AND DENIED, IN PART.

**Topics** EXTRA-DUTY ASSIGNMENTS; COMPENSATION

**Docket No.** 02-14-263

**Synopsis** Grievants claimed they should receive extra compensation for field trips they were required to take in the middle of the school day, between their regular morning and

afternoon runs. Grievance Board has held that these are not extra duty assignments, but when such trips cause a driver to work overtime, he is entitled to overtime pay. Grievance GRANTED, IN PART and DENIED, IN PART.

**Topics** HIRING; SELECTION; EXPERIENCE

**Docket No.** 03-41-161

**Synopsis** Grievant was not selected for a posted counselor's position. Respondent improperly calculated "years of experience within the required certification area." However, Grievant provided no evidence that she would have been successful had the correct criteria been used. Remanded to lower level for re-evaluation of candidates' experience, with order to instate Grievant if she is then successful. Grievance GRANTED, IN PART and DENIED, IN PART.

**Topics** MERIT RAISES; DISCRIMINATION; FAVORITISM

**Docket No.** 03-DNR-094

**Synopsis** Respondent's Conservation Officer 2's who were referred to as Regional Training Officers were given raises after they were assigned additional firearms training and armorer duties as compensation, for the added duties. Grievants, who were also classified as Conservation Officer 2's, but referred to by Respondent as Field Sergeants, with different duties than the Regional Training Officers, were not given these raises and grieved, claiming discrimination and favoritism. Grievants demonstrated the raises were not given for merit, and were improper, and amounted to discrimination and favoritism. Grievants requested as relief that they also be awarded raises. This relief would also be improper, as Grievants did not demonstrate they were entitled to merit raises. The relief granted was the rescission of the raises for the Regional Training Officers. Grievance GRANTED, IN PART and DENIED, IN PART.

**Topics** MISCLASSIFICATION

**Docket No.** 02-HHR-111

**Synopsis** Personnel had reviewed Grievants' duties and recommended to HHR in January 2001 that a new classification be created for Grievants' job, in a pay grade three levels above that of their current classification. HHR would not give approval for the change due to budgetary constraints, and Personnel would not move forward with the new classification because it believed it had to have HHR's approval. Personnel's Rules require consultation with the affected agency, not the agency's approval. Personnel's refusal to move forward with its recommendation that a new classification be created for Grievants' jobs was based upon a mistaken belief as to the law, and was arbitrary and capricious. Grievants demonstrated it would cost less than \$10,000 to fund the salary increases incident to the change in pay grade. Grievants demonstrated that a new classification should be created for the Accounting Technician 3's in their unit, in a pay grade 10. No back pay was awarded. Grievance GRANTED.

**Topics** NONSELECTION; CERTIFICATION

**Docket No.** 03-15-101

**Synopsis** Based upon prior practice, HCBE did not appoint Grievant to a position of bus operator because she did not hold a hard copy of her certification at the time the position was filled. Grievant asserts the certification had been issued and telefaxed to HCBE by the State Department of Education. HCBE argues there is no legal authority requiring that a telefax copy be accepted.

Because the telefax was from the State Department of Education, and it is a common practice of that agency, Grievant should have been awarded the position in December 2002. Grievance GRANTED.

<b>Topics</b>	POSTING
<b>Docket No.</b>	02-DOH-364
<b>Synopsis</b>	<p>Grievant argued that a position had been created and filled without posting. Respondent asserted that an employee was simply reassigned.</p> <p>DECISION: The county superintendent (Highway Administrator II) was given duties and working title of Assistant to the Maintenance Engineer. The county superintendent's position was subsequently filled, and the Assistant's position was upgraded to Highway Administrator III, establishing that a new position had been created. DOH failed to post the position pursuant to Division of Personnel Administrative Rule, 9.7. Grievance GRANTED.</p>
<b>Topics</b>	REALLOCATION; PROMOTION; QUALIFICATIONS; OFFICER APPRENTICESHIP PROGRAM
<b>Docket No.</b>	02-CORR-044
<b>Synopsis</b>	<p>Grievant contended she was entitled to reallocation to Correctional Officer II before completion of the Officers Apprenticeship Program. The job description for that classification states that employees with either four years of specific experience or a specified number of college credits are minimally qualified, and need only complete the OAP within two years of their appointment. Therefore, Grievant was qualified and entitled to reallocation, since she was performing the duties of a CO II. Only officers who have only a high school education and do not possess the required experience or college credits are required to complete the OAP prior to reallocation. Grievance GRANTED.</p>
<b>Topics</b>	REDUCTION IN FORCE
<b>Docket No.</b>	03-HEPC-072
<b>Synopsis</b>	<p>When Respondent reduced the number of librarians during a reduction in force by one-half position, Grievant, a full-time employee was bumped into a position four pay grades lower. Grievant argues that it was inequitable to allow a half-time employee to bump into his full-time position, and that he was qualified for positions in pay grade 16. Respondent asserts that it is not required to consider whether positions are full or part-time, only the seniority and qualifications of the individuals involved. Grievant was not offered the positions in pay grade 16 because there was no evidence that he had any experience as a Residence Hall Director or Admissions Counselor.</p> <p>DECISION: Pursuant to the decision in Hendershot, Grievant should have retained one-half of the librarian position. Further, Respondent should have conferred with Grievant to determine his qualifications for the positions in pay grade 16. Grievance GRANTED.</p>
<b>Topics</b>	REDUCTION IN FORCE
<b>Docket No.</b>	03-HEPC-061
<b>Synopsis</b>	<p>During a reduction in force, Grievant was bumped from her full-time position of Secretary to a half-time position of Assignment Assistant. Employees with less seniority in pay grade 10 retained full-time employment. Grievant argues that she should have been bumped into the position of Records Assistant II. WLSC asserts that it is not statutorily required to consider whether positions are full or part-time, only the seniority and qualifications of the individuals involved.</p> <p>DECISION: WLSC's failure to consider full or part-time status of positions was arbitrary and capricious. Employees are to be assigned to as substantially equivalent position as possible. Grievance GRANTED.</p>
<b>Topics</b>	REMAND; BACK PAY; INTEREST DUE
<b>Docket No.</b>	01-17-341R

**Synopsis** DECISION: Back pay was determined to be \$16,428, and with simple interest, a total of \$22,112. Interest calculated to January 31, 2003.

**Topics** SELECTION

**Docket No.** 02-DOH-350

**Synopsis** Grievant had been an Administrative Services Assistant III for many years. A new position was posted for an Administrative Services Manager I. Pursuant to the duties described in the posting, Grievant had been performing these duties for many years. He applied for the position, and a former employee with less years of services and fewer qualifications was selected.

In this specific set of facts, Respondent's decision was arbitrary and capricious. Grievance GRANTED.

**Topics** SELECTION

**Docket No.** 03-24-121

**Synopsis** In selecting an applicant for a special education teaching position, Respondent asserted that neither set of factors in W. Va. Code §18A-4-7a was applicable. However, because in this case, neither Grievant nor successful applicant were permanently employed, the first set of factors applied. Respondent failed to properly consider teaching experience in the subject area, course work in the relevant field, and specialized training. Therefore, case must be remanded to board of education for proper consideration of applicants' credentials pursuant to these criteria. Grievance GRANTED, IN PART and DENIED, IN PART.

**Topics** SELECTION

**Docket No.** 03-55-151

**Synopsis** Grievant had recently been placed in a regular half-time position because she had special skills needed by a hard-of-hearing student. (This skill allowed her "leap-frog" over many other more senior aides.) When a full-time position became available, Grievant applied, and she was not selected because the Board believed that Code Section 18A-4-5(d) allowed them to keep Grievant in the half-time position until she had served half of her employment term.

The ALJ found the Board had misapplied the above cited Code Section and Grievant should be eligible for the position because the duties of the position did not start until the beginning of the second semester. Grievance GRANTED.

**Topics** SELECTION; COACHING POSITIONS; QUALIFICATIONS

**Docket No.** 02-39-371

**Synopsis** Grievants had held coaching positions at Preston High School for three years and had exemplary evaluations. For the 2002-2003 school year, positions were posted and Intervenor selected to fill both positions. Evidence established that Grievants clearly had superior qualifications to Intervenor, and the principal appeared to have some bias against them unrelated to their coaching performance. Therefore, the selection process was arbitrary and capricious, and Grievants are entitled to reinstatement to the positions for the past school year. Grievance GRANTED.

**Topics** SELECTION; DISCRIMINATION; FAVORITISM

**Docket No.** 02-DOH-398

**Synopsis** Grievant alleged that he was better qualified than the successful applicant and that the decision was motivated by political favoritism and age discrimination. Respondent denies any wrongdoing, and asserts that because the two candidates were equally well qualified, the position was awarded to the most senior employee.

DECISION: The evidence does not support the claims of favoritism or discrimination. However, Grievant did establish that he was more qualified than the successful applicant, and was entitled to the position. Grievance GRANTED.

**Topics** SELECTION; FAVORITISM

**Docket No.** 02-DOH-291

**Synopsis** Grievant was off on Workers' Compensation when a temporary upgrade to Crew Leader became available and was offered to a coworker. After Grievant returned to work, the Crew Leader position was posted; both Grievant and the coworker applied, and the coworker received the position. Grievant's supervisor testified the only reason he recommended the coworker was because he had been serving in that capacity on a temporary basis, but acknowledged that he had rated Grievant higher in performance evaluations, and had Grievant been working at time temporary position was offered, he would have received it, and then would have received the permanent position. Decision: It was arbitrary and capricious to select the coworker on the sole basis of his being in the job on a temporary basis when Grievant was the better qualified applicant, and the only reason given for the selection was the temporary upgrade status of the coworker. Grievance GRANTED.

**Topics** SELECTION; LEAVE OF ABSENCE POSITION

**Docket No.** 02-51-426

**Synopsis** Grievant claimed generally that substitute teachers were not called for work in a fair manner at Hacker Valley School. Specifically, Grievant claimed one particular substitute had been called more than any other, and that individual had also been placed in a five-week leave of absence position at the end of the school year. Pursuant to Respondent's policy regarding hiring of substitute teachers, if a position is to last more than five days, the most qualified teacher--by virtue of licensure--is to be placed in the position. Therefore, Grievant, holding a permanent certificate, was more qualified than the substitute who held only a long-term substitute permit. Grievant was entitled to placement in the long-term substitute position, but did not prove entitlement to any of the other substitute positions at Hacker Valley School. Grievance GRANTED, IN PART and DENIED, IN PART.

**Topics** SELECTION; POLITICAL; FAVORITISM; AFFILIATION

**Docket No.** 01-DOH-573/561

**Synopsis** Grievants and Intervenor applied for County Highways Administrator position. Position was posted twice, and each time, Grievant Roush was selected as the most qualified candidate by the county administrators. Assistant Commissioner White directed county administrators to hire Intervenor Watterson, despite their concerns about his overall qualifications. DECISION: Evidence demonstrated that political affiliation, favoritism, or influence played substantial role in decision to hire Intervenor Watterson. Grievant Forbes did not demonstrate he would have been selected for the position, and his portion of the grievance was DENIED. Grievant Roush proved he would have been selected but for political interference, and his portion of grievance was GRANTED. Grievance GRANTED, IN PART and DENIED, IN PART.

**Topics** SELECTION; QUALIFICATIONS

**Docket No.** 01-30-495

**Synopsis** Grievant argued that she was the best qualified applicant for the principal position based on her experience and education. MCBE asserts that the position was awarded to the candidate with the most points, Intervenor. DECISION: After a review of the evidence, it was determined that MCBE's recent

change in the evaluation tool used to calculate the applicants' points was not improper, but that giving full weight to the points allocated by the parent on the selection committee was erroneous since that individual lacked the requisite expertise to evaluate the statutory criteria. MCBE also erred when it failed to review the applicants' academic achievement. Grievance GRANTED to the extent that MCBE was Ordered to consider the academic achievement of Grievant and Intervenor, delete the points awarded by the parent, and recalculate the total points awarded. If Grievant received the most points, she would be entitled to the position.

**Topics** SELECTION; SECOND SET OF FACTORS; SPECIALIZED TRAINING;  
PERFORMANCE EVALUATIONS; DEGREE

**Docket No.** 02-52-341

**Synopsis** Grievant challenged the application of three of the W. Va. Code §18A-4-7a factors by Respondent in selecting a classroom teacher. The posted position was a 7th and 8th grade mathematics teaching position, and the second set of factors was applicable. Grievant demonstrated that specialized training was improperly considered. When applying the second set of factors, the statute states "Specialized training directly related to the performance of the job as stated in the job description" is to be considered. As no specialized training was listed in the job description, or otherwise in the posting, it was improper to evaluate the applicants in this area. Grievant also demonstrated that Respondent erred in crediting the successful applicant in the area of performance evaluations over the previous 2 years, as the successful applicant did not receive a performance evaluation the preceding year as a substitute teacher. Grievant's argument that a Master's degree in secondary education with an emphasis in mathematics was not a degree in the required certification area of mathematics, was rejected. It was within the discretion of the board of education to decide whether such a degree was in the required certification area, and the decision that it was reasonable. After these corrections were made, Grievant scored the highest in the seven factors which must be evaluated by the board of education in selecting the best qualified applicant, and should have been selected for the position. Grievance GRANTED.

**Topics** SELECTION; SENIORITY

**Docket No.** 03-20-008

**Synopsis** Grievant asserted KCBOE's interpretation of W. Va. Code §18A-4-8e was incorrect, and he should have received the position. Grievant was correct that KCBOE had incorrectly interpreted the Code Section, but as the other applicant was more senior, he should not have received the position pursuant to W. Va. Code §18A-4-8e. Grievance GRANTED, IN PART and DENIED, IN PART.

**Topics** SENIORITY; POSTING; TEMPORARY POSITION

**Docket No.** 03-50-019

**Synopsis** Grievant was a substitute bus operator who applied for a temporary regular position. The most senior applicant was awarded the position, but did not drive it due to interference from transportation director. Grievant was eventually placed in the position as the next most senior applicant, but while she was driving the run, the Board voted to retroactively award the job to the first applicant, who never drove the run. Grievant was given only substitute seniority for the job. DECISION: Grievant should have received regular employment seniority because it was posted as such. Grievance GRANTED.

**Topics** SPECIAL; LEVY; VOCATIONAL; INTERPRETATION; JURISDICTION

**Docket No.** 03-33-067

**Synopsis** Grievants alleged Board violated the language of the special excess levy when it failed to hold vocational classes at the Vocational Technical Center during the summer of 2002, but held academic classes there instead. All public agencies are responsible for the proper application of publicly mandated funds. When a levy election is held to raise money for a specific public purpose, the money must be applied towards that purpose. The language of the special levy, the historical practice of offering summer vocational programs at the Center, and the Board members' testimony that they intended vocational summer programs to be funded by the levy, all combine to demonstrate that the voters of McDowell County intended to fund summer vocational programs at the Center. The levy contained no language giving the Board or Superintendent discretion to use the special levy funds for a purpose other than offering summer vocational programs at the Center. Grievance GRANTED.

**Topics** SUMMER EMPLOYMENT

**Docket No.** 03-30-070

**Synopsis** Grievant was employed by Respondent in Summer 2001 on the maintenance crew. Four positions for this crew were posted for Summer 2002. Grievant did not see the posting until the day after it expired. He was advised by the Assistant Manager of Human Resources that the positions had already been filled. Grievant argues that he was entitled to one of the positions. Respondent asserted that it is necessary for an employee to bid on a position, and that it would be burdensome to require the employer to contact employees to inquire if they were interested in summer employment. DECISION: The statute is silent regarding notice; however, it does give prior summer employees a "right of first refusal" for summer jobs in succeeding years. In this case, it would not have been burdensome for Respondent to have contacted Grievant. Grievance GRANTED.

**Topics** SUSPENSION; DUE PROCESS; INSUBORDINATION

**Docket No.** 03-20-092

**Synopsis** Grievant was suspended for ten days for insubordination. She asserted she had done nothing wrong, and her behavior was the direct result of the treatment she had received from her superiors. She also asserted she had not received due process, and KCBOW was required to put her on an Improvement Plan before she could be suspended.

KCBOW demonstrated Grievant had been insubordinate in her continuing behavior towards her supervisors. No failure to provide due process was found. Additionally, Grievant did not prove discrimination or favoritism. Grievant did establish a prima facie case of retaliation, but this case was rebutted by Respondent.

Because Grievant had received three verbal reprimands, her behavior resulting in suspension was not related to her job performance, and her behavior was ongoing, no need for an Improvement Plan was found. A written reprimand was, however, ordered removed from Grievant's personnel file. Grievance GRANTED, IN PART AND DENIED, IN PART.

**Topics** SUSPENSION; INSUBORDINATION; WILFUL NEGLECT OF DUTY; CRUELTY

**Docket No.** 03-20-087

**Synopsis** Grievant disciplined a disruptive student in class by picking up the edge of the student's desk and dropping it, and slamming a notebook on the student's desk. The Board suspended Grievant for 15 days without pay for insubordination, willful neglect of duty, and cruelty. While Grievant's method may not have been "taught" to him, neither was there any evidence that such methods were forbidden. The student claimed he was injured by this act, but the evidence did not support the student's claims. Grievant deliberately took the action; he did not lose control. Overall, the evidence fails to support the charges against Grievant, and the suspension was reversed. Grievance

GRANTED.

**Topics** SUSPENSION; SEXUAL HARASSMENT

**Docket No.** 03-CORR-116

**Synopsis** Grievant received a three-day suspension after, on three separate occasions, he said to a coworker "Would you like to have sex?" Although Respondent argued Grievant was not disciplined for sexual harassment, the disciplinary letter specified that he was. In accordance with legal definition of sexual harassment, the victim must be intimidated or feel a hostile work environment has been created, and the evidence did not support this. Accordingly, mitigation was found appropriate, and the suspension was reduced to a verbal reprimand. Grievance GRANTED, IN PART and DENIED, IN PART.

**Topics** TRAINING; COMPENSATION

**Docket No.** 03-DOE-157

**Synopsis** Grievant's job description as a child care worker required that, within one year of employment, she become proficient in Braille. Shortly after her employment began, the superintendent sent her a letter, noting that she was not attending the Braille course offered free of charge to school employees, and reminding her that she must obtain these skills. Under FLSA, required training is considered compensable work time. Therefore, even though Grievant did not normally work during the hours the course was offered, she was entitled to compensation for time spent in the classes. Grievance GRANTED, IN PART and DENIED, IN PART.