

STATE OF WEST VIRGINIA
EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

ANNUAL REPORT
TO THE
GOVERNOR AND THE LEGISLATURE

FISCAL YEAR 2005



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January 23, 2006

**THE HONORABLE JOE MANCHIN, III
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 Fiscal Year 2005.

This report contains detailed information concerning grievances filed and acted on by the administrative law judges, information on the mediation services offered by the Board and an evaluation of the level four grievance process.

Included in this report are five legislative recommendations the Board proposed during the 2005 legislative session, one of which includes many amendments to improve the grievance procedure.

Respectfully submitted,

David K. Hendrickson, Esq.
Chair

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Mission Statement

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.

Administrative Highlights of Fiscal Year 2005

Beginning last fiscal year, the Board changed its annual schedule of major activities and now prepares its Annual Report to the Governor and the Legislature on a fiscal year basis.

- The Board's staff continued its outreach and education activities, while striving to improve customer and employee satisfaction. The Director made two presentations on mediation at the fall 2004 State EEO/Higher Education Training Conference at Stonewall Resort. Valerie Rist, Administrative Officer, a long-time employee of the Board, in cooperation with the Division of Personnel, began making presentations to managers and supervisors in state government, as part of a class on Understanding the Grievance Procedure. These presentations emphasize and promote mediation early in the grievance process before a grievance hearing is held and are part of an outreach and educational program the Board intends to expand in upcoming years.
- The Board amended its Procedural Rules in December 2004. During the 2005 legislative session, the Board's staff drafted proposed legislation, prepared fiscal notes and appeared before legislative committees. The Board made several legislative recommendations again this year that are briefly outlined later in this report.
- The Board completed a three-year project to convert to digital recording systems in all hearing rooms. Use of digital recordings will benefit to agency in several respects and will improve customer service. Plans are being made to further build upon this enhancement to improve the service provided by the Board.

- The Board recently improved Internet access for the Charleston office and staff in that office began using new software that will improve employee productivity and efficiency as part of an ongoing program to make the Board more accessible to its customer base.
- The Board also continued to review all agency operations and practices looking for ways to increase efficiency and improve services.

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.¹ 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 disputes. The goals of the legislation are to maintain good morale, enhance job performance, and better serve the citizens of this State.

Ten years later in 1998, the Legislature made several changes to the law governing grievances by state employees. A new default provision was added by which an employee may obtain the relief requested in a grievance, if the grievance evaluator at Level One, Two or Three failed 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 grievance 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 grievances by state employees. W. Va. Code § 29-6A-12 (1998)² Finally, in

¹ 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).

² The Board first made this recommendation to the Legislature in 1992. The law was
(continued...)

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).

Employees covered by grievance procedure laws 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). "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.

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 amended Procedural Rules governing the practice and procedure for handling grievances at Level Four effective December 4, 2004, under the authority granted by W. Va. Code §§ 18-29-5(a) & 29-6A-5(a). The Rules are codified at 156 Code of State Rules 1

²(...continued)

also amended to make it clear that ALJs can require the parties in a state employee grievances to participate in settlement conferences. W. Va. Code § 29-6A-6 (1998).

(156 C.S.R. 1). In 2002, the Board adopted a Procedural Rule to 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. This law specifies the manner in which governing bodies must give notice to the public of meetings, and provides general rules for conducting meetings. 156 C.S.R. 2 (Aug. 11, 2002).

The grievance procedure laws cast the Board in the role of protecting the rights of public employees covered by these laws. The Board consists of three members appointed by the Governor, with the advice and consent of the Senate. On August 30, 2005, Governor Joe Manchin III appointed Edgar Morano, a Republican from the 1st Congressional District, to a term two year term ending June 30, 2007. He succeeds Walt Auvil, Esq. Also on August 30, 2005, Governor Manchin appointed Cam Lewis, a Democrat from the 3rd Congressional District, to a one year term ending June 30, 2006. He succeeds Lowell Witters. Finally, Governor Manchin appointed David K. Hendrickson, Esq., a Republican from the 2nd Congressional District, to a three year term ending June 30, 2008. He succeeds Debra Kilgore, Esq.

In December of 2005 the Board interviewed for and hired a new Director to replace Ron Wright who retired in October of 2005 after serving in that office for sixteen years. The new Director, who serves at the will and pleasure of the Board, is Earl W. Maxwell. Mr. Maxwell took office on January 16, 2006. Earl W. Maxwell has been a practicing attorney in West Virginia for 15 years, and was three times elected Prosecuting Attorney in his home county of Randolph. He resigned his elected office to take the position of Director and looks forward to working with the people and organizations that the Board serves and will continue to work with the customers and the Board to improve its operation.

The Board hires 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 Administrative Law Judges (ALJs) because of the nature of their duties and

responsibilities.³ 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.⁴

As of October 2005, the Board employed only ten people: a Director, an Administrative Officer, five ALJs, and three Secretaries in a flat organizational structure.⁵ See Appendix A. The Board's principal office is in Charleston, and it maintains hearing offices in Beckley, Elkins, Westover, and Wheeling. All agency employees work in the Charleston or Westover Office. The Beckley, Elkins and Wheeling offices are not staffed on a daily basis, but ALJs conduct hearings and mediation sessions at these locations.

The primary activities of the Board employees 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 anytime before a Level Four hearing; (4) administering Level Four of the grievance procedure and handling procedural matters at Levels 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

³ The West Virginia Division of Personnel has placed these positions in the class title of ALJ 2 in its classified-exempt plan.

⁴ 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. On July 1, 2005, an ALJ Code of Conduct, 158 CSR 15 was enacted, which does apply to the ALJ's.

⁵ As recently as 1997, the Board employed seventeen people, but through attrition 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% budget cut for FY05. Another ALJ resigned in January 2004, leaving the Board with only four ALJs. The Board employed five ALJs during fiscal year 2005.

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 Customer Satisfaction Survey

The Board, after proper notice, conducted its annual public meeting at its Charleston Office on November 16, 2005. The purpose of the annual meeting is to help the Board evaluate the 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. See W. Va. Code § 18-29-5(a) (1998), and W. Va. Code § 29-6A-5(a) (1998).

The Board mailed about 750 notices of the meeting, along with a Customer Satisfaction Survey form, to participants whose cases had been completed between July 1, 2004 and June 30, 2005. State agencies, educational institutions, county superintendents, employee organizations, union representatives, attorneys, and the Director of the West Virginia Division of Personnel (Personnel) were notified of the meeting. In addition, the meeting was announced on the Board's web site and the customer satisfaction survey form was made available online. Five people attended the public meeting and a representative of AFSCME, West Virginia Council 77, read a letter that was submitted and marked as Exhibit One.

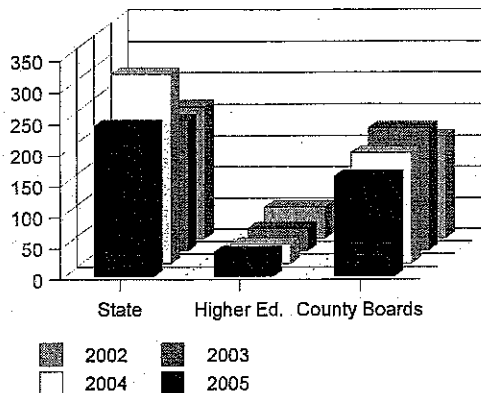
The Board began using a Customer Satisfaction Survey form in 1997 to help in the evaluative process, identify areas that may need improvement, and serve as a benchmark for future evaluations. The Board and its staff will consider the survey responses to find ways to improve agency performance.

Grievances Filed at Level Four and Adjudication Activities in FY 2005

The number of grievances filed at Level Four has been steady during the past four fiscal years, as shown in the following table.⁶

⁶ The number of grievances filed at level four in fiscal year 2005 includes thirteen cases remanded to the Board by the courts, and default claims filed at level four. Appendices B, C and D show the number of grievances filed against each employer.

Grievances filed at Level Four	FY 2005	FY 2004	FY 2003	FY 2002
State	242	304	210	211
Higher Education	38	32	37	51
County Boards of Education	161	179	198	164
Totals	441	515	445	426



The number of hearings scheduled and the number of hearings held is shown below. One or more continuances were granted upon request of the parties in more than 50% of the cases scheduled for hearing.

Hearing Activity	FY 2005	FY 2004
Hearings Scheduled	603	580
Hearings Held	282	268
Prehearing Conference Calls Conducted	87	96

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% during the last ten years. This year forty-five cases, or 19% of the grievances decided, were submitted on the record the parties made before appealing to Level Four.

The total number of Decisions and Orders issued is shown in the next table.

All Decisions and Orders	FY 2005	FY 2004
Decisions Issued	232	233
Default Orders	24	29
Dismissal Orders	187	127
Total⁷	443	389

The law requires decisions to be issued within thirty working days. As shown in the next table, ALJs issued decisions less promptly this fiscal year, for the first time in many years. Compared to 2004, forty percent fewer ALJs conducted five percent more hearings, issued about the same number of decisions, and conducted substantially more mediation sessions in 2005.

Grievance Processing Time in Working Days	FY 2005	FY 2004
Average Decision-Making Time in Decided Cases	24	16
Average Total Processing Time in Decided Cases	132	120
Percentage of Cases Decided within 30 Working Days	72%	89%
Percentage of Cases Decided within 60 Working Days	97%	97%

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

FY 2005 DECISIONS	DECISIONS ISSUED	GRIEVANCES GRANTED	PERCENT GRANTED
State	93	16	17%

⁷ This total substantially understates the number of grievances actually processed, because the Board counts grievances consolidated at level four as only one grievance when the case is completed. For example, one of the consolidated cases involved fifteen employees who had filed separate grievances seeking a promised pay increase. Another consolidated case, that was settled and dismissed from the docket after a mediation session, involved seven separate grievances from seven employees. During 2005 there were twenty-four consolidated grievances processed that included two or more grievances, several of which involved a large number of employees.

Higher Education	20	2	10%
Boards of Education - Professional Personnel	47	14	30%
Boards of Education -Service Personnel	69	6	9%
State Department of Education	3	0	0%
TOTAL	232	38	-----

Appendix E contains a synopsis of the thirty-eight grievances granted in 2005, plus six grievances in which employers were found to have defaulted by not processing the grievances in the time limits set by law.⁸

ALJs issued one hundred eighty-six (186) Dismissal Orders in 2005. 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 Board's docket at Level Four. Fifty-five grievances were dismissed upon the Grievant's written request, with no explanation for the withdrawal. Sixteen grievances were dismissed for failure to pursue, and fifteen cases were dismissed and remanded to the proper level of the procedure. The table below shows the number of grievances known to have been settled by type of employer without mediation.

Grievances Settled at Level Four Without Mediation	FY 2005	FY 2004
State	44	18
Higher Education	15	2
County Boards of Education	14	13
Totals	73	33

⁸ Cases are counted as granted if the grievance was granted in any part. Cases are counted as denied even 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.

Administrative Support Activities and Use of the Internet

The Board's secretarial staff assembles and mails certified records to circuit courts when grievance decisions are appealed to circuit court. They certified fifty-seven records to the courts this year, down dramatically from previous years. This is a reliable indicator of the number of level four decisions appealed.

	FY 2005	FY2004
Records Certified to Circuit Court	57	83

The Board's staff typed the transcripts of the Level Four hearings in about 91% of the decisions appealed to circuit court. The Board contracts out for transcription services when its secretarial staff becomes backlogged and cannot meet court deadlines. Producing transcripts and certifying records to circuit court continues to be a primary task of the secretarial staff. They normally transmit the certified record to circuit court within thirty days of receipt of the court order notifying the Board of the appeal.

The agency mechanically records hearings held at its offices on four-track audio tapes or digitally on a computer hard drive. 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, or a CD containing an audio file of the hearing testimony, instead of a transcript. When a decision is appealed and the transcript is prepared in-house, the agency provides the parties a copy of the transcript in electronic form upon request, without charge.⁹ When transcripts are prepared by a transcription service, the parties may purchase a copy from the service.

In July 2005 the Board began using digital recording systems for all hearings. All five hearing rooms are now equipped with four-channel digital recording systems. Digital recording systems have several advantages over traditional analog tape-recording systems, including improved sound quality and electronic storage. CDs will hold many

⁹ 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.

hours of testimony, and the parties can listen to the hearing on a personal computer using free player software. Analog tapes are no longer being used.

The Board has created a large body of law and precedent covering many areas of public employment law. The Board has long recognized the value of consistency in grievance decisions. It also quickly realized that making precedent readily available would serve the interests of both management and labor and promote the resolution of disputes. The Board readily embraced the Internet for this purpose. 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 the Board's primary method of distributing information. New decisions are published twice a month. Customers can download all decisions by calendar year in Rich Text Format, a format compatible with most word-processing applications. The agency also provides the Secretary of State's office with copies of all decisions twice a month in electronic form.¹⁰

The Board's staff has created and uses a Microsoft Access database, called Boardlaw, containing case summaries and pertinent information on more than 5,700 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. The Board updates the database every month with summaries of the new decisions rendered and with information received about court rulings in decisions that were appealed. The information in the database is published on the web site, and it can be quickly and easily searched. In 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

¹⁰ Final decisions are filed with the Secretary of State's office in accordance with W. Va. Code § 29A-2-9.

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 five school years.

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.¹¹

The Board has 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 frequently, typically by a recorded telephone conference call, to identify and clarify issues, to resolve discovery disputes, to encourage settlement discussions and for many other purposes.

The Board conducted forty mediation sessions in 2005, more than in any prior year, and continued to experience a high success rate, as shown in the table below.

Mediation Sessions Conducted	FY 2005	FY 2004
Grievances Mediated after Reaching Level Four	22	13
Percentage Resolved after Mediation at Level Four	64%	54%
Grievances Mediated while Pending at a Lower Level	18	10
Percentage Resolved while Pending at a Lower Level	78%	60%

¹¹ 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.

Although the percentage of grievances mediated after reaching Level Four remains small, it is important to recognize that employers and employees frequently settle disputes on their own, without the assistance of a mediator. One hundred eighty-five, or 42%, of all grievances processed in 2005 were closed by issuance of a dismissal order.¹² As noted earlier at least seventy-two of these grievances were dismissed from the docket due to settlements. Likewise, many grievances are resolved before being appealed to the Board. These settlements are encouraged and made possible because the Board is holding hearings and issuing decisions in a prompt fashion, as intended by the Legislature. Nonetheless, many grievances cannot be settled through mediation or otherwise.

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 frequently.

Level Three of the Grievance Procedure for State Employees

In 2002 the Board's staff began gathering information about the grievance procedure at the lower levels, especially Level Three, to find out how well the process was working. The Board understood that the legislature intended to provide a procedure for the equitable and consistent resolution of employment grievances. What we found out was that not only were employers and employees settling grievances below, but the procedure was essential for resolving grievances by state employee that involved back pay. For example, if a state agency inadvertently fails to obtain the approval for a planned merit salary increase or other type of salary increase from all necessary persons and offices, the agency is not at liberty simply to correct the payroll error. The State Auditor and the State Budget Office of the Department of Administration, based on constitutional and statutory provisions, take the position that retroactive salary increases are illegal and will not approve such payments.

¹² This number includes seven cases resolved through mediation after reaching Level Four.

The Auditor will approve such payments, but only if the payroll is accompanied by a Level Three or Level Four grievance award, or a written settlement agreement between the employer and the employee resolving the grievance, provided the agreement has been approved by the Office of the Attorney General. See Memorandum on Retroactive Pay (Dec. 7, 1998).

The Grievance Board does not possess payroll records to determine the number and total amount of back pay awards made at Level Three of the grievance procedure, or to determine the amount of back pay paid to state employees who were granted relief at Level Four. The Division of Personnel, however, has compiled data on back wage payments covering twelve fiscal years. The Division of Personnel reported that state agencies made at least 3,930 back wage payments July 1, 1991 through June 30, 2003, totaling \$9,031,376.45, and paid interest on 1,797 of these payments. Many of these back wage payments were due to settlements made at Level Three.

Evaluation of the Grievance Procedure at Level Four

Including 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. The Board believes the grievance procedure at Level Four continued to function well in 2005. The Board is providing prompt hearings and timely decisions, and is thereby encouraging the settlement of many 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.

The Board also believes its ALJs performed well overall this year. The Board also believes the ALJs are deciding the cases properly, fairly and impartially. The Board, however, must point out that the 10% budget cut in fiscal year 2004, and an additional 5.5% cut for fiscal year 2006, have combined to reduce the number of ALJ positions to five and to impair the agency's performance in 2005.

As reported in the Board's last annual report, the courts uphold grievance decisions most of the time. The Board's records show that about 27% of all decisions issued since 1985 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 is frugal with its limited resources. At the same time, the Board earnestly strives to comply with its legal duties and responsibilities. The Board's actual expenditures are shown in the table below.

FY 2004	FY 2003	FY 2002	FY 2001	FY 2000	FY 1999	FY 1998
\$864,539	\$878,476	\$849,883	\$861,443	\$920,469	\$938,611	\$913,483

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

Recommendations

Because of its role as the neutral third party, the Board usually makes few legislative recommendations. The Board decided, however, to make five recommendations to the Governor and the Legislature in 2005. First, the Board recommends, as it has consistently done, the Legislature revise the grievance procedure laws to help insure the agency's complete neutrality and the appearance of impartiality. When the Legislature reorganized the Executive Branch of State government in 1989, the agency 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 before 1989.

Second, the Board recommends the Legislature pass legislation creating a special revenue fund for operation of the agency. See House Bill 4005 (2004) and Senate Bill 142 (2004). 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. The Board will not be able to continue functioning properly without adequate funding.

Third, the Board recommends the Legislature raise the compensation paid to its members by passing House Bill 2076 (2004). 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 bill would not remove the existing cap of seven hundred fifty dollars per fiscal year.

Fourth, the Board urges the passage of legislation to "clean up" both grievance procedure statutes to accurately designate the public employers and employees subject to these laws. See the Grievance Board's Resolution attached as Appendix F.

Fifth, the Board recommends many amendments to the grievance procedure laws of this state. These recommendations have been conveyed in writing to Subcommittee C of the Joint Committee on Government Organization.

Effective Grievance Procedure

The Board believes a properly functioning grievance procedure is vital to any organization, and it may be especially important in the public sector. This State's grievance laws are well designed to facilitate the settlement of grievances when possible after they arise. This is important because grievances become magnified in importance and more difficult to settle as they progress through the steps in the process. See F. Elkouri, How Arbitration Works 157 (4th 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, public employers, employees, unions, and employee organizations, and all interested persons should keep certain guiding principles firmly in mind. First, they must clearly understand that the basic objective of the grievance procedure is not "winning" grievances, but resolving disputes fairly and equitably. 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 management decisions have been made, these actions 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, regulations and Board decisions. See F. Elkouri, How Arbitration Works 154-155 (recommendations of the President's National Labor-Management Conference of 1945).

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

ORGANIZATIONAL CHART

EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

CABINET SECRETARY
WV Department of Administration*

ROBERT W. FERGUSON, Jr.

BOARD MEMBERS

DAVID K. HENDRICKSON
CAM LEWIS
EDGAR MORANO

DIRECTOR***
EARL MAXWELL

ADMN OFFICER
VALERIE RIST

ADMN LAW JUDGES
IONA KELLER
JANIS I. REYNOLDS
DENISE M.SPATAFORE
M. PAUL MARTENEY
JACQUELYN CUSTER

SECRETARIES
CRICKET POWELL
STEFANEY WILLIAMS
MARY McFARLAND

- * Grievance Board included in DOA, W. Va. Code § 5F-2-1 (a) (7).
** Board members appointed by Governor, W. Va. Code § 18-29-5 (a).
*** No statutory provision for a Director. Director also serves as Chief Administrative Law Judge

Last Revised: Oct. 20, 2005

APPENDIX B

**GRIEVANCES FILED AT LEVEL FOUR AGAINST COUNTY BOARDS OF EDUCATION, THE STATE DEPARTMENT
OF EDUCATION AND OTHER EDUCATIONAL ENTITIES
FISCAL YEAR 2005 AND 2004**

County Boards of Education:	FY 2005	FY 2004
Barbour County Board	3	4
Berkeley County Board	1	0
Boone County Board	5	4
Braxton County Board	1	0
Brooke County Board	3	1
Cabell County Board	11	7
Calhoun County Board	0	4
Clay County Board	0	0
Doddridge County Board	0	1
Fayette County Board	4	5
Gilmer County Board	3	2
Grant County Board	1	3
Greenbrier County Board	0	3
Hampshire County Board	4	5

Hancock County Board	2	2
Hardy County Board	1	0
Harrison County Board	3	0
Jackson County Board	4	7
Jefferson County Board	2	7
Kanawha County Board	12	14
Lewis County Board	2	0
Lincoln County Board	5	4
Logan County Board	4	7
Marion County Board	2	1
Marshall County Board	0	1
Mason County Board	1	2
McDowell County Board	1	12
Mercer County Board	4	3
Mineral County Board	0	1
Mingo County Board	7	7
Monongalia County Board	17	16
Monroe County Board	2	2
Morgan County Board	1	0

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

Wirt County Board	1	0
Wood County Board	4	7
Wyoming County Board	1	1
Multi-County Vocational Centers	1	4
Regional Educ. Serv. Agencies	0	0
W. Va. Department of Education	3	5
Totals	161	179

Reports for many prior school years are available on the Board's Home Page.

APPENDIX C

GRIEVANCES FILED AT LEVEL FOUR AGAINST HIGHER EDUCATION INSTITUTIONS AND ENTITIES
FISCAL YEAR 2005 and 2004

STATE COLLEGES	FY 2005	FY 2004
Bluefield State College	0	0
Glenville State College	1	2
West Liberty State College	1	3
W. Va. Northern Community College	2	0
W. Va. Southern Community & Technical College	0	0
STATE UNIVERSITIES	0	0
Concord University	0	1
Fairmont State University	2	1
Shepherd University	4	1
Marshall University	4	10
W. Va. State University	3	2
W. Va. University	17	10
W. Va. University Hospitals/W. Va. University Medical Corporation	0	0
W. Va. Univ. Institute of Technology	2	1

W. Va. University School of Dentistry	0	0
W. Va. School of Osteopathic Medicine.	0	0
WVNET	0	0
Higher Education Policy Commission	0	0
Totals	38	32

APPENDIX D

GRIEVANCES FILED AT LEVEL FOUR AGAINST STATE AGENCIES
FISCAL YEAR 2005 AND 2004

	FY 2005	FY 2004
Administration, Department of	0	0
General Services	1	3
Information Services and Communications	0	1
Public Employees Insurance Agency	0	1
Purchasing	2	1
Boards and Commissions, Miscellaneous	0	0
Nursing Home Administrators Licensing Board	1	0
Commerce, Department of	0	0
Forestry	0	1
Labor	1	1
Miners' Health, Safety and Training	1	0
Natural Resources	4	2
Education, Department of	1	0
Education & the Arts, Department of	0	0

Culture and History	0	3
Rehabilitation Services	3	4
Employment Programs, Bureau of	3	5
Environmental Protection, Department of	3	13
Health and Human Resources, Department of	58	126
Military Affairs & Public Safety, Department of	0	0
Adjutant General	4	1
Corrections	31	24
Emergency Services	1	0
Juvenile Services	13	13
Public Safety	1	1
Regional Jail and Correctional Facility Authority	9	6
Veteran Affairs	2	0
Public Service Commission	1	0
Senate *	1	1
Senior Services, Bureau of	0	0
Revenue, Department of	0	0
Tax Department	7	34
Transportation, Department of	0	0

Highways	63	34
Motor Vehicles	7	8
Parkways, Economic Dev. & Tourism Authority	11	5
Workers' Compensation Commission **	13	11
County Health Departments	0	5
Totals	242	304

* This table reflects the current organizational structure of State government. Please note that employees of constitutional officers and employees of the Legislature do not have right to file grievances, and thus the Board does not have jurisdiction over such grievances. See Footnote 1 of this report. Please also note that the agency's procedures and docketing system do not always enable the Board to identify the specific division or organizational unit within a department or bureau from which the grievances arose.

** The Legislature created the Workers' Compensation Commission as an independent agency in 2003. The Commission will become a mutual insurance company in the near future.

APPENDIX E

2005 Grievances Granted and Defaults Found

Topics 261-DAY CONTRACTS
Docket No. 04-50-146
Synopsis Grievants were employed as Directors and did not have 261-day contracts. Other Directors performing similar duties did have 261-day contracts. Grievance GRANTED.

Topics BACK PAY
Docket No. 05-HE-044
Synopsis Grievants initiated a grievance in February 2001 when they participated in an informal conference with their immediate supervisor. Grievants, like many other employees in the Physical Plant, were seeking back pay for a period of time they were allegedly misclassified. Their supervisor, knowing that these grievances were being placed in abeyance pending a review of the jobs, requested that Grievants sign a request for the grievance to be placed in abeyance. Grievants complied; however, WVU never reactivated the grievance. In October 2004, settlement offers were made to many employees. Grievants were not extended the offer based on the premise that they had not proceeded to level three or four.
DECISION: Grievants had not proceeded with their grievance based on the document they signed at the request of their supervisor. Grievants had initiated their complaint in a timely manner, and are entitled to the settlement offer. Grievance GRANTED.

Topics BACK PAY
Docket No. 03-03-332R
Synopsis On remand the circuit court directed the ALJ to determine the amount of back pay due Grievants based on work performed during their planning periods. Grievants had little concrete proof to support their assertions that they worked 95% of their planning periods, but they certainly did work some of these periods.
Given the directions from the West Virginia Supreme Court in Spencer and W. Va. Code Section 18-29-5(b) that states an ALJ may devise relief that is fair and equitable, the ALJ granted Grievants 87% of their planning periods for the first month of school and 40% for their planning periods for the remainder of the school year.

Topics CLASSIFICATION; MULTI-CLASSIFICATION; STANDING
Docket No. 04-54-288
Synopsis Grievants were all classified as mechanics and were also certified and used as back-up bus operators. Respondent offered to add the additional classification title to their positions, but reneged when bus operators objected.
DECISION: Grievants were acting as bus operators in addition to their normal mechanic duties, and were entitled to the multi-classified title. Grievance GRANTED.

Topics COMPENSATION; BACK PAY; PROMOTION
Docket No. 01-HE-438
Synopsis Along with many other employees, Grievant filed a grievance in 2001, challenging his pay grade. In December of that year he was promoted to lead worker. He did not file a second grievance. In 2003, the Lambert decision held that employees who had been reclassified in 2003, were entitled to back pay to 2001. Grievant seeks back pay as lead; however WVU asserts that he is not entitled since he did not file a second grievance.

DECISION: It is unnecessary for a second grievance to be filed. Grievant held the same classification title, and was simply promoted to lead worker. Grievance GRANTED.

Topics COMPENSATION; DISCRIMINATION

Docket No. 04-HHR-011

Synopsis The companion case to Sluss and Bates. Grievants allege discrimination when other employees in their job classifications were given a salary increase while they were not. Respondents assert that the increases were properly awarded based upon a study of regional salaries.
DECISION: The salary increases were awarded based upon a flawed study. Grievants have proven discrimination. Grievance GRANTED.

Topics DEFAULT

Docket No. 04-PEDTA-175DEF

Synopsis Grievant alleged a default occurred at Level III, when the hearing examiner did not respond to his attempts to set a hearing date. Grievant met his burden of proof. Default GRANTED.

Topics DEFAULT

Docket No. 04-DOH-153DEF

Synopsis Grievant filed a grievance in September 2001, and another grievance in June 2002. These grievances were heard at Level III in September 2002 and November 2002, respectively, and Grievant agreed to waive the time for issuing these decisions for approximately two months in each case. Grievant filed default for these cases in April 2004.

Although Grievant did agreed to waive the time lines for the issuing these decision and did not set a date certain for his waiver to end, the length of time in this case was unreasonable. Default GRANTED.

Topics DEFAULT

Docket No. 04-HHR-306DEF

Synopsis The Level III decision was not issued until one day after the statutory deadline because the paralegal who is responsible for mailing out the decisions was not at work due to illness. The respondent employer argued that the delay was therefore excused under the provisions of West Virginia Code section 29-6A-3(a)(2), which excuses defaults where the grievance evaluator is prevented from issuing a timely decision "directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud." Under the unique definition of excusable neglect that applies in the grievance context, the paralegal's absence does not constitute excusable neglect because the grievance evaluator was in the office when the paralegal was out sick and, thus, could have ensured that the decision was issued timely. The paralegal, rather than the grievance evaluator, was sick. Therefore, sickness did not "directly" prevent timely issuance of the decision. Default GRANTED.

Topics DEFAULT REMEDY

Docket No. 04-DOH-153D

Synopsis In this default remedy case, Grievant was presumed to have prevailed on the merits. His requested relief was for the alleged harassment to cease. DOH agreed that it would be clearly wrong for Grievant to be harassed. Grievance GRANTED.

Topics DEFAULT REMEDY

Docket No. 03-HHR-038D

Synopsis In this default remedy case, Grievant requested to receive holiday and shift differential pay. The evidence demonstrated Grievant already received shift differential pay, and it would be clearly wrong to grant her an additional shift differential. Grievant did not receive holiday pay and this request was granted. Decision GRANTED, IN PART and DENIED, IN PART.

Topics DEFAULT; MERIT RAISE; EXCUSABLE NEGLECT

Docket No. 04-DOH-397DEF

Synopsis A level two decision was not timely issued due to the District Engineer's mistaken belief that days he was out of the office on DOH business were not to be counted. DOH asserts this constitutes excusable neglect.
DECISION: While there is no indication of bad faith present, a mistaken belief does not constitute excusable neglect for the failure to timely file a decision. Default GRANTED.

Topics DEFAULT; TIMELINESS; WAIVER; FRAUD

Docket No. 05-WCC-009DEF

Synopsis The grievant agreed to waive proceedings at Level 2. This was not, however, a waiver of pertinent timelines. When her employer decided to conduct a Level 2 hearing, despite the existence of the waiver, the grievant was entitled to a decision within the statutory five-day period. There was no duty on the part of the grievant to educate her employer as to the proper deadline for issuance of the written Level 2 decision. Her failure to do so was not fraud. Accordingly, the employer's failure to issue the decision timely resulted in a default. Default GRANTED.

Topics DEMOTION; HOSTILE WORK ENVIRONMENT; RETALIATION; MITIGATION

Docket No. 02-DJS-174

Synopsis Grievant was demoted as the result of an EEO investigation which concluded that he had engaged in retaliation toward a coworker, Kathy Hess, and had created a hostile work environment for her. Ms Hess complained that, during a particular conversation, he threatened and intimidated her. The evidence did not support the conclusion that this single conversation resulted in a hostile work environment for Ms. Hess.

As to retaliation, Ms. Hess alleged Grievant issued two memorandums, one of which was to be placed in her personnel file, in retaliation for his belief that she was responsible for his being admonished for personal phone calls. Because Grievant did not have any supervisory authority over Ms. Hess, it did appear that he attempted to issue at least one of the memos as revenge for her actions against him.

It was found that mitigation was appropriate in this case, and Grievant only deserved punishment for engaging in disrespectful and abusive conduct toward a coworker. Therefore, the demotion was reduced to a thirty-day suspension. Grievance GRANTED, IN PART, and DENIED, IN PART.

Topics DISCRIMINATION; FAVORITISM; PRIMA FACIE; INCLEMENT WEATHER; LEAVE; TIMELINESS; DISCOVERY RULE

Docket No. 03-33-226

Synopsis School was cancelled for students due to bad weather. Some staff members, including the grievants, reported to work on a delayed schedule in conformity with the superintendent's announcement. Other staff members did not report to work but the superintendent forgave their absences which, in effect, gave the absentees an extra leave day that was not afforded the grievants and other employees who reported to work. The respondent failed to demonstrate a legitimate non-discriminatory reason for the difference in treatment and thus were unable to rebut Grievants' prima facie

showing of discrimination/favoritism. Grievance GRANTED.

Topics DISMISSAL; ARBITRARY AND CAPRICIOUS

Docket No. 04-28-211

Synopsis MCBE dismissed Grievant based upon his conviction in Circuit Court for assault. MCBE did not conduct an independent investigation, and did not present evidence to establish Grievant's guilt at the level four hearing. Grievant continues to deny the event occurred. MCBE argues that it may reasonably rely upon the criminal conviction to proceed with dismissal.
DECISION: Notwithstanding the criminal conviction, MCBE did not prove that Grievant engaged in an activity warranting dismissal. The discipline was arbitrary and capricious without meeting the burden of proof. Grievance GRANTED.

Topics DISMISSAL; DRUG TESTING; PROBATIONARY EMPLOYEE

Docket No. 04-DOH-215

Synopsis Respondent had adopted a drug and alcohol abuse policy that required an opportunity to rehabilitate after a first failed drug test, and claimed a later amendment excepted probationary employees. Respondent did not produce the amendment however, and by the plain terms of the policy, Grievant was covered by it despite his probationary status.
DECISION: The Policy modified the Division of Personnel Administrative Rule provision that permitted dismissal of a probationer with less cause than a regular employee. Grievance GRANTED.

Topics DISMISSAL; HARASSMENT; THREATENING BEHAVIOR; MITIGATION

Docket No. 04-CORR-313

Synopsis Grievant became involved in a personal relationship with a coworker at Huttonsville Correctional Center, Kirissa Siler. After the relationship ended, Grievant and Ms. Siler had repeated contact, arguments, and reconciliations. Eventually, Ms. Siler complained that Grievant sexually harassed and threatened her. Evidence established Ms. Siler as a non-credible witness. Her repeated, voluntary contact with Grievant, even after his termination, established that she was not harassed by Grievant. Also, evidence did not support a finding that she felt or was actually threatened by Grievant. Moreover, except for one occasion, all of the contact between the two occurred outside the workplace. Therefore, dismissal was reduced to a ten-day suspension, for Grievant's one-time violation of a directive not to have contact with Ms. Siler at work. Grievance GRANTED, IN PART, and DENIED, IN PART.

Topics DISMISSAL; WILLFUL NEGLECT OF DUTY

Docket No. 04-14-114

Synopsis Grievant was employed as finance director for the board, with no previous school accounting experience. He worked under a mentor the first year, and received a favorable evaluation. During the summer of 2003, Grievant and his mentor worked diligently on the fiscal year's required reports, but some items were submitted late. At the beginning of the 2003-2004 school year, superintendent placed Grievant on improvement plan for various failures to perform specific duties. Two weeks later, Grievant was escorted from the office by sheriff deputies, and placed on suspension while an audit was conducted. At conclusion of the audit, Grievant was accused of various failures and alleged improprieties regarding his work, and was terminated. Evidence at hearing revealed that Grievant performed all of his duties in accordance with accepted practices and at the direction of his mentor, who had never been cited for similar conduct. Many irregularities occurred in the conduct of the audit itself, also. BOE failed to prove willful neglect of duty, because all evidence showed that Grievant

was a diligent, hardworking employee. No willful or intentional misconduct was proven. Grievance GRANTED.

Topics EXTRA-DUTY CONTRACT; SUBSTITUTES

Docket No. 04-18-437

Synopsis Grievant had an extra-duty to perform summer work on an "as needed" basis. Respondent, instead of calling Grievant to perform certain jobs within her classifications, improperly called out substitutes (when there were no absent employees to replace). Grievant proved that, under her contract, she should have been given some of that work, so her request for pay she could have earned was GRANTED.

Topics EXTRA-DUTY CONTRACT; TIMELINESS

Docket No. 05-40-073

Synopsis Grievant, as he had in several past years, signed an extra-duty contract to teach Saturday school on each Saturday there was students for the program. Respondent elected to hire two teachers this year rather than one, and rotate them. Grievant objected, since he was available to teach each Saturday. Parties did not agree on the contract terms, and benefit was given to Grievant, as Respondent caused the confusion. Grievance was timely when filed after actual breach rather than after notice of intent to breach contract, because Grievant had no obligation to grieve until actual damage had occurred. Grievance GRANTED.

Topics FAVORITISM; DISCRIMINATION; TIMELINESS

Docket No. 03-33-225

Synopsis The Superintendent declared a delayed opening on February 18, 2003, but then communicated to a small number of employees that he had changed his mind and they did not have to report. The absentee employees were not charged a day of personal leave for February 18. Grievants, who had braved the bad roads to report as directed, were not afforded an additional day of annual leave. This difference in treatment, for which there was no rational basis, constitutes discrimination. Grievants' argument that the inclement weather policy was not properly adopted lacks factual support. The Board's argument that the grievance was not timely is untenable under the discovery rule found in West Virginia Code section 18-29-4(a)(1). Grievance GRANTED, IN PART and DENIED, IN PART.

Topics GRIEVABLE EVENT; STANDING; JURISDICTION

Docket No. 04-HHR-191

Synopsis Grievant's car broke down in the hospital parking lot, and she obtained permission from her supervisor and the supervisor of buildings and grounds to leave it there until she could get it fixed. A security guard, not knowing whose car it was or that it was permitted, had it towed after it had been there for several days. Hospital policy did not permit towing cars; and permitted employees to have their cars on the grounds. Grievant had to pay \$100 to get her car from the towing company, and requested Respondent reimburse her. Respondent contended the matter was not grievable, as it did not involve the terms of Grievant's employment. DECISION: In this specific case, matter was grievable on these unique facts, and Respondent was ordered to pay. Grievance GRANTED.

Topics HIRING; SELECTION

Docket No. 04-DOH-157

Synopsis Grievant was not selected for a position that he had been performing on a temporary basis for a long time. Grievant proved successful candidate was less qualified, and reasons stated by Respondent for selection were not supported by the record; therefore decision was arbitrary and capricious. Grievance GRANTED.

Topics INCREASED DUTIES

Docket No. 04-50-170

Synopsis Grievant who previously served as an Assistant Principal, applied for and received a half-time Assistant Principal and half-time Athletic Director position. Due to many problems with staffing during the year, Grievant ended up being assigned almost full-time Assistant Principal duties that he had agreed to accept on a temporary basis. Although a Principal can assign an Assistant Principal any of the duties within his job description, an employee in a half-time position cannot be assigned almost full-time duties. Grievance GRANTED.

Topics LEAVE ACCRUAL; QUALIFYING SERVICE

Docket No. 04-DOH-228

Synopsis Grievant transferred to Respondent's employ, but Respondent could not verify all of Grievant's past service with the State, so he got a lower leave accrual rate than expected. Grievant had a past job that initially was not a state job, but through a lawsuit it was determined it should have been. Grievant only had records to show that part of the time in that job was converted, but proved job did not change, so by implication, all of the service should be credited. Grievance GRANTED.

Topics LEVEL II DEFAULT

Docket No. 04-ADJ-348DEF

Synopsis The failure of the employer to hold a conference prior to issuing a Level II decision constituted a default. The matter will be scheduled for a hearing to determine if the remedy sought by the grievant is lawful. Default GRANTED.

Topics POSTING

Docket No. 04-24-281

Synopsis MCBE posted a position vacancy for a Physical Education/Health teacher, pursuant to its practice since the 1980's. Grievant holds PE, but not Health certification. No Health classes were to be assigned to the individual, as none were needed. Grievant asserts the required Health certification was improper. MCBE argues that it was permissible, and provides more flexibility in scheduling. DECISION: The flexibility argument is again rejected. The practice unnecessarily and unfairly excludes qualified teachers, outweighing the possibility of a future need to change teaching assignments. Grievance GRANTED.

Topics POSTING

Docket No. 04-DOH-177

Synopsis Respondent lost a previous grievance requiring it to promote an employee to a position that had been filled by a new hire, so it initiated a reduction in force to layoff the new hire and place her in a vacant position. Grievant contended the vacancy should have been posted and filled competitively. DECISION: Respondent improperly laid off the new hire and should have returned her to status she was in before being hired; and respondent must fill vacancy through posting. Grievance GRANTED.

Topics REMAND; DISMISSAL; BACK PAY; ATTORNEY FEES; RETALIATORY DISCHARGE

Docket No. 02-10-217R

Synopsis The underlying grievance was appealed to the Circuit Court of Fayette County and from there to the Supreme Court of Appeals of West Virginia. The case was remanded to circuit court with directions to remand it to the Grievance Board with directions to grant the grievance and award reinstatement, if the grievant so desired, along with back pay and attorney fees. The grievant's dismissal was deemed retaliatory. Grievance GRANTED.

Topics RIF; TRANSFER; CERTIFICATION

Docket No. 03-54-275

Synopsis Grievant was placed on transfer incident to a reduction in force (RIF), but another, more senior teacher, was not certified to teach the special needs students remaining at the school. Students' special needs status was improperly changed to match elder teacher's certification. Found Respondent should have transferred more senior teacher because she was not certified to teach the class that she was given, but Grievant was. Grievance GRANTED.

Topics RIF; TRANSFER; SENIORITY

Docket No. 04-01-212

Synopsis Grievants are elementary school teachers and were placed on transfer when the total number of teachers at their school was reduced. However, the physical education teacher at the school had less seniority. That teacher had been excluded from the transfer process, due to Grievance Board decision indicating that "special programs" teachers are not to be included when elementary school teachers are reduced. However, pursuant to the explicit language of W. Va. Code §18A-4-7a and the definition of classroom teacher, physical education teacher should not have been excluded. As the least senior classroom teacher, she should have been placed on transfer, and one of Grievants should have retained her position. Grievance GRANTED.

Topics SELECTION

Docket No. 04-WCC-414

Synopsis Grievant met her burden of proving Respondent's selection to fill an Investigator 2 position was arbitrary and capricious. Respondent's choice was clearly less qualified, so interviewer's testimony that Grievant was fairly considered was not credible. Grievance GRANTED.

Topics SELECTION/NON-SELECTION; BUS OPERATOR CERTIFICATION; JOB QUALIFICATIONS

Docket No. 04-23-097

Synopsis The Grievant alleged that the successful applicant for a bus operator position was not certified as a school bus operator and that the position should have been awarded to the Grievant. The Grievant introduced evidence that the successful applicant's certification had expired prior to receiving the position. The Board failed to rebut this evidence. Grievance GRANTED.

Topics SELECTION; COACH

Docket No. 04-18-365

Synopsis Grievant, a certified professional educator, was not selected for a coaching position.

Intervenor, who possessed a teaching permit, was selected for the position.

Code Section 18A-3-2a states a substitute teaching on permit cannot receive a coaching position if a certified professional educator applies. Halley, a coaching case contrary to this ruling, was specifically overruled. Grievance GRANTED.

Topics SELECTION; HIRING; FAVORITISM; SENIORITY

Docket No. 04-DOH-297

Synopsis Grievant proved he was both more senior and more qualified than selected candidate, and that successful candidate was hired through favoritism. Grievance GRANTED.

Topics SELECTION; POSTING; GRIEVANCE SETTLEMENT

Docket No. 04-30-386

Synopsis Grievant applied for a half-time secretarial position at UHS and was the most senior, qualified applicant. At the same time, another secretary (Intervenor) was being disciplined, and Board decided to place her in the secretarial position at UHS in lieu of a grievance, but as a full-time employee. Board did not repost the position as full-time. This clearly violated 18A-4-8b's posting requirements. Also, it has been held that a board cannot settle a grievance by giving the employee a position unrelated to that grievance. Therefore, Grievant was entitled to placement in the half-time position for which she applied. Grievance GRANTED.

Topics SELECTION; POSTING; TIMELINESS

Docket No. 04-01-181

Synopsis Grievants complained regarding the selection of Intervenor to permanently fill the position of an employee who had been on a lengthy suspension. Intervenor was the only available substitute when the employee was first suspended, and he substituted in the position for nearly a year and half. When it was finally posted for permanent replacement in January 2004, Intervenor was selected over Grievants, due to Respondent's treatment of him as a regular employee who was still serving in the suspended employee's position. Grievants first contended the position should have been posted when the driver was first suspended, but this claim was untimely. As to the selection process, statutes do require that a substitute in a suspended employee's position be treated as a regular employee during the suspension, but when the suspension is concluded, they must be returned to substitute status. Therefore, when board decided to post the position in January, the suspension must have ended, and Intervenor should have again been treated as a substitute. He had less seniority than any of Grievants, so one of them should have been selected over him to permanently fill the position. Grievance GRANTED, IN PART and DENIED, IN PART.

Topics SELECTION; REPRISAL

Docket No. 04-06-280

Synopsis Grievant was Superintendent's first nomination for posted position, and Respondent instead chose another applicant. Grievant had a pending grievance over a similar issue at the time. Grievant met her burden of proving Board's reasons for selecting other employee were arbitrary and capricious and a result of reprisal for other grievance. Grievance GRANTED.

Topics STAFF DEVELOPMENT HOURS; PAY

Docket No. 04-02-347

Synopsis Grievant was on approved leave for the first month of the school year, due to a family member's illness. During the time she was absent, three days of staff development

training was offered by and conducted by the Board. When Grievant returned to work, no comment was made about her lack of staff development hours until late May, when she was notified that she would have until the end of June to obtain the 15 hours she was lacking. Otherwise, Grievant's pay would be docked for 2 and a half days. Policy 5500 requires professional employees to obtain 18 hours of this training each school year, and each board of education is required to provide the training. However, there is no provision for penalizing employees by docking their pay for failure to obtain all of the staff development hours. Therefore, board was not legally authorized to dock Grievant's pay. Grievance GRANTED.

Topics SUSPENSION PENDING CRIMINAL CHARGES

Docket No. 04-HHR-322

Synopsis The grievant, who was charged in a criminal complaint and arrest warrant with three felony counts of child molestation involving his daughter, was suspended without pay from his job as an Information Systems Specialist for DHHR. Once DHHR concluded an investigation and was unable to establish any rational nexus between the charges and the grievant's job duties, there was no longer any basis under the Division of Personnel's Rule 12.3 for keeping the grievant on an indefinite suspension. The fact that grievant's lawyer would not allow him to be interviewed by DHHR investigators due to the pendency of the criminal charges did not establish a basis for claiming that DHHR's investigation was not concluded.

The grievance was DENIED with respect to the suspensions that preceded the conclusion of DHHR's investigation but GRANTED with respect to the suspensions imposed thereafter.

Topics SUSPENSION; ARBITRARY AND CAPRICIOUS

Docket No. 04-HHR-375

Synopsis Grievant was suspended pending an investigation into an allegation of welfare fraud that occurred prior to her employment with DHHR. After investigation was concluded, Respondent continued to extend Grievant's suspension a total of 120 days in 30-day increments, but took no other action. Charges were referred to law enforcement, but no indictment ensued until days before the level four hearing. Charges had nothing to do with Grievant's employment and there was no harm in permitting her to work until formally charged.

DECISION: Suspensions were improper. Grievant was not given requisite 8-day notice prior to suspension and if she had been, investigation would have concluded prior to suspension, negating its necessity. Grievance GRANTED.

Topics SUSPENSION; SEXUAL HARASSMENT; INSUBORDINATION; THREATS

Docket No. 04-WCC-268

Synopsis Grievant was suspended for thirty days for alleged sexual harassment, insubordination, threats to his supervisor, and poor work performance. Respondent failed to prove the sexual harassment charges. Some of the alleged behavior occurred outside the workplace on Grievant's own time, so he could not be disciplined for it. As to alleged harassment of coworkers, evidence showed the alleged victims were not offended, a key element of sexual harassment which violates DOP policy.

Respondent established that Grievant was insubordinate, in that he violated his superiors' directives not to discuss the charges against him pending investigation. Respondent failed to prove threatening behavior--Grievant made idle, harmless statements, with no actual intent to harm anyone.

Respondent also proved that Grievant's performance has been poor in recent times, and he had been warned regarding this. Since Respondent failed to prove many of the charges, mitigation was appropriate. Therefore, the thirty-day suspension was to be reduced to ten days. Grievance GRANTED, IN PART, and DENIED, IN PART.

Topics TRAINING; DISCRIMINATION

Docket No. 04-DOH-081

Synopsis This grievance was granted at Level III, and Grievant appealed to Level IV. Upon questioning about what additional relief he was seeking a Level IV, Grievant was unclear. Grievant did appear to continue to assert that he had been discriminated against or other people had been treated more favorably than he had, but this issue was resolved below. Grievant presented no evidence at Level IV to demonstrate the need for any additional relief. Grievant was also upset that Respondent was allowed to present evidence at Level IV, and believed this was not allowed. Since the relief sought was granted at Level III, that Decision was AFFIRMED, and the grievance was GRANTED.



GOVERNOR
JOE MANCHIN, III

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APPENDIX F

**RESOLUTION BY THE
EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD
REGARDING AMENDMENTS TO THE GRIEVANCE PROCEDURE LAWS
OF WEST VIRGINIA**

Whereas, the Grievance Board is responsible for administering the fourth and final administrative level of the grievance procedure laws applicable to many public employees; and

Whereas, in 2001, the West Virginia Legislature amended W. Va. Code § 18B-2A-4(k), so as to require grievances filed by higher education employees after July 1, 2001, to be processed under W. Va. Code §§ 29-6A-1 et seq., the Grievance Procedure for State Employees, rather than W. Va. Code §§ 18-29-1 et seq., the grievance procedure applicable to public education employees; and

Whereas, through its amendment of W. Va. Code § 18B-2A-4(k), the Legislature altered the coverage of both W. Va. Code §§ 29-6A-1 et seq. and W. Va. Code §§ 18-29-1 et seq., but failed to amend either statute to reflect this change; and

Whereas, the Grievance Board voted at its meeting on June 30, 2004, to recommend both grievance procedure statutes be amended and directed that a resolution be drafted to convey its recommendation; now therefore be it

Resolved, that the West Virginia Legislature amend W. Va. Code §§ 29-6A-1 et seq., and W. Va. Code §§ 18-29-1 et seq., to accurately designate the public employers and employees subject to these statutes.