

Nos. 32163 and 33296

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

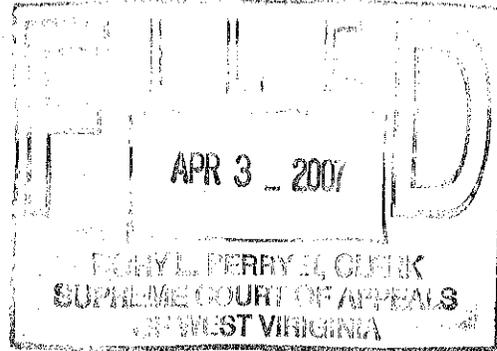
AMANDA A. FRYMIER,

Appellant,

v.

GLENVILLE STATE COLLEGE/HIGHER  
EDUCATION POLICY COMMISSION,

Appellee.



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BRIEF ON BEHALF OF APPELLEE

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GLENVILLE STATE COLLEGE BOARD OF  
GOVERNORS / GLENVILLE STATE COLLEGE

By Counsel,

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Now comes the Glenville State College Board of Governors<sup>1</sup> on behalf of Glenville State College (hereinafter “GSC” or “Appellee”), by counsel, Elaine L. Skorich, Assistant Attorney General, and submits the following brief in the appeal of Amanda A. Frymier (hereinafter “Frymier” or “Appellant”).

## **I. KIND OF PROCEEDING AND NATURE OF RULING BELOW**

On June 3, 2003, Appellant filed a grievance which was denied throughout Levels I through III of the grievance process outlined in W. Va. Code § 29-6A-1 et seq. On September 16, 2003, a Level IV hearing was held before the Education and State Employees’ Grievance Board (hereinafter “Grievance Board.”) After brief testimony, it was understood, and the undersigned even reiterated, that the following issues before the Grievance Board were: 1) whether GSC should have provided Appellant the opportunity to “bump” a less senior employee out of a 1.0 FTE<sup>2</sup> position pursuant to W. Va. Code § 18B-7-1 when her FTEs were lowered but her position was not eliminated; 2) whether GSC had the authority to lower FTEs at all; and 3) whether GSC violated W. Va. Code § 18B-7-6 when it hired temporary summer employees instead of offering that work to Appellant.

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<sup>1</sup>The Board of Regents formally governed West Virginia’s state colleges and universities. In 1989, the West Virginia Legislature abolished the Board of Regents and transferred the governing powers of the Board of Regents to two separate governing boards, the University of West Virginia Board of Trustees (“BOT”), and the State College System Board of Directors (“BOD”). See W. Va. Code §§ 18B-1-1 [1989], 18B-1-3 [1989], 18B-1-4 (1989), 18B-1-7 [1993]. On July 1, 2000 the BOT and the BOD ceased to exist. W. Va. Code §§ 18B-2-1(e); 18B-3-1(e) [2000]. In their stead, the Legislature created the West Virginia Higher Education Policy Commission (“HEPC”). W. Va. Code § 18B-1B-1, et seq. [2000]. In addition, a Board of Advisors for each institution and the West Virginia Higher Education Interim Governing Board were created to operate the higher education system during the transitional period of fiscal year 2000/2001. W. Va. Code §§ 18B-1-2; 18B-1C-2 [2000]. On July 1, 2001, the Interim Governing Board and the Boards of Advisors ceased to exist and were replaced by an Institutional Board of Governors at each institution. W. Va. Code § 18B-2A-1, et seq. [2000]. The HEPC was erroneously added as a party by the Grievance Board below and has remained in the caption of this matter even though the HEPC does not govern Glenville State College.

<sup>2</sup> FTEs will be discussed more fully below.

On or about October 9, 2003, GSC filed its brief addressing only the issues outlined above. On or about October 8, 2003, Appellant filed her brief with the Grievance Board which addressed issues one and two outlined above but completely failed to address issue number three. On November 5, 2003, the Grievance Board issued its Decision denying the grievance and holding that “Grievant failed to prove that she was entitled to bumping rights granted under W. Va. Code § 18B-7-1, after her hours were reduced to less than 1.0 FTE.” The Grievance Board further held that “[a]s a twelve-month employee, Grievant was not eligible for a summer assignment under the provisions of W. Va. Code § 18B-7-6.” Regarding the issue of GSC’s authority to lower FTEs, the Grievance Board held that “Respondent acted within its discretion when it determined that it was in the school’s best interests to curtail employee costs by reducing employment terms rather than eliminating positions.”

On November 10, 2003, the Grievance Board issued an *Errata Notice* which corrected an inadvertent omission of part of a footnote in the original decision. On December 9, 2003, through her new counsel, Appellant filed her Petition for Appeal with the Circuit Court of Gilmer County, and on March 23, 2004, Appellant filed her brief with the circuit court. Her brief addressed the following issues:

- a. The Appellant is entitled to *de novo* review.
- b. The West Virginia Education and State Employees Grievance Board Erred in its application and interpretation of the West Virginia Supreme Court decision *Lucion v. McDowell County Board of Education*.
- c. The Administrative Law Judge erred in the interpretation and application of West Virginia Code § 18B-7-1.
- d. The actions of the college constitute **favoritism**.

On April 13, 2003, prior to GSC being able to complete and file its brief, the circuit court issued its ruling affirming the Decision of the Grievance Board regarding its application and

interpretation of West Virginia Code § 18B-7-1. The circuit court also remanded back to the Grievance Board the portion of Appellant's grievance relating to her favoritism argument. The Gilmer County Circuit Court specifically held:

The Court further finds that the Appellant has not exhausted her administrative remedies with regard to her **favoritism** argument. The Court is of the opinion that the Appellant must exhaust her administrative remedies prior to appealing to this Court. In fact, the hearing examiner was not afforded the opportunity to hear the Appellant's allegations of **favoritism**, since that issue was never brought before the hearing acting as an appellate court pursuant to W. Va. Code § 29-6A-7, and thus does not hear new issues not hear testimony or evidence but rather must rely upon the record below. Accordingly, the Court hereby REMANDS this portion of the Appellant's grievance to the West Virginia Education and State Employees Grievance Board for further proceedings.

[Emphasis added.]

On August 9, 2004, Appellant appealed the circuit's decision on the application of West Virginia Code § 18B-7-1 to this Court<sup>3</sup>, and the issue of favoritism went back before the Grievance Board to be heard. No further evidence was submitted regarding the issue of favoritism, and the matter was submitted on the prior record. On November 16, 2004, the Grievance Board issued its Decision on the issue of favoritism. On December 15, 2004, Appellant filed her Petition for Appeal on the issue of favoritism with the Circuit Court of Gilmer County. On June 6, 2006, the circuit court issued its decision upholding the Grievance Board's decision on the issue of favoritism and finding Appellant failed to meet the test under both the old and new standards for determining if favoritism occurred. Appellant appealed the favoritism issue to this Court on August 30, 2006<sup>4</sup>.

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<sup>3</sup> On January 18, 2005, this Court stayed the appeal on the issue of the application of West Virginia Code § 18B-7-1.

<sup>4</sup> On January 23, 2007, this Court lifted the stay in case number 32163 and consolidated it with the issue of favoritism which is case number 33296.

## **II. STATEMENT OF FACTS**

Appellant has been consistently employed by GSC since May 19, 1980, and has been classified as an Accounting Assistant I, pay grade 12, since July 2000. Until July 2003, Appellant's assignment was for 37 ½ hours per week, or 1.0 full-time equivalency ("FTE<sup>5</sup>." ) In response to state-mandated budget cuts, GSC reduced the assignments of thirty-six employees, including Appellant, from 1.0 FTE, to less than 37.5 hours per week. Positions were identified for reduction based on an assessment of those job duties which were most essential to GSC's operation. Neither seniority nor job performance were considered when the reductions were made.

Effective July 1, 2003, Appellant's position was reduced to .87 FTE, with her salary and benefits prorated accordingly. Appellant's salary was reduced from approximately \$30,000 to \$26,000 per annum. Mawhana Gifford, also classified as an Accounting Assistant I, with eight years of seniority, retained a 1.0 FTE position based upon her duties as school cashier, which require that she be present during business hours. Other Accounting Assistants, including Appellant, have no mandated working hours. There is no question that Appellant is qualified for the position held by Ms. Gifford, since she had been offered the job a few months earlier when Ms. Gifford left GSC's employ. When Ms. Gifford asked to return to work, Appellant agreed to resume her position in the Business office as she was unaware of the impending reductions. Grievant had the second highest level of seniority for Pay Grade 12 at GSC.

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<sup>5</sup> FTE refers to the amount of hours an employee works per year. A 1.00 FTE employee works 1,950 hours per year. Any employee working at least 1,040 hours per year (.53 FTE) is considered full-time and is eligible for benefits pursuant to 133 C.S.R. 8, § 2.1.

**III. ASSIGNMENTS OF ERROR**

- A. **WHETHER THE CIRCUIT COURT ERRED IN ITS INTERPRETATION AND APPLICATION OF WEST VIRGINIA CODE § 18B-7-1.**
- B. **WHETHER THE CIRCUIT COURT ERRED IN ITS INTERPRETATION AND APPLICATION OF THIS COURT'S DECISION IN LUCION V. MCDOWELL COUNTY BOARD OF EDUCATION, 191 W. Va. 399, 466 S.E.2d 487 (1994).**
- C. **WHETHER THE CIRCUIT COURT ERRED IN ITS APPLICATION AND INTERPRETATION OF W. Va. CODE § 29-6A-2 (REGARDING DISCRIMINATION AND FAVORITISM) BY ALLOWING GLENNVILLE STATE COLLEGE TO ASSIGN THE 1.0 FTE POSITION TO MS. GIFFORD AND REDUCE THE HOURS OF APPELLANT.**

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## **V. DISCUSSION OF LAW**

### **A. Standard of Review**

West Virginia Code §29-6A-7(b) defines enforcement and reviewability of decisions conducted before the Grievance Board and affirmed by a circuit court. Judicial review of such decisions is similar to the standard of review under the Administrative Procedure Act, § 29A-5-4, in that both require that findings of fact made at an administrative hearing may not be reversed unless they are clearly wrong. Parham v. Raleigh County Bd. of Educ. v. Scalia, 192 W. Va. 540, 453 S.E.2d 374 (1994).

The decision of a Grievance Board ALJ can be reversed on appeal if the decision:

- (1) Is contrary to law or a lawfully adopted rule or written policy of the employer;
- (2) Exceeds the hearing examiner's statutory authority;
- (3) Is the result of fraud or deceit;
- (4) Is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (5) Is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W. Va. Code §29-6A-7(b).

A final order of the Grievance Board...based upon findings of fact should not be reversed unless clearly wrong. Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997); Quinn v. W. Va. Northern Community College, 197 W. Va. 313, 475 S.E.2d 405 (1996); W. Va. Dep't of Health and Human Resources v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Randolph County Bd. of Educ. v. Scalia, 182 W. Va. 289, 387 S.E.2d 524 (1989). Questions of law are subject to *de novo* review. McClung v. Bd. of Educ. of County of Nicholas, 213 W. Va. 606, 584 S.E.2d 240 (2003). Plenary review is conducted as to conclusions of law and application of law to

facts, which are reviewed *de novo*. Richards v. W. Va. Dep't of Health and Human Resources, 213 W. Va. 304, 582 S.E.2d 751 (2003).

**B. The circuit court did not err in its interpretation and application of West Virginia Code § 18B-7-1.**

W. Va. Code § 18B-7-1 addresses higher education reductions in force. The code defines reduction in force (“RIF”) and specifically states:

All decisions by the appropriate governing board, the commission or its agents at state institutions of higher education concerning **reductions in work force** of full-time classified personnel, [definition of reduction in force] **whether by temporary furlough or permanent termination**, shall be made in accordance with this section. For **layoffs** by classification [reasons for the layoff follow] **for reason of lack of funds or work, or abolition of position or material changes in duties or organization** and for recall of employees laid off, consideration shall be given to an employee's seniority as measured by permanent employment in the service of the state system of higher education. [This is what triggers bumping.] In the event that the institution wishes to **lay off** a more senior employee, [bumping process] the institution shall demonstrate that the senior employee cannot perform any other job duties held by less senior employees of that institution in the same job class or any other equivalent or lower job class for which the senior employee is qualified . . .

W. Va. Code § 18b-7-1(b). (Emphasis added.) [The above brackets indicate additions to the Code for clarity.]

The first sentence of this section sets forth when higher education institutions are to apply this part of the Code, that is, in instances where a reduction in force occurs when employees are either **temporarily furloughed and/or permanently terminated**.

The second sentence stands for the principle that if an institution **lays off** (*i.e.* permanently terminates) an employee for any of the five stated reasons (lack of funds; lack of work; material

changes in duties; material changes in organization; and abolition of position), the institution must consider the **displaced** employee's seniority when executing the bumping policy that follows in sentence three. The second sentence also stands for the principle that an institution must also consider the laid off employee's seniority when implementing the preferred recall procedures set forth in W. Va. Code § 18B-7-1(c) (that is, the order in which employees are recalled to employment is determined by descending order of seniority and qualifications).

The third sentence establishes the bumping procedure and speaks only in terms of employees who have been **laid off** (again, permanently terminated). That is, the statute states that: "In the event the institution wishes to **lay off** a more senior employee . . .", the employee is entitled to bumping rights. The statute does not state that an employee is entitled to bumping rights if a college reduces the number of hours the employee works in a year.

Thus, based upon the language of the statute, to be eligible for bumping rights, an employee must be **temporarily furloughed, permanently terminated or laid off – not experience a reduction in the number of hours worked per year**. An employee whose number of hours worked per year (FTE) has been reduced has not been temporarily furloughed, permanently terminated or laid off because a reduced FTE employee's position still exists with duties that must be performed, a salary that must be paid, and so long as the employee is still working at least 1,040 hours (.53FTE) or more per year, benefits that must be provided by the employer. See 133 C.S.R. 8. § 2.1.

The court below agreed with GSC concluding that,

W. Va. Code s. 18B-7-1(b) does not apply to this case. The first sentence of section (b), partially quoted above, is concerned only with reductions in work force effected "by temporary furlough or permanent termination." The Appellant's complaint concerns a reduction in hours, and her argument that this amounts to a "reduction in force," while creative and perhaps true in a mathematical sense, appears to be

defeated by the statutory language, which in this Court's opinion concerns itself only with reductions in force carried out by actually eliminating personnel....It should be pointed out, though, that the second part of the Appellant's argument likewise depends on a mis-reading of the statute. Section (b)'s second sentence is concerned only with layoffs, like the rest of the section. As the Court reads the sentence, "material changes in duties" serves therein as one of the enumerated "reasons" for which the "layoffs by classification" are being undertaken, and not as an independent subject regarding which consideration must be given to seniority... Finally, the bump provision of section (b) clearly is applicable only in layoff situations, and would not authorize the Court to grant the Appellant the relief she seeks, even had the Court accepted her interpretation of the rest of the section.

The decision of the court below was well conceived and considered Appellant's arguments.

The decision was not, however, contrary to law or a lawfully adopted rule or written policy of the employer; did not exceed the judge's statutory authority; was not the result of fraud or deceit; was not clearly wrong in view of the reliable, probative and substantial evidence on the whole record; and was not arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Therefore, Appellant's assertion that reducing the number of hours an employee works per year constitutes a reduction in force for the purposes of the bumping statute must be rejected, and the decision of the circuit court upheld.

Furthermore, although this Court has not defined reduction in force *per se*, or addressed the higher education bumping statute, it has recognized that an employment reduction in force is the reduction in the number of employees employed by an employer through the elimination of positions and permanent termination of employees. W. Va. Alcohol Beverage Control Admin. v. Scott, 205 W. Va. 398, 518 S.E.2d 639 (1999). In Scott, this Court stated the following:

On March 20, 1991, the ABCA Commissioner, Mr. Harry G. Camper, sent Mrs. Scott a certified letter notifying her that her **position would be eliminated** on April 30, 1991. On April 17, 1991, Mr. Camper requested approval of a second **reduction-in-force** plan involving certain additional employees, including the Appellant. On April 23, 1991, the Appellant filed a grievance with the Board, alleging that she

had been improperly **terminated** and requesting retention of her job, or, in the alternative, an opportunity to “bump” into another position for which she had seniority.

[Emphasis added.] Id.

Based upon the aforementioned, the argument that a reduction in an employee’s position FTE (*i.e.* reduction in number of hours worked) constitutes a RIF for the purposes of triggering bumping rights, is contrary to the language of the statute. Appellant’s interpretation is also illogical in that, the purpose of the bumping statute is to provide a mechanism to provide an employment option for a more senior employee who has been permanently terminated, temporarily furloughed and/or would be laid off because of lack of funds, lack of work, or abolition of position or because material changes in duties or organization have occurred. This employee’s position FTE has been reduced to .87FTE; she is still employed in a benefits eligible position; and, therefore, she has no need to avail herself of an alternate employment option. Furthermore, GSC reduced the work hours of over twenty employees so that the College could meet its mandatory budget reductions but retain many of its employees in full-time, benefits eligible positions. The Legislature never intended for the bumping statute to apply to employees with reduced working hours. The statute was meant only to address employees who have lost their positions - not some of their working hours.

“Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.” Syllabus Point 3, Maikotter v. Univ. of W. Va. Bd. of Trustees/W. Va. Univ., 206 W. Va. 691, 527 S.E.2d 802 (1999), *citing*, Syllabus Point 2[,] State v. Elder, 152 W. Va. 571, 165 S.E.2d 108 (1968). Syl. Pt. 1, Peyton v. City Council of Lewisburg, 182 W. Va. 297, 387 S.E.2d 532 (1989). Syl. Pt. 3, Hose v. Berkeley County Planning

Comm'n, 194 W. Va. 515, 460 S.E.2d 761 (1995). Syl. Pt 2, Mallamo v. Town of Riversville, 197 W. Va. 616, 477 S.E.2d 525 (1996).

Here, W. Va. Code § 18B-7-1(b) clearly states an employee is entitled to bumping to rights only if the employee loses his/her employment position completely. Contrary to Appellant's assertion, the statute does not state or even intimate that employees must be provided the right to bump into positions if their FTEs are reduced.<sup>6</sup> Therefore, Appellant failed to meet her burden that GSC violated W. Va. Code §18B-7-1(b), and the Circuit Court of Gilmer County did not err in so finding.

GSC submits that the reduction in FTEs instead of the elimination of positions is a business decision and is a matter of college policy. Employers have the right to determine an employee's duties and hours worked provided that any changes in those duties and hours are not made arbitrarily and capriciously. Lowering the hours worked per year (FTEs) of a position in order to save the college money is a common right of an employer. Here, GSC made a business decision based upon its mandate to lower its budget.

The jurisdiction of the Education and State Employees Grievance Board is limited to the resolution of grievances as defined by W. Va. Code §29-6A-2(i) (1988) and W. Va. Code §18-29-2(a) (1992) so that its 'authority extends only to resolving grievances made cognizable by its authorizing legislation.'

Skaff v. Pridemore, 200 W. Va. 700, 709, 490 S.E.2d 787, 796 (1997), *citing*, Vest v. Bd. of Educ., 193 W. Va. 222, 225, 455 S.E.2d 781, 784 (1995). The court in Skaff further held that "[t]he

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<sup>6</sup>It is also important to look for discussion of the reduction of FTEs in the heading of W. Va. Code §18B-7-1 as it identifies the content of that section. The heading for this statute reads: "Seniority for full-time classified personnel; seniority to be observed in reducing work force; preferred recall list; renewal of listing; notice of vacancies." Nowhere in the body of the statute or the heading does this Code section outline, mention, or even allude to the reduction of FTEs initiating the bumping process.

**grievance board simply does not have the authority to second guess a state employer's employment policy."** Id. [Emphasis added.]

In Skaff, the grievant claimed that the respondent was mandated to adopt a shift trading policy. This Court in Skaff determined that because the grievance board's discussion of the issue and the grievant's brief failed to cite any rule or regulation that mandates the adoption of a shift trading policy, the Grievance Board had no jurisdiction to order the respondent to adopt such a policy and doing so exceeded the Grievance Board's statutory authority. Here, the Appellant has failed to cite any rule or regulation that mandates that GSC must first reduce positions before it can reduce FTEs. The Grievance Board had no authority to order GSC to adopt such a policy, and the circuit court likewise did not outreach its authority by so ordering.

Like every other business that is facing financial difficulties, GSC has the right to make personnel and fiscal changes in order to keep its business operating. In the instant case, GSC was instructed by the Higher Education Policy Commission to cut a sum certain from its operating budget. Instead of eliminating numerous positions thereby putting many employees out of work, GSC made a business decision to reduce the number of hours some of its employees worked per year so that it could continue to employ a large number of its workforce in as many full-time, benefits eligible positions as possible. Unfortunately Appellant held one position GSC reduced in FTE. The alternative would have been to eliminate a position completely, which in the end would result in an least one employee losing employment completely. GSC chose instead to save money by retaining employees and reducing the number of hours worked per year. Both the Grievance Board and the Gilmer County Circuit Court agreed that GSC made the right decision in the right manner, and Appellant has not shown otherwise.

**C. The circuit court did not err in its interpretation and application of this Court's decision in Lucion v. McDowell County Bd. of Educ.**

First, it must be noted that the circuit court below did not make a specific finding that it relied upon this Court's findings in Lucion v. McDowell County Bd. of Educ., 191 W. Va. 399, 466 S.E.2d 487 (1994). In fact, the circuit court never mentioned Lucion at all in either of its decisions. Accordingly, Appellant must be presuming that ALJ Keller's reliance upon Lucion in her decision November 3, 2003, somehow influenced the Gilmer County Circuit Court. Assuming *arguendo* that the Appellant's presumption is correct, she still cannot prevail here because the ALJ's reliance on Lucion is not clearly wrong and therefore, any reliance on the same by the circuit court would also be correct.

In her decision, ALJ Keller wrote,

In Lucion v. McDowell County Board of Education, 191 W. Va. 399, 466 S.E.2d 487 (1994), the Court held that when a board of education seeks to reduce employment costs, the board may decide that the school's best interests require either the elimination of some service personnel jobs or the retention of all service personnel jobs, but with reduced employment terms. The Court also noted that "[f]rom the humanitarian prospective, the firing of people in economic hard times, rather than reducing everyone's hours defeats government's implied goal of helping to provide counter cyclical employment." That reasoning would apply to the present case which involved the same factual scenario albeit on a different educational level.

Based upon the above language from this Court in Lucion, ALJ Keller concluded that "Respondent acted within its discretion when it determined that it was in the school's best interests to curtail employee costs by reducing employment terms rather than eliminating positions."

Lucion is clearly applicable here even though the facts can be distinguished from the instant matter. In Lucion, the employment contracts of 57 secondary education service personnel were terminated, and new contracts were issued with reduced employment terms and proportional

decreases in salary. In essence, the McDowell County Board of Education voted to terminate the employees' contracts and to "reinststate" them to identical contracts except with reduced employment terms. The employees filed a grievance. The Level IV hearing examiner found that the Board of Education had followed statutory requirements to terminate the contracts and rejected the employees' argument that the West Virginia Code requires the Board of Education to follow the reduction in force provisions. The circuit court reversed the Grievance Board's decision, but on appeal, this Court reversed the circuit court.

Not only did this Court come to the conclusion outlined above, but it also opined that

if a board of education decides to reduce the number of jobs for service personnel, the board must follow the reduction in force procedures of W. Va. Code 18A-4-8b [1990]. If a board of education decides to reduce the employment terms for particular jobs, the board must first terminate the existing contracts by following the procedures of W. Va. Code 18A-2-6 [1989], and second fill the job vacancies by following the procedures and requirements of W. Va. Code 18A-4-8b [1990]. In either case, a board of education must make decisions affecting ***promotion and filling of any service personnel positions of employment or jobs*** ... on the basis of seniority, qualifications and evaluation of past service.

[Emphasis added.] Id. at 403, 446 S.E.2d 487, 491.

Accordingly, this Court has already ruled that if the position is eliminated or promotion is at issue, then bumping rights using seniority and qualifications come into play. In the instant matter, Appellant was not up for promotion and did not lose her job to have it filled; therefore, the bumping rights afforded higher education employees in W. Va. Code § 18B-7-1 were not afforded her. In that regard, the facts of the instant case mirror the decision in Lucion, and if the circuit court relied upon Lucion, its decision was not clearly wrong, arbitrary or capricious and must stand.

In fact, ALJ Keller and the circuit court should be applauded for relying on this Court's

decision in Lucion. Lucion stands for the proposition that, on a public policy level, it is better to save more jobs and benefit packages at reduced wages than to fire a few people to keep the rest at full salaries and benefits. ALJ Keller and the Gilmer County Circuit Court realized the importance of this rationale of this Court when they made their decisions and ruled on the side of public policy. Simply stated, in the instant matter Appellant would prefer that a number of her coworkers had lost their jobs and benefits altogether so that she could have kept \$4,000 per year. Clearly, the ALJ and circuit court saw the bigger social picture and did not err in their rulings.

**D. The circuit court did not err in its application and interpretation of W. Va. Code § 29-6A-2 (regarding discrimination and favoritism) by allowing Glenville State College to assign the 1.0 FTE position to Ms. Gifford and reduce the hours of Appellant.**

In her brief to the circuit court, Appellant stated that “Judge Keller found that the actions of Glenville State College [hereinafter: the College] did not constitute *favoritism or discrimination* as defined by W. Va. Code § 29-6A-1 *et seq.* Because the actions of the College were based upon the employees actual job responsibilities.” [Emphasis added.] Appellant then argued that ALJ Keller failed to properly apply the holding in Bd. of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004). To the contrary, ALJ Keller’s decision only addressed the issue of favoritism as directed by the circuit court. The issue of discrimination was not raised by Appellant in either her first or second trip to the Grievance Board nor was it raised before the circuit court the first time that she appealed the Grievance Board. In fact, the issue of discrimination was never even mentioned until Appellant filed her second brief before with the circuit court below.

The appellate review of a ruling of a circuit court is limited to the very record there made and will not take into consideration any matter which is not a part of that record.” Syllabus Point 2, State v. Bosley, 159 W. Va. 67, 218 S.E.2d 894 (1975). “““This Court will not pass on a nonjurisdictional

question which has not been decided by the trial court in the first instance.” Syllabus Point 2, Sands v. Security Trust Co., 143 W. Va. 522, 102 S.E.2d 733 (1958).’ Syl. pt. 2, Duquesne Light Co. v. State Tax Dept., 174 W. Va. 506, 327 S.E.2d 683 (1984), cert. denied, 471 U.S. 1029, 105 S.Ct. 2040, 85 L.Ed.2d 322 (1985).” Syllabus Point 2, Crain v. Lightner, 178 W. Va. 765, 364 S.E.2d 778 (1987).

The issue of whether or not Appellant has previously raised the issue of discrimination when she off-handedly raised the issue of favoritism in her first trip to circuit court is extremely important because she is again raising the issue before this Court even though the circuit court below correctly decided not to address the issue of discrimination “as that was not brought before the Grievance Board. The Board ruled solely on the issue of favoritism as was previously ordered by this Court, and that is what this Court will consider.” Unlike White, who raised both favoritism and discrimination in her original grievance before the Grievance Board, the Grievant here alleged the issue of favoritism for the first time, not in her first appeal, but in her second appeal to the circuit court. This Court, therefore, cannot address the claim of favoritism as it was not addressed by any of the lower tribunals.

Again, Appellant is relying heavily on this Court’s decision in White, supra. That decision, however, only addresses the issue of *discrimination* under W. Va. Code §18-29-2 (m) and states as follows:

The provisions of W. Va. Code §18-29-2(m) are unambiguous and should be applied and not construed. Accordingly, we now hold that to prevail in a claim for *discrimination under W. Va. Code § 29-29-2(m)*, an employee must show that he or she has been treated differently from other employees and that the difference treatment is not related to the actual job responsibilities of the employees and not agreed to in writing by the employee. (FN7) Once a claim is established, an employer

cannot escape liability by asserting a justification, such as financial necessity, for the discriminatory treatment. To the extent our prior cases are inconsistent with this holding, they are expressly overruled.

[Emphasis added.] 216 W. Va. 242, 248, 605 S.E.2d 814, 820 (2004).

Appellee acknowledges that this Court in White specifically mentioned both favoritism and discrimination when it found that

the circuit court erred as a matter of law in ruling that once a Grievant establishes a *prima facie* case of lack of uniformity, discrimination and favoritism under W. Va. Code § 18A-4-5B and W. Va. Code §§ 18-29-2(m) and (o), the employer may then escape liability by offering a legitimate reason to justify its different treatment of the Grievant.

216 W. Va. 242, 245, 605 S.E.2d 814, 817 (2004). This Court next stated “For the reasons set forth below, we conclude that the circuit court improperly applied the law applicable to discrimination claims under the State’s Human Rights Act to Ms. White’s discrimination and favoritism claims brought under W. Va. Code §§ 18-29-2(m) and (o).” 216 W. Va. 242, 246, 605 S.E.2d 814, 818 (2004). Even though this Court recognized that White’s claim was for both discrimination and favoritism, its decision clearly only addresses discrimination. Because the only issue before the Court is that of favoritism, the decision in White should be inapplicable here.

It is clear that this Court discussed the issue of favoritism in its rationale in White; however, this Court completely fails to mention favoritism in its decision. The undersigned is quite confident that the learned justices did not mention favoritism throughout their discussion of the case only to forget to add it to the ruling at the end. Appellee proffers that this Court intends to apply its opinion in White only to prospective cases wherein the issue is discrimination and not favoritism. Although Appellant would want this court to commix the issues of favoritism and discrimination here, this

Court did not confuse the two issues in its decision in White and should not do so here either.

The definitions outlined in W. Va. Code §§ 18-29-2(m) and (o) and similarly in §§ 29-6A-2(d) and (h) are key to why this Court chose to apply its decision in White only to the issue of discrimination. In both sections of the Code, discrimination is defined as “*any* differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” [Emphasis added.] W. Va. Code §§ 18-29-2(m) and 29-6A-2(d). Favoritism is defined as “*unfair treatment* of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.” [Emphasis added.] W. Va. Code §§ 18-29-2(o) and 29-6A-2(h).

A closer reading of the definition demonstrates that in order to prove favoritism, one must prove that some sort of *unfair* treatment occurred - not just that there was a difference in treatment between two employees. Simply stated, discrimination is a mere difference in treatment while favoritism is treatment that is somehow better. GSC postulates that this Court would determine that the test for discrimination should be different than the test for favoritism because the definitions are different. As a result, this Court in White only applied its decision to the issue of discrimination which is not an issue in the instant matter.

It is a long accepted standard that “adjudicated cases can only be relied on as precedents as to points actually in issue between the parties, and not as to such as may be deemed extrajudicial unless in relation to the latter they should have ripened into law by various and successive decisions.” McGinnis v. Savage, 29 W. Va. 362, 1 S.E. 746 (1887). Because the sole issue decided in White is discrimination and Appellant only raised the issue of favoritism below, White cannot be

relied on as precedent here.

Further, this Court has specifically addressed the issue of precedent.

Precedent does not cease to be authoritative merely because counsel in a later case advances a new argument. *See generally Matter of Penn Central Transp. Co.*, 553 F.2d 12 (3<sup>rd</sup> Cir. 1977). But, as a practical matter, a precedent-creating opinion that contains no extensive analysis of an important issue is more vulnerable to being overruled than an opinion which demonstrates that the court was aware of conflicting decisions and gave at least some persuasive discussion as to why the old law must be changed.

State v. Guthrie, 194 W. Va. 657, n.28, 461 S.E.2d 163, n.28 (1995). *See also, Mayhew v. Mayhew*, 205 W. Va. 490, 519 S.E.2d 188 (1999). Therefore, this Court recognizes that cases, such as White, which fail to provide a thorough analysis of an issue cannot be relied upon as precedent. Because White provides no logical analysis relative to the issue of favoritism, this Court should not rely upon the decision in White as precedent.

Appellant argues that the decision in White applies to the issue of favoritism and erroneously states that the *only* requirement in determining whether favoritism occurred is whether there was preferential treatment of another employee. Even if the new test under the White case is applied to the issue of favoritism, the Grievance Board and the Gilmer County Circuit Court correctly determined that Appellant has not proven her case.

In her Decision, ALJ Keller addressed the applicability of the White case:

Administrative notice is taken that the West Virginia Supreme Court of Appeals recently revised the legal test for discrimination / favoritism claims raised under the grievance procedure statutes. In The Board of Education of the County of Tyler v. White, Slip Opinion No. 31717 (Oct. 28, 2004), a grievant must establish a case of favoritism by showing:

- (a) that he or she has been treated differently from one or more similarly-situated employee(s);

- (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
- (c) that the difference in treatment was not agreed to in writing by the employee.

Grievant has demonstrated that she was treated differently than Ms. Gifford in that her employment was reduced while Ms. Gifford's was not, and that she did not agree to the different treatment in writing. However, the evidence establishes that the difference in treatment was based on the actual job responsibilities of the two individuals. Ms. Gifford was not treated favorably in retaining her 1.0 FTE assignment because she serves as the school cashier, and the cashier's window is required to be open during all regular business hours. Conversely, Grievant's position had no mandated hours of operation. Thus, Grievant failed to prove favoritism under the revised standard.

As ALJ Keller correctly points out, there are three requirements to prove favoritism pursuant to White. Appellant failed to discuss the actual job responsibilities, however. Instead, Appellant argued that she is able to perform Ms. Gifford's position; therefore, GSC showed favoritism in reducing Appellant's FTEs but not Ms. Gifford's FTEs. This Court in White did not address an employee's ability to perform duties. Rather, this Court opined that the appealing party must show that the different treatment is not related to the actual job responsibilities of the employees. Appellant here did not even address the actual job responsibilities. Ms. Gifford's job as the cashier clearly requires her to work for specific, mandated hours. Furthermore, reducing Ms. Gifford's working hours would have required GSC to close the Cashier's Office thereby resulting in an unacceptable interruption of a service provided by Appellee to its students. Appellant's job, however, does not specify particular working hours, and reducing her working hours resulted in no interruption of student services. Based upon the aforementioned, therefore, ALJ Keller correctly applied the requirements of White.

The circuit court also found that Appellant did not meet the test set forth in White. The court

opined that while Appellant and Ms. Gifford were similarly situated and were treated differently, the undisputed facts show that the difference in treatment was related to “actual job responsibilities” as is required by White. White had a 240-day contract and did not receive paid vacation, yet she performed the same duties as an employee with a 261-day contract which included 24 days of paid vacation. Therefore, White was working the same job but paid less than her counterpart. Clearly, White’s situation violated the education statutes regarding uniformity. Here, however, Appellant had different job responsibilities and duties than Ms. Gifford, but more importantly, Appellant and Ms. Gifford were compensated equally for the time that they worked. Appellant was assigned to and paid for a .87 FTE position, and Ms. Gifford was assigned to and paid for a 1.0 FTE position. Unlike White, Appellant was not working the same or more for less. Consequently, the statutes regarding uniformity were not violated in the instant matter.

Appellant also argued that GSC could have assigned Ms. Gifford’s tasks to Appellant and vice versa. Clearly, Appellant is attempting once again to make a case for use of the “bumping” statute. The Grievance Board and the circuit court determined that Appellant was not entitled to exercise the right to bump when there was no reduction in force. Even if this Court determines that the more senior employee would have the right to have the job duties “swapped” so that the more senior employee would retain a 1.0 FTE position, Appellant would still not prevail because she was only the second most senior employee in the pay grade. Therefore, the most senior employee (not Appellant) would have “swapped” duties with Ms. Gifford, and Appellant would still have had her position reduced to a .87 FTE.

Finally, this Court should defer to GSC’s decision regarding lowering Ms. Gifford’s FTEs but not Appellant’s. In Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787(1997), this Court

emphasized that the courts should defer to the public employer in development of employment policy. There, the Grievance Board had ordered the state agency to implement a shift trading policy its employees sought. This Court reversed, stating: "The grievance board simply does not have the authority to second guess a state employer's employment policy....the grievance board, the circuit court [does] not have the authority to substitute our management philosophy for that of the appellant in this instance." Id. at 709, 490 S.E.2d 787, 796 (1997). Pursuant to Skaff, the ALJ, the circuit court and this Court do not have the authority to second guess GSC's decision to reduce Appellant's hours worked per week while deciding to keep the cashier's office open for its students.

"Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 29-6A-2(h). The test to determine whether Appellant has established a *prima facie* case of favoritism required Appellant to establish by a preponderance of the evidence:

- (a) that he is similarly situated in a pertinent way, to one or more other employee(s);
- (b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded him; and,
- (c) that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference.

Chaudri v. HEPC/Marshall Univ., Docket Nos. 02-HEPC-211/213 (Jun. 26, 2003) citing, Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

"Once a *prima facie* case has been established, a presumption exists, which the employer may rebut by demonstrating a 'legitimate, nondiscriminatory reason' for its action. Grievant may still prevail by establishing that the rationale given by the employer is 'mere pretext.'" Mainella, et al.

Appellant was correct in her previous brief to the Gilmer Circuit Court when she wrote,

Mahana [sic] Gifford, also classified as an Accounting Assistant I, has less seniority, but retains a 1.0 FTE position. The College asserts that decision to retain Ms. Gifford as a 1.0 FTE position was based upon a determination that her job responsibilities are more time consuming than those of the other accounting assistants.

The hearing examiner, based upon the fact that Ms. Gifford's position was offered to Ms. Frymier a few months earlier when Ms. Gifford terminated her employment with the College, found that the grievant is clearly qualified for the position held by Ms. Gifford. When Ms. Gifford returned to work, Ms. Frymier, unaware of the pending reductions, agreed to resume her former position. The College subsequently determined that Ms. Frymier's position should be reduced to .87FTE, but not the one held by Ms. Gifford. The College asserted, and the hearing examiner agreed, that a reduction in hours and pay does not constitute a reduction in force and concluded that although seniority is a factor in layoffs and termination, it does not apply to a reduction of hours and benefits.

In her brief to the Circuit Court, Appellant argued that:

Here, Ms. Frymier and Ms. Gifford were similarly situated in that they are in the same classification. The parties acknowledge that Ms. Frymier was qualified to do the job. Despite the fact that Ms. Frymier is more senior than Ms. Gifford, Ms. Gifford was treated in a preferential manner by being allowed to retain her 1.0 FTE position.

Appellant has failed to establish a *prima facie* case of favoritism because she was not similarly situated in a pertinent way to Ms. Gifford and because there clearly was a known and apparent justification for the difference in treatment between Appellant and Mawhana Gifford. Although Appellant and Ms. Gifford were in the same job classification, their job duties were not the same. Vice President Robert Hardman testified at Level IV that Ms. Gifford worked as the school's cashier and that the cashier's window was required to be open during all regular business hours. Therefore, Ms. Gifford's FTEs were not lowered in order to comply with said requirement.

Because Appellant's position had no mandated hours of operation, GSC determined that hers was one of the 36 positions on campus for which FTEs could be lowered. (L-III, Ex. R-5.) Accordingly, GSC demonstrated a known and apparent justification for the lowering of Appellant's FTEs without lowering those of Ms. Gifford.

Finally, because the Respondent has provided a legitimate and non-discriminatory reason for lowering Appellant's FTEs but not Ms. Gifford's FTEs, the Appellant could still prevail if she were able to prove by a preponderance of the evidence that the College's reasons were pretextual. Appellant cannot do so here. At no time prior to the submission of her circuit court brief did Grievant even allege the issue of favoritism let alone present any evidence on that issue. Even after the matter was remanded, Appellant failed to present any new evidence and relied on the record below. Even if the Appellant alleges that her previous testimony somehow rises to the level of evidence directly on the point of favoritism, there is absolutely no evidence in the record that shows that GSC's reasons for lowering her FTEs while keeping Ms. Gifford at a 1.0 FTE were pretextual. Therefore, Appellant cannot prevail.

ALJ Keller specifically found that,

Grievant has established that she was similarly situated to Ms. Gifford, who was allowed to retain full-time status. However, Respondent has provided a legitimate reason for the difference in treatment, *i.e.*, Ms. Gifford's duties as school cashier require her to work regular business hours. There is no evidence that the state reason was pretextual. Again, Grievant believes that she should be allowed to bump into Ms. Gifford's position based on seniority, and she is not entitled to bump because there was no reduction in force. Grievant has failed to prove that Respondent engaged in favoritism.

Accordingly, the ALJ's decision was not contrary to law. Moreover, the decision of the circuit court was not contrary to law or a lawfully adopted rule or written policy of the employer; did

not exceeds the judge's statutory authority; was not the result of fraud or deceit; was not clearly wrong in view of the reliable, probative and substantial evidence on the whole record; and was not arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Therefore, Appellant's assertion that GSC favored another employee while discriminating against her must be rejected, and the decision of the circuit court upheld.

**VI. CONCLUSION AND PRAYER FOR RELIEF**

For the above outlined reasons, the decision of the Gilmer County Circuit Court should be upheld.

GLENVILLE STATE COLLEGE BOARD OF GOVERNORS / GLENVILLE STATE COLLEGE

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Nos. 32163 and 33296

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AMANDA A. FRYMIER,

Appellant,

v.

GLENVILLE STATE COLLEGE/HIGHER  
EDUCATION POLICY COMMISSION,

Appellee.

CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, do hereby certify that I have this 3<sup>rd</sup> day of April 2007, served a true copy of the foregoing "**Brief of Appellee**" by depositing a copy of the same in the regular United States Mail, first class postage prepaid, addressed to:

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