

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in February 2009

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to wvgb@wv.gov.

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

TOPICAL INDEX
HIGHER EDUCATION EMPLOYEES

KEYWORDS: REMAND; POSTING; STANDING

CASE STYLE: FROST v. BLUEFIELD STATE COLLEGE AND DIANA GIBSON, INTERVENOR
DOCKET NO. 07-HE-349R (2/11/2009)

PRIMARY ISSUES: Adjudication on the merits of the grievance; whether vacant classified position should be posted by Respondent.

SUMMARY: This matter was remanded by the Circuit Court of Kanawha County, “for adjudication on the merits of the grievance.” In March of 2007, the Director of the Physical Plant at Bluefield State College retired. Instead of posting the position as a vacancy, the college continued to employ the retired employee as Acting Director of the Physical Plant. Grievant seeks the posting of the position of Director of the Physical Plant. Grievant lacks standing to challenge the decision concerning of the posting of the Director’s position. This grievance is DENIED.

KEYWORDS: STANDING; SPECULATIVE RELIEF; DAMAGES; TORT-LIKE; PUNITIVE; GRIEVANCE OF A CO-WORKER

CASE STYLE: RIEDEL v. WEST VIRGINIA UNIVERSITY
DOCKET NO. 07-HE-395 (2/24/2009)

PRIMARY ISSUES: Whether Grievant had standing to file the grievance?

SUMMARY: This grievance requested that notice to Grievant’s research assistant that his contract would be terminated due to lack of funding be stayed, pending the outcome of another grievance filed by the same Grievant. Termination of the research assistant’s contract directly impacted the research assistant, not Grievant. Grievant did not have standing to file this grievance. Further, the damages alleged by Grievant were speculative and were tort-like or punitive damages, which the Grievance Board does not award. Grievance DISMISSED.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: CREDIBILITY; TERMINATION; EMPLOYEE CODE OF CONDUCT; INSUBORDINATION; MITIGATION; POLICY VIOLATION

CASE STYLE: HOOVER, JR. v. WIRT COUNTY BOARD OF EDUCATION
DOCKET NO. 2008-1482-WIRED (2/12/2009)

PRIMARY ISSUES: Whether Respondent met its burden of proof and demonstrated it had just cause in terminating Grievant.

SUMMARY: Respondent asserted Grievant was insubordinate and showed a lack of judgement when he failed to follow board of education and state policies and brought guns on school property. Grievant asserted he had "implicit" permission from the Superintendent to bring the guns on school property, he was not aware of the board of education policy, and the security system had been tampered with. Grievant was found to lack credibility, his assertions were not proven, and Respondent's evidence was un rebutted. Grievance DENIED.

KEYWORDS: DEFAULT, LEVEL ONE DECISION, WORKING DAYS, WAIVER, AMENDMENT, RELIEF SOUGHT, JUSTIFIED DELAY, NEGLIGENCE, EXCUSE

CASE STYLE: DANIEL v. FAYETTE COUNTY BOARD OF EDUCATION
DOCKET NO. 2008-1762-FAYEDDEF (2/24/2009)

PRIMARY ISSUES:

SUMMARY: Grievant avers that the BOE is in default because a Level One decision was not issued within fifteen days of the conference. Respondent counters and argues that the decision was timely, the Grievant waived his statutory right to a timely decision and the Grievant's "amendment" of his "Relief Sought" permitted an extension of the statutory requirement.

The Respondent did not issue a Level One decision within the applicable time frame. The evidence established that the Grievant agreed to waive the time requirement for holding the Level One conference. It does not evince any intention to waive the time requirement for issuing a decision. The Grievant's "amendment" of the "Relief Sought" merely clarified or restates the "Relief Sought" in the initial grievance filing and does not create a "justified delay not caused by negligence" W. Va. Code § 6C-2-3(b)(1). Default is GRANTED.

KEYWORDS: RESIGNATION; VOLUNTARY; INVOLUNTARY; DURESS

CASE STYLE: CARDER v. MCDOWELL COUNTY BOARD OF EDUCATION AND DEPARTMENT OF EDUCATION
DOCKET NO. 2008-0403-MCDED (2/26/2009)

PRIMARY ISSUES: Whether Grievant's resignation was given voluntarily.

SUMMARY: Grievant was contacted by State Superintendent Steven Payne to discuss his multiple difficulties which arose during his short tenure of employment. Grievant was aware that he would likely be suspended, even perhaps terminated from his employment. During this discussion, Grievant decided he would rather resign. Grievant tendered a written resignation to Dr. Payne. By agreement of the parties, the sole issue to be decided is whether the resignation was voluntary. Grievant failed to prove his resignation was involuntary. Grievant was not forced to resign. This grievance is denied.

KEYWORDS: TRANSFER; ARBITRARY AND CAPRICIOUS; CERTIFICATION

CASE STYLE: COOK v. LOGAN COUNTY BOARD OF EDUCATION
DOCKET NO. 2009-0435-LOGED (2/2/2009)

PRIMARY ISSUES: Whether it was proper for the Superintendent to transfer Grievant back to her original assignment.

SUMMARY: Grievant is employed by the Respondent as an elementary school teacher. Grievant is certified to teach K-8. Grievant was assigned by the Superintendent to a first grade teaching position for the 2008-2008 school year. When Grievant reported for the beginning of the school year, the Principal informed Grievant that she would have to move to another classroom because the room would be used for a kindergarten class. Grievant informed the Principal that she was certified to teach kindergarten and would agree to teach the kindergarten class for the 2008-2009 school year. The primary motivation behind this decision was eliminating the necessity to physically change classrooms. This transfer resulted in the first grade class at the elementary school being instructed by a substitute teacher not certified to teach that grade. After the start of the instructional term, the Superintendent informed Grievant that she would be returning to the her first grade class for the remainder of the 2008-2009 school year. The transfer of Grievant back into her first grade class was in the best interest of the students. In addition, it was not arbitrary and capricious for the Superintendent to transfer Grievant. This grievance is denied.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: BUS OPERATOR

CASE STYLE: VANGILDER v. MARION COUNTY BOARD OF EDUCATION AND GARY TOOTHMAN, INTERVENOR
DOCKET NO. 2008-0708-MRNED (2/20/2009)

PRIMARY ISSUES: Whether Grievant's bid was sufficiently clear as to what position he was applying for, and whether he was entitled to the position over Intervenor?

SUMMARY: Due to confusion caused by two very similar postings for mid-day vo-tech runs whose posting periods overlapped, Grievant's application for the position for which he applied was not considered. His bid was considered for the first posting, and he was not the most senior applicant. Intervenor was placed in the second posted position, which was the position that Grievant had bid upon. At level one, the grievance was granted, because Grievant was the most senior, qualified applicant for the position that he bid on.

Intervenor contends that Grievant did not make his application sufficiently clear and should have not been considered for the second posted position. However, Respondent's posting system does not number or provide clear designations for applicants when applying for service positions, and Grievant should not have been required to know that there were two different postings with very similar descriptions posted at the same time. Grievant sufficiently described the position he was bidding on, and he was entitled to placement in that position. Intervenor's appeal is DENIED.

KEYWORDS: SELECTION; QUALIFICATIONS; COMPETENCY TESTING; DISCRIMINATION; FAVORITISM

CASE STYLE: NELSON v. BOONE COUNTY BOARD OF EDUCATION AND RICKY STARKEY/RICHARD SHORT, INTERVENORS

DOCKET NO. 2008-1190-BOOED (2/24/2009)

PRIMARY ISSUES: Whether Grievant should have been selected over Intervenor for the position at issue and whether he should have been allowed to take the necessary competency tests.

SUMMARY: Grievant was regularly employed as a Custodian III, at the time he applied for a General Maintenance/Plumber II/Sanitation Plant Operator position for which he was not qualified, as he had not taken the necessary competency tests. The Respondent chose to fill the position with a substitute service employee who possessed all of the posted minimum requirements for the position. If Grievant had met the minimum requirements posted for the General Maintenance/Plumber II/Sanitation Plant Operator at the time he applied for the position, he would have received priority or preference as the result of his regular seniority. Grievant was not qualified for the position he was seeking, and Respondent was not required to call Grievant and schedule testing for him that he had not requested.

Grievant also contended that Respondent engaged in discrimination and favoritism by allowing the Intervenor the position at issue, alleging he was allowed an opportunity to take the required competency tests that others were not given. These allegations were simply untrue, in that Intervenor had qualified for the class title position by virtue of taking the required tests before he applied for the position in January 2008. Grievant had not taken the required tests at that time, so he was not qualified for the General Maintenance/Plumber II/Sanitation Plant Operator position when it was posted in January 2008. No discrimination or favoritism was proven, and the grievance is denied.

KEYWORDS: STEP-UP, BUS OPERATOR, REGULAR EMPLOYEE
CASE STYLE: JAMES v. PUTNAM COUNTY BOARD OF EDUCATION
DOCKET NO. 2008-1028-PUTED (2/6/2009)

PRIMARY ISSUES: Whether Respondent has failed to properly implement the step up provisions of W. Va. Code § 18A-4-15.

SUMMARY: Grievant, a regular half day bus operator challenged Respondent Putnam County Board of Education's action of using a substitute to fill a full day position of an absent employee whose absence was prolonged. Grievant maintains he is entitled to relief (loss wages) in that Respondent had notice of his interest and should have allowed him the opportunity to fill the full day run position.

It is undisputed that in an emergency, the normal rotation used for making substitute bus operator assignments does not have to be followed. A substitute was called to fill an absent regular driver's afternoon run, on short notice. However, sometime shortly thereafter it was known, by pertinent parties, that the regular employee's absence was to be for an extended period. Pursuant to applicable statutes, the so-called "step-up" provision is implicated, requiring that other regular drivers be offered the opportunity to accept the assignment throughout the period of the regular employee's extended absence.

While it was established that Respondent should have presented regular employees with the opportunity step up, Grievant is not the only, or most senior regular (half day), bus operator with an interest in filling an extended absence of a full time operator. Grievant did not demonstrate he was next in line to be placed in an extended assignment, or that he was otherwise entitled to the position at issue. Grievant did not establish that he, exclusively, lost wages as a result of prospective full day assignment. Grievance granted in part and denied in part.

TOPICAL INDEX
STATE EMPLOYEES

KEYWORDS: CLASSIFICATION; DEFAULT REMEDY; REALLOCATION; BEST FIT; CLEARLY WRONG; CONTRARY TO LAW; CLASS SERIES; MAJOR PROGRAM

CASE STYLE: STIHLER v. DIVISION OF NATURAL RESOURCES AND DIVISION OF PERSONNEL
DOCKET NO. 07-DNR-360D (2/6/2009)

PRIMARY ISSUES: Whether it would clearly wrong or contrary to law to place Grievant's position in the Wildlife Biologist 3 classification?

SUMMARY: Grievant believes his position should be classified as a Wildlife Biologist 3, rather than a Wildlife Biologist 2. Respondents demonstrated that the nature of Grievant's job has not changed, and that his duties have not changed significantly. Accordingly, it would be clearly wrong and contrary to law to reallocate Grievant's position to a different classification. Respondents further demonstrated, by clear and convincing evidence, that the Endangered Species Program is not a major program for the Division of Natural Resources, and therefore, the Wildlife Biologist 2 classification is the best fit for Grievant's position. It would be clearly wrong and contrary to law to place Grievant's position in the Wildlife Biologist 3 classification. Grievance DENIED.

KEYWORDS: CLASSIFICATION; REALLOCATION; BEST FIT; ADVANCED LEVEL; BEST FIT; SIGNIFICANT CHANGE IN DUTIES

CASE STYLE: RICHMOND v. DIVISION OF HIGHWAYS AND DIVISION OF PERSONNEL
DOCKET NO. 2008-0144-DOT (2/27/2009)

PRIMARY ISSUES: Whether Grievant is misclassified?

SUMMARY: Grievant believes her position should be classified as an Office Assistant 3, rather than an Office Assistant 2. Grievant's position cannot be reallocated because the nature of Grievant's job has not changed, and her duties have not changed significantly. The Office Assistant 2 classification remains the best fit for Grievant's position. Grievance DENIED.

KEYWORDS: DEFAULT; SUBSTANTIAL COMPLIANCE; LEVEL ONE HEARING

CASE STYLE: WILLS v. OFFICE OF TECHNOLOGY

DOCKET NO. 2008-1464-DOADEF (2/19/2009)

PRIMARY ISSUES: Whether Grievant is entitle to a default ruling.

SUMMARY: Grievant alleges he is entitled to prevail by default in a grievance filed against his employer, the West Virginia Department of Administration/Office of Technology. W. Va. Code § 6C-2-4 (2007), in relevant part provides that the chief administrator shall hold a conference or hearing, as requested by the grievant, within ten days of receiving the grievance. Grievant contends Respondent is in violation of W. Va. Code § 6C-2-4 (2007).

The record contains no basis to find bad faith on Respondent's part. In the facts and circumstances of this case, Respondent was taking reasonable and prudent steps to advance to a resolution of the grievance on its merits. A hearing date was agreed to by the parties. A level one hearing was held (in absentia), Grievant was given the option of rescheduling. If a proper level one hearing did not occur, as Grievant alleges, Grievant was the cause of the failure to conduct such a hearing. The undersigned finds that, under the circumstances presented, Grievant is not entitled to relief by default.

Accordingly, Grievant's request for relief by default is DENIED.

KEYWORDS: MITIGATION, TERMINATION, BAD RELEASE, INMATE

CASE STYLE: PRINCE v. REGIONAL JAIL AND CORRECTIONAL FACILITY
AUTHORITY/SOUTHERN REGIONAL JAIL

DOCKET NO. 2009-0593-MAPS (2/13/2009)

PRIMARY ISSUES: Whether the punishment of termination is disproportionate to a bad release where Grievant was an employee of thirteen years, had never been involved in a bad release, had many duties, the release paperwork was not uniform and the inmates had similar names?

SUMMARY: Grievant openly and honestly admits he mistakenly signed off on the release of a misdemeanor, pretrial inmate from the Jail who was not properly authorized to be released. Respondent maintains that the unauthorized release of an inmate is an unforgivable mistake that indicates the Grievant is "unable or unwilling to meet the standards required for your [Grievant's] position"; yet, it allowed the Grievant to supervise booking for six months after the accidental release. Then, after exemplary performance during the six-month interim, Respondent dismissed the Grievant for the lone incident.

Grievant argues that dismissal from his employment is too harsh of a penalty given the circumstances. Grievant is a supervisory correctional officer with many responsibilities and duties throughout the Jail. Overseeing the release of inmates is only one of his duties.

But for the incident in question, in over twelve years in the corrections field, Grievant has never improperly released an inmate. The evidence suggests an honest, but serious mistake occurred. Given the totality of the circumstances, the punishment of dismissal was disproportionate to the offense. This grievance is GRANTED.

KEYWORDS: REALLOCATION, CLASSIFICATION, MISCLASSIFICATION, SUPERVISOR, LEAD WORKER, CLEARLY WRONG, CLEARLY ERRONEOUS

CASE STYLE: BRADLEY v. DIVISION OF HIGHWAYS AND DIVISION OF PERSONNEL

DOCKET NO. 2008-1772-DOT (2/27/2009)

PRIMARY ISSUES: Whether Grievant's position was appropriately allocated to the Accounting Technician 4 classification?

SUMMARY: Grievant was temporarily upgraded from an Accounting Technician 4 to an Administrative Services Assistant 2 when her manager went on an extended medical leave of absence. The upgrade extended from August 1, 2006, through February 1, 2008. During this period there was a reorganization in Grievant's section and a new manager was hired. Grievant sought to have her position permanently reallocated to the Administrative Services Assistant 2 at the end of the temporary upgrade period arguing that she was given new supervisory duties that best fit in that classification.

DOP determined that, even after the reorganization, Grievant's predominant duties continued to fit in the Accounting Technician 4 classification. Grievant was unable to prove that DOP's decision was clearly wrong or arbitrary and capricious so the grievance is DENIED.

KEYWORDS: REALLOCATION, CLEARLY ERRONEOUS, CLEARLY WRONG

CASE STYLE: VANDERLAAN, ET AL. v. DIVISION OF HIGHWAYS AND DIVISION OF PERSONNEL
DOCKET NO. 2008-0868-CONS (2/13/2009)

PRIMARY ISSUES: Whether the delay in reallocation of Grievants' positions was unreasonable, arbitrary and capricious? Whether the denial of one Grievant's reallocation was clearly erroneous?

SUMMARY: Grievants Smith and Daniel had been promoted to the classification of Highway Engineer 3 ("HE 3") prior to being reclassified to Highway Engineer Associate ("HEA"). Consequently, they were moved into the HEA classification at a pay rate that would have been equivalent to a HE 3 classification. Their only claim was that they should have been reallocated to HE 3 sooner and they claim back pay to October 1, 2007. Grievant Vanderlaan was denied promotion to the HE 3 classification. When she was moved into the HEA classification it was at a rate of pay commensurate with the Highway Engineer 1 classification. Therefore, she is claiming that she should have been reallocated to the HE 3 classification prior to the creation of the HEA classification and that she should have been placed in the HEA classification at the pay rate commensurate with an HE 3. Grievants did not prove that the delay in their reallocation was a result of a violation of any statute, rule, policy or written agreement, nor were they able to prove that the delay was arbitrary or capricious. Therefore, the claims for back pay caused by the delay must be denied.

Grievant Vanderlaan was able to prove that she met the qualifications for the HE 3 classification when she applied for that position. Therefore the grievance is granted to the limited extent that Ms. Vanderlaan must be reallocated to the HE 3 classification effective April 1, 2008, and her salary must be adjusted accordingly.

KEYWORDS: REALLOCATION, MISCLASSIFICATION, CLEARLY WRONG, ERRONEOUS, PREDOMINATE DUTIES.

CASE STYLE: HART v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILD SUPPORT ENFORCEMENT AND DIVISION OF PERSONNEL
DOCKET NO. 2008-0641-DHHR (2/19/2009)

PRIMARY ISSUES: Whether Grievant's job responsibilities and duties fit best in the OA # classification.

SUMMARY: Grievant is an Office Assistant 2 but she is performing the same duties as a co-worker who is classified as an Office Assistant 3. Grievant argues that she should be reallocated to the Office Assistant 3 classification because she and her co-worker are performing duties and responsibilities that best fit in that classification. Respondents correctly point out that the issue is not whether Grievant is performing the same duties of her co-worker but whether the duties and responsibilities of her position best fit the Office Assistant 3 classification. Grievant was unable to prove that the Office Assistant 3 classification was the best fit for her position and the grievance must be DENIED.

KEYWORDS: REALLOCATION; POSTING; DUTIES; PREMATURE; SPECULATIVE; STANDING; INJURY

CASE STYLE: LOGSDON v. DIVISION OF HIGHWAYS
DOCKET NO. 2008-1159-DOT (2/23/2009)

PRIMARY ISSUES: Should Grievant be exempted from a new reallocation procedure adopted by the Division of Personnel?

SUMMARY: Grievant challenges a new reallocation procedure adopted by the Division of Personnel in 2007, whereby, instead of additional job duties being assigned to an employee who applies for reallocation, the new job duties have to first be posted. He contends that this will only delay the process for reallocation of employees who advance from one level to the next in his job series, the Transportation Engineering Technician classifications.
Grievant will not be eligible for reallocation to the next level in the series until he obtains more years of experience and more training hours, so this grievance is premature. Moreover, Grievant's request to have the technician series of job classes exempted from the new reallocation procedure had no basis, and the new procedure does not violate any law, policy, rule or agreement. Grievance DENIED.

KEYWORDS: SUSPENSION; AUTHORITY; MITIGATION; CLEARLY EXCESSIVE; VIOLATION OF PROCEDURE; OFF-SYSTEM ROAD; SRIC; ESSENTIAL PERSONNEL; HEARSAY

CASE STYLE: BAKER v. DIVISION OF HIGHWAYS

DOCKET NO. 2008-1659-DOT (2/18/2009)

PRIMARY ISSUES: Whether Respondent proved the charges, and whether the discipline imposed was clearly excessive and should be reduced?

SUMMARY: Grievant, a supervisor, was suspended for 15 days without pay, because he sent an employee to treat a street, within the city limits of the City of Martinsburg, so that I-81 supervisor Jimmy Kees could go get another employee, Roberta Michael, and bring her to work. This street was not within any right of way owned and maintained by the Division of Highways, which was considered "off system," and it was a violation of Respondent's procedures to treat this city street. Grievant was aware that his action was a violation of procedures, but argued his action should be excused because it was common practice to help other employees get to work in adverse weather conditions. Grievant demonstrated that in other instances roadways that were within Respondent's rights of way had been treated in order to get essential personnel to work, and that another employee who lived "off system" had been picked up at her home in a state vehicle by another employee when she could not get to work, at the direction of the Berkeley County Supervisor. Grievant also demonstrated that he was not the one who decided Ms. Michael needed to come to work. However, Grievant did not have the authority to make the decision to treat an off-system road, and he knew this. Grievant did not demonstrate that the penalty imposed was clearly excessive. Grievance DENIED.