

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in April 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: EMPLOYER AUTHORITY; FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED; GRIEVABLE EVENT

CASE STYLE: POSEY v. WEST VIRGINIA UNIVERSITY
DOCKET NO. 2009-0745-WVU (4/10/2009)

PRIMARY ISSUES: Whether, as an employee of the Division of Motor Vehicles, Grievant could challenge his non-selection for a position with West Virginia University.

SUMMARY: Grievant, an employee of the Department of Motor Vehicles, applied for a position with West Virginia University and was not selected. He then filed a grievance with West Virginia University. Grievant's requested relief, placement in a position with a deferent employer, is beyond his employer's authority and cannot be grieved. This grievance states a claim upon which relief cannot be granted. This grievance is DISMISSED.

KEYWORDS:

TIMELINESS

CASE STYLE:

DAVID v. WEST VIRGINIA UNIVERSITY/INSTITUTE OF TECHNOLOGY

DOCKET NO. 2008-1899-CONS (4/2/2009)

PRIMARY ISSUES:

Whether the two grievances consolidated for hearing were filed within the statutory time limits?

SUMMARY:

In the salary enhancement grievance, Respondent's policy prohibited granting a salary enhancement because he had received an "unsatisfactory" rating in teaching within the last five years. Grievant did not question the policy but rather contests the validity of the evaluation in which he received the "unsatisfactory" rating. Grievant did not contest the evaluation when it was issued and the salary enhancement review does not create a subsequent, separate event to grieve the evaluation years later. Therefore, the grievance is dismissed as untimely.

In the evaluation grievance, the Cluster Committee informed Grievant of his "unsatisfactory" evaluation in the area of teaching shortly after February 19, 2007. Rather than filing a grievance contesting the evaluation, Grievant wrote a memorandum to the Dean asking him to overturn the evaluation issued by the Committee. A grievance was filed after the Dean responded by stating that the Committee's evaluation would not be changed. Grievant was unequivocally informed that he received an "unsatisfactory" rating in February 2007, and did not file a grievance until June 18, 2007. The grievance was not timely filed and is dismissed.

KEYWORDS: TIMELINESS; PROSPECTIVE APPLICATION; UNTIMELY

CASE STYLE: KENDRICK v. MARSHALL UNIVERSITY AND JEANNE ADKINS, INTERVENOR
DOCKET NO. 2009-0042-MU (4/28/2009)

PRIMARY ISSUES: Whether Respondent is required to credit Grievant with benefits he did not receive while he was on Workers' Compensation TTD leave.

SUMMARY: Grievant elected to receive Workers' Compensation benefits for a period of time he was absent from his employment in 2004. Subsequently, Grievant became aware he had lost seniority and other accrued benefits for the time he was off work. Grievant relies on Canfield v. West Virginia Division of Corrections and West Virginia Division of Personnel, 217 W. Va. 340, 617 S.E.2d 887 (2005), in which the West Virginia Supreme Court of Appeals ruled that denial of credit for years of service and annual leave while on TTD was not related to a proper government purpose, and violated the equal protection clause of Section 10, Article III, of the West Virginia Constitution.

The Canfield issue has been addressed by this Board on several occasions, and the reasoning applied is applicable to this grievance. Absent a specifically directed retrospective application of the changes in Canfield, supra, the prospective application by Respondent must be upheld, and Grievant's claim from before July 6, 2005, is not covered. In addition, Marshall raises the defense of timeliness. Grievant was advised in 2004 that he would not accrue certain benefits. This grievance was filed June 10, 2008, more than four years after the occurrence. Grievance is DISMISSED as untimely filed.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

- KEYWORDS:** DISMISSAL, TEACHER, IMPROVEMENT PLAN, IMPROVEMENT TEAM, EVALUATION, UNSATISFACTORY PERFORMANCE, POLICY 5300, POLICY 5310
- CASE STYLE:** CARTER v. NICHOLAS COUNTY BOARD OF EDUCATION
DOCKET NO. 2009-0196-NICED (4/8/2009)
- PRIMARY ISSUES:** Whether Grievant was properly dismissed where she was afforded the opportunity to improve her unsatisfactory classroom performance and failed to do so?
- SUMMARY:** Grievant, a first grade school teacher, was properly evaluated and placed on a plan of improvement. She failed to achieve the requirements outlined in her improvement plan and her performance was deemed unsatisfactory. As a result thereof, the BOE, at the recommendation of the Superintendent, terminated her employment upon proper notice and hearing.
- The Grievant's principal assisted in drafting her improvement plan, conducted progress monitoring observations of the Grievant's performance during her improvement plan and drafted her final evaluation. He found that the Grievant's performance in the area of "classroom environment" was unsatisfactory.
- At the Level Three hearing, the Grievant offered no evidence in support of her grievance and she does not challenge the finding that her performance was unsatisfactory. The BOE has met its burden of proving by a preponderance of the evidence that Grievant's job performance was unsatisfactory. Grievant was provided a full and fair opportunity to correct her performance and she failed to do so. There is no indication that any error in the evaluation occurred. Grievant's dismissal was not arbitrary, capricious or contrary to law. Accordingly, this grievance must be DENIED.

KEYWORDS: NON-SELECTION; STANDING; EMPLOYER; EMPLOYEE

CASE STYLE: MARSICANO v. MARION COUNTY BOARD OF EDUCATION
DOCKET NO. 2009-0500-MRNED (4/23/2009)

PRIMARY ISSUES: Whether Grievant is an “employee” for purposes of standing to file a grievance.

SUMMARY: Grievant, a math teacher, was not hired for a math teaching position for which she bid in August 2008. Respondent asserted that Grievant was not an “employee” within the meaning of the grievance procedure when she filed the grievance, and so had no standing to dispute the posting and selection process. Grievant was hired as a full-time employee of the Harrison County Board of Education on August 5, 2008. Therefore, when she filed this grievance on October 14, 2008, she was no longer an employee of Respondent and does not have standing to avail herself of the grievance procedure. Respondent proved this affirmative defense by a preponderance of the evidence, so the grievance is dismissed.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: CONTINUING CONTRACT, IMPLIED WAIVER, TRANSFER

CASE STYLE: VANCE v. JEFFERSON COUNTY BOARD OF EDUCATION
DOCKET NO. 2009-0232-JEFED (4/23/2009)

PRIMARY ISSUES: Whether Grievant voluntarily gave up her right to a continuing contract by applying for a position posted as “one year only.”

SUMMARY: The issue presented is whether Grievant voluntarily gave up her continuing contract by applying for a position that was posted expressly as “one year only.” Absent an express waiver of her continuing contract right, Respondent was unable to meet its burden of proving a waiver should be implied, and the grievance is therefor granted.

KEYWORDS: TERMINATION; SEXUAL HARASSMENT

CASE STYLE: DARBY v. KANAWHA COUNTY BOARD OF EDUCATION
DOCKET NO. 2009-0763-KANED (4/9/2009)

PRIMARY ISSUES: Whether Grievant had a sexual relationship with a 17 year old female who rode is bus.

SUMMARY: Grievant was terminated based on allegations that he had a sexual relationship with a 17 year old female who rode his bus. Respondent asserted this violated its sexual harassment policy. Respondent did not meet its burden of proof. Grievance is GRANTED.

TOPICAL INDEX
STATE EMPLOYEES

KEYWORDS: ANNUAL LEAVE, WORKERS COMPENSATION, ARBITRARY AND CAPRICIOUS, DISCRIMINATION, GRIEVANCE DEFINITION

CASE STYLE: GIBSON v. DIVISION OF NATURAL RESOURCES
DOCKET NO. 2009-0773-DOC (4/23/2009)

PRIMARY ISSUES: Whether DNR may hold Grievant's accrued annual leave for him until he returns to work from a job related injury?

SUMMARY: Grievant was injured in an automobile accident while he was performing his duties for his employer, DNR. He applied for and received Workers Compensation TTD benefits while recovering from his injuries. Grievant avers that it is unfair for him to lose accrued annual leave that cannot be carried into the next employment year while he is off work. He seeks to require DNR to hold these accrued annual leave days until he returns to work. Respondent has followed all statutes, policies and rules related to the accrual of annual leave and Workers Compensation benefits. Grievant was unable to show that Respondent's actions were arbitrary or discriminatory. The grievance is DENIED.

KEYWORDS: CONSTRUCTIVE DISCHARGE, CONSTRUCTIVE TRANSFER

CASE STYLE: KENNEN v. DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS
DOCKET NO. 08-DOH-001 (4/27/2009)

PRIMARY ISSUES: Whether Grievant was constructively discharged where she accepted a promotion to another area after her supervisor was removed from his position?

SUMMARY: Grievant filed two separate grievances complaining about her supervisor's conduct. Ultimately, her supervisor was removed from his position and transferred. After Grievant's supervisor was removed from the workplace, Grievant transferred to a higher paying position at another location. At Level Four, Grievant argues that she was constructively discharged and entitled to damages. Grievant has not established constructive discharge by a preponderance of the evidence. Accordingly, this grievance is DENIED.

KEYWORDS: DISMISSAL, TERMINATION, DISCRIMINATION

CASE STYLE: DONAHUE v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/MILDRED MITCHELL-BATEMAN HOSPITAL
DOCKET NO. 2009-0154-DHHR (4/30/2009)

PRIMARY ISSUES: Whether Respondent proved that there was good and just cause to terminate Grievant's employment?

SUMMARY: DHHR alleges Grievant habitually violated the attendance and leave policies at the Hospital. Respondent argues that Grievant's employment had to be terminated because she could not be depended upon to regularly be available for work. Grievant counters that she is a single parent and had trouble finding dependable child care while she was at work. She had personal health issues and an ill parent that made it difficult for her to be available for work. Grievant also avers that other nurses had similar attendance problems and were not disciplined. Respondent was able to present significant evidence to support their disciplinary decision and the grievance is DENIED.

KEYWORDS: DISMISSAL; DUE PROCESS; NOTICE OF CHARGES; INSUBORDINATION; PROGRESSIVE DISCIPLINE; MITIGATION; FAILURE TO PROTECT; FALSIFICATION OF DOCUMENTS

CASE STYLE: VELA v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILDREN AND FAMILIES
DOCKET NO. 2008-0180-DHHR (4/7/2009)

PRIMARY ISSUES: Whether Respondent proved the charges, and whether the discipline should be mitigated?

SUMMARY: Grievant was dismissed from her employment as a Child Protective Service Worker for failure to protect children, insubordination, and failure to report a conflict of interest. Respondent proved the charges against Grievant. Grievant's conduct was of a substantial nature directly impacting the rights and interests of the public. Grievance DENIED.

KEYWORDS: HOSTILE ENVIRONMENT, SEXUAL HARASSMENT, MITIGATION, CREDIBILITY.

CASE STYLE: ROGERS v. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY/SOUTH CENTRAL REGIONAL JAIL
DOCKET NO. 2009-0685-MAPS (4/23/2009)

PRIMARY ISSUES: Whether Respondent proved that Grievant was guilty of creating a hostile work environment for female officers at the regional jail?

SUMMARY: Grievant was demoted and transferred from his position of Chief Correctional Officer at the South Central Regional Jail. Respondent alleges that Grievant made inappropriate comments to female subordinates that violated agency policy and created a hostile work environment. Grievant denies making most of the comments, avers that the allegations were unsubstantiated and argues that any comments that were made, were innocent and misconstrued. He further implies that the main complainant exhibited ribald behavior indicating that she would not be offended by suggestive comments if Grievant did make them.

Respondent proved that Grievant made inappropriate comments to female subordinates that violated agency policy and contributed to a hostile workplace. While the penalty was severe, it was not disproportionate with the offense given Grievant's supervisory position, and the grievance is denied.

KEYWORDS: PAY EQUITY POLICY, DISCRIMINATION, CIVIL SERVICE SYSTEM, PAY RAISE, INTERNAL RANK

CASE STYLE: SERGEANT v. Regional Jail and Correctional Facility Authority/Western Regional Jail AND Division of Personnel
DOCKET NO. 2008-1283-MAPS (4/27/2009)

PRIMARY ISSUES: Whether Grievant is entitled to a discretionary pay raise?

SUMMARY: Grievant is employed as a Correctional Officer 4 at Western Regional Jail and holds the rank of First Sergeant. Prior to January, 2008, she applied for and was awarded a Correctional Officer 4 position that increased her internal ranking from Sergeant to First Sergeant. She argues that this change constituted a promotion and she should have received a salary increase. Additionally, she claims a violation of the DOP internal pay equity policy and that she was discriminated against. Grievant does not assert her position is misclassified.

On January 1, 2008, Grievant's position was placed under the civil service system. Hence, DOP classification and compensation rules apply. There are no indicium that Grievant is being paid at a rate outside of her classification. Nor is there any indication the Grievant was illegally discriminated against. This Board has no authority to stand in the place of the agency and grant Grievant a discretionary pay raise. Accordingly, this grievance is DENIED.

KEYWORDS: REASSIGNMENT; TRANSFER; FAVORITISM; COMPENSATION FOR TRAVEL TIME; WORK LOCATION

CASE STYLE: PETRUCCI, ET AL. v. DIVISION OF HIGHWAYS

DOCKET NO. 2009-0003-CONS (4/29/2009)

PRIMARY ISSUES: Whether Respondent could reassign Grievants, and whether they were entitled to be paid for their travel time?

SUMMARY: Grievants contested the change in their work location from the Hundred Sub-station to New Martinsville. Grievant Mercer is no longer employed by Respondent, and is seeking only to be paid for the time it took him to travel from his home in Hundred to his new work location and back. Grievant Petrucci seeks the same relief, or to have the reassignment reversed. State agencies may reassign employees as the need arises. Grievant Petrucci was reassigned based upon the needs of Respondent. Grievant Petrucci claimed favoritism based upon the fact that employees assigned to Hundred who are sent to New Martinsville to work for the day are paid from the time they leave Hundred until they return, while he is not paid for the time it takes him to travel to New Martinsville. Grievant Petrucci is not similarly situated to employees who are assigned to Hundred, but are sent to New Martinsville to work for the day, as his assigned work location is New Martinsville, not Hundred. Further, Respondent is not required by law to pay Grievants for the time it takes them to travel from their home to their assigned work location. Grievance DENIED.

KEYWORDS: SELECTION; FLAW; ARBITRARY AND CAPRICIOUS; INTERVIEW; PUBLIC; QUALIFICATIONS

CASE STYLE: NEELY v. DIVISION OF HIGHWAYS

DOCKET NO. 2008-0632-DOT (4/23/2009)

PRIMARY ISSUES: Whether there was flaw in the selection process, and whether Grievant should have been selected for the position?

SUMMARY: This grievance was filed when David Cava was selected as the Harrison County Highway Administrator II. Two of the three members of the interview committee made their choice for the position based primarily upon how they believed the applicants would deal with the public. One of the committee members concluded that Mr. Cava would be better able to deal with the public than Grievant based upon his perception that Mr. Cava was friendly during the interview, and somehow projected a better attitude, while Grievant was arrogant during the interview, and sat with his arms crossed. The second member could not recall the basis for his conclusion that Mr. Cava was the best choice, other than that he thought Grievant was arrogant during the interview. The selection decision was not based upon demonstrated ability. Grievant demonstrated that the selection was flawed, and arbitrary and capricious. However, Grievant did not demonstrate that he should have been selected for the Highway Administrator II position over all the other applicants; therefore, it would not be appropriate to place Grievant in this position. The position should be posted again, and a new selection process should be undertaken by DOH. Grievance DENIED IN PART AND GRANTED IN PART.

KEYWORDS: TERMINATION; CREDIBILITY

CASE STYLE: HONAKER v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES

DOCKET NO. 2008-1511-DHHR (4/30/2009)

PRIMARY ISSUES: Whether Grievant was terminated without good cause

SUMMARY: Grievant was terminated because her driver's license was suspended, and she continued to transport children in the state car. When Respondent obtained a copy of her driver's record it realized that she had received a speeding ticket while in the state vehicle and had never disclosed it. Grievant had prior disciplinary action, and Respondent followed the progressive discipline policy. This grievance is DENIED.

KEYWORDS: TERMINATION; PROBATIONARY EMPLOYMENT;
UNSATISFACTORY PERFORMANCE; DISCRIMINATION

CASE STYLE: KELLEY v. DIVISION OF HIGHWAYS

DOCKET NO. 2009-0317-DOT (4/23/2009)

PRIMARY ISSUES: Whether Respondent should have terminated Grievant's probationary employment for unsatisfactory performance.

SUMMARY: Grievant's probationary employment was terminated, due to DOH's determination that her performance was unsatisfactory, specifically with regard to properly performing her duties and taking direction from her supervisors. When a probationary employee is terminated, it is her burden to prove her services were satisfactory. In this case, Grievant failed to meet this burden, and the evidence supported the conclusion that Grievant repeatedly failed to follow proper procedures for performing her assigned duties and resisted direction from her supervisors. Therefore, this grievance is denied.

KEYWORDS: TIMELINESS, ISSUE PRECLUSION, CLAIM PRECLUSION RES JUDICATA, COLLATERAL ESTOPPEL, COMPENSATION, COMMUTING, PRINCIPLE ACTIVITY, TRAVEL TIME POLICY, FAIR LABOR STANDARDS ACT, FLSA, REGION, VEHICLE POOLING, DISCRIMINATION

CASE STYLE: COLLINS, ET AL. v. DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS

DOCKET NO. 08-DOH-010 (4/28/2009)

PRIMARY ISSUES: Whether DOH's policy concerning payment for travel time was arbitrary, capricious or discriminatory?

SUMMARY: Grievants allege that the DOH policy concerning state vehicle usage and payment for travel time is discriminatory, arbitrary, capricious and contrary to law. Respondent DOH argues that this grievance is barred by the doctrines of issue preclusion and claim preclusion and was untimely filed. Further, DOH maintains that the policy is not discriminatory, arbitrary, capricious or contrary to law.

This grievance is not barred by any preclusionary doctrine and was timely filed. The Grievants have not established, by a preponderance of the evidence, that the DOH policy is arbitrary, capricious, discriminatory or contrary to law, in any respect. This grievance is DENIED.