

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in May 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: CLASSIFICATION; EXPERIENCE; ARBITRARY AND CAPRICIOUS; DEFERENCE

CASE STYLE: CAMPOLONG, ET AL. v. WEST VIRGINIA UNIVERSITY

DOCKET NO. 2008-0374-CONS (5/19/2009)

PRIMARY ISSUES: Whether Grievants were misclassified?

SUMMARY: Grievants believed the Job Evaluation Committee incorrectly determined that their Job Title, Housekeeper, should be in a pay grade 9. Grievants asserted their positions require more than one year of experience, and if they were credited with this in the Experience point factor, they would properly be placed in a pay grade 10. Grievants did not demonstrate that the Job Evaluation Committee's decision was clearly wrong or arbitrary and capricious. Grievance DENIED.

KEYWORDS: PROMOTION; WRITTEN GUIDELINES; ARBITRARY AND CAPRICIOUS; RESEARCH

CASE STYLE: PENN v. WEST VIRGINIA UNIVERSITY

DOCKET NO. 2008-0387-WVU (5/13/2009)

PRIMARY ISSUES: Whether Respondent followed the written promotion and tenure guidelines?

SUMMARY: Grievant applied for promotion to Professor. While his Department Chair and the College Promotion and Tenure Committee supported his promotion, the Chemistry Department Promotion and Tenure Committee, the Dean of the Eberly College, and ultimately the Provost, acting for the President, did not support his promotion. The final decision was based upon Grievant's publication record in refereed journals, and his external grant funding record. The Provost did not consider Grievant's entire record since his last promotion, as is required by WVU's written promotion and tenure guidelines, nor did he take into consideration the quality of Grievant's work. Further, in comparing Grievant's record to others in his department who were recently promoted, the Provost did not compare Grievant's record to that of individuals who were promoted, but rather improperly compared Grievant's publication and grant record to the average for the Chemistry Department. Grievance GRANTED IN PART AND DENIED IN PART.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: NON SELECTION; DISCRIMINATION; RACE; GENDER; ARBITRARY; CAPRICIOUS

CASE STYLE: ENGLISH v. LOGAN COUNTY BOARD OF EDUCATION
DOCKET NO. 2009-0365-LOGED (5/28/2009)

PRIMARY ISSUES: Whether Grievant should have been selected for the position at issue and whether she was the victim of discrimination.

SUMMARY: Grievant applied for the posted position of Director of Testing and Guidance and was not chosen for the position. Grievant asserts she is more qualified than the successful applicant, and that she was discriminated against during the selection process. Respondent denies the charge of discrimination in the selection process, and considers the successful applicant as the most qualified for the position. Grievant has failed to meet her burden of proof and demonstrate a flaw in the selection process, or that the selection of the successful applicant was arbitrary and capricious or an abuse of discretion. Respondent is permitted to decide what weight to give the mandated factors in W. Va. Code § 18A-4-7a when filing administrative positions. In addition, Grievant failed to establish that she was the victim of discrimination. This grievance is denied.

KEYWORDS: NON-SELECTION

CASE STYLE: BAILEY v. MCDOWELL COUNTY BOARD OF EDUCATION AND DEPARTMENT OF EDUCATION
DOCKET NO. 2008-0442-MCDED (5/12/2009)

PRIMARY ISSUES: Whether Grievant was the most qualified candidate for the position of Assistant Superintendent of Elementary Education and Planning.

SUMMARY: Grievant asserts he was the most qualified candidate for the position of Assistant Superintendent of Elementary Education and Planning because he holds a superintendent certification and has years of supervisory experience. The chosen candidate did not have either. There is no requirement that a superintendent hold a superintendent certification. Also, Respondent determined district-wide experience was more important, given the duties of the position. Respondent's decision to hire the highest ranking applicant was not arbitrary and capricious.

KEYWORDS: NON-SELECTION; STANDING; EMPLOYER; EMPLOYEE
CASE STYLE: RANSON v. KANAWHA COUNTY BOARD OF EDUCATION
DOCKET NO. 2009-0761-KANED (5/19/2009)

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

SUMMARY: Grievant was not hired for a coaching position that was awarded to a citizen coach in 2008. Respondent asserted that Grievant was not an “employee” within the meaning of the grievance procedure when he filed the grievance, and so had no standing to dispute the selection pursuant to WV Public Employee Grievance Procedure. Respondent proved this affirmative defense by a preponderance of the evidence. A “Grievance” is “a claim by an employee.” W. Va. Code § 6C-2-2(i). Only an employee may file a grievance. See W. Va. Code § 6C-2-4(a)(1). Accordingly, this grievance is dismissed.

KEYWORDS: STATE INTERVENTION; TRANSFER; MOTION TO DISMISS
CASE STYLE: NELSON v. LINCOLN COUNTY BOARD OF EDUCATION AND DEPARTMENT OF EDUCATION

DOCKET NO. 2009-0044-LINED (5/13/2009)

PRIMARY ISSUES: Whether W. Va. Code § 18A-4-7a is relevant with regard to Grievant’s transfer action?

SUMMARY: Grievant argues that transferring him to a vacant position violated W. Va. Code § 18-A-4-7a. Grievant seeks to be placed back into his previous position at West Hamlin Elementary. Respondents argue that this section is not controlling because Lincoln County Board of Education is under State intervention pursuant to W. Va. Code § 18-2E-5. As such, the State Superintendent has the sole discretion to hire administrators and principals in counties under intervention without regard to the provisions of W. Va. Code § 18A-4-7a. Because Grievant has asserted no basis for this grievance other than the alleged failure to comply with § 18A-4-7a, which is not controlling, this grievance fails to state a claim upon which relief can be granted. This grievance is DISMISSED.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: BACK PAY; TIMELINESS

CASE STYLE: KOWALSKY v. MONROE COUNTY BOARD OF EDUCATION
DOCKET NO. 2008-1099-MNRED (5/4/2009)

PRIMARY ISSUES: Whether Grievant is entitlement to retroactive salary.

SUMMARY: Grievant requested five years of experience credit pursuant to an obscure policy and Respondent granted her request. The heightened degree of experience credit had the effect of increasing Grievant's salary. Subsequently, Grievant requested that she be granted retroactive salary, the difference between her salary then and the amount she would have been paid if she had received credit for the additional five years of experience the prior school year.

Respondent declined to grant Grievant additional compensation. Respondent maintains the denial of a request for additional relief, not previously requested, after being granted the relief originally sought, does not serve to renew or extend the time for initiating a grievance. Grievant's actions with regard to initiating a grievance claim for back pay (retroactive compensation) was untimely. It is incumbent upon a Grievant to initiate a grievance within the statutory prescribed time period of becoming aware of the facts giving rise to her grievance. This grievance is denied.

KEYWORDS: SUSPENSION; WILLFUL NEGLECT OF DUTY; INTEMPERANCE; CRUELTY; NOTICE OF CHARGES; SPRAYING DISINFECTANT; CELL PHONE USAGE; STUDENT SEATING; YELLING; RAISING VOICE TO STUDENT; INAPPROPRIATE COMMENTS; MITIGATION; CLEARLY EXCESSIVE

CASE STYLE: BLACKBURN v. BROOKE COUNTY BOARD OF EDUCATION
DOCKET NO. 2009-0618-BROED (5/27/2009)

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

SUMMARY: Grievant was suspended for 60-days without pay and placed on an improvement plan for willful neglect of duty, cruelty, and intemperance. The superintendent had recommended a 30-day suspension without pay. Respondent did not prove all the charges against Grievant. Several of the charges proven were minor infractions, for which a reprimand would be appropriate for an employee, such as Grievant, who had never been disciplined. The remaining significant charge proven was that Grievant had made inappropriate, unprofessional comments to a student on the bus, and she raised her voice when speaking to him. Grievant demonstrated that a 60-day suspension without pay was so clearly disproportionate to the offense that it amounted to an abuse of discretion. Suspension reduced to 5 days without pay. Grievance GRANTED IN PART, AND DENIED IN PART.

TOPICAL INDEX
STATE EMPLOYEES

KEYWORDS: CLASSIFICATION, BEST FIT, PAY RAISE, WEIGHT ENFORCEMENT OFFICER, UTILITIES INSPECTOR, PAY EQUITY, DISCRIMINATION

CASE STYLE: CASTO v. PUBLIC SERVICE COMMISSION AND DIVISION OF PERSONNEL

DOCKET NO. 2009-0647-PSC (5/19/2009)

PRIMARY ISSUES: Whether Grievant was properly classified as a Weight Enforcement Officer?

SUMMARY: Grievant argues that he should be classified as a Utilities Inspector 1 or Utilities Inspector 3. Further, and alternatively, he maintains that he should be given a salary increase based upon "salary equity" and/or discrimination.

The Weight Enforcement Officer classification is the "best fit" for the Grievant's position. Grievant has cited no rule or law entitling him to a salary increase. Accordingly, this grievance must be DENIED.

KEYWORDS: CONTINUING PRACTICE; CONTINUING DAMAGE; DISCRIMINATION; FAVORITISM

CASE STYLE: MORGAN v. DIVISION OF HIGHWAY

DOCKET NO. 2008-1714-DOT (5/13/2009)

PRIMARY ISSUES: Whether Grievant's salary was incorrect when he began working for Respondent in 1998, and whether Grievant has been a victim of discrimination or favoritism.

SUMMARY: Grievant asserts his salary was incorrect when he started at DOH in 1998. Therefore, his salary has continually remained incorrect through the eleven years of his employment. Also, Grievant avers DOH has engaged in disparate treatment whereby individuals with less seniority in DOH are being paid a higher salary than Grievant. Lastly, Grievant asserts he was not trained on the grievance procedure. Respondent asserts this grievance is not timely filed. Respondent argues Grievant's starting pay in 1998 was correct. However, Respondent avers if Grievant believed his pay to be incorrect, he should have brought his grievance at that time. Respondent also asserts that Grievant's salary is within his pay grade and does not violate any policy or law. After a complete review of the record, this grievance is denied.

KEYWORDS: DISMISSAL; FAVORITISM; HOSTILE WORK ENVIRONMENT; CHARGES IN DISMISSAL LETTER; BURDEN OF PROOF

CASE STYLE: BRYANT v. DEPARTMENT OF TRANSPORTATION/DIVISION OF MOTOR VEHICLES
DOCKET NO. 06-DMV-225 (5/22/2009)

PRIMARY ISSUES: Whether the charges in support of Grievant's termination were proven.

SUMMARY: Grievant was charged with giving preferential treatment to certain employees in the form of longer breaks and lunches, creating a hostile working environment if employees complained to her regarding the favoritism, and not supporting her Manager or assisting with the daily operations of the agency. The charges against Grievant were not proven. Accordingly, this grievance is GRANTED.

KEYWORDS: INJURY; STANDING; CONFIDENTIALITY

CASE STYLE: KERSHNER v. DEPARTMENT OF ENVIRONMENTAL PROTECTION
DOCKET NO. 2008-1862-DEP (5/18/2009)

PRIMARY ISSUES: Whether Grievant's privacy was compromised when Respondent had her complete a waiver form required by the DMV to obtain her driver's record in accordance with her lease agreement for a state owned vehicle.

SUMMARY: Grievant leases a state owned vehicle. The terms of her agreement allow Respondent to review her driver's record annually. DMV developed a new policy that required Grievant to complete a waiver for Respondent. The waiver contains Grievant's name, driver's license number, birth date, and last four digits of her social security number. Grievant asserts that providing all this information leaves her ripe for identity theft. Grievant has failed to allege a personal injury. Grievance is DENIED.

KEYWORDS: JURISDICTION, EMPLOYEE, CLASSIFIED EXEMPT, CONSTITUTIONAL OFFICER

CASE STYLE: CLUTTER v. DEPARTMENT OF AGRICULTURE

DOCKET NO. 2009-1372-AGR (5/28/2009)

PRIMARY ISSUES: Whether an employee of the Department of Agriculture may contest his dismissal through the Public Employees Grievance Procedure?

SUMMARY: Grievant filed a grievance contesting his discharge from his position as State Apiary with the Department of Agriculture. A Motion to Dismiss the grievance was filed by the Department claiming that Grievant did not meet the definition of "employee" as set out in the Public Employees Grievance Procedure. The Department avers that employees of the Department of Agriculture are not covered under the grievance statute and therefore the Grievance Board has no jurisdiction to hear Mr. Clutter's complaint.

The Public Employees Grievance Board is a statutory creation with jurisdiction defined by law to resolve disputes between specific public employees and their public employers. Grievant's position did not meet the statutory definition of an employee set out in the grievance procedure and the Grievance Board does not have jurisdiction to hear his grievance. The grievance must be DISMISSED.

KEYWORDS: LATERAL TRANSFER, PAY RANGE, PAY GRADE, PUCCIO MEMORANDUM, GOVERNOR'S MEMO

CASE STYLE: CELESTINE v. STATE POLICE

DOCKET NO. 2009-0256-MAPS (5/4/2009)

PRIMARY ISSUES: Whether Grievant is entitled to a raise in salary subsequent to a lateral job change.

SUMMARY: Grievant voluntarily transferred from the position of Building Maintenance Mechanic to the position of Mechanic 2. This alteration in employment with Respondent, a state agency, constituted a lateral transfer in that both positions are within the same pay grade. Grievant argues that his salary is below the starting wage for a Mechanic 2. Pursuant to relevant and applicable legislative rules an employee who receives a lateral class change shall be paid the same salary received prior to the change. Further, discretionary pay increases are currently prohibited by the Governor's office.

Grievant is being paid in accordance with the pay scale for his classification and regrettably Respondent is barred from increasing his salary to the level comparable to that of a new hiree. Grievance denied.

KEYWORDS: NON-SELECTION, SIGNIFICANT FLAW, INTERVIEW, SENIORITY, TIMELINESS, MOST QUALIFIED. QUALIFICATION, RECORD OF PERFORMANCE

CASE STYLE: MCCOY v. DIVISION OF HIGHWAYS

DOCKET NO. 2008-1442-DOT (5/21/2009)

PRIMARY ISSUES: Whether Respondent's non-selection of the Grievant for the position of Transportation Crew Supervisor 1 was clearly wrong or arbitrary and capricious?

SUMMARY: Grievant was not the successful candidate for the position of Transportation Crew Supervisor 1 and challenges his non-selection. Each applicant was interviewed and asked the same general questions. The successful applicant received higher ratings than the Grievant in "Knowledge, Skills & Abilities" and "Interpersonal Skills." There is no indication that these ratings were somehow unreasonable. Grievant has not established, by a preponderance of the evidence, that he was the most qualified applicant. There is no indication a significant flaw in the selection process occurred. Accordingly, this grievance is DENIED.

KEYWORDS: PROBATIONARY PERIOD, ULTRA VIRES ACT, ESTOPPEL, ESTOPPEL IN PAIS, EQUITABLE ESTOPPEL, AUTHORITY

CASE STYLE: UNDERWOOD v. Department of Health and Human Resources/Bureau for Children and Families AND Division of Personnel

DOCKET NO. 2008-1254-DHHR (5/5/2009)

PRIMARY ISSUES: Whether Grievant is entitled to credit for probationary time spent in a separate and distinct position?

SUMMARY: Grievant was hired as a Child Protective Service Worker Trainee in Clay County from a competitive, geographically-limited register/certification. Before completing his probationary period for this position, Grievant resigned and accepted a similar trainee position in Calhoun County. Grievant was required to retake the civil service exam and required to start his probationary period anew when accepting the Calhoun County position. Grievant argues that equity requires he be given probationary credit for the probationary time he spent in the Clay County position.

DOP rules specifically forbid an employee from transferring during his or her probationary period where the employee is hired from a competitive, geographically-limited register/certification. The interest of justice does not demand that equitable estoppel be applied in this particular circumstance and any unclear or misleading averments made to the Grievant constitute ultra vires acts. This grievance is DENIED.

KEYWORDS: SELECTION, FLAWED PROCESS, ARBITRARY AND CAPRICIOUS, CLEARLY WRONG

CASE STYLE: FORSYTHE v. DIVISION OF PERSONNEL
DOCKET NO. 2009-0144-DOA (5/20/2009)

PRIMARY ISSUES: Whether the selection process was flawed, and whether Grievant was the most qualified candidate?

SUMMARY: This grievance was filed when John Bowyer was selected for the position of DOP Assistant Director for Employee Relations and Grievant was not. The interview procedure did not comply with the process recommended by DOP for filling public employment vacancies in important ways. In fact, the position was offered to one applicant before all candidates slated to be considered by the interview committee were actually interviewed. Grievant was able to demonstrate that the interview and hiring process were so flawed as to render it arbitrary and capricious. However, Grievant failed to prove that he was the most qualified candidate for the position out of all the applicants, including Mr. Bowyer. Therefore, it would not be appropriate to place Grievant in this position. The position must be posted again, and a new selection process must be undertaken by DOP. The grievance is Granted in part and Denied in part.

KEYWORDS: STANDING, PERMANENT EMPLOYEE, SEASONAL EMPLOYEE, TEMPORARY EMPLOYEE

CASE STYLE: GILL v. DIVISION OF NATURAL RESOURCES
DOCKET NO. 2009-1598-CONS (5/22/2009)

PRIMARY ISSUES: Whether Grievant has standing to file two grievances contesting her non-selection to permanent positions.

SUMMARY: Grievant challenges the selection of less experienced workers to fill two full-time permanent positions at the Park. She claims that since she has more experience as a temporary worker she should have been selected for the permanent positions. DNR notes that temporary, seasonal workers, are exempt from coverage under the state classified service by W. Va. Code § 29-6-4, and they are not included in the definition of “employee” set out in W. Va. Code § 6C-2-2. Consequently, Respondent argues that Grievant has no standing to file a grievance with the Public Employees Grievance Board. Because Grievant is not a permanent employee of the DNR she has no standing under the grievance statute and the grievances must be dismissed.

KEYWORDS: STANDING; PROMOTION; INJURY-IN-FACT

CASE STYLE: PERRIS v. DIVISION OF HIGHWAYS

DOCKET NO. 2009-0903-DOT (5/26/2009)

PRIMARY ISSUES: Whether Grievant has standing to grieve the promotion of a fellow worker to TRET SR when Grievant did not apply for the posted position because he was already a TRET SR.

SUMMARY: Grievant alleged the promotion of a fellow worker to TRET SR was improper, as the co-worker did not meet the criteria set forth by the Division of Personnel. Grievant was a TRET SR when the position was posted, and therefore, he did not apply for the position. The promotion did not affect Grievant in anyway. Therefore, Grievant could not demonstrate an injury-in-fact. The grievance is dismissed.

KEYWORDS: TERMINATION; GOOD CAUSE

CASE STYLE: HARDBARGER v. DIVISION OF VETERAN'S AFFAIRS

DOCKET NO. 2009-0643-MAPS (5/7/2009)

PRIMARY ISSUES: Whether Grievant was terminated from her employment for good cause.

SUMMARY: Grievant engaged in physical abuse of a facility resident. In particular, Grievant failed to meet proper service worker standards by failing to follow the attending physician's orders and failed to follow the Nursing Facility policy concerning the transfer of residents. Respondent proved Grievant engaged in this misconduct of a substantial nature and the dismissal is upheld. This grievance is denied.

KEYWORDS: TERMINATION; GOOD CAUSE; FITNESS; ESSENTIAL DUTIES

CASE STYLE: JETT v. DIVISION OF JUVENILE SERVICES/WV INDUSTRIAL HOME FOR YOUTH

DOCKET NO. 2009-0845-MAPS (5/27/2009)

PRIMARY ISSUES: Whether Grievant was terminated for good cause.

SUMMARY: Grievant was terminated for committing child abuse of a resident while escorting the resident from the Institution's school back to his unit. The evidence established that the resident sustained bruising and swelling to his face and eye as a result of excessive use of force by Grievant. In addition, an independent investigation was conducted by the Institutional Investigation Unit of the Department of Health and Human Resources which found Grievant responsible for committing child abuse of a resident. Grievant did not challenge this finding. Once Grievant was found to have committed child abuse and it was determined he should not work around juveniles, the inescapable consequence was that Grievant could not fulfill the duties of a juvenile correctional officer. This grievance is denied.