

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in June 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

DEPARTMENT OF EDUCATION EMPLOYEES

<u>KEYWORDS:</u>	TIMELINESS; WORK HOURS; CHANGE IN SCHEDULE; ROTATING SHIFTS; MISLEADING INFORMATION; FAVORITISM
<u>CASE STYLE:</u>	<u>DODGINS v. DEPARTMENT OF EDUCATION/SCHOOLS FOR THE DEAF AND THE BLIND</u> DOCKET NO. 2009-0407-DOE (6/15/2009)
<u>PRIMARY ISSUES:</u>	Whether the grievance was timely filed? Whether Respondent could post the position as rotating shifts, and then not schedule employees to rotate among shifts?
<u>SUMMARY:</u>	Respondent posted three General Maintenance/Security Guard positions. The job description stated with regard to work hours, "rotating shifts" and "as scheduled by supervisor." Grievant applied for one of the positions, and was offered one of the positions. Grievant did not accept the position because he did not want to work rotating shifts. This grievance was not filed until several weeks later when Grievant saw the schedule for these positions, which showed that only one of the employees was rotating among the shifts. Grievant claimed that he had been misled. Respondent argued this grievance should be dismissed as untimely filed. Grievant did not timely complain about the posting itself or the job requirements in the posting or job description. As to Grievant's complaint that he was misled, Respondent did nothing improper by posting the position to allow the option of scheduling the employees for rotating shifts, and then not scheduling all employees to rotate among the shifts. Although the initial schedule does not reflect that two of the three successful applicants are scheduled to rotate among the shifts, Respondent retains the option to adjust these employees' schedules, as needed, to rotate them among shifts. Grievant also claimed favoritism, but produced no evidence to support this claim. Grievance DENIED.

TOPICAL INDEX
HIGHER EDUCATION EMPLOYEES

KEYWORDS: MERIT PAY; ARBITRARY AND CAPRICIOUS; EXCEEDS EXPECTATIONS; ANNUAL REPORT

CASE STYLE: MARTIN v. SHEPHERD UNIVERSITY
DOCKET NO. 2009-0022-SU (6/23/2009)

PRIMARY ISSUES: Whether Grievant should have been awarded merit pay? Whether Respondent's evaluation for merit pay was arbitrary and capricious?

SUMMARY: Grievant applied for merit pay in 2008. Grievant's annual report submitted in support of this request was very brief, providing little detail of his work. The Merit Evaluation Committee did not find Grievant's service, the area chosen by Grievant, to exceed expectations based upon the information provided in Grievant's annual report, and did not recommend him for merit pay. Grievant did not demonstrate that this decision was arbitrary and capricious, based upon the information provided to the Committee in his annual report. Grievance DENIED.

KEYWORDS: PARKING; PERMIT; FEE; DISCRIMINATION; SIMILARLY SITUATED; FREE; AFTER HOURS PARKING; POLICY; RELIEF; AUTHORITY TO CHANGE POLICY

CASE STYLE: JENKINS v. WEST VIRGINIA UNIVERSITY
DOCKET NO. 2008-0158-WVU (6/2/2009)

PRIMARY ISSUES: Whether Grievant demonstrated discrimination in the parking fee charged to employees?

SUMMARY: Grievant believes some West Virginia University ("WVU") employees receive an unfair benefit because they are not charged a fee to park in certain lots or at certain times of the day, while he is required to pay to park in a lot owned by WVU near his work site during the day. Grievant is not similarly situated to all other WVU employees. The parking situation and parking rates vary widely across the expansive WVU campus, and some lots where employees are allowed to park are not owned by WVU. No permit is required to park in any lot during certain hours, so employees may choose to park in any lot for free during those hours. Those employees who work at the same work site as Grievant, during the same hours, for the same department as Grievant, and who park in the same lot as Grievant are similarly situated to Grievant, and all these employees are charged a fee if they wish to park in this lot. Grievance DENIED.

KEYWORDS: TIMELINESS; EVALUATION

CASE STYLE: DELLA-GIUSTINA v. WEST VIRGINIA UNIVERSITY

DOCKET NO. 2008-1693-CONS (6/8/2009)

PRIMARY ISSUES: Whether the grievance was timely filed?

SUMMARY: Respondent argued these grievances should be dismissed as untimely filed. Respondent demonstrated that the first grievance was filed more than 24 days after Grievant became aware of his 2003 evaluation, which was the subject of the grievance, and the second grievance was filed almost two weeks later. The grievances were not timely filed. Grievant offered no excuse for his failure to timely file these grievances. Grievance DISMISSED.

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COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: NON-SELECTION; ARBITRARY AND CAPRICIOUS; COACH; QUALIFIED

CASE STYLE: JULIO v. BROOKE COUNTY BOARD OF EDUCATION
DOCKET NO. 2009-0120-BROED (6/22/2009)

PRIMARY ISSUES: Whether Grievant should have been selected for the position of Assistant Football Coach over the successful applicant?

SUMMARY: Grievant was not selected for a coaching position although he had greater experience than the person who was selected; however he failed to show Respondent abused its discretion by placing weight in the selection decision on other factors such as demeanor, interview performance and related education and training. Grievant did not follow the Brooke County BOE policy which required him to present a letter of application for the position. Despite his failure to comply with Board policy, he was still considered for the position, but was not the most qualified candidate. Respondent did not act arbitrarily or capriciously in reaching its decision. Accordingly, this grievance is DENIED.

KEYWORDS: NON-SELECTION; DISCRIMINATION; ARBITRARY AND CAPRICIOUS; COACH; MOST QUALIFIED

CASE STYLE: JULIO v. BROOKE COUNTY BOARD OF EDUCATION
DOCKET NO. 2009-0254-BROED (6/22/2009)

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

SUMMARY: Grievant was not selected for a coaching position although he had greater experience than the person who was selected; however he failed to show Respondent abused its discretion by placing weight in the selection decision on other factors such as demeanor, interview performance and related education and training. Grievant also claimed he was discriminated against. Grievant has not met his burden of proving this claim, because he has shown no difference in treatment from similarly situated employees. Accordingly, this grievance is DENIED.

KEYWORDS: RIF; SENIORITY; MULTICLASSIFICATION

CASE STYLE: FARR v. WOOD COUNTY BOARD OF EDUCATION

DOCKET NO. 2008-1439-WOODED (6/18/2009)

PRIMARY ISSUES: Was it proper to identify Grievant, classified as an aide, for reduction in force when less senior aides with paraprofessional certification were not.

SUMMARY: With regard to the 2008-09 school year of Wood County Schools, Respondent conducted a reduction in force (RIF) in the "aide" classification of service personnel. In determining what positions would be RIFed, a conscious effort was made (preference given) to retain individuals with paraprofessional certification, over those who merely had aide certification. As a result of Respondent's actions, Grievant was RIFed, even though she had more seniority than a significant number of paraprofessional aides.

W. Va. Code §18A-4-8b(d)(2)(c) clearly provides that the paraprofessional classification title does not stand alone as a classification category. A paraprofessional holds a multi-classification status. The paraprofessional classification title is one of the class titles that comprise the aide classification category. W. Va. Code §18A-4-8b(h) provides that seniority is the basis of determining which employees are terminated and which are retained in a reduction in force action. The least senior employees within the classification category in which a RIF is being conducted are the employees who are terminated and placed on the preferred recall list. Unless the aide job in discussion requires the additional qualifications/skills of a paraprofessional for the successful performance of the job, it is improper to intentionally give retention preference to classroom aides with paraprofessional certification during a RIF of the aide classification. The particular classification title held by an employee within a classification category is not a factor during a reduction in force. According, this grievance is granted.

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STATE EMPLOYEES

<u>KEYWORDS:</u>	DISCRIMINATION; NEW HIRES; LATERAL CLASS CHANGE; JOB CLASSIFICATION
<u>CASE STYLE:</u>	<u>BURNS v. DIVISION OF HIGHWAYS</u> DOCKET NO. 2009-1079-DOT (6/30/2009)
<u>PRIMARY ISSUES:</u>	Whether Grievant is entitled to a salary increase because when new hires transferred their salaries were greater than his.
<u>SUMMARY:</u>	Grievant, an Equipment Operator 2, began his employment with the Division of Highways in Tucker County on February 17, 2005. His pay was the same as other Equipment Operator 2's in Tucker County with the same amount of service. In January 2007, Dickie Hedrick transferred from a Supervisor position with the Division of Natural Resources, to an Equipment Operator 2 position in Tucker County, with the Division of Highways. Mr. Hedrick had 17 years of service with the State, and had previously been employed by the Division of Highways for a few years in the 1990's. Mr. Hedrick's pay upon his transfer was higher than Grievant's salary, but was less than some other Equipment Operator 2's in Tucker County with fewer years of service with the State. Grievant possessed prior work experience; however, it was not with the State of West Virginia. Grievant did not demonstrate that this difference in pay was discriminatory, or that it was otherwise improper. This grievance is DENIED.

KEYWORDS: LEAVE; SUSPENSION

CASE STYLE: WATTS v. DIVISION OF HIGHWAYS

DOCKET NO. 2009-0852-DOT (6/5/2009)

PRIMARY ISSUES: Whether Grievant's fifteen day suspension was appropriate when he left his job due to a family illness without telling the supervisor but sent word to the supervisor through a mechanic who stopped to check on Grievant while he was pulled over by a State Trooper for speeding.

SUMMARY: Respondent asserts Grievant was suspended for fifteen working days for leaving his employment without notifying his supervisor. Respondent further asserts that this behavior has happened before, and Respondent was following its progressive discipline policy when determining the appropriate action in this instant case. Grievant argues he received a call that his daughter had a very high temperature and was ill. Grievant avers because of this emergency, he left work, but asked a mechanic who worked for Respondent to notify Grievant's acting crew leader. Respondent has met its burden in this matter. Therefore, this grievance is denied.

KEYWORDS: RANDOM DRUG TESTING; MARIJUANA; CDL; DISMISSAL; REHABILITATION; SUBSTANCE ABUSE

CASE STYLE: MAZZIE v. DIVISION OF HIGHWAYS

DOCKET NO. 2009-0872-DOT (6/30/2009)

PRIMARY ISSUES: Whether Grievant was wrongfully terminated.

SUMMARY: Grievant was dismissed from his employment after he tested positive for marijuana in his system in a mandatory random drug test. Respondent's random drug testing policy applied to employees in safety sensitive positions who are required to hold a CDL license. Respondent had adopted a drug and alcohol abuse policy that required an opportunity to rehabilitate after a first failed drug test. Grievant was required to provide verification that he made arrangements with a substance abuse professional to be evaluated. Despite warnings from Respondent, Grievant failed to comply with the agency's drug testing program requirements. Grievant did not show good cause why he should not be terminated. This grievance is DENIED.

KEYWORDS: SELECTION, HIRING, QUALIFICATIONS, DISCRIMINATION, FAVORITISM, RETALIATION, REPRISAL

CASE STYLE: MORRAL v. DIVISION OF HIGHWAYS

DOCKET NO. 2008-1334-DOT (6/22/2009)

PRIMARY ISSUES: Whether Grievant should have been selected for a posted Storekeeper 2 position.

SUMMARY: Grievant and one other, less senior, employee applied for a posted Storekeeper 2 position, and Grievant was not selected. Grievant did not show she was the most qualified candidate, and her grievance is therefore denied.

KEYWORDS: TIMELINESS, SUBSTANTIAL COMPLIANCE.

CASE STYLE: SHOUP v. WORKFORCE WEST VIRGINIA

DOCKET NO. 2009-0957-DOC (6/5/2009)

PRIMARY ISSUES: Whether the grievance was filed within the statutory time limit?

SUMMARY: Grievant's employment with WORKFORCE was terminated when she submitted her resignation and it was accepted on October 30, 2008. Grievant filed a grievance on January 29, 2009, claiming that she was improperly discharged. Respondent proved that the grievance was not filed within the time period required by statute. Grievant failed to prove that she was excused from meeting the statutory time limit for filing a grievance. The grievance is dismissed.