

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in October 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: NON-TENURE, FACULTY, RENEWAL, TERMINAL CONTRACT, DISCRIMINATION, RETALIATION, STUDENT ENROLLMENT, TEACHING, PROPERTY INTEREST, VISITING PROFESSOR, FIRST AMENDMENT, UNILATERAL EXPECTATION

CASE STYLE: JARRELL v. NEW RIVER COMMUNITY AND TECHNICAL COLLEGE
DOCKET NO. 2008-1826-NRCTC (10/7/2009)

PRIMARY ISSUES: Whether Grievant has a sufficient property interest in her position so as to require contract renewal.

SUMMARY: Grievant was employed as a non-tenure track visiting instructor at New River Community and Technical College, for a term of one year. Grievant was given a letter from her local NRCTC dean to give to her bank when purchasing a home. The letter provided that Grievant held a contract subject to annual renewal. During her period of employment, while at a faculty meeting, Grievant participated in the questioning of an administrator. Ultimately, Grievant's contract was not renewed, and her position was not posted because of low enrollment and the decision to fill student needs through other modes. Grievant argues that NRCTC's decision not to renew her contract was discriminatory and retaliatory. Respondent argues that Grievant has no property interest in her continued employment, and its decision not to renew her contract was reasonable and not pernicious. Grievant has failed to establish, by a preponderance of the evidence, that she was discriminated or retaliated against. This grievance is DENIED.

KEYWORDS: SIMILARLY SITUATED; AT-WILL EMPLOYEE; DISCRIMINATION;
NON-RENEWAL; SEVERANCE PAY; COMPENSATION

CASE STYLE: GROOMS v. WEST VIRGINIA STATE COMMUNITY AND
TECHNICAL COLLEGE

DOCKET NO. 2009-1693-SCTC (10/27/2009)

PRIMARY ISSUES: Whether Grievant was the victim of discrimination.

SUMMARY: An African-American, Grievant alleges discriminatory employment behavior on the part of her former employer, in that upon the termination of her employment, she was not granted severance pay for the outstanding time period of her service contract. Grievant, formerly an at-will employee, is not grieving the discharge but the perceived inequitable treatment upon separation. Grievant highlights the differences in Respondent's conduct in the termination of a Caucasian professor's employment/service contract and her own. The record demonstrates that Grievant and the comparative employee were not similarly situated. The non-renewal of a faculty member's contract and the termination of at-will administrative personnel are governed by different procedural rules and regulations. In the instant grievance no evidence of record establishes that an employee, similarly-situated to Grievant, has been granted severance pay. Accordingly, there is no basis for her claim that she was the subject of discrimination. Grievant has not established that Respondent has violated any statute, rule or policy in not providing her with severance pay. This grievance is DENIED.

KEYWORDS: TERMINATION; DISCRIMINATION; JOB DUTIES; JOB PERFORMANCE; UNSATISFACTORY PERFORMANCE; PROGRESSIVE DISCIPLINE; MITIGATION

CASE STYLE: TAYLOR v. WEST VIRGINIA UNIVERSITY

DOCKET NO. 2009-1478-WVU (10/30/2009)

PRIMARY ISSUES: Whether the dismissal of Grievant's employment was too severe due to her unsatisfactory work performance and whether Grievant was a victim of discrimination.

SUMMARY: Grievant was fired for unsatisfactory work performance, and failure to maintain acceptable work standards. Grievant argued that termination was too severe a penalty in the case, and that she was the victim of discrimination. Respondent asserted that Grievant had been given numerous opportunities to improve the deficiencies in her work performance. The record supports a finding that Grievant's employment termination in this instance was justified. Grievant did not establish that she was the victim of discrimination. She presented no evidence of a situation remotely similar to her where the employee had been treated differently. In addition, mitigation is not warranted in this situation. This grievance is DENIED.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: HARASSMENT, INSUBORDINATION; THREATENING BEHAVIOR;
SUSPENSION

CASE STYLE: MCMANN v. JEFFERSON COUNTY BOARD OF EDUCATION
DOCKET NO. 2009-0653-CONS (10/21/2009)

PRIMARY ISSUES: Whether Grievant proved a claim of harassment by his supervisor
and whether Grievant was insubordinate.

SUMMARY: After two separate incidents of insubordination, Grievant was
suspended for thirty days without pay for insubordination. Grievant
had previously been suspended for a five-day period, but did not
serve the entirety of that suspension because it was issued at the
end of the school year. At the beginning of the following school year,
the principal met with Grievant to discuss the days for which the
balance of the suspension would be served. Grievant became
agitated and displayed an angry, almost irrational response.
Grievant's response to his supervisor was unprofessional,
inappropriate, and showed disrespect for his supervisor; he was
insubordinate. Grievant's claim that Respondent harassed him was
not proven. This grievance is DENIED.

KEYWORDS: INSUBORDINATION; INCOMPETENCY; IMPROVEMENT PLAN; EVALUATION; UNSATISFACTORY PERFORMANCE; TEACHER; DISMISSAL; CORRECTABLE BEHAVIOR

CASE STYLE: MCMANN v. JEFFERSON COUNTY BOARD OF EDUCATION
DOCKET NO. 2009-1340-JEFED (10/21/2009)

PRIMARY ISSUES: Whether the dismissal of Grievant was proper.

SUMMARY: Grievant's employment was terminated due to incompetency. This decision by Respondent was based on the findings and recommendation of a psychological evaluation which found that Grievant was unfit for duty. Grievant was previously suspended for insubordination due to conduct that was unprofessional, inappropriate, and showed disrespect for his supervisor. State Board of Education Policy and controlling case law prohibit boards of education from discharging employees for reasons having to do with incompetency that has not been called to the attention of the employee through an evaluation, and which is correctable.

Respondent did not provide Grievant with any constructive evaluation related to his conduct prior to terminating his employment for incompetency. The Superintendent's recommendation was made immediately after receiving the psychological evaluation. Grievant's evaluation pointed out that his behavior could become out of control and was not acceptable in the school building; however, it did not address the central issue of whether or not Grievant's impulse control issues could be corrected. The record also established that Grievant was not provided any improvement plan which might have led to correcting his behavior. Based upon this sequence of events, Grievant's dismissal was contrary to the provisions of W. Va. Code § 18A-2-12 because Grievant was not given a meaningful opportunity to improve his performance under an improvement plan. The Respondent exercised its authority to dismiss Grievant in an unreasonable fashion, and was arbitrary and capricious. This grievance is GRANTED.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: EXTRA-DUTY; ROTATION LIST; BUS RUN; MID-DAY RUN; “STEP UP”

CASE STYLE: MULLINS v. HANCOCK COUNTY BOARD OF EDUCATION
DOCKET NO. 2009-1341-CONS (10/27/2009)

PRIMARY ISSUES: Whether HBOE acted in an arbitrary and capricious manner by placing Grievant at the bottom of the rotation list after a run was cancelled.

SUMMARY: Grievant was assigned a mid-day run scheduled for December 4, 2008, transporting certain pre-school students, in the absence of another bus operator who had accepted an extra-duty trip that day. This run was not needed because all the pre-school students were going to be on the extra-duty trip, but the school did not inform the Transportation Department of this. When the Transportation Coordinator inquired about whether the run would be needed, he was informed that it was not, and the run was cancelled for the day. Grievant’s name was placed at the bottom of the rotation list, in accordance with Respondent’s standard practice when an assignment is cancelled. Also, Grievant was assigned an extra-duty trip during Christmas break which was cancelled after it was assigned to her. This trip was assigned two weeks in advance, rather than the usual one week in advance, because of the Christmas break. Had it been assigned a week in advance, it would never have been on the list to be assigned. Neither of these situations is addressed by the applicable statutes or Respondent’s written procedures. Respondent followed its standard practice, and Grievant did not demonstrate that it acted in an arbitrary and capricious manner. This grievance is DENIED.

KEYWORDS: IMMORALITY, FELONY, CONVICTION, PLEA, DISCLOSURE, EMPLOYMENT APPLICATION, CREDIBILITY, MOTION TO DISMISS

CASE STYLE: BROCKMAN v. KANAWHA COUNTY BOARD OF EDUCATION
DOCKET NO. 2009-1638-KANED (10/15/2009)

PRIMARY ISSUES: Whether Grievant's conduct was immoral so as to support dismissal where he failed to disclose a felony conviction on three distinct employment applications with the BOE.

SUMMARY: Grievant was convicted of a felony in 1991 and served time in federal prison. Years later, on his initial employment application with the BOE, Grievant failed to disclose his conviction and marked that he had no prior felony or misdemeanor convictions. He began working for the BOE as a substituted custodian. Thereafter, Grievant completed two online employment applications for extracurricular coaching positions. He again failed to disclose his conviction. Grievant subsequently accepted a full-time position as a custodian and while processing his coaching certification, it was learned that the Grievant had a felony conviction which he failed to disclose. Grievant was dismissed and filed this grievance.

The Respondent has established, by a preponderance of the evidence, that the Grievant failed to disclose his conviction. Grievant's non-disclosure constitutes immoral conduct. Respondent's decision to dismiss Grievant was not unreasonable or otherwise arbitrary and capricious. This grievance is DENIED.

KEYWORDS: JOB DUTIES; RESPONSIBILITIES; CLASSIFICATION; JOB DESCRIPTION; CUSTODIAN

CASE STYLE: WALKER v. FAYETTE COUNTY BOARD OF EDUCATION
DOCKET NO. 2009-0195-FAYED (10/20/2009)

PRIMARY ISSUES: Whether Grievant was properly classified.

SUMMARY: Grievant is employed by Respondent as a Custodian I assigned to Meadow Bridge High School. Grievant alleges she is being required to perform certain job duties out of her classification. The duties of which Grievant complains (cleaning ceiling shades, ceiling fans and vents, cleaning heating radiators, cleaning the ceilings, shampooing carpets, running a floor scrubber and cleaning floor-stripping machine) are responsibilities which are consistent with “assigned duties” of her job classification. Said duties can be within the general job responsibilities of a Custodian I and are not reserved exclusively for a Custodian III simply because the Custodian III has the responsibility of operating the heating and cooling system and making minor repairs.

Grievant’s assigned duties are encompassed within the job description of a Custodian I, as set forth in the statute and the Fayette County Board of Education job responsibilities. The facts of this grievance do not demonstrate that Grievant is unlawfully being required to perform custodian duties outside of her classification. This grievance is DENIED.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	CLASSIFICATION, REALLOCATION, BEST FIT, NURSE, ULTRA VIRES, EQUITABLE ESTOPPEL
<u>CASE STYLE:</u>	<u>RAMSEY v. Department of Health and Human Resources/Welch Community Hospital AND Division of Personnel</u> DOCKET NO. 2009-0555-DHHR (10/21/2009)
<u>PRIMARY ISSUES:</u>	Whether Grievant's position is properly classified as a Nurse 2 where her predominant duties are patient related.
<u>SUMMARY:</u>	<p>Grievant maintains that her position is improperly classified in the Nurse 2 classification. She argues that the Nurse 3 classification is the "best fit" for her position. To support her argument, Grievant relies upon certain minimal additional duties she has assumed since beginning her employment and her recent national certification as a Maternal Newborn Nurse.</p> <p>Grievant's duties primarily involve patient care and fit within the Nurse 2 classification. Respondent DOP's classification determination was not unreasonable or otherwise arbitrary and capricious. The Nurse 2 classification is the "best fit" for the Grievant's position in light of the duties of the position. This grievance is DENIED.</p>

<u>KEYWORDS:</u>	DEMOTION, ARBITRARY AND CAPRICIOUS, CLEARLY WRONG.
<u>CASE STYLE:</u>	<u>HARRIS/BOGGS v. DIVISION OF HIGHWAYS AND BILL FARREN, INTERVENOR</u> DOCKET NO. 07-DOH-071 (10/20/2009)
<u>PRIMARY ISSUES:</u>	Whether Respondent's reduction of Grievant's pay rate to her that equal to her previous position when she was demoted to that was arbitrary and capricious.
<u>SUMMARY:</u>	<p>Grievant was removed from a supervisory position and demoted to her previous job as the result of a decision in a grievance filed by one of the unsuccessful applicants. As part of the demotion, Grievant's pay was reduced from the supervisory rate to the rate she received in her previous position. Grievant argues that it was unreasonable to lower her salary as a result of returning her to her prior job. Grievant failed to prove that Respondent's decision to reduce Grievant's salary to the rate she previously held when she was removed from the supervisory position not arbitrary or capricious. Accordingly the grievance is DENIED.</p>

KEYWORDS: DISCRIMINATION; HEARSAY; RECORDING; INTERVIEW TAPE; INVESTIGATION; GENERAL ORDERS; POLICY; RELIEF; GARRITY WARNING; INTERPRETATION; DEFERENCE; NOTICE; NATURE OF COMPLAINT; ADVISORY OPINION

CASE STYLE: COOK, ET AL. v. PARKWAYS, ECONOMIC DEVELOPMENT AND TOURISM AUTHORITY

DOCKET NO. 2008-0966-CONS (10/13/2009)

PRIMARY ISSUES: Whether Respondent's interpretation of its General Orders was reasonable; whether Respondent followed its own General Orders; and, whether Grievant demonstrated an adverse impact.

SUMMARY: Grievant is a Conservation Officer employed by the Division of Natural Resources. The various issues in this consolidated grievance arose primarily out of Grievant's disagreement with Respondent's General Orders, and Respondent's interpretation of its General Orders. In several instances, Grievant's reading of the General Orders was incorrect, as was his reading of a statute he cited in support of his asserted right to record an investigatory interview. Where the General Orders were ambiguous, Respondent's interpretation was entitled to deference. Many of Grievant's complaints about changes in General Orders had not affected Grievant in any way, and represented merely a philosophical disagreement with his employer's rules, which is not grievable. Finally, the changes in the General Orders were not discriminatory, as they apply to all DNR officers. This grievance is DENIED.

KEYWORDS: DISMISSAL, TERMINATION, WORKERS' COMPENSATION, INJURY, LEAVE OF ABSENCE, EXHAUSTED LEAVE, DISABILITY

CASE STYLE: HENDERSON v. DIVISION OF VETERAN'S AFFAIRS/WEST VIRGINIA VETERANS HOME

DOCKET NO. 2010-0130-MAPS (10/21/2009)

PRIMARY ISSUES: Whether Respondent properly terminated Grievant's employment after she was unable to return to work due to an injury.

SUMMARY: Grievant was dismissed after she proved unable to return to work after an on-the-job injury. After her recovery period, her physical restrictions rendered her unable to perform the duties of her job. Respondent had no alternate job openings for which she was qualified and able to perform, and dismissed her employment after she failed to return to work. Grievant's termination under these circumstances was proper, so her grievance is denied.

KEYWORDS: MOOT; ADVISORY OPINION

CASE STYLE: SPENCE v. DIVISION OF NATURAL RESOURCES

DOCKET NO. 2010-0149-CONS (10/29/2009)

PRIMARY ISSUES: Whether grievance should be dismissed as moot.

SUMMARY: Grievant asserts that other conservation officers employed by Respondent were not being required to wear their flashlights, while he was being required to do so. On August 31, 2009, Colonel D.E. Murphy issued a Memorandum to all District Captains directing them to inform the employees in their districts that they were required to wear their Stinger flashlights on their issued holster while wearing their duty belts. Employees who had been “authorized by the Chief to wear a “paddle” or “pancake” style holster on their uniform pant belt are exempt from wearing of the Stinger flashlight while wearing the “paddle” or “pancake” style holster.” Grievant acknowledged that this memorandum resolved all issues in this grievance; therefore there is no actual relief to be granted, so this grievance is DISMISSED as moot..

KEYWORDS: NON-SELECTION, QUALIFICATION, ARBITRARY AND CAPRICIOUS, INTERVIEW, SENIORITY, EXPERIENCE, PERSONALITY, PSYCHOLOGICAL TESTING

CASE STYLE: SMITH v. DEPARTMENT OF ENVIRONMENTAL PROTECTION

DOCKET NO. 2008-1014-DEP (10/16/2009)

PRIMARY ISSUES: Whether Grievant was the most qualified application for the position.

SUMMARY: Grievant was not the successful applicant for the position of Engineer IV and challenges his non-selection. Each applicant was interviewed and asked the same general questions. The successful applicant received higher ratings than the Grievant. The successful applicant has a greater level of education and greater personnel management experience. There is no indication that these ratings were unreasonable or otherwise arbitrary and capricious.

Grievant has not established, by a preponderance of the evidence, that he was the most qualified applicant. Nor has he established a significant flaw in the selection process occurred. Accordingly, this grievance is DENIED.

KEYWORDS: REALLOCATION; CLASSIFICATION; DUTIES AND RESPONSIBILITIES; BEST FIT; SIGNIFICANT CHANGE

CASE STYLE: ADKINS v. WORKFORCE WEST VIRGINIA AND DIVISION OF PERSONNEL

DOCKET NO. 2009-1457-DOC (10/13/2009)

PRIMARY ISSUES: Whether Grievant's position was properly classified as an Employment Programs Interviewer 2 when compared to an Employment Programs Interviewer 3.

SUMMARY: Grievant asserts there has been a change in her duties and responsibilities and seeks reallocation. Respondents assert Grievant is correctly classified as an Employment Programs Interviewer 2, and while there have been additional duties added to her position, they were minimal at best and there has not been an increase in the complexity and difficulty so as to warrant reallocation to the Employment Programs Interviewer 3 classification. Grievant did not meet her burden of proof and demonstrate she should be reallocated to an Employment Programs Interviewer 3. This grievance is DENIED.

KEYWORDS:

RELIEF; MOOT; ADVISORY OPINIONS; EMPLOYEE RESIGNATION

CASE STYLE:

ROSS v. DIVISION OF MOTOR VEHICLES

DOCKET NO. 2009-0757-DOT (10/29/2009)

PRIMARY ISSUES:

Whether the volunteer resignation of Grievant is fatal to the pending grievance.

SUMMARY:

Grievant, Lisa Ross, filed a grievance against the West Virginia Division of Motor Vehicles protesting a six-month leave restriction. Grievant sought to have this leave restriction lifted. A full hearing on the merits of the issue(s) in contention was held. Subsequently, Respondent filed a "Motion to Dismiss" in that Grievant had tendered her resignation. Respondent highlighted that Grievant was no longer an "employee" as defined by W. Va. Code § 6C-2-2(d)(1) and there is no viable relief available in this action.

The definitive determination of the issue in dispute (legality of the leave restriction extension) may have bearing on other pending grievance(s). However, as to the instant grievance, the relief requested is moot. Any ruling issued regarding the question raised by this grievance would merely be an advisory opinion. This Grievance Board does not issue advisory opinions. The requested relief would only be available to an individual, who was still employed by Respondent.

The resignation of Grievant renders the requested relief of this grievance moot. The "Motion to Dismiss" is GRANTED and the grievance action is DISMISSED.

KEYWORDS: SELECTION, FLAWED PROCESS, ARBITRARY AND CAPRICIOUS, CLEARLY WRONG, PRE-SELECTION, FAVORITISM

CASE STYLE: WESTFALL v. DIVISION OF HIGHWAYS AND HARRY HUTCHISON III, INTERVENOR

DOCKET NO. 2009-0339-DOT (10/30/2009)

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

SUMMARY: Grievant complains that instead of filling a posted supervisory position with one of the applicants who met the position's minimum qualifications, DOH allowed an unqualified applicant to remain in the position in an acting capacity. DOH waited until the unqualified applicant completed a certification to meet the minimum qualifications, then reposted the same position and filled it with that applicant. Grievant avers that this action constituted favoritism and was arbitrary and capricious. Respondent asserts that DOH has discretionary authority to refrain from filling any posted position. Respondent chose not to fill this position because it felt that the person in the acting capacity had more relevant experience than either of the other applicants and was therefore more qualified for the job. Respondent's actions were arbitrary and capricious and the grievance is GRANTED.

KEYWORDS: SUSPENSION, IMPROVEMENT PLAN, CORRECTIVE ACTION PLAN; WRITTEN REPRIMAND; JOB PERFORMANCE; REPRISAL

CASE STYLE: GIBSON v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILD SUPPORT ENFORCEMENT

DOCKET NO. 2009-0424-DHHR (10/7/2009)

PRIMARY ISSUES: Whether Grievant was properly suspended for failing to comply with the provisions of a performance improvement plan.

SUMMARY: DHHR alleges that Grievant has failed to meet the conditions of a performance improvement plan that was implemented as part of a settlement agreement resolving a previous grievance. Based upon Grievant's failure to successfully complete the plan, Respondent suspended Grievant for three working days. Grievant counters that Respondent did not implement the improvement plan in a timely way and that the suspension was retaliation for her prior participation in the grievance process. DHHR was able to prove Grievant did not successfully complete the terms of the performance improvement plan and Grievant failed to prove that the disciplinary action was a reprisal or retaliation. However, the agreement of the parties specified that the consequence for failing to complete the plan would be reinstatement of the written reprimand not suspension. This grievance is GRANTED.