

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in November 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: SELECTION; MOST QUALIFIED; ARBITRARY AND CAPRICIOUS;
CLEARLY WRONG; INTERVIEW

CASE STYLE: LEMLEY v. WEST VIRGINIA UNIVERSITY
DOCKET NO. 2009-0174-WVU (11/10/2009)

PRIMARY ISSUES: Whether Respondent's non-selection of the Grievant for a posted position was clearly wrong or arbitrary and capricious.

SUMMARY: Grievant asserts that his years of experience as a Trade Specialist Lead II establish his credentials to hold the same position on a different shift. Grievant believes that night shift employees are intentionally being denied transfers to ensure competent workers are available on the least desirable shift. WVU denies any wrongdoing, and counters that while Grievant met the standards for the day shift positions, there were simply two candidates whose qualifications exceeded those of other applicants, including Grievant. The record of the grievance failed to establish that Grievant's non-selection was arbitrary and capricious, or that he was more qualified than the successful applicants for the positions in question. This grievance is DENIED.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: SUSPENSION, DISCIPLINE, MITIGATION, BATTERY

CASE STYLE: KIRK v. LINCOLN COUNTY BOARD OF EDUCATION
DOCKET NO. 2010-0152-LINED (11/17/2009)

PRIMARY ISSUES: Whether Grievant's suspension for striking another teacher should be reduced.

SUMMARY: Grievant was suspended without pay for striking another school employee at school. She does not dispute that she should have been suspended, but challenges the length of her suspension, thirteen days, as excessive. Grievant cited no law, rule, or policy that may have been violated by the suspension. Respondent met its burden of proving the suspension was proper, and Grievant did not show it should be lessened; hence the grievance is denied.

KEYWORDS: TIMELINESS, UNEQUIVOCAL NOTIFICATION, PERSONAL LEAVE UNSPECIFIED, SICK LEAVE, PERSONAL LEAVE WITHOUT CAUSE, TIME SHEET, GREEN SHEET

CASE STYLE: BARBER, III v. MCDOWELL COUNTY BOARD OF EDUCATION AND DEPARTMENT OF EDUCATION

DOCKET NO. 2009-0458-MCDED (11/4/2009)

PRIMARY ISSUES: Whether Grievant was arbitrarily docked pay for two days where he was absent because of illness, filled out the appropriate leave form and provided the necessary doctor's statement.

SUMMARY: Grievant, a teacher, was not paid for two days he was absent, even though he had leave time to cover these absences and filled out the necessary form. Further, Grievant was charged a ½ PLU day from his leave account, when he did not utilize leave. Upon recognizing his pay was docked for two days and he was charged with leave time he did not take, Grievant brought the situation to the attention of his school's principal who, after contacting the central office, instructed Grievant to bring in a doctor's statement. Grievant provided the appropriate doctor's statement. Thereafter, the principal told Grievant that the situation would be dealt with at the beginning of the next school year because the fiscal year had expired. At the beginning of the next school year, the principal was informed by the central office that it would not pay Grievant because he did not tender a doctor's statement within five days. Grievant was further informed by the BOE that it was not crediting his account with a ½ PLU day.

The Grievant's claims relating to the conduct of the school secretary are untimely as they were not filed within fifteen days of the last grievable event. Grievant's other claims are timely. Grievant has established, by a preponderance of the evidence, that the BOE failed to properly pay him for absences on May 14, 2008, and May 15, 2008. Insofar as the Grievant seeks to recover a ½ PLU day for time docked in May of 2008, Grievant has also met his burden of proof. The BOE's decisions were arbitrary and capricious. This grievance is DISMISSED, in part, and GRANTED, in part.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: EXTRACURRICULAR ASSIGNMENTS; POSTING; BUS RUN; ABUSE OF DISCRETION; HIRING; TRANSFER; ARBITRARY AND CAPRICIOUS; STATUTORY RIGHT TO RETAIN ASSIGNMENT; INTERESTS OF STUDENT; SPECIAL EDUCATION STUDENT

CASE STYLE: GARNER, ET AL. v. MONONGALIA COUNTY BOARD OF EDUCATION

DOCKET NO. 2009-0523-CONS (11/4/2009)

PRIMARY ISSUES: Whether it was arbitrary and capricious, or an abuse of discretion for Respondent to combine two short extracurricular assignments into one much longer assignment in order to better serve a special education student, and whether Grievants had acquired the right to retain their assignments.

SUMMARY: At the beginning of the 2008-2009 school year, one of the Grievants was transporting a particular special education student to his assigned work site, and the other Grievant was picking him up at his assigned work site and transporting him back to the vocational center. Sometime in September 2008, or earlier, Respondent decided to post the transportation to and from the work site as one extracurricular run, with the bus operator remaining at the work site while the student was there. Neither Grievant could perform this assignment due to their other duties, and apparently, neither bid on the posted run. Both asserted that they were entitled to retain their separate runs transporting this student to or from his work site. Grievants did not demonstrate that they had acquired their assignments through the proper statutory procedure, and, therefore, neither acquired any statutory right to retain the assignment. Grievants also questioned the validity of the rationale provided by Respondent for combining the runs into one run, and having the bus operator remain at the work site. Grievants did not demonstrate that Respondent's actions were arbitrary and capricious or an abuse of discretion. Accordingly, this grievance is DENIED.

KEYWORDS: EXTRA-DUTY ASSIGNMENTS; ROTATION LIST; BID SHEET; SENIORITY; TRIP; BUS OPERATOR; EMERGENCY TRIP; REFUSAL; CANCELLATION

CASE STYLE: SOLLARS v. MONONGALIA COUNTY BOARD OF EDUCATION
DOCKET NO. 2009-0706-MONED (11/9/2009)

PRIMARY ISSUES: Whether MBOE violated W. Va. Code § 18A-4-8b(f) when assigning extra-duty trips.

SUMMARY: Grievant believes he was denied three extra-duty assignments. First, Respondent filled the first extra-duty assignment of the new school year with the person directly above Grievant on the extra-duty rotation list, but then did not give Grievant the next assignment. Grievant had received the last trip of the preceding school year, while the person above him could not take that trip, but was not given a refusal because it was an emergency trip. This was the normal procedure for an emergency trip. However, regardless of whether it was an error to not give this person a refusal, Grievant was not next in line for the next assignment. In the second instance, Grievant's trip was canceled. He was not entitled to compensation for a trip that was canceled. Finally, Grievant complained that a third trip should have been placed on the extra-duty bid sheet for the week. However, Grievant was confused about the facts, and this trip was not requested in time to be placed on the bid sheet. Accordingly, this grievance is DENIED.

KEYWORDS: SENIORITY; SUBSTITUTE; CONTRACT EMPLOYEE; REGULAR EMPLOYEE; SUBSTITUTE SENIORITY; REGULAR SENIORITY; TEMPORARY; PERMANENT

CASE STYLE: WEBB v. HAMPSHIRE COUNTY BOARD OF EDUCATION
DOCKET NO. 07-14-334R (11/20/2009)

PRIMARY ISSUES: Whether Grievant's seniority date should be changed.

SUMMARY: Grievant argued her seniority date should be changed from October 1, 1996, to the first day of school in August 1996. Grievant could not recall whether she was called to work as a substitute or as a full-time contract employee. Respondent approved Grievant's contract effective October 1, 1996, and Grievant accepted and signed that contract on October 10, 1996. After the significant lapse in time, the contract was the best evidence of Grievant's seniority date. This grievance is DENIED.

KEYWORDS: TERMINATION, INSUBORDINATION, IMMORALITY, SEXUAL HARASSMENT; RATIONAL NEXUS

CASE STYLE: KIMBLE v. KANAWHA COUNTY BOARD OF EDUCATION

DOCKET NO. 2009-1640-KANED (11/30/2009)

PRIMARY ISSUES: Whether Grievant was properly terminated from her position as cheerleading coach. Whether a rational nexus existed between her conduct as a coach and her position as a cook.

SUMMARY: Grievant worked as head cook at Mary Ingles Elementary School. She also held an extracurricular position as head cheerleading coach at Riverside High School. Respondent terminated Grievant from both of her positions . Respondent asserts Grievant participated in an unauthorized overnight, out of county trip with the cheerleaders. Respondent argues that, while on this unauthorized trip, Grievant permitted the cheerleaders to behave in an inappropriate manner by allowing them to get into the hot tub topless. Respondent further avers Grievant posted on MySpace a photo of the cheerleaders, albeit fully clothed, but referring to them as “hoes.” Respondent asserts that this behavior violated the sexual harassment policy. Grievant argues the trip was not a school function, but instead, a Christmas party organized by a cheerleader mother. Grievant asserts she was there only to assist the parent. Grievant avers that she did not know the cheerleaders were in the hot tub topless, and when she became aware of that fact, she immediately told the girls it was inappropriate. Lastly, Grievant concedes referring to the young women as “hoes” was not in the best taste, yet it does not constitute sexual harassment. This grievance is denied in part, and granted in part.

TOPICAL INDEX
STATE EMPLOYEES

KEYWORDS: AT-WILL EMPLOYEE, DUTY RIG, POLICE OFFICER, FIREARM, SUBSTANTIAL PUBLIC POLICY, OPERATING PROCEDURES, AGENCY POLICY, FRAUD, MODIFICATION

CASE STYLE: DUBITES v. DIVISION OF PROTECTIVE SERVICES
DOCKET NO. 2010-0032-MAPS (11/9/2009)

PRIMARY ISSUES: Whether Grievant has established a violation of substantial public policy where he was dismissed after leaving his “duty rig” unattended in an unsecured area and the Respondent’s operating procedure provided that at-will employees could be dismissed for any reason.

SUMMARY: Grievant, an at-will employee, was discharged from his position as a Capitol Police Officer after leaving his “duty belt” in an unsecured location after work. Grievant’s “duty belt” contained his firearm, handcuffs and cap-stun “pepper” spray.
At-will employees may be dismissed for any reason or no reason, so long as the dismissal does not violate a substantial public policy. Grievant alleges that the Division failed to follow its own policy/procedure and this failure constitutes a violation of substantial public policy. Grievant has not established that the agency’s policy/procedure is a substantial public policy. The policy/procedure confers no additional rights beyond those provided in the law. Accordingly, this grievance is DENIED.

KEYWORDS: CDL; RANDOM DRUG TESTING; SUBSTANCE ABUSE; COCAINE; URINE SAMPLE; DRUG AND ALCOHOL TESTING POLICY; GOOD CAUSE

CASE STYLE: HICKMAN, SR. v. DIVISION OF HIGHWAYS
DOCKET NO. 2010-0008-DOT (11/4/2009)

PRIMARY ISSUES: Whether Respondent had good cause to terminate Grievant’s employment.

SUMMARY: As an employee required to hold a Commercial Driver’s License, Grievant was subject to random drug testing. Respondent’s drug and alcohol abuse policy provides an opportunity to rehabilitate after a first failed drug test. This was Grievant’s second positive test, and he was dismissed in accordance with the Department of Transportation’s Drug Testing Policy. Respondent established by a preponderance of the evidence good cause for the termination of Grievant’s employment. Grievance DENIED.

KEYWORDS: COMPENSATION; PAY GRADE; SIMILARLY SITUATED;
ARBITRARY AND CAPRICIOUS; ABUSE OF DISCRETION;
REALLOCATION; BACK PAY; SALARY

CASE STYLE: CHILDRESS v. WEST VIRGINIA STATE POLICE AND DIVISION
OF PERSONNEL

DOCKET NO. 2008-0195-MAPS (11/25/2009)

PRIMARY ISSUES: Whether Grievant was entitled to additional salary given the amount of compensation received by a co-worker.

SUMMARY: Grievant alleges he is entitled to additional compensation. Grievant avers that his compensation should have been the same as a fellow employee during the period of time both were assigned to the West Virginia Intelligence Exchange section of the West Virginia State Police. Alternatively, Grievant is seeking additional compensation for the difference in pay during a period of time that he was assigned additional duties.

Grievant was paid within the pay range of his Pay Grade and Classification. Respondents were not acting in an arbitrary or capricious manner by not providing Grievant with an increase in pay (or backpay). Grievant did not establish that Respondents acted contrary to applicable law, rule or regulation with regard to his salary. This grievance is denied.

KEYWORDS:

DISCIPLINE, DISMISSAL, MITIGATION, FIGHT, RATIONAL NEXUS, VULGAR LANGUAGE, DUCK HUNT, HOSTILE WORK ENVIRONMENT, HARASSMENT

CASE STYLE:

WILLIAMS v. ALCOHOL BEVERAGE CONTROL ADMINISTRATION
DOCKET NO. 2009-1684-DOR (11/25/2009)

PRIMARY ISSUES:

Whether employee should be dismissed for fighting with a co-worker off State property.

SUMMARY:

Respondent dismissed Grievant for allegedly challenging his supervisor's authority, using inappropriate language, harassing fellow employees, exhibiting unprofessional conduct, leaving work early under a false excuse and punching a fellow employee. Grievant argues that his behavior is consistent with the work environment at the ABCA warehouse and no worse than the behavior of most other employees, including his supervisor. Grievant does not deny that he engaged in a physical confrontation with a fellow employee but asserts that they both were active participants and it is unfair for him to be dismissed and the other employee to escape punishment completely. Finally, Grievant notes that the fight took place off State property outside of the workplace and is therefore not appropriate for discipline by his employer.

Given the overall circumstances and daily conditions of employment at the ABCA warehouse, Respondent failed to prove that Grievant was guilty of workplace harassment or creating a hostile work environment. Respondent did prove that Grievant struck a fellow employee in the face with his fist just outside the property of the warehouse facility. The altercation was related to an incident that occurred at work and took place immediately following work. There was a sufficient rational nexus between the incident and Grievant's employment to justify Respondent taking disciplinary action against Grievant. Granted in Part and Denied in Part.

KEYWORDS: DISMISSAL, JOB ABANDONMENT, GOOD CAUSE, DISCIPLINE

CASE STYLE: HAMILTON v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR MEDICAL SERVICES

DOCKET NO. 2008-1591-DHHR (11/9/2009)

PRIMARY ISSUES: Whether Grievant's abandoned her job.

SUMMARY: Respondent contends that Grievant abandoned her job by failing to appear at work and failing to contact her employer for three consecutive days. In support of Respondent's proposition it sights the Division of Personnel Rule related to "job abandonment" 143 C.S.R. 1 § 12.2 (c). Grievant argues that she had told Respondent that she would be missing work the previous week, her illness prevented her from calling in to work, and she never intended to abandon her job. Grievant seeks to be placed on an unpaid leave of medical leave of absence and to be allowed to return to work when her doctor gives his approval. Respondent failed to prove that Grievant's dismissal was based upon good cause. The grievance is GRANTED.

KEYWORDS: PROBATIONARY EMPLOYEE; UNSATISFACTORY WORK

CASE STYLE: BIAS v. DIVISION OF HIGHWAYS

DOCKET NO. 2009-1518-DOT (11/4/2009)

PRIMARY ISSUES: Whether Grievant proved he should have been retained due to satisfactory work performance.

SUMMARY: Grievant, a probationary employee, was terminated prior to the completion of his probationary period. Respondent asserts Grievant was terminated for disruptive behavior, damaging a snow plow, putting the wrong fuel in a dump truck, and having to be continually reminded to check and treat his designated highway area during Snow Removal Ice Control ("SRIC") season. Grievant argues Respondent did not prove he engaged in disruptive behavior. Grievant also avers the damage to the snow plow happened in the normal course of business and because of the age and rust on the plow. Grievant asserts putting the wrong fuel in the dump trunk was an accident. Lastly Grievant argues Respondent should have properly evaluated Grievant's work so as to correct any issues with training on how to perform the job. Grievant has not met his burden in this matter. This grievance is denied.

KEYWORDS: REPRIMAND, REPRISAL, RETALIATION, INSUBORDINATION, DISCIPLINE

CASE STYLE: CLEMONS v. DEPARTMENT OF ENVIRONMENTAL PROTECTION
DOCKET NO. 2009-0138-DEP (11/20/2009)

PRIMARY ISSUES: Whether Grievant was properly disciplined for failure to remove excess clutter from her office, or whether the action taken was reprisal for her past actions.

SUMMARY: Grievant was reprimanded for failure to remove clutter from her office that was causing a safety hazard, after repeated directives from her supervisor to do so. She alleged this reprimand was retaliatory for a grievance she filed in 1995 or for a suggestion she sent to the legislature that may have affected her supervisor's job. Respondent met its burden of proof; Grievant did not. The grievance is, therefore, denied.

KEYWORDS: RESIGNATION, RESCIND, ACCEPTANCE, DISCRIMINATION

CASE STYLE: SMITH v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/LAKIN HOSPITAL
DOCKET NO. 2009-1542-DHHR (11/10/2009)

PRIMARY ISSUES: Whether Grievant rescinded her resignation before it was accepted.

SUMMARY: Grievant turned in her resignation after an incident that led to an investigation concerning possible abuse of a patient. Grievant placed the resignation in her supervisor's mailbox at the end of the evening shift. Two days later, Grievant asked to rescind her resignation. The management of the Hospital decided not to allow Grievant to rescind her resignation and Grievant's last day of work was April 30, 2009. Grievant asserts that she rescinded her offer to resign before Respondent accepted it and therefore the resignation is void. However, Grievant's supervisor accepted her resignation and Respondent was thereafter under no obligation to allow Grievant to rescind it.

KEYWORDS: TERMINATION; TRUTHFULNESS; GENERAL ORDERS;
INTERNAL INVESTIGATION

CASE STYLE: YOUNG v. DIVISION OF NATURAL RESOURCES
DOCKET NO. 2009-0540-DOC (11/13/2009)

PRIMARY ISSUES: Whether Grievant engaged in stalking and intentionally provided false information during an internal investigation.

SUMMARY: Grievant was terminated from his position as a Conservation Officer for DNR on October 10, 2008. Respondent asserts Grievant was terminated for both stalking his intimate partner and providing false information in an internal investigation. Grievant argues he was terminated without good cause and the disciplinary action was excessive. Grievant also asserts he was denied due process. Respondent avers the disciplinary action was not excessive, as Grievant had received a written reprimand in 2005 for lying during a separate internal investigation. Respondent proved Grievant intentionally provided false information during an internal investigation and has met its burden in this case. Therefore, this grievance is denied.