

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in January 2016

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
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: Circuit Court Remand Order; Motion to Dismiss; Workday; Duty Free Lunch; Moot Issues; Relief Sought; Job Responsibilities

CASE STYLE: Kaplan v. Cabell County Board of Education

DOCKET NO. 2009-1819-CONS (1/19/2016)

PRIMARY ISSUES: Whether Grievant adequately met the burden of proof recognized for this grievance matter.

SUMMARY: The Circuit Court of Kanawha County remanded and consolidated two related grievances filed by Grievant. The underlying grievance(s) originally initiated in 2008, protested Grievant's work day, daily responsibilities and contended among other things that Grievant was not getting a duty free lunch pursuant to W. Va. Code '18A-4-14. The relief sought included having certain identified responsibilities removed, have a defined workday, and receive a duty free lunch. Subsequent to the filing of the grievances, Grievant retired from employment with Respondent, the Cabell County Board of Education. Grievant was formerly employed as an Assistant Principal. Grievant's retirement was approximately one and a half years before the Remand Order from the Circuit Court.

Grievant failed to adequately meet the burden of proof recognized for this grievance matter. It is acknowledged that Grievant was a consummate educator; however the merits of this matter do not indicate that Grievant is entitled to current relief. The injunctive relief of having certain identified responsibilities removed, receiving a duty free lunch, and having an agency defined workday, as performed by Grievant prior to September 2008, have little to no application with regard to Grievant's current duties. Further, Grievant failed to establish entitlement to back wages for activity performed.

KEYWORDS: Continuing Extended Contract; Compensation; Salary Calculation; Correcting an Error; Notice

CASE STYLE: Bailey, et al. v. Mingo County Board of Education

DOCKET NO. 2015-1551-CONS (1/8/2016)

PRIMARY ISSUES: Whether Grievants proved that the implementation of the calculation to initially establish their salaries was intentional.

SUMMARY: Respondent reduced Grievants' salaries after discovering that the initial calculation used to determine the total annual pay for each Grievant was incorrect. Grievants argue that the unique calculation was done intentionally to compensate them for the additional duties involved in administering a "comprehensive" high school. The calculation used to arrive at the salaries for Grievants was never used previously in Mingo County Schools and there is no record or independent evidence that it was utilized intentionally in this instance. Grievants did not meet their burden of proof and the consolidated grievance must be DENIED.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Discrimination; Favoritism; Inclement; Personal Leave; Absence; Job Responsibilities

CASE STYLE: Spencer, et al. v. Kanawha County Board of Education
DOCKET NO. 2015-1004-CONS (1/14/2016)

PRIMARY ISSUES: Whether Grievants proved their claims of discrimination and favoritism by a preponderance of the evidence.

SUMMARY: Grievants are employed as 261-day employees in the Maintenance Department. On February 16, 2015, Kanawha County Schools sent an email out to employees informing them that schools were to be closed the next day, and directing certain employees to report to work despite the closure. All 261-day employees in the Maintenance Department were to report to work on February 17, 2015. Grievants reported to work as directed; however, many employees failed to so report. County administration learned that many employees failed to report to work because they misunderstood the email. Given the poorly worded email, the county did not require those employees who failed to report to take a personal leave day to cover their absence. Grievants allege discrimination as the other employees got a day off with pay and did not have to take personal leave. Respondent denied Grievants' claims and argues that there has been no difference in treatment, but if there has been any difference in treatment, such was related to actual job responsibilities. Grievants proved their claims by a preponderance of the evidence. Therefore, this grievance is GRANTED.

KEYWORDS: Termination; Unsatisfactory Performance; Performance Improvement Plan; Arbitrary and Capricious; Fair Evaluation

CASE STYLE: Yoders v. Harrison County Board of Education
DOCKET NO. 2016-0129-HarED (1/15/2016)

PRIMARY ISSUES: Whether Respondent demonstrated that Grievant's performance was unsatisfactory, or that she was not successful in completion of the improvement plan.

SUMMARY: Grievant was terminated from her employment as a Cook for unsatisfactory performance after Respondent determined that she had not successfully completed a performance improvement plan. Respondent did not demonstrate that Grievant failed to successfully complete the improvement plan, or that her performance was unsatisfactory.

KEYWORDS: Medical Leave of Absence; Unpaid Leave; Continuing Contract; Voluntary Resignation; Policies; Written Notice

CASE STYLE: McClure v. Raleigh County Board of Education

DOCKET NO. 2016-0324-RaIED (1/11/2016)

PRIMARY ISSUES: Whether Respondent violated law in involuntarily separating Grievant from employment without written notice of charges against him, or an opportunity for Grievant to respond.

SUMMARY: Grievant held a continuing contract with Respondent and was physically unable to return from an approved unpaid medical leave of absence. Respondent deemed Grievant to have resigned by operation of its policy, even though Grievant did not resign. As Grievant's separation from employment was not an actual voluntary resignation by Grievant, but was by operation of its policy, that separation was involuntary, in the nature of disciplinary action, and Respondent holds the burden of proof. Respondent violated its policies in refusing to allow Grievant to apply for an additional period of unpaid leave and in deeming that Grievant had resigned by operation of the incorrect policy. Respondent violated law in involuntarily separating Grievant from employment without written notice of charges against him, an explanation of the evidence, and an opportunity for Grievant to respond. The Grievance Board does not have the authority to grant Grievant compensation for stress and emotional hardship or to place him in a position for which he had not been hired. The proper remedy in this circumstance is to invalidate the termination of Grievant's continuing contract and return Grievant to the position and employment status he held at the time his contract was improperly terminated. Accordingly, the grievance is granted.

TOPICAL INDEX
STATE EMPLOYEES

KEYWORDS: Verbal Abuse; Verbal Reprimand; Counseling Session; Policy; Progressive Discipline

CASE STYLE: Smith v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2015-0371-DHHR (1/21/2016)

PRIMARY ISSUES: Whether Grievant demonstrated that Respondent's refusal to allow the removal of counseling or disciplinary documents from her employment files was improper based on agency policy.

SUMMARY: Grievant is employed as a Health Service Worker at the William R. Sharpe, Jr. Hospital. After some discussion and testimony at level one, Respondent reduced a verbal reprimand to a counseling session. Because counseling is non-disciplinary, Grievant bears the burden of proving that Respondent's actions were improper. The record suggested that Grievant raised her voice at patients and slammed the patients' locker doors. This behavior was out of character for Grievant, and Respondent's decision to reduce the reprimand to a counseling session was reasonable under the circumstances. Grievant did not demonstrate that this action by Respondent was inappropriate or otherwise arbitrary. The record did support a finding that the documentation of a reprimand and counseling should be removed from all of Grievant's files, including the administrative file.

KEYWORDS: Suspension; Gross Misconduct; Policy Violation; Supervised Visit

CASE STYLE: Luzader v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2015-0911-CONS (1/29/2016)

PRIMARY ISSUES: Whether Respondent met its burden of proof and demonstrated Grievant engaged in gross misconduct.

SUMMARY: Grievant was suspended for three days for failure to supervise a resident while off grounds of the Transitional Living Facility. The record established that Grievant directed a forensic patient to roam freely in a public place without any level of supervision. This action was in direct violation of the Transitional Living Facility's relevant policy. Respondent proved by a preponderance of the evidence the charges against Grievant and demonstrated that the three-day suspension was appropriate. Respondent acknowledged that Grievant was entitled to pay differential as a result of his reassignment pending the investigation of the matter. This grievance is granted, in part, and denied, in part.

KEYWORDS: Termination; Judicial Standard; Drug and Alcohol Testing Policy; Prescribed Rehabilitation Plan; Witness Credibility; Substance Abuse Professional; Technical Offence; Notice; Wrongful Intent; Arbitrary and Capricious; Mitigation

CASE STYLE: Parsley v. Division of Highways

DOCKET NO. 2015-1335-DOT (1/29/2016)

PRIMARY ISSUES: Whether the termination of Grievant's employment was justified in the circumstanced of the case and/or whether discharge was excessive in nature and inherently disproportion penalization of a classified employee.

SUMMARY: Respondent maintained Grievant's employment was termination for violation of the West Virginia Department of Transportation's Drug and Alcohol Testing Policy, as Grievant failed to complete the counseling as prescribed by the Substance Abuse Professional. Grievant protested. Grievant maintains that Respondent and/or its agents conduct was unreasonable, arbitrary and capricious.

This grievance matter is with regard to the dismissal action taken by Respondent. Respondent bears the burden of establishing, by a preponderance of the evidence, the charges upon which Grievant's dismissal as predicated. Respondent failed to demonstrate that Grievant's conduct warranted dismissal actions. Further, Grievant successfully challenged this disciplinary action and persuasively establishing that Respondent's actions were excessive in nature and disproportion between the offense and the personnel action given the lack of notice by Respondent and failure to properly provide the services it recommended. Mitigating factors are present in the circumstances of this matter. This Grievance is GRANTED.

KEYWORDS: Termination; Code of Conduct; Off-Duty Misconduct; Rational Nexus; Falsely Reporting an Emergency Incident; Arbitrary and Capricious; Substantial Nature

CASE STYLE: Meador v. Regional Jail and Correctional Facility Authority/Southern Regional Jail

DOCKET NO. 2015-1064-MAPS (1/29/2016)

PRIMARY ISSUES: Whether Respondent proved a rational nexus between Grievant's off-duty misconduct of reporting a false emergency and his continued employment as a Correctional Officer II.

SUMMARY: Respondent suspended Grievant from his position as a Correctional Officer II, while he was under criminal investigation, and subsequently terminated him. Respondent contends Grievant's dismissal was justified in that he violated various provisions of its "Code of Conduct" policies while off duty. Grievant responds his termination was unjustified in that Respondent did not prove he committed the criminal violations with which he was charged or that he violated Respondent's Code of Conduct. Respondent proved Grievant intentionally violated state law by falsely reporting an emergency incident, which constituted misconduct of a substantial nature, which had a rational nexus to performance of his job as a Correctional Officer II, justifying Grievant's termination.

KEYWORDS: Pay Increase; Hartley Case; Motion To Dismiss; Circuit Court Order; Jurisdiction

CASE STYLE: Karp, et al. v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital

DOCKET NO. 2016-0426-CONS (1/27/2016)

PRIMARY ISSUES: Whether the Grievance Board has jurisdiction to hear this matter.

SUMMARY: Grievants are employed by Respondent in direct patient care positions at William R. Sharpe, Jr. Hospital. Grievants assert they were improperly denied a pay increase pursuant to a State Board of Personnel proposal, and that such was also discriminatory. Respondent denies Grievant's claims and asserts that the Grievance Board lacks jurisdiction to hear this matter pursuant to West Virginia Code § 5-5-4a, and as Grievant is seeking to enforce a circuit court order. Grievant is seeking a pay increase granted by Order of the Circuit Court of Kanawha County, West Virginia. The Grievance Board lacks jurisdiction to enforce a Circuit Court order, or to compel compliance therewith. Further, West Virginia Code § 5-5-4a specifically exempts pay increases granted pursuant thereto from the grievance process. Therefore, Respondent's Motion to Dismiss should be granted, and this grievance, DISMISSED.

KEYWORDS: Level Three Decision; Intervene; Job Posting; Selection Process; Hiring Decision

CASE STYLE: Johnson v. Department of Health and Human Resources/Bureau for Children and Families
DOCKET NO. 2014-1008-DHHR (1/8/2016)

PRIMARY ISSUES: Whether Grievant is entitled to the relief requested.

SUMMARY: Grievant attempted to challenge a level three decision which resulted in placing another employee to the position he occupied. Grievant asserts the employer was under an obligation to notify him of the grievance resulting in his employment change in order that he could have intervened. In the instant case, Grievant attempted to demonstrate he was more qualified for the position from which he was removed. At the time this grievance was initiated, the prior level three decision had become final. The prior decision was not subject to a collateral attack in a subsequent proceeding involving the same hiring decision. The employer was under no obligation to notify Grievant of the previous grievance which adversely affected him. This grievance is denied.

KEYWORDS: Reallocation; Classification; Desk Audit; Job Duties; Lead Worker; Position Description Form; Arbitrary and Capricious

CASE STYLE: Belcher v. Department of Health and Human Resources/Bureau for Child Support Enforcement and Division of Personnel
DOCKET NO. 2015-0697-DHHR (1/13/2016)

PRIMARY ISSUES: Whether Grievant proved that her position should be reallocated to a different classification.

SUMMARY: Grievant contends that her position is misclassified as a Child Support Specialist 3. She believes her duties more closely fit the Health & Human Resources Specialist Senior classification (“HHRs Sr.”). After performing a number of reviews of Grievant’s position, the Division of Personnel managers assigned to perform those reviews concluded that the position was not responsible for certain essential functions necessary to qualify for the HHRs Sr. classification. Additionally, the essential functions of Grievant’s position had not significantly changed since the position was initially classified in 2009. Consequently DOP determined that the best fit for the position remained the CSS 3 classification. Grievant did not prove that this determination was arbitrary or capricious. The grievance is DENIED.