

**WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**SYNOPSIS REPORT**

**Decisions Issued in January 2017**

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](mailto: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**

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**KEYWORDS:** Termination; Dismissal; Insubordination; Dishonesty; Professional Duties; Predetermination; Bath Faith; Ethics; After Acquired; Investigation; Disciplinary

**CASE STYLE:** Cross v. Mountwest Community and Technical College  
DOCKET NO. 2016-1191-MCTC (1/20/2017)

**PRIMARY ISSUES:** Whether Respondent proved that Grievant engaged in insubordination and dishonesty in the performance of her duties.

**SUMMARY:** Grievant was employed by Respondent as an Associate Professor. Respondent terminated Grievant's employment for "insubordination by refusal to abide by legitimate reasonable directions of administrators," and for "dishonesty in the performance of professional duties." Grievant filed this grievance challenging her termination, denying all allegations of misconduct, and raising issues of bad faith. Respondent failed to prove its claims against Grievant by a preponderance of the evidence. Grievant failed to prove her claims of bad faith. Therefore, this grievance is GRANTED, IN PART, and DENIED, IN PART.

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**KEYWORDS:** Promotion; Student Evaluations; Discrimination; Arbitrary and Capricious; Teaching; Graduate Student Advising; Annual Evaluations

**CASE STYLE:** Subramani v. West Virginia University  
DOCKET NO. 2012-1353-WVU (1/4/2017)

**PRIMARY ISSUES:** Whether Grievant demonstrated that he should have been promoted.

**SUMMARY:** Grievant's application for promotion to Full Professor was denied based on a conclusion by the Provost that his teaching efforts did not meet the standard for promotion. Grievant's research and service met the standard for promotion. Grievant argued that too much emphasis was placed on student evaluations and graduate student advising in the evaluation of his teaching efforts, in violation of the applicable guidelines. The Grievance Board has long-standing case law which holds poor student evaluations may support a finding that teaching and advising does not meet the effectiveness standard. Grievant was advised of the importance of mentoring graduate students in his annual evaluations. Grievant did not demonstrate that the decision not to promote him to Full Professor was arbitrary and capricious

**TOPICAL INDEX**  
**COUNTY BOARDS OF EDUCATION**  
**PROFESSIONAL PERSONNEL**

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**KEYWORDS:** Motion to Dismiss; Resignation; Relief; Moot

**CASE STYLE:** Simmons v. Randolph County Board of Education  
DOCKET NO. 2017-0187-RanED (1/18/2017)

**PRIMARY ISSUES:** Whether Grievant's resignation has rendered this matter moot.

**SUMMARY:** After the Level Three hearing on October 3, 2016, Grievant voluntary resigned from his position with Respondent on October 14, 2016. On November 10, 2016, Respondent moved to dismiss this matter as moot.

**TOPICAL INDEX**  
**COUNTY BOARDS OF EDUCATION**  
**SERVICE PERSONNEL**

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**KEYWORDS:** Termination; Use of Force; Physical Restraint; Misconduct; Training

**CASE STYLE:** Austin III v. Raleigh County Board of Education  
DOCKET NO. 2017-1107-RaIED (1/25/2017)

**PRIMARY ISSUES:** Whether Grievant's conduct constituted insubordination.

**SUMMARY:** Grievant's employment as a Special Education Aide was suspended, without pay, on September 28, 2016, after he allegedly threw a bean bag chair at a behavior disordered student on September 27, 2016. At the same time Grievant was suspended, the Superintendent further recommended the Board terminate his employment. Grievant had previously been suspended for five days for using improper force to remove an unruly student from a school bus. The evidence established that Grievant failed to adhere to the behavior control techniques he had been trained to apply in dealing with behavior disordered students. Further, the Board established by a preponderance of the evidence that Grievant's failure to follow the training he had received for responding to violent and unruly behavior by behavior disordered students constituted insubordination. Accordingly, this grievance must be denied.

**KEYWORDS:** Pay; Leave Reimbursement; Inclement Weather Policy; Similarly Situated Employees; Discrimination

**CASE STYLE:** Davis, et al. v. Kanawha County Board of Education  
DOCKET NO. 2016-1237-CONS (1/4/2017)

**PRIMARY ISSUES:** Whether Grievants were required to take a vacation day.

**SUMMARY:** Following a severe snowstorm in January 2016, Respondent Kanawha County Board of Education (“KCBOE”) closed all schools on Friday, January 22, 2016. No employees were required to report to work that day. Schools remained closed on the following Monday, January 25, 2016, and, consistent with previous personnel staffing for a “snow day,” only maintenance employees at Crede, and 261-day custodians, were ordered to report on January 25, 2016. Grievants, who are assigned to the school system’s operations center at Crede, and all service personnel employees in KCBOE’s Central Office were to remain home. Less than four hours after this initial notice was distributed, a “corrected” notice was disseminated, directing all service employees assigned to Crede to report for duty on January 25, not just maintenance employees who are focused on snow removal. Service employees assigned to the Central Office, many of whom hold the same job classifications and perform similar duties in support of school operations, were not required to report. Crede employees who failed to report on January 25 were docked a day’s vacation pay. Central Office employees were compensated without having to forfeit a vacation day.

Ostensibly, KCBOE’s Superintendent hoped to reopen the schools on Tuesday, but schools remained closed on January 26, while Grievants performed little or no meaningful work on January 25, and no work on that day which was shown to have been essential to reopening the schools the following day. Grievants demonstrated by a preponderance of the evidence that they were treated adversely to their similarly situated peers in the Central Office, and there were no relevant differences in the job duties of the two groups of employees to warrant such different treatment. Those Grievants who were docked leave time for failing to report are entitled to have their lost leave reinstated. Grievants who were able to report for work received a day’s pay and lost no leave. Therefore, they suffered no adverse personnel action and are not entitled to relief. Further, Grievants who managed to report to work were not working on a holiday simply because that is the code used to pay employees who are excused from reporting due to adverse weather conditions, and no Grievants may be awarded holiday pay in these circumstances. Accordingly, this Grievance must be GRANTED, in part, and DENIED, in part.

**TOPICAL INDEX**  
**STATE EMPLOYEES**

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**KEYWORDS:** Promotion; Classification; Minimum Qualifications; Arbitrary and Capricious

**CASE STYLE:** McCarthy v. Division of Corrections/Huttonsville Correctional Center and Division of Personnel  
DOCKET NO. 2015-1212-MAPS (1/31/2017)

**PRIMARY ISSUES:** Whether Grievant demonstrated by a preponderance of the evidence that he met the minimum qualifications of the position in question.

**SUMMARY:** Grievant seeks a promotion to a Correctional Officer 4 position. The record did not demonstrate by a preponderance of the evidence that Grievant met the minimum qualifications of the position at the time he sought the promotion. The record did establish that Grievant has met the qualifications of the position since filing this action and has been promoted. Accordingly, this grievance is denied.

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**KEYWORDS:** Educational Reimbursement; Policy; Denial; Class; Form; Arbitrary and Capricious; Discretion

**CASE STYLE:** Hoffman v. Department of Health and Human Resources/Bureau for Public Health and Education Reimbursement and Leave Program  
DOCKET NO. 2016-1085-DHHR (1/31/2017)

**PRIMARY ISSUES:** Whether Grievant proved by a preponderance of the evidence that the denial of his educational expense reimbursement was improper.

**SUMMARY:** Grievant is employed by Respondent DHHR as an Epidemiologist in the Bureau of Public Health. Grievant applied for reimbursement through DHHR's Education Expense Reimbursement Program for the cost of a college course he planned to take. Grievant made the initial application, which was approved. However, Grievant dropped the course that had been listed on his approved application, and added a new course without informing the EER/L Program. When he submitted his final paperwork to seek reimbursement of the cost of the class, his application was denied because Respondent EER/L concluded that Grievant failed to comply with its policies for seeking reimbursement. The main problem was that Grievant took a class that the program had not approved. Grievant argues that he was wrongly denied his reimbursement in that the policy was applied too narrowly. Respondents assert that they properly denied the request for reimbursement. Grievant failed to prove his claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

**KEYWORDS:** Classification; Tier System; Requirements; Qualifications; Certifications; Pay; Arbitrary and Capricious; Apprenticeship Program; CDL

**CASE STYLE:** Adkins v. Division of Highways

DOCKET NO. 2016-0818-DOT (1/23/2017)

**PRIMARY ISSUES:** Whether Grievant proved by a preponderance of the evidence that the tier system and his placement therein were improper.

**SUMMARY:** Grievant is employed by Respondent as a Transportation Worker 3 Equipment Operator. When the DOH implemented its Transportation Worker Apprenticeship Program in 2015, based upon the tier criteria it established, Grievant was slotted into the lowest tier for his classification, Tier 1, because he lacked a Class-A CDL. Grievant made a number of arguments challenging his placement in Tier 1 and the tier system itself, essentially asserting that Respondent's decisions were arbitrary and capricious. Respondent denies Grievant's claims, and argues that Grievant was properly placed in Tier 1. Grievant failed to prove his claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

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**KEYWORDS:** Retaliation; Hostile Work Environment; Job Duties; Equipment Maintenance; Safe Workplace

**CASE STYLE:** Johnson v. Division of Highways

DOCKET NO. 2016-0869-DOT (1/30/2017)

**PRIMARY ISSUES:** Whether Grievant is victim to a hostile work environment and/or whether a limited alteration in job duties constituted punitive retaliatory conduct.

**SUMMARY:** Grievant alleged retaliation and hostile work environment. Grievant did not meet the applicable burden to establish either, as identified and/or defined in accordance with West Virginia Grievance Statute(s) or Division of Personal's Prohibited Workplace Harassment Policy. Grievant did not demonstrate that Respondent's personnel actions with respect to him were illegal. Grievant has not established a violation of an applicable and controlling statute, policy or rule. Accordingly, this grievance is DENIED.

**KEYWORDS:** Reimbursement; Travel Expenses; Training; Certification; Motion to Dismiss; Statutory Timelines

**CASE STYLE:** Mills v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital  
DOCKET NO. 2016-1347-DHHR (1/25/2017)

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

**SUMMARY:** Grievant seeks reimbursement for travel expenses, wages, and fees incurred to attend a training in Virginia to become certified as an interpreter for the deaf and hard of hearing in West Virginia and Virginia. She asserts that the training and certification were required for her employment at Bateman Hospital in that role. Respondent demonstrated that the grievance was not filed within the mandatory statutory timeline.

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**KEYWORDS:** Termination; Misconduct; Patient Restraint; Work History; Automatism; Self-Defense; Defense of Others

**CASE STYLE:** Rees v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital  
DOCKET NO. 2016-0357-DHHR (1/18/2017)

**PRIMARY ISSUES:** Whether Respondent proved that there was good cause to dismiss Grievant from employment because of his actions in restraining a patient.

**SUMMARY:** Grievant was dismissed from employment for striking a patient in the back of the head with a closed fist while he and others were attempting to disarm the patient and bring him under control. Grievant was specifically charged with patient abuse. When Grievant struck the patient he was in extreme pain due to the patient's grip on Grievant's testicles and biting his arm. Under the circumstances of this incident Respondent did not prove that good cause existed to terminate Grievant's employment.

**KEYWORDS:** Written Reprimand; Credibility; Lifting Restriction; Discrimination; ADA; Safety Concerns; Essential Duties; Nursing Duties; Medical Leave

**CASE STYLE:** Trozzi v. Grafton-Taylor Health Department  
DOCKET NO. 2014-1762-GraCH (1/20/2017)

**PRIMARY ISSUES:** Whether Respondent proved the charges against Grievant, and whether Grievant demonstrated she should have been allowed to return to work with a 6 pound lifting restriction.

**SUMMARY:** Grievant received a written reprimand for unprofessional behavior when she allegedly drove her car in a loud, erratic manner when exiting Respondent's parking lot, and continued into the street "under high acceleration." Grievant's car is designed to be loud, and she was not driving the car on the day in question. Respondent failed to prove the charges against Grievant. As to Grievant's claim that she should have been allowed to return to work with a six pound lifting restriction, Grievant failed to demonstrate that she could safely perform her essential duties as a Nurse in the clinic, providing immunizations, blood pressure checks, and other nursing care as required, to children and adults who came into the clinic for assistance.

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**KEYWORDS:** Resignation; Harassment; Reinstatement

**CASE STYLE:** Evans v. Department of Health and Human Resources/Bureau for Children and Families  
DOCKET NO. 2016-1674-CONS (1/13/2017)

**PRIMARY ISSUES:** Whether Grievant proved it is more likely than not that she intended to rescind her tendered resignation before acceptance by Respondent.

**SUMMARY:** Grievant was previously employed by Respondent as an Economic Service Worker and Social Service Worker III. Following some incidents with coworkers, Respondent determined that Grievant had resigned, and processed her separation from employment as a resignation. The limited record established that it is more likely than not that Grievant rescinded her resignation prior to its acceptance by Respondent. Grievant is entitled to reinstatement, back pay, interest on the back pay, and restoration of all benefits. Accordingly, the grievance is granted.

**KEYWORDS:** Motion to Dismiss; Job Abandonment; Moot; Advisory Opinions

**CASE STYLE:** Hash v. Division of Rehabilitation Services

DOCKET NO. 2017-1016-DEA (1/11/2017)

**PRIMARY ISSUES:** Whether the grievance was moot because Grievant was dismissed from employment after it was filed and then failed to respond to any notices for hearings.

**SUMMARY:** After the three-day suspension without pay expired, Grievant never returned to his job and has not contacted Respondent in any way, even after being notified that his employment was terminated for job abandonment. Grievant did not file a grievance related to the termination and did not respond Respondent's Motion to Dismiss. It is clear that Grievant has no interest in pursuing this matter and it is now moot.