

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in February 2014

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: At-Will Employee; Annual Appointment; Retaliation; Discrimination; Harassment; Hostile Work Environment

CASE STYLE: Wycherley v. West Virginia Northern Community College
DOCKET NO. 2013-1097-NCC (2/28/2014)

PRIMARY ISSUES: Whether Respondent demonstrated that Grievant did not fulfill the duties of her administrative position at the level expected of her by her supervisors.

SUMMARY: Grievant was employed by Respondent as a Disability Services Counselor. Grievant also entered into separate adjunct faculty contracts to teach classes for Respondent. Grievant was an at-will employee whose position was terminated five months into her most recent annual appointment. Respondent argues that Grievant's employment could be terminated for any reason that does not violate a substantial public policy. The record established that Grievant had a reasonable expectation of continued employment through the term of her most recent annual appointment. In any event, Respondent demonstrated that Grievant did not fulfill the duties of her administrative position at the level expected of her by her supervisor. This is sufficient under the terms of the annual appointment and the job responsibilities to justify termination of the appointment before its ending date, for this otherwise at-will employee. The same rationale applies to Respondent's termination of Grievant's adjunct faculty contracts. The record did not support Grievant's claims that she was being harassed, was exposed to a hostile work environment, or that she was the victim of discrimination or retaliation.

KEYWORDS: Annual Contract; Non-Tenure-Track; Annual Evaluation; Non-Retention; Property Interest; Arbitrary and Capricious

CASE STYLE: Colson v. West Virginia University

DOCKET NO. 2013-1554-WVU (2/26/2014)

PRIMARY ISSUES: Whether Grievant demonstrated that he had a property interest in his continued employment, and whether Grievant demonstrated that the decision not to renew his contract was arbitrary and capricious.

SUMMARY: Grievant was notified in February 2013 that his annual contract would not be renewed, and that his employment relationship with Respondent would terminate on June 30, 2013. Grievant asserted that he had acquired a property interest in his continued employment by virtue of several occurrences, including the renewal of his contract for many years, his promotion the preceding year to Associate Professor, his appointment to a review board, and his signing bonus. Grievant did not demonstrate that he had anything other than a unilateral expectation of continued employment. Grievant did not acquire a property interest in his continued employment. Respondent could simply choose not to renew his contract.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Stipend; Discrimination; Compensation; Job Description; Bus Route

CASE STYLE: Graham v. Wetzel County Board of Education
DOCKET NO. 2013-0849-WetED (2/10/2014)

PRIMARY ISSUES: Whether Grievant demonstrated that he was the victim of discrimination.

SUMMARY: Grievant is a bus operator employed by Respondent. Grievant's route involves him picking up a relatively small number of students including special education students and regular education students. Grievant argues that he should receive a stipend for transporting students to a high school where they board another bus and are transported to a technical school. He claims to be the victim of discrimination. Grievant presented no evidence in support of his claim of discrimination. The grievance is denied.

KEYWORDS: Job Description; Extra Duty Trips; Compensation; Discrimination; Salary; Rate of Pay; Bad Faith

CASE STYLE: Graham v. Wetzel County Board of Education
DOCKET NO. 2013-0858-WetED (2/10/2014)

PRIMARY ISSUES: Whether Grievant proved that his salary, rate of pay, or benefits were inconsistent with those offered to other employees performing similar work.

SUMMARY: Grievant is a bus operator employed by Respondent. Grievant claimed that Respondent owed him unpaid wages, including overtime pay, for his work as a bus operator. Grievant failed to meet his burden of proof and establish any entitlement to additional compensation for his bus trips. This grievance is denied. Respondent's request for costs to be assessed against the Grievant is also denied.

KEYWORDS: Leaving School without Permission; Smoking Marijuana with a Student; Immorality; Hearsay; Proof; Right to Remain Silent; 5th Amendment Privilege

CASE STYLE: Smith v. Berkeley County Board of Education

DOCKET NO. 2014-0378-BerED (2/5/2014)

PRIMARY ISSUES: Whether Respondent proved Grievant smoked marijuana with a student. Whether Respondent proved that providing bond money for a student falls within any of the statutory grounds for suspension or dismissal.

SUMMARY: Grievant was dismissed from his employment as a Librarian at Martinsburg High School based on allegations that he had smoked marijuana with a student at Grievant's home, and that he had left school without permission to post bond for the student when the student was arrested. The allegations related to smoking marijuana were made by Grievant's wife, who was also employed at Martinsburg High School, after she had removed a substantial amount of money from the joint checking account and vacated their house with most of the furnishings. The student denied smoking marijuana with Grievant, and Grievant advised the Principal that his wife had threatened to invent a scenario where hypothetically he had smoked marijuana with a student. The Principal took Grievant's statements as an admission that he had smoked marijuana with a student, and reported the allegations to law enforcement personnel. When the Superintendent questioned Grievant, he refused to answer any questions about smoking or buying marijuana, and he refused to answer any such questions at the hearing before the Board of Education. No witnesses with first-hand knowledge of the allegations were called as witnesses at any evidentiary hearing. Respondent failed to prove the charges against Grievant related to smoking marijuana with a student. Respondent did demonstrate that Grievant left school without signing out to provide bond money for the student, but failed to demonstrate that this was grounds for dismissal.

KEYWORDS: Reduction in Force; Probationary Contract; Nonrenewal; Seniority; Arbitrary and Capricious; Secure Job; Ultra Vires

CASE STYLE: Fields v. Mingo County Board of Education

DOCKET NO. 2013-1130-MinED (2/4/2014)

PRIMARY ISSUES: Whether Grievant proved that Respondent's decision not to renew her probationary contract was arbitrary and capricious.

SUMMARY: Grievant's probationary contract was not renewed pursuant to a reduction in force. Grievant asserted that Respondent was required to renew her contract because the director of human resources had assured Grievant her position was secure or that Respondent should have chosen to assign positions differently when it merged two schools. Grievant was one of the least senior employees in her job classification. Respondent would not have been bound by any assurance by the director of human resources, which would have been ultra vires, as the law requires reduction in force be based on seniority. Grievant failed to prove by a preponderance of the evidence that Respondent's decision not to renew Grievant's probationary contract was arbitrary and capricious. Accordingly, the grievance is denied.

TOPICAL INDEX
STATE EMPLOYEES

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| <u>KEYWORDS:</u> | Use of Excessive Force; Falsify Reports; Policy Violation; Pre-Determination Hearing; Due Process; Supervisor |
| <u>CASE STYLE:</u> | <u>Owens v. Division of Juvenile Services/Dr. Harriet B. Jones Treatment Center</u> DOCKET NO. 2013-2120-MAPS (2/13/2014) |
| <u>PRIMARY ISSUES:</u> | Whether Respondent proved the charges against Grievant, and demonstrated good cause for his dismissal. |
| <u>SUMMARY:</u> | Grievant, a supervisor, was dismissed from his employment by Respondent for use of excessive force with a juvenile offender, placing a second juvenile offender in a headlock, and asking subordinates not to place in their incident reports that he had placed the juvenile offender in a headlock. Respondent proved the charges against Grievant. |

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| <u>KEYWORDS:</u> | Suspension; Failure to Pursue; Failure to Respond; Resignation; |
| <u>CASE STYLE:</u> | <u>Clem v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital</u> DOCKET NO. 2014-0317-DHHR (2/3/2014) |
| <u>PRIMARY ISSUES:</u> | Whether this grievance should be dismissed for failure to pursue. |
| <u>SUMMARY:</u> | Grievant filed this grievance disputing his suspension. Respondent moved to dismiss the matter as moot. Grievant has failed to respond to Respondent's motion or otherwise pursue his grievance further, despite multiple contacts from the Grievance Board. Accordingly, the grievance should be dismissed. |

KEYWORDS: Plan of Care; Neglect; Resident Injury; Misconduct

CASE STYLE: Potter v. Department of Health and Human Resources/Welch Community Hospital
DOCKET NO. 2013-1905-DHHR (2/5/2014)

PRIMARY ISSUES: Whether Grievant's actions constituted good cause to terminate her employment.

SUMMARY: Grievant, a Licensed Practical Nurse in a nursing home was dismissed for failing to follow a resident's Plan of Care and causing serious physical injury to the resident. Grievant argues that she followed the Plan of Care and the injury was not a result of her failing to follow appropriate care procedures for the resident. Much of the testimony offered by both parties proved to be unreliable, but Respondent proved the charges against Grievant by a preponderance of the evidence. The grievance is DENIED.

KEYWORDS: Classification; Pay Grade; Annual Salary; Pay Equity; Internal Equity; Equal Pay for Equal Work

CASE STYLE: Bowser, et al. v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2013-0247-CONS (2/13/2014)

PRIMARY ISSUES: Whether Respondent violated the Pay Equity statute and policies by hiring an external candidate at a higher rate of pay.

SUMMARY: All five Grievants are employed in the Guard 1 classification at Sharpe Hospital. Their tenure at the Hospital varies but each was employed at the Hospital before becoming a Guard. In 2012 an outside applicant was hired as a Guard 1 at Sharpe Hospital with a starting salary that exceeded the salary being paid to every Grievant. Grievant's argue that it is unfair to start a new employee at a significantly higher salary than existing employees and that the practice violates pay equity policies. Respondent counters that the outside applicant had a number of years of Guard experience which was reflected in his starting salary. Additionally, Respondent notes that pay equity policies only require that all of the Guards are paid within the salary range set out in the pay grade for that classification. Grievant's were unable to prove that Respondent's action was a violation of law or policy, or that it was arbitrary or capricious.

KEYWORDS: Discretionary Pay Increase; Retroactive Pay Increase; Resignation; Moot

CASE STYLE: Hapney v. Public Employees Insurance Agency/Department of Administration and Division of Personnel
DOCKET NO. 2013-0861-DOA (2/24/2014)

PRIMARY ISSUES: Whether any actual relief could be granted to Grievant.

SUMMARY: Grievant grieved the failure to award her a discretionary pay increase. Grievant has resigned, so the only remaining remedy available is a retroactive pay increase. Grievant's discretionary pay increase had not been denied at the time of her resignation. The Grievance Board cannot award a retroactive discretionary pay increase in this circumstance. It is not possible for any actual relief to be granted, so this case must be dismissed.

KEYWORDS: Mandatory Overtime Practices; Discrimination; Arbitrary and Capricious

CASE STYLE: Crites, et al. v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2012-1491-CONS (2/12/2014)

PRIMARY ISSUES: Whether Grievants demonstrated that Respondent's practices regarding mandatory overtime were arbitrary and capricious.

SUMMARY: Grievants are employed as Health Service Workers and Health Service Assistants at the William R. Sharpe, Jr. Hospital. Grievants allege that they were unfairly required to work overtime and that Sharpe Hospital's mandatory overtime practices are discriminatory. Respondent counters that its mandatory overtime practices are not discriminatory, and are not applied in an arbitrary and capricious manner. Grievants did not meet their burden of proof and demonstrate that Respondent's overtime practices were discriminatory or arbitrary and capricious. This grievance is denied.

KEYWORDS: Policy Violation; Neglect; Transporting a Patient; Job Duties; Discovery; Due Process; Dismissal; Mitigating Factors; Arbitrary and Capricious

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

DOCKET NO. 2013-0851-CONS (2/6/2014)

PRIMARY ISSUES: Whether Respondent had good cause to terminate Grievant for her failure to follow policy in willful disregard of her job responsibilities. Whether Respondent violated Grievant's due process rights by failing to provide requested information during informal discovery.

SUMMARY: Grievant, a Health Service Worker employed by Respondent at Sharpe Hospital, was dismissed for failure to follow policy in transporting a patient. Grievant was required to remain with the patient at all times, and did not do so, which allowed the patient to elope. Respondent proved by a preponderance of the evidence that Grievant was aware of the relevant policy and that Grievant's actions violated the policy. Respondent had good cause to dismiss Grievant for violation of the policy in willful disregard of her job responsibilities. Grievant was unable to prove any mitigating factors exist. Accordingly, the grievance is denied.

KEYWORDS: Termination; Classified Exempt, At-Will; Substantial Public Policy; Reprisal; Retaliation

CASE STYLE: Carter v. Public Broadcasting

DOCKET NO. 2013-1556-DEA (2/4/2014)

PRIMARY ISSUES: Whether Grievant met his burden of proving by a preponderance of the evidence that he was terminated in violation of substantial public policy.

SUMMARY: Grievant was terminated from his position with Respondent. Grievant asserted that his termination was improper because he should be considered a classified employee. Grievant further argued that he was terminated in violation of substantial public policy. Respondent denied Grievant's claims, and asserted Grievant's termination was proper under the law. Grievant failed to meet his burden of proving his claims by a preponderance of the evidence. Accordingly, the grievance is DENIED.