

**WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**SYNOPSIS REPORT**

**Decisions Issued in February 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](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**  
**COUNTY BOARDS OF EDUCATION**  
**SERVICE PERSONNEL**

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<b><u>KEYWORDS:</u></b>	Classification; Class Title; Job Duties; Payroll; Substitute Data
<b><u>CASE STYLE:</u></b>	<u>Smith v. Jefferson County Board of Education</u> DOCKET NO. 2015-0730-JefED (2/3/2016)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant demonstrated that her duties more closely matched those of the Accountant III classification.
<b><u>SUMMARY:</u></b>	Grievant is employed by Respondent as a Secretary III/Accountant I, but believes she should be classified as a Secretary III/Accountant III. Grievant's primary duties are to make sure substitute employees have been called out to fill all vacancies each day, and to make sure the data on these vacancies and substitutes is accurately recorded in the computerized substitute employee management system which flows into the payroll system. Grievant does not manage or supervise payroll procedures, nor does she have any role in payroll except to make sure the data on substitute positions is accurately reported to payroll. Grievant's duties do not closely match those of an Accountant III.

**KEYWORDS:** Selection; Bid Sheet; Bid Box; Proof of Application; Receipt of Bid; Responsibility of Applicant; Lost Application

**CASE STYLE:** Spaid v. Preston County Board of Education  
DOCKET NO. 2015-1636-PreED (2/5/2016)

**PRIMARY ISSUES:** Whether Grievant demonstrated that Intervenor did not submit an application for the posted position at issue, and that he should not have been removed from the position at issue.

**SUMMARY:** Grievant is employed by Respondent as a Bus Operator. He bid on a posted Bus Operator position because the bus run was in his preferred area, and he was awarded the position as the most senior applicant. After he was awarded the position, another employee came forward asserting that she had bid on the run and was more senior than Grievant. The employee, Intervenor, had a witness who stated that he had assisted Intervenor in completing a bid sheet for the position, and a witness who watched her place bid sheets in the bid box. Respondent removed Grievant from the position and awarded it to Intervenor. Intervenor completed bid sheets for two posted positions, made copies, and then placed folded pieces of paper in the bid box. Respondent never found Intervenor's bid sheet for the position at issue. Grievant demonstrated that Respondent did not receive a bid sheet from Intervenor for the position at issue. It is more likely than not that Intervenor mixed up the copies and did not place a bid sheet in the bid box for the posted position at issue. It was Intervenor's responsibility to ensure that Respondent received her application. Grievant demonstrated that he should not have been removed from the position at issue.

**KEYWORDS:** Additional Compensation; Snow Days; Regular Rate of Pay; Policy; Discrimination, Weather, School Closing, Report to Work.

**CASE STYLE:** Tabor v. Boone County Board of Education  
DOCKET NO. 2015-0671-BooED (2/10/2016)

**PRIMARY ISSUES:** Whether Grievant was entitled to additional pay beyond his daily rate for reporting to work on snow days.

**SUMMARY:** Grievant claims that the Board violated a long-standing established past practice of paying additional compensation to custodians when they were required to report for a half day on snow days to check on the school, if they were the only custodian assigned to the school. He alleges that such custodians were paid an additional half day of pay each time they were required to report when the other staff assigned to the school were not. Grievant had to report to the school on fifteen day when classes were cancelled due to inclement weather during the 2013-2014 school year and only received his regular pay for those days. Grievant also claims that another custodian who is similarly situated to him received an additional half day's pay for each of those days when Grievant did not.

Grievant failed to prove the existence of any rule regulation policy or law which would require Respondent to provide him half a day pay in addition to his full day of pay on the snow days he was required to report to work. Additionally, Respondent provided documentation establishing that the custodian identified by Grievant as receiving the extra pay had not actually received such compensation. Accordingly, the grievance is DENIED.

**KEYWORDS:** Private Sector Experience Credit; Ultra Vires Acts; Equitable Estoppel

**CASE STYLE:** Ragione v. Preston County Board of Education  
DOCKET NO. 2014-1327-PreED (2/12/2016)

**PRIMARY ISSUES:** Whether the facts of this grievance warrant the application of equitable estoppel against the Respondent.

**SUMMARY:** At the time of his hiring, Grievant was awarded 28 years of private sector experience credit by former Superintendent Larry Parsons. The action of Superintendent Parsons in awarding experience credit for private sector experience was taken without involvement of the West Virginia Board of Education. The error in awarding the private sector experience credit was discovered by the Office of Educational Performance Audits. The Respondent and the West Virginia Board of Education acted within their authority to eliminate the private sector experience credit improperly granted to Grievant. Grievant also argued the doctrine of equitable estoppel. The record did not support a finding that the doctrine of equitable estoppel is applicable to this case. The interests of justice does not demand that equitable estoppel be applied in this particular circumstance and any unclear or misleading statements made to Grievant constitute ultra vires acts.

**KEYWORDS:** Snow Days; School Closing; Discrimination; Favoritism; Uniformity; Similarly Situated; Leave; Essential Employees

**CASE STYLE:** Chandler, et al. v. Kanawha County Board of Education  
DOCKET NO. 2015-1018-CONS (2/23/2016)

**PRIMARY ISSUES:** Whether Grievants were similarly situated to other employees who were not required to report to work.

**SUMMARY:** Grievants are employed by Respondent in the Maintenance Department. On March 5, 2015, a winter storm hit Kanawha County toppling trees and power lines in some areas, causing flooding, and leaving roads snow-covered. Although Kanawha County schools were closed for the day, employees of the Maintenance Department, including Grievants, were required to report to work. Most of the Grievants were unable to report to work due to road conditions, flooding, or downed trees and power lines. Those Grievants who did not report to work were required to take a personal or vacation day. Those school service personnel who were not required to report to work, including secretaries employed in the Maintenance Department, were not required to use personal leave time even though they did not report to work. Grievants did not produce evidence that any similarly situated employee was treated differently than any of the Grievants with regard to the requirement to report to work on this date or take leave time. Grievants did not prove their claims of discrimination, favoritism, or a violation of the uniformity provision.

**KEYWORDS:** Termination; Qualifications; Classification; Diploma; GED; TASC Exam; Accreditation; Arbitrary and Capricious

**CASE STYLE:** Sebolt v. Logan County Board of Education  
DOCKET NO. 2016-0168-LogED (2/25/2016)

**PRIMARY ISSUES:** Whether Respondent acted arbitrarily and capriciously in terminating Grievant for incompetency.

**SUMMARY:** Respondent asserts it properly terminated Grievant's employment as a bus operator because she did not have a legitimate, "accredited," "high school diploma," to allow her to meet the educational qualifications under W. Va. Code § 18A-2-5, making her "incompetent" under W.VA. CODE § 18A-2-8 to either hold or be recertified for the position. Respondent allowed Grievant to remain in her position after OEPA discovered her "educational deficiency," under the condition that she must obtain a GED to correct it. Respondent asserts it offered Grievant a reasonable period of time to correct her educational deficiency, by giving her approximately 7- 8 months to obtain a GED but she failed to meet the imposed deadline. Grievant contends that Respondent's action in terminating her because she was allegedly educationally unqualified was arbitrary and capricious in that her "high school diploma" was sufficient. Respondent proved Grievant's "high school diploma" was deficient under W. VA. CODE § 18A-2-5 and that it acted reasonably by asking Grievant to pass a high school equivalency exam. Grievant proved Respondent wrongfully terminated her, because it erroneously believed she was ineligible for recertification under W.VA. CODE § 18A-2-5 and, therefore, "incompetent" under W.VA. CODE § 18A-2-8. Grievant was provisionally educationally qualified under the contingency clause of W. VA. CODE § 18A-2-5 and, therefore, was "competent" and eligible for recertification. This clause permitted Respondent to recommend Grievant for recertification and allowed her to remain in her position, provided that she was continuously enrolled in an adult education program to obtain her GED or TASC and passed the exam within a reasonable time period, as prescribed by Respondent. Grievant further proved that Respondent arbitrarily and capriciously assigned an insufficient amount of time for Grievant to obtain her GED, which lead to her wrongful termination.

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

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<b><u>KEYWORDS:</u></b>	Probationary Employee; Dismissal; Misconduct; Suspension; Prank; Arbitrary and Capricious; Training
<b><u>CASE STYLE:</u></b>	<u>Conley III v. Division of Corrections/Huntington Work Release Center</u> DOCKET NO. 2016-0399-MAPS (2/16/2016)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent proved by a preponderance of the evidence that Grievant engaged in misconduct that justified his dismissal.
<b><u>SUMMARY:</u></b>	Grievant, a probationary employee, was dismissed from his position as a Correctional Officer II for alleged misconduct. Grievant denies Respondent's claims, and argues that dismissal was improper. Respondent demonstrated that Grievant engaged in unprofessional conduct, and encouraged two inmates in his charge to violate the facility rules in order to orchestrate a prank on another correctional officer, and that Grievant's dismissal was justified. Therefore, this grievance is DENIED.

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<b><u>KEYWORDS:</u></b>	Dismissal; Jurisdiction; Pay Increase; Circuit Court Order; Pay Grade; Hartley
<b><u>CASE STYLE:</u></b>	<u>Workman v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital</u> DOCKET NO. 2015-0873-DHHR (2/16/2016)
<b><u>PRIMARY ISSUES:</u></b>	Whether the Grievance Board has jurisdiction to hear this matter.
<b><u>SUMMARY:</u></b>	Grievant is employed by Respondent as a Health Service Assistant at Mildred Mitchell-Bateman Hospital. Grievant asserts he was improperly denied a 3% retentive rate of pay, citing State Board of Personnel Proposals 2668 and 2668A. 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:**

Termination; Probationary Employee; Unsatisfactory Work Performance; Sexual Innuendos; Sexually Provocative Language and Suggestions; Verbal Abuse

**CASE STYLE:**

Blake v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital

DOCKET NO. 2015-1091-CONS (2/29/2016)

**PRIMARY ISSUES:**

Whether Grievant prove by a preponderance of the evidence that his work for Respondent was satisfactory.

**SUMMARY:**

Grievant was a probationary employee, working as a Driver, at the William R. Sharpe, Jr. Hospital, a state psychiatric facility. Grievant was denied permanent employment status at the end of his probationary period in March 2015. This was due to Respondent's determination that his performance was unsatisfactory, specifically with regard to properly performing his duties. The record established that Grievant stated several sexually inappropriate conversations with patients and other Sharpe Hospital employees. When a probationary employee is terminated for reasons other than discipline, it is his burden to prove his services were satisfactory. In the instant case, Grievant was not able to meet his burden of proof and demonstrate that his performance was satisfactory. This grievance is denied.

**KEYWORDS:**

Termination; Violation of Workplace Standards; Theft of State Property; Circumstantial Evidence; Investigation

**CASE STYLE:**

Clagg, et al. v. Division of Highways

DOCKET NO. 2015-1631-CONS (2/10/2016)

**PRIMARY ISSUES:**

Whether Respondent proved that Grievants were guilty of theft of State property, violation of policy, or refusing to cooperate with an agency investigation.

**SUMMARY:**

Respondent had suffered the loss of expensive tools and materials from DOH Cabell County Maintenance Headquarters in recent years including chainsaws. When the DOH replaced a number of chainsaws, the management implemented a policy requiring all such tools to be locked in an equipment cage each evening and checked out by the crew leader when they were needed for a particular job. Crew leaders were advised that they were charged with ensuring that the equipment was returned to the cage after each shift and they would be held accountable if the equipment was not returned.

Grievant Clagg was recorded by a video camera removing a chainsaw from the equipment cage to be used on a job by the crew he was supervising. Grievant James was recorded with Crew Supervisor Clagg when the saw was taken from the building. The chainsaw was removed and both Grievants were fired for involvement in taking the chainsaw.

Respondent was unable to prove that either Grievant actually took the chainsaw or specifically knew how it disappeared. However, Grievant Clagg was specifically charged with the return of the equipment and his failure to meet that duty was grounds for dismissal under the totality of the circumstances and his grievance is DENIED. Respondent did not prove Grievant James was involved in the chainsaw loss and his grievance is GRANTED.

<b><u>KEYWORDS:</u></b>	Selection; Employer; Employee; Jurisdiction
<b><u>CASE STYLE:</u></b>	<u>King v. Division of Highways</u> DOCKET NO. 2016-0867-DOT (2/10/2016)
<b><u>PRIMARY ISSUES:</u></b>	Whether this grievance must be dismissed since Grievant is not employed by Respondent.
<b><u>SUMMARY:</u></b>	Grievant, and employee of the Department of Health and Human Resources, grieved her non-selection for a position with the Division of Highways, a division of the Department of Transportation. The grievance procedure was put in place to provide a mechanism for resolution of problems which arise in the workplace, between employees and their employer. It does not, by statute, provide a mechanism for a grievant to bring a grievance against a state agency that is not her employer. Accordingly, the grievance is dismissed.
<b><u>KEYWORDS:</u></b>	Demotion; Inappropriate Comments; Hostile Work Environment; Policy Violation; Code of Conduct
<b><u>CASE STYLE:</u></b>	<u>Brafford v. Regional Jail and Correctional Facility Authority/Potomac Highland Regional Jail</u> DOCKET NO. 2016-0178-MAPS (2/4/2016)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant's unacceptable conduct in his supervisory capacity warranted a demotion.
<b><u>SUMMARY:</u></b>	Grievant was demoted from his position of Captain at the Potomac Highland Regional Jail. Respondent alleges that Grievant made inappropriate comments to a female subordinate that violated agency policy and created a hostile work environment. Grievant does not deny the comments, but argues that any comments that were made were innocent and misconstrued. The limited record proved that Grievant made inappropriate comments to a female subordinate that violated agency policy and contributed to a hostile workplace. While the penalty was severe, it was not disproportionate with the offense given Grievant's supervisory position. The grievance is denied.
<b><u>KEYWORDS:</u></b>	Default; Mediation; Settlement Authority; Required Response
<b><u>CASE STYLE:</u></b>	<u>Wise v. Division of Highways</u> DOCKET NO. 2015-1263-DOTDEF (2/9/2016)
<b><u>PRIMARY ISSUES:</u></b>	Whether settlement authority of person Respondent sends to a mediation can be a default issue.
<b><u>SUMMARY:</u></b>	Grievant alleged a default occurred because he asserted that the person who appeared at the mediation session did not have authority to settle the grievance. This does not constitute a required response, and is not subject to the default provisions.

**KEYWORDS:** Non-Selection; Hiring Policy; Experience; Discrimination; Interview; Favoritism; Most Qualified Candidate; Arbitrary and Capricious; Moot; Timeliness

**CASE STYLE:** Tanner v. Division of Highways  
DOCKET NO. 2015-1303-DOT (2/16/2016)

**PRIMARY ISSUES:** Whether Grievant proved he was the most qualified applicant or that the selection process was arbitrary and capricious.

**SUMMARY:** Grievant is employed by Respondent as a Transportation Worker 2, Equipment Operator. Grievant protests his non-selection for the position of Transportation Crew Supervisor 1 and general discrimination. Grievant proved that the selection decision was arbitrary and capricious because the decision-maker made his decision based only on his personal knowledge of and relationship with the successful candidate and refused to consider Grievant's experience with Respondent in another county. Grievant cannot be awarded the position because he failed to prove that he was the most qualified candidate, but, as the decision was arbitrary and capricious, the position must be reposted. One of Grievant's claims of discrimination is now moot, and Grievant failed to prove the remainder of his claims. Accordingly, the grievance is granted in part and denied in part.

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**KEYWORDS:** Termination; Probationary Employee; Sleeping on Post; Unsatisfactory Performance; Discrimination

**CASE STYLE:** Austin v. Division of Corrections/Mount Olive Correctional Complex  
DOCKET NO. 2016-0125-MAPS (2/17/2016)

**PRIMARY ISSUES:** Whether Grievant, a probationary employee, proved that his overall performance was satisfactory.

**SUMMARY:** Grievant was a probationary Correctional Officer assigned to Mount Olive Correctional Complex, the State's maximum security facility which houses inmates who have been convicted of the most serious offences. During his short employment at Mount Olive, Grievant had been warned to stay alert while on duty and had been found sleeping on post twice. Respondent decided not to retain Grievant as a permanent employee. Grievant argues that he is a good employee and his dismissal constitutes discrimination since the typical penalty for a second "sleeping on post" offence for a permanent employee is a ten-day suspension. Grievant did not prove that his performance as a probationary employee was satisfactory. Respondent was justified in terminating Grievant's probationary employment.

**KEYWORDS:** Selection; Motion to Dismiss; Untimely Filing; Statutory Time Limits

**CASE STYLE:** Conard, et al. v. Division of Highways  
DOCKET NO. 2015-0714-CONS (2/19/2016)

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

**SUMMARY:** Considering when they were unequivocally informed by Respondent of the event giving rise to their grievances, both Grievants filed their initial grievances after the time limit set by statute. The grievances must be dismissed as untimely filed.

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**KEYWORDS:** Selection; Grievance Statement; Return to Work; Discrimination, Alternative Employment

**CASE STYLE:** Everson v. Division of Highways  
DOCKET NO. 2015-1328-DOT (2/22/2016)

**PRIMARY ISSUES:** Whether Grievant demonstrated that Respondent actions in failing to offer him the identified position of employment was unlawful.

**SUMMARY:** Grievant specifically grieved that he was not offered a “mail carrying job” (aka Driver 2 position) in District 3. Grievant was formerly employed by Respondent as a Transportation Worker 2. Grievant sustained an on-the-job injury that resulted in permanent significant impairment and medical restrictions. Grievant reached maximum medical improvement and was cleared to light duty work. Grievant is unable to perform the essential functions of his former position with or without reasonable accommodation.

Much of Grievant’s argument alleges that Respondent had a duty to provide him an employment position pursuant to relevant ADA rules and a prior Grievance Board ruling. Grievant did not meet his burden that Respondent failed to offer him the identified position, which was posted prior to Grievant’s full participation with the agency’s rehabilitation program. Grievant pursued an open ended indictment of Respondent’s failure to provide Grievant with alternative employment. Respondent objected to Grievant filing an untimely claim specific grievance and pursuing an opened ended allegation of misfeasance. Grievant failed to establish a violation of the specifically alleged offense. Grievance DENIED.