WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

SYNOPSIS REPORT

Decisions Issued in February 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.

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: Tenure; Promotion; Arbitrary and Capricious

CASE STYLE: Huffman v. Marshall University

DOCKET NO. 2016-1631-MU (2/10/2017)

PRIMARY ISSUES: Whether Grievant demonstrated that Marshall is equitably estopped from penalizing him for this mistake.

SUMMARY: Grievant is employed by Respondent Marshall as an Assistant Professor in its College of Information Technology and Engineering. Grievant was hired without a terminal degree in Engineering, and his letter of appointment stated that his tenure application date was to occur during the 2015-2016 school year. In 2014, Marshall adopted new policies governing tenure and promotion which Grievant reasonably interpreted to require that he apply for tenure and promotion concurrently and, as a probationary faculty member without a terminal degree in his teaching field, allowed him to compete for promotion and tenure at the same time during the 2016-2017 academic year. During the 2013-2014 academic year, Grievant submitted a pre-tenure review portfolio to the Personnel Committee of his college in which he affirmatively stated his intention to apply for tenure in January 2017. In these particular circumstances, Marshall is equitably estopped from denying Grievant an opportunity to compete for tenure based upon his failure to submit an application for tenure during the 2015-2016 academic year. Accordingly, this grievance will be granted.

TOPICAL INDEX

COUNTY BOARDS OF EDUCATION

PROFESSIONAL PERSONNEL

KEYWORDS: Student Overage Pay; Co-Teacher; Compensation; Planning Period; Duty-Free Lunch; Recess; Calculation; Stare Decisis

CASE STYLE: Bane, et al. v. Hancock County Board of Education

DOCKET NO. 2016-0558-CONS (2/21/2017)

PRIMARY ISSUES: Whether Grievants are entitled to overage pay for recess, planning periods, lunch, and when there is a co-teacher in the room.

SUMMARY: Grievants argued the calculation of student overage pay was incorrect, in that the time allocated to lunch, recess, and planning periods was deducted from the total number of minutes for which they were paid each day. Planning periods must be included in the calculation of student overage pay, but duty-free lunch is not required to be so included. Grievants did not demonstrate that recess time must be included in the calculation of student overage pay. Grievants also argued that Respondent should not be adjusting the student-teacher ratio when a special education co-teacher is assigned to the classroom, that is, if there are 22 students in a Kindergarten classroom with the Kindergarten teacher and a special education teacher, this should be calculated as a 2 student overage. The presence of a special education co-teacher has no impact on the determination as to whether the classroom teacher is entitled to overage pay. In other words, if there are 22 students enrolled in the Kindergarten classroom, the Kindergarten teacher is entitled to overage pay for 2 students, even when there is a special education teacher also assigned to the classroom.

TOPICAL INDEX

COUNTY BOARDS OF EDUCATION

SERVICE PERSONNEL

KEYWORDS: ECCAT Certification; Seniority; Training; Reduction in Pay; Contract; Arbitrary and Capricious

CASE STYLE: Gerrard, et al. v. Brooke County Board of Education

DOCKET NO. 2016-1393-CONS (2/2/2017)

PRIMARY ISSUES: Whether Respondent properly notified Grievant that her contract as an ECCAT was being terminated.

SUMMARY: Grievant was transferred from an ECCAT Kindergarten position to an Aide position in another school, although she held more seniority as an ECCAT than at least one other service employee in an ECCAT position, who was allowed to maintain her ECCAT position. Although ECCATs are Aides who are qualified to fill other Aide positions, a more senior Aide who lacks ECCAT certification is not permitted to fill an ECCAT position. In addition, ECCATs are in a higher pay grade than Aides. Thus, Grievant suffered a loss in pay as a result of being transferred to an Aide position.

The school board failed to comply with W. Va. Code § 18A-4-8g(d) which, when read in Pari materia with W. Va. Code § 18A-4-8e, 18A-4-8 and 18A-4-8a, requires a board needing to reduce the number of ECCATs by reduction in force, to eliminate the ECCAT with the least seniority. Instead, Grievant was required to displace a less senior Aide. In addition, the school board failed to follow W. Va. Code § 18A-2-6 when it omitted any reference to that statute, or the proposed termination of Grievant's contract as an ECCAT, when it notified Grievant that she was being proposed for transfer in accordance with W. Va. Code § 18A-2-7. Therefore, this grievance must be granted.

KEYWORDS: Overtime; Extra-Duty Assignment; Job Description; Blueprint; Competency Test; Arbitrary and Capricious; Advisory Opinion

CASE STYLE: Shaffer v. Kanawha County Board of Education

DOCKET NO. 2015-1295-KanED (2/17/2017)

PRIMARY ISSUES: Whether Grievant proved by a preponderance of the evidence that he was entitled to the overtime compensation.

SUMMARY: At the times relevant herein, Grievant was employed by Respondent as a heavy equipment operator. Grievant elected to take the blueprint reading component of the carpenter classification competency test when it was offered on May 9, 2015. On that same day, overtime work was offered to the heavy equipment operators, but Grievant was not available to work because he was already scheduled to take the test. Grievant did not pass the blueprint reading test. However, Grievant has not grieved such, and has not grieved any non-selection as a result of not passing the test. Grievant argues that he is entitled to be paid for the overtime work he missed because he was taking the test. Grievant argues that he should not have had to take the test; therefore, he is entitled to the overtime pay he lost. Respondent denies Grievant's claims. Grievant failed to prove his claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

TOPICAL INDEX

STATE EMPLOYEES

KEYWORDS: Enterprise Resource Planning Board; Work Schedule; Non-Uniformed Employees; Policy; Reprisal; Retaliation; Workweek; Jurisdiction; Management Decisions; Remedy; Relief

CASE STYLE: Harper, et al. v. Division of Corrections/Mount Olive Correctional Complex

DOCKET NO. 2016-1113-CONS (2/1/2017)

PRIMARY ISSUES: Whether Grievants demonstrated that requiring some of them to work late more than one day a week violated policy, or that this scheduling was a retaliatory action.

SUMMARY: The Enterprise Resource Planning Board changed the workweek for all state employees effective January 1, 2016, to begin on Saturday morning at 12:00 a.m. Previously, the workweek began on Sunday morning at 12:00 a.m. This change resulted in employees who worked only one weekend a month, being required to work more than five days in a row, as Respondent did not allow employees to work four ten-hour days. Grievants are non-uniformed employees. Their original complaint was that they were required to work seven or ten days in a row when they were scheduled to work a weekend, which they are required at times to do, and they wanted the option to work four ten-hour days so they would have the Friday off work before they had to work a weekend. By the time the level three hearing was held, Respondent had changed its procedure, and was allowing non-uniformed employees to work four ten-hour days preceding the weekend they were scheduled to work, if they wished to do so, as Grievants had requested. Grievants were not happy with this accommodation because some of them were being scheduled to work until 8:00 p.m. more than one day a week when they were scheduled for ten-hour days. Grievants asserted this was retaliatory, and in violation of policy, and they also asserted that the change in the workweek was made to avoid overtime, in violation of the Fair Labor Standards Act. Grievants are not employees of the Enterprise Resource Planning Board, and cannot grieve the change in the workweek as their employer had nothing to do with this decision. Grievants did not demonstrate that requiring some of them to work late more than one day a week violated any policy, or that this scheduling was a retaliatory action.

KEYWORDS: Termination; Probationary Employee; Falsifying Document; Misconduct; Credibility

CASE STYLE: Hall v. Department of Health and Human Resources/Bureau for Children and Families

DOCKET NO. 2017-0877-DHHR (2/7/2017)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence that a probationary employee with a good employment performance history falsified signatures on a document.

SUMMARY: Grievant, a probationary employee, was dismissed for allegedly falsifying a document by signing a parent's name to it. Otherwise, Grievant was a good employee with a successful job performance record. Given the overall record and the relative credibility of the witnesses, Respondent did not prove by a preponderance of the evidence that Grievant was guilty of misconduct.

KEYWORDS: Selection; Vacancy; Timeliness; Fifteen Days; Statutory Time Lines; Discovery Rule; Motion to Dismiss

CASE STYLE: Powell v. Division of Highways and Terra Goins, Intervenor

DOCKET NO. 2016-0870-DOT (2/8/2017)

PRIMARY ISSUES: Whether the grievance was timely filed after Grievant allegedly discovered the successful applicant's qualification six months after the hiring date.

SUMMARY: Grievant contested the filling of a vacant position based upon the belief that the successful applicant did not meet the minimum qualification for the position. He received notice that he was not selected for the contested position more than six months before he filed his grievance. Respondent argues that the grievance was not filed within the mandatory time frame set by statute and must be dismissed. Grievant asserts that the time period for filing the grievance did not begin until he talked with the successful applicant and discovered her lack of necessary experience. He filed the grievance within fifteen days of that conversation. Under normal circumstances the time period for contesting a selection decision begins to run when the employee is notified that he or she did not receive the position. The grievance was not timely filed.

KEYWORDS: Termination; Insubordination; Hostile Work Environment; Disruptive Behavior; Misconduct; Credibility; Retaliation; Reprisal

CASE STYLE: Deyerle v. Department of Health and Human Resources/Bureau for Public Health

DOCKET NO. 2015-0860-DHHR (2/14/2017)

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

SUMMARY: Grievant had been employed as an Office Assistant III in the Office of Nutrition Services within the Bureau for Public Health, and her employment had been terminated. Grievant successfully grieved the termination of her employment and was reinstated as an Office Assistant II in the Office of Maternal, Child and Family Health, within the Bureau for Public Health. Grievant was again terminated from her employment. Grievant filed the instant grievance alleging Respondent terminated her employment without good cause and in retaliation for her previous successful grievance. Respondent proved it had good cause to terminate Grievant's employment and that it did not retaliate against Grievant. Accordingly, the grievance is denied.

KEYWORDS: Termination; Job Duties; Failure to Obtain a CDL

CASE STYLE: Leonard v. Division of Highways

DOCKET NO. 2017-0889-DOT (2/3/2017)

PRIMARY ISSUES: Whether Respondent proved that Grievant's employment was terminated for good cause.

SUMMARY: Grievant was terminated from her position for failure to obtain a Class A CDL license pursuant an agreement she entered into at the beginning of her employment. Respondent extended the cutoff date in an attempt to allow Grievant to obtain the Class A CDL license. Respondent proved by a preponderance of the evidence that Grievant's employment was terminated for good cause. This grievance is denied.

KEYWORDS: Classification; Pay; Motion to Dismiss; Timelines; Fifteen Days; Continuing Practice; Continuing Damage

CASE STYLE: Johnson v. Department of Health and Human Resources/Welch Community Hospital

DOCKET NO. 2015-1116-DHHR (2/15/2017)

PRIMARY ISSUES: Whether this grievance was timely filed.

SUMMARY: Grievant was employed by Respondent at Welch Community Hospital from 1975 until her retirement effective October 24, 2014. Grievant alleged that, in 1986, she did not receive a pay increase upon her promotion from Clerk 2 to Clerk 3. Respondent asserts the grievance is untimely. Grievant asserts the grievance is timely because the failure to grant the pay increase was a continuing practice that could be grieved any time within fifteen days of the receipt of Grievant's last paycheck. The greivance does not involve a continuing practice, but rather, continuing damage. Respondent proved the grievance is untimely filed. Accordingly, the grievance is dismissed.

KEYWORDS: Pay; Motion to Dismiss; Jurisdiction; Employer; Employee

CASE STYLE: Jackson v. State Auditor's Office

DOCKET NO. 2017-1152-AUD (2/15/2017)

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

SUMMARY: Grievant is employed by Concord University and New River Community and Technical College. Grievant filed the grievance against the West Virginia State Auditor's Office. Grievant is not employed by the West Virginia State Auditor's Office. The Grievance Board lacks jurisdiction in this matter. Accordingly, the grievance must be dismissed.

KEYWORDS: Compensation; Discrimination; Job Duties; Geographical Area; Testing; Extra Work; Compensation; Extra Duty

CASE STYLE: Jackson v. Division of Labor

DOCKET NO. 2016-1114-DOC (2/6/2017)

PRIMARY ISSUES: Whether Grievant proved his claims of discrimination by a preponderance of the evidence.

SUMMARY: Grievant is employed as a Labor Inspector 2 by the Respondent, and is assigned to cover a five-county area in the eastern panhandle of the state. Over the years, Grievant became assigned to conduct propane testing outside his five-county geographical area. First, he worked with another employee, then he was assigned to do the work on his own. Grievant is now assigned to perform propane testing in 23 of the 55 counties in the state. Another labor inspector covers the other 22 counties. Grievant asserts that Respondent has discriminated against him by assigning him to consistently work in 18 counties outside his regular geographical area, and that he is entitled to a pay increase for performing this extra work. Respondent denies Grievant's claims. Grievant failed to prove his claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

KEYWORDS: Suspension; Resignation; Moot; Relief

CASE STYLE: Sizemore v. Department of Health and Human Resources/Jackie Withrow Hospital

DOCKET NO. 2017-0947-DHHR (2/17/2017)

PRIMARY ISSUES: Whether this grievance is moot due to Grievant's voluntary resignation.

SUMMARY: Grievant alleged Respondent suspended her from employment, refused to pay for a required physical examination, removed her from her regular assignment, retaliated against her for absence arising from a workers compensation injury, and refused to make reasonable accommodations. Respondent moved to dismiss the grievance asserting mootness due to Grievant's voluntary resignation from employment. Respondent asserted Grievant had not been suspended and had not been charged for the required physical examination. Despite notice and opportunity to be heard, Grievant did not respond to the motion to dismiss. Respondent proved the grievance is now moot due to Grievant's voluntary resignation. Accordingly, Respondent's motion to dismiss should be granted, and this grievance, dismissed.

KEYWORDS: Sick Leave; Holiday Pay; Arbitrary and Capricious

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

DOCKET NO. 2016-1018-CONS (2/16/2017)

PRIMARY ISSUES: Whether Grievants proved that Respondent violated any policy, rule, law or regulation or otherwise acted in an arbitrary or capricious manner.

SUMMARY: Grievants are employed full-time in various classifications at Sharpe Hospital. Grievants argue that Respondent should not interpret a Division of Personnel Rule to require employees to use holiday leave during a day in which they have requested sick leave. Grievants request that they be able use sick leave and bank holiday time for a later date. Grievants failed to meet their burden of proof and establish that Respondent's interpretation of the applicable rule was in any way unreasonable or arbitrary and capricious.

KEYWORDS: Termination; Resignation; Moot

CASE STYLE: Redman v. Division of Corrections/Martinsburg Correctional Center

DOCKET NO. 2017-1349-MAPS (2/1/2017)

PRIMARY ISSUES: Whether Grievant's resignation rendered this grievance moot.

SUMMARY: Grievant was notified that he would be dismissed from his employment for misconduct. Prior to the effective date of the dismissal, Grievant resigned his employment, and his resignation was accepted by Respondent. The dismissal was never effective. Grievant's resignation rendered this grievance moot.

KEYWORDS: Work Accommodations; Resignation; Motion to Dismiss; Relief; Moot; Advisory Opinion

CASE STYLE: Keeling v. Division of Labor

DOCKET NO. 2017-0593-DOC (2/27/2017)

PRIMARY ISSUES: Whether Respondent proved this grievance is moot due to Grievant's resignation.

SUMMARY: Grievant grieved his alleged change in work assignment and charge to medical leave. As relief, Grievant requested to be made whole in every way including cessation and reversal of adverse treatment. Respondent moved to dismiss the grievance asserting mootness due to Grievant's resignation from employment. Grievant, by representative, filed a response to the motion providing he has no objection. As the grievance only involves conditions of employment, Respondent proved the grievance is now moot due to Grievant's resignation. Accordingly, Respondent's motion to dismiss should be granted, and this grievance, dismissed.

KEYWORDS: Unauthorized Leave; Improvement Plan; Reprimand; Resignation; Motion to Dismiss; Relief; Moot; Advisory Opinion

CASE STYLE: Keeling v. Division of Labor

DOCKET NO. 2017-0499-DOC (2/27/2017)

PRIMARY ISSUES: Whether Respondent proved this grievance is moot due to Grievant's resignation.

SUMMARY: Grievant grieved his placement on an improvement plan and a reprimand. As relief, Grievant requested to be made whole in every way including removal of plan and any and all record of discipline. Respondent moved to dismiss the grievance asserting mootness due to Grievant's resignation from employment. Grievant, by representative, filed a response to the motion providing he has no objection. Respondent proved the grievance is now moot due to Grievant's resignation. Accordingly, Respondent's motion to dismiss should be granted, and this grievance, dismissed.

KEYWORDS: Selection; Qualifications; Supervisory Experience; Arbitrary and Capricious

CASE STYLE: Riddle v. Department of Health and Human Resources/Bureau for Children and Families

DOCKET NO. 2016-1268-DHHR (2/23/2017)

PRIMARY ISSUES: Whether Grievant proved that the selection decision was arbitrary and capricious.

SUMMARY: Grievant alleges that the selection process was flawed because Respondent failed to consider Grievant's supervisory experience earned outside her employment with the DHHR. Respondent followed the process established by DHHR Policy Memorandum 2106. for filing vacant positions within the agency. The procedure was not arbitrary, capricious or in violation of the policy.