

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in March 2015

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

<u>KEYWORDS:</u>	Timeliness; Statutory Time Limits; Discovery Rule Exception; Retaliation; Reprisal; Hearsay; Make-Whole Remedy; Full-Time Position
<u>CASE STYLE:</u>	<u>Frost v. Bluefield State College</u> DOCKET NO. 2013-2074-BSC (3/19/2015)
<u>PRIMARY ISSUES:</u>	Whether Grievant established a prima facie case of retaliation. Whether Respondent established that any of the articulated bona fide reasons for making changes to the position discussed.
<u>SUMMARY:</u>	Grievant is employed as a Counselor II by Respondent BSC. He has been employed by BSC since September 1995, initially working in the Physical Plant as a Painter, Trades Worker and Trades Worker Lead. Grievant has filed several grievances during his tenure at BSC. Grievant established by a preponderance of the evidence that BSC's Vice President for Student Affairs and Enrollment Management retaliated against Grievant for engaging in extensive grievance activity by intentionally and improperly manipulating the terms and conditions of employment of the Director of Intramurals and Wellness Programs which was posted in or about June 2011 for the express purpose of deterring Grievant from submitting an application for the position. BSC failed to establish that the legitimate reasons it posited for making these changes constituted anything more than a pretext for prohibited retaliation. Accordingly, Grievant is entitled to a make-whole remedy involving reinstatement of the status quo as it would have existed in 2011, absent any prohibited retaliation.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Private Sector Experience Credit; Non-Relegation Clause; Ultra Vires; Rate of Pay

CASE STYLE: Hooton v. Preston County Board of Education
DOCKET NO. 2014-1202-PreED (3/3/2015)

PRIMARY ISSUES: Whether Grievant established a violation of any statute, policy, rule, or regulation that would entitle her to continue to receive her rate of pay awarded in error.

SUMMARY: Grievant is challenging the elimination of her private sector work experience credit. The decision of the former superintendent to grant private sector experience credit, without approval from the Preston County Board of Education, the West Virginia Department of Education or the West Virginia Board of Education, was an error that the Respondent was required to correct. In addition, the decision of the former superintendent to grant the private sector experience credit was an unauthorized action. This grievance is denied.

KEYWORDS: Reduction In Force; Contract; Substitute Seniority; Random Selection; Policy

CASE STYLE: Fields v. Mingo County Board of Education
DOCKET NO. 2014-1023-MinED (3/18/2015)

PRIMARY ISSUES: Whether Grievant met her burden of proof and demonstrated that a second random drawing between employees holding identical seniority within the same classification category was in error.

SUMMARY: Grievant and four other Cooks originally began work as regular Cooks with Respondent on August 13, 2012. A tiebreaker drawing was conducted among the five tied Cooks on August 16, 2012, resulting in Grievant being second in seniority, and Cook Dillon being number three. Thereafter, Grievant experienced a break in service as a regular Cook and accumulated substitute Cook experience. Once Grievant returned to work as a regular Cook, the Respondent perceived that there was a new tie that had to be broken between Grievant and Cook Dillon. A tiebreaker was conducted between the two tied Cooks on February 7, 2014. Cook Dillon won the tiebreaker and was awarded higher seniority than the Grievant. The record established that, as Grievant argues, the original tiebreaker from 2012 should have been permanent since Grievant and Cook Dillon held identical seniority within the same classification category. This grievance is granted.

KEYWORDS: Contract; Reduction; Modified; Salary Supplement; Notice; Opportunity; Emergency; Fiscal; Budget; Levy

CASE STYLE: Goff, et al. v. Calhoun County Board of Education

DOCKET NO. 2015-0049-CONS (3/10/2015)

PRIMARY ISSUES: Whether Grievants proved that Respondent's elimination of their local salary supplements was improper. Whether Grievants proved that Respondent violated the notice and hearing provisions of the West Virginia Code when it reduced their contract terms.

SUMMARY: Grievants are employed by Respondent in various service personnel positions. In May and June 2014, Respondent was faced with a significant budget deficit. In May 2014, Respondent determined that it needed to eliminate employees' \$600.00 salary supplements to save money, and obtained the required permission from the State Board of Education to do so. These salary supplements had not been funded by a levy; they had been paid from local funds. Respondent eliminated these salary supplements in late June 2014 without providing Grievants notice and opportunity for a hearing. Thereafter, on June 30, 2014, the State Superintendent of Schools sent a letter to Respondent informing it that its proposed budget was insufficient to maintain the proposed educational programs as well as its other financial obligations for the year, and ordered Respondent to reduce employees' extended employment contracts that were in excess of 200 days to reduce salary costs. This letter was received during the afternoon June 30, 2014. Based upon the order of the State Superintendent, Respondent held an emergency meeting that evening during which the order of the State Superintendent was implemented, thereby reducing the contract term of those employees who held extended employment contracts in excess of 200 days. The affected employees received no notice of this change to their contract or an opportunity for a hearing before the same was implemented. Grievants assert that Respondent violated various provisions of the West Virginia Code when it eliminated the salary supplements and reduced their contract terms. Respondent denies Grievants' claims, and asserts it acted lawfully pursuant to certain emergency provisions of the West Virginia Code, and that it was not required to follow the standard notice and hearing provisions in this circumstance. Grievants proved by a preponderance of the evidence that Respondent eliminated their local salary supplements in violation of law. However, Grievants failed to prove by a preponderance of the evidence that Respondent violated West Virginia law when it reduced their contract terms pursuant to the order of the State Superintendent of Schools. Therefore, this grievance is GRANTED IN PART, and DENIED IN PART.

KEYWORDS: Timeliness; Untimely; Dismissal

CASE STYLE: Thomas v. Logan County Board of Education
DOCKET NO. 2015-0280-LogED (3/13/2015)

PRIMARY ISSUES: Whether Grievant timely appealed to level two of the grievance process.

SUMMARY: Grievant filed her appeal to level two more than ten business days after the issuance of the level one decision. Accordingly, Grievant's level two appeal was untimely filed. Therefore, this grievance should be dismissed.

TOPICAL INDEX
STATE EMPLOYEES

KEYWORDS: Shift Differential; Interpretation; Deference; Clear and Unambiguous; Internal Policy

CASE STYLE: Mickey, et al. v. Department of Health and Human Resources/Jackie Withrow Hospital
DOCKET NO. 2014-0244-CONS (3/10/2015)

PRIMARY ISSUES: Whether Grievants proved that they are entitled to receive shift differential pay.

SUMMARY: Grievants are employed in the Dietary Department at Jackie Withrow Hospital. Despite the fact that some of the hours they work during their shift fall within the facility evening and facility night shift, they are not paid a shift differential for those hours. Grievants argue that they are entitled to receive the shift differential pursuant to the Respondent shift differential policy. However, Respondent asserts that Grievants are not entitled to receive the shift differential pursuant to the policy because they do not work in a 24-hour department and because they do not work the full evening or night shifts. Respondent asserts that its interpretation of the policy is entitled to deference. Grievants proved their claims by a preponderance of the evidence. The plain language of the shift differential policy is clear and unambiguous on its face; therefore, no interpretation of the policy is warranted. Therefore, this grievance is GRANTED.

KEYWORDS: Demotion; Failing to Report; Supervisor; Security Philosophy; Progressive Discipline; Disciplinary History; Mitigation

CASE STYLE: Farley v. Division of Corrections/Lakin Correctional Center
DOCKET NO. 2014-0546-MAPS (3/9/2015)

PRIMARY ISSUES: Whether Respondent proved the demotion of Grievant was justified.

SUMMARY: Grievant became involved in an extraordinary incident involving an officer who could not stay awake. Grievant was ultimately demoted to a non-supervisory position for failing to report his co-worker for sleeping on the job, and not reporting the serious nature of the co-worker's condition. Respondent proved by a preponderance of the evidence that Grievant failed to report the problem with his co-worker in violation of the Facility's Security Orders and Regulations.

KEYWORDS: Termination; Good Cause; Qualifications; Driver's License; Confidentiality; Investigation

CASE STYLE: Fertig v. Department of Health and Human Resources/Bureau for Children and Families
DOCKET NO. 2015-0572-CONS (3/27/2015)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence that it had good cause to terminate Grievant's employment.

SUMMARY: Grievant was employed by Respondent as a Family Support Specialist. DHHR received a report that Grievant was violating certain agency policies pertaining to public assistance benefit cases. Thereafter, DHHR referred the matter for investigation through the Office of Inspector General. As a result of the investigation, Respondent charged Grievant with a number of policy infractions, suspended her pending further investigation, and ultimately terminated her employment. Grievant denied all of the charges brought against her except for those pertaining to her having a revoked driver's license. Respondent proved by a preponderance of the evidence that Grievant does not meet the minimum qualifications for the Family Support Specialist position, and that she violated DHHR confidentiality policy by having her husband drive her to conduct home visits for DHHR clients. Therefore, the grievance is DENIED.

KEYWORDS: Disciplinary Actions; Demotion; Lack of Leadership; Mitigation

CASE STYLE: Salser v. Division of Corrections/Lakin Correctional Center
DOCKET NO. 2014-0540-MAPS (3/4/2015)

PRIMARY ISSUES: Whether Respondent proved the charges against Grievant and that demotion was an appropriate penalty under rule and policy.

SUMMARY: Grievant was demoted from Correctional Officer III to Correctional Officer II for her failure to act when her commanding officer fell asleep for more than an hour and could not be awoken, for breaching security by then leaving her commanding officer alone in Central Control, and for her previous disciplinary history. Respondent proved the charges against Grievant and that demotion was an appropriate penalty under rule and policy. Grievant failed to prove that mitigation was warranted given Grievant's previous performance as a supervisor, her disciplinary history, and the seriousness of her conduct. Accordingly, the grievance is denied.

KEYWORDS: Res Judicata; Motion to Dismiss; Timeliness; Misclassification

CASE STYLE: Weaver v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital and Division of Personnel
DOCKET NO. 2014-0861-DHHR (3/30/2015)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence that this grievance was untimely filed.

SUMMARY: Grievant asserts that his is misclassified, and that his duties fall more in line with the HVCA Specialist classification. Respondent moved to dismiss this grievance as untimely filed and/or as barred by the doctrine of res judicata. Respondent, Department of Health and Human Resources, proved by a preponderance of the evidence that this grievance was untimely filed. Accordingly, the grievance is dismissed.

KEYWORDS: Selection Process; Interview Team; Most Qualified Applicant; Supervisory Position; Arbitrary and Capricious

CASE STYLE: Butler v. Department of Health and Human Resources/Bureau for Children and Families
DOCKET NO. 2014-0539-DHHR (3/16/2015)

PRIMARY ISSUES: Whether Grievant demonstrated that the selection decision was unlawful, unreasonable, or arbitrary and capricious.

SUMMARY: This grievance was filed when Grievant was not selected for a posted CPS Supervisor position. Grievant asserted that the successful applicant was pre-selected for the position, and that he was the more qualified applicant. Grievant did not present evidence to support his assertions, nor did he demonstrate a flaw in the selection process, or that the selection was otherwise unlawful, unreasonable, or arbitrary and capricious.

KEYWORDS: Random Drug and Alcohol Test; Positive Alcohol Test; Follow-Up Test; Safety-Sensitive Position; Failure to Take Test; Refusal to Test; Due Process Rights; Predetermination Conference

CASE STYLE: Baker v. Division of Highways

DOCKET NO. 2015-0236-DOT (3/18/2015)

PRIMARY ISSUES: Whether Respondent proved it had good cause to dismiss Grievant from employment when Grievant held a safety-sensitive position, had failed one alcohol test, and had failed to report for a follow-up drug and alcohol test.

SUMMARY: Grievant was employed as a Transportation Worker 2 Equipment Operator and was dismissed from employment for his second violation of Respondent's drug and alcohol testing policy. Respondent proved it had good cause to dismiss Grievant from employment when Grievant held a safety-sensitive position, had failed one alcohol test, and had failed to report for a follow-up drug and alcohol test. Grievant's excuse for his failure to appear for testing was not adequate. Although Respondent failed to hold a predetermination conference prior to requiring Grievant's separation from employment, under the circumstances Grievant received sufficient notice and opportunity to be heard. Accordingly, the grievance is denied.

KEYWORDS: Job Duties; Unsatisfactory Job Performance; Breach of Security; Training; Security Checks; Policy; Progressive Discipline; Good Cause; Mitigation

CASE STYLE: Foster v. Division of Corrections/Mount Olive Correctional Complex

DOCKET NO. 2014-1320-MAPS (3/20/2015)

PRIMARY ISSUES: Whether Respondent demonstrated good cause for dismissal of Grievant from employment.

SUMMARY: Grievant protests his dismissal from employment with Respondent. Termination of employment is a severe disciplinary action. During the course of Grievant's employment, it is documented that he has a history of behavioral and security related issues. Respondent argued that given the nature of the employer's business, and the fact that it is a high-security correctional facility, Grievant's failure to properly perform his duties and his conduct in falsifying daily log is a serious security breach. Evidence shows that Grievant failed to follow proper procedure, policy and training when performing his security related duties. In the circumstances of this matter the disciplinary action taken cannot be considered as discriminatory, arbitrary or capricious. Grievance is DENIED.

KEYWORDS: Classified Employee, Dismissal; Insubordination; Gross Misconduct; Arbitrary and Capricious, Employee Performance Appraisal; Probationary Employee; Good Cause

CASE STYLE: Poke v. Human Rights Commission

DOCKET NO. 2014-1196-HRC (3/18/2015)

PRIMARY ISSUES: Whether Respondent established that Grievant's conduct demonstrated gross misconduct warranting termination of employment of a classified employee.

SUMMARY: Grievant protest her dismissal from employment with Respondent. Grievant argues her termination was based upon inaccurate factual information; the disciplinary imposed was not for just cause and was arbitrary and capricious. Grievant maintains that her discharge was unjust and wrong. Respondent maintains that the discharge of Grievant was appropriate.

Grievant had proprietary interest in her employment. Respondent was aware that Grievant had achieved regular employee status. Respondent perceived Grievant to be a difficult employee to manage. Respondent lost faith in Grievant's ability to perform her assigned duties in a proficient and agency approved manner. Prior to the termination meeting, Respondent did not sufficiently indicate perceived performance deficiencies to Grievant or fully communicate that her performance was deemed unduly detrimental to the operations of the agency. Grievant was terminated for alleged gross misconduct.

A classified state employee is entitled to fundamental safeguards, and/or notice pertaining to work place performance that was not provided to Grievant. Termination of employment is a severe disciplinary action and should not be an arbitrary or capricious action. Respondent demonstrated reservation regarding select conduct of Grievant but the act of gross misconduct and/or insubordination by an employee demands an action or omission of conduct more than was established. In the circumstance of this case, Respondent did not demonstrate by a preponderance of the evidence that termination of Grievant's employment was justified. There are procedural protocols for identifying, educating, and correcting classified employees behavior. Respondent established Grievant's behavior was not necessarily ideal employee conduct; however did not establish by a preponderance of the evidence that Grievant's action(s) constituted gross misconduct. Grievance Granted

KEYWORDS: Classification; Minimum Qualifications; Valid Driver's License; Favoritism; Discrimination; Similarly-Situated Employee; Due Process; Arbitrary and Capricious

CASE STYLE: Rinehart v. Division of Highways
DOCKET NO. 2014-0984-DOT (3/25/2015)

PRIMARY ISSUES: Whether Respondent met its burden of proving it had good cause to dismiss Grievant.

SUMMARY: Grievant was employed in a classification which required that he maintain a valid driver's license. Grievant lost his driver's license as a result of being arrested and convicted for Driving Under the Influence of Alcohol. Respondent terminated Grievant's employment. Respondent asserts it terminated Grievant because he no longer was able to meet the minimum qualification of the job. Respondent has met the burden of proof in this case. This grievance is DENIED.

KEYWORDS: Discretionary Pay Raise; Back Pay; Discrimination; Favoritism

CASE STYLE: Boggess v. Public Service Commission
DOCKET NO. 2015-0079-PSC (3/25/2015)

PRIMARY ISSUES: Whether Grievant demonstrated a violation of any statute, rule, policy, procedure or regulation which requires that his approved internal equity pay raise be made retroactive.

SUMMARY: Grievant is currently employed by Respondent as a Technical Analyst Trainee in the Gas Pipeline Safety Division of the Public Service Commission ("PSC"). PSC hired Grievant in 2012 as an Office Assistant II. Subsequently, Grievant successfully competed for a posted position as a Technical Analyst Trainee, the position he currently holds. At the time he accepted this promotion, effective May 1, 2013, Grievant was told that he would be submitted for an "internal equity" pay raise involving a ten percent increase beyond the new salary he would be receiving upon promotion, because he was being paid less than other employees in the same classification. This grievance is based upon the inordinate delay in effectuating that pay raise, which was not accomplished until more than a year later. Because internal equity pay raises are completely discretionary, and there are no established time limits for granting, denying, or implementing those pay raises which are approved, Grievant cannot show that this delay violated any applicable law, rule, policy or regulation applicable to state employees, and this Grievance Board has no authority to second guess the employer's actions to create a remedy in the circumstances presented. Accordingly, this grievance will be denied.

KEYWORDS: Selection Process; Job Posting; Supervisory Experience; Best Qualified Applicant; Arbitrary and Capricious

CASE STYLE: Dabiri v. Office of Technology and Natalie Faulkner, Intervenor
DOCKET NO. 2014-1657-DOA (3/27/2015)

PRIMARY ISSUES: Whether Respondent's nonselection of Grievant was arbitrary and capricious.

SUMMARY: Grievant was not selected for a management position despite his many years of experience and education. Respondent selected Intervenor, another employee with many years of experience, based on her broader experience and management skills. Respondent clearly explained why Intervenor was best suited to the position, which explanation was supported by the evidence in the record. Grievant failed to prove that the selection process or decision violated law or policy or was otherwise arbitrary and capricious. Accordingly, the grievance is denied.