

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in March 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.

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: Pay Increase; Untimely Filed; Discrimination; Favoritism; Classification; Similarly Situated Employees

CASE STYLE: Cale, et al. v. West Virginia University
DOCKET NO. 2015-0576-CONS (3/3/2016)

PRIMARY ISSUES: Whether Grievants demonstrated that Respondent violated any law, rule, regulation, policy or procedure, or that they otherwise are entitled to a pay increase.

SUMMARY: Grievants argued they should have received a pay increase because employees in a different classification from Grievants received a pay increase. Grievants did not assert that Respondent violated any policy, procedure, rule, regulation or statute, nor did they present any evidence that they were otherwise entitled to a pay increase. Under these circumstances, the undersigned has no authority to require Respondent to increase Grievants' pay. Grievants also are not similarly-situated to other employees who are not in the same classification and do not have the same duties as Grievants.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: Selection Process; Extracurricular Assignment; Minimum Qualifications; Relief; Arbitrary and Capricious

CASE STYLE: Craig v. Upshur County Board of Education
DOCKET NO. 2015-0499-UpsED (3/18/2016)

PRIMARY ISSUES: Whether Respondent abused its discretion in this selection process or acted in an arbitrary and capricious manner.

SUMMARY: Grievant challenges the posting and filling of mentor teacher positions by the Respondent. Grievant failed to prove that the actions taken by Respondent in filling the mentor positions, as posted, was unreasonable, arbitrary or capricious. The record established that the actions were taken in an effort to provide for skilled and available mentors to improve the performance of new teachers, which was clearly in the best interests of the schools.

KEYWORDS: Transfer; Job Duties; Schedule Change; AP Courses; High School Classes; Middle School Classes; Arbitrary and Capricious

CASE STYLE: Cole v. Wood County Board of Education
DOCKET NO. 2015-1554-WooED (3/16/2016)

PRIMARY ISSUES: Whether the change in Grievant's teaching schedule and course required notice and an opportunity for a hearing as a transfer pursuant to W. Va. Code 18A-2-7.

SUMMARY: Grievant alleges that the change in her schedule was so significant that she was entitled by statute to notice and a hearing before the Board of Education prior to it being implemented. She also alleges that the the principal's action was arbitrary and capricious. While Grievant's displeasure with her schedule change is understandable, under the specific facts of this case, it was not the type of change that requires the implementation of rights set out in W. Va. Code § 18A-2-7. Additionally, Principal Peters relied upon appropriate factors in making his decision to change Grievant's schedule and did not act arbitrarily or capriciously.

KEYWORDS: Termination; Insubordination; Inappropriate Remarks; Employee Code of Conduct; Discrimination; Mitigation

CASE STYLE: Canterbury v. Raleigh County Board of Education

DOCKET NO. 2016-0725-RaIED (3/16/2016)

PRIMARY ISSUES: Whether Respondent proved that Grievant's conduct violated the employee code of conduct and was insubordinate.

SUMMARY: Grievant was employed by Respondent as a substitute teacher and coach. Grievant asserted that he has been discriminated against because of his religion, that other employees had received lesser discipline for more serious conduct, and that he should have received no more than a thirty day suspension. There is no evidence that the school board or administration was improperly motivated by religious discrimination in its dismissal of Grievant. Respondent proved that Grievant's conduct violated the employee code of conduct and was insubordinate. Respondent proved that termination of Grievant's contracts was justified. Respondent's position that termination of Grievant's contracts was necessary due to Respondent's concern that Grievant's behavior would be repeated is reasonable and supported by the evidence. Grievant failed to prove that mitigation of his dismissal is warranted. Accordingly, the grievance is denied.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Reduction in Force; Summer Assignment; Seniority

CASE STYLE: Hogan v. Kanawha County Board of Education
DOCKET NO. 2015-1306-KanED (3/15/2016)

PRIMARY ISSUES: Whether Grievant demonstrated that her summer position was not affected by the reduction in force, and she should have retained the full-time Cook position.

SUMMARY: As a result of a reduction in force of four summer Cook positions, Respondent allowed the three Cooks at Grievant's school who had held the summer Cook positions the preceding summer to choose which position they wanted at that same school for the summer of 2015, by seniority. This resulted in Grievant being displaced from the full-time position she had held for the previous three summers into a half-time position, while the more senior Cook who had worked at the same school as Grievant the previous summer in a half-time position was placed in what had been Grievant's full-time position. The only person truly affected by the reduction in force who held sufficient seniority to be re-employed in a different position was placed in the summer Cook position at a different school from Grievant's, in a position previously held by the least senior summer Cook, who was reduced in force due to her seniority. This chain of events had no impact on Grievant's school or position. Respondent's decision to let the summer Cooks at Grievant's school choose which position they preferred at the school based on seniority is not supported by the statute addressing a reduction in force for summer employees. Grievant should have been allowed to remain in the full-time Cook position she held during the summer of 2014.

KEYWORDS: Termination; Immorality; Willful Neglect Of Duty; Theft; Verbal Confession

CASE STYLE: Russell v. Kanawha County Board of Education
DOCKET NO. 2016-0447-KanED (3/21/2016)

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

SUMMARY: Grievant was employed as a Custodian at Sharon Dawes Elementary School. On March 20, 2015, it was discovered that over \$2000 in proceeds from a Book Fair at the school was missing from an unlocked safe in the Principal's Office. This apparent theft of public funds was reported to the West Virginia State Police. An investigation was launched which quickly focused on Grievant, who had unaccompanied access to the office in the course of performing her custodial duties. Under questioning by two State Troopers, Grievant made a verbal confession, which was digitally recorded. Grievant failed to establish that her confession was coerced or obtained under duress. KCBE established by a preponderance of the credible evidence of record that Grievant engaged in immorality and willful neglect of duty by wrongfully taking the school funds and converting them to her personal use. Therefore, KCBE's decision to terminate Grievant's employment was warranted in the circumstances.

TOPICAL INDEX
STATE EMPLOYEES

KEYWORDS: Selection; Qualifications; Favoritism; Arbitrary and Capricious

CASE STYLE: Gill v. Division of Natural Resources

DOCKET NO. 2015-1506-DOC (3/23/2016)

PRIMARY ISSUES: Whether Grievant proved that Respondent filled positions based upon favoritism rather than qualifications.

SUMMARY: Grievant has been employed at Pipestem for over four decades. For thirty-five years he performed light maintenance in the housekeeping department. In the spring and summer of 2015, Grievant applied for three different positions which had been posted at Pipestem, but was not the successful applicant for any of them. He asserts that he was the most qualified candidate for each position and should have been selected.

Respondent demonstrated that the decisions regarding the successful candidates were made based upon their credentials, and not extraneous factors such as friendships. While Grievant may have significant experience in some of the duties related to the positions, he had difficulty providing confirmation of that experience. Grievant did not prove that Respondent's selection decisions were arbitrary, capricious or the result of unlawful favoritism.

KEYWORDS: Rescind Resignation; Constructive Discharge; Employee Performance Appraisal; Moot

CASE STYLE: Beckett v. Department of Health and Human Resources/Bureau for Child Support Enforcement
DOCKET NO. 2014-1753-CONS (3/25/2016)

PRIMARY ISSUES: Whether Grievant proved that her resignation was involuntary or that she was constructively discharged.

SUMMARY: Grievant was employed by Respondent as a Child Support Specialist I with the Bureau of Child Support Enforcement. Grievant was upset upon receiving an unfavorable employee performance appraisal and resigned. Respondent accepted Grievant's resignation. Grievant then attempted to rescind her resignation. Respondent refused to allow Grievant to rescind her resignation. Grievant failed to prove that her resignation was involuntary or that she was constructively discharged. Grievant failed to prove Respondent acted improperly in refusing to allow Grievant to rescind her resignation when Respondent had already communicated to Grievant that it accepted her resignation. Grievant's claim of improper employee performance appraisal with a request for a corrected appraisal is moot as Grievant is no longer employed by Respondent. Accordingly, the grievance is denied.

KEYWORDS: Relief; Return to Position; Enforcement of a Previous Grievance Board Decision

CASE STYLE: Trozzi v. Grafton-Taylor Health Department
DOCKET NO. 2016-0817-GraCH (3/31/2016)

PRIMARY ISSUES: Whether there is any relief available to Grievant through the grievance procedure.

SUMMARY: Grievant was previously dismissed from her employment with Respondent. Grievant filed a successful grievance and was ordered reinstated by final decision of the Grievance Board. Respondent reinstated Grievant to a different position than the position she held when she was wrongfully dismissed from employment. Grievant seeks enforcement of the previous final decision of the Grievance Board for reinstatement into her original position. Grievance Board final decisions are not enforceable by the Grievance Board; they are enforceable in the circuit court of Kanawha County by mandamus proceeding. Therefore, Grievant seeks relief that cannot be granted by the Grievance Board. Accordingly, the grievance is dismissed.

KEYWORDS: Verbal reprimand; resignation; moot; Motion to Dismiss; relief

CASE STYLE: Stroud v. Department of Veterans Assistance
DOCKET NO. 2016-0015-DVA (3/11/2016)

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

SUMMARY: Grievant grieved both conditions of her employment and a verbal reprimand. Grievant has now resigned from employment. Respondent moved to dismiss asserting mootness. A Grievant is no longer an employee, and a decision on her grievance would have no practical effect, the grievance is moot. Accordingly, Respondent's motion to dismiss should be granted, and this grievance, DISMISSED.

KEYWORDS: Selection Process; Supervisory Position; Qualifications; Most Qualified Applicant; Interview Committee Members; Arbitrary and Capricious

CASE STYLE: Weaver v. Division of Highways
DOCKET NO. 2015-1223-DOT (3/9/2016)

PRIMARY ISSUES: Whether the selection process complied with applicable policy and/or whether the selection was arbitrary and capricious.

SUMMARY: Grievant applied for a Transportation Crew Supervisor 1 position posted by Respondent and was not the chosen candidate. Grievant asserts the selection process was flawed. Grievant contends his non-selection was the product of unreasonable, arbitrary and capricious behavior. The selection process did not comply with applicable policy, but Grievant failed to prove he was the most qualified candidate. Where the selection process is proven to be arbitrary and capricious, but the grievant fails to prove that he/she should have been selected for the position, the position should be reposted and a new selection process undertaken. Accordingly, the grievance is granted in part and denied in part.

KEYWORDS: Suspension; Improvement Plan; Written Reprimand; Errors; Progressive Discipline; Unsatisfactory Performance; Evaluations; Mitigation; Arbitrary and Capricious

CASE STYLE: Liegey v. Department of Environmental Protection/Division of Land Restoration
DOCKET NO. 2016-0606-DEP (3/23/2016)

PRIMARY ISSUES: Whether Respondent provided that it was justified in suspending Grievant for three days without pay.

SUMMARY: Grievant is employed by Respondent as an Office Assistant 3. Grievant was suspended for three days without pay for unsatisfactory work performance. Grievant admits to making most of the clerical errors alleged, but asserts that suspension improper. Respondent argues that the suspension was proper and justified as Grievant's continued work performance issues had been addressed with her for several years, and such had not improved, even after two written reprimands and two improvement/development plans. Respondent proved its claims of unsatisfactory work performance by a preponderance of the evidence, and that Grievant's three-day suspension was justified. Grievant failed to prove that mitigation of her suspension was warranted. Therefore, the grievance is DENIED.

KEYWORDS: Discrimination; Favoritism; Hostile Work Environment; Prohibited Workplace Harassment; Harassment; Threatening Comments; Sexual Harassment

CASE STYLE: Hinkle, et al. v. Division of Highways
DOCKET NO. 2015-0807-CONS (3/22/2016)

PRIMARY ISSUES: Whether Grievants proved by a preponderance of the evidence their claims of hostile work environment, discrimination, and favoritism.

SUMMARY: Grievants are employed by Respondent in various positions in DOH District Nine. Grievants argue that Respondent has engaged in acts of discrimination and favoritism by allowing a coworker to violate rules, neglect duties, and refuse to report to work Snow Removal Ice Control (SRIC). Grievants further assert that this same coworker has engaged in conduct that has violated the DOP Prohibited Workplace Harassment Policy, and has created a hostile work environment for them. Respondent denies Grievants' claims. Grievants proved their claims of prohibited workplace harassment and hostile work environment by a preponderance of the evidence. However, Grievants failed to prove their claims of discrimination and favoritism by a preponderance of the evidence. Therefore, this grievance is GRANTED IN PART, and DENIED IN PART.