

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in April 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

DEPARTMENT OF EDUCATION EMPLOYEES

<u>KEYWORDS:</u>	At-Will Employee; Substantial Public Policy Principle; Termination; Relief
<u>CASE STYLE:</u>	<u>McGraw v. Department of Education</u> DOCKET NO. 2015-0666-DOE (4/24/2015)
<u>PRIMARY ISSUES:</u>	Whether Grievant, an at-will employee, proved that her discharge contravened some substantial public policy.
<u>SUMMARY:</u>	Grievant was employed by Respondent as the Executive Director of the Office of Instructional Technology, an at-will position. Respondent dismissed Grievant from employment after four days for “loss of confidence in your ability to discharge the duties and responsibilities of your position effectively,” following receipt of an anonymous letter accusing Grievant of wrongdoing in her previous employment. Grievant failed to state a claim on which relief can be granted because she did not allege that her discharge contravened some substantial public policy. Accordingly, the grievance is dismissed.

TOPICAL INDEX
HIGHER EDUCATION EMPLOYEES

<u>KEYWORDS:</u>	Promotion; Tenure; Guidelines; Annual Evaluation; Service; Reasonable Contributions; Previous Years' Ratings; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Petersen v. West Virginia University Potomac State College</u> DOCKET NO. 2014-1625-PSCWVU (4/3/2015)
<u>PRIMARY ISSUES:</u>	Whether Respondent acted in an arbitrary and capricious manner and in violation of the applicable guidelines by denying Grievant's applications for promotion and tenure.
<u>SUMMARY:</u>	Grievant applied for tenure, and promotion to Associate Professor at Potomac State College. His Department Chair and the College-Wide Review Committee supported his promotion and tenure requests. The Potomac State College Campus Provost supported Grievant's award of tenure, but not promotion, and the West Virginia University Provost denied both the tenure and promotion requests. Grievant demonstrated that the Campus Provost and West Virginia University Provost misapplied the Potomac State College Guidelines when they determined that Grievant was required to have a preponderance of good or excellent ratings in his third area of institutional concern, professional growth and development. Grievant also demonstrated that Respondent acted in an arbitrary and capricious manner and contrary to the applicable guidelines for promotion and tenure, by completely disregarding the ratings in service he had received for five years on his annual evaluations and promotion and tenure review, and advising him for the first time that his service activities were not sufficient to justify the ratings of good and excellent he had received. Grievant demonstrated that Respondent acted in an arbitrary and capricious manner in denying his applications for promotion and tenure.

KEYWORDS: Salary Determination; Time Lines; Continuing Practice; Prevailing Wage

CASE STYLE: Saifi v. West Virginia University Potomac State College
DOCKET NO. 2014-0956-PSCWVU (4/10/2015)

PRIMARY ISSUES: Whether the grievance was timely filed, and whether Grievant demonstrated that he was entitled to an adjustment to his salary.

SUMMARY: Grievant believes his salary at Potomac State College should be higher, and that Respondent should look to the prevailing wage to adjust his salary. Grievant did not demonstrate that he was entitled to an adjustment to his salary. Grievant's delay in filing his grievance did not result in untimely filing, as this situation falls into the continuing practice exception.

KEYWORDS: Termination; Gross Misconduct; Violation of Policy; Insubordination; Mitigation; Lying to Supervisor; Time Keeping; Time Cards; Extended Lunch; Late to Work; Remorse; Long-Term Employee; Work Record

CASE STYLE: Heaster v. West Virginia University
DOCKET NO. 2015-0278-WVU (4/28/2015)

PRIMARY ISSUES: Whether Grievant demonstrated that the penalty imposed was clearly excessive and reflects an abuse of discretion.

SUMMARY: Grievant's employment was terminated by Respondent for gross misconduct. The specific actions which Respondent alleged were gross misconduct were, leaving Grievant's time card and that of a subordinate with other subordinates when Grievant and the subordinate left to pick up lunch for themselves, and instructing the remaining subordinates to clock them in if they were late, in violation of policy; returning late and eating lunch while clocked in; and lying to Grievant's supervisor when she asked Grievant whether she had ever clocked anyone else in or had anyone clock her in. Grievant admitted to the charges, except that she did not characterize her statement to her subordinate to "clock her in" as an instruction. Grievant's primary argument was that the penalty imposed was too severe for her infraction. Grievant was a 23-year employee who had never before even been suspended without pay, admitted she was wrong, and was remorseful for lying to her supervisor and advised her supervisor the very next day that she had been untruthful. Grievant demonstrated that the penalty imposed was so clearly disproportionate to the employee's offense that it indicated an abuse of discretion. The termination will be reduced to a ten-day suspension without pay.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: Contract Term; Duties; Title; Arbitrary and Capricious; Notice; Reduction

CASE STYLE: Hoffman v. Mingo County Board of Education and Department of Education

DOCKET NO. 2013-2259-CONS (4/30/2015)

PRIMARY ISSUES: Whether Grievant proved by a preponderance of the evidence that Respondent's decision to reduce his contract term was arbitrary and capricious, and whether Respondent violated statute when it changed Grievant's job duties and responsibilities.

SUMMARY: Grievant is employed by Respondent as a Vocational Administrator. Grievant has held this position since 2006. When Grievant started in this position, he was responsible for all of the career and technical education ("CTE") programs in the county. However, with the opening of a new high school and the closure of four others, Grievant's duties began to change. First, all of the CTE programs for high school students were moved from Grievant's facility. Thereafter, Grievant began to share CTE duties with two Assistant Principals within the county, and the Assistant Superintendent. Grievant was still responsible for all of the adult education programs in the county, and was the administrator in the Extended Learning Center, or "ELC." County administration then moved the summer school program from the ELC. Thereafter, Respondent reduced Grievant's contract term from 261 day to 240 days citing lack of need for his supervision over the summer program. Grievant alleges that the reduction of his contract term was arbitrary and capricious. Grievant further asserts that Respondent modified his job title and job duties unilaterally in violation of West Virginia Code § 18A-2-2(c). Respondent denies Grievant's allegations, and asserts that it reduced Grievant's contract term properly pursuant to statute. Respondent further denies changing Grievant's job title. Grievant proved by a preponderance of the evidence that Respondent's decision to reduce his contract term was arbitrary and capricious. However, Grievant failed to prove his other claims by a preponderance of the evidence. Therefore, this grievance is GRANTED IN PART, and DENIED IN PART.

KEYWORDS: School Calendar; Instructions Days; Amended Calender; Arbitrary and Capricious

CASE STYLE: Bonnett, et al. v. Gilmer County Board of Education

DOCKET NO. 2014-1433-CONS (4/15/2015)

PRIMARY ISSUES: Whether Grievants demonstrated a violation of law when Respondent amended the school calendar.

SUMMARY: Grievants filed this action challenging the rescheduling of the last days of the employment contract to what had been designated by the Respondent as Spring Break. The amended 2014-2015 school calendar for the Respondent moved the March 17-21 out-of-calendar days to June 2-6 and moved five outside school environment days from the end of the school year to March 17-21. Those outside school environment days were then converted to instruction days. In essence, due to inclement weather, Spring Break 2014 was canceled and students and teachers were to report to school on March 17-21, 2014. The record did not support a finding that this action was unreasonable and no employee of Respondent was required to work any more days than required by their contract of employment.

KEYWORDS: Probationary Employee; Drug Policy; Reasonable Suspicion; Suspension; Refusal to Take a Drug Test; Pre-Determination Hearing; Pre-Termination Hearing; Non-Renewal of Probationary Contract; Right to Representation

CASE STYLE: Layne v. Kanawha County Board of Education

DOCKET NO. 2014-1763-CONS (4/10/2015)

PRIMARY ISSUES: Whether Respondent's decision not to renew Grievant's contract was arbitrary and capricious. Whether Respondent had reasonable suspicion to conduct an alcohol and drug screening on Grievant. Whether Grievant, as a probationary employee of the school board, was entitled to a pre-determination hearing before suspension and a pre-termination hearing before the non-renewal of her contract.

SUMMARY: Grievant was terminated from her position as a sign language interpreter for refusing to take a drug test when the principal told her she had reasonable suspicion that Grievant was under the influence of drugs or alcohol. Grievant contends there was not reasonable suspicion to require her to submit to a drug test and that her behavior/conduct could be explained due to various medical conditions/disabilities. However, Grievant never provided proof of these medical conditions to her employer, though the employer requested it approximately a month before Grievant was asked to submit to a drug test and did not establish that she had the disabilities claimed. The school principal was familiar with Grievant's habitual demeanor/behavior, which included restlessness, body movement and rapid speech and, in the past, Grievant had informed the principal of some of her medical conditions. Nevertheless, Grievant's demeanor on the date when her behavior was questioned, was "drastically different" than her demeanor/behavior prior to that time. The principal received several reports from others concerning Grievant's behaviors on the date in question that suggested drug/alcohol induced impairment and the principal's own observations confirmed same, creating a "reasonable suspicion" to require Grievant to undergo a drug test. Therefore, Respondent properly suspended Grievant for 30 days pending a hearing before the Board. Grievant correctly contends that Respondent violated W. VA. CODE § 18A-2-7(c) when it did not provide her with a hearing upon charges filed by the superintendent within 30 calendar days of her suspension. Grievant further contends that she was entitled under W. VA. CODE § 18A-2-7 to a pre-determination hearing before her suspension and a pre-termination hearing and that there was not cause to suspend her under the factors enumerated at W. VA. CODE § 18A-2-8. These code sections are inapplicable to probationary employees. W. VA. CODE § 18A-2-8a governs probationary employees and does not require Respondent to provide a

predetermination hearing before suspension or pre-termination hearing for its probationary employees.

Grievant further alleges that Respondent did not permit her to use the phone after the principal requested that she undergo a drug test, in violation of W. VA. CODE § 6C-2-3(g)(1). However, Grievant admittedly did not state that she wished to call her attorney or otherwise make an affirmative request to have a representative present during her meeting with the principal and, therefore, did not demonstrate that Respondent violated W. VA. CODE § 6C-2-3(g)(1). Respondent's policy provides that refusal to take a drug test, after the establishment of reasonable suspicion, is grounds for termination. Therefore, Grievant's refusal to submit to a drug screening warranted her termination.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Extra-Duty Assignment; Overtime Assignments; Next in Line; Water Delivery; Seniority; Arbitrary and Capricious

CASE STYLE: Raines v. Kanawha County Board of Education
DOCKET NO. 2014-1011-KanED (4/7/2015)

PRIMARY ISSUES: Whether Respondent's decision to consider the entire period of water delivery as one assignment was arbitrary and capricious.

SUMMARY: Grievant, a Truck Driver, grieved Respondent's decision to assign extra-duty overtime water delivery to the Truck Drivers of a particular department for the entirety of the need for delivery of water. Grievant proved that Respondent's assignment of extra-duty overtime to employees in a specific department rather than by seniority in the entire employment category was arbitrary and capricious. Grievant failed to prove that Respondent's decision to consider the entire period of water delivery as one assignment was arbitrary and capricious. Grievant failed to prove he was "next in line," or offer argument that Respondent's practices in assigning overtime were so deficient that it is impossible to tell who would have been next in line. Accordingly, the grievance is denied.

KEYWORDS: Unsatisfactory Work Performance; Improvement Plan; Observation; Evaluation; Arbitrary and Capricious

CASE STYLE: Wade v. Lincoln County Board of Education

DOCKET NO. 2015-0174-LinED (4/30/2015)

PRIMARY ISSUES: Whether Respondent lawfully terminated Grievant's employment.

SUMMARY: Grievant was employed as a fulltime custodian at an elementary school and protests her dismissal from employment. Respondent maintains the discharge was warranted and justified. Grievant had been observed numerous times (6) and evaluated 3 times during the school year and none of those observations or evaluations met standards in an acceptable number of categories. Grievant received two letters of reprimand during the school year and failed to successfully complete her improvement plan. The improvements made in a few isolated areas were not substantial or significant enough to overshadow identified deficiencies. Respondent established the charges against Grievant by a preponderance of the evidence. Respondent met its burden. Respondent proved, by a preponderance of the evidence, that Grievant did not satisfactorily perform the essential duties of her job with sufficient proficiency to meet the needs of the agency and the public it serves. Grievance DENIED.

KEYWORDS: Extracurricular Assignments; Contract Violation; Minimum Pay Requirements; Uniformity in Pay Provision; Job Duties; Timeliness

CASE STYLE: Stephens, et al. v. Wayne County Board of Education

DOCKET NO. 2014-1662-CONS (4/17/2015)

PRIMARY ISSUES: Whether this grievance was timely filed.

SUMMARY: Grievants are regularly employed as bus operators by the Respondent, Wayne County Board of Education ("the Board"). Each Grievant had an individual extracurricular daytime bus driving assignment. Grievants allege Respondent violated the uniformity in pay provisions at W. Va. Code 18A-4-5b when Respondent elected to pay select extracurricular bus operators, who performed numerous shuttle runs, more than Grievants. Select Grievants appeared at the Level III hearing and testified, describing their individual extracurricular daytime bus operator assignments. Grievants further assert that Respondent violated its Memorandum of Agreement/contract with them, in particular its "minimum" pay requirements, when it paid the extracurricular "shuttle run" bus operators in excess of the prescribed minimum of twenty dollars, based in part on the number of hours required to perform the "shuttle run" bus assignment, while continuing to pay Grievants the minimum allowable amount. Grievants did not prove that Respondent violated the terms of its contractual agreement with Grievant bus operators when it continued to pay them the "minimum" required amount of twenty dollars per day or that the contract prohibited Respondent from paying the other bus operators forty dollars. The additional pay was based, in large part, upon the extra duties of the "shuttle run" bus operators, and the accompanying time required to perform their assignments. Grievants failed to prove that the disparity in pay between themselves and the "shuttle run bus" operators violated the uniformity provisions of W. Va. Code 18A-4-5b. Grievants did not demonstrate that they had been performing duties and assignments "like" those of the identified bus drivers who were assigned numerous, unscheduled "shuttle runs." Accordingly this grievance is DENIED.

KEYWORDS: Classification; Autism Mentor Pay; Qualifications; Policy; Working with Autistic Students

CASE STYLE: Durham, et al. v. Hancock County Board of Education
DOCKET NO. 2014-0762-CONS (4/1/2015)

PRIMARY ISSUES: Whether the Grievants were working with autistic students during the 2013-2014 school year and met the standards and experience necessary to qualify for the Autism Mentor classification.

SUMMARY: Grievants claim that they are entitled to pay for the Autism Mentor classification because they were working with students who were diagnosed with Autism Spectrum Disorders during the 2013-2014 school year, and that they had met all the training and experience standards to qualify for that classification. Respondents argue that Grievants were not in title to pay as Autism Mentors because they were serving as Aides in Kindergarten classrooms and not in positions that were posted for Autism Mentors. Respondent also argues that Grievant Thornburg did not meet the minimum qualifications for the Autism Mentor classification. Grievants prove that they met all the qualifications to receive pay for the Autism Mentor classification.

TOPICAL INDEX
STATE EMPLOYEES

KEYWORDS: Medical Leave of Absence; Job Abandonment; Failure to Comply; Due Process; Arbitrary and Capricious

CASE STYLE: Maynard v. Division of Highways
DOCKET NO. 2014-1670-DOT (4/9/2015)

PRIMARY ISSUES: Whether Respondent established lawful cause for the termination of Grievant employment subsequent to an extended period of Medical Leave of Absence.

SUMMARY: Grievant protests being dismissed for job abandonment. Grievant was off work after being in a car accident and suffering recognized physical injury. Grievant was authorized for a Medical Leave of Absence, commencing from the onset of the event. After a significant amount of time, two years, Grievant was contacted requesting additional medical documentation. Respondent sought reliable information regarding the medical status of Grievant and prospective timeline for his return to duty. Grievant failed to provide documentation Respondent determined sufficient to justify authorizing additional leave.

According to applicable administrative procedures, failure of an employee to report promptly at the expiration of a medical leave of absence, except for satisfactory reasons submitted in advance, is cause for recommendation for dismissal. Respondent demonstrated that Grievant's absence from work was unauthorized. Applicable policies permit the actions that were exercised by Respondent. The undersigned does not conclude, in the circumstances of this matter, that Respondent's actions were unlawful. This grievance is DENIED.

KEYWORDS: Probationary Employee; Unsatisfactory Job Performance; Job Duties

CASE STYLE: Rittenhouse v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2014-0980-DHHR (4/13/2015)

PRIMARY ISSUES: Whether Grievant demonstrated that her performance was satisfactory during her probationary period.

SUMMARY: Grievant was dismissed from her probationary employment as a Purchasing Assistant because of unsatisfactory performance. Grievant did not demonstrate that her performance was satisfactory as a probationary employee.

KEYWORDS: Return to Work; Restrictions; Job Requirements; Classification; Reasonable Accommodations; Americans with Disabilities Act; Alternative Position; Arbitrary and Capricious

CASE STYLE: Everson v. Division of Highways

DOCKET NO. 2014-0150-DOT (4/17/2015)

PRIMARY ISSUES: Whether Grievant proved that he could perform the essential functions of his position with or without reasonable accommodation. Whether Respondent's failure to allow Grievant the opportunity to provide additional information for consideration for other positions is arbitrary and capricious.

SUMMARY: Grievant is employed by Respondent as a Transportation Worker 2. Grievant sustained an on-the-job injury that resulted in permanent significant impairment and medical restrictions. Respondent denied Grievant's return to work, stating that Grievant could not be returned to safe and productive work given his restrictions. Grievant did not prove that he could perform the essential functions of his position with or without reasonable accommodation and is, therefore, not entitled to return to work in his current position. Respondent's failure to allow Grievant the opportunity to provide additional information for consideration for other positions is arbitrary and capricious. Accordingly, the grievance is granted in part and denied in part.

KEYWORDS: Suspension; Supervise Inmates; Security Issues; Gang Activity; Mitigation

CASE STYLE: Turley v. Division of Corrections/Huttonsville Correctional Center

DOCKET NO. 2014-0955-MAPS (4/30/2015)

PRIMARY ISSUES: Whether Respondent proved the charges against Grievant.

SUMMARY: Grievant was suspended for ten days without pay for failure to break up or report an inmate meeting lasting over 40 minutes in the gymnasium, which turned out to be a gang meeting. Grievant knew inmates were not allowed to gather in a group for an extended period of time, and he knew he was supposed to patrol the gymnasium and supervise inmates. Respondent proved the charges against Grievant.

KEYWORDS: Termination; Essential Job Duties; Integrated Assessment System; Training Opportunities

CASE STYLE: Coats-Riley v. Tax Department

DOCKET NO. 2015-0297-DOR (4/30/2015)

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

SUMMARY: Respondent dismissed Grievant from employment for allegedly not being able to perform all of the necessary duties of her position, especially the need to enter accurate information into the Agency's specialized database software. Respondent also alleged that Grievant had been insubordinate and had falsified information on a timesheet. Grievant adamantly denies being insubordinate. She also argues that the problem related to her timesheet was confusion regarding how to submit the time and not a falsification of her records. With regard to the database, Grievant argues that she did not receive adequate training to properly navigate the database and properly enter the data. Respondent proved by a preponderance of the evidence that Grievant was unable to perform essential functions of her job after receiving the training and assistance. The grievance is DENIED.

KEYWORDS: Progressive Discipline; Insubordination; Suspension; Nondiscriminatory Hostile Workplace Harassment; Arbitrary and Capricious; Predetermination; Verbal Counseling; Written Warning

CASE STYLE: Long v. Division of Personnel

DOCKET NO. 2015-0021-DOA (4/14/2015)

PRIMARY ISSUES: Whether Respondent proved that Grievant's conduct violated DOP and agency policies, and whether suspension was proper.

SUMMARY: Grievant is employed by Respondent as a Personnel Specialist, Senior. Grievant has been employed by Respondent since 1992. As part of his duties, Grievant trained new employees in the Staffing Services section of DOP. While Grievant performs the technical aspects of his job in an exemplary manner, Grievant has had a history of making demeaning comments toward his co-workers, as well as being sarcastic, condescending, and overly harsh and critical to them. Respondent addressed these problems with Grievant over the years with verbal counseling and warnings, then by written warnings. Such disciplinary actions were not grieved. Thereafter, in May 2014, Grievant was involved in an incident with a co-worker whom he was training, during which Grievant became angry and raised his voice at the co-worker. Such upset the co-worker who complained about this incident, as well as the way he had been treating her since she began her job. Respondent charged Grievant with violating provisions of the DOP Prohibited Workplace Harassment policy, DOP Employee Conduct policy, the Department of Administration Employee Handbook, and insubordination. Respondent suspended Grievant for three days without pay for this misconduct. Grievant denied Respondent's allegations, and argued that the suspension was improper. Respondent proved by a preponderance of the evidence that Grievant engaged in conduct that violated provisions of the stated policies, and that his conduct constituted insubordination. Further, Respondent proved that the suspension was proper and complied with progressive discipline. Therefore, this grievance is denied.