

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SYNOPSIS REPORT

Decisions Issued in April 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
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

<u>KEYWORDS:</u>	Administrative Seniority; Pro-Rated Contract Days; Paid Contract Days; Employment Term; Transfer; Arbitrary and Capricious; Mistake of Fact
<u>CASE STYLE:</u>	<u>Bailey v. Mingo County Board of Education</u> DOCKET NO. 2016-1382-MinED (4/21/2017)
<u>PRIMARY ISSUES:</u>	Whether Grievant demonstrated she had more administrative seniority than another administrator who began his administrative employment after her and after July 1, but was paid for the full contract term, and whether she should have been the employee transferred.
<u>SUMMARY:</u>	<p>Grievant was transferred from a 240-day Assistant Principal position at a high school to a 220-day Assistant Principal position, due to MBOE eliminating one of the three Assistant Principal positions at the high school. Grievant was not the least senior Assistant Principal in the county, but was placed on transfer because MBOE determined that she was the least senior Assistant Principal at the high school. Grievant began working as an Assistant Principal in July 2013, and was paid for 225 days her first year as she did not begin working in this position on July 1. Another Assistant Principal, who started working in his first administrative position for MBOE as an Assistant Principal at the same high school after Grievant began working there, was found by MBOE to have acquired more seniority than Grievant, because he was paid for 240 days that first year as a result of the Superintendent allowing him to count hours he worked at athletic events as the Athletic Director at the high school as additional work days. Professional personnel employed as Assistant Principals accrue seniority based on the fulfillment of the employment term. By statute, if an Assistant Principal is hired and begins work after the beginning of the fiscal year, the seniority must be prorated. Grievant's employment began after the beginning of the fiscal year, as did her fellow Assistant Principal, and the seniority of both employees must be prorated for that first year, making Grievant more senior. While Respondent was not required to transfer the least senior Assistant Principal, the transfer decision was based on seniority, and Grievant was transferred as a result of a mistake of fact. Grievant should not have been the employee transferred.</p>

KEYWORDS: Annual Salary Supplement; Policy; Arbitrary and Capricious

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

DOCKET NO. 2016-1883-CONS (4/20/2017)

PRIMARY ISSUES: Whether Grievants established that Respondent abused its discretion or acted arbitrarily or capriciously by reducing their supplements.

SUMMARY: Grievants contest the action of Respondent which reduced Grievants' local salary supplements. Grievants argue that this action of reducing the annual salary supplements without consideration of other alternatives was arbitrary and capricious. In addition, Respondent's reduction of the salary supplements was improper and a violation of state law. Respondent counters that Grievants did not meet their burden of proof in that they failed to present evidence that the reduction of their salary supplements violated any statute, policy, rule or written agreement applicable to the them. Respondent also argues that Grievants failed to demonstrate that Respondent acted in an arbitrary and capricious manner in reducing their salary supplements in order to save money.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Posting; Transfer; Job Duties; Classification; False Representation; Newly Created Position; Facility Closure; Movement of Staff; Change in Duties

CASE STYLE: Curry, et al. v. Boone County Board of Education
DOCKET NO. 2016-1524-CONS (4/4/2017)

PRIMARY ISSUES: Whether Grievants demonstrated that the position at issue was a newly created position which Respondent was required to post.

SUMMARY: Grievants argued that a Cook position should have been posted when a Madison Elementary School Pre-K Center was closed and the Cook III was moved to the main building housing Madison Elementary School. The Pre-K Center was not a free-standing school, but rather a building housing Pre-Kindergarten students enrolled at Madison Elementary School. When those students were moved to the main building, the staff assigned to the Pre-K Center was also moved. This did not create any new positions which Respondent was required to post. Although the duties of the position at issue have been changed since the move, this did not result in a change in the job title or an increase in compensation. Grievants did not demonstrate that a new position was created which Respondent was required to post. Grievants also failed to demonstrate that any false representation or concealment of material facts caused them to forego bidding on the position at issue when it was posted in December 2015, such that the doctrine of equitable estoppel should be applied.

KEYWORDS:

Selection; Classification Requirement; State Competency Test; Blueprint Test; Next in Line; Arbitrary; Capricious

CASE STYLE:

Shaffer v. Kanawha County Board of Education

DOCKET NO. 2016-1064-KanED (4/5/2017)

PRIMARY ISSUES:

Whether Grievant met his burden of proof to establish that he was "next in line," for the position at issue.

SUMMARY:

Grievant, was employed as a "heavy equipment operator" for Respondent and, while so employed, applied for a position with Respondent as a "Carpenter II." Due to the Carpenter II classification requirement that anyone occupying the position must be able to "read" and work from blueprints as appropriate to the trade, Respondent added a new assessment to the State competency carpenter test; specifically, a blueprint reading assessment. Respondent then required all of its future job applicants for carpentry positions to pass the blueprint reading assessment as a qualification to be hired as a Carpenter for the school district. Grievant refused to take the blue print test and asserts that it is arbitrary and capricious. Grievant further argues that because he passed the two-part portion of the State competency test before the Carpenter II position was posted, Respondent cannot properly require him to take its additional blueprint reading assessment. Respondent contends that it must have some means to ascertain whether applicants for the position of carpenter have the capability to read blueprints and the express language of the classification justifies testing for this skill. Respondent further asserts that Grievant was unjustified in refusing to take this necessary blueprint assessment, on the basis that he previously passed the two-part State competency test and believes he has, therefore, fully qualified for the carpenter position. However, even assuming Grievant met his burden of proof to support his foregoing arguments, Grievant must finally establish that he was "next in line" for the Carpenter II position in order to prevail. In fact, there were two other job applicants, who had also not passed the blue print test, who were both senior to Grievant. As such, Grievant failed to establish that he was next in line for the position he sought.

KEYWORDS: Harassment; Hostile Work Environment; Inappropriate Conduct

CASE STYLE: Hall v. Mason County Board of Education
DOCKET NO. 2016-0780-MasED (4/21/2017)

PRIMARY ISSUES: Whether Grievant was subject to harassment or hostile work environment.

SUMMARY: Grievant is employed by Respondent in its Maintenance Department. Grievant alleged he had been harassed and subjected to a hostile work environment by the Director of Maintenance. Grievant proved that during two incidents, which occurred years apart, the Director of Maintenance inappropriately raised his voice and made forceful gestures. However, this conduct did not rise to the level of repeated or continual behavior necessary to prove harassment or severe or pervasive conduct necessary to create a hostile work environment. Accordingly, the grievance is denied.

KEYWORDS: Selection; Motion to Dismiss; Time Limits; Untimely Filed

CASE STYLE: Guy v. Kanawha County Board of Education
DOCKET NO. 2016-1700-KanED (4/24/2017)

PRIMARY ISSUES: Whether Respondent proved the grievance was not timely filed.

SUMMARY: Grievant is employed by Respondent as a full-time cook. Grievant was not offered a summer cook position for the summer of 2015. Grievant did not file her grievance challenging her non-selection for the position until approximately one year later, on June 1, 2016, claiming she was unaware of who had been selected or how or why Respondent had made its selection decision until May 2016. Respondent proved the grievance was not timely filed when it was filed approximately a year after Grievant was not selected to fill the position. Grievant's discovery of the identity of the person selected to fill the position does not extend her time limit to file the grievance. Accordingly, the grievance is dismissed.

KEYWORDS: Selection; Summer Position; Seniority, Summer Seniority, Bus Aide, Classroom Aide, Transportation Aide, Newly Created Summer Position

CASE STYLE: Carpenter v. Logan County Board of Education
DOCKET NO. 2016-1807-LogED (4/28/2017)

PRIMARY ISSUES: Whether Grievant proved that she was entitled to a summer bus aide position based upon her superior regular aide seniority.

SUMMARY: Grievant is contesting Respondent's decision to select Intervenor for a summer bus aide position serving special needs students attending an elementary school in the Chapmanville area. Grievant claims that she held a similar job in the summer of 2014 and is therefore entitled to this position due to her greater regular seniority in the Aide classification. In fact, this position was different from the position held by Grievant in the summer of 2014, but was identical to the ones held by Intervenor in the summers of 2012 and 2013. Intervenor was therefore entitled to the 2016 position by the mandates of West Virginia Code § 18-5-39.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Suspension; Progressive Discipline; Job Duties; Discrimination; Case Load; Performance Issues
<u>CASE STYLE:</u>	<u>Whitt v. Department of Health and Human Resources/Bureau for Child Support Enforcement</u> DOCKET NO. 2017-0971-DHHR (4/11/2017)
<u>PRIMARY ISSUES:</u>	Whether Respondent proved that a three-day suspension was appropriate for Grievant's inability to meet performance expectations over time.
<u>SUMMARY:</u>	Respondent imposed a three-day suspension upon Grievant as part of a pattern of progressive discipline for Grievant's failure to meet performance expectations for her position. Grievant argues that she is not the only employee who is not meeting these expectations and it is unfair to discipline her for failing to keep up with her caseload this early in her career. Ultimately, Respondent proved that a suspension was not unreasonable under the circumstances of this case.

<u>KEYWORDS:</u>	Default; Level One Decision; Untimely; Days; Timeframe
<u>CASE STYLE:</u>	<u>Fletcher v. Division of Highways</u> DOCKET NO. 2017-0673-DOTDEF (4/14/2017)
<u>PRIMARY ISSUES:</u>	Whether Respondent was in default.
<u>SUMMARY:</u>	Grievant made a claim for relief by default when Respondent failed to hold a hearing within the statutory time-frame. Respondent, instead of holding a hearing, drafted a dismissal order, but failed to file the order with the Grievance Board or send the order to Grievant. Respondent did not make a required response within the timeframe and was not prevented from doing so directly as a result of injury, illness or a justified delay. Respondent's failure is negligent, but Grievant's claim for relief was itself not timely filed. Accordingly, Grievant's claim for relief by default is denied.

KEYWORDS: Verbal Warning; State Vehicle; Parking Ticket

CASE STYLE: Bolen v. Division of Highways
DOCKET NO. 2016-1198-CONS (4/14/2017)

PRIMARY ISSUES: Whether Respondent is justified in giving Grievant a verbal warning for failing to pay parking tickets for seven months that he received while driving a State vehicle on State business.

SUMMARY: Respondent gave Grievant a “verbal warning” after he received five parking tickets while operating a State vehicle on State business and did not take any action to address them until they were the subject of a memorandum from the director of the DOH Equipment Division more than seven months later. Respondent found this action to be more egregious because Grievant was a supervisor at the time of these incidents. Grievant argues that he paid the fines when they were brought to his attention and therefore should not be disciplined. Respondent avers that it is not only the non-payment of the tickets that is the problem but that Grievant ignored them for seven months and would have continued to do so had they been brought to his attention by his supervisors.

KEYWORDS: Termination; Attendance Issues; Unauthorized Leave; Due Process; Mitigation

CASE STYLE: Paxton v. Division of Motor Vehicles
DOCKET NO. 2017-0421-DOT (4/18/2017)

PRIMARY ISSUES: Whether Respondent established a valid basis for terminating Grievant’s employment.

SUMMARY: Grievant was employed by Respondent as an Office Assistant III. Respondent terminated Grievant for failing to report to work at the expiration of a leave of absence. Grievant challenges her dismissal. Grievant is aware there are rules and regulations governing attendance and absences from the workplace. Unauthorized leave from the workplace is sanctionable conduct. Grievant was aware of the disputed conduct, notice of the charges, explanation of Respondent’s interpretation, and was provided an opportunity to respond. Applicable policies permit the actions 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: Motion to Dismiss; Rate of Pay; Minimum Salary; Moot

CASE STYLE: Elkins, et al. v. Department of Health and Human Resources/Bureau for Children and Families
DOCKET NO. 2017-0981-CONS (4/19/2017)

PRIMARY ISSUES: Whether Respondent proved this grievance is moot.

SUMMARY: Grievants are employed by Respondent as Economic Service Workers. Grievants alleged pay disparity after an Economic Service Worker position was posted at above the minimum starting salary. The posting was removed and Respondent's human resources director asserts the posting above the minimum was an error. Although Grievants assert Respondent removed the posting it still intends to hire new employees above the minimum, that assertion is speculative. The grievance is moot and that any decision would be advisory. Accordingly, the grievance is dismissed.

KEYWORDS: Termination; Sexual Harassment; Hostile Work Environment; Policy; Code of Conduct; Supervisor

CASE STYLE: Ranson v. Regional Jail and Correctional Facility Authority/Southwestern Regional Jail
DOCKET NO. 2017-1187-MAPS (4/26/2017)

PRIMARY ISSUES: Whether Respondent proved that Grievant committed sexual harassment and created a hostile work environment for his subordinate.

SUMMARY: Respondent dismissed Grievant from employment for allegedly sexually harassing a subordinate Correctional Officer on several occasions. Grievant argues that the subordinate's allegations are not credible, and she fabricated the charges to avoid working on night shift. He also alleges Respondent dismissed him in retaliation for filing an earlier grievance. Respondent conducted a full investigation of the incidents and made a finding that the charges were true. Respondent proved the allegations by a preponderance of the evidence.

KEYWORDS:

Selection; Interview; Minimum Qualifications; Job Classification; Creditable Work Experience; Arbitrary and Capricious

CASE STYLE:

Tate, Jr. v. Division of Corrections/Parkersburg Correctional Center

DOCKET NO. 2017-0202-MAPS (4/28/2017)

PRIMARY ISSUES:

Whether Respondent violated any applicable policy, procedure, rule or practice in denying Grievant an opportunity to interview for a posted position.

SUMMARY:

Grievant presented a timely application for a posted position along with several other applicants. Grievant was informed by Respondent, his employer, that he did not qualify for the position and would not be interviewed. Grievant challenges Respondent's action. Respondent maintains that the information provided at the time of application did not demonstrate that Grievant had the necessary work experience required for the position.

Pursuant to the provisions of W. Va. Code § 29-6-1, et seq., the West Virginia Division of Personnel (DOP) is charged with establishing classification plans for state employees. DOP is also vested with authority to determine the minimum qualifications for each job classification. See W. Va. Division of Personnel Administrative Rule, 143 C.S.R. 1 (2012). State agencies which utilize such positions are obligated to select applicants who qualify under the terms established by DOP classification and specifications. The amount of work experience Grievant is rightfully entitled is debatable but given the totality of relevant factors and the circumstances, it is not established by a preponderance of the evidence that Respondent's action was beyond its reasonable exercise of discretion. In accordance with the DOP's interpretation and explanation of the work experience requirements pertaining to the classified position of Corrections Unit Manager, Respondent action was not arbitrary and capricious nor clearly erroneous, this grievance must be DENIED.