

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in May 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
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Extracurricular Assignment; Afternoon Bus Run; Reduction in Force; Arbitrary and Capricious; Pre-School Run; Early Afternoon Run; Timeliness; Triggering Event

CASE STYLE: Risk v. Hancock County Board of Education

DOCKET NO. 2014-0362-HanED (5/22/2015)

PRIMARY ISSUES: Whether the grievance was timely filed, and whether the bus run at issue was an extracurricular assignment.

SUMMARY: Grievant held an extracurricular assignment in the 2012-13 school year, transporting special needs pre-school students from home to school for the afternoon pre-school session, and from school to home after the morning pre-school session, from 11:30 a.m. to 1:30 p.m. Grievant received a notice in the spring of 2013, as she had in every other year, that her extracurricular assignment would be reduced in force. In previous years, the extracurricular assignment would be reinstated in the fall, once Respondent knew how many special education pre-school students would require transportation. Grievant did not file a grievance until the fall of 2013, when she became aware that the special education pre-school students requiring transportation were assigned to the afternoon bus route of another driver, resulting in that driver receiving overtime pay, rather than her extracurricular assignment being reinstated. Respondent argued the grievance was not timely filed. The failure to reinstate the extracurricular route in these circumstances, when there were special education pre-school students needing transportation, constituted the triggering event. The transportation of special needs pre-school students changed in the fall of 2013, when a change in the law resulted in one session of five hours a day four days a week, rather than two three-hour sessions four days a week, with some students attending the morning session and other students attending the afternoon session. Respondent decided to make the afternoon transportation of these students an early afternoon regular bus run, rather than an extracurricular assignment, which changed the regularly scheduled working hours of the bus operator making the run. The early afternoon run under these circumstances was not an extracurricular run, and Respondent did not act in an arbitrary and capricious manner when it decided to accommodate this change in this way.

KEYWORDS: Termination; Immoral Conduct; Petty Theft; Taking Food from the School, Immorality; Criminal Investigation; Mitigation

CASE STYLE: Buckley v. Kanawha County Board of Education

DOCKET NO. 2015-0963-KanED (5/18/2015)

PRIMARY ISSUES: Whether the penalty of termination is disproportionate or excessive.

SUMMARY: Grievant was employed by the Kanawha County Board of Education as a Cook III at Riverside High School. Following an investigation by the West Virginia State Police and the school principal, Grievant was suspended pending resolution of criminal charges for taking food from the school kitchen. Subsequently, after the criminal charges were dismissed, Grievant's employment was terminated for stealing food from the school where she worked. KCBE established by a preponderance of the credible evidence of record that Grievant participated in petty theft of food from the kitchen at RHS. Under established West Virginia law and the precedents of this Grievance Board, such theft constitutes immorality prohibited under W. Va. Code § 18A-2-8(a). Grievant's testimony seeking to shift the blame to other KCBE employees and minimize her involvement was not credible. Considerable deference is afforded an employer's assessment of the seriousness of an employee's conduct. Grievant failed to demonstrate that the disciplinary measure levied was so clearly disproportionate to the employee's offense that it amounts to an abuse of discretion. Therefore, this grievance must be denied.

KEYWORDS: Extracurricular Bus Run; Uniformity In Pay Provisions; Job Assignments; Shuttle Run; Minimum Pay

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

DOCKET NO. 2014-1284-CONS (5/14/2015)

PRIMARY ISSUES: Whether Grievants proved that the disparity in pay between themselves and identified shuttle run bus operators violated the uniformity provisions.

SUMMARY: Grievants are bus operators employed by Respondent, Wayne County Board of Education. Various Grievants had individual extracurricular daytime bus driving assignments. 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 identified shuttle runs, more than Respondent paid Grievants. Grievants further assert that Respondent violated an identified Memorandum of Agreement/Contract, in particular its pay requirements, when it paid certain extracurricular shuttle run bus operators in excess of the prescribed minimum of twenty dollars, while continuing to pay Grievants the minimum allowable amount.

Grievants did not establish that Respondent violated the terms of its contractual agreement with bus operators when it continued to pay them the "minimum" required amount of twenty dollars per day for their extracurricular bus run assignments, or that the contract prohibited Respondent from paying identified shuttle run bus operators forty dollars. The additional pay was largely based in part upon the extra duties of the identified shuttle run bus operators, and the accompanying time requirements to perform the assignments. Further, Grievants did not demonstrate that they (individually or collectively) had been performing duties and assignments "like" those of the identified shuttle bus drivers receiving compensation above the minimum allowable amount. Grievants failed to prove that the disparity in pay between themselves and identified shuttle run bus operators violated the uniformity provisions of W. Va. Code ' 18A-4-5b. Grievance DENIED.

KEYWORDS: Suspension; School Property; Petty Theft; Immoral Conduct; Pending Investigation; Criminal Charges; Arbitrary and Capricious

CASE STYLE: Miller v. Kanawha County Board of Education

DOCKET NO. 2015-0214-KanED (5/29/2015)

PRIMARY ISSUES: Whether Grievant proved that Respondent violated law, rule or policy in suspending Grievant pending a criminal investigation.

SUMMARY: Grievant, a custodian at Riverside High School, was suspended without pay pending a criminal investigation into extensive theft of school property by multiple employees and Grievant's own admission of receiving stolen property. Grievant failed to prove Respondent erred in suspending Grievant without pending investigation or in extending that suspension beyond thirty days as allowed by statute. Grievant did not ask that a representative be present during her investigatory interview and Respondent does not have an affirmative duty to ask her if she desires to have a representative present. Accordingly, the grievance is denied.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Default; Level One Decision; Statutory Time Frame
<u>CASE STYLE:</u>	<u>Lamp v. Division of Juvenile Services/Lorrie Yeager Jr. Juvenile Center</u> DOCKET NO. 2015-0076-MAPSDEF (5/20/2015)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved by a preponderance of the evidence that Respondent was in default.
<u>SUMMARY:</u>	Grievant alleges that a default occurred at level one of the grievance process contending he never received the level one decision. Respondent issued the level one decision timely, by certified services, properly addressed, which was returned as "Return to sender unclaimed unable to forward." Grievant's refusal to pick up his decision at the post office does not establish default by Respondent. Grievant has failed to prove by a preponderance of the evidence that Respondent was in default. Grievant's claim for default is denied.

<u>KEYWORDS:</u>	Classification Specification; Position Description Form; Job Content Questionnaire; Job Audit; Misclassification; Reallocation; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Hundley v. Division of Corrections and Division of Personnel</u> DOCKET NO. 2014-0993-MAPS (5/21/2015)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved that the DOP's classification for her position was clearly wrong or arbitrary and capricious.
<u>SUMMARY:</u>	Grievant, an employee of the Division of Corrections, seeks to have her position reallocated from the classification of Office Assistant 3 at pay grade 7 to the classification of a Corrections Program Specialist, pay grade 12. The Division of Personnel is charged with making classification determinations. After reviewing the documents related to Grievant's position, and performing an on-site audit, the Division of Personnel determined that Grievant's position best fit into the classification of Office Assistant 3. Grievant did not prove that Respondent DOP's classification decision was clearly wrong. Grievant did not prove that her position should be reallocated to the classification of Corrections Program Specialist. This grievance is DENIED.

KEYWORDS: Voluntary Resignation; Drug Test

CASE STYLE: Richardson, Jr. v. Department of Health and Human Resources/Welch Community Hospital

DOCKET NO. 2013-0144-DHHR (5/13/2015)

PRIMARY ISSUES: Whether Grievant has proved that his resignation from Respondent was not voluntary.

SUMMARY: Grievant was employed as a Maintenance Worker at Welch Community Hospital for a little over a year. On July 24, 2012, it was reported that Grievant appeared to show signs of being under the influence of drugs. Grievant's supervisor met with Grievant and told him he would need to take a drug test. Record indicates that Grievant was confused, upset, and uncertain what his choices might be concerning this request. The record established that Grievant was mistaken in the belief that if he tested positive, he would lose his employment because the valid prescription, which he obtained from the hospital, was past the discard date. The situation was not helped by the pressure of his supervisor to either take the drug test or resign. Grievant contends his resignation was the product of coercion, and amounted to a constructive discharge. Grievant established by a preponderance of the evidence that a material fact that would have avoided his resignation was unknown to the Grievant. Grievant's resignation was not voluntary thereby rendering his resignation void and of no effect.

KEYWORDS: Suspension; Drug Test; Refusal; Failure; Collection Site

CASE STYLE: Parsley v. Division of Highways

DOCKET NO. 2015-0762-DOT (5/15/2015)

PRIMARY ISSUES: Whether Respondent proved the charges against Grievant and whether suspension was proper.

SUMMARY: Grievant is employed by Respondent as a Transportation Crew Supervisor 1, in Mingo County. Grievant was selected for random drug testing to be conducted in Huntington, West Virginia, on December 19, 2014; however, Grievant did not appear for the same. Instead, Grievant left work without telling any member of management, and without permission to leave. Respondent charged Grievant with violating the Respondent's Drug and Alcohol Testing Policy and suspended him for five days without pay. Grievant asserts that he was not informed that the trip to Huntington was for a drug test, and that he did not refuse to take the drug test. Grievant argues that this was all a misunderstanding, and that he had to be at a medical appointment that day and could not go to Huntington. Respondent proved the charges against Grievant by a preponderance of the evidence, and that his suspension was warranted. Accordingly, this grievance is DENIED.

KEYWORDS: Default; Timelines; Waiver; Timeliness; Level One Decision

CASE STYLE: Coats-Riley v. Tax Department

DOCKET NO. 2014-1745-DORDEF (5/4/2015)

PRIMARY ISSUES: Whether a default occurred at level one.

SUMMARY: Grievant argues that a default occurred at level one of the grievance process because the level one decision was never issued. Respondent asserts that there has been no default as the parties waived the statutory timelines for the issuance of the level one decision, Grievant lacks standing, and as the notice of default was not timely filed. Respondent offered no defense that would excuse the failure to issue a level one decision. However, Grievant failed to timely pursue default. Therefore, Grievant's claim for default is denied. Accordingly, as default is denied and no level one decision has been issued, the matter is remanded to level one for the issuance of a decision on Grievant's challenge to her three-day suspension without pay.

KEYWORDS: Wage Payment and Collection Act; Relief; Jurisdiction

CASE STYLE: McCune v. Regional Jail and Correctional Facility Authority/Central Regional Jail
DOCKET NO. 2015-1185-MAPS (5/15/2015)

PRIMARY ISSUES: Whether the Grievance Board has jurisdiction to resolve a Grievant's claim pursuant to West Virginia Code 21-5-4 of the Wage Payment and Collection Act.

SUMMARY: The West Virginia Public Employees Grievance Board does not have subject matter jurisdiction to determine liability for claims made pursuant to the West Virginia Wage Payment and Collections Act.

KEYWORDS: Selection Process; Most Qualified Candidate; Experience; Arbitrary and Capricious

CASE STYLE: Jobo v. Regional Jail and Correctional Facility Authority/Southwestern Regional Jail
DOCKET NO. 2014-0377-MAPS (5/14/2015)

PRIMARY ISSUES: Whether the selection process complied with Respondent's policy. Whether Grievant proved she was the most qualified candidate for the position.

SUMMARY: Grievant, an Office Assistant II employed by Respondent, was not selected for an Administrative Services Assistant I position. The selection process did not comply with Respondent's policy and was arbitrary and capricious, but Grievant failed to prove she 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: Office Location; Administrative Staff; Budget Cuts; Arbitrary and Capricious; Abuse of Discretion; Worksite.

CASE STYLE: Brewer, et al. v. Division of Labor

DOCKET NO. 2014-1493-CONS (5/21/2015)

PRIMARY ISSUES: Whether Respondent's decision to relocate the worksite for the Weights and Measures administrative personnel from St. Albans to Charleston was arbitrary and capricious.

SUMMARY: The Weights and Measures Section of the Division of Labor has been headquartered at a facility in Saint Albans, West Virginia since 1989. Grievants both work out of that facility. Acting Commissioner of Labor, John Junkins, decided to move the administrative employees of the Weights and Measures section to Charleston in the Capitol Complex with the offices of the other sections of the Division of Labor. Grievants were moved from their Saint Albans facility to the Capitol Complex effective March 17, 2014. Grievants argue that the decision to relocate them to the Capitol Complex was arbitrary and capricious, and characterize the decision as part of a series of adverse actions toward the employees of Weights and Measures. Respondent was able to articulate a business reason for moving the administrative employees of the Weights and Measures section to the Capitol complex. In such situations it is not appropriate for the Administrative Law Judge to substitute his judgment for that of the agency administrators. Accordingly, the grievance is DENIED.

KEYWORDS: Office Location; Administrative Staff; Budget Cuts; Arbitrary and Capricious; Abuse of Discretion; Worksite.

CASE STYLE: Kelly, et al. v. Division of Labor

DOCKET NO. 2014-1494-CONS (5/21/2015)

PRIMARY ISSUES: Whether Respondent's decision to relocate the worksite for the Weights and Measures administrative personnel from St. Albans to Charleston was arbitrary and capricious.

SUMMARY: The Weights and Measures Section of the Division of Labor has been headquartered at a facility in Saint Albans, West Virginia since 1989. Grievants both work out of that facility. Acting Commissioner of Labor, John Junkins, decided to move the administrative employees of the Weights and Measures section to Charleston in the Capitol Complex with the offices of the other sections of the Division of Labor. Grievants were moved from their Saint Albans facility to the Capitol Complex effective March 17, 2014. Grievants argue that the decision to relocate them to the Capitol Complex was arbitrary and capricious, and characterize the decision as part of a series of adverse actions toward the employees of Weights and Measures. Respondent was able to articulate a business reason for moving the administrative employees of the Weights and Measures section to the Capitol complex. In such situations it is not appropriate for the Administrative Law Judge to substitute his judgment for that of the agency administrators. Accordingly, the grievance is DENIED.

KEYWORDS: Reallocation; Classification Specifications; Arbitrary and Capricious; Qualifications; Position Description Form; Job Content Questionnaire; Bad Faith

CASE STYLE: Good v. Division of Highways

DOCKET NO. 2014-1178-DOT (5/29/2015)

PRIMARY ISSUES: Whether Respondent acted improperly, or in bad faith, by failing to process Grievant's request for reallocation.

SUMMARY: Grievant sought to be reallocated to the position of Transportation Engineering Technician Level 3. Grievant completed the necessary forms and submitted them to his supervisor. Grievant's supervisor approved the same and forwarded them to the Human Resources Director for processing, but noted that Grievant lacked the written communication skills needed for the job and attached some examples of his writing. Upon receipt of the documents, the Human Resources Director reviewed the same, discovering numerous grammatical and typographical errors. Considering the errors in the forms and the supervisor's comments, the Human Resources Director concluded that Grievant lacked the qualifications for the position and did not forward the forms to the Division of Personnel ("DOP") for review for reallocation. Grievant asserts that Respondent's actions in failing to forward his reallocation request to DOP were improper. Grievant also alleges that Respondent acted in bad faith by delaying his reallocation and intentionally working him out of his classification for a year. Respondent denies Grievant's claims, and asserts that Grievant did not meet the qualifications for the position he sought, and that it had no obligation to forward the reallocation request to DOP. Grievant failed to prove his claims by a preponderance of the evidence. Therefore, this grievance is DENIED.