

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in May 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
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

<u>KEYWORDS:</u>	Termination; Remand; Improvement Plan; Unsatisfactory Performance; Corrective Actions; Harassment Complaints; Performance Evaluations; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Wells v. Upshur County Board of Education</u> DOCKET NO. 2010-0131-UpsED(R) (5/24/2016)
<u>PRIMARY ISSUES:</u>	Whether Respondent violated statutes, rules, regulations, policies, or written agreements when it terminated Grievant's contract of employment.
<u>SUMMARY:</u>	Grievant was terminated from her employment as Principal of Buckhannon-Upshur High School for unsatisfactory performance after Respondent determined that she had not successfully completed a performance improvement plan. Respondent demonstrated by a preponderance of the evidence that Grievant failed to successfully complete the improvement plan within the time frame given.

<u>KEYWORDS:</u>	Motion to Dismiss; Employee; Employer; Jurisdiction
<u>CASE STYLE:</u>	<u>Collins v. Calhoun County Board of Education</u> DOCKET NO. 2015-1343-CalED (5/12/2016)
<u>PRIMARY ISSUES:</u>	Whether this grievance must be dismissed as it was filed against an entity that is not Grievant's employer.
<u>SUMMARY:</u>	Grievant filed this grievance against the Calhoun County Board of Education. Grievant is employed by the Calhoun-Gilmer Career Center. The Calhoun-Gilmer Career Center is not a part of the Calhoun County Board of Education and is not under the control of the Calhoun County Board of Education. The grievance must be dismissed as it was filed against an entity that is not Grievant's employer. Grievant did not give notice of his grievance to the chief administrator of his actual employer. Grievant cannot cure this failure by attempting to "add" his actual employer to his grievance at level three of the process. Therefore, Respondent's Motion to Dismiss should be granted, and this grievance, DISMISSED.

KEYWORDS:

Selection; Most Qualified; Arbitrary and Capricious; Administrative Experience; Administrative Seniority; Nomination; Administrator; Qualifications; Committee; Executive Session; Executive Summary

CASE STYLE:

Barnett, et al. v. Cabell County Board of Education and John McMillian, Intervenor

DOCKET NO. 2015-1762-CONS (5/31/2016)

PRIMARY ISSUES:

Whether Grievants proved by a preponderance of the evidence that Respondent failed to select the most qualified candidate for the position of Director of Buildings and Grounds, and/or that the selection process was flawed.

SUMMARY:

Grievants Barnett, Cooper, and Webb were employed as principals in Cabell County. They each applied for the position of Director of Buildings and Grounds. A screening committee was formed to narrow the candidate pool down to two names. The committee recommended Grievant Webb and Intervenor to the superintendent, even though Intervenor had never served as an administrator. The superintendent nominated Grievant Webb for the position, but the county board of education rejected the nomination in favor of the Intervenor. Grievants argue that Intervenor lacked the qualifications to hold the position of Director of Buildings and Grounds. Grievant Webb argues that he was the most qualified candidate, and that the county board's decision to select Intervenor instead of him was arbitrary and capricious. Grievants Barnett and Cooper argue that the board's decision was arbitrary and capricious, that they were more qualified than Intervenor, and that screening committee committed error. Grievants all initially sought instatement into the position, and Grievant Barnett requested the position be reposted and the selection process repeated. Respondent denies all of the Grievants' claims, and asserts that it selected the most qualified candidate for the position. Grievants failed to prove by a preponderance of the evidence that Intervenor lacked the required administrative experience to be considered for the job. Grievants Barnett and Cooper failed to prove that the selection committee erred in any way. Grievant Webb proved by a preponderance of the evidence that he was the most qualified candidate for the position, and that Respondent's decision to select Intervenor was arbitrary and capricious. Therefore, this grievance is GRANTED IN PART and DENIED IN PART.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

<u>KEYWORDS:</u>	Extra-Duty Assignment; Seniority; Extra-Duty List; Substitute Bus Operator; Availability for Assignment
<u>CASE STYLE:</u>	<u>Smith v. Ohio County Board of Education</u> DOCKET NO. 2015-1624-OhIED (5/12/2016)
<u>PRIMARY ISSUES:</u>	Whether Grievant demonstrated that he was entitled to priority over the other regular bus operator who performed the extra-duty assignment.
<u>SUMMARY:</u>	Grievant was awarded a three-day extra-duty assignment. In order to complete this assignment, however, he would miss at least one day of work, and a substitute would have to be employed to cover his regular bus run. No substitute bus operator accepted Grievant's regular bus run, and Grievant was told he could not drive the extra-duty run. A substitute bus operator who had declined to take Grievant's regular bus run accepted the extra-duty assignment. A second bus was needed to transport students for the three-day extra-duty assignment, and the regular bus operator who had received the assignment was told if she could find a substitute to drive her regular bus route, she could drive the extra-duty assignment, and she did so. No one told Grievant he had this option. Grievant had priority in the assignment over the second regular driver, and was entitled to the extra-duty assignment over her.

KEYWORDS: Job Duties; Hostile Work Environment; Advisory Opinion

CASE STYLE: Bias v. Boone County Board of Education

DOCKET NO. 2015-1235-BooED (5/25/2016)

PRIMARY ISSUES: Whether Grievant proved that she was subjected to a hostile workplace.

SUMMARY: Grievance initially alleged that she was being required to work outside her classification by having to operate the central office switchboard for an hour each day while the regular switchboard operator had her lunch. Before the level two mediation was conducted, Grievant voluntarily applied for and received a different job at the Career Center ending any requirement for her to work at the switchboard. All issues related to Grievant working the switchboard are moot.

Grievant also alleges that she was subjected to a hostile work environment by the switchboard operator. She argues that the behavior of the coworker was so egregious that Grievant had to apply for the Career Center position to escape the hostile work environment, even though the position was less financially advantageous.

Grievant recounted incidents of petty office bickering, but did not prove that she was subjected to a hostile work environment.

KEYWORDS: Change in Work Schedule; Special Needs; Contract Term; Assignment to Bus; Itinerant; Beginning of Year; Timeliness; Failure to File with Grievance Board; Substantial Compliance

CASE STYLE: Lawton v. Hancock County Board of Education

DOCKET NO. 2015-0611-HanED (5/27/2016)

PRIMARY ISSUES: Whether the changes made to Grievant's schedule violate W. Va. Code.

SUMMARY: Grievant is a Transportation Aide, employed under a 7-hour per day contract, and has been assigned to Bus 136 for a number of years, after bidding on this bus assignment. Bus 136 transports only special needs students. When pre-school students started school about two weeks after school started, three special needs pre-school students were re-assigned to Bus 136 because the bus they to which they had been assigned did not have time to transport them home and return on time to school. This added one hour and ten minutes to Grievant's work day, but did not extend her work day beyond her 7-hour contract term. This change added a bus route in the southern part of Hancock County. Prior to this, all the routes assigned to Bus 136 were in the northern part of Hancock County. This change did not violate the applicable statute, as Grievant was assigned to Bus 136, and her duties were of an itinerant nature, subject to changes in the special needs student population. Respondent also argued that the grievance should be dismissed because it was not filed with the Grievance Board. The failure to file the grievance with the Grievance Board did not operate to invalidate the filing of the grievance with Respondent.

KEYWORDS: Termination; Evaluations; Attendance Issues; Correctable Conduct; Willful Neglect of Duty; Insubordination

CASE STYLE: McCloud v. Mingo County Board of Education
DOCKET NO. 2016-1006-MinED (5/23/2016)

PRIMARY ISSUES: Whether Respondent proved the charges of excessive absenteeism and failure to complete reporting requirements, after bringing these issues to Grievant's attention and giving her opportunities to improve.

SUMMARY: Respondent terminated Grievant's contract after several years of significant absences, often without providing the documentation required by county policy. Grievant argues that her employment cannot be terminated without bringing her performance problems to her through regular evaluations and providing her an opportunity to improve. Grievant was never placed on a formal plan of improvement. Respondent argued that an improvement plan was not necessary since the reasons for Grievant's dismissal were "willful neglect of duty" and "insubordination." Respondent proved Grievant was chronically absent from work over the course of a number of years and consistently failed to comply with the reporting requirements of Respondent's policies. Additionally, Respondent proved that these issues were brought to Grievant's attention through regular performance evaluations, and that Grievant failed to improve her performance in these areas after being given ample opportunity to do so.

KEYWORDS: Summer Positions; Length of Service; Seniority; Arbitrary and Capricious

CASE STYLE: Scurlock, et al. v. Raleigh County Board of Education

DOCKET NO. 2015-1760-CONS (5/16/2016)

PRIMARY ISSUES: Whether Respondent's method of calculating seniority among applicants for summer employment was lawful and reasonable.

SUMMARY: Respondent Raleigh County School Board was required to decide who it should properly hire, between several eligible applicants, for a limited number of 2015 summer positions. Grievants, who were desirous of summer painter positions, contend the positions as awarded in 2015 were not done in accordance with highlighted West Virginia Code. Several of the applicants were tied with regard to the number of years of participation with the summer painting classification. Grievants suggest that a random tiebreaker should have been conducted among the applicants in order to determine which of them to appoint for the summer of 2015. Respondent awarded the limited number of posted summer painter positions for 2015 to the applicants who worked the most days as summer painters in 2013 and 2014 combined.

W. Va. Code §18-5-39(g) governs reduction in force and priority in re-employment of service personnel in summer positions. However, W. Va. Code §18-5-39(g) does not define how a service employee's prior summer service time is to be calculated, beyond stating that it must be determined by "the length of service time in the particular summer program or classification." Respondent interpreted this phrase to determine seniority between the candidates. Respondent's method of calculating seniority based upon the total days served by Grievants and the other employee during their respective years of summer employment was both reasonable and permissible. Respondent's actions were not inconsistent with identified in West Virginia Code. This grievance is DENIED.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Termination; Job Duties; Mitigation
<u>CASE STYLE:</u>	<u>Bragg v. Department of Health and Human Resources/Bureau for Children and Families</u> DOCKET NO. 2015-0981-DHHR (5/13/2016)
<u>PRIMARY ISSUES:</u>	Whether Respondent proved the charges against Grievant by a preponderance of the evidence and that her dismissal from employment was justified.
<u>SUMMARY:</u>	Grievant was dismissed from employment as a Regulatory Supervisor for wrongfully issuing a license to a child care facility without proper documentation. Respondent proved the charges against Grievant by a preponderance of the evidence and that her dismissal from employment was justified. Respondent had good cause to dismiss Grievant for her complete failure in her duties as a supervisor in approving the license and for her inexplicable failure to review and respond appropriately once the approval of the license was questioned. Grievant failed to prove that mitigation was warranted. Despite her previous good record, Grievant was a veteran supervisor who failed in her basic obligations as a supervisor and upon whom Respondent could no longer rely. Accordingly, the grievance is denied.

KEYWORDS: Travel Expenses; Mileage; Mandatory Meeting; State Business; Sick Leave Status

CASE STYLE: Guertin v. Tax Department
DOCKET NO. 2016-0172-DOR (5/4/2016)

PRIMARY ISSUES: Whether Grievant demonstrated that Respondent failed to pay travel expense(s) incurred as part of Grievant's work duties.

SUMMARY: Grievant contends that Respondent refused to fully pay his travel expenses from a mandatory conference. Respondent elected not to reimburse Grievant for his return trip expenses. Respondent contends it is not obligated to reimburse Grievant for travel expense incurred pursuant to Grievant's early return from a training retreat given that he was on sick leave at the time of the trip. Respondent maintains its decision is within its authority and consistent with the provisions of the West Virginia Code of State Rules governing travel reimbursement.

Grievant incurred the expense(s) in discussion. The expense was incurred as a result of an employment related activity, agency sponsored training retreat. In the fact pattern of this matter, Grievant's sick leave status at the time of the return travel does not sever Respondent's obligation to reimburse anticipated and standard travel expense actually incurred. An employee should not have to personally absorb costs related to the activities which are of a business nature and which would not have been incurred had the individual not been an employee. This grievance is Granted.

KEYWORDS: Selection Process; Favoritism; Arbitrary and Capricious; Physical Agility Test

CASE STYLE: Bradley v. Division of Corrections/Pruntytown Correctional Center
DOCKET NO. 2015-0867-MAPS (5/3/2016)

PRIMARY ISSUES: Whether Respondent's determination that Grievant was not the most qualified applicant for the position at issue was arbitrary or capricious.

SUMMARY: This grievance was filed when Grievant was not selected for a posted Correctional Officer VI position. Grievant made many allegations, but did not demonstrate a flaw in the selection process or that he should have been selected for the position.

<u>KEYWORDS:</u>	Suspension; Leave Restriction; Attendance Deficiencies; Due Process
<u>CASE STYLE:</u>	<u>Freeman v. Division of Highways</u> DOCKET NO. 2015-1771-CONS (5/23/2016)
<u>PRIMARY ISSUES:</u>	Whether Respondent proved Grievant violated his leave restriction on two occasions and was justified in suspending Grievant for one and then two days for this violation.
<u>SUMMARY:</u>	Grievant is employed as a Transportation Worker 2. Grievant protests his suspension for one and then two days for occurrences violating a previously-imposed leave restriction. Grievant cannot relitigate the imposition of the leave restriction as he previously filed a grievance, which was denied at level one that he did not appeal. Grievant was not denied due process as he was given clear written notice of the charges against him and written notice and an opportunity to respond and he failed to do so. Respondent proved Grievant violated his leave restriction on two occasions and was justified in suspending Grievant for one and then two days for this violation when Grievant had previously been disciplined for attendance issues. Accordingly, the grievance is denied.
<u>KEYWORDS:</u>	Workplace Injury; Untimeliness; Time Limits; Motion to Dismiss; Failure to State a Claim; Tort-Like Damages; Relief
<u>CASE STYLE:</u>	<u>Boardman v. Division of Natural Resources</u> DOCKET NO. 2016-0685-DOC (5/25/2016)
<u>PRIMARY ISSUES:</u>	Whether the remedies Grievant seeks in his grievance are available through the Grievance Procedure.
<u>SUMMARY:</u>	The record of this matter demonstrates that Grievant failed to file a grievance within fifteen days following the occurrence of the event upon which the grievance is based, and that Grievant is seeking relief wholly unavailable from the Grievance Board. Accordingly, Respondent's motion is granted and this grievance is dismissed.

KEYWORDS: Discretionary Pay Increase; Pay Plan Implementation Policy; Back Pay; Job Duties; Additional Duty Pay

CASE STYLE: Hart v. Division of Highways and Division of Personnel
DOCKET NO. 2015-1717-DOT (5/23/2016)

PRIMARY ISSUES: Whether Grievant is entitled to be awarded a pay increase which is discretionary in nature.

SUMMARY: Grievant believes she is entitled to be paid for taking on the additional duties she was performing in the absence of the Occupational Safety Specialist 2 in District 5, for a period of two years. The Division of Highways agrees that Grievant should be compensated for her hard work, and, after a delay of several months, submitted a request for a 3% discretionary pay increase to the Division of Personnel. The Division of Personnel determined that Grievant's situation did not meet the requirements of the Pay Plan Implementation Policy for Grievant to be considered for the 3% discretionary pay increase for additional duties pay. The Division of Personnel's interpretation of its own Policy is entitled to deference. Moreover, Grievant is not entitled to be awarded a pay increase which is discretionary in nature, and back pay is not available for discretionary pay increases.

KEYWORDS: Termination; Under the Influence of Drugs or Alcohol; Reasonable Suspicion; Drug Screen; Policy; Mitigation

CASE STYLE: Daugherty v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2016-0821-CONS (5/17/2016)

PRIMARY ISSUES: Whether the dismissal of Grievant was excessive and disproportionate to his conduct.

SUMMARY: Grievant was employed as a housekeeper at William R. Sharpe, Jr. Hospital. On October 1, 2015, Grievant reported to his supervisor that he was under the influence. Based on this admission and other factors, Respondent had reasonable suspicion to conduct a secondary test. Respondent's policy also provided for the testing of other listed controlled substances. Grievant was informed that a test would be conducted for alcohol and drugs, to which he consented. The test results indicated that Grievant had a high blood alcohol level and he tested positive for the opiate Oxycodone. Nothing improper about the secondary testing appeared in the record, and Respondent established it was appropriate to impose discipline on the Grievant. Grievant was able to demonstrate that the termination of his employment was clearly excessive and reflected an inherent disproportion between the offense and the personnel action. Accordingly, this grievance is granted, in part, and denied, in part.