

**WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**SYNOPSIS REPORT**

**Decisions Issued in June 2014**

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](mailto: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**

---

<b><u>KEYWORDS:</u></b>	Selection; Most Qualified Applicant; Qualifications; Arbitrary and Capricious; Online Course Assignment; Adjunct Faculty; Priority in Assignments
<b><u>CASE STYLE:</u></b>	<u>Sharma v. West Virginia Northern Community College</u> DOCKET NO. 2014-0076-NCC (6/24/2014)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant demonstrated she should have been selected as Division Chair, and that she had priority in the assignment of online courses.
<b><u>SUMMARY:</u></b>	Grievant alleged she should have been selected as Division Chair, and that she should have been given preference in teaching two online courses. Grievant did not demonstrate that the selection of another well-qualified faculty member to serve as Division Chair was arbitrary and capricious. Grievant also did not demonstrate that WVNCC had in place a policy or practice which gave full-time faculty who had already been assigned a full teaching load preference over adjunct faculty in the assignment of online courses.

---

<b><u>KEYWORDS:</u></b>	Evaluation; Improvement Plan; Bullying; Harassment; Abuse of Discretion; Arbitrary and Capricious
<b><u>CASE STYLE:</u></b>	<u>Boone v. West Virginia University</u> DOCKET NO. 2013-1715-WVU (6/5/2014)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent's action of placing Grievant on an improvement plan was arbitrary and capricious.
<b><u>SUMMARY:</u></b>	Respondent filed a Motion to Dismiss the grievance insofar as it challenged the written reprimand, arguing that part of the grievance was moot, based on the fact that the written reprimand would be removed from Grievant's personnel file after one year had passed, which would occur on March 28, 2014. That Motion was granted at the hearing. Grievant argued that she was unfairly evaluated and should not have been placed on an improvement plan. Grievant demonstrated that most of the allegations made against her by a co-worker, which resulted in her placement on an improvement plan, were baseless as they were particular to that co-worker, and that it was arbitrary and capricious for Respondent to place her on an improvement plan.

**KEYWORDS:** Salary Increase; Classification; Pay Grade; Years of Service; Mercer Classification System

**CASE STYLE:** Stafford v. West Virginia University

DOCKET NO. 2013-1842-WVU (6/2/2014)

**PRIMARY ISSUES:** Whether Grievant proved that an error was made in the computation of his salary which has resulted in underpayment for many years.

**SUMMARY:** Grievant alleges that his current salary is lower than it should be due to a failure to provide him a salary increase in 1995 when his position was upgraded. Record established that Grievant was upgraded from a pay grade 9 to a pay grade 11 in 1994. Grievant received a 10% salary increase at that time. Subsequently, in 1995, the Mercer Classification System was implemented and a change in assigned pay grades took place. Pay grade 11 positions, such as Grievant's, were reclassified under the Mercer Classification System to a pay grade 14. The pay grade 14 entry level rate was \$18,780 and Grievant was above the entry level rate with a salary of \$20,532. Accordingly, Grievant received no additional salary at that time. Grievant failed to meet his burden of proof and demonstrate an error was made by Respondent under the facts of the grievance.

**TOPICAL INDEX**  
**COUNTY BOARDS OF EDUCATION**  
**PROFESSIONAL PERSONNEL**

---

**KEYWORDS:** Interview; Qualifications; Experience; Arbitrary and Capricious; Discrimination

**CASE STYLE:** Eskew v. Kanawha County Board of Education  
DOCKET NO. 2013-1904-KanED (6/12/2014)

**PRIMARY ISSUES:** Whether Grievant should have been granted an interview for the assistant principal position and whether Grievant proved his claim of discrimination by a preponderance of the evidence.

**SUMMARY:** Grievant is employed as the Assistant Principal at East Bank Middle School. In May 2013, Grievant applied for the position of Assistant Principal at Bridgeview Elementary School. This position required a minimum of three years teaching experience at the elementary school level. Respondent determined that Grievant lacked the three years elementary school teaching experience. Grievant was not granted an interview for the position. Respondent hired another individual for the position. Grievant argues that he met the minimum qualifications for the position and should have been granted an interview. Grievant further argues that the teaching experience requirement is arbitrary and capricious. Grievant also alleges discrimination. Respondent denies Grievant's claims, and asserts that Grievant does not meet the minimum qualifications for the position, and that the teaching experience requirement is reasonable and necessary for the position. Grievant failed to prove his claims by a preponderance of the evidence. Therefore, this grievance is denied.

**TOPICAL INDEX**  
**COUNTY BOARDS OF EDUCATION**  
**SERVICE PERSONNEL**

---

**KEYWORDS:** Mistake; Ultra Vires; Split Shift Pay; Multi-Classified Position; Additional Pay; Non-Relegation Clause

**CASE STYLE:** Williams v. Roane County Board of Education  
DOCKET NO. 2014-0178-RoaED (6/27/2014)

**PRIMARY ISSUES:** Whether Respondent is bound by administration's erroneous application of split shift pay to Grievant's position.

**SUMMARY:** Grievant is a multi-classified Bus Operator/Aide who had previously received an additional 1/8th pay for split shift. School administration had erroneously determined that Grievant's position entitled him to split shift pay. Grievant does not work a split shift and is not entitled to split shift pay. When Respondent discovered Grievant had been paid in error, it removed the additional 1/8th from Grievant's pay. Respondent's correction of a pay error does not violate the non-relegation clause. Grievant failed to prove that Respondent's action was in violation of statute or arbitrary and capricious. Accordingly, the grievance is denied.

---

**KEYWORDS:** Multi-Classified Position; Administrative Error; Split Shift Pay; Contract; Mistake; Non-Relegation Clause; Ultra Vires

**CASE STYLE:** Vannoy v. Roane County Board of Education  
DOCKET NO. 2014-0265-RoaED (6/27/2014)

**PRIMARY ISSUES:** Whether Respondent is bound by administration's erroneous application of split shift pay to Grievant's position.

**SUMMARY:** Grievant is a multi-classified Mechanic/Bus Operator who had previously received an additional 1/8th pay for split shift on days he drove a bus route in addition to performing his mechanic duties. School administration had erroneously determined that Grievant's position entitled him to split shift pay. Grievant does not work a split shift and is not entitled to split shift pay. When Respondent discovered Grievant had been paid in error, it removed the additional 1/8th from Grievant's pay. Respondent's correction of a pay error does not violate the non-relegation clause. Grievant failed to prove that Respondent's action was in violation of statute or arbitrary and capricious. The grievance is DENIED.

**KEYWORDS:** Disengage the Bus Camera; Safety Equipment; Medical Condition; Employee Conduct Policy; Disciplinary Record; Due Process; Willful Neglect of Duty; Abuse of Discretion

**CASE STYLE:** Bailey v. McDowell County Board of Education

DOCKET NO. 2013-2111-McDED (6/5/2014)

**PRIMARY ISSUES:** Whether Respondent proved that Grievant engaged in conduct which constituted a willful neglect of duty in disengaging bus safety equipment / camera.

**SUMMARY:** Grievant is employed by Respondent as a bus operator. While on duty and operating her bus, Grievant intentionally disengaged the camera installed on her bus without prior authorization from Respondent. She had a medical condition which could frequently necessitate immediate use of restroom facilities. She disengaged the camera for privacy, when there were no students on the bus, because she was unable to access the facilities timely on the day in question, due to this condition. However, despite the fact that this very symptom could frequently and predictably result from this condition, Grievant never requested an accommodation from Respondent to disconnect the camera under these circumstances. Though Grievant was not specifically and personally advised of Respondent's policy that its bus operators should not disengage cameras while operating Respondent's buses, the facts demonstrated that Grievant knew that Respondent installed the cameras for the purpose of, inter alia, maintaining safety and order on its buses and that she was, therefore, unauthorized to disconnect them. Grievant was given a three-day suspension without pay for willful neglect of duty, in disengaging the video camera, in violation of the West Virginia Board of Education Employee Conduct, which mandates, inter alia, that employees maintain a "safe and healthy" environment. She was provided with written notice, an opportunity to respond to the allegation, and the opportunity for a hearing before final ratification of the disciplinary recommendation. Respondent proved willful neglect of duty under W. Va. Code § 18A-2-8 and violation of the West Virginia Board of Education Employee Conduct Policy at § 4.2.3. However, given Grievant's fine employment history, lack of any prior disciplinary actions, and her medical condition, which precipitated her action of disengaging the camera, Grievant was entitled to mitigation of the penalty, and a written reprimand was deemed appropriate.

**KEYWORDS:** Compensation; Extracurricular Run; Hours Worked; Waiting

**CASE STYLE:** Staats v. Jackson County Board of Education  
DOCKET NO. 2013-1637-JacED (6/13/2014)

**PRIMARY ISSUES:** Whether the time Grievant spends waiting at the county vocational center between his extracurricular runs should be counted as hours worked.

**SUMMARY:** Grievant is employed as a regular bus operator for Respondent. In addition to his regular morning and evening runs, Grievant has an extracurricular run each day where he is required to transport students from a high school to the county vocational center and back. The students are at the vocational center for nearly two hours. During those two hours, Grievant is on his own time, but for all practical purposes, he is stranded at the remote vocational center because he has no means of transportation to leave the center. County policy requires that the buses remain on site until the students are returned to their schools. Grievant asserts that because he is not able to leave the vocational center between runs, his time spent there should be counted as hours worked for the calculation of overtime. Respondent argues that the time Grievant spends waiting at the vocational center should not be considered hours worked because Grievant is on his own personal time and is not otherwise encumbered by duties or responsibilities to Respondent. Grievant failed to prove his case by a preponderance of the evidence. Therefore, this grievance is DENIED.

---

**KEYWORDS:** Additional Pay; Split Shift Pay; Multiclassification; Job Duties; Non-Relegation Clause

**CASE STYLE:** Tolley v. Roane County Board of Education  
DOCKET NO. 2014-0223-RoaED (6/6/2014)

**PRIMARY ISSUES:** Whether Grievant proved that Respondent's correction of the error in Grievant's pay was in violation of statute or otherwise arbitrary and capricious.

**SUMMARY:** Grievant is a multiclassified Bus Operator/Aide who had previously received an additional 1/8th pay for split shift. School administration had erroneously determined that Grievant's position entitled him to split shift pay. Grievant does not work a split shift and is not entitled to split shift pay. When Respondent discovered Grievant had been paid in error, it removed the additional 1/8th from Grievant's pay. Respondent's correction of a pay error does not violate the non-relegation clause. Grievant failed to prove that Respondent's action was in violation of statute or arbitrary and capricious. Accordingly, the grievance is denied.

---

**KEYWORDS:** Additional Pay; Split Shift Pay; Job Duties; Non-Relegation Clause; Arbitrary and Capricious

**CASE STYLE:** Talbert v. Roane County Board of Education  
DOCKET NO. 2014-0177-RoaED (6/6/2014)

**PRIMARY ISSUES:** Whether Grievant proved that Respondent's correction of the error in Grievant's pay was in violation of statute or otherwise arbitrary and capricious.

**SUMMARY:** Grievant is a multiclassified Bus Operator/Aide who had previously received an additional 1/8th pay for split shift. School administration had erroneously determined that Grievant's position entitled him to split shift pay. Grievant does not work a split shift and is not entitled to split shift pay. When Respondent discovered Grievant had been paid in error, it removed the additional 1/8th from Grievant's pay. Respondent's correction of a pay error does not violate the non-relegation clause. Grievant failed to prove that Respondent's action was in violation of statute or arbitrary and capricious. Accordingly, the grievance is denied.

---

**KEYWORDS:** Willful Neglect of Duty; Simple Negligence; Exercise of Poor Judgment Damaging a Surveillance Camera; Witness Credibility

**CASE STYLE:** Adams v. Kanawha County Board of Education  
DOCKET NO. 2014-1137-KanED (6/26/2014)

**PRIMARY ISSUES:** Whether Respondent established by a preponderance of the evidence that Grievant's conduct constituted willful neglect of duty.

**SUMMARY:** Grievant is employed as a Custodian at Nitro High School. His employment was suspended for thirty days on December 9, 2013, due to alleged willful neglect of duty, more particularly for intentionally damaging a surveillance camera on the exterior of the high school building. KCBE failed to establish by a preponderance of the credible evidence of record that Grievant's conducted constituted willful neglect of duty in violation of W. Va. Code § 18A-2-8(a). Therefore, this grievance must be granted.

**TOPICAL INDEX**  
**STATE EMPLOYEES**

---

**KEYWORDS:** OC Spray; Untruthful Statements; Progressive Discipline; Misconduct; Reasonable Standard Of Conduct; Off Duty Conduct; Exclusionary Rule; Fourth Amendment; Rational Nexus

**CASE STYLE:** Humphrey v. Division of Corrections/Mount Olive Correctional Complex  
DOCKET NO. 2013-0366-MAPS (6/12/2014)

**PRIMARY ISSUES:** Whether the Division of Corrections was justified terminating the employment of a Correctional Officer for participating in the spraying of civilians with pepper spray (OC) while he was off duty.

**SUMMARY:** Grievant's employment as a Correctional Officer was terminated after an incident where he was arrested for driving an automobile from which passengers sprayed pedestrians with pepper spray, and gave inconsistent reports about the incident to various investigators. Respondent alleges Grievant's action violate Agency policy and erode essential public trust. Grievant argues that the charges against him were dismissed and all of the evidence of the pepper spray incident is inadmissible because it was gathered by the police after an improper arrest. The exclusionary doctrine is not applicable to public employee grievance procedures. Respondent proved the charges against Grievant and that his off-duty conduct had a rational nexus to his job performance. The grievance is DENIED.

**KEYWORDS:** Job Vacancy; In-House Applications; Interview; Nepotism

**CASE STYLE:** Davis, et al. v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital  
DOCKET NO. 2013-0270-CONS (6/11/2014)

**PRIMARY ISSUES:** Whether Grievants proved that the Respondent violated any rules and regulations governing hiring; or that the decision to follow Division of Personnel directives was clearly wrong.

**SUMMARY:** Sharpe Hospital posted an Office Assistant I position for the Hospital's Dietary Department in March 2012. Some of the Grievants saw the posting, but none of the Grievants applied for the position. Sharpe Hospital interviewed three candidates from the Division of Personnel Register and hired one of those candidates. That successful applicant was deemed ineligible for the position since he was a probationary employee. Subsequently, Sharpe Hospital interviewed three applicants on August 20 and August 21, 2012. This was conducted within six-months of the original posting. Record established that in the event a posted vacancy is filled within six months of the established closing date, the appointing authority is not required to re-post the vacancy.

---

**KEYWORDS:** Bad Faith; Attorney's Fees; Costs; Remedial

**CASE STYLE:** Ferrell, et al. v. Regional Jail and Correctional Facility Authority/Western Regional Jail  
DOCKET NO. 2013-1005-CONS(A) (6/12/2014)

**PRIMARY ISSUES:** Whether Grievants should be awarded their costs as a result of Respondent's extreme bad faith and whether attorney's fees may be included in said costs.

**SUMMARY:** Respondent was previously found to have acted in extreme bad faith during this grievance action. Pursuant to West Virginia Code § 6C-2-4(c)(6), Grievants sought an award of the costs they incurred during the grievance against Respondent, including their attorney's fees. Respondent conceded certain costs claimed by Grievants, but argued that the Grievance Board had no authority to award attorney's fees as costs for extreme bad faith. Where an administrative law judge has found that a party has acted in extreme bad faith, the administrative law judge may allocate the costs of the hearing to the party found to have acted in bad faith. Such costs may include, but are not limited to, attorney's fees.

---

**KEYWORDS:** Annual Salary Increase; Direct Patient Care; Jurisdiction; Discrimination; Favoritism

**CASE STYLE:** Latif, et al. v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital  
DOCKET NO. 2013-2243-CONS (6/18/2014)

**PRIMARY ISSUES:** Whether the Grievance Board lacks jurisdiction to hear this grievance.

**SUMMARY:** Grievants contest their exclusion from pay increases received by other employees of Respondent at Mildred Mitchell-Bateman Hospital with whom they feel they are similarly situated. These pay increases were received either due to the enactment of a particular statute or under a Circuit Court settlement agreement and Order in an ongoing lawsuit. The statute specifically exempts the implementation of its pay increase from the grievance process. The Grievance Board lacks jurisdiction to enforce a Circuit Court settlement agreement or Order. Accordingly, Respondent's Motion to Dismiss is GRANTED.

---

**KEYWORDS:** Patient Abuse; Unsubstantiated Investigation; Rescinded Suspension; Return to Work; Job Abandonment; Mootness; Untimeliness; Lack of Jurisdiction

**CASE STYLE:** Smith v. Department of Health and Human Resources/Lakin Hospital  
DOCKET NO. 2014-0320-DHHR (6/17/2014)

**PRIMARY ISSUES:** Whether the grievance is now moot because the investigatory suspension was rescinded.

**SUMMARY:** Grievant was employed by Respondent and was suspended pending investigation of an allegation of patient abuse. The suspension was rescinded and Grievant lost no pay or benefits. The issue of the suspension is moot. Grievant was later dismissed for job abandonment, but did not file a grievance protesting his dismissal. Grievant cannot litigate his dismissal for job abandonment in this grievance as the investigatory suspension and the dismissal do not involve the same conduct. Accordingly, this grievance is dismissed.

**KEYWORDS:** Direct Patient Care Position; Pay Increases; Jurisdiction

**CASE STYLE:** Albright, et al. v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital

DOCKET NO. 2013-1413-CONS (6/17/2014)

**PRIMARY ISSUES:** Whether the Grievance Board has jurisdiction to hear this matter.

**SUMMARY:** Grievants grieve their exclusion from pay increases received by other employees of Respondent at Mildred Mitchell-Bateman Hospital. These pay increases were received either due to the enactment of a particular statute or under a Circuit Court settlement agreement and order in an ongoing lawsuit. The statute specifically exempts the implementation of its pay increase from the grievance process. The Grievance Board lacks jurisdiction to enforce a Circuit Court settlement agreement or order. Accordingly, Respondent's Motion to Dismiss should be granted, and this grievance, DISMISSED.