

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in July 2013

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>	Most Qualified Applicant; Administrative Experience; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Carr v. Department of Education/Division of Teaching and Learning and Kenneth S. Rubenstein, Intervenor</u> DOCKET NO. 2013-0080-DOE (7/10/2013)
<u>PRIMARY ISSUES:</u>	Whether Grievant demonstrated that the selection process was flawed, or that he was the most qualified applicant for the position at issue.
<u>SUMMARY:</u>	Grievant was not selected to serve as Principal at the Pruntytown Correctional Center. Grievant did not demonstrate that the selection process was flawed, or that the decision to select another applicant was arbitrary and capricious or clearly wrong.

TOPICAL INDEX
HIGHER EDUCATION EMPLOYEES

KEYWORDS: Contract Renewal; Improvement Plan; Unsatisfactory Work Performance; Failure to Improve; Arbitrary and Capricious

CASE STYLE: Morris v. West Virginia Northern Community College

DOCKET NO. 2012-0903-NCC (7/19/2013)

PRIMARY ISSUES: Whether Respondent's decision to not renew Grievant's term appointment for the academic year 2012-2013 was arbitrary and capricious.

SUMMARY: Respondent hired Grievant in 2007 on a term appointment as an instructor in the Computer Information Technology Department. Grievant was employed by a series of one-year renewable term appointments for five academic years. While he was employed by Respondent, Grievant was placed on improvement plans on three separate occasions for unsatisfactory work. Record established that Grievant did not have a property interest or right to continued employment with Respondent. In addition, Grievant did not demonstrate by preponderate evidence that Respondent's decision to not renew Grievant's faculty appointment was an arbitrary and capricious act.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: Statutory Time Limits; Minimum Instructor Pay; Dailey Rate of Pay; 220-Day Contract; Retired Rank; Years of Service; 200-Day Contract; Res Judicata; Repetitive Grievances; Violation of Current Employment Contract

CASE STYLE: Plumley, et al. v. Lincoln County Board of Education
DOCKET NO. 2013-0160-CONS (7/30/2013)

PRIMARY ISSUES: Whether Grievants were unequivocally put on notice that the employer would not adjust their pay to pay them the full amount established by the Army as the Minimum Instructor Pay an employing school board will pay to retired military personnel employed as JROTC Instructors. Whether Grievants received the amount of compensation to which they were entitled under the Board's contract with the U.S. Army, and by federal law, as retired military personnel employed as JROTC Instructors, consisting of an annual sum certain labeled "Minimum Instructor Pay," and calculated by the Army, in accordance with their 11-month, 220-day teaching contracts approved by the Board.

SUMMARY: Grievants, Dallas Plumley and Craig Adkins, are retired from active service in the United States Army. Grievant Plumley holds the retired rank of Lieutenant Colonel and Grievant Adkins holds the retired rank of Sergeant Major. Grievants have been conducting an Army Junior Reserve Officer Training Corps ("JROTC") program in Lincoln County for several years. The JROTC program presently operates out of the recently consolidated Lincoln County High School as a "vocational program." Grievants are employed as teachers by Respondent LCBE.

Grievants are unique among the school faculty in their county in that their compensation is subsidized by the federal government in an apparent effort by the Department of Defense to promote the JROTC program in secondary education. The terms of employment for JROTC Instructors in Lincoln County have previously been litigated before this Grievance Board by Grievant Adkins on at least two occasions without success.

KEYWORDS: Reprisal; Retaliation; Employment Contracts; Compensation; 220-Day Teaching Contracts; Pay Calculations; Discrimination

CASE STYLE: Plumley, et al. v. Lincoln County Board of Education

DOCKET NO. 2013-0324-CONS (7/30/2013)

PRIMARY ISSUES: Whether Grievants established by a preponderance of the evidence that the employment contracts they were required to sign involved a material violation of any applicable law, statute, rule, or regulation applicable to their employment status. Whether Grievants established a prima facie case of retaliation where there is no persuasive evidence that the employment contracts they were required to sign represented an adverse employment action.

SUMMARY: Grievants allege that the contracts they were required to sign violated some official action by the Board of Education, and that the terms contained in those contracts were included as retaliation for their actions in filing separate grievances in August 2012 challenging their pay calculations. However, there was no evidence to indicate how the contracts necessarily violated any agreement approved by LCBE. Indeed, no provisions in these contracts were as restrictive in regard to scheduling JROTC Instructor duties as the agreement between LCBE and the Army, which required Grievants to satisfy various Army requirements. Further, Grievants failed to establish a prima facie case of retaliation because they did not establish by a preponderance of the evidence that the 220-day contracts they were required to sign in September 2012 contained terms that differed from their 220-day contracts for the previous school year so as to constitute a materially adverse personnel action. Therefore, this grievance must be denied.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Employee Code of Conduct; Harassment; Intimidation; Bullying; Insubordination

CASE STYLE: Dempsey v. Fayette County Board of Education
DOCKET NO. 2013-1138-FayED (7/10/2013)

PRIMARY ISSUES: Whether Respondent was established that Grievant was insubordinate when she sprayed a co-worker with water from the dish sprayer.

SUMMARY: Grievant was suspended for three days without pay for intentionally spraying a coworker in the face with water. Grievant argues that the spraying was accidental. Respondent proved that Grievant intentionally sprayed a coworker with water and that this act was a violation of Policy 5902 of the Employee Code of Conduct of the West Virginia and Fayette County Boards of Education, which constituted insubordination and that Grievant's three day suspension was justified and appropriate.

KEYWORDS: Pay; Compensation; Reprisal

CASE STYLE: Anderson, et al. v. Kanawha County Board of Education
DOCKET NO. 2012-0131-CONS (7/11/2013)

PRIMARY ISSUES: Whether Grievant was properly compensated for a summer position and whether Grievant proved his claim of reprisal.

SUMMARY: On each work day, Grievant made a morning run and an afternoon run. The runs were scheduled to take a total of three and one-half hours to complete. However, on some days, the runs took Grievant more than three and one-half hours to complete. On others, it took less time. Starting in July 2011, Grievant began to be paid less than a full day's pay for his runs even when he worked more than three and one-half hours. Grievant asserts that he was improperly paid a half-day's pay on July 1, 5, 7, and 8, 2011, when he should have been paid for full days because he worked more than three and one-half hours on those days. Grievant also asserts that he received a written reprimand in retaliation for filing his grievance.

KEYWORDS: Compensation; Overtime Opportunity; Extra-Duty Work; Regular Employee

CASE STYLE: Shaffer v. Kanawha County Board of Education
DOCKET NO. 2013-0261-KanED (7/3/2013)

PRIMARY ISSUES: Whether Grievant is entitled to 1.5 hours of compensation as a result of overtime work performed by a substitute employee.

SUMMARY: Grievant contends that he, a regular employee, should have been given the opportunity to work overtime on a date certain as opposed to the substitute general maintenance employee who worked the overtime. The amount of overtime in dispute is a total of one and an half (1.5) hours. Respondent maintains Grievant's allegations of wrong doing are misplaced. Respondent avers Grievant should not be granted a windfall pursuant to a mistake or misunderstanding not of its making. Respondent is aware and sensitive to giving priority in overtime assignments to regular employees rather than substitutes. Grievant did not establish he was the regular employee next in line to perform the overtime work performed by the substitute employee. Grievance was denied

TOPICAL INDEX
STATE EMPLOYEES

KEYWORDS: Progressive Discipline; Overzealous Behavior; Overstepping Authority; Insubordination; Hostile Work Environment; Intimidating and Threatening Behavior

CASE STYLE: Halen v. Division of Motor Vehicle
DOCKET NO. 2012-0912-DOT (7/30/2013)

PRIMARY ISSUES: Whether disciplinary action taken was for good cause, and not arbitrary and capricious.

SUMMARY: Grievant's employment with the West Virginia Division of Motor Vehicles was terminated after approximately five years of employment. Respondent maintains that Grievant was terminated for cause. Respondent highlights Grievant's pattern of behavior, alleging continued intimidating and objectionable conduct despite remedial disciplinary measures. Respondent cites cumulative effect. Specifically, Grievant was terminated because of behavior Respondent deemed insubordinate. Grievant protests.
In accordance with applicable standard, Respondent established 'good cause' for termination of Grievant's employment by a preponderance of the evidence. Respondent has substantial discretion to determine the penalty in these types of situations. This grievance is DENIED.

KEYWORDS: Progressive Discipline; Probationary Employee; Trial Work Period; Absenteeism; Constituted Leave Abuse; Attendance Improvement Plan; Unsatisfactory Work Performance

CASE STYLE: Davis v. Department of Health and Human Resources/Hopemont Hospital
DOCKET NO. 2012-1131-CONS (7/26/2013)

PRIMARY ISSUES: Whether suspension and termination were warranted after progressive disciplinary measures were ineffective.

SUMMARY: Grievant was terminated from her employment with Hopemont Hospital effective March 29, 2012, for excessive absenteeism. The record established that Grievant was afforded an improvement period and counseling during the probationary period of her employment in an attempt to help her with the attendance issues. The record also established that this discipline was appropriate and that Grievant's excessive absenteeism was of a substantial nature that was affecting the rights and the interests of the patients at the hospital. In short, Grievant was terminated from her employment for good cause.

KEYWORDS: Time Lines; Processing Mail; Statutory Excuse; Delay Level One Conference; Lost Form

CASE STYLE: Thomas v. Regional Jail and Correctional Facility Authority/Southwestern Regional Jail
DOCKET NO. 2013-1820-MAPSDEF (7/19/2013)

PRIMARY ISSUES: Whether Respondent triggered a default by failing to hold a conference within the statutory time period.

SUMMARY: Grievant proved that Respondent failed to hold a level one conference within the mandatory time frame set out in W. Va. Code § 6C-2-4. Respondent failed to prove that it was prevented from holding the level one conference as a result of any of the acceptable reasons set out in W. Va. Code § 6C-2-3. Accordingly, Grievant prevails by default.

KEYWORDS: Failure to Maintain Control of Vehicle; Automobile Accident; State-Owned Vehicle; At-Fault; Arbitrary and Capricious; Discrimination; Default; Time Lines

CASE STYLE: Winters v. Division of Labor
DOCKET NO. 2013-1016-DOC (7/19/2013)

PRIMARY ISSUES: Whether Respondent defaulted by providing a witness list to Grievant less than six days prior to the hearing. Whether Respondent was justified in giving Grievant a three-day suspension without pay for wrecking a State-owned vehicle

SUMMARY: Respondent gave Grievant a three-day suspension for wrecking a State vehicle while on duty. Grievant argues that the penalty discriminatory because other employees had not been suspended for having automobile accidents with State vehicles. Grievant also argues that the suspension was arbitrary because a review committee did not recommend a suspension.

KEYWORDS: Policy allowing employees to bid on shifts; Shift Bid Process

CASE STYLE: Burdette, Jr., et al. v. General Services Division

DOCKET NO. 2012-0709-CONS (7/31/2013)

PRIMARY ISSUES: Whether Respondent violated applicable laws, rules, and procedures in discontinuing the shift bid policy.

SUMMARY: Grievants are employed by General Services Division. In 2007, the Director of General Services instituted a policy allowing employees to bid on the shifts they wished to work. The Director amended the policy in 2010 and then rescinded it in December 2011. Grievants filed this grievance contesting the rescission of the policy, asserting that the Director had no authority to rescind the policy, and that a 2010 settlement agreement also prohibited its rescission. Respondent denies Grievants claims and contends that the Director had the authority to rescind the policy and that he violated no rules, laws, or policies in doing so. Grievants failed to prove their claims by a preponderance of the evidence.

KEYWORDS: On-Call Employee; Respond to Emergencies; Demotion; Unsatisfactory Job Performance

CASE STYLE: Baker v. Division of Highways

DOCKET NO. 2012-1372-DOT (7/17/2013)

PRIMARY ISSUES: Whether Grievant demonstrated that the penalty imposed for the minor infraction, under extenuating circumstances, was clearly excessive.

SUMMARY: Grievant, a supervisor, was suspended for 20 days without pay, and demoted from a Transportation Crew Supervisor 1 to a Transportation Worker 2, Craftworker, with a reduction in pay, because rather than ignoring an emergency call when he was the on-call supervisor responsible for dispatching a crew in an emergency, after-hours situation when he was out of town on annual leave and exhausted, which would have been acceptable, he answered the telephone and asked the dispatcher if she could contact the next person on the on-call list, which she said she would do. Grievant acknowledged it was his responsibility to call out someone to respond to the emergency, but argued that the discipline imposed was excessive.

KEYWORDS: Improvement Plan; Inappropriate Behavior; Failing to Follow the Directives of his Supervisor; Misconduct; Retaliation; FMLA Leave

CASE STYLE: Adkins v. Department of Health and Human Resources/Bureau for Children and Families
DOCKET NO. 2013-0264-DHHR (7/19/2013)

PRIMARY ISSUES: Whether Grievant established by a preponderance of the evidence that his termination by Respondent violated the FMLA or any other law, rule or regulation.

SUMMARY: Respondent terminated Grievant’s employment based upon a series of performance problems and workplace conduct issues, including failing to notify his assigned clients to appear for Judicial Reviews, failure to timely complete required face-to-face meetings with clients, cursing in the presence of his immediate supervisor, missing one or more court hearings, and failing to follow through on addressing needs presented by various clients. Between December 2006 and December 2011, Grievant had been the subject of multiple disciplinary or remedial actions, including four written reprimands, one verbal reprimand, one three-day suspension, one five-day suspension, an employee evaluation with an overall rating of “needs improvement,” and a 90-day Improvement Plan, all of which related to performance and behavior issues. Grievant’s five-day suspension was based on an investigation which found that he had created a hostile work environment for his co-workers. Although some of the allegations in Grievant’s termination notice were excluded because they failed to provide sufficient notice of the date, time, place and persons involved to comply with due process standards, and some allegations were not established by a preponderance of the evidence, Respondent nonetheless established by preponderant evidence that Grievant committed multiple offenses which represented a continuation of the pattern of misconduct for which he had previously been disciplined and warned that further misbehavior would result in termination. Grievant failed to demonstrate that Respondent violated the Family Medical Leave Act (“FMLA”), Americans with Disabilities Act (“ADA”), or any other statute, rule or regulation in regard to this action, or that the punishment imposed was disproportionate to the offenses committed or an abuse of discretion.

KEYWORDS: Duty-Free Meal Break; Bona Fide Meal Break; On-Call; Statute of Limitations; Two-Way Radio

CASE STYLE: Meeks v. Regional Jail and Correctional Facility Authority/Tygart Valley Regional Jail

DOCKET NO. 2013-0220-MAPS (7/2/2013)

PRIMARY ISSUES: Whether Respondent is required to pay Grievant for her meal breaks.

SUMMARY: Grievant asserted that she should have been paid for her 30 minute meal break every day she worked from 2007 until her resignation in August 2012, because she had to carry her radio during her meal break and was required to report to duty in case of an emergency. Respondent did not raise a timeliness defense, however, the undersigned could not, by statute, award back pay beyond one year preceding the filing of this grievance.

KEYWORDS: Obscene Websites; Pornography; Policy Violations; State Computer; Reprisal; Retaliation

CASE STYLE: Carper v. Clay County Health Department

DOCKET NO. 2012-0235-ClaCH (7/15/2013)

PRIMARY ISSUES: Whether the penalty of dismissal was clearly excessive or mitigation of the penalty is was appropriate.

SUMMARY: Respondent dismissed Grievant from employment for accessing and attempting to access pornographic material on his work computer during the work day. Grievant denies these allegations and argues, among other things, that his dismissal was an act of reprisal for his filing a previous successful grievance and whistle-blowing activity. Respondent proved the allegations by a preponderance of the evidence and that it had valid, non-retaliatory reasons for terminating Grievant's employment.

KEYWORDS: Arbitrary and Capricious; Selection Process; Vacancy; Job Duties

CASE STYLE: Bowen, et al. v. Division of Highways/ AND
DOCKET NO. 2012-0888-CONS (7/15/2013)

PRIMARY ISSUES: Whether Respondent's decision to not consider technologists when filing the vacant position was arbitrary and capricious or a violation of any law, rule, or regulation.

SUMMARY: Grievants allege that the decision to use two postings to fill one vacancy, and to not fill the Transportation Engineering Technologist position that was posted on September 19, 2011, was somehow a violation of statute, policy, and applicable rule, or was an arbitrary and capricious act. Grievants failed to prove by a preponderance of the evidence that Respondent violated its rules by deciding to post a Transportation Engineering Technologist position to secure an eligible applicant for an Assistant Maintenance Engineer vacancy.