

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in July 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.

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

KEYWORDS: Misconduct; Evidence; Discipline; Witness Credibility

CASE STYLE: Smith v. Berkeley County Board of Education
DOCKET NO. 2014-0449-BerED (7/2/2014)

PRIMARY ISSUES: Whether Respondent proved that Grievant was involved in encouraging students to harm a co-worker by spraying her with cologne.

SUMMARY: Grievant was terminated by Respondent for her alleged involvement in encouraging students to spray a co-worker with cologne. This was allegedly done with the intent to harm the co-worker with the knowledge that the co-worker would suffer an allergic reaction. The extensive record of this case was not convincing due to the existence of an equal number of student witnesses offered in support of the conspiracy theory and an equal number that opposed such a theory. In addition, the main accuser recanted his initial account of Grievant's involvement in the alleged conspiracy at level three. Respondent failed to prove, by preponderance of the evidence, that Grievant was involved in encouraging students to harm a co-worker by spraying her with cologne. This grievance is granted.

KEYWORDS: Professional Extracurricular Assignment; Coach; Merger; Same Assignment; Priority in Assignments

CASE STYLE: Keatley v. Mingo County Board of Education and Department of Education and Marcella Charles, Intervenor

DOCKET NO. 2014-0127-MinED (7/28/2014)

PRIMARY ISSUES: Whether Grievant demonstrated that she was entitled to retain the extracurricular cheerleading coach assignment after a merger of schools.

SUMMARY: Matewan Middle School and Matewan Elementary School were merged to form Matewan Pre K-8 at the beginning of the 2013-2014 school year. Grievant was notified in the Spring of 2013 that her professional extracurricular contract as cheerleading coach at Matewan Middle School was being terminated at the end of the 2012-2013 school year, due to the closure of Matewan Middle School. The cheerleading coach assignment at Matewan Pre K-8 was posted in the late Spring of 2013, and Grievant applied, but was not selected. Grievant did not challenge her non-selection, but rather contended that the assignment should not have been posted because it was never vacant, and alternatively, that the assignment was the same assignment that existed in the prior school year, and she was entitled to retain the assignment. As to the second argument, the statute on which Grievant relies applies only to service personnel extracurricular assignments, not professional extracurricular assignments. As to the first argument, the record does not reflect that a majority of the classroom teachers voted to receive priority in filling positions at the new school. Further, the statute on which Grievant relies does not apply to extracurricular assignments.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Classification; Seniority; Extended Absence; Fill-In; Arbitrary and Capricious; Preferred Recall; Step-Up

CASE STYLE: Myers v. Monongalia County Board of Education
DOCKET NO. 2013-1493-MonED (7/8/2014)

PRIMARY ISSUES: Whether Respondent's decision to go down the seniority list to fill-in for an employee who was on sick leave for an extended period of time was unreasonable, when no employee or substitute had ever held the classification of the absent employee.

SUMMARY: Respondent's Supervisor of Maintenance used his accumulated leave to take approximately three months off work for medical reasons. Respondent had no other employee, including substitute employees, who had ever held the classification of Supervisor of Maintenance. Respondent went down the seniority list for the Maintenance Department in order to find an employee to fill-in for the Supervisor of Maintenance. The employee who accepted this task performed the Supervisor of Maintenance duties about half the time for a pro-rated portion of the Supervisor stipend, while continuing to perform part of his own job duties the rest of the time. Grievant asserted that because Respondent mistakenly had this employee take the state competency test for Foreman rather than the state competency test for Supervisor, that this mutated the classification into Foreman and Grievant was entitled to be recalled from the preferred recall list as a Foreman to work in the position during the extended absence. This argument is without merit. Neither Grievant nor any other employee had obtained a right to fill-in as the Supervisor of Maintenance during his absence. Respondent's decision to go down the seniority list to fill this assignment was not unreasonable.

KEYWORDS: Willful Neglect of Duty; Insubordination; Assigned Bus Stop; Misconduct; Policy Violation; Hearsay Statements; Employee Code of Conduct; Disciplinary Action

CASE STYLE: Graham v. Wetzel County Board of Education

DOCKET NO. 2014-0901-WetED (7/9/2014)

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

SUMMARY: Grievant's employment as a Bus Operator was suspended on January 7, 2014, due to alleged willful neglect of duty. Grievant was alleged to have improperly changed a senior vocational student's assigned bus stop and then failed and refused to pick up the same student on his morning bus run as an act of insubordination and willful neglect of duty. The employer failed to establish by a preponderance of the credible evidence of record that Grievant was insubordinate or engaged in willful neglect of duty in violation of W. Va. Code § 18A-2-8(a). Therefore, this grievance must be granted.

KEYWORDS: Qualifications; Classification Title; Vacancy; Multiclassified Position; Seniority; Certification; Stare Decisis

CASE STYLE: Spicer v. Monongalia County Board of Education

DOCKET NO. 2013-1942-MonED (7/2/2014)

PRIMARY ISSUES: Whether Grievant should have been selected for the posted Mechanic/School Bus Operator vacancy.

SUMMARY: Grievant argued he should have been selected for a posted Mechanic/School Bus Operator vacancy because he was a Bus Operator at the time of the posting, and was fully-certified as a Bus Operator. No applicant held the multi-classification title in the posting, and none of the applicants had any seniority in the Mechanic classification. All applicants had passed the Mechanic state competency test. The successful applicant had the most seniority as a Bus Operator for Respondent, and the most overall seniority, but he was not a Bus Operator at the time of the posting, and was not certified to operate a school bus. He did not become fully certified as a Bus Operator until more than a month after he was placed in the position. Without proper certification as a Bus Operator, the successful applicant could not be placed in the posted position.

KEYWORDS: Default; Level One Decision; Statutory Time Lines; Fifteen Days
CASE STYLE: Thomas v. Marion County Board of Education
DOCKET NO. 2014-0499-MrnEDDEF (7/9/2014)
PRIMARY ISSUES: Whether Respondent prove by a preponderance of the evidence any excuse for the default.
SUMMARY: Grievant argues that a default occurred at level one of the grievance process because the level one decision was not issued within fifteen days after the conclusion of the hearing as required by statute. Respondent denies the same, arguing that an unintentional delay in mailing a decision does not provide a basis for default. Grievant proved by a preponderance of the evidence that a default occurred at level one. Grievant's claim for default is granted.

KEYWORDS: Extracurricular Run; Regular Bus Run; Continuing Practice; Time Limits
CASE STYLE: Straley v. Putnam County Board of Education
DOCKET NO. 2014-0314-PutED (7/28/2014)
PRIMARY ISSUES: Whether Respondent has proven by a preponderance of the evidence that the grievance was not timely filed.
SUMMARY: Grievant grieved the inclusion of a cross-country stop in his regular bus run for which he was hired in 2012, which caused the denial of an extra-duty run in 2013. The grievance does not involve a continuing practice. The denial of the extra-duty run is continuing damage from the previous act of inclusion of the stop in Grievant's regular run, and is not a continuing practice. Respondent has proven by a preponderance of the evidence that the grievance was not timely filed. Grievant presented no evidence demonstrating a proper basis to excuse his failure to file in a timely manner. Accordingly, the grievance is dismissed.

KEYWORDS: Default; Remedy; Advisory Opinion; Relief; Tort-Like Damages; Moot; Resignation

CASE STYLE: Smith v. Wood County Board of Education

DOCKET NO. 2013-2255-CONS (7/24/2014)

PRIMARY ISSUES: Whether the relief sought by Grievant is unavailable, rendering the grievance moot.

SUMMARY: Since Grievant prevailed on the merits by default, the sole issue is whether the remedies sought by Grievant are contrary to law or contrary to proper and available remedies. As relief, Grievant requested Respondent to make accommodation for her disability, pay her legal fees, hospital bill and bills for any future medical treatment which may be required due to the fact that she had to drive a bus that released fumes, which caused her to have bronchial /asthma symptoms. Grievant voluntarily retired her position as a "regular bus operator" with WCBOE on July 31, 2013, while her grievance was still pending. However, after her retirement, Grievant was employed by the WCBOE as a substitute bus operator. In addition, Grievant was recently elected to the WCBOE. Respondent correctly asserts that, as a School Board member, Grievant is prohibited by W. Va. Code §18-5-1a(a)(2)(2013) from continued employment as a bus driver for the WCBOE. Grievant is no longer an employee of the Board and does not seek back pay or other pay-related damages in this grievance. Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not proper issues before the Public Employees Grievance Board. Because the relief sought by Grievant is not available from the Grievance Board, the grievance is moot and is dismissed.

KEYWORDS: Discrimination; Favoritism; Experience Credit; Policy; Duties; Responsibilities

CASE STYLE: Clark, et al. v. Preston County Board of Education

DOCKET NO. 2013-2251-CONS (7/22/2014)

PRIMARY ISSUES: Whether Grievants demonstrated that they were the victims of discrimination or favoritism.

SUMMARY: Grievants argue that they should receive a salary supplement based upon prior work experience that was similar to the duties they perform for Respondent. Grievants argue that they perform like assignments and duties to an employee of Respondent that was granted prior work experience credit. Record established that the prior superintendent that granted the work experience credit did so without the appropriate authority. In addition, record failed to establish that Respondent violated West Virginia Code § 18A-4-5b.

TOPICAL INDEX
STATE EMPLOYEES

KEYWORDS: Suspension; Disciplinary History; Resident Neglect; Resident Abuse; Mitigation

CASE STYLE: Clark, et al. v. Department of Health and Human Resources/Lakin Hospital
DOCKET NO. 2014-1559-CONS (7/2/2014)

PRIMARY ISSUES: Whether Grievants proved that their suspension was disproportionate to the offence.

SUMMARY: Grievants are Health Service Workers employed by Respondent at Lakin Hospital who grieved their three-day suspension. Respondent proved by a preponderance of the evidence that Grievants were jointly responsible for the care of an incapacitated resident, that they were to provide care for that resident every two hours, including checking her skin, and that Grievants failed in that responsibility. As a result, the failure of a lab technician to remove a tourniquet from the resident's wrist went undiscovered for over five hours. Grievants suspension for three days each for this failure was justified. Grievants did not prove that the penalty should be mitigated. Accordingly, the grievance is denied.

KEYWORDS: Selection Process; Interview Committee; Experience; Procedural Inconsistencies; Substantial Evidence; Arbitrary and Capricious

CASE STYLE: Browning v. Department of Health and Human Resources/Bureau for Public Health
DOCKET NO. 2013-1604-DHHR (7/3/2014)

PRIMARY ISSUES: Whether Grievant proved that the selection decision was arbitrary and capricious.

SUMMARY: Grievant was not selected for the position of Chief Radiological Health Specialist, although she had performed the duties of the subordinate Radiological Health Specialist for many years. The Chief Radiological Health Specialist is a managerial position. Respondent's selection of an outside candidate who possessed greater managerial experience than Grievant was not arbitrary and capricious. The few procedural inconsistencies in the selection process did not affect the ultimate selection decision. Accordingly, the grievance is denied.

KEYWORDS: Reallocation; Duties; Retirement; Moot; Advisory Opinions; Relief

CASE STYLE: Wright v. Division of Motor Vehicles and Division of Personnel
DOCKET NO. 2013-0714-DOT (7/14/2014)

PRIMARY ISSUES: Whether his grievance is moot since the relief sought by Grievant is not available from the Grievance Board after her resignation.

SUMMARY: Grievant filed a grievance against her state employer (DMV) alleging her position was improperly classified, seeking reallocation. The West Virginia Division of Personnel, was joined as an indispensable party. Prior to a decision regarding the issue in dispute, Grievant retired from her position with the Division of Motor Vehicle. A motion to dismiss this matter was filed by the former employing agency. Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not proper issues before the Public Employees Grievance Board. The relief sought by Grievant is not available after her retirement. Consequently, this issue is moot and the grievance is dismissed.

KEYWORDS: Selection Committee; Vacancy; Qualifications; Arbitrary and Capricious

CASE STYLE: Skinner v. Department of Health and Human Resources/Bureau for Children and Families
DOCKET NO. 2012-1302-DHHR (7/8/2014)

PRIMARY ISSUES: Whether Grievant met her burden of proving the selection process was insufficient or fatally flawed.

SUMMARY: Grievant is a Child Support Specialist with the Bureau for Child Support Enforcement. Respondent posted for the position of Family Support Supervisor for the Respondent's Lewis/Upshur County District. Respondent interviewed the Grievant and three other candidates, and selected the candidate with the highest score. The selection committee found the Grievant to be less qualified than the successful candidate. Grievant failed to meet her burden and demonstrate that Respondent's selection process was flawed, or that she was the more qualified candidate.

KEYWORDS: Performance Improvement Program; Job Responsibilities; Cultural Differences; National Origin; Work Performance; Employee Performance Appraisal; Insubordination; Hostile Work Environment; Suspension; Progressive Discipline; Reprisal; Discrimination; Medical Accommodations; Due Process; Wrongful Termination; Mitigation of Damages; Representation in Disciplinary Meetings

CASE STYLE: Deyerle v. Department of Health and Human Resources/Bureau for Public Health

DOCKET NO. 2013-2231-CONS (7/15/2014)

PRIMARY ISSUES: Whether Grievant was improperly suspended for an indefinite period of time and reason, in violation of DOP Administrative Rule, 143 C.S.R. 1 §§ 12.3 and 12.3.b.(2012).
Whether Respondent's directive to attend an investigatory interview requested by Respondent, absent a representative, was contrary to W. Va. Code § 6C-2-3(g)(1).
Whether Respondent's 'guidelines for representation' violate W. Va. Code § 6C-2-3(g)(1) and are, therefore, void.
Whether Grievant was wrongfully terminated.

SUMMARY: This grievance consolidates four grievances filed by Grievant, stemming from disciplinary actions taken against her by Respondent; a three-day suspension for insubordination, another suspension concerning an investigation into a verbal altercation between Grievant and her Supervisor, which raised allegations that Grievant's conduct created a hostile work environment and, finally, Grievant's termination. Her conduct allegedly violates a number of DHHR policies.
Grievant was suspended for three days for allegedly insubordinate conduct in failing to comply with the request of her superior to complete a newly assigned task. Grievant contends she was not insubordinate, but was simply responding to conflicting directives and, when the conflict was resolved, completed the task. Also, Grievant contends Respondent was retaliating against her with this suspension because she had filed a prior grievance. Respondent demonstrated Grievant was insubordinate and that her conduct justified a three-day suspension. Grievant did not prove retaliation by Respondent.
Respondent suspended Grievant again while it conducted an investigation into an altercation between Grievant and her supervisor, which allegedly created a hostile work environment. Grievant alleges she was improperly suspended for an indefinite period of time and for an indefinite reason, in violation of the Administrative Rule of the West Virginia Division of Personnel ("Administrative Rule"), 143 C.S.R. 1 §§ 12.3 and 12.3.b.(2012). Grievant established that Respondent violated the general mandate of Administrative Rule 12.3 to limit suspensions to "a specific period of time." Therefore, her

suspension was improper.

Grievant also contends that Respondent's directive to attend an investigatory interview requested by Respondent, absent a representative, was contrary to W. Va. Code § 6C-2-3(g)(1), and that Respondent's 'guidelines for representation' are, therefore, void. Grievant proved Respondent violated this statute. The investigation proceeded, without affording Grievant the due process of appearing with a representative, as requested, to hear the evidence and defend her conduct against possible disciplinary action, in violation of W. Va. Code § 6C-2-3(g)(1). To the extent that Respondent's "guidelines for representation," violate the provisions of W. Va. Code § 6C-2-3(g)(1) by prohibiting its employees from having a representative, if requested, in a meeting which might result in discipline, they are void as contrary to law.

Respondent completed its investigation and contends it had good cause to terminate Grievant because Grievant's conduct violated DHHR hostile workplace/harassment policies. However, had Grievant been permitted to hear the charges against her and answer them in an interview, with the benefit of having her representative present, the outcome of the investigation may well have been different. It is impossible to know what discipline, if any, she would have received for alleged violation of the hostile workplace policy. Respondent denied Grievant the statutory and procedural protections to which she was entitled.

KEYWORDS: Dismissal; Moot; Suspension; Resignation; Advisory Opinion

CASE STYLE: Cline v. Regional Jail and Correctional Facility
Authority/Southwestern Regional Jail
DOCKET NO. 2014-0858-MAPS (7/2/2014)

PRIMARY ISSUES: Whether Respondent's rescission of Grievant's suspension and Grievant's subsequent resignation from his employment have rendered this grievance moot.

SUMMARY: Grievant filed this grievance on January 8, 2014, contesting a suspension he had received. Respondent rescinded Grievant's suspension on February 11, 2014. Grievant resigned his position with Respondent effective March 17, 2014, while this matter was pending at level three of the grievance process. The rescission of Grievant's suspension and Grievant's subsequent resignation from his employment have rendered his grievance moot. Accordingly, this grievance is DISMISSED.

KEYWORDS: Discrimination; Reprisal; Retaliation; Upgrade; Profanity; Complaint; EEO; Gender

CASE STYLE: Cobb v. Division of Highways

DOCKET NO. 2013-1931-DOT (7/2/2014)

PRIMARY ISSUES: Whether Grievant proved her claims of discrimination and reprisal by a preponderance of the evidence.

SUMMARY: Grievant is employed as a Transportation Worker 2 at Division of Highways. At the time of the events leading to this grievance, Grievant worked at the Respondent's Elkview location. Grievant asserts that she was denied the opportunity to receive temporary upgrades to the Crew Supervisor 1 position because of her gender, and in retaliation for making complaints about profanity use in the workplace and perceived incidents of a sexual nature also occurring in the workplace. Respondent denies Grievant's claims. Grievant failed to prove her claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

KEYWORDS: Permanent Employee; Vacancy; Properly Hired; Posting; Definition of Employee; Permanent Employment

CASE STYLE: Pratt v. Jefferson County Health Department

DOCKET NO. 2013-2150-JefCH (7/24/2014)

PRIMARY ISSUES: Whether Grievant was an employee for purposes of the grievance procedure, and could, by statute, file a grievance.

SUMMARY: Respondent did not follow the procedures established by the Division of Personnel when it hired Grievant in 2010. When Respondent was told by personnel employed by the Division of Personnel sometime in 2013 that the proper procedures had not been followed, and that Grievant was not considered to be an employee because of this, Respondent posted Grievant's position, requested a register, and interviewed the applicants, according to the Division of Personnel's Rules. Grievant was not the successful applicant, and his employment relationship with Respondent was terminated. Because the proper procedure was not followed in hiring Grievant, he was not an employee as that term is defined by the grievance procedure, and could not file a grievance.

KEYWORDS: Selection; Promotion; Minimum Qualifications; Work History; Seniority; Most Qualified Applicant; Arbitrary and Capricious

CASE STYLE: Goins v. Division of Natural Resources and Michael S. Lott, Intervenor
DOCKET NO. 2012-1425-DOC (7/24/2014)

PRIMARY ISSUES: Whether Respondent's determination of the selected candidate was based upon relevant factors, and not arbitrary or capricious, or clearly wrong.

SUMMARY: Grievant, who is employed as a Natural Resources Police Officer for the DNR, was not selected for the position of Sergeant within the paramilitary rank structure for DNR's certified law enforcement personnel. An employee other than Grievant was deemed more qualified for the position. Grievant alleges that he should have been selected for the position because he has more seniority and applicable military training than the successful applicant. Respondent set forth information that reasonably supports its decision, it cannot be said that Respondent's selection was without due consideration, or in disregard of pertinent facts and circumstances of the job responsibilities. Grievant did not establish by a preponderance of the evidence that Respondent's selection was improper. Respondent's selection decision was not arbitrary or capricious or clearly wrong. This grievance is DENIED.

KEYWORDS: Written Policy; Motor Vehicle Accident/Incident Review Board; Chargeable Accident; Damage to State Property; State-Issued Vehicle; Arbitrary and Capricious

CASE STYLE: Goins v. Division of Natural Resources
DOCKET NO. 2013-1135-DOC (7/24/2014)

PRIMARY ISSUES: Whether Respondent lawfully enforced applicable policy relevant to the review of accidents or incidents involving state-issued vehicles.

SUMMARY: Grievant received a written reprimand subsequent to driving his state-issued vehicle through a stream crossing which resulted in approximately three thousand (\$3,000) dollars in vehicle repair. Grievant protest this reprimand. Grievant had previously been counseled for damage to a state-issued vehicle. Respondent established a factual, rational and lawful justification for the disciplinary action at issue. This grievance is DENIED.

KEYWORDS: Physician's/Practitioner's Statement Form DOP-L3; Misconduct; Return to Work; Falsified Doctor's Excuse; Modified Duty

CASE STYLE: Cales v. Department of Health and Human Resources/Jackie Withrow Hospital

DOCKET NO. 2014-0406-DHHR (7/28/2014)

PRIMARY ISSUES: Whether Respondent proved that it was justified in dismissing Grievant for falsifying a doctor's excuse.

SUMMARY: Grievant was dismissed from employment as a Food Service Worker at Jackie Withrow Hospital for falsification of a doctor's excuse. Respondent proved by a preponderance of the evidence that Grievant falsified a doctor's excuse allowing her to return to work at modified duty, which was misconduct of a substantial nature and good cause that justified Respondent dismissal of Grievant from employment. Accordingly, the grievance is denied.

KEYWORDS: Pay Increase; Lack of Jurisdiction

CASE STYLE: DaSilva, et al. v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital and Division of Personnel

DOCKET NO. 2014-0733-CONS (7/25/2014)

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 and William r. Sharpe, Jr. 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.

KEYWORDS: Probationary Employee; Unsatisfactory Performance; Trial Work Period; Job Duties; Performance Appraisal

CASE STYLE: Halen v. Office of Technology

DOCKET NO. 2014-1194-DOA (7/29/2014)

PRIMARY ISSUES: Whether Grievant demonstrated that her performance was satisfactory during her probationary period.

SUMMARY: Grievant was dismissed for unsatisfactory job performance during her probationary period of employment as an ASA 2 with Respondent. Such dismissals are not disciplinary in nature. Grievant has the burden to prove by a preponderance of the evidence that her job performance was satisfactory and/or her dismissal was unlawful. Grievant was provided with training and feedback on her performance. However, Grievant's work performance during her probationary period as a ASA 2 did not meet the reasonable expectations of her supervisor with regard to learning the new tasks, policies and procedures of DOP and OOT as they related to her role as HR Manager for Respondent/OOT. She failed to follow through with meeting critical deadlines. Grievant also failed to develop a thorough understanding of the mission and priorities of her HR management position with OOT. A probationary employee may be dismissed at any time for unsatisfactory job performance. Grievant did not demonstrate that her performance was satisfactory as a probationary employee. Grievant failed to establish that she should not have been dismissed. It was within Respondent's discretion to dismiss Grievant from probationary employment. This grievance is DENIED.