

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in August 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 wvwb@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

KEYWORDS: Untimely; Moot; Relief; Advisory Opinions; Class Action; Remedy

CASE STYLE: Frost v. Bluefield State College

DOCKET NO. 2013-2110-BSC (8/6/2014)

PRIMARY ISSUES: Whether the remedies Grievant requests are available through the grievance procedure.

SUMMARY: Respondent failed to present preponderant evidence that the issue of timeliness was raised at the lower levels of the grievance procedure in compliance with W. Va. Code § 6C-2-3(c)(1). However, Respondent established by preponderant evidence that the particular issue addressed in this grievance is moot and, even if Grievant were to prove his grievance by a preponderance of the evidence, the remedies he requests are not available through the grievance procedure in the circumstances presented.

KEYWORDS: Annual Contract; Nonrenewal; Nonretention; Non-Tenure Track; Eliminated Position; Reorganization; Continuing Right of Employment; Discrimination; Arbitrary and Capricious

CASE STYLE: Vehse v. West Virginia University

DOCKET NO. 2014-0030-WVU (8/28/2014)

PRIMARY ISSUES: Whether Grievant proved by a preponderance of the evidence that Respondent's non-retention decision was arbitrary and capricious.

SUMMARY: Grievant was notified in March 2013 that her annual contract would not be renewed, and that her employment relationship with Respondent would terminate on June 30, 2013. As a non-classified, at-will employee, employed pursuant to an annual contract, Grievant had acquired no right to continued employment. Respondent could choose not to renew her contract, and it did so when Grievant's position was eliminated in reorganization. Grievant argued she was discriminated against because she was the only employee whom Respondent did not continue to employ in the reorganization. Grievant was not similarly-situated to classified employees in her unit, many of whose positions continued to exist, nor was she similarly situated to the Director of the unit, as Grievant was not a Director. Further, another non-classified position was created in the reorganization for which the former Director was qualified, whereas, no such position was available for Grievant. Grievant did not demonstrate that she was discriminated against.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: Classification; Training; Years of Experience; Instructional Purposes; Teaching Profession; Salary; Experience Credit; Prior Service

CASE STYLE: Hall, et al. v. Kanawha County Board of Education
DOCKET NO. 2014-0282-CONS (8/7/2014)

PRIMARY ISSUES: Whether Grievants are entitled to experience increment pay from the time they were hired by Respondent as sign language interpreters.

SUMMARY: Grievants are long-time sign language interpreters for Respondent, who were promoted to a new professional classification for interpreters. Grievants were paid the basic salary, without experience increment pay, under the statutory salary schedule, because Respondent did not consider Grievants to be teachers, and experience is defined by the code as teaching experience. School laws must be strictly construed in favor of the employee, and such analysis of the relevant code sections as a whole and related caselaw mandate that Grievants be paid experience increment pay for their experience as sign language interpreters. Accordingly, the grievance is granted.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Classification; Job Description; Misclassification; Executive Secretary

CASE STYLE: Linville v. Lincoln County Board of Education

DOCKET NO. 2013-2222-LinED (8/1/2014)

PRIMARY ISSUES: Whether Grievant proved by a preponderance of the evidence that she should be classified as an Executive Secretary.

SUMMARY: Grievant is employed as a Secretary III by Respondent Lincoln County Board of Education. Grievant works in School Health Services, which is within the Special Education Department, and works primarily with the school nurses. Grievant asserts that she is misclassified and should instead be classified as an Executive Secretary because of her duties and because the Director of Special Education is her supervisor. Respondent argues that Grievant is properly classified, and that Grievant is supervised by the Lead School Nurse and not the Director of Special Education. Grievant failed to prove by a preponderance of the evidence that she meets either the statutory definition of Executive Secretary or the Respondent's expanded job description for Executive Secretary. Therefore, this grievance is denied

KEYWORDS: Extracurricular Bus Run; Schedule Conflict; Discrimination; Arbitrary and Capricious

CASE STYLE: Mullins v. Mason County Board of Education
DOCKET NO. 2014-0357-MasED (8/20/2014)

PRIMARY ISSUES: Whether Grievant proved that Respondent discriminated against her by disqualifying her from an extracurricular assignment that conflicted with her daily work schedule.

SUMMARY: Grievant applied for an aide position on an extracurricular bus run which would require that she be picked up at the EES at 2:30 p.m. each day. Her regular daily work schedule did not end at the EES until 3:15 p.m., even though the special needs students in the classroom were usually gone by 2:30 p.m. each day. Respondent did not award the position to Grievant because the start time conflicted with the work schedule of her regular assignment. Grievant argued that she is not needed at the EES after 2:30 p.m., so it was arbitrary and capricious to deny her the extracurricular run. Additionally, Grievant argues that Respondent's decision is discriminatory because other aides who are similarly situated have been allowed to leave their regular assignments early to take an extracurricular run. Respondent demonstrated that Grievant is not in the same situation as the cited employees and that its decision was not arbitrary or capricious.

KEYWORDS: Discrimination; Favoritism; Job Responsibilities; Classification; Contact Length; Uniformity Provision

CASE STYLE: Hays, Jr. v. Roane County Board of Education
DOCKET NO. 2014-0643-RoaED (8/28/2014)

PRIMARY ISSUES: Whether Grievant's 230-day contract violates the uniformity provision or is discrimination or favoritism.

SUMMARY: Grievant, a Mechanic/Bus Operator, has a 230-day employment term while the other similarly-classified employee with whom he works holds a 261-day employment term. Grievant argues violation of West Virginia Code section 18A-4-5b, the uniformity provision, as well as discrimination or favoritism. The amount of work performed by Grievant is materially different than that of the compared employee, therefore, the uniformity provision does not apply. Grievant's shorter contract length is directly related to his job responsibilities, therefore, it is not discrimination or favoritism. Accordingly, the grievance is denied.

TOPICAL INDEX
STATE EMPLOYEES

KEYWORDS: Discrimination; Favoritism; Job Responsibilities; Evening Shift; Overtime; Schedule Adjust

CASE STYLE: Coleman v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2013-1856-DHHR (8/8/2014)

PRIMARY ISSUES: Whether Grievant established a claim of discrimination by a preponderance of the evidence.

SUMMARY: Grievant is employed as a Guard 1 at the William R. Sharpe, Jr. Hospital. Grievant claims to be the victim of discrimination. Grievant asserts that Respondent singles him out as the only guard on evening shift who is required to schedule adjust when he works extra hours. Grievant wants Respondent to permit him to work more than 40 hours per week, rather than schedule adjust, so that Grievant will be paid time and a half for overtime hours. Respondent maintain that it has discretion to set the work schedules for its employees. Respondent argues that it is not required to pay overtime for hours worked unless Grievant actually works more than 40 hours in a single workweek. Grievant established a case of discrimination by a preponderance of the evidence introduced at level one. This grievance is granted, in part, and denied, in part.

KEYWORDS: Probationary Employee; Excessive Call-Ins; Absenteeism; Verbal Reprimand; Attendance Improvement Plan; Unsatisfactory Performance

CASE STYLE: Lucion v. Department of Health and Human Resources/Welch Community Hospital
DOCKET NO. 2014-0092-DHHR (8/5/2014)

PRIMARY ISSUES: Whether Grievant proved that his performance was satisfactory and was a reliable employee.

SUMMARY: Grievant, a probationary Cook, was dismissed from his employment for unsatisfactory performance due to absenteeism. Attendance was crucial in Grievant's position, and Grievant was not a reliable employee. Grievant did not prove that his performance was satisfactory. Accordingly, the grievance is denied.

KEYWORDS: Probationary Employee; Trial Work Period; Misconduct; Physical Abuse; Verbal Abuse

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

DOCKET NO. 2014-0774-DHHR (8/1/2014)

PRIMARY ISSUES: Whether Respondent proved, by a preponderance of the evidence that Grievant was guilty of the misconduct that was the basis for the termination of her employment.

SUMMARY: Respondent terminated Grievant's probationary employment for misconduct of abusing a resident by failing to follow Hospital protocol when Grievant stood between a resident who was advancing with a motorized wheelchair, and Grievant's supervisor who was feeding another resident in the Dining Hall. Respondent failed to prove by a preponderance of the evidence that Grievant was guilty of abuse as a defined by the Code of State Rules. Respondent also failed to prove that Grievant was guilty of the misconduct with which she was charged.

KEYWORDS: Performance Improvement Plan; Employee Performance Appraisal; Evaluation; Job Duties; Reassignment; Retaliation; Reprisal; Arbitrary and Capricious

CASE STYLE: Goins v. Division of Natural Resources

DOCKET NO. 2013-2242-CONS (8/1/2014)

PRIMARY ISSUES: Whether Grievant proved that the Employee Performance Appraisal or Performance Improvement Plan was arbitrary, capricious and/or whether his involuntary transfer was unlawful reprisal.

SUMMARY: This is a consolidated grievance matter. Grievant, employed as a Natural Resources Police Officer for the West Virginia Division of Natural Resources ("DNR"), was concurrently issued an Employee Performance Appraisal 2 ("EPA-2") and Performance Improvement Plan ("PIP"). The PIP included a 120 calendar day performance improvement period. PIPs and EPAs are recognized as part of the evaluation process and are management tools to increase productivity and to correct unsatisfactory performance. Grievant challenges the veracity of the both the EPA-2 and PIP. Further, Grievant, who had been assigned to Wirt County, was eventually reassigned to Wayne County. Grievant also grieves his transfer. Generally employers have reasonable discretion in these situations. State agencies have the right to transfer employees geographically where there is a need, if they remain in the same classification and pay grade, and are not demoted or reduced in pay. As to transfer of employees in lieu of other methods of discipline, this Grievance Board has recognized that a transfer-justified by the employee's misconduct is a viable option for an employer. Challenges to performance improvement plans and employee performance appraisals, involuntary reassignments and accusations of reprisals have different burdens of proof. Evaluations and PIPs are not disciplinary actions. Consequently, Grievant had the burden of proving by a preponderance of the evidence that the PIP or EPA was improper, arbitrary and capricious or an abuse of discretion. Grievant did not prove that either the PIP or EPA were issued arbitrarily or capriciously, or that they were marked by an abuse of discretion. Respondent established by a preponderance of the evidence a basis for its decision to involuntarily transfer Grievant to a different county. Grievant presented no evidence of reprisals. Respondent nevertheless established, by a preponderance of the evidence, that the reasons for the involuntary transfer were legitimate and not necessarily related to any pending grievance action(s). Grievant has not established a violation of any applicable and controlling statute, rule or policy. Accordingly this grievance is DENIED.

KEYWORDS: Suspension; Unprofessional Behavior; Breach of Confidentiality; Employee Conduct; Personal Issue; Intimidation; Disciplinary History

CASE STYLE: Mullins v. Department of Health and Human Resources/Bureau for Children and Families
DOCKET NO. 2014-0981-DHHR (8/11/2014)

PRIMARY ISSUES: Whether Respondent proved that Grievant violated DHHR Policy Memorandum 2108, by pursuing a personal issue while at work.

SUMMARY: Grievant was suspended for initiating contact on a personal issue with an applicant for benefits, while that person was being assisted in the cubical of a co-worker. This contact led to a loud verbal altercation with a family member of the applicant which disrupted the work of the office. Respondent alleges that Grievant breached the applicant's confidentiality, intimidated the applicant, and disrupted the agency's operations at the office. Respondent issued Grievant a thirty-day suspension because she had been previously suspended for ten days for a similar incident. Grievant alleges that she did not instigate the altercation and that she had a legitimate reason for questioning the applicant's presence in Respondent's offices. She denies and breach of confidentiality or intimidation of the applicant.

KEYWORDS: Performance Improvement Plan; Unsatisfactory Job Performance; Incomplete Work; Inaccurate Work; Missed Deadlines; Written Reprimand; Suspension; Reprisal; Retaliation; Non-Selection; Family Medical Leave Act; Hostile Work Environment; Progressive Discipline; Mitigation; Arbitrary and Capricious

CASE STYLE: Metz v. Department of Health and Human Resources/Office of the Inspector General

DOCKET NO. 2013-2256-CONS (8/7/2014)

PRIMARY ISSUES: Whether Grievant's termination for unsatisfactory performance was proper, or resulted from multiple retaliatory motives.

SUMMARY: Grievant was dismissed from her employment as an Attorney I in the Medicaid Fraud Control Unit, an agency within the Office of the Inspector General for the Respondent Department of Health and Human Resources, for unsatisfactory job performance. Prior to her termination, Grievant also received a three-day suspension for unsatisfactory job performance. Grievant challenges these disciplinary actions as unjustified and as being initiated in retaliation for Grievant's protected activity in filing previous grievances against her supervisors, filing a complaint with the West Virginia Ethics Commission, filing a complaint with the Equal Employment Opportunity Commission, and taking leave authorized under the Family Medical Leave Act. Respondent bears the burden of proof regarding these two disciplinary actions while Grievant bears the burden of proof regarding three ancillary grievances asserting creation of a hostile work environment, her non-selection to an Attorney II position with the Unit, and the continuation of a Performance Improvement Plan. Respondent established the charges against Grievant in her three-day suspension by preponderant evidence, presenting extensive and detailed testimonial and documentary evidence to support each specific instance of unsatisfactory performance. Likewise, Respondent established the unsatisfactory performance charges alleged in support of Grievant's termination by preponderant credible evidence that was essentially uncontradicted. However, Respondent failed to establish that the charge that Grievant communicated with her supervisor in a disrespectful manner because this does not state a recognized offense. Nonetheless, given the record of progressive discipline which included a Performance Improvement Plan, a written reprimand, and a three-day suspension, termination was a proper penalty for the misconduct established. Although Grievant presented a prima facie case of retaliation under the grievance statute, the Whistle-Blower Law, the Civil Rights Act of 1964, as amended, and the Family Medical Leave Act, Respondent provided legitimate, job-related reasons for the adverse actions taken, and Grievant failed to demonstrate that these articulated reasons were pretextual or that

either of these actions were actually taken for retaliatory motives. Further, Grievant did not establish that these disciplinary actions were otherwise in violation of any law, rule, regulation or policy applicable to her employment. Finally, Grievant likewise failed to meet her burden of proof in regard to the merits of her ancillary grievances. Accordingly, this grievance is DENIED.

KEYWORDS: Inexperience; Unacceptable Job Performance; Improper Strip Searches; Progressive Discipline; Breach of Security; Mitigation

CASE STYLE: Taylor v. Division of Corrections/Mount Olive Correctional Complex
DOCKET NO. 2014-0756-MAPS (8/15/2014)

PRIMARY ISSUES: Whether Respondent was justified under its progressive discipline policy to suspend Grievant for five days for his actions constituting a breach of security.

SUMMARY: Grievant, a Correctional Officer II, was suspended for five days for failing to properly conduct inmate searches and failing to report improper inmate searches conducted by other officers. Respondent proved by a preponderance of the evidence that Grievant's actions were a serious security breach in violation of policy and procedure and that suspension was justified. Grievant failed to prove that mitigation of the penalty was warranted when his relative inexperience was the only mitigating factor. Accordingly, the grievance is denied.

KEYWORDS: At-Will Public Employee; Classified-Exempt Service; First Amendment; Public Concern; Facebook Comments; Termination Without Cause

CASE STYLE: Day v. Division of Protective Services
DOCKET NO. 2014-1010-MAPS (8/19/2014)

PRIMARY ISSUES: Whether Grievant established that his Facebook posting involved a matter of public concern. Whether Respondent is required to establish a proper cause for Grievant's termination.

SUMMARY: Grievant, a classified-exempt, at-will Capitol Police Officer, was dismissed by DPS for no given reason. Grievant asserts that his termination is prohibited because DPS retaliated against him for exercising his First Amendment right to freedom of speech in regard to comments Grievant made in a Facebook posting. However, the speech in question was not focused on a matter of public concern, and was therefore not protected by the First Amendment. Accordingly, as an at-will employee, Grievant was subject to discharge for any reason, no reason or a bad reason, and has no legal basis to challenge his termination.

KEYWORDS: Hostile Work Environment; Harassment; Discrimination; Negative Verbal Comments; Job Duties; Conflicting Testimony

CASE STYLE: Beverly v. Division of Highways
DOCKET NO. 2014-0461-DOT (8/19/2014)

PRIMARY ISSUES: Whether Grievant established that he was subjected to a hostile work environment or harassment.

SUMMARY: Grievant is currently employed by Respondent DOH as a Driver 1 in District 1. Although Grievant established that his second-level supervisor, Gerald Smith, made some negative verbal comments which injured Grievant's pride, these actions were not of sufficient magnitude nor frequency to create a hostile work environment nor to constitute harassment prohibited by the grievance statute. Likewise, changes that were made in Grievant's assigned duties as a Driver 1 were made for legitimate, job-related reasons, and were not directed at Grievant personally. Accordingly, this grievance must be denied.

KEYWORDS: Discrimination; Similarly Situated; Pay Differential; Special Operations Units; Arbitrary and Capricious

CASE STYLE: Arbogast, et al. v. Division of Corrections/Huttonsville Correctional Center
DOCKET NO. 2013-1596-CONS (8/19/2014)

PRIMARY ISSUES: Whether Grievants demonstrated that the State Personnel Board's authorization of a pay differential for members of the Special Operations Unit was arbitrary and capricious.

SUMMARY: Grievants are employed in various classifications at Huttonsville Correctional Center. None of them are members of the Special Operations units within the Division of Corrections. The State Personnel Board approved a special pay differential for members of the Special Operations units. Grievants compared their training and response to emergency situations at the prison where they work to the response of members of the Special Operations units to extreme emergency situations at prisons and other facilities throughout the state. While Grievants are indeed the first responders to emergency situations, and may be placed in dangerous situations, if these situations are not quickly resolved, then the members of the Special Operations units, who have advanced specialized training, are called on to handle and resolve the situation, using their specialized skills and training, which Grievants do not have. Grievants did not demonstrate that the pay differential was clearly wrong or an abuse of discretion, or that they are similarly situated to members of the Special Operations units.

KEYWORDS: Temporary Classification Upgrade; Job Duties; Class Specification; Salary Adjustment; Supervisory Work; Additional Assignments

CASE STYLE: Watson v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital and Division of Personnel

DOCKET NO. 2013-1759-DHHR (8/14/2014)

PRIMARY ISSUES: Whether Grievant established that Respondent violated any statute, regulation or policy by failing or refusing to compensate her at a higher rate for temporarily performing some of the duties which were previously performed by a Supervisor II.

SUMMARY: Grievant is currently employed by Respondent DHHR as a Housekeeper, Lead at Mildred Mitchell-Bateman Hospital. Following retirement of the Supervisor II who supervised the Housekeeping Department and Laundry at the hospital, certain duties and responsibilities which had previously been accomplished by the Supervisor were assigned to Grievant. Other duties, including approval authority over scheduling, denying leave requests, and taking disciplinary actions were assumed by Patricia Franz, the hospital's Assistant Chief Executive Officer ("CEO"). Grievant failed to meet the strict requirements of the Division of Personnel Policy for Temporary Classification Upgrades to a Supervisor II classification, given that many key duties were assumed by the Assistant CEO rather than Grievant. Accordingly, this grievance must be denied.

KEYWORDS: Inmate Count; Breach of Security; Gross Negligence; Mitigation; Similar Conduct; Like Penalties

CASE STYLE: Rexrode v. Division of Corrections/Huttonsville Correctional Center
DOCKET NO. 2014-0857-MAPS (8/4/2014)

PRIMARY ISSUES: Whether Grievant demonstrated that Respondent violated its substantial discretion in determining that the penalty of a three-day suspension should be applied in these circumstances to Grievant's conduct.

SUMMARY: Grievant was suspended for three days without pay for not properly conducting an inmate count at 12:00 a.m., on September 25 and 26, 2013. Three inmates in three different cells had placed dummies in their cell beds, and were in other cells. Grievant did not stop long enough at the cells during the count to make sure that breathing humans were in them, and did not discover the dummies in any of the three cells. Grievant did not dispute that he had not properly conducted the inmate count. Grievant argued he should have received the same punishment as the officer who conducted the 2:00 a.m. inmate count, and also missed dummies in two of the cells. That officer did discover there was a dummy in the one of the three cells. This other officer received a written reprimand. Respondent concluded that Grievant was more negligent than the other officer based on the fact that he was moving very quickly as he glanced in each cell, while the other officer moved more slowly and stopped to check the cells using his flashlight. While the other officer gave the appearance of conducting a more proper inmate count than Grievant, it is apparent that his slower pace did not, in fact, equate to following proper procedure as he also missed two of the three dummies, and he was disciplined for this. Nonetheless, Grievant did not meet his burden of proving that he should have received the same punishment as the other officer.

KEYWORDS: Moot, Advisory Opinions

CASE STYLE: Strawn v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital

DOCKET NO. 2012-0667-DHHR (8/22/2014)

PRIMARY ISSUES: Whether Grievant's resignation before the level three hearing rendered the grievance moot.

SUMMARY: Grievant, Lyn Strawn, was employed by Respondent, Department of Health and Human Resources, at Mildred Mitchell-Bateman Hospital as a Health Service Worker. Grievant filed a Level One grievance with the Public Employees Grievance Board alleging that she was denied representation and threatened with discipline. The undersigned found that Grievant voluntarily resigned her position and was not constructively discharged. When Grievant's second grievance was denied, this matter was rendered moot.