

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in August 2017

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: Tenure; Minimum Experience Requirements; Employment Terminal Contract; Racial Discrimination; Job Duties; Research; Teaching; Evaluations; Similarly Situated Employee; Policies; Funding; Timeliness; Arbitrary and Capricious

CASE STYLE: Zeng v. Marshall University
DOCKET NO. 2016-1650-MU (8/18/2017)

PRIMARY ISSUES: Whether Grievant proved he was improperly denied tenure.

SUMMARY: Grievant was employed by Respondent as a tenure-track Associate Professor in its School of Medicine's Department of Biochemistry and Microbiology. Grievant was denied tenure and asserts that the tenure denial was arbitrary and capricious for many individual reasons which all relate to either errors in the process or discrimination. Essentially, Grievant argues he was more deserving of tenure than two other faculty members who had recently been granted tenure, that he was evaluated differently than the two other faculty members, and that the University made numerous procedural and factual errors throughout the process. Grievant asserts this difference in treatment was caused by racial discrimination. Respondent asserts the compared faculty members are not similarly situated, that the tenure review process was thorough and without error, and that Grievant clearly failed to meet the requirements for tenure. Grievant did not prove he was similarly situated to the compared employees. Respondent violated its policy by failing to include Grievant's tenure requirements in his contract. Under Respondent's policy and past practice, job duties and responsibilities are not the same as tenure requirements. It was improper for Respondent to consider Grievant's job duty and responsibility to secure external funding in the tenure decision. The portion of the grievance related to Grievant's challenge of his employment end date is untimely. Accordingly, the grievance is denied.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: Selection; Erroneous Posting; Minimum Qualifications; Reposting; Newly Created Position; Change in Job Title

CASE STYLE: Chrisman v. Jefferson County Board of Education
DOCKET NO. 2017-2322-CONS (8/17/2017)

PRIMARY ISSUES: Whether Respondent could repost a position when the posting listed minimum qualifications and a salary schedule that was in error, and whether changing the name of the position made it a newly created position that had to be posted.

SUMMARY: Grievant is a School Counselor at Shepherdstown Middle School. She applied for a posted Dean of Students position at Jefferson High School. The posting stated that an administrative certificate was required for the position, or that the applicant be eligible for such a certificate, and it stated that the salary would be calculated based on the administrative scale. This was a new position and was approved by the board of education to be paid at the teacher salary schedule. The board of education did not approve the requirement of administrative certification. The erroneous posting was not discovered by Respondent until after it had been filled by the successful applicant, who did not hold an administrative certificate, nor was she eligible for one. Additionally, one of the successful applicant's relatives was on the interview committee. The Superintendent was made aware of these issues at the level one conference, and directed that the position be reposted with no administrative certification required, and at the teacher salary schedule, and that no relative of an applicant serve on the interview committee. Respondent acted in a reasonable manner in correcting the error when it became aware of it. The successful applicant possessed the qualifications necessary to the position, and Grievant did not demonstrate that the position was an administrative position. Respondent later changed the title of the position, but did not change any duties, responsibilities, contract terms, or salary. The change in title did not make the position a newly created position which had to be posted.

KEYWORDS: Contract; Probationary Employee; Arbitrary and Capricious

CASE STYLE: Morris v. Jefferson County Board of Education

DOCKET NO. 2017-2189-JefED (8/29/2017)

PRIMARY ISSUES: Whether Respondent's decision to not renew Grievant's contract was arbitrary and capricious.

SUMMARY: Grievant, a probationary employee, challenged the non-renewal of her probationary contract. Grievant failed to prove that Respondent's decision was arbitrary and capricious. The record supported a finding that the decision not to renew Grievant's contract came after three years of efforts to help the Grievant meet standards. Respondent took all appropriate steps to advise the Grievant of its concerns about her performance and to give her the tools to improve. Accordingly, this grievance is denied.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Vacancy; Pay Grade; Policy; Arbitrary and Capricious

CASE STYLE: Dempsey v. Kanawha County Board of Education
DOCKET NO. 2017-0491-KanED (8/10/2017)

PRIMARY ISSUES: Whether Grievant is entitled to the compensation rate of her prior position.

SUMMARY: Grievant transferred out of a 261-day Buyer position with the knowledge that the position was going to be reduced to a 220-day position. To avoid the loss of benefit(s) Grievant sought and accepted employment in an alternate position (Inventory Supervisor), preserving 261-day employment terms, but compensation at a lower pay rate. The Buyer position was transformed; however, Respondent did not timely pursue a permanent fix to the vacancy, after Grievant's departure. Grievant contends she is entitled to the pay difference between the two positions from the time of her departure till the Buyer position actually became a 220-day position.

KEYWORDS: Selection; Extracurricular Bus Runs; Seniority; Arbitrary and Capricious

CASE STYLE: Walls v. Cabell County Board of Education
DOCKET NO. 2017-0955-CabED (8/25/2017)

PRIMARY ISSUES: Whether Grievant established that Respondent unlawfully failed to award him an identified extracurricular bus run.

SUMMARY: Grievant, employed by Respondent as a bus operator, applied for an extracurricular position, but was not the successful applicant. Grievant filed this grievance challenging his non-selection for an extracurricular special needs bus run. Grievant contends that, based on his seniority, he should have been awarded the (Sp. needs) bus run. Grievant is not assigned to a lift bus, which is required to complete the identified bus run. Respondent specified valid cause why Grievant, a service person, with acknowledged seniority was not employed in the position for which he applied. Grievant is not available to complete this run. Accordingly, this grievance is DENIED.

KEYWORDS:

Summer Seniority; Back Pay; Policy

CASE STYLE:

Howard v. Marshall County Board of Education

DOCKET NO. 2016-1654-MarED (8/31/2017)

PRIMARY ISSUES:

Whether Grievant proved that he was entitled to a bus operator position for the 2016 summer school program.

SUMMARY:

Grievant is employed by Respondent as a regular bus operator. Grievant seeks summer seniority credit as a bus operator for the summer of 2016. The record established that Grievant was not entitled to a bus operator position for the 2016 summer school. It is undisputed that Grievant did not serve in a summer school bus operator position in the summer of 2016. Accordingly, this grievance is denied.

TOPICAL INDEX
STATE EMPLOYEES

KEYWORDS: Demotion; Resignation; Lost Wages; Motion to Dismiss

CASE STYLE: Samuel v. Department of Health and Human Resources/Bureau for Children and Families
DOCKET NO. 2017-2008-DHHR (8/2/2017)

PRIMARY ISSUES: Whether Grievant's resignation from employment before this matter was resolved renders the grievance moot.

SUMMARY: Respondent notes that Grievant resigned his position with the DHHR prior to the effective date of the demotion. Respondent argues that since Grievant is no longer a State employee and he suffered no loss of pay prior to his resignation, the matter is now moot. Grievant indicated that he wished to go forward with the grievance after his resignation to clear his name. There is no remaining remedy which can be granted by the Grievance Board after Grievant's resignation which renders this matter moot.

KEYWORDS: Classification; Pay Grade; Job Duties and Responsibilities; Position Description Form; Job Audit; Reallocation; Arbitrary and Capricious

CASE STYLE: Brown v. Division of Justice and Community Services and Division of Personnel

DOCKET NO. 2016-1490-MAPS (8/8/2017)

PRIMARY ISSUES: Whether DOP's determination regarding the best fit classification for Grievant's position was arbitrary, capricious or clearly wrong.

SUMMARY: Grievant filed a grievance against her employer alleging her position is improperly classified, seeking reallocation. It is Grievant's assertion that her position should be classified as a Criminal Justice Program Manager, pay grade 20 and not a Criminal Justice Specialist 3, pay grade 16. Grievant's employer, the West Virginia Division of Justice and Community Services, supports Grievant's assertion and requested relief.

The Division of Personnel is the entity of WV State government charged with making classification determinations. Upon reviewing the documents related to Grievant's position, and performing an on-site job audit, DOP determined that Grievant's job duties fit into the classification of Criminal Justice Specialist 3, and did not opine that the best fit classification for the duties performed by Grievant was the Criminal Justice Program Manager classification. Respondent DJCS and Grievant did not prove that Respondent DOP's classification decision was clearly wrong. It is understood that Grievant is a valued employee and does steadfast important work; nevertheless, pursuant to the relevant regulations and decisive factors it was not established that Grievant's preferred classification was the "best fit" classification for the position as it currently stands. This grievance is DENIED.

KEYWORDS: Selection; Promotion; Moot; Resignation; Advisory Opinion; Motion to Dismiss

CASE STYLE: Guertin v. Tax Department
DOCKET NO. 2017-1154-DOR (8/2/2017)

PRIMARY ISSUES: Whether this grievance is moot.

SUMMARY: Grievant grieves non-selection for promotion to Excise Tax Supervisor II. As relief, Grievant requests that the position be reposted and filed by proper procedures. Respondent moved to dismiss the grievance asserting mootness due to Grievant's resignation from employment. Grievant, filed a response to the motion stating that he wishes to proceed with his grievance. Respondent proved the grievance is now moot due to Grievant's resignation. Grievant's resignation prior to the resolution of the grievance renders the matter moot, requiring that the grievance be dismissed.

KEYWORDS: Selection; Policy; Interview Process; Minimum Qualifications; Experience; Arbitrary and Capricious

CASE STYLE: Stewart v. Department of Health and Human Resources/Chief Operating Officer for Administration
DOCKET NO. 2016-0970-DHHR (8/10/2017)

PRIMARY ISSUES: Whether Respondent's selection decision was arbitrary or capricious.

SUMMARY: Grievant alleges that the decision to select another candidate for a management position was invalid because DHHR Policy Memorandum 2106 was not strictly followed, he was the most qualified candidate and the decision made was arbitrary and capricious. Grievant was unable to prove by a preponderance of the evidence that he was objectively the most qualified or that the selection process was arbitrary and capricious. Additionally, Grievant did not prove that any errors in the implementation of DHHR Policy Memorandum 2106 would reasonably affect the outcome of the selection decision.

KEYWORDS: Dress Code Policy; Covering Tattoos; Motion to Dismiss; Relief; Moot

CASE STYLE: Sears, et al. v. Division of Motor Vehicles
DOCKET NO. 2017-0503-CONS (8/11/2017)

PRIMARY ISSUES: Whether this grievance is moot.

SUMMARY: The issue of the requirement that Grievants conceal their tattoos at all times regardless if they do not work with the public is moot. Some Grievants are no longer employed with Respondent, and Respondent revised the policy to eliminate this requirement. Accordingly, this grievance is dismissed.

KEYWORDS: Verbal Reprimand; Memorandum; Due Process; Predetermination Meeting

CASE STYLE: Byrd v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2017-0769-DHHR (8/8/2017)

PRIMARY ISSUES: Whether Grievant was entitled to notice and an opportunity to respond to the charge of a verbal reprimand.

SUMMARY: Grievant's supervisor issued a disciplinary memorandum to Grievant in August 2016, in which she reviewed an incident involving Grievant's failure to do four assigned hall walks and fifteen minutes checks which Grievant was scheduled to complete. The nurse supervisor did not speak with Grievant concerning her version of events prior to placing the memorandum documenting the verbal warning in her personnel file. Respondent's position is that the subsequent Legal Aid investigation gave Grievant an opportunity to be heard on the issue of discipline. The failure of the supervisor to address her concerns with Grievant prior to issuing what is essentially a disciplinary letter is in violation of the most basic right of due process. This grievance is granted.

KEYWORDS: Temporary Upgrade; Policy; Supervising Inmates; Pay; Classification

CASE STYLE: Tignor v. Division of Highways
DOCKET NO. 2016-1705-DOT (8/22/2017)

PRIMARY ISSUES: Whether Grievant is entitled to a temporary upgrade.

SUMMARY: Grievant alleges that he should receive an upgrade to supervisor pay anytime prison inmates are assigned to work inside the Elkview garage because he supervises their activities. Grievant only receives such an upgrade if the inmates are assigned work inside the garage and the employee assigned to the inmates as well as Grievant's supervisor is absent. Grievant did not prove that DOH is required to give him an upgrade in pay when the inmates are assigned to work in the garage if another employee with supervisory authority is present.

KEYWORDS: Suspension; Performance Improvement Plan; Reprimand; Misconduct; Unsatisfactory Performance; Unprofessional Conduct

CASE STYLE: Whitt v. Department of Health and Human Resources/Bureau for Child Support Enforcement
DOCKET NO. 2017-1982-CONS (8/28/2017)

PRIMARY ISSUES: Whether Respondent had good cause to suspend Grievant.

SUMMARY: Grievant is employed as a Child Support Specialist 1. Grievant protests her reprimand and suspension for five days for unsatisfactory performance, and unprofessional behavior in the work place. Respondent proved by a preponderance of the evidence that Grievant engaged in the behavior set forth in her suspension letter. Moreover, the suspension was proper and justified as Grievant's performance and behavioral issues had been addressed with her many times throughout her employment, and had not improved, even after having been placed on employee performance improvement plans. Therefore, the grievance is DENIED.

KEYWORDS: Suspension; Termination; Dismissal; Employee Conduct; Conflict of Interest; Confidentiality; Hearsay; Misconduct; Public Assistance; Good Cause; Application; Policy Memorandum 2108

CASE STYLE: Wyer v. Department of Health and Human Resources/Bureau for Children and Families

DOCKET NO. 2016-1886-CONS (8/24/2017)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence that Grievant violated certain policies which constituted good cause for her suspension and termination.

SUMMARY: Grievant was employed by Respondent as an Economic Service Worker. Respondent received a report from a county prosecutor that Grievant was engaging in misconduct involving communications with inmates at a regional jail. Respondent referred the matter for investigation through the Office of Inspector General. The investigation found nothing to substantiate the claims of the county prosecutor. However, the Office of Inspector General found other issues with Grievant's conduct in the workplace. Respondent charged Grievant with a number of infractions, including policy violations and criminal conduct, suspended her without pay pending further investigation, and ultimately terminated her employment. Grievant denied all of the charges brought against her. The Grievance Board has no authority to make any rulings on the criminal allegations; therefore, such are not addressed herein. Respondent proved by a preponderance of the evidence that Grievant violated DHHR Policy Memorandum 2108 "Employee Conduct," the Employee Confidentiality Statement, that Grievant included incorrect information on her applications for certain public assistance benefits, and that Grievant improperly used the food stamp benefits of another for her personal use. As such, Respondent proved that there existed good cause for Grievant's dismissal. Therefore, the grievance is DENIED.

KEYWORDS: Termination; Job Abandonment; Notice; Good Cause; Return to Work; Dismissed; Absent

CASE STYLE: Stamper v. Department of Health and Human Resources/Lakin Hospital

DOCKET NO. 2017-1515-DHHR (8/29/2017)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence that Grievant abandoned her job which would constitute good cause for her dismissal.

SUMMARY: Grievant was employed by Respondent at Lakin Hospital. Grievant's medical practitioner released her to return to work, but did not complete the correct form. While initially there may have been a misunderstanding between Grievant and the hospital assistant administrator about the date she was to return to work, the evidence demonstrated that Grievant was eventually given a clear directive to return to work, she failed to do so, and ceased communications with that administrator and her employer. Thereafter, Grievant was dismissed for job abandonment. Grievant denies abandoning her job, and asserts that the assistant administrator told her that she could not return to work without the correct form completed by her medical practitioner. Respondent proved by a preponderance of the evidence that Grievant abandoned her position, which constitutes good cause for her dismissal. Therefore, this grievance is DENIED.