

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in October 2015

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
HIGHER EDUCATION EMPLOYEES

KEYWORDS: Non-Selection; Policy; Posting; Promotion Board; Selection Process; Arbitrary and Capricious

CASE STYLE: Morris v. Marshall University
DOCKET NO. 2015-0272-MU (10/29/2015)

PRIMARY ISSUES: Whether Respondent's decision to promote another employee over Grievant was either arbitrary and capricious or clearly wrong.

SUMMARY: Grievant asserts that Marshall University's failure to follow any policy with regard to the posting and the selection of the Campus Police Supervisor position rendered the decision arbitrary and capricious. Grievant also asserts that Marshall University's selection decision was arbitrary and capricious because the interview panel was aware that Grievant's experience and qualifications exceeded that of the other candidates, yet failed to select Grievant for the position. Marshall University counters that the selection was not arbitrary and capricious in that the selection was supported by substantial evidence and had a rational basis. In addition, if the posting was somewhat erroneous, any error was harmless because it did not influence the outcome. Grievant failed to prove his claims by a preponderance of the evidence. This grievance is denied.

KEYWORDS: Salary Increase; Pay Equity; Reassignment; Job Duties; Memorandum; Contract; Consideration; Ultra Vires

CASE STYLE: Taylor v. Southern West Virginia Community and Technical College
DOCKET NO. 2015-0006-SWVCTC (10/8/2015)

PRIMARY ISSUES: Whether Grievant proved that Respondent violated a contractual obligation by not paying him the last two \$5000 annual installments for a proposed \$15000 pay increase.

SUMMARY: The President of the Respondent College wrote a memorandum to the College Director of Human Resources, instructing that Grievant receive a \$5,000 salary increase each year for three consecutive years. Grievant received the \$5,000 increase in the first year. Thereafter, Grievant was reassigned as part of a large reorganization of the College management team. As a result of the new assignment, Respondent determined that it was inappropriate to pay the last two installments of the proposed salary increase. Grievant argues that Respondent has a mandatory contractual obligation to pay him all three installments of the proposed salary increase. Grievant failed to prove that proposed salary increase constituted a binding obligation of the College. Accordingly, the grievance is DENIED.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: Termination; Willful Neglect of Duty; Hearsay; Malfeasance; Correctable Conduct

CASE STYLE: Crum v. Logan County Board of Education
DOCKET NO. 2015-1197-CONS (10/19/2015)

PRIMARY ISSUES: Whether Respondent proved that Grievant willfully neglected her duty by committing an act of malfeasance.

SUMMARY: Grievant was previously employed by Respondent as a certified first grade teacher at West Chapmanville Elementary School in her very first year as a teacher. While Grievant was actively engaged in teaching her class, brief inappropriate contact occurred between two students underneath a table in the classroom. Respondent terminated Grievant's teaching contract for abandoning her responsibility to appropriately monitor and supervise her students, which it asserted constituted malfeasance severe enough to amount to willful neglect of duty. Respondent failed to prove that Grievant willfully neglected her duty when there was no evidence that Grievant had left the students alone, ignored what was happening, or that there was anything that should have drawn her attention to the incident. To the extent that Grievant's performance was unsatisfactory, Respondent failed to prove that Grievant's conduct was not correctable, so Grievant was entitled to notice of her alleged deficiencies and an opportunity to improve, which she did not receive. Accordingly, the grievance is granted.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Summer Bus Operator Position; CPR Certification; Qualifications; Bus Operator Certification; Posted Position

CASE STYLE: Sayre v. Hancock County Board of Education and Jeff Plimpton, Intervenor

DOCKET NO. 2014-0033-HanED (10/29/2015)

PRIMARY ISSUES: Whether Grievant met the qualifications to be a bus operator.

SUMMARY: Grievant is employed by Respondent as a bus operator. She was off work on a medical leave of absence at the time Respondent normally provides CPR training for bus operators, and did not get her CPR certification renewed. Grievant had lost her CPR card, and had not tried to replace it. She asked HBOE personnel if she needed to do anything in order to return to work, and was not advised that her CPR certification had expired. No HBOE personnel reviewed Grievant's records to make sure all her training and certifications were up to date prior to Grievant returning to work, or for several months after she returned to work, nor did Grievant make any effort to check her records herself. When the Superintendent became aware that Grievant's CPR certification had expired, she told Grievant she could not drive the summer bus run she had been awarded, because her CPR certification had expired, and the decision to award Grievant the summer bus run was reversed because her CPR certification was expired at the time she was placed in the position. Regardless of who was at fault, Grievant could not drive a school bus if she did not have all the necessary certifications, and she could not be awarded a position if she was not qualified for the position at the time the position was posted and filled.

KEYWORDS: Job Posting; Selection; Qualifications; Competency Test; Newly Created Position

CASE STYLE: Young, Jr. v. Raleigh County Board of Education
DOCKET NO. 2014-1620-RaIED (10/22/2015)

PRIMARY ISSUES: Whether Grievant proved by a preponderance of the evidence that Respondent was obligated to offer him the painter competency test before filling the vacant positions.

SUMMARY: Grievant is employed by Respondent as a regular bus operator. Grievant applied for two newly created summer painter positions that were posted on May 5, 2014. Grievant had the greatest seniority of all the applicants for these positions. None of the applicants for the position held, or had held, the painter classification. Two of the applicants had previously taken and passed the painter competency test. Grievant had not taken the painter competency test. Respondent did not offer the competency test for the May 5, 2014, applicants. Instead, Respondent selected the two applicants who had already taken and passed the competency test for the two positions. Grievant asserts that Respondent was obligated to offer him the competency test, and that Respondent's selection of the two other applicants was in error. Respondent argues that it had no obligation to offer the competency test as two of the applicants had already taken and passed the same and were, therefore, already qualified. Grievant failed to prove his claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

KEYWORDS: Job Duties; Supervisory Aide Pay; Monetary Relief

CASE STYLE: LaRue III v. Wetzel County Board of Education
DOCKET NO. 2014-1336-WetED (10/6/2015)

PRIMARY ISSUES: Whether Grievant established by a preponderance of the evidence that he is entitled to supervisory aide pay.

SUMMARY: Grievant complains that his duties in the cafeteria and kitchen are not consistent with his job description for a custodian/painter. Grievant seeks compensation for those duties or removal of the duties in the cafeteria and kitchen. Grievant was unable to demonstrate, by a preponderance of the evidence, any statute, regulation or policy authorizing Respondent to pay Grievant additional compensation for performing these duties.

KEYWORDS: Continuing Contract; Acceptable Employment; Reprisal; Mitigation; Certification; Suspension

CASE STYLE: Louk v. Braxton County Board of Education

DOCKET NO. 2015-1231-BraED (10/15/2015)

PRIMARY ISSUES: Whether Grievant proved by a preponderance of the evidence that the non-renewal of his contract was improper, and whether Grievant proved his claim of reprisal.

SUMMARY: Grievant was employed as a regular bus operator by Respondent. Grievant had been employed as a regular bus operator for twenty years in another county, but came to work for Respondent near the beginning of the 2013-2014 school year. Grievant was suspended for the last two months of that school year for conduct occurring on April 28, 2014, in the performance of his duties. Grievant served his suspension, and he was granted a contract for the following contract year. However, because the April 28, 2014, conduct had been reported to the West Virginia Department of Education, there was an investigation initiated, and his bus operator certification placed in a pending status. As a result of not having his certification, Grievant was again suspended. Many months later, the Department of Education agreed to renew Grievant's certification upon his completion of additional training. Grievant completed the training in March 2015. Respondent took action not to renew Grievant's contract on April 9, 2015, based upon the April 2014 incident. Grievant's certification was renewed as of April 20, 2015. Grievant returned to work on April 21, 2015. Grievant argues that the non-renewal was improper, and that he was entitled to continuing contract status effective July 1, 2014, pursuant to West Virginia Code § 18A-2-6, as he had completed a year of acceptable employment with Respondent. Grievant also claims reprisal for filing a previous grievance action. Respondent argues that Grievant was a probationary employee as of July 1, 2014, because he did not complete a year of acceptable employment as he was suspended the last two months of the prior school year. Therefore, Respondent had the authority to decide not to renew his contract, and did not have to comply with the notice provisions of West Virginia Code § 18A-2-6. Grievant proved that he was entitled to continuing contract status, and that the non-renewal was improper. Grievant failed to prove his reprisal claim by a preponderance of the evidence. Therefore, this grievance is GRANTED in part, and DENIED in part.

KEYWORDS: Termination; Suspension; Willful Neglect of Duty; Immorality; Insubordination; Inappropriate Relationship with Students

CASE STYLE: Johnson v. Randolph County Board of Education

DOCKET NO. 2015-0156-RanED (10/30/2015)

PRIMARY ISSUES: Whether Respondent proved by the preponderance of evidence that Grievant's conduct with minor female students constituted immorality, willful neglect of duty and insubordination.

SUMMARY: The Board terminated Grievant's employment for providing alcohol to a student, and engaging in an amorous relationship with another student. The Board proved the allegations against Grievant by a preponderance of the evidence. Accordingly, the grievance is denied.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Discretionary Pay Rate Increase; Co-Op Experience; Rate of Pay; Untimely Filing; Time Limits
<u>CASE STYLE:</u>	<u>Sunt v. Division of Highways and Division of Personnel</u> DOCKET NO. 2015-1110-DOT (10/30/2015)
<u>PRIMARY ISSUES:</u>	Whether Respondent has proven that the grievance was untimely filed.
<u>SUMMARY:</u>	Grievant was hired by Respondent as a Highway Engineer Trainee in 2012. Respondent had the discretion to appoint Grievant to his position at a rate higher than entry-level, but did not do so. The posting specifically notified Grievant of the availability of this discretionary pay at appointment to the position. The grievance was not timely filed. Accordingly, the grievance is dismissed.

<u>KEYWORDS:</u>	Written Reprimand; Job Duties; Unacceptable Performance and Conduct; Correction Action Plan; Employee Code of Conduct; Reprisal
<u>CASE STYLE:</u>	<u>White II v. Alcohol Beverage Control Administration</u> DOCKET NO. 2015-0230-DOR (10/30/2015)
<u>PRIMARY ISSUES:</u>	Whether Respondent proved that the written reprimand issued to Grievant is justified and not improper.
<u>SUMMARY:</u>	Employed as an Office Assistant II, Grievant received a written reprimand. Grievant contends he received the disciplinary action because he complained to his supervisor that she was showing bias toward a vendor that employs her husband and maintains that he is doing the same duties that he has been doing since 2008. Respondent presented persuasive documentary and testimonial evidence supporting the allegation in the written reprimand. Grievant has failed to provide reliable evidence to demonstrate that the written reprimand was an act of reprisal. By a preponderance of the evidence, Respondent met its burden of proof demonstrating proper justification for the disciplinary action of written reprimand. This grievance is DENIED.

KEYWORDS: Overtime; Job Duties; Discrimination; Favoritism; Reprisal

CASE STYLE: White II v. Alcohol Beverage Control Administration

DOCKET NO. 2015-0303-DOR (10/30/2015)

PRIMARY ISSUES: Whether Grievant demonstrated that Respondent's refusal to grant him overtime was illegal.

SUMMARY: Grievant contends that he was unlawfully denied overtime. Respondent maintains that all overtime is at the discretion of the agency and/or as in this case, must be pre-approved, and is not guaranteed to any employee. Grievant, historically was one of the numerous employees who received overtime as a result of the Agency's yearly Trade Show. At the time of relevant events Grievant and Respondent were entangled with in pending grievances. Respondent deliberately chose not to grant Grievant the opportunity to work overtime and receive additional compensation for his services. The difficult issue is whether Respondent made a legitimate business decision or unlawfully denied Grievant overtime opportunity. Intent and facts are pivotal factors. Grievant has failed to demonstrate that Respondent's refusal to grant him overtime in association with the Agency's 2014 Trade Show was illegal, discrimination, favoritism or retaliation. This issue is not easily determined. It is understandable that Grievant feels penalized by Respondent's actions; nevertheless, Respondent established factual, rational and lawful justification for the action taken. Grievant failed to establish by a preponderance of the evidence that he was unlawfully denied overtime and the associated wages for such services. Accordingly, this grievance is denied.

KEYWORDS: Salary Increase; Job Classification; Pay Grade; Discrimination

CASE STYLE: Collins, Jr. v. Division of Highways

DOCKET NO. 2015-0763-DOT (10/29/2015)

PRIMARY ISSUES: Whether the DOH discriminated against Grievant by giving a pay to employees in a different classification and not to employees in Grievant's classification.

SUMMARY: Respondents got approval to implement a salary increase program for employees in four Transportation Workers classifications. Grievant is in a different job classification and was not able to participate in the program or receive a pay increase. Grievant alleges that it is unfair for some employees to receive pay increases and not others. This is particularly frustrating for Grievant because he supervises employees in the classifications that received raises and many of them now receive wages that are higher than his. While Grievant's concerns are understandable, he did not prove that Respondent had discriminated against him as that term is defined in the grievance procedure statute.

KEYWORDS: Pay Raise; Circuit Court Settlement Agreement; Hartley; Jurisdiction

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

DOCKET NO. 2015-1079-DHHR (10/23/2015)

PRIMARY ISSUES: Whether the Grievance Board has jurisdiction over this matter.

SUMMARY: Grievant grieves the amount of a pay raise he 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: Tobacco Use Policy; Retirement; Moot; Relief

CASE STYLE: Hendrix v. Division of Highways

DOCKET NO. 2015-1260-DOT (10/16/2015)

PRIMARY ISSUES: Whether this grievance is moot.

SUMMARY: Grievant grieved his supervisor's failure to enforce a policy. Respondent moved to dismiss the grievance asserting mootness due to the retirement of Grievant's supervisor. Grievant did not respond to the motion to dismiss. As the grievance involves a condition of employment alleged to be caused by Grievant's supervisor who is now retired, the grievance is moot. Accordingly, Respondent's Motion to Dismiss should be granted, and this grievance, dismissed.

KEYWORDS: Termination; Threatening an Employee; Workplace Security Policy; Imminent Harm; Credible Threat; Likelihood of Harm

CASE STYLE: Simpson v. Department of Veterans Assistance

DOCKET NO. 2015-0959-DVA (10/6/2015)

PRIMARY ISSUES: Whether Respondent demonstrated that Grievant engaged in threatening behavior.

SUMMARY: Grievant was dismissed from her employment by Respondent for making a statement that she would break a co-worker's arm if she did not quit taking food out of the refrigerator. Grievant was asked by her supervisor to work night shift to determine what was happening to food that was disappearing from the refrigerator. The co-worker to whom the comment was directed by Grievant was subsequently caught by Grievant removing food from the second floor refrigerator to take to the first floor refrigerator during the night shift. Grievant verbally confronted the co-worker, telling her she was not allowed to remove the food, and took the food from her. Grievant did not assault the co-worker, nor did she make any attempt to do so. Grievant's statement regarding breaking the co-worker's arm, while inappropriate, was obviously just a figure of speech, and did not constitute a threat of violence in the workplace. Respondent failed to demonstrate good cause for Grievant's dismissal.

KEYWORDS: Job Posting; Retaliation; Favoritism; Arbitrary and Capricious

CASE STYLE: Acord v. Division of Highways
DOCKET NO. 2015-0199-DOT (10/8/2015)

PRIMARY ISSUES: Whether Grievant established that Respondent's refusal to accept his application for the posted position was arbitrary and capricious.

SUMMARY: Grievant was not considered for a particular Transportation Crew Supervisor I position with Respondent. Grievant alleges that the posting and selection process for the position was flawed, thus invalid and unlawful. Respondent maintains the job opening was legitimately posted and Grievant's application was untimely.
It is not established that the alleged flaw in the posting of the job opening, in discussion was significant enough to render Respondent's selection process invalid. Grievant has not established by a preponderance of the evidence that Respondent's selection process was unlawful. Respondent's selection decision was not arbitrary and capricious or clearly wrong. This grievance is DENIED.

KEYWORDS: Suspension; Standards for Conduct; Non-Compliance; Inappropriate and Disrespectful Behavior; Safe Working Practices

CASE STYLE: Reichard v. Division of Highways
DOCKET NO. 2015-1188-DOT (10/15/2015)

PRIMARY ISSUES: Whether Respondent proved that the three-day suspension was warranted because Grievant's conduct.

SUMMARY: Grievant was given a three-day suspension for failing to follow instructions while the work crew was removing a fallen tree from the highway, and for refusing to drive a truck that was assigned to him for snow removal and ice control. Grievant was accused of addressing his crew supervisor inappropriately during this incident, as well as slamming a door hard enough to break the closure mechanism. Grievant contends that he did not refuse to follow instructions and that his crew supervisor intentionally goaded him into a negative reaction in an effort to get him fired. There was conflicting testimony regarding the tree removal incident but Respondent proved sufficient misconduct by Grievant to warrant the three-day suspension.

KEYWORDS: Termination; Horseplay; Failure to Follow Policy; Poor Judgement

CASE STYLE: Hebb v. Division of Juvenile Services/Kenneth "Honey" Rubenstein Center
DOCKET NO. 2014-0210-MAPS (10/16/2015)

PRIMARY ISSUES: Whether Respondent demonstrated good cause for Grievant's dismissal.

SUMMARY: Grievant was dismissed from his employment by Respondent for failing to take appropriate action to stop residents of a juvenile detention facility from engaging in rough horseplay over an extended period of time. Respondent proved the charges against Grievant, and that it had good cause for his dismissal.

KEYWORDS: Non-Selection; Promotion; Seniority; Arbitrary and Capricious

CASE STYLE: McCloy, Jr. v. Division of Rehabilitation Services
DOCKET NO. 2014-1499-DEA (10/22/2015)

PRIMARY ISSUES: Whether Grievant established that Respondent violated any statute, regulation or policy, or that it abused its substantial discretion, during the selection process.

SUMMARY: Grievant contests his non-selection for the position of Rehabilitation Office Supervisor, claiming DRS acted in an arbitrary and capricious manner when reviewing his application for the position. Grievant failed to prove by a preponderance of the evidence that there was a flaw in the selection process, or that the decision was arbitrary and capricious. Accordingly, the grievance is denied.