

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in November 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: Default; Time Limits; Delay at Level One; Request For Mediation

CASE STYLE: Riedel v. West Virginia University
DOCKET NO. 2015-1097-WVUDEF (11/12/2015)

PRIMARY ISSUES: Whether default occurred at Level One.

SUMMARY: Grievant filed this action challenging his ratings by the chairman of the Department of Biochemistry in his most recent annual review. Grievant disagrees with the good rating provided by his chairman in the areas of teaching and service. In his initial March 30, 2015 filing, Grievant expressly proposed early mediation before a hearing was held at level one, but he asked that the mediation be scheduled within one week of receipt of his grievance. On April 8, 2015, a Notice of Hearing was issued, scheduling a level one hearing on April 14, 2015. The Chief Grievance Administrator notified the parties on April 13, 2015, that a mediator would be available, and that the hearing scheduled for April 14, 2015, was cancelled to allow the parties to schedule mediation, as requested by Grievant. Grievant did not object to the level one hearing being cancelled. Grievant communicated to the mediator that he would be available for mediation in July 2015 upon his return from travel outside of the United States. The record is clear that Grievant consented to a delay by his request for mediation in July 2015, and not objecting to a continuance of the level one hearing to allow for his requested mediation.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: Schedule Change; Harassment; Policy

CASE STYLE: McCool v. Marshall County Board of Education
DOCKET NO. 2014-1441-MarED (11/20/2015)

PRIMARY ISSUES: Whether the changes made to Grievant's schedule constitute harassment.

SUMMARY: Grievant has served Respondent as a music teacher for almost thirty years. Grievant contends that changes made to her schedule constitute harassment by her Principal. The record of the grievance demonstrated that changes made to Grievant's schedule were done by Respondent's Director of Curriculum and not by Grievant's Principal. Grievant failed to prove by a preponderance of the evidence that the changes made to her schedule constituted harassment. Grievant failed to prove that the Respondent violated any statute, regulation, policy or law in connection with the changes made to her teaching schedule.

KEYWORDS: Reduction in Force; Eliminated; Vacancies; Ensuing School Year; Current School Year; Newly Created; Applicant

CASE STYLE: Doebrich v. Wood County Board of Education
DOCKET NO. 2015-1227-WooED (11/19/2015)

PRIMARY ISSUES: Whether Respondent was required to automatically make Grievant an applicant for two newly created half-time positions following a reduction in force.

SUMMARY: Grievant was employed by Respondent as an Attendance & Home Services Consultant. Her position was eliminated through a reduction in force in February 2015. Soon thereafter, two half-time positions were posted to be filled before the end of the school year. Grievant did not apply for either position, and was not selected for the same. Grievant argues that Respondent was required to automatically make her an applicant for the positions because her position had been eliminated. Respondent asserts that it had no such duty because the positions were not vacant for the ensuing school year; they were vacancies to be filled in the current school year. Grievant failed to prove her claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Holiday Pay; Employment Contracts; Discrimination; Favoritism; Non-Relegation Clause

CASE STYLE: Goodson, et al. v. Fayette County Board of Education

DOCKET NO. 2014-1654-CONS (11/12/2015)

PRIMARY ISSUES: Whether Grievants proved they were entitled to payment for the West Virginia Day holiday.

SUMMARY: Grievants are service employees employed by Respondent as Custodians with varying contract lengths who grieved Respondent's refusal to pay Grievants for the West Virginia Day holiday. Grievants failed to prove they are entitled to payment for the West Virginia Day holiday as payment for the West Virginia Day holiday was not included in their employment contracts and Respondent did not violate the non-relegation clause as Grievants never previously received pay for West Virginia Day under their regular contracts. Accordingly, the grievance is denied.

KEYWORDS: Extra-Duty Assignments; Extracurricular; Independent Contractor; Contracts; Instructional Class

CASE STYLE: Brinkley-Simpkins v. Mercer County Board of Education

DOCKET NO. 2015-0429-MerED (11/6/2015)

PRIMARY ISSUES: Whether Respondent had to offer an assignment to Grievant.

SUMMARY: Grievant is employed by Respondent as a cook. Grievant asserts that Respondent improperly hired an independent contractor to perform a training that had most recently been included in the regular duties of the Nutritional Director, but that Grievant had previously performed as an extracurricular duty. Respondent argues that Grievant was not entitled to the assignment, that it had previously been an extra-duty assignment, and that it was permitted by law to hire an independent contractor to teach the class as it was a one-time assignment. While Grievant proved that the assignment had been extracurricular when she last held it years ago, the evidence demonstrated that the position ceased being an extracurricular assignment when it became the regular responsibility of the Nutritional Director. Grievant failed to prove her claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

KEYWORDS: Reduction in Force; Continuing Contract; Arbitrary and Capricious
CASE STYLE: Riffel v. Wayne County Board of Education

DOCKET NO. 2015-1030-WayED (11/2/2015)

PRIMARY ISSUES: Whether Grievant proved that the reason for the elimination of her position in a Reduction In Force was valid.

SUMMARY: The Board of Education voted to eliminate Grievant's position and terminate her continuing contract of employment based upon the superintendent's recommendation that the position was not needed. Grievant proved that two full-time OT professionals are needed to meet the OT needs of identified special needs students in Wayne County and that the reason given by the superintendent for eliminating Grievant's position was not valid. The grievance is GRANTED.

KEYWORDS: Default; Level One Decision; Timeliness

CASE STYLE: Bumgardner v. Kanawha County Board of Education

DOCKET NO. 2015-0927-KanEDDEF (11/19/2015)

PRIMARY ISSUES: Whether Grievant's claim for default was timely filed.

SUMMARY: Grievant made a claim for relief by default claiming Respondent failed to issue a signed level one decision. Respondent emailed Grievant a copy of the level one decision denying the grievance, and Grievant filed her appeal to level two the next day. Grievant did not file her claim for default until mediation had concluded, nearly two months after she appealed Respondent's denial of her grievance. Grievant was required to claim default within ten days of the default. Grievant's claim for default was not timely filed. Accordingly, Grievant's claim for relief by default is denied.

TOPICAL INDEX
STATE EMPLOYEES

KEYWORDS: Non-Selection; Qualifications; Experience; Minimum Requirements; Arbitrary and Capricious

CASE STYLE: Daniels v. Division of Highways
DOCKET NO. 2015-0307-DOT (11/12/2015)

PRIMARY ISSUES: Whether Grievant demonstrated that he was the most qualified applicant for the posted position.

SUMMARY: This grievance was filed when Grievant was not selected for a posted Transportation Crew Supervisor I position. Grievant did not demonstrate a flaw in the selection process or that he was the most qualified applicant for the position.

KEYWORDS: Pay Grade; Classification; Pay Differential; Salary Adjustment

CASE STYLE: Minnick, et. al. v. Division of Highways and Division of Personnel
DOCKET NO. 05-DOH-336(K) (11/10/2015)

PRIMARY ISSUES: Whether Grievants demonstrated any flaw in the pay differential approved by the State Personnel Board, or demonstrated that they were entitled to a salary adjustment.

SUMMARY: This grievance was filed in 2005 when certain classifications in three Eastern Panhandle Counties received a pay differential approved by the State Personnel Board. Many grievances were filed by employees across the state seeking the same pay increase. These three employees were all employed in one of these three Eastern Panhandle Counties, and after a decision was issued by the Supreme Court of Appeals of West Virginia, this last grievance on this issue was heard. Grievants were not in any of the classifications approved for a pay differential, and they did not demonstrate they were entitled to a pay increase.

KEYWORDS: Written Reprimand; Hearsay; Motion to Dismiss; Moot; Sexually Explicit Comments

CASE STYLE: Simms v. Division of Natural Resources

DOCKET NO. 2015-1156-DOC (11/12/2015)

PRIMARY ISSUES: Whether Respondent proved the allegations for the letter of reprimand by a preponderance of the evidence.

SUMMARY: Respondent issued a letter of reprimand to Grievant on the eve of her last day of employment with the agency for allegedly making sexually explicit remarks about other employees of the Division in a telephone conversation with a Natural Resources Police Sergeant. Respondent did not prove the stated basis for the written reprimand by a preponderance of the evidence. Accordingly, the grievance is GRANTED.

KEYWORDS: Termination; Medical Leave; Return-to-Work Release; Job Abandonment

CASE STYLE: Hall v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital

DOCKET NO. 2014-1713-DHHR (11/9/2015)

PRIMARY ISSUES: Whether Respondent met its burden of proof and that Grievant had abandoned her job.

SUMMARY: Grievant was dismissed from her position as a Licensed Practical Nurse at Sharpe Hospital for job abandonment. Grievant did not report to work for four consecutive scheduled workdays because she was incarcerated. Grievant was going through an unfortunate period in her life from which she has since recovered. However, the record did establish that she did not attempt to call Sharpe Hospital during her scheduled workdays. Grievant asserts that Respondent terminated her employment without good cause. Respondent argues that its employees are required to report to work as scheduled or to provide the necessary notice and documentation if they cannot report to work. Respondent relies on Division of Personnel Administrative Rule providing that if an employee is absent from work more than three consecutive work days without notice to the employer of the reason for the absence, the employer may dismiss the employee for job abandonment. Respondent met its burden of proof and demonstrated that Grievant was terminated for good cause. This grievance is DENIED.

KEYWORDS: Suspension; Policy; Leaving Assigned Work Area; Refusing Job Assignment; Mitigation

CASE STYLE: Carson v. Division of Highways

DOCKET NO. 2015-1337-DOT (11/10/2015)

PRIMARY ISSUES: Whether Respondent's disciplinary action was justified and/or whether it reflected an abuse of discretion.

SUMMARY: Grievant was suspended for one (1) day after he refused a job assignment and left the assigned work area without permission. Grievant challenges the discipline imposed, contending justification. Among other delineated offenses "failure to follow major instructions;" and "leaving assigned work area without permission" are actions duly identified as sanctionable violation of agency policy. See West Virginia Division of Highways Administrative Operating Procedures. Respondent established by a preponderance of the evidence that Grievant violated applicable Administrative Operating Procedures. Grievant failed to demonstrate that the disciplinary action taken against him was excessive or an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation. Mitigation is not found to be warranted in this matter. This grievance is DENIED.

KEYWORDS: Suspension; Secondary Employment; Excessive Absenteeism; Employee Performance Appraisals; Employee Improvement Plan; Absence Improvement Plan; Unsatisfactory Performance; Arbitrary and Capricious; Leave Use; Representation; Demotion; Discipline

CASE STYLE: Bruer v. Department of Health and Human Resources/Bureau for Behavioral Health and Health Facilities

DOCKET NO. 2015-1105-CONS (11/5/2015)

PRIMARY ISSUES: Whether Respondent established that Grievant was suspended for good cause. Whether Grievant proved that she had a statutory right to have a representative present at the specified EPA meeting.

SUMMARY: Grievant asserted her three-day suspension was unjustified. However, Respondent proved Grievant's pattern of leave use became so frequent that her attendance and service to the DUI Unit was not sufficiently dependable to allow proper performance of some of the elements of her position, justifying the suspension. Grievant further challenged whether her Employee Improvement Plan (EIP) or Employee Absence Plan (AIP) was proper. As relief, Grievant requested removal of the AIP and rescission of any demotion and loss of pay, but provided no evidence of either. Additionally, Grievant has voluntarily resigned her position. As such, the remedy of "removal of AIP" is no longer available and the issue is moot. Grievant also contends she was entitled, under W. VA. CODE § 6C-2-3(g)(1), to have a representative present at an EPA meeting, because she had reason to believe it could result in demotion or disciplinary action. The evidence substantiated Grievant's belief, prior to the meeting, that Respondent might demote or discipline her at the EPA meeting. However, there is no evidence Grievant made a request to have a representative in the EPA meeting, in advance of that meeting. Rather, she made the request as the meeting was near its conclusion. Grievant failed to establish that she was entitled to representation at the meeting.

KEYWORDS: Written Reprimand; Corrective Action Plan; Unacceptable Conduct; Insubordination; Employee Code of Conduct; Disciplinary Action; Arbitrary and Capricious

CASE STYLE: White II v. Alcohol Beverage Control Administration

DOCKET NO. 2015-0653-DOR (11/6/2015)

PRIMARY ISSUES: Whether Respondent met the burden of proving that the written reprimand issued to Grievant was justified.

SUMMARY: Grievant is employed as an Office Assistant II at Respondent's Nitro Warehouse. Grievant received a written reprimand for willfully reallocating a previously-set and supervisor-approved allocation of limited product and allegedly incorrectly advising retail liquor outlets regarding holiday deliveries. The reprimand maintained that Grievant exceeded the scope of his job duties. Grievant denies allegations of wrong doing and maintains he performed his duties within the criteria for the situation.

It is not established that Grievant was insubordinate. Nevertheless, in the totality of the facts, Grievant did exceed his authorized authority. Grievant's conduct created dubious situations for the agency. This is not the first time Grievant's actions sparked negative reaction by businesses with whom Respondent must and should maintain mutually respectful relations. Respondent is well within its purview to set forth Grievant's workplace responsibilities and to expect Grievant to conduct his job related duties in a professional manner as prescribed by lawful parameters. By a preponderance of the evidence, Respondent demonstrated justification for the issuance of a written reprimand to Grievant. Accordingly this grievance is denied.

KEYWORDS: Suspension; Excessive Use of Force; Gross Negligence; Injury to Inmate; Pushing Inmate; Failure to Control Inmate; Falsifying Records; Aggressive Inmate; Defensive Tactics Training; Inmate Fall; Spitting; Mitigation

CASE STYLE: Thompson v. Division of Corrections/Huttonsville Correctional Center
DOCKET NO. 2014-1484-MAPS (11/9/2015)

PRIMARY ISSUES: Whether Respondent proved the charges against Grievant, and whether a 20-day suspension was the appropriate penalty for excessive use of force.

SUMMARY: Grievant was suspended for 20 days without pay by Respondent for excessive use of force involving an inmate. Respondent demonstrated that Grievant did not follow proper policy, procedure or training when he removed one hand from the inmate's back to open a door, releasing his complete control of the inmate. This allowed the cuffed and shackled inmate to attempt to spit at Grievant. Grievant's reaction was to push the inmate away from himself and toward officers who were coming to assist, resulting in the inmate falling on the floor, unable to catch himself. Respondent did not demonstrate that Grievant acted improperly prior to this with regard to this inmate, or that he falsified records, as he was charged with. Respondent considered Grievant's work history in determining to assess a 20-day suspension rather than dismissal or a 30-day suspension. As Respondent did not prove all the charges against Grievant, the discipline imposed should be reduced to a 15-day suspension without pay.

KEYWORDS: Written Reprimand; Motion to Dismiss; Moot; Relief

CASE STYLE: Fetty v. Department of Health and Human Resources/Bureau for Medical Services

DOCKET NO. 2015-0261-DHHR (11/18/2015)

PRIMARY ISSUES: Whether Grievant's protest of the written reprimand is moot as the written reprimand has now been removed from her personnel file.

SUMMARY: Grievant filed the instant grievance alleging that a written reprimand was not justified and alleging a hostile work environment. As the written reprimand has now been removed from her personnel file, that portion of the grievance is moot. As Grievant did not dispute Respondent's assertion that Grievant was not removed from her position and cannot be placed under a different supervisor, that relief is unavailable. As Grievant made no allegations in her grievance as to any circumstance that would entitle her to a pay increase or that Respondent denied her a pay increase to which she was entitled, that is a claim on which no relief can be granted. Grievant's request for legal and medical expenses and compensation for pain and suffering is unavailable from the Grievance Board. Accordingly, the grievance is dismissed.

KEYWORDS: Termination; Progressive Discipline; Unprofessional Conduct; Failure to Obey Orders; Insubordination; Disruptive Behavior; Policy Violations; Retaliation; Reprisal; Discrimination; Religious Discrimination; Arbitrary and Capricious

CASE STYLE: Hess v. Division of Corrections/Mount Olive Correctional Complex
DOCKET NO. 2015-0986-MAPS (11/17/2015)

PRIMARY ISSUES: Whether Grievant demonstrated that the disciplinary measure of dismissal was retaliatory, discriminatory, disproportionate to the offense, arbitrary and capricious, or an abuse of discretion by Respondent.

SUMMARY: Respondent contends that its dismissal of Grievant was justified because his conduct was prohibited under DOC policies, in that he, inter alia, breached facility security, willfully defied orders and damaged state property when he repeatedly kicked a security door and refused to wait to submit to a contraband search. Grievant responds that his conduct did not create a security breach. Though he admitted to some of the conduct for which he was terminated, he contends that his discharge was too severe a punishment. He further asserts that his termination was retaliatory and/or discriminatory, based upon his previously filed EEO complaint and grievance. After he filed the EEO complaint, Grievant contends Respondent repeatedly required him to work in violation of its leave and staffing policies and, further, improperly detained him for a contraband search. Grievant believes Respondent acted deliberately to prevent him from taking leave for a religious holiday and timely departing for an appointment. Grievant failed to establish a prima facie case of discrimination or retaliation or that Respondent violated the policies cited. Respondent did not prove Grievant created a security breach by breaking a security door, given that the door continued to lock. Nonetheless, Respondent established Grievant engaged in conduct prohibited under DOC policies and that did not meet the requirements of his EPA or the classification specifications of his supervisory position. Moreover, Grievant's violations were willful, as they were directly contrary to established and published directives. Finally, Grievant failed to demonstrate that the disciplinary measure of dismissal was disproportionate to the offenses, arbitrary and capricious, or an abuse of discretion by Respondent.

KEYWORDS: Timeliness; Time Lines; May; Discretionary; Pay Rate Increase, Co-Op Experience

CASE STYLE: Hatfield II v. Division of Highwaysa and Division of Personnel
DOCKET NO. 2015-1276-DOT (11/23/2015)

PRIMARY ISSUES: Whether this grievance was timely filed.

SUMMARY: Grievant was hired by Respondent DOH as into a full-time classified position of Highway Engineer Trainee on June 4, 2013. He had previously serve in a co-op program with the DOH. In recognition of his co-op service, 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. Grievant did not contest his starting salary for nearly until nearly two years after he accepted his initial appointment. The grievance was not timely filed. Accordingly, the grievance is DISMISSED.

KEYWORDS: Voluntary Compensable Overtime; Policy Directive; Suspension; Unwritten Policy; Ultra Vires Practice

CASE STYLE: Edwards v. Division of Corrections/Lakin Correctional Center
DOCKET NO. 2015-0844-MAPS (11/25/2015)

PRIMARY ISSUES: Whether excluding Grievant from volunteering to work compensable overtime by applying an unwritten practice that is inconsistent with a written Policy Directive is improper.

SUMMARY: Grievant is currently employed by Respondent as a Corrections Officer at LCC. Respondent DOC has an established written Policy Directive governing the assignment of voluntary compensable overtime to Correctional Officers on a fair and equitable basis. Grievant was issued a three-day disciplinary suspension and instructed that he would not be eligible for voluntary overtime during the week preceding, the week during, and the week following, his disciplinary suspension. This denial of overtime was consistent with a practice at LCC that has been in place for several years, and which is intended to provide assurance that suspended employees are not able to eliminate the financial impact from a disciplinary suspension by working additional paid overtime. LCC's unwritten practice is inconsistent with and contrary to the scheme for assigning voluntary overtime in DOC's written Policy Directive and, under the line of cases which started with Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977), LCC has failed to follow the required procedures for assigning overtime. Accordingly, this grievance will be granted, at least in part.

KEYWORDS: Termination; Criminal Charges; No Contest Plea; Misdemeanor; Policy; Rational Nexus; Conduct Away from Work.

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

DOCKET NO. 2014-0478-DHHR (11/25/2015)

PRIMARY ISSUES: Whether there is a rational nexus between a plea of no contest to misdemeanor welfare fraud and a Social Service Worker 2 position if the events giving rise to the charge occurred prior to Grievant's employment.

SUMMARY: Respondent terminated Grievant's employment after she pled no contest to a misdemeanor criminal charge of fraud in obtaining welfare benefits. Grievant was originally charged with two felony counts of fraud and two felony counts of conspiracy. When Grievant plead to the lesser included misdemeanor charge the remaining counts were dismissed. Grievant argues that the facts leading to the plea of no contest occurred years before her employment with DHHR and should not be grounds for the termination of her employment. Respondent proved that the charge that was the subject of the plea of no contest was sufficiently related to the duties performed in Grievant's employment to justify her dismissal based upon the no contest plea.