

**WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**SYNOPSIS REPORT**

**Decisions Issued in November 2016**

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](mailto: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**

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<b><u>KEYWORDS:</u></b>	Time Limits; Demotion; Classification; Salary; Harassment; Discrimination; Arbitrary and Capricious; Fair Labor Standards Act
<b><u>CASE STYLE:</u></b>	<u>Swisher v. West Virginia University at Parkersburg</u> DOCKET NO. 2016-0882-WVUP (11/4/2016)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant proved that Respondent's designation of her position as an hourly non-exempt position was arbitrary and capricious.
<b><u>SUMMARY:</u></b>	Grievant is currently employed by Respondent as a Program Specialist. Grievant grieves her demotion from Program Administrator Senior to Program Specialist, alleging harassment and discrimination, and Respondent's determination that the Program Specialist should be an hourly, non-exempt position under the Fair Labor Standards Act. Respondent asserts the grievance must be dismissed as untimely and denies that its actions were improper. The grievance was timely filed. Grievant failed to prove that her demotion was due to harassment or discrimination or that her demotion violated policy or law. Grievant failed to prove that Respondent's designation of her position as an hourly non-exempt position was arbitrary and capricious. Accordingly, the grievance is denied.

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**COUNTY BOARDS OF EDUCATION**  
**PROFESSIONAL PERSONNEL**

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**KEYWORDS:** Insubordination; Willful Neglect of Duty; Disclosure; Confidential Information; Personally Identifying Information; Arbitrary and Capricious; Op-Ed; Removal; FERPA

**CASE STYLE:** McCall v. Fayette County Board of Education  
DOCKET NO. 2015-0937-FayED (11/10/2016)

**PRIMARY ISSUES:** Whether Respondent proved that Grievant engaged in an act of insubordination and whether Respondent was justified in removing Grievant from his substitute position.

**SUMMARY:** Grievant was employed by Respondent as a substitute principal at a county high school. During the time Grievant was serving as substitute principal, he wrote and caused to be published in two local newspapers an op-ed article criticizing a sitting board member in which he disclosed certain information about a student who had recently been through a disciplinary hearing. While Grievant did not disclose the student's name, he disclosed her school, her offense, and the nature of the discipline she received. Upon seeing the op-ed article, the county superintendent made the decision to remove Grievant from his substitute assignment because he had disclosed confidential student information in the op-ed. Grievant was removed from his position, and prohibited from substituting at the high school in the future, but was allowed to substitute at any other school in the county. His employment was not terminated. Grievant denied Respondent's claims and argued that he was removed from his position for exercising his Constitutional right to free speech, and raised numerous claims asserting that his removal was improper and unlawful. Respondent proved that Grievant engaged in an act of insubordination warranting discipline, and that his removal from the position was not arbitrary and capricious, or otherwise improper. Therefore, this grievance is DENIED.

**KEYWORDS:** Apology; Attorney Fees; Remedy

**CASE STYLE:** Downs, et al. v. Hampshire County Board of Education

DOCKET NO. 2016-0699-CONS (11/29/2016)

**PRIMARY ISSUES:** Whether the remedies Grievants seek are available through the grievance procedure.

**SUMMARY:** Grievants complain that the Hampshire County Board of Education had harassed them and otherwise engaged in inappropriate conduct. The only remedies that Grievants seek are the disciplining of a board member, an apology, as well as attorney fees and cost incurred in prosecuting the grievance. The Grievance board has decided on several occasions that this type of relief is not within the agency's authority to grant. Accordingly, this grievance is denied.

**TOPICAL INDEX**  
**COUNTY BOARDS OF EDUCATION**  
**SERVICE PERSONNEL**

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**KEYWORDS:** Selection; Posting; ECCAT; Classification Title; Seniority; Certification; Credential; Qualified; Priority

**CASE STYLE:** Workman v. Raleigh County Board of Education  
DOCKET NO. 2016-0830-RaIED (11/22/2016)

**PRIMARY ISSUES:** Whether Respondent was required to place Grievant in the posted Kindergarten Aide/ECCAT position.

**SUMMARY:** Grievant is employed by Respondent as an aide. Grievant applied for a Kindergarten Aide/Early Childhood Classroom Assistant Teacher (“ECCAT”) position. While Grievant was the most senior applicant in the aide classification, she did not hold an ECCAT credential from the West Virginia Department of Education, nor had she ever held an ECCAT position. Another applicant who was already employed as an ECCAT, who also held an ECCAT credential, was selected for the position. Grievant asserts that she is entitled to the position as she had the most seniority in the aide classification. Respondent argues that its selection of the other applicant for the ECCAT position was proper pursuant to statute. Grievant failed to prove her claim by a preponderance of the evidence. Therefore, the grievance is DENIED.

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**KEYWORDS:** Motion to Dismiss; Moot; Advisory Opinion; Merits

**CASE STYLE:** Clark v. Raleigh County Board of Education  
DOCKET NO. 2016-1611-RaIED (11/17/2016)

**PRIMARY ISSUES:** Whether Grievant’s claim is now moot, and any ruling thereon would result in an advisory opinion.

**SUMMARY:** Grievant was employed by Respondent as an Aide. Grievant filed this grievance alleging a student with whom she worked seriously injured her and repeatedly assaulted her. Since the grievance was filed, Grievant took another position with Respondent in another school, and no longer has contact with that student. Grievant has not alleged any similar occurrences at her new school. Respondent moved to dismiss the matter as moot. Respondent proved by a preponderance of the evidence that the grievance should be dismissed as the issues raised are now moot, and any ruling thereon would result in an advisory opinion. Therefore, the grievance is DISMISSED.

**KEYWORDS:** Suspension; Failure to Follow Directive; Disrespectful Behavior; Insubordination; Obscene Gesture; Legitimate Disagreement with Directive; Reasonableness of Directive

**CASE STYLE:** Bissett v. Monongalia County Board of Education

DOCKET NO. 2016-1582-MonED (11/4/2016)

**PRIMARY ISSUES:** Whether Respondent proved the charges against Grievant, and whether Grievant's actions constituted insubordination.

**SUMMARY:** Grievant is employed by Respondent as an Aide. She was suspended for three days without pay for failure to follow a directive, making an obscene gesture toward her supervisor, and her generally disrespectful behavior toward her supervisor. Respondent did not demonstrate that Grievant made an obscene gesture, nor did Respondent demonstrate that the Grievant's failure to follow a directive constituted insubordinate behavior. Grievant did act in a generally disrespectful manner toward her supervisor.

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**KEYWORDS:** Suspension; Insubordination; Dock Day; Arbitrary and Capricious

**CASE STYLE:** Kestner v. Brooke County Board of Education

DOCKET NO. 2016-1454-BroED (11/3/2016)

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

**SUMMARY:** Grievant was a regularly employed bus operator for Respondent. Grievant was suspended for misuse of a dock day. This is an absence, but the employee does not take a personal day. The employee does not receive his salary for such days. Grievant had been told he would need approval by Respondent prior to using such dock days. Grievant did not do so. Respondent met its burden of proof and demonstrated by a preponderance of the evidence that Grievant was insubordinate.

**KEYWORDS:** Conspicuous Places; Extra-Curricular Assignment; Posting

**CASE STYLE:** Conley v. Logan County Board of Education  
DOCKET NO. 2016-1034-LogED (11/16/2016)

**PRIMARY ISSUES:** Whether Respondent posted the assignment at issue in conspicuous places where it was available for all employees to view, in compliance with the statutory requirements.

**SUMMARY:** Grievant failed to apply for a posted extracurricular assignment, and did not receive that assignment, because he was not aware of the posting. The assignment was posted at the county central office in the postings notebook, on the county website which links to the state department of education website, and on the county hotline which is accessible to all employees by telephone. The assignment was not physically posted at the bus garage where Grievant is assigned, as is normally the case. Grievant knew the assignment would be posted and checked the bulletin board at the bus garage to which he is assigned every day. Grievant did not check the county or state website, the county automated calling system, or at the county central office, although he was aware that the county uses these mechanisms to post vacancies. Respondent posted the assignment in conspicuous places as it is required to do by statute.

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**KEYWORDS:** Compensation; Normal Workweek; Work Hours; Policy on Work Hours

**CASE STYLE:** Murray, et al. v. Lewis County Board of Education  
DOCKET NO. 2016-1216-CONS (11/30/2016)

**PRIMARY ISSUES:** Whether Grievants are entitled to additional compensation when they work more than 37.5 but less than 40 hours in a week.

**SUMMARY:** Grievants claim that, because Respondent has a policy in place which states that the “normal workweek” for a Secretary or Accountant is 37.5 hours, Grievants are entitled to additional compensation for time worked over 37.5 hours in a week, and but less than 40 hours in a week. Grievants receive additional compensation for any hours worked over 40 in a week. Respondent’s policy does not in any way provide for such additional compensation when Secretaries or Accountants work more than 37.5 but less than 40 hours in a week, nor have Grievants demonstrated that they are by law entitled to such additional compensation.

**KEYWORDS:** Statutory Time Lines; Discrimination; Harassment

**CASE STYLE:** Carpenter v. Upshur County Board of Education

DOCKET NO. 2015-1086-UpsED (11/18/2016)

**PRIMARY ISSUES:** Whether Grievant demonstrated that she was the victim of discrimination.

**SUMMARY:** The record of this matter demonstrates that Grievant failed to file a grievance within fifteen days following the occurrence of some events upon which the grievance is based. In addition, Grievant failed to establish that she was the victim of discrimination and harassment. Accordingly, this grievance is denied.

**TOPICAL INDEX**  
**STATE EMPLOYEES**

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**KEYWORDS:** Discrimination; Annual Leave; Reprisal; Party

**CASE STYLE:** Eggert v. Division of Highways  
DOCKET NO. 2015-0702-DOT (11/29/2016)

**PRIMARY ISSUES:** Whether Grievant met his burden of proving his claims of discrimination and reprisal by a preponderance of the evidence.

**SUMMARY:** Grievant is employed by Respondent as a Transportation Worker 3-Mechanic. On December 16, 2014, Grievant saw a flyer for a retirement party being held for a supervisor in another county within District 9, and decided he wanted to attend. Grievant's supervisor informed him that the party was for supervisors only, and if he wanted to attend, he had to take annual leave for the time he would be away from work. Grievant took annual leave and attended the party. While there, he saw four people who were not supervisors in attendance, and none of them worked in that county with the retiring employee. Grievant alleged claims of discrimination and reprisal alleging that the other four employees did not have to take annual leave to attend the party. Respondent denied Grievant's claims. Grievant failed to prove his claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

**KEYWORDS:** Default; Statutory Time Lines; Level One Hearing

**CASE STYLE:** Evans, et al. v. Upshur-Buckhannon Health Department  
DOCKET NO. 2016-1884-CONSDEF (11/16/2016)

**PRIMARY ISSUES:** Whether Grievants proved by a preponderance of the evidence that Respondent failed to hold a Level One hearing within the time period required.

**SUMMARY:** Grievants proved that Respondent failed to hold a Level One hearing within the mandatory time frame set out in West Virginia Code § 6C-2-4. Under the unique facts of this case, the record supports a finding that Grievants were in substantial compliance with the filing requirements for the Public Employees Grievance Board. Nothing in the record suggests that Respondent did not receive a copy of Grievants' Level One grievance forms. Grievants mailed the forms to the highest ranking administrator at the Upshur-Buckhannon Health Department. Respondent failed to prove that it was prevented from holding the Level One hearing as a result of any of the acceptable reasons set out in West Virginia Code § 6C-2-3. Accordingly, Grievants prevail by default.

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**KEYWORDS:** Suspension; Patient Neglect; Abuse; Hearsay; Credibility; Good Cause; Representative; Disciplinary Action

**CASE STYLE:** Davis v. Department of Health and Human Resources/Jackie Withrow Hospital  
DOCKET NO. 2016-1597-CONS (11/17/2016)

**PRIMARY ISSUES:** Whether Respondent proved by a preponderance of the evidence that Grievant's suspension was justified.

**SUMMARY:** Grievant is employed as a Health Service Worker by Respondent at Jackie Withrow Hospital. Respondent argues that Grievant slapped a resident, constituting patient neglect, which warranted his being suspended without pay for ten working days. Grievant denied slapping the resident and denied committing patient neglect. Respondent failed to prove by a preponderance of the evidence that Grievant slapped the resident. Further, Respondent failed to prove that Grievant violated any DHHR or hospital policies. Therefore, the grievance is GRANTED.

**KEYWORDS:** Transportation Workers Apprenticeship Program; Pay Structure; Job Classification; Arbitrary and Capricious; Tier Classification

**CASE STYLE:** Melton, et al. v. Division of Highways

DOCKET NO. 2016-0773-CONS (11/4/2016)

**PRIMARY ISSUES:** Whether Grievants established that Respondent abused its discretion in the implementation of the Transportation Worker Apprenticeship Program.

**SUMMARY:** Grievants are classified employees paid in accordance with the State Personnel Board's approved tier structure within the Division of Highways' "Transportation Worker Apprenticeship Program." It is recognized that pay differences may be based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer.

Grievants are not satisfied with their classified pay. A general claim of unfairness or an employee's philosophical disagreement with a policy does not, in and of itself, constitute an injury. Grievants failed to establish by a preponderance of the evidence that either Respondent DOH or DOP acted in an arbitrary and capricious manner or in violation of any statute, policy, or rule in the implementation of the Transportation Worker Apprenticeship Program. Respondent presented persuasive justification for its proposal(s) and amendments establishing the basis for the agency action at issue and the reasonableness of that action. This Grievance is DENIED.

**KEYWORDS:** Selection; Qualifications; Experience; Job Duties; Interview Process; Discrimination; Arbitrary and Capricious

**CASE STYLE:** VanDervort v. Public Service Commission and Matthew Minney, Intervenor

DOCKET NO. 2015-0932-PSC (11/14/2016)

**PRIMARY ISSUES:** Whether Grievant proved that the process and decision for filling a Deputy Chief Administrative Law position was arbitrary and capricious.

**SUMMARY:** Grievant challenges the selection process and decision regarding the filling of a Deputy Chief Administrative Law Judge position for the Public Service Commission. Grievant argues the process and decision were arbitrary and capricious because many of the interview questions and specified criteria for selecting the successful applicant did not relate to the job duties for the position described in the job posting. She also argues that too much weight was given to criteria related to management style and not enough weight was given to adjudication experience and knowledge of utility law. Grievant also alleged that the decision resulted from unlawful sex and age discrimination.

Respondent demonstrated that the supervisory portion of the job duties were more important to the agency than deciding cases and rendering decisions. Consequently, the questions, criteria and the weight assigned thereto, were appropriately geared toward finding the applicant with the best skill set to meet the needs of the agency. Grievant was unable to prove that Respondent's decisions in the selection process were arbitrary and capricious. Additionally, Grievant did not prove discrimination as that term is applied to the grievance procedure.

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**KEYWORDS:** Dismissal; Employer; Employee; Lack Of Jurisdiction

**CASE STYLE:** Grose v. AFL-CIO Appalachian Council Head Start

DOCKET NO. 2017-1055-MISC (11/16/2016)

**PRIMARY ISSUES:** Whether the Grievance Board has jurisdiction to hearing this matter.

**SUMMARY:** Grievant is employed by the AFL-CIO Appalachian Counsel Head Start. The AFL-CIO Appalachian Counsel Head Start is a private, non-profit corporation and is not an employer subject to the grievance procedure. The Grievance Board lacks jurisdiction in this matter. Accordingly, the grievance is dismissed.

**KEYWORDS:** Selection; Supervisor; Interview; Factors; Discretion; Arbitrary and Capricious

**CASE STYLE:** Salmons, Jr. v. Department of Health and Human Resources/Bureau for Child Support Enforcement  
DOCKET NO. 2016-0853-DHHR (11/22/2016)

**PRIMARY ISSUES:** Whether Grievant proved he was the most qualified applicant for a supervisor position.

**SUMMARY:** Grievant believes that he was the most qualified candidate for a Child Support Supervisor 2 position due to his long experience with the agency and his advanced classification. Respondent followed its policy in making the selection and did not ignore Grievant's strong qualifications. The process used and the results achieved were neither arbitrary nor capricious.

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**KEYWORDS:** Classification; Pay Grade; Experience; Discrimination; Favoritism; Similarly Situated Employees; Equal Pay Act; Pay Plan Implementation Policy

**CASE STYLE:** Deem, et al. v. Division of Motor Vehicles  
DOCKET NO. 2016-1041-CONS (11/30/2016)

**PRIMARY ISSUES:** Whether Grievants proved by a preponderance of the evidence that they were subjected to discrimination or favoritism.

**SUMMARY:** Grievants are all experienced employees of the DMV in the Inspector 2 and 3 classifications. In May of 2015, another employee was hired into the Inspector 2 classification at a salary which exceeded that paid to Grievants. Grievants argue that they should be paid at least as much as the new employee, if not more, because they have more experience in the classification. They opine that to do otherwise constitutes discrimination or favoritism.

Grievants were unable to prove that they were entitled to be paid the same salary as all other employees in their classification as long as all employees were paid within the pay grade established for the classifications in which they are employed. All of the Grievants and the new employee are paid salaries which fall within the pay grade established for their classifications.

**KEYWORDS:** Pay; Transportation Worker Apprenticeship Program; Qualifications; Certifications; CDL License; Arbitrary and Capricious

**CASE STYLE:** Samples, et al. v. Division of Highways

DOCKET NO. 2016-0774-CONS (11/23/2016)

**PRIMARY ISSUES:** Whether Grievants proved that Respondent's decision to make the Class A CDL the core requirement of the Transportation Worker Apprenticeship Program was arbitrary and capricious.

**SUMMARY:** Grievants are all employed by Respondent in the Transportation Worker series and protest aspects of Respondent's Transportation Worker Apprenticeship Program. Grievants failed to prove Respondent's implementation of the Transportation Worker Apprenticeship Program and refusal to consider licenses acquired after submission of the Placement Form were arbitrary and capricious or that Respondent's failure to inform employees of the requirements of the Transportation Worker Apprenticeship Program prior to its implementation was improper. Accordingly, the grievance is denied.

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**KEYWORDS:** Pay; Equal Pay for Equal Work; Classification; Pay Grade; Pay Plan Implementation Policy

**CASE STYLE:** Compton v. Division of Highways

DOCKET NO. 2015-0689-DOT (11/29/2016)

**PRIMARY ISSUES:** Whether Grievant established that his past salary was in violation of any applicable and controlling statute, rule or regulation.

**SUMMARY:** Grievant contends that from October 1, 2012 until October 31, 2015, that he was being paid less than other employees in the same position although those employees were less qualified and lacked the seniority of Grievant. Under applicable law, the fact that employees are employed in the same classification as Grievant, at a higher salary and performing similar duties, does not violate protections related to equal pay for equal work. As long as the agency is paying all of the employees who are in the same classification within the range set out in the appropriate pay grade, it does not have to place all of the employees at the same pay to meet the agency's pay equity obligations. In addition, Grievant was unable to demonstrate that he was paid 20% less than any other crew supervisor under the provisions of the Pay Plan Implementation Policy. Accordingly, this grievance is denied.