

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in January 2013

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
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: Insubordination; Willful Neglect of Duty; Lack of Supervision; Fire Drill

CASE STYLE: Moore v. Brooke County Board of Education
DOCKET NO. 2012-0741-BroED (1/18/2013)

PRIMARY ISSUES: Whether Grievant willfully neglected his duties and was insubordinate.

SUMMARY: Grievant was suspended for three days for insubordination and willful neglect of duty. Respondent proved by a preponderance of the evidence that Grievant failed to supervise his classroom following a fire drill. As a result of lack of supervision, three students engaged in the use of synthetic marijuana in the classroom after the fire drill. Respondent met its burden of proof and established the charges that led to the discipline of Grievant.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Absences; Smartfind Express System; Training; Insubordination; Good Faith Effort; Willful Neglect of Duty; Password

CASE STYLE: Myers v. Monongalia County Board of Education

DOCKET NO. 2012-1282-MonED (1/11/2013)

PRIMARY ISSUES: Whether Grievant's failure to follow through on his responsibility constitutes willful neglect of duty.

SUMMARY: Grievant was suspended for two days without pay for failure to make sure his absence was properly recorded in the SmartFind Express system, as he was required to do. Grievant was aware that he was responsible for recording his absences in this system, but failed to maintain his password and identification number in a secure place where he would be able to access it if he forgot them, which he did, and consequently did not timely record his absence in the SmartFind Express system. Grievant's failure to follow through on this responsibility constitutes willful neglect of duty.

KEYWORDS: Classification; Qualifications; Experience; Requirements; Autism Mentor

CASE STYLE: Dolin v. Greenbrier County Board of Education

DOCKET NO. 2012-0355-GreED (1/24/2013)

PRIMARY ISSUES: Whether Grievant is entitled to both the classification title and the classification pay grade of autism mentor.

SUMMARY: Grievant is employed by Respondent as an Aide III. Near the beginning of the 2011-2012 school year, her principal assigned her to work with an autistic student. However, Respondent did not reclassify Grievant as an autism mentor. Grievant argues that she met all the policy requirements to qualify as an autism mentor during the time she was assigned to the student. Respondent does not dispute Grievant has the training and experience required to qualify as an autism mentor. However, Respondent asserts that Grievant does not meet the physical ability and stamina requirement. Grievant proved by a preponderance of the evidence that she worked with an autistic student and met the statutory definition of autism mentor, thereby entitling her to that classification title and pay grade, for the time she was assigned to B.F. Therefore, this grievance is GRANTED.

KEYWORDS: Daily Schedule; Hours Worked; Over Time Policy; Work Day; Duty-Free Lunch; Fair Labor Standards Act; Classification

CASE STYLE: Nott, et al. v. Mason County Board of Education

DOCKET NO. 2012-0140-CONS (1/17/2013)

PRIMARY ISSUES: Whether the Respondent changing the Grievants' work schedule was in violation of the non-relegation clause in W. Va. Code 18A-4-8(m).

SUMMARY: Respondent Mason County Board of Education began implementing a new "overtime" policy at the beginning of the 2011-12 school year which required certain school service personnel working as cooks, aides and school secretaries (which category included all named Grievants in this matter) to work an eight-hour work day. Previously, by approved written policy, Grievants' standard work schedule involved a seven-hour work day. Pursuant to an unwritten policy or practice which was never formally approved by the Mason County Board of Education, Grievants were paid at their regular rate of pay for each hour worked over 35 per week up to 40 per week. In calculating "hours worked" for purposes of applying this unwritten policy, a one-half hour duty-free lunch period and two 15-minute duty free breaks were included as work time. Once Grievants' work hours were increased to eight per day and a 40-hour week, Respondent only paid overtime to Grievants as mandated by the federal Fair Labor Standards Act, although Respondent continued to count the one-half hour duty-free lunch period and two 15-minute duty-free breaks as hours worked toward the 40-hour week threshold. Respondent presented evidence that it was facing a budget deficit in excess of \$1 million, and it was mandated by law to provide aides for certain students more than seven hours per day. However, this increase in Grievants' work hours violated the limitations in the "non-relegation clause" of W.Va. Code § 18A-4-8(m), and Respondent failed to demonstrate any legal basis for superseding that Code provision. Accordingly, this Grievance must be GRANTED.

KEYWORDS: Extra-Duty Assignments; Extracurricular Run; Untimely

CASE STYLE: Dinger v. Mercer County Board of Education

DOCKET NO. 2011-1746-MerED (1/18/2013)

PRIMARY ISSUES: Whether the practice enforced by Respondent's agents denied Grievant employment opportunity or defacto prohibited him from accepting extra-duty assignments.

SUMMARY: Respondent's Transportation Division implemented an operating procedure/practice which, permitted a regular bus operator to take an extra-duty assignment and ignore his/her extracurricular run, but on the condition that if the extracurricular run that the operator abandons for the day is one that begins before noon, said bus operator must also give up his/her regular morning run for that day. Similarly, if the abandoned extracurricular run is one that begins after noon, the bus operator must give up his regular afternoon run for that day. Grievant filed a grievance over what he depicts as a financial disincentive that keeps him from accepting extra-duty bus runs.

It has been acknowledged for some time that a county board of education is under no legal obligation to allow any bus operator to accept an extra-duty assignment if, in order to make the extra-duty run, the bus operator would have to miss a run that he is already obligated to perform. Nevertheless, administrative personnel of the transportation department (Respondent's agents) cannot create practices which artificially restrict bus operators' employment in excess of Respondent's statutory authority.

Respondent argues that the current operating practice serves a necessary purpose. Said purpose is recognized as valid. Yet, the operating procedure/practice was not properly implemented. By a preponderance of the evidence Grievant has established that Respondent's practice as implemented is not proper. This grievance is GRANTED.

KEYWORDS: Reclassification; Job Duties; Responsibilities; Qualified; Seniority; Full-Time Secretary; Administrative Duties; Job Description.

CASE STYLE: Combs v. Berkeley County Board of Education

 DOCKET NO. 2011-1844-BerED (1/30/2013)

PRIMARY ISSUES: Whether Grievant is entitled to be reclassified as an Executive Secretary.

SUMMARY: Respondent promoted the Director of Special Education to the position of Executive Director of Special Education. As an Executive Director he was entitled to an Executive Secretary. The Board followed the Executive Director's recommendation and reclassified one of the Secretary III's in the Department to the classification of Executive Secretary with new duties and responsibilities appropriate to that classification. Grievant argues that she was the Secretary III who was performed most of the secretarial duties for the Director and therefore should have received the reclassification. The Executive Director felt that all of the Secretaries were qualified to for the reclassification and he made his selection based upon the full-time secretary with the most seniority and what he perceived to be the best people skills. Grievant did not prove that selection was contrary to law or arbitrary and capricious.

KEYWORDS: Training and Physical Requirements; Two Year Experience Requirement; Arbitrary and Capricious; Favoritism; Discrimination

CASE STYLE: Lawton v. Hancock County Board of Education
DOCKET NO. 2012-0743-HanED (1/24/2013)

PRIMARY ISSUES: Whether Grievant meets all of the requirements to be classified as an autism mentor.

SUMMARY: Grievant is employed as an Aide III, and is assigned to ride a bus which transports special education students. As a bus aide, Grievant assists the students in boarding and exiting the bus, helps them get into their seats and fasten seatbelts, monitors the behavior of the students while they are on the bus and takes steps to control inappropriate behavior and to try to calm them down, and assists the students with issues they encounter while on the bus. Some of the students riding the bus are autistic. Grievant does not assist the students on the bus with any learning activities. Grievant has met the training and physical requirements to be classified as an autism mentor, and has acquired 292 days of experience working with autistic students, which is sufficient to meet the two year experience requirement. Grievant is fully qualified to be an autism mentor, and should be classified and paid as such when she is working with autistic students. Grievant is not serving as an autism mentor in her role as a bus aide, and cannot be paid as such. Grievant did work as an autism mentor for 14 days during the summer of 2012, and is entitled to backpay, with interest, for those 14 days.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Advisory Opinion; Dismissal; Relief Wholly Unavailable
<u>CASE STYLE:</u>	<u>Milam v. Division of Rehabilitation Services</u> DOCKET NO. 2012-0890-DEA (1/11/2013)
<u>PRIMARY ISSUES:</u>	Whether there is relief that can be granted through the Grievance procedure.
<u>SUMMARY:</u>	Grievant's request for annual leave was denied by his supervisor. However, the denial was rescinded a day later. Without knowing of the rescission, Grievant canceled his travel plans. Grievant filed this grievance alleging improper denial of annual leave, but sought no relief that can be granted by the Grievance Board. Accordingly, this grievance is DISMISSED.

<u>KEYWORDS:</u>	Alternate Uniform Option; Standard Uniform Policy; Clothing Restrictions; Unauthorized Leave; Good Faith Attempt; Discrimination; Disciplinary Action
<u>CASE STYLE:</u>	<u>Simons v. Division of Highways</u> DOCKET NO. 2012-0864-DOT (1/31/2013)
<u>PRIMARY ISSUES:</u>	Whether it was reasonable, or not, in the fact of this case for Respondent to discipline Grievant for violating the applicable uniform policy provided to her.
<u>SUMMARY:</u>	<p>Respondent has implemented a uniform policy for its workers. Respondent and Grievant executed an agreement establishing an alternative uniform option for Grievant. Grievant did not consistently conform to the alternate uniform criteria or the standard uniform policy. Grievant grieved the actions of Respondent, her employing state agency, after being sent home for violation of the duly recognized "Alternate Uniform Option" provided to her.</p> <p>Considerable deference is afforded to employers in disciplinary situations. Respondents had discretionary options in the circumstances of this case. It was established by a preponderance of the evidence that Grievant failed to adhere to the alternative uniform option provided to her. It has not been demonstrated that the disciplinary measure levied was so clearly disproportionate as to constitute an abuse of discretion. Accordingly, this grievance is DENIED.</p>

KEYWORDS: Complete Relief; Moot; Verbal Counseling Document; Removed from Employee's Files

CASE STYLE: Britton v. Department of Health and Human Resources/Hopemont Hospital

DOCKET NO. 2011-1179-DHHR (1/29/2013)

PRIMARY ISSUES: Whether there is additional relief that can be granted by the Grievance Board.

SUMMARY: Respondent asserts that Grievant received her relief requested in this matter, and the grievance is now moot. Grievant received a non-disciplinary verbal counseling, not a verbal warning. The verbal counseling document was removed from the employee's files. Grievant has received complete relief in this grievance, and the case is now moot.

KEYWORDS: Disciplinary Action; Empty Beer Can; Alcohol On State Property; Alcohol-Free Workplace

CASE STYLE: Shannon v. Workforce West Virginia

DOCKET NO. 2012-0959-DOC (1/29/2013)

PRIMARY ISSUES: Whether Grievant's termination was based on good cause in the circumstances presented.

SUMMARY: Respondent presented compelling circumstantial evidence that Grievant, having been duly placed on notice that Division of Personnel policy strictly prohibits bringing alcohol into the workplace, subsequently brought alcohol onto agency premises, consumed it, and attempted to avoid detection by disposing of the empty beer cans in public trash receptacles outside the building. Grievant had been verbally reprimanded for bringing beer to his work area in a backpack, had been placed on leave restriction for excessive leave, and warned on multiple occasions about taking unscheduled leave that did not involve a legitimate medical situation. Contrary to the pleadings in Grievant's grievance statement, there was no persuasive evidence that Grievant's supervisors engaged in any form of harassment or retaliation in addressing his alcohol possession. Further, the penalty of termination was reasonable in the circumstances presented.

KEYWORDS: Excessive Use of Force; Gross Misconduct; Attack; Serious Injury; Concussion; Unconscious

CASE STYLE: Barnett v. Division of Juvenile Services/James H. Morton Juvenile Center

DOCKET NO. 2013-0086-MAPS (1/8/2013)

PRIMARY ISSUES: Whether Respondent had good cause to terminate Grievant when his improper conduct was unconscious due to the concussion he sustained.

SUMMARY: Grievant was dismissed from employment as a correctional officer at a juvenile center for excessive use of force. Grievant was attacked by an adult resident and sustained a concussion during the attack. He has no memory of the actions he took during the following restraint of the resident. Respondent did not prove that the resident's injuries were caused by Grievant, although Respondent did prove some improper conduct. Grievant's actions were unconscious and, therefore, not intentional. Respondent failed to prove it had good cause to terminate Grievant, a twenty-one year veteran of civil service, when his improper conduct was unconscious due to the concussion he sustained. Accordingly, the grievance is granted.

KEYWORDS: Job Abandonment; Medical Leave Benefits; Intermittent Medical Leave pf Absence; Policy's Requirements; Leave Use; Attendance Improvement Plan; Call In

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

DOCKET NO. 2012-1374-DHHR (1/28/2013)

PRIMARY ISSUES: Whether Respondent had good cause to terminate Grievant's employment for job abandonment.

SUMMARY: Grievant filed the instant grievance stating dismissal without good cause. Grievant was terminated for job abandonment effective June 6, 2012. Respondent alleges that Grievant abandoned her job after a number of consecutive days missed without proper notice. Grievant does not deny that she missed work but avers that she communicated with her supervisor that she would be absent. Respondent proved by a preponderance of the evidence that it had good cause to terminate Grievant's employment for job abandonment. Consequently this Grievance is DENIED.

KEYWORDS: Meeting; Representative Present; Entitled to Representation; Disciplinary Action; Counseling Session

CASE STYLE: Parsons v. General Services Division
DOCKET NO. 2011-1799-DOA (1/14/2013)

PRIMARY ISSUES: Whether Grievant was entitled to representation at a meeting, when he was informed prior to the meeting that it was not disciplinary, no disciplinary action was discussed or taken, and no investigation occurred during the meeting.

SUMMARY: Grievant's representative was refused admittance to a meeting between Grievant, his immediate supervisor, and his second-level supervisor. The meeting was not investigatory or disciplinary in nature, and no discipline has been taken against Grievant for the conduct discussed at the meeting. The meeting was in the nature of a counseling session, and Grievant was informed prior to the meeting that the meeting was not disciplinary. Therefore, Respondent was not required to permit Grievant's representative to attend the meeting. Accordingly, the grievance is denied.

KEYWORDS: Nurse Aide Abuse Registry; Abuse; Neglect; Federal Regulations; Moot; Relief

CASE STYLE: Prince v. Department of Health and Human Resources/Jackie Withrow Hospital
DOCKET NO. 2013-0156-DHHR (1/18/2013)

PRIMARY ISSUES: Whether Grievant sought relief that could be granted by the Grievance Board.

SUMMARY: Grievant was placed upon the Nurse Aide Register by OHFLAC which bared her relief of reinstatement.

KEYWORDS: Patient Neglect; One on One Assignment; Off-Hospital Activities; Forensic Patient; Patient Abuse/Neglect; Lack of Supervision

CASE STYLE: Bowen v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital
DOCKET NO. 2011-0978-CONS (1/10/2013)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence that Grievant's failure to provide for the specific supervision of a forensic patient required by Bateman policy constituted "neglect."

SUMMARY: Grievant was dismissed for patient neglect based upon an incident where she was accused of leaving a forensic patient alone for a period of time in violation of Bateman Hospital rules. Grievant argues that she did not leave the patient alone. Respondent proved the charges against Grievant by a preponderance of the evidence.

KEYWORDS: Reallocation; Working Out of Class; Job Description; Extra Duties; Classification

CASE STYLE: Myers v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital and Division of Personnel
DOCKET NO. 2012-0225-DHHR (1/11/2013)

PRIMARY ISSUES: Whether Grievant establish by a preponderance of the evidence that he was being made to work out of classification and eligible for a reallocation.

SUMMARY: Contrary to Grievant's Statement of Grievance, this case is not disciplinary in nature. At level three, Grievant argued that he was being forced to work out of his classification. Grievant failed to establish by a preponderance of the evidence that he was eligible for reallocation. In addition, Grievant failed to establish by a preponderance of the evidence that he met the necessary requirements to be eligible for a temporary upgrade.

KEYWORDS: Resignation; Voluntary; Rescind; Constructive Discharge

CASE STYLE: Spence v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital
DOCKET NO. 2012-0026-DHHR (1/17/2013)

PRIMARY ISSUES: Whether Grievant voluntarily resigned, and whether grievant rescinded her resignation before her employer notified her that it was accepted.

SUMMARY: Respondent asserts that Grievant voluntarily resigned and her employment was terminated when the verbal resignation was accepted by the Hospital Chief Executive Officer ("CEO"). Grievant counters that she did not mean to resign and when she realized that the CEO thought Grievant resigned, Grievant withdrew the resignation before it was acted upon. Additionally, Grievant alleges that she was constructively discharged from employment without cause.
Respondent proved that Grievant voluntarily resigned rather than work for a particular supervisor and that the Bateman Hospital CEO accepted Grievant's resignation before Grievant withdrew it. Additionally, Grievant was unable to prove that that she was constructively discharged when Respondent moved her position into the Human Resources department as a result of a reorganization plan. The grievance is DENIED.

KEYWORDS: Settlement Agreement; Training; Relief Sought; Moot

CASE STYLE: Hoskins v. Division of Highways
DOCKET NO. 2013-0750-DOT (1/9/2013)

PRIMARY ISSUES: Whether the relief sought by Grievant is available from the Grievance Board.

SUMMARY: Grievant seeks to have the Public Employees Grievance Board enforce an agreement between the Respondent and himself. This relief is not available as a matter of law through the grievance procedure.

KEYWORDS: Sleeping on Duty; Misconduct; Serious Infraction; Tower Officers; Rover; Tower Keys; Penalty; Termination

CASE STYLE: Smith v. Regional Jail and Correctional Facility Authority/Southwestern Regional Jail
DOCKET NO. 2013-0177-MAPS (1/3/2013)

PRIMARY ISSUES: Whether there was sufficient evidence that Grievant was sleeping on duty and termination was a reasonable penalty.

SUMMARY: Respondent presented testimony from two co-workers who separately and independently observed Grievant sleeping on multiple occasions while on duty at the Southwestern Regional Jail. Grievant denied sleeping on the job at any time and presented testimony from another co-worker who had been fired for sleeping on duty and asserted that one of the witnesses who testified against Grievant had made similar false allegations against him. Several co-workers testified that they had worked with Grievant for several years, and that they had never observed him sleeping or otherwise doing anything improper. Grievant's efforts to impeach the credibility of his accusers were ineffective while Grievant's testimony asserting his innocence was unconvincing. A jail guard who is sleeping while his co-workers are in harm's way involves a serious infraction. Thus, the penalty of termination was not unreasonable and this grievance must be denied.

KEYWORDS: Statutory Time Lines; Filing; Date Stamp

CASE STYLE: Runion III v. Division of Highways

DOCKET NO. 2013-0146-DOT (1/11/2013)

PRIMARY ISSUES: Whether Grievant timely filed the instant grievance.

SUMMARY: The record of this matter demonstrates that Grievant failed to file the instant grievance within fifteen days following the occurrence of the event upon which the grievance is based. Accordingly, this grievance is dismissed.

KEYWORDS: Submitted False Time Records; Threatened Physical Violence; Gross Misconduct; Disciplinary Action; Progressive Discipline

CASE STYLE: Nguyen v. Division of Highways

DOCKET NO. 2012-1368-DOT (1/16/2013)

PRIMARY ISSUES: Whether Grievant was terminated for good cause.

SUMMARY: Grievant was a long-time employee of the Division of Highways, serving as a Chemist II in its Environmental Coatings Division. During his nearly 22 years with Respondent Grievant compiled a substantial disciplinary record, focusing on leave compliance and hostile behavior in the workplace. The present charges involve unauthorized absence from work, submitting fraudulent time records, and making threatening comments toward a co-worker when confronted concerning his leave discrepancies. Although Grievant denied the allegations, and provided some testimony that contradicted the charges, Respondent established the charges by the weight of the credible evidence. Based upon a clear record of progressive discipline for leave compliance issues, and the serious nature of the threat Grievant related in a meeting, Respondent presented good cause for Grievant's termination.

KEYWORDS: Unsatisfactory Work Performance; Harassment; Hostile Work Environment; Discrimination; Inadequately Trained; Arbitrary and Capricious

CASE STYLE: Hundley v. Department of Health and Human Resources/Bureau for Child Support Enforcement
DOCKET NO. 2011-1334-DHHR (1/28/2013)

PRIMARY ISSUES: Whether Respondent complied with the applicable provisions of DOP rules governing dismissal of probationary employees in discharging Grievant.

SUMMARY: Grievant was a probationary employee who was dismissed due to unsatisfactory performance. Grievant asserts that she was wrongfully terminated because she was inadequately trained, discriminated against due to a hearing deficit and denied reasonable accommodation. She further alleges that she has been subjected to harassment and a hostile work environment. Respondent maintains that Grievant's training and supervision were adequate. Respondent counters that Grievant's training was at least as comprehensive as the training of another CSS 1 employee who was successfully trained with Grievant. Respondent argues that that Grievant's work was unsatisfactory, justifying her discharge. Grievant failed to demonstrate that her training was inadequate or that her performance was satisfactory. Respondent denies any knowledge of Grievant's hearing loss and responds that Grievant's work environment was not hostile or harassing based upon either discriminatory or nondiscriminatory conduct by BCSE management. Grievant proved that Respondent was aware of her hearing deficit. However, Grievant did not meet her obligation to advise Respondent that her hearing problem was a disability that may have required accommodation. Though Grievant's immediate supervisor was sometimes overbearing and intimidating to Grievant and her coworkers, Grievant did not prove that her supervisor's conduct was hostile or harassing.

KEYWORDS: Violating Policy; Proper Authorization; Conflict of Interest.

CASE STYLE: Harrah v. Department of Health and Human Resources/Bureau for Child Support Enforcement
DOCKET NO. 2012-0723-DHHR (1/31/2013)

PRIMARY ISSUES: Whether the penalty given to Grievant was so clearly disproportionate to the offense that it indicated an abuse of discretion and mitigation is appropriate.

SUMMARY: Grievant was dismissed for violating DHHR and BCSE policies by suspending child support arrearage payments in a case without proper authorization, at the request of a co-worker. Grievant argues that she did not violate the policies and that the penalty imposed was so disproportionate to her actions that it constituted an abuse of discretion. Respondent proved that Grievant violated the cited policies and that Grievant could be disciplined for her actions. However, Grievant proved that dismissal was out of proportion to Grievant's action and that the penalty should be mitigated. The grievance is Granted in part, and Denied in part.