

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in March 2014

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: Timeliness; Pay Discrimination; Selection

CASE STYLE: Davari v. West Virginia University Institute of Technology
DOCKET NO. 2014-0347-WVUIT (3/11/2014)

PRIMARY ISSUES: Whether Grievant filed his grievance within the statutory time limits.

SUMMARY: Grievant alleges that his grievance is timely because it is challenging pay discrimination which is a continuing violation allowing him to file each time he receives a paycheck. However the grievance is actually contesting his non-selection for a Dean position which required him to file his grievance within fifteen days of the selection of the successful candidate. The grievance was not filed with the mandatory time limits and is DISMISSED.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: Incompetency; Renewed Professional Teaching Certificate; Teaching Contract; Arbitrary and Capricious

CASE STYLE: H. v. Tucker County Board of Education

DOCKET NO. 2014-0312-TucED (3/19/2014)

PRIMARY ISSUES: Whether Respondent's decision to terminate Grievant's employment for incompetency was arbitrary and capricious.

SUMMARY: Grievant was terminated from her employment as a teacher when the State Department of Education had not acted on Grievant's application to renew her professional teaching certificate as of the first day of Grievant's contract term, August 19, 2013. Grievant's application was pending on that date, and was approved August 20, 2013, with her certificate renewed effective July 1, 2013. At the time Respondent voted to terminate Grievant's employment, it was aware that her teaching certificate had been renewed effective July 1, 2013. Respondent's decision to terminate Grievant's employment was arbitrary and capricious.

KEYWORDS: Misconduct; Inappropriate Behavior; Physical Altercation; Inappropriate Activities; Insubordination; Willful Neglect of Duty; Due Process

CASE STYLE: Jones II v. Mason County Board of Education

DOCKET NO. 2013-1728-MasED (3/5/2014)

PRIMARY ISSUES: Whether Respondent established that Grievant's repeated conduct constituted a disciplinary offense; and/or whether Respondent established that Grievant's behavior and failure to rectify or cease to be involved in the type of conduct discussed constitute insubordination.

SUMMARY: Grievant was dismissed after participating in a physical altercation with a student in his classroom, and disclosing information to the media arguably deemed protected. Grievant has a history of disciplinary action(s) viewed as relevant and reflecting prior warning by Respondent regarding participation in similarly natured conduct. A county board of education is authorized to discipline an employee for the causes listed in W. VA. CODE § 18A-2-8, as amended, and action must be exercised reasonably, not arbitrarily or capriciously. Respondent had discretionary options in the circumstances of this case. Respondent elected to terminate Grievant's employment. Respondent established, by a preponderance of the evidence, that in the circumstances of this case, Grievant's conduct constituted a disciplinary offense. It has not been demonstrated that the disciplinary measure levied was so clearly disproportionate as to constitute an abuse of discretion. Grievance is DENIED.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Remedies; Default; Plan of Improvement; Evaluation; Harassment; Hostile Work Environment; Apology

CASE STYLE: Walker v. Kanawha County Board of Education

DOCKET NO. 2013-0202-KanED (3/12/2014)

PRIMARY ISSUES: Whether the remedies sought by the Grievant are contrary to law or contrary to proper and available remedies.

SUMMARY: As Grievant prevailed on the merits of her grievance by default, the sole issue in this matter is whether the remedies sought by the Grievant are contrary to law or contrary to proper and available remedies. Grievant has sought a number of remedies in her statement of grievance. Upon analysis of each remedy sought, the grievance is GRANTED IN PART, and DENIED IN PART.

KEYWORDS: Res Judicata; Reprimand; Misconduct; Re-Litigating

CASE STYLE: Graham v. Wetzel County Board of Education

DOCKET NO. 2012-0907-WetED (3/7/2014)

PRIMARY ISSUES: Whether Grievant is barred from re-litigating same matters with his employer.

SUMMARY: Grievant is a bus operator employed by Respondent. Grievant challenges a letter of reprimand issued to him on February 22, 2012. The substance of this letter of reprimand was the subject of a prior related grievance between these same parties. In that grievance, Mr. Graham challenged his three-day suspension without pay. During the course of that hearing, Grievant challenged the content of the February 22, 2012, letter of reprimand. The grievance was denied by the undersigned after a level three hearing. That decision was later affirmed by the Circuit Court of Kanawha County. This grievance is barred by the doctrine of claim or issue preclusion. Lower level record also established the charges against Grievant by a preponderance of the evidence.

KEYWORDS: Job Performance Observations; Bus Accidents; Written Observations; Pay for this Training Session; Untimely Claim

CASE STYLE: Graham v. Wetzel County Board of Education
DOCKET NO. 2013-2157-CONS (3/21/2014)

PRIMARY ISSUES: Whether Grievant proved that the observations and his satisfactory performance evaluation were the result of some misinterpretation or misapplication of established policies or rules governing the county's service personnel evaluation process.

SUMMARY: Grievant, a bus operator received two evaluations from his immediate supervisor relating to his failure to clean his bus and being involved in two accidents. Grievant failed to meet his burden of proof and demonstrate that the evaluations were flawed, inaccurate or otherwise violated any statute, rule, regulation or policy or that it was arbitrary, capricious or an abuse of discretion.

KEYWORDS: Insubordination; Reprimand; Improper Use of Two-Way Radio System; Disrespectful Comment; Disrespect for Authority

CASE STYLE: Finley v. Mercer County Board of Education
DOCKET NO. 2013-1268-MerED (3/7/2014)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence that Grievant was insubordinate.

SUMMARY: On January 16, 2013, Grievant, a bus operator for the MCBOE, was issued a written reprimand for improper use of the two-way bus radio system and willful disrespect for authority. Respondent met its burden of proof and demonstrated the charges against Grievant by a preponderance of the evidence. The grievance is DENIED.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Job Abandonment; Unauthorized Leave; Excessive Absences
<u>CASE STYLE:</u>	<u>Johnson v. Department of Health and Human Resources/Jackie Withrow Hospital</u> DOCKET NO. 2013-1864-DHHR (3/19/2014)
<u>PRIMARY ISSUES:</u>	Whether Respondent had good cause to dismiss Grievant for job abandonment.
<u>SUMMARY:</u>	Grievant was dismissed for job abandonment. Respondent proved by a preponderance of the evidence that Grievant was absent from work for more than three consecutive workdays without notice. Grievant offered no explanation for why he had been absent without notice and attempted to quit. Respondent had good cause to dismiss Grievant for job abandonment. Accordingly, the grievance is denied.

<u>KEYWORDS:</u>	K-9 Unit; Correctional Dogs; Vaccinations; Kennel Violations; Retirement from Service Reallocation; Resignation; Monetary Damages; Relief
<u>CASE STYLE:</u>	<u>Stalnaker v. Division of Corrections/Mount Olive Correctional Complex</u> DOCKET NO. 2013-1084-MAPS (3/26/2014)
<u>PRIMARY ISSUES:</u>	Whether Grievant was entitled to monetary damages and to have Corrections Dogs given to him upon their retirement from service.
<u>SUMMARY:</u>	Respondent reassigned Grievant as a Correctional Officer 2 at MOCC from the K-9 Unit for alleged violation of rules related to the upkeep of the dog kennels, and vaccinations of the dogs in his care. The dogs were returned to MOCC and reassigned to another officer in the K-9 Unit. As a result of the reassignment, Grievant was reallocated from a Correctional Officer 3 to a Correctional Office 2, but his rate of pay was not reduced. Grievant argues that some of the alleged violations were not true and that the punishment was too severe for the remaining minor infractions. Because he now has other employment, Grievant does not wish to be reinstated to his position with Respondent's K-9 Unit, but seeks to be paid \$100,000 in damages and to have the two dogs given to him upon their retirement from active service. Neither of the remedies Grievant now seeks is available from the West Virginia Public Employees Grievance Board. Accordingly, the grievance must be denied.

KEYWORDS: Probationary Employee; Probationary Period; Employee Performance Appraisal; Professionalism; Inappropriate Comments; Trial Work Period

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

DOCKET NO. 2012-1295-DHHR (3/14/2014)

PRIMARY ISSUES: Whether Grievant, a probationary employee, has proven by a preponderance of the evidence that her work for Respondent was satisfactory.

SUMMARY: Grievant's probationary employment was terminated, due to Respondent's determination that her performance was unsatisfactory, specifically with regard to properly performing her duties. When a probationary employee is terminated for reasons other than discipline, it is her burden to prove her services were satisfactory. In this case, Grievant's performance was regularly evaluated and she was given several opportunities to improve before she was dismissed. Grievant was not able to meet her burden of proof and demonstrate that her job performance was satisfactory. Therefore, this grievance is denied.

KEYWORDS: Patient Abuse; Sexual Contact with a Patient; Credible Evidence; Hearsay

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

DOCKET NO. 2012-1378-CONS (3/26/2014)

PRIMARY ISSUES: Whether Respondent proved the charge of patient abuse against Grievant by a preponderance of the evidence.

SUMMARY: Grievant was employed as a Health Service Worker at the William R. Sharpe, Jr. Hospital, a facility operated by the West Virginia Department of Health and Human Resources. Grievant was terminated following an investigation conducted by Respondent which substantiated an allegation of patient abuse. The only evidence to support the patient abuse accusation was the testimony of the investigator, and her report summarizing her interviews with co-workers and a patient of the Respondent. This is hearsay and, in some instances, hearsay upon hearsay. Under the circumstances of this grievance, this hearsay is entitled to no weight. Respondent also offered documentary evidence which was at best circumstantial, often unreliable, and entitled to little or no weight. Respondent did not prove the charge against Grievant. This grievance is granted.

KEYWORDS: Attendance Improvement Plan; Inappropriate Language; Violent/Hostile Work Environment; Terroristic Threat; Gun Threat; Witness Credibility; Inconsistent Statements; Implausible Accounts

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

DOCKET NO. 2013-1022-CONS (3/24/2014)

PRIMARY ISSUES: Whether Respondent proved that Grievant made a threat to bring a gun to work.

SUMMARY: Respondent dismissed Grievant from employment for allegedly threatening to bring a gun to work and shoot other employees at Sharpe Hospital. Respondent argues that these threats constituted a serious violation of DHHR Policy Memorandum 2123 Violent/Hostile Work Environment. The alleged threats were so serious that Grievant was charged and tried for the criminal offense of making terrorist threats. Respondent's case rests upon the allegation of two of Grievant's coworkers who said they heard Grievant make the threats. The testimony of these coworkers was not credible and Respondent was unable to prove by a preponderance of the evidence that Grievant made the alleged threats. Accordingly, the grievance is GRANTED.

KEYWORDS: Selection; Promotion; Discrimination; Favoritism; Arbitrary and Capricious

CASE STYLE: Gollihue v. Regional Jail and Correctional Facility Authority/Southwestern Regional Jail

DOCKET NO. 2013-1927-MAPS (3/5/2014)

PRIMARY ISSUES: Whether Grievant proved that Respondent's selection for the position of Corporal was flawed, or arbitrary and capricious, and whether Grievant proved his claims of discrimination and favoritism.

SUMMARY: Grievant applied for a promotion to the rank of Corporal. Grievant passed the promotion exam and was granted an interview. Grievant was interviewed; however, he was not selected for one of the three open positions. The candidates with the top three scores were selected for the positions. Grievant was ranked fourth. Grievant asserted that the selection process was flawed, as well as claims of discrimination and favoritism. Respondent denied Grievant's claims, asserting that it selected the most qualified candidates for the positions. Grievant failed to prove his claims by a preponderance of the evidence. Therefore, the grievance is DENIED.

KEYWORDS: Sleeping on Duty; Witness Credibility; Suspension; Back Pay

CASE STYLE: Bailey v. Division of Corrections/Huttonsville Correctional Center
DOCKET NO. 2013-1684-MAPS (3/25/2014)

PRIMARY ISSUES: Whether Respondent proved the charges against Grievant.

SUMMARY: Grievant was suspended for ten days without pay for sleeping on post. The allegations against Grievant were based on the observation by another officer that Grievant was leaning back in a chair with his head on his chest, and Grievant's failure to acknowledge the presence of this officer when he approached the door to the room where Grievant was sitting. This officer did not speak to Grievant as he approached, and could not say whether Grievant's eyes were open. This was not conclusive. Grievant denied he was sleeping and offered a plausible explanation of the situation. Respondent did not demonstrate that it was more likely than not that Grievant was sleeping.

KEYWORDS: Threatening Text Messages; Workplace Security; Threatening/Violent Behavior; Conduct Away from Work; Rational Nexus; Mitigation

CASE STYLE: Cook v. Division of Rehabilitation Services
DOCKET NO. 2014-0052-DEA (3/28/2014)

PRIMARY ISSUES: Whether Respondent's decision to terminate Grievant's employment for violation of Workplace Security Policy for conduct outside of recognized office hours was excessive in light of the totality of the circumstances.

SUMMARY: Grievant sent text messages to a former friend outside of regular recognized business hours away from the workplace for issue(s) unrelated to state business. In close proximity to one another, same field office, each individual is employed by Respondent, a state agency. Respondent terminated Grievant's employment contending Grievant engaged in behavior that is in violation of "General Expectations for Conduct of DRS Employees" and the "Workplace Security Policy" by sending threatening text messages to a co-worker. Grievant acknowledges that she was guilty of bad judgment, but persuasively contends that dismissal is too severe a penalty given the nature and circumstances of the conduct.

Respondent established that Grievant violated policy, but failed to demonstrate that Grievant was culpable to the degree alleged. Reasonable assessment of a threat includes more than just identifying that a threat exists. Mitigation is found to be appropriate in the circumstance of this case. Termination of Grievant's employment is deemed to be disproportionate to the facts of the offense and Grievant's employment record in toto. Consequently, this grievance is GRANTED in part.

KEYWORDS: Arbitrary and Capricious; Job Posting; Selection Process; Most Qualified Candidate

CASE STYLE: McFarland v. Division of Culture and History
DOCKET NO. 2011-1620-DEA (3/11/2014)

PRIMARY ISSUES: Whether Grievant proved that the method of selection was arbitrary and capricious and that Grievant was the best-qualified candidate.

SUMMARY: Grievant was not selected for the position of Cultural Program Coordinator, and alleges that the selection process was arbitrary and capricious, asserting she was the best-qualified candidate. The selection decision was arbitrary and capricious as Respondent had no methodology for making the selection decision and could not explain that the successful candidate was the best-qualified candidate. Grievant did not prove that she was the best-qualified candidate. Grievant has already been afforded the remedy to which she is entitled, the reposting of the position, and she failed to apply. Accordingly, the grievance is denied.

KEYWORDS: Medical Leave of Absence; Work-Related Injury; Time Limits; Default; Remand; Abeyance

CASE STYLE: Everson v. Division of Highways
DOCKET NO. 2014-0150-DOTDEF (3/13/2014)

PRIMARY ISSUES: Whether Respondent defaulted by not conducting a conference within ten working days following the date on which it was filed, and placing the matter in abeyance because Grievant was off work on approved leave at the time.

SUMMARY: Grievant contends that DOH is in default because a Level One conference was not conducted within ten days of the filing of his grievance. Respondent received this grievance on or about August 13, 2013, and responded to Grievant in writing within the ten-day time limit by unilaterally placing the grievance in abeyance because Grievant was then on a medical leave of absence, citing W. Va. Code § 6C-2-3(a)(2). Based upon an analysis of the grievance procedure statute as a whole, applying well-established rules of statutory construction, it was concluded that Respondent's actions to date did not result in default as provided in the statute, but the grievance should be allowed to proceed to a Level One conference to comply with the Legislature's intent in establishing the current grievance procedure for public employees.

KEYWORDS: Executive Order; Additional Pay; Discrimination; Favoritism

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

DOCKET NO. 2013-0065-CONS (3/11/2014)

PRIMARY ISSUES: Whether Grievants demonstrated that they were the victims of discrimination.

SUMMARY: On June 29, 2012, a severe storm caused extensive damage throughout the State of West Virginia. On Saturday, June 30, 2012, Governor Earl Ray Tomblin declared a statewide state of emergency. On July 1, 2012, due to continued power outages and other effects from the storm, Governor Tomblin issued an Executive Order that indicated that only employees who provide essential services shall be required to report to work on July 2, 2012. Grievants claim that Respondent used the Executive Order in a discriminatory fashion. Grievants did not demonstrate that they were treated differently from similarly-situated employees. The record did not establish that Grievants were treated any differently than other employees who were not scheduled to work on Monday, July 2, 2012.