

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in April 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
HIGHER EDUCATION EMPLOYEES

KEYWORDS: Discrimination; Favoritism; Job Evaluation Plan; Pay Grade; Misclassified; Lead; Supervision

CASE STYLE: Pack, et al. v. West Virginia University
DOCKET NO. 2012-1497-CONS (4/2/2013)

PRIMARY ISSUES: Whether Grievants proved their claims of discrimination or favoritism and whether Grievants demonstrated that they are not properly classified.

SUMMARY: Grievants argued that when the Trade Specialist Leads each had been working under vacated their positions, Grievants had assumed all the duties of the positions, and that they should have been compensated in the higher pay grade. Grievants did not challenge any point factors. Neither Grievant leads any full-time employee on a regular basis. Grievants believed they had been discriminated against, pointing to other employees who had been placed in a Lead position when the Lead they were working under vacated the position, and pointing to some employees classified as Trade Specialist Lead who had no employees working under them. The employees to whom Grievants compared themselves were not similarly situated to Grievants. Further, the relief sought, that Grievants be placed in the higher pay grade, could not be granted because Grievants failed to challenge any point factors assigned to their classification, and did not demonstrate they were misclassified.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Misclassified; Pay Grade; Job Duties; Job Description; Administrative Duties; Discrimination; Favoritism

CASE STYLE: McComas, et al. v. Lincoln County Board of Education AND Department of Education and Tammy Barrett, et al., Intervenors
DOCKET NO. 2011-1169-CONS (4/17/2013)

PRIMARY ISSUES: Whether Grievants proved by a preponderance of the evidence that their positions are included in the expanded job description of Executive Secretary which the Board has adopted and utilized.

SUMMARY: Grievants claim that they are misclassified as Secretary III's and they should be classified as Executive Secretaries because they are performing substantially similar duties as other employees who are classified as Executive Secretaries, and to give them a lower classification with a lower pay grade constitutes discrimination or favoritism. Grievants also argue that the Board has expanded the Executive Secretary job description beyond the definition set out in statute and their positions meet the expanded job description.

Respondent argues that the employees who are classified as Executive Secretaries are all directly supervised by the Superintendent, Assistant Superintendent or the Treasurer. These Administrators are higher on the administrative hierarchy than the Directors who supervise Grievants. They also note that the Executive Secretaries are all multi-classified and carry more responsibilities than Grievants, therefore, the two groups are not similarly situated. Respondent also argues its Executive Secretary antiquated and does not reflect how the employees are presently assigned.

KEYWORDS: Suspension; Bus Operator Certification; Incompetency; Contract

CASE STYLE: Redman v. Jackson County Board of Education

DOCKET NO. 2013-0326-JacED (4/29/2013)

PRIMARY ISSUES: Whether a 7.5-day suspension was appropriate for Grievant's failure to renew his bus operator certification.

SUMMARY: Grievant, while on personal leave due to a medical condition, allowed his bus operator certification to expire. At the beginning of his contract year, Grievant, still lacking his required certification, reported to work for inservice days, then returned to personal leave before having to start making his bus runs. During that time, Grievant was again reminded that his certification was needed. However, Grievant did not take action to renew his certification. In response, Respondent suspended Grievant without pay for incompetency as he lacked the certification required to be employed as a bus driver. Upon being suspended, Grievant took action to obtain his certification. Grievant was suspended without pay for a total of 7.5 days. Grievant asserts that his suspension violated West Virginia Code § 18A-2-8. Respondent denies Grievant's claims arguing that the suspension was proper because Grievant lacked certification, and was, therefore, incompetent. Respondent has proved its claims by a preponderance of the evidence.

KEYWORDS: Timeliness; Discovery Exception; Verification of Information; Overtime; Assignment of Extra-Duty Work; Next in Line; Multi-Classification; Similarly Situated Employees; Discrimination; Favoritism

CASE STYLE: Myers v. Monongalia County Board of Education

DOCKET NO. 2012-0674-MonED (4/9/2013)

PRIMARY ISSUES: Whether Grievant was next in line for the summer overtime work. Whether Grievant demonstrated that he was in the same classification as the employees assigned to the overtime at issue.

SUMMARY: Grievant asserted that Respondent was not following the rotation list in assigning overtime (extra-duty) work during the summer of 2011, resulting in other employees receiving more overtime than he did. Respondent asserted the grievance was not timely filed. Grievant filed the grievance as soon as he confirmed that others had received more overtime than he. The grievance was timely filed. Grievant did not demonstrate that he should have received any of the overtime worked by any employee in the same multi-classification as Grievant.

TOPICAL INDEX
STATE EMPLOYEES

KEYWORDS: Attacked By A Patient; Serious Injuries; Safe Work Environment; Traumatic Incident; Arbitrary And Capricious; Punitive Damages; Relief

CASE STYLE: Troutman v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2013-0630-DHHR (4/29/2013)

PRIMARY ISSUES: Whether Grievant established by a preponderance of the evidence that Respondent's management decisions were clearly wrong or the result of an abuse of discretion.

SUMMARY: Grievant is employed as a Licensed Practical Nurse at the William R. Sharpe, Jr. Hospital. On September 29, 2012, she was attacked by a patient and suffered serious injuries. Grievant maintains that Sharpe Hospital fails to provide employees with a safe working environment. Grievant argues that Sharpe Hospital fails to equip staff members with appropriate training. Grievant seeks a tort-like damage award as compensation for her injuries. Respondent does not dispute that this was a tragic, traumatic incident involving an aggressive patient. However, the record did not establish that the management decisions complained of in this grievance were arbitrary and capricious. In addition, the undersigned does not have authority to award tort-like or punitive damages.

KEYWORDS: Employee Performance Appraisal; DOP Guidelines; Performance Expectations; Performance Appraisal; Abused of Discretion; Arbitrary and Capricious

CASE STYLE: Parsons v. General Services Division

DOCKET NO. 2012-0867-DOA (4/17/2013)

PRIMARY ISSUES: Whether Grievant established that his supervisor failed to follow established regulations in rendering his 2011 performance evaluation. Whether Grievant established that his performance evaluation was rendered without the benefit of a DOP Form EPA-1 defining his supervisor's performance expectations.

SUMMARY: Grievant is employed by Respondent GSD as its Operations and Maintenance Manager. Grievant's 2011 employee performance evaluation covering the period from October 1, 2010 through September 30, 2011 included two elements which were rated as "needs improvement" by David Oliverio, Director of GSD and Grievant's immediate supervisor. Although Grievant established that the evaluation was untimely because it was not discussed with him until December 9, 2011, rather than sometime before the end of October, there was no evidence that this delay affected the substantive ratings which Grievant received. Likewise, Director Oliverio's failure to submit the evaluation to his supervisor, the Secretary of Administration, before discussing the ratings with Grievant, while inconsistent with the procedures established by the Division of Personnel, was not shown to have affected the particular ratings issued. However, Grievant established that Director Oliverio's failure to set measurable goals at the beginning of the rating period, conduct a proper mid-term evaluation at the six-month point of the rating period, or otherwise document the ratings rendered, resulted in ratings that were not rendered in accordance with specific procedures established in West Virginia Division of Personnel Policy DOP-17 governing the employee performance appraisal process. Accordingly, this grievance will be granted.

KEYWORDS: Federal Law Enforcement Officer Safety Act; Retired Law Enforcement Officers; Concealed Weapons; Retired Law Enforcement Identification Card; Certified Police Officer; Training; Arbitrary and Capricious; Discrimination

CASE STYLE: McComas v. Public Service Commission

DOCKET NO. 2012-0240-PSC (4/24/2013)

PRIMARY ISSUES: Whether Respondent is required to provide Grievant with a retired office identification card.

SUMMARY: Grievant seeks to require Respondent to provide him with an identification card from the PSC confirming that he is a retired law enforcement officer. The identification card would trigger certain rights for Grievant under federal law. Respondent believes that the issuance of the identification card is discretionary and has declined exercise that discretion, because it feels that many of its officers have not had the same training as other law enforcement officers in the state. Grievant argues that Respondent's failure to issue the card constitutes discrimination because other law enforcement officers in the state do receive a retired officer identification card. Respondent demonstrated that is has refused to issue the identification card for all officers retiring from that Agency and therefore, has not discriminated. Additionally, Respondent notes that there are other agencies which employ law enforcement officers and decline to issue the cards. Grievant was unable to prove that Respondent is guilty of discrimination as that term is defined in the public employees grievance statute.

KEYWORDS: Mandated Overtime; Work; FLSA; Legal Workweek; Policies

CASE STYLE: Puckett, et al. v. Department of Health and Human Resources/BUREAU FOR CHILDREN AND FAMILIES

DOCKET NO. 2010-1575-CONS (4/15/2013)

PRIMARY ISSUES: Whether Respondent's overtime policy is arbitrary or capricious. Whether Respondent violated the FLSA in assigning overtime or 143 C.S.R. 1 § 14.2 related to agency work schedules.

SUMMARY: Grievants are social workers with CPS in the Mercer County DHHR office who investigate referrals of child abuse and neglect. Grievants were assigned mandatory overtime for an extended time period, in order to process a backlog of initial case assessments. Grievants aver that it is a violation of the FLSA and DHHR policies for Respondent to mandate its employees to work in excess of 40 hours per week, absent an emergency. Grievants further assert that Respondent is required to formulate overtime policies that provide a "distinction between scheduled, preplanned [non-emergency] and emergency overtime." Grievants assert that they can refuse requests for any non-emergency overtime without sanction. Grievants failed to prove that Respondent is prohibited from mandating overtime by its employees absent an emergency or that Respondent must formulate distinct policies for nonemergency and emergency overtime. Additionally, Grievants have failed to prove that they can refuse mandated overtime without facing disciplinary action. Grievants further assert that Respondent should submit a change of their work schedule to the Director of Personnel for the Division of Personnel ("DOP") to reflect the regular assignment of Saturday overtime to them, pursuant to 143 C.S.R. 1 § 14.2. Grievants have proven that Respondent has violated that rule by failing to submit their habitual overtime as a "change" in Grievants' schedules. The grievance is DENIED in part and GRANTED in part.

KEYWORDS: Misconduct; Wrongdoing; Dispose of State Property; Borrow State-Owned Property; Personal Equipment; Training; Safety and Liability Issue; Progressive Discipline; Abuse of Discretion

CASE STYLE: Shanklin v. General Services Division
DOCKET NO. 2012-1168-DOA (4/26/2013)

PRIMARY ISSUES: Whether Respondent was justified in imposing the level of discipline.

SUMMARY: Grievant was suspended for three days from his position as Grounds Manager for four incidents of alleged misconduct. Respondent was not justified in imposing discipline for two of the incidents. Respondent did prove misconduct in the other two incidents by a preponderance of the evidence. However, reduction in the level of discipline is warranted in the interest of fairness and Grievant's history of satisfactory work performance.

KEYWORDS: Policies; Unprofessional Behavior; Performance Improvement Plan; Progressive Discipline; Due Process; Insubordination

CASE STYLE: Turner v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital
DOCKET NO. 2013-0022-DHHR (4/23/2013)

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

SUMMARY: Grievant was terminated for her continuing failure to adhere to the Hospital's policies and expectations of behavior toward her coworkers. Respondent proved that Grievant repeatedly violated its policies and expectations concerning appropriate conduct toward fellow employees by her aggressive and otherwise unprofessional conduct. Grievant failed to demonstrate that Respondent did not follow its progressive discipline policy in terminating Grievant. Grievant also failed to show that termination was too severe a punishment, that mitigation was warranted under the circumstances or that her due process rights were violated. Respondent gave Grievant adequate warning concerning her inappropriate conduct, instruction on how to improve it and apprised her of the potential consequences if she did not comply. She nonetheless persisted with her inappropriate conduct. Grievant's termination was justified and appropriate. Accordingly, the grievance is DENIED.

KEYWORDS: Probationary Employee; Unprofessional Behavior; Unacceptable Conduct; Unsatisfactory Performance; Hearsay; Insubordination; Retention Offer

CASE STYLE: Greco v. Monongalia County Health Department
DOCKET NO. 2012-1293-MonCH (4/22/2013)

PRIMARY ISSUES: Whether Grievant demonstrated that her performance was satisfactory during her probationary employment period.

SUMMARY: Grievant was dismissed from her probationary employment as a Nutritionist I with the Monongalia County Health Department for misconduct and unsatisfactory performance. Prior to the dismissal, however, Respondent offered to let Grievant continue to be employed as an hourly employee without benefits, in lieu of dismissal. This action undermines the assertion that Grievant was not meeting the expectations of her job. Respondent did not demonstrate that Grievant engaged in misconduct, and Grievant demonstrated that her performance was satisfactory.

KEYWORDS: Progressive Discipline; Performance Improvement Plan Attendance Issues; Refused Mandatory Overtime; Discrimination

CASE STYLE: Loflin v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital
DOCKET NO. 2012-1291-DHHR (4/30/2013)

PRIMARY ISSUES: Whether Respondent's disciplinary action was in violation of Policy or discriminatory.

SUMMARY: Grievant was suspended without pay for three working days for allegedly failing to adhere to Bateman policies regarding behavior and attendance by having excessive absences and refusing to work overtime. Grievant alleges that the suspension was in violation of Hospital policy because Respondent took into consideration absences outside of a six month period, suspended him after he successfully completed a plan of improvement without first taking less severe disciplinary action and was the result of discrimination. Specifically, Grievant notes that he did not have eight occurrences of unscheduled sick leave within a six month period which would be necessary for suspension pursuant to the policy MMBHC016 under most circumstances. DENIED

KEYWORDS: Unnecessary and Excessive Force; Physical Contact; Resident Injury; Violation of Policy

CASE STYLE: Townsend, Jr. v. Division of Juvenile Services/Industrial Home for Youth
DOCKET NO. 2012-0089-MAPS (4/5/2013)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence that Grievant's employment was terminated for good cause, and whether it demonstrated Grievant was not able or suited to perform the essential duties of his position.

SUMMARY: Grievant was terminated for the use of unnecessary and excessive force on a resident during a restraint. Grievant counters that Respondent failed to offer evidence to support the allegation that Grievant hurt the resident or was guilty of the charges against him. Grievant contends that the resident caused his own injuries to his eyes in an effort to have Grievant terminated. The record established that Respondent proved, by a preponderance of the evidence, that Grievant used unnecessary and excessive force which resulted in an injury to the resident. This grievance is denied.

KEYWORDS: Use of Force; Excessive Force; Hearsay; Abuse of Discretion; Unsworn, Hand-Written Statement

CASE STYLE: Comfort v. Regional Jail and Correctional Facility Authority/Western Regional Jail

DOCKET NO. 2013-1459-CONS (4/18/2013)

PRIMARY ISSUES: Whether Respondent proved the charges against Grievant.

SUMMARY: Grievant was suspended from his position as a Correctional Officer II for a renewable period of at least fifteen days, based upon allegations that Grievant used excessive force in his interactions with inmates in his care and custody. This suspension was renewed on December 1, 2012. Thereafter, the Administrator of the Western Regional Jail decided to convert the indefinite suspension into a fifteen-day suspension, based upon a determination that Grievant participated in an incident involving use of excessive force, by holding an inmate while another Correctional Officer beat the inmate, and for failing to timely submit an accurate incident report describing that event, in accordance with established policy.

During the Level Three hearing, Respondent presented no testimony from any witnesses who were present during the alleged events, only unsworn, hand-written statements from various correctional personnel who were interviewed in the course of an internal investigation, nearly all of whom were themselves implicated in either using excessive force or failing to report such an incident as required, and other hearsay evidence from Respondent's administrators. Respondent failed to establish the disciplinary charges against Grievant by a preponderance of the credible evidence of record, and thus Grievant's challenge to his fifteen-day suspension will be granted. Grievant's allegations that the original investigative suspension without pay was either substantively or procedurally flawed, and therefore improper, were likewise not supported by competent evidence, and will be denied.

KEYWORDS: Violation of Policy; Progressive Discipline; Varying Infractions; Smoking on Hospital Property

CASE STYLE: Frame v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2012-1423-DHHR (4/18/2013)

PRIMARY ISSUES: Whether Respondent justified Grievant's suspension within the limitations of its discretion.

SUMMARY: Grievant was suspended for three days without pay for smoking at William R. Sharpe Jr. Hospital. On May 11, 2011, the Assistant CEO of William R Sharpe Jr. Hospital, Terry Small, found Grievant smoking on hospital grounds in violation of the "Tobacco Free Campus" policy. Grievant admitted to Ms. Small that she was smoking at the time. The next day, Grievant told her direct supervisor she had not been smoking, but had taken the blame for another employee. The Respondent has met its burden of proof and established that the suspension was justified and within the parameters of the hospital's progressive disciplinary policy and discretion.

KEYWORDS: Waiver Of The Strict Statutory Time Lines; Justified Delay; 10-Day Time Limit; Timely Manner; Hearsay

CASE STYLE: Ferrell v. Regional Jail and Correctional Facility Authority/Western Regional Jail

DOCKET NO. 2013-1030-MAPSDEF (4/26/2013)

PRIMARY ISSUES: Whether a default has occurred, and whether Respondent has a statutory excuse for not responding within the time limit required by law.

SUMMARY: Grievant contends that the Authority is in default because a Level One conference was not scheduled within ten days of the filing of his grievance. Respondent received this grievance on January 14, 2013, and was required to hold a Level One conference with Grievant not later than January 29, 2013. On January 29, 2013, following a series of unsuccessful attempts to communicate with Grievant's representative via telephone, Respondent's Legal Assistant had a telephone conversation with Grievant's counsel. After being informed that the Level One conference could not be scheduled for later that day, counsel asked that the conference be scheduled for the following day. When informed that the next day was also not available, counsel requested written confirmation.

The Legal Assistant relayed this request to her immediate supervisor, Respondent's General Counsel. He indicated that he would speak to Grievant's counsel. Later that day, the General Counsel told his Legal Assistant that he and Grievant's counsel had agreed to schedule the Level One conference for the following day, and directed her to issue a written notice. After the notice setting the Level One conference for January 30, 2013, was issued, Grievant's counsel declared a default. In these circumstances, Grievant's counsel agreed to a hearing outside the 10-day time limit, thereby waiving Grievant's right to declare a default at Level One.