

**WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**SYNOPSIS REPORT**

**Decisions Issued in May 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](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>	Position Information Questionnaire; Hiring Process; Vacant Position; Minimum Qualifications; Nonselection; Settlement Agreement; Discrimination; Moot; Relief; Arbitrary and Capricious
<b><u>CASE STYLE:</u></b>	<u>Metz, Sr. v. Concord University</u> DOCKET NO. 2012-0601-CU (5/21/2014)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant demonstrated that he was minimally qualified for the posted position, or treated differently than similarly situated employees of Respondent.
<b><u>SUMMARY:</u></b>	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. Additionally, Grievant asserts that his prior employment and volunteer work history establish that he is minimally qualified for the position of Trades Specialist 1, Carpenter, at Concord University. He contends that he was the victim of favoritism and discrimination when another applicant was selected for the position and that the selection process was flawed, arbitrary and capricious. Concord denies any wrongdoing and counters that while Grievant performed carpentry-related tasks during his prior employment, this general carpentry work did not equip him to meet the minimum requirements of the position. Concord further asserts that volunteer carpentry work is not appropriate for consideration in determining minimum qualifications. The record of the grievance failed to establish that Grievant's prior employment history demonstrated that he was minimally qualified for the position or that his non-selection was arbitrary and/or capricious or that he was the victim of discrimination or favoritism. This grievance is denied.

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**KEYWORDS:** Suspension; Termination; Discrimination; Favoritism; Gross Misconduct; Reprisal; Retaliation; Good Cause

**CASE STYLE:** Foutty v. West Virginia University at Parkersburg  
DOCKET NO. 2014-0431-WVUP (5/16/2014)

**PRIMARY ISSUES:** Whether Respondent proved by a preponderance of the evidence that Grievant engaged in gross misconduct which was good cause for his termination, and whether Grievant proved his claims of discrimination, favoritism, and reprisal by a preponderance of the evidence.

**SUMMARY:** Grievant was employed by Respondent as a campus security guard. On September 21, 2013, a Saturday, Grievant worked the 3:00 p.m. until 11:00 p.m. shift. At some point during this shift, Grievant learned that the computerized door locking system for the Main Building had malfunctioned, resulting in all exterior doors to the building being unlocked. Even though he knew the building was unlocked and unsecure, Grievant clocked out a few minutes early and headed home. On his way, he called his supervisor's cell phone and left him a voicemail message stating that the building was unlocked and that he was going home. The building was left unlocked and unsecure until Grievant's supervisor could get to campus, which was about thirty minutes. Respondent deemed Grievant's actions that evening gross misconduct and terminated his employment. Grievant denies that he engaged in gross misconduct, and asserts that he was the victim of discrimination, favoritism, and reprisal. Respondent proved by a preponderance of the evidence that Grievant engaged in gross misconduct, and that such was good cause for his termination. Grievant failed to prove his claims of discrimination, favoritism, and reprisal by a preponderance of the evidence. Therefore, this grievance is denied.

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

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**KEYWORDS:** Multiclassification; Reclassification; Job Duties; Competency Test; School Personnel; Service Personnel

**CASE STYLE:** West v. Marshall County Board of Education  
DOCKET NO. 2013-1674-MarED (5/19/2014)

**PRIMARY ISSUES:** Whether Grievant established that a significant amount of her time is spent performing duties which more closely match those of an Accountant II, rather than Secretary II.

**SUMMARY:** Grievant is employed by Respondent Marshall County Board of Education (“MCBOE”) as a Secretary II. At the time this grievance was initiated, Grievant was the School Secretary at Washington Lands Elementary School. Subsequent to the Level One decision, Grievant transferred to an equivalent position as the School Secretary at Glendale Elementary School. Grievant’s day-to-day duties did not change as a result of the transfer, although Glendale is a smaller school. Grievant, who previously passed the competency test for the Accountant school service personnel classification, established by a preponderance of the evidence that a significant portion of her regular and recurring duties, including some duties that occur on a daily basis, represent tasks that are best encompassed by the classification of Accountant II. Although Grievant’s accounting duties were not shown to be predominant, this is not a prerequisite to attain multiclassification status under W. Va. Code § 18A-4-8(a)(62). Accordingly, this grievance will be GRANTED.

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

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**KEYWORDS:** Pay Plan Implementation (PPI) Policy; Additional Duties; Equal Pay for Equal Work; Discretionary Pay Increase; Alsop Memorandum; Arbitrary and Capricious

**CASE STYLE:** Moore v. Department of Environmental Protection  
DOCKET NO. 2014-0046-DEP (5/9/2014)

**PRIMARY ISSUES:** Whether Grievant proved that Respondent's refusal to award a retroactive discretionary pay increase was arbitrary and capricious.

**SUMMARY:** Grievant was assigned additional duties in 2006 and did not receive additional compensation. Respondent can recommend that an employee who assumes additional duties receive additional compensation under the Division of Personnel's Pay Plan Implementation policy, but that policy was suspended by the Governor between 2005 and 2011. Respondent is not required to recommend this discretionary increase retroactively, and Grievant failed to prove that Respondent's refusal to award a retroactive discretionary pay increase was arbitrary and capricious. Accordingly, the grievance is denied.

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**KEYWORDS:** Settlement Agreement; Pay Raises; Jurisdiction

**CASE STYLE:** Miser, et al. v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital  
DOCKET NO. 2013-1324-CONS (5/6/2014)

**PRIMARY ISSUES:** Whether the Grievance Board lacks jurisdiction to enforce the Circuit Court settlement agreement and order.

**SUMMARY:** Grievants are employed in various direct patient care staff positions by Respondent at Mildred Mitchell-Bateman Hospital. In an ongoing Circuit Court lawsuit, Respondent had entered into a settlement agreement that would provide pay raises to certain types of employees of Mildred Mitchell-Bateman Hospital, which agreement was memorialized in an agreed order. Grievant alleges violation of the Circuit Court settlement agreement and agreed order. The Grievance Board lacks jurisdiction to enforce a Circuit Court settlement agreement or order. Accordingly, the grievance is dismissed.

**KEYWORDS:** Harassment; Hostile Work Environment; Relief; Dismissal; Moot

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

DOCKET NO. 2013-0758-CONS (5/2/2014)

**PRIMARY ISSUES:** Whether Grievant's subsequent dismissal from employment has rendered all but one request for relief moot.

**SUMMARY:** Grievant grieved conditions of his employment and Grievant has now been dismissed from employment. Grievant requested that the conditions of his employment be remedied and for certain unspecified disciplinary action to be removed from his record. Respondent moved to dismiss asserting mootness. The grievance regarding conditions of employment is moot and Grievant has failed to respond to the dismissal motion or contact from the Grievance Board. Accordingly, Respondent's Motion to Dismiss should be granted, and this grievance, DISMISSED.

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**KEYWORDS:** Employee; Employer; Jurisdiction

**CASE STYLE:** Mullins v. Division of Personnel

DOCKET NO. 2014-1328-DOA (5/15/2014)

**PRIMARY ISSUES:** Whether the Grievance Board has jurisdiction to adjudicate this dispute since Grievant is not an employee of the Division of Personnel.

**SUMMARY:** Grievant is not and never has been employed by Respondent, Division of Personnel. The grievance procedure was put in place to provide a mechanism for resolution of problems which arise in the workplace, between employees and their employer. It does not, by statute, provide a mechanism for a grievant to bring a grievance against a state agency that is not his employer.

**KEYWORDS:** Insubordination; Supervising Inmates; Medical Condition; Job Duties; Physician's Note; Written Reprimand; Recommended Suspension

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

DOCKET NO. 2014-0953-CONS (5/15/2014)

**PRIMARY ISSUES:** Whether Respondent proved the charge of insubordination by a preponderance of the evidence.

**SUMMARY:** Grievant was given a written reprimand for insubordination when he did not report to work and supervise an inmate crew. Grievant denies the charge and the record established that he provided his supervisor with notice that he could not supervise an inmate crew due to a medical condition. The limited evidence relevant to the charge did not satisfy Respondent's burden of proving insubordination by a preponderance of the evidence. Consequently, the grievance is granted.

**KEYWORDS:** Temporary Assignment; Job Duties; Timeliness; Merits; Jurisdiction; Responsibilities; Administrative Decisions; Arbitrary and Capricious

**CASE STYLE:** Hollins, et al. v. Division of Labor

DOCKET NO. 2013-1043-CONS (5/6/2014)

**PRIMARY ISSUES:** Whether Respondent's decision to alter the counties in Grievants geographic areas of assignment is improper.

**SUMMARY:** Grievants are Inspectors employed in Respondent's Weights and Measures Section and are assigned responsibility for inspections in specific counties, which the Division designates as numbered areas, generally consisting of multiple counties. The employees' areas of assignment and the counties included in the employees' areas have been and are periodically adjusted, realigned and reassigned. Grievants protest Respondents delegation of assigned areas. Respondent, a state agency, has the flexibility to make administrative decisions. Respondent possesses the power, duty, jurisdiction and authority to employ and remove inspectors as needed, and to assign their duties so that the Division's statutory responsibilities are effectively carried out. Generally, a state agency has the right to transfer employees geographically where there is a need, if they remain in the same classification and pay grade, and are not demoted or reduced in pay. Grievants have failed to prove by a preponderance of the evidence that Respondent's decision to alter the counties in their geographic areas of assignment is improper, that Respondent did not have the authority to make such a decision, whether temporary or not, or that the Respondent's decision was a violation, a misapplication or a misinterpretation of any statute, policy, rule or written agreement. Accordingly, this consolidated grievance is DENIED.

**KEYWORDS:** Temporary Upgrade Policy; Supervisory Duties; Classification; Favoritism; Compensation; Classification Specification; Arbitrary and Capricious

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

DOCKET NO. 2013-0568-CONS (5/19/2014)

**PRIMARY ISSUES:** Whether Grievants established that Respondent violated any statute, regulation or policy, or that it abused its substantial discretion, by failing or refusing to assign either or both of them to temporary Crew Leader duties, or to properly compensate either or both of them for performing such duties.

**SUMMARY:** Each Grievant is currently employed by Respondent DOH as a Transportation Worker 2. Grievants are assigned to Lewis County where DOH employs three individuals in the classification of Transportation Crew Supervisor 1, commonly referred to as a "Crew Leader." From time to time, as needed, hourly employees, such as Grievants, are temporarily upgraded and compensated for performing the duties of a Crew Leader when they are tasked with performing the duties of that position. DOH policy allows such payment when the employee in a lower classification performs "all essential job duties" of the higher classification. A preponderance of the credible evidence of record supports the DOH position that Transportation Workers, including Grievants, are only upgraded to Crew Leader when the employee fills in for an absent Crew Leader, or on other less frequent occasions when the employee is assigned to perform duties that are substantially equivalent to those performed by employees currently assigned Crew Leader duties in terms of the responsibilities involved, including such factors as the number of employees and amount of equipment required for the operation, and the need for effective traffic control at the scene. Grievants failed to demonstrate that DOH is not following the requirements contained in its Temporary Upgrade Policy or that the provisions of that policy are being applied in an arbitrary and capricious manner. Accordingly, this grievance must be DENIED.

**KEYWORDS:** Annual Leave; Accumulated Hours; Reprisal; Settlement Agreement; Arbitrary and Capricious

**CASE STYLE:** Hamilton v. Department of Health and Human Resources/Welch Community Hospital

DOCKET NO. 2013-1601-CONS (5/27/2014)

**PRIMARY ISSUES:** Whether Grievant proved that the reason offered by Respondent for reducing Grievant's accumulated annual leave was a pretext for retaliatory motives.

**SUMMARY:** Grievant was reinstated to work on November 1, 2012, after the termination of her employment was overturned. In January 2013 her accumulated annual leave was reduced to 240 hours consistent with the Division of Personnel Administrative Rule related to annual leave. Grievant alleges that Respondent's refusal to allow Grievant to carry leave in excess of 240 hours from one calendar year to the next was arbitrary and capricious, as well as an act of reprisal against Grievant for contesting her dismissal. Respondent proved that it had a mandatory duty to reduce Grievant's annual leave to 240 hours at the beginning of 2013, and that Grievant was credited with the maximum amount of accrued annual leave available to someone with her years of service. Grievant did not prove that Respondent's decision was arbitrary or capricious or an act of reprisal.

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**KEYWORDS:** Default; Statutory Timelines; Waiver; Level One Conference; Procedural Issues; Time Period for Raising Default Claim

**CASE STYLE:** Rossell v. Division of Forestry

DOCKET NO. 2014-0176-CONSDEF (5/22/2014)

**PRIMARY ISSUES:** Whether default occurred at Level One.

**SUMMARY:** Grievant filed three grievances contesting the same written reprimand, requesting a hearing at level one in the first filing, a conference in the second filing, and a hearing at level one in the third filing. Grievant argued a default occurred when neither a level one conference or hearing was held within the statutory time periods. Grievant waived the statutory timelines for holding the level one hearing, in writing, when he requested a continuance of the hearing on the first grievance. Shortly thereafter, he filed the second and third grievances, which were consolidated with the first grievance, with no objection from Grievant. Four months later a hearing was to be held at level one on the consolidated matter. When Grievant's request to continue the hearing was denied, he then filed the default claim. No default occurred in this case.

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**KEYWORDS:** Training; Maintenance Equipment; Experience; Operating Procedure; Favoritism; Classification; Similarly Situated Employees

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

DOCKET NO. 2013-0569-CONS (5/22/2014)

**PRIMARY ISSUES:** Whether Grievants established a prima facie case of favoritism.

**SUMMARY:** Grievants are employed by Respondent Division of Highways ("DOH") as Transportation Workers. In March 2012, each Grievant applied to receive training to operate a Gradall excavator. Grievant Heckert established that he was similarly situated to the co-worker who was selected for the training. Prior to working for DOH, Grievant Heckert operated construction equipment, including a backhoe, bulldozer and pan scraper in the oil industry for around 15 years. Grievant Heckert also worked in the orange groves for about 11 years while operating farm tractors. The successful applicant had been working for DOH less than 3 years and had at least 10 years of experience operating construction equipment in the coal industry. Respondent failed to provide persuasive evidence to rebut Grievant Heckert's prima facie case of favoritism. Accordingly, Grievant Heckert prevailed on his claim of favoritism in selecting employees to participate in specialized equipment training, and DOH will be required to offer the Gradall excavator training to Grievant Heckert. Grievant Powers failed to present sufficient evidence to establish a prima facie case of favoritism. Consequently, Grievant Powers failed to demonstrate that DOH violated any law, rule, regulation or policy pertaining to his employment situation, and is therefore not entitled to any relief in this matter.