

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in July 2012

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: Relief Wholly Unavailable; Moot

CASE STYLE: Olson v. Marshall University

DOCKET NO. 2012-1083-MU (7/16/2012)

PRIMARY ISSUES: Whether or not the Grievance Board has the authority to grant the Grievant the relief he is seeking.

SUMMARY: On March 26, 2012, Grievant was temporarily re-assigned from patrol duties to dispatch duties to accommodate his medical condition, and was asked to turn in his service weapon. Grievant then requested and was granted a medical leave of absence beginning June 1, 2012, and ending December 2, 2013. Grievant has requested that he be allowed to retire effective December 3, 2013. There is no relief that can be granted, and this grievance is moot.

KEYWORDS: Timeliness; untimely; level three; appeal

CASE STYLE: Frost v. Bluefield State College

DOCKET NO. 2011-0856-BSC (7/31/2012)

PRIMARY ISSUES: Whether Grievant's filing of his level three appeal was timely.

SUMMARY: Respondent has proven by a preponderance of the evidence that the grievance should be denied. This grievance was not timely appealed to level three. Grievant did not demonstrate a proper basis to excuse his failure to timely file a level three appeal. Accordingly, Respondent's motion is Granted and this matter is DISMISSED.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: Abandonment of Duty, Insubordination; Correctable Behavior; Excessive Disciplinary Action

CASE STYLE: Carson v. Kanawha County Board of Education
DOCKET NO. 2012-0633-KanED (7/31/2012)

PRIMARY ISSUES: Whether Grievant's behavior constitutes deeds of actionable misconduct and of an uncorrectable nature which properly support termination of employment.

SUMMARY: Allegations were made that during the course of a duty assignment as a substitute teacher with the Kanawha County Board of Education, Grievant had abandoned the teaching assignment, thrown a notebook hitting a student, and called students inappropriate names. Respondent terminated Grievant's employment. Grievant contends the termination should be overturned in that he is not culpable of the conduct alleged.

Respondent did not establish essential facts relevant to the offenses levied. Grievant did not leave students without a supervisor, nor did he throw a notebook at a student. Grievant may have used words or language which is not a positive motivating influence; students should not be called stupid. Nevertheless it is not established that Grievant's conduct is not correctable. Respondent did not prove the charges against Grievant. Respondent did not establish by a preponderance of the evidence conduct by Grievant which would justify termination of Grievant's employment... The disciplinary action levied was excessive. Thus, this grievance is GRANTED.

KEYWORDS: Advisory Opinion; Moot; Dismissal; Relief Wholly Unavailable

CASE STYLE: Adkins v. Boone County Board of Education

DOCKET NO. 2011-1618-BooED (7/31/2012)

PRIMARY ISSUES: Whether Grievant is seeking an advisory opinion.

SUMMARY: Grievant seeks to require Respondent to post all future positions where an employee will be compensated. Respondent offered Grievant the opportunity to work on compacting the curriculum for summer school 2011, as well as the same compensation paid to other teachers who worked on the project. Grievant declined this offer. Grievant seeks an advisory opinion on whether tasks such as compacting the curriculum is a "position" as defined by W. VA. CODE § 18A-4-7a. As the Grievance Board does not issue advisory opinions, this grievance is DENIED.

KEYWORDS: Personal Leave, Continuing Education; Staff Development

CASE STYLE: Mullins v. Doddridge County Board of Education

DOCKET NO. 2010-1642-DodED (7/19/2012)

PRIMARY ISSUES: Whether Grievant worked beyond her 200-day contract and whether Grievant was entitled to restoration of leave for taking job-related professional development on her off day.

SUMMARY: Grievant, an elementary school teacher, was on leave on a day when professional staff development training was offered by Respondent. To obtain the eighteen hours of professional staff development training required by law, Grievant attended a training session on one of her days off later in the year. Grievant earned more than enough professional staff development credits to comply with policy requirements. However, Grievant asserts that because she took a training session on one of her days off, the leave day she took earlier in the year on a "CE" day, should be restored to her. Grievant further argues that because the leave day was not restored, she has worked beyond her 200-day contract. Respondent asserts that Grievant has not worked beyond her 200-day contract and that she is not entitled to restoration of the day of leave. Grievant has failed to present sufficient evidence to prove her claims by a preponderance of the evidence. As such, this grievance is DENIED.

KEYWORDS: Selection; Arbitrary; Capricious; Criterion; Matrix; Posting; Qualification

CASE STYLE: Barber III v. McDowell County Board of Education AND Department of Education
DOCKET NO. 2011-1304-McDED (7/9/2012)

PRIMARY ISSUES: Whether Respondent's decision not to select or hire Grievant for the position was an improper, arbitrary or capricious decision.

SUMMARY: Grievant applied twice for the administrative position of Director of Facilities and Safety and was not the successful applicant. Grievant avers that the Board violated W. Va. Code § 18A-4-7a in failing to interview him following the first posting of the contested position and in hiring another applicant following the second posting.
Respondent did not have to comply with W. Va. Code § 18A-4-7a because, at the time relevant to this grievance, the W. Va. State Board of Education, under the authority of W. Va. Code §18-2-E-5(p)(4)(C)(v)(II), had intervened in the operation of the McDowell County School District. Respondent, nonetheless, voluntarily applied the matrix at W. Va. Code § 18A-4-7a in assessing and recommending who should be selected for the contested position. Though the seven point matrix system used by the Superintendent for evaluation of the candidates was incomplete as to two categories, that did not affect whether Grievant was finally selected for the position. The appropriate criterion were applied consistently to all of the applicants. Respondent demonstrated that the selection process was fair and unbiased. Moreover, Grievant's assertion that the Board should have interviewed him following the first posting is time-barred. The grievance is DENIED.

KEYWORDS: Timeliness; Contract Termination; Transferred; Selection; Arbitrary and Capricious

CASE STYLE: Redd v. McDowell County Board of Education and Department of Education

DOCKET NO. 2012-0420-McDED (7/27/2012)

PRIMARY ISSUES: Whether Respondent proved that Grievant did not file her grievance concerning the termination of her contract as an Assistant Principal, her transfer to a classroom teaching position and her Grievance for non-selection for the position of Dean of Students within the time limits established by statute. Whether Grievant established that her non-selection for the position of Dean of Students at Mount View High School was arbitrary and capricious, or otherwise contrary to law.

SUMMARY: McDowell County Schools Superintendent James Brown notified Grievant that she was being considered for transfer due to his decision to eliminate all Assistant Principal Positions. The Superintendent simultaneously notified Grievant that her employment contract as an Assistant Principal would be terminated at the end of the 2010-11 school. Following hearings Benjamin Shew, acting as the designee of the State Superintendent, approved Grievant's transfer from her Assistant Principal's position, concluding that she was not entitled to "bump" a principal or central office staff member. Grievant was notified by Barbara Miller, the Director of Personnel for the McDowell County Board of Education, that she was being transferred to the position of Classroom Teacher, MI/LD, at River View High School. Grievant did not file a grievance challenging the termination of her contract as an Assistant Principal or her transfer to a teaching position at River View. Subsequently, Grievant applied for and received a position as a Fourth Grade Teacher at Welch Elementary, effective August 5, 2011.

On or around August 24, 2011, the Board posted an administrative job opening for Dean of Students at Mount View High School. The posting was originally set to close on August 31, 2011, but the closing date was extended to September 2, 2011. Grievant submitted a timely application for the position but the Board selected another applicant, Leon Gravely, to fill the position. This grievance is DENIED.

KEYWORDS: Timeliness; Selection; Standing

CASE STYLE: Redd v. McDowell County Board of Education and Department of Education

DOCKET NO. 2012-0419-McDED (7/18/2012)

PRIMARY ISSUES: Whether Respondent proved that Grievant did not file her grievance concerning the termination of her contract as an Assistant Principal and her transfer to a classroom teaching position within the time limits established by statute, and whether Grievant demonstrated a proper basis to excuse her failure to file in a timely manner.

SUMMARY: McDowell County Schools Superintendent James Brown notified Grievant that she was being considered for transfer due to his decision to eliminate all Assistant Principal Positions. The Superintendent simultaneously notified Grievant that her employment contract as an Assistant Principal would be terminated at the end of the 2010-11 school. Following hearings Benjamin Shew, acting as the designee of the State Superintendent, approved Grievant's transfer from her Assistant Principal's position, concluding that she was not entitled to "bump" a principal or central office staff member. Grievant was notified by Barbara Miller, the Director of Personnel for the McDowell County Board of Education, that she was being transferred to the position of Classroom Teacher, MI/LD, at River View High School. Grievant did not file a grievance challenging the termination of her contract as an Assistant Principal or her transfer to a teaching position at River View. Subsequently, Grievant applied for and received a position as a Fourth Grade Teacher at Welch Elementary, effective August 5, 2011.

During May through August of 2011, the Board posted notices of a vacancy for the position of Supervisor of Curriculum and Instruction at Mount View High School on four separate occasions. Following the fourth posting, Kathryn Tabor was selected to fill the position in September 2011. Grievant never applied for this position under any of these postings. In her grievance, Grievant states that "the event causing this grievance to be filed was the hiring of Kathryn Tabor as the Supervisor of Curriculum and Instruction at Mt. View." This grievance is DENIED.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Substitute Assignments; Summer Absences; Rotating Seniority Basis

CASE STYLE: Flynn, et al. v. Berkeley County Board of Education

DOCKET NO. 2011-1297-CONS (7/31/2012)

PRIMARY ISSUES: Whether Respondent deprived Grievant's of the opportunity for substitute assignments by virtue of the Respondent's failure to observe the requirement that assignments be made on a rotating seniority basis.

SUMMARY: Grievants contend that Respondent failed to follow the statutorily-mandated procedure for using regular employees to serve as substitutes to fill summer absences. Evidence showed that runs were offered and assigned to the next available senior bus driver who had not driven in each rotation, and this information was placed on a sheet containing the substitutes' names. However, the document concerning the substitute call-out procedure was not intended to create a record that could be relied upon to demonstrate statutory compliance. Grievants failed to prove Respondent did not follow proper rotation. Accordingly, this grievance is DENIED.

KEYWORDS: Termination; Willful Neglect of Duty; Disparate Treatment; Prior Disciplinary Record; Sexual Acts; Failure to Monitor Students

CASE STYLE: Costello v. Monongalia County Board of Education

DOCKET NO. 2012-0622-MonED (7/31/2012)

PRIMARY ISSUES: Whether Respondent proved that Grievant willfully neglected her duty.

SUMMARY: Grievant was terminated from her employment as an Aide when she completely ignored two male students on the special education bus to which she was assigned, allowing those students to engage in sexual acts with each other while riding on the bus on two consecutive days. Respondent demonstrated that Grievant willfully neglected her duty. Accordingly, this grievance is DENIED.

KEYWORDS: Withdrawal of Bid; Written Policy, Arbitrary and Capricious; Abuse of Discretion

CASE STYLE: Howes v. Logan County Board of Education

DOCKET NO. 2010-1185-LogED (7/31/2012)

PRIMARY ISSUES: Whether Grievant proved that Respondent's refusal to accept the withdrawal of his bid was arbitrary and capricious and an unreasonable abuse of discretion.

SUMMARY: Respondent moved to dismiss the grievance as being untimely filed at level one, but grievance was filed within fifteen days as required. Grievant bid on a Bus Operator position with Respondent, but then withdrew his bid prior to being awarded the position. The Respondent decided that Grievant could not withdraw his bid, forcing him to accept the Bus Operator position and causing him to lose his previous Maintenance position. In absence of specific written policy establishing a procedure for withdrawing a bid an employee may withdraw a bid prior to the time it is accepted by the Board of Education. Accordingly, the grievance is GRANTED.

TOPICAL INDEX
STATE EMPLOYEES

KEYWORDS: Default; delay; expeditious; negligence

CASE STYLE: Robinson v. Division of Corrections/Anthony Correctional Center
DOCKET NO. 2012-0253-MAPSDEF (7/31/2012)

PRIMARY ISSUES: Whether the Employer has failed to respond to the lower level Grievance in a timely manner, resulting in default.

SUMMARY: Grievant asserts he is entitled to prevail by default in a grievance filed against his employer, because his grievance had been received by Respondent and the Level One hearing was held one day outside of the prescribed fifteen day time frame. Respondent asserts that Grievant was offered hearing dates within the fifteen day time frame. Grievant, in effect, rejected the prospective hearing dates and requested additional dates. Respondent asserts that they offered Grievant the next available date on its hearing examiner's calendar. Grievant agreed to the date. Grievant does not dispute that he was offered dates within the fifteen day time frame.

Evidence of record established that the one day delay occurred because Respondent accommodated Grievant's wishes as to scheduling the hearing date. The delay was not done out of negligence, or in an attempt to delay proceedings. Respondent has established proper justification for its actions. Accordingly, Grievant's claim for default is DENIED.

KEYWORDS: Disciplinary; Demotion; Supervision; Security; Past Disciplinary Record; Officer-In-Charge;

CASE STYLE: Smith v. Division of Corrections/Mount Olive Correctional Complex
DOCKET NO. 2012-0412-MAPS (7/17/2012)

PRIMARY ISSUES: Whether Respondent met its burden of proof and established Grievant's disciplinary demotion was warranted and whether mitigation is warranted.

SUMMARY: Grievant was demoted from his position as a Correctional Officer IV to that of a Correctional Officer II for failing to provide proper supervision and security to the main yard of the correctional complex during an open house event. Respondent asserts that Grievant's conduct that day violated numerous facility policies and procedures, including causing a breach of facility security. Respondent argues that Grievant's conduct that day, coupled with his disciplinary record, warrant demotion. Grievant argues that he did not violate any policies or procedures and that the demotion was inappropriate and excessive. Grievant also asserts this his past disciplinary record should not have been considered in deciding whether to impose disciplinary action against him. Respondent demonstrated that Grievant's conduct violated its policies and procedures, and that the demotion was appropriate. Grievant failed to prove that his demotion was clearly excessive, disproportionate to his offense, or an abuse of discretion. Further, Grievant failed to offer sufficient evidence in support of mitigating his demotion. Therefore, this grievance is DENIED.

KEYWORDS: Dismissal; Suspension; Harassment; Misconduct; Progressive Discipline

CASE STYLE: Workman v. General Services Division

DOCKET NO. 2011-1889-CONS (7/27/2012)

PRIMARY ISSUES: Whether Respondent demonstrates good cause for disciplinary action.

SUMMARY: This matter is a consolidated grievance wherein Grievant protests a five (5) day suspension, and his subsequent discharge from employment. Grievant maintains that Respondent improperly disciplined him. Respondent was presented with a myriad of allegations and events which are characterized as a violation of the applicable Workplace Security Policy prohibiting workplace harassment and contrary to recognized standard(s) of employee conduct. Respondent identified behavior of Grievant which justified corrective actions. Respondent established a nexus between Grievant's conduct and adverse effects to the workplace/force. Respondent demonstrated good cause for disciplinary action. This grievance is DENIED.

KEYWORDS: Equal Pay for Equal Work; Pay Increase; Salary; Pay Grade; Classification

CASE STYLE: McClung v. Division of Natural Resources
DOCKET NO. 2011-1806-DOC (7/31/2012)

PRIMARY ISSUES: Whether Grievant is entitled to a 15% pay increase.

SUMMARY: Grievant, a state employee of approximately twenty-four years was paid within the pay range of his Pay Grade and Classification. Grievant contends that a former employee of Respondent's, employed as a Wildlife Manager, the same classification as Grievant, earned a higher wage. Grievant did not allege pay disparity with any other employees classified as Wildlife Manager currently employed by Respondent. Grievant argues that this pay disparity violates the principle of equal pay for equal work and that he is entitled to a 15% annual salary increase. Respondent disagrees.

Applicable statutes, rules and regulations, coupled with relevant case law, provide that classified employees are to be compensated within their pay grade. It is a well-discussed concept that state employees in the same classification need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification. Grievant is being paid within the pay range of the pay grade assigned by the Division of Personnel to his respective classification. Grievant did not establish by a preponderance of the evidence that he is mandated a pay increase. Nor did Grievant prove that Respondent has violated any rule, regulation, policy or statute in the circumstances presented. Grievance is DENIED.

KEYWORDS: Insubordination; Excessive Absence; Improvement Plan; Family Medical Leave Act (FMLA)

CASE STYLE: Ervin v. Department of Health and Human Resources/Bureau for Public Health
DOCKET NO. 2011-1794-CONS (7/24/2012)

PRIMARY ISSUES: Whether Respondent proved that Grievant failed to comply with the notice procedures that it had put in place to address her absentee issues and whether the notice requirements did not improperly interfere with Grievant's ability to receive leave under the FMLA.

SUMMARY: Grievant's employment was terminated for insubordination and excessive absences. Respondent demonstrated that Grievant had been placed on an Improvement Plan with specific restrictions related to leave and leave notice. Grievant failed to follow the clear directives from her employer after being warned orally and in writing that she needed to do so. Grievant alleged that Respondent violated the Family Medical Leave Act ("FMLA") by interfering with her attempts to take leave under the Act. Barring unusual circumstances, an employer is entitled to require an employee to follow the usual and customary leave notice requirements in seeking FMLA leave. Grievant failed to follow Respondent's notice requirements. Consequently, the grievance is DENIED.

KEYWORDS: Termination; Polygraph; Disclosure; Hiring Process; Misconduct; Tenured Employee; Good Cause

CASE STYLE: L. v. Division of Natural Resources

DOCKET NO. 2012-0533-DOC (7/27/2012)

PRIMARY ISSUES: Whether Respondent proved that Grievant withheld information during the hiring process that should have been disclosed and whether Grievant's failure to disclose this information would have affected the Respondent's decision to hire Grievant.

SUMMARY: Grievant was dismissed from his employment by Respondent after Respondent was informed by the Ohio equivalent of the Division of Natural Resources of some issues that had come to light during a polygraph examination conducted as part of Grievant's employment application with that agency. Respondent asserted that Grievant had withheld this information during the hiring process and should have disclosed it to Respondent at that time, and that the failure to do so, as well as the nature of the violations themselves, affected Grievant's credibility and demonstrated dishonesty. Respondent did not demonstrate that Grievant withheld information he should have disclosed during the hiring process, nor did it demonstrate that he would not have been hired had he disclosed the information. Further, the conduct for which he was fired occurred nine years before his dismissal and four to five years before he was hired, when he was a college student, and was so remote in time that there was no rational nexus between the pre-hiring conduct and Grievant's employment. Grievant was an excellent officer during his employment, demonstrating that he had put his adolescent behavior behind him. As to the one incident which occurred while Grievant was employed, Respondent did not prove the charges. Accordingly, this grievance is GRANTED.

KEYWORDS: Timeliness; Preponderance of Evidence; Approved Leave; Job Abandonment

CASE STYLE: Kingery v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital

DOCKET NO. 2012-1080-DHHR (7/16/2012)

PRIMARY ISSUES: Whether Grievance was filed within the statutory time period and whether Grievant provided a reasonable justification for the untimely filing of this Grievance.

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