

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in August 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

DEPARTMENT OF EDUCATION EMPLOYEES

<u>KEYWORDS:</u>	Termination; Excessive Absenteeism; Habitual Tardiness; Falsification of Return to Work Slip; Improvement Plan; Credibility;
<u>CASE STYLE:</u>	<u>Puffinburger v. Department of Education/Schools for the Deaf and the Blind</u> DOCKET NO. 2012-0824-DOE (8/15/2012)
<u>PRIMARY ISSUES:</u>	Whether Respondent proved that Grievant falsified the return to work slip that she presented to her employer.
<u>SUMMARY:</u>	Grievant was dismissed from her employment by Respondent for falsification of her return to work slip, while she was on an improvement plan for excessive absenteeism. Respondent demonstrated that Grievant falsified her return to work slip, altering the return to work date to a date 12 days later than that placed on the slip by the doctor who had signed the slip, and that Grievant did not return to work when she was able to do so. Accordingly, this grievance is DENIED.

TOPICAL INDEX
HIGHER EDUCATION EMPLOYEES

KEYWORDS: Termination; Workplace Violence Policy; Verbally Confrontational; Unprofessional with Students; Pushing a Student; Gross Misconduct; Dismissal

CASE STYLE: Olean v. West Virginia University Potomac State College
DOCKET NO. 2012-0874-PSCWVU (8/20/2012)

PRIMARY ISSUES: Whether Respondent proved that Grievant pushed a student and that his conduct was such that his contract could be terminated.

SUMMARY: Grievant was employed under a one year contract. His employment was terminated prior to the end of the contract period for pushing a student. Respondent proved that Grievant pushed a student, and that he could be terminated for this improper behavior. Accordingly, this grievance is DENIED.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Job Assignments; Duties; Notification; Postings; Transfer

CASE STYLE: Yeager v. Wetzel County Board of Education
DOCKET NO. 2011-1881-CONS (8/17/2012)

PRIMARY ISSUES: Whether Grievant was able to demonstrate that she was entitled to, and did not receive, timely notice of transfer.

SUMMARY: Grievant was a “Supervisory Teacher Aide for Early Start” at Long Drain for the 2010-2011 school year, providing personal care for special needs students. She was transferred from Long Drain to Short Line for the 2011-2012 school year and was notified of that transfer on or about June 3, 2011. Grievant alleges that Respondent violated the notice of transfer requirements of W. Va. Code § 18A-2-7 in transferring her as it did. Grievant was able demonstrate that she was entitled to - and did not receive - timely notice of transfer under said statute and was not afforded the rights thereunder. The grievance is granted.

KEYWORDS: Posting, Substitute Assignments; Substitute Service Personnel; Rotating Seniority List; Arbitrary and Capricious

CASE STYLE: Davis v. Kanawha County Board of Education
DOCKET NO. 2011-0002-KanED (8/8/2012)

PRIMARY ISSUES: Whether Grievant proved Respondent’s decision to refuse to permit Grievant to accept a second assignment prior to completing his current assignment was arbitrary and capricious.

SUMMARY: Grievant contends Respondent has no authority to prevent Grievant’s acceptance of a second substitute position while he was already assigned to another substitute position. Respondent’s employment of service personnel substitutes is governed by statute, and Respondent interpretation of that statute is entitled to great weight unless clearly erroneous. Grievant did not show Respondent is clearly wrong in its implementation of the statute requirements. In addition, Respondent has substantial discretion in this matter, and Grievant failed to prove Respondent acted in an arbitrary and capricious manner.
Accordingly, the grievance is denied.

KEYWORDS: Selection; Structured Interview; Arbitrary; Capricious; Abuse of Discretion

CASE STYLE: Weese v. Randolph County Board of Education and Albert Chewning, Intervenor

DOCKET NO. 2011-1562-RanED (8/1/2012)

PRIMARY ISSUES: Whether Grievant proved that the decision-making process was fatally flawed, or that Respondent acted in an arbitrary and capricious manner, or otherwise overstepped its broad discretion when they did not select him for the position in question.

SUMMARY: Grievant alleged that he should have been selected over the successful applicant for the position of Building Construction Instructor at Respondent's Technical Center. An interview committee was appointed to recommend a candidate for the position. The interview questions were developed by the Director of the Technical Center and the Administrative Assistant of the Technical Center. After the interviews, the committee eventually recommended the intervenor for the position based upon his qualifications and his interview performance. Grievant claimed he was more qualified for the position, and that Respondent did not consider each statutory factor when hiring Intervenor. Evidence established that Respondent afforded consideration to statutory factors in evaluating the qualifications of the candidates. Under the factor of other measures or indicators upon which the relative qualifications of the applicant may be judged, Respondent considered the results of the structured interview in making their selection. Respondent did not act arbitrarily or capriciously or abuse its broad discretion in hiring Mr. Chewning for the position. In addition, Grievant argued that the interview process was not listed as a qualification on the posting and it was inappropriate to utilize it as a criterion. This argument is without merit. Accordingly, this grievance is DENIED.

KEYWORDS: Seniority; Qualifications

CASE STYLE: Slone v. Mingo County Board of Education
DOCKET NO. 2011-1896-CONS (8/21/2012)

PRIMARY ISSUES: Whether Respondent violated policy and procedure during selection of a posted position.

SUMMARY: Grievant alleges that Respondent erred in calculating seniority, and therefore improperly awarded three separate positions to applicants with less seniority than Grievant. Grievant failed to present sufficient evidence to prove she was the most senior applicant for any of the positions. Respondent did not violate its policy regarding removal of substitutes when it allowed one of the successful applicants to remain a substitute, preserving her greater seniority over Grievant. Respondent did not violate any law or policy, and acted reasonably, in requiring Grievant to report for regular duty several days later than another successful applicant, resulting in that applicant's greater seniority. Grievant was not entitled to regular seniority when she worked a short-term substitute assignment during the first few days of her regular contract. Accordingly, the grievance is denied.

KEYWORDS: Termination; Misconduct, Driving Violations; Letters of Reprimand Suspended; Plan of Improvement; Digital Camera Footage

CASE STYLE: Stephens v. Wayne County Board of Education
DOCKET NO. 2012-0339-WayED (8/10/2012)

PRIMARY ISSUES: Whether Respondent established cause for termination of Grievant's employment and/or whether Respondent's actions were unreasonable or discriminatory.

SUMMARY: Grievant, a regular school bus operator admittedly violated municipal and state road laws while operating a school bus with elementary children on board. Respondent unanimously voted to terminate Grievant's employment as a result of Grievant's current misconduct coupled with his past school bus operator's work history.
Respondent established misconduct. Respondent cites the instant event and the cumulative effect of past improper actions with respective opportunity to correct as proper justification for the severity of disciplinary action. It is within Respondent's discretionary authority to terminate Grievant's employment. Grievant did not establish that Respondent has acted in an unreasonable or discriminatory manner. Respondent's actions are lawful. Accordingly, this grievance is DENIED.

TOPICAL INDEX
STATE EMPLOYEES

KEYWORDS: Absenteeism; Reprimand; Suspension; Progressive Discipline; Termination; Dismissal

CASE STYLE: Kesner v. Department of Health and Human Resources/Bureau for Child Support Enforcement
DOCKET NO. 2012-0600-DHHR (8/27/2012)

PRIMARY ISSUES: Whether Respondent met its burden of proof and demonstrated that Grievant demonstrated a continuing pattern of inability to work as scheduled which constituted absenteeism.

SUMMARY: Grievant was terminated for absenteeism. Grievant had a long history of absenteeism, and had received reprimands and suspensions. Despite numerous attempts at counseling sessions and a plan of improvement, Grievant continued a pattern of absenteeism. Respondent met its burden of proof and demonstrated that Grievant was suspended and terminated for good cause. This grievance is DENIED.

KEYWORDS: Appeal; Timeliness

CASE STYLE: Smith v. Division of Corrections/St. Mary's Correctional Center
DOCKET NO. 2012-0348-MAPS (8/28/2012)

PRIMARY ISSUES: Whether Grievant failed to timely appeal to Level Three of the grievance process.

SUMMARY: Grievant filed his Level Three appeal more than two months after the issuance of the Level Two Mediation Order. Grievant contends that he did not receive the Order; however, his Representative received a copy of the Order. Respondent asserts that the Level Three appeal was untimely filed, and, as such, has moved to dismiss this grievance. For the reasons more fully set out below, Respondent's Motion to Dismiss is granted.

KEYWORDS: Arbitrary and Capricious; Discretionary Pay Raise; Comparable Experience; Discretion

CASE STYLE: Nichols, et al. v. Division of Rehabilitation Services
DOCKET NO. 2011-1890-CONS (8/21/2012)

PRIMARY ISSUES: Whether Respondent's decision to not recommend a discretionary pay raise to the Division of Personnel was arbitrary and capricious or an abuse of discretion.

SUMMARY: Grievants assert that their tenure, experience, and years of service are comparable to other employees. Given that some of their fellow employees are paid more than 20% of the Grievants' salary, they assert this justifies a pay raise under the principles of internal equity. The record established that Respondent used policy information provided by the Division of Personnel in making the determination that the Grievants' training and experience, as well as their years of service are not comparable to the higher paid employees. Accordingly, Respondent did not recommend a discretionary pay increase for Grievants to the Division of Personnel. This action was not arbitrary or capricious or an abuse of discretion.

KEYWORDS: Arbitrary and Capricious; Qualifications; Seniority; Unlawful

CASE STYLE: Hoskins v. Division of Highways
DOCKET NO. 2011-1386-DOT (8/28/2012)

PRIMARY ISSUES: Whether Respondent acted arbitrary and capriciously in choosing applicants for training based solely on seniority.

SUMMARY: Grievant grieved his non-selection for crew leader training. Training is a benefit contemplated by W.Va. Code § 29-6-10(4), therefore, Respondent is required to select applicants for training based on qualifications, with consideration of seniority given only if qualifications are substantially equal or similar. Respondent made the selection based solely on seniority without any consideration given to qualifications, which was unlawful and arbitrary and capricious because it did not rely on criteria required to be considered by statute. The evidence presented shows Grievant had superior qualifications to the selected applicants. Accordingly, the grievance is granted.

KEYWORDS: Arbitrary and Capricious; Selection; Qualifications

CASE STYLE: Latif v. Division of Highways and Fouad Shoukry, Intervenor
DOCKET NO. 2012-0137-DOT (8/28/2012)

PRIMARY ISSUES: Whether Respondent acted arbitrary and capriciously in the job selection process.

SUMMARY: This grievance was filed when Grievant was not selected for the posted District Traffic Engineer position in District 4. The qualifications of the applicants were evaluated by the two persons conducting the interview, and the applicants were rated by the interviewers in six categories. While Grievant had the most experience as a District Traffic Engineer, having served in that position in District 7 for 12 years, Grievant did not demonstrate that he was the best qualified candidate overall, that there was any flaw in the selection process, or that he was entitled to be transferred into the position from District 7. The selection decision was not arbitrary and capricious or clearly wrong.

KEYWORDS: Discrimination; Favoritism; Retaliation; Reprimand; Insubordination; Questioning Work Assignments; Personal Comments on DOT-12

CASE STYLE: Tallman v. Division of Highways
DOCKET NO. 2012-0275-DOT (8/24/2012)

PRIMARY ISSUES: Whether Respondent proved the charges against Grievant. Whether Grievant proved his claims of retaliation, discrimination or favoritism.

SUMMARY: Grievant received a written reprimand for continually questioning his work assignments, and writing personal complaints on the back of form DOT-12. Respondent demonstrated that Grievant's behavior was insubordinate. Grievant claimed discrimination, favoritism, and retaliation had occurred on several occasions. Many of Grievant's claims were completely without merit. Grievant did not meet his burden of proving his claims.

KEYWORDS: Dismissal; Moot; Resignation; Employee; Employer

CASE STYLE: Short v. Department of Health and Human Resources/Bureau for Children and Families
DOCKET NO. 2012-0492-DHHR (8/6/2012)

PRIMARY ISSUES: Whether Grievant's resignation from her employment with Respondent rendered her grievance moot.

SUMMARY: Grievant filed a grievance regarding expense reimbursements due her from Respondent. Grievant resigned from her position with Respondent effective June 8, 2012, after the filing of her grievance, but before the scheduled Level Two mediation. Grievant's resignation from her employment with Respondent rendered her grievance moot. Accordingly, this grievance is DISMISSED.

KEYWORDS: Job abandonment ; Dismissal; Moot

CASE STYLE: Tenney v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2012-0141-DHHR (8/21/2012)

PRIMARY ISSUES: Whether grievance is moot because Grievant is no longer a state employee.

SUMMARY: Grievant filed a grievance regarding reasonable medical accommodations and restrictions on leave. The Respondent dismissed Grievant for job abandonment effective January 18, 2012. Grievant did not file a grievance or otherwise challenge her termination. Grievant's dismissal from employment with Respondent rendered her grievance moot.

KEYWORDS: Reallocation; Classification; Duties

CASE STYLE: Hall v. Division of Highways and Division of Personnel
DOCKET NO. 2010-1637-DOT (8/15/2012)

PRIMARY ISSUES: Whether DOP acted arbitrarily and capriciously in refusing to reallocate Grievant's position when his duties had increased but were not the duties of the classification he seeks. Whether DOP acted arbitrarily and capriciously in reversing its decision to reallocate Grievant's position after receiving additional information.

SUMMARY: Grievant contends DOP acted arbitrarily and capriciously in refusing to reallocate his position. Grievant has experienced an increase in his duties, but is not performing the duties of the classification he seeks. DOP's change of opinion regarding the classification was not arbitrary and capricious because it was based on the receipt of additional information. Grievant has failed to meet his burden. Accordingly, the grievance is denied.

KEYWORDS: Reclassified; Discretionary Pay Increase

CASE STYLE: Baldwin II, et al. v. Lottery Commission and Division of Personnel
DOCKET NO. 2011-1486-CONS (8/6/2012)

PRIMARY ISSUES: Whether Grievants were entitled to a greater pay increase upon reclassification when they had already received a discretionary pay increase.

SUMMARY: Grievants protest the amount of the pay increase they received upon reclassification. Grievants believed they did not receive a greater pay increase because of a “pay freeze”, which they assert was either not in effect or was illegal. Grievants argued they were entitled to receive an additional pay increase of up to 15% according to the number of pay grades raised from their previous reclassified positions. Grievants were reclassified and not promoted or reallocated, so, under DOP rule they are not entitled to the increase they seek. Grievants provided no evidence that the DOP rule is unreasonable or nonconforming to law. Grievants’ arguments regarding the “pay freeze” are not relevant because all Grievants did receive a discretionary pay raise. DOP did not abuse its discretion in recommending a 5% pay increase rather than the increase requested by the agency.
Accordingly, the consolidated grievance is denied.

KEYWORDS: Sick Leave, Work-Related Injury, Policy and Procedure

CASE STYLE: Beaton v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2010-1344-DHHR (8/27/2012)

PRIMARY ISSUES: Whether Respondent requirement that Grievant clock out to receive treatment for his work-related injury was proper.

SUMMARY: Grievant was injured on the job, was required to clock out to seek medical attention, and claim that time as sick leave. Grievant proved by a preponderance of the evidence that his employer directed him to seek treatment. Therefore, pursuant to federal regulation and Respondent’s policy, the time Grievant spent seeking medical attention should have been counted as hours worked. Respondent inappropriately required Grievant to clock out to receive medical attention. Accordingly, the grievance is granted.

KEYWORDS: Termination; Dismissal; Insubordination; Leave Abuse; Moot Grievances

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

DOCKET NO. 2011-1880-CONS (8/24/2012)

PRIMARY ISSUES: Whether Grievants consolidated grievances are moot. Whether Grievant can utilize a previously filed grievance to contest a subsequent termination.

SUMMARY: Grievant filed her first grievance form on April 1, 2011, alleging that she was dismissed for refusing to take a drug test. Within a day or two she was assured that her employment had not been terminated and she continued to work at the hospital. Grievant's second grievance contested a performance improvement plan alleging that the plan was invalid because she was not allowed to bring a representative to the meeting in which it was implemented. Grievant was subsequently dismissed from employment for alleged poor performance, leave abuse, and insubordination. She did not file a grievance contesting this action.

Respondent argues that the grievances have been rendered moot by the termination of Grievant's employment for different reasons than were originally alleged. Grievant counters that her grievance contested her dismissal and she should not have to file a new one.

The consolidated grievances which were filed, have nothing to do with the ultimate termination of Grievant's employment which took place months after the first one was filed. Therefore, they are DENIED.

KEYWORDS: Termination; Dismissal; Suspension; Negligence; Abuse; Training; Lift; Job Performance Observation

CASE STYLE: Roush v. Department of Health and Human Resources/Lakin Hospital
DOCKET NO. 2011-1310-DHHR (8/17/2012)

PRIMARY ISSUES: Whether Respondent proved that Grievant was negligent in his care of a nursing facility resident.

SUMMARY: Grievant was dismissed from employment for allegedly neglecting a resident by strapping him in a mechanical lift and then leaving the resident alone while Grievant went to find a co-worker to help with transferring the resident from his chair to his bed. Respondent also cited prior patient safety issues with Grievant. Grievant argues that no harm came to the patient in the incident and that he was not aware that proper procedure required that two workers be present when the patient was placed in the transfer mechanism. Respondent proved that Grievant failed to follow proper procedures for utilizing a mechanical lift, which met the definition of neglect of a patient. The charges against Grievant were proven by a preponderance of the evidence and the grievance is DENIED.

KEYWORDS: Termination; Dismissal; Suspension; Progressive Discipline; Insubordination

CASE STYLE: Nestor v. Department of Health and Human Resources/Hopemont Hospital
DOCKET NO. 2012-0652-DHHR (8/29/2012)

PRIMARY ISSUES: Whether Respondent demonstrated that Grievant was terminated for good cause.

SUMMARY: Grievant was terminated for insubordination and a pattern of leave abuse. Grievant had a history of leave abuse, and had received reprimands and suspensions. Despite attempts at counseling sessions and an attendance plan of improvement, Grievant continued to engage in leave abuse. Grievant alleged that Respondent violated the Family and Medical Leave Act by continuing the leave restrictions placed in her Attendance Improvement Plan. Barring unusual circumstances, an employer is entitled to require an employee to follow the usual and customary leave notice requirements in seeking Family and Medical Leave Act coverage. Respondent met its burden of proof and demonstrated that Grievant was terminated for good cause.

KEYWORDS: Termination; Family and Medical Leave Act; Medical Leave of Absence; Documentation; Unauthorized Leave; Non-probationary Employee; Good Cause

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

DOCKET NO. 2012-0189-DHHR (8/1/2012)

PRIMARY ISSUES: Whether Respondent established a valid basis for terminating Grievant's employment.

SUMMARY: Grievant failed to respond to three requests to apply for a medical leave of absence. When notified of her proposed termination, she responded a day late. The employer followed DHHR and Division of Personnel policies in terminating her employment due to job abandonment. Grievant never advised her employer that she wanted FMLA leave. Grievant had previously requested and been granted multiple medical leaves of absence. Grievant failed to provide an acceptable explanation for her failure to respond to her employer's proper requests to complete a leave of absence request. Accordingly, this grievance is DENIED.

KEYWORDS: Termination; Unsatisfactory Performance; Good Cause; Improvement Plan; Tenured State Employee; Misconduct of a Substantial Nature; Patient Care

CASE STYLE: Arnold v. Hampshire County Health Department

DOCKET NO. 2012-0746-HamCH (8/2/2012)

PRIMARY ISSUES: Whether Respondent proved that Grievant was unable to competently perform her duties, placing patients at risk, constituting good cause for dismissal.

SUMMARY: Grievant was dismissed from her employment by Respondent for unsatisfactory performance. Respondent demonstrated that Grievant's performance did not meet the standards expected of employees. Accordingly, this grievance is DENIED.