

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in September 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
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: Untimely Filing; Working Days; Mandatory Filing Period

CASE STYLE: Lemasters v. Jackson County Board of Education
DOCKET NO. 2013-0798-JacED (9/23/2013)

PRIMARY ISSUES: Whether Respondent established that Grievant filed her appeal to level three in excess of the ten working days prescribed by applicable statute.

SUMMARY: Grievant filed her level three appeal in excess of the prescribed time-period allotted pursuant to W. Va. Code § 6C-2-4(c)(1). Grievant contends that the filing was timely in the circumstances of the case. Respondent asserts that the level three appeal was untimely filed, and, as such, has moved to dismiss this grievance. Grievant was properly notified and Grievant was aware of filing timeline constraints. Grievant’s appeal to level three was untimely and Grievant did not demonstrate “a proper basis to excuse her failure to file in a timely manner.” Respondent’s Motion to Dismiss is Granted.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Extracurricular Assignment; Seniority; Stare Decisis; Arbitrary and Capricious; Change in Number of Days; Same Assignment

CASE STYLE: Statler v. Monongalia County Board of Education
DOCKET NO. 2012-0777-MonED (9/11/2013)

PRIMARY ISSUES: Whether Respondent's determination that the addition of two days to the assignment at issue rendered it a new extracurricular assignment was reasonable, and not arbitrary and capricious.

SUMMARY: Grievant argued she should have been allowed to retain the extracurricular assignment at issue from year to year, because it was the same run. The change in the after school program associated with this assignment, and accordingly the change in the assignment from three days a week to five days a week, rendered this a different assignment. Grievant was paid an hourly rate for the actual time worked, not a flat rate, and the addition of two more days each week created a more appealing assignment for the bus operators who would consider bidding on these types of assignments.

KEYWORDS: Seniority; Job Posting; Relief; Moot; Advisory Opinion

CASE STYLE: Vesley v. Marion County Board of Education/ AND
DOCKET NO. 2013-0651-MrnED (9/5/2013)

PRIMARY ISSUES: Whether there is any relief that can be granted.

SUMMARY: Grievant contends that extended-day assignments were not properly filled because an Aide with less seniority than she who had held an extended-day assignment the preceding year was allowed to retain the assignment, even though the assignment had not been posted the preceding three years. Grievant believes she should have had first choice of the assignments based on her seniority. However, Grievant was satisfied with the extended-day assignment she held for the school year, and simply seeks a legal ruling on the issue of seniority. Respondent moved that this matter be dismissed, asserting that Grievant was seeking an advisory opinion. No relief can be granted and this grievance is moot.

KEYWORDS: Extra-Duty Assignments; Discrimination; Mileage; Relief; Trips Out of County; County Policy; Correction of Error; Mistake; Boards Encouraged to Correct Errors

CASE STYLE: Dinger v. Mercer County Board of Education

DOCKET NO. 2013-1047-MerED (9/19/2013)

PRIMARY ISSUES: Whether Grievant was discriminated against, and whether there is any relief that can granted.

SUMMARY: Grievant accepted an extra-duty assignment scheduled for August 24, 2012, but was then advised that, because the trip would exceed 200 miles one-way, Respondent's Policy I-42 required that a Charter bus be used. Grievant learned in December 2012, that an extra-duty trip had been carried out by two co-workers on December 1, 2012, transporting students from Pike View Middle School to a West Virginia University football game in Morgantown, West Virginia, and that the total mileage turned in by one of the bus operators was 404 miles. Grievant claimed that Policy I-42 had been applied in a discriminatory manner. Respondent acknowledged that if the December 1, 2012 trip exceeded 200 miles one-way, the use of a school bus and driver for the trip violated county policy, and was an error, and has taken steps to try to ensure that this error is not repeated. No further relief is available. Grievance DENIED.

KEYWORDS: Harassment; Inappropriate Comments; Unacceptable Behavior; Horseplay; Hearsay

CASE STYLE: Shaffer v. Kanawha County Board of Education

DOCKET NO. 2013-0161-KanED (9/18/2013)

PRIMARY ISSUES: Whether Grievant proved he was harassed by Intervenor, and what remedy is available to Grievant through the grievance process.

SUMMARY: Grievant alleges he was harassed by Intervenor. Grievant proved by a preponderance of the evidence that he was harassed by Intervenor. The Grievance Board has no authority to order Intervenor to undergo drug testing or mental evaluation, or to order Respondent to take disciplinary action against Intervenor. Grievant is not entitled to know the disciplinary action taken against Intervenor. However, Respondent has some responsibility to stop an employee from engaging in harassing conduct. Accordingly, the grievance is granted.

KEYWORDS: RIF; Changes in Schedule; Relegation; Contract Terms; Extracurricular Assignment; Continuing Contract Provision; Notice and Hearing

CASE STYLE: Shantie v. Putnam County Board of Education
DOCKET NO. 2013-0870-PutED (9/19/2013)

PRIMARY ISSUES: Whether Grievant was entitled to notice and hearing when the number of her "runs" was reduced in connection with her extracurricular, second semester, "as needed," contract/assignment.

SUMMARY: Grievant held an extracurricular contract with the Board to transport nursing school students to and from school and work during the "second semester" on an "as needed" basis, beginning in the 2007-2008 school year through the 2012-2013 school year. This extracurricular assignment was always performed during the second semester until the 2012-2013 school year, when Grievant agreed to a request by the nursing school instructor to transport the students during first semester, in addition to second semester. This request was unknown to and unauthorized by the Board. When the Board discovered that Grievant was transporting students during first semester, it instructed Grievant to halt the run, posted the new, first semester extracurricular assignment for the nursing program and filled it with the most senior/qualified applicant. Grievant maintained her contract with the Board for the second semester extracurricular assignment and performed all of the runs required during that semester. Grievant argues that her extracurricular contract was substantially changed because some of the nursing school runs were needed and performed during the first semester, rather than exclusively in the second semester. Due to this asserted change, Grievant contends that Respondent was required to provide her with notice and a hearing pursuant to W. Va. Code §§ 18A-2-8 and 18A-2-7, but failed to do so. Additionally, Grievant contends that Respondent is in violation of the following statutory provisions: W. Va. Code §§ 18A-4-8(j), which requires written agreement to changes in schedule; W. Va. Code § 18A-2-6, the continuing contract status provision; W. Va. Code § 18A-4-8(m)(2), the relegation provision, and W. Va. Code § 18A-2-5, which specifies the form of the contract required between service personnel and the Board. In addition, Grievant asserts that the Board should not be able to use the broad term "as needed" in her contract and posting to cover any eventuality to nullify its obligation to notify her of the changes in her contract. Respondent denies any violation of the foregoing statutes and contends that the contract and posting clearly define the period of employment by specifying that it is to be performed "second semester" on an "as needed" basis. Respondent further asserts that it promptly removed Grievant from the first semester extracurricular

assignment, and properly posted it to be filled by the most senior/qualified applicant. Grievant did not demonstrate that Respondent violated any law, rule, regulation or policy, or otherwise acted improperly.

KEYWORDS: Additional Students; Overtime Requests; Reprisal; Retaliation

CASE STYLE: Tibbs v. Hancock County Board of Education

DOCKET NO. 2012-0341-HanED (9/30/2013)

PRIMARY ISSUES: Whether Grievant suffered any retaliation or reprisal.

SUMMARY: In the 2011-2012 school year, Respondent discovered that an additional fifty-one students had been classified as having special needs thereby increasing the transportation needs from ninety-nine students to one hundred fifty students. The result of this influx of students was a change in Grievant's schedule by Respondent's transportation department. While Grievant argued this was a clear act of reprisal, the record did not support such a conclusion.

TOPICAL INDEX
STATE EMPLOYEES

KEYWORDS: Suspension; Time Lines; Default; Back Pay; Remedies

CASE STYLE: Thomas v. Regional Jail and Correctional Facility Authority/Southwestern Regional Jail
DOCKET NO. 2013-1820-MAPS (9/4/2013)

PRIMARY ISSUES: Whether the remedies sought by Grievant were improper or contrary to law.

SUMMARY: Since Grievant prevailed on the merits by default, the sole issue is whether the remedies sought by Grievant are contrary to law or contrary to proper and available remedies. Respondent conceded that Grievant was entitled to ten-days of back pay and to removal of all record of the suspension from Grievant's file, but argued that she was barred from receiving travel expenses by statute. Grievant argued that she was entitled to a promotion she would have received had she not been suspended.
Grievant is entitled to back pay and removal of the suspension from her record. All other relief is either barred by statute or too speculative to be proper under the circumstances.

KEYWORDS: Failing to Administer Medications; Med Pass; Misconduct; Throw Away Medications

CASE STYLE: Van Meter v. Department of Health and Human Resources/Lakin Hospital
DOCKET NO. 2012-0405-DHHR (9/4/2013)

PRIMARY ISSUES: Whether Respondent proved it was justified for terminating Grievant's employment for allegedly failing to administer medication to residents.

SUMMARY: Respondent dismissed Grievant for failing to administer medication to a large number of residents under her care during a single shift at the Hospital. Grievant insisted that she administered the medications. Respondent proved by a preponderance of the evidence that Grievant violated Hospital and failed to administer medication to medically and mentally fragile residents under her care.

KEYWORDS: Dismissal; Moot; Relief; Advisory Opinion

CASE STYLE: Simons v. Division of Highways
DOCKET NO. 2013-0646-DOT (9/5/2013)

PRIMARY ISSUES: Whether Grievant's transfer has rendered this grievance moot.

SUMMARY: Grievant filed this grievance asserting that her supervisor subjected her to sexual harassment. Following the filing of the grievance, Grievant was transferred to another work location, and she was assigned a new supervisor. Grievant has not alleged that sexual harassment has continued since her transfer, and she is no longer supervised by the supervisor referenced in her Grievance. The grievance was rendered moot by Grievant's transfer. Accordingly, Respondent's Motion to Dismiss should be granted, and this grievance, DISMISSED.

KEYWORDS: Corrective Action Plan; Progressive Discipline; Unsatisfactory Performance; Unacceptable Job Performance; Misconduct

CASE STYLE: Harrison v. Department of Health and Human Resources/Bureau for Children and Families
DOCKET NO. 2012-1362-DHHR (9/11/2013)

PRIMARY ISSUES: Whether termination was warranted after progressive disciplinary measures were ineffective.

SUMMARY: Grievant was terminated from her job with the Bureau for Children and Families because of performance deficiencies. Grievant's performance was regularly evaluated and she was given numerous opportunities to improve before she was dismissed. The record established that Grievant was counseled, placed on corrective action plans, reprimanded, twice suspended, and demoted; however, her job performance did not adequately improve. Record also established that progressive discipline was ineffective, and termination for unsatisfactory performance was for good cause.

KEYWORDS: Gross Neglect; Patient Abuse; Care of Residents; Credibility; Right to Representation; Due Process Rights

CASE STYLE: Swiger v. Department of Veterans Assistance

DOCKET NO. 2013-1134-DVA (9/13/2013)

PRIMARY ISSUES: Whether Respondent proved the charges and whether they constituted good cause for dismissal.

SUMMARY: Grievant was dismissed from her employment by Respondent for patient abuse. Respondent demonstrated that Grievant did not provide proper care for eight of the nine residents to whom she was assigned on one shift, and that this constituted good cause for dismissal. Grievant argued that Respondent was required to advise her of her right to representation during the predetermination hearing, and that the hearing was a predetermination hearing, but did not demonstrate that there is any such requirement. Respondent advised Grievant of the allegations and made it clear that she was being given the opportunity to respond. This is all that is required. Grievant was not denied a representative at the predetermination hearing as she never requested that a representative be present.

KEYWORDS: Salary; Pay Grade; Equal Pay for Equal Work; Education; Work Experience; Salary Adjustment; Pay Differences; Pay Equity

CASE STYLE: Wisner v. Department of Environmental Protection/Division of Water and Waste Management

DOCKET NO. 2011-1471-DEP (9/19/2013)

PRIMARY ISSUES: Whether Grievant demonstrated a violation of the equal pay for equal work principle.

SUMMARY: Grievant, who was paid within his pay grade, asserts he should have received more compensation due to another employee hired a year later, for the same position, being paid at a higher salary. Grievant did not meet his burden of proof. Grievant was compensated within his pay grade, and Respondent did not violate the equal pay for equal work principles. The grievance is denied.

KEYWORDS: Electronic Mail; Internet Use; Breach of Confidentiality; Misuse of State Equipment; Misrepresentation of Information; Entering Office Without Authorization; Improperly Making Audio Recordings; Reprimand; Insubordination; Retaliation; Reprisal; Progressive Discipline

CASE STYLE: Knight v. Department of Health and Human Resources/Bureau for Children and Families

DOCKET NO. 2012-1517-CONS (9/30/2013)

PRIMARY ISSUES: Whether employer established the offenses charged; whether evidence obtained from a search of Grievant's work computer was admissible; whether communications between Grievant and her representative are protected by a statutory or other privilege; whether the adverse actions at issue were taken in retaliation for Grievant's grievance activity; whether the penalty of termination was appropriate, where not all allegations are proven and there is a finding of retaliation in regard to at least some of the charges.

SUMMARY: Grievant was suspended, pending investigation, and subsequently dismissed from her employment by Respondent based upon multiple alleged infractions. Much of the evidence relied upon by Respondent was obtained during a search of Grievant's work computer. Based upon established written policies and training Grievant had no reasonable expectation of privacy in her computer records and e-mail, thereby eliminating any basis to contend that her Fourth Amendment right to freedom from unreasonable search and seizure was violated. The employer acted within proper authority by adopting a policy prohibiting the use of audio recording devices in the work area. Grievant asserted that all of the adverse actions taken against her by DHHR were initiated in retaliation for her participation in the grievance procedure for public employees, initially as a witness for co-workers who were challenging the promotion of one of their co-workers to a position where she served as Grievant's immediate supervisor, as well as for multiple grievances which Grievant subsequently filed on her own behalf. The Respondent established various charges against Grievant but failed to demonstrate by a preponderance of the evidence that Grievant generally misused her office computer and the state electronic mail system to engage in communications that, in many instances, were related, directly or indirectly, to Grievant's grievance activity, as well as the charge that Grievant misrepresented information in the course of an internal agency investigation. It was determined that several of the proven allegations involved essentially technical violations of state technology policy which did not involve any particular personal gain for Grievant, or her immediate family. Because not all of the charges against Grievant were sustained, and Grievant established that

certain charges constituted retaliation prohibited under the state grievance procedure for public employees, it was to reassess the penalty imposed. As a result, this grievance was granted, in part, and Grievant reinstated as an Office Assistant 2, with a 30-day suspension without pay as a penalty for those allegations which were established by a preponderance of the evidence.

KEYWORDS: Disciplinary Misconduct; Improvement Plan; Written Reprimand; Arbitrary and Capricious; Insubordination

CASE STYLE: Rowe v. Division of Forestry
DOCKET NO. 2012-0999-DOC (9/20/2013)

PRIMARY ISSUES: Whether Respondent established that disciplinary action was warranted by Grievant's conduct.

SUMMARY: Grievant is employed and is currently assigned as the manager of the West Virginia Division of Forestry Legacy Program. Grievant is not a low-level employee, with his chain of command being a direct supervisor who is directly supervised by the Division's Director. Grievant's duties include coordinating with the United States Forest Service and timely submitting materials to USFS for funding projects. Grievant was reprimanded by his immediate supervisor and provided a three month 'improvement plan.' Grievant was reprimanded for alleged disregard for the chain of authority and disrespectful conduct. Grievant grieves the basis of the reprimand, in fact and spirit. Grievant challenges the merits of Respondent's actions against him. Grievant avers the reprimand was unwarranted and unjust.

Respondent has the burden of proof in disciplinary grievances. Grievant is unequivocally on notice that his immediate supervisor finds his demeanor and conduct to be objectionable. Nevertheless, in the circumstances of this grievance, it was not established by a preponderance of the evidence that Grievant was in violation of an agency directive, rule or regulation. Respondent did not establish Grievant's conduct warranted disciplinary action. Respondent has not met its burden in the facts of this matter. This grievance is GRANTED.

KEYWORDS: Family and Medical Leave Act; Attendance Policies; Employee Performance Appraisal; Policy and Procedure

CASE STYLE: Combs v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital
DOCKET NO. 2013-0497-DHHR (9/24/2013)

PRIMARY ISSUES: Whether Respondent can meet its burden of proof that Grievant's attendance violated policy when Respondent failed to introduce the policies Grievant is alleged to have violated.

SUMMARY: Grievant was suspended for violation of site-specific attendance policies. Respondent failed to introduce the policies Grievant was alleged to have violated. Respondent cannot meet its burden of proof that Grievant violated policies that were not introduced into evidence. Accordingly, the grievance is granted.

KEYWORDS: Falsifying Report; Gross Negligence Resulting in the Injury; Insulting Comments; Escalating a Situation; Arbitrary and Capricious

CASE STYLE: Bolen v. Division of Corrections/St. Mary's Correctional Center
DOCKET NO. 2012-0343-MAPS (9/30/2013)

PRIMARY ISSUES: Whether demotion was improper discipline or otherwise warranting mitigation.

SUMMARY: Grievant was demoted for unprofessional treatment of an inmate, falsifying a report, and gross negligence resulting in the injury of an inmate. Respondent proved by a preponderance of the evidence that, despite her specialized training as a crisis negotiator, Grievant antagonized a helpless inmate, escalating a situation that led to his significant injury, and then filed a false incident report and lied to cover it up. Demotion as a penalty was not arbitrary and capricious, in violation of rule or policy, and was not excessive. Accordingly, the grievance is denied.