

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in October 2011

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: SELECTION; QUALIFICATIONS; INTERVIEW;
EXTRACURRICULAR POSITION; INTERVIEW QUESTIONS; BIAS

CASE STYLE: MORRIS v. MARSHALL COUNTY BOARD OF EDUCATION AND
CHAD CLUTTER, INTERVENOR
DOCKET NO. 2010-1578-MARED (10/25/2011)

PRIMARY ISSUES: Whether Respondent's interview questions and decision to select
Intervenor for the posted position were arbitrary and capricious, or
represented an abuse of discretion.

SUMMARY: Grievant contends that he should have been awarded the position of
Science Department Head at Cameron High School instead of Chad
Clutter. Grievant believes that some of the interview questions asked
were intended to favor Mr. Clutter, Intervenor. Respondent and
Intervenor assert that the interview questions asked were not
intended to favor Intervenor and that the interview committee's
scores reflect that Intervenor was the highest rated interviewee.
Grievant failed to prove that Respondent's interview questions and
decision to select Intervenor were arbitrary and capricious, or
represented an abuse of discretion. Consequently, the grievance is
DENIED.

KEYWORDS: TERMINATION; SUSPENSION; IMMORALITY; STEALING; THEFT; MITIGATION; MISCONDUCT; ABUSE OF DISCRETION; INSUBORDINATION; WILLFUL NEGLECT OF DUTY

CASE STYLE: SHORT v. WYOMING COUNTY BOARD OF EDUCATION

DOCKET NO. 2011-1420-WYOED (10/27/2011)

PRIMARY ISSUES: Whether Respondent's decision to suspend and subsequently terminate Grievant for stealing from his employer was arbitrary or capricious, or an abuse of its discretion and whether the discipline imposed on Grievant is disproportionate to his offenses.

SUMMARY: Grievant was terminated from his teaching position at Westside High School for stealing money from a cash drawer located in the school's office. Grievant's actions were witnessed by one student, and were also captured on video surveillance. Grievant has admitted to stealing money; however, the parties dispute the amount stolen. Grievant argues his actions resulted from extreme emotional stress/strain he was experiencing due to his child being ill and the child needing a medical procedure for which a large up-front payment was required before the procedure would be performed. Grievant asks that his actions be excused for these reasons and that his suspension and subsequent termination be reversed. Respondent has met its burden in proving the charges against Grievant. For the reasons set forth in the discussion below, this grievance is DENIED.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: EXTRA DUTY ASSIGNMENTS; AUTOMATED CALLING SYSTEM; SENIORITY; TRIP; CALL LIST

CASE STYLE: HONAKER v. GREENBRIER COUNTY BOARD OF EDUCATION
DOCKET NO. 2010-0533-GREED (10/19/2011)

PRIMARY ISSUES: Whether Respondent's automated calling system implemented in the 2009 school year violated W.Va. Code § 18A-4-8b and Respondent's Policy 2.71-I when Grievant was not contacted for an assignment.

SUMMARY: Grievant asserts that Respondent's automated calling system implemented in the 2009 school year is in violation of W.Va. Code § 18A-4-8b and Respondent's Policy 2.71-i. Under the applicable statute and policy, extra-duty assignments shall be made on the basis of seniority on a rotating basis. Grievant argues that she was erroneously skipped over on the call list for trips performed on October 24 and 31, 2009. Respondent asserts that the automated call system correctly contacted eligible bus operators based on seniority on a rotating basis. Grievant failed to prove by a preponderance of the evidence that the automated call system violated W.Va. Code § 18A-4-8b and Respondent's Policy 2.71-i when it did not call her for a trip to be performed on October 24, 2009. Grievant did demonstrate that the automated call system violated W.Va. Code § 18A-4-8b and Respondent's Policy 2.71-i when it did not call her for a trip to be performed on October 31, 2009. Accordingly, this grievance is DENIED, in part, and GRANTED, in part.

KEYWORDS: POSTING; SUMMER ASSIGNMENT; COMPETENCY TEST; BACK PAY

CASE STYLE: HANSON, ET AL. v. MASON COUNTY BOARD OF EDUCATION
DOCKET NO. 2011-0146-CONS (10/26/2011)

PRIMARY ISSUES: Whether Grievants should have received back pay to a date five days after the close of posting for a summer position.

SUMMARY: Respondent posted summer assignments for which the Grievants were not qualified. Respondent did not approve the Superintendent's recommendation to hire less senior employees who were qualified for the positions in order to give other more senior applicants, such as Grievants, the opportunity to take the necessary competency test. Once Grievants passed the competency test, Respondent placed them into the summer positions. Grievants' argument that they be given back pay to a date twenty days after the end of the posting period is without merit. This grievance is DENIED.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	CLASSIFICATION; POSITION DESCRIPTION FORM (PDF); PREDOMINATE DUTIES; RESPONSIBILITIES; BEST FIT; SIGNIFICANT CHANGE; REALLOCATION
<u>CASE STYLE:</u>	<u>ROSE v. DIVISION OF REHABILITATION SERVICES AND DIVISION OF PERSONNEL</u> DOCKET NO. 2011-0047-DEA (10/7/2011)
<u>PRIMARY ISSUES:</u>	Whether Division of Personnel's classification determination was the best fit for Grievant's position.
<u>SUMMARY:</u>	Grievant and Respondent DRS believe that Grievant's position includes duties and responsibilities that are administrative in nature. Specifically, they argue that her duties include training and the development of policy procedures. These duties, they reason, justify placement of Grievant's position in the Administrative Service Assistant 1 classification at pay grade ten, rather than the Office Assistant 2 classification at pay grade five. Respondent DOP agrees that Grievant's duties have changed significantly and that her position needed to be reallocated. However, DOP pointed out that Grievant's predominant duties involve the registration of vendors for the DRS. These duties can be complicated but they follow established policies and procedures which make them clerical in nature. Consequently, DOP determined that the best fit for Grievant's position was the Office Assistant 2 classification. Grievant did not prove that DOP's classification determination was clearly wrong or arbitrary and capricious. Accordingly, the grievance is DENIED.

KEYWORDS: CLASSIFICATION; REALLOCATION; POSITION DESCRIPTION FORM (PDF); DUTIES; RESPONSIBILITIES; SPECIFICATION

CASE STYLE: REED v. CONSOLIDATED PUBLIC RETIREMENT BOARD AND DIVISION OF PERSONNEL

DOCKET NO. 2010-0723-DOA (10/26/2011)

PRIMARY ISSUES: Whether Grievant's position is properly classified and whether reallocation is appropriate.

SUMMARY: Grievant believes she should be classified as an Information Systems Manager 2, rather than an Information Systems Manager 1. Grievant did not demonstrate that any of the changes in her duties were such that she should be reallocated to the requested classification. Further, Grievant did not demonstrate that the requested classification was a better fit for her position. Accordingly, this grievance is DENIED.

KEYWORDS: COMPENSATION; HOLIDAY PAY; SPECIAL ELECTION; LEGAL HOLIDAY; OPINION OF THE ATTORNEY GENERAL

CASE STYLE: STOVER v. DIVISION OF CORRECTIONS/MOUNT OLIVE CORRECTIONAL COMPLEX AND DIVISION OF PERSONNEL

DOCKET NO. 2011-0409-MAPS (10/31/2011)

PRIMARY ISSUES: Whether Grievant was legally entitled to be paid for a legal holiday that fell on a Saturday even though she did not work.

SUMMARY: A special election was held on Saturday, August 28, 2010. State employees who worked on that day received a compensatory day off on a different day. Grievant did not work on the Saturday of the special election, but argues that she should have been compensated and/or paid overtime for that date. Grievant argues that the special election was a holiday which requires all State employees to receive additional compensation. Respondent relied upon an official Opinion of the Attorney General to compensate only those employees who reported to work on the Saturday when the special election was held. Grievant did not meet her burden of proof and demonstrate that she was entitled to compensation for the legal holiday in question. Accordingly, this grievance is DENIED.

KEYWORDS: DISMISSAL ORDER; JURISDICTION; EMPLOYER; EMPLOYEE

CASE STYLE: WILSON v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILDREN AND FAMILIES AND LOTTER COMMISSION AND DIVISION OF PERSONNEL

DOCKET NO. 2011-1769-DHHR (10/31/2011)

PRIMARY ISSUES: Whether Grievant can pursue a grievance against an agency that is not her employer.

SUMMARY: Grievant, an employee of the Department of Health and Human Resources, applied for a position with the Lottery Commission, which is a separate agency not under the direction or control of the Department of Health and Human Resources. Grievant filed a grievance after not being selected for the position. 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 her employer. Accordingly, the grievance is DISMISSED.

KEYWORDS: FAVORITISM, DISCRIMINATION; EMPLOYEE PERFORMANCE APPRAISAL (EPA); REPRISAL; RETALIATION

CASE STYLE: CLEMONS v. DEPARTMENT OF ENVIRONMENTAL PROTECTION

DOCKET NO. 2010-0018-DEP (10/5/2011)

PRIMARY ISSUES: Whether Grievant's mid-year employee performance appraisal rating was retaliation against her for previously filing a grievance or whether Grievant was a victim of favoritism or discrimination.

SUMMARY: Grievant is an Office Assistant III for Respondent. Grievant's supervisor performed the mid-year Employee Performance Appraisal and rated Grievant as "fair, but needs improvement." Grievant asserts that the rating was an act of retaliation. Grievant argues that she was treated unfairly. Respondent argues that Grievant's mid-year EPA was not inaccurate, arbitrary and capricious, or a misinterpretation or misapplication of policy. Grievant failed to establish a claim of favoritism or discrimination. Grievant failed to establish that Respondent's mid-year EPA rating of her was an act of retaliation. Grievant presented no evidence that the performance evaluation prepared by her supervisor was the result of some misinterpretation or misapplication of established policies or rules governing the evaluation process. Likewise, Grievant was unable to prove that the evaluation document or process was arbitrary and capricious. Accordingly, the grievance is DENIED.

KEYWORDS: SELECTION; EXPERIENCE; POSTING; ARBITRARY AND CAPRICIOUS; INTERVIEW; QUALIFICATIONS; SENIORITY; DISCRIMINATION; FAVORITISM

CASE STYLE: CRANK v. DIVISION OF HIGHWAYS

DOCKET NO. 2010-0222-DOT (10/7/2011)

PRIMARY ISSUES: Whether Respondent's selection for the position of Secretary 2 was arbitrary and capricious.

SUMMARY: This grievance was filed after Grievant was not selected for the position of Secretary 2 with the Bridge Department of the Division of Highways, Respondent. Subsequent to the interview process, an employee other than Grievant was deemed more qualified for the posted position. Grievant did not establish by a preponderance of the evidence that Respondent's selection was improper or a case of favoritism pursuant to applicable grievance procedure. Grievant failed to demonstrate that the selection decision made was arbitrary, capricious or clearly wrong. This grievance is DENIED.

KEYWORDS: SMOKING POLICY; DESIGNATED SMOKING AREA; TOBACCO; TIMELINESS; SUBSTANTIAL COMPLIANCE

CASE STYLE: BAILEY, ET AL. v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/WILLIAM R. SHARPE, JR. HOSPITAL

DOCKET NO. 2011-0342-CONS (10/27/2011)

PRIMARY ISSUES: Whether Grievance was timely filed and whether Respondent violated policy when imposing its restrictive smoking policy.

SUMMARY: On May 1, 2009, Sharpe Hospital instituted Policy #34.316, mandating a tobacco free campus. In addition, Respondent informed employees that they were not to leave the hospital grounds during their morning and afternoon breaks. Grievants seek a designated smoking area to be used during their breaks. Grievants met their burden of proof and established that Respondent violated policy related to smoking tobacco. Respondent is ordered to either provide a designated smoking area for employees or obtain the necessary approval of the Director of Personnel to impose a stricter smoking policy. Accordingly, this grievance is GRANTED.

KEYWORDS: SUSPENSION; INMATE GRIEVANCE APPEALS; TIME FRAME; EMPLOYEE PERFORMANCE APPRAISAL (EPA); DUTIES; PROGRESSIVE DISCIPLINE; UNAUTHORIZED LEAVE

CASE STYLE: SOTAK v. DIVISION OF CORRECTIONS
DOCKET NO. 2011-1241-MAPS (10/20/2011)

PRIMARY ISSUES: Whether Respondent's disciplinary action with regard to Grievant are in compliance with applicable corrective agency directives.

SUMMARY: Grievant challenges her fifteen (15) day suspension by the West Virginia Division of Corrections. Grievant is employed as the Inmate Grievance Coordinator, whose duties, among other responsibilities, is to investigate and respond within applicable time frames to inmate grievances appealed to the Commissioner of Corrections. In addition to her failure to timely respond to inmate grievance appeals, Grievant did not come to work on days claimed as snow days, during a period in which Grievant did not have adequate leave to cover the absences. Further, Grievant made repeated errors in filling out her monthly time-sheets. Respondent established by a preponderance of the evidence the acts and omissions of Grievant were contrary to applicable policy and instruction. The decision to suspend Grievant was within the discretionary authority of Respondent. This grievance is DENIED.

KEYWORDS: TERMINATION; LEAVE ABUSE; ATTENDANCE; ABSENCE; UNAUTHORIZED LEAVE; GOOD CAUSE

CASE STYLE: WESTFALL v. TAX DEPARTMENT
DOCKET NO. 2011-1230-DOR (10/31/2011)

PRIMARY ISSUES: Whether Respondent had good cause to terminate Grievant's employment.

SUMMARY: Respondent dismissed Grievant from employment for a demonstrated pattern of continued misuse of leave and for submitting a false physician's statement, which relayed inaccurate information relating to Grievant's latest absences from work. Grievant implies she should not be held responsible for her actions. Respondent met its burden of proof in this matter and established by a preponderance of the evidence that the disciplinary action was warranted. Respondent established good cause for termination of Grievant's employment. This grievance is DENIED.

KEYWORDS: WRITTEN REPRIMAND; WORK WEEK, FORTY HOURS; LEAVE; OVERTIME; DISCIPLINARY ACTION

CASE STYLE: HYPES v. DIVISION OF HIGHWAYS

DOCKET NO. 2010-0828-CONS (10/20/2011)

PRIMARY ISSUES: Whether Respondent's disciplinary action was lawful and whether Respondent's actions with regard to Grievant use and attempted use of leave time was justified.

SUMMARY: Grievant was not permitted to use/swap leave time used prior to her initial forty work-hours, for hours of overtime hours worked later in the week. Further, Grievant was not permitted to use sick leave as an hour worked to receive holiday pay. Grievant generally alleges that Respondent's time accounting policies are arbitrary and capricious. Administrators with Respondent repeatedly explained how state policy and federal law applied to the instances grieved. Grievant received a written reprimand for not signing a one hour leave slip, regardless of the fact that she ended the work week with a total of forty-nine work hours. Respondent established a factual, rational and lawful justification for the disciplinary action taken in this matter. Respondent established by a preponderance of the evidence that requiring Grievant to use an hour leave for time not worked prior to working forty hours and refusing to sanction the use of sick leave for holiday hours worked was rational and lawful. This Grievance is DENIED.