

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in February 2015

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
SERVICE PERSONNEL

KEYWORDS: Selection; Seniority; Summer School Service Personnel; Reduction-in-Force; Re-Employment; Length of Service Time

CASE STYLE: McDonald v. Wood County Board of Education

DOCKET NO. 2014-1623-WooED (2/27/2015)

PRIMARY ISSUES: Whether Respondent's particular interpretation of "length of service time," to allow it to count days, rather than years, served in order to determine seniority is permissible. W. Va. Code §18-5-39(g).

SUMMARY: Due to a necessary reduction in force, Respondent Wood County School Board ("Board") was required to decide whom it should properly hire, as between two eligible employees, for a 2014 summer position as a transportation aide ("aide"). W. Va. Code §18-5-39(g) governs reduction in force and priority in reemployment of service personnel in summer positions. However, W. Va. Code §18-5-39(g) does not define how a service employee's prior summer service time is to be calculated, beyond stating that it must be determined by "the length of service time in the particular summer program or classification." Therefore, Respondent was required to interpret this phrase to determine seniority between the candidates. Respondent calculated "length of service time"/seniority based upon the total number of days worked by Grievant and the other employee during their respective seven summers employed as aides. Grievant served 55.5 days and the other employee 105 days and, therefore, Respondent offered the position to the other employee. Grievant contended that Respondent erroneously interpreted this phrase to mean days, rather than years, served. And proposed several other methods to calculate seniority. Though the methods of determining seniority proposed by Grievant may be permissible under the pertinent language of the statute, the sole issue before the Grievance Board is whether Respondent's particular interpretation of "length of service time," to allow it to count days rather than years served in order to determine seniority is permissible. W. Va. Code §18-5-39(g). Respondent's method of calculating seniority based upon the total days served by Grievant and the other employee during their respective seven years of summer employment was both permissible and reasonable. Grievant failed to demonstrate that she should have been selected for the position as a summer aide based upon "length of service time"/seniority or to offer proof that she was physically incapable of taking the custodian position offered to her for the summer of 2014. Accordingly, the grievance is DENIED.

KEYWORDS: Discrimination; Uniformity of Compensation; Prior Experience; Job Duties; Classification; Pay

CASE STYLE: Crockett, et al. v. Wayne County Board of Education
DOCKET NO. 2014-1698-CONS (2/19/2015)

PRIMARY ISSUES: Whether Grievants proved Respondent's failure to award them credit for prior work experience was discriminatory or a violation of uniformity of compensation.

SUMMARY: Grievants, Bus Operators, alleged Respondent discriminated against them and violated the statutory requirement of uniformity of compensation when Respondent refused to grant Grievants credit for prior work experience when other employees had been granted such credit. Grievants were not similarly situated or performing like assignments or duties to the compared employees in that the compared employees had much longer contracts, had different classifications, and two were retired. Grievants did not prove Respondent's failure to award them credit for prior work experience was discriminatory or a violation of uniformity of compensation. Accordingly, the grievance is denied.

KEYWORDS: Timeliness; Dismiss; Misclassification; Appeal; Reinstate; Continuing

CASE STYLE: Harris v. Wood County Board of Education
DOCKET NO. 2014-1496-WooED (2/5/2015)

PRIMARY ISSUES: Whether the grievance was timely filed.

SUMMARY: Grievant is employed by Respondent as a Secretary III. Grievant asserts that she is the school's Registrar, and that based upon her duties, she should be classified as a Coordinator. Respondent denies Grievant's claims and argues that she is not entitled to the Coordinator classification. Respondent moved to dismiss this grievance as untimely and/or as barred by the doctrine of res judicata. Grievant opposed Respondent's motion asserting the grievance was timely filed and that it is not barred by res judicata. Respondent proved by a preponderance of the evidence that this grievance was untimely filed. Therefore, the grievance is dismissed.

KEYWORDS: Insubordination; Drug-Free Workplace Policy; Mandatory Drug Test; Reasonable Suspicion; Right to Privacy; Mitigation

CASE STYLE: Robinette v. Boone County Board of Education

DOCKET NO. 2014-1437-BooED (2/10/2015)

PRIMARY ISSUES: Whether Respondent's agents had reasonable suspicion to require Grievant to take a mandatory drug test.

SUMMARY: Grievant's employment was terminated when results of a drug test indicated the presence of a controlled substance in Grievant's body while he was at work, in violation of Respondent's Drug-Free Workplace Policy. Grievant argued that Respondent's agents did not have reasonable suspicion that Grievant was under the influence of a controlled substance and therefore violated his right to privacy by requiring him to take a drug test. Additionally, Grievant argues that dismissal was too severe a penalty considering Grievant's long tenure and good work history. Respondent proved that there was reasonable suspicion for the drug test and that the penalty was not disproportionate to Grievant's misconduct. The grievance is DENIED.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Suspension; Using Profanity Toward the Inmate; Inappropriate Comments; Aggressive Behavior; Non-Professional Behavior; Escalation of Situation; Mitigation
<u>CASE STYLE:</u>	<u>Wheeler, Jr. v. Division of Corrections/Beckley Correctional Center</u> DOCKET NO. 2014-1402-MAPS (2/24/2015)
<u>PRIMARY ISSUES:</u>	Whether Respondent proved the charges against Grievant, and whether Grievant demonstrated that the punishment imposed was clearly excessive.
<u>SUMMARY:</u>	Grievant was suspended for five days without pay for confronting and screaming at an inmate in an aggressive manner, using profanity toward the inmate, and making inappropriate comments to another inmate. Respondent demonstrated that Grievant's aggressive behavior was non-professional and inappropriate, and created a dangerous situation.

<u>KEYWORDS:</u>	Leave Abuse; Unauthorized Leave; Past Work Record; Job Abandonment; Abuse of Discretion
<u>CASE STYLE:</u>	<u>Wallace v. Division of Highways</u> DOCKET NO. 2014-1703-DOT (2/9/2015)
<u>PRIMARY ISSUES:</u>	Whether Respondent established that Grievant had a history of leave abuse, which warranted suspension and termination.
<u>SUMMARY:</u>	Grievant was terminated for a pattern of leave abuse, and job abandonment. Grievant had a history of leave abuse, and had received reprimands and a suspension. Despite attempts at correcting this conduct, Grievant continued a pattern of leave abuse and failed to report to work all together. Respondent met its burden of proof and demonstrated that Grievant was terminated for good cause. This grievance is DENIED.

KEYWORDS: Untimely; Timelines; Fifteen Working Days; Advisory Opinions
CASE STYLE: Cunningham v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2014-1081-DHHR (2/3/2015)
PRIMARY ISSUES: Whether this grievance was timely filed at level one.
SUMMARY: Grievant, Ellen Cunningham, is employed by Respondent, Department of Health and Human Resources, at William R. Sharpe, Jr. Hospital. Respondent proved in its November 3, 2014, Motion to Dismiss that this grievance was not timely filed, and Grievant has not offered any response to the Motion. Moreover, the Grievance Board does not issue advisory opinions. Accordingly, this Grievance must be DISMISSED.

KEYWORDS: Jurisdiction; Employer; Employee
CASE STYLE: Smith v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital
DOCKET NO. 2015-0693-DHHR (2/2/2015)
PRIMARY ISSUES: Whether Grievant was an employee of Respondent.
SUMMARY: Grievant, Johnnie Smith, filed a Level Three grievance against the Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital on December 12, 2014. On January 2, 2015, Respondent, by counsel, requested, that this grievance be dismissed because Grievant is not an employee of Respondent. The grievance states a claim upon which relief cannot be granted. This grievance is DISMISSED.

KEYWORDS: Suspension; Investigation; Verbal Abuse; Motion to Dismiss; Relief; Moot; Advisory Opinion
CASE STYLE: Lawson v. Department of Health and Human Resources/Lakin Hospital
DOCKET NO. 2015-0448-DHHR (2/10/2015)
PRIMARY ISSUES: Whether Grievant failed to state a claim upon which relief can be granted. Whether this grievance is moot.
SUMMARY: Grievant, Teresa Lawson, is employed by Respondent, Department of Health and Human Resources, at Lakin Hospital. Respondent proved in its December 16, 2014, Motion to Dismiss that this grievance is moot, and Grievant has not offered any response to the Motion. Accordingly, this Grievance must be DISMISSED.

KEYWORDS: Resignation; Dismissal; Burden of Proof; Credibility; Doctor's Appointment; Rescind Resignation; 'Tort-Like' Damages; Reinstatement; Reprisal

CASE STYLE: Hess v. Division of Corrections/Mount Olive Correctional Complex
DOCKET NO. 2015-0080-MAPS (2/6/2015)

PRIMARY ISSUES: Whether Grievant proved it is more likely than not that he did not resign. Whether Grievant has the right to rescind his resignation.

SUMMARY: Grievant was previously employed by Respondent as a Correctional Officer III. Following an incident and outburst by Grievant, Respondent determined Grievant had resigned although Grievant denied resigning, and processed his separation from employment as a resignation. Grievant proved it is more likely than not that he did not resign. Even if Grievant had resigned, he rescinded his resignation. Grievant is entitled to reinstatement, back pay, interest on the back pay, and restoration of leave and benefits. Grievant's request for other money damages is unavailable. Accordingly, the grievance is granted.

KEYWORDS: Fair Labor Standards Act; FLSA; Overtime Pay; Classification; Non-Exempt; Executive Exemption; Supervision

CASE STYLE: Bartlett v. Division of Highways
DOCKET NO. 2014-0565-DOT (2/3/2015)

PRIMARY ISSUES: Whether Grievant falls within the administrative and executive exemption of the Federal Fair Labor Standards Act for overtime purposes.

SUMMARY: After a review of employees in Grievant's classification by Respondent, in October 2013, Grievant's overtime classification status was changed from non-exempt to exempt, based on a determination that Grievant's duties fit within the administrative and executive exemption of the Fair Labor Standards Act. Because Grievant no longer supervises at least two employees, he does not fit within the definitions in this exemption, and should be classified as non-exempt for overtime purposes.