

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in May 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

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- KEYWORDS:** TERMINATION; PERFORMANCE IMPROVEMENT PLAN; INSUBORDINATION; DISCRIMINATION; FAVORITISM; HARASSMENT; MITIGATION; NEGLIGENCE OF DUTY; EVALUATION; CREDIBILITY
- CASE STYLE:** WHETSTONE v. SOUTH BRANCH CAREER AND TECHNICAL CENTER AND DEPARTMENT OF EDUCATION
DOCKET NO. 2009-1817-CONS (5/14/2012)
- PRIMARY ISSUES:** Whether Grievant's termination was for good cause and whether he was the victim of discrimination, favoritism and harassment.
- SUMMARY:** Grievant was the director of a multi-county career and technical center. Grievant challenges the termination of his employment, alleging the action was wrongful and malicious. The grounds for discharge were identified as insubordination, willful neglect of duty, incompetence, and failure to comply with the plan of improvement/action. Respondents bear the burden of proof in proving Grievant's termination was appropriate. The burden of proof is on Grievant to establish the necessary elements of several ancillary grievances filed challenging numerous conditions of his employment. The terminology used and personnel discussed throughout the eight days of hearing at Level 3 was extensive. Respondents established facts and deeds of relevance in the circumstances of this matter. Respondents established, by a preponderance of the evidence, that their actions were permissible and lawful. Respondents established that Grievant was insubordinate, willfully neglected to perform tasks assigned to him, and failed to demonstrate improvement in operating the South Branch Career and Technical Center. Grievant did not establish Respondents' disciplinary action was unlawful, arbitrary and/or capricious. Respondents demonstrated good cause for termination of Grievant's employment. Accordingly, this grievance is DENIED.

TOPICAL INDEX
HIGHER EDUCATION EMPLOYEES

KEYWORDS: TERMINATION; RACIAL SLURS; HEARSAY; CREDIBILITY; DISCRIMINATION; TESTIMONY

CASE STYLE: SIMPSON v. WEST VIRGINIA UNIVERSITY
DOCKET NO. 2011-1326-WVU (5/3/2012)

PRIMARY ISSUES: Whether Respondent had good cause to terminate Grievant's employment based on hearsay evidence.

SUMMARY: Grievant's employment was terminated by Respondent based on allegations that Grievant had made racial comments at the workplace to an African American who was employed as a temporary worker. Respondent chose not to present as witnesses those who had reported they had heard the comments, or the former employee to whom the comments were allegedly directed, relying instead on the hearsay report of the person who investigated the matter, and the written statements of the alleged victim and other employees, which were not given under oath. These statements are hearsay and cannot be given any weight under the circumstances presented. Accordingly, this grievance is GRANTED.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: WRITTEN WARNING; HARASSMENT; RELIEF;
INSUBORDINATION; ADVISORY OPINION; WHOLLY
UNAVAILABLE

CASE STYLE: LACY v. KANAWHA COUNTY BOARD OF EDUCATION
DOCKET NO. 2011-1690-KANED (5/2/2012)

PRIMARY ISSUES: Whether the Grievance Board has the authority to grant Grievant the relief he is seeking and whether Grievant was being harassed.

SUMMARY: Grievant challenged a “written warning” he received and alleged that he was being harassed by his supervisor. Respondent argued that the “written warning” imposed on Grievant was appropriate, and denied the allegations of harassment. With respect to his challenge to the “written warning,” Grievant failed to request any relief that the Grievance Board has the authority to grant. Further, Grievant failed to prove his harassment claim by a preponderance of the evidence. Therefore, the portion of this grievance challenging the “written warning” is DISMISSED, and the remaining portion of this grievance is DENIED.

TOPICAL INDEX
STATE EMPLOYEES

KEYWORDS: ABUSE; NEGLECT; CERTIFIED NURSE AIDES; NURSE AIDE ABUSE REGISTRY; FAILURE TO REPORT OBSERVED, SUSPECTED ABUSE OR NEGLECT

CASE STYLE: WILLIAMS v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/LAKIN HOSPITAL
DOCKET NO. 2011-1720-DHHR (5/10/2012)

PRIMARY ISSUES: Whether Respondent proved that Grievant failed to immediately report suspected neglect of a resident to her supervisor.

SUMMARY: While testifying in a separate grievance hearing, Grievant stated that she believed that the staffing level at the Hospital led to occasional resident neglect. Grievant is required to immediately report suspected cases of neglect. After an investigation Respondent suspended Grievant for failing to immediately report what she believed to be neglect of a resident.

Grievant argues that she had told her supervisors on several occasions that she was having difficulty in providing care for the residents' needs when she was scheduled to work alone. Grievant admits that she didn't use the specific word "neglect" when she reported these problems to her supervisors but alleges that she made them fully aware of the issues and her concerns for resident care. Finally, Grievant alleges that the suspension was actually a reprisal against her for participating in the prior grievance proceeding.

Grievant made her supervisors aware of the problems that she believed constituted resident neglect. Consequently, Respondent failed to prove the charges for her suspension. Grievance is GRANTED.

KEYWORDS: ADVISORY OPINION; CAUSE OF ACTION; RELIEF; WHOLLY UNAVAILABLE

CASE STYLE: ADKINS v. DIVISION OF HIGHWAYS
DOCKET NO. 2012-0259-DOT (5/25/2012)

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

SUMMARY: This grievance presents no claim upon which relief can be granted and a remedy wholly unavailable is requested.

KEYWORDS: CLASSIFICATION; PAY GRADE; SALARY; DISCRIMINATION; FAVORITISM; SIMILARLY SITUATED; QUALIFICATIONS; EQUAL PAY; INTERNAL EQUITY; REINSTATEMENT

CASE STYLE: CORLEY v. WORKFORCE WEST VIRGINIA

DOCKET NO. 2011-1589-DOC (5/15/2012)

PRIMARY ISSUES: Whether Respondent violated any statute, rule, policy or procedure when it hired an employee at a higher salary than Grievant's.

SUMMARY: Grievant has been working for Respondent for 15 years, and her classification is in pay grade 14. Respondent brought in a new employee as a reinstatement, in a pay grade 12 position, at a salary higher than Grievant's. The new employee had 28 years of service prior to her break in service, had two Masters' Degrees, and had served as Director of another state agency at one time. The salary of the new employee was higher than the salary requested by those making the hiring decision. Grievant did not demonstrate a violation of any law, rule, regulation, policy or procedure, or that she was otherwise entitled to the relief requested. Accordingly, this grievance is DENIED.

KEYWORDS: DISCIPLINE, DISMISSAL, INSUBORDINATION, ANNUAL LEAVE.

CASE STYLE: WALLACE v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR PUBLIC HEALTH

DOCKET NO. 2011-1868-DHHR (5/24/2012)

PRIMARY ISSUES: Whether Grievant committed insubordination by taking annual leave after she had been directed not to because she had no accumulated leave.

SUMMARY: Grievant was dismissed for insubordination after she took annual leave when she had no leave accrued and was directed not to. Grievant notes that she has never been disciplined previously and believes that termination of her employment is too harsh. Respondent points out that Grievant was made aware of the fact that she did not have accumulated leave to cover her vacation days and was told that her leave was not approved. Grievant's supervisor told her that she would be disciplined if she took the days and Grievant took the vacation days anyway. Grievant willfully violated a lawful directive. Under these circumstances she left her employer with little choice but to terminate her employment. Grievance DENIED.

KEYWORDS: DISCRIMINATION; EQUAL PAY; PROMOTION;
RECLASSIFICATION; PAY INCREASES

CASE STYLE: CALDWELL, ET AL. v. DIVISION OF HIGHWAYS
DOCKET NO. 2011-1193-CONS (5/31/2012)

PRIMARY ISSUES: Whether Respondent discriminated against Grievants by granting pay increases to newly promoted Transportation Crew Supervisor 1s, when Grievants did not receive pay increases when they were placed in this position, and by paying the newly promoted employees more than Grievants, even though they hold the same job classification.

SUMMARY: Grievants are employed by Respondent DOH as Transportation Supervisor 1s, which is a pay grade 12 salary. Grievants became Transportation Supervisor 1s through reclassification in 2007. Grievants did not receive pay increases when they were reclassified because the salaries they were earning before the reclassification fell within the pay range for their new positions. On February 1, 2011, two other DOH employees were promoted to the position of Transportation Supervisor 1. As a result of this promotion, those two employees received 15% pay increases. Thus, the two newly promoted workers are now paid more than Grievants, even though Grievants have been in the Transportation Supervisor 1 position for years, and did not receive raises when they were placed into the same job classification. As such, Grievants claim Respondent has discriminated against them. Respondent denies Grievants' allegations and asserts it followed the applicable rules and policies for reclassification and promotion. Grievants did not demonstrate by a preponderance of the evidence that Respondent discriminated against them. Therefore, this grievance is DENIED.

KEYWORDS: DISMISSAL ORDER; MOTION TO DISMISS; MOOT; ADVISORY OPINION; CONTROVERSY

CASE STYLE: DONOHUE, ET AL. v. DIVISION OF HIGHWAYS

DOCKET NO. 2010-1590-CONS (5/24/2012)

PRIMARY ISSUES: Whether this grievance is moot because Grievant prevailed in part at level one and did not grieve their second non-selection.

SUMMARY: Grievants filed grievances challenging their non-selection for a position. At Level One, the selection process was found to be arbitrary and capricious. Therefore, Grievants prevailed, in part, at Level One. Respondent was ordered to repost the position and to go through the selection process again. Respondent complied with that order and a new selection was made. However, neither of the Grievants was selected for the position. Grievants did not appeal their second non-selection. Because the relief ordered at Level One was implemented, and as Grievants failed to appeal their second non-selection, no live controversy exists in this matter. Therefore, this grievance is moot. Accordingly, Respondent's Motion to Dismiss should be granted and this grievance, DISMISSED.

KEYWORDS: EXTRA PAY; EIGHT HOUR WORK DAY; EARLY MEETINGS; CREW ASSIGNMENT MEETINGS

CASE STYLE: HILLBERRY, ET AL. v. DIVISION OF HIGHWAYS

DOCKET NO. 2010-1568-CONS (5/25/2012)

PRIMARY ISSUES: Whether or not Grievants are entitled to extra pay for reporting to work ten minutes early for crew leader meetings prior to the beginning of the general employees shift for more than two years.

SUMMARY: Grievants allege that they worked an extra ten minutes every day for the past two years as a result of being directed to report to work at 6:50 a.m. Grievants failed to meet their burden of proof and demonstrate that they in fact worked ten minutes more per day over that period. The grievance is denied.

KEYWORDS: MANDATORY OVERTIME; ACCOMMODATION; TERMINATE; MEDICAL CONDITION; RESTRICTIONS; AMERICANS WITH DISABILITIES ACT OF 1990; DISABILITY; REASONABLE ACCOMMODATION

CASE STYLE: MARTIN v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/JACKIE WITHROW HOSPITAL

DOCKET NO. 2011-1590-DHHR (5/18/2012)

PRIMARY ISSUES: Whether Respondent proved Grievant's termination was for good cause. Whether it was a reasonable accommodation for Grievant's disability to exclude her from mandatory overtime.

SUMMARY: Respondent terminated Grievant due to her inability to work mandatory overtime. Respondent asserts that essential kitchen operations in the dietary department became dysfunctional due to Food Service Workers (FSWs) receiving accommodations exempting them from mandatory overtime.

Beginning in 2008, Grievant provided Respondent with Physician's Statement forms stating that she has a medical condition which restricted her from working more than 8 hours per day and 40 hours per week. Grievant still performed the FSW duties and responsibilities during the 40 hour workweek. Respondent and Grievant entered into an Accommodation Agreement in August 2008 exempting Grievant from mandatory overtime. Grievant received this accommodation for approximately 4 years.

Respondent contends that it followed West Virginia Division of Personnel (DOP) Administrative Rule 14.4(h) when it decided not to continue the Accommodation Agreement and ultimately terminate Grievant. As Grievant was not returning to work following sick leave or a leave of absence, Respondent incorrectly applied the WV DOP Administrative Rule. Additionally, Respondent failed to demonstrate that Grievant cannot perform the essential duties of her job.

Grievant is able to perform her duties and responsibilities as a Food Service Worker for a 40 hour workweek. She has provided Physician's Statements restricting her from working overtime due to a medical condition. Respondent failed to demonstrate the termination was for good cause. Accordingly, this grievance is GRANTED.

KEYWORDS: MANDATORY TIME LIMITS; TERMINATION; JOB ABANDONMENT; MOTION TO DISMISS; UNEQUIVOCALLY NOTIFIED

CASE STYLE: HICKMAN v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR PUBLIC HEALTH

DOCKET NO. 2012-0827-DHHR (5/24/2012)

PRIMARY ISSUES: Whether Grievance was filed within the statutory time period.

SUMMARY: Respondent moved for the grievance to be dismissed because it was filed outside the mandatory time period for filing a grievance. Respondent proved that the grievance was filed months after the incident which gave rise to the grievance. Grievant was unable to provide a legitimated reason for excusing the late filing. Grievance DISMISSED.

KEYWORDS: MEDICAL TREATMENT; CLOCK OUT; ON-THE-JOB INJURY; PAY; LOST LEAVE

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

DOCKET NO. 2011-0983-DHHR (5/30/2012)

PRIMARY ISSUES: Whether or not Grievant should have been paid for the time she sought medical treatment for a work-related injury.

SUMMARY: Grievant was injured by a patient while performing her duties as a Health Service Assistant. Grievant sought medical attention at a local hospital. Grievant was clocked-out on that day for one hour and fifty-seven minutes. Grievant did not request sick leave for the time period. Grievant did not meet her burden of proof and demonstrate that the Respondent violated, misapplied or misinterpreted any statutes, policies, rules, or regulations in this matter when it requested that she clock out during the time she was away from work and being treated for her injury. Grievance is Denied.

KEYWORDS: MONEY SAVING SUGGESTION; EMPLOYEE SUGGESTION AWARD PROGRAM; DISMISSED AS UNTIMELY; GRIEVANT NOT EMPLOYED BY; JURISDICTION OF THE PUBLIC EMPLOYEES GRIEVANCE BOARD; TIME PERIOD FOR FILING GRIEVANCES

CASE STYLE: MONROE v. REAL ESTATE DIVISION AND LEGISLATIVE SERVICES

DOCKET NO. 2012-0873-DOA (5/14/2012)

PRIMARY ISSUES: Whether Grievant should receive a monetary award from the Employee Suggestion Award Program and whether Grievance should be dismissed because it was untimely filed.

SUMMARY: Grievant sought to recover an employee suggestion award for a money saving suggestion he submitted. Grievant is not employed by the entity that is responsible for granting such awards so the Grievance Board had no jurisdiction to hear his claim. Additionally, the grievance was not timely filed and must be DISMISSED.

KEYWORDS: SELECTION; REPRISAL; INTERNAL AND EXTERNAL APPLICANTS; COMPETITIVE REGISTER; RANK; FLAWED; QUALIFIED

CASE STYLE: PARSONS v. GENERAL SERVICES DIVISION

DOCKET NO. 2011-1621-DOA (5/18/2012)

PRIMARY ISSUES: Whether Respondent's selection for the position of Deputy Director was flawed, or arbitrary and capricious.

SUMMARY: Grievant applied for the position of Deputy Director for the General Services Division, but was not selected for the position. Grievant alleged numerous flaws in the hiring process and that he was the most qualified candidate for the position. Grievant also alleged his non-selection was an act of reprisal. Respondent asserted that all applicable laws and rules were followed in the hiring process and that the most qualified candidate was selected for the position. Grievant failed to prove his claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

KEYWORDS: VERBAL RESIGNATION; VOLUNTARILY RESIGNED AND ACCEPTANCE OF RESIGNATION; ALLEGED TERMINATION OF EMPLOYMENT FOR MISUSE OF INTERNET RESOURCES; RESIGN RATHER THAN BE DISMISSED; RESCIND THE RESIGNATION; BOUND BY VERBAL RESIGNATION; EMPLOYEE

CASE STYLE: WALTERS v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/WELCH COMMUNITY HOSPITAL
DOCKET NO. 2011-0965-DHHR (5/24/2012)

PRIMARY ISSUES: Whether Grievant is bound by his verbal resignation.

SUMMARY: Grievant contests the alleged termination of his employment for misuse of internet resources provided at the Hospital. Respondent argues that Grievant voluntarily resigned and his resignation was accepted by Respondent, prior to filing a grievance and therefore the grievance must be dismissed. Respondent did not take any action to dismiss Grievant after accepting his resignation. Grievant voluntarily resigned his employment and Grievant's resignation was accepted by Respondent prior to the filing of the grievance.