

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in January 2014

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

HIGHER EDUCATION EMPLOYEES

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- KEYWORDS:** Selection; Vacancy; Denied Interview; Minimum Qualifications; Supervisory Experience; Retaliation; Reprisal; Arbitrary and Capricious
- CASE STYLE:** Frost v. Bluefield State College and Brian Christopher Bales, Intervenor
DOCKET NO. 2011-0895-BSC (1/29/2014)
- PRIMARY ISSUES:** Whether Grievant established that Respondent's articulated reasons to justify its refusal to select him for an interview in regard to his application to fill a vacancy was pretext for prohibited retaliation. Whether Respondent's decision regarding which applicants to interview for the posted position was based upon legitimate reasons relating to the qualifications of the applicants, and was not arbitrary and capricious.
- SUMMARY:** Grievant is employed as a Counselor II by Respondent BSC. He has been employed by BSC for approximately 18 years, with the first 6 years in the Physical Plant as a Painter, Trades Worker and Trades Worker Lead. Grievant has filed several grievances during his tenure at BSC, including a grievance challenging BSC's failure or refusal to post the position of Director of Physical Plant when the previous Director, Clyde Harrison retired, and returned in a part-time capacity. After his grievance was successfully prosecuted through the Circuit Courts of Kanawha and Mercer Counties, and an Administrative Law Judge with this Grievance Board ordered BSC to post the position, BSC Director of Physical Plant position was advertised, and Grievant was one of 14 applicants who met the minimum qualifications for the position.
A 5-member Hiring Committee was nominated and appointed to consider the applications and make a recommendation on the person to be hired. The Committee met and reviewed the applications, narrowing the field to 4 applicants to be given personal interviews. Grievant was not included as one of the 4 interviewees. The successful applicant, Intervenor Brian Bales, was then employed as a Facilities Manager at a 56-bed acute care hospital. The former BSC Director of Physical Plant was also interviewed but not selected. The other applicants receiving interviews included a Town Manager who had previously served as the Town Engineer and Public Works Director, and an individual who had 8 years of recent experience as the Facilities Management Supervisor for a college campus. Despite a painstaking review of the hiring and selection process, there was insufficient credible evidence to demonstrate that the

exclusion of Grievant from the pool of applicants receiving an interview was the result of retaliation for Grievant's protected activity in participating in the grievance process. BSC established that the Hiring Committee wanted a Director with experience managing an operation comparable to the Physical Plant. Each of the applicants selected for interview met those general qualifications while Grievant and other similarly situated applicants did not. There was no credible evidence that the selection process was manipulated to facilitate or establish a merely pretextual basis to exclude Grievant from consideration. Accordingly, this grievance must be denied.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Inaccurate Documentation; Work Performance; Inappropriate Remarks; Relief; Moot; Advisory Opinions

CASE STYLE: DeLauney v. Jefferson County Board of Education
DOCKET NO. 2012-0771-JefED (1/29/2014)

PRIMARY ISSUES: Whether this grievance is moot since relief has been provided to Grievant.

SUMMARY: Grievant argues that she was subjected to irritating and hurtful remarks and actions that rendered her work environment hostile. Grievant also complains that the temperature of her office was always cold. The source of the harassment has removed himself from the school. Grievant also acknowledged at level three that the temperature problem appears to have come under control. The undersigned agrees with Respondent's counsel that the issues of this grievance are now moot. Any relief that could be granted in regard to the prior assistant principle, toward whom many of Grievant's allegations were directed, would be moot in that those employees no longer work in the same location. The temperature issues have been addressed in a number of ways and appear to no longer be a problem.

KEYWORDS: Employee Evaluation; Harassment; Discrimination; Negotiated Agreements; Abandoned Grievances; Failure to Pursue

CASE STYLE: Graham v. Wetzel County Board of Education
DOCKET NO. 2011-1886-CONS (1/29/2014)

PRIMARY ISSUES: Whether Grievant has abandoned his grievances.

SUMMARY: Respondent moves the Grievance Board to dismiss the grievances as the Grievant appears to have abandoned his grievances. The limited record of this grievance does document that, at the lower level, agreements were made to settle and/or withdraw the grievances in this case. Grievant failed to execute the agreements and did not file an appeal to the next level of the grievance procedure. The undersigned gave Grievant and his representative ample time to respond to this motion, and provide a status update. None was forthcoming.

KEYWORDS: Job Duties; Valid Driver's License; Opportunity to Improve; Discrimination; DUI; Restricted License; Device

CASE STYLE: Casto v. Wood County Board of Education
DOCKET NO. 2014-0274-WooED (1/24/2014)

PRIMARY ISSUES: Whether Respondent proved that a valid driver's license is required for Grievant's job and whether termination Grievant's employment was justified.

SUMMARY: Respondent dismissed Grievant from employment because his driver's license was allegedly revoked. Respondent argues that HVAC Mechanics are required to hold a valid driver's license as a condition of employment. They note that the mechanics are expected to travel to various facilities throughout the county to perform repairs, and they must drive trucks that are loaded with the tools and equipment that are necessary to perform these repairs. Grievant argues that he holds a "provisional" driver's license which allows him to drive any vehicle that has a "blow-and-go" mechanism attached. This attachment allows him to operate the vehicle once the attachment measures his blood alcohol content, and finds it acceptable. Grievant believes the Board could attach the device to their truck, or they could provide another employee with a license to accompany him on repairs, thus, allowing him to perform his job. Respondent proved that it was necessary for HVAC Mechanics to hold a valid driver's license to perform their jobs, and Grievant did not hold a license that allowed him to operate Respondent's vehicles. Accordingly, the grievance is DENIED.

KEYWORDS: Paid Leave; Family Medical Leave Act; Long Term Leave of Absence; Substitute School Service Personnel

CASE STYLE: Stalnaker v. Gilmer County Board of Education

DOCKET NO. 2013-0791-GILED (1/16/2014)

PRIMARY ISSUES: Whether Grievant established that she should have been afforded regular employment status.

SUMMARY: Grievant was employed by Respondent as a substitute cook and teacher's aide at the time the grievance was filed. On August 24, 2012, Grievant began working in a posted half-time long-term leave of absence cook position at Sand Fork Elementary School. She worked fifteen days in the Sand Fork Position. On September 14, 2012, Grievant began working in a posted full-time long-term leave of absence cook position at Glenville Elementary School. She worked nineteen days in the Glenville Elementary position. In October of 2012, Grievant was granted a three-month unpaid leave to care for her gravely ill father-in-law. Upon her return, Grievant was informed by Superintendent Ronald Blankenship that she would not be returned to the Glenville Elementary leave of absence position, but would instead be returned to the substitute cook and substitute teacher's aide rotations. Because Grievant did not serve in any posted long-term leave of absence position for twenty or more working days, she was not entitled to any form of regular employment status. Grievant did not meet her burden of proof and establish that she was entitled to the relief which she requested.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Employment Discrimination; Equal Pay for Equal Work; Salary Increase; Salaries Differences; Internal Pay Equity; Time Limits; Untimely
<u>CASE STYLE:</u>	<u>Anderson v. Division of Rehabilitation Services/ AND</u> DOCKET NO. 2013-1651-DEA (1/13/2014)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved that the difference between her salary and the salary of the new employees constituted unlawful discrimination or was arbitrary and capricious.
<u>SUMMARY:</u>	Grievant, who is employed in the classification of a Rehabilitation Services Associate, filed a grievance because others have been hired, in the same classification, by Respondent, a state agency, years after she was, at a higher rate of pay. Grievant alleges gender discrimination. Grievant seeks to have her pay increased to the same annual salary as the new employees, with back pay retroactively to the date the new employees were hired. The annual salaries received by Grievant and the new employees are within pay grade 9 which is the appropriate pay grade for their classification. A state employee's salary is the result of many factors. Factors taken into consideration by an agency when hiring an individual includes market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds or other special identifiable criteria that are reasonable. It is a well-discussed concept that state employees in the same classification need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification (see Largent, cite infra). In the instant case, Grievant, and the two male employees she references, are all compensated within the salary range of their position's pay grade. Grievant did not establish gender discrimination, or a violation of equal pay for equal work. The applicable requirement is that all classified employees must be compensated within their respective pay grade.

KEYWORDS: Excessive Absenteeism; Attendance; Performance Appraisal; Probationary Employee; Unscheduled Leave; Leave Improvement Plan

CASE STYLE: Johnson v. Department of Health and Human Resources/Lakin Hospital

DOCKET NO. 2012-1444-DHHR (1/10/2014)

PRIMARY ISSUES: Whether Grievant demonstrated by a preponderance of the evidence that her services for Respondent were satisfactory.

SUMMARY: Grievant was employed at Lakin Hospital as a probationary Health Service Worker. Although Grievant performed her assigned duties in a satisfactory manner when she was present for work, she experienced attendance problems throughout her six-month probationary period. Grievant's attendance problems were primarily related to her personal health and the health of her immediate family members. However, Grievant's attendance did not improve after repeated counseling and warnings, leading her employer to conclude that she would not be a dependable and reliable employee in a hospital setting where those traits are inherently important. Accordingly, Grievant failed to establish that her performance was satisfactory, given her documented attendance issues. Moreover, Respondent's decision to terminate Grievant's probationary employment was not arbitrary and capricious, nor an abuse of the substantial discretion extended to the employer under the Division of Personnel's Rules and this Grievance Board's precedents.

KEYWORDS: Job Abandonment; Termination; Good Cause; Leave

CASE STYLE: Schwarz v. Department of Health and Human Resources/Bureau for Children and Families
DOCKET NO. 2013-1090-DHHR (1/21/2014)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence that Grievant abandoned her job.

SUMMARY: Grievant was employed by Respondent as an Economic Services Worker. Grievant applied for and received Family Medical Leave Act (FMLA) leave, first to care for her daughter, then for her own condition. When her FMLA leave was exhausted, Grievant applied for, and received, a Medical Leave of Absence (MLOA) for six months. Grievant then exhausted her MLOA. At the expiration of her MLOA, Grievant had no other available leave. At the suggestion of her supervisor, she applied for a one-year Personal Leave of Absence (PLOA). A statement from Grievant's doctor that was attached to her PLOA request form indicated that her condition would permanently prevent her from returning to work. Respondent denied Grievant's request for PLOA based upon the needs of the agency. After Grievant had been off work without any leave to cover her absence, Respondent terminated Grievant's employment for job abandonment. Respondent asserts that it was within its rights to terminate Grievant as she had no leave to cover her absence and Grievant did not return to work. Grievant argues that she was terminated without good cause, that she had not exhausted the FMLA available to her, and that Respondent violated her due process rights. Respondent proved its case by a preponderance of the evidence. Therefore, this grievance is DENIED.

KEYWORDS: Default; Time Limit; Level One Decision; Excusable Neglect; Justified Delay; Workload; Unexpected Event

CASE STYLE: Vance v. Division of Juvenile Services/Kenneth "Honey" Rubenstein Center

DOCKET NO. 2014-0024-MAPSDEF (1/31/2014)

PRIMARY ISSUES: Whether Grievant demonstrated that a default occurred, and whether Respondent demonstrated it was justifiably delayed from timely issuance of the level one decision.

SUMMARY: Grievant demonstrated that a default occurred when the level one decision was not issued within 15 days of the level one hearing. Respondent argued it was justifiably delayed from issuing the level one decision within the statutory timelines because a lot was going on at the time, with a large number of employees being transferred to the Division of Corrections and juvenile residents being moved, and because it was waiting on a response from outside agencies on the legal issue raised by Grievant, both of which, Respondent asserted, were events outside its control. A large workload is not an excuse for failure to timely respond to a grievance. In addition, it was Respondent's choice to delay issuing a decision while it waited on a response from an outside agency on the legal issue involved. Respondent did not demonstrate that its failure to act within the statutory timelines was "the result of an unexpected event, or events that was outside of the defaulter's control."

KEYWORDS: Classification Specification; Position Description Form; Reclassification; Job Duties; Job Audit; Discretionary Pay Increase; Arbitrary and Capricious; Reallocation; Reclassification

CASE STYLE: Santone v. Department of Health and Human Resources and Division of Personnel

DOCKET NO. 2012-1265-DHHR (1/31/2014)

PRIMARY ISSUES: Whether Grievant proved that the classification of her position by DOP as ASM 3 was clearly wrong or arbitrary and capricious.

SUMMARY: Grievant is the Director of the Office of Electronic Benefits Transfer at the West Virginia Department of Health and Human Resources, classified as a Administrative Services Manager 3. Additional duties were subsequently added to her position. Grievant seeks to have her position reallocated from the Administrative Services Manager 3 to the Administrative Services Manager 4 classification. The Division of Personnel is charged with making classification determinations. After an on-site audit and review of other pertinent documents related to Grievant's position, the Division of Personnel determined that, though Grievant had taken on additional responsibilities and duties, her position was best classified as a Administrative Services Manager 3 because, inter alia, her duties "did not create a new function within the business operations" of the office. Grievant did not prove that her position should be reallocated to the classification of Administrative Services Manager 4.

KEYWORDS: Permanent Employee; Hiring Procedures; Grievance Procedure

CASE STYLE: Curtis v. Jefferson County Health Department

DOCKET NO. 2013-2151-JefCH (1/22/2014)

PRIMARY ISSUES: Whether Grievant was an employee, for purposes of the grievance procedure, and could file a grievance.

SUMMARY: Respondent did not follow the procedures established by the Division of Personnel when it hired Grievant in 2010. When Respondent was told by the Division of Personnel in 2013 that the proper procedures had not been followed and that Grievant was not considered to be an employee because of this, Respondent posted Grievant's position, requested a register, and interviewed the applicants, according to the Division of Personnel's Rules. Grievant was not the successful applicant, and her employment relationship with Respondent was terminated. Because the proper procedure was not followed in hiring Grievant, she was not an employee as that term is defined by the grievance procedure, and could not file a grievance.

KEYWORDS: Policy; Minimum Requirements; Selection Decision; Arbitrary and Capricious

CASE STYLE: Farley, et al. v. Department of Health and Human Resources/Jackie Withrow Hospital
DOCKET NO. 2012-1161-CONS (1/7/2014)

PRIMARY ISSUES: Whether Grievants proved that Respondent's selection decision was arbitrary and capricious?

SUMMARY: Grievants were not selected for a Recreation Specialist position. There were multiple errors in the selection process and Respondent could not explain how the successful candidate was the best fit for the job. The selection decision was arbitrary and capricious. Grievants did not request reinstatement, but only that the position be reposted and a selection made in accordance with Respondent's policy. Accordingly, the grievance is granted.

KEYWORDS: Progressive Discipline; Attendance; Family and Medical Leave Act; Attendance Improvement Plan; Reprisal

CASE STYLE: Miser v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital
DOCKET NO. 2013-1696-DHHR (1/15/2014)

PRIMARY ISSUES: Whether Respondent proved that it had good cause to dismiss Grievant when his absenteeism violated policy and he was given ample opportunity to apply for leave or correct his behavior?
Whether Grievant proved that his dismissal was actually reprisal?

SUMMARY: Respondent proved by a preponderance of the evidence that Grievant's absenteeism violated policy and that he was given ample opportunity to correct his behavior or to apply for leave and failed to do so. Grievant made a prima facie case of reprisal; however, Respondent provided sufficient evidence to rebut the presumption by showing legitimate, nonretaliatory reasons for the dismissal. Grievant could not prove that Respondent's reasons were pretextual. Accordingly, the grievance is denied.

KEYWORDS: Salary Increase; Retention; Pay Plan Implementation Policy; State Pay Plan; Competitive Salary Offer; Authority to Grant Salary Adjustment; Ultra Vires

CASE STYLE: Samples, Jr. v. Department of Health and Human Resources/Bureau for Children and Families and Division of Personnel
DOCKET NO. 2013-1541-DHHR (1/6/2014)

PRIMARY ISSUES: Whether Grievant qualified for the discretionary retention salary increase provided by the Pay Plan Implementation Policy.

SUMMARY: Grievant was led to believe that he would receive a 10% salary increase to stay at the BCF rather than accept a job offer with another state agency. Unfortunately, the supervisor who indicated that Grievant would receive a salary increase was not authorized to grant the increase. Additionally, Grievant did not qualify for the discretionary retention salary increase provided by the Pat Plan Implementation Policy. Accordingly, the grievance must be DENIED.