

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SYNOPSIS REPORT

Decisions Issued in February, 2019

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

<u>KEYWORDS:</u>	Motion to Dismiss; At-Will Employee; Termination; Substantial Public Policy
<u>CASE STYLE:</u>	<u>McCarthy v. Department of Education</u> DOCKET NO. 2019-0550-DOE (2/22/2019)
<u>PRIMARY ISSUES:</u>	Whether Grievant an at-will employee identified a claim on which relief can be granted pursuant to West Virginia Public Employees Grievance Procedure.
<u>SUMMARY:</u>	<p>The West Virginia State Board of Education moved for an Order dismissing this grievance without an evidentiary hearing on the grounds that Grievant has failed to allege or identify a substantial public policy that has been violated by the termination of her at-will employment. Grievant was employed by Respondent, WVDE, as a Secretary IIIA in the Office of Special Education. Grievant was an at-will employee, and as such could be terminated for any reason that did not violate a substantial public policy. Respondent dismissed Grievant from employment without stating any cause for terminating her at-will employment. Pursuant to relevant case law and pertinent statutes, Grievant, has failed to identify a public policy violation. Grievant failed to state a claim on which relief can be granted, because the alleged conduct she identified, if true, were not identified as substantial policies violations linked to her termination. Grievant has failed to state a claim for which relief may be granted in the West Virginia Public Employees Grievance Procedure. Accordingly, Respondent's "Motion to Dismiss" is Granted and this grievance is dismissed.</p>

TOPICAL INDEX
HIGHER EDUCATION EMPLOYEES

<u>KEYWORDS:</u>	Motion to Dismiss; Moot; Employee; Resignation; Relief
<u>CASE STYLE:</u>	<u>Dewitt v. West Virginia University</u> DOCKET NO. 2013-2262-CONS (2/15/2019)
<u>PRIMARY ISSUES:</u>	Whether this grievance is moot since Grievant is no longer employed by Respondent.
<u>SUMMARY:</u>	Grievant was previously employed by Respondent but resigned his employment. Respondent moved to dismiss the grievance as moot. As Grievant is no longer employed, his claim relating to his non-selection for a position is moot. The remainder of Grievant's claims relate to conditions of his employment, which are also moot as Grievant is no longer employed. The relief requested for some claims, which may be available in other forums, is unavailable within the grievance process. Accordingly, the grievance is dismissed.

<u>KEYWORDS:</u>	Termination; Discipline Policy and Procedure; Progressive Discipline; Discrimination
<u>CASE STYLE:</u>	<u>Hairston v. West Virginia University</u> DOCKET NO. 2017-2508-CONS (2/7/2019)
<u>PRIMARY ISSUES:</u>	Whether Respondent proved by a preponderance of the evidence that Grievant failed to maintain the standards of performance.
<u>SUMMARY:</u>	Grievant was hired on June 7, 2016, as a Program Specialist in the WVU School of Dentistry. Grievant was responsible for independently, professionally and effectively managing all dental student recruitment and graduate/postdoctoral admissions function within the School of Dentistry. The applicable policy in the instant case provides that progressive discipline be used with employees to correct deficiencies. In this case, once progressive discipline was used to no avail, Respondent was justified in exercising its discretion to terminate Grievant's employment because he continued to perform the duties of his position in an unsatisfactory manner. Grievant failed to establish that he was victim of discrimination. Accordingly, this grievance is denied.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS:

Transfer; Elementary School; Seniority; Least Senior Position; Certification; Arbitrary and Capricious

CASE STYLE:

Henderson v. Wayne County Board of Education

DOCKET NO. 2018-1108-WayED (2/7/2019)

PRIMARY ISSUES:

Whether Grievant demonstrated the decision to transfer her was arbitrary or capricious.

SUMMARY:

Grievant is employed by Respondent as a classroom teacher. Grievant filed this grievance regarding her transfer from Crum PK-8 school to Fort Gay PreK-8 School. Grievant argues Respondent has misconstrued West Virginia school law in the circumstance of this matter. Grievant proports Respondent's actions are in violation of applicable intent and reasonable prudent action. Respondent maintains the decision to transfer Grievant was not improper or an abuse of discretion in that the Grievant was the least senior of the second grade teachers, she was not certified to bump the least senior teacher in the building and she was transferred to a lateral position with no reduction in salary or benefits.

The issue(s) in dispute of the instant matter, are simple yet simultaneously convoluted. Respondent's actions were in keeping with its interpretation of what is professed to be the relevant school code [West Virginia Code ' 18A-4-7a]. The parties interpreted the application of West Virginia Code ' 18A-4-7a in this situation differently. Whether the instant situation as it pertains to this PreK-8 school verses that of a traditional elementary school warrants alternative treatment was a concern of the parties. Regrettably, the parties did not resolve this via a mutually acceptable teaching assignment. Grievant maintains she should be allowed to bump a "less" senior classroom teacher at her school, while Respondent maintains Grievant was not certified to bump "the least" senior teacher in the building thus, Grievant goes on the transfer list. Once on the county wide transfer list, Grievant is reassigned accordingly with no preference or further consideration to available classroom teaching position which Grievant is qualified to teach at the school Grievant is being up-rooted.

Grievant has the burden of proof in this matter. Grievant did not establish, by a preponderance of the evidence, that the decision to transfer her from a classroom teaching position at Crum PK-8 to an alternate teaching assignment at Fort Gay PK-8 was implausible, unreasonable or not subject to a difference of opinion. Grievant did not demonstrate the decision to transfer her was arbitrary or capricious. Grievant did not establish that Respondent's action(s) were in violation of an applicable West Virginia Code; school law or regulation. Accordingly, this grievance is DENIED.

KEYWORDS: Termination; Unprofessional Language; Inappropriate Conduct; Employee Code of Conduct; Insubordination

CASE STYLE: Masser v. Jefferson County Board of Education
DOCKET NO. 2018-1138-JefED (2/19/2019)

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

SUMMARY: Grievant was employed as a physical education teacher for Respondent at the time of his termination. The record established that Grievant's unprofessional language and inappropriate conduct violated the Employee Code of Conduct and his refusal to refrain from its use constitutes unsatisfactory performance and/or insubordination. The record is undisputed that Grievant was provided warnings, training, and a Focused Support Plan and Corrective Action Plan. Nevertheless, Grievant continued to use profanity and exhibit the same pattern of inappropriate behavior. Accordingly, the grievance is denied.

KEYWORDS: Sick Leave Bank Policy; Application; Medical Condition; Arbitrary and Capricious

CASE STYLE: Walker v. Jefferson County Board of Education
DOCKET NO. 2018-1221-JefED (2/7/2019)

PRIMARY ISSUES: Whether Grievant established that the Sick Leave Bank Committee's actions were a violation of its Policy, or arbitrary and capricious in disapproving her application.

SUMMARY: Grievant was employed by Respondent as a classroom teacher during the 2017-2018 school year. Grievant submitted a request for days of sick leave from Respondent's Sick Leave Bank. The Committee charged with reviewing and approving or disapproving these requests voted unanimously to disapprove Grievant's request. The record of this case did not support a finding that this action was in violation of the applicable policy, or an action that could be viewed as arbitrary and capricious. Accordingly, this grievance is denied.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Substitute Employee; Tool Allowance; Uniforms; Benefits; Health Insurance; Tax Penalty; Policy

CASE STYLE: Little v. Wayne County Board of Education
DOCKET NO. 2017-2212-WayED (2/25/2019)

PRIMARY ISSUES: Whether Grievant proved he was entitled to the benefits he seeks or reimbursement of the tax penalty he paid.

SUMMARY: Grievant is employed by Respondent as a substitute mechanic. Grievant grieves Respondent's failure to provide him with certain benefits arguing he is entitled to the same due to the number of days he worked as a substitute, an agreement made between Respondent and its service personnel, and state board rule. Grievant also asserted he is entitled to reimbursement of the tax penalty he suffered because Respondent failed to provide him health insurance under the Affordable Care Act. Grievant failed to prove he was entitled to the benefits he seeks or reimbursement of the tax penalty. Accordingly, the grievance is denied.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Annual Leave; Length of Service; Discrimination; Favoritism; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Thomas v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital</u> DOCKET NO. 2018-0903-DHHR (2/15/2019)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved by a preponderance of evidence that Respondent discriminated against her.
<u>SUMMARY:</u>	Grievant lost 11.3 hours of excess annual leave at the end of 2017. Grievant claims discrimination due to Respondent's failure to inform her of her leave balance in a timely manner and to provide a substitute to process leave requests in place of her absent supervisor. Grievant contends equitable estoppel should reinstate her lost leave. Respondent counters that it emailed leave balances to employees at work on November 14, 2017, and provided a substitute supervisor to process leave requests. Grievant was on extended leave so did not have access to her work email. Grievant claims she never received her balance even after her return on December 18, 2017. Grievant did not prove that Respondent had a duty to ensure that Grievant knew her leave balance without her asking or that Respondent failed to timely inform her of her annual leave balance, let alone define the requisite period of time in which it was obligated to inform her. Grievant did not prove that Respondent failed to provide her a substitute supervisor to process her leave request. Grievant did not prove that Respondent discriminated against her or failed to fulfill any duty under equitable estoppel. Accordingly, the grievance is Denied.

KEYWORDS: Resignation; State Policy; Constructive Discharge; Credibility

CASE STYLE: Benedum v. Department of Health and Human Resources/Bureau for Child Support Enforcement
DOCKET NO. 2019-0040-DHHR (2/4/2019)

PRIMARY ISSUES: Whether Grievant proved by a preponderance of evidence that Respondent coerced her resignation and that she resigned involuntarily, resulting in constructive discharge.

SUMMARY: Grievant alleges that Respondent coerced her resignation by misrepresenting state policy in telling her she would not work for the state again if she was fired but that she could work for the state by resigning. She contends that her resignation is constructive discharge and that she should be reinstated. In the alternative, Grievant alleges that she never technically resigned, but that even if she did she rescinded her resignation prior its acceptance. Grievant failed to prove that she rescinded her resignation prior to acceptance. However, Grievant proved she was constructively discharged when Respondent's misrepresentation of the state policy induced her to resign in lieu of termination. Respondent's misrepresentation created a false distinction between the future employability of state employees who are terminated verses those who resign in lieu of termination. Accordingly, the grievance is GRANTED.

KEYWORDS: Selection; Interviews; Most Qualified; Arbitrary and Capricious

CASE STYLE: Hatfield, et al. v. Department of Health and Human Resources/Bureau for Children and Families
DOCKET NO. 2018-1393-CONS (2/8/2019)

PRIMARY ISSUES: Whether Grievant proved the selection process was arbitrary and capricious and that she was the most qualified candidate.

SUMMARY: Grievant is employed by Respondent as an Economic Service Worker. Grievant was not selected for an Economic Service Supervisor position that was awarded to Intervenor. Respondent failed to follow its policy regarding hiring decisions. Respondent could not explain why Intervenor was the most qualified candidate when Grievant had more experience. Grievant proved the selection process was arbitrary and capricious. Grievant failed to prove she was the most qualified applicant but, as the selection process was arbitrary and capricious, the position must be reposted. Accordingly, the grievance is granted, in part, and denied, in part.

<u>KEYWORDS:</u>	Sexual Harassment; Hostile Work Environment; Moot; Remedy; Reprisal; Protected Activity
<u>CASE STYLE:</u>	<u>Hatfield v. Department of Health and Human Resources/Bureau for Children and Families</u> DOCKET NO. 2018-0648-DHHR (2/5/2019)
<u>PRIMARY ISSUES:</u>	Whether Grievant claims that she has been subjected to sexual harassment and a hostile workplace.
<u>SUMMARY:</u>	Grievant claims that she has been subjected to sexual harassment and a hostile workplace. Grievant also alleges that she has been subjected to reprisal as a result of filing a grievance and EEO complaint. Because of intervening events there is no longer a remedy for Grievant's sexual hostile workplace claim. Grievant proves that she has been subjected to reprisal in one specific respect. The sexual harassment claim is DISMISSED and the grievance is GRANTED in part and DENIED in part.
<u>KEYWORDS:</u>	Termination; Family Medical Leave Act; Unpaid Leave; Due Process Rights; Retaliation; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Greco v. Monongalia County Health Department</u> DOCKET NO. 2019-0373-MonCH (2/8/2019)
<u>PRIMARY ISSUES:</u>	Whether Respondent had good cause to terminate Grievant's employment.
<u>SUMMARY:</u>	Grievant contends her dismissal from employment with Respondent is arbitrary and capricious, an abuse of discretion, and in retaliation for her filing multiple grievances against Respondent. She contends that in citing conduct which occurred more than a year prior, for which she had already been disciplined, and which was addressed in a previous grievance, Respondent revealed its retaliatory motive. Respondent contends that it dismissed Grievant on the day her six months of unpaid family medical leave expired based on her disciplinary history and her physician statement. This physician statement gave a return to work date that was beyond the six-month period of unpaid leave and stated that Grievant's condition would permanently prevent her from performing her work duties. Respondent proved a proper basis to dismiss Grievant. Grievant did not prove her dismissal was arbitrary, capricious, or an abuse of discretion and did not prove that the dismissal was retaliation. Accordingly, the grievance is DENIED.

KEYWORDS: Probationary Employee; Termination; Dismissal; Unsatisfactory Work Performance; Satisfactory; Arbitrary and Capricious; Telephone; Custodian; EPA; Performance

CASE STYLE: Strickland v. West Virginia Lottery
DOCKET NO. 2019-0293-DOR (2/1/2019)

PRIMARY ISSUES: Whether Grievant proved that his work performance was satisfactory; whether Grievant proved that Respondent violated any rule in dismissing him from employment; and, whether Grievant proved that his dismissal was arbitrary and capricious.

SUMMARY: Grievant was employed as a probationary employee by Respondent. Respondent dismissed Grievant for unsatisfactory work performance. Grievant argued that his work performance was satisfactory, and that he should not have been dismissed from his employment. Grievant also alleged that the manner by which he was dismissed violated rules. Respondent denied Grievant's claims. Grievant failed to prove by a preponderance of the evidence that his work performance was satisfactory. Grievant also failed to prove by a preponderance of the evidence that Respondent violated any rule in dismissing him from employment by telephone. Therefore, the grievance is DENIED.

KEYWORDS: Demotion; Supervisory Position; Code of Conduct; Due Process; Reports; Mitigation

CASE STYLE: Roach II v. Regional Jail and Correctional Facility Authority/South Central Regional Jail
DOCKET NO. 2018-0932-MAPS (2/25/2019)

PRIMARY ISSUES: Whether Respondent had good cause to demote Grievant.

SUMMARY: Grievant, a supervisory correctional officer, was demoted from Sergeant, Correctional Officer IV, to Correctional Officer II by Respondent for failing to take appropriate action in response to an inmate escape attempt at a site outside the South Central Regional Jail. Grievant failed to take the initiative to send an additional officer and additional restraints to the site, and further failed to take any action to respond after being given specific instructions by a superior officer. Based upon a violation of Grievant's right to procedural due process, allegations that Grievant failed to timely submit notifications of an unusual event to his superiors were not sustained. Nonetheless, Respondent proved the most serious charges against Grievant, and demonstrated good cause for his demotion.

KEYWORDS:

Back Pay; Reallocation; Timeliness

CASE STYLE:

Wheeler v. Department of Environmental Protection/Division of Mining and Reclamation AND Division of Personnel

DOCKET NO. 2018-1122-DEP (2/27/2019)

PRIMARY ISSUES:

Whether Grievant is entitled to back pay.

SUMMARY:

Grievant challenged the DOP decision that she was not entitled to back pay when the position she previously held was reallocated from an ERS 1 to an ERS 2. Grievant did not have standing to file a grievance regarding the reallocation of the ERS 1 position because she was not in that position when the reallocation decision was made. Additionally, Grievant did not prove specific facts relate to when the ERS 1 might have been reallocated rendering any award of backpay as too speculative to grant.