

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SYNOPSIS REPORT

Decisions Issued in February, 2020

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

<u>KEYWORDS:</u>	Timelines; Contract; Retirement; Insurance Coverage; Harassment; Discrimination
<u>CASE STYLE:</u>	<u>Bradstreet v. West Virginia University</u> DOCKET NO. 2019-0391-WVU (2/26/2020)
<u>PRIMARY ISSUES:</u>	Whether this grievance was timely filed.
<u>SUMMARY:</u>	<p>Grievant was employed by WVU in a non-tenure track position through annual contracts for nine years. Each annual contract ended on June 30th. On July 3, 2018, WVU informed Grievant it was not renewing her contract but that it was extending her employment until August 31, 2018. Grievant waited until after her final day to file this grievance. WVU alleges untimely filing, asserting that Grievant should have determined the filing deadline using the day she was informed of her non-renewal rather than her final day of employment. Grievant counters that she thought it was possible WVU would reverse her non-renewal before her final day. Grievant further contends she experienced harassment, retaliation, and discrimination between the day she was informed of her non-renewal and her final day. Grievant asserts that this entitles her to reinstatement and renewal for public policy reasons. She also claims that WVU failed to adequately supervise her over the course of her employment, did not inform her of her non-renewal before her contract expired, and caused her to lose COBRA coverage by processing her as retired. WVU proved untimely filing on all claims except pertaining to processing Grievant as retired. Grievant failed to prove a proper basis to excuse her untimely filing and failed to prove loss of COBRA coverage. Accordingly, this grievance is DENIED, in part, and DISMISSED, in part.</p>

KEYWORDS:

Dismiss; Withdrawn; De Novo; Moot; Relief; Advisory Opinions; Professional Discipline; Merits; Controversy; Failure; Reinstatement

CASE STYLE:

Romano v. Southern West Virginia Community and Technical College

DOCKET NO. 2020-0556-SWCTC (2/20/2020)

PRIMARY ISSUES:

Whether this grievance should be dismissed.

SUMMARY:

Grievant withdrew her grievance at level one before the issuance of the level one decision. Nonetheless, the level one grievance evaluator did not dismiss the grievance as withdrawn, and instead denied the grievance for failure to state a claim. Grievant appealed the level one decision seeking a retraction and revision of the level one decision to reflect that the grievance was withdrawn, but also seeks a level three evidentiary hearing so that she can build a record upon which to seek professional discipline against the level one grievance evaluator. As Grievant withdrew her grievance at level one and has not sought reinstatement, or to pursue the merits of her claim, this matter is hereby DISMISSED AS WITHDRAWN.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

<u>KEYWORDS:</u>	Selection; Reduction in Force; Transfer; Timelines; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Messer v. Wayne County Board of Education</u> DOCKET NO. 2019-1282-CONS (2/3/2020)
<u>PRIMARY ISSUES:</u>	Whether Grievant demonstrated a substantial flaw in the selection process, or that he was the best qualified candidate for the identified positions.
<u>SUMMARY:</u>	Grievant is employed by Respondent as a classroom teacher. Grievant filed the instant grievance(s) challenging his non-selection for two positions and his reduction in force during the 2016/2017 school year. Grievant did not raise the issue of his 2016/2017 transfer until the 2018/2019 school year, 14 months post transfer and clearly out of compliance with the time line requirements set forth in West Virginia Code § 6C-2-3(1). This is a consolidated grievance; Grievant withdrew a portion of his protest, an identifiable selection of the grievance is untimely and lastly Grievant did not establish Respondent's selection decision was arbitrary and capricious or an abuse of discretion. Grievant has not met the applicable burden of proof thus this grievance is denied.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Selection; Qualifications; Competency Test; Arbitrary and Capricious

CASE STYLE: Daniel v. Raleigh County Board of Education
DOCKET NO. 2019-1344-RaIED (2/4/2020)

PRIMARY ISSUES: Whether Respondent acted in an arbitrary, capricious or unlawful manner in selecting the successful candidate for the position in discussion.

SUMMARY: Grievant is regularly employed as service personnel and she currently holds the multi-classification title of Secretary III/Accountant III. Respondent posted a vacancy in the multi-classified position of Secretary III/Accountant III/Buyer as a result of the retirement of the individual performing the duties. Grievant applied. There is no state-approved competency test exists for the classification title of buyer. Grievant contends that the application and selection process implemented was flawed and that it should be declared null and void. Grievant contends that Respondent's actions were arbitrary and capricious. Respondent contends that, when a state-approved competency test does not exist, it has some discretion. Respondent argues their actions were permissible, rationale and not in violation of applicable standards. Grievant failed to establish that Respondent acted in an arbitrary or capricious manner in selecting and hiring an candidate for a multi-classification position, or more specifically a "Buyer" classification, for which the West Virginia State Board of Education has not developed a competency test. This Grievance is DENIED.

KEYWORDS:

Extra Pay; Extra Assignments; School Holiday

CASE STYLE:

Apesos v. Hancock County Board of Education/ AND

DOCKET NO. 2019-0735-HanED (2/21/2020)

PRIMARY ISSUES:

Whether Grievant was entitled to extra pay.

SUMMARY:

Grievant is a bus operator employed by the Hancock County Board of Education. Grievant seeks extra pay for work she performed in excess of her normal working day during a week in which the school was closed for Election Day. Grievant makes this argument based upon statutory construction and the position that Election Day should be recognized as a school holiday. West Virginia Code § 18A-4-8a(i) clearly references weeks of school holidays as the occasions when extra pay is provided, not the weeks of state holidays as defined elsewhere. In addition, there is a specific definition of school holidays contained in West Virginia Code § 18A-5-2, which is the applicable provision when determining the requirement of extra pay for school employees.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Motion to Dismiss; Employee; Employee; Moot; Relief
<u>CASE STYLE:</u>	<u>Green v. General Services Division</u> DOCKET NO. 2017-2506-CONS (2/4/2020)
<u>PRIMARY ISSUES:</u>	Whether Respondent proved the grievance is now moot as Grievant is no longer an employee.
<u>SUMMARY:</u>	Grievant was employed by Respondent as HVAC Technician. Grievant filed the instant consolidated grievance alleging harassment, bullying, and retaliation by Grievant's supervisor. The grievance does also protest a written warning, but no loss of pay accompanied that discipline. Subsequent to the filing of the instant grievance, Respondent terminated Grievant's employment and the grievance protesting the termination has now been denied. Respondent proved the grievance is now moot as Grievant is no longer an employee. Accordingly, the grievance is dismissed.

<u>KEYWORDS:</u>	Selection; Qualified; Arbitrary and Capricious; Pre-Determined; Flaw; Quagmire; Comparison; Management Decisions; Classification Specification
<u>CASE STYLE:</u>	<u>Jackson v. Division of Forestry</u> DOCKET NO. 2019-0817-DOC (2/3/2020)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved by a preponderance of the evidence that Respondent's selection decision was arbitrary and capricious, or otherwise, improper.
<u>SUMMARY:</u>	Grievant was employed by Respondent as an Assistant State Forrester. Grievant applied for another Assistant State Forrester position that had been posted. Grievant was not selected for the position. Grievant argues that the person selected for the position was not qualified, that he was more qualified than the person selected, and that the selection was pre-determined. Respondent denies all of Grievant's claims. Grievant failed to prove his claims by a preponderance of the evidence. Accordingly, the grievance is DENIED.

<u>KEYWORDS:</u>	Jurisdiction; Employee; Employer
<u>CASE STYLE:</u>	<u>Smith v. State Auditor's Office</u> DOCKET NO. 2020-0630-AUD (2/4/2020)
<u>PRIMARY ISSUES:</u>	Whether the Grievance Board has jurisdiction in this matter.
<u>SUMMARY:</u>	Grievant is employed by the Department of Health and Human Resources. Grievant filed the grievance against the West Virginia State Auditor's Office. Grievant is not employed by the West Virginia State Auditor's Office. The Grievance Board lacks jurisdiction in this matter. Accordingly, the grievance must be dismissed.
<u>KEYWORDS:</u>	Classification; Reallocation; Position Description Form; Discrimination; Promotion
<u>CASE STYLE:</u>	<u>Flohr v. Department of Health and Human Resources/John Manchin Sr. Health Care Center AND Division of Personnel</u> DOCKET NO. 2018-0755-DHHR (2/5/2020)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved that any delay in the processing of her reallocation to Nurse 2 was a result of retaliation or discrimination.
<u>SUMMARY:</u>	Grievant was employed by DHHR as a Nurse 1 at the Manchin Clinic outpatient unit when she applied for a Nurse 2 position in the long-term care unit. Grievant did not hear back from DHHR, so filed this grievance. DHHR determined that Grievant did not want the position applied for, but simply wanted her existing position reallocated to a Nurse 2. DHHR therefore directed Grievant to complete a PDF for processing with DOP. Grievant refused, reasoning that coworkers had been upgraded to Nurse 2 without a PDF. DHHR explained that an employee could become a Nurse 2 either by applying for a Nurse 2 under a different position number than the one held or by submitting a PDF requesting DOP to reallocate their current position. After 16 months of quibbling, Grievant refused to be swayed. So DHHR submitted a PDF to DOP without Grievant's assistance. Whereupon, DOP reallocated Grievant's position to a Nurse 2. Grievant alleges that her supervisor retaliated and discriminated against her by not timely processing her reallocation and by requiring her, but not similarly situated coworkers, to complete a PDF to become a Nurse 2. Grievant requests two years of backpay as a Nurse 2. Grievant failed to prove that any delay in her reallocation was due to retaliation or discrimination. Accordingly, this grievance is DENIED.

KEYWORDS:

Termination; Inmate Transport; Inmate Escape; Policy Violation; Misconduct; Arbitrary and Capricious; Discrimination; Mitigation

CASE STYLE:

Gragg v. Division of Corrections and Rehabilitation/Bureau of Prisons and Jails

DOCKET NO. 2019-1194-MAPS (2/7/2020)

PRIMARY ISSUES:

Whether Respondent had good cause to terminate Grievant.

SUMMARY:

Grievant was employed by Respondent as a Correctional Officer II. Respondent asserts that Grievant violated policy while performing his duties as a Temporary Transportation Officer for the North Central Regional Jail, and that such contributed to the escape of an inmate. Respondent dismissed Grievant from employment. Grievant denies Respondent's claims and asserts that any violation of policy or practice he committed did not contribute to the inmate escape. Grievant further asserts that Respondent engaged in discrimination and favoritism as he was dismissed from employment when others involved were not. Respondent proved its claims by a preponderance of the evidence. Grievant failed to prove his claims of discrimination and favoritism by a preponderance of the evidence. Grievant also failed to prove that mitigation of his discipline was appropriate.

KEYWORDS: Termination; At-Will Employee; Classified-Exempt Employee; Sex Discrimination, Age Discrimination; Severance Pay

CASE STYLE: Hooker v. Offices of the Insurance Commissioner
DOCKET NO. 2019-0505-DOR (2/28/2020)

PRIMARY ISSUES: Whether Grievant proved he had a permanent employment contract or other substantial employment right. Whether Grievant proved his termination was motivated to contravene a substantial public policy.

SUMMARY: Grievant was employed by Respondent as an Insurance Company Examiner Supervisor. Grievant was suspended and then terminated from his position after he was arrested for domestic battery against his girlfriend, who was also employed by Respondent, and his bond agreement required he have no contact with her. Grievant asserted he was entitled to civil service protection, however, Grievant was a classified-exempt employee who is presumed to be at will. Grievant failed to establish a permanent employment contract or other substantial employment right by clear and convincing evidence that would change his status as an at-will employee. As an at-will employee Grievant could be terminated for any reason that did not contravene a substantial public policy. Grievant was a member of a protected class and adverse employment action was taken against him but Grievant failed to prove that but for his protected status, the adverse decision would not have been made. Therefore, Grievant failed to prove his termination was motivated to contravene a substantial public policy. As a classified-exempt employee, Grievant was not entitled to severance pay. Accordingly, the grievance is denied.

KEYWORDS:

Sick Leave; Policy; Arbitrary and Capricious

CASE STYLE:

McGinnis v. Department of Environmental Protection/Business and Technology Office

DOCKET NO. 2019-1200-DEP (2/25/2020)

PRIMARY ISSUES:

Whether Grievant that the requirement that she take sick leave when she was ill violated policy.

SUMMARY:

Grievant has a medical condition which causes her to have sever swelling when standing on a concrete surface for extended periods of time. Respondent has accommodated Grievant by allowing her to perform the majority of her work from home. Occasionally Grievant is required to come into the office for specific meetings. On Tuesday, February 26, 2019, Grievant sent a doctor excuse to her supervisor stating that she was unable to come to work from February 25, 2019, through March 3, 2019, because she had an upper respiratory infection and was very contagious. She informed her supervisor that she was not going to be able to attend specific meetings at the office that week. Her supervisor told her that she needed to take sick leave for the period specified by the doctor. Grievant did not believe she should have to take leave because she could work from home and attend the meetings remotely even though she was ill. Respondent proved that it was not unreasonable nor arbitrary and capricious to require Grievant to take sick leave for the days her doctor advised her not to go to work.