

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in March 2017

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>	Discrimination; Motion to Dismiss; Untimely Filed; Timelines; Continuing Practice
<u>CASE STYLE:</u>	<u>Frost v. Bluefield State College</u> DOCKET NO. 2016-1073-BSC (3/8/2017)
<u>PRIMARY ISSUES:</u>	Whether Respondent proved the grievance was untimely filed.
<u>SUMMARY:</u>	Grievant is employed by Respondent as a Counselor II. Grievant protests the removal of recruitment from his duties. Grievant was unequivocally notified on July 2, 2015, that he would no longer be permitted to recruit. The grievance was not filed until five and one half months later. The decision to remove the recruiting duty was a single act that has had continuing damage and was not a continuing practice. Respondent proved the grievance was untimely filed and Grievant failed to demonstrate a proper basis to excuse his untimely filing. Accordingly, the grievance is dismissed.

<u>KEYWORDS:</u>	Termination; Suspension; Job Responsibilities; Gross Insubordination; Due Process; Credibility; Hearsay; Mitigation
<u>CASE STYLE:</u>	<u>Thackston v. Concord University</u> DOCKET NO. 2016-1068-CU (3/22/2017)
<u>PRIMARY ISSUES:</u>	Whether Respondent had proper cause to terminate Grievant.
<u>SUMMARY:</u>	<p>Grievant was employed by Concord University as an Admissions Counselor. Grievant was terminated from his position for persistent insubordination, regular and intentional obstruction and/or disruption of University operations. The scope of Grievant's employment is of dispute, nevertheless, defying the reasonable orders of his superiors, and engaging in prohibited activities is actionable conduct.</p> <p>Respondent informed Grievant that his behavior was unacceptable and that failure to modify it would be interpreted as insubordination and subject him to disciplinary action including termination. Respondent communicated reasonable expectations and Grievant was aware of Respondent's expectations. Respondent established grounds for disciplinary action. Grievant repeatedly circumvented and disrupted the anticipated operations of Respondent. Respondent choose to terminate employment, considering the totality of the circumstances, termination of Grievant's employment was not excessive and mitigation of the disciplinary action taken is not required. This Grievance is DENIED.</p>

KEYWORDS: Compensation; Discrimination; Regularly Scheduled Work Hours; Conference

CASE STYLE: Money Penny, et al. v. West Virginia University
DOCKET NO. 2016-1029-CONS (3/28/2017)

PRIMARY ISSUES: Whether Grievants established their claim of discrimination or that they are otherwise entitled to compensation for time spent attending the conference.

SUMMARY: Grievants, along with fifteen additional co-workers, attended a Level One Conference in another case, with the knowledge and consent of their representative. This conference was not conducted during their scheduled work day. Grievants were not compensated by West Virginia University for the time they were in attendance at the conference. Grievants allege the failure to compensate them is a statutory violation and results in discrimination. The Grievance Board has consistently held that time spent by an employee participating in a grievance proceeding scheduled outside the employee's normal work schedule is not compensable time. Because Grievants were not scheduled to work at the time the conference was held they are not similarly situated to the remaining Grievants and have not established that West Virginia University engaged in discrimination.

KEYWORDS: Selection; Minimum Qualifications; Experience; Arbitrary and Capricious

CASE STYLE: Zimmerlink v. West Virginia University
DOCKET NO. 2016-0967-WVU (3/17/2017)

PRIMARY ISSUES: Whether Grievant demonstrated that the selection decision was arbitrary and capricious.

SUMMARY: Grievant is employed by West Virginia University as an Operations Coordinator for Facilities Management. Grievant argues that she was the most qualified applicant for a Purchasing Agent position based on her experience which requires that she complete duties similar to those of a Purchasing Agent. Grievant also asserts that consideration should be given to her seniority earned while working at West Virginia University. The determination of which applicant for a position will not be changed absent a showing that the decision was arbitrary and capricious. Grievant failed to demonstrate that her qualifications were superior to those of the successful applicant, or that there was a flaw in the selection process.

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COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

<u>KEYWORDS:</u>	Contract; Uniformity; Discrimination; Favoritism; Reprisal; Similarly Situated; Classification; Retaliation; Transfer
<u>CASE STYLE:</u>	<u>Charles v. Mingo County Board of Education</u> DOCKET NO. 2016-1813-CONS (3/7/2017)
<u>PRIMARY ISSUES:</u>	Whether Grievant demonstrated that she is similarly situated to another employee, and whether Grievant was transferred in retaliation for filing a grievance.
<u>SUMMARY:</u>	Grievant is an Assistant Principal at a high school with responsibility for the CTE program at that high school. She is employed under a 240-day contract, just like all the other Assistant Principals in high schools in Mingo County. She asserted that she was a CTE administrator, and should be employed under a 261-day contract like the county CTE Administrator. Grievant is not employed in the same classification as the county CTE Administrator, and has a different level of responsibility than he does. She has not been discriminated against or been the victim of favoritism with regard to the contract term, nor did she demonstrate that the statutory uniformity provision has been violated. Grievant also did not demonstrate that she was placed on transfer in retaliation for filing a grievance. The three Assistant Principals at Grievant's high school were assigned different areas of responsibility, and had a secondary title reflecting the assigned area, which was unique in Mingo County. Grievant was placed on transfer due to the reduction in force of one Assistant Principal position at her high school, as was the other remaining Assistant Principal at the school, so that the duties of the least senior Assistant Principal, as reflected in her secondary title, could be reassigned as the Principal deemed appropriate.

KEYWORDS:

Selection Process; Extracurricular Coaching Assignment Position; Qualifications; Arbitrary and Capricious

CASE STYLE:

Wright v. McDowell County Board of Education

DOCKET NO. 2016-0876-McDED (3/31/2017)

PRIMARY ISSUES:

Whether Grievant's qualifications for the extracurricular coaching assignments were greater than those of the persons appointed by Respondent to fill the assignments.

SUMMARY:

Grievant complained that he unsuccessfully applied for two extracurricular coaching assignments. Grievant contends bias and other rationale was the motivation for Respondent not hiring him for one or more of the vacancies. Grievant woefully failed to meet the recognized burden of proof for a non-selection grievance. Grievant did not demonstrate a significant flaw in the selection process, or that he was the best qualified candidate. Grievant failed to establish, by a preponderance of the evidence, that his non-selection for one of two extracurricular coaching assignments was arbitrary and capricious, an abuse of Respondent's discretion, or otherwise contrary to any applicable law, rule or regulation. Accordingly, this grievance is DENIED.

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COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

<u>KEYWORDS:</u>	Uniformity of Compensation; Extracurricular Pay
<u>CASE STYLE:</u>	<u>Zanders v. Wayne County Board of Education</u> DOCKET NO. 2016-1448-WayED (3/8/2017)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved Respondent violated the uniformity provisions.
<u>SUMMARY:</u>	Grievant is employed by Respondent as a Bus Operator. Grievant asserted he was not provided uniform compensation. The employees to whom Grievant compared himself were performing an extracurricular duty when they were required to take extra time to pick up Aides away from their regular bus routes. Grievant was not performing an extracurricular duty as picking up the Aide was included in his route, and did not take extra time as it was on the route. Grievant failed to prove Respondent violated the uniformity provisions as Grievant was not performing an extracurricular duty like the compared employees. Accordingly, the grievance is denied.

<u>KEYWORDS:</u>	Selection; Minimum Qualifications; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Jackson v. Kanawha County Board of Education and Bernard Balser, Intervenor</u> DOCKET NO. 2016-0879-KanED (3/6/2017)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved that the selection process was arbitrary and capricious.
<u>SUMMARY:</u>	Grievant claims that the Kanawha County Board of Education failed to properly consider his seniority and his past service when it hired a less senior applicant. Respondent argues that Grievant's satisfactory evaluations and lengthy seniority were considered, but those factors could not overcome Grievant's failure to meet the necessary qualifications for the supervisory position. Based upon the record of this case and applicable case law, the undersigned concludes that Grievant failed to demonstrate by a preponderance of the evidence that the selection of Intervenor for the position of Supervisor of Maintenance was arbitrary and capricious or an abuse of discretions.

KEYWORDS: Selection; ECCAT Certification, Aide, Kindergarten, Seniority

CASE STYLE: McCoy v. Mason County Board of Education
DOCKET NO. 2016-1439-MasED (3/15/2017)

PRIMARY ISSUES: Whether Grievant should have been the successful applicant for an ECCAT position when she had the most aide seniority but no ECCAT certification.

SUMMARY: Grievant challenges her non-selection for a Kindergarten Aide position. She argues that the position was not actually posted as an ECCAT position so her lack of ECCAT certification should not have disqualified her. Grievant argues that the successful applicant did not hold ECCAT certification at the time the position was posted and her certification should not be used to allow her to be selected ahead of Grievant who is undisputedly more senior. Finally, she argues that the statutory construction requires the selection of the most senior person who has been employed in the Aide classification be selected to fill an Aide position regardless of their ECCAT certification status.

The statute related to Kindergarten Aide positions requires all newly posted positions be filled with someone holding the ECCAT certification. The Board's failure to specifically use the term ECCAT in the position title did not remove that requirement. Especially when the requirement was listed in the job description. The successful applicant was issued a Temporary Authorization Early Childhood Classroom Assistant Teacher Certificate prior to the date she was hired for the position which was sufficient to meet the minimum qualifications for the job. Finally, the Grievance Board previously held that a Board may select a less senior applicant for an ECCAT/Aide position if the less senior applicant holds any ECCAT certification and the more senior applicant does not.

KEYWORDS: Classification; Job Duties; Competency Test

CASE STYLE: Greenwalt v. Jefferson County Board of Education
DOCKET NO. 2016-1592-JefED (3/9/2017)

PRIMARY ISSUES: Whether Grievant must pass the Secretary competency test in order to be reclassified as a Secretary.

SUMMARY: Grievant is employed by Respondent as a Clerk/Aide, but believes she should be classified as a Clerk/Aide/Secretary II. Grievant has taken the state competency test for Secretary four times, including twice in 2016, but has not ever passed that test. She has never held the Secretary classification. Grievant cannot be classified as a Secretary II because she has not passed the state competency test for that classification.

KEYWORDS: Suspension; Termination; Code of Conduct; Immorality; Incompetency; Insubordination; Corporal Punishment; Unsatisfactory Performance; CPI Training; Correctable Conduct; Autistic Student; Dragging Student

CASE STYLE: Foltz v. Berkeley County Board of Education
DOCKET NO. 2017-1357-BerED (3/23/2017)

PRIMARY ISSUES: Whether Grievant's conduct constituted insubordination, immorality, or cruelty, and whether her conduct was correctable.

SUMMARY: Grievant was terminated from her employment as an Autism Mentor after she pulled a nine-year-old Autistic student along the floor of the hallway at school by his arm and leg. His other arm was fractured and was in a sling at the time, as the result of an accident at his home. There was no threat to the student or others at the time of this incident, nor was there any other emergency situation which would necessitate moving the student. Grievant had extensive training as an Autism Mentor, Crisis Prevention Intervention training, and additional recent positive intervention training. The Crisis Prevention Training included training on the scenarios when a child might need to be moved, and how to move a child if it became necessary. None of Grievant's training instructed that it was appropriate for one person to drag a student along the floor by his arm and leg. Grievant never called for help with the student as her training has taught her when she is in need of assistance with a student. Respondent proved the charges against Grievant.

KEYWORDS: Emergency Assignments; Extra-Duty Assignments; Next-in-Line; Seniority; Discrimination; Arbitrary and Capricious

CASE STYLE: Browning, et al. v. Lincoln County Board of Education
DOCKET NO. 2015-1287-CONS (3/31/2017)

PRIMARY ISSUES: Whether Grievants demonstrated that Respondent's actions resulted in an abnormally inequitable distribution of emergency extra-duty

SUMMARY: Grievants, bus operators for Lincoln County Board of Education, contend that they are not receiving their fair share of emergency extra-duty assignments. Grievants maintain this inequity is the direct result of Respondent's conduct. Grievants contend that Respondent has been implementing faulty call out procedure(s) alleging violation of W. Va. Code ' 18A-4-8b and/or discrimination/favoritism actions. Respondent denies any wrong doing and contends that while it attempts to utilize the extra-duty call out list for emergency bus runs as long as time permits, there is no requirement that they do so. Grievants seek alleged lost wages and desire an equitable distribution of emergency extra-duty assignments henceforward.

The instant Grievants were not called upon and/or did not receive any emergency extra-duty assignments during the 2014-2015 school year, a time period in which there were approximately 34-58 so-called emergency extra-duty assignments. Respondent allegedly systematically assigns such assignments. Grievants while eligible and in line did not receive any, not one, emergency extra-duty assignment. Grievants persuasively clarified and demonstrated lost economic opportunity. This grievance is GRANTED.

KEYWORDS: Extra-Duty Assignments; Job Duties; Next in Line

CASE STYLE: Shaffer v. Kanawha County Board of Education

DOCKET NO. 2016-1063-KanED (3/29/2017)

PRIMARY ISSUES: Whether Grievant established that he was entitled to assignment of the extra-duty work at issue.

SUMMARY: Grievant, classified as a “heavy equipment operator,” asserts that Respondent improperly provided extra-duty work, operating heavy equipment, to personnel who were not classified as “heavy equipment operators,” but as “masons,” in violation of W. W. VA. CODE § 18 A-4-8b and that, as such, he is entitled to compensation for the hours of work they performed out of their classification on that date. Respondent effectively contends that if an employee only occasionally performs duties outside and at a lower classification than his own, this should not entitle the individual who holds the classification, who usually performs those duties, to receive payment for those occasional instances, as Respondent would be required to “pay twice for the same work.” However, this issue need not be addressed because, even assuming Respondent improperly gave extra-duty heavy equipment work to the masons, Grievant failed to establish that he was “next in line” for the work and, thus, failed to meet his burden of proof against Respondent.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Suspension; Performance Standards; Hearsay; Knife; Predetermination
<u>CASE STYLE:</u>	<u>Mucklow v. Division of Juvenile Services</u> DOCKET NO. 2017-0903-MAPS (3/9/2017)
<u>PRIMARY ISSUES:</u>	Whether Respondent proved by a preponderance of the evidence that Grievant failed to meet acceptable performance standard thereby justifying his suspension without pay.
<u>SUMMARY:</u>	Grievant is employed by Respondent as a Correctional Counselor I. Respondent suspended Grievant for five days without pay for “failing to meet acceptable performance standards” by being in possession of a pocket knife while at work, and for asking a juvenile “if he had been smoking a crack pipe.” Grievant denies being in possession of the knife and denies making the statement to the juvenile. Grievant argues that suspension was improper. Respondent failed to meet its burden of proving its claims by a preponderance of the evidence. Therefore, this grievance is GRANTED.

KEYWORDS: Pay; Shift Differential; Reprisal; Arbitrary and Capricious; Retaliation; Revise; Inference; Interpretation

CASE STYLE: Dickens, et al. v. Department of Health and Human Resources/Jackie Withrow Hospital

DOCKET NO. 2016-0100-CONS (3/8/2017)

PRIMARY ISSUES: Whether Grievants proved that revisions to the Shift Differential Policy constituted reprisal, and were otherwise arbitrary and capricious.

SUMMARY: Grievants are employed by Respondent in various positions at Jackie Withrow Hospital. Some of the Grievants were parties to a previous grievance action regarding a shift differential policy. Those Grievants prevailed as the Grievance Board found that under the policy as it was then written, they were eligible for the shift differential pay. A few months later, Respondent revised the policy, and under the same, many employees, including the Grievants in this matter, were no longer eligible for the shift differential pay. Grievants claim that the Respondent's revision of the policy was an act of reprisal. Grievants also claim violation of the Administrative Rule and substantive due process. Respondent denies Grievants' claims, and asserts that its revision of the policy was proper. Grievants established a prima facie case of reprisal by a preponderance of the evidence. Respondent successfully rebutted the presumption of retaliation. Grievants failed to prove their remaining claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

KEYWORDS: Termination; Suspended Motor Vehicle License; Job Classification; Condition of Employment; Policy; Discrimination; Arbitrary and Capricious

CASE STYLE: Wilson v. Division of Highways
DOCKET NO. 2016-1151-DOT (3/2/2017)

PRIMARY ISSUES: Whether Respondent was justified in dismissing Grievant from employment.

SUMMARY: Grievant was employed by Respondent as a Transportation Worker 1. Grievant was dismissed from employment for failure to maintain licensure required for his position when his driver's license was suspended for failure to pay a fine. Respondent asserts it had good cause to dismiss Grievant from employment. Grievant alleges his dismissal was discriminatory. Respondent's action was not discriminatory as Grievant was not similarly situated to compared employees. Respondent's action was arbitrary and capricious as Respondent violated its own policy, which required Grievant be given a specified time frame in which to re-acquire licensure, and it was unreasonable to dismiss Grievant from employment after two months when he simply needed more time to pay a significant fine and other employees were customarily given six months to do so. Accordingly, the grievance is granted.

KEYWORDS: Hostile Work Environment; Restriction of Duties; Motion to Dismiss; Retirement; Relief; Moot; Advisory Opinion

CASE STYLE: Moore v. Division of Highways
DOCKET NO. 2017-0131-DOT (3/9/2017)

PRIMARY ISSUES: Whether this grievance is moot.

SUMMARY: Grievant was employed by Respondent as a Transportation Engineering Technician – Associate. Grievant alleged he had been subjected to a hostile work environment and inappropriate restriction of duties. After filing his grievance, Grievant retired. Respondent asserts the grievance is now moot because Grievant retired and failed to state a claim upon which relief can be granted. Respondent proved Grievant's claims are either moot due to his retirement or request relief that is unavailable from the Grievance Board. Accordingly, the grievance is dismissed.

KEYWORDS:

Salary; Entry Level; Discretionary Salary Adjustment; Co-Op Experience; Ultra Vires Promises; Equitable Estoppel

CASE STYLE:

Wise v. Division of Highways

DOCKET NO. 2015-1263-DOT(R) (3/13/2017)

PRIMARY ISSUES:

Whether Grievant demonstrated that Respondent had to pay him at 20% above entry level.

SUMMARY:

Grievant became aware shortly after he began his employment that his starting salary was not what he had expected. Grievant's expectation that his salary would be 20% above entry level was based solely on a statement in the posting that the appointment "may be made at the rate of five percent for each three months of co-op experience" with Respondent. Grievant had four summers of co-op experience with Respondent, and made clear at the interview that he would not accept a starting salary of less than 20% above entry level. When the job offer was made to Grievant, he was not advised of his starting salary, nor did he make any inquiry regarding his salary. It was some time later that Grievant discovered his salary was 10% above entry level. Whether Grievant was paid any amount over the entry level salary for the position was discretionary. Discretionary salary adjustment is generally not grievable. No one promised Grievant a particular salary, nor did Grievant rely on any false representations or concealment of material facts in accepting the position and the starting salary. Grievant did not demonstrate that he was entitled to a starting salary of 20% above entry level based on the doctrine of detrimental reliance or the doctrine of equitable estoppel.

KEYWORDS: Suspension; Hostile Work Environment; Insubordination; Unnecessary Touching; Due Process Rights; Reprisal

CASE STYLE: Crews v. Department of Veterans Assistance
DOCKET NO. 2017-0344-DVA (3/14/2017)

PRIMARY ISSUES: Whether Respondent proved that Grievant created a hostile environment or was insubordinate.

SUMMARY: Respondent issued Grievant a two-day unpaid suspension for violating the DOP Prohibited Workplace Harassment Policy, by repeatedly and unnecessarily touching her subordinates in a way that made them uncomfortable. Respondent also alleged that Grievant was guilty of insubordination for continuing to unnecessarily touch her subordinates after being directed to stop.
Grievant argues that the suspension was in retaliation for her filing a separate grievance, violated the rule related to predetermination meetings and that she did not violate the DOP policy.
Respondent proved that it had a legitimate, non-retaliatory reason for the discipline which was not a pretext for nefarious conduct, and that it was in compliance with the DOP rule related to predetermination meetings. Respondent also proved by a preponderance of the evidence that Grievant's unwanted touching was sufficiently pervasive to create a hostile work environment and the Grievant was insubordinate.

KEYWORDS: Termination; Family and Medical Leave Act; Poor Performance; Substantial Public Policy; At-Will

CASE STYLE: Mahmoud v. Department of Health and Human Resources/Bureau for Public Health
DOCKET NO. 2014-0303-DHHR (3/20/2017)

PRIMARY ISSUES: Whether Respondent contravened substantial public policy in terminating Grievant, an at-will employee.

SUMMARY: Grievant was employed by Respondent as a Deputy Medical Examiner in the Office of the Chief Medical Examiner. Respondent dismissed Grievant from employment while he was on Family and Medical Leave Act leave. The FMLA is a substantial public policy and Grievant proved retaliatory intent can be inferred as Respondent dismissed Grievant while he was on FMLA leave. However, Respondent proved it was not motivated to dismiss Grievant from employment to contravene the FMLA, but dismissed him for his long history of poor performance. Accordingly, the grievance is denied.

KEYWORDS: Demotion; Job Duties; Classification; Witness Credibility; Retaliation; Arbitrary and Capricious

CASE STYLE: Lamp v. Division of Juvenile Services/Lorrie Yeager Jr. Juvenile Center
DOCKET NO. 2015-0076-MAPS (3/30/2017)

PRIMARY ISSUES: Whether Grievant proved the decision to remove his duties as a Field Training Officer was arbitrary and capricious.

SUMMARY: Grievant is employed by Respondent as a Correctional Officer II. Grievant served as a Field Training Officer at the Lorrie Yeager Jr. Juvenile Detention Center. The Facility Director removed Grievant's duties as Field Training Officer and assigned Grievant to the regular shift rotation for Correctional Officer IIs. Grievant was not demoted and he suffered no change in pay or job class. Grievant did not prove he was functionally demoted. Grievant did not prove the decision to remove his duties as a Field Training Officer was arbitrary and capricious. Grievant established a prima facie case of retaliation but Respondent showed legitimate, non-retaliatory reasons for its actions. Accordingly, the grievance is denied.

KEYWORDS: Selection; Training; Equipment Operators Training Academy; Tier System; Upgrade; Experience; Tenure; General Abilities; Work History; Leave Balances; Disciplinary; Arbitrary and Capricious

CASE STYLE: Womack, et al. v. Division of Highways
DOCKET NO. 2016-1577-CONS (3/24/2017)

PRIMARY ISSUES: Whether Respondent followed its policy in selecting an employee to attend the Equipment Operators Training Academy, and whether Respondent's decision was arbitrary and capricious.

SUMMARY: Grievants signed up to be considered for selection to attend backhoe training at the Respondent's Equipment Operators Training Academy. Through such trainings employees receive certifications that help them to advance through the tier system resulting in higher pay, and qualify them for temporary upgrades in pay when operating the equipment. Grievants were not selected for the training despite their years of experience and time with the agency. Respondent selected another employee who had less work experience and only one year of service with DOH. Grievants argue that Respondent failed to follow its policy for selecting employees for these trainings, and that its decision was arbitrary and capricious. Respondent denies Grievants' claims, and asserts that it followed its policy and its selection decision was proper. Grievants proved by a preponderance of the evidence that Respondent failed to follow its policy for selecting employees for the training, and that its decision was arbitrary and capricious. Therefore, the grievance is GRANTED.