

**WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**SYNOPSIS REPORT**

**Decisions Issued in May 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](mailto: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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<b><u>KEYWORDS:</u></b>	Untimely; Motion to Dismiss; Relief; Pay; FTE Reduction; Fair Labor Standards Act
<b><u>CASE STYLE:</u></b>	<u>Whitlow, Jr. v. New River Community and Technical College</u> DOCKET NO. 2016-1596-NRCTC (5/12/2017)
<b><u>PRIMARY ISSUES:</u></b>	Whether New River acted within its authority to reduce Grievant's weekly pay and required work hours.
<b><u>SUMMARY:</u></b>	Respondent, in its effort to maintain the financial stability of the college in a manner that least affected its employees and students, temporarily reduced all classified employees' work hours by 0.2 full-time equivalent ("FTE"). Grievant claims, inter alia., that New River did not have either the authority to reduce classified staff work hours and commensurate wages by 0.2 FTE, or the discretion to direct specific college funds toward identified budgetary needs. More specifically, Grievant claims that Respondent violated the federal Fair Labor Standards Act ("FLSA") by implementing the reduced schedule of hours and that he is entitled to recoup lost wages and benefits for the period of the temporary reduction. However, under the FLSA, the reduction of an exempt employee's weekly pay or hours is permitted, so long as the employee continues to be paid in excess of the federal minimum hourly wage. Grievant failed to meet his burden of proof as to all claims made against Respondent.

**KEYWORDS:**

Motion to Dismiss; Res Judicata; Preclusion

**CASE STYLE:**

Lynch v. Concord University

DOCKET NO. 2016-1872-CU (5/12/2017)

**PRIMARY ISSUES:**

Whether Respondent proved by a preponderance of the evidence that this grievance is precluded by the doctrine of res judicata.

**SUMMARY:**

Grievant previously filed a grievance alleging that he was assigned duties outside his job description and that a mutual agreement for employment was required for such. That earlier grievance was adjudicated on the merits. However, before that decision was issued, Grievant filed the instant grievance raising the same claim. In both grievances, the assignment Grievant challenged involved cleaning light fixtures without performing electrical work. Respondent argues that the doctrine of res judicata precludes Grievant from bringing this claim. Grievant filed a response to the Motion to Dismiss, but did not address the issue of res judicata. Grievant has not denied that the claims he has made in the two grievances are the same. Respondent proved by a preponderance of the evidence that the doctrine of res judicata applies to preclude Grievant from pursuing the instant grievance. Therefore, this grievance is Dismissed.

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**COUNTY BOARDS OF EDUCATION**  
**PROFESSIONAL PERSONNEL**

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<b><u>KEYWORDS:</u></b>	Relief; Failure to Assert a Claim; Damages; Change of Student Grade; Moving Student; Cease and Desist Order; Acknowledgement of Wrong; Apology; Student Rights
<b><u>CASE STYLE:</u></b>	<u>Joy v. Jefferson County Board of Education</u> DOCKET NO. 2016-1687-JefED (5/16/2017)
<b><u>PRIMARY ISSUES:</u></b>	Whether any relief can be granted.
<b><u>SUMMARY:</u></b>	The statement of grievance alleges a violation of West Virginia Code § 18-5-46, which provides that, “[n]o teacher may be required by a principal or any other person to change a student’s grade on either an individual assignment or a report card,” and then provides exceptions. Grievant was not required to change a student’s grade, rather a student was moved to another classroom and Grievant has alleged that teacher was required to change a grade. Grievant cannot grieve for another employee. Additionally, Grievant seeks as relief that Respondent acknowledge it was wrong, a cease and desist order, damages for mental, emotional, and physical distress, and to have the action of the principal reversed, which would require the undersigned to take actions which would affect the rights of the student, none of which is available from the Grievance Board in this case.

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<b><u>KEYWORDS:</u></b>	Selection; Job Positing; Experience; Qualifications; Executive Summary For Administrative Position; Arbitrary and Capricious
<b><u>CASE STYLE:</u></b>	<u>Werthammer v. Cabell County Board of Education</u> DOCKET NO. 2016-1703-CabED (5/30/2017)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant proved that the Respondent’s decision to hire the second person recommended rather than the first was arbitrary and capricious.
<b><u>SUMMARY:</u></b>	Grievant alleges that Respondent’s decision to hire Intervenor for the position of CTE Director was arbitrary and capricious. Grievant alleges the interview process was biased, Grievant was the most qualified candidate, and the Board had decided to reject the Superintendent’s recommendation of the Grievant prior to the meeting. While there was more than usual rumor and speculation about the hiring process involved in this case, Grievant did not prove by a preponderance of the evidence that the Board’s actions violated the law or were arbitrary and capricious.

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**COUNTY BOARDS OF EDUCATION**  
**SERVICE PERSONNEL**

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<b><u>KEYWORDS:</u></b>	Selection; Posting; ECCAT; Certification; Credential; Classification Title; Seniority; Qualified; Priority
<b><u>CASE STYLE:</u></b>	<u>Chapman-Davidson v. Boone County Board of Education and Willa Antill, Intervenor</u> DOCKET NO. 2016-1712-BooED (5/17/2017)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant proved by a preponderance of the evidence that holding greater seniority in the aide classification entitled her to be selected for the posted ECCAT position.
<b><u>SUMMARY:</u></b>	Grievant is employed by Respondent as an aide. Grievant applied for an Instructional Aide II/III/IV/Early Childhood Classroom Assistant Teacher ("ECCAT")/Bus Aide position. While Grievant was the most senior applicant in the aide classification, she did not hold an ECCAT credential from the West Virginia Department of Education, nor had she ever held an ECCAT position. Another applicant, Intervenor, who was already employed in an ECCAT position, and held an ECCAT credential, was selected for the position. Grievant asserts that she is entitled to the position as she had the most seniority in the aide classification. Respondent argues that its selection of the other applicant for the ECCAT position was proper pursuant to statute. Grievant failed to prove her claim by a preponderance of the evidence. Therefore, the grievance is DENIED.

**KEYWORDS:** Respondent Appeal Rights; Effect of Level One Decision; Experience Requirement; Selection; Seniority; Qualifications; Res Judicata

**CASE STYLE:** Townsend v. Kanawha County Board of Education  
DOCKET NO. 2016-1702-KanED (5/22/2017)

**PRIMARY ISSUES:** Whether Respondent was bound by a level one decision, and whether Grievant should have been placed in the position at issue.

**SUMMARY:** Grievant was not selected for a Crew Leader position because he had not passed the blueprint test and because he did not have five year's experience "in the craft." He filed a grievance and a level one decision was issued requiring that the position be reposted, that applicants be allowed to train for and take the blueprint test, and that the selection be based on qualifications, seniority, and evaluations, after a finding that Respondent could not add an experience requirement to the posting. Grievant did not appeal that decision. By agreement of the parties, Respondent did not post the position, but allowed Grievant to take the blueprint test, which he passed. Respondent still did not place Grievant in the position, even though he had more seniority than the successful applicant, because Respondent asserted Grievant did not meet the experience requirement. Respondent is bound by the first level one decision, which rejected the argument that Respondent could include an experience requirement in the selection process, and cannot relitigate the issues decided therein. Respondent was required by the first level one decision to base its decision on seniority, qualifications, which is defined as holding the class title or passing the Crew Leader competency test, and evaluations. Grievant was the most senior remaining applicant, and should have been placed in the position.

**KEYWORDS:** Termination; Unsatisfactory Performance Evaluations; Disciplinary Action; Correctable Conduct; Inappropriate Behavior

**CASE STYLE:** Wright v. Kanawha County Board of Education  
DOCKET NO. 2017-1370-KanED (5/22/2017)

**PRIMARY ISSUES:** Whether Respondent proved it was justified in terminating Grievant's employment.

**SUMMARY:** Grievant was employed by Respondent as an Aide. Respondent terminated Grievant's employment for grabbing a three-year-old special needs child by the wrist with enough force to lift the child's feet off the floor eight to ten inches and then dropping the child back to the floor. Respondent proved it was justified in terminating Grievant's employment without an additional improvement plan. Grievant's conduct was not correctable as it both directly affected the safety of the child and was the same type of conduct and lack of judgment for which previous discipline, evaluation, and improvement plans had failed to correct. Accordingly, the grievance is denied.

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**STATE EMPLOYEES**

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<b><u>KEYWORDS:</u></b>	Non-Disciplinary Suspension; Investigation; Back Pay; Annual Leave; Reimbursement
<b><u>CASE STYLE:</u></b>	<u>Lott v. Division of Corrections/Division of Parole Services</u> DOCKET NO. 2017-1690-MAPS (5/10/2017)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant was entitled to be reimburses for pay and annual leave lost while on suspension pending an investigation.
<b><u>SUMMARY:</u></b>	Mr. Lott was suspended without pay pending an investigation. The investigation was conducted over the course of two thirty-day periods. The investigation did not produce sufficient evidence to support discipline and Grievant was reinstated. Grievant's annual leave and other benefits were restored, but he has not received pay for the period he was suspended. Grievant is entitled to back pay for the period of suspension pursuant to the Division of Personnel ("DOP") Administrative Rule.



**KEYWORDS:** Classification; Position Description Forms; Pay Grade; Job Responsibilities; Added Job Duties; Reallocation; Arbitrary and Capricious

**CASE STYLE:** Fewell v. Department of Environmental Protection/Division of Air Quality and Division of Personnel  
DOCKET NO. 2017-0002-DEP (5/15/2017)

**PRIMARY ISSUES:** Whether Grievant proved that DOP's classification for his position was clearly wrong or arbitrary and capricious.

**SUMMARY:** Grievant filed a grievance against his employer alleging his position is improperly classified, seeking reallocation. The West Virginia Division of Personnel was joined as an indispensable party. Grievant contends he is misclassified as a Technical Analyst, pay grade 22 and suggests that the classification of Technical Analyst Senior, pay grade 23 more accurately reflects his job duties. Both Grievant and Department of Environmental Protection, the employing State agency, seek to have the position reallocation as a Technical Analyst Senior classification.

The Division of Personnel is the entity of WV State government charged with making classification determinations. Upon reviewing the documents related to Grievant's position, and performing an on-site job audit, DOP determined that Grievant's duties best fit into the classification of Technical Analyst classification (or Environmental Resources Program Manager which is a lower pay grade). Grievant did not prove that DOP's classification decision was clearly wrong. It is understood why Grievant is steadfast with his opinion; nevertheless, pursuant to the relevant regulations and decisive factors Grievant has not establish that his preferred classification was the "best fit" classification for his position. This grievance is DENIED.

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**KEYWORDS:** Timeliness; Motion to Dismiss; Time Limits; Grievance Filing

**CASE STYLE:** Payne v. Division of Juvenile Services  
DOCKET NO. 2017-1436-MAPS (5/8/2017)

**PRIMARY ISSUES:** Whether this grievance was timely filed.

**SUMMARY:** Grievant was employed by Respondent, Division of Juvenile Services, as a Correctional Counselor II. Grievant was dismissed from employment by letter dated September 27, 2016. Grievant filed this grievance challenging her dismissal on December 29, 2016. Respondent moved to dismiss the grievance as untimely. Grievant claimed she did not understand the grievance procedure. Grievant failed to file her grievance within the statutory time-limit and ignorance of the grievance procedure does not excuse the untimely filing. Accordingly, the grievance is dismissed.

**KEYWORDS:** Discretionary Pay Increase; Policy; Certification

**CASE STYLE:** Parsons v. General Services Division and Division of Personnel  
DOCKET NO. 2016-1812-DOA (5/10/2017)

**PRIMARY ISSUES:** Whether Grievant proved the Division of Personnel erred in determining the amount of pay increase warranted by his certification.

**SUMMARY:** Grievant is employed by the General Services Division as the Building Operations Maintenance Manager. Grievant protested the amount of discretionary pay increase he received for completion of a certification and sought the pay increase retroactive to his receipt of the certification. Grievant failed to prove the Division of Personnel erred in determining the amount of pay increase warranted by his certification. Grievant asserted no law, rule, or policy that required Respondent General Services Division or Respondent Division of Personnel to act on the discretionary pay increase within a certain timeframe, therefore, Grievant is not entitled to a retroactive award of his pay increase. Accordingly, the grievance is denied.

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**KEYWORDS:** Motion to Dismiss; Timeliness; Amended; Sick Leave; Balance; Workers' Compensation; Buyback; Credit; Hours

**CASE STYLE:** Kershner v. Department of Environmental Protection  
DOCKET NO. 2014-0731-CONS (5/11/2017)

**PRIMARY ISSUES:** Whether Respondent proved by a preponderance of the evidence that Grievant's claim was untimely. Whether Grievant proved by a preponderance of the evidence her claim that her accrued sick leave balance was incorrect.

**SUMMARY:** Grievant initially grieved a pay issue, but such was resolved prior to the level three hearing. Grievant argued that she orally amended her grievance at level one to include a claim that her accrued sick leave balance was incorrect as it did not reflect credits she should have received for buying back sick leave used while she was on workers' compensation in the early 1990s. Respondent asserted that the grievance had not been amended to include the claim regarding the leave balance, and that the same was untimely. Respondent further asserted that Grievant's accrued sick leave balance was correct. Grievant orally amended her grievance at level one to include the claim regarding her accrued sick leave balance. Respondent failed to prove by a preponderance of the evidence that this grievance was untimely. Grievant failed to prove her claims regarding her accrued sick leave balance by a preponderance of the evidence. Therefore, the grievance is DENIED.

**KEYWORDS:**

Dismissal; Terminate; Good Cause; Misconduct; Performance; Responsibilities; Policies; Procedures; Risk; Removal; Arbitrary and Capricious; Progressive Discipline; Mitigation; Supervisor; Plan; Referral; Contacts; Excessive

**CASE STYLE:**

Curry v. Department of Health and Human Resources/Bureau for Children and Families

DOCKET NO. 2015-0608-DHHR (5/3/2017)

**PRIMARY ISSUES:**

Whether Respondent proved by a preponderance of the evidence that it had good cause to terminate Grievant's employment.

**SUMMARY:**

Grievant was employed by Respondent as a Child Protective Service Supervisor ("CPSS"). Respondent dismissed Grievant from employment for job performance failures and misconduct in violating provisions of CPS policy. Grievant denied Respondent's allegations, and argued that her dismissal was improper, arbitrary and capricious, and excessive. Respondent proved by a preponderance of the evidence that Grievant failed to perform the duties of her job, and that she engaged in misconduct of a substantial nature which constituted good cause for her dismissal. Grievant failed to demonstrate that mitigation of the discipline imposed was warranted. Therefore, the grievance is DENIED.

**KEYWORDS:** Selection Process; Qualifications; Policy; Arbitrary and Capricious

**CASE STYLE:** Blair v. Department of Veterans Assistance  
DOCKET NO. 2016-1479-DVA (5/1/2017)

**PRIMARY ISSUES:** Whether Grievant proved that the selection process for the new Office Assistant 1 position was insufficient or fatally flawed.

**SUMMARY:** Grievant was initially employed by Respondent as a Licensed Practical Nurse assigned to the Alzheimer's Unit. Grievant was subsequently injured by a resident on the Alzheimer's Unit. Due to her injuries, Grievant was placed on light duty as a receptionist. Grievant was thereafter informed that her transitional duty work answering phones was going to end. Grievant requested an extension of this assignment. Respondent did not extend Grievant's transitional duty work. During the same time period, Grievant applied for a newly created Office Assistant 1 position that was posted at the West Virginia Veterans Nursing Facility. Grievant was not selected for the position. The decision to not extend Grievant's light duty work was not demonstrated to be arbitrary and capricious. Grievant did not meet her burden of proof in demonstrating the selection process for the new Office Assistant 1 position was insufficient or fatally flawed. Finally, Grievant did not prove that the selection of the successful applicant for the position was an arbitrary and capricious decision.

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**KEYWORDS:** Termination; Drug & Alcohol Testing; Reasonable Suspicion; Reporting to Work Intoxicated

**CASE STYLE:** Linger v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital  
DOCKET NO. 2016-0963-CONS (5/12/2017)

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

**SUMMARY:** Grievant was terminated from his position as a Health Service Worker after it was reported to hospital administration that Grievant was under the influence of alcohol. Grievant was confronted and agreed to a drug and alcohol test. Grievant's alcohol test showed that Grievant had a blood alcohol level of .143. Drug and alcohol testing was appropriate because there was undisputed evidence that Grievant reported to work in an intoxicated condition, smelled of an alcoholic beverage and admitted that he had been drinking alcohol. Respondent demonstrated that Grievant was dismissed for good cause. Accordingly, this grievance is denied.

**KEYWORDS:** Selection Process for Training; Seniority; Experience; Favoritism; Arbitrary and Capricious

**CASE STYLE:** Newlon, et al. v. Division of Highways  
DOCKET NO. 2016-1604-CONS (5/23/2017)

**PRIMARY ISSUES:** Whether Grievants proved that their non-selection for identified equipment training was an arbitrary and capricious decision.

**SUMMARY:** Grievants are Transportation Worker 2 Equipment Operators employed by the Division of Highways, Respondent. Grievants claim their employer=s selection of individuals to attend training courses for equipment operation is flawed. Grievants also tend to allege that they are victims of favoritism in not being selected for equipment operator certification training. Grievants' claims were not substantiated by the evidence. Seniority is a factor, but not the sole consideration for granting employment benefits. It was not established that the training selection decisions were arbitrary and capricious, nor did Grievants prove favoritism. This grievance is DENIED.

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**KEYWORDS:** Back Pay; Motion to Dismiss; Moot; Advisory Opinion; Lack of Jurisdiction

**CASE STYLE:** Jeffries, et al. v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital  
DOCKET NO. 2016-1741-CONS (5/23/2017)

**PRIMARY ISSUES:** Whether Respondent proved the grievance is moot.

**SUMMARY:** Grievants are employed by Respondent in various classifications at William R. Sharpe, Jr. Hospital. Grievants alleged they had not received back pay that had been awarded to them in a previous level one decision. Respondent filed a motion to dismiss alleging mootness, among other arguments, as Grievants had received their back pay in July 2016. Grievants failed to respond to the motion to dismiss and dispute this assertion, despite notice and opportunity to be heard and the instruction that the grievance may be dismissed if Grievants did not respond. Respondent has proved the grievance is moot and must be dismissed. Accordingly, the grievance is dismissed.

**KEYWORDS:**

Default; Level One Hearing; Level One Decision; Timely Issued; Discovery

**CASE STYLE:**

Tate, Jr. v. Division of Corrections/Parkersburg Correctional Center  
DOCKET NO. 2017-1184-MAPSDEF (5/18/2017)

**PRIMARY ISSUES:**

Whether Grievant proved by a preponderance of the evidence that he is entitled to entry of default judgment.

**SUMMARY:**

Grievant filed a grievance challenging his non-selection as case manager at the Parkersburg Correctional Center. Respondent scheduled and provided a Level I hearing within ten days of receipt of the grievance, and a decision was timely issued, denying the grievance. However, Grievant requested discovery regarding the successful applicant and the interview process. The requested discovery required review and redaction and, at the Level I hearing, Respondent failed to provide Grievant with redacted copies of the responsive discovery documents. Grievant asserts he is entitled to the entry of default judgment due to the fact that Respondent did not timely respond to his discovery requests, in violation of W. Va. Code, § 6C-2-3(k). Though Respondent violated W. Va. Code § 6C-2-3(k) in failing to give Grievant copies of the discovery material that Respondent submitted to the hearing examiner at the Level I hearing, there is no authority to permit the Grievance Board to grant default judgment due to this violation. Therefore, Grievant has failed to prove by a preponderance of the evidence that he is entitled to entry of default judgment and default is denied.

**KEYWORDS:** Discretionary Pay Raise; Pay Grade; Classification

**CASE STYLE:** Keplinger v. Division of Highways

DOCKET NO. 2017-0795-DOT (5/23/2017)

**PRIMARY ISSUES:** Whether Grievant met his burden of proof to demonstrate that the Division of Highways failure to recommend a discretionary pay raise to the Division of Personnel was arbitrary and capricious or an abuse of discretion.

**SUMMARY:** Grievant is challenging Respondent's failure to recommend to the West Virginia Division of Personnel a discretionary pay raise. Grievant is also challenging the Division of Personnel's prohibition against rounding up the percentage difference between employees' salaries to determine eligibility under the internal equity provision of the pay plan policy. The record established that Respondent used policy information provided by the Division of Personnel that a 19% salary difference could not be rounded up to meet the policy requirement of a 20% salary difference to qualify for the pay plan policy. Accordingly, Respondent did not recommend a discretionary pay increase for Grievant to the Division of Personnel. This action was not arbitrary and capricious or an abuse of discretion.