

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SYNOPSIS REPORT

Decisions Issued in May, 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
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

<u>KEYWORDS:</u>	Termination; Immortality; Theft; Misconduct
<u>CASE STYLE:</u>	<u>Miller v. Kanawha County Board of Education</u> DOCKET NO. 2020-0494-KanED (5/14/2020)
<u>PRIMARY ISSUES:</u>	Whether Respondent's decision to terminate Grievant's employment for theft was reasonable.
<u>SUMMARY:</u>	Grievant was employed by Respondent as a teacher at Ben Franklin Career Center teaching classes to adults for the operation of heavy equipment. Grievant's employment was terminated for immorality for the theft of a large slab of aluminum. Grievant denied the charges. Although there was some question of the ownership of the aluminum, Respondent proved it was more likely than not Grievant stole the aluminum and that it was reasonable to terminate Grievant's employment for the same. Accordingly, the grievance is denied.

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COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

<u>KEYWORDS:</u>	Hostile Work Environment; Seniority; Extra-duty; Overtime Assignments; Compensation; Fair and Equitable Relief
<u>CASE STYLE:</u>	<u>Pottorff v. Kanawha County Board of Education</u> DOCKET NO. 2019-0878-KanED (5/19/2020)
<u>PRIMARY ISSUES:</u>	Whether the amount of overtime and/or step-up pay Grievant was improperly denied due to a hostile work environment.
<u>SUMMARY:</u>	<p>The issue in discussion is entitlement, if any, to money Grievant improperly missed out on in overtime, step-up pay, and/or compensation she may have earned had she been awarded a summer substitute contract. Grievant was employed by Respondent as a Custodian I at Capital High School (CHS) at the time that she initially filed this grievance. While at Capital High School Grievant was subjected to what was found to be a hostile work environment. During the time that Grievant was subjected to this hostile work environment, she alleges that other employees with less seniority were being improperly given step-up assignments and overtime work ahead of her. Grievant also claims that she was unlawfully denied a summer substitute assignment during the Summer of 2018.</p> <p>Grievant has the burden of establishing the amount of wage(s) she was improperly denied. It is more likely than not that Grievant missed out on a limited amount of overtime and/or step-up pay, given the recognized (hostile) work environment however the amount of lost compensation is subjective. Grievant did not establish she was denied a summer substitute contract due to malfeasances of Respondent. The make-whole remedy of five hundred (\$500) dollars is GRANTED to Grievant, which is calculated as the outstanding proportionate amount of extra-duty pay that is due to Grievant per distribution of applicable moneys to CHS custodians over the statutorily recognized time period for back pay.</p>

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Suspension; Investigation; Constructive Discharge; Remedies; Unreasonable Working Conditions; Resignation; Gross Misconduct; Due Process; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Kendall, et al. v. Department of Health and Human Resources/Bureau for Children and Families</u> DOCKET NO. 2019-1336-CONS (5/19/2020)
<u>PRIMARY ISSUES:</u>	Whether Grievants proved that Respondent violated their constitutionally guaranteed due process rights to continued employment by suspending them without an opportunity to be heard while an unreasonably long investigation was conducted.
<u>SUMMARY:</u>	<p>Grievants were suspended without pay pending an investigation based upon a specific complaint received by Respondent. The investigation has gone on for a year without resolution. While the investigation was ongoing, Grievant Kendall would not participate in an interview scheduled by the Respondent's Office of Inspector General. Respondent dismissed Grievant Kendall for gross misconduct by forfeiting her job pursuant to W. Va. Code § 29-6-19 when she did not participate in an interview to be conducted by an Office of the Inspector General investigator. Also, during the course of the investigation, Grievant Underwood retired after exhausting all of her accrued annual leave days. Respondent argues that her grievance is now moot as a result of her retirement.</p> <p>Grievants argue that the indefinite suspension of their right employment pending an investigation violates their due process rights by terminating their property interest in their continuing employment. Respondent argues that the Division of Personnel Administrative Rule specifically allows for an "indefinite" suspension of an employee without pay pending an investigation.</p> <p>Grievant Underwood's grievance is not moot because she has an available remedy concerning her accrued annual leave should her employment be restored. Grievant Underwood did not prove that she was subjected to constructive discharge when she chose to retire during the course of the suspension. Respondent did not prove that Grievant Kendall was guilty of gross misconduct because W. Va. Code § 29-6-19 does not apply to the facts in this matter. Grievants proved that the length of the investigation was unreasonable and violated their due process rights.</p>

<u>KEYWORDS:</u>	Motion to Dismiss; Vacant Position; Timelines
<u>CASE STYLE:</u>	<u>Kessel v. Division of Natural Resources</u> DOCKET NO. 2020-1031-DOC (5/6/2020)
<u>PRIMARY ISSUES:</u>	Whether Respondent established that Grievant lacks standing to pursue this action, and the grievance was not filed in timely manner.
<u>SUMMARY:</u>	Grievant alleges irregularities regarding the filling of a position by her employer. Grievant did not apply for this position. Given the circumstances of this case, Grievant lacks standing to pursue her grievance. In addition, the record established that the grievance was not timely filed. Accordingly, Respondent's Motion to Dismiss is granted.
<u>KEYWORDS:</u>	Termination; Gross Misconduct; Mitigation
<u>CASE STYLE:</u>	<u>Washington v. Department of Health and Human Resources/Bureau for Children and Families</u> DOCKET NO. 2020-0543-DHHR (5/5/2020)
<u>PRIMARY ISSUES:</u>	Whether Respondent had good cause to terminate Grievant.
<u>SUMMARY:</u>	Grievant was employed by Respondent within the Bureau of Children and Families as a Family Support Specialist. Grievant's employment was terminated for gross misconduct. Respondent proved Grievant committed gross misconduct and that it was justified in terminating Grievant's employment for the same. Grievant failed to prove retaliation or that mitigation of the punishment is warranted. Accordingly, the grievance is denied.