

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SYNOPSIS REPORT

Decisions Issued in September, 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>	Termination; At-Will Employee; Job Duties; Job Accommodations; Hearing impaired
<u>CASE STYLE:</u>	<u>Simmerman v. Concord University</u> DOCKET NO. 2019-0084-CU (9/28/2020)
<u>PRIMARY ISSUES:</u>	Whether Respondent had good cause to terminate Grievant's at-will employment.
<u>SUMMARY:</u>	<p>Grievant was originally employed by Respondent as a classified employee, but his employment was converted to nonclassified or "at-will" by the passage of legislation which became om July 1, 2017. Respondent dismissed Grievant from employment "for continuing failure to meet employment expectations." Grievant argues that Respondent was required to grant Grievant employment protections set out in CU policy He asserts that his work performance was satisfactory, and any performance shortfalls were related to Respondent's failure to provide him with reasonable accommodations necessary to assist with his disability.</p> <p>As an at-will employee Respondent may terminate Grievant's employment for any reason that does not violate public policy. Respondent proved that Grievant's job performance failed to meet expected standards and that Grievant was not denied reasonable accommodations. Grievant did not prove that he dismissed for prohibited reasons.</p>

KEYWORDS: Tenure; Promotion; Policy; Discrimination; Decisional Process; Arbitrary and Capricious

CASE STYLE: Hijazi v. Marshall University

DOCKET NO. 2019-1638-MU (9/23/2020)

PRIMARY ISSUES: Whether Grievant proved the denial of his promotion and tenure application was discrimination, failure to conform with policy and procedure, or otherwise arbitrary and capricious.

SUMMARY: Grievant was employed by Respondent as a probationary Assistant Professor within the College of Information Technology and Engineering in the Weisberg Division of Engineering to serve as faculty in a new mechanical engineering program. Grievant applied for promotion and tenure asserting exemplary performance in research, scholarly, and creative activity. Although the division committee had a tie vote for and against recommendation, and the division chair recommended Grievant, Grievant's application was not recommended by the college committee, the dean, or the provost and the university president ultimately denied promotion and tenure. The decisional process by the non-recommending reviewers through the college level did not conform with applicable policy and procedure and Grievant suffered significant harm as a result. The non-recommending decisions were also arbitrary and capricious. Accordingly, the grievance is granted.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

<u>KEYWORDS:</u>	Termination; Suspension; Insubordination; Discrimination; Harassment; Retaliation; Reprisal; Credibility; Arbitrary and Capricious; Mitigation; Dismissed; Evaluations; Performance; Satisfactory; Unsatisfactory; Improvement; Correctable
<u>CASE STYLE:</u>	<u>S. v. Kanawha County Board of Education</u> DOCKET NO. 2020-0070-KanED (9/30/2020)
<u>PRIMARY ISSUES:</u>	Whether Respondent met its burden of proving by a preponderance of the evidence that Grievant engaged in acts of insubordination and that its decision to suspend and, subsequently, terminate Grievant's employment contract was justified.
<u>SUMMARY:</u>	Grievant was employed by Respondent as a carpenter and had been employed, although in different capacities, since in or about 2007. Respondent first suspended Grievant and subsequently terminated Grievant's employment contract for insubordination after two interactions with his intermediate supervisor. Grievant filed his grievance challenging the charge of insubordination and his suspension and dismissal asserting a number of claims including discrimination, harassment, and retaliation/reprisal. Respondent denies these claims and asserts that it was justified in terminating Grievant's employment contract. Respondent failed to meet its burden of proving insubordination and failed to prove that the discipline imposed was justified. Accordingly, this grievance is GRANTED.

KEYWORDS: Termination; Immorality; Insubordination; Hearsay; Misconduct; Correctable Conduct

CASE STYLE: Ainsworth v. Jefferson County Board of Education

DOCKET NO. 2020-1006-JefED (9/24/2020)

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

SUMMARY: Respondent contends that Grievant was dismissed from employment for immorality and insubordination. The only evidence to support these accusations was the testimony of the Human Resource Director, and her report summarizing interviews conducted by her and a third-party investigator. This is hearsay and, in some instances, hearsay upon hearsay. Under the circumstances of this grievance, this hearsay is entitled to no weight. Respondent failed to meet its burden of proof and establish these charges by a preponderance of the evidence. In addition, the record established that Respondent's action of termination was precipitous due to the nature of Grievant's conduct. Given the facts of this case, it appears that Grievant's alleged misconduct could be correctable. Accordingly, the undersigned finds that Respondent failed to establish the charges against Grievant, and Grievant is entitled to an improvement plan. This grievance is granted.

KEYWORDS: Transfer Letter; Schedules; Bus Route; Retaliation; Due Process

CASE STYLE: Toothman, et al. v. Marion County Board of Education
DOCKET NO. 2019-1747-CONS (9/29/2020)

PRIMARY ISSUES: Whether Grievants proved that the changes in their 2019-2020 bus routes were in retaliation for their union and grievance activity.

SUMMARY: Grievant Toothman and Grievant Reed are employed by Respondent as bus drivers. Respondent notified Grievants of changes to their bus schedules for the 2019-2020 school year. Grievants claim these changes were in retaliation for their union and grievance activity. They also allege lack of due process because Respondent did not provide them transfer letters and timely notice of rights or obtain their written consent to changes. After Grievants initiated this action, Respondent properly transferred Grievants routes for 2020-2021. Grievants amended their grievance to include breach of confidentiality after Respondent let Grievant Toothman's supervisors listen in on her transfer hearing against her wishes. As Grievants were properly transferred in 2020-2021, their due process claims requesting reinstatement to their 2018-2019 routes are moot. Their claims of retaliation and breach of confidentiality do not entail a request for return to their 2018-2019 routes. Nevertheless, Grievants did not prove a right to confidentiality in transfer hearings or that the changes to their 2019-2020 routes were retaliatory. Accordingly, this grievance is DENIED.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Termination; Probationary Employees; Investigation; Nazi Salute; Misconduct; Discrimination; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Smarr, et al. v. Division of Corrections and Rehabilitation/Bureau of Prisons and Jails</u> DOCKET NO. 2020-1488-CONS (9/23/2020)
<u>PRIMARY ISSUES:</u>	Whether Respondent had good cause to terminate Grievants' probationary employment.
<u>SUMMARY:</u>	Grievants were employed on a probationary basis as Correctional Officers and sent to the Corrections Academy for training. After seeing a photo of the graduating cadets performing a Nazi style salute, Respondent ordered an investigation. When the investigation substantiated Grievants' participation in and failure to report the salute, Respondent terminated Grievants for misconduct. Grievants assert they performed a Roman rather than a Nazi salute, were simply following orders under the peril of dismissal if disobeyed, and were not properly trained to report misconduct. While Grievants lacked hateful intent in performing the salute, Respondent proved that participating in the salute was misconduct. Accordingly, this grievance is DENIED.

<u>KEYWORDS:</u>	Termination; Probationary Employee; Inappropriate and Offensive Conduct; Nazi Salute
<u>CASE STYLE:</u>	<u>Smith, Jr. v. Division of Corrections and Rehabilitation/Bureau of Prisons and Jails</u> DOCKET NO. 2020-0827-MAPS (9/9/2020)
<u>PRIMARY ISSUES:</u>	Whether Respondent had good cause to terminate Grievant's probationary employment.
<u>SUMMARY:</u>	Grievant was a probationary employee. Respondent became aware of misconduct by Grievant while attending Respondent's Corrections Academy. Respondent conducted an investigation and determined that Grievant was depicted in a graduation photograph participating in a "Nazi salute." Grievant was dismissed from his probationary employment for his participation in, and failure to report, the offensive conduct while attending the Correctional Academy. Respondent proved by preponderance of the evidence that Grievant engaged in the inappropriate and offensive conduct, and that such conduct rendered him incapable of performing the duties of a correctional officer. This grievance is denied.