

# **WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

## **SYNOPSIS REPORT**

### **Decisions Issued in October 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**  
**STATE EMPLOYEES**

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<b><u>KEYWORDS:</u></b>	Termination; Probationary Employee; Training Courses; Travel Policy; Job Performance; Arbitrary and Capricious
<b><u>CASE STYLE:</u></b>	<u>Kidd v. Department of Health and Human Resources/Bureau for Children and Families</u> DOCKET NO. 2017-1874-DHHR (10/5/2017)
<b><u>PRIMARY ISSUES:</u></b>	Whether the termination of Grievant's probationary employment was arbitrary and capricious.
<b><u>SUMMARY:</u></b>	Grievant was a probationary employee in the Social Services Worker 2 classification. She was required to attend training sessions before entering her duties on a full performance basis. Grievant was assigned to the Putnam County DHHR offices' but the training took place in Flatwoods, West Virginia. Grievant was late arriving at the training on at least one day and fell asleep at various times throughout the session and during the final examination. Grievant had requested that she be allowed to stay in a motel during the courses of these trainings due to the distance she had to travel to attend. Her supervisor denied this request even though Grievant was traveling nearly twice the distance required by the travel policy for a participant to stay overnight. In spite of the long hours and driving which caused her sleeping difficulties, Grievant passed the comprehensive test at the end of the training. Grievant proved the only time that her performance lapsed was caused by Respondent's failure to follow its own policy. It was arbitrary and capricious for Respondent to terminate Grievant's employment for performance lapses caused by its own agents.

<b><u>KEYWORDS:</u></b>	Motion to Dismiss; Jurisdiction; SNAP Benefits Relief, Remedy Unavailable
<b><u>CASE STYLE:</u></b>	<u>D. v. Department of Health and Human Resources/Bureau for Children and Families</u> DOCKET NO. 2017-1155-DHHR (10/5/2017)
<b><u>PRIMARY ISSUES:</u></b>	Whether the Grievance Board has jurisdiction to hear this matter. Whether there in any remedy which can be granted.
<b><u>SUMMARY:</u></b>	Grievant alleges receiving a reprimand and being denied benefits by Respondent. Grievant seeks removal of any disciplinary action and restoration of all benefits. Respondent did not administer a reprimand or any other discipline to Grievant. The benefits Grievant seeks to be restores are SNAP benefits received through a nutrition program which is totally separate from Grievants's employment. The Grievance Board has no jurisdiction to grant relief related to the SNAP program and there is not relief available for a disciplinary action since none was taken. Because there is no relief available through the grievance procedure the grievance must be DISMISSED.
<b><u>KEYWORDS:</u></b>	Termination; Performance Improvement Plan; Progressive Discipline; Job Performance; Due Process; Retaliation
<b><u>CASE STYLE:</u></b>	<u>Kelly v. Workforce West Virginia</u> DOCKET NO. 2017-2296-DOC (10/6/2017)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent had good cause to terminate Grievant.
<b><u>SUMMARY:</u></b>	Grievant contests her dismissal. Grievant alleges nefarious rationale for the termination. From April 18, 2016, until her termination on May 30, 2017, Grievant was more or less continually on Performance Improvement Plans. During the course of her improvement plans, Grievant met with her supervisor on a bi-weekly basis for coaching and counseling. Ultimately, Grievant was terminated after an extended period of poor work performance. Respondent offered legitimate, non-retaliatory reasons for its action. Respondent's position is fortified by evidence of record. This grievance is DENIED.

**KEYWORDS:** Motion to Dismiss; Jurisdiction; Remedy; Relief; Unused Leave

**CASE STYLE:** Bryant v. Division of Natural Resources  
DOCKET NO. 2018-0021-DOC (10/6/2017)

**PRIMARY ISSUES:** Whether the remedy that Grievant seeks in this grievance is available through the grievance process.

**SUMMARY:** Grievant attempted to avail himself of the opportunity to receive value for accrued unused annual and/or sick leave. As authorized by W. Va. Code '5-5-6 Grievant applied to exchange unused leave. Grievant's request was denied by the administering authority, West Virginia Department of Administration, because funding for the state-wide program had been eliminated. Grievant filed this grievance against his employer the West Virginia Division of Natural Resources. Grievant's employer, DNR, Respondent does not have the ability to remedy the facts and circumstances that gave rise to this grievance. The grievance procedure is in place to allow employees to pursue grievances against the agency which employs them. Inasmuch as Respondent is not responsible for the action about which Grievant complains, and has no authority to resolve the grievance, this grievance is not proper for resolution by this body. Accordingly, Respondent's motion is granted and this grievance is dismissed.

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**KEYWORDS:** Annual Increment Pay; State Agency; Service Credit; Public Defender Corporations

**CASE STYLE:** Malone v. Department of Health and Human Resources/Office of the Inspector General and Division of Personnel  
DOCKET NO. 2017-0514-DHHR (10/4/2017)

**PRIMARY ISSUES:** Whether Grievant proved he is entitled to years of service credit for annual increment pay based on his previous employment.

**SUMMARY:** Grievant is an attorney employed by Respondent DHHR in the Medicaid Fraud Unit of the Office of the Inspector General. Prior to his employment with Respondent DHHR, Grievant was employed as a public defender by two separate public defender corporations. Grievant grieves his failure to receive annual increment pay, asserting he is entitled to the same based on his years of service with the public defender corporations. Public defender corporations are not state agencies or spending units of the state for purposes of annual increment pay. Grievant failed to prove he is entitled to years of service credit for annual increment pay based on his previous employment with public defender corporations. Accordingly, the grievance is denied.

**KEYWORDS:** Termination; Attendance Improvement Plan; Shift; Overlap; Progressive Discipline; Predetermination Conference; Due Process; Arbitrary and Capricious

**CASE STYLE:** Sparks v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital

DOCKET NO. 2017-2089-DHHR (10/5/2017)

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

**SUMMARY:** Grievant was employed by Respondent at Mildred Mitchell-Bateman Hospital as a Health Service Worker. Grievant was dismissed from employment following progressive discipline for attendance issues. Respondent failed to provide Grievant with notice and opportunity to be heard on part of the charges upon which her termination was based. Respondent failed to prove it had good cause to dismiss Grievant from employment. Grievant's tardiness of a few minutes during "shift overlap" appears to be more a "technical [violation] of statute or official duty without wrongful intention" rather than "misconduct of a substantial nature directly affecting the rights and interest of the public." Accordingly, the grievance is granted.