

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SYNOPSIS REPORT

Decisions Issued in November, 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; Probationary Employee; Job Duties; Hearsay; Quality of Work; Unsatisfactory Performance; Time Limits; Arbitrary and Capricious; Advisory Opinion
<u>CASE STYLE:</u>	<u>Podewell v. West Virginia University</u> DOCKET NO. 2020-0278-WVU (11/12/2020)
<u>PRIMARY ISSUES:</u>	Whether Respondent had good cause to terminate Grievant's probationary employment.
<u>SUMMARY:</u>	Grievant was employed on a probationary basis as Supervisor of Roads and Grounds when WVU dismissed him for unsatisfactory performance and cited prior discipline. Grievant grieves his prior discipline and dismissal. WVU proved that the grievance of prior discipline was untimely. Grievant did not prove a proper basis to excuse his untimely grievance of prior discipline. As for the dismissal, WVU cites two incidents: that Grievant failed to ensure the quality of landscaping work at Mountaineer Station on July 17, 2019, and that he improperly processed timecards. While Grievant successfully challenged the charge involving landscaping work at Mountaineer Station, he did not address the accusation that he repeatedly failed to properly process timecards. Grievant thereby failed to prove his performance was satisfactory. Accordingly, this grievance is DISMISSED, in part, and DENIED, in part.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: Discrimination; Job Responsibilities; Planning Period

CASE STYLE: Holt v. Kanawha County Board of Education
DOCKET NO. 2020-0120-KanED (11/9/2020)

PRIMARY ISSUES: Whether Grievant proved that Respondent's failure to provide her with an additional planning period is discriminatory.

SUMMARY: Grievant is employed by Respondent as a classroom teacher at Mary Ingles Elementary School teaching special education. Although Grievant receives the planning period required by statute, Grievant protests Respondent's failure to provide her an additional planning period as other classroom teachers have been provided, asserting discrimination. Respondent's failure to provide Grievant with an additional planning period is not discriminatory as the difference in treatment is related to Grievant's job responsibilities. Accordingly, the grievance is denied.

KEYWORDS: Salary Increase; Paraprofessional Licenses; Teaching License; Burden of Proof; Arbitrary and Capricious; Endorsement

CASE STYLE: Hall, et al. v. Kanawha County Board of Education

DOCKET NO. 2020-0897-CONS (11/24/2020)

PRIMARY ISSUES: Whether Grievants established by a preponderance of the evidence that they are entitled to the three-step pay increase authorized by W.Va. Code § 18A-4-2(e).

SUMMARY: Respondent, a county school board, grants a pay-increase to licensed classroom teachers with a special education endorsement. Grievants are of the opinion they too are entitled to the three-step salary increase authorized by WEST VIRGINIA CODE § 18A-4-2(e). Grievants are Educational Sign Language Interpreters who work with students who are hearing impaired. Both Grievants hold paraprofessional licenses as Educational Sign Language Interpreters. Neither Grievant is a licensed teacher.

The salary increase is paid by the West Virginia Department of Education ("WVDE") through a reimbursement to the county. Respondent relying on two separate guidance documents from the WVDE in order to determine who is approved for the three-step pay increase. WVDE has made it clear through its guidance documents, which explains the specific licenses a teacher must have, and corresponding endorsement codes that must be attached to those licenses in order to qualify for the three-step pay increase. Neither Grievant has a recognized teaching license with qualifying special education endorsement. Neither Grievant is on the certified list for an employee certified in special education. In accordance with the guidance of the agency charged with the payment of the three-step pay increase Respondent determined Grievants were ineligible for the pay increase.

Grievants have not shown Respondent is clearly wrong in its implementation of the Department of Education's interpretation of W. Va. Code § 18A-4-2(e). Grievants have not proven that they are entitled to the three-step pay increase by a preponderance of the evidence. This grievance is DENIED.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Termination; Failure to Report; Essential Duty; State of Emergency; Arbitrary and Capricious; Mitigation
<u>CASE STYLE:</u>	<u>Bassham v. Division of Corrections and Rehabilitation/Bureau of Prisons and Jails</u> DOCKET NO. 2020-1447-MAPS (11/6/2020)
<u>PRIMARY ISSUES:</u>	Whether Respondent had just cause to terminate Grievant's employment and whether his dismissal was clearly excessive or an abuse of discretion.
<u>SUMMARY:</u>	<p>Grievant was employed as a Correctional Officer 3 with Respondent at Southwestern Regional Jail (SWRJ), and, as such, was subject to a requirement to serve temporary duty assignments in any of the state's Regional Jails at any time as deemed necessary for the appropriate care, custody, and control of the state's jail inmate population. Respondent dismissed Grievant for his failure to report to work a shift at the South Central Regional Jail (SCRJ). Grievant alleges that he was wrongfully terminated.</p> <p>At or near the time period relevant to this matter, some non-essential workers in the state were permitted or encouraged to work remotely, nevertheless, state's prison and jail employees were, and are still, considered essential workers who must report for duty in person as they are directly responsible for the care, custody, and control of an incarcerated population. Whether or not positive COVID-19 cases were diagnosed among inmate or staff populations does not alter the necessity of correctional officers and staff to report for duty to protect the public welfare. In short, the refusal or unwillingness of a correctional officer to perform his or her essential duties is substantial misconduct directly and adversely affecting the rights and interests of the public.</p> <p>The nature of Grievant's conduct is significant enough for Respondent, within its scope of discretion, to reasonably conclude that termination of Grievant's employment was warranted. Grievant has not persuasively provided adequate rebuttal to overturn or significantly mitigate the disciplinary actions of Respondent. Respondent established good cause to dismiss Grievant from employment. This grievance is DENIED.</p>

KEYWORDS: State of Emergency; Annual Leave; Executive Order; Excess Leave

CASE STYLE: Abner, et al. v. Division of Corrections and Rehabilitation/Bureau of Prisons and Jails

DOCKET NO. 2019-0812-CONS (11/6/2020)

PRIMARY ISSUES: Whether Grievants proved that Executive Order 11-17 allowed them the ability to carryover excess leave into 2019.

SUMMARY: Grievants were employed as Correctional Officers by Respondent, the Division of Corrections and Rehabilitation, at all relevant times. Due to staffing deficiencies, the Governor issued two executive orders declaring a state of emergency in December 2017. One allowed Respondent to force Correctional Officers to work extra hours. The second suspended the Division of Personnel's Administrative Rule by allowing Correctional Officers unable to utilize accrued annual leave by the end of 2017 to carry it forward through the end of 2018. Due to continued staffing shortages in 2018, Grievants were unable to utilize some accrued annual leave and were prohibited from carrying beyond 2018 the leave exceeding the carryover limits under the Administrative Rule. Grievants contend they should be allowed to carryover the excess because the state of emergency was never terminated and the Administrative Rule is unconstitutional. While the undersigned lacks authority to invalidate the Administrative Rule, it does have the authority to determine whether it remains suspended through an executive order. Grievants failed to prove that the Administrative Rule remains suspended beyond 2018. Accordingly, this grievance is DENIED.

KEYWORDS: Return to Work; Light Duty; Job Responsibilities; Discrimination

CASE STYLE: Carver v. Division of Corrections and Rehabilitation/Bureau of Prisons and Jails

DOCKET NO. 2019-1429-MAPS (11/6/2020)

PRIMARY ISSUES: Whether Respondent improperly denied Grievant the opportunity to return to his position of Correctional Officer I on light duty.

SUMMARY: Grievant was employed by Respondent as a Correctional Officer I. Grievant contends that Respondent's action(s) in denying his return to work on light duty was improper. Grievant has the burden of proof in this non-disciplinary matter. Grievant seeks back pay for the period he was off work till his return to full duty.

Respondent invested significant time and effort into evaluating request for light duty/return to work made by Grievant. Grievant could not work any of the posts manned by correctional officers, was unable to work directly with inmates, and was restricted from performing many of the essential duties of his position as outlined in the classification specifications. Grievant failed to prove that he was discriminated against or that Respondent denied him the right to return to his position of Correctional Officer I in violation of any applicable rule or statute. This grievance is DENIED.

KEYWORDS: Termination; Temporary Assignment

CASE STYLE: Fields v. Division of Corrections and Rehabilitation/Bureau of Prisons and Jails AND

DOCKET NO. 2020-1412-MAPS (11/19/2020)

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

SUMMARY: Respondent dismissed Grievant for refusing to perform a temporary assignment at the South Central Regional Jail because it was falsely rumored that an inmate had tested positive to COVID-19 at that facility. Grievant did not refuse to perform the temporary assignment. Grievant told his supervisors that he was not feeling well and needed to go to the doctor. The executive officers specifically gave Grievant permission to leave the facility to see a doctor. Respondent did not prove the reasons it cited for the termination of Grievant's employment by a preponderance of the evidence.

KEYWORDS: Fair Labor Standards Act; Travel Time; Classification; Professional Employees; Discrimination

CASE STYLE: Hockensmith, et al. v. Tax Department

DOCKET NO. 2020-0661-CONS (11/24/2020)

PRIMARY ISSUES: Whether Grievants proved they were subjected to discrimination.

SUMMARY: Grievants allege that any work-related travel they incurred during a specific three-month period identified herein, should have been counted as additional work time entitling them to additional pay or compensatory leave. They argue that Respondent inaccurately designated them as “professional employees” exempt from the overtime and wage provisions of the federal Fair Labor Standards Act. 29 U.S.C. § 201, et seq. and therefore denied them travel time benefits set out in the FSLA. Grievants also argue that Respondents improperly discriminated against them by treating them differently regarding to travel time.

Grievants positions clearly met the “professional employees” for exemption from coverage under the FLSA. Consequently, the various provisions under that Act which Grievants allege Respondent was violating have no bearing since those provisions were no applicable to Grievants’ positions. Grievant’s did not prove that they were similarly situated to Revenue Agents or that the different treatment of office-based auditors and field-based auditors vis-à-vis travel were not based on actual differences in their job responsibilities.