

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in December 2016

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; Gross Misconduct; Investigation; Fraudulent Purchases; Dishonesty; Witness Credibility
<u>CASE STYLE:</u>	<u>Fansler v. West Virginia University</u> DOCKET NO. 2017-0872-WVU (12/15/2016)
<u>PRIMARY ISSUES:</u>	Whether Respondent had good cause to terminate Grievant's employment.
<u>SUMMARY:</u>	Grievant's employment was terminated by Respondent based on allegations that he was dishonest and fraudulent purchases. The purchases at issue were approved by Grievant's supervisor, and Respondent did not demonstrate any impropriety in the purchases, or that Grievant intended the items for his own use. Respondent further failed to demonstrate that Grievant was dishonest in any representations to his employer.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Motion to Dismiss; Settlement Agreement; Time Lines; Appeal

CASE STYLE: Johnson v. Mercer County Board of Education
DOCKET NO. 2016-1492-MerED (12/13/2016)

PRIMARY ISSUES: Whether issues in dispute were legally resolved.

SUMMARY: Throughout the grievance process, Grievant has been represented by individuals from the West Virginia Education Association (hereinafter "WVEA"). After a level one conference, Grievant and Respondent reached a settlement and the grievance was withdrawn on April 20, 2016. Thereafter, Grievant filed an untimely level two appeal on May 12, 2016.

The resolution which Grievant agreed upon is valid and binding and Grievant has set forth unpersuasive reasons to set such resolution aside. Grievant's alleged lack of understanding of the impact of the agreed resolution, despite having representation at the time of the agreement, is insufficient, in circumstances of this matter, to excuse her actions which also tends to include failure to timely file a level two appeal. Accordingly, the grievance is dismissed.

KEYWORDS: Continuing Contract Status; Contract Terms; Paid Vacation Days; 261-Day Employee; Transfers and Assignments; Time Lines; Due Process

CASE STYLE: Damron v. Wayne County Board of Education

DOCKET NO. 2016-0252-WayED (12/9/2016)

PRIMARY ISSUES: Whether Grievant is entitled to paid vacation days.

SUMMARY: Grievant contests her terms of employment with Wayne County Board of Education. The parties differ regarding the status of Grievant's employment with Respondent as a secretary assigned to the WFGH radio station, specifically the proper amount of vacation pay due. The circumstances of this employment matter are convoluted. Both parties tend to be guarded, or less than overly forthcoming, with reliable information.

Respondent argues that an alteration of Grievant's 261-day employment contract was implemented, highlighting a notable community event (school consolidation in 1987-88) effecting all then employed personnel. Relevant Wayne County School Board action was implemented, employees of Grievant's classification/status were effected. However, it is not established that Grievant was duly noticed and/or presented with the relevant information as it pertained to her employment status. There is a difference between the benefits of a 261-day employee and that of a 240-day employee. It is hard to fathom that for over twenty-five years no event or conversation between employer and employee transpired, (e.g., payroll) which alerted one or the other that the two parties were governing their activities pursuant to different criteria. Nevertheless, pursuant to relevant school board policy, service personnel may accumulate unused vacation leave, but no such employee is allowed to carry more than 30 days over to each new fiscal year. Thus, this grievance is GRANTED in part.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Termination; Drug and Alcohol Testing Policy; Patient Abuse
<u>CASE STYLE:</u>	<u>Lewis v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital</u> DOCKET NO. 2016-1059-CONS (12/1/2016)
<u>PRIMARY ISSUES:</u>	Whether Respondent had good cause to terminate Grievant's employment.
<u>SUMMARY:</u>	Grievant was employed by Sharpe Hospital as a Health Service Worker. Respondent was able to prove by a preponderance of the evidence that Grievant engaged in patient abuse and for testing positive for various drugs during his scheduled work time. Grievant was dismissed for good cause. Accordingly, this grievance is denied.

<u>KEYWORDS:</u>	Classification; Position Description Form; Job Responsibilities; Pay Grade; Job Audit; Reallocation; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Clark v. Insurance Commission and Division of Personnel</u> DOCKET NO. 2016-1442-DOR (12/13/2016)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved by a preponderance of the evidence that DOP's classification for his position was clearly wrong or arbitrary and capricious.
<u>SUMMARY:</u>	Grievant, an employee of the Workers' Compensation Office of Judges within the Insurance Commission contends the reallocation of his position is in error. Grievant is in opposition to the classification of his position from an Employment Program Manager 1, pay grade 18 to a Supervisor 3, pay grade 13. Grievant contends he is being misclassified and suggests that the classification of Workers' Compensation District Claims Manager more accurately reflects his job duties. 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 audit, the Division of Personnel determined that Grievant's position best fit into the classification of Supervisor 3. Grievant did not prove that Respondent DOP's classification decision was clearly wrong or arbitrary and capricious. This grievance is DENIED.

KEYWORDS: Termination; Policy GSD-P2; Attendance Standards; Discrimination

CASE STYLE: Hall v. General Services Division

DOCKET NO. 2016-1409-DOA (12/12/2016)

PRIMARY ISSUES: Whether Respondent proved it had good cause to dismiss Grievant from employment for violation of policy.

SUMMARY: Grievant was employed by Respondent as a Trades Specialist. Grievant was dismissed from employment for repeated violation of Respondent's policy for reporting off work. Respondent proved it had good cause to dismiss Grievant from employment for his repeated violation of policy. Grievant's long tenure with the agency is outweighed by his recent unsatisfactory performance and disciplinary history. Grievant did not prove that his dismissal from employment was discrimination. Accordingly, the grievance is denied.

KEYWORDS: Tuition Reimbursement; Employee Education Expense Reimbursement/Subsidized Education Leave Program

CASE STYLE: Sarver v. Department of Health and Human Resources/Office of Human Resource Management AND Education Reimbursement/Leave Program

DOCKET NO. 2016-1466-DHHR (12/12/2016)

PRIMARY ISSUES: Whether Grievant met her burden of proving by preponderance of the evidence that Respondents failed to equitably expend funds for education reimbursement.

SUMMARY: Grievant asserts that Respondents improperly denied her EERL A1 Application to obtain education expense reimbursement under DHHR's Employee Education Expense Reimbursement/Subsidized Education Leave Program ("Program"), which was submitted beyond the 30-day deadline clearly specified in the process and procedures for the Program. Grievant asserts that DOP's Education Expense Reimbursement/Leave Program Policy, which states that, "... funds shall be expended ... in a fair and equitable manner consistent with the mission of the agency and the agency's present and future staffing needs," requires Respondents to make an exception to the deadline in this instance, due to the difficult personal circumstances she faced at or about the time of the prescribed deadline. Grievant failed to prove that Respondents violated any applicable policies or procedures when her application was denied on the basis that it was not timely submitted.

KEYWORDS: Motion to Dismiss; Moot; Retirement; Classification

CASE STYLE: Rossell v. Division of Forestry

DOCKET NO. 2017-0961-DOC (12/13/2016)

PRIMARY ISSUES: Whether this matter is moot.

SUMMARY: Grievant grieved Respondent's decision to move him into a new position. As relief, Grievant requested to be placed in a different position and promoted to a higher classification. Respondent moved to dismiss the grievance asserting mootness due to Grievant's retirement. Grievant did not respond to the motion to dismiss. Respondent proved the grievance is now moot due to Grievant's retirement as Grievant grieved a condition of his employment and did not allege an entitlement to lost wages.

Accordingly, Respondent's motion to dismiss should be granted, and this grievance, dismissed.

KEYWORDS: Sick and Annual Leave Balance; Transferring Leave; City Employment; State Employee; Reimbursement; Ultra Vires

CASE STYLE: Casto v. Fire Commission and Division of Personnel

DOCKET NO. 2016-0720-MAPS (12/1/2016)

PRIMARY ISSUES: Whether Respondent is bound by the erroneous transfer of leave balances and calculation of leave accrual rate using Grievant's employment with a city by Respondent's Human Resources Director and whether Respondent may seek reimbursement of unearned leave used by Grievant.

SUMMARY: Grievant is employed as an Assistant State Fire Marshal by Respondent Fire Commission. Grievant was previously employed by the City of Nitro. In violation of Respondent Division of Personnel's Administrative Rule, Respondent Fire Commission's Human Resources Director transferred Grievant's sick and annual leave balances from the City of Nitro, calculated Grievant's leave accrual rate using his tenure from the City of Nitro, and permitted Grievant to carry leave balances in excess of that permitted by the Rule. Grievant is not entitled to relief as his leave was calculated and transferred through the legally unauthorized acts of the Human Resources Director, by which Respondents are not bound. Accordingly, the grievance is denied.

KEYWORDS: Resignation; General Order No. 5; Investigation; Polygraph Examination

CASE STYLE: Dawson v. Division of Natural Resources

DOCKET NO. 2015-1301-DOC (12/14/2016)

PRIMARY ISSUES: Whether Grievant proved by a preponderance of the evidence that his resignation was not voluntary.

SUMMARY: Grievant was employed as a Natural Resources Police Officer at District 2 for just over three years. In the fall of 2014, a complaint was made against Grievant that alleged he had used false information in a search warrant affidavit. Respondent conducted an internal investigation. Against the clear weight of the evidence, Respondent sustained the complaint. The record established that no evidence was uncovered during the internal investigation to suggest that Grievant intentionally used false information in the search warrant affidavit. The record further established that provisions of General Order No. 5, Respondent's written policy for handling internal investigation, were violated. The sustenance of the complaint was based upon an invalid polygraph examination. Grievant established by a preponderance of the evidence that his resignation was caused by Respondent's flawed internal investigation and clearly wrong finding, creating a working condition that was so intolerable that a reasonable person would be compelled to resign. Grievant's resignation was not voluntary thereby rendering his resignation void and of no effect.

KEYWORDS: Classification; Reallocation; Promotion; Trainee; Salary; Arbitrary and Capricious

CASE STYLE: Kirk v. Department of Health and Human Resources/Bureau for Children and Families and Division of Personnel

DOCKET NO. 2016-1512-DHHR (12/16/2016)

PRIMARY ISSUES: Whether Grievant proved by a preponderance of the evidence that the delay in the reallocation of her position was arbitrary or capricious.

SUMMARY: Grievant had served her probationary period as an Adult Protective Service Worker Trainee (“ASP Worker Trainee”) by mid-February 2016, and expected her salary to increase with the reallocation of her position the an Adult Protective Service Worker (“ASP Worker”) at that time. However, the reallocation of Grievant’s position was delayed until mid-April 2016. Grievant argues that the delay was unreasonable and seeks back pay representing the difference between her salary as an APS Trainee and her salary as an APS Worker for the two month period. Respondent DHHR had made all reasonable efforts to cause Grievant’s position to be reallocated by the mid-February date and would likely have succeeded had it not been for Grievant’s need to take unpaid leave while the personnel actions were being processed. Grievant did not prove that the delay was caused by unreasonable, arbitrary or capricious action of Respondent.

KEYWORDS: Hostile Work Environment; Moot; Relief; Advisory Opinions; Motion to Dismiss

CASE STYLE: Sibray v. Division of Motor Vehicles

DOCKET NO. 2016-1809-DOT (12/20/2016)

PRIMARY ISSUES: Whether this matter is moot.

SUMMARY: Grievant is employed by Respondent, Division of Motor Vehicles. Grievant alleged that a specific coworker was creating a hostile working environment. Respondent moved to dismiss the grievance as moot. Despite proper notice and an opportunity to be heard, Grievant failed to respond to the motion. As the coworker about whom Grievant complained has now moved to another section of the Division of Motor Vehicles, the grievance is moot as a decision on the grievance would have no practical consequences and would be merely advisory. Accordingly, the grievance is dismissed.

KEYWORDS: Wage Differential; Time Limits; Fifteen Days; Continuing Practice; Motion to Dismiss

CASE STYLE: Gill v. Division of Corrections/Mount Olive Correctional Complex and Division of Personnel
DOCKET NO. 2016-1138-MAPS (12/20/2016)

PRIMARY ISSUES: Whether this grievance was timely filed.

SUMMARY: Grievant is employed by the Division of Corrections as a Correctional Officer II. Grievant alleged a wage differential had occurred due to a paperwork mistake between the Division of Corrections and the Division of Personnel. Respondents moved to dismiss the grievance as untimely filed. The specific allegation in the grievance, the wage differential due to a paperwork mistake, occurred more than a year prior to the filing of the grievance, so is untimely. The allegations of pay disparity Grievant made in his testimony are beyond the nature of the grievance as filed. Even if the pay disparity allegation was a proper part of the grievance filing, the filing was untimely as it was a result of the isolated act of Grievant's choice to resign to take another position more than a year prior to the filing of the grievance. Accordingly, the grievance is dismissed.

KEYWORDS: Classification; Transportation Worker Apprenticeship Program; Arbitrary and Capricious

CASE STYLE: Cutright, et al. v. Division of Highways
DOCKET NO. 2016-1149-CONS (12/13/2016)

PRIMARY ISSUES: Whether Respondent's decision to require employees to possess a Class A-CDL to be placed in Tier Two of the Transportation Worker Apprenticeship Program is arbitrary and capricious.

SUMMARY: Grievants are all mechanics and argue that Respondent's requirement that they possess a Class A-CDL to advance in their recently implemented tier program is unreasonable due to the nature of their job duties. Grievants failed to demonstrate by a preponderance of the evidence that Respondent acted in an arbitrary and capricious manner by including the Class A-CDL license as a component of the Transportation Worker Apprenticeship Program.

KEYWORDS: Overtime; Snow Removal and Ice Control; Job Duties; County Organizations; Arbitrary and Capricious

CASE STYLE: Jividen, et al. v. Division of Highways
DOCKET NO. 2016-1187-CONS (12/19/2016)

PRIMARY ISSUES: Whether Grievants proved by a preponderance of the evidence that Respondent was giving overtime work in one county to workers from another county organization. Whether Respondent's assignments of duties were arbitrary and capricious.

SUMMARY: Grievants believed that Respondent was assigning workers from another county organization to perform winter storm monitoring duties in an area assigned to the Mason County Organization and denying them the opportunity to earn overtime. The area which was being monitored was a section of Route 35, located in Mason County. That section of Route 35 is assigned to the Route 35 Interstate and Freeway Organization and not Mason County Organization. Employees in the Route 35 Organization were properly assigned to perform the winter storm watch duties.

KEYWORDS: Classification; Supervisor; Lead Worker; Job Duties; Position Description Form; Arbitrary and Capricious

CASE STYLE: Milam v. Division of Highways and Division of Personnel
DOCKET NO. 2016-1507-DOT (12/30/2016)

PRIMARY ISSUES: Whether the determination that Grievant's duties best fit the Highway Storekeeper classification was arbitrary and capricious.

SUMMARY: Grievant was employed by Respondent Division of Highways as a Supervisor 2. After completing a position review, Respondent Division of Personnel determined the position should be reallocated to Highway Storekeeper. Grievant asserted his duties best fit Supervisor 2 and that Respondent Division of Personnel's reliance on the glossary definition of "supervisor" was arbitrary and capricious. Respondent Division of Personnel's interpretation of the classification specifications is entitled to deference as it is supported by substantial evidence and a rational basis. Grievant failed to prove the Supervisor 2 classification is the best fit for his duties as Grievant only supervised only one employee. Grievant failed to prove that the Division of Personnel's determination that the Highway Storekeeper classification was the best fit was arbitrary and capricious. Accordingly, the grievance is denied.

KEYWORDS: Return to Work; Less-than-Full-Duty; Restrictions; Reasonable Accommodation; Light Duty; Arbitrary and Capricious; Essential Duties; Essential Functions; Reprisal

CASE STYLE: Hamilton v. Department of Health and Human Resources/Welch Community Hospital
DOCKET NO. 2016-0968-DHHR (12/22/2016)

PRIMARY ISSUES: Whether Grievant proved by a preponderance of the evidence that Respondent actions denying her continuation of less-than-full-duty work was improper, or arbitrary and capricious.

SUMMARY: Grievant is employed by Respondent as a Health Service Worker, or Certified Nursing Assistant. Grievant sustained an on-the-job injury that resulted in permanent impairment and medical restrictions. Respondent denied Grievant's request to return to work in a permanent light-duty position. Grievant asserted that Respondent's actions were improper. Grievant did not prove that she could perform the essential functions of her positions with or without accommodation, and failed to prove any right to be returned to work in a permanent light duty capacity. Further, Grievant failed to prove Respondent's actions in attempting to find her other positions was arbitrary and capricious. Grievant also raised a claim of reprisal in an attempt to enforce a prior Grievance Board Order. As the Grievance Board is prohibited for enforcing its own orders, this claim cannot be addressed herein. Therefore, this grievance is DENIED.

KEYWORDS: Selection Process; Qualifications; Experience; Favoritism; Arbitrary and Capricious

CASE STYLE: Booth v. Division of Corrections/Huttonsville Correctional Center
DOCKET NO. 2016-0539-MAPS (12/30/2016)

PRIMARY ISSUES: Whether Grievant proved the selection process was insufficient or fatally flawed.

SUMMARY: The record of this case demonstrated that the selection process for Unit Manager was not arbitrary and capricious, and Grievant did not meet her burden of proof to establish that she should have been selected for the position. The record did not establish that favoritism played a part in the selection process. Grievant failed to meet her burden of proof and demonstrate that Respondent's selection process was flawed.

KEYWORDS: Termination; Drug Testing; Policy; Reasonable Suspicion

CASE STYLE: Skinner v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital

DOCKET NO. 2016-1590-CONS (12/21/2016)

PRIMARY ISSUES: Whether Respondent demonstrated good cause for Grievant's dismissal.

SUMMARY: Grievant was dismissed from employment as a Licensed Practical Nurse by Respondent for testing positive for controlled substances in her system while at work. Respondent presented sufficient credible evidence to establish that there was reasonable suspicion to order Grievant to submit to a for-cause drug test. Grievant established that Respondent failed to follow applicable policy when it did not make arrangements for Grievant to conduct a second test on the second sample vial. Respondent committed additional procedural error when it failed to present evidence that the purportedly positive laboratory results were ever reviewed by a qualified Medical Review Officer. The only document in the record which could potentially demonstrate that this review was accomplished is blank. This grievance is granted.