

**WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**SYNOPSIS REPORT**

**Decisions Issued in January 2018**

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**  
**HIGHER EDUCATION EMPLOYEES**

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**KEYWORDS:** Salary; Pay Grade; Minimum Salary; Pay Differences; Equal Pay; New Employee Salaries

**CASE STYLE:** Summers, et al. v. West Virginia University

DOCKET NO. 2016-1879-CONS (1/3/2018)

**PRIMARY ISSUES:** Whether Grievants demonstrated they are entitled to a salary increase.

**SUMMARY:** Grievants believe they are being treated unfairly and should be awarded a pay increase because new employees may be receiving a starting salary above entry level for the pay grade. Grievants did not demonstrate that Respondent has violated any law, rule, regulation, policy, or procedure. More importantly, however, Respondent is not required to compensate all employees at the same level. All that is required is that the employees be properly classified and be paid within the pay range for the classification's pay grade.

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**KEYWORDS:** Dismiss; Wholly Unavailable; Advisory Opinion; Intellectual Property; Copyright; Tort-Like Damages; Injury-in-Fact; Speculative

**CASE STYLE:** Baker v. West Virginia University at Parkersburg

DOCKET NO. 2017-2458-WVUP (1/26/2018)

**PRIMARY ISSUES:** Whether Respondent proved by a preponderance of the evidence that its motion to dismiss should be granted.

**SUMMARY:** Grievant is employed by Respondent as a professor. Grievant alleges claims involving intellectual property rights and copyright infringement, and seeks various remedies, including tort-like damages. Respondent moved to dismiss this grievance for a variety of reasons, including, but not limited to, lack of jurisdiction, and that Grievant seeks remedies that are wholly unavailable through the grievance process. Respondent has proved by a preponderance of the evidence that its Motion to Dismiss should be granted. Therefore, this grievance is DISMISSED.

**TOPICAL INDEX**  
**COUNTY BOARDS OF EDUCATION**  
**PROFESSIONAL PERSONNEL**

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**KEYWORDS:** Termination; Insubordination; Willful Neglect of Duty; Correctable Conduct; Mitigation

**CASE STYLE:** Phillips v. Boone County Board of Education  
DOCKET NO. 2017-2333-CONS (1/19/2018)

**PRIMARY ISSUES:** Whether Respondent proved Grievant violated the Employee Code of Conduct and was insubordinate.

**SUMMARY:** Grievant was dismissed from employment as a teacher for allegedly having several inappropriate conversations with students and making sexually charged comments. The allegations were based upon statements given by students in one of his classes. Grievant argues that the student allegations are not true and were brought as part of a plan by the students to get him fired. He opined that the students perpetrated this ruse because they thought his assignments and tests were unfair and the students were not getting the grades they wanted. Grievant also argues that he was entitled to be informed of any shortcomings through performance evaluations and given an opportunity to improve before disciplinary action was taken. Grievant also alleges that Respondent broke an agreement regarding prior actions and that the punishment was out of proportion to any misconduct he may have committed.

Respondent proved that Grievant, more likely than not, made the inappropriate comments alleged by the students, and his conduct was not correctable so as to require an improvement plan. Grievant did not show that the punishment was clearly excessive or constituted an abuse of discretion.

**KEYWORDS:** Harassment; Hostile Work Environment; Reprisal; Observations; Focused Support Plan; Unreasonable Work Expectations

**CASE STYLE:** Joy v. Jefferson County Board of Education  
DOCKET NO. 2017-1495-JefED (1/22/2018)

**PRIMARY ISSUES:** Whether Grievant demonstrated that the actions complained of constituted harassment, reprisal, or that a hostile work environment existed.

**SUMMARY:** Grievant alleged that various individuals engaged in harassment, reprisal, created a hostile work environment, and placed unreasonable work expectations on her. Grievant was subjected to several observations of her teaching, and disagreed with the comments on the observation forms. Those observing Grievant had legitimate reasons for follow-up observations. Unreasonable work expectations were not placed on Grievant and she was not subjected to a hostile work environment or harassment, and no actions were taken against Grievant in reprisal for filing a grievance.

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**KEYWORDS:** Transfer; Timeliness; Time Lines; Fifteen Days

**CASE STYLE:** Wilfong v. Randolph County Board of Education  
DOCKET NO. 2018-0177-RanED (1/25/2018)

**PRIMARY ISSUES:** Whether this grievance was timely filed.

**SUMMARY:** Grievant has been a professional employee for Respondent since 2009. Grievant served as a half-time principal and half-time teacher at Valley Head School for approximately six years. Valley Head was designated for closure at the conclusion of the 2016-2017 school year. Because of the closure of her school, by letter dated March 17, 2017, Grievant was notified that she would be recommended for transfer for the upcoming 2017-2018 school year. She was advised of her right to request a hearing before the Board of Education. Grievant is alleging improprieties regarding her transfer. There being no positions which were lateral to Grievant's position as a half principal/half teacher, she was not entitled to direct placement into any other position in the county. Respondent asserts that the filing of this grievance was clearly untimely. This grievance was filed far beyond the 15-day time requirement of the grievance statute, and no explanation or excuse for the untimely filing has been offered. Grievant did not file a grievance until August 1, based upon a transfer that was approved on April 18, so this grievance is untimely.

**KEYWORDS:** Default; Conceded; Corrective Action Plan; Personal Leave of Absence; Level One Decision; Remedy

**CASE STYLE:** Joy v. Jefferson County Board of Education

DOCKET NO. 2017-2478-JefED (1/17/2018)

**PRIMARY ISSUES:** Whether default occurred at level one.

**SUMMARY:** Grievant argues that a default occurred at Level One of the grievance process because the decision was not issued within fifteen days after the conclusion of the conference as required by statute. Respondent acknowledges that a timely written decision was not issued by Superintendent Gibson. The issue in this case is the continuation of a Focused Support Plan and Grievant's request that this plan be removed. The record established that Grievant is entitled to this relief as it is neither contrary to law nor contrary to proper and available remedies. Accordingly, for the limited purpose of this proceeding, Respondent is ordered to remove the Focused Support Plan.

**TOPICAL INDEX**  
**COUNTY BOARDS OF EDUCATION**  
**SERVICE PERSONNEL**

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**KEYWORDS:** Termination; Insubordination; Unprofessional Behavior; Employee Code of Conduct; Willful Neglect of Duty

**CASE STYLE:** Barrett v. Berkeley County Board of Education  
DOCKET NO. 2017-2060-BerED (1/16/2018)

**PRIMARY ISSUES:** Whether Respondent proved that Grievant engaged in conduct constituting insubordination and willful neglect of duty.

**SUMMARY:** Grievant's bus operator contract was terminated by Respondent on April 10, 2017. The termination followed a hearing held before the Berkeley County Board of Education on multiple charges of misconduct against Grievant brought by the County Superintendent. The record established that Grievant had been involved in incidents of unprofessional conduct. Grievant used threatening and profane language directed at another adult in the presence of school aged children. Grievant engaged in a physical altercation with her sister-in-law on the bus stairwell and then once the fight was interrupted by her husband, she resumed fighting and again attacked her sister-in-law. As a result, the Respondent proved by a preponderance of the evidence that it properly exercised its authority pursuant to W. Va. Code § 18A-2-8 in terminating Grievant's bus operator's contract.

**TOPICAL INDEX**  
**STATE EMPLOYEES**

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**KEYWORDS:** Termination; Motion to Dismiss; Time Lines; Untimely; Remedy

**CASE STYLE:** Hines v. Division of Natural Resources  
DOCKET NO. 2018-0723-DOC (1/12/2018)

**PRIMARY ISSUES:** Whether this grievance was untimely filed.

**SUMMARY:** Grievant was employed by Respondent as an Accounting Technician 3. Grievant grieved his termination from employment. Respondent moved to dismiss the grievance as untimely-filed and because Grievant had requested a remedy wholly unavailable through the grievance process. The grievance was untimely-filed and Grievant offered no excuse for the untimely filing. The only remedy Grievant sought was employment with an agency other than Respondent, which is a remedy wholly unavailable through the grievance process. Accordingly, the grievance is dismissed.

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**KEYWORDS:** Probationary Employee; Dismissed; Unsatisfactory Performance; EPA-1; Satisfactory; Arbitrary And Capricious; Unreasonable; Predetermination; Work Performance; Performance Evaluation; Complaints; Low Threshold

**CASE STYLE:** Blackshire v. Tax Department  
DOCKET NO. 2018-0332-DOR (1/9/2018)

**PRIMARY ISSUES:** Whether Grievant proved by a preponderance of the evidence that his services for Respondent were satisfactory.

**SUMMARY:** Grievant was employed as a probationary employee by Respondent. Respondent dismissed Grievant for unsatisfactory work performance. Grievant argued that his work performance was satisfactory, and that he should not have been dismissed from his employment. Respondent denied Grievant's claims. Grievant failed to prove by a preponderance of the evidence that his work performance was satisfactory. Therefore, the grievance is DENIED.

**KEYWORDS:** Salary; Arbitrary and Capricious; Relief

**CASE STYLE:** Buzzard v. Department of Health and Human Resources/Bureau for Child Support Enforcement and Division of Personnel  
DOCKET NO. 2017-1420-DHHR (1/19/2018)

**PRIMARY ISSUES:** Whether Respondent's action was arbitrary and capricious.

**SUMMARY:** Grievant is employed by Respondent as a Child Support Technician 3. Grievant was selected as a Child Support Specialist 2 and agreed to a lower salary than indicated by the Division of Personnel's Pay Plan Policy. Grievant asserted she accepted the offer under duress and that Respondent's decision to offer her a lower salary was arbitrary and capricious. Grievant failed to prove Respondent's action was arbitrary and capricious or that she was otherwise entitled to the relief she seeks when she accepted the salary that was offered. Accordingly, the grievance is denied.

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**KEYWORDS:** Termination; Gross Misconduct; Using a State Vehicle for Personal Use; Policy and Procedure; Administrative Rule; Mitigation

**CASE STYLE:** Hutton v. Division of Highways  
DOCKET NO. 2018-0017-DOT (1/22/2018)

**PRIMARY ISSUES:** Whether Respondent proved that Grievant's misconduct constituted to gross misconduct.

**SUMMARY:** Grievant was dismissed from employment for operating an agency owned vehicle for personal pursuits, transporting a person who was not a state employee in the vehicle without business necessity, removing the license plate from the vehicle to elude discovery of its personal use, and having controlled substances in the agency owned vehicle. Grievant had been previously suspended for unauthorized use of an agency owned vehicle to transport a person who was not an agency employee. Grievant admitted to all the allegations except possession of a controlled substance. He alleged that he knew nothing of the drugs and syringes found in the car and that they could have belonged to the person to whom the vehicle is normally assigned. He also argued that he was denied due process. Respondent proved the allegations which were the basis for terminating Grievant's employment except the possession of drugs and paraphernalia. Respondent complied with the Division of Personal Administrative Rule when terminating Grievant's employment. Given Grievant's prior offence, dismissal was justified.



**KEYWORDS:** Demotion; Mitigation; Supervisor; Code Of Conduct Violation; Escalation; Inmate Incitement

**CASE STYLE:** Kostick, Jr. v. Regional Jail and Correctional Facility Authority/Potomac Highland Regional Jail

DOCKET NO. 2017-1684-MAPS (1/23/2018)

**PRIMARY ISSUES:** Whether the discipline imposed was clearly excessive.

**SUMMARY:** Grievant was demoted from a Correctional Officer III supervisory position to a Correctional Officer II position, with a reduction in pay, for escalating a situation by telling inmates they were all his bitches, resulting in the inmates attacking Grievant and three other officers. Grievant admitted to the conduct, and acknowledged it was inexcusable. Even though Grievant had asked to be demoted because of this incident, he regretted that he had made this request, and argued the discipline imposed was too severe. Grievant did not demonstrate that the discipline imposed was clearly excessive or so clearly disproportionate to the offense that it indicated an abuse of discretion, or that there were mitigating circumstances which should have been considered.

**KEYWORDS:** Termination; Inappropriate Conduct; Sexual Harassment; Workplace Harassment; Hostile Work Environment; Mitigation

**CASE STYLE:** Bennett v. Division of Highways

DOCKET NO. 2017-2115-DOT (1/18/2018)

**PRIMARY ISSUES:** Whether the termination of Grievant's employment was excessive.

**SUMMARY:** Grievant was terminated from his employment. Grievant filed a grievance stating that he had been falsely accused and requested to be reinstated with the DOH as a Transportation Worker III Equipment Operator. Grievant alleges pretext and retaliation for voicing opposition to other actions he believed to be unlawful conduct. Respondent maintains Grievant participated in multiple instances of inappropriate conduct of a sexually harassing nature perpetrated in the workplace. The alleged behavior included, but not limited to 'flipping' a female employee's breast by forcefully flipping the employee's breast upward. Evidence throughout this matter is both direct and hearsay in nature.

It is acknowledged there was inappropriate behavior in the workplace happening in District 9, Summer County, interestingly, a good number contend varying degrees of others' complicity while readily expressing individual innocence. Respondent has a responsibility to remedy unlawful workplace behavior. Respondent established with a reasonable degree of certainty that Grievant participated in behavior toward a female co-worker rationally viewed as inappropriate conduct of a sexually harassing nature. Employees have a duty to refrain from work place harassment. Sexual harassment can be perpetrated with or without physical touching in the workplace. Respondent established a violation of applicable Prohibited Workplace Harassment Policy by a preponderance of the evidence. Grievant did not persuasively establish that termination of his employment was too severe of discipline. This grievance is DENIED.

**KEYWORDS:** Selection; Minimum Qualifications; Arbitrary and Capricious

**CASE STYLE:** Tate, Jr. v. Division of Corrections/Parkersburg Correctional Center  
DOCKET NO. 2017-1184-MAPS (1/30/2018)

**PRIMARY ISSUES:** Whether Grievant proved that the selection decision was arbitrary and capricious.

**SUMMARY:** Grievant is employed by Respondent at Parkersburg Correctional Center as a Correctional Counselor. Grievant was not selected for a Case Manager position and asserts that the successful candidate falsified her application and that she did not meet the minimum qualifications of the position. The successful candidate did meet the minimum qualifications, and, although she made false statements on a revised application, there was no evidence that the selection committee viewed the revised application or relied on the false statements in making the selection decision. Grievant failed to prove that the selection decision was arbitrary and capricious. Accordingly, the grievance is denied.

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**KEYWORDS:** Dismiss; Abandonment; Probationary Employee; Appealable Dismissal Order

**CASE STYLE:** Katona v. Department of Health and Human Resources/Lakin Hospital  
DOCKET NO. 2018-0133-DHHR (1/16/2018)

**PRIMARY ISSUES:** Whether Respondent proved by a preponderance of the evidence that its motion to dismiss should be granted.

**SUMMARY:** Grievant was employed by Respondent as a Housekeeper. Grievant was a probationary employee. Respondent dismissed Grievant from employment, and Grievant filed this grievance. The matter proceeded to a level three hearing. However, while questioning one of Respondent's witnesses during the hearing, Grievant began to yell at the witness, then stormed out of the hearing, and left the premises. Thereafter, Respondent moved for dismissal based upon abandonment. Grievant filed no response to the motion, and ceased communicating with the Grievance Board. Respondent proved by a preponderance of the evidence that the grievance should be dismissed for abandonment. Therefore, the grievance is DISMISSED.

**KEYWORDS:** Dismiss; Timeliness; Untimely; Affirmative Defense; Filing; Unequivocally Notified; Occurrence; Excuse; Demoted

**CASE STYLE:** Seese v. Department of Health and Human Resources/Bureau for Children and Families

DOCKET NO. 2018-0015-DHHR (1/22/2018)

**PRIMARY ISSUES:** Whether Respondent has proved by a preponderance of the evidence that this grievance was untimely filed.

**SUMMARY:** Grievant was employed by Respondent as a Child Protective Services Worker. Respondent informed Grievant in writing that she was being demoted because of her inability to perform the functions of her position. Grievant was then demoted and continued to work for Respondent in the new position. Nearly nine months after being informed of her demotion, Grievant filed a grievance challenging the same. Respondent proved by a preponderance of the evidence that this grievance was untimely filed. Grievant failed to demonstrate any proper bases for excusing her untimely filing. Therefore, the grievance is dismissed.