

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in February 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.

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

DEPARTMENT OF EDUCATION EMPLOYEES

<u>KEYWORDS:</u>	Termination; Motion to Dismiss; Substantial Public Policy; At-Will Employee; Relief
<u>CASE STYLE:</u>	<u>Keller v. Board of Education</u> DOCKET NO. 2018-0763-BOE (2/7/2018)
<u>PRIMARY ISSUES:</u>	Whether Grievant stated a claim for which relief may be granted.
<u>SUMMARY:</u>	Grievant, an at-will employee, alleges he was improperly dismissed from his employment as the Superintendent of the West Virginia Schools for the Deaf and Blind with the West Virginia State Board of Education. Respondent moved for the grievance to be dismissed for failure to state a claim upon which relief can be granted as Grievant had failed to allege his termination was in violation of a substantial public policy. Grievant's mere conclusory statements and citation of inapplicable sources of public policy failed to properly allege his dismissal violated substantial public policy. Therefore, the grievance must be dismissed.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: Termination; Suspension; Arrest; Convicted Felon; Motion to Dismiss; Relief; Moot

CASE STYLE: Thomas v. Berkeley County Board of Education
DOCKET NO. 2015-0431-BerED (2/2/2018)

PRIMARY ISSUES: Whether Grievant’s felony conviction, sentencing agreement and revocation of his teaching certificate has rendered this matter moot.

SUMMARY: Grievant, a teacher, was convicted of the felony offense of sexual abuse by a person in a position of trust following a jury trial in Berkeley County Circuit Court. Grievant sought alternative sentencing by agreeing not to pursue or accept any employment in a teaching capacity where minors are present. In addition, Grievant’s teaching certificate and endorsement were permanently revoked by an Order issued by the State Superintendent of Schools. When Grievant engaged in a voluntary act that removed him from possible employment, any subsequent decision on the merits is a meaningless exercise, and constitutes an advisory opinion. Accordingly, this grievance is dismissed.

KEYWORDS: Contract; At-Will Employee; Nepotism Policy; Substantial Public Policy; Term of Superintendent; Transfer; Non-Renewal

CASE STYLE: Hinkle-Brown v. Mingo County Board of Education

DOCKET NO. 2017-2223-MinED (2/7/2018)

PRIMARY ISSUES: Whether Grievant is entitled to retain her position as Assistant Superintendent.

SUMMARY: As Assistant Superintendent, Grievant was an at-will employee, whose term, by statute, could not extend beyond that of the Superintendent with whom she served, or beyond four years. The Superintendent with whom she served retired in August 2016, and an Interim Superintendent was hired by Respondent. The Interim Superintendent was asked by the Board to keep Grievant on as Assistant Superintendent until June 30, 2017, and he agreed to do so. The Interim Superintendent was then chosen to be the Superintendent effective July 1, 2017, in February 2017. In March 2017, he made the decision to recommend to Respondent that Grievant's contract as Assistant Superintendent not be renewed, and he told Grievant of his decision. Grievant was notified in writing of this recommendation in late April 2017, and Respondent accepted this recommendation in May 2017. Grievant's contract states she is to receive notice of non-renewal of her contract pursuant to West Virginia Code §18A-2-7, which relates to transfers. Grievant was not transferred, nor did Respondent approve this notice provision in her contract. Grievant did not acquire the right to notice by April 1. Grievant further asserted that a "scheme" was in place to force her out so that the successful applicant for the Assistant Superintendent position, who is the husband of a Board member at the time, could be placed in the position, in violation of a substantial public policy, and that his selection for the position violated Respondent's Nepotism Policy. Grievant did not prove that any such "scheme" existed, or that Respondent's interpretation of its Nepotism Policy was without foundation.

KEYWORDS: Evaluation; Unsatisfactory; Rating; Arbitrary and Capricious; Disagree; Standards

CASE STYLE: Mize v. Cabell County Board of Education

DOCKET NO. 2017-2232-CONS (2/7/2018)

PRIMARY ISSUES: Whether Grievant proved by a preponderance of the evidence that two ratings on her evaluation were arbitrary and capricious.

SUMMARY: Grievant is employed by Respondent as a principal. Grievant's supervisor conducted her evaluation and rated her "Unsatisfactory" in two standards. Grievant argues that her supervisor treated her unfairly and that these two "Unsatisfactory" ratings are arbitrary and capricious. Respondent denies Grievant's claims. Grievant failed to prove her claims by a preponderance of the evidence. Therefore, the grievance is DENIED.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Selection; Summer Job; Newly Created Summer Position; Seniority; Arbitrary and Capricious

CASE STYLE: Deshazo v. McDowell County Board of Education

DOCKET NO. 2017-2174-McDED (2/27/2018)

PRIMARY ISSUES: Whether Grievant demonstrated that Respondent erred in not awarding him one of the three new summer general maintenance positions.

SUMMARY: Grievant is employed by Respondent as a bus operator. Grievant seeks to be placed in one of three new summer general maintenance positions for the summer of 2017. Of the applicants, Grievant was determined to be fourth in seniority. Grievant did not establish by a preponderance of the evidence entitlement to one of the new summer positions. Accordingly, this grievance DENIED.

TOPICAL INDEX
STATE EMPLOYEES

KEYWORDS: Termination; Unauthorized Leave; Work Performance; Mitigation; Alcohol Abuse; Failure to Report; Failure to Call Off

CASE STYLE: Hall v. Division of Highways
DOCKET NO. 2018-0439-DOT (2/9/2018)

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

SUMMARY: Grievant was dismissed from his employment by Respondent for unauthorized leave after he reported to work late or failed to report to work, and did not call in to report off work, on multiple occasions. Grievant was suspended for this behavior five times prior to being dismissed, yet did not correct his behavior. Grievant's behavior was caused by his abuse of alcohol, and he was aware of this, and sought help from Respondent. Respondent's personnel provided Grievant with information to contact a substance abuse facility, but Grievant did not follow through in getting help for his alcohol abuse problems. Respondent proved the charges against Grievant. Grievant did not provide evidence of any mitigating circumstances which would support a reduction of the penalty imposed.

KEYWORDS: Suspension; Gross Misconduct; Sexual Harassment Allegation; Sexually Inappropriate Comments

CASE STYLE: Thompson v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2017-1164-CONS (2/12/2018)

PRIMARY ISSUES: Whether Respondent met its burden of proof and demonstrated Grievant engaged in gross misconduct.

SUMMARY: Grievant was suspended for five days for making harassing and inappropriate comments to a co-worker. Record established that Respondent had worked with Grievant to address this behavior through prior coaching and counseling. Respondent met its burden of proof and established by a preponderance of the evidence that Grievant engaged in gross misconduct when he made inappropriate comments to a female co-worker and failed to abide by Respondent's directive to limit his contact with this co-worker.

KEYWORDS: Pay Increase; Discrimination; Discretionary Pay Raise; Classification Specification; Job Duties; Arbitrary and Capricious

CASE STYLE: Gregory, et al. v. Division of Juvenile Services/James H. Morton Juvenile Center

DOCKET NO. 2018-0179-CONS (2/12/2018)

PRIMARY ISSUES: Whether Grievants proved discrimination by Respondent or to otherwise show that they were entitled to a pay increase.

SUMMARY: Grievants both work for Respondent, one as a Correctional Case Manager and the other as a Correctional Counselor 2. Grievants assert that they should have received the same raise that Correctional Officers recently received, essentially asserting they were discriminated against because they were excluded from this pay increase. Grievants presented evidence attempting to prove that they are entitled to this raise due to the similarities between their work and the Correctional Officers' work and because they are exposed to some of the same type of risks as the Correctional Officers. The record established that the one dollar per hour raise given to COs in particular was reasonably related to the state correctional system's critical need to attract and retain COs to fill the numerous vacant CO positions within the system. Moreover, a review of the classification specifications for the positions that Grievants occupied plainly showed that the nature of their work differed substantially from the CO's work. Additionally, Respondent DJJ did not have the authority to provide this discretionary pay increase to Grievants. In summary, Grievants failed to prove that they were discriminated against when they were excluded from the pay raise that was awarded solely to Correctional Officers, or that Respondent acted arbitrarily or capriciously or abused its discretion in connection with the pay raise that was provided exclusively to the COs.

KEYWORDS: Termination; At-Will Employee; Retaliation; Credibility; Hostile Work Environment; Substantial Public Policy

CASE STYLE: Thompson v. Board of Social Work

DOCKET NO. 2018-0197-BBC (2/9/2018)

PRIMARY ISSUES: Whether Grievant established that her discharge violates a substantial public policy.

SUMMARY: Grievant filed a grievance regarding the termination of her employment. Grievant held the position of Administrative Assistant with the West Virginia Board of Social Work. This position is an at-will position and is not within the classified system of the West Virginia Division of Personnel. Grievant contend the dismissal was illegal retaliation. Respondent maintains that Grievant was dismissed in the light of on-going performance issues which included identifiable deficits while highlighting that no reason was required.

The burden of proof is on an at-will employee to establish a violation of substantial public policy. If this burden is not met, the reasons for the termination are not at issue. Grievant was an at-will employee, and as such could be terminated for any reason that did not violate a substantial public policy. This grievance is DENIED.

KEYWORDS: Suspension; Unacceptable Conduct; Unprofessional Behavior; Credibility; Insubordination; Arbitrary and Capricious; Mitigation

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

DOCKET NO. 2018-0157-DHHR (2/8/2018)

PRIMARY ISSUES: Whether Respondent proved the charges against Grievant, and demonstrated good cause for his 10-day suspension.

SUMMARY: Respondent established by a preponderance of the evidence that Grievant misrepresented the extent of his investigation into the proper placement of two minor females in an official written report, acted unprofessionally during a meeting in the hospital room of a brother and sister who had been drugged and sexually assaulted, acted unprofessionally in telling hospital security officers that their assistance might be required to “kick the mother’s ass,” and acted unprofessionally by telling the children’s mother that she would be arrested if she approached the children, and that she had only 15 minutes in which to identify a family member for alternative placement of the children before he took them into his custody. These violations established a factual and legal basis for Grievant’s 10-day suspension. Grievant failed to establish that his 10-day suspension involved a penalty which constituted an abuse of the employer’s discretion or constituted an arbitrary and capricious exercise of the employer’s disciplinary authority.

KEYWORDS: Classification; Reallocation; Job Duties; Arbitrary and Capricious

CASE STYLE: Snow v. Division of Motor Vehicles and Division of Personnel
DOCKET NO. 2017-1117-DOT (2/28/2018)

PRIMARY ISSUES: Whether the DOP classification determination and subsequent reallocation of Grievant's position was arbitrary and capricious.

SUMMARY: Grievant contests what she characterizes as a demotion from the Supervisor 2 classification to the Supervisor 1 classification. She is also upset that she will not receive a pay increase if she obtains a Supervisor 2 position with the DMV within two years of the change is her position. Grievant's position was actually reallocated to the Supervisor 1 classification as a result of a review of all DMW Supervisor 2 positions. The DOP concluded that the present duties of these positions are a better fit for the Supervisor 1 classification because Grievant and others supervise clerical employees instead of technical employees. DOP's classification decision was not arbitrary or capricious. Because Grievant retained the same pay and benefits in the Supervisor 1 position which she received for the Supervisor two position, the unambiguous language of the DOP Pay Plan Policy prohibits her from receiving a raise in pay for taking a Supervisor 2 position for the DMV within the next twenty-four months.

KEYWORDS: Suspension; Reprimand; Leave Restriction; Leaving Work Early; Unauthorized Leave; FMLA

CASE STYLE: Shirk v. Division of Highways
DOCKET NO. 2017-2494-CONS (2/20/2018)

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

SUMMARY: Grievant receive an unwritten reprimand and a record of significant occurrence for leaving work early without prior approval and failing to complete an important assignment within the time frame established. Respondent proved the allegations related to this discipline by a preponderance of the evidence. Grievant received a one-day suspension for violating Respondent's call-off policy when she overslept and was late for work. Grievant argued that her absence was caused by her FMLA covered illness and Respondent restrained her lawful use of the leave in violation of the federal act. Respondent noted that employees on FMLA leave may be required to follow employer call-off policies and Grievant's failure to do so allowed refusal to honor the leave request and impose discipline. Grievant demonstrated that her failure to follow the call-off procedure resulted from unusual circumstances related to her FMLA claim. Accordingly, the consolidated Grievances are GRANTED in part, and DENIED in part.

KEYWORDS: Motion to Dismiss; Written Reprimand; Probationary Employee; Dismissal; Moot; Advisory Opinion; Substantial Compliance; Suspended; Discipline; Quagmire

CASE STYLE: Compton v. Division of Motor Vehicles
DOCKET NO. 2018-0275-DOT (2/22/2018)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence that this grievance is now moot.

SUMMARY: Grievant was a probationary employee. She filed a grievance challenging a written reprimand she received from Respondent for poor work performance. While her grievance was pending at level two, approximately two months after receiving the written reprimand, Respondent dismissed Grievant due to unsatisfactory work performance. The issue of the written reprimand is now moot. Grievant did not file a grievance challenging her dismissal. Grievant asserts that it was not necessary for her to file a separate grievance to challenge her dismissal, and that she substantially complied with the grievance procedure. Grievant was required to file a separate grievance challenging her dismissal, and she did not substantially comply with the grievance procedure. Accordingly, this grievance is dismissed.

KEYWORDS: Selection; Policy; Supervisory Experience; Arbitrary and Capricious

CASE STYLE: Ringler v. Department of Health and Human Resources/Bureau for Child Support Enforcement and Larry Bostic, Intervenor
DOCKET NO. 2016-1061-DHHR (2/20/2018)

PRIMARY ISSUES: Whether Respondent violated any statute, regulation or policy in its selection process.

SUMMARY: Grievant is currently employed by Respondent as a Child Support Specialist III. Grievant and seven other employees applied for an open position as a Child Support Supervisor II in the Bureau for Child Support Enforcement. Grievant and the other applicants were interviewed by a three-member panel. The panel asked the same prepared questions of each applicant. All applicants met the minimum qualifications for the position. Each panel member rated Intervenor as the best applicant. Although there was some arguable deviation from established procedures in the manner in which the interview process was conducted, it was not shown that the decision reached was affected, nor that the decision to select Intervenor for the Child Support Supervisor II position at issue was an abuse of discretion or an arbitrary and capricious exercise of the authority to select which employee should receive a promotion. Accordingly, this grievance will be denied.

KEYWORDS: Annual Leave; Unauthorized Leave; Rule; Policy

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

DOCKET NO. 2016-1276-DHHR (2/23/2018)

PRIMARY ISSUES: Whether Grievant demonstrated that Respondent violated Division of Personnel's Rule relating to annual leave.

SUMMARY: Grievant is employed at Sharpe Hospital as a Licensed Practical Nurse. During a work week at issue in this case Grievant was short of a required forty-hour week. The record established that without Grievant's request or submission of a leave form to cover for this short amount of time, Grievant's supervisor filed out an annual leave request form on her behalf. Grievant established by preponderance of the evidence that this was a clear violation of the Division of Personnel's Rules relating to annual leave. Respondent is ordered to return this amount of leave to Grievant's annual leave balance. Grievant is ordered to reimburse Respondent for that amount of time she was paid during which no work was performed.