

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in February, 2021

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; Suspension; Gross Misconduct; Insubordination
<u>CASE STYLE:</u>	<u>Shuff v. West Virginia State University</u> DOCKET NO. 2020-1565-CONS (2/9/2021)
<u>PRIMARY ISSUES:</u>	Whether Respondent had good cause to terminate Grievant's employment.
<u>SUMMARY:</u>	Grievant was employed with Respondent, West Virginia State University in a position recognized as an essential worker. During the time period of relevant events, the area was experiencing the onset of Covid-19. Grievant had misgivings regarding his employer's position that he and other co-workers were required to report and perform assigned duties. After not reporting to work for three days, Grievant confronted management regarding personal protection equipment and the necessity of attendance. After the confrontation, Grievant and several co-workers abandoned their respective job duties. Respondent maintains that Grievant's actions merit disciplinary action in that Grievant engaged in conduct which constitutes "gross misconduct" in accordance with applicable rules and regulations. Grievant disputes Respondent's determination and the sanction levied. Proper grounds are established, by a preponderance of the evidence, for suspension and/or termination of Grievant's employment. It is not determined that Respondent abused its discretion in the circumstances of this case. This grievance is denied.

KEYWORDS: Tenure; Promotion; Policy; Arbitrary and Capricious

CASE STYLE: Gratchev v. Marshall University

DOCKET NO. 2020-1422-MU (2/23/2021)

PRIMARY ISSUES: Whether Grievant proved that Respondent's decision to deny his application for promotion to the rank of Professor was arbitrary and capricious.

SUMMARY: Grievant is contesting the denial of a promotion to the rank of Professor at Marshall University. He asserts that his teaching performance was not properly assessed causing him to receive a lower ranking in that criteria. The consequence of that ranking was that Grievant did not qualify for the promotion to Professor. To be promoted a candidate must be ranked "exemplary" in two of the three areas of performance; Research and Scholarship, Teaching and Advising, and Service. His performance was rated as "exemplary" in the area of Research and Scholarship but only "professional" in the areas of Teaching and Advising and Service. Grievant did not contest the rating in the Service category but disagreed with the rating of his teaching performance. He argues that the rating was arbitrary and capricious because the Committees either ignored or did not fully appreciate his performance in that area. While reasonable people might disagree with the rating Grievant received in Teaching, Respondent demonstrated that the rating committees fully reviewed all of the materials submitted by Grievant and used the appropriate criteria for judging his application. Grievant did not prove that Respondent's decision was arbitrary or capricious.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: Suspension; Verbal Threat; Insubordination; Policy; Correctable Conduct

CASE STYLE: Cunningham v. Calhoun County Board of Education

DOCKET NO. 2020-0771-CalED (2/4/2021)

PRIMARY ISSUES: Whether Respondent proved that Grievant intentionally violated policy or refused to follow specific instructions.

SUMMARY: Grievant was suspended for ten days without pay for allegedly making a verbal threat to a student in a disciplinary situation. Respondent did not prove by a preponderance of the evidence that Grievant threatened the student. Rather, Grievant warned the student that he would have to restrain him if the student's aggressive behavior continued to escalate. Reasonable restraint would have been an appropriate reaction if the student's behavior had continued. Grievant's actions were an appropriate warning of potential consequences for bad behavior, not a threat. Additionally, any errors in judgement made by Grievant were related to his performance and lack of adequate training. Therefore, he was entitled to an opportunity to improve his performance prior to implementation of the penalties sent out in W. Va. Code § 18A-2-8(a).

KEYWORDS: Motion to Dismiss; Timelines; Untimely Filed

CASE STYLE: Wright v. McDowell County Board of Education

DOCKET NO. 2020-0657-McdED (2/17/2021)

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

SUMMARY: The record of this case demonstrates by a preponderance of the evidence that Grievant failed to file a grievance within fifteen days following the occurrence of the events upon which the grievance is based. Accordingly, this grievance is dismissed as untimely.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Termination; Suspended; Incompetency; ECCAT; Aide; Certification; Application; Arbitrary and Capricious; Correctable Conduct

CASE STYLE: Phelps v. Raleigh County Board of Education

DOCKET NO. 2020-0866-RaIED (2/5/2021)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence that Grievant was incompetent to hold her position, thereby justifying its termination of her employment contract.

SUMMARY: Grievant was employed by Respondent as an Aide IV/Early Childhood Classroom Assistant Teacher-I (ECCAT-I) and had been so employed since on or about February 12, 2019. Respondent first suspended, then terminated Grievant's employment citing her lack of an ECCAT certification rendering her incompetent to hold her position. Grievant does not dispute that she lacked her ECCAT certification. However, Grievant argues that her failure to properly obtain her ECCAT certification was correctable conduct, and, as such, would be entitled to notice of the deficiency and an opportunity to improve before her employment was terminated. Grievant also argues that as she was multiclassified as an ECCAT/Aide, she was entitled to retention as in an Aide capacity. Respondent met its burden of proving that it properly suspended and subsequently dismissed Grievant from employment because she was incompetent to hold her position. Grievant failed to prove her claims by a preponderance of the evidence. Accordingly, the grievance is DENIED.

KEYWORDS: Probationary Contract; Harassment; Hostile Work Environment; Reprisal; Arbitrary and Capricious

CASE STYLE: Starkey v. Wayne County Board of Education

DOCKET NO. 2019-1893-CONS (2/3/2021)

PRIMARY ISSUES: Whether Grievant proved that Respondent's non-renewal of her probationary contract was arbitrary and capricious.

SUMMARY: Grievant was employed by Respondent as a probationary substitute cook. Respondent declined to renew Grievant's probationary contract of employment. Respondent failed to comply with the statutorily-required timeframe for the nonrenewal of a probationary contract. Respondent failed to provide Grievant with a proper evaluation and opportunity to improve. Grievant is entitled to reinstatement of her probationary substitute contract but failed to prove she was entitled to back pay or reinstatement into a permanent position. Grievant proved she was subjected to harassment but failed to prove hostile work environment. Accordingly, the grievance is granted, in part, and denied, in part.

TOPICAL INDEX
STATE EMPLOYEES

KEYWORDS: Selection; Career Advancement; Arbitrary and Capricious

CASE STYLE: Hamden, et al v. Department of Health and Human Resources/Bureau for Children and Families
DOCKET NO. 2019-1885-CONS (2/5/2021)

PRIMARY ISSUES: Whether Grievants proved that Respondent acted in an arbitrary and capricious manner in only assigning its Senior CPS worker position to the BCF county offices rather than the Crisis Teams.

SUMMARY: Grievants are employed as Child Protective Service (CPS) workers with the North Crisis Team by the Department of Health and Human Services/Bureau for Children and Families (DHHR/BCF). While regular CPS workers are assigned to particular BCF county offices, CPS Crisis Team workers travel as needed to assist with CPS backlogs. The State legislature periodically allots Senior CPS worker positions to BCF. BCF assigns these positions to its county offices to mentor regular CPS workers and has never assigned a Senior position to its Crisis Teams. Grievants contend that the North Crisis Team is entitled to a Senior position because members have few means of career advancement. Yet, Crisis Team workers have significant experience as CPS workers, while regular CPS workers tend to be new hires in need of the guidance and assistance provided by Senior workers. Grievants failed to prove that BCF acted arbitrarily and capriciously in allotting all Senior positions to BCF county offices. Accordingly, this grievance is DENIED.

KEYWORDS: Dismiss; Resignation; Advisory Opinion; Illusory; Moot; Merits; Nonappealable; Appealable

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

DOCKET NO. 2020-0633-DHHR (2/1/2021)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence that the grievance is now moot due to Grievant's resignation from employment.

SUMMARY: Grievant grieved a written warning he received while he was employed by Respondent. Grievant did not assert he had lost any pay due to these issues. Following the filing of his grievance, but before the level three hearing, Grievant resigned. Respondent moved to dismiss the grievance asserting mootness due to Grievant's resignation. Grievant did not object to the dismissal of the grievance and has not denied that he resigned his employment. Respondent proved the grievance is now moot. Accordingly, Respondent's motion to dismiss should be granted, and this grievance, dismissed.

KEYWORDS: Termination; Suspension; Misconduct; Investigation

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

DOCKET NO. 2020-1535-CONS (2/9/2021)

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

SUMMARY: Grievant was employed by Respondent as a Child Protective Service Worker. Grievant was suspended pending investigation and later dismissed from employment at the conclusion of the investigation. Respondent proved it had good cause to terminate Grievant's employment for the misuse of clothing vouchers and improper handling of client prescription medication. Grievant failed to prove her due process rights were violated. Accordingly, the grievance is denied.

KEYWORDS: Dismiss; Termination; Probationary; Unsatisfactory; Satisfactory; Arbitrary and Capricious; Nondiscriminatory Hostile Work Environment

CASE STYLE: Morgan v. Department of Health and Human Resources/Bureau for Public Health
DOCKET NO. 2020-1470-DHHR (2/1/2021)

PRIMARY ISSUES: Whether Grievant, a probationary employee, who was dismissed by her employer on the grounds of unsatisfactory performance, proved by a preponderance of the evidence that her work was satisfactory. Whether Grievant proved her claim on nondiscriminatory hostile work environment by a preponderance of the evidence.

SUMMARY: Grievant was employed as a probationary employee by Respondent. Respondent dismissed Grievant for unsatisfactory work performance. Grievant argued that her work performance was satisfactory, and that she should not have been dismissed from her employment. Grievant also alleged nondiscriminatory hostile environment. Grievant failed to prove her claims by a preponderance of the evidence. Therefore, the grievance is DENIED.

KEYWORDS: Motion to Dismiss; Retirement; Military Service Credit; Employer; Employee; Jurisdiction

CASE STYLE: Bryant v. Department of Health and Human Resources/Bureau for Public Health
DOCKET NO. 2020-0898-DHHR (2/4/2021)

PRIMARY ISSUES: Whether the Grievance Board has jurisdiction in this matter.

SUMMARY: Grievant seeks to gain retirement credit as a State employee for her military service. She does not include the Public Employees Retirement Board as a respondent and seeks her remedy from her employer, DHHR. Respondent is not vested with the authority to provide any of the remedies sought by Grievant. This action does not meet the definition of “grievance” as set out in the provisions of W. Va. Code § 6C-2-1 et seq. The Grievance Board does not have jurisdiction to resolve Grievant’s complaint. The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

KEYWORDS: Reallocation; Backpay; Job Duties; Responsibilities

CASE STYLE: Robinson v. Regional Jail and Correctional Facility Authority/Southwestern Regional Jail

DOCKET NO. 2018-0887-MAPS (2/8/2021)

PRIMARY ISSUES: Whether Grievant proved that, due to a change in his duties and responsibilities, his position should have been reallocated.

SUMMARY: Grievant is employed by Respondent as a Correctional Officer II. Grievant became eligible for reallocation to Correctional Officer II on April 1, 2016, when his duties and responsibilities changed to those of that position. Respondent neglected to reallocate Grievant's position to Correctional Officer II until June 10, 2017. It is undisputed that Grievant is entitled to back pay, with statutory interest, for the period of April 1, 2016, to June 9, 2017, due to the late reallocation. Accordingly, the grievance is granted.

KEYWORDS: Promotion; Classification; Salary Compensation; Backpay

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

DOCKET NO. 2020-1493-MAPS (2/16/2021)

PRIMARY ISSUES: Whether Grievant is entitled to backpay.

SUMMARY: Grievant was employed by Respondent as a Correctional Officer V. Grievant was selected for promotion through a competitive promotional process. Respondent inadvertently delayed promoting his position to Correctional Officer VI. Respondent admits that a mistake was made causing Grievant to work in the higher classification for a period without the commensurate salary increase. Respondent admits that Grievant is owed the additional compensation he would have received if he had been paid at the proper rate when she began working as a Correctional Officer VI. Accordingly, this grievance is GRANTED.

KEYWORDS: Hostile Work Environment; Temporary Upgrade

CASE STYLE: Lucas v. Division of Highways

DOCKET NO. 2019-0563-DOT (2/26/2021)

PRIMARY ISSUES: Whether Grievant prove that he had been subjected to a hostile workplace.

SUMMARY: Grievant alleges that he was subjected to a hostile workplace when Respondent required him to take a temporary upgrade to a Crew Chief and completed paperwork related to the assignment is Grievant's name. Respondent may occasionally and intermittently assign employees work outside their normal classification to help in areas of need. Grievant did not prove that Respondent was treating him improperly when he was assigned to a temporary upgrade, nor that Respondent was subjecting him to a hostile workplace.

KEYWORDS: Return to Work; Job Duties; Medical Restrictions; Temporary Assignment; Discrimination

CASE STYLE: Perdue v. Division of Motor Vehicles

DOCKET NO. 2019-0674-DOT (2/26/2021)

PRIMARY ISSUES: Whether Grievant failed to prove Respondent improperly denied her return to work due to her medical restrictions.

SUMMARY: Grievant is employed by Respondent, Division of Motor Vehicles, as an Administrative Services Assistant 1. Grievant suffered from a medical condition that restricted her ability to work. Respondent initially accommodated Grievant's medical restrictions through providing transitional employment for a year but were unable to continue to accommodate Grievant's restrictions after Grievant developed additional restrictions. Grievant failed to prove Respondent discriminated against her as she is not similarly situated to the employees with whom she compares herself. Grievant failed to prove Respondent improperly denied her return to work due to her medical restrictions. Accordingly, the grievance is denied.

KEYWORDS: Suspension; Termination; COVID-19 Policy; N95 Mask; Full Protective Gear; Leaving Post Without Permission; Insubordinate Behavior; Mitigation; Arbitrary and Capricious

CASE STYLE: Wratchford v. Division of Corrections/Bureau of Prisons and Jails
DOCKET NO. 2020-1560-CONS (2/25/2021)

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

SUMMARY: Grievant was employed by the Division of Corrections and Rehabilitation (DCR) as a Correctional Counselor at the Huttonsville Correctional Center and Jail (HCCJ) when COVID-19 swept the nation. Grievant knew that many inmates and multiple staff had tested positive for COVID-19 and that hundreds of other inmates were awaiting their test results. Grievant was under immense stress due to the possibility of exposing her immunocompromised husband due to her daily inmate interaction with only a cloth mask manufactured from an old t-shirt to protect her. When she arrived at work on May 27, 2020, Grievant saw staff equipped with N95 masks and full gear. Lt. Currence directed that Grievant also be fitted. Superintendent Searls arrived moments later and nixed the directive, deeming a cloth mask sufficient. Grievant yelled at Superintendent Searls and left the facility grounds in a panic, even after being told to stay. DCR dismissed Grievant for various infractions related to this incident. While DCR proved that Grievant's actions violated protocol, it did not prove that this amounted to misconduct of a substantial nature affecting the interests and safety of the public or a gross disregard for professional responsibilities. In the alternative, Grievant proved mitigation is warranted. Accordingly, the grievance is GRANTED.