

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in January 2022

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>	Contract Renewal; Annual Contract; Discrimination; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Van Ellis v. West Virginia University</u> DOCKET NO. 2021-2416-WVU (1/25/2022)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved by a preponderance of the evidence that he was the victim of discrimination.
<u>SUMMARY:</u>	Grievant was employed by West Virginia University as an Assistant Director in the division of Information Technology Services. Grievant was employed pursuant to an annual contract. Grievant was employed and paid for the entirety of his most recent annual contract for the 2020-2021 academic year. The clear language of Grievant's annual contracts established that Grievant had no right or entitlement to a new annual contract, and Respondent had no duty or obligation to renew Grievant's annual contract. Grievant was unable to produce any evidence of any right or expectation of continued employment. Grievant did not meet his burden of proof to show any entitlement or right to have his contract renewed. Grievant also failed to establish his claim of discrimination. This grievance is denied.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: Motion to Dismiss; Failure to State a Claim; Relief; Jurisdiction

CASE STYLE: Worley v. Jackson County Board of Education
DOCKET NO. 2022-0349-JacED (1/14/2022)

PRIMARY ISSUES: Whether issue in dispute should be dismiss or go to full hearing.

SUMMARY: Respondent moves the Grievance Board to dismiss this grievance matter. The record includes Grievant's acknowledgement and recognition that her allegations stem from Respondent's COVID-19 face covering rule and Grievant's failure to comply. The COVID-19 Jobs Protection Act establishes an absolute defense against claims based on an employer's implementation of policies and procedures designed to prevent or minimize the spread of COVID-19 and dictates the grievance be dismissed as a matter of law. Grievant's allegations and acknowledgements of record tend to place this matter within the auspices of the COVID-19 Jobs Protection Act. The Grievance Board lacks jurisdiction in this matter. Accordingly, this grievance is dismissed.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Suspension; Termination; Code of Conduct; Sexual Harassment; Misconduct; Insubordination; Mitigation

CASE STYLE: Sanbower, Sr. v. Raleigh County Board of Education
DOCKET NO. 2021-2490-RaIED (1/31/2022)

PRIMARY ISSUES: Whether Grievant violated applicable code of conduct and/or policy justifying disciplinary action.

SUMMARY: Grievant was employed by Respondent as a custodian at Liberty High School. Grievant was suspended without pay and then terminated from employment following the investigation of a complaint. Respondent maintains that Grievant engaged in conduct that violated both its employee code of conduct and sexual harassment policies and that such violations of each constitutes insubordination, immorality, impacting the learning environment of students, and jeopardizing the health, safety, and welfare of students. Respondent bears the burden to prove by a preponderance of the evidence that the disciplinary action taken was justified.

Respondent highlights that it is within its authority to punish Grievant for his conduct, up to and including termination. Grievant seeks mitigation of the punishment imposed by Respondent, maintaining that the punishment was disproportionate to the offense. An allegation that a particular disciplinary measure is disproportionate to the offense proven is an affirmative defense. Grievant bears the burden of demonstrating that the penalty was clearly excessive, reflects an abuse of the employer's discretion or an inherent disproportion between the offense and the personnel action. Mitigation was seriously considered, but Grievant failed to meet his burden of proof that the punishment should be mitigated. Respondent established Grievant engaged in conduct impacting the learning environment and jeopardizing the health, safety, and welfare of students. Grievant violated applicable school employee code of conduct and policies. Accordingly, this Grievance is DENIED.

TOPICAL INDEX
STATE EMPLOYEES

KEYWORDS: Default; Relief; Timeframes; Level One

CASE STYLE: Robinett v. Workforce West Virginia/ AND Division of Personnel
DOCKET NO. 2021-2208-DOC (1/27/2022)

PRIMARY ISSUES: Whether Grievant timely filed her claim for default.

SUMMARY: Grievant made a claim for relief by default when Respondent failed to hold a level one grievance conference within the statutory timeframe. Respondent pursued a settlement agreement rather than conducting the grievance conference. Grievant did not assert default until after she received a copy of the settlement agreement that she declined to sign. Grievant failed to make a claim for default within the statutory timeframe. Accordingly, Grievant's claim for relief by default is denied.

KEYWORDS: Performance Evaluation; Retaliation

CASE STYLE: Peters v. Division of Natural Resources
DOCKET NO. 2021-0270-DOC (1/10/2022)

PRIMARY ISSUES: Whether Grievant proved his evaluation was improper retaliatory.

SUMMARY: Grievant is employed by Respondent as the Park Superintendent of Cabwaylingo State Forest. Grievant protests his performance evaluation alleging it was improper due to procedural failures and retaliation. Grievant proved there were procedural failures but failed to show that the result of the evaluation would have been different but for the procedural errors. Grievant failed to prove the evaluation was retaliatory. Accordingly, the grievance is denied.

KEYWORDS: Leave Reimbursement; COVID Leave Policy; Discrimination

CASE STYLE: Metz v. Division of Corrections and Rehabilitation/Bureau of Prisons and Jails
DOCKET NO. 2021-2146-MAPS (1/24/2022)

PRIMARY ISSUES: Whether Grievant was subjected to discrimination.

SUMMARY: Grievant is employed by the Division of Corrections and Rehabilitation. Under the COVID leave policy, employees who missed work with COVID between April 1, 2020 and December 31, 2020 received COVID leave. When Grievant got COVID in January 2021, COVID leave was no longer available, so she used sick leave. Grievant contends this lack of coverage after December 31, 2020, was discriminatory. Grievant requests her sick leave be returned and changed to COVID leave. Grievant was not similarly situated to those who received COVID leave because it was expired when she got sick. Grievant failed to prove discrimination. Accordingly, the grievance is DENIED.

KEYWORDS: Termination; Workplace Harassment; Sexual Harassment; Misconduct; Inappropriate Conduct; Policy; Discrimination; Retaliation; Investigation; Credibility; Mitigation

CASE STYLE: McHenry v. Division of Highways
DOCKET NO. 2020-0577-CONS (1/20/2022)

PRIMARY ISSUES: Whether Respondent proved the charges against Grievant and whether Respondent had good cause to terminate Grievant's employment for the proven misconduct.

SUMMARY: Grievant was employed by Respondent as a Highway Equipment Supervisor 2. Grievant's employment was terminated for violation of the West Virginia Division of Highways Standards of Work Performance and Conduct and the West Virginia Division of Personnel Prohibited Workplace Harassment Policy. Respondent proved charges sufficient to establish good cause to terminate Grievant's employment. Grievant failed to prove that the termination of his employment was discriminatory or retaliatory. Grievant failed to demonstrate that mitigation of the penalty was warranted. Accordingly, the grievance is denied.

KEYWORDS: Termination; Federal Family and Medical Leave; Job Duties; Mandatory Overtime

CASE STYLE: Burger v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2019-0713-CONS (1/3/2022)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence that good cause existed for the termination of Grievant's employment.

SUMMARY: Grievant was employed as a Health Service Worker with the Department of Health and Human Resources at Sharpe Hospital. Grievant was dismissed from her employment because she could not perform an essential function of the job. The record supported a finding that Respondent attempted to make reasonable accommodations; however, no positions were available that could be performed by Grievant. Respondent established by a preponderance of the evidence that Grievant was dismissed from employment for good cause. This grievance is denied.

KEYWORDS: Pay Grade; Classification and Compensation Career Plan; Relief

CASE STYLE: Armentrout, et al v. Division of Highways
DOCKET NO. 2021-1890-CONS (1/27/2022)

PRIMARY ISSUES: Whether the relief Grievants seek is available.

SUMMARY:

KEYWORDS: Termination; Insubordination; Patient Neglect; Physical Abuse; Verbal Abuse; Hearsay; Discrimination

CASE STYLE: Workman v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2020-0891-CONS (1/4/2022)

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

SUMMARY: Grievant was employed at Sharpe Hospital when dismissed for insubordination, patient neglect, physical abuse, and verbal abuse. Sharpe alleges that Grievant defied orders to bring Unit G1 patients to the Christmas tree lighting ceremony, disregarded her duty to read email about the ceremony, ignored patients who told her the tree lighting portion was in the lobby rather than the gymnasium, mouthed "bitch" in the direction of RN Snead, and questioned patients as to who reported her. Grievant denies these allegations. Due to a late dinner, Unit G1 patients made it to the gymnasium with only minutes remaining in the tree lighting portion of the ceremony, so chose not to go, but still attended the second portion of the ceremony. Regardless, Grievant was never directed to bring patients to the ceremony but volunteered at the last minute to accompany coworkers. Yet Grievant was the only employee disciplined or even questioned. Some employees even allowed patients to stay in their unit during the ceremony without being questioned. RN Snead conducted an initial investigation of the failure to bring patients to the tree lighting. RN Snead interviewed Grievant but not her coworkers. Grievant proved discrimination. Respondent was unable to overcome a hearsay and credibility analysis and failed to prove that dismissal was justified. Accordingly, the grievance is GRANTED.

KEYWORDS: Motion to Dismiss; Untimely Filed; Timelines

CASE STYLE: Tenney v. Department of Health and Human Resources
DOCKET NO. 2022-0143-DHHR (1/25/2022)

PRIMARY ISSUES: Whether Grievant filed her appeal to level two of the grievance process within the timeframe required by statute.

SUMMARY: Grievant was employed by Respondent and grieved an alleged hostile work environment. Respondent moved to dismiss the grievance when Grievant failed to timely file to level two following the denial of her grievance at level one of the grievance process. Grievant failed to file within the timeframe required by statute and failed to respond to the motion to dismiss to provide any excuse for her late filing. Accordingly, the grievance is dismissed.

KEYWORDS: Suspension; Resignation; Untimely Filing; Moot Claims

CASE STYLE: Roggenbach v. Department of Health and Human Resources/Hopemont Hospital

DOCKET NO. 2019-1514-DHHR (1/6/2022)

PRIMARY ISSUES: Whether Grievant proved that his email was not a tender of resignation, that it was involuntary, or that he rescinded prior to Respondent's acceptance.

SUMMARY: Grievant emailed all employees and management on Wednesday, stating, "I am turning in my resignation effective immediately on Monday." While not then apparent, Grievant only intended to threaten resignation. Before Grievant could clarify, management accepted via text, reasonably interpreting the immediacy of his tender. Within minutes, Grievant texted back that he had not resigned but simply proposed the possibility based on work conditions. The next day, management barred Grievant from work, telling him he was suspended without pay pending investigation into alleged misconduct. Grievant timely grieved this suspension. Two months later, Grievant finally learned he was processed as resigned and made two amended filings. The amended claims related to resignation were filed timely, but the remainder were untimely. Grievant did not prove that Respondent was unreasonable in interpreting his email as a tender of resignation rather than a promise of future tender. Grievant did not prove that the resignation was coerced or that he rescinded his resignation before it was accepted. As such, this grievance is DENIED.