

**WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**SYNOPSIS REPORT**

**Decisions Issued in March 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:** Termination; Violation of Policy; Cellular Telephone; Gross Misconduct; Hearsay Evidence

**CASE STYLE:** D. v. West Virginia State University  
DOCKET NO. 2018-0469-CONS (3/20/2018)

**PRIMARY ISSUES:** Whether Respondent proved Grievant violated the acceptable use policies.

**SUMMARY:** Grievant was charged with violating Respondent's acceptable use provisions of the WVSU Policy and Handbook, by erasing applications necessary for completing necessary duties from a University issued cellular telephone by resetting the device to the factory settings. Additionally, Grievant was charged in participating in profane conversations and proposing illegal activity in text conversations on the University cell phone. Respondent proved the allegations by a preponderance of the evidence and the discipline was appropriate given Grievant's prior work history.

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**KEYWORDS:** Motion to Dismiss; Untimely Filing; Time Limits; Level Three Appeal

**CASE STYLE:** Sadique v. Marshall University  
DOCKET NO. 2017-1932-MU (3/16/2018)

**PRIMARY ISSUES:** Whether Respondent proved that Grievant's level three appeal was not timely filed.

**SUMMARY:** Grievant was employed as a probationary tenure-track Assistant Professor by Respondent. Grievant grieved his non-retention in that position. Grievant filed his appeal to level three more than a month late, and Respondent moved to dismiss the grievance as the appeal was untimely. Grievant did not respond to Respondent's motion to dismiss, but had sought an extension to file his level three appeal because he was out of the country. Grievant's presence outside of the country is not a proper basis to excuse his failure to file in a timely manner. Accordingly, the grievance is dismissed.

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

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**KEYWORDS:** Suspension; Insubordination; Repeated Inappropriate Conduct; Smoking on School Property; Mitigation

**CASE STYLE:** Fleming v. Logan County Board of Education  
DOCKET NO. 2017-1633-LogED (3/20/2018)

**PRIMARY ISSUES:** Whether Grievant's ten-day suspension was too severe of a sanction in the circumstances of this case.

**SUMMARY:** It was established and uncontested that Grievant has repeatedly engaged in use of tobacco products on school property. Grievant challenges the severity of a ten-day suspension. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and Grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. Mitigation was considered.

Respondent has substantial discretion to determine a penalty in these types of situations. Grievant had knowledge of the prohibition based upon both State and County School Board policies, she in fact, had been previously reprimanded and placed on probation for using tobacco products on school property or in the presence of students thus, it is difficult to find that Respondent in imposing of a ten-day suspension for this violation is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. This Grievance is DENIED.

**KEYWORDS:** Remand; Motion to Dismiss; Duty Free Lunch; Work Schedule; Relief; Moot; Advisory Opinion

**CASE STYLE:** Kaplan v. Cabell County Board of Education

DOCKET NO. 2009-1819-CONS(R) (3/23/2018)

**PRIMARY ISSUES:** Whether there is relief to be granted- alteration in relief request.

**SUMMARY:** The Circuit Court of Kanawha County remanded and consolidated two related grievances filed by Grievant. The underlying grievances originally initiated in 2008/2009, protested Grievant's work day, daily responsibilities and contended among other things that Grievant was not getting a duty-free lunch pursuant to W. Va. Code '18A-4-14. The relief sought included having certain identified responsibilities removed, have a defined workday, and receive a duty-free lunch. Subsequent to the filing of the grievances, Grievant retired from employment with Respondent, the Cabell County Board of Education. The selective injunctive relief of having certain identified responsibilities removed, receiving a duty-free lunch, and having an agency defined workday, as performed by Grievant prior to September 2008, have little to no application with regard to Grievant's current duties as a substitute teacher-professional personnel. Grievant now wishes to contend entitlement to back wages. It is lawful to allow a timely request to amend a filed grievance. Nevertheless, the assigned ALJ, the trier of fact, does not find that Grievant is entitled to additional wages for duties performed.

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

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**KEYWORDS:** Selection; Multiclassified Position; Seniority; Arbitrary and Capricious

**CASE STYLE:** West v. Marshall County Board of Education

DOCKET NO. 2017-1536-MarED (3/9/2018)

**PRIMARY ISSUES:** Whether Respondent acted in an arbitrary and capricious manner in filling the contested position.

**SUMMARY:** Grievant and the successful applicant in this case applied for the contested John Marshall High School Secretary/Accountant position, and both were qualified for the position. The successful applicant had greater seniority in the secretary class title and greater overall county seniority than Grievant. Respondent awarded the multiclassified position by considering the applicant with the greatest seniority in the secretary class based upon its relevance to the needs of the position. Grievant did not meet her burden of proof to demonstrate by a preponderance of the evidence that this action was arbitrary and capricious.

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**KEYWORDS:** Motion to Dismiss; Standing; Retirement; Sick Leave; Insurance; Wholly Unavailable; Retired; Resigned; Forum

**CASE STYLE:** Smith v. Lewis County Board of Education

DOCKET NO. 2018-0868-LewED (3/28/2018)

**PRIMARY ISSUES:** Whether Grievant has standing to pursue a grievance against Respondent, and whether the relief sought is wholly unavailable through the grievance procedure.

**SUMMARY:** Grievant was not an employee of Respondent at the time he filed this grievance. As such, Grievant lacks standing to pursue a grievance against Respondent. Further, to the extent that Grievant is seeking an order from the Grievance Board compelling Respondent, PEIA, or the Consolidated Public Retirement Board to allow him to use his accrued sick leave to pay his insurance premium, such relief is wholly unavailable through the grievance procedure. Accordingly, this grievance is dismissed.

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

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<b><u>KEYWORDS:</u></b>	Selection; Interview Process; Supervisory Experience; Arbitrary and Capricious
<b><u>CASE STYLE:</u></b>	<u>Weaver v. Division of Highways</u> DOCKET NO. 2017-2014-DOT (3/2/2018)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant proved that Respondent's selection decision was arbitrary and capricious.
<b><u>SUMMARY:</u></b>	Grievant is employed by Respondent as a Transportation Worker 3, Equipment Operator, and grieves his nonselection for a position as Transportation Worker 3, Crew Chief. Grievant asserts that the selection decision was flawed because the selection panel failed to properly consider Grievant's previous supervisory experience, because the selection panel was the same that had already been found to have made an arbitrary and capricious selection decision, and because a member of the selection committee pressured one of the applicants to withdraw her application and attempted to conceal this fact. Grievant failed to prove that Respondent failed to consider his previous supervisory experience or that his supervisory experience exceeded that of the successful candidates. The previous grievance decision overturning the first selection decision was not based on any factor that would require a different selection panel be chosen. The selection panel member's attempt to conceal his conversation that lead to the withdrawal of a candidate's application does impact his credibility, but does not constitute a flaw in the process itself, as the withdrawal of the application of another candidate would not impact the sufficiency or legality of the selection process as it relates to Grievant. Grievant failed to prove that the selection decision was unlawful, unreasonable, or otherwise arbitrary and capricious. Accordingly, the grievance is denied.

**KEYWORDS:** Holiday Leave; Sick Leave; Rule; Policy; Arbitrary and Capricious

**CASE STYLE:** Hull, et al. v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital  
DOCKET NO. 2017-1966-CONS (3/13/2018)

**PRIMARY ISSUES:** Whether Grievants met their burden of proof and establish that Respondent's interpretation of the applicable rule was arbitrary and capricious.

**SUMMARY:** Grievants are employed full-time as Health Service Workers at Sharpe Hospital. Grievants argue that Respondent should not interpret a Division of Personnel Rule to require employees to use holiday leave during a day in which they have requested sick leave. Grievants request that they be able use sick leave and bank holiday time for a later date. Grievants failed to meet their burden of proof and establish that Respondent's interpretation of the applicable rule was in any way unreasonable or arbitrary and capricious.

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**KEYWORDS:** Motion to Dismiss; Employee; Harassment; Relief; Moot

**CASE STYLE:** Hutchinson v. Division of Highways  
DOCKET NO. 2018-0804-DOT (3/14/2018)

**PRIMARY ISSUES:** Whether this grievance is moot because Grievant is no longer employed by Respondent.

**SUMMARY:** Grievant grieved the alleged violation of the prohibited workplace harassment policy by her former supervisor. Respondent moved to dismiss the grievance asserting mootness as Grievant was no longer an employee. Grievant failed to respond to the motion to dismiss despite notice and opportunity to be heard. As the grievance only involves conditions of employment, Respondent proved the grievance is now moot. Accordingly, Respondent's motion to dismiss should be granted, and this grievance, dismissed.

**KEYWORDS:** Classification; Position Description Form; Job Duties; Arbitrary and Capricious

**CASE STYLE:** Austin v. Division of Highways and Division of Personnel  
DOCKET NO. 2017-1364-DOT (3/1/2018)

**PRIMARY ISSUES:** Whether Grievant established that the position he occupies should be classified as a Supervisor 2.

**SUMMARY:** Grievant is in opposition to the reallocation classification of the position he occupies from Supervisor II, pay grade 11 to Supervisor I, pay grade 9. The specific amount of pay Grievant receives as compensation was not altered. 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 I. Grievant did not prove that Respondent DOP's classification decision was arbitrary and capricious, or clearly wrong. This grievance is DENIED.

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**KEYWORDS:** Motion to Dismiss; Termination; Child Abuse; Relief Wholly Unavailable

**CASE STYLE:** Adebulu v. Division of Juvenile Services/Lorrie Yeager Jr. Juvenile Center  
DOCKET NO. 2017-2117-MAPS (3/9/2018)

**PRIMARY ISSUES:** Whether any relief can be granted by the Grievance Board.

**SUMMARY:** Grievant was employed by Respondent as a counselor at Lorrie Yeager Jr. Juvenile Center and filed the instant grievance protesting his termination from that position. Respondent moved to dismiss the grievance, stating that Grievant had been found to have committed child abuse by a prior administrative decision, which disqualifies him from his former position. Grievant did not dispute that such a decision had been rendered, instead he asserted he had been discriminated against, had never received a copy of the full investigation, and that the grievance should not be dismissed as there was a claim upon which relief could be granted. He further argued that the Rules of Practice and Procedure of the West Virginia Public Employees Grievance Board prevents the dismissal of the grievance without hearing. The Grievance Board has no authority to overturn the administrative decision of an agency that is not Grievant's employer. Grievant requests reinstatement to his position, which is relief that is wholly unavailable as he can no longer perform the essential duties of his position. Accordingly, the grievance is dismissed.

**KEYWORDS:** Sick Leave; Holiday Hours; Res Judicata; Arbitrary and Capricious

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

DOCKET NO. 2017-1125-DHHR (3/2/2018)

**PRIMARY ISSUES:** Whether this grievance is barred by the doctrine of res judicata.

**SUMMARY:** This is the same grievance filed by Grievant on February 11, 2016. A Level Three Decision was issued by the undersigned addressing that grievance on February 16, 2017, and Grievant did not appeal that decision. This grievance is barred by the doctrine of res judicata.

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**KEYWORDS:** Motion to Dismiss; Create a New Position; Equipment Operation; Classification; Temporary Upgrade; Relief; Arbitrary and Capricious; Remedy Wholly Unavailable

**CASE STYLE:** Conner, et al. v. Division of Highways

DOCKET NO. 2017-2292-CONS (3/6/2018)

**PRIMARY ISSUES:** Whether this Grievance Board can order Respondent to create a permanent TW3 position as demanded by the Grievants.

**SUMMARY:** Grievants are demanding that Respondent create a permanent Transportation Worker 3 position for the exclusive operation of a piece of heavy equipment known as a boom mower. Respondent has deemed the position unnecessary. Grievants have not identified the violation of an applicable rule, policy, procedure, statute, or regulation. This Grievance Board has little to no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed.

**KEYWORDS:** Schedule Change; Weekends; Holidays; Transfer; Work Location; Unit Management; Arbitrary and Capricious; Promise

**CASE STYLE:** Morris II v. Division of Corrections/Northern Correctional Center  
DOCKET NO. 2017-2318-MAPS (3/13/2018)

**PRIMARY ISSUES:** Whether Respondent could require Grievant to work weekends and holidays, and work at a different facility on occasion.

**SUMMARY:** Grievant and other Case Managers at the Northern Correctional Center have not been required to work weekends or holidays for at least eight years. In the summer of 2017, the Case Managers were told they would be required to work weekends and holidays, rotating this schedule with other members of the unit management team who had been covering weekends and holidays, and that all unit management staff at the Northern Correctional Center would also be assisting in covering weekends and holidays at the Ohio County Correctional Center. Grievant argued he was told when he interviewed for the Case Manager position eight years ago that he would not be working weekends and holidays and that his schedule could not be changed to require such work because of this representation, and because of his reading of the applicable Policy Directive. He also argued the posting for which he applied was for the Northern Correctional Center, and he could not be required to work at the Ohio County Correctional Center because it is a separate facility. Grievant was never promised that his schedule would not be changed, nor would any such promise be binding on Respondent. Grievant's tortured reading of the applicable Policy Directive is erroneous, and the Policy Directive has since been replaced by a Protocol which makes clear that Case Managers may be required to work weekends and holiday. Finally, state agencies have the authority to transfer employees to different work sites as needed, and Grievant presented no law, rule, regulation, policy or practice which is being violated by Respondent requiring employees assigned to the Northern Correctional Center to help cover weekends and holidays at the Ohio County Correctional Center.

**KEYWORDS:** Pay; Classification; Pay Grade; Equal Pay Act; Discrimination

**CASE STYLE:** Simpson, et al. v. Department of Veterans Assistance

DOCKET NO. 2013-2053-CONS (3/23/2018)

**PRIMARY ISSUES:** Whether Grievants are entitled to a pay increase.

**SUMMARY:** Grievants are employed in various classifications at the West Virginia Veteran's Nursing Facility in Clarksburg, West Virginia. They are dissatisfied with their wages, and seek additional compensation. Respondent made several attempts after this grievance was filed to obtain pay increases for many of its employees, and several, if not all, of the Grievants received one or more salary advancements as a result of these efforts, all of which were discretionary on Respondent's part. Those Grievants who appeared for the hearing and placed evidence into the record are paid within the pay range for their respective pay grades, and it is likely that all Grievants are paid with the pay range for their pay grades. Grievants did not demonstrate a violation of any statute, rule, regulation or policy, or that they were entitled to additional compensation.

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**KEYWORDS:** Discretionary Pay Increase; Minimum Qualifications; Class Specification; Policy; Arbitrary and Capricious

**CASE STYLE:** Brown v. Department of Health and Human Resources/Bureau for Public Health and Division of Personnel

DOCKET NO. 2017-1175-DHHR (3/26/2018)

**PRIMARY ISSUES:** Whether Respondent's DOP's denial of a pay increase based on internal equity was arbitrary and capricious.

**SUMMARY:** Grievant is employed by the Department of Health and Human Resources Bureau for Public Health as an Administrative Services Assistant 3. Grievant protests the Division of Personnel's denial of a discretionary pay increase based on internal equity. Grievant failed to prove Respondent Division of Personnel's determination that Grievant did not qualify for a discretionary pay increase was arbitrary and capricious. Grievant failed to prove Respondent DOP is required to change its policy, that Respondent DOP was without the authority to adopt the policy as written, or that the policy violates any law, rule, or regulation. Accordingly, the grievance is denied.

**KEYWORDS:** Demotion; Code Of Conduct; Horseplay; Inappropriate Behavior; Mitigation; Supervisor

**CASE STYLE:** Hileman, et al. v. Regional Jail and Correctional Facility Authority/Southwestern Regional Jail

DOCKET NO. 2017-2054-CONS (3/26/2018)

**PRIMARY ISSUES:** Whether Grievants demonstrated that the penalty imposed was excessive or an abuse of discretion.

**SUMMARY:** Grievants were employed by Respondent in supervisory positions at the Southwestern Regional Jail. They were both demoted to Correctional Officer 2 positions, which are non-supervisory positions, after engaging in horseplay, which involved touching subordinates with cut off broom handles and play-fighting each other and subordinates with the broom handles during work hours. They were also found to have engaged in calling subordinates inappropriate names. Grievants did not deny the charges, but argued demotion was too severe a penalty. Grievants did not demonstrate that the penalty imposed was clearly excessive or an abuse of discretion.

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**KEYWORDS:** Suspension; Insubordination; Misconduct; Mandated Overtime; Employee Conduct; Reprisal; Arbitrary and Capricious

**CASE STYLE:** Greene v. Department of Health and Human Resources/Jackie Withrow Hospital

DOCKET NO. 2017-2502-CONS (3/30/2018)

**PRIMARY ISSUES:** Whether Respondent proved that Grievant engaged in insubordinate behavior which supported the penalty imposed.

**SUMMARY:** Grievant was suspended without pay for three days for insubordination involving a refusal to accept mandated overtime on one occasion, and for remarking on the motivation of her supervisors coming to her unit in the presence of a patient, and abruptly hanging up the phone during a conversation with the hospital's CEO. Respondent established facts to support these charges by a preponderance of the evidence, thereby demonstrating good cause for Grievant's suspension. Grievant failed to establish that her suspension represented a disproportionate penalty for the offenses proved, or that her suspension was taken in retaliation for her grievance activity.

**KEYWORDS:** Selection; Management; Qualifications; Supervisory; Experience; Arbitrary and Capricious; Best Fit; Interview Scores; Weight; Leadership; Manager; Super-Interview

**CASE STYLE:** Kiger v. Department of Health and Human Resources/Bureau for Children and Families and Eric Davis, Intervenor  
DOCKET NO. 2016-1806-DHHR (3/16/2018)

**PRIMARY ISSUES:** Whether Grievant proved by a preponderance of the evidence that Respondent's selection decision was arbitrary and capricious.

**SUMMARY:** Grievant is employed by Respondent as a CPS Worker. Grievant was not selected for a CPS Supervisor position, which is a management position. Respondent selected for the position another employee who had not worked in CPS, and who had not worked for the agency as long as Grievant. Grievant argued that the Respondent's selection was arbitrary and capricious. Respondent denied Grievant's claims, asserting that it properly selected the most qualified candidate for the position. Grievant failed to prove her claims by a preponderance of the evidence. Accordingly, the grievance is DENIED.

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**KEYWORDS:** Video Surveillance Cameras; Break Room; Arbitrary and Capricious

**CASE STYLE:** Clark, et al. v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital  
DOCKET NO. 2017-1682-CONS (3/22/2018)

**PRIMARY ISSUES:** Whether Grievants proved that Respondent violated or misapplied any policy, rule, law or regulation by installing video cameras.

**SUMMARY:** The record of this case demonstrated that Respondent's installation of the surveillance equipment was not in a break room, but in a work space. Grievants failed to prove by preponderance of the evidence that Respondent violated or misapplied any policy, rule, law or regulation or otherwise acted in an arbitrary and capricious manner.

**KEYWORDS:** Motion to Dismiss; Res Judicata; Pay; Mandatory Time Lines

**CASE STYLE:** Brisendine, et al. v. Insurance Commission

DOCKET NO. 2018-0294-CONS (3/30/2018)

**PRIMARY ISSUES:** Whether the consolidated grievance is barred by res adjudicata. Whether the consolidated grievance was timely filed. Whether Grievants had standing to raise claims for another employee.

**SUMMARY:** Respondent alleges the consolidated grievance is an attempt to relitigate a prior grievance related to the same issues which had been decided at level one and not appealed by the Grievants. Respondent argues that the issue of a temporary pay increase for a fellow Credit Analyst is barred from being litigated anew by the claim preclusion doctrine of res judicata. Respondent also alleges that the consolidated grievance was not timely filed. Grievants contend that the claims are different and seek different remedies. Grievants also point to recent events which they claim make their new grievance timely. There is sufficient difference between the claims filed in the two consolidated grievances to avoid preclusion of the second claim filed by pro se grievants. Conversely, the point at which Grievants became aware of the underlying facts which are the basis for their claim occurred at such time as to make the filing of this grievance outside the mandatory statutory time limit for filing.

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**KEYWORDS:** Employer; Employee; Moot; Relief; Remedy

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

DOCKET NO. 2017-1956-DHHR (3/30/2018)

**PRIMARY ISSUES:** Whether this grievance is moot.

**SUMMARY:** Grievant, Linda Mealey, was employed by Respondent, Department of Health and Human Resources, at William R. Sharpe, Jr. Hospital. Grievant's representative stated that this grievance is moot since Grievant is no longer employed by Respondent. Grievant's resignation from her employment with Respondent rendered this grievance moot. Accordingly, this Grievance must be DISMISSED.