

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SYNOPSIS REPORT

Decisions Issued in March, 2019

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
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: Selection; Extracurricular Position; Qualifications; Arbitrary and Capricious

CASE STYLE: Rapp, Jr. v. Tucker County Board of Education
DOCKET NO. 2018-1417-TucED (3/27/2019)

PRIMARY ISSUES: Whether Grievant proved that the selection for the Athletic/Activities Director position was arbitrary and capricious.

SUMMARY: Grievant is employed by Respondent as a classroom teacher. Grievant applied for an extracurricular position that was posted by Respondent as a county athletic/activities director. Grievant was not the successful applicant for the position. Grievant did not prove by a preponderance of the evidence that the selection of the other qualified applicant for the position was unreasonable, arbitrary and capricious, or constituted an abuse of discretion. Accordingly, the grievance is denied.

KEYWORDS: Termination; Insubordination; Willful Neglect of Duty; Training; Restraint Techniques; Policy

CASE STYLE: McDonald v. Fayette County Board of Education
DOCKET NO. 2019-0317-FayED (3/20/2019)

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

SUMMARY: Grievant's employment as a teacher for special needs students was terminated after it was discovered that she had kept a student from leaving the classroom by grabbing the hood on her jacket to pull her back, and she dragged the same student across the floor by her arm after the student succeeded in leaving the room.

Grievant argued that termination of her employment violated her rights under the Code to improve her performance. She also argued that the incident was not nearly as onerous as it appeared on the video, and she had several years of successful employment with the Board. This made dismissal too severe as well as arbitrary.

Respondent proved that Grievant's actions were in violation of specific methods required to address such situations which is taught to all employees. Further, the training indicates that the actions taken by Grievant are known to cause injuries to students. Respondent met its burden of proof.

KEYWORDS: Remedy; Default

CASE STYLE: Khan, et al. v. Randolph County Board of Education
DOCKET NO. 2019-0327-CONS (3/29/2019)

PRIMARY ISSUES: Whether Respondent demonstrated that the remedy requested by Grievants was contrary to law or contrary to proper and available remedies.

SUMMARY: The record indicates that Respondent defaulted, and has acknowledged that it has no statutorily accepted excuses for its default. Since Grievants have prevailed on the merits by default, the sole issue is whether the remedy sought by Grievants is contrary to law or contrary to proper and available remedies. The Respondent has the burden of proving this affirmative defense by a preponderance of the evidence. The record established that the remedy requested by Grievants is available and not contrary to law. Contrary to Respondent's assertion, Grievants do not request that the students at the alternative school be deprived of counseling services. Grievants simply request that they not be required to leave their place of assignment to provide those services without their consent and without notice and some opportunity to be heard on the assignment. Accordingly, the remedy is granted.

KEYWORDS: Compensation; Paraprofessional Duties; Job Duties; Education; Certification

CASE STYLE: Clutter v. Harrison County Board of Education
DOCKET NO. 2018-1104-HarED (3/1/2019)

PRIMARY ISSUES: Whether Grievant proved that she is currently performing paraprofessional duties.

SUMMARY: Grievant is currently employed by Respondent as an Aide/Early Childhood Classroom Assistant Teacher. Grievant contends that once she obtained the necessary education and certification to be a paraprofessional, she became entitled to paraprofessional compensation, so long as she works in any aide position and regardless of her actual job duties. The record of this case, and the applicable law, did not support such a conclusion. Grievant failed to prove that she is currently performing paraprofessional duties. Grievant also failed to prove that she was entitled to any more compensation than she already receives in her current position. Accordingly, this grievance is denied.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

<u>KEYWORDS:</u>	Termination; Criminal Background; Investigation; Discovery Rule; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Smith v. Roane County Board of Education</u> DOCKET NO. 2018-1278-CONS (3/18/2019)
<u>PRIMARY ISSUES:</u>	Whether Respondent established just cause to terminate Grievant in accordance with West Virginia Code.
<u>SUMMARY:</u>	<p>Grievant was employed as a bus operator with Roane County Board of Education. After four and one-half years of service Grievant was terminated from said position. Respondent terminated Grievant's employment upon becoming aware of his criminal background. It is undisputed that Grievant was not charged with any new or additional crimes during his tenure of employment with Respondent.</p> <p>Grievant contends that he was wrongfully suspended and then terminated. Grievant argues that his employment with Respondent should be reinstated. Respondent argues Grievant's failure to completely and accurately disclose his criminal history on his three applications for employment with Roane County Schools coupled with the contents of the criminal history, it is permissible and readily prudent to discharge Grievant from employment. Grievant has never been convicted of, plead guilty to or plead nolo contender to a felony charge. Grievant underwent an extensive criminal background investigation under the direction of the West Virginia Department of Education prior to being hired by Respondent. He passed the investigation and was issued a bus operator certification. Respondent has not established a discovery rule exception in the confines of this case.</p> <p>Respondent has failed to prove by a preponderance of the evidence that Grievant has committed any of the offenses set out in West Virginia Code § 18A-2-8(a) to justify termination.</p>

KEYWORDS: Seniority; ECCAT; Certification; Tie-breaker

CASE STYLE: Carpenter, et al. v. Webster County Board of Education
DOCKET NO. 2018-1027-CONS (3/27/2019)

PRIMARY ISSUES: Whether Grievants proved that Respondent was required to use Aide seniority for ECCAT employment decisions.

SUMMARY: Grievants are employed by Respondent as Aides holding ECCAT certification. In the past Respondent ranked them for seniority purposes based upon their Aide seniority for Aide and ECCAT purposes. In early 2018 Respondent determined that even though Grievants have different start dates as Aides they all entered into their ECCAT duties on the same date. Respondent determined that Grievants were tied for ECCAT seniority and required Grievants to participate in a random selection process to determine their ECCAT seniority ranking.

Grievants argue that their ECCAT seniority should be calculated the same as their Aide seniority. Additionally, they aver that the process for determining the seniority ranking for employees was held years after the statutory time limit for that procedure.

Respondent's proved that the ECCAT seniority is not the same as Aide seniority and that it was proper to hold the random selection process outside the statutory time limit when it was necessary to correct a prior mistake in seniority calculation.

KEYWORDS: Selection; ECCAT; Classification; Kindergarten; Certification; Credentials; Seniority; Vacancy; Qualifications; Class Title; Posting

CASE STYLE: Hill, et al. v. Mason County Board of Education
DOCKET NO. 2017-2509-CONS (3/15/2019)

PRIMARY ISSUES: Whether Grievants demonstrated that they were entitled to placement into certain kindergarten Aide positions.

SUMMARY: Grievants are employed by Respondent as Aides. Grievants applied for two positions that required Early Childhood Classroom Assistant Teacher (ECCAT) certification. While Grievants were the more senior applicants in the aide classification than those awarded the positions, Grievants did not at that time hold ECCAT certifications from the West Virginia Department of Education, nor had they ever held an ECCAT position. The successful applicants held ECCAT certifications. Grievants assert that they were entitled to placement in the positions over those selected. Respondent argues that its selection of the other applicants for the ECCAT positions was proper. Grievants failed to prove their claims by a preponderance of the evidence. Therefore, the grievance is DENIED.

KEYWORDS: Motion to Dismiss; Untimeliness; Time Lines

CASE STYLE: Wolford v. Hampshire County Board of Education
DOCKET NO. 2018-0549-HamED (3/1/2019)

PRIMARY ISSUES: Whether this grievance is untimely.

SUMMARY: Grievant was a bus operator for one of Respondent's three extracurricular bus runs starting with the 2014-15, school year. Respondent reduced these to one run for the 2017-18, school year. Upon posting, Grievant applied for the run and was unequivocally notified on September 5, 2017, that the run was awarded to another applicant. Grievant did not file this grievance until October 10, 2017. Respondent moved to dismiss this grievance as untimely, arguing that Grievant filed it beyond the requisite fifteen working days after the grievable event. Grievant contends that Respondent informed her that the 2016-17, run was a "tutoring run" and the 2017-18, run was an "activity run". Grievant contends she did not suspect there was grievable event until September 22, 2017, when she retrieved her 2014-15, extracurricular contract from Respondent and noticed "activity run" handwritten on it. Grievant contends she only knew there was a grievable event when Respondent confirmed on September 29, 2017, that her prior extracurricular runs and the 2017-18, extracurricular run were "activity runs". The timeframe for filing a grievance is calculated from the date Grievant is "unequivocally notified of the decision being challenged", not the date she knows she has a grievable event. Accordingly, the grievance is Dismissed.

KEYWORDS: Selection; Seniority; Qualifications; Job Posting

CASE STYLE: Elbert v. Harrison County Board of Education
DOCKET NO. 2018-1085-HarED (3/1/2019)

PRIMARY ISSUES: Whether Grievant is entitled to the position at issue.

SUMMARY: Grievant is employed by Respondent as a bus operator. Grievant applied for the school bus supervisor position currently held by Mr. Stonestreet. Grievant argues that his qualifications were superior to the more senior applicants and that he should have been selected by Respondent. Mr. Stonestreet and Respondent contend that Mr. Stonestreet was properly selected to fill the vacancy, because Mr. Stonestreet met the minimum qualifications for the posted vacancy and Respondent has substantial discretion in making hiring decisions. Respondent has the discretion to select the most senior applicant who meets the minimum qualifications for a posted vacancy, pursuant to the provisions of West Virginia Code § 18A-4-8b. Accordingly, this grievance is denied.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Relief; Moot; Illusory; Advisory Opinion; Instatement; Bad Faith; Qualifications; Economic Services Worker; Office Assistant
<u>CASE STYLE:</u>	<u>Cole v. Department of Health and Human Resources/Bureau for Children and Families AND Division of Personnel</u> DOCKET NO. 2017-1686-DHHR (3/22/2019)
<u>PRIMARY ISSUES:</u>	Whether this grievance is moot. Whether Grievant proved her claim of bad faith.
<u>SUMMARY:</u>	Grievant was employed by Respondent DHHR as an Office Assistant II ("OA II") in its Summers County Office. Grievant applied for and was selected to fill an Economic Service Worker ("ESW") position also in that office. However, Respondent DOP rejected Grievant as the successful applicant finding that she did not meet the minimum qualifications for the position. Grievant filed this grievance ultimately seeking instatement into the position, plus back pay and interest. Grievant's testimony that she no longer wants the relief she had sought has rendered this grievance moot. Any decision on the merits of the claim would be illusory, or would result in an advisory opinion. Grievant raised a claim of bad faith against Respondent DHHR in her post-hearing submissions. Grievant failed to prove her claim of bad faith. Therefore, this grievance is DISMISSED.

KEYWORDS: Discretionary Pay Increase; Pay Plan Policy; Job Classification; Discrimination; Similarly Situated Employees; Job Duties

CASE STYLE: Foster, et al. v. Division of Natural Resources/ AND Division of Personnel

DOCKET NO. 2018-1112-CONS (3/22/2019)

PRIMARY ISSUES: Whether Grievants proved that they were similarly situated to the employees who received the discretionary pay increases.

SUMMARY: Grievants are employed by the Division of Natural Resources, and all have earned the Certified Wildlife Biologist certification prior to May of 2002. Their certification dates precede the date on which discretionary increases for Professional Skills/Competency Development under the Division of Personnel's Pay Plan policy existed. Respondent demonstrated that Grievants were not similarly situated to the employees who received their certifications after the prohibition on discretionary pay increases was lifted. The record also established an unauthorized approval of the certification to be eligible for a discretionary raise by a former Assistant Director of the Division of Personnel. It is well established that Grievants cannot rely upon an ultra vires action to confer entitlement to the relief they are seeking. Accordingly, this grievance is denied.

KEYWORDS: Discretionary Increase; Pay Plan Policy; Arbitrary and Capricious

CASE STYLE: Hazlewood v. General Services Division

DOCKET NO. 2018-0864-CONS (3/28/2019)

PRIMARY ISSUES: Whether Grievant established he was entitled to a discretionary merit increase.

SUMMARY: Grievant was denied a discretionary merit increase. This is a consolidated grievance wherein the original two grievances are treated as one. In a consolidated grievance, it is possible that one claim may be dismissed while other claims remain, in the instant grievance, additional facts and/or clarification were collected before any final determination was reached on the pending issue(s). Grievant protest Respondent's determination not to provide him a discretionary salary increase. Challenging how the score of his 2016 EPA3 is being used is different from challenging the score on the EPA. Grievant did not timely challenge the validity of the 2016 EPA. Grievant did successfully challenge the validity of his 2017 EPA. Grievant failed to establish by a preponderance of the evidence that Respondent's decision not to recommend him for a discretionary merit increase violated any law, rule, policy or procedure, or that it was otherwise arbitrary and capricious. This Grievance is GRANTED IN PART AND DENIED IN PART.

KEYWORDS: Termination; Threatening Management; Erratic Behavior; Gross Misconduct; Arbitrary and Capricious; Mitigation

CASE STYLE: Lowman v. Department of Environmental Protection
DOCKET NO. 2018-1225-DEP (3/27/2019)

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

SUMMARY: Grievant was employed by Respondent as an Environmental Resources Analyst in the Division of Mining and Reclamation. Grievant was terminated by Respondent for threatening two members of management following a time-period of escalating erratic behavior and ongoing serious attendance problems. Respondent proved the charges against Grievant and that it was justified in terminating Grievant's employment. Grievant failed to prove mitigation of the punishment was warranted. Accordingly, the grievance is denied.

KEYWORDS: Suspension Pending Investigation; Due Process; Predetermination Meeting; WV CARES Act; Arbitrary and Capricious; Moot; Damages

CASE STYLE: Myers v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2019-0256-DHHR (3/21/2019)

PRIMARY ISSUES: Whether Grievant proved that Respondent failed to provide him with due process or the reason for his suspension.

SUMMARY: Sometime after the legislature created WV CARES in 2015, to facilitate the processing and analysis of the criminal history and background of applicants for direct access employment with covered providers, WV CARES notified Sharpe Hospital and Grievant, a nineteen-year employee of Sharpe, that Grievant was ineligible for direct access employment based on his criminal history report. WV CARES informed Grievant he could apply for a variance. Sharpe suspended Grievant without pay pending investigation. Grievant applied for a variance and expended time and resources to obtain the criminal history report and correct its inaccuracies. WV CARES granted Grievant a variance and Sharpe reinstated Grievant's employment and annual leave. Grievant contends that Respondent denied him a predetermination meeting and due process and requests to be made whole, including reimbursement of his expenses in obtaining a variance and the removal of his suspension from his record. Grievant did not prove that Respondent violated his rights or that it was obligated to remove the suspension from his record, that it owed him backpay, or that it had any obligation to reimburse him the cost of his criminal history report or his expenditures in obtaining a variance. Accordingly, the grievance is DENIED.

KEYWORDS: Termination; Dismissal; Physical Abuse; Verbal Abuse; Patient; Misconduct; Retaliation; Investigation; Complaint; EEO; Investigator; Investigative Report; APS; Injured; Security Camera Recording; Unsubstantiated

CASE STYLE: Hoback v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital
DOCKET NO. 2019-0264-CONS (3/7/2019)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence that Grievant engaged in misconduct constituting good cause for Grievant's dismissal.

SUMMARY: Grievant was employed by Respondent as a Registered Nurse at Mildred Mitchell-Bateman Hospital. Respondent dismissed Grievant charging her as having engaged in physical and verbal abuse of a patient. Grievant denies Respondent's claims, arguing that she was accused of this misconduct and dismissed in retaliation for making complaints about her supervisor's behavior. Respondent failed to prove by a preponderance of the evidence that Grievant engaged in physical abuse of a patient or verbal abuse of a patient. Respondent failed to prove that there was good cause for Grievant's dismissal. Therefore, the grievance is GRANTED.

KEYWORDS: Employee Performance Appraisal; Travel Time Pay; Unprocessed Equal Employment Opportunity (EEO) Claims; Timelines; Discovery Rule

CASE STYLE: Messer v. Division of Highways
DOCKET NO. 2018-0936-CONS (3/8/2019)

PRIMARY ISSUES: Whether Respondent proved that Grievant failed to file this grievance related to Employee Performance Appraisals or Pay for Travel Time within the mandatory time line established by statute after he became aware of the events giving rise to the grievances.

SUMMARY: Grievant has three claims that have been consolidated for resolution in this decision. Grievant claims that all his Employee Performance Appraisals must be reevaluated because his supervisor gave him a second higher EPA on the same day after Grievant complained that the first appraisal was invalid as too low. Grievant claims that he should have received travel time for a period where he was required to drive past the Crum substation to report to work in Wayne. Respondent proved that both these grievances were filed months after the time mandated for filing established by statute. These grievances must be DISMISSED.
Grievant also claims the Respondent violated policies and guidelines related to processing of Equal Employment Opportunity complaints. Grievant failed to meet the burden of proof for this claim by failing to cite or provide a guideline or policy which Respondent is alleged to have violated. This grievance must be DENIED.

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

CASE STYLE: Shirk v. Division of Highways/ AND Division of Personnel
DOCKET NO. 2017-1419-DOT (3/5/2019)

PRIMARY ISSUES: Whether Grievant proved the Division of Personnel's reallocation of her position was arbitrary and capricious.

SUMMARY: Grievant is employed by Respondent as a Supervisor 1 and grieved her demotion from a Supervisor 2 to a Supervisor 1. Grievant was not demoted; the position she occupies was reallocated by the Division of Personnel. Supervisor 1s oversee the activities of clerical support staff, semi-or-fully-skilled trade workers, or inspectors and Supervisor 2s oversee employees engaged in technical work requiring advanced training. Grievant failed to prove her subordinate employees were engaged in technical work requiring advanced training. Therefore, Grievant failed to prove the Division of Personnel's reallocation of her position was arbitrary and capricious. Accordingly, the grievance is denied.

<u>KEYWORDS:</u>	Termination; Performance Issues; Unprofessional Conduct; Insubordinate Behavior
<u>CASE STYLE:</u>	<u>Underwood v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital</u> DOCKET NO. 2016-1885-CONS (3/12/2019)
<u>PRIMARY ISSUES:</u>	Whether Respondent had good cause to terminate Grievant.
<u>SUMMARY:</u>	Grievant was dismissed from employment as a Licensed Practical Nurse due to a history of performance failures culminating with a failure to follow a direct order of a supervisor. The record also supported a finding that Grievant mixed two drugs in the same syringe after being told by the hospital pharmacist not to do so. The record also supported a finding that Grievant had a long history of performance issues along with attempts to correct the deficiencies. Grievant offered no evidence that would contradict the evidence presented by Respondent, and offered no evidence that her due process rights were violated. Accordingly, this grievance is denied.
<u>KEYWORDS:</u>	Reallocation; Classification; Position Description Form; Policy; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Cutright v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital AND Division of Personnel</u> DOCKET NO. 2017-2167-DHHR (3/12/2019)
<u>PRIMARY ISSUES:</u>	Whether Respondents violated any law, rule, regulation, policy or practice.
<u>SUMMARY:</u>	Grievant is currently employed by the Department of Health and Human Resources in a position classified as a Health Service Worker. The position was not reallocated from a Health Service Worker Trainee to a Health Service Worker until after Grievant completed a Position Description Form that was then submitted by the Department of Health and Human Resources to the Division of Personnel for review and a classification determination. The Division of Personnel and Department of Health and Human Resources both acted in accordance with applicable policy in regard to the reallocation of the position. Grievant failed to demonstrate that any delay in processing the reallocation violated any law, rule, regulation, policy or practice applicable to his employment situation. Accordingly, this grievance is denied.

KEYWORDS:

Termination; Employee Code of Conduct; Policy

CASE STYLE:

Farley v. Department of Health and Human Resources/Bureau for Children and Families

DOCKET NO. 2019-0448-DHHR (3/15/2019)

PRIMARY ISSUES:

Whether Respondent proved that the termination of Grievant's employment as a CPS Worker was justified.

SUMMARY:

Respondent terminated Grievant's employment after serious incidents at her home led to an investigation by the CPS unit of a Boone County. The Boone County CPS works found impending dangers to the child living in Grievant's home. Respondent based Grievant's dismissal upon a violation of the statute which identifies Grievant as a mandatory reported of suspected child abuse and neglect and DHHR policy against conflicts of interest between an employee's personal life and their professional responsibilities.

Grievant argued that she was at work when the incidents took place and they were reported by her supervisor before Grievant found out about them. Respondent proves that the incidents were emblematic of impending dangers in Grievant's home and dismissal was justified.