

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in March 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
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: Motion to Dismiss; Covid-19 Jobs Protection Act

CASE STYLE: Mullins v. Putnam County Board of Education
DOCKET NO. 2022-0348-PutED (3/30/2022)

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

SUMMARY: Grievant alleges she contracted COVID-19 at work due to Respondent's failures to follow regulations and the state department of education's guidance, forcing her to use personal leave. Respondent moved the Grievance Board to dismiss the grievance as barred by the COVID-19 Jobs Protection Act. Grievant argues that the Act is unconstitutional or, alternately, inapplicable. The COVID-19 Jobs Protection Act is applicable to the grievance and Grievant has not alleged facts to support an exception to the Act. The Grievance Board lacks jurisdiction to determine the constitutionality of the Act or hear the grievance. Respondent's motion to dismiss must be granted and the grievance dismissed.

KEYWORDS: Motion to Dismiss; COVID-19 Jobs Protection Act; Jurisdiction

CASE STYLE: Hampton, et al v. Raleigh County Board of Education
DOCKET NO. 2021-0923-CONS (3/30/2022)

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

SUMMARY: Grievants allege Respondent assigned them to positions for which they did not apply for requiring them to perform remote teaching duties. Respondent moved the Grievance Board to dismiss the grievance as untimely. Although the grievance is not untimely filed, the grievance is barred by the COVID-19 Jobs Protection Act. Grievants argued that the Act is unconstitutional or, alternately, inapplicable. The COVID-19 Jobs Protection Act applies to the grievance as the grievance does arise from COVID-19 as defined by statute. The Grievance Board lacks jurisdiction to determine the constitutionality of the Act or hear the grievance. Accordingly, the grievance is dismissed.

KEYWORDS: COVID-19 Jobs Protection Act; Jurisdiction

CASE STYLE: DeWitt, et al v. Preston County Board of Education
DOCKET NO. 2021-1061-CONS (3/29/2022)

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

SUMMARY: Grievants allege Respondent assigned them to positions for which they did not apply for requiring them to perform remote teaching duties. Respondent moved the Grievance Board to dismiss the grievance as barred by the COVID-19 Jobs Protection Act. The record is undisputed that this grievance arises out of Respondent's response to the COVID-19 pandemic and an effort to stem the spread of the virus. Grievants argued that the Act is unconstitutional or, alternately, inapplicable. The COVID-19 Jobs Protection Act applies to the grievance as the grievance does not truly allege a violation of contract. The Grievance Board lacks jurisdiction to determine the constitutionality of the Act or hear the grievance. Respondent's motion to dismiss must be granted and the grievance must be dismissed.

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

CASE STYLE: Auville v. Wood County Board of Education
DOCKET NO. 2022-0593-WooED (3/21/2022)

PRIMARY ISSUES: Whether this grievance must be dismissed for failure to state a claim upon which relief can be granted.

SUMMARY: Grievant is employed by Respondent as a teacher. In her grievance filing, Grievant asserted she may be subject to reprisal in the future based on her filing of a citizen's complaint against Respondent. As relief, she sought preemptive actions to prevent this possible reprisal. Respondent moved to dismiss the grievance for failure to state a claim upon which relief may be granted and as the relief requested is wholly unavailable. Respondent's motion must be granted as the grievance alleged no injury in fact, was speculative and premature, and requested remedies that are wholly unavailable. Accordingly, the grievance is dismissed.

KEYWORDS: Selection Process; Qualifications; Favoritism; Arbitrary and Capricious

CASE STYLE: Mick v. Hancock County Board of Education
DOCKET NO. 2022-0038-HanED (3/4/2022)

PRIMARY ISSUES: Whether Grievant proved by a preponderance of the evidence that the selection process was unreasonably tainted by arbitrary and capricious actions.

SUMMARY: Respondent Board of Education selected Ms. Parsons over Grievant as Director of Personnel upon nomination of the Superintendent. Grievant claims to be the most qualified of the four candidates interviewed by the Superintendent. Grievant alleges that the Superintendent preselected Ms. Parsons and weighed the §18A-4-7a selection factors in her favor due to their close friendship. Respondent contends it has discretion to attribute weight regardless of friendship. It asserts that the Superintendent and the Board each have exclusive roles in the selection process, with the Superintendent having sole authority to nominate and the Board sole authority to select or reject a nomination. Yet, State Code assigns the Board authority to weigh selection factors. The Superintendent usurped this authority in unilaterally giving more weight to candidate interviews under the “other measures” selection factor. The Superintendent used this most subjective factor to favor Ms. Parsons and justified the weight assigned using ambiguous traits such as “trustworthiness.” Grievant proved that Respondent abused its discretion and played favorites but failed to prove she was the most qualified. Accordingly, the grievance is GRANTED in part and DENIED in part.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Motion to Dismiss; Timelines; Timeliness; Appeal
<u>CASE STYLE:</u>	<u>Miller, et al. v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital AND Division of Personnel</u> DOCKET NO. 2020-1440-CONS (3/18/2022)
<u>PRIMARY ISSUES:</u>	Whether Respondent proved Grievants failed to timely file their appeal to level three of the grievance process.
<u>SUMMARY:</u>	Grievants were employed by Respondent as Human Resource Assistants. Grievants filed their grievances alleging they were functionally demoted and working outside of their job classifications. Due to an error by their representative, Grievants did not timely file their appeal to level three. Respondents moved to dismiss the grievance as untimely. The error of Grievants' representative does not excuse the untimely filing. Accordingly, the grievance is

<u>KEYWORDS:</u>	Termination; Controlled Substance; Division of Personnel Drug – and Alcohol – Free Workplace Policy
<u>CASE STYLE:</u>	<u>Bragg v. Library Commission</u> DOCKET NO. 2022-0303-DACH (3/18/2022)
<u>PRIMARY ISSUES:</u>	Whether Respondent proved by a preponderance of the evidence that Grievant brought alcohol and a controlled substance into the workplace in violation of the DOP Drug – and Alcohol – Free Workplace policy.
<u>SUMMARY:</u>	<p>Grievant was dismissed for possessing a controlled substance (methamphetamine) and alcohol in the workplace in violation of the Division of Personnel Drug – and Alcohol – Free Workplace policy. Grievant argues that the dismissal is invalid because Respondent did not provide her required constitutional due process protections as a result of considering her to be a probationary employee instead of a permanent employee. The employment status of Grievant did not matter because she was provided the required constitutional due process necessary for a permanent employee.</p> <p>Grievant also argues that her confession to bringing the barred substances into the workplace was improperly obtained as set out in the United States Supreme Court decisions in <i>Miranda v. Arizona</i> and <i>Garrity v. New Jersey</i>. For reasons fully set out below, these holdings have no relevance to the present case. Respondent proved by a preponderance of the evidence that Grievant violated the Division of Personnel Drug – and Alcohol – Free Workplace policy.</p>

KEYWORDS: Motion to Dismiss; Moot; Relief; Remedy

CASE STYLE: Simmons v. Department of Health and Human Resources/Bureau for Public Health
DOCKET NO. 2021-1050-DHHR (3/8/2022)

PRIMARY ISSUES: Whether this grievance is moot.

SUMMARY: Ms. Simmons filed the present grievance in which she sought only “a change of supervisors as soon as possible.” The level three hearing was continued to see if Grievant would receive a position for which she had applied which was within the BPH with different supervisor. Grievant received and accepted such a position. Respondent argues that the grievance is now moot and should be dismissed. Respondent’s motion is granted.

KEYWORDS: Accommodation; Medical Condition; Miscommunication; Job Duties; Medical Leave; Arbitrary and Capricious

CASE STYLE: Payne-Lesher v. Division of Corrections and Rehabilitation/Bureau of Prisons and Jails
DOCKET NO. 2020-0745-MAPS (3/1/2022)

PRIMARY ISSUES: Whether Grievant proved that Respondent’s failure to make the accommodation when requested was arbitrary and capricious.

SUMMARY: Grievant had a very serious medical condition which resulted in her requesting certain accommodations to her regular work schedule. Those accommodations were to be placed where she could use the restroom as needed and to work no more than eight hours per day. Respondents had legitimate concerns regarding the second accommodation because there are emergency situations where Mt. Olive is “locked down” and all employees must stay until the matter is resolved. The accommodation was originally denied. For reasons discussed herein, the accommodation was later allowed. It is established that if the matter had been appropriately discussed with Grievant the accommodation could have been made all along. Grievant’s circumstances did not change in any way between the time the accommodation was denied and the time it was granted. There was only a problem with communication. Respondent’s denial of the accommodation was arbitrary and capricious.

KEYWORDS: Motion to Dismiss; Pay Increase; Jurisdiction

CASE STYLE: Jeffries, et al v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital AND

DOCKET NO. 2019-1703-CONS (3/7/2022)

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

SUMMARY: Grievants are employed by Respondent as Recreation Specialists at William R. Sharpe, Jr. Hospital. Grievants protest Respondent's failure to provide the same pay raises to Grievants that are being given to employees in direct care positions. Differences in pay between direct care employees and other employees were created by a combination of legislative, judicial, and state personnel board action. West Virginia Code § 5-5-4a removed jurisdiction from the Grievance Board to hear any grievance arising from the implementation of the direct care employee pay rates. Therefore, Respondent's motion to dismiss should be granted, and this grievance, dismissed.