

**WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**SYNOPSIS REPORT**

**Decisions Issued in March 2023**

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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| <b><u>KEYWORDS:</u></b>       | Termination; Gross Misconduct; Insubordination; Policy; Discrimination; Public Safety  |
| <b><u>CASE STYLE:</u></b>     | <u>Mercer v. West Virginia State University</u><br>DOCKET NO. 2023-0209-WVSU (3/28/2023)   |
| <b><u>PRIMARY ISSUES:</u></b> | Whether Respondent proved that Grievant engaged in misconduct of a substantial nature directly affecting the rights and interest of the public and whether Grievant's conduct showed a gross disregard for professional responsibilities or the public safety.   |
| <b><u>SUMMARY:</u></b>        | Grievant was dismissed from his employment as a campus police officer by Respondent, West Virginia State University. Grievant failed to prove this was retaliation or discrimination. Respondent proved that, despite corrective action, Grievant had ongoing performance deficiencies, constituting good cause for dismissal. Thus, claims for conditions of employment are moot. This grievance is therefore DENIED. |

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

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**KEYWORDS:** Selection; Most Qualified Candidate; Interview Committee; Arbitrary and Capricious

**CASE STYLE:** Blackburn v. Mingo County Board of Education  
DOCKET NO. 2021-2450-CONS (3/16/2023)

**PRIMARY ISSUES:** Whether Grievant proved by a preponderance of evidence that he was the most qualified candidate for the principal position. Whether the selection process was flawed

**SUMMARY:** Grievant was regularly employed by Respondent as a classroom teacher. Grievant applied for the Principal position at Lenore PK-8, but he was not selected for the same. Grievant argued that he should have been selected for the position because he was the most qualified applicant. Respondent denies Grievant's claims and asserts that it properly selected the most qualified applicant based upon the factors listed in West Virginia Code § 18A-4-7a. Grievant proved by a preponderance of the evidence that the selection process used by the interview committee to select the Principal for Lenore PK-8 was flawed, that Intervenor was not the most qualified candidate, and that its decision to select Intervenor was arbitrary and capricious. Further, Grievant proved by a preponderance of the evidence that the interview committee abused its discretion by weighting the single subjective factor more than the other eight objective factors combined which resulted in the selection of a candidate who was not the most qualified for the position. Grievant failed to prove by a preponderance of evidence that he was the most qualified candidate for the principal position at Lenore PK-8. Therefore, the grievance is GRANTED IN PART, and DENIED IN PART.

**KEYWORDS:** Termination; Unprofessional Conduct; Employee Code of Conduct; Correctable Conduct; Improvement Plan

Conduct; Correctable Conduct; Improvement Plan

Conduct; Correctable Conduct; Improvement Plan

**CASE STYLE:** Wells v. Monongalia Board of Education

DOCKET NO. 2023-0143-MonED (3/14/2023)

**PRIMARY ISSUES:** Whether Grievant's conduct was correctable, and whether Respondent was entitled to take disciplinary action against Grievant.

**SUMMARY:** Grievant was employed by Respondent as a science teacher at University High School until his termination on August 9, 2022. Grievant was terminated because his conduct was unprofessional and in violation of the Employee Code of Conduct. Respondent also alleged that Grievant's conduct jeopardized the health, safety, and welfare of students. Respondent has met its burden of proof that the termination of Grievant's contract was justified by the undisputed facts of this case resulting in a clear violation of the Employee Code of Conduct. The record demonstrated that Grievant's conduct was not correctable and that he was not entitled to a second improvement plan. Accordingly, this grievance is denied.

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

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| <b><u>KEYWORDS:</u></b>       | Suspension; Investigation; Due Process; Arbitrary and Capricious   |
| <b><u>CASE STYLE:</u></b>     | <u>Pigman v. Department of Health and Human Resources/Bureau of Social Services</u><br>DOCKET NO. 2023-0312-DHHR (3/24/2023)   |
| <b><u>PRIMARY ISSUES:</u></b> | Whether Grievant proved that Respondent violated her constitutionally guaranteed due process rights to continued employment by suspending her without proper notice and an opportunity to be heard while an unreasonably long investigation is conducted.  |
| <b><u>SUMMARY:</u></b>        | On October 7, 2022, Respondent suspended Grievant without pay pending investigation into allegations of inappropriate and unprofessional comments with clients. Respondent referred the matter to the Department of Health and Human Resources Office of Inspector General (OIG) for investigation. As of the date of the level three hearing on January 18, 2023, OIG had not completed its investigation and Grievant was still suspended without pay. Further, as of that date, Grievant had exhausted all her accrued annual leave, which she had been using to cover her absence, and was no longer receiving income. Grievant asserts that her suspension is disciplinary, and that it was improper and violated her due process rights. Respondent denies Grievant's claims arguing that Grievant was properly suspended pending investigation into complaints it received about her performance as a CPS crisis worker, that such suspensions are permitted by the Division of Personnel Administrative Rule, and that the suspension is not disciplinary. Grievant proved by a preponderance of the evidence that Respondent violated her constitutionally guaranteed due process rights to continued employment by suspending her without providing her notice of the reasons for her suspension and for suspending her without an opportunity to be heard while an unreasonably long investigation was conducted. Grievant failed to prove her claim that her suspension is disciplinary. Therefore, the grievance is GRANTED, in part and DENIED, in part. |

**KEYWORDS:** Dismissed; Job Duties; ADA accommodation; Discrimination; Failure to Return to Work; Arbitrary and Capricious

**CASE STYLE:** Pekarek v. Department of Health and Human Resources/Bureau for Child Support Enforcement

DOCKET NO. 2022-0838-CONS (3/17/2023)

**PRIMARY ISSUES:** Whether Respondent proved by a preponderance of the evidence that dismissal was justified.

**SUMMARY:** Grievant was diagnosed with agoraphobia and given a work at home ADA accommodation. When Grievant's doctor later deemed Grievant permanently unable to perform her job duties even with an accommodation, Respondent terminated Grievant's employment. Grievant does not seek reinstatement but requests a different position, backpay, future pay, lost wages, medical expenses, removal of both her prior discipline and dismissal, \$100,000 for each act of discrimination, and \$35,000 for each dollar of lost income to compensate for her emotional distress. Respondent proved good cause for dismissal due to Grievant's inability to perform even with an accommodation. Respondent was justified in ending Grievant's medical leave of absence since this inability was permanent. Respondent acted reasonably in its discretionary denial of a personal leave of absence. Thus, claims related to conditions of employment and prior discipline are moot. Grievant failed to prove her dismissal was discrimination; that she was entitled to wages, benefits, or a different position; or that she was entitled to use of paid leave. Further, the Grievance Board lacks authority to award the tort-like relief requested. Accordingly, this grievance is DENIED.

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**KEYWORDS:** Dismissed; Terminated; Misconduct; Code of Conduct; Driving Under the Influence; DUI; Discrimination; Incarceration

**CASE STYLE:** Gooden v. Department of Homeland Security/Huttonsville Correctional Center and Jail

DOCKET NO. 2023-0365-DHS (3/28/2023)

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

**SUMMARY:** Grievant was employed as a Correctional Officer III at the Huttonsville Correctional Center. Grievant was arrested for driving under the influence of alcohol in May 2021 and May 2022. Grievant's employment was terminated after his second arrest and conviction for driving under the influence. Respondent established by a preponderance of the evidence that Grievant's conduct was in violation of established policy, and that his employment was terminated for good cause.

**KEYWORDS:** Discretionary Pay Increase; Pay Plan Policy; Internal Equity; Arbitrary and Capricious

**CASE STYLE:** Hazlewood v. General Services Division/ AND Division of Personnel  
DOCKET NO. 2022-0667-CONS (3/3/2023)

**PRIMARY ISSUES:** Whether Grievant proved he was entitled to a discretionary increase or that Respondents' actions were arbitrary and capricious.

**SUMMARY:** Grievant is employed by General Services Division as a Facilities/Equipment Maintenance Technician. Grievant grieves General Services Division's initial failure to seek a discretionary pay increase for Grievant for salary inequity when it did so for other employees. Grievant further grieves the Division of Personnel's later denial of a discretionary pay increase when Respondent General Services Division sought the same for Grievant. Grievant failed to prove he was entitled to a discretionary increase or that Respondents' actions were arbitrary and capricious. Accordingly, the grievance is denied.