

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in April 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.

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

KEYWORDS: Pay Increase; Classification; Pay Grade; Starting Pay; Pay Range

CASE STYLE: Aldrich, et al. v. West Virginia University
DOCKET NO. 2017-0884-CONS (4/23/2018)

PRIMARY ISSUES: Whether Grievants demonstrated that they are entitled to a salary increase.

SUMMARY: Grievants believe they are being treated unfairly and should be awarded a pay increase because some new employees are receiving a starting wage above entry level for the pay grade, and some new hires are being paid more than Grievants, yet Grievants are expected to offer guidance to these new employees. Grievants did not demonstrate that Respondent has violated any law, rule, regulation, policy, or procedure. Moreover, Respondent is not required to compensate all employees at the same level. All that is required is that the employees be properly classified and be paid within the pay range for the classification's pay grade.

KEYWORDS: Selection; Experience; Educational Requirements; Arbitrary And Capricious

CASE STYLE: Buracker v. Shepherd University

DOCKET NO. 2017-1153-SU (4/30/2018)

PRIMARY ISSUES: Whether Grievant demonstrated that Respondent acted in an arbitrary and capricious manner.

SUMMARY: Grievant has been employed by Respondent for 28 years as a part-time security or police officer, and his classification for several years has been Campus Police Investigator I. Grievant applied for a posted full-time Campus Police Investigator I position, but was not considered for the position because he did not hold an Associate's Degree, as was set forth in the posting as a minimum requirement. Several months after this posting, a second Campus Police Investigator I position was posted, for which Grievant did not apply. During this time period, there was a change in the person having oversight of the Public Safety Department, and after speaking with Grievant about Grievant's disappointment in not being considered for this first posted position, the new person offered Grievant the second posted position, if he would apply. Grievant did not apply, nor did he indicate that he would accept this offer. Grievant argued Respondent acted in an arbitrary and capricious manner in its application of the Associate's Degree requirement. Respondent had chosen to consider experience in lieu of the educational requirement in other instances when no applicants with an Associate's Degree applied, or were willing to accept an offer of employment. In this instance, Grievant was already in the very same classified position as a part-time employee. It is inherently unreasonable to consider Grievant not minimally qualified for the position when he is already working in the classification. Grievant should have been offered the posted full-time position.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: Termination; Workers' Compensation; License; Certification; Permit; Authorization; Incompetency; Endorsement; Compensable; Retaliation; Separate Dischargeable Offense; Arbitrary and Capricious

CASE STYLE: Rollyson v. Kanawha County Board of Education
DOCKET NO. 2018-0296-KanED (4/4/2018)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence that it was justified in terminating Grievant's employment because he was incompetent to hold his position; Whether Grievant proved by a preponderance of the evidence that Respondent terminated his employment in retaliation for filing a workers' compensation claim.

SUMMARY: Grievant was employed by Respondent as a teacher in a behavioral disorder ("BD") classroom and had been so employed for several years. However, Grievant lacked an endorsement for teaching in BD classes. Grievant also lacked a permit or authorization to allow him to teach these classes. Respondent terminated Grievant from his employment citing his lack of certifications when he was off work receiving workers' compensation benefits. Respondent alleged that Grievant was terminated as he was incompetent to hold his position. Grievant disputes this, arguing Respondent dismissed him from employment in retaliation for filing a workers' compensation claim, and/or making complaints about mold in his classroom. Respondent met its burden of proving that it dismissed Grievant from employment because he was incompetent to hold his position. Grievant failed to prove his claims by a preponderance of the evidence. Accordingly, the grievance is DENIED.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

<u>KEYWORDS:</u>	Observation; Misconduct; Lunch Period; De Minimus Rule; Insubordination; Arbitrary or Capricious
<u>CASE STYLE:</u>	<u>Tribbie, et al. v. Mason County Board of Education</u> DOCKET NO. 2018-0548-CONS (4/26/2018)
<u>PRIMARY ISSUES:</u>	Whether Grievants met their burden of proof to show that Respondent acted arbitrarily or capriciously in requiring Grievants to adhere to a designated lunch period.
<u>SUMMARY:</u>	<p>Respondent employs Grievants as maintenance employees. This grievance concerns a "Service Personnel Observation," form issued to Grievants by their supervisor, which documented, in part, that Grievants did not take their lunch during the designated time period on September 19, 2017 and failed to call their supervisor to request a variance from the prescribed period. On this basis, the Observation noted that Grievants did not meet performance standards in that they failed to comply with the rules and County policies. The Observation further noted that Grievants did not meet performance standards in terms of their "quantity of work." Grievants assert that the observations are disciplinary in nature, as well as inaccurate. Grievants further allege that Respondent violated W. Va. Code §18A-2-12a and W.Va. Code §18A-2-12a(b)(7), in connection with the lunch requirements themselves and issuance of the Observation.</p> <p>The "Observation" was not disciplinary in nature and Grievants did not meet their burden of proof to show that Respondent arbitrarily or capriciously documented their failure to take lunch during the required time period. Nor did Grievants prove that the lunch requirements were unenforceable in that Grievants were admittedly well aware of these reasonable requirements and had abided by them in the past. Therefore, Grievants had proper notice of the lunch requirements, and the Observation notation that they violated the rules was neither arbitrary nor capricious. However, Grievants established that remaining Observation notations were unsubstantiated and, therefore, arbitrary and capricious.</p>

TOPICAL INDEX
STATE EMPLOYEES

KEYWORDS: Reprimand; Suspension; Progressive Discipline; Work Performance; Behavioral Issues; Improvement Plans

CASE STYLE: Crites v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2017-2499-CONS (4/10/2018)

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

SUMMARY: Grievant is employed as a Health Service Assistant. Grievant challenges his reprimand and suspension for five days for violating policies related to employee conduct, including not meeting professional expectations. Respondent proved by a preponderance of the evidence that Grievant engaged in the behavior as charged. The suspension was proper and justified as Grievant's behavioral issues had been addressed for many years, and had not improved, even after having been placed on improvement plans. This grievance is denied.

KEYWORDS: Selection; Minimum Qualifications; Professional Experience; Classification; Job Duties; Promotion; Arbitrary and Capricious

CASE STYLE: Sizemore v. Division of Corrections/Central Office - DOC AND Division of Personnel

DOCKET NO. 2017-2337-MAPS (4/12/2018)

PRIMARY ISSUES: Whether Grievant meets the minimum qualification for the CPS classification and/or whether her job duties fall more closely within the CPS classification than her OA 3 classification.

SUMMARY: Grievant challenges the West Virginia Division of Personnel's determination that she was not eligible for promotion to the position of Program Specialist/Records Supervisor (CPS) after her selection for the position by the West Virginia Division of Corrections, her employer. Grievant highlights her experience and perceived ability to perform the duties of the position.

The Division of Personnel is the entity of WV State government charged with making classification determinations. DOP develops and manages the State's Classification/Compensation Plan. An applicant must meet the minimum qualifications for a State classified position, before he or she can be approved for a promotion to that position. If DOP finds that an applicant is found to lack the requirements established for the position, DOP may deny the applicant's promotion. Pursuant to applicable rules and regulations, Grievant was deemed ineligible for the position in discussion. Grievant did not demonstrate by a preponderance of the evidence that she met the minimum qualifications of the CPS classification specification. Further, it has not established that the duties performed by Grievant fell more closely within the CPS classification than the OA 3 classification to which her position was assigned. Grievant did not establish that Respondent DOP's classification decision(s) were arbitrary and capricious, or clearly wrong. Accordingly, this Grievance is DENIED.

KEYWORDS: Safe Work Environment; Workplace Conditions; Reasonable, Air Quality; Water Damage

CASE STYLE: Deyerle, et al. v. Division of Rehabilitation Services
DOCKET NO. 2017-1128-CONS (4/4/2018)

PRIMARY ISSUES: Whether Grievants established that Respondent failed to provide a reasonably safe work environment.

SUMMARY: Grievants assert that the environment in which their employer required them to work affected their individual health. Grievants contend that they suffered undue risk and physical harm because of Respondent's handling of a workplace disorder. Grievants seek restoration of sick and annual leave used; a comprehensive Air Quality Study of the building; and establishment of a procedure to have an alternate work site if there should be a future similar incident. Respondent maintains it acted in a responsible and reasonable manner.

Grievants individual allegations of misfeasance by Respondent varies, to some limited degree; nevertheless, none establish failure on the part of Respondent to provide a reasonably safe work environment to the degree warranting the requested sanctions. Grievants failed to establish by a preponderance of the evidence legal liability of Respondent for any alleged health issues Grievants may have suffered relevant to the time period in discussion. This grievance is DENIED.

KEYWORDS: Overtime; Work Schedule; Discretionary Change; Annual Leave; Arbitrary and Capricious

CASE STYLE: Workman v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2018-0175-DHHR (4/2/2018)

PRIMARY ISSUES: Whether Grievant demonstrated that Respondent's actions were arbitrary and capricious.

SUMMARY: Grievant is a Health Service Worker/Programmer employed by William R. Sharpe, Jr. Hospital, a psychiatric facility operated by the West Virginia Department of Health and Human Resources. Grievant claims that Respondent improperly changed her schedule, which caused her to lose eight hours of overtime. Respondent maintains that it has discretion to set the work schedules and that it acted within the scope of its policy. The record of this case supported a finding that Grievant has failed to demonstrate by a preponderance of the evidence that Respondent's actions in this case were contrary to law, policy or regulation, or were otherwise unreasonable or arbitrary and capricious.

KEYWORDS: Termination; Motion to Dismiss; Jurisdiction; Constitutional Officer; At-Will Employee

CASE STYLE: Crabtree II v. State Auditor's Office

DOCKET NO. 2018-0960-AUD (4/27/2018)

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

SUMMARY: Grievant was employed by the State Auditor's Office as an at-will employee. Grievant filed this grievance protesting the termination of his at-will employment. The Auditor is a constitutional officer and, as an at-will employee of a constitutional officer, Grievant is not an employee as defined by the grievance procedure statute. The Grievance Board lacks jurisdiction in this matter. Accordingly, the grievance must be dismissed.

KEYWORDS: Termination; Insubordination; Policy Violations; Reprisal

CASE STYLE: Crews v. Department of Veterans Assistance

DOCKET NO. 2017-2120-DVA (4/26/2018)

PRIMARY ISSUES: Whether Respondent proved Grievant committed insubordination and violated agency policies.

SUMMARY: Respondent dismissed Grievant for failing to adopt a more helpful and cooperative management style after being instructed to do so, continuing to criticize her coworker in front of staff and residents after receiving written notice to altering the care plans of coworkers in other disciplines without their permission, creating an adversarial relationship with the staff of the VA Hospital, and being disrespectful of the rights of the veteran residents. Grievant argues that she was diligently and professionally pursuing her duties as the Director of Nursing while being obstructed by the Administrator. She avers that the discipline is nothing more than reprisal for her filing a grievance against her supervisor for giving her instructions which interfered with her nursing responsibilities.

Respondent proved that there were valid non-pretextual reasons for the disciplinary action which had nothing to do with reprisal.

KEYWORDS: Motion to Dismiss; Hartley Pay Increase; Jurisdiction; Relief

CASE STYLE: Dozer, Jr. v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2016-1238-DHHR (4/27/2018)

PRIMARY ISSUES: Whether the Grievance Board has jurisdiction to hear this grievance.

SUMMARY: Grievant is employed by Respondent at William J. Sharpe, Jr. Hospital. Grievant asserts that he was improperly denied a pay increase pursuant to a State Board of Personnel proposal, and that such was also discriminatory. Respondent denies Grievant's claims and asserts that the Grievance Board lacks jurisdiction to hear this matter pursuant to West Virginia Code § 5-5-4a, and as Grievant is seeking to enforce a circuit court order. Grievant is seeking a pay increase granted by Order of the Circuit Court of Kanawha County, West Virginia. The Grievance Board lacks jurisdiction to enforce a Circuit Court order, or to compel compliance therewith. Further, West Virginia Code § 5-5-4a specifically exempts pay increases granted pursuant thereto from the grievance process. Therefore, Respondent's Motion to Dismiss should be granted, and this grievance, DISMISSED.

KEYWORDS: Pay Increase; Pay Range; Minimum Salary; Classification; Pay Plan Policy; Starting Salary; New Hires; Pay Equity

CASE STYLE: Driscoll v. Department of Health and Human Resources/Bureau for Children and Families and Division of Personnel
DOCKET NO. 2017-2148-DHHR (4/19/2018)

PRIMARY ISSUES: Whether Grievant demonstrated that she is entitled to an increase in her salary.

SUMMARY: Grievant is employed by the Department of Health and Human Resources as a Child Protective Services Worker. Grievant discovered that newly employed Child Protective Services Workers have recently been hired at a starting salary higher than the minimum for the pay grade, based on experience and education, and higher than her salary after five years of employment. The Division of Personnel raised a timeliness defense arguing that Grievant knew her starting salary five years ago. The grievance was timely filed when Grievant learned that newly hired employees were being paid more than she was. Employers may pay new employees a starting salary above the entry level based on experience and education. The only requirement is that all employees be paid within the pay range for the classification, which was the case here with Grievant and the new hires. Grievant did not demonstrate that she was entitled to a pay increase.

KEYWORDS: Flu Vaccination Policy; Influenza Immunization Program; Arbitrary and Capricious

CASE STYLE: Welch, et al. v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2017-1870-CONS (4/19/2018)

PRIMARY ISSUES: Whether Grievants proved that Respondent violated or misapplied any policy, rule, law or regulation or otherwise acted in an arbitrary and capricious manner.

SUMMARY: Ms. Welch is a Food Service Worker and has been employed at Sharpe Hospital since 2006. The other Grievants in this case are employed in various classifications within Sharpe Hospital. Grievants argue that Sharpe Hospital made a flu vaccination mandatory and that they should not be required to take the vaccination or to wear a mask if they do not take the vaccination. Record established that by implementing the flu vaccination policy, or asking employees who might be infected with the flu virus to wear a mask, Respondent was attempting to protect the health and welfare of all employees, patients and the public. Grievants failed to prove by a preponderance of the evidence that Respondent's actions in this case were contrary to law, policy, rules, regulations or were otherwise arbitrary and capricious.

KEYWORDS: Motion to Dismiss; Money Damages; Relief

CASE STYLE: White v. Division of Corrections/Mount Olive Correctional Complex
DOCKET NO. 2018-0171-MAPS (4/19/2018)

PRIMARY ISSUES: Whether the relief requested is available from the Grievance Board.

SUMMARY: Grievant filed the instant grievance alleging witnesses had lied under oath in a separate grievance. For relief, Grievant sought only money damages for harassment and emotional distress. Respondent moved to dismiss the grievance alleging Grievant seeks a remedy wholly unavailable through the grievance process. The Grievance Board does not have the authority to award money damages for harassment or emotional distress. Accordingly, the grievance is dismissed.

KEYWORDS: Motion to Dismiss; Relief; Money Damages; Moot

CASE STYLE: White v. Division of Corrections/Mount Olive Correctional Complex
DOCKET NO. 2018-0035-MAPS (4/19/2018)

PRIMARY ISSUES: Whether this grievance is moot.

SUMMARY: Grievant filed the instant grievance alleging harassment, hostile working environment, and retaliation. For relief, Grievant sought only money damages and for discipline to be imposed upon another employee for retaliation against Grievant. Respondent moved to dismiss the grievance alleging Grievant seeks remedies that are wholly unavailable through the grievance process. The Grievance Board does not have the authority to award “tort-like” damages. The remedy of discipline against another employee for retaliation is not wholly unavailable, however, as Grievant is no longer employed and he grieved only conditions of his employment, the grievance is moot. Accordingly, the grievance is dismissed.

KEYWORDS: Reallocation; classification; job duties; arbitrary or capricious

CASE STYLE: Wilcoxon v. Department of Health and Human Resources/Bureau for Behavioral Health and Health Facilities and Division of Personnel
DOCKET NO. 2017-2062-DHHR (4/27/2018)

PRIMARY ISSUES: Whether Grievant proved that the Division of Personnel’s decision to reallocate the position he occupies was arbitrary and capricious.

SUMMARY: At the time this grievance was filed, Grievant was employed by Respondent as a Health Facilities Surveyor 1. Grievant protests the Division of Personnel’s decision to reallocate the position he occupies to Building and Grounds Manager and asserts the position should remain classified as Health Facilities Surveyor 1. Grievant failed to prove the Division of Personnel’s decision to reallocate the position he occupies was arbitrary and capricious or that the classification he seeks is the best fit for the position. Accordingly, the grievance is denied.