

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in April, 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
HIGHER EDUCATION EMPLOYEES

KEYWORDS: Default; Level One Hearing; Working Days; Statutory Timelines

CASE STYLE: Ashby v. West Virginia University Potomac State College
DOCKET NO. 2019-0737-PSCWVU (4/23/2019)

PRIMARY ISSUES: Whether Grievant proved by a preponderance of evidence that Respondent defaulted.

SUMMARY: Grievant contends that a default occurred at level one of the grievance process because the level one hearing was not held within fifteen days of Respondent's receiving the grievance as required by statute and Respondent failed to send Grievant notice of the hearing at least five days prior to the February 1, 2019, hearing deadline. Grievant contends its Notice of Intent to Enforce Default was timely filed on January 29, 2019, because Respondent could not thereafter comply with the five-day notice of hearing requirement. In addition to Grievant's untimely filing, Respondent asserts that Grievant promised to reply to Respondent's request for waiver of the hearing timeline after contacting her attorney, but that she never replied. Grievant asserts that Respondent was obligated to contact her attorney. Respondent counters that Grievant's attorney never made an appearance prior to filing the notice of default. Grievant prematurely filed her notice of default. Respondent reasonably relied on Grievant's promise to respond and did not act with intent to delay the grievance process. As such, default is denied.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: Termination; Certification; Licensure; Renewal; Accredited Class Credits; Arbitrary and Capricious

CASE STYLE: Allen v. Wood County Board of Education
DOCKET NO. 2019-0347-CONS (4/10/2019)

PRIMARY ISSUES: Whether Respondent established proper grounds for the termination of Grievant's employment contract.

SUMMARY: To work as a school nurse in West Virginia, it is necessary for a registered nurse to take additional college courses. In order to maintain certification/licensure as a school nurse, an individual must take a certain number of approved courses. Grievant was employed as a school nurse at Jefferson Elementary Center prior to the instant disciplinary action(s). Grievant's certification/licensure as a school nurse was due for renewal for the 2018-2019 school year. Grievant took a number of online courses, which she believed would serve to renew her certification/licensure. The online courses that Grievant had taken did not qualify for renewal of certification/licensure as a school nurse. Grievant requested a one-time one-year waiver that would grant her certification/licensure as a school nurse for the 2018-2019 school year. Respondent is not required to grant this extension. Grievant had three years to acquire the necessary accreditation. Respondent suspended Grievant without pay and subsequently recommended the termination of her contract of employment.

Grievant contends a number of manipulating factors influenced Respondent's actions in the context of this matter. Grievant alleges Respondent's actions can be viewed in several unacceptable manners, be it retaliatory or arbitrarily and capriciously. Grievant failed to persuasively establish Respondent's actions were not proper exercise of discretion. Respondent establish by a preponderance of the evidence justification for disciplinary action against Grievant. Grievant failed to renew her school nurse certificate in a timely manner and she was not qualified to work for Respondent. This

KEYWORDS: Position; School Merger; Hearing; Policy

CASE STYLE: Bailey v. Mingo County Board of Education

DOCKET NO. 2018-1473-CONS (4/18/2019)

PRIMARY ISSUES: Whether Principal position in merged school had to be posted.

SUMMARY: Respondent closed an elementary school and combined it with a middle school in the middle school building. Respondent labeled the school as a new school, abolished Grievant's principal position and gave the new principal position to another employee. Grievant proved that her position as principal of the merged school should not have been posted or eliminated. Grievant also proved that Respondent abolished Grievant's position and assigned her to a new position before giving her notice and an opportunity to be heard in violation of W. Va. Code §§ 18A-2-7 and 18A-4-7a, rendering those actions void.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Summer Bus Run; Reduction in Force; Summer Seniority; Arbitrary and Capricious; Reemployment

CASE STYLE: Kennedy v. Wetzel County Board of Education
DOCKET NO. 2018-1209-WetED (4/9/2019)

PRIMARY ISSUES: Whether Respondent's assignment of the summer bus runs was arbitrary and capricious.

SUMMARY: Respondent has employed Grievant as a summer bus run operator since 2014. Each year, Respondent reduces in force all summer bus driver positions, reposts the positions by run, and chooses from applicants based on summer seniority, which usually results in drivers retaining their runs from the previous summer. Grievant drove the New Martinsville/Paden City summer run in 2017. In 2018, Respondent eliminated the run driven by the most senior summer bus operator, Ms. Norris, and reduced in force the least senior summer bus driver, Mr. West, before assigning Grievant's 2017, summer run to Ms. Norris. Respondent assigned to Grievant the summer Extended Year Run, resulting in her working 14 fewer days in the summer of 2018. Grievant contends that she was entitled to retain her 2017, summer run under W. Va. Code § 18-5-39(f). Respondent contends that W. Va. Code § 18-5-39(g) obligated it to provide Ms. Norris her choice of summer runs once it eliminated Ms. Norris' 2017, summer bus run. The cited code sections mandate that reemployment in summer positions be based on summer seniority, but permit drivers who drove the previous summer to retain their summer employment over more senior summer drivers who did not drive the previous summer. While neither party's interpretation of the code is accurate, Respondent's interpretation led it to the proper outcome. Accordingly, the grievance is DENIED.

KEYWORDS: Selection; Seniority; Work Performance; Evaluations; Evaluation of Past Service; Arbitrary and Capricious

CASE STYLE: Strickland v. Kanawha County Board of Education

DOCKET NO. 2018-1391-KanED (4/18/2019)

PRIMARY ISSUES: Whether Respondent actions in selecting an applicant other than Grievant was arbitrary, capricious and/or resulted in a violation of W. Va. Code ' 18A-4-8b.

SUMMARY: Grievant was not selected for a Cook II position at Clendenin Elementary School. Grievant was qualified and the most senior applicant for the position. County boards of education in West Virginia must fill school service personnel positions "on the basis of seniority, qualifications and evaluation of past service." W. Va. Code ' 18A-4-8b(a) The dispute tends to be whether Respondent has lawfully denied Grievant the Cook II position.

Respondent maintains proper justification exist in the record for it to lawfully select another applicant for the position in discussion. Grievant persuasively establishes, that one or more of Respondent's motivating concern(s) for not selection her, for the Cook II position, included factors not reflexed in Respondent's official justification. All of Grievant's work history with Respondent was relevant with regard to Respondent's analysis and selection. Respondent had concerns with regard to Grievant's past service, which include but not limited to her attendance, reliability and effect on work place. Evaluation of past service is more than the chronological measurement of time. Grievant did not meet her burden and establish that Respondent's action was unlawful and/or resulted in a violation of W. Va. Code ' 18A-4-8b.

TOPICAL INDEX
STATE EMPLOYEES

KEYWORDS: Termination; Dismiss; Suspension; Attendance; Absenteeism; Absent; Sick; Unauthorized Leave; Sick Leave; Annual Leave; Family Medical Leave Act; FMLA; Due Process; Arbitrary and Capricious; Predetermination; Performance Improvement Plan; PIP; Excuse; Accrual; Docked; Texted-In; Unreliable; Hardship; Written Reprimand

CASE STYLE: Thompson v. Department of Environmental Protection
DOCKET NO. 2019-0390-CONS (4/29/2019)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence that Grievant engaged in misconduct justifying suspension and that it had good cause to dismiss Grievant from employment.

SUMMARY: Grievant was employed by Respondent as an Office Assistant 3 in its Office of Special Reclamation (OSR). Respondent asserts that Grievant was frequently absent from work which resulted in his use of unauthorized leave. Respondent argues that his frequent absences and unauthorized leave only increased despite its attempts to help correct this problem. Respondent suspended Grievant from employment in July 2018, and later dismissed him in August 2018 for his unacceptable attendance and unauthorized leave use. Grievant denies Respondent's claims and asserts that as he had doctor's slips for many of these absences, such should not have been counted against him when calculating his absence rate or for disciplinary action. Grievant also argues that many of his absences should have been covered by the Family and Medical Leave Act (FMLA) and that Respondent failed to inform him of such. Lastly, Grievant claims that Respondent violated his due process rights by failing to provide him with a predetermination conference before dismissing him, and that his dismissal was improper as it was not issued in writing. Respondent proved its claims by a preponderance of the evidence, and that the disciplinary actions taken were proper and justified. Grievant failed to prove his claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

KEYWORDS: Employee; Employer; Jurisdiction
CASE STYLE: Wright v. West Virginia Military Authority
DOCKET NO. 2019-1175-MAPS (4/16/2019)
PRIMARY ISSUES: Whether the Grievance Board has jurisdiction in this matter.
SUMMARY: Grievant is employed by the West Virginia Military Authority as a System Administrator. Grievant's employment with Respondent is specifically exempted from the grievance procedure by statute. The Grievance Board lacks jurisdiction in this matter. Accordingly, the grievance is dismissed.

KEYWORDS: Unauthorized Leave; Pay; Paid Holidays; Witness Credibility
CASE STYLE: Williams v. Department of Health and Human Resources/Jackie Withrow Hospital
DOCKET NO. 2018-0766-DHHR (4/3/2019)
PRIMARY ISSUES: Whether Respondent met its burden to prove that the disciplinary action taken was justified.
SUMMARY: Grievant is employed by Respondent as a Plumber. Grievant grieves a charge of unauthorized leave that resulted in the docking of his pay and ineligibility for two paid holidays. Respondent asserts Grievant's leave request was denied, which Grievant disputes. Although corroborating evidence was allegedly available, it was not presented, leaving the proof of the charge to the credibility of Grievant and his supervisor. Respondent failed to meet its burden to prove that the disciplinary action taken was justified when proof relied on witness credibility and it cannot be found that Respondent's witness was more credible than Grievant. Accordingly, the grievance is granted.

KEYWORDS: Classification; Paygrade; Position Description Form; Reallocation; Arbitrary and Capricious

CASE STYLE: Bradshaw, et al. v. Offices of the Insurance Commissioner/ AND Division of Personnel

DOCKET NO. 2018-1392-CONS (4/10/2019)

PRIMARY ISSUES: Whether Grievants proved that the decision of DOP regarding which classification was the best fit for Grievants' position was arbitrary and capricious.

SUMMARY: Grievants were both in positions originally classified as Paralegal, paygrade 10. Upon review of Position Description Forms, the West Virginia Division of Personnel (DOP) determined the positions should be reallocated to the classification of Office Assistant 2 (OA 2). After working closely with OIC, OOJ and other State agencies who utilize the Paralegal class specifications, DOP drafted new and revised class specifications for the Paralegal class series. The class specifications underwent the scrutiny of the Unlawful Practice of Law Committee of the West Virginia State Bar (State Bar) before being brought before the State Personnel Board (SPB) for consideration. The SPB approved a new class specification of Paralegal 1, assigning it to paygrade 9 and approved a title change to the old Paralegal class specification creating a new Paralegal 2 classification and assigning it to paygrade 10. Once these classifications were in place, DOP revised their original classification determinations on the positions occupied by Grievants reallocating them to the Paralegal 1 classification.

At no time throughout this entire process did Grievants suffer a loss in pay. Grievants argue that the positions they occupy should be returned to their original classification of Paralegal and reassigned to paygrade 10. Respondent DOP argues but for its actions in drafting new class specifications and working with State agencies and the UPL committee, the positions occupied by the Grievants would remain appropriately classified as OA 2s. The Paralegal classification the Grievants seek no longer exists as a result of SPB action. This Grievance is DENIED.

KEYWORDS: Written Reprimand; Removal Policy; Arbitrary and Capricious; Mitigation

CASE STYLE: Goff v. Division of Highways
DOCKET NO. 2018-1013-DOT (4/5/2019)

PRIMARY ISSUES: Whether Respondent was obligated to consider removing the written reprimand from Grievant's personnel file.

SUMMARY: During the course of his ongoing employment with Respondent, Grievant was disciplined through a written reprimand. Grievant contends he did not grieve the reprimand because the district human resource director informed Grievant he could request its removal from his personnel file after a year. Two years later, Grievant did request removal of the written reprimand. Respondent refused to consider Grievant's request, citing its unwritten policy of not removing written reprimands from employee personnel files. Grievant contends that Respondent's refusal is arbitrary and capricious, because Respondent has no such policy. Consequently, Grievant argues, the Division of Personnel's Supervisor's Guide to Progressive Corrective and Disciplinary action obligates Respondent to remove, or at least consider removing, the written reprimand from his personnel file. While Grievant proved that Respondent did not have a removal policy, he did not prove that Respondent was obligated to even consider his request for removal. Accordingly, the grievance is Denied.

KEYWORDS: Motion to Dismiss; Untimely; Timelines

CASE STYLE: Markovich v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital AND Division of Personnel
DOCKET NO. 2017-1361-DHHR (4/15/2019)

PRIMARY ISSUES: Whether this grievance was timely filed.

SUMMARY: The record developed in this matter demonstrates by a preponderance of the evidence that Grievant failed to file a grievance within fifteen days following the occurrence of the event upon which the grievance is based. Accordingly, this grievance is dismissed as untimely. In addition, as it relates to any purported classification issue, the relief sought has been provided and, as such, that issue is moot.

KEYWORDS: Suspension; Misconduct; Investigatory Interview; Due Process; Discovery

CASE STYLE: Porter v. Division of Highways
DOCKET NO. 2018-1315-DOT (4/8/2019)

PRIMARY ISSUES: Whether Respondent was justified in suspending Grievant for ten days for misconduct.

SUMMARY: Grievant is employed by Respondent as a Transportation Worker 3. Grievant was suspended for ten days for violation of a confidentiality agreement and acceptable standards of conduct. Respondent proved Grievant, with no proper purpose, viewed employee performance evaluations containing social security numbers that were located on her supervisor's desk and discussed the contents of the evaluations, including scores, with multiple co-workers. Respondent was justified in suspending Grievant for ten days for her misconduct. Respondent violated Grievant's right to representation during the investigatory interview and, under the facts and circumstances of this case, the appropriate remedy is to exclude the interview transcript and written statement. Grievant is not entitled to prevail in her grievance for Respondent's alleged failure to provide documents in informal discovery. Accordingly, the grievance is DENIED.

KEYWORDS: Demotion; Reassigned Duties; Salary Reduction; Job Classification

CASE STYLE: Dillon v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2018-0244-DHHR (4/15/2019)

PRIMARY ISSUES: Whether Respondent met its burden of proof to establish that the accommodation provided to Grievant, which led to a demotion with prejudice, was reasonable and did not violate any law, rule or policy.

SUMMARY: Grievant is employed as an Office Assistant II, pay grade 5, with the Department of Health and Human Resources at Sharpe Hospital. Prior to the issues in this case, Grievant was employed as a Health Service Assistant, pay grade 7. Due to a medical condition, Respondent made a determination, based upon Grievant's physician, that she could no longer engage in direct patient care as a Health Service Assistant. In an effort to accommodate Grievant's condition to enable her to perform the essential functions of her job she was placed in another position that was a lower pay grade. This action by Respondent resulted in a demotion with prejudice. Respondent established by a preponderance of the evidence that this action was not in violation of any law, rule or policy and was not arbitrary and capricious. Accordingly, this grievance is denied.

KEYWORDS: Motion to Dismiss; Time Lines; Untimely; Notification

CASE STYLE: Frazie v. Offices of the Insurance Commissioner/ AND Division of Personnel
DOCKET NO. 2019-0047-DOR (4/11/2019)

PRIMARY ISSUES: Whether this grievance was untimely filed.

SUMMARY: Grievant received notice that her position was reallocated on June 4, 2018. She was subsequently required to submit an application containing her credentials to verify that she met the minimum qualifications for the new classification of her position. She met those qualifications, was reassigned to the position as reallocated. The process was completed on or around June 23, 2018. The grievance contesting the reallocation of this position was filed on July 5, 2018. Respondents argue that the grievance is untimely because Grievant received unequivocal notice that her position was reallocated on June 4, 2018, and did not file her grievance until several days after the fifteen working days-time limit. Grievant argues that the date for filing the grievance does not start until she was reassigned to the reallocated position. The position was reallocated to the Paralegal 1 classification. Grievant disagrees with that classification and wishes her position to be allocated differently. The date of notice of the reallocation was June 4, 2018, and that reallocation was going to remain the same even if Grievant did not meet the minimum qualifications. Respondents proved that the grievance was untimely filed.

KEYWORDS: Classification; Temporary Upgrade; Salary; Promotion; Pay Grade

CASE STYLE: Brennan v. Division of Highways
DOCKET NO. 2019-0250-DOT (4/26/2019)

PRIMARY ISSUES: Whether Grievant proved that he was temporarily upgraded to a position one pay grade above his regular job. Whether Grievant proved that he was entitled to receive a salary upgrade.

SUMMARY: The parties agree that Grievant was temporarily upgraded into an advanced job classification for a specific time period. Grievant argues that he should have been paid an additional seven percent while he was serving in the advanced classification, which is the amount of increase he would have received if he applied for and was selected for the position. Respondent believes it is limited to pay Grievant an additional five percent while serving in the advanced classification by the Division of Personal rules. Grievant did not prove that he was entitled to a seven percent increase. The grievance is GRANTED in part and DENIED in part.

KEYWORDS: Overtime; Policy; Fair Labor Standards Act; Arbitrary and Capricious
CASE STYLE: Butcher v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital

DOCKET NO. 2018-1351-DHHR (4/17/2019)

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

SUMMARY: Grievant is employed as a Registered Nurse at the William R. Sharpe, Jr. Hospital. Since Grievant has been working as a Nurse, she has sometimes worked more than forty hours in a workweek. Grievant is then required to take compensatory time for the time she works over her usual hours. Grievant maintains that she is entitled to be paid at least straight-time pay for all hours she has worked in excess of forty hours. Under the Fair Labor Standards Act and applicable policy, Respondent properly compensated Grievant, an exempt employee, for her hours worked during the period in question. Grievant has not shown that Respondent has violated any law, rule, regulation or policy. Therefore, this grievance is denied.

KEYWORDS: Selection; Discrimination; Qualifications; Arbitrary and Capricious

CASE STYLE: Fathallah v. Department of Environmental Protection/Division of Water and Waste Management

DOCKET NO. 2018-0433-DEP (4/30/2019)

PRIMARY ISSUES: Whether Grievant that the selection of the most qualified candidate was arbitrary or capricious.

SUMMARY: Grievant applied for a Position in the Environmental Resources Program Manager 2 classification in the DWWM Program Support subdivision. Grievant is a valued employee and met the minimum qualifications for the position. Respondent picked a different applicant for the position. Grievant claims that he was the most qualified candidate and Respondent's selection decision was improper. Grievant also claims that he was subjected to discrimination and favoritism. Respondent demonstrated that the standard hiring procedure was followed reasonably explained the committee's recommendation and selection of a different applicant. Grievant did not prove by a preponderance of the evidence that the actions of Respondent were unlawful or arbitrary and capricious. Grievant did not prove that he was treated any differently than other employees in the hiring process for this position.

KEYWORDS: Reallocation; Back Pay; Job Duties; Position Description Form; Arbitrary and Capricious

CASE STYLE: Lamb v. Department of Health and Human Resources/Bureau for Children and Families AND Division of Personnel
DOCKET NO. 2018-1018-DHHR (4/24/2019)

PRIMARY ISSUES: Whether Grievant demonstrated that Respondents acted in an arbitrary and capricious manner as it related to the classification of the position.

SUMMARY: Grievant claims that she was performing duties outside of the Health and Human Services Aide classification assigned to the position she formerly occupied. Grievant seeks a retroactive salary increase for an unspecified period of time when she was performing extra work. It is undisputed that Grievant failed to submit a Position Description Form to the Division of Personnel for a classification determination. Grievant failed to demonstrate by a preponderance of the evidence that Respondents acted in an arbitrary and capricious manner as it relates to classification and compensation of the position she occupied. Accordingly, this grievance is denied.

KEYWORDS: Motion to Dismiss; Lack of Jurisdiction; Retirement Board; Employer; Tort-like Damages

CASE STYLE: Mooney III v. Department of Veterans Assistance
DOCKET NO. 2019-0635-DVA (4/19/2019)

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

SUMMARY: Grievant is employed by the Department of Veterans Assistance and filed this grievance alleging he had been denied five years military service credit by the Consolidated Public Retirement Board towards his retirement benefit due to the negligence of Respondent's "benefit coordinator." Respondent moved to dismiss the grievance for lack of jurisdiction. Grievant's complaint is not a "grievance" as defined by statute. The Grievance Board is not authorized by statute to hear tort claims and award money damages for negligence. The Grievance Board lacks jurisdiction in this matter.

KEYWORDS: Dismissed; Failure; Abide; Communications; Order

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

DOCKET NO. 2019-0409-DHHR (4/29/2019)

PRIMARY ISSUES: Whether this grievance should be dismissed.

SUMMARY: Grievant had failed to respond to communications from the West Virginia Public Employees Grievance Board concerning his pending grievance matter. By Order entered March 21, 2019, was ordered to contact the Grievance Board by April 5, 2019, if he wished to pursue his grievance. The Order further stated that “[t]his grievance will be dismissed if Grievant fails to do as ordered.” Grievant failed to abide by the Order of the ALJ. Therefore, this matter should be dismissed pursuant to W. VA. CODE ST. R. §156-1-6.19.3.