

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in May, 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

<u>KEYWORDS:</u>	Suspension; Progressive Discipline; Inappropriate Comments; Workplace Behavior; Mitigation
<u>CASE STYLE:</u>	<u>Kargul v. Marshall University</u> DOCKET NO. 2018-0528-MU (5/1/2018)
<u>PRIMARY ISSUES:</u>	Whether suspension of Grievant's employment was an excessive disciplinary action.
<u>SUMMARY:</u>	Grievant protests the severity of the sanction levied for a list of alleged 'mis' and 'mal' feasant actions by Grievant. Representative agent(s) of Respondent and Grievant disagree on select courses of action with regard to Grievant's employment. Grievant provides some explanation for her actions but acknowledges the majority of the contended conduct. Respondent established grounds for disciplinary action. Respondent chose to suspend Grievant for five days without pay. Respondent maintains its actions were lawful and consistent with the principles of progressive discipline. Grievant is now readily aware of Respondent's earnestness to the correction of her workplace activity. In considering the totality of the circumstances, the undersigned is conflicted but acknowledges suspension is not necessarily an excessive disciplinary action. This grievance is DENIED.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: Termination; Failure to Return to Work; Exhausted Leave; Insubordination; Harassment; Mitigation

CASE STYLE: Reed v. Berkeley County Board of Education
DOCKET NO. 2017-2507-CONS (5/15/2018)

PRIMARY ISSUES: Whether Respondent met its burden of proof and demonstrated that Grievant's conduct was such that she may be disciplined, up to and including termination.

SUMMARY: Grievant was a second-grade teacher at Rosemont Elementary School in Berkeley County, West Virginia. The ultimate issue in this case is whether Respondent acted within its discretion in terminating Grievant's employment after she refused to return to work following the exhaustion of her leave. Grievant's failure to return to work is undisputed. The fact that Grievant does not suffer from an impairment that interferes with her ability to teach, thus requiring an accommodation, is also undisputed. For these reasons and others, as more fully set forth below, this grievance is denied.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Motion to Dismiss; Timeliness; Untimely; Reduction in Force; Recall; Rescinded; Fraudulent Inducement; Detrimental Reliance; Equitable Estoppel; Arbitrary and Capricious; Seniority; Terminated; Ultra Vires

CASE STYLE: White v. Logan County Board of Education
DOCKET NO. 2017-0899-LogED (5/9/2018)

PRIMARY ISSUES: Whether Respondent proved that this grievance was untimely filed; Whether Grievant proved that Respondent violated any law, rule, or policy when imposing her reduction in force; Whether Respondent fraudulently induced Grievant into not challenging her reduction in force; Whether Grievant proved that Respondent violated law when it filled Grievant's position.

SUMMARY: Grievant was employed by Respondent as an Aide. Grievant was called to a meeting with the personnel director at which Grievant was informed that she was being reduced in force (RIF) and was given a letter to that effect. Grievant did not request a hearing on her RIF and did not challenge the same. As a result of the RIF, Grievant's employment was terminated at the end of the school year. Grievant filed this grievance months after being informed of her RIF asserting that the personnel director mislead her into believing that her RIF would be rescinded and she would get her job back if enough students were enrolled for the next school year. Grievant asserts claims of fraudulent inducement, detrimental reliance, and equitable estoppel. Grievant also argues that there was no lack of need for her position, and that Respondent violated the statute by filling her position with an employee who was not on the preferred recall list. Respondent moved to dismiss the grievance as untimely. Respondent denies Grievant's claims, arguing that the personnel director did not make the statements alleged, that it properly RIF'd Grievant for lack of need pursuant to the applicable statutes, and that it properly filled the vacancy created by Grievant's RIF. Respondent proved that this grievance was untimely filed, but Grievant demonstrated a proper basis to excuse her failure to file in a timely manner. As such, Respondent's Motion to Dismiss is DENIED. Grievant failed to prove her claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

KEYWORDS: Selection; Seniority; Summer Assignment; Summer School Credit
CASE STYLE: Gump v. Marshall County Board of Education
DOCKET NO. 2017-2138-MarED (5/22/2018)
PRIMARY ISSUES: Whether G is entitled to any summer school positions at issue in this case.
SUMMARY: Grievant is employed by Respondent as a regular bus operator. Grievant seeks summer school program bus operator assignments awarded to other bus operators. This case involves previous grievances filed by other parties, a settlement agreement, and facts that can be somewhat disjointed at times. Nevertheless, while Grievant is entitled to retain any summer school days she has worked, that summer school credit did not entitle her to any summer school positions at issue in this case.

KEYWORDS: Transfer; Bus Route; Seniority; Arbitrary or Capricious
CASE STYLE: Matheny v. Harrison County Board of Education
DOCKET NO. 2018-0225-HarED (5/2/2018)
PRIMARY ISSUES: Whether Grievant established that Respondent's transfer of him was arbitrary or capricious.
SUMMARY: Grievant, a bus driver for Respondent Board of Education, was assigned to a bus route that served special needs students for approximately 16 years. There were two bus routes in Harrison County that served special needs students for a period of time, Grievant's route and another similar route. When the Board decided that it no longer needed two bus routes to serve the special needs students, it eliminated Grievant's route and transferred him to another route. Grievant asserts that he should have been given the remaining special needs bus route when his route was eliminated, because he was senior to the bus driver of the other route, citing a violation of W. Va. Code § 18A-4-8b. Grievant did not lose any benefits or salary as a result of his transfer. West Virginia law does not require that service personnel be transferred on the basis of seniority and Grievant failed to establish that Respondent's transfer of him was either arbitrary or capricious. Respondent asserts the defense that Grievant failed to timely file his grievance, but failed to prove this. Therefore, this grievance must be DENIED.

KEYWORDS: Reassigning Bus Run Duties; Unwritten Procedure

CASE STYLE: White v. Webster County Board of Education

DOCKET NO. 2018-0299-WebED (5/4/2018)

PRIMARY ISSUES: Whether Grievant proved that Respondent violated Code when it removed her bus run duties without her written consent.

SUMMARY: Grievant is employed by Respondent as an Itinerant Aide/Personal Care Aide/Bus Aide. Grievant protests the removal of afternoon bus run duties, which resulted in a loss of compensation. Respondent removed the duties stating they were assigned in error based on its unwritten procedures. Grievant alleged the removal of the duties violated sections 18A-4-8a(j) and 18A-4-8(m) of the West Virginia Code. Respondent argued Grievant was assigned the duties only by mistake, and that it lawfully remedied the mistake by assigning the duties to a more senior employee. Respondent violated sections 18A-4-8a(j) and 18A-4-8(m) of the West Virginia Code and correcting what it viewed as an error made under its unwritten procedures does not excuse this violation. Accordingly, the grievance is granted.

TOPICAL INDEX
STATE EMPLOYEES

KEYWORDS: Motion to Dismiss; Pay Increase; Jurisdiction; Advisory Opinion;
CASE STYLE: Heater, et al. v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2018-0579-CONS (5/2/2018)
PRIMARY ISSUES: Whether the Grievance Board has jurisdiction to hear this grievance.
SUMMARY: Grievants are employed by Respondent as Recreation Specialists at the William R. Sharpe, Jr. Hospital. Grievants assert that they were improperly denied a pay increase pursuant to a State Board of Personnel proposal. Respondent denies Grievants' claim and assert that the Grievance Board lacks jurisdiction to hear this matter pursuant to West Virginia Code § 5-5-4a, and Grievants are seeking to enforce a circuit court order. The Grievance Board lacks jurisdiction in this matter. West Virginia Code § 5-5-4a specifically exempts pay increases granted pursuant thereto from the grievance process. Accordingly, this grievance is dismissed.

KEYWORDS: Suspension; Termination; Dismissal; Abuse; Investigation; Video; Hearsay; Substantiated; Policy 2108; Horseplay; Personal Space; Singular Offense; Good Cause
CASE STYLE: Myers v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital
DOCKET NO. 2017-2498-CONS (5/9/2018)
PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence that Grievant engaged in improper conduct warranting her dismissal.
SUMMARY: Grievant was employed by Respondent as a Health Service Worker ("HSW") at Mildred Mitchell-Bateman Hospital. Respondent dismissed Grievant for engaging in conduct toward a patient in violation of policy and the applicable state regulations constituting physical abuse. Grievant denies Respondent's claims. Respondent proved by a preponderance of the evidence that Grievant engaged in physical abuse of a patient in violation of policy, and that such warranted dismissal. Therefore, the grievance is DENIED.

KEYWORDS: Discretionary Pay Increase; Training Program; Similarly Situated Employees; Job Responsibilities; Discrimination

CASE STYLE: Rosen, et al. v. Department of Health and Human Resources/Office of the Secretary and Division of Personnel
DOCKET NO. 2017-1487-CONS (5/2/2018)

PRIMARY ISSUES: Whether Grievants proved that they were similarly situated to their coworker who received the discretionary salary increase.

SUMMARY: Grievants earned the West Virginia Procurement Basic and Advanced Certifications (“WVPSC”) and (“WVPAC”), more than twelve months prior to approval by DOP for the training to qualify recipients for a discretionary raise under the DOP Pay Plan Policy (“PPP”). In October another employee working in their unit received a discretionary pay increase for passing virtually the same requirements and receiving the WVPBC. Grievants contend that granting one employee a pay increase for having the WCPBC and not giving a raise to others who have completed virtually the same training constitutes discrimination as defined in the grievance procedure.
Respondent proved that Grievants were not similarly situated to the employee who completed her WVPBC training after the course of study was approved by the DOP to qualify for a discretionary increase under the PPP.

KEYWORDS: Motion to Dismiss; Failure to State a Claim; Relief; Remedy Wholly Unavailable

CASE STYLE: Urban, et al. v. General Services Division
DOCKET NO. 2018-0739-CONS (5/10/2018)

PRIMARY ISSUES: Whether Grievants stated a claim upon which relief can be granted.

SUMMARY: Grievants are employed by Respondent, General Services. Grievants grieved the agency director’s refusal to meet with their union representative to discuss a policy the employees proposed regarding employee compensation. Respondent moved to dismiss the grievance alleging Grievants had failed to state a claim upon which relief can be granted. Grievants assert Respondent violated the Petition Clause of the West Virginia Constitution. Grievants have failed to state a claim upon which relief can be granted as the agency director’s refusal to meet with Grievants’ union representative was not a violation of the Petition Clause because it was not regarding a matter of public concern and Grievants have alleged no other statutes, policies, rules or written agreements the agency director violated by his refusal. Accordingly, the grievance is dismissed.

KEYWORDS: Termination; Circumstantial Evidence; Work History; Misconduct
CASE STYLE: Southall v. Division of Corrections/Parole Services
DOCKET NO. 2018-0658-CONS (5/30/2018)
PRIMARY ISSUES: Whether Respondent proved a Probation Officer knew about and failed to report her domestic partner hiding drugs and money in her home.

SUMMARY: Respondent suspended and dismissed Grievant after her home was raided and searched by Federal Bureau of Investigation (“FBI”) Agents as part of a drug related investigation. Grievant’s domestic partner, and more than a dozen other people, were arrested and charged related to drug activity. A large stash of illegal drugs, cash and firearms were seized in the raid. Grievant was not arrested, charged, or interrogated concerning any of this activity. Respondent dismissed Grievant arguing that she knew or reasonably should have known about the illegal activities and did not report them to law enforcement.

Respondent did not prove by a preponderance of the evidence that Grievant participated in, or knew about the illegal activities of her domestic partner, or that she knew about the contraband in her home. Accordingly, the grievance is GRANTED.

KEYWORDS: Termination; Call-In Procedure; Job Abandonment
CASE STYLE: Summerfield v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2017-1363-DHHR (5/30/2018)
PRIMARY ISSUES: Whether Respondent proved that Grievant had abandoned his job, which was good cause for the termination of his employment.

SUMMARY: Grievant was employed at Sharpe Hospital as a Health Service Worker. Respondent met its burden of proof and demonstrated by preponderance of the evidence that Grievant was dismissed for good cause when he was absent from work for more than three consecutive workdays without notice. Grievant offered no explanation for why he had been absent without notice. Respondent relies on the Division of Personnel Administrative Rule providing that if an employee is absent from work more than three consecutive work days without notice to the employer of the reason for the absence, the employer may dismiss the employee for job abandonment. This grievance is denied.

KEYWORDS: Suspension; Inappropriate Comments; Unprofessional Conduct; Code of Conduct; Mitigation

CASE STYLE: Goddard v. Regional Jail and Correctional Facility Authority/Northern Regional Jail
DOCKET NO. 2018-0827-MAPS (5/18/2018)

PRIMARY ISSUES: Whether Grievant demonstrated that the penalty imposed by Respondent was clearly excessive and/or abuse of discretion.

SUMMARY: Grievant was disciplined for acknowledged comments. Respondent contends Grievant’s conduct violated applicable West Virginia Regional Jail Authority Code of Conduct Policy. Subsequent to an investigation, Grievant was sanctioned for conduct, which was perceived as unprofessional and detrimental to the stability and safety of the facility, residents and employees. Grievant acknowledges the conduct but contends that the penalty ultimately imposed was excessive and too severe a penalty. Grievant protest the severity of her suspension. Respondent’s undertaking with regard to the severity of the disciplinary measure tends to indicate arbitrary action; nevertheless, Grievant failed to establish an abuse of discretion or that mitigation is warranted. This Grievance is Denied.

KEYWORDS: Motion to Dismiss; Moot; Relief; Advisory Opinion

CASE STYLE: Hicks, Jr. v. Division of Highways
DOCKET NO. 2018-0824-DOT (5/30/2018)

PRIMARY ISSUES: Whether this grievance is moot.

SUMMARY: Grievant is employed by Respondent as a Highway Engineer Associate by Respondent. Grievant protests Respondent’s decision to rehire an employee Grievant alleges engaged in misconduct while he was previously employed by Respondent. As relief, Grievant requests an investigation be conducted. Respondent moved to dismiss asserting the grievance was moot, untimely, and “because the relief sought is vague and cannot be granted.” Grievant opposed the dismissal of the grievance. The grievance is moot in that it protests Respondent’s actions in rehiring an employee who is no longer employed. The remedy requested, that an investigation be conducted, is wholly unavailable as the Grievance Board has no independent investigatory power or statutory authority to order an investigation be conducted. Accordingly, the grievance is dismissed.

KEYWORDS: Motion to Dismiss; Bi-Weekly Pay; Employer; Employee

CASE STYLE: Driscoll, et al. v. Department of Health and Human Resources/Bureau for Children and Families, Bureau for Child Support Enforcement and Bureau for Public Health

DOCKET NO. 2018-0125-CONS (5/22/2018)

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

SUMMARY: Grievants assert that the change from twice-monthly pay to bi-weekly pay, which occurred in May 2017, caused them to be deprived of pay for 20 hours that they worked during 2017, and prevented proper accrual of their annual leave. The West Virginia State Auditor's Office and Treasurer's Office are charged with assuring that state employees are paid their full salaries, not Respondents, and it is the Enterprise Resource Planning Board, comprised of the Governor, Treasurer, and Auditor of the State of West Virginia that required the change in the pay cycle. The grievance procedure permits grievants to pursue grievances against the agency that employs them. However, Respondent employers are not responsible for the change in the payroll schedule and, thus, are without authority to resolve the grievance. Moreover, the Grievance Board does not have jurisdiction to resolve the dispute between Grievants and the ERPB or to provide the requested relief. As such, this grievance must be dismissed.

KEYWORDS: Alternative Work Assignment; Annual Leave; Arbitrary and Capricious

CASE STYLE: Burwell v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital

DOCKET NO. 2018-0452-DHHR (5/25/2018)

PRIMARY ISSUES: Whether Respondent acted in an arbitrary and capricious fashion when it offered her an alternative work assignment or when it charged her annual leave during the time she refused to work an alternative assignment.

SUMMARY: Grievant is employed by Sharpe Hospital as a Health Service Worker. On September 21, 2017, Grievant was present during an incident in which a patient hit another patient in the head. Sharpe is required to submit such incidents to Adult Protective Services for investigation. The only issue in this case is whether Grievant is entitled to restoration of annual leave that she used in lieu of accepting an alternative work assignment during an Adult Protective Services investigation. Record of the case demonstrated that Grievant's use of leave was properly calculated as she chose to use leave rather than accept an alternative work assignment.

KEYWORDS: Motion to Dismiss; Abeyance; Moot; Advisory; Termination; Dismissal; Declaration

CASE STYLE: Crews v. Department of Veterans Assistance
DOCKET NO. 2017-0806-DVA (5/30/2018)

PRIMARY ISSUES: Whether this grievance is moot.

SUMMARY: Grievant was employed by Respondent as the Director of Nursing. Grievant filed this action alleging she had been given an improper directive and sought its withdrawal. While this grievance was pending, Grievant was dismissed from her employment and she grieved the same. This matter was placed in abeyance pending the outcome of her separate dismissal grievance. The Grievance Board issued a decision denying Grievant's dismissal grievance on April 26, 2018. As Grievant is no longer employed by Respondent, any decision on the issue of the alleged improper directive would merely be a declaration that one party is right or wrong, would have no substantive consequence, and would merely be advisory in nature. Therefore, grievance is now moot. Accordingly, this grievance is DISMISSED.

KEYWORDS: On-Call Pay; Motion to Dismiss; Statutory Time Lines; Kronos; Salary Disparity

CASE STYLE: Brown, et al. v. Department of Health and Human Resources/Welch Community Hospital
DOCKET NO. 2018-0914-CONS (5/9/2018)

PRIMARY ISSUES: Whether Grievants filed their claims within the statutory time frame.

SUMMARY: Respondent asserts that Grievant's did not file their actions within fifteen days of being notified that the method for compensating them for being on call changed from a percentage of salary to a flat rate. Grievants counter, inter alia, they are being subject to salary disparity which constitutes a continuing violation which allows them to file a grievance within fifteen days of the most recent occurrence. All Hospital employees are now subject to the same fixed rate for on call time. There is no disparity of pay. Rather the grievable event was the conversion from percentage to fixed compensation. Respondent proved that Grievant's did not file their claims within fifteen working days of that event.

KEYWORDS: Selection; Most Qualified Candidate; Managerial Experience; Interview Process; Interview Questionnaire; Discrimination; Arbitrary or Capricious

CASE STYLE: Cunningham v. Division of Motor Vehicles

DOCKET NO. 2017-2002-DOT (5/1/2018)

PRIMARY ISSUES: Whether Grievant demonstrated that there was a significant flaw in the selection process.

SUMMARY: Grievant is a Customer Service Representative in the DMV. She timely applied for the Transportation Services Manager I (“TSM I”) position in the Department of Motor Vehicles (“DMV”). Grievant alleges that the selection process was significantly flawed, so as to affect the outcome of the selection process, that she was more qualified than the candidate selected, and that Respondent discriminated against her in the hiring process. Respondent maintains that it legitimately considered personality traits, as well as the length of managerial experience of the candidates, both of which reasonably qualified the other individual over Grievant for a managerial position. Grievant failed to prove any violations, unlawful conduct, or discrimination by Respondent and, likewise, failed to demonstrate that Respondent’s selection was arbitrary or capricious.