

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in May, 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: Motion to Dismiss; Timelines; Untimely Filing; Annual Leave

CASE STYLE: Werntz III v. West Virginia University

DOCKET NO. 2018-1438-WVU (5/9/2019)

PRIMARY ISSUES: Whether this grievance was timely filed.

SUMMARY: Grievant was employed as an Associate Professor at West Virginia University's School of Public Health. On August 24, 2017, WVU informed Grievant he was required to use annual leave to attend outside conferences and meetings scheduled for six days that fall, because he had used up the five days allotted for that purpose. In September 2017, Respondent reiterated this directive and entered annual leave on Grievant's behalf into its timekeeping system. Grievant filed this grievance in June 2018, claiming WVU had entered his leave time without his knowledge. WVU moved for dismissal due to untimely filing, arguing the grievable event was in August when Grievant was directed to use his annual leave. Grievant contends that, in conjunction with his non-renewal and subsequent out-processing on June 4, 2018, he learned his leave payout was less than he had calculated and therefore checked the timekeeping system. He contends that the fifteen-day period to file a grievance was tolled until this discovery. He further contends WVU rescinded his required use of annual leave during a meeting on September 8, 2017, and there were multiple policy violations. WVU timely moved for dismissal and proved untimely filing. Grievant did not prove any basis to excuse untimely filing. Analysis of the merits is therefore unnecessary. Accordingly, the grievance is Dismissed.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

<u>KEYWORDS:</u>	Selection; Interview Committee; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Smith v. Cabell County Board of Education</u> DOCKET NO. 2019-0244-CabED (5/14/2019)
<u>PRIMARY ISSUES:</u>	Whether Respondent's selection making process was fatally flawed or performed in an arbitrary and capricious manner.
<u>SUMMARY:</u>	<p>Grievant alleged that she should have been selected over the successful applicant for the position of Assistant Principal at Huntington East Middle School. West Virginia Code § 18A-4-7a sets out specific criteria the Board must use in determining which candidate is the most qualified for a professional position. While each of the factors listed in W. Va. Code § 18A-4-7a must be considered, this Code Section permits county boards of education to determine the weight to be applied to each factor when filling an administrative position, so long as this does not result in an abuse of discretion.</p> <p>Respondent placed a weighted value on identified factors. Respondent used a recognized selection process to identify the successful applicant. Grievant has failed to prove by a preponderance of the evidence that the decision-making process was fatally flawed, that Respondent acted in an arbitrary and capricious manner, or that Respondent otherwise overstepped its discretion as described in W. VA. CODE § 18A-4-7a. The decision reached was not so implausible that it could not be ascribed to a difference of opinion. In any event, Grievant failed to establish, by a preponderance of the evidence, that her non-selection for the position was an abuse of Respondent's discretion, or otherwise contrary to any applicable law, rule or regulation. This Grievance is DENIED.</p>

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

<u>KEYWORDS:</u>	Jurisdiction; Employee; Employer
<u>CASE STYLE:</u>	<u>McCloud v. Logan County Board of Education</u> DOCKET NO. 2019-1249-LogED (5/14/2019)
<u>PRIMARY ISSUES:</u>	Whether Grievance Board has jurisdiction in this matter.
<u>SUMMARY:</u>	Grievant filed the grievance against the Logan County Board of Education. Grievant is not employed by the Logan County Board of Education. The Grievance Board lacks jurisdiction in this matter. Accordingly, the grievance must be dismissed.

<u>KEYWORDS:</u>	Timeliness; Discrimination; Return to Work; Restrictions
<u>CASE STYLE:</u>	<u>Miller v. Marion County Board of Education</u> DOCKET NO. 2018-1428-MrnED (5/24/2019)
<u>PRIMARY ISSUES:</u>	Whether Grievant established a claim of discrimination by a preponderance of the evidence.
<u>SUMMARY:</u>	Grievant was employed by Respondent as a special education aide at East Fairmont High School. Grievant was absent from work for an injury that did not occur at work. Grievant learned that a similarly situated employee, who suffered an injury, was permitted to return to work with some restrictions. Grievant was not permitted to return to work with minor restrictions. Grievant was forced to use personnel leave as a result of Respondent's action. Grievant established by a preponderance of the evidence that she was the victim of discrimination. Respondent is ordered to compensate or reinstate Grievant for the twenty-two days of personnel leave with cause (or sick) used as a result of her time away from work. Respondent's argument that the grievance was not timely filed is without merit.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Written Reprimand; Patient's Care Plan; Hearsay; Unsworn Statements
<u>CASE STYLE:</u>	<u>Miller v. Department of Health and Human Resources/Welch Community Hospital</u> DOCKET NO. 2018-1188-DHHR (5/14/2019)
<u>PRIMARY ISSUES:</u>	Whether Grievant's written reprimand was justified.
<u>SUMMARY:</u>	Grievant is employed by Respondent as a Certified Nursing Assistant at Welch Community Hospital. Grievant received a written reprimand for failure to follow a patient care plan, which resulted in the patient falling, and for failing to report the fall to a supervisor. As proof of the allegations, Respondent provided only unsworn, compound hearsay statements that were entitled to no weight. Respondent failed to meet its burden of proof. Accordingly, the grievance is granted.

KEYWORDS: Termination; Probationary Employee; Gross Misconduct; Relationship With A Client; Sexual Contact; Ethics; Training; Arbitrary and Capricious; Mitigation

CASE STYLE: Narkevic v. Department of Health and Human Resources/Bureau for Children and Families
DOCKET NO. 2019-0473-DHHR (5/3/2019)

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

SUMMARY: Grievant was a probationary employee as a Child Protective Service Worker Trainee when Respondent dismissed her for gross misconduct. Respondent contends that Grievant started a romantic relationship with a client's father while working on the child's abuse and neglect case. Respondent asserts that Grievant's conduct was unethical, even though the father was the non-offending parent, because the father also became a client once listed on the petition filed by DHHR on behalf of the child. Grievant contends that Respondent did not provide sufficient ethics training or adequately define "client". Respondent counters that it was Grievant's responsibility to familiarize herself with her ethical obligations through the resources made available to her. Grievant asserts that these resources did not define "client" to include the father and that, even if she committed an infraction, Respondent's harsh penalty warranted mitigation, given her lack of training and resources, and her stellar employment record. Even though it is not clear that the father was a client under the resources provided Grievant, these resources do make clear that Grievant engaged in misconduct by violating her ethical obligations when she had sexual contact with the father of a known client. Grievant did not prove her punishment was arbitrary and capricious or warranted mitigation. Accordingly, the grievance is DENIED.

KEYWORDS: Classification; Salary; Pay Plan Policy; Pay Grade; Moot; Relief; Back Pay

CASE STYLE: Beard v. Division of Highways
DOCKET NO. 2018-1289-DOT (5/2/2019)

PRIMARY ISSUES: Whether Grievant proved that Respondent is required to provide back pay for the reclassification determination.

SUMMARY: Grievant filed a grievance protesting his job classification and salary. Subsequent to newly established authority, see Senate Bill 2003, Respondent is able to make certain determinations regarding classification, pay, and qualifications of Division of Highways employees independent of Division of Personnel, the entity of WV State government traditionally charged with making classification determinations.

Respondent issued a Pay Plan Policy dated May 1, 2018 including new Hourly and Salary Pay Grade Schedules dated June 27, 2018. Respondent reclassified Grievant to the position of Building and Grounds Manager, pay grade 15; with an effective date of September 29, 2018. Grievant's interpretation of past events is perplexing and convoluted, nevertheless, the relevant issue of his assigned classification is moot. Respondent has provided Grievant the relief requested. Grievant was provided repeated opportunity but fails to establish a viable grievance. Respondent has established that this grievance should be dismissed as moot. Accordingly, his grievance is dismissed.

KEYWORDS:

Termination; Failure to Report to Work; Unauthorized Leave; Incarcerated; Arbitrary and Capricious

CASE STYLE:

Bishop v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital

DOCKET NO. 2019-0531-DHHR (5/7/2019)

PRIMARY ISSUES:

Whether Grievant's termination was an abuse of discretion or an arbitrary and capricious act.

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 his employment without authority based upon being incarcerated on a misdemeanor charge. Grievant contacted Respondent and advised that he was negotiating a plea agreement which would expose him to forty-five days of incarceration. Grievant was able to bond out on the misdemeanor charge fifteen days after his arrest, which represented the majority of his work schedule. Grievant did not have approved leave to cover his extended absence.

In the circumstances presented, Grievant's termination was not an abuse of discretion or an arbitrary action. The record is undisputed that Grievant was incarcerated for fifteen days of his month long work schedule. The record did not establish that Grievant had sufficient leave to cover this absence. Thus, Respondent had discretion to grant or deny Grievant's request for leave, so long as that discretion was not exercised in an arbitrary and capricious manner. This grievance is denied.

KEYWORDS:

Motion to Dismiss; Moot; Jurisdiction; Suspension Pending Investigation; Job Duties; Criminal Charges; Leave

CASE STYLE:

Corley v. Department of Health and Human Resources/Bureau for Children and Families

DOCKET NO. 2019-0532-DHHR (5/7/2019)

PRIMARY ISSUES:

Whether Grievant proved his suspension pending the resolution of his criminal charges was improper.

SUMMARY:

Grievant was previously employed by Respondent as a Social Service Worker III. Following his arrest on misdemeanor charges, Grievant was suspended pending investigation. Although the criminal charges were later dismissed, Grievant had already resigned from his position. Respondent filed a motion to dismiss alleging the Grievance Board lacked jurisdiction and that the matter was moot due to Grievant's resignation. The Grievance Board does not lack jurisdiction as Grievant was still an employee at the time of his resignation. The grievance is not moot as back pay would be available if Grievant should prevail. The Division of Personnel's administrative rules permit the unpaid suspension of an employee while criminal charges are pending and does not provide for the payment of back wages if the employee resigns prior to the resolution of the criminal charges. Grievant failed to prove his suspension pending the resolution of his criminal charges was improper or that he was entitled to back pay or restoration of leave when he resigned prior to the dismissal of the criminal charges. Accordingly, the motion to dismiss and grievance are denied.

KEYWORDS: Overtime; Volunteer; D-SNAP; Disaster; Compensation; Reimbursed; Travel; Per Diem; Discriminatory; Discrimination; Arbitrary and Capricious; Turnout

CASE STYLE: Goodnight v. Department of Health and Human Resources/Bureau for Children and Families

DOCKET NO. 2018-0372-DHHR (5/15/2019)

PRIMARY ISSUES: Whether Grievant proved by a preponderance of the evidence her claim that Respondent's decision to send her back to her home county before the end of a special out-of-county project, which eliminated her opportunity to earn additional overtime compensation, was arbitrary and capricious, and discriminatory.

SUMMARY: Grievant was employed as an Economic Services Worker for Respondent. Grievant volunteered to travel to another county office to work in a program designed to assist flood victims in applying for special supplemental nutritional assistance benefits following the declaration of a disaster, D-SNAP. Sixteen workers, including Grievant, were scheduled to work D-SNAP, and were scheduled to work their regular workday hours, plus additional hours, to assist the flood victims. However, there were not as many applicants for these benefits as had been expected. Respondent made the decision to send workers home earlier than anticipated because of lack of need. Grievant was sent home four days earlier than anticipated. Grievant asserts that the decision to send her home was discriminatory and arbitrary and capricious. Grievant also asserts that she is entitled to be paid for the overtime work she missed when she was sent home early. Respondent denies Grievant's claims, and asserts that its decision was proper. Grievant failed to prove her claims by a preponderance of the evidence. Therefore, the grievance is DENIED.

<u>KEYWORDS:</u>	Internal Equity Pay Rise; Job Classification; Pay Grade; Budget; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Burke v. Division of Rehabilitation Services</u> DOCKET NO. 2017-2135-DEA (5/16/2019)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved that Respondent's decision to not submit Grievant's request for an "internal equity" was otherwise arbitrary and capricious.
<u>SUMMARY:</u>	Grievant requested a discretionary pay raise from Respondent based on internal equity. Respondent refused to process the request through the Division of Personnel. Grievant protests Respondent's refusal. While internal equity pay raises must be approved by the DOP, Respondent has the discretion to submit to the DOP an employee's request for an internal equity pay raise. Grievant did not prove that Respondent's refusal was arbitrary and capricious or in violation of any law or policy. Accordingly, the grievance is Denied.
<u>KEYWORDS:</u>	Classification; Discrimination; Workers Compensation; Work Assignments; Retaliation; Reprisal
<u>CASE STYLE:</u>	<u>Joyce v. Division of Highways</u> DOCKET NO. 2018-0963-DOT (5/17/2019)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved by a preponderance of the evidence that he was subject to retaliation or reprisal.
<u>SUMMARY:</u>	Grievant alleges that Respondent discriminated against him pursuant grievance procedure definition, and the definition found in W. Va. Code §§ 23-5A-1, and 3(b), by failing to fully reinstate him to a soil nailing assignment upon his return from workers' compensation. Grievant presented no evidence comparing his treatment to the treatment of similarly-situated employees, which is required to prove discrimination under the grievance procedure statutes. Additionally, while Grievant proved that Respondent may have precipitously removed Grievant from the soil nailing assignment, it was not proved that Respondent failed to return Grievant to the Transportation Worker 3 position he held prior to his work-related injury.

KEYWORDS: Return to Work Policy; Work Assignments; Light Duty Assignments

CASE STYLE: McNeely v. Division of Corrections and Rehabilitation/Bureau of Prisons and Jails

DOCKET NO. 2019-0673-MAPS (5/30/2019)

PRIMARY ISSUES: Whether Grievant proved that she has been placed off work, exhausted leave, and required to take unpaid leave due to Respondent's violation of the Return to Work policy.

SUMMARY: Grievant was working as a Correctional Officer 2 at the Southwestern Regional Jail after returning to work from a sever work related injury. Grievant had been placed on light duty for a month upon return to work and was only assigned to the Central Control post. At the month expired Grievant was assigned to additional posts in the Jail including the tower. An incident occurred related to Grievant's ability to perform essential functions of her position. Respondent place Grievant off work where she stayed because she was unable to procure a doctor to complete a Functional Capacity form required by Respondent. Grievant alleges she was placed off work as a disciplinary measure and the Respondent violated the provisions of its Return to Work policy. Grievant did not prove that Respondent placed her off work as discipline. Grievant did prove that Respondent violated its own policy.

KEYWORDS: Termination; Gross Misconduct; Forging Signatures; Failing to Cooperate; Investigation; Mitigation; Arbitrary and Capricious

CASE STYLE: Salisbury v. Department of Health and Human Resources/Bureau for Children and Families

DOCKET NO. 2019-0633-CONS (5/28/2019)

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

SUMMARY: Grievant was employed by Respondent as a Secretary I. Respondent suspended Grievant without pay after she signed a coworker's name to a document without permission. Respondent terminated Grievant for failure to cooperate in the subsequent internal investigation and for forging three coworker's signatures to documents. While Grievant concedes to signing some documents, she contends her behavior was not intentional, was not misconduct, and that Respondent denied her due process in failing to hold a predetermination meeting. While Respondent did not prove failure to cooperate or criminal forgery, Respondent proved Grievant engaged in misconduct through signing coworker's names to documents without permission. Grievant failed to prove that mitigation of her punishment is warranted. Accordingly, the grievance is denied.

KEYWORDS: Salary; Pay Disparity; Pay Grade; Classification; Arbitrary and Capricious

CASE STYLE: Thompson v. Department of Environmental Protection/Division of Land Restoration
DOCKET NO. 2018-0920-DEP (5/31/2019)

PRIMARY ISSUES: Whether Grievant proved that Respondent's decision to pay him and another employee different salaries when they started and during their employment was arbitrary or capricious.

SUMMARY: When preparing to retire Mr. Thompson file a grievance contesting the fact that a coworker in his same classification was paid more than him for the duration of their careers with the DEP. Grievant does not argue that the pay disparity is cause by discrimination, but rather that the initial and ongoing practice of Respondent was arbitrary and capricious. Even putting aside the timeliness issue that the two employees were initially hired at least seventeen years before the Grievance was filed, both employees were paid salaries within the page grade for which they were assigned. Thus, Respondent's actions to pay them different salaries from the beginning was not improper. Additionally, Grievant produced no evidence proving that Respondent's actions were arbitrary or capricious.

KEYWORDS: Termination; Work Schedule; Job Duties; Unscheduled Absences; Leave; Absenteeism; Reasonable Accommodation

CASE STYLE: Watton v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2018-0661-DHHR (5/16/2019)

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

SUMMARY: Grievant was employed by Sharpe Hospital as a Licensed Practical Nurse. Grievant's duties consisted of providing direct care to patients and mandatory overtime was an essential function of the position. Grievant suffers from Lyme Disease. Record established that Grievant missed substantial periods of work, not only during extended periods of leave, but also unscheduled absences, which were particularly difficult in a setting which requires around the clock patient care. Grievant is unfortunately physically unable to perform the duties of her position. The facts of this case demonstrate that Respondent established the existence of good cause for Grievant's dismissal.

KEYWORDS: Discretionary; Pay Increase; Pay Plan Implementation Policy; Arbitrary and Capricious; Project-based; Incentive; Project; Temporary; Completed

CASE STYLE: White v. Offices of the Insurance Commissioner
DOCKET NO. 2018-1012-DOR (5/23/2019)

PRIMARY ISSUES: Whether Grievant proved that Respondent's decision to end his project-based incentive pay increase was arbitrary and capricious, or otherwise improper.

SUMMARY: Grievant is employed by Respondent as a Credit Analyst 2. Respondent implemented a discretionary project-based incentive 10% pay increase for Grievant who was assigned to work on a project to resolve old accounts. Grievant worked on the project for nearly twenty-seven months. In January 2018, Respondent concluded that the project was completed and terminated Grievant's 10% pay increase in January 2018. Grievant asserts that the pay increase was not temporary, and that the project was not completed. Grievant also asserts that the Respondent's decisions were arbitrary and capricious. Respondent denied Grievant's claims and argued that the pay increase was properly terminated when the project was completed. Grievant failed to prove his claims by a preponderance of the evidence. Accordingly, this grievance is DENIED.