

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SYNOPSIS REPORT

Decisions Issued in June, 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.

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HIGHER EDUCATION EMPLOYEES

<u>KEYWORDS:</u>	Email Policy; Personnel Email; Non-Renewal of Contract
<u>CASE STYLE:</u>	<u>Werntz III v. West Virginia University</u> DOCKET NO. 2018-1265-WVU (6/3/2019)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved that WVU's email policy mandates WVU to provide Grievant access to his WVU email account for personal use.
<u>SUMMARY:</u>	Grievant was employed as WVU faculty for over twenty years, until the non-renewal of his contract. WVU deactivated Grievant's University email account months ahead of his last workday. Grievant contends that WVU's email policy allows him account access until his last day of employment. Grievant is no longer employed by WVU, but demands access to personal emails in his WVU email account. Even though Grievant proved that WVU's email policy allowed him access to his WVU email account until his last day of employment, and that he was permitted to use the account for personal purposes, he did not prove that WVU's policy mandated that WVU allow him access to his account for personal use. Accordingly, the grievance is Denied.

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COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

<u>KEYWORDS:</u>	Retirement Benefits; Relief; Jurisdiction
<u>CASE STYLE:</u>	<u>Myers v. Lewis County Board of Education</u> DOCKET NO. 2018-0971-LewED (6/11/2019)
<u>PRIMARY ISSUES:</u>	Whether any relief can be granted.
<u>SUMMARY:</u>	Grievant was employed by Respondent for many years as Attendance Director. Grievant was granted the use of a Board-owned vehicle to use in the course of his job duties in the county. Beginning in October of 2003, he received approval to also use the vehicle for his daily commute between home and work. Respondent's treasurer included the monetary value of the vehicle use benefit in Grievant's monthly compensation calculation, including contributions to the Teachers' Retirement System. The Consolidated Public Retirement Board overruled this action by Respondent and Grievant, unsuccessfully, appealed. The Public Employees Grievance Board has no jurisdiction over Grievant's dispute with a decision of the Consolidated Public Retirement Board regarding his benefits, and there is no relief that may be granted in this matter.

KEYWORDS: Selection; Certification; Qualifications; Interview; Executive Summary; Arbitrary and Capricious

CASE STYLE: Daniels v. Cabell County Board of Education
DOCKET NO. 2019-0107-CabED (6/17/2019)

PRIMARY ISSUES: Whether Grievant proved that she was the most qualified candidate or that the selection decision was arbitrary and capricious.

SUMMARY: Grievant applied for the posted position of Principal at Huntington High School. Grievant has extensive experience, training and education and opines that she was the most qualified applicant for the job. She was not selected. In addition to arguing that she was the most qualified candidate, she alleges that the hiring process was rendered arbitrary and capricious by her supervisor, who was on the selection committee, advised her to highlight her experience in Cabell County rather than the experience and training she accumulated in Florida. Respondent asserts that the decision to hire a different candidate was based upon the appropriated statutory criteria and was not arbitrary or capricious. Grievant did not prove by a preponderance of the evidence that she was the most qualified candidate or that the process was tainted by the pre-interview advice given to her by her supervisor.

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COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

<u>KEYWORDS:</u>	Motion to Dismiss; Untimely Filed; Timelines; Resignation
<u>CASE STYLE:</u>	<u>Hans v. Doddridge County Board of Education</u> DOCKET NO. 2019-1339-DodED (6/3/2019)
<u>PRIMARY ISSUES:</u>	Whether Respondent proved the grievance was not timely filed.
<u>SUMMARY:</u>	Grievant was previously employed by Respondent as a substitute bus driver and resigned his position. Grievant filed the instant grievance challenging his resignation. Respondent moved to dismiss the grievance as untimely filed. The grievance was untimely filed. Accordingly, the grievance is dismissed.

<u>KEYWORDS:</u>	Selection; Seniority; Competency Test; Qualifications
<u>CASE STYLE:</u>	<u>Cyphers v. Marion County Board of Education</u> DOCKET NO. 2018-1333-MrnED (6/19/2019)
<u>PRIMARY ISSUES:</u>	Whether Respondent was obligated to hire the applicant with the most overall county seniority for the position in question.
<u>SUMMARY:</u>	Grievant is regularly employed by Respondent as a service personnel and she hold the classification title of Secretary III. Respondent posted a vacancy under the classification title of Accounts Payable Supervisor. Grievant was one of eleven total applicants, none of whom held the classification title of Accounts Payable Supervisor. Grievant contends that Respondent's failure to offer a competency test to determine the qualifications of the applicants prior to filling the position violated state code and policy. No local board of education has a legal duty to create a local competency test when the State Board of Education has failed to create such a test. Because both Grievant and Ms. Poling were deemed qualified for the position and neither of them held that classification title at the time of application for the position, Respondent was obligated to hire the applicant with the most overall county seniority.

KEYWORDS: Overtime; Extra-Duty Assignments; Seniority; Classification; Irregular Jobs

CASE STYLE: Cyphers v. Marion County Board of Education
DOCKET NO. 2018-0962-MrnED (6/10/2019)

PRIMARY ISSUES: Whether Grievant proved that she was next in line for any of the extra-duty assignments at issue.

SUMMARY: Grievant asserts that she, a regularly employed secretary, should have been given the opportunity to perform extra-duty assignments related to a secretarial position in personnel. Respondent does not deny that it assigned the secretarial duties to another regular service employee and to a retired employee. Respondent should have offered this work to regular secretaries in seniority order on a rotating basis before offering the opportunity to a retired secretary. Grievant failed to demonstrate that she should have been offered any particular extra-duty assignment on any particular date, and that she would have been available to take that assignment on that date. This grievance is granted, in part, and denied, in part.

KEYWORDS: Selection; Qualifications; Arbitrary and Capricious

CASE STYLE: Dempsey v. Kanawha County Board of Education
DOCKET NO. 2018-1184-KanED (6/17/2019)

PRIMARY ISSUES: Whether Grievant proved that the selection decision was arbitrary and capricious.

SUMMARY: Grievant is employed by Respondent as an Inventory Supervisor and grieves her non-selection for a Warehouse Supervisor position. Grievant argued the selection decision was arbitrary and capricious as Respondent exceeded its discretion in including additional qualifications for the position and argued that, regardless, she met the additional qualifications. Grievant failed to prove the selection decision was arbitrary and capricious. Respondent's addition of the specific qualifications was within its discretion. Grievant did not meet the additional qualifications and the successful candidate exceeded those qualifications. Accordingly, the grievance is denied.

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STATE EMPLOYEES

<u>KEYWORDS:</u>	Merit Raise; Classification; Discrimination; Pay Plan Policy; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Cassella v. Division of Highways</u> DOCKET NO. 2018-0565-DOT (6/6/2019)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved that Respondent violated any law, rule, policy, or procedure when it failed to give Grievant a merit raise.
<u>SUMMARY:</u>	Grievant has been employed in the Transportation Worker class series with Respondent since 2008. In 2017, Respondent refused to consider Grievant for a merit raise. The Department of Personnel Pay Plan Policy then in effect declared employees in the Transportation Worker class series ineligible for merit raises. The West Virginia Division of Highways Pay Plan Policy, which does not exclude Grievant from merit raises, now controls. However, the Governor issued a decade long freeze on merit raises, lifting the freeze for a short period in 2017, before reinstating it. Accordingly, this grievance lamenting the denial of a merit raise is Denied.

<u>KEYWORDS:</u>	Motion to Dismiss; Employee; Employer; Jurisdiction
<u>CASE STYLE:</u>	<u>Skeens, Jr. v. Division of Administrative Services</u> DOCKET NO. 2019-1485-MAPS (6/7/2019)
<u>PRIMARY ISSUES:</u>	Whether the Grievance Board has jurisdiction in this matter.
<u>SUMMARY:</u>	Grievant filed his grievance against his employer, the Division of Administrative Services, protesting the actions of the Division of Personnel in disqualifying his application for a position with the Department of Health and Human Resources. The decision of the Division of Personnel relating to Grievant's application for employment with a state agency not already his employer is not a grievable event. The Grievance Board lacks jurisdiction in this matter. Accordingly, the grievance must be dismissed.

KEYWORDS: Selection; Qualifications; Experience; Arbitrary and Capricious

CASE STYLE: Cox v. Division of Highways
DOCKET NO. 2017-2285-DOT (6/26/2019)

PRIMARY ISSUES: Whether Grievant proved that the selection process was arbitrary or capricious.

SUMMARY: Grievant is employed by Respondent as a Storekeeper 2. Respondent posted a vacancy for Supervisor I. Respondent chose an external applicant over Grievant. Grievant disputes her non-selection. Grievant did not prove by a preponderance of the evidence that the selection process was legally flawed, that she was the most qualified candidate, or that the selection of another applicant was arbitrary and capricious. Accordingly, this grievance is DENIED.

KEYWORDS: Termination; Job Abandonment; Due Process; Attendance Policy; Incarceration

CASE STYLE: Jensen v. Offices of the Insurance Commissioner
DOCKET NO. 2019-0220-DOR (6/19/2019)

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

SUMMARY: Grievant was employed by Respondent as an Office Assistant 2 and was terminated from his employment for job abandonment. Grievant was absent due to his incarceration on criminal charges that were later dismissed. While Grievant was incarcerated, he was denied access to a telephone and had no ability to contact Respondent personally. Grievant provided notice of the reason for his absence through an intermediary as soon as he was permitted a visitor at the jail. Respondent failed to prove it was justified in terminating Grievant's employment for job abandonment under those circumstances. Accordingly, the grievance is granted.

KEYWORDS: Termination; Job Abandonment; Incarceration; Leave; Due Process

CASE STYLE: Sabatini v. Department of Health and Human Resources/Bureau for Public Health

DOCKET NO. 2019-0792-DHHR (6/26/2019)

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

SUMMARY: Grievant was employed by Respondent as an Office Assistant 2 and was terminated from her employment for job abandonment. Grievant was absent due to her incarceration on criminal charges that were later dismissed. While Grievant was incarcerated, she was initially denied access to a telephone and was then only allowed to make a collect call to her supervisor which was refused. Thus, Grievant was prevented from personally contacting her supervisor. Grievant provided notice of the reason for her absence through her sister as soon as Grievant was permitted to contact her. Respondent failed to prove it was justified in terminating Grievant's employment for job abandonment under those circumstances. Accordingly, the grievance is GRANTED.

KEYWORDS: Suspension; Progressive Discipline; Field Sobriety Tests; Mitigation; Arbitrary and Capricious

CASE STYLE: Spence v. Division of Natural Resources

DOCKET NO. 2019-0670-DOC (6/26/2019)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of evidence that it had cause to discipline Grievant.

SUMMARY: Grievant has been employed by Respondent as a Natural Resources Police Officer for over twenty years. During the past few years, Respondent has issued Grievant warnings and reprimands for various infractions. Grievant's most recent infraction entailed failing to properly administer field sobriety tests to a subject for boating under the influence and failing to do the incident report after being ordered to do so, resulting in a three-day suspension and six-month improvement plan. Respondent proved that this most recent discipline was warranted as part of progressive discipline. Accordingly, the grievance is Denied.