

**WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**SYNOPSIS REPORT**

**Decisions Issued in June 2021**

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](mailto: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**

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| <b><u>KEYWORDS:</u></b>       | Termination; Gross Misconduct; Supervisor; Policy; TikTok Videos; Social Media; Code of Conduct; Mitigation  |
| <b><u>CASE STYLE:</u></b>     | <u>Nixon v. West Virginia University</u><br>DOCKET NO. 2020-1489-WVU (6/17/2021)   |
| <b><u>PRIMARY ISSUES:</u></b> | Whether Grievant proved by a preponderance of evidence that he was denied due process or that mitigation of his dismissal is warranted.  |
| <b><u>SUMMARY:</u></b>        | While employed by WVU, Grievant supervised a cleaning crew. Crew members videoed themselves engaged in workplace shenanigans, some involving Grievant. One video showed a crew member sitting on Grievant's lap. The crew posted the videos to social media. After finding the videos, WVU determined that some were detrimental to its image and dismissed Grievant. WVU proved that Grievant committed gross misconduct by engaging in some of the depicted behavior, allowing it to be filmed, and failing to take remedial action even though he knew the crew members had posted other videos to social media. Accordingly, this grievance is DENIED. |

**TOPICAL INDEX**  
**COUNTY BOARDS OF EDUCATION**  
**SERVICE PERSONNEL**

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**KEYWORDS:** Motion to Dismiss; ECCAT Employees; Seniority Dates

**CASE STYLE:** Barker, et al v. Cabell County Board of Education  
DOCKET NO. 2019-1239-CONS (6/4/2021)

**PRIMARY ISSUES:** Whether this matter should be dismissed.

**SUMMARY:** Aides and ECCATs are separately defined by WV statute. As a result of the independent nature of the two classifications and because seniority dates are established as an employee enters upon his or her duties within the classification for the regular employment assignment, the Supreme Court of Appeals of West Virginia has recognized that ECCAT seniority accrues independently of aide seniority. The parties agree that there was an identified case before the WV Supreme Court of Appeals which would be wholly dispositive regarding the issue(s) of the instant matter. The WV Supreme Court of Appeals rendered a decision in the Davis Case on March 26, 2021 in Webster Cty. Bd. of Educ. v. Davis, 856 S.E.2d 661 (W. Va. 2021). The Court held that the Legislature intended that seniority for Aide and ECCAT class titles accrue independently from each other for purposes of a reduction in force, regardless of which level of ECCAT classification is held, and regardless of whether an ECCAT employee qualifies for multiclassification status. Respondent conducted a random drawing to determine respective rank for any anticipated reduction in force. In accordance with the conditions of the abeyance this matter has been held for approximately 16 months, this matter is now ripe for dismissal.

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**STATE EMPLOYEES**

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| <b><u>KEYWORDS:</u></b>       | Selection; Interview Process; Arbitrary and Capricious   |
| <b><u>CASE STYLE:</u></b>     | <u>Cosby v. Division of Corrections and Rehabilitation/Bureau of Community Corrections</u><br>DOCKET NO. 2020-1030-MAPS (6/17/2021)  |
| <b><u>PRIMARY ISSUES:</u></b> | Whether Grievant demonstrated that the selection decision was unlawful, unreasonable, or arbitrary and capricious.   |
| <b><u>SUMMARY:</u></b>        | Grievant filed this action challenging his non-selection for the posted position of Correctional Officer IV (“Sargent”). Grievant alleges bias. Respondent maintains the selection was in accordance with applicable procedure, rules, and regulations. The successful applicant had the higher test score, and the higher total in-person interview score. The successful applicant was ranked higher in performance by his supervisor, the Associate Superintendent, and Superintendent. Grievant did not prove that unlawful bias or favoritism played a significant part in the selection process. It is not established that the selection process was biased and therefore arbitrary or capricious. Grievant did not meet his burden of proof to establish that he should have been selected for the position. Accordingly this grievance is DENIED. |

**KEYWORDS:** Suspension; Employee Conduct; Misconduct; Unprofessional Behavior; Mitigation

**CASE STYLE:** Kerr v. Department of Health and Human Resources/Bureau for Children and Families  
DOCKET NO. 2019-1896-CONS (6/3/2021)

**PRIMARY ISSUES:** Whether Grievant proved by a preponderance of the evidence that the penalty of suspension was disproportionate to the offense proven.

**SUMMARY:** Grievant was suspended for ten days without pay for violating DHHR Policy Memorandum 2106 – Employee Conduct through unprofessional conduct including being confrontational with co-workers, disrespectful with her supervisors and outside contacts as well as disrupting a training program.

Grievant argues that her behavior was not in violation of the policy, that the discipline was actually based upon her sexual preference, that she was not sufficiently warned of the consequences of her behavior, and that the penalty of suspension was disproportionate to any misconduct she may have committed.

Respondent proved that Grievant violated the identified policy, had warned Grievant about her conduct on several occasions, and that there were legitimate reasons for the suspension unrelated to any discrimination or retaliation. The penalty was not clearly disproportionate to the misconduct which was proven.

**KEYWORDS:** Pay Plan Policy; Pay Increase; Discrimination

**CASE STYLE:** Goodman, et al. v. Division of Highways

DOCKET NO. 2019-0863-CONS (6/22/2021)

**PRIMARY ISSUES:** Whether Grievants proved that Respondent was required to provide pay increases to all employees or that the pay plan was discriminatory.

**SUMMARY:** Grievants are employed by Respondent, Division of Highways, in various classifications. Grievants protested Respondent's failure to establish a pay structure for all employees that provided pay increases comparable to the pay increases establishes for certain other classifications. Grievants argued pay increases for all employees were mandated by the Legislature and the State Personnel Board and that failure to provide pay increases to all employees was discrimination. Respondent asserted the grievance was untimely filed, that its pay plan complied with the mandate of the Legislature, and the State Personnel Board and was not discriminatory. Respondent failed to prove the grievance was untimely filed. Grievants failed to prove Respondent was required to provide pay increases to all employees or that the pay plan was discriminatory. Accordingly, the grievance is denied.

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**KEYWORDS:** Suspension; Abandoned Grievance; Resigned Employment

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

DOCKET NO. 2020-1075-DHHR (6/30/2021)

**PRIMARY ISSUES:** Whether this matter should be dismissed.

**SUMMARY:** After filing the grievance, Grievant failed to pursue further action in the grievance and failed to respond to contact by her representative. Grievant has abandoned the grievance. Therefore, the grievance must be dismissed.