

**WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**SYNOPSIS REPORT**

**Decisions Issued in July 2017**

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

### DEPARTMENT OF EDUCATION EMPLOYEES

---

<b><u>KEYWORDS:</u></b>	Salary Reduction; Payment Schedule; Contract; Notification; Arbitrary and Capricious
<b><u>CASE STYLE:</u></b>	<u>Baldwin, et al. v. Department of Education/Office of Institutional Education Programs</u> DOCKET NO. 2017-1190-CONS (7/20/2017)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent's action of reducing Grievants' annual salaries, to be consistent with the Boone County salary supplements, for the 2016-2017 school year is unlawful and/or an abuse of authority.
<b><u>SUMMARY:</u></b>	<p>This grievance arose out of the West Virginia Department of Education, Respondent reducing Grievants' rate of pay to be consistent with the reductions in pay their counterparts employed by the Boone County Board of Education experienced. The reduction occurred several months after the State of West Virginia moved from issuing salary checks twice a month (semi-monthly) to every two weeks (bi-weekly). These two events, coupled with the practice of paying salaries in arrears, has caused much confusion, discord and misunderstandings.</p> <p>Grievants contend that Respondent has acted unlawfully and wish for their prior yearly salaries to be restored. Respondent contends that in accordance with what has been interpreted as applicable controlling statutes and regulations, it was determined that the salary rate for personnel employed by the WVDE needed to be the equivalent of the salary paid by the county board in the county where each agency facility is located, whether this was an increase or a decrease in pay. The instant matter was the first time a county board reduced salaries supplements. It is not established that Respondent acted in an illogical or irresponsible manner. The facts are regrettable, the circumstances are undesirable, and extremely problematic; nevertheless, it is not determined illegal and/or unlawful for Respondent to timely adjust Grievants yearly salary.</p>

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

---

<b><u>KEYWORDS:</u></b>	Selection Process; Vacancy; Interview; Qualifications; Arbitrary and Capricious; Physical Education Endorsement; Elementary Teacher; Narrowing Applicant Pool
<b><u>CASE STYLE:</u></b>	<u>Spatafore v. Harrison County Board of Education</u> DOCKET NO. 2017-0980-HarED (7/26/2017)
<b><u>PRIMARY ISSUES:</u></b>	Whether the interview committee was required by any law, rule, regulation, or policy to interview all minimally qualified applicants.
<b><u>SUMMARY:</u></b>	Grievant is a fourth grade teacher. He applied for a cover planning period teacher position at the same school where he is employed. The posting indicated that a specialty in physical education was preferred, as this teacher would be responsible for instructing students in physical education and health. Grievant did not have a specialty or endorsement in physical education. The applicant field was narrowed by the principal to reduce the number of applicants interviewed, by interviewing only those applicants who held a physical education endorsement. Respondent did not violate any law, rule, regulation, or policy by narrowing the applicant pool to reduce the number of applicants interviewed, nor did Grievant demonstrate that he was entitled to be interviewed, or that the actions of Respondent were arbitrary and capricious.

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

---

<b><u>KEYWORDS:</u></b>	Selection; Experience; Qualifications; Multiclassification; Arbitrary and Capricious; Competency Testing; Seniority
<b><u>CASE STYLE:</u></b>	<u>Strahan v. Monongalia County Board of Education and Carol Ponceroff, Intervenor</u> DOCKET NO. 2017-0148-MonED (7/14/2017)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent's selection decision was arbitrary and capricious.
<b><u>SUMMARY:</u></b>	Grievant argued she should have been selected for a posted Secretary III/Accountant II vacancy. No applicant held the multi-classification title in the posting. The successful applicant had the most seniority as a Secretary, and the most overall seniority, but she had not taken the competency test for Accountant, while Grievant had seniority both as a Secretary and a Secretary III/Accountant II. The statutory provisions do not address how Respondent is to evaluate seniority for a multiclassified position. Accordingly, it is evaluated under the arbitrary and capricious standard. Grievant did not demonstrate that it was arbitrary and capricious for Respondent to allow applicants to take the Accountant competency test, or to use overall seniority in making the selection.

---

<b><u>KEYWORDS:</u></b>	Automatic Calling System; Extra-Duty Work Assignments; Reasonable Effort
<b><u>CASE STYLE:</u></b>	<u>Nowlin v. Mercer County Board of Education</u> DOCKET NO. 2017-1075-MerED (7/20/2017)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent made reasonable, good faith attempts to contact Grievant in assigning an extra-duty bus run(s).
<b><u>SUMMARY:</u></b>	Grievant alleges that she has lost out on employment opportunities in that she did not received telephone call(s) from the automated dialer utilized by Respondent to contact employees for substitute and extra duty assignments. Grievant failed to demonstrate that Respondent failed to make a reasonable, good faith attempt to contact her, in rotation order, to present extra duty or substitution assignment. This grievance is DENIED.

<b><u>KEYWORDS:</u></b>	Travel Expenses; Mileage; Annual Physical Examination; Cost of Examination
<b><u>CASE STYLE:</u></b>	<u>Weaver, et al. v. Morgan County Board of Education</u> DOCKET NO. 2015-1445-CONS (7/26/2017)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent is required to pay Grievants mileage for the travel to the physician's office for their annual physical examinations.
<b><u>SUMMARY:</u></b>	Grievants are bus operators, and are required to have a physical examination each year. Respondent pays for the physical examination, but does not reimburse Grievants for their mileage to travel to the physician's office. The statutory provision which requires Respondent to pay for the cost of the examination does not require Respondent to reimburse employees for their mileage to travel to the doctor's office.
<b><u>KEYWORDS:</u></b>	Suspension; Termination; Insubordination; Willful Neglect of Duty; Misconduct; Autism Mentor; Aide; Interns; Credibility; Restraint; Profanity; Inconsistencies; Intentional; Disciplinary Hearing; Transporting; Written Statement; Bias
<b><u>CASE STYLE:</u></b>	<u>Courts v. Kanawha County Board of Education</u> DOCKET NO. 2017-1369-KanED (7/21/2017)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent proved that Grievant engaged in conduct constituting insubordination and/or willful neglect of duty justifying suspension and dismissal.
<b><u>SUMMARY:</u></b>	Grievant was employed by Respondent as an Autism Mentor/Aide. Grievant was suspended then terminated for insubordination and willful neglect of duty in the treatment of the students in his charge as alleged by two high school student interns, or observers. Grievant disputes these charges, and argues that the alleged misconduct did not occur. There is an additional claim that Grievant used an improper restraint technique, but Respondent met with Grievant soon after the incident, and discussed the same. Grievant was not disciplined for his actions, and it appears to have been treated like correctable conduct. Respondent failed to prove its claims by a preponderance of the evidence, and failed to justify Grievant's suspension and dismissal. Accordingly, the grievance is GRANTED.

**KEYWORDS:** Selection; Vacancy; ECCAT Classification; Seniority

**CASE STYLE:** Wagner v. Raleigh County Board of Education

DOCKET NO. 2017-0809-RaIED (7/20/2017)

**PRIMARY ISSUES:** Whether Grievant established that she possessed more seniority in the aide/ECCAT classification than the successful applicant.

**SUMMARY:** Grievant was employed by Respondent as an Aide when she filed this grievance. She bid on a posted Aide/Early Childhood Classroom Assistant Teacher position, which required Early Childhood Classroom Assistant Teacher certification. Although Grievant was the most senior applicant in the Aide classification, this Board has ruled that for seniority purposes, the aide class titles are not in the same classification category as the ECCAT class titles. The record did not establish that Grievant had more seniority in the ECCAT category than the successful applicant. In addition, the successful applicant held an ECCAT job at the time Respondent appointed her to the position. Grievant did not demonstrate she was entitled to placement in the posted position.

**TOPICAL INDEX**  
**STATE EMPLOYEES**

---

<b><u>KEYWORDS:</u></b>	Suspension; Attendance Improvement Plan; Progressive Discipline; Arbitrary and Capricious
<b><u>CASE STYLE:</u></b>	<u>Allen v. Department of Health and Human Resources/Jackie Withrow Hospital</u> DOCKET NO. 2017-1076-DHHR (7/5/2017)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent proved it was justified in giving Grievant a 5-day suspension for poor attendance.
<b><u>SUMMARY:</u></b>	Grievant argues that the suspension of her employment was arbitrary and capricious because Respondent failed to follow its obligations under the Attendance Improvement Plan implemented ostensibly as a tool to improve Grievant's attendance. Respondent proved that Grievant had been given unsuccessful opportunities to improve her attendance before the suspension was implemented and the suspension was justified.

---

<b><u>KEYWORDS:</u></b>	Evaluation; Arbitrary and Capricious
<b><u>CASE STYLE:</u></b>	<u>Matthews v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital</u> DOCKET NO. 2016-1657-DHHR (7/11/2017)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant proved by a preponderance of the evidence that her revised evaluation was a result of an abuse of discretion.
<b><u>SUMMARY:</u></b>	Grievant filed a prior grievance challenging her Employee Performance Evaluation dated September 24, 2014. The undersigned granted that grievance and ordered that evaluation be rescinded and replaced with an evaluation which rates Grievant for her overall job performance throughout the entire rating period. This revised evaluation was done by Respondent's Chief Financial Officer familiar with the expectations for the position Grievant was working in for the reporting period. In the instant matter, Grievant failed to prove by a preponderance of the evidence that her evaluation was a result of an abuse of discretion or was the result of some misinterpretation or misapplication of policies or rules governing the evaluation process.

**KEYWORDS:** Training; Selection; Equipment Operators Training Academy; Tier System; Upgrade; Experience; Tenure; Seniority; Service; Leave Balances; Seat Time; Arbitrary and Capricious

**CASE STYLE:** Prest, et al. v. Division of Highways  
DOCKET NO. 2016-1532-CONS (7/7/2017)

**PRIMARY ISSUES:** Whether Grievants proved by a preponderance of the evidence that Respondent failed to follow its policy regarding the selection of employees to be sent to the Equipment Operators Training Academy, and whether Respondent's decision was arbitrary and capricious.

**SUMMARY:** Grievants signed up to be considered for selection to attend three heavy equipment trainings at the Respondent's Equipment Operators Training Academy. Grievants were not selected for the trainings. Respondent selected three other employees who had fewer years of service with DOH, and questionable experience. Grievants argue that Respondent failed to follow its policy for selecting employees for these trainings, and that its decisions were arbitrary and capricious. Respondent denies Grievants' claims, asserting that it followed its policy, and its selection decisions were proper. Grievants proved by a preponderance of the evidence that Respondent failed to follow its policy in selecting employees for the training, and that its decisions were arbitrary and capricious. Therefore, the grievance is GRANTED.

---

**KEYWORDS:** Default; Level One Hearing Location; Time-Frame

**CASE STYLE:** Stone v. Division of Rehabilitation Services  
DOCKET NO. 2017-1366-DEADEF (7/7/2017)

**PRIMARY ISSUES:** Whether default occurred, and, if so, whether the delay was justified.

**SUMMARY:** Grievant made a claim for relief by default claiming Respondent failed to meet level one timeframes and for "non-communication between parties." Grievant objected to the locations proposed by Respondent for the level one hearing due to privacy concerns. Grievant sought the Grievance Board's intervention in resolving the hearing location dispute. Due to time constraints, the Grievance Board was unable to make a decision regarding the hearing location before the scheduled level one hearing, and instructed Respondent to continue the level one hearing. Before an order on the hearing location dispute could be issued, Grievant claimed default. Grievant's claim for default must be denied as Respondent's failure to hold the level one hearing within the statutory timeframe was justified as Grievant had disputed the hearing location, had sought Grievance Board intervention, and Respondent had been instructed by the Grievance Board to continue the hearing. Accordingly, Grievant's claim for relief by default is denied.



**KEYWORDS:** Termination; Unscheduled Absences; Family Medical Leave Act; Job Abandonment; Policy and Procedure; Due Process; Notice; Retaliation

**CASE STYLE:** Large v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital  
DOCKET NO. 2017-0210-DHHR (7/20/2017)

**PRIMARY ISSUES:** Whether Respondent proved the charges against Grievant, and demonstrated good cause for his dismissal.

**SUMMARY:** Respondent established by a preponderance of the evidence that Grievant failed to communicate with his employer under a set of circumstances which constituted job abandonment within the meaning of that term in the West Virginia Division of Personnel's Administrative Rule. Accordingly, Respondent established a factual and legal basis for Grievant's termination. Grievant failed to establish that Respondent's decision to terminate his employment resulted from retaliation for protected activities in which Grievant had previously participated.