

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in July, 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

DEPARTMENT OF EDUCATION EMPLOYEES

<u>KEYWORDS:</u>	Suspension; Termination; Motion to Dismiss; Substantial Public Policy; Relief; At-Will
<u>CASE STYLE:</u>	<u>Loy v. Board of Education</u> DOCKET NO. 2018-1206-CONS (7/19/2018)
<u>PRIMARY ISSUES:</u>	Whether Grievant stated a claim on which relief can be granted.
<u>SUMMARY:</u>	Grievant was employed by Respondent, Board of Education, as Director of the West Virginia Birth to Three Program at the Regional Education Service Agencies Eight. Grievant's employment was at-will. Grievant was suspended with pay due to allegations that she had harassed employees and created a hostile work environment. Respondent later dismissed Grievant from employment without stating any cause for terminating her at-will employment. Grievant failed to state a claim on which relief can be granted because she did not allege that her discharge contravened some substantial public policy. Accordingly, the grievance is dismissed.

TOPICAL INDEX
HIGHER EDUCATION EMPLOYEES

KEYWORDS: Motion to Dismiss; Res Judicata; Collateral Estoppel; Termination

CASE STYLE: Riedel v. West Virginia University
DOCKET NO. 2017-2469-WVU (7/20/2018)

PRIMARY ISSUES: Whether Respondent has proven that this grievance is precluded by the doctrine of collateral estoppel.

SUMMARY: Grievant filed a grievance premised on the same claim of wrongful termination that had been dismissed in Docket No. 2015-1774-CONS. Respondent filed a motion to dismiss. Respondent proved by a preponderance of the evidence that Grievant was precluded from relitigating the issue of whether Grievant retired or was terminated from his employment. Accordingly, this grievance is dismissed.

KEYWORDS: Termination; Unacceptable Attendance; Performance Plan; Progressive Discipline; Family Medical Leave Act

CASE STYLE: Flemings v. Marshall University
DOCKET NO. 2018-0981-MU (7/5/2018)

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

SUMMARY: Grievant was employed by Respondent as a Campus Service Worker and protests her dismissal from employment. Respondent asserts it had good cause to terminate Grievant's employment due to her long history of unacceptable attendance, which was not corrected despite progressive discipline and an additional performance plan, and which caused Respondent to hire an additional part-time temporary employee to compensate for Grievant's absences. Grievant asserts that her absences should be excused due to her circumstances and that Respondent interfered with her use of FMLA leave and retaliated against her for requesting FMLA leave. Respondent proved it had good cause to terminate Grievant for her absenteeism when Grievant's absenteeism worsened after progressive discipline and an additional performance improvement plan.

Grievant established a prima facie case of retaliatory discharge, however, Respondent provided credible evidence of legitimate nondiscriminatory reasons for its actions and Grievant did not demonstrate those reasons were merely pretextual. Accordingly, the grievance is denied.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: Volunteer Club Sponsorship; Due Process; Arbitrary and Capricious

CASE STYLE: Totten v. Mingo County Board of Education

DOCKET NO. 2018-0777-MinED (7/30/2018)

PRIMARY ISSUES: Whether Grievant established that Respondent's action(s) were unlawful.

SUMMARY: Grievant, a classroom teacher, filed a grievance after she was removed from an unpaid volunteer position of faculty sponsor of the school's BETA club by the school principal. BETA club is extra-curricular activity for students. Grievant avers she was improperly removed as a faculty sponsor of Mingo Central High School BETA club without notice and cause for insufficient allegations. Mingo County Board of Education, Respondent, maintains a school principal is empowered with the authority to make decisions and operate the daily operations of their respective schools. Accordingly, the instant principal is empowered to determine who will be allowed to volunteer/serve as a club sponsor.

For a quality teacher, the working environment and job satisfaction is more than the brick and mortar of the school house and the compensation received. By a preponderance of the evidence the instant Grievant has persuasively established she was chastened without opportunity to correct or alter debatable conduct. A principal's authority is not omnipotent, discretion must be exercised reasonably. The action(s) of the instant Principal are controversial; however, it cannot be found that the Principal's action with regard to Grievant is unlawfully abuse of discretion. Grievance Denied.

KEYWORDS: Reduction in Force; Selection; Transfer; Vacant Position Prior Discipline

CASE STYLE: Smith v. Wayne County Board of Education

DOCKET NO. 2017-2180-WayED (7/30/2018)

PRIMARY ISSUES: Whether Grievant proved by a preponderance of the evidence that he was entitled to be transferred.

SUMMARY: Grievant was laid off from his position as an assistant principal because that position was abolished, and he had insufficient seniority to bump any other assistant principal. Grievant argues that he should have been transferred directly to a vacancy which opened to an assistant principal position at another school in the county or in the alternative, based upon his qualifications, he should have been selected for that position when it was posted. Respondent proved that it was required to post the vacant position rather than transfer Grievant directly into it. Respondent also proved that it followed the statutory requirements in filling the vacant position with a different applicant.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Untimely Filed; Level One; Statutory Time Lines

CASE STYLE: Magers v. Marshall County Board of Education
DOCKET NO. 2017-2139-MarED (7/3/2018)

PRIMARY ISSUES: Whether this grievance was timely filed at level one.

SUMMARY: The record of this matter demonstrates by a preponderance of the evidence that Grievant failed to file a grievance within fifteen days following the occurrence of the event upon which the grievance is based. Accordingly, this grievance is dismissed as untimely.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Classification; Reallocation; Position Description Form; Job Duties; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Woodford v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital and Division of Personnel</u> DOCKET NO. 2018-0141-DHHR (7/18/2018)
<u>PRIMARY ISSUES:</u>	Whether Grievant established that the Division of Personnel abused its discretion in not seeking the creation of a Medical Transcriptionist classification.
<u>SUMMARY:</u>	Grievant, holding the classification of Data Entry Operator 2, argues she should be classified as a Medical Transcriptionist, because there is no such classification, she contends that the Division of Personnel should create such classification. She argues in the alternative that she be classified as a Medical Records Assistant. Respondents argue that the standard of review is one of abuse of discretion and the discretion of whether to create a certain classification is broad. In addition, Grievant has not shown by a preponderance of the evidence that her duties and responsibilities fall more closely within the Medical Records Assistant classification than the Data Entry Operator 2. For reasons more fully set out below, this grievance is denied.

KEYWORDS: Motion to Dismiss; Timelines; Laches; Selection; Qualified; Due Consideration; Vacancies; Arbitrary and Capricious; Repost; Flawed; Application; Lost; Diligence

CASE STYLE: Harper v. Division of Corrections/Mount Olive Correctional Complex
DOCKET NO. 2018-0457-MAPS (7/24/2018)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence that this matter was untimely filed or barred by the doctrine of laches. Whether Grievant proved by a preponderance of the evidence that the selection process used by Respondent to fill the position at issue was flawed. Whether Grievant proved by a preponderance of the evidence that he was entitled to the position at issue or a pay raise.

SUMMARY: At the times relevant herein, Grievant was employed by Respondent as a Case Manager. Grievant properly applied for a Corrections Program Specialist Senior position that had been posted. Respondent lost Grievant's application, resulting in its failure to consider him for the position and he was not granted an interview. Respondent argues that this matter was untimely filed and is barred by the doctrine of laches. Grievant denies these claims. Grievant argues that Respondent violated provisions of the Administrative Rule and policies by failing to consider his application for the position. Respondent denied Grievant's claims. This grievance was timely filed and is not barred by the doctrine of laches. Grievant proved his claims by a preponderance of the evidence. Grievant did not prove that he was the most qualified candidate for the position, or that he was entitled to a pay increase. Accordingly, the grievance is GRANTED IN PART and DENIED IN PART.

KEYWORDS: Motion to Dismiss; Relief; Moot

CASE STYLE: Cunningham v. Division of Motor Vehicles and Cecil Lloyd, Intervenor
DOCKET NO. 2018-0642-DOT (7/25/2018)

PRIMARY ISSUES: Whether Respondent has proven the grievance is moot and must be dismissed due to Grievant's termination from employment.

SUMMARY: Grievant was employed by Respondent as a Customer Service Representative. Grievant protests her non-selection for the position of Transportation Systems Director II. Respondent moved to dismiss the grievance as moot due to Grievant's termination from employment. Respondent has proven the grievance is moot and must be dismissed due to Grievant's termination from employment. Accordingly, the grievance is dismissed.

KEYWORDS: Termination; Insubordination; Retaliation; Reasonable Accommodation; Arbitrary and Capricious

CASE STYLE: B. v. Department of Health and Human Resources/Bureau for Child Support Enforcement
DOCKET NO. 2018-0632-CONS (7/20/2018)

PRIMARY ISSUES: Whether Respondent proved it was justified in suspending and then terminating Grievant's employment for insubordination.

SUMMARY: Grievant was employed by Respondent as a Child Support Specialist 2 within the Kanawha County office of the Bureau for Child Support Enforcement. The Kanawha County office is divided into separate units, and Respondent moved Grievant from the enforcement unit to the customer service unit, both of which are staffed by Child Support Specialists. Grievant continuously refused to be moved, stating that she could not answer telephones due to her generalized anxiety disorder. Grievant failed to present appropriate medical documentation that she could not answer telephones or that she was entitled to a reasonable accommodation. Respondent issued a verbal and then written reprimand, suspended Grievant for five days, and then terminated Grievant's employment, all for insubordination. Grievant filed five grievances that were consolidated into the instant grievance protesting the following: involuntary transfer, attendance improvement plan, written reprimand, suspension, and termination. Grievant alleged Respondent's actions were unreasonable and retaliatory. Respondent proved it was justified in suspending and then termination Grievant's employment for insubordination. Grievant made a prima facie case of retaliation, but Respondent rebutted the presumption and Grievant failed to prove Respondent's stated reasons for terminating Grievant were pretextual. Grievant failed to prove she was denied representation during the predetermination conference for her termination. The remaining issues presented are moot. Accordingly, the grievance is denied.

KEYWORDS: Suspension; Breach of Security; Improper Cuffing; Failing to Report; Misconduct; Progressive Discipline; Discrimination

CASE STYLE: Lilly, et al. v. Division of Corrections/Mount Olive Correctional Complex

DOCKET NO. 2018-0959-CONS (7/11/2018)

PRIMARY ISSUES: Whether Grievants proved that they were subjected to discrimination.

SUMMARY: Each Grievant received a three-day suspension without pay for failing to follow proper procedures in escorting inmates and failing to report improper conduct by fellow officers. Grievants argue that they were charged with misconduct they did not commit, and they were subjected to discrimination because not all officers involved in the incidents received the same discipline. Respondent did not prove all the allegations of misconduct with which all Grievants were charged. However, Respondent proved that each Grievant was guilty of sufficient misconduct to support the penalty given. Not all officers received the same discipline but Grievants did not prove they were similarly situated with the officers who received different penalties.

KEYWORDS: Salary; Job Duties; Classification; Discrimination; Equal Pay for Equal Work

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

DOCKET NO. 2017-2082-DHHR (7/6/2018)

PRIMARY ISSUES: Whether Grievant proved that she is entitled to be paid the same salary as a coworker. Whether Respondent discriminated against Grievant.

SUMMARY: Grievant is employed by Respondent in a Social Service Worker 2 position in the Adult Protective Service Unit. Grievant and coworker perform the same job duties in the same job classification. Yet Respondent pays Grievant's coworker more than Grievant. Grievant filed a grievance against Respondent which alleges that Respondent is discriminating against Grievant by paying coworker more than Grievant and that Grievant is entitled to equal pay for equal work in conjunction with the Administrative Rule of the West Virginia Division of Personnel, W.Va. Code St. R. §143-1-5.1. However, Grievant did not prove by a preponderance of the evidence either that she was entitled to be paid the same salary as her coworker or that Respondent had discriminated against her. Therefore, the grievance is denied.

KEYWORDS: Motion to Dismiss; Salary Increases; Harley; Lack of Jurisdiction

CASE STYLE: Davis, et al. v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital
DOCKET NO. 2018-0435-CONS (7/10/2018)

PRIMARY ISSUES: Whether the Grievance Board has jurisdiction to hear this matter.

SUMMARY: Grievants contest their exclusion from pay increases received by other employees of Respondent at Mildred Mitchell-Bateman Hospital with whom they feel they are similarly situated. These pay increases were received either due to the enactment of a particular statute or under a Circuit Court settlement agreement and Order in an ongoing lawsuit. The statute specifically exempts the implementation of its pay increase from the grievance process. The Grievance Board lacks jurisdiction to enforce a Circuit Court settlement agreement or Order. Accordingly, Respondent's Motion to Dismiss is GRANTED.