

# **WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

## **SYNOPSIS REPORT**

### **Decisions Issued in July, 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](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

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<b><u>KEYWORDS:</u></b>	Termination; Dismissal; Whistle-Blower; At-will; Performance; Substantial Public Policy; Wrongdoing; Evaluation; Retaliate; Discharge; Report; Protected Activity
<b><u>CASE STYLE:</u></b>	<u>Alladin v. Department of Education</u> DOCKET NO. 2019-0545-DOE (7/19/2019)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant proved by a preponderance of the evidence that she was dismissed in violation of substantial public policy.
<b><u>SUMMARY:</u></b>	Grievant, an at-will employee, was dismissed from her position with Respondent on October 23, 2018. Grievant asserts that her dismissal was improper as it violated West Virginia Code § 6C-1-1, et seq., The Whistle-Blower Law. Respondent denies Grievant's claims, and argues that Grievant's dismissal was lawful. Grievant failed to meet her burden of proving her claims by a preponderance of the evidence. Accordingly, the grievance is DENIED.

**TOPICAL INDEX**  
**HIGHER EDUCATION EMPLOYEES**

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<b><u>KEYWORDS:</u></b>	Contract; Non-Renewal; Retaliatory Discharge; Public Policy; Retaliation; FMLA
<b><u>CASE STYLE:</u></b>	<u>Massoud v. West Virginia University</u>  DOCKET NO. 2018-1348-CONS (7/30/2019)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant proves that he had acquired a property right in his continued employment beyond the expiration of his employment contract.
<b><u>SUMMARY:</u></b>	Grievant was employed through an annual contract as an Assistant Professor with WVU. Grievant's employment with WVU included an additional role as Medical Director of Sharpe Hospital. WVU did not renew Grievant's contract. Grievant contends that he is entitled to be reinstated because his non-renewal was motivated by discrimination and retaliation, and because he was functionally demoted for the remainder of his term. Grievant further contends that Respondent violated FMLA in the manner it implemented his non-renewal. Grievant claims WVU was obligated to provide cause for non-renewal. Grievant did not prove that he had a property interest in continued employment. Therefore, any consideration of Grievant's lack of cause and functional demotion arguments are moot. Grievant also did not prove his claims of discrimination, retaliation, and FMLA violations. Accordingly, this grievance is Denied.

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**COUNTY BOARDS OF EDUCATION**  
**PROFESSIONAL PERSONNEL**

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<b><u>KEYWORDS:</u></b>	Motion to Dismiss; Professional Teaching Certificates; Lack of Standing; Remedy; Moot
<b><u>CASE STYLE:</u></b>	<u>Burch v. Roane County Board of Education</u>  DOCKET NO. 2019-0862-RoaED (7/12/2019)
<b><u>PRIMARY ISSUES:</u></b>	Whether the remedy requested is wholly unavailable and moot.
<b><u>SUMMARY:</u></b>	Grievant was employed by Respondent Roane County Board of Education as a teacher. Grievant protests the termination of his employment. Respondent moved to dismiss asserting the grievance should be dismissed for lack of standing and mootness as Grievant's teaching certificates had been suspended by the State Board of Education. Grievant admits his teaching certificates have been suspended for other misconduct but disputes the allegations of misconduct that were the subject of this grievance. The remedy requested, to be reinstated to his teaching position, is wholly unavailable and moot as Grievant no longer possesses the required teaching certificates. Accordingly, the grievance is dismissed.

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<b><u>KEYWORDS:</u></b>	Salary; Compensation; Uniformity Provision; Job Responsibilities; Similar Employees; Arbitrary and Capricious
<b><u>CASE STYLE:</u></b>	<u>Myers v. Lewis County Board of Education</u>  DOCKET NO. 2018-0972-LewED (7/2/2019)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant's position is comparable to other positions in the county for uniformity of salary purposes.
<b><u>SUMMARY:</u></b>	Grievant asserts that he was performing like assignments and duties as other central office employees with respect to the salary supplement given to his position. Grievant argues that the past failure of Respondent to provide him with a larger salary supplement violates uniformity provisions. Respondent demonstrated that other central office administrators and Grievant do not perform like assignments and duties. This grievance is denied.

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**COUNTY BOARDS OF EDUCATION**  
**SERVICE PERSONNEL**

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<b><u>KEYWORDS:</u></b>	Selection; Qualifications; Arbitrary and Capricious
<b><u>CASE STYLE:</u></b>	<u>Dempsey v. Kanawha County Board of Education</u> DOCKET NO. 2018-1184-KanED (7/17/2019)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant proved that the selection decision was arbitrary and capricious.
<b><u>SUMMARY:</u></b>	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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<b><u>KEYWORDS:</u></b>	Classification; Paraprofessional; Compensation
<b><u>CASE STYLE:</u></b>	<u>Hess v. Berkeley County Board of Education</u> DOCKET NO. 2019-0394-BerED (7/19/2019)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant established that she is entitled to any more compensation than she already receives in her current position as a Supervisory Special Education Aide IV.
<b><u>SUMMARY:</u></b>	Grievant is currently employed by Respondent as a Supervisory Special Education Bus Aide IV. Grievant contends that once she obtained the necessary education and certification to be a paraprofessional, she became entitled to paraprofessional compensation, so long as she works in any aide position and regardless of her actual duties. The record of this case, and the applicable law, did not support such a conclusion. The record of this case failed to demonstrate that Grievant is performing paraprofessional duties. Grievant also failed to prove that she was entitled to any more compensation than she currently receives in her current position.

**KEYWORDS:**

Selection; Qualifications; Seniority; Competency Test; Posting; Arbitrary and Capricious

**CASE STYLE:**

Slusher v. Jefferson County Board of Education

DOCKET NO. 2018-1480-CONS (7/16/2019)

**PRIMARY ISSUES:**

Whether Grievant proved that Respondent was obligated to offer her the Clerk competency test for the Clerk/Clerk-Aide vacancy, or that its selection decision was otherwise improper.

**SUMMARY:**

Grievant is regularly employed by Respondent under the Secretary classification title as regular service personnel. Respondent posted a vacancy under the Clerk/Clerk-Aide multi-classification title. Grievant applied but was not considered. In order to be considered, applicants were required to hold or have held the multi-classification title or be qualified for each of the component classification titles. None of the regular service personnel ever held the multi-classification title. Respondent therefore only considered regular service personnel applicants who were qualified for both the Clerk classification and the Aide classification, allowing applicants to be qualified if they either held the title or met the definition of the job title via a competency test. Grievant had previously held the Aide classification title as a regular service personnel but was not qualified for the Clerk classification, having never held the clerk classification or passed the Clerk competency test.

Only 10 of the 37 applicants were regular service personnel. None of the 10 ever held the Clerk classification title. Six of the ten held the Aide classification title. Five of those had previously passed the Clerk competency test. Respondent only considered these five applicants for the vacancy. Respondent did not offer the competency test to Grievant or any of the remaining applicants prior to closing the job posting. Respondent prioritized seniority for the five candidates using their Aide classification. Intervenor Wills was the second most senior of these five. When the senior-most declined the position, it was awarded to Intervenor Wills.

Grievant contends that Respondent was obligated to offer a Clerk competency test to all ten regular service personnel applicants, because none of them ever held the Clerk or multiclassification titles, and only five had passed the Clerk competency test, some as substitute service personnel. Grievant argues that no one with less seniority should have been ranked higher than her for the job posting. Respondent counters that it had no obligation to offer the Clerk competency test, as five regular service personnel applicants had already taken and passed the same and were, therefore, qualified. Respondent further contends that, since Grievant was not qualified for the multiclassification position, her seniority did not matter. Grievant did not prove that applicants could only qualify as

Clerk by first holding the title, that Respondent was required to offer the remaining applicants the Clerk competency test just because some passed it as substitute service personnel, or that ranking multiclassification position applicants using only Aide seniority was arbitrary and capricious. Accordingly, the grievance is DENIED.

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**STATE EMPLOYEES**

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<b><u>KEYWORDS:</u></b>	Pay; Salary; Discrimination; Equal Pay for Equal Work; Arbitrary and Capricious
<b><u>CASE STYLE:</u></b>	<u>Denton v. Department of Health and Human Resources/Welch Community Hospital</u> DOCKET NO. 2018-1174-DHHR (7/22/2019)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant proved that the decision to not seek a merit-based salary advancement for Grievant was arbitrary or capricious.
<b><u>SUMMARY:</u></b>	Grievant is being paid a lower wage than other employees in her classification who were hired after her. She argues that paying these less experienced employees a higher wage is discriminatory as well as arbitrary and capricious. All the employees in Grievant's classification are being paid in the appropriate Pay Grade for the cook classification. The West Virginia Supreme Court of Appeals has held that an Agency is only required to pay employees in the same classification within the wage range established in the Pay Grade for that classification, which the respondent is doing in this instance.



**KEYWORDS:** Selection; Intervenor Appeal; Hiring Process; Tangible Work Experience; Qualifications; Arbitrary and Capricious

**CASE STYLE:** Hartman, et al. v. Division of Highways  
DOCKET NO. 2018-1141-CONS (7/30/2019)

**PRIMARY ISSUES:** Whether Intervenor proved that there was no flaw in the selection process and that it was not arbitrary and capricious.

**SUMMARY:** Grievant and Intervenor applied for a Transportation Worker 3 Equipment Operator position with Respondent, Division of Highways. Respondent selected Intervenor over four certified backhoe operators, due to his skill as an equipment operator. Grievant argues that Respondent should have selected a candidate who was certified as a backhoe operator. Grievant further contends that Intervenor should not have been credited with any equipment operating experience he gained as a minor. The level one evaluator granted the grievance in part, but directed Respondent to repost the position and select the most qualified candidate based on a fair comparison of experience in compliance with all procedures and policies. Intervenor appealed, arguing that Respondent did nothing improper in considering the expertise Intervenor gained while operating equipment as a child on his family farm and ranking him above certified candidates, because he was clearly the best equipment operator. Intervenor proved that Respondent did not act arbitrarily and capriciously in selecting him over certified candidates and crediting him with expertise gained as a minor. Accordingly, Intervenor's appeal is GRANTED.

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**KEYWORDS:** Selection Process; Qualifications; Arbitrary and Capricious

**CASE STYLE:** Hopson v. Department of Environmental Protection/Division of Mining and Reclamation  
DOCKET NO. 2017-1709-DEP (7/19/2019)

**PRIMARY ISSUES:** Whether Grievant proved any legal insufficiency in the selection process or that the selection decision was arbitrary and capricious.

**SUMMARY:** Grievant is employed by Respondent as an Environmental Inspector in the Division of Mining and Reclamation. Grievant applied for and was not selected for an Environmental Inspector position in Hazardous Waste Unit of the Office of Environmental Enforcement within the Division of Water and Waste Management. Grievant failed to prove any legal insufficiency in the selection process or that the selection decision was arbitrary and capricious. Accordingly, the grievance is denied.

**KEYWORDS:**

Motion to Dismiss; Travel Expenses; Moot; Remedy

**CASE STYLE:**

Patterson v. Department of Health and Human Resources/Office of the Inspector General

DOCKET NO. 2019-0408-DHHR (7/22/2019)

**PRIMARY ISSUES:**

Whether this grievance is moot.

**SUMMARY:**

Grievant seeks payment for travel expenses which have not be paid for more than thirty days after he submitted them for reimbursement. He also seeks that all travel expense requests to be entered in the VISTA system operated by the State Auditor's office within three days of submission so that Grievant can track the payments. Respondent repaid all amounts owed to Grievant for travel expenses by the day after the filing of the grievance and has no control of the operation of VISTA posting times controlled by the Auditor's office. Accordingly, there is no remaining remedy which can be granted, and this grievance must be dismissed as moot.