

**WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**SYNOPSIS REPORT**

**Decisions Issued in July 2022**

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.

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

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**KEYWORDS:** Termination; Employee Code of Conduct; Consuming Alcohol on School Property; Arbitrary and Capricious; Mitigation

**CASE STYLE:** Jordan v. Lincoln County Board of Education  
DOCKET NO. 2022-0059-LinED (7/6/2022)

**PRIMARY ISSUES:** Whether Respondent had good cause to terminate Grievance employment.

**SUMMARY:** Grievant was employed by Lincoln County School Board, Respondent as a Teacher. Respondent disciplined Grievant for self-acknowledged conduct of bringing moonshine on school property, consuming alcohol on school property, and giving another employee moonshine on school property. Respondent terminated Grievant's position for violations of the employee code of conduct and West Virginia Code §18a-2-8. Grievance DENIED.

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**KEYWORDS:** COVID-19 Jobs Protection Act; Jurisdiction; Sick Leave

**CASE STYLE:** Stout, II v. Harrison County Board of Education  
DOCKET NO. 2021-2515-HarED (7/26/2022)

**PRIMARY ISSUES:** Whether the Grievance Board has jurisdiction in this matter.

**SUMMARY:** Grievant is employed by the Harrison County Board of Education as a cook/cafeteria manager. Respondent provides its employees with an incentive program in which employees receive bonus pay if they use less than five days of leave per school year. Grievant argues that he should not have had his incentive pay deducted for five sick days he used during a COVID-19 quarantine. Respondent counters that it was following health department directives in requiring a quarantine period when an employee was exposed to the virus. Respondent acknowledged that, at the beginning of the pandemic, federal funding made it possible to not count absences of employees against their accrued leave. When federal funds were no longer provided, employees used sick leave when exposed to COVID-19 in personal exposure situations. While lack of jurisdiction was not raised by the parties, the undersigned may take notice of lack of jurisdiction on its own motion. The West Virginia Legislature passed the COVID-19 Jobs Protection Act and removed jurisdiction from the Grievance Board to hear claims arising out of facts related to the Covid-19 pandemic. Grievant's claim has clearly arisen out of the COVID-19 pandemic and the legislature has removed such cases from the Grievance Board's jurisdiction.

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

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<b><u>KEYWORDS:</u></b>	Involuntary Transfer; Retaliation; Representation; Statutory Rights
<b><u>CASE STYLE:</u></b>	<u>Peters v. Division of Natural Resources</u> DOCKET NO. 2021-2381-CONS (7/26/2022)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent's action of transferring Grievant's location of employment is an act of retaliation. Whether Respondent's exclusion of Grievant's representative from a transfer meeting was in violation of Grievant's statutory rights under W.Va. Code § 6C-2-3(g)(1).
<b><u>SUMMARY:</u></b>	<p>Grievant is employed by Respondent as a Park Superintendent. Grievant alleges his transfer from Cabwaylingo State Forest to Kumbrabow State Forest was retaliatory and takes issue with his representative not being allowed to attend the meeting where he was advised of the transfer. The label given the meeting does not matter, if the topic of the meeting is conduct of the employee that could lead to discipline, the employee has a statutory right to have a representative present, if requested. Grievant provided notice and arranged for representation.</p> <p>Grievant did not present any evidence relating to his claim of retaliatory scheduling or retaliatory 2020 EPA-3. Facts, law, circumstances, and intent are critical factors, their interaction and application are demonstrative to the instant matter. Respondent had the authority to transfer Grievant. NEVERTHELESS, it is established that Grievant's involuntary transfer from Cabwaylingo State Forest to Kumbrabow State Forest was disciplinary in nature, or at the very least, that the topic of the May 7, 2021 meeting "could lead to discipline." Respondent's exclusion of Grievant's representative from the May 7, 2021, meeting was in violation of Grievant's statutory rights under W.Va. Code § 6C-2-3(g)(1). Accordingly, this grievance is Granted.</p>

**KEYWORDS:** Termination; Leave; Return to Work; Permanent Disability; Federal Family and Medical Leave Act; Arbitrary and Capricious

**CASE STYLE:** Nicely v. Division of Forestry

DOCKET NO. 2022-0362-DOC (7/25/2022)

**PRIMARY ISSUES:** Whether Respondent established by a preponderance of the evidence proper justification for the termination of Grievant's employment.

**SUMMARY:** Grievant was an Office Assistant III. Her last day at work was June 15, 2021, when she left in an ambulance following a medical event at work. Grievant was thereafter on leave. On September 20, 2021, Respondent received a medical submission from Grievant, which advised that Grievant was unable to return to work due to a permanent disability. After Grievant had used and exhausted all leave entitlement under the Family and Medical Leave Act and had no further accrued sick or annual leave, Respondent terminated Grievant's employment. Grievant is admittedly not capable of returning to work, does want to return to work, and is currently seeking long-term disability. Respondent establishes by a preponderance of the evidence proper justification for the termination of Grievant's employment. Accordingly, the grievance is denied.

**KEYWORDS:** Termination; Suspension; Annual Leave; Inappropriate Relationship With Former Patient; Misconduct; Policy; Harassment; Retaliation

**CASE STYLE:** Jenkins v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital

DOCKET NO. 2020-0896-CONS (7/20/2022)

**PRIMARY ISSUES:** Whether Respondent was justified in terminating Grievant's employment for her inappropriate relationship with a former patient and for breaching patient confidentiality and privacy.

**SUMMARY:** Grievant was employed by Respondent at Mildred Mitchell-Bateman Hospital as a Social Worker III. Grievant's employment was terminated for violation of Respondent's policies regarding relationships with patients and patient confidentiality and privacy. Respondent proved Grievant's relationship with her former patient violated Respondent's policy. Respondent proved Grievant violated its policy regarding patient confidentiality and privacy. Grievant failed to prove the termination of her employment was discriminatory or retaliatory. Grievant proved she was entitled to back pay for the period of time between the initial suspension for an unsubstantiated allegation and the second suspension for the allegation for which she was eventually discharged. Accordingly, the grievance is granted, in part, and denied, in part.

**KEYWORDS:** Selection; Minimum Qualifications; Promotion; Class Specification; Arbitrary and Capricious

**CASE STYLE:** Abner v. Department of Homeland Security/Bureau of Prisons and Jails AND Division of Personnel

DOCKET NO. 2022-0183-DHS (7/26/2022)

**PRIMARY ISSUES:** Whether Grievant demonstrated that the determination by the Division of Personnel that his Correctional Officer 2 experience was not qualifying professional experience was arbitrary and capricious.

**SUMMARY:** Grievant is employed by the Department of Homeland Security in a position classified as a Correctional Officer 3. Grievant seeks to have his work experience as a Correctional Officer 2 count toward meeting the established minimum qualifications of the Corrections Hearing Officer class specification in order for him to be eligible for a promotion. The Division of Personnel determined that Grievant failed to meet the minimum qualifications of the position as set forth in the class specification for the Corrections Hearing Officer. After consultation with, and agreement of, the Department of Homeland Security, the Division of Personnel was advised to reject the personnel transaction for the promotion. The record supported a finding that the interpretation of the minimum requirements and the determination that Grievant lacked the necessary qualifications was reasonable and Grievant was unable to demonstrate that the work of positions assigned to the classification of Correctional Officer 2 met the definition of professional. Grievant was also unable to demonstrate that the Division of Personnel's interpretation of the definition of professional, as applied to the State's Classification Plan, was arbitrary and capricious.

**KEYWORDS:** Motion to Dismiss; Jurisdiction; COVID-19 Jobs Protection Act

**CASE STYLE:** Willis v. Department of Veterans Assistance  
DOCKET NO. 2021-2085-DVA (7/6/2022)

**PRIMARY ISSUES:** Whether the Grievance Board has jurisdiction in this matter.

**SUMMARY:** Grievant is employed as a registered nurse by Respondent, Department of Veterans Affairs, at the West Virginia Veterans Nursing Facility. Respondent uses a combination of its own employees and those of outside staffing agencies to staff the facility. During the COVID-19 pandemic, Respondent avoided COVID-19 staffing shortages by providing COVID-19 hazard pay to outside staffing agencies but not to its own employees. Grievant claims that equity entitles her to COVID-19 hazard pay. The COVID-19 Jobs Protection Act protects certain employers, including State entities, from litigation related to COVID-19. As this matter relates to COVID-19, it must be DISMISSED for lack of jurisdiction.

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**KEYWORDS:** Termination; Probationary Employee; Drug Test; Refusal to Test; Drug and Alcohol Testing Policy; Arbitrary and Capricious

**CASE STYLE:** Wiggins v. Division of Highways  
DOCKET NO. 2022-0212-DOT (7/7/2022)

**PRIMARY ISSUES:** Whether Respondent's decision to dismiss Grievant from his probationary employment was arbitrary and capricious, or otherwise unreasonable.

**SUMMARY:** Grievant was employed as a probationary employee by Respondent as a Transportation Worker (TW). Respondent dismissed Grievant for "refusal to test" after he was unable to produce enough urine for a drug test. Grievant argued that Respondent failed to follow its drug testing policy in that Respondent failed to refer him to a physician to determine if he had a medical condition preventing him from producing an adequate sample, and that, as such, he should not have been dismissed from employment. While Respondent violated a provision in its Drug and Alcohol Testing Policy, Respondent cured the same by offering Grievant additional time to submit documentation and informing him that upon receipt, Respondent would re-evaluate Grievant's employment status. Respondent proved by a preponderance that Grievant failure to produce enough urine for the drug test constituted a refusal to test thereby justifying his dismissal as a probationary employee. Therefore, the grievance is DENIED.



**KEYWORDS:** Salary Increase; Reallocation; Back Pay

**CASE STYLE:** Onukwugha v. Department of Health and Human Resources/Bureau for Children and Families AND Division of Personnel  
DOCKET NO. 2022-0089-DHHR (7/14/2022)

**PRIMARY ISSUES:** Whether Grievant proved he is entitled to back pay.

**SUMMARY:** Grievant is currently employed by Respondent as a Child Protective Services Worker. Grievant was initially employed as a Child Protective Services Worker Trainee. Grievant asserts Respondent failed to timely process his salary increase when his position was reallocated from Child Protective Services Worker Trainee to Child Protective Services Worker. Grievant asserts he is entitled to back pay from April 13, 2021, through July 31, 2021. Grievant proved that Respondent Department of Health and Human Resources failed to timely submit the initial request for reallocation to Respondent Division of Personnel, which entitles him to back pay from April 13, 2021, through June 30, 2021. However, Grievant failed to prove he is entitled to back pay for the month of July 2021. Accordingly, the grievance is granted, in part, and denied, in part.

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**KEYWORDS:** Suspension; Non-discriminatory Hostile Workplace Harassment; Harassing Behavior

**CASE STYLE:** Hamlin v. Division of Highways  
DOCKET NO. 2022-0203-DOT (7/6/2022)

**PRIMARY ISSUES:** Whether Respondent established by a preponderance of the evidence justification for disciplinary action.

**SUMMARY:** Respondent contends Grievant, employed as a Night Shift Supervisor Manager, has demonstrated poor and unwise behavior to the point of being in violation of “Non-discriminatory Hostile Workplace Harassment.” Grievant was given a one-day suspension and required to take additional supervisor training. This disciplinary measure occurred subsequent to two separate personnel incidents. Respondent and Grievant disagree upon the significance of events. Grievant contends his due process rights were violated and maintains he hasn’t done anything wrong. By a preponderance of the evidence, Respondent established prohibited workplace harassment conduct. Respondent highlighted that the behavior was unacceptable for a supervisor and cites progressive disciplinary action. This grievance is denied.

**KEYWORDS:** Termination; Probationary Employee; Physical Abuse Against a Patient; Verbal Abuse; Policy; Arbitrary and Capricious; Mitigation

**CASE STYLE:** Coleman v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital  
DOCKET NO. 2021-2426-CONS (7/7/2022)

**PRIMARY ISSUES:** Whether Respondent proved the charges against Grievant and whether termination of Grievant's probationary employment arbitrary and capricious.

**SUMMARY:** Grievant was employed by Respondent as a probationary Health Service Worker. Respondent terminated Grievant's probationary employment for patient abuse. Respondent proved Grievant committed physical abuse against a patient. Respondent failed to prove Grievant committed verbal abuse. Respondent's termination of Grievant's probationary employment for patient abuse was not arbitrary and capricious. Grievant failed to prove mitigation of the punishment is warranted. Accordingly, the grievance is denied.