

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in August, 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
HIGHER EDUCATION EMPLOYEES

KEYWORDS: Jurisdiction; Employee; Employer

CASE STYLE: Wiley v. Glenville State College

DOCKET NO. 2018-1467-GSC (8/27/2018)

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

SUMMARY: Grievant is an inmate at Huttonsville Correctional Center. Grievant filed this grievance against Glenville State College alleging that he had not been paid for work he performed as a Peer Tutor for Glenville State College. Inmates are expressly excluded from the grievance procedure by statute. The Grievance Board lacks jurisdiction in this matter. Accordingly, the grievance must be dismissed.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: Jurisdiction; Employee; Employer; Selection

CASE STYLE: Pritchard v. Putnam County Board of Education
DOCKET NO. 2018-1338-PutED (8/7/2018)

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

SUMMARY: Grievant filed the grievance against the Putnam County Board of Education. Grievant is not employed by the Putnam County Board of Education. The Grievance Board lacks jurisdiction in this matter. Accordingly, the grievance must be dismissed.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Motion to Dismiss; Untimely Filed; Timelines; Continuing Practice; Continuing Violation

CASE STYLE: Evans v. Berkeley County Board of Education
DOCKET NO. 2018-0587-BerED (8/1/2018)

PRIMARY ISSUES: Whether this grievance was timely filed.

SUMMARY: Grievant has been employed by Respondent as a bus operator since 2001. Grievant worked for the prior 15 years as a bus operator in Maryland. This grievance is premised on Respondent not crediting Grievant for any of her work experience in Maryland in calculating her pay. Respondent has a policy of crediting employees only for prior in-state experience. Grievant has known since she was hired that Respondent was not crediting her for her Maryland work experience. Respondent filed a motion to dismiss at level 1. Respondent proved by a preponderance of the evidence that the grievance was filed untimely. Grievant failed to prove that she had a proper basis to excuse her untimely filing. Accordingly, the grievance is dismissed.

KEYWORDS: Observations; Harassment; Hostile Work Environment; Supervisor/Employee Relationship; Arbitrary and Capricious

CASE STYLE: Tribbie v. Mason County Board of Education
DOCKET NO. 2018-0861-MasED (8/10/2018)

PRIMARY ISSUES: Whether Grievant provided that the written service person observations were improper.

SUMMARY: This grievance concerns “Service Personnel Observation” forms issued to Grievant by his supervisor, which documented workplace conduct of Grievant. Grievant contends that the observations are inaccurate, misleading, arbitrary and capricious. Grievant alleges his supervisor’s behavior constitutes harassment and created a hostile work environment. (W. Va. Code 6C-2-2 & 18A-2-12a).
The “Observation” are not recognized as disciplinary in nature. Observations of service personnel by his or her supervisor is not abnormal work behavior. Grievant failed to establish that the Observations as written were the result of some misinterpretation or misapplication of established policies or rules governing the county’s service personnel evaluation process. Grievant did not establish by a preponderance of the evidence that he was harassed and subject to a hostile work environment. This Grievance is DENIED.

KEYWORDS: Selection; Classification; Qualifications; Seniority; Accountant Classification Competency Test; Arbitrary and Capricious

CASE STYLE: Bishop v. Raleigh County Board of Education

DOCKET NO. 2017-2272-RaIED (8/28/2018)

PRIMARY ISSUES: Whether Grievant proved that Respondent's action of hiring Intervenor for the position at issue instead of her was unlawful or arbitrary and capricious.

SUMMARY: Grievant believes that she should have been selected for a multiclassified Secretary III/Accountant III position because she had passed the competency test for the Accountant classification and had more seniority than the successful applicant as a Secretary III. Respondent had reclassified the successful applicant's position to a multiclassified position because a significant portion of her duties were in the Accountant classification. Since Intervenor was working in the same multiclassification category as the vacant position she received statutory preference for filling the position. Accordingly, the grievance is denied.

KEYWORDS: Selection; Qualifications; Sign Support Specialist Classification; Substitute Employee; Arbitrary and Capricious

CASE STYLE: Bright v. Marion County Board of Education

DOCKET NO. 2018-0449-MrnED (8/24/2018)

PRIMARY ISSUES: Whether Grievant prove that Respondent acted in an arbitrary and capricious manner.

SUMMARY: Grievant, a substitute employee, alleged Respondent violated W. Va. Code §18A-4-8b in filling of Sign Language Specialist position with a new employee. Record established that when a position involves highly specialized skill and the relative skill level of the applicant so dramatically affects a special education student's ability to succeed academically, focusing on seniority to the exclusion of qualifications, not only is contrary to West Virginia's personnel laws, and also subjects Respondent to liability for violating federal special education laws. Grievant failed to prove by a preponderance of the evidence that Respondent acted in an arbitrary and capricious manner in hiring the successful applicant for the Sign Support Specialist position.

KEYWORDS: Salary; Uniformity in Compensation; Policy; Discrimination; Favoritism; Harm

CASE STYLE: Moffett v. Mason County Board of Education

DOCKET NO. 2018-0160-MasED (8/31/2018)

PRIMARY ISSUES: Whether the Grievant was uniformly compensated and whether Grievant proved that he was harmed by any discrimination and/or favoritism.

SUMMARY: Grievant is employed by Respondent as the Director of Maintenance. Grievant alleges that Respondent is exhibiting favoritism towards its Transportation Director and that it uses a more favorable compensation formula to determine that employee's salary, thereby treating Grievant unfairly. Grievant alleges that Respondent's compensation formula violates the uniformity provisions of W. Va. Code § 18A-4-5. Grievant has not proven that Respondent compensates its directors in a non-uniform manner or that he has suffered any harm as a result of Respondent's conduct. Therefore, this grievance is denied.

TOPICAL INDEX
STATE EMPLOYEES

KEYWORDS: Motion to Dismiss; Fail to Attend Hearing; Workplace Behavior

CASE STYLE: Blake v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital and Division of Personnel
DOCKET NO. 2018-0243-DHHR (8/9/2018)

PRIMARY ISSUES: Whether this grievance should be dismissed.

SUMMARY: Grievant was employed by the Department of Health and Human Resources as a Health Service Assistant. Grievant was demoted to a Health Service Worker without prejudice. Grievant is challenging what her job duties were as a Health Service Assistant before the demotion. Grievant failed to situate herself in a private area of the hospital in order to testify at the Level Three hearing and failed to make herself available to testify telephonically. Thereafter, counsel for Respondents moved to dismiss the case. Grievant's representative did not oppose the motion at the Level Three hearing. Respondents and the record of the case established by a preponderance of the evidence that the grievance should be dismissed.

KEYWORDS: Termination; Probationary Employee; Due Process; Arbitrary and Capricious

CASE STYLE: Bosley v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2018-0374-DHHR (8/2/2018)

PRIMARY ISSUES: Whether Respondent's termination of Grievant's employment was arbitrary and capricious.

SUMMARY: Grievant was employed at the William R. Sharpe, Jr. Hospital as a probationary Registered Nurse II. Grievant was dismissed following Respondent's determination that her performance was unsatisfactory, and she demonstrated unprofessional behavior towards co-workers. When a probationary employee is terminated for reasons other than discipline, it is her burden to prove her services were satisfactory. In the instant case, Grievant was not able to meet her burden of proof and demonstrate that her performance was satisfactory; however, the record did establish that Respondent violated its policy and applicable provisions regarding termination of probationary employees. Respondent's termination of Grievant's employment was arbitrary and capricious.

KEYWORDS: Pay; Training Period; Policy; Reallocation

CASE STYLE: Moore v. Department of Health and Human Resources/Bureau for Children and Families and Division of Personnel
DOCKET NO. 2017-2453-DHHR (8/3/2018)

PRIMARY ISSUES: Whether Grievant demonstrated that the delay in processing the necessary reallocation documentation to effectuate her pay increase violated any law, rule, regulation or policy.

SUMMARY: Grievant is currently employed by Respondent as an Adult Protective Service Worker. After Grievant completed a one-year training period as an Adult Protective Service Worker Trainee on May 15, 2017, DHHR did not begin paying her at the higher pay rate of an Adult Protective Service Worker until June 24, 2017. DHHR acted in accordance with a policy memorandum from the Division of Personnel, issued in 2015, which allows up to ninety (90) days to accomplish such transactions. Grievant failed to demonstrate that this delay in processing the necessary reallocation documentation to effectuate her pay increase violated any law, rule, regulation or policy applicable to her employment situation. Accordingly, this grievance will be denied.

KEYWORDS: Motion To Dismiss; Employee; Moot; Relief

CASE STYLE: Fox v. Division of Corrections/Huttonsville Correctional Center and Division of Personnel
DOCKET NO. 2018-0888-MAPS (8/21/2018)

PRIMARY ISSUES: Whether Respondent proved this grievance is moot due to Grievant's resignation.

SUMMARY: Respondent moved to dismiss this grievance, asserting mootness due to Grievant's resignation from employment with the Respondent. Respondent persuasively asserted that there is no basis for this Board to entertain a grievance about denial of consideration for a promotion at an agency for which Grievant no longer works. Grievant did not file a response. His wife did inform the Board by phone that Grievant is employed elsewhere and does not wish to pursue the grievance. Respondent established that the grievance is now moot in that Grievant resigned from employment with the agency. Accordingly, Respondent's motion to dismiss should be granted and this grievance dismissed.

KEYWORDS: Termination; DOP Drug-and Alcohol-Free Workplace Policy; Mitigate Damages; Back Pay

CASE STYLE: Justice v. Department of Environmental Protection
DOCKET NO. 2018-0362-DEP (8/17/2018)

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

SUMMARY: Based upon reasonable suspicion that Grievant was impaired at work, Respondent sent Grievant for drug and alcohol testing. Grievant was administered three tests related to blood alcohol content. Additionally, the lab techs were unable to draw blood from Grievant for the most accurate method of determining blood alcohol content. The tests produced contradictory results. Respondent terminated Grievant's employment for a violation of the Division of Personnel Drug- and Alcohol-Free Workplace Policy based solely upon a positive test result indicating Grievant had alcohol in her body while at work. Respondent did not prove by a preponderance of the evidence that Grievant had alcohol in her body while at work. The issue of mitigation of damages is also raised. While Respondent proved that Grievant failed to seek other employment to mitigate her damages, Respondent provided no evidence that such employment was available or what amount Grievant could have been paid had she exercised due diligence.

KEYWORDS: Discretionary Salary Increase; Back Pay; Equal Pay; Policy

CASE STYLE: Leggett, et al. v. Division of Corrections/Parole Services AND Division of Personnel
DOCKET NO. 2017-1210-CONS (8/22/2018)

PRIMARY ISSUES: Whether Grievants proved that Respondents are required to provide back pay for a discretionary salary increase.

SUMMARY: Grievants allege that the discretionary pay raise, they received on April 15, 2017, should have become effective on October 15, 2015, the day that a discretionary raise for new employees became effective. Grievants seek back pay for the period between the time the two raises became effective. Grievants provided no evidence, law, rule, regulation, or policy which requires Respondents to provide back pay to Grievants for a discretionary raise they received effective April 15, 2017.

KEYWORDS: Motion to Dismiss; Employee; Work Schedule; Relief; Moot

CASE STYLE: Perrine v. Department of Environmental Protection/Division of Mining and Reclamation
DOCKET NO. 2016-1706-DEP (8/21/2018)

PRIMARY ISSUES: Whether Respondent established that the instant grievance is moot due to Grievant's resignation.

SUMMARY: Respondent moved to dismiss this grievance asserting mootness due to Grievant's resignation from employment. Respondent persuasively averted that there is no basis for this Board to entertain a grievance about changes to Grievant's work schedule at an agency for which Grievant no longer works. Respondent established the grievance is now moot in that Grievant resigned from employment with the agency. Accordingly, Respondent's Motion to Dismiss is granted, and this grievance, dismissed.

KEYWORDS: Discretionary Pay Increase; Delay; Back Pay; Discrimination; Arbitrary and Capricious; Harassment; Processing; Wrongdoing; Discretionary Decisions; Vendetta; Hearsay; Substantiating Facts; Incompetence

CASE STYLE: Prince v. Division of Highways
DOCKET NO. 2018-0271-DOT (8/24/2018)

PRIMARY ISSUES: Whether Grievant proved by a preponderance of the evidence that the processing of her discretionary pay increase was delayed for ten months as a result of discrimination and harassment.

SUMMARY: Grievant was employed by Respondent as a Contract Development Manager. Grievant was submitted for a discretionary pay increase. However, Respondent's Human Resources Office took ten months to complete the processing of her pay increase so that she could start receiving the increased pay. The pay increase was implemented prospectively, and Grievant was denied back pay for the ten-month delay. Grievant alleged wrongdoing, including discrimination and harassment, against the former DOH Director of Human Resources. Respondent denied Grievant's claims, and asserted that while the processing took ten months, no laws, policies, or rules were violated by Respondent or its former director of Human Resources. Grievant failed to prove her claims by a preponderance of the evidence. Accordingly, this grievance is DENIED.

KEYWORDS: Termination; Discrimination; Harassment; Substance Abuse; Drug; Safety; Rehabilitation; Follow-Up Test; Dismissed; Refusal; SAP; Directly Observed; Return-to-Duty; Urine Sample

CASE STYLE: Smith v. Division of Highways

DOCKET NO. 2018-0993-DOT (8/21/2018)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence that Grievant refused a drug test thereby justifying its decision to terminate Grievant's employment. Whether Grievant proved his claims of discrimination and harassment by a preponderance of the evidence.

SUMMARY: Grievant was employed by Respondent as a Transportation Worker 3 (Bridge) After having tested positive for drugs on a required drug test, pursuant to the requirements of Respondent's policy, Grievant entered into a rehabilitation program. After he returned to duty Grievant was required to take eight follow-up drug tests over the next year. Grievant took and passed five valid drug tests. Grievant refused to cooperate with testing on his sixth test, and such was counted as a positive test. Respondent dismissed Grievant for his refusal to test and a second offense violation of the applicable drug and alcohol policies. Grievant denied refusing to test, argued that he was only required to take six tests which he had done, and raised claims of discrimination and harassment. Respondent proved by a preponderance of the evidence that Grievant refused to take a required drug test and that such is good cause for his dismissal. Grievant failed to prove his claims of discrimination and harassment. Accordingly, this grievance is DENIED.