

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SYNOPSIS REPORT

Decisions Issued in September 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.

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>	Work Location; Headquarters; Travel Reimbursement; Management Decision; Arbitrary and Capricious; Level One Decision; Respondent Appeal Rights
<u>CASE STYLE:</u>	<u>Pense v. Department of Education</u> DOCKET NO. 2017-1009-DOE (9/13/2017)
<u>PRIMARY ISSUES:</u>	Whether the decision to change Grievant's headquarters location to Charleston was arbitrary and capricious, or was made in violation of the ruling in a level one decision.
<u>SUMMARY:</u>	Grievant filed a grievance after his headquarters location was changed. That grievance was granted at level one, and the headquarters change was reversed. The decision stated that after a comprehensive review of the situation, "a final recommendation would be made to the State Superintendent of Schools, for his consideration and approval." Several months later the Deputy Superintendent of Schools and Grievant's supervisor made the decision to again change Grievant's headquarters location. While the State Superintendent was kept informed, no recommendation for this change was made to the State Superintendent for approval. Respondent was bound by the level one decision, and could change Grievant's headquarters location only in accordance with the directives of that decision. The decision to change Grievant's headquarters is void.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

<u>KEYWORDS:</u>	Pay; Planning Period; Compensation; Agreement
<u>CASE STYLE:</u>	<u>Allen v. Harrison County Board of Education</u> DOCKET NO. 2017-1779-HarED (9/18/2017)
<u>PRIMARY ISSUES:</u>	Whether Grievant was entitled to compensation for exchanging her planning period to teach a class on days she was absent.
<u>SUMMARY:</u>	Grievant agreed to give up her 90 minute planning period to teach a class, in exchange for additional compensation. The agreement Grievant signed stated she would be compensated in exchange for her planning period, and would be paid a set hourly rate to teach the course for a stated period of time during the fall semester. Grievant was not paid this hourly rate in exchange for her planning period on days she was absent on leave, but believed she was entitled to be compensated for these instructional periods because she had to prepare lesson plans. Grievant had not clarified this point prior to signing the agreement. The agreement Grievant signed is consistent with the statutory language which allows an employee to exchange her planning period for compensation. On days Grievant was absent, she had no planning period which she could exchange for compensation and was not entitled to any additional payment on those days.

KEYWORDS: Termination; Discrimination; First Amendment; Freedom of Speech; Social Media; Rational Nexus; Job Duties; Code of Conduct

CASE STYLE: Durstein v. Cabell County Board of Education

DOCKET NO. 2017-1955-CabED (9/22/2017)

PRIMARY ISSUES: Whether Respondent had good cause to terminate Grievant for activity on her own public social media account.

SUMMARY: Grievant, a social studies teacher, made several provocative posts on her public Twitter account which became the subject of significant notoriety when they were exposed by other Twitter users. Respondent determined that due to the nature of the posts, as well as their notoriety, it was not possible for Grievant to continue as an effective social studies teacher and terminated her employment. Grievant argued that Respondent contributed to the notoriety of her Twitter posts, that there was no rational nexus between the posts and Grievant's job duties, that the other employees were given less discipline for similar offenses and that Respondent was barred from dismissing Grievant because her posts were protected by the First Amendment. Respondent proved there was a rational nexus between Grievant's conduct away from work and her job duties, and that there was significant "untainted notoriety to support Grievant's dismissal. Additionally, Grievant was not similarly situated with the other employees she cited to prove discrimination. Respondent proved that the Grievant's activity was not entitled to free speech protections, and the employers interests in creating a safe, healthy, and unbiased learning environment outweighed Grievant's free speech interests.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

<u>KEYWORDS:</u>	Selection; Summer Position; Classification; Seniority
<u>CASE STYLE:</u>	<u>Adkins v. Wayne County Board of Education</u> DOCKET NO. 2016-1817-WayED (9/13/2017)
<u>PRIMARY ISSUES:</u>	Whether Grievant was entitled to be placed in the position based on his summer seniority.
<u>SUMMARY:</u>	Grievant is employed by Respondent as a Custodian. Grievant argued he should have been placed in a half-time summer custodian position in the summer of 2016, because it was a position that he held in the summer of 2013. The facts of this case do not meet the statutory requirement that an employee be given the option of retaining a job that they held during the previous summer. Respondent correctly returned the employee who held the position in the summer of 2015 to the position in the summer of 2016.

<u>KEYWORDS:</u>	Termination; Insubordination; Misconduct; Employee Code of Conduct
<u>CASE STYLE:</u>	<u>Ference v. Brooke County Board of Education</u> DOCKET NO. 2017-2282-BroED (9/25/2017)
<u>PRIMARY ISSUES:</u>	Whether Respondent proved that Grievant engaged in conduct constituting insubordination.
<u>SUMMARY:</u>	Grievant was employed by Respondent as a custodian at Wellsburg Middle School. The principal of Wellsburg Middle School made changes to Grievant's work assignments. Grievant was upset with the changes and confronted the principal to return him to his previous assignments. Subsequently, Grievant made comments to other custodians that if anyone gave him any more work to do, and he could not complete the work, he was going to get a gun and start taking people out as well as anyone related to them. The record established that Respondent proved that Grievant's credible threats of violence in the workplace constituted insubordination. Termination of Grievant's employment was an appropriate response by Respondent.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Suspension; Unsatisfactory Performance; Disciplinary History; Policy; Progressive Discipline; Mitigation
<u>CASE STYLE:</u>	<u>Oliver v. Division of Juvenile Services/Sam Perdue Juvenile Center</u> DOCKET NO. 2017-2055-MAPS (9/1/2017)
<u>PRIMARY ISSUES:</u>	Whether the sanction levied for acknowledged misconduct is lawful /proper.
<u>SUMMARY:</u>	Grievant grieves a five-day suspension he received after being found guilty of improper employee conduct and unnecessary use of force in two interactions with juvenile residents. Grievant's actions were a violation of agency policy and operational procedure. It was further established that Grievant had a history of prior discipline and unsatisfactory conduct. Respondent highlights the concept of progressive discipline and notes prior attempts to correct Grievant's workplace performance. Grievant did not establish that mitigation is warranted. Accordingly, the grievance is DENIED.

KEYWORDS: Termination; Insubordination; Misconduct; Bullying a Co-Worker; Facebook Comments; Employee Code of Conduct; Social Media Policy; Due Process Rights; Mitigation

CASE STYLE: Epling v. Regional Jail and Correctional Facility Authority/Southern Regional Jail
DOCKET NO. 2017-0954-MAPS (9/15/2017)

PRIMARY ISSUES: Whether Grievant's misconduct is enough to justify his dismissal from employment.

SUMMARY: Grievant was employed at Southern Regional Jail as a Correctional Officer IV with the rank of sergeant, and served as a supervisor. Grievant was dismissed from employment for violations of Respondent's code of conduct and social media policies, insubordination, and dishonesty in his predetermination conference. Grievant asserts that Respondent failed to prove the charges against Grievant as its witnesses were not credible, that Respondent's investigation was improper; that Grievant did not have a previous disciplinary history, that Grievant was not trained on the policy, that disciplinary action was not warranted under the policy; that Respondent failed to follow progressive discipline, that Respondent violated Grievant's due process rights, and that the disciplinary action was disproportional. Respondent proved it had good cause to dismiss Grievant from employment when, as a supervisor, he violated multiple policies, was insubordinate, and was dishonest and belligerent when confronted about his misconduct. Respondent proved there was a rational nexus between Grievant's employment and his social media conduct. Grievant's due process rights were not violated. Grievant failed to prove mitigation of the penalty was warranted. Accordingly, the grievance is denied.

KEYWORDS: Motion to Dismiss; Relief; Discipline; Advisory Opinion; Wholly Unavailable; Adverse Personnel Action

CASE STYLE: Easley, et al. v. General Services Division
DOCKET NO. 2017-1379-CONS (9/8/2017)

PRIMARY ISSUES: Whether the relief Grievants seek is available through the grievance procedure.

SUMMARY: The only relief Grievants seek in this matter is that Respondent impose additional, or more severe, discipline upon their supervisor for his misconduct. As the Grievance Board does not have the authority to order an agency to impose discipline on an employee, Grievants seek a remedy that is wholly unavailable through the grievance process, and a decision on the merits of the claim would only result in an advisory opinion. Thus, the Motion to Dismiss should be granted, and this grievance, DISMISSED.

KEYWORDS: Suspension; DHHR Policy Memorandum 2108; Misconduct; Conflict of Interest; Employee Confidentiality Statement; Arbitrary and Capricious; Unauthorized; Services; Discipline; Mitigation

CASE STYLE: Riddle v. Department of Health and Human Resources/Bureau for Children and Families
DOCKET NO. 2017-1358-DHHR (9/14/2017)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence that Grievant violated certain policies which justified her suspension.

SUMMARY: Grievant was employed by Respondent as an Economic Service Worker. Respondent charged Grievant with violating the DHHR Policy Memorandum 2108 "Employee Conduct" and the Employee Confidentiality Statement by taking certain actions to work in a friend's case. Respondent suspended Grievant for ten days without pay. Respondent proved by a preponderance of the evidence that Grievant violated DHHR Policy Memorandum 2108 "Employee Conduct" and the Employee Confidentiality Statement. As such, Respondent proved that Grievant's suspension was justified. Grievant failed to prove by a preponderance of the evidence that mitigation of the discipline imposed was warranted. Therefore, the grievance is DENIED.

KEYWORDS: Suspension; Resident Abuse/Neglect; Investigation; Motion to Dismiss; Relief; Moot; Advisory Opinion

CASE STYLE: Britton v. Department of Health and Human Resources/Hopemont Hospital
DOCKET NO. 2017-2321-DHHR (9/13/2017)

PRIMARY ISSUES: Whether there is any remedy to grant Grievant related to the suspension.

SUMMARY: Grievant, Debbie Britton, is employed by Respondent, Department of Health and Human Resources, at Hopemont Hospital. Respondent proved in its June 29, 2017, Motion to Dismiss that this grievance is moot, and Grievant has not offered any response to the Motion. Accordingly, this Grievance must be DISMISSED.

KEYWORDS: Pay Increase; Resigned; Hardship; Payment; WV OASIS; Agreement; Offset

CASE STYLE: Jones v. Parole Board
DOCKET NO. 2017-0880-MAPS (9/27/2017)

PRIMARY ISSUES: Whether Grievant proved her claims regarding her pay by a preponderance of the evidence.

SUMMARY: Grievant was employed by Respondent as an Executive Secretary. Grievant was approved for a 15 percent pay increase in July 2016, but the same was never implemented. Grievant resigned her position effective August 26, 2016. On that same day, Grievant filed this grievance seeking payment of the additional sum of money she would have been paid had the pay increase been implemented as approved. Respondent did not dispute that Grievant was owed the pay increase, but asserted that Grievant's calculation of the amount owed was incorrect. The parties do not dispute that Grievant received an additional \$1,200.00 pay check in September 2014 that Respondent failed to recoup when she left employment. Grievant failed to prove her claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

KEYWORDS: Motion to Dismiss; Relief; Remedy Wholly Unavailable

CASE STYLE: Jarrells v. Division of Highways
DOCKET NO. 2017-2163-DOT (9/29/2017)

PRIMARY ISSUES: Whether this grievance presents a claim upon which relief can be granted.

SUMMARY: Grievant seeks disciplinary action against other employees. It is well settled that the relief sought by Grievant is not within the authority of the undersigned to grant. Respondent has demonstrated that the relief requested cannot be granted based on the applicable law. Therefore, the grievance is dismissed.

KEYWORDS: Termination; Dismissal; Physical Abuse; Patient Abuse and Neglect
CASE STYLE: Snider v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital

DOCKET NO. 2017-1168-DHHR (9/18/2017)

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

SUMMARY: Grievant was employed as a Health Service Worker at the William R. Sharpe, Jr. Hospital, a state psychiatric facility. A patient grievance alleging physical abuse was filed against Mr. Snider in August 2016. Two co-workers reported that Grievant used a choke hold on a patient, and a doctor and nurse noted red marks on the patient's neck after the event. Grievant was reassigned pending an investigation. Subsequently, it was substantiated that physical abuse had occurred, and Mr. Snider was dismissed. Respondent established by a preponderance of the evidence that good cause existed to terminate the employment of Grievant.

KEYWORDS: Termination; Probationary Employee; Unsatisfactory Performance; Misconduct

CASE STYLE: Perry v. Department of Health and Human Resources/Bureau for Public Health

DOCKET NO. 2017-1077-DHHR (9/25/2017)

PRIMARY ISSUES: Whether Respondent proved the charges of misconduct against Grievant and whether Grievant proved her services as a probationary employee were satisfactory.

SUMMARY: Grievant was employed by Respondent as a probationary customer service representative in the Vital Registration Office of the Bureau of Public Health. Grievant was dismissed from her probationary employment for unsatisfactory performance and misconduct. Respondent proved the misconduct occurred. Grievant failed to prove her performance was satisfactory. Accordingly, the grievance is denied.

KEYWORDS: Termination; Probationary Employee; Misconduct; Employee Code of Conduct; Progressive Discipline; Arbitrary and Capricious

CASE STYLE: Conley v. Regional Jail and Correctional Facility
Authority/Southwestern Regional Jail

DOCKET NO. 2017-2142-MAPS (9/28/2017)

PRIMARY ISSUES: Whether Respondent's decision to terminate Grievant's probationary employment was arbitrary and capricious.

SUMMARY: Grievant was employed by Respondent as a probationary correctional officer at Southwestern Regional Jail. Grievant's probationary employment was terminated for Grievant's misconduct in violating multiple provisions of Respondent's Code of Conduct. Respondent proved the alleged misconduct occurred and its decision to terminate Grievant's probationary employment for the misconduct was not arbitrary and capricious. Accordingly, the grievance is denied.