WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

SYNOPSIS REPORT

Decisions Issued in September, 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

COUNTY BOARDS OF EDUCATION

PROFESSIONAL PERSONNEL

KEYWORDS: Substitute Teaching Jobs; Lost Wages; Policy; Discrimination; Arbitrary and Capricious; Retaliation

CASE STYLE: Menas v. Marion County Board of Education

DOCKET NO. 2018-1092-MrnED (9/7/2018)

PRIMARY ISSUES: Whether Respondent's actions were unreasonable, or arbitrary and capricious.

SUMMARY: Grievant is employed by Respondent as a substitute teacher. Grievant makes a claim regarding alleged lost opportunities to substitute teach. Grievant claims that this was the result of reprisal and discrimination. Record did not support a finding that Grievant was the victim of either reprisal or discrimination. A building principal has broad discretion in selecting substitute teachers to fill the positions of absent teachers. Without proof that this discretion has been exercised in an arbitrary and capricious manner, or on the basis of some recognized impermissible reason, a substitute teacher's claim for lost wages for not being selected to work as a substitute on any particular day is without merit. Further, Grievant seeks numerous forms of relief which, as a matter of law, are not available through the grievance process. Accordingly, this grievance is denied.

KEYWORDS: Selection; Extra-Curricular Position; Posting; Availability; Arbitrary and Capricious

CASE STYLE: Wroblewski v. Wayne County Board of Education

DOCKET NO. 2018-0464-WayED (9/13/2018)

PRIMARY ISSUES: Whether Grievant proved that Respondent's decision to start the ALC classes at 3:30 p.m. was unreasonable, arbitrary and capricious, or an abuse of its discretion.

SUMMARY: Grievant applied for two extra-curricular teaching positions in the Wayne County Alternative Learning Center. The classes start at 3:30 a.m. and run through 7:00 p.m. and are located at Wayne Middle School. Grievant demonstrated that he was qualified for the two position. Grievant's regular full-time teaching position is at Spring Valley High School. Due to the end time of his regular teaching schedule and the distance from Spring Valley High School to Wayne Middle School, it is not possible for Grievant to be at the Alternative Learning Center until 3:45 p.m. at best. Respondent did not consider Grievant for the posted position because he was not available to be present at the start of classes. Grievant argued unsuccessfully that it was arbitrary and capricious for Respondent to start the alternative program at a time when he and other potential applicants were not available to be considered for the positions.

KEYWORDS: Reduction in Force; RIF; Arbitrary and Capricious; Lack of Need; Vendetta; Terminated; Purge; Pretext; CTE

CASE STYLE: Fields v. Wayne County Board of Education

DOCKET NO. 2017-2152-WayED (9/21/2018)

PRIMARY ISSUES: Whether Grievant proved that Respondent's decision to terminate his contract through reduction in force and to eliminate his program was arbitrary and capricious, or otherwise improper.

SUMMARY: Grievant was employed by Respondent as a CTE teacher at Tolsia High School. In March 2017, Grievant was informed that he was subject to a reduction in force ("RIF") for lack of need, and that the superintendent would be recommending that his contract for employment be terminated at the end of the school year. Respondent approved this action and Grievant's contract was so terminated. Grievant filed this grievance asserting that Respondent subjected him to a reduction in force and terminated his contract not for lack of need, but instead because of the superintendent's personal vendetta against Grievant's family. Therefore, his reduction in force and termination was arbitrary and capricious. Respondent denied Grievant's claims and argued that it properly imposed the reduction in force and terminated Grievant's contract. Grievant failed to prove his claims by a preponderance of the evidence. Accordingly, this grievance is DENIED.

KEYWORDS: Motion to Dismiss; Employee; Employer; Negative Comments; Moot; Relief

CASE STYLE: Scott v. Mason County Board of Education

DOCKET NO. 2017-2505-CONS (9/19/2018)

PRIMARY ISSUES: Whether this grievance is moot due to Grievant's resignation from employment.

SUMMARY: Grievant was employed by Respondent as a Teacher and Coach. Grievant filed consolidated grievances protesting the alleged improper conduct of his school principal. Grievant resigned his employment and is now employed by another county school board. Respondent moved to dismiss the grievance as moot. Grievant asserted the grievance was not moot as he alleged his former school principal has continued to make negative comments about Grievant to employees of his current employer. Grievant cannot pursue allegations against his former principal for her current conduct in making negative comments to Grievant's new employer through this grievance against Respondent as he is no longer an employee of Respondent. The grievance is moot due to Grievant's resignation from employment and must be dismissed. Accordingly, the grievance is dismissed.

TOPICAL INDEX

COUNTY BOARDS OF EDUCATION

SERVICE PERSONNEL

KEYWORDS: Mistake; Vocational; Extracurricular; Arbitrary and Capricious; Relegate; Consent; Change; Available; Contract; Termination; Assignment; Reduction; Loss; Approval; Modified

CASE STYLE: Dawson v. Wyoming County Board of Education

DOCKET NO. 2018-0424-WyoED (9/18/2018)

PRIMARY ISSUES: Whether Grievant proved by a preponderance of the evidence that Respondent violated various statutes when it changed the bus runs and/or assignments she had been performing for nearly thirty years.

SUMMARY: Grievant is employed by Respondent as a bus operator. Respondent changed Grievant's regular bus run to correct what it believed to be a mistake made in 1987 or 1988, which created a time conflict with the extracurricular vocational run Grievant had driven since 1985. Thereafter, Respondent deemed Grievant unavailable to make the vocational run, and selected a less senior bus operator for the vocational run. These changes resulted in a change of Grievant's work schedule and duties, and a decrease in her compensation. Grievant asserted that in making all of these changes, Respondent violated numerous provisions of the West Virginia Code. Respondent denied Grievant's claims asserting that it made the changes to Grievant's regular run to lawfully correct a mistake. Also, Respondent argued that Grievant was not selected for the vocational run because she was unavailable to perform the same due to a time conflict with her regular bus run. Grievant proved her claims by a preponderance of the evidence. Therefore, this grievance is GRANTED.

TOPICAL INDEX

STATE EMPLOYEES

KEYWORDS: Temporary Upgrade Policy; Pay Increase; Supervision; Inmate Work Crew; Discrimination; Arbitrary and Capricious

CASE STYLE: Branson, et al. v. Division of Highways and Division of Personnel

DOCKET NO. 2017-2289-CONS (9/14/2018)

PRIMARY ISSUES: Whether Grievants established they should be granted temporary upgrade pay.

SUMMARY: Grievants, employees of the Division of Highways, seek temporary pay upgrade for crew supervision. Both Respondents maintain that Grievants are not eligible for an upgrade but arrive at the conclusion from different rational. Grievants protest failing to receive a temporary pay upgrade when overseeing inmate work crews. Grievants avert that there is no difference in duties or responsibilities between the jobs of supervising a crew of DOH employees, a crew of inmates or a mixed crew of inmates and DOH employees. Grievants assert, given the identical essential nature of the job, paying extra compensation for one job and not the other is unreasonable, without due consideration, and is in disregard of the duty performed.

Historically, DOH had an internal agency practice of providing temporary hourly upgrades to employees when they were in positions that did not have crew chief responsibilities but were assigned the crew chief responsibilities on any given day. DOH interpretation of their identified policy suggests temporary oversight of inmates does not qualify the DOH employee for crew chief pay increase. Respondent DOP maintains that Grievant's activities do not comport to the definition of supervision found in DOP's Pay Plan, thus Grievants are not eligible for a pay upgrade. Grievants failed to establish by a preponderance of the evidence entitlement to a pay increase. Grievance DENIED.

KEYWORDS: Suspension; Improvement Plan; Progressive Discipline; Performance Deficiencies; Hearsay; Policy; Mitigation

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

DOCKET NO. 2018-2077-DHHR (9/11/2018)

PRIMARY ISSUES: Whether Respondent proved the charges against Grievant and that suspension was justified.

SUMMARY: Grievant is employed by Respondent as a Social Services Worker III in the Centralized Intake Unit. Grievant protests his suspension from employment for poor performance. Respondent proved the charges against Grievant and that suspension was justified given Grievant's chronic performance deficiencies, the seriousness of the precipitating incident, and Grievant's failure to demonstrate any understanding of the seriousness of the incident or accept any responsibility. Grievant failed to prove mitigation is warranted. Accordingly, the grievance is denied.

KEYWORDS: Termination; Job Abandonment; Failure to Report to Work

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

DOCKET NO. 2017-2294-DHHR (9/14/2018)

PRIMARY ISSUES: Whether Grievant was terminated for good cause.

SUMMARY: Grievant was employed as an Economic Service Worker with the Bureau for Children and Families in Wheeling, West Virginia. Respondent met its burden of proof and demonstrated by a preponderance of the evidence that Grievant was dismissed for good cause when she was absent from work for more than three consecutive workdays without notice. Grievant had no annual leave or sick leave and had been denied other types of leave due to ineligibility for lacking the necessary work hours. Respondent relies on the Division of Personnel Administrative Rule providing that if an employee is absent from work more than three consecutive workdays without notice to the employer of the reason for the absence, the employer may dismiss the employee for job abandonment.

KEYWORDS: Motion to Dismiss; Jurisdiction; At-Will Employee; Employer; Termination; Constitutional Officer; Failure to State a Claim

CASE STYLE: Spencer, Jr. v. State Auditor's Office

DOCKET NO. 2019-0091-AUD (9/14/2018)

PRIMARY ISSUES: Whether this grievance must be dismissed for lack of jurisdiction and failure to state a claim.

SUMMARY: Grievant was employed by the State Auditor's Office and filed this grievance protesting the termination of his employment. The State Auditor is a constitutional officer and employees of constitutional officers are not entitled to the grievance procedure unless their employment is covered under the civil service system. In his statement of grievance, Grievant did not assert his employment was covered under the civil service system. Respondent, in its motion to dismiss asserted Grievant's employment was at-will. Grievant failed to respond to dispute Respondent's assertion that his employment was at will or to assert that his employment was covered under the civil service system. Grievant is not an employee as defined by the grievance procedure statute. The Grievance Board lacks jurisdiction in this matter. Accordingly, the grievance must be dismissed.

KEYWORDS: Termination; Gross Misconduct; Employee Locker; Prescription Medication; Policy; Investigation

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

DOCKET NO. 2017-1422-DHHR (9/7/2018)

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

SUMMARY: Respondent dismissed Grievant for "gross misconduct" after discovering that she and a coworker were sharing a footlocker at the hospital which contained a significant amount of prescription and over-the-counter medications. The two employees were dismissed for allegedly violating policies and statutes related to proper storage of medication as well as proper labeling of prescription drug containers. Grievant was additionally cited for refusing to participate in an OIC investigation of the incident.

The policies and laws cited by Respondent applied to medications stored by the hospital for patient use, as well as medicine dispensed and labeled by pharmacy personnel. The vast majority of the medication in the footlocker was being stored by Grievant for personal use. The policies and statutes did not apply. Additionally, Respondent did not prove that Grievant refused to participate in the investigation. The only thing Respondent was able to prove was that Grievant did not report that a skin care cream, which had previously been prescribed for a patient who died, was not properly disposed of. Grievant was not charged with that violation and it would not constitute "gross misconduct" if she had been.

KEYWORDS: Selection Process; Qualifications; Experience; Education/Training; Favoritism; Arbitrary and Capricious

CASE STYLE: Clark v. Offices of the Insurance Commissioner

DOCKET NO. 2018-0759-DOR (9/21/2018)

PRIMARY ISSUES: Whether Grievant demonstrated a flaw in the selection process.

SUMMARY: Grievant was one of numerous applicants for the sole Insurance Program Manager position at the OIC Office of Judges. This was a highly sought-after position with a relatively high paygrade in a work environment of limited advancement opportunities for non-attorneys. Grievant alleges that Respondent's selection of Intervenor for the position was improper. Grievant avers he is a more qualified candidate. Grievant further asserts that Intervenor was selected due to favoritism and an arbitrary and capricious selection process. Grievant has considerable work experience in the workers' compensation industry and was a prime candidate for the position, but did not prove that Respondent's actions were unlawful and/or arbitrary or capricious. This Grievance is DENIED.

KEYWORDS: Motion to Dismiss; Remedy Wholly Unavailable; Arbitrary and Capricious

CASE STYLE: Heater, et al. v. Division of Highways

DOCKET NO. 2018-0571-CONS (9/26/2018)

PRIMARY ISSUES: Whether Respondent demonstrated that a remedy wholly unavailable.

SUMMARY: Grievants are requesting that the undersigned create a new position within the Buildings and Trades classification. Respondent has come to the conclusion that the position is unnecessary. A government agency's determination regarding matters within its expertise is entitled to substantial weight, unless the decision can be viewed as arbitrary and capricious. Respondent's decision cannot be viewed as arbitrary and capricious. The Grievance Board has little to no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed. The record of this case did not support such a conclusion. Accordingly, the record established by a preponderance of the evidence that Grievants are requesting a remedy wholly unavailable.

KEYWORDS: Unauthorized Leave; Emergency Annual Leave; Policy

CASE STYLE: Johnson v. Division of Highways

DOCKET NO. 2017-1555-DOT (9/18/2018)

PRIMARY ISSUES: Whether disciplining Grievant for failing to provide twenty-four hours of notice for emergency leave was justified.

SUMMARY: Grievant is employed by Respondent as a Transportation Worker II Equipment Operator. Grievant was denied his application for four hours of emergency annual leave and disciplined for unauthorized leave for failing to provide twenty-four hours of notice for his emergency leave. Respondent had no written policy or procedure requiring twenty-four hours of notice for requesting emergency leave and it is unreasonable to require twenty-four hours of notice for emergency leave. Respondent failed to prove that disciplining Grievant for failing to provide twenty-four hours of notice for his emergency leave was justified. Accordingly, the grievance is granted.

KEYWORDS: Probationary Employee; Misconduct; Unsatisfactory Performance; Insubordination; Arbitrary and Capricious

CASE STYLE: Overberger v. Division of Corrections/Salem Correctional Center

DOCKET NO. 2018-2033-MAPS (9/27/2018)

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

SUMMARY: Grievant was employed by Respondent on a probationary basis as a Correctional Officer when Respondent terminated her for unsatisfactory performance and misconduct. Whereupon, Grievant alleged that Respondent created a hostile work environment, harassed her, and discriminated against her. Respondent proved that Grievant engaged in misconduct. Grievant failed to prove that her performance was satisfactory or that Respondent created a hostile work environment, harassed her, or discriminated against her. Accordingly, the grievance is denied.

KEYWORDS: Pay Increase; Job Responsibilities; Discrimination; Similarly Situated Employees

CASE STYLE: Prince v. Regional Jail and Correctional Facility Authority/Southern Regional Jail

DOCKET NO. 2018-0583-MAPS (9/18/2018)

PRIMARY ISSUES: Whether Grievant proved that he is entitled to the one dollar per hour pay increase given to correctional officers.

SUMMARY: Grievant alleges that he is entitled to the same one dollar per hour pay increase which was given to correctional officers ("CO") which was implemented by the Division of Corrections ("DOC") on July 28, 2017. Grievant presented evidence attempting to prove that he is entitled to this raise because he is exposed to some of the same type of risks as the Correctional Officers, and that he sometimes fills in at security posts in CO jobs when insufficient security staff is available. The record established that the one dollar per hour raise given only to COs was reasonably related to the State correctional system's critical need to attract and retain COs to fill the numerous vacant CO positions within the system. Grievant is in the classification of Building Maintenance Supervisor 1 and therefore not entitled to the retention and recruitment raise.