

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SYNOPSIS REPORT

Decisions Issued in October, 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: Termination; Annual Appointment; Job Duties; Vegan Beliefs

CASE STYLE: Reilly v. West Virginia University

DOCKET NO. 2018-2004-WVU (10/24/2018)

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

SUMMARY: Grievant was employed as an Industrial Specialist in Environmental Health and Safety at West Virginia University. Grievant was an at-will employee whose position was terminated eight months into his most recent annual appointment. Grievant's appointment stated his employment was at-will and that termination of his appointment could occur if he failed to perform his duties and responsibilities as assigned. During the first fifteen months of this employment, Grievant performed the duties of his position without any issues. In February 2018, Grievant refused to perform assigned duties and was terminated for insubordination. Grievant asserts that he is a vegan and that he has moral and ethical objections to working at WVU's farms or laboratories. Grievant was aware at the beginning of his employment that WVU is an Agricultural University with many farms and laboratories. Respondent demonstrated that Grievant did not fulfill the duties of his administrative position at the level expected of him by his supervisor. This is sufficient under the terms of the annual appointment to justify termination of the appointment before its ending date, for this otherwise at-will employee. The record did not support a finding that Grievant's conduct was protected under the religious discrimination provision in Title VII.

KEYWORDS: Termination; Sleeping on the Job; Insubordination; Favoritism; Mitigation

CASE STYLE: McCallister v. Marshall University
DOCKET NO. 2017-2046-MU (10/1/2018)

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

SUMMARY: Grievant, Luetta McCallister, was employed by Respondent, Marshall University, as an Assistant Supervisor. Grievant was terminated from her position for managerial misconduct, sleeping on the job, favoritism, and insubordination. Respondent proved Grievant committed serious managerial misconduct during a meeting with a subordinate employee that warranted termination. Respondent failed to prove Grievant committed favoritism or insubordination. Respondent failed to prove discipline was warranted for sleeping on the job given the circumstances. Grievant argued her punishment should be mitigated, but given the seriousness of her misconduct, Grievant's prior good performance and lack of disciplinary history does not warrant mitigation of the punishment. Grievant failed to prove her penalty was disproportionate to the penalties employed by the employer against other employees guilty of similar offenses. Accordingly, the grievance is denied.

KEYWORDS: Motion To Dismiss; Employee; Employer

CASE STYLE: Thomas v. West Virginia University
DOCKET NO. 2017-2268-WVU (10/2/2018)

PRIMARY ISSUES: Whether Grievant meets the definition of employee and whether this grievance must be dismissed.

SUMMARY: Grievant was employed in the Energy Express Program and grieved her non-selection for a position within that program. Respondent asserts that Grievant's employment was temporary and that she was not an employee at the time the grievance was filed. Grievant asserts she was a permanent employee. Grievant does not meet the definition of employee and this grievance must be dismissed. Accordingly, the grievance is dismissed.

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COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

<u>KEYWORDS:</u>	Motion to Dismiss; Employee; Resignation; Moot; Relief
<u>CASE STYLE:</u>	<u>Campbell v. Putnam County Board of Education</u> DOCKET NO. 2018-1456-PutED (10/26/2018)
<u>PRIMARY ISSUES:</u>	Whether this grievance is moot due to Grievant's resignation.
<u>SUMMARY:</u>	Grievant alleged an employee evaluation he received while he was employed by Respondent was improper. Following the filing of his grievance, Grievant resigned. Respondent moved to dismiss the grievance asserting mootness due to Grievant's resignation. Grievant did not file a response to the Motion to Dismiss. Respondent proved the grievance is now moot. Accordingly, Respondent's motion to dismiss should be granted, and this grievance, dismissed.

<u>KEYWORDS:</u>	Default; Remedy; Level One Decision; Timeline; Harassment
<u>CASE STYLE:</u>	<u>Allen v. Wood County Board of Education</u> DOCKET NO. 2018-0919-WooED (10/5/2018)
<u>PRIMARY ISSUES:</u>	Whether Respondent was in default at level one and whether the remedy sought by Grievant is contrary to law.
<u>SUMMARY:</u>	Grievant claimed default when the Chief Administrator failed to issue a Level One decision within the statutory time limit. Grievant and Respondent agreed to extend the issuance of the decision to a date certain. However, Respondent did not issue the decision on the agreed date. Grievant proved default. Respondent did not raise any of the specific statutory defenses. The remedy sought by Grievant was lawful and appropriate.

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COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

<u>KEYWORDS:</u>	Transfer; ECCAT; Bus Aide; Arbitrary and Capricious; Non-Relegation; Overtime; State Board of Education Policy 2525
<u>CASE STYLE:</u>	<u>Bryant v. McDowell County Board of Education</u> DOCKET NO. 2018-1124-McDED (10/17/2018)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved that Respondent's actions in reconfiguring her Pre-K-Aide/ECCAT position and placing her on transfer was arbitrary and capricious.
<u>SUMMARY:</u>	<p>Grievant was employed by Respondent as a pre-kindergarten ("Pre-K") classroom Aide/ECCAT with regular Bus Aide duties. Respondent reconfigured Grievant's Pre-K Aide/ECCAT position to remove the bus duties because such required her to leave the classroom over an hour before the last of the students were dismissed from school each day. A Head Start employee had been available to cover for Grievant each afternoon. For financial reasons, Head Start could not commit to a position for the upcoming school year. Respondent reconfigured the Pre-K classroom Aide/ECCAT duties to ensure Pre-K classroom coverage. Grievant was placed on transfer, and Respondent posted the reconfigured Pre-K Aide/ECCAT position and a second regular classroom Aide position that included bus duties. Grievant did not receive the Pre-K classroom Aide/ECCAT position because a more senior employee applied. Grievant bid on and received the regular classroom Aide/Bus Aide position which caused Grievant a loss of compensation. Grievant argues that Respondent's actions were arbitrary and capricious and in violation of W. Va. Code § 18A-4-8(m). Respondent denies Grievant's claims, and asserts that its actions were reasonable and proper. Grievant failed to prove her claims by a preponderance of the evidence. Therefore, this grievance is DENIED.</p>

KEYWORDS: Summer Employment; Selection; Compensation

CASE STYLE: Buchanan v. Mercer County Board of Education

DOCKET NO. 2019-0051-MerED (10/11/2018)

PRIMARY ISSUES: Whether Grievant proved that she is entitled to the remedy she is seeking from Respondent.

SUMMARY: Grievant received a summer job assignment as a cook for a summer program the Board was operating. She received the assignment in May, but was told in July that another employee was entitled to the position. Grievant had turned down other summer work believing she would be working for the Board and seeks pay for the last opportunity to take other summer jobs. The Board is obligated to fix mistakes in personnel matters as soon as possible. The Grievance Board does not award tort-like or speculative damages. Accordingly, the grievance is DENIED.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Pay; Salary Increase; Similarly Situated Employees; Job Duties; Classification; Non-Uniformed Employees
<u>CASE STYLE:</u>	<u>Crowder, et al. v. Division of Corrections/Mount Olive Correctional Complex</u> DOCKET NO. 2018-0417-CONS (10/4/2018)
<u>PRIMARY ISSUES:</u>	Whether Grievant should have received the same salary increase as the correctional officers.
<u>SUMMARY:</u>	<p>Grievants are non-uniformed employees of Respondent who are assigned to Mount Olive. Correctional Officers at Mount Olive received a \$1.00 per hour pay increase to enhance recruitment and retention levels in that classification. Grievants allege that it is discriminatory to require them to work at security posts performing the same duties as Correctional Officers without giving them the same \$1.00 per hour salary increase. They also argue that it is unlawful for Respondent to routinely assign them duties outside of the classification specifications of their position.</p> <p>Grievants were not similarly situated to Correctional Officers with regard to the raise. Respondent was not experiencing the emergency level of vacancies in the non-uniform classifications which were prevalent in the Correctional Officer classification. Grievants may be assigned duties outside their classification if necessary to meet the demonstrated needs of the organization and the outside duties do not become close to becoming the Grievants' predominate duties.</p>

<u>KEYWORDS:</u>	Merit Increase; Salary Advancement; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Trent v. Division of Motor Vehicles</u> DOCKET NO. 2018-0672-DOT (10/12/2018)
<u>PRIMARY ISSUES:</u>	Whether Respondent's decision to not grant Grievant a merit increase was arbitrary and capricious.
<u>SUMMARY:</u>	<p>Grievant is employed by Respondent as a Transportation Services Manager 1. Grievant protests her non-selection for a merit increase. Grievant asserts Respondent failed to disseminate or adhere to its own guidelines regarding the merit increases and that the distribution of merit increases was arbitrary and capricious. Grievant failed to prove Respondent's decision not to grant Grievant a merit increase violated any law, rule, policy, or procedure or that it was otherwise arbitrary and capricious. Accordingly, the grievance is denied.</p>

KEYWORDS: Job Duties; Classification; Work Assignments; Advisory Opinion

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

DOCKET NO. 2017-2110-DHHR (10/23/2018)

PRIMARY ISSUES: Whether Grievant is entitled to the immediate and continued removal of out-of-classification duties.

SUMMARY: Grievant is employed by Respondent in its Wood County office as an Adult Protective Services Worker. Although Grievant was promoted to her Adult Protective Services Worker position, due to high turnover, she continued to be assigned the duties of her previous Social Service Worker II position. Grievant requested “the immediate and continued removal of assignments that are clearly not within her classification.” Grievant is not entitled to the removal of the out-of-class duties she is required to perform as those duties comprise no more than five percent of her total duties. Grievant’s request for the continued removal of out-of-class duties due to her concern that the out-of-class duties may again become predominant is speculative and would constitute an advisory opinion, which is unavailable. Accordingly, the grievance is denied.

KEYWORDS: Selection Process; Qualifications; Experience; Favoritism; Arbitrary and Capricious

CASE STYLE: Williams v. Division of Highways

DOCKET NO. 2017-1643-DOT (10/1/2018)

PRIMARY ISSUES: Whether Grievant proved that he was subjected to favoritism and whether Respondent’s selection decision was arbitrary and capricious.

SUMMARY: Grievant is contesting his non-selection for a Transportation Worker Crew Chief position. He alleges the Respondent failed to consider his seniority with the agency in violation of a statutory mandate to do so. He also alleges that the selection process was flawed and arbitrary and capricious because the interviews for the committee could not articulate any real differences between the candidates to support their decision. Finally, Grievant alleges that the selection of the successful application was the result of favoritism. Respondent counters that it followed an organized and impartial selection procedure where the applicants were compared based upon predetermined criteria and an interview. Respondent points out that the applicants were all asked the same questions during the interviews and avers that this process was not arbitrary or capricious and was not based upon favoritism. Grievant proved his allegations by a preponderance of the evidence.

KEYWORDS: Classification; Job Duties; Pay Increase; Discretionary; Arbitrary and Capricious; Supervise; Manager; Temporary Upgrade; Pay Plan Implementation; Merit

CASE STYLE: Compton, Sr. v. Division of Juvenile Services/James H. Morton Juvenile Center
DOCKET NO. 2018-0756-MAPS (10/24/2018)

PRIMARY ISSUES: Whether Grievant proved that he is entitled to a pay increase.

SUMMARY: Grievant is employed by Respondent as a cook. In July 2015, Grievant was required to assume additional kitchen duties because the persons hired to perform these functions vacated their positions. Grievant received no pay increase for these additional duties. Grievant asked his supervisor and administration for a pay increase to no avail, even though Respondent continues to compliment his work performance. Respondent has taken the position that it has no authority to grant such a pay increase. Respondent also asserts that pay increases that Grievant seeks are simply discretionary and are not required. Grievant has failed to prove by a preponderance of the evidence that he is entitled to a pay increase, or that Respondent has violated any law, rule, or policy by failing to grant him such. Accordingly, this grievance is DENIED.

KEYWORDS: Motion to Dismiss; Investigation; Relief Granted; Moot

CASE STYLE: Jenkins v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital
DOCKET NO. 2019-0254-DHHR (10/24/2018)

PRIMARY ISSUES: Whether this grievance is moot.

SUMMARY: Grievant contested her suspension without pay while an investigation was conducted into an allegation of verbal abuse and neglect that was made against her. Before the scheduled Level Three hearing was held, Respondent finished the investigation and found that allegations were unsubstantiated. Respondent restored all pay or leave that Grievant had lost during the suspension which renders the pending grievance moot.

KEYWORDS: Overtime; Policy; Discrimination; Favoritism; Arbitrary and Capricious

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

DOCKET NO. 2017-2267-CONS (10/16/2018)

PRIMARY ISSUES: Whether Respondent's distribution of emergency overtime was arbitrary and capricious or as the result of discrimination or favoritism.

SUMMARY: Grievants are employed by Respondent as transportation workers and grieve the distribution of emergency overtime at their worksite. Grievant allege discrimination or favoritism and that the assignment of overtime was arbitrary and capricious. Respondent asserts the assignment of overtime was proper under it operating procedures. Grievants failed to prove discrimination, favoritism, or that Respondent's actions were arbitrary and capricious. Accordingly, the grievance is denied.

KEYWORDS: Annual Leave; Policy; Employee Representative; Paid Time Off; Predetermination Meeting; Rules of Interpretation

CASE STYLE: Riddle v. Department of Health and Human Resources/Bureau for Children and Families
DOCKET NO. 2018-2029-DHHR (10/24/2018)

PRIMARY ISSUES: Whether Grievant is entitled to paid time off to attend a coworker's predetermination meeting as an employee representative.

SUMMARY: Respondent charged Grievant annual leave rather than paid time off for appearing at a coworker's predetermination meeting as the employee representative. West Virginia code permits Grievant to represent fellow employees, upon request, at any stage of a "grievance proceeding" or at non "grievance proceeding" meetings to consider disciplinary action. The code requires Respondent to provide Grievant paid time off to attend and prepare for a coworker's "grievance proceeding". The code does not require paid time off for attending disciplinary meetings that fall outside the definition of "grievance proceedings". The code's definition of "grievance proceeding" is ambiguous enough to include predetermination meetings. The parties have not provided sufficient facts to enable this Board to determine whether the predetermination meeting Grievant attended on March 16, 2018, falls within the definition of "grievance proceeding". Respondent's grievance policy excludes predetermination meetings from the definition of "grievance proceedings" in its requiring employee representatives to use annual leave time to attend predetermination meetings. Grievant did not prove by a preponderance of the evidence that Respondent either violated the law or Respondent's own policy when Respondent charged Grievant annual leave for representing a coworker at a predetermination meeting rather than providing her paid leave. Accordingly, this grievance is DENIED.

KEYWORDS: Motion to Dismiss; Temporary Employee; Lack of Jurisdiction

CASE STYLE: Plymale v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital
DOCKET NO. 2019-0169-DHHR (10/4/2018)

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

SUMMARY: Grievant was employed by Respondent as a temporary exempt employee in a Health Service Worker position. Respondent moved to dismiss the grievance for lack of jurisdiction. Temporary employees are not afforded the statutory right to file a grievance. Accordingly, this grievance is DISMISSED.

KEYWORDS:

Salary Increase; Non-Uniformed Employees; Job Duties; Discrimination; Similarly Situated Employees

CASE STYLE:

Rexrode, et al. v. Division of Corrections/Huttonsville Correctional Center

DOCKET NO. 2018-0800-CONS (10/12/2018)

PRIMARY ISSUES:

Whether Grievants are entitled to the same salary increase as the Correctional Officers.

SUMMARY:

Grievants are non-uniformed employees of Respondent who are assigned to Huttonsville Correctional Center. Grievants allege that they are required to work security posts, and escort contractors on the facility grounds. Grievants assert that by escorting the contractors they are performing security duties. The record established that non-uniformed staff will have their pay adjusted to Correctional Officer pay for the time they spend working a security post/duties if they make less than the entry level hourly rate for a Correctional Officer. The record did not support a finding the Grievants were the victims of discrimination. Respondent was not experiencing the emergency level of vacancies in the non-uniform classifications which were prevalent in the Correctional Officer classification. Grievants did not prove by a preponderance of the evidence that Respondent was prohibited from assigning them occasional duties outside of their normal classification when there is a need to do so.

KEYWORDS: Dismissal; Termination; Good Cause; Falsification; Credibility; Contact; Face-to-Face; Attempted; Error; Accurate; Case-Specific; Safety; Risk

CASE STYLE: Collins v. Department of Health and Human Resources/Bureau for Children and Families
DOCKET NO. 2018-2061-DHHR (10/11/2018)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence that Grievant violated policy and falsified a record constituting good cause for her dismissal.

SUMMARY: Grievant was employed by Respondent as a Child Protective Services ("CPS") worker in its Mingo County office. Grievant made an entry in the agency computer system indicating that she made face-to-face contact with a family in her caseload in January 2018. However, no such contact was ever made. Respondent dismissed Grievant alleging violation of certain policies and falsification of an agency record. Grievant denied Respondent's allegations, asserting that the contact she entered contained errors, but that she did not falsify the agency record. Respondent failed to prove by a preponderance of the evidence that Grievant violated DHHR Policy Memorandum 2108 and CPS Policy 4.6 and 4.6(4). Respondent proved by a preponderance of the evidence that Grievant falsified an agency record which constituted good cause for her dismissal. Therefore, the grievance is DENIED.

KEYWORDS:

Default Remedy; Relief

CASE STYLE:

Testement v. Regional Jail and Correctional Facility
Authority/Southern Regional Jail

DOCKET NO. 2013-1846-MAPS (10/2/2018)

PRIMARY ISSUES:

Whether the relief Grievant requested in his original grievance filing is contrary to law or contrary to proper and available remedies.

SUMMARY:

Default judgment was granted in this matter by Order Granting Default issued June 27, 2017, and the matter was bifurcated to allow Respondent opportunity to demonstrate whether the remedy sought by Grievant was contrary to law or contrary to proper and available remedies. A default remedy hearing was scheduled for which Respondent again failed to appear and failed to demonstrate good cause for its failure to appear. Although Grievant was later terminated from his employment with Respondent, the grievance only protests his unpaid suspension from employment. Although the Grievance Board has previously allowed grievants to litigate their subsequent dismissal in grievances challenging a suspension when "the facts giving rise" to the suspension were the same as the dismissal, in this circumstance, it would not further a simple and expeditious process to allow Grievant to receive relief in default for the termination he did not grieve. Grievant is limited to recovering the relief he requested in his original grievance filing. Accordingly, the grievance is granted only as to the specific relief requested by Grievant in the original grievance filing for the time-period between his suspension and termination.