

**WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**SYNOPSIS REPORT**

**Decisions Issued in October, 2019**

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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**HIGHER EDUCATION EMPLOYEES**

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<b><u>KEYWORDS:</u></b>	Suspension; On-the-Job Injury; Workers' Compensation; Preferential Recall; Right to Representation; Arbitrary and Capricious
<b><u>CASE STYLE:</u></b>	<u>Morrison v. Marshall University</u>  DOCKET NO. 2019-0786-MU (10/9/2019)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent had good cause to suspend Grievant. Whether Grievant established by a preponderance of the evidence that Respondent's failure to return him to his transitional administrative position was arbitrary and capricious.
<b><u>SUMMARY:</u></b>	Grievant was employed as a Campus Service Worker at Marshall University. Grievant suffered an on-the-job injury and was on workers' compensation. Grievant suffered another on-the-job injury subsequently, and was once again on workers' compensation. Grievant suffers from other health issues. Grievant was placed back on the job in an administrative transitional position. For reasons not entirely clear in the record, Grievant was suspended for five days related to an allegation of falsification of sick leave applications. Grievant was also informed after this suspension that he would not be returned to work due to the discipline and work performance concerns. Respondent failed to establish the charge by a preponderance of the evidence that led to Grievant's suspension. Grievant established by a preponderance of the evidence that Respondent's failure to return him to his transitional administrative position was arbitrary and capricious. This grievance is granted.

**KEYWORDS:** Salary Upgrade; Job Duties; Policy; Job Description; Discrimination

**CASE STYLE:** Holley v. Marshall University

DOCKET NO. 2019-0604-MU (10/25/2019)

**PRIMARY ISSUES:** Whether Grievant proved that Respondent violated its Interim Salary Adjustment policy by requiring him to fill in for his supervisor.

**SUMMARY:** Grievant alleges that Respondent subjected him to discrimination and violated its own policy by refusing to give him a salary upgrade when he filled in for his supervisor who was gone for an extended time. Part of Grievant's regular duties listed in his job description include filling in for his supervisor when he is absent. Grievant did not prove he was subject to discrimination because he was not similarly situated with the coworkers he identified. Grievant did not prove that Respondent violated its policy of giving employees a salary upgrade when they are required to temporarily perform additional duties. Filling in for his supervisor in part of his regular duties, and does not qualify as an additional duty.

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<b><u>KEYWORDS:</u></b>	Termination; Suspension; Stealing; Employee Code of Conduct; Arbitrary and Capricious; Immorality; Excessive; Security Camera; Authorized; Discrepancy; Investigation; De Minimis; Misconduct; Long-Term
<b><u>CASE STYLE:</u></b>	<u>Davis v. Cabell County Board of Education</u> DOCKET NO. 2019-1283-CabED (10/3/2019)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent proved by a preponderance of the evidence that Grievant engaged in conduct constituting immorality thereby justifying her suspension and dismissal.
<b><u>SUMMARY:</u></b>	Grievant was employed by Respondent as a Cook II. Respondent charged Grievant with five instances of stealing from the cafeteria and suspended, then terminated Grievant's employment for violating an Employee Code of Conduct and her employment contract. Grievant denies all of Respondent's claims and asserts that she did not steal anything. Grievant asserts that she took from the cafeteria only what was hers, given to her, or authorized by her supervisors. Respondent failed to prove its claims by a preponderance of the evidence. Accordingly, the grievance is GRANTED.

**KEYWORDS:** Schedule Change; Regular Job Duties; Relief; Similarly Situated Employees; Arbitrary and Capricious

**CASE STYLE:** Ward v. Raleigh County Board of Education  
DOCKET NO. 2019-0222-RaIED (10/29/2019)

**PRIMARY ISSUES:** Whether Grievant established that she was entitled to the requested relief.

**SUMMARY:** Grievant is regularly employed by Respondent as a Custodian III with a 230-day contract. Under her 230-day contract, Grievant was required to work five (5) days during June, 2018. (June 14, 15, 18, 25 and 26). Grievant was contacted by the central office person overseeing the summer assignments and offered the opportunity to work additional days as a substitute (i.e., June 15, 18, 25 and 26, 2018) at another school and earn extra money. Several days overlapped. Grievant desired and requested but was not provided proper authorization to alter her working days. Grievant contends that she was unfairly or improperly denied the opportunity or benefit of four days' pay.

While select identifiable agents of Respondent are to some degree capable of authorizing the type of schedule alterations Grievant desires Respondent persuasively maintains it does not knowingly authorize the type of working day scheduled change proposed by Grievant. Respondent is not discriminating against Grievant in not provided Grievant the flexibility to double dip on scheduled workdays nor is it established that Grievant is entitled to the prospective monetary relief. Grievant has failed to establish by a preponderance of the evidence that she was unlawfully denied opportunity, benefit or compensation which other similarly situated employees are permitted to avail themselves. This Grievance is DENIED.

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**STATE EMPLOYEES**

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<b><u>KEYWORDS:</u></b>	Termination; Code of Conduct; Policy Violation; Prison Rape Elimination Act ("PREA"); Mitigation; Arbitrary and Capricious
<b><u>CASE STYLE:</u></b>	<u>Vance v. Division of Corrections and Rehabilitation/Bureau of Prisons and Jails</u> DOCKET NO. 2019-0376-MAPS (10/1/2019)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent had good cause to terminate Grievant.
<b><u>SUMMARY:</u></b>	<p>The incident(s) giving rise to the termination of Grievant's employment transpired during his assignment to the South Central Regional Jail, Charleston, West Virginia, in June of 2018. Grievant submits that his termination was unwarranted and overly punitive considering the totality of circumstances. Respondent alleged that Grievant engaged in conduct that is and/or was in violation of applicable WV Regional Jail Authority policy and procedure. Respondent by a preponderance of the evidence established that Grievant did not perform his duties within the standard of conduct established by policy, procedure and/or training. Respondent established Grievant, as a correctional officer charged with the care, custody, and control of female inmates, he violated multiple policies, allowed the inmates to violate multiple policies, and failed to report the violations. The nature of the misconduct was significant enough for Respondent, within its scope of discretion, to reasonably conclude that termination of Grievant's employment was warranted. Grievant has not provided adequate rebuttal to overturn or significantly mitigate the disciplinary actions of Respondent. This grievance is DENIED.</p>

**KEYWORDS:** Motion to Dismiss; Harassment; Employee; Employer; Moot; Relief

**CASE STYLE:** Booth, Jr. v. General Services Division  
DOCKET NO. 2019-0086-DOA (10/8/2019)

**PRIMARY ISSUES:** Whether Respondent has proven the grievance must be dismissed as moot as Grievant is no longer employed by Respondent.

**SUMMARY:** Grievant was employed by Respondent in an unspecified position. Grievant alleges harassment by his supervisor and requests that the harassment cease. Respondent moved to dismiss the grievance as moot as Grievant is no longer employed by Respondent and has withdrawn his grievance protesting his separation from employment. Respondent has proven the grievance must be dismissed as moot. Accordingly, the grievance is dismissed.

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**KEYWORDS:** Job Classification; Salary; Policy; Compensation; Relief

**CASE STYLE:** McCoy v. Division of Highways  
DOCKET NO. 2019-0247-DOT (10/15/2019)

**PRIMARY ISSUES:** Whether Grievant establish that he is entitled to the relief requested.

**SUMMARY:** Grievant argues Respondent failure to timely advance him to the next level of his identified classification. Grievant maintains his supervisor unlawfully kept him from promptly progressing within the organizational ranks. Grievant is now classified as Transportation Realty Agent 3. Further, Grievant among other allegations contend his salary is unduly low in comparison to others. Grievant is compensated within the established salary range of the identified job classification.

Grievant failed to demonstrate a violation of any rule, policy, procedure, statute or regulation, or that he was otherwise entitled to the relief requested due to malfeasance by Respondent. Accordingly this grievance is DENIED.

**KEYWORDS:** Internal Equity Pay Increase; Pay Plan Policy; Pay Grade; Classification; Arbitrary and Capricious

**CASE STYLE:** Martin, et al. v. Regional Jail and Correctional Facility Authority/Southern Regional Jail  
DOCKET NO. 2018-1483-CONS (10/2/2019)

**PRIMARY ISSUES:** Whether Grievants proved that Respondent's decision to not pursue an internal equity increase for Grievants at this time was arbitrary and capricious.

**SUMMARY:** All the Grievants are employed in the Southern Regional Jail in positions which are not classified as correctional officers. They have each identified at least one co-worker in each of their classifications who is being paid an annual salary which is more than 20% higher than the annual pay received by each Grievant. Grievants seek "internal equity" pay increases pursuant to the Division of Personnel Pay Plan Policy III. E. 2. Grievant's allege that they meet all the requirements set out in the policy and Respondent's failure to recommend them for the internal equity increase is arbitrary and capricious.

Respondent admits that it may have numerous employees including Grievants who may meet the qualifications for an internal equity increase. Respondent has identified a division-wide problem with recruitment and retention of employees and has implemented a large-scale plan to systematically increase the salaries of all their employees over the past few years. The priority of the agency has been to focus on the overall salaries of employees before exercising its discretion to address pay equity issues. This strategy is not arbitrary and capricious or an abuse of discretion.

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**KEYWORDS:** Work Shift Change; Policy; Discrimination; Arbitrary and Capricious

**CASE STYLE:** Lilly, et al. v. Department of Health and Human Resources/Jackie Withrow Hospital  
DOCKET NO. 2018-0951-CONS (10/25/2019)

**PRIMARY ISSUES:** Whether Grievants proved that Respondent's decision to change its work shifts was arbitrary and capricious or discriminatory.

**SUMMARY:** Grievants are employed by Respondent, Department of Health and Human Resources within the Bureau for Behavioral Health and Health Facilities at Jackie Withrow Hospital. Grievants protest Respondent's decision to change the hospital's work shifts alleging the decision to be arbitrary and capricious and discriminatory. Respondent asserts it was within its discretion to change the shifts and it violated no law or rule in doing so. Grievants failed to prove Respondent's decision to change its work shifts was arbitrary and capricious or discriminatory. Accordingly, the grievance is denied.



<b><u>KEYWORDS:</u></b>	Termination; Misconduct; Face Checks/Security Checks
<b><u>CASE STYLE:</u></b>	<u>Sparks v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital</u> DOCKET NO. 2019-1750-CONS (10/21/2019)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent had good cause to terminate Grievant's employment.
<b><u>SUMMARY:</u></b>	Grievant was employed by Respondent as a Health Service Worker and grieves her suspension and subsequent termination from employment for patient neglect. Grievant was terminated for failing to perform face checks when she documented that she had done so. Respondent proved Grievant failed to perform face checks and falsely documented that she had done so. This is substantial misconduct for which termination of employment is warranted. Accordingly, the grievance is denied.
<b><u>KEYWORDS:</u></b>	Suspension; Drug and Alcohol Policy; Positive Drug Screen
<b><u>CASE STYLE:</u></b>	<u>Spears v. Division of Highways</u> DOCKET NO. 2019-0649-DOT (10/25/2019)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent had good cause to suspend Grievant.
<b><u>SUMMARY:</u></b>	Grievant is employed by Respondent as a Transportation Worker 2 Equipment Operator, which requires her to hold a commercial driver's license. Grievant protests her suspension from employment. Federal regulations require Respondent to have a drug and alcohol testing program in place for employees holding a commercial driver's license. Grievant was selected for random drug screening under Respondent's policy and tested positive due to her use of CBD oil for her various medical conditions. Grievant's use of CBD oil was approved by her medical provider. Use of CBD oil is not a valid medical reason per the federal regulations. Although Respondent failed to present the laboratory results, its presentation of the reviewing physician's report and the testimony of the reviewing physician at the level three hearing was sufficient to meet the burden of proof. Accordingly, the grievance is denied.

**KEYWORDS:** Temporary Upgrade; Compensation; Minimum Qualifications

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

DOCKET NO. 2019-0500-DHHR (10/30/2019)

**PRIMARY ISSUES:** Temporary Upgrade

**SUMMARY:** Grievant is employed by Respondent at Mildred Mitchell-Bateman Hospital as a Health Service Worker. Respondent asked Grievant to assume the duties of a critical vacant Secretary 2 position and informed Grievant she would receive a temporary upgrade for the same. Grievant performed the duties for less than thirty days when the Division of Personnel determined she was not eligible for a temporary upgrade. Grievant failed to prove she was entitled to a temporary upgrade when she did not meet the minimum qualifications of the position and did not perform the duties for at least thirty days. Accordingly, the grievance is denied.

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**KEYWORDS:** Hostile Workplace Harassment; Single Incident

**CASE STYLE:** Bradshaw, et al. v. Offices of the Insurance Commissioner

DOCKET NO. 2018-2017-CONS (10/25/2019)

**PRIMARY ISSUES:** Whether Grievants are subjected to a hostile work environment.

**SUMMARY:** Grievants are employed by the Office of the Insurance Commissioner in the Workers' Compensation Office of Judges in various capacities. What can only be described as an unfortunate event took place in their office on March 9, 2018. Intervenors and another employee tore down the signs and balloons welcoming back the Chief Administrative Law Judge which were placed in a common area by one of the Grievants. While unfortunate, it was a single occurrence by a co-worker. Grievants allege harassment. Hostile workplace harassment requires repeated and unwelcome mistreatment, and a single incident cannot be defined as harassment. The record did not support a finding that a hostile work environment existed given the totality of the circumstances.

**KEYWORDS:** Temporary Upgrade; Welding Jobs; Certification; Minimum Requirement; Retaliation; Reprisal

**CASE STYLE:** Sloan v. Division of Highways

DOCKET NO. 2018-1474-CONS (10/31/2019)

**PRIMARY ISSUES:** Whether Grievant proved by a preponderance of the evidence that Respondent violated its temporary upgrade policy.

**SUMMARY:** Grievant that he has been denied temporary upgrades to the TW 4, Welder classification by Respondent assigning worker to welding jobs who are not certified instead of giving those upgrade opportunities to him. Grievant also alleges that Respondent has subjected him to reprisal by failing to assign him welding jobs after he filed a grievance in April 2018. Respondent argues that it is the practice of the agency to occasionally upgrade uncertified workers to perform welding on jobs which do not present a safety issue with the equipment arising from the weld. Respondent also denies limiting upgrades for Grievant following his grievance filing.

Grievant proved that Respondent violated the DOH temporary upgrade policy upgrading uncertified welders to perform welding tasks when a certified welder was available. Grievant did not prove that he was subjected to reprisal following the filing of his grievance.