

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SYNOPSIS REPORT

Decisions Issued in November 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
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

<u>KEYWORDS:</u>	Motion to Dismiss; Time Limits; Untimely Filed
<u>CASE STYLE:</u>	<u>Bradley v. Ohio County Board of Education</u> DOCKET NO. 2017-1538-OhIED (11/6/2017)
<u>PRIMARY ISSUES:</u>	Whether Respondent proved that this grievance was untimely filed.
<u>SUMMARY:</u>	Grievant is employed by Respondent as a full-time teacher. Upon her hire as a full-time employee in 2010, Grievant requested, but was denied, certain experience credit in her salary determination. At the time, Grievant was unaware she had a right to file a grievance, and also struggled with serious personal issues. Grievant filed her grievance after she joined her union and became aware of her grievance rights. Respondent moved to dismiss the Grievant as untimely. Grievant argued the grievance was timely as a continuing practice. The grievance does not involve a continuing practice, but, rather, continuing damage from the original salary determination. Grievant's untimely filing of her grievance almost seven years later cannot be excused by her ignorance of her grievance rights or her personal issues. Accordingly, the grievance is dismissed.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

<u>KEYWORDS:</u>	Selection, Seniority, Arbitrary and Capricious, Disqualified, Ad Infinitum, Clean Driving Record
<u>CASE STYLE:</u>	<u>Bird v. Kanawha County Board of Education and Emmett Busse, Intervenor</u> DOCKET NO. 2017-1534-KanED (11/9/2017)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved that it was arbitrary and capricious for Respondent to consider him not qualified for the Electrician II position.
<u>SUMMARY:</u>	Grievant is a regularly employed Custodian of the Kanawha County Board of Education. Grievant was the most senior applicant for the posting of an Electrician II with the Kanawha County Board of Education. Grievant was denied the position by Respondent on the basis that he was not qualified. Grievant proved by a preponderance of the evidence that it was arbitrary and capricious for Respondent to consider him not qualified for the Electrician II position. Grievant proved by a preponderance of the evidence that he was qualified to perform the job at the time Respondent made its hiring decision. According to the statutory criteria outlined in WEST VIRGINIA CODE § 18A-4-8b, Grievant should have received the position.

<u>KEYWORDS:</u>	Extra-Duty Trips; Cancelled; Cancellation; Alternate Transportation; Discrimination; Bad Faith
<u>CASE STYLE:</u>	<u>Finney v. Hancock County Board of Education</u> DOCKET NO. 2017-1523-HanED (11/28/2017)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved that any similarly-situated employee had been treated differently from her and whether Respondent proved this grievance was pursued in extreme bad faith by Grievant.
<u>SUMMARY:</u>	Grievant was assigned an extra-duty trip scheduled for December 28, 2016, transporting a private high school wrestling team to a wrestling match. Grievant was told the same day she accepted this trip that the trip had been canceled. Respondent followed its standard practice and did not pay Grievant for this trip. Grievant did not demonstrate that she was treated differently from any other similarly-situated employee. Grievance Denied.

KEYWORDS: Aide/Early Childhood Classroom Assistant Teacher (ECCAT), Seniority, Multiclassified; Priority

CASE STYLE: Manning v. Raleigh County Board of Education and Tara Sanders, Intervenor

DOCKET NO. 2017-2171-RaIED (11/22/2017)

PRIMARY ISSUES: Whether Grievant established that she should have been selected for a posted aide/ECCAT position over the successful applicant and/or whether Respondent violated any law, rule or policy in giving priority to the successful applicant.

SUMMARY: Grievant filed a complaint over her non-selection for a vacancy in the position of Aide/Early Childhood Classroom Assistant Teacher (ECCAT) at Daniels Elementary School. Grievant was employed by Respondent as an Aide when she filed this grievance. She bid on a posted aide/early childhood classroom assistant teacher position, which required Early Childhood Classroom Assistant Teacher certification. Respondent selected another candidate although Grievant was the most senior applicant in the Aide classification. This Board has ruled that for seniority purposes, the aide class titles are not in the same classification category as the ECCAT class titles. The parties disagree on the application of the law, practical implications and determining the proper selection process with or without preferential application. It is ECCAT certification, seniority and employment status that tends to distinctly influence personnel decisions, for ECCAT positions. The amount of seniority in the ECCAT category which Grievant is entitled is debated. The successful applicant held an ECCAT job at the time Respondent appointed her to the position in dispute. The record did not establish that Grievant had more seniority in the ECCAT category than the successful applicant. Grievant did not demonstrate she was entitled to placement in the posted position. Grievance Denied.

KEYWORDS: Aide/Early Childhood Classroom Assistant Teacher (ECCAT), Seniority, Multiclassified

CASE STYLE: Manning v. Raleigh County Board of Education
DOCKET NO. 2018-0028-RaIED (11/22/2017)

PRIMARY ISSUES: Whether Grievant established that she should have been the successful applicant and/or that Respondent violated any law, rule or policy in giving priority to the successful applicant.

SUMMARY: Grievant filed a complaint over her non-selection for a vacancy in the position of Aide/Early Childhood Classroom Assistant Teacher (ECCAT) at Lester Elementary School. Grievant was employed by Respondent as an Aide when she filed this grievance. She bid on a posted aide/early childhood classroom assistant teacher position, which required Early Childhood Classroom Assistant Teacher certification. Respondent selected another candidate although Grievant was the more senior applicant of the two.

It is ECCAT certification, seniority and employment status that tends to distinctly influence personnel decisions, for ECCAT positions. Grievant's seniority is greater as to ECCAT certification and aid classification. The successful applicant held an ECCAT job at the time Respondent appointed her to the position in dispute. The parties disagree on the practical application of the selection process, relevant law and priorities in the circumstance of this grievance. Respondent established pertinent rationale for its action. Grievant has failed to establish by a preponderance of the evidence that Respondent violated any law, rule, or policy in giving priority to the successful applicant who held an aide/ECCAT job at the time of application for the vacant position. Grievance Denied.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Pay Equity, Higher Salary, Pay Range, Discretionary
<u>CASE STYLE:</u>	<u>Gwilliams v. Regional Jail and Correctional Facility Authority/Western Regional Jail and Division of Personnel</u> DOCKET NO. 2017-1590-MAPS (11/7/2017)
<u>PRIMARY ISSUES:</u>	Whether Grievant established that his current salary is in violation of any applicable and controlling statute, rule or regulation or that he was entitled to a mandatory pay increase.
<u>SUMMARY:</u>	<p>Grievant avers that he commenced employment with Respondent's Western Regional Jail in the classification of Building Maintenance Supervisor 1 ("BMS1") at a salary of \$23,088 per year. He has become aware that some other individuals were subsequently hired as BMS1s at the South Central Regional Jail with a starting salary of \$29,900 per year and further discovered that other similarly situated employees at the Southwestern Regional Jail are paid an unspecified amount more than his annual salary. Grievant contends this constitutes unfair wages and seeks equal pay of \$29,900 per year as relief as well as back pay to his date of hire.</p> <p>It is well established that employees in the same classification, who are performing the same or similar duties, need not be paid the same salary, as long as they are paid within the pay range for the pay grade to which their classification is assigned. <i>Largent v. W. Va. Div. of Health and Div. of Pers.</i>, 192 W. Va. 239, 452 S.E.2d 42 (1994) This has been a common issue before the Grievance Board and the controlling case law is clearly established. Grievant has at all times relevant to this grievance matter been paid within the pay range of the pay grade assigned to the Building Maintenance Supervisor 1 classification. This grievance is DENIED.</p>

<u>KEYWORDS:</u>	Default; Procedural Error; Hearing v. Conference; Chief Administrator; Request for Hearing; Substantial Compliance
<u>CASE STYLE:</u>	<u>Greco v. Monongalia County Health Department</u> DOCKET NO. 2017-0998-MonCHDEF (11/7/2017)
<u>PRIMARY ISSUES:</u>	Whether Grievant demonstrated that a default occurred.
<u>SUMMARY:</u>	Grievant argued a default occurred when a hearing was held at level one, rather than the conference she requested, when the level one decision was not issued by the chief administrator, that the level one decision was not issued in a timely manner, and that the request for a hearing on the default was made by someone who was not the chief administrator. The level one decision was issued within the statutory time period by the chief administrator. If a hearing was held at level one rather than a conference, this is a procedural error, not a default. Finally, the response to the default was signed by the Secretary for Board of Health, and substantially complied with the statutory requirements.
<u>KEYWORDS:</u>	Termination; Probationary Employee; Improper Language; Employee Conduct; Unsatisfactory Performance; Hearsay
<u>CASE STYLE:</u>	<u>Clark v. Department of Health and Human Resources/Bureau for Children and Families</u> DOCKET NO. 2017-2133-CONS (11/1/2017)
<u>PRIMARY ISSUES:</u>	Whether Respondent proved it was justified to terminate Grievant's probationary contract for violating DHHR policy.
<u>SUMMARY:</u>	Respondent terminated Grievant's probationary employment for violating DHHR policies by using profane words and derogatory comments when talking to a client. Grievant argued that she was following her training by using the same language used by the client. Respondent proved that DHHR policies prohibit use of profanity when dealing with clients and that it is counter to the program philosophy denigrate clients by questioning their intelligence.

KEYWORDS: Selection; Minimum Qualifications; Professional Work Experience; Classification; Policy; Arbitrary and Capricious

CASE STYLE: Prue v. Division of Corrections/Charleston Correctional Center and Division of Personnel

DOCKET NO. 2017-1400-MAPS (11/3/2017)

PRIMARY ISSUES: Whether Grievant established that his employer's determination not to allow him to interview for a posted position was arbitrary and capricious.

SUMMARY: Grievant applied for a vacant position and submitted an application to his employer, the West Virginia Division of Corrections. Grievant was advised he did not meet the professional experiences qualification for the position of Correction Program Manager II. Grievant is of the opinion he has sufficient qualifying experience.

In the circumstance of this grievance matter, there is disharmony as to the appropriate delineation of professional work experience. The West Virginia Division of Personnel develops and manages the State's Classification/Compensation Plan. At the time of the employing agency's ruling that Grievant was ineligible to interview for the position, the determination was in accordance with the then governing authoritative agency's interpretation and application of professional work experience. Grievant avers that the interpretation was wrong and highlights that subsequently the applicable interpretation has been altered, or is inconsistently being applied. Respondent's interpretation of the prerequisites for the Correction Program Manager II position in discussion and Grievant's qualifications was reasonable at the time of the interviewing for the position. It is not established that Grievant, as a matter of law, is entitled to the Correction Program Manager II position in discussion or the salary of the job classification. This grievance is DENIED.

KEYWORDS: Default; Statutory Time-Frame; Failure to Appear; Evidence; Claim; Denied

CASE STYLE: Oglesby v. Regional Jail and Correctional Facility Authority/Southern Regional Jail
DOCKET NO. 2017-2047-MAPSDEF (11/21/2017)

PRIMARY ISSUES: Whether Grievant proved by a preponderance of the evidence his claim for relief by default.

SUMMARY: Grievant made a claim for relief by default alleging that Respondent failed to issue a level one decision within the statutory time-frame. Grievant failed to appear in person at the hearing on his claim for relief by default, and he made no request for a continuance. Grievant's representative appeared in person, and explained that Grievant had not returned any of his telephone calls. Grievant's representative suggested that the claim for relief by default be denied. Grievant bears the burden of proof on his claim for relief by default, and no evidence was presented to support such. Grievant failed to prove his claim by a preponderance of the evidence. Accordingly, Grievant's claim for relief by default is DENIED.

KEYWORDS: Termination, SNAP Benefits, Intentionally Inflated, Falsified, Investigations and Fraud Management

CASE STYLE: Trout II v. Department of Health and Human Resources/Bureau for Children and Families
DOCKET NO. 2018-0030-DHHR (11/16/2017)

PRIMARY ISSUES: Whether Respondent proved that Grievant submitted knowingly false information on his SNAP application form in order to receive excessive SNAP benefits for himself and his three young children.

SUMMARY: In addition to being employed by the DHHR, he received SNAP benefits through the federally funded program administered by the West Virginia DHHR. The agency conducted a quality control review of Grievant's benefit file and concluded that Grievant had falsely and intentionally inflated his actual living expenses to increase the SNAP benefits received for himself and his children. Respondent terminated Grievant's employment based upon that report. Grievant claims that he did not inflate his expenses and that he was extremely careful not to receive benefits for which he was not entitled. Respondent did not prove that Grievant falsified his living expenses on his SNAP applications.

KEYWORDS:

Reprimand; Suspension; Predetermination; Discipline; EPA-3; EPA-2; Improvement Plan; EPIR; Arbitrary; Capricious; Hostile Work Environment; Nondiscriminatory Workplace Harassment; Harassment; Customer Service; Performance; Expectations; Policy Memorandum 2123; DOP P-6; Noncompliance; Improvement; Attendance; Rating; Criticism; Progressive Discipline; Evaluation; Attorney's Fees

CASE STYLE:

Tucker v. Department of Health and Human Resources/Bureau for Public Health

DOCKET NO. 2016-1684-CONS (11/21/2017)

PRIMARY ISSUES:

Whether Respondent proved by a preponderance of the evidence that that it was justified in reprimanding Grievant, and later suspending him for three days without pay. Whether Grievant proved by a preponderance of the evidence his claims of hostile work environment, prohibited workplace harassment, that his performance evaluation was incorrect and/or arbitrary and capricious, and that the notice of predetermination conference was indicative of harassment and hostile work environment, or otherwise improper.

SUMMARY:

Grievant filed four separate grievances against Respondent challenging various actions taken against him. These grievances were eventually consolidated and heard together as one grievance at level three. Grievant challenged a written reprimand he was issued in October 2015, a three-day suspension without pay issued in May 2016, an employee performance evaluation issued in October 2016, and the issuance of a notice of predetermination conference issued in November 2016. In each of these grievances, Grievant challenged the action taken and asserted claims of hostile work environment and harassment in violation of DHHR and Division of Personnel policies. Respondent denied Grievant's claims of harassment and hostile work environment, and argued that it properly followed DHHR's progressive discipline policy to address Grievant's performance issues, and that the written reprimand and suspension were proper. Respondent also argued that the evaluation at issue was correct, as was the issuance of the notice of predetermination conference.

Grievant proved his claims of hostile work environment and harassment by a preponderance of the evidence. Respondent failed to prove most of the charges listed in the written reprimand and suspension letter, and failed to prove that these disciplinary actions were justified. Grievant proved that the employee performance evaluation issued in October 2016 was incorrect, and that his supervisor abused her discretion when evaluating him. Grievant proved the notice of predetermination conference was indicative of harassment and the hostile work environment created. As Grievant did not pursue any other claims regarding this notice at level three, any such claims previously raised are deemed abandoned.

Therefore, the grievance is GRANTED IN PART and DENIED IN PART.

KEYWORDS:

Harassment; Bullying; Verbal Warning; Evaluation; Retaliation; Hostile Work Environment; Supervision

CASE STYLE:

Greco v. Monongalia County Health Department

DOCKET NO. 2016-1880-CONS (11/22/2017)

PRIMARY ISSUES:

Whether Respondent proved the charges against Grievant, and whether Grievant proved the allegations of retaliation, harassment, bullying, and discrimination, and whether she proved that her evaluation was inaccurate.

SUMMARY:

Grievant received a verbal warning for confronting a co-worker in an inappropriate manner, and was given a corrective action plan. Respondent demonstrated that the verbal warning was justified. Grievant challenged her evaluation, and asserted that she was being retaliated against for filing a grievance, that she was being harassed, bullied, and subjected to a hostile work environment, and discriminated against, citing a number of incidents. Generally, the incidents cited by Grievant were instances where she was simply being supervised. Grievant did not prove any of her claims, except for her claim that she did not counsel a client outside her office. The grievance is GRANTED IN PART, AND DENIED IN PART.

KEYWORDS:

Suspension; Time Sheets; Falsified; Representation; Arbitrary and Capricious

CASE STYLE:

White v. Division of Highways

DOCKET NO. 2017-1174-DOT (11/21/2017)

PRIMARY ISSUES:

Whether Respondent proved by a preponderance of the evidence that it was justified in suspending Grievant for three days without pay. Whether Grievant proved by a preponderance of the evidence his claim that Respondent denied him representation at a meeting.

SUMMARY:

Respondent charged Grievant with falsifying time sheets to indicate he was working when he was not, and imposed a three-day suspension without pay for the same. Grievant denied Respondent's claims, and argued that his time was reported accurately. Grievant also argued that Respondent denied him his right to representation at a meeting with his supervisor, and that Respondent did not give him the required notice prior to the start of his suspension. Respondent proved its claims by a preponderance of the evidence. Grievant failed to prove his claim that he was denied representation at the meeting with his supervisor, and failed to prove his claim that he was denied the required notice of his suspension. Accordingly, this grievance is DENIED.