

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in November, 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.

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

<u>KEYWORDS:</u>	Performance Evaluation; Letter of Warning; Relief; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Scott v. West Virginia University</u> DOCKET NO. 2019-0508-WVU (11/20/2019)
<u>PRIMARY ISSUES:</u>	Whether Respondent's failure to rescind or alter the language of Grievant's annual performance evaluation is arbitrary and capricious.
<u>SUMMARY:</u>	Grievant was employed as a Senior Investigator, under an annual contract, at the time this grievance was filed. Grievant seeks to have a reference to a letter of warning redacted from her 2017 performance evaluation. Grievant seeks this removal on the allegation that to not do so by Respondent would be arbitrary and capricious. Grievant also seeks removal of this reference on the theory that it might damage her future employment opportunities. The record did not support a finding that Respondent's actions were arbitrary and capricious. Any type of relief regarding potential future employment opportunities would be speculative and would merely be an advisory opinion from the undersigned. This grievance is denied.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

<u>KEYWORDS:</u>	Seniority Date; Reduction in Force; Pay Grade
<u>CASE STYLE:</u>	<u>Stanley v. Mason County Board of Education</u> DOCKET NO. 2019-1361-MasED (11/21/2019)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved that Respondent inaccurately calculated her ECCAT seniority date.
<u>SUMMARY:</u>	<p>Grievant alleges that Respondent violated its policy and the State statute related to the calculation of her ECCAT seniority. She claims that this violation resulted in a less senior Aide/ECCAT to be improperly recalled to an Aide/ECCAT position before Grievant. Respondent asserts that their system of subtracting a day of Grievant's accumulated ECCAT seniority for each day that she worked outside of that classification was proper.</p> <p>Grievant proved that Respondent did not follow the ECCAT seniority calculation process required by statute and Board policy, and that this violation caused Grievant to not be recalled to an Aide/ECCAT position ahead of a less senior employee.</p>

KEYWORDS: Extracurricular; Extra Duty; Compensation; Schedule; Arbitrary and Capricious; Unreasonable; Duties; Workday; Posting; Compliance; Extension; Minimal; Written Consent; Unavailable; Route

CASE STYLE: Morris v. Nicholas County Board of Education
DOCKET NO. 2019-0315-NicED (11/19/2019)

PRIMARY ISSUES: Whether Grievant proved by a preponderance of the evidence that Respondent violated West Virginia Code § 18A-4-8(j) by changing her daily work schedule without her written consent and whether the additional bus run she was assigned in an extracurricular run.

SUMMARY: Grievant is employed by Respondent as a bus operator. Respondent added an additional daily evening run to Grievant's regular duties without her consent, written or otherwise. She was required to perform this run at a time after her regularly scheduled work hours and was given no compensation for the same. Grievant filed this grievance asserting that Respondent's actions in assigning her this additional run violated West Virginia Code § 18A-4-8a(j), was arbitrary and capricious, and that the additional evening runs constituted an extracurricular run for which she was entitled to compensation. Respondent denied Grievant's claims asserting that the addition of the second evening run to Grievant's daily duties was proper and violated no statute. Grievant proved all of her claims by a preponderance of the evidence. Therefore, this grievance is GRANTED.

KEYWORDS: Reduction in Force; Transfer Policy; Arbitrary and Capricious

CASE STYLE: Barrett, et al v. Morgan County Board of Education

DOCKET NO. 2019-1521-CONS (11/7/2019)

PRIMARY ISSUES: Whether Grievants proved that Respondent was obligated under its transfer policy to divide a full-time position in order to accommodate Grievants.

SUMMARY: Grievant Harvey was employed by Respondent as a half-time cook at Warm Springs Intermediate School (WSIS). Grievant Barrett was employed by Respondent as a half-time cook at Widmyer Elementary School (WES). For the 2019-20 school year, Respondent eliminated Grievant Harvey's half-time cook position due to budgetary and efficiency reasons. It then reduced in force Grievant Barrett, since she was the least senior half-time cook in the county, and transferred Grievant Harvey to Grievant Barrett's position at WES. Grievants contend that Respondent violated West Virginia Code and Respondent's own policies in not reducing WSIS full-time cook Sharon Roach and converting her position into two half-time cook positions so Grievant Harvey could remain at WES as a half-time cook. Grievants failed to prove that Respondent lacked the discretion under the law and its' own policy to retain its full-time cook positions at WSIS rather than convert one into two half-time positions. According, this grievance is DENIED.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Work Schedules; Sixteen-Hour Shift; Verbal Directive; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Cutright, et al. v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital</u> DOCKET NO. 2019-0193-CONS (11/22/2019)
<u>PRIMARY ISSUES:</u>	Whether Grievants proved that Respondent's verbal directive prohibiting them from scheduling sixteen-hour shifts was arbitrary and capricious.
<u>SUMMARY:</u>	Grievants are employed by Sharpe Hospital. Sharpe had allowed Grievants to work sixteen-hour shifts in conjunction with its written policy permitting these shifts. In order to reduce employee fatigue and payroll expenses, Sharpe issued a verbal directive prohibiting employees from scheduling sixteen-hour shifts. Grievants contend that Sharpe's directive is improper because its written policy permitting sixteen-hour shifts remains unchanged. Grievants assert that Respondent also failed to follow the Administrative Rule in not submitting the modification of shift hours to the Director of Personnel. Grievants failed to prove that Sharpe's verbal directive violated either its written policy or the Administrative Rule. Accordingly, the grievance is DENIED.

<u>KEYWORDS:</u>	Selection; Qualifications; Hiring Policy; Experience; Arbitrary and Capricious; Favoritism
<u>CASE STYLE:</u>	<u>Burgess v. Division of Highways</u> DOCKET NO. 2019-0576-DOT (11/22/2019)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved he was the most qualified applicant, that there was any significant flaw in the selection process, or that Intervenor was selected due to favoritism.
<u>SUMMARY:</u>	Grievant is employed by Respondent in District 1 as a Transportation Worker 2, Equipment Operator. Grievant protests his nonselection for a Transportation Worker 3 position. Grievant failed to prove he was the most qualified applicant, that there was any significant flaw in the selection process, or that Intervenor was selected due to favoritism. Accordingly, the grievance is denied.

<u>KEYWORDS:</u>	Discretionary Pay Raise; Certification; Job Responsibilities; Discrimination; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Miri v. Division of Highways</u> DOCKET NO. 2019-0851-DOT (11/12/2019)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved by a preponderance of evidence that Respondent discriminated against him.
<u>SUMMARY:</u>	Grievant is employed by Respondent as a Transportation Engineering Technician Senior (TRET SR). Grievant alleges that Respondent discriminated against him due to his Iranian national origin, which included failing to pay him as much as coworkers in his position and not reprimanding a coworker who made a bigoted statement towards him. He requests fair compensation and an end to discrimination and favoritism. Grievant did not prove that Respondent discriminated against him or showed favoritism to coworkers. Accordingly, this grievance is DENIED.
<u>KEYWORDS:</u>	Suspension; Inmate Escape; Security Check; Investigation; Mitigation
<u>CASE STYLE:</u>	<u>Bibbee v. Division of Corrections and Rehabilitation/Bureau of Prisons and Jails</u> DOCKET NO. 2019-1241-MAPS (11/6/2019)
<u>PRIMARY ISSUES:</u>	Whether Respondent had good cause to suspend Grievant.
<u>SUMMARY:</u>	Grievant was employed by Respondent as a Correctional Officer I at the Wood County Holding Center. On January 2, 2019, an inmate at the holding center, who was left unattended in an interview room for four hours, eventually kicked his way through the drywall wall and escaped. The inmate's escape went unnoticed until the next as it was incorrectly reported that he had been transported back to a regional jail facility. Grievant was suspended for eighty hours for failure to comply with policy regarding the transfer of inmates, unsatisfactory job performance, and falsifying records. Respondent failed to prove Grievant violated the transport policy or falsified records. Respondent proved that Grievant's failure to perform security checks was a serious failure of job performance warranting suspension. Grievant failed to prove his suspension should be mitigated. Accordingly, the grievance is denied.

<u>KEYWORDS:</u>	Suspension; Misconduct; Breaks; Mitigation
<u>CASE STYLE:</u>	<u>Dix v. Department of Health and Human Resources/Jackie Withrow Hospital</u> DOCKET NO. 2019-1273-DHHR (11/6/2019)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved that the penalty imposed by Respondent was clearly excessive or disproportionate to the misconduct.
<u>SUMMARY:</u>	Grievant was suspended for three days without pay for failing to take her lunch and rest breaks according to policy and not following the DHHR Employee Conduct Policy. She argues that the punishment was too severe and not in compliance with the DHHR discipline policy because she was issued a suspension before she received a written reprimand or warning. Respondent proved the allegations which were the basis for the discipline and that Grievant had previously been issued a written reprimand in compliance with the DHHR progressive discipline policy. Mitigation of the penalty was not proven to be appropriate.
<u>KEYWORDS:</u>	Shift Differential Pay; Workweek Change; Enterprise Resource Planning Board; Employer; Policy
<u>CASE STYLE:</u>	<u>Keesler, et al. v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital</u> DOCKET NO. 2017-2465-CONS (11/4/2019)
<u>PRIMARY ISSUES:</u>	Whether Grievants demonstrated that Respondent has violated any statute, rule, regulation or policy.
<u>SUMMARY:</u>	The Enterprise Resource Planning Board changed the workweek for all state employees effective January 1, 2016, to begin on Saturday morning at 12:00 a.m. Previously, the workweek began on Sunday morning at 12:00 a.m. This change resulted in Grievants losing one hour of shift differential pay per shift. Respondent was not responsible for the change in the Grievants' schedule, nor did it have authority to refuse to implement the change put in place by the State's new timekeeping and payroll system. Grievants understandably did not like the loss of their of shift differential pay due to the change in their work schedules; however, the undersigned does not have the authority to change the Enterprise Resource Planning Board's or Respondent's policies, absent some violation of statute, rule, regulation, or policy.

KEYWORDS:

Termination; Dismiss; Physical Abuse; Restraint; Investigation; Misconduct; Self-Harm; Self-Mutilation; Danger; CCG; Adult Protective Services; Code; Video; Interview

CASE STYLE:

Bailey v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital

DOCKET NO. 2019-1137-DHHR (11/19/2019)

PRIMARY ISSUES:

Whether Respondent proved by a preponderance of the evidence that physically abused a patient by use of an improper restraint technique, and whether Respondent had good cause to terminate Grievant's employment.

SUMMARY:

Grievant was employed by Respondent as a Registered Nurse at Mildred Mitchell-Bateman Hospital. Respondent dismissed Grievant charging him with physical abuse of a patient and use of improper restraint techniques. Grievant denied all of Respondent's claims. Respondent failed to prove by a preponderance of the evidence that Grievant engaged in physical abuse of a patient. Respondent also failed to prove any improper restraint or that there was good cause for Grievant's dismissal. Therefore, this grievance is GRANTED.