

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in December 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

DEPARTMENT OF EDUCATION EMPLOYEES

<u>KEYWORDS:</u>	Dismissal, Termination, At-Will Employee, Violated, Public Policy
<u>CASE STYLE:</u>	<u>Canton v. Board of Education/Office of Institutional Education Programs</u> DOCKET NO. 2018-0336-BOE (12/1/2017)
<u>PRIMARY ISSUES:</u>	Whether Respondent violated a substantial public policy by the termination of Grievant's at-will employment.
<u>SUMMARY:</u>	The West Virginia State Board of Education moved for an Order dismissing this grievance without an evidentiary hearing on the grounds that Grievant has failed to allege or identify a substantial public policy that has been violated by the termination of his at-will employment. Grievant was an at-will employee, and as such could be terminated for any reason that did not violate a substantial public policy. Pursuant to relevant case law and pertinent statutes, Grievant, has failed to identify a public policy violation. Grievant has failed to state a claim for which relief may be granted in the West Virginia Public Employees Grievance Procedure. Therefore, Respondent's motion is Granted.

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HIGHER EDUCATION EMPLOYEES

KEYWORDS: Termination, Gross Misconduct, Counseling, Corrective Discipline

CASE STYLE: Conklin v. Shepherd University

DOCKET NO. 2018-0287-SU (12/15/2017)

PRIMARY ISSUES: Whether Respondent proved Grievant's behavior rose to the level of gross misconduct and was cause for termination of Grievant's employment.

SUMMARY: Grievant was hired by Respondent as a custodian through the Department of Rehabilitation Services. Grievant's employment was terminated for alleged gross misconduct. Respondent failed to prove by preponderance of the evidence that Grievant acted in a violent and reckless manner, or that he posed any risk to school personnel or students justifying his immediate termination when such alleged conduct could have been correctable by counseling and/or instruction through progressive discipline. This grievance is GRANTED.

KEYWORDS: Reprisal; Retaliation; Rebut; Grievance Process; Pretext; Annual Leave; Sick Leave; Denial; Attendance; Teaching

CASE STYLE: Frost v. Bluefield State College

DOCKET NO. 2017-0472-BSC (12/7/2017)

PRIMARY ISSUES: Whether Grievant proved by a preponderance of the evidence that Respondent's denial of requested annual leave was an act of reprisal.

SUMMARY: During the 2016 Fall semester, Grievant was scheduled to teach a college skills class to incoming freshmen. During the first three weeks of classes, Grievant missed three days of teaching his class because he took approved annual leave. Thereafter, Grievant requested annual leave for two more days in early September, one of which was a teaching day. Grievant's supervisor denied his request for annual leave on the teaching day, but not the other. Grievant alleged reprisal for participating in the grievance process. Respondent denied Grievant's claim, and argued that the request for annual leave was properly denied. Grievant proved by a preponderance of the evidence a prima facie case of reprisal. Respondent rebutted the presumption of retaliation by offering legitimate, nonretaliatory reasons for the denial of annual leave. Grievant failed to demonstrate that Respondent's stated reason for the denial was a pretext for a retaliatory motive. Therefore, this grievance is DENIED.

KEYWORDS: Written Reprimand, Warning Letter, Retaliation, Harassment, Discrimination, Malfeasance, Professional Conduct Moot Issue

CASE STYLE: Hallman-Warner v. Bluefield State College

DOCKET NO. 2017-1007-BSC (12/12/2017)

PRIMARY ISSUES: Whether it was lawful/permissible for Respondent to issue Grievant a letter of warning for conduct perceived as unprofessional.

SUMMARY: Grievant filed a grievance contesting the actions of Respondent with regard to a written warning pertaining to the performance of her duties as a Professor at Bluefield State College. It was highlighted prior to the Level III three hearing that the requested relief of removing the disciplinary letter from Grievant's personnel files was a moot issue. Grievant alleged discriminatory application of policy, interference with job performance and retaliation/reprisal action by Respondent. Grievant was not deprived of the opportunity to establish unlawful actions by Respondent. Other than the removal of a disciplinary letter from Grievant's personnel files the relief requested and inferred was akin to an advisory opinion. Arguably, discretion was present in the facts of this matter; nevertheless, Respondent established appropriate grounds for the disciplinary action of issuing a written warning letter. This grievance is DENIED.

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COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: Supplemental Pay, Error, Extracurricular, WVSSAC Regulations

CASE STYLE: Estep v. Boone County Board of Education
DOCKET NO. 2017-1094-BooED (12/1/2017)

PRIMARY ISSUES: Whether Grievant meet her burden of proof and established that Respondent violated any statute, policy, rule, or regulation that would entitle her to continue to receive supplemental pay awarded in error.

SUMMARY: Grievant was employed by Respondent as a Majorette Sponsor under an extracurricular contract. In previous years, the superintendent approved a supplement pay without the knowledge and consent of the Board of Education. This error was corrected by the current superintendent and Grievant was paid pursuant to the language of her contract. Grievant did not meet her burden of proof and establish a violation of any statute, policy, rule, or regulation that would entitle her to continue to receive supplemental pay awarded in error. Grievance is Denied.

KEYWORDS: Termination of Extracurricular Contract, Dismissal, Profane Language, Profanity, Code Of Conduct, Students, Athletes, Suspension, Insubordination

CASE STYLE: Neal v. Cabell County Board of Education
DOCKET NO. 2017-2157-CabED (12/29/2017)

PRIMARY ISSUES: Whether Respondent proved it was justified in terminating Grievant's contract for his insubordination and violation of the code of conduct and whether Grievant proved that the penalty of termination should be mitigated.

SUMMARY: Grievant is employed by Respondent as a teacher and was previously employed as a head basketball coach. Grievant's extracurricular coaching contract was terminated for his repeated use of profanity. Respondent proved that, after being suspended for use of profanity and being counseled regarding the same, Grievant was insubordinate when he again used profanity. Grievant's conduct did not relate to professional incompetency and was not correctable, so Grievant was not entitled to a plan of improvement. Respondent proved it was justified in terminating Grievant's contract for his insubordination and violation of the code of conduct. Grievant failed to prove that the penalty of termination should be mitigated. Accordingly, the grievance is denied.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Classification Title; Service Personnel; Qualified; Vacancy; Selection, Interview; Arbitrary and Capricious; Matrix; Lateral; Supervisor; Seniority; Experience; Evaluation; Attendance; Minimum Qualifications; Categories; Factors; Supervisory; Opportunity

CASE STYLE: Carnell, et al. v. Kanawha County Board of Education and Lisa Wooten, Intervenor

DOCKET NO. 2017-0986-CONS (12/14/2017)

PRIMARY ISSUES: Whether Grievants proved by a preponderance of the evidence that Respondent filled the Supervisor of Transportation/Exceptional Students position improperly in violation of West Virginia Code § 18A-4-8b.

SUMMARY: Grievants are employed by Respondent as Supervisors of Transportation. They each applied for a vacant Supervisor of Transportation position, which would have been a lateral move. The Respondent proceeded with the selection and interview process, considering individuals who did not hold the Supervisor of Transportation classification title. Respondent selected an individual who held the classification title of Bus Operator for the position based upon her performance in the job interview. Grievants assert that Respondent violated West Virginia Code § 18A-4-8b, and that the hiring process was otherwise arbitrary and capricious. Respondent denies Grievants' claims arguing that it complied with West Virginia Code § 18A-4-8b in filling the vacancy, and that its selection and the selection process used were proper. Grievants proved that Respondent violated West Virginia Code § 18A-4-8b in filling the vacancy at issue in this matter. However, Grievants failed to prove their claim that the hiring process used was otherwise arbitrary and capricious. Therefore, this grievance is GRANTED IN PART, and DENIED IN PART.

KEYWORDS: Extracurricular; Seniority; Previous School Year; Succeeding School Year

CASE STYLE: Frye v. Lincoln County Board of Education

DOCKET NO. 2017-1012-LinED (12/18/2017)

PRIMARY ISSUES: Whether Grievant proved by a preponderance of the evidence her claim that she was entitled to a certain extracurricular assignment.

SUMMARY: Grievant is employed by Respondent as a bus operator. Grievant applied for an extracurricular bus run, but the same was awarded to another bus operator. Grievant claims that she should have been awarded the run because of her overall higher seniority. Respondent denies Grievant's claim and asserts that it properly awarded the run to another employee who had held the same during the last school year. Grievant failed to prove her claim by a preponderance of the evidence. Therefore, this grievance is DENIED.

KEYWORDS: Dismissal Order; Moot; Advisory Opinion; Deceased

CASE STYLE: Handy v. McDowell County Board of Education

DOCKET NO. 2017-2059-McDED (12/20/2017)

PRIMARY ISSUES: Whether this grievance is moot.

SUMMARY: Grievant was employed by Respondent as an Kindergarten Aide. Grievant filed this grievance alleging an improper transfer. Grievant sought only the rescission of her transfer, and no back pay, or other compensation. Grievant is now deceased. Accordingly, the issues raised are now moot, and any ruling thereon would result in an advisory opinion. Therefore, the grievance is DISMISSED.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Suspension, Policy, Procedure, Standards of Conduct
<u>CASE STYLE:</u>	<u>Wood v. Division of Juvenile Services/Lorrie Yeager Jr. Juvenile Center</u> DOCKET NO. 2017-1796-MAPS (12/6/2017)
<u>PRIMARY ISSUES:</u>	Whether Respondent proved Grievant violated policies, procedures or standards of conduct in the incidents for which she was suspended.
<u>SUMMARY:</u>	Grievant is employed by Respondent as a Correctional Officer IV. Respondent suspended Grievant for alleged violation of policy for unnecessarily entering a resident's room and for unnecessary use of force. Respondent failed to prove Grievant violated policy as alleged. Accordingly, the grievance is granted.

<u>KEYWORDS:</u>	Dismissal, Non-Selection, Retirement, Moot, Advisory Opinion
<u>CASE STYLE:</u>	<u>Dingess v. Division of Homeland Security and Emergency Management</u> DOCKET NO. 2018-0185-MAPS (12/11/2017)
<u>PRIMARY ISSUES:</u>	Whether this grievance is moot and whether Respondent is entitled to attorney's fees.
<u>SUMMARY:</u>	Grievant was employed by Respondent and filed the instant grievance protesting his non-selection for a position with Respondent. Following the filing of this grievance, Grievant retired from employment with Respondent. Respondent moved to dismiss the grievance due to Grievant's retirement. As Grievant has now retired, the relief he seeks would be speculative, and the grievance must be dismissed. Respondent's request for attorney's fees and costs is denied. Accordingly, the grievance is dismissed.

KEYWORDS: Emotional Distress, Relief, Monetary Damages, Punitive, Tort-Like Damages, Remedy Wholly Unavailable

CASE STYLE: White v. Division of Corrections/Mount Olive Correctional Complex
DOCKET NO. 2017-2488-CONS (12/13/2017)

PRIMARY ISSUES: Whether the remedy Grievant seeks is available through the grievance process.

SUMMARY: Grievant complains that DOC violated the HIPAA Privacy Rule and unspecified civil rights provisions by filing correspondence related to a fitness for duty examination which he had undergone in his personnel file, rather than a more secure medical file. For purposes of ruling upon a motion to dismiss, it shall be presumed that all facts alleged in the grievance are true. Respondent contends that even if Grievant's rights were violated as alleged, the remedy sought, monetary damages for emotional distress, is not available through the statutory grievance procedure for public employees in West Virginia. This Grievance Board has previously determined in multiple grievance rulings that damages such as Grievant is seeking may not be obtained through the public employee grievance procedures. Accordingly, this grievance must be dismissed.

KEYWORDS: Untimely, Dismissed, Nonselection

CASE STYLE: Adkins v. Department of Health and Human Resources/Bureau for Children and Families and Russell Findley, Jr., Intervenor
DOCKET NO. 2016-1062-DHHR (12/6/2017)

PRIMARY ISSUES: Whether Respondent proved this grievance was untimely filed and whether Grievant's representative's failure to file her appeal excuses the untimely filing.

SUMMARY: Grievant grieved her non-selection for a position with Respondent. Following unsuccessful mediation, an Order of Unsuccessful Mediation was entered from which Grievant had ten days to appeal to level three of the grievance process. Grievant's representative failed to file an appeal. Approximately four months later, Grievant discovered her representative had not filed an appeal and filed an appeal on her own behalf. Respondent moved to dismiss the appeal as untimely filed. Grievant does not dispute the grievance was untimely-filed. The failure of Grievant's representative to file her appeal does not excuse the untimely filing. Accordingly, the grievance is dismissed.

KEYWORDS: Reclassification, Back Pay, Bad Faith, Position Description Form, Promotion, Mentor/Trainer, Back-Up Supervisor

CASE STYLE: Sturgis v. Department of Health and Human Resources/Bureau for Child Support Enforcement
DOCKET NO. 2016-1619-DHHR (12/22/2017)

PRIMARY ISSUES: Whether Grievant proved by a preponderance of the evidence that she was working as a CSS3 while in the Lincoln County office and whether Grievant was entitled to back pay for working outside of the CSS2 classification.

SUMMARY: Grievant seeks reclassification from a CSS2 to a CSS3 during the time she worked in the Lincoln County BCSE office. Grievant alleged bad faith on the part of her Supervisor in discouraging her from seeking reclassification and/or promotion. Grievant filed this grievance while working in the Lincoln County office. Shortly thereafter, she accepted a CSS3 position in another location. Grievant proved by a preponderance of the evidence that she was working as a CSS3 while in the Lincoln County office. Grievant did not prove that her Supervisor acted in bad faith, as defined in W. Va. Code §6C-2-3(2). Grievant is entitled to all the back wages and benefits she would have earned had she been reclassified to a CSS3, from May 5, 2015, one year prior to the date of the filing of the grievance, until the date Grievant resigned from the Lincoln County BCSE office, May 28, 2016. Accordingly, the grievance is GRANTED.

KEYWORDS: Hostile Work Environment; Bullying; Harassment; Supervisor; Retaliation; Yelling; Inappropriate Behavior; Merit Increase; Work Schedule

CASE STYLE: Johnson v. Division of Highways

DOCKET NO. 2017-2504-CONS (12/22/2017)

PRIMARY ISSUES: Whether Grievant's supervisor engaged in bullying, harassment, or created a hostile work environment. Whether Grievant proved her work schedule was changed and she was denied a merit increase in retaliation for filing a grievance.

SUMMARY: Grievant alleged that her supervisor has engaged in harassment and bullying, and created a hostile work environment. Grievant demonstrated that her supervisor has raised her voice to Grievant in an inappropriate manner, and made comments to Grievant which should not have been made in the presence of other employees. However, not every action documented by Grievant was inappropriate behavior for someone who is Grievant's supervisor, and Grievant's rendition of events points, in many instances, to unreasonable expectations by Grievant, and a lack of facts. Respondent has taken steps to try to improve the situation, but is limited in what it can do. Respondent is directed, however, to take further steps to assure that Grievant's supervisor is made aware that she is not to raise her voice to Grievant, that she is not to make comments regarding her work or attire to Grievant in the presence of other employees, and that she needs to reevaluate how she manages her employees. As to Grievant's Whistle-blower claims, Grievant did not meet her burden of proof, nor did she demonstrate that she was entitled to a merit increase, that her work schedule was improperly changed, or that her supervisors cannot require her to attend status meetings. Accordingly, this grievance is GRANTED IN PART, AND DENIED IN PART.

KEYWORDS: Dismissed, Jurisdiction, Enterprise Resource Planning Board, Bi-Weekly Payroll; Annual Salary; Employer

CASE STYLE: Adams, et al. v. Division of Corrections/Northern Correctional Center
DOCKET NO. 2017-1666-CONS (12/18/2017)

PRIMARY ISSUES: Whether the Grievance Board has jurisdiction to resolve a dispute between Grievants and the ERPB, Treasurer's Office and Auditor's Office.

SUMMARY: Grievants assert that the change from twice monthly pay to bi-weekly pay has caused them to be paid less than their annual salary. The West Virginia State Auditor's Office and Treasurer's Office are the entities charged with assuring that state employees are paid their salaries, not Respondent, and it is the Enterprise Resource Planning Board which required the change in the pay cycle. The grievance procedure is in place to allow grievants to pursue grievances against the agency which employs them. Inasmuch as Respondent is not responsible for the action about which Grievants complain, and has no authority to resolve the grievance, this grievance will be dismissed.

KEYWORDS: Written Reprimand, General Order, Complaint, Unattended Boat, One-Man Patrols, Fellow Officer, Dangerous, Misconduct, Safety

CASE STYLE: Spence v. Division of Natural Resources
DOCKET NO. 2017-1777-DOC (12/29/2017)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence that the written reprimand issued to Grievant on February 21, 2017, was warranted and supported by the facts.

SUMMARY: Grievant is employed by the Division of Natural Resources as a Natural Resources Police Officer. Grievant received a complaint of an unattended boat on the Ohio River, possibly as a result of an accident. Grievant contacted a co-worker who responded in a patrol boat to assist with the search. Grievant came to the conclusion that the complaint was unfounded, and notified his co-worker that no overturned boat was visible on the river. Grievant's co-worker continued the search by patrol boat, and Grievant failed to assist his co-worker, leaving him alone in the patrol boat. Record established this is a violation of the Respondent's General Order that prohibits one-man patrols. Respondent demonstrated by a preponderance of the evidence that the written reprimand issued to Grievant on February 21, 2017, was warranted and supported by the facts. Accordingly, this grievance is DENIED.

KEYWORDS: Emotional Distress, Relief, Monetary Damages, Tort-Like Damages, Remedy Wholly Unavailable

CASE STYLE: White v. Division of Corrections/Mount Olive Correctional Complex
DOCKET NO. 2017-2482-MAPS (12/18/2017)

PRIMARY ISSUES: Whether the remedy Grievant seeks is available through the grievance process.

SUMMARY: Grievant filed the instant grievance alleging retaliation. For relief, Grievant sought only money damages for emotional distress. Respondent moved to dismiss the grievance alleging Grievant seeks a remedy wholly unavailable through the grievance process. The Grievance Board does not have the authority to award damages for emotional distress. Accordingly, the grievance is dismissed.