

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in December, 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

DEPARTMENT OF EDUCATION EMPLOYEES

<u>KEYWORDS:</u>	Default Remedy; Policy; Investigative Report; Relief
<u>CASE STYLE:</u>	<u>Loy v. Board of Education</u> DOCKET NO. 2018-1195-BOE (12/21/2018)
<u>PRIMARY ISSUES:</u>	Whether the remedy requested by Grievant is contrary to law.
<u>SUMMARY:</u>	The record indicates that Respondent defaulted, and has acknowledged that it has no statutorily accepted excuses for its default. Since Grievant prevailed on the merits by default, the sole issue is whether the remedy sought by Grievant is contrary to law or contrary to proper and available remedies. The Respondent has the burden of proving this affirmative defense by a preponderance of the evidence. Grievant stipulated that the sole item of relief now sought is a copy of report of an investigation conducted regarding Grievant. Since the suspension and investigation were matters of discipline, the report of investigation should have been part of Grievant's personnel file pursuant to Respondent's applicable policy. The request for this report is not is contrary to law or contrary to proper and available remedies.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: Default; Timelines; Conference; Decision; Justified; Delay; Outside; Control; Failure to Act; Unexpected Event; Extend; Deadlines; Assumption; Defense; Responsibility; Time-Sensitive

CASE STYLE: Newberry v. Wood County Board of Education
DOCKET NO. 2018-1130-WooEDDEF (12/7/2018)

PRIMARY ISSUES: Whether default occurred at level one of the grievance procedure.

SUMMARY: Grievant argues that a default occurred at level one of the grievance process because the level one decision was not issued within fifteen days after the conclusion of the level one conference as required by statute. Respondent argues that there was no default, but if there were, it was the result of events outside its control; therefore, any delay was justified. Grievant proved by a preponderance of the evidence that a default occurred at level one. Respondent failed to prove by a preponderance of the evidence that its failure to act within the required time limit was the result of an unexpected event, or events, that was outside of the defaulter's control. Therefore, the default was not the result of a justified delay. Accordingly, Grievant prevails by default.

KEYWORDS: Written Reprimand; Intimidating Behavior; Body Language; Employee Code of Conduct; Hearsay; Due Process; Arbitrary and Capricious

CASE STYLE: Sanchez v. Monongalia County Board of Education

DOCKET NO. 2018-0595-MonED (12/7/2018)

PRIMARY ISSUES: Whether the letter of reprimand was arbitrary and capricious.

SUMMARY: Grievant is employed by Respondent as a teacher at Westwood Middle School and grieves a letter of reprimand. The letter of reprimand concludes that Grievant engaged in intimidating behavior by standing close to a student and waving her finger in the student's face, while the student stood with his back against the wall. It also concludes that Grievant violated confidentiality by questioning the student as to "why" his guardian did not attend a parent-teacher conference. Respondent did not prove by a preponderance of the evidence that Grievant asked the student "why" his guardian did not attend a parent-teacher conference. Respondent proved by a preponderance of the evidence that Grievant stood close to a student and waved her finger in the student's face, while the student had his back against the wall. Respondent's interpretation of this conduct as a violation of the West Virginia State Board of Education's Employee Code of Conduct was reasonable. The letter of reprimand was not applied in an arbitrary and capricious manner and did not violate Grievant's due process rights. Accordingly, this grievance is DENIED.

KEYWORDS: Selection; Abuse of Discretion; Arbitrary and Capricious

CASE STYLE: Athey v. Mineral County Board of Education

DOCKET NO. 2018-0872-MnIED (12/3/2018)

PRIMARY ISSUES: Whether Grievant's non-selection for the position at issue was arbitrary and capricious.

SUMMARY: Grievant alleged that she should have been selected over the successful applicant for the position of the Director of Curriculum and Instruction. The record demonstrated that the Superintendent's recommendation to Board members was based on personal opinions about the job applicants, and not their qualifications based upon criteria set out in West Virginia Code § 18A-4-7a. In addition, mistakes were made in the matrix provided to Board members relating to the successful applicant's qualifications. Notwithstanding this input, the record was not developed as to what the Respondent knew or did not know regarding the overall qualifications of the applicants. In any event, Grievant failed to establish, by a preponderance of the evidence, that her non-selection for the position was arbitrary and capricious, an abuse of Respondent's discretion, or otherwise contrary to any applicable law, rule or regulation.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Termination; Improvement Plan; Absenteeism; Attendance Policy; Correctable Conduct; Willful Neglect of Duty; Insubordination; Medical Condition

CASE STYLE: Thomas v. Kanawha County Board of Education
DOCKET NO. 2018-1419-KanED (12/19/2018)

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

SUMMARY: Grievant was employed by Respondent as a Bus Operator. Grievant suffers from a chronic medical condition that caused him to be absent from work for ten days out of the school year. Although school employees are allowed fifteen personal days per school year, Respondent requires that employees provide a doctor's excuse for any absence for sickness after five days have been missed in the year, and Grievant did not provide doctor's excuses for his absences. Respondent terminated Grievant's employment for his ten unexcused absences. Respondent asserts Grievant's absences are insubordination, willful neglect of duty, or unsatisfactory performance that is not correctable. Grievant's conduct was not willful and was correctable. It was not reasonable for Respondent to terminate Grievant's employment when his absences were not excessive, when the need to provide a doctor's excuse for absence due to his chronic medical condition was not explained, and when Grievant had been specifically told that he would receive another plan of improvement and then told that he would start with a "clean slate" following his suspension. Accordingly, the grievance is granted.

KEYWORDS: Termination; Suspension; Misconduct; Unsatisfactory Performance; Insubordination; Willful Neglect of Duty; Correctable Conduct; Arbitrary and Capricious; Contact; Confrontation; Inappropriate; Camera; Abrasion; Mark; Discipline

CASE STYLE: Hines v. Kanawha County Board of Education

DOCKET NO. 2019-0074-KanED (12/7/2018)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence that Grievant engaged in misconduct justifying his dismissal from employment pursuant to W. Va. Code § 18A-2-8.

SUMMARY: Grievant was employed by Respondent as a bus operator. During a morning bus run, a ten-year-old student called Grievant “stupid,” and in response, Grievant deliberately stopped the bus, confronted the student, screamed at him, and called the student “stupid,” all of which was captured on the bus security camera. During this confrontation, Grievant also stuck his finger in the student’s face to punctuate his comments. As a result, Grievant unintentionally made contact with the student’s face and left a red mark on his cheek. Respondent terminated Grievant’s employment as a result of his conduct toward the student. Grievant denied making contact with the student’s face and leaving the mark. Grievant did not deny his other conduct during the incident. Respondent proved by a preponderance of the evidence that Grievant engaged in conduct constituting insubordination and willful neglect of duty thereby justifying his termination. Accordingly, the grievance is DENIED.

KEYWORDS: Termination; Suspended; Improvement Plan; Unsatisfactory Performance; Evaluation; Correctable Conduct; Arbitrary and Capricious; Work Orders; Deficiencies

CASE STYLE: Davis v. Kanawha County Board of Education

DOCKET NO. 2018-1418-KanED (12/21/2018)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence that Grievant’s work performance was unsatisfactory, thereby justifying his termination.

SUMMARY: Grievant was employed by Respondent as an Electrician II. Respondent terminated Grievant’s employment asserting the charge of unsatisfactory performance. Grievant denies Respondent’s claims and argues that he was wrongfully terminated. Respondent proved by a preponderance of the evidence the charge of unsatisfactory work performance, thereby justifying Grievant’s termination. Accordingly, the grievance is DENIED.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Non-Selection; Promotion; Favoritism; Qualifications; Selection Process; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Ringler v. Department of Health and Human Resources/Bureau for Child Support Enforcement</u> DOCKET NO. 2018-0645-DHHR (12/27/2018)
<u>PRIMARY ISSUES:</u>	Whether the selection process at issue was improper.
<u>SUMMARY:</u>	Grievant is challenging her employer's failure to select her for promotion to a Child Support Supervisor 2 position. Grievant asserts that she was better qualified than the successful applicant, Tina L. Good, who is an Intervenor in this grievance. Grievant failed to establish that she was the victim of prohibited favoritism. Further, Grievant failed to demonstrate that she was better qualified to fill the position than Intervenor Good, the successful applicant. Likewise, Grievant failed to establish that Respondent DHHR failed to comply with Policy Memorandum 2106 by failing to employ the specific forms recommended to record applicant qualifications. However, Grievant established by a preponderance of the evidence that the interview process was flawed by requiring the applicants to answer a question which had no bearing on the candidate's abilities to perform the essential duties of the position, instead interfering with a public employee's right to participate in the statutory grievance procedure. Grievant did not prove by a preponderance of the evidence that she would have been selected had the proper process been followed.

KEYWORDS: Motion to Dismiss; Tort-like Damages; Relief

CASE STYLE: Goff v. Division of Highways

DOCKET NO. 2018-1178-DOT (12/3/2018)

PRIMARY ISSUES: Whether this grievance should be dismissed as Grievant's only requested relief is wholly unavailable from the Grievance Board.

SUMMARY: Grievant filed the instant grievance against Respondent alleging that laundering his work uniforms was causing damage to his washer and dryer and exposing family members to hazardous materials. The only relief requested by Grievant was for Respondent to replace his washer and dryer. Respondent moved to dismiss the grievance for failure to state a claim upon which relief can be granted. The Grievance Board is not authorized by statute to hear tort claims or award tort-like damages. Grievant seeks a remedy wholly unavailable through the grievance process. Accordingly, the grievance is dismissed.

KEYWORDS: Pay raise; job classification; job duties; arbitrary and capricious

CASE STYLE: Martin, et al. v. Regional Jail and Correctional Facility Authority/Southern Regional Jail

DOCKET NO. 2018-1470-CONS (12/11/2018)

PRIMARY ISSUES: Whether Respondent acted arbitrary and capriciously in seeking a pay differential for the correctional officer classification series only.

SUMMARY: Grievants are employed by Respondent Regional Jail and Correctional Facility Authority as Correctional Counselor 2s at Southern Regional Jail. Grievants assert that, as they perform many of the same duties as correctional officers, they should receive the same pay raise received by correctional officers. Grievants do not assert that they are misclassified and should be classified as correctional officers. Respondent sought a discretionary pay differential for correctional officers from the Personnel Board to address critical recruitment and retention issues in that classification series, which was supported by a report submitted along with the request. Grievants failed to prove Respondent acted arbitrary and capriciously in seeking a pay differential for the correctional officer classification series only. Accordingly, the grievance is denied.

KEYWORDS: Suspension; Trainee; Unacceptable Work Performance; Training; Arbitrary and Capricious; Mitigation

CASE STYLE: Casdorph v. Division of Rehabilitation Services
DOCKET NO. 2018-2005-CONS (12/4/2018)

PRIMARY ISSUES: Whether Respondent established reliable rationale to justify disciplinary action against Grievant.

SUMMARY: Respondent suspended Grievant for continued unacceptable work performance. Respondent contends Grievant has failed to perform her job at a level consistent with the expectations of her position. Grievant did not effectively challenge the objective performance data showing that she continually performs at a level well-below that of her co-workers; rather, Grievant blamed her supervisor (the system), an assertion Respondent persuasively contradicted. Grievant also contended that the three-day suspension was illogical and counterproductive because it effectively caused her to be further behind in her work. Respondent, by a preponderance of the evidence, justified disciplinary action. The disciplinary action of a three-day suspension is not established to be excessive or found to be unreasonable. This Grievance is DENIED.

KEYWORDS: Motion to Dismiss; Continuing Damage; Continuing Untimely Filed; Time Limits

CASE STYLE: D'Alessio v. Division of Motor Vehicles
DOCKET NO. 2018-1204-DOT (12/21/2018)

PRIMARY ISSUES: Whether the grievance was timely filed.

SUMMARY: Grievant is employed by Respondent as an Administrative Service Assistant 2, Wellness Coordinator. In June 2017, Grievant was informed that she would have to vacate her office and that she would be moving to a different workspace. Grievant did not file this grievance until May 2018, almost a year after she was informed and/or became unequivocally aware of her change in work location. Respondent has proved by a preponderance of the evidence that this grievance was untimely filed. Accordingly, Respondent's motion is granted, and this grievance is dismissed.

KEYWORDS: Termination; probationary employee; misconduct; arbitrary and capricious

CASE STYLE: Gill v. Division of Highways
DOCKET NO. 2018-1118-DOT (12/19/2018)

PRIMARY ISSUES: Whether Respondent had good cause to terminate Grievant's probationary employment.

SUMMARY: Grievant was employed to inspect highway accident scenes and report damage to State property so the responsible parties may be required to compensate the State. Inspectors must work closely with police agencies investigating the accidents to avoid impeding those investigations. Grievant had a successful probationary performance until an incident occurred less than a week before the end of his probationary period. Respondent terminated Grievant's probationary employment as a result of complaints received from an officer with the Charleston Police Department as a result of this incident. Grievant contends that his conduct was generally proper during the incident and his words and actions were misinterpreted by the police officer. He also points to his past experience, and successful probationary service, to argue that he should not be terminated for this one incident which he believes was overblown. The standard for dismissal of a probationary employee is much lower than for a regular full-time employee. Respondent presented sufficient evidence to justify the decision to not retain a probationary employee.

KEYWORDS: Motion to Dismiss; Voluntarily Resigned; Employee; Employer; Moot; Relief; Advisory Opinion

CASE STYLE: Riley v. Division of Natural Resources
DOCKET NO. 2018-1067-DOC (12/17/2018)

PRIMARY ISSUES: Whether this grievance is moot.

SUMMARY: Grievant was employed by Respondent as a Natural Resources Police Officer. Grievant protests a counseling and reprimand. Following the filing of the grievance, Grievant voluntarily resigned from employment with Respondent. Respondent asserts the grievance is now moot. Grievant contends the grievance is not moot as Grievant may seek re-employment with Respondent in the future. Respondent has established that the grievance should be dismissed as moot. Accordingly, the grievance is dismissed.