

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in January 2010

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

KEYWORDS: DISCRIMINATION; TIMELINESS; MILITARY LEAVE; ANNUAL LEAVE; SALARY; PAY; UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT ACTS OF 1994 (USERRA); CLASSIFIED EMPLOYEE

CASE STYLE: RIGGS v. WEST VIRGINIA UNIVERSITY
DOCKET NO. 2009-1416-WVU (1/25/2010)

PRIMARY ISSUES: Whether this grievance was timely filed, and whether grievant was entitled to an additional 30 days of military leave.

SUMMARY: Grievant is a professor at West Virginia University, and at the time of this grievance was in the Navy Reserves. During 2008, Grievant was on paid military leave for 30 days, and was gone from the workplace for an additional 20 days on active duty for training orders, and was placed on annual leave for these days. Grievant argued that he was eligible for up to an additional 30 days of paid military leave, citing the Division of Personnel's Rules. The Division of Personnel's Rules are not applicable to higher education employees. Grievant did not demonstrate that Respondent's determination that his orders were not the type which would make him eligible for an additional 30 days of paid military leave was erroneous. Grievant's complaints about his salary, bonuses, military leave, and productivity goals for prior years were not timely filed. Grievant's complaint that he was discriminated against was subject to analysis using the definition of discrimination found in the grievance procedure. Grievant presented no evidence regarding the position of any other employee to whom he was similarly-situated who was treated differently. This Grievance is DENIED.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: ARBITRARY AND CAPRICIOUS; PLANTS; MOLD; ALLERGIC REACTION; FLORA; CONTAMINANT; ENVIRONMENTAL TESTING; AIR QUALITY

CASE STYLE: EVANS v. MARSHALL COUNTY BOARD OF EDUCATION
DOCKET NO. 2009-0747-MARED (1/8/2010)

PRIMARY ISSUES: Whether Respondent's zero tolerance for allowing any small number of plants in Grievant's classroom was an arbitrary and capricious act.

SUMMARY: Sometime during the 2007-2008 school year, the administration of Sherrard Middle School began to receive complaints from staff members about allergic reactions to a suspected air contaminant at the school. An indoor environmental testing and consulting company was contracted to determine the source of the air contaminant that was affecting the staff. The company recommended that the Respondent remove flora in all areas of the school to limit the condition. The school's library contained more than forty plants that had been situated there for many years. All plants were removed from the school building without an objection from the faculty staff. Thereafter, four small potted plants were placed on a table in the library by a faculty staff member. Respondent's maintenance supervisor ordered the plants be removed because their presence in the building was not in compliance with the environmental report. In view of the circumstances of this grievance, this was an arbitrary and capricious act in that it was not supported by the environmental report. This grievance is granted in part, and denied in part.

KEYWORDS: NON-RENEWAL; SUSPENSION; DISCRIMINATION;
PROBATIONARY/CONTINUING CONTRACT; TIMELINESS;
ARBITRARY AND CAPRICIOUS

CASE STYLE: BISHOP v. PRESTON COUNTY BOARD OF EDUCATION
DOCKET NO. 2010-0012-PREED (1/21/2010)

PRIMARY ISSUES: Whether Grievant was a probationary employee; whether Grievant was properly suspended; whether her grievance was untimely, and whether Respondent's decision not to renew her contract was arbitrary and capricious.

SUMMARY: Grievant contends she held a continuing contract, but failed to prove she had completed three years of acceptable employment as required to convert her contract status from probationary to continuing. Grievant was suspended prior to Respondent giving her notice of its intent not to renew her contract, but her challenge to the suspension was untimely. Grievant did not prove that Respondent's decision not to rehire her under a continuing contract was arbitrary and capricious, and her Grievance is therefore denied.

KEYWORDS: STANDING; SPECULATIVE RELIEF; FAILURE TO STATE A CLAIM; GRIEVABLE EVENT

CASE STYLE: BOHN v. HARRISON COUNTY BOARD OF EDUCATION
DOCKET NO. 2010-0675-HARED (1/27/2010)

PRIMARY ISSUES: Whether the grievance stated a claim upon which relief could be granted.

SUMMARY: Grievant sought to be provided a contract in compliance with W. Va. Code§ 18A-4-16. The Respondent moved to dismiss the grievance because it failed to state a claim upon relief can be granted. A Grievant must show "an injury-in-fact, economic or otherwise" to have what "constitutes a matter cognizable under the grievance statute." (cites omitted) The injury Grievant alleges has not yet occurred, and the relief requested is speculative in nature. Although Respondent does intend to propose a transfer for Grievant for next year, that event has not yet occurred. This grievance is premature and consequently fails to state a claim upon which relief can be granted. The grievance is DISMISSED.

KEYWORDS: STANDING; SPECULATIVE RELIEF; FAILURE TO STATE A CLAIM; GRIEVABLE EVENT

CASE STYLE: HAYSLETTE v. HARRISON COUNTY BOARD OF EDUCATION
DOCKET NO. 2010-0693-HARED (1/27/2010)

PRIMARY ISSUES: Whether the grievance stated a claim upon which relief could be granted.

SUMMARY: Grievant sought to be provided a contract in compliance with W. Va. Code§ 18A-4-16. The Respondent moved to dismiss the grievance because it failed to state a claim upon relief can be granted. A Grievant must show “an injury-in-fact, economic or otherwise” to have what “constitutes a matter cognizable under the grievance statute.” (cites omitted) The injury Grievant alleges has not yet occurred, and the relief requested is speculative in nature. Although Respondent does intend to propose a transfer for Grievant for next year, that event has not yet occurred. This grievance is premature and consequently fails to state a claim upon which relief can be granted. The grievance is DISMISSED.

KEYWORDS: UNSATISFACTORY PERFORMANCE; IMPROVEMENT PLAN, EVALUATION; OPEN AND HONEST; OBSERVATION; DEFICIENCIES; ARBITRARY AND CAPRICIOUS

CASE STYLE: BAILEY v. KANAWHA COUNTY BOARD OF EDUCATION
DOCKET NO. 2009-1594-KANED (1/19/2010)

PRIMARY ISSUES: Whether Grievant proved that her evaluation and improvement plan was not conducted in an “open and honest manner.”

SUMMARY: Grievant was placed on an Improvement plan for the 2009-2010 school year to address deficiencies in the areas of Classroom Climate, Communication, and Professional Work Habits. Grievant asserts that Kay Lee, Principal at Dunbar Primary School, did not observe the incidents which led to the Improvement plan, and Principal Lee did not hold a post-observation conference within five working days. Grievant avers that she followed the common practice when she asked the aide in her room to supervise the students on the playground. Grievant asserts the evaluation she received on May 29, 2009, rating her unsatisfactory in the areas of Classroom Climate, Communication, and Professional Work Habits were not based on Principal Lee’s observations and therefore was not open and honest.

Respondent asserts Grievant’s interactions with coworkers, her supervisor, and the students in her class were unsatisfactory. Respondent also argues that the evaluation was conducted properly, and the Improvement plan identified Grievant’s deficiencies and provided corrective actions to remedy those deficiencies. This grievance is DENIED.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: SELECTION; SENIORITY; PHYSICAL; EXAMINATION; DIABETES; INTRASTATE WAIVER; DETRIMENTAL RELIANCE; CERTIFICATION; BUS OPERATOR

CASE STYLE: LAYNE v. BOONE COUNTY BOARD OF EDUCATION
DOCKET NO. 2009-0328-BOOD (1/12/2010)

PRIMARY ISSUES: Whether Grievant should have been selected over the successful applicant.

SUMMARY: Grievant asserts she is entitled to a posted one-half time regular bus operator position which was awarded to a substitute bus operator, with a lower priority employment status than Grievant. Grievant, at the time the position in discussion was filled, had not supplied Respondent with necessary documentation needed to be eligible for selection. Grievant contends that her failure to comply with certain prerequisites was due to her detrimental reliance upon the representation of Respondent's agent(s), and but for the inaccurate information conveyed, she would have been the selected applicant for the position at issue. Grievant contends her failure to timely take a mandatory physical and acquire newly enacted waiver documentation should be excused.

Respondent had a reasonable and legal obligation to require Grievant to verify she was able to safely drive a bus. Grievant did not establish that the actions of Respondent's agent(s) or Respondent were improper. Respondent's selection of an applicant/candidate who met all the requirements for a position at the time of selection is reasonable. The actions of Respondent in the facts of this case are not arbitrary, capricious or clearly wrong. This grievance is DENIED.

KEYWORDS: SUSPENSION; EMAIL; COMPUTER; TRAINING; ONLINE, STAFF DEVELOPMENT; WILLFUL NEGLECT OF DUTY; INSUBORDINATION

CASE STYLE: RICHARDS v. KANAWHA COUNTY BOARD OF EDUCATION
DOCKET NO. 2009-1639-KANED (1/12/2010)

PRIMARY ISSUES: Whether Grievant engaged in conduct constituting insubordination and willful neglect of duty.

SUMMARY: Grievant was suspended for one-half day on May 25, 2009, for failing to complete the required staff development for the 2007-2008 school year. Respondent asserts it sent Grievant notice of the staff development to his email account provided by the school board. Respondent avers that there are numerous computers available to its employees. Respondent further argues that when Grievant had not completed the required staff development, two letters were sent to Grievant's home, and yet he did not complete the required courses. Grievant asserts he does not know how to use the computer and does not use his email. He further argues that he does not have a computer, and Respondent should send the notice through the mail. Respondent has met its burden in this matter. This grievance is DENIED.

KEYWORDS: TIMELINESS, HARASSMENT; HOSTILE WORK ENVIRONMENT

CASE STYLE: LACY v. KANAWHA COUNTY BOARD OF EDUCATION
DOCKET NO. 2009-1606-KANED (1/26/2010)

PRIMARY ISSUES: Whether the grievance is timely, and whether Grievant is subject to harassment on the job.

SUMMARY: Grievant made many claims in his statement of grievance of perceived wrongs dating back to the date he was hired. Most of these claims were untimely, but he alleged ongoing harassment, which is a continuing practice. However, he nevertheless failed to make a claim for any event that occurred within the time for filing of a grievance, and his allegations of harassment did not rise to the level of misconduct that could be construed as harassment. Therefore, the grievance is denied.

TOPICAL INDEX
STATE EMPLOYEES

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| <u>KEYWORDS:</u> | ARBITRARY AND CAPRICIOUS; PERFORMANCE; EVALUATION; APPRAISAL; RATINGS; SUPERVISOR; IMPROVEMENT PLAN; ABUSE OF DISCRETION |
| <u>CASE STYLE:</u> | <u>GIBSON v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILD SUPPORT ENFORCEMENT</u> DOCKET NO. 2008-1469-DHHR (1/12/2010) |
| <u>PRIMARY ISSUES:</u> | Whether Grievant proved that her evaluation was the result of a misinterpretation or misapplication of the rules governing such evaluation, and whether the evaluation was the result of arbitrary and capricious actions. |
| <u>SUMMARY:</u> | Grievant contends that her mid-year evaluations rating was not supported by her performance record and requests that she receive a fair evaluation. Grievant was not able to demonstrate, by a preponderance of the evidence, that the evaluation rating was arbitrary or capricious. The grievance is denied. |

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| <u>KEYWORDS:</u> | ARBITRARY AND CAPRICIOUS; PERFORMANCE; EVALUATION; APPRAISAL; RATINGS; SUPERVISOR; IMPROVEMENT PLAN; ABUSE OF DISCRETION |
| <u>CASE STYLE:</u> | <u>GIBSON v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILD SUPPORT ENFORCEMENT</u> DOCKET NO. 2009-0700-DHHR (1/19/2010) |
| <u>PRIMARY ISSUES:</u> | Whether Grievant proved that her evaluation was the result of a misinterpretation or misapplication of the rules governing such evaluation, and whether the evaluation was the result of arbitrary and capricious actions. |
| <u>SUMMARY:</u> | Grievant contends that her Annual Employment Performance rating was not supported by her performance record and requests that she receive a fair evaluation. Grievant was not able to demonstrate, by a preponderance of the evidence, that the evaluation rating was arbitrary or capricious. The grievance is denied. |

KEYWORDS: CLASSIFICATION; PAY GRADE; TIMELINESS; REALLOCATION; DISCRIMINATION; PAY RAISE; PUCCIO MEMORANDUM; SIMILARLY SITUATED

CASE STYLE: BAISDEN, JR., ET AL. v. DIVISION OF HIGHWAYS

DOCKET NO. 2009-0444-CONS (1/28/2010)

PRIMARY ISSUES: Whether the grievance was timely filed and whether Grievants were discriminated against because others were reallocated and were given a 15% pay raise.

SUMMARY: Grievants assert they have been victims of discrimination because they did not receive a 15% pay raise when they were reclassified from a Transportation Crew Chief (TCC Main) to a Transportation Crew Supervisor. Grievants aver that the Puccio memo barring discretionary pay raises is not binding on Respondent.

Respondent asserts this grievance is not timely. Respondent also argues Grievants did not move to a higher pay grade. Instead, upon reallocation, Grievants were moved to a lower pay grade, but did receive a small increase upon reallocation.

Grievants have failed to meet their burden in this matter. Therefore, this grievance is DENIED.

KEYWORDS: DISCRIMINATION; TEMPORARY UPGRADE; ARBITRARY AND CAPRICIOUS; CREW LEADER; SUPERVISORY DUTIES

CASE STYLE: CLAYPOOL v. DIVISION OF HIGHWAYS

DOCKET NO. 2009-0807-DOT (1/27/2010)

PRIMARY ISSUES: Whether the Respondent's refusal to approve a temporary upgrade was the result of discrimination?

SUMMARY: Grievant, employed as a Transportation Worker 2 Equipment Operator, claimed the Division of Highways discriminated against him in failing to grant him a temporary upgrade to crew leader and also that he was entitled to a 5% salary increase. Evidence showed Grievant was at times upgraded to crew leader; however, on this occasion the duties performed did not require a supervisor to be present. Upgrades are also at the discretion of the supervisor. Grievant failed to establish he was the victim of discrimination. Additionally, the refusal to authorize the upgrade was not arbitrary and/or capricious. This grievance is DENIED.

KEYWORDS: JURISDICTION; DISMISSAL; AUTHORITY OF THE GRIEVANCE BOARD; LAW OF THE CASE

CASE STYLE: STEPP v. DIVISION OF HIGHWAYS

DOCKET NO. 2008-1248-DOT (1/22/2010)

PRIMARY ISSUES: Whether this case should be dismissed, after the ruling of the circuit court.

SUMMARY: Grievant filed a grievance, but then filed the same issues before the circuit court, adding other forms of relief not available from the Grievance Board. After hearing, the circuit court granted DOH's Motion for Summary Judgement, and resolved all issues against Grievant. Grievance DISMISSED.

KEYWORDS: SALARY; PAY RAISE; DISMISSAL

CASE STYLE: THACKER v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/MILDRED MITCHELL-BATEMAN HOSPITAL

DOCKET NO. 2010-0036-DHHR (1/15/2010)

PRIMARY ISSUES: Whether Grievance Board has authority to review a grievance concerning W. Va. Code § 5-4-4a.

SUMMARY: Grievant filed a grievance because he did not receive a pay raise which was passed by the West Virginia Legislature allowing raises to be given to physicians, physician specialists, nurses, nursing directors, health service workers, health service assistants, health service associates or other positions at Mildred Mitchell-Bateman Hospital and William R. Sharpe, Jr. Hospital. This statute specifically prohibits the filing of grievances and civil complaints; therefore the undersigned is without authority to hear the grievance. Grievance is DISMISSED.

KEYWORDS: SALARY; PAY RAISE; DISMISSAL ORDER

CASE STYLE: WHITMORE v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/MILDRED MITCHELL-BATEMAN HOSPITAL
DOCKET NO. 2010-0069-DHHR (1/28/2010)

PRIMARY ISSUES: Whether Grievance Board has authority to review a grievance concerning W. Va. Code § 5-5-4a

SUMMARY: Grievant filed a grievance because she did not receive a pay raise which was passed by the West Virginia Legislature allowing raises to be given to physicians, physician specialists, nurses, nursing directors, health service workers, health service assistants, health service associates or other positions at Mildred Mitchell-Bateman Hospital and William R. Sharpe, Jr. Hospital. This statute specifically prohibits the filing of grievances and civil complaints; therefore the undersigned is without authority to hear the grievance. Grievance is DISMISSED.

KEYWORDS: SUSPENSION; IMPAIRED; MEDICAL CONDITION; DRUG TEST

CASE STYLE: HUFFMAN v. DIVISION OF HIGHWAYS
DOCKET NO. 2009-0194-DOT (1/27/2010)

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

SUMMARY: Respondent suspended Grievant for one day for reporting to work in an impaired condition. Respondent avers Grievant came to work incoherent, drowsy, unsteady and demonstrating slurred speech. Grievant was taken home, and Respondent asserts Grievant was not able to perform her job duties.

Grievant avers she has a medical condition whereby she has weakness in her lower limbs and at times presents with slurred speech. Grievant argues she was not impaired but was having an episode related to a chronic condition.

Grievant has met her burden of proof. This grievance is GRANTED.

KEYWORDS: SUSPENSION; INSUBORDINATION; OVERTIME; DISCIPLINE;
MITIGATION; WITNESS; REPRESENTATIVE;
PREDETERMINATION MEETING, EXCUSE

CASE STYLE: HILL v. DIVISION OF CORRECTIONS/HUTTONSVILLE
CORRECTIONAL CENTER

DOCKET NO. 2010-0113-MAPS (1/6/2010)

PRIMARY ISSUES: Should Grievant have been suspended for three days for refusing to work mandatory overtime and whether Grievant was denied the right to a witness or a representative during his predetermination hearing.

SUMMARY: Grievant was suspended for three days without pay for refusing to work mandatory overtime on June 24, 2009. Grievant did not dispute the charges, but argued he should have been excused from being required to work overtime on this date because he was too tired to work past his shift, and it would have been dangerous for him to work a second shift. Respondent's policies on mandatory overtime advise the employee that he is subject to being required to work overtime to cover staff shortages, and do not excuse the employee from mandatory overtime when he is tired. Grievant did not demonstrate that he should not have been punished for refusing to work overtime. Grievant's argument that he was denied a witness at the predetermination meeting was not proven, as he did not ask to have a witness present. Grievance is DENIED

KEYWORDS: WRITTEN REPRIMAND; DISCRIMINATION; HARASSMENT; REPRISAL; TRANSFER; REASSIGNMENT; ARBITRARY AND CAPRICIOUS

CASE STYLE: COOK v. DIVISION OF NATURAL RESOURCES
DOCKET NO. 2009-0875-DOC (1/22/2010)

PRIMARY ISSUES: Whether the written reprimand issued to Grievant was proper and supported by the evidence, whether the transfer of Grievant was justified, and whether the Grievant was a victim of discrimination, harassment or reprisal?

SUMMARY: Grievant is a Conservation Officer employed by the Division of Natural Resources. At all times relevant to this grievance he was assigned to Randolph County. Following an internal investigation regarding various Randolph County citizen complaints against Grievant and a predetermination meeting, Respondent determined that the appropriate disciplinary action was reassignment and a letter of reprimand. Respondent made the decision to reassign Grievant from Randolph County to Hardy County. The reprimand letter set out that this action was a final measure in the attempt to reinforce to Grievant his obligation to behave in a manner that is suitable to be a representative of the Division of Natural Resources. Grievant had previously requested the reassignment to Hardy County. Grievant sought to remain in Hardy County, but to have all disciplinary action related to the reassignment rescinded. Grievant also claimed he was the victim of harassment, discrimination, and reprisal. Grievant's conduct was inappropriate, and the penalty of a written reprimand was appropriate. In addition, Grievant did not prove that he was the victim of harassment, discrimination or reprisal. This grievance is DENIED.