

**WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**SYNOPSIS REPORT**

**Decisions Issued in March 2009**

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](mailto: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**

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**KEYWORDS:** NON-RENEWAL; ARBITRARY AND CAPRICIOUS; FOREIGN NATIONAL; VISA; IMMIGRATION

**CASE STYLE:** SHILARO v. WEST VIRGINIA UNIVERSITY  
DOCKET NO. 2008-0398-WVU (3/17/2009)

**PRIMARY ISSUES:** Whether Respondent's decision not to renew Grievant's one-year terminal contract was arbitrary and capricious.

**SUMMARY:** Grievant was employed by WVU as a tenure-track Assistant Professor of History. Grievant is a foreign national who was working during the 2006-2007 academic year under authorization of a temporary work visa. Grievant sought an additional one-year terminal contract for the 2007-2008 academic year when it appeared to WVU that Grievant was an unauthorized alien with respect to such employment. WVU was not legally permitted to offer Grievant this contract because, at that time, she lacked a green card, visa, or other authorization permitting her to work in the United States. This action cannot be said to be arbitrary and capricious under this set of facts. This grievance is DENIED.

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**KEYWORDS:** SELECTION; ARBITRARY AND CAPRICIOUS; BEST QUALIFIED; DISCRIMINATION

**CASE STYLE:** ROWE v. WEST VIRGINIA UNIVERSITY  
DOCKET NO. 2008-0186-WVU (3/12/2009)

**PRIMARY ISSUES:** Whether the selection was arbitrary and capricious?

**SUMMARY:** Grievant has been employed by West Virginia University as a Landscape Worker for 21 years, and is very capable in the performance of his duties. He applied for a Lead Landscape Worker position. He was qualified for the position, but he was not found to be the best qualified applicant. Grievant did not demonstrate any flaws in the selection process, or that the selection decision was arbitrary and capricious. Grievance DENIED.

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**KEYWORDS:** TIMELINESS, POSTING, MINIMUM QUALIFICATIONS, EXPERIENCE, SEARCH COMMITTEE

**CASE STYLE:** WHIPKEY v. WEST VIRGINIA NORTHERN COMMUNITY COLLEGE  
DOCKET NO. 2009-0234-NCC (3/18/2009)

**PRIMARY ISSUES:** Whether Grievant met the minimum qualifications for a position where she did not have the requisite type of experience?

**SUMMARY:** Grievant applied for, and was not interviewed for, an executive secretary position at West Virginia Northern Community College. The Director of Human Resources determined that Grievant did not meet the minimum qualifications for the position. After receiving a request from the Grievant that her resume be submitted to the search committee anyway, the search committee determined that the Grievant did not meet the minimum qualifications for the position.

Grievant generally challenges the Respondent's finding that she did not meet the minimum qualifications for the position. Respondent claims that this grievance is untimely and Grievant did not meet the minimum qualifications for the position.

In light of the particular factual scenario presented, this grievance is untimely. Even assuming timeliness, Grievant did not have the requisite type of experience to meet the minimum qualifications for the position. She has never worked as an executive secretary or administrative assistant and has only served as an accounting clerk. This grievance is DENIED.

**TOPICAL INDEX**  
**COUNTY BOARDS OF EDUCATION**  
**PROFESSIONAL PERSONNEL**

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**KEYWORDS:** MOOT; SELECTION

**CASE STYLE:** KOMOROWSKI v. MARSHALL COUNTY BOARD OF EDUCATION  
DOCKET NO. 08-25-007 (3/23/2009)

**PRIMARY ISSUES:** Whether grievance is moot due to Grievant retiring prior to the completion of the grievance.

**SUMMARY:** Grievant asserted he was the most qualified person for the position of Principal. However, before the grievance was completed, Grievant voluntarily retired. At the hearing, Respondent made a motion to dismiss alleging the grievance was moot. Grievance is DISMISSED.

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**KEYWORDS:** NON-SELECTION, COACH, PHYSICAL FITNESS, INSTRUCTOR, PREFERRED QUALIFICATION, QUALIFICATION, SIGNIFICANT FLAW

**CASE STYLE:** FILBERTO v. HANCOCK COUNTY BOARD OF EDUCATION  
DOCKET NO. 2008-1101-HANED (3/26/2009)

**PRIMARY ISSUES:** Whether the Grievant is entitled to the extracurricular position of Physical Fitness I where the successful applicant had greater qualifications than the Grievant?

**SUMMARY:** Grievant, the head football coach at Oak Glen High School, was not selected to fill an extracurricular contract for a Physical Fitness I instructor position. He challenges his non-selection, maintaining that there was a significant flaw in the selection process and the BOE's selection for the position was arbitrary and capricious.

The Grievant has failed to meet his burden of proving that a significant flaw in the selection process that reasonably questions the selection occurred. The record does not indicate a significant flaw occurred. Likewise, Grievant has failed to prove by a preponderance of the evidence that the BOE's selection for the position was arbitrary and capricious or otherwise unreasonable. This grievance is DENIED.

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**SERVICE PERSONNEL**

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**KEYWORDS:** DURESS; COERCE; VOLUNTARY; SENIORITY; SUBSTITUTE POLICY; LEGAL RIGHTS; WAIVER; CREDIBILITY

**CASE STYLE:** RODRIQUES v. GRANT COUNTY BOARD OF EDUCATION AND DELMER BERG, INTERVENOR  
DOCKET NO. 2008-0960-GRAED (3/10/2009)

**PRIMARY ISSUES:** Whether Grievant was coerced into relinquishing his place on the substitute seniority list?

**SUMMARY:** Grievant is a substitute bus operator for Respondent. When he obtained full-time employment with another employer, Grievant informed the Transportation Supervisor, Delmer Berg, that he would have to resign, because he would not be available to accept assignments on a regular basis. The Board of Education has a policy which states that declining an assignment because of other employment is a refusal, and a substitute may be terminated from employment if he refuses too many assignments. Mr. Berg tried to find a way to let Grievant stay on the substitute list to work when he could, but there was a concern about Grievant retaining his seniority over other substitutes. Mr. Berg and the Director of Human Resources, Abraham Evans, discussed this, and Mr. Evans told Mr. Berg that Grievant could remain on the substitute list to work when he could, if he would relinquish his seniority and go to the bottom of the seniority list. Sometime later, Grievant wrote and signed a letter, and submitted it to Mr. Berg, stating he would be unable to substitute on a regular basis, but asked to remain on the substitute list as the least senior substitute bus operator. Grievant now alleges that Mr. Berg coerced him into relinquishing his seniority, and wants his seniority back. Grievant failed to demonstrate any coercion by Mr. Berg, or that he otherwise acted under duress. Grievance DENIED.

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**KEYWORDS:** SUSPENSION; INSUBORDINATION; NON-RENEWAL; PROBATIONARY; ARBITRARY AND CAPRICIOUS; CREDIBILITY

**CASE STYLE:** JENKINS v. JEFFERSON COUNTY BOARD OF EDUCATION  
DOCKET NO. 2008-1760-CONS (3/4/2009)

**PRIMARY ISSUES:** Was Grievant properly suspended for insubordination, and was Respondent's decision not to renew his probationary contract arbitrary and capricious?

**SUMMARY:** Grievant, a probationary custodian, was placed on a plan of improvement for several months during the 2007-2008 school year. He was also suspended twice for misconduct. This grievance resulted from an unpaid 10-day suspension that was imposed as a result of an altercation Grievant had with a teacher he had been warned to avoid, due to previous unpleasant encounters between them. Shortly after the suspension, Grievant was notified that his probationary contract had not been renewed for the upcoming school year, which is also at issue in this grievance.  
Evidence clearly established that Grievant was given numerous opportunities to improve his work, relationships, and attitude, to no avail. The suspension for insubordination was appropriate under the circumstances, and Respondent's decision not to renew his contract was reasonable. Grievance DENIED.

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**KEYWORDS:** TIMELINESS

**CASE STYLE:** BUTT v. CALHOUN COUNTY BOARD OF EDUCATION  
DOCKET NO. 2008-1026-CALED (3/27/2009)

**PRIMARY ISSUES:** Whether this grievance was timely filed.

**SUMMARY:** This event giving rise to this grievance occurred in August 2007, and Grievant did not file this grievance until late December 2007. Grievant did not timely file this grievance. Grievance DISMISSED.

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**KEYWORDS:** TIMELINESS; LIGHT DUTY; SUBSTANTIAL COMPLIANCE

**CASE STYLE:** SUMNER v. PUTNAM COUNTY BOARD OF EDUCATION  
DOCKET NO. 2008-1310-PUTED (3/31/2009)

**PRIMARY ISSUES:** Whether this grievance was timely filed. Whether Grievant should have been allowed to return to work on light duty when he did not provide documentation of his restrictions.

**SUMMARY:** While Grievant substantially complied with the rules for filing a grievance, the grievance was not timely file.

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**STATE EMPLOYEES**

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**KEYWORDS:** DEFAULT, REMEDY, BURDEN OF PROOF

**CASE STYLE:** DUNLAP v. DEPARTMENT OF ENVIRONMENTAL PROTECTION  
DOCKET NO. 2008-0808-DEP (3/20/2009)

**PRIMARY ISSUES:** Whether remedies sought by Grievant were contrary to law or contrary to proper and available remedies?

**SUMMARY:** Since Grievant prevailed on the merits by default, the sole issue is whether the remedies sought by Grievant are contrary to law or contrary to proper and available remedies. While unhappy with the default decision, DEP stipulated in writing, and at the hearing, that the remedies of restoring Grievant's annual and sick leave, as well as permitting Grievant to remain in her position at the DEP Kanawha City Office, are proper and available remedies to the Grievant. Those remedies are GRANTED. The remedies related to medical expenses, future legal fees and punishment of a co-worker are not proper and available remedies and they are DENIED.

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**KEYWORDS:** DISCIPLINE, WRITTEN REPRIMAND, DISCRIMINATION, FAVORITISM, REPRISAL, RETALIATION

**CASE STYLE:** JENSEN v. INSURANCE COMMISSION  
DOCKET NO. 2008-0743-DOR (3/30/2009)

**PRIMARY ISSUES:** Whether the written reprimand issue to Grievant was proper and supported by the evidence?

**SUMMARY:** Respondent issued a written reprimand to Grievant for his failure to comply with leave policies and follow directions concerning his schedule. Respondent presented a plethora of evidence supporting the charges in the written reprimand, as well as corrective measures taken prior to that action. Grievant does not agree with all of the allegations but Respondent has met the burden of proof that the disciplinary action was proper. The grievance is DENIED.

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**KEYWORDS:** DISMISSAL, PROBATIONARY EMPLOYMENT, EVALUATION, PERFORMANCE APPRAISAL

**CASE STYLE:** ROBERTS v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/LAKIN HOSPITAL  
DOCKET NO. 2008-0958-DHHR (3/13/2009)

**PRIMARY ISSUES:** Whether Grievant's proved that his performance as a probationary employee was satisfactory?

**SUMMARY:** DHHR dismissed Grievant from his probationary Food Service Worker position due to unsatisfactory performance. Respondent demonstrated that Grievant's performance was regularly evaluated and that he was given several opportunities to improve before he was dismissed. Grievant was not able to meet his burden of proof to demonstrate that his job performance was satisfactory. The grievance must be DENIED.

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**KEYWORDS:** DISMISSAL, TERMINATION, SUSPENSION, MITIGATION, EXCESSIVE PUNISHMENT

**CASE STYLE:** DICKENS v. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY/SOUTHERN REGIONAL JAIL  
DOCKET NO. 2009-0534-CONS (3/23/2009)

**PRIMARY ISSUES:** Whether the dismissal of a Correctional Officer should be mitigated because there was a past practice of only giving employees a two day suspension for the same offence and there were significant mitigating factors that led to his failure to follow the policy for release of inmates?

**SUMMARY:** Grievant released an inmate from jail who was not properly authorized to be released. Grievant argues that termination of his employment is too harsh given the circumstances of the incident. Respondent argues that Grievant's dismissal is justified because an authorized release of a prisoner is a serious mistake. Grievant has always received good evaluations of his job performance up to the time of the bad release incident. Other employees who have made the same mistake as Grievant were given a less severe punishment, consisting of suspension, and not dismissal. The punishment of dismissal was disproportionate to the offense, and the grievance is GRANTED.

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**KEYWORDS:** EQUAL PAY; VOLUNTARY TRANSFER; REDUCTION IN PAY; DISCRIMINATION

**CASE STYLE:** MYERS v. DIVISION OF HIGHWAYS

DOCKET NO. 2008-1380-DOT (3/12/2009)

**PRIMARY ISSUES:** Whether it was discriminatory for Respondent to pay another employee a higher salary than Grievant upon transfer to Tucker County?

**SUMMARY:** Grievant, an Equipment Operator 2, voluntarily transferred from Mineral County to Tucker County in 2002, and accepted a decrease in pay. At the time of the transfer, Grievant had been an employee of the State of West Virginia for eight months, and his pay was the same as other Equipment Operator 2's in Tucker County with the same amount of service. Four years later, in January 2007, Dickie Hedrick transferred from a Supervisor position with the Division of Natural Resources, to an Equipment Operator 2 position in Tucker County, with the Division of Highways. Mr. Hedrick had 17 years of service with the State, and had previously been employed by the Division of Highways for a few years in the 1990's. Mr. Hedrick's pay upon his transfer was higher than Grievant's, but was less than some other Equipment Operator 2's in Tucker County with fewer years of service with the State. Grievant did not demonstrate that this difference in pay was discriminatory, or that it was otherwise improper. Grievance DENIED.

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**KEYWORDS:** MITIGATION, TERMINATION, BAD RELEASE, INMATE, CORRECTIONAL OFFICER

**CASE STYLE:** STAFFORD v. REGIONAL EDUCATION SERVICE AGENCIES I/SOUTHERN REGIONAL JAIL  
DOCKET NO. 2009-0583-MAPS (3/30/2009)

**PRIMARY ISSUES:** Whether the punishment of dismissal was disproportionate to a bad release in light of the totality of the circumstances?

**SUMMARY:** Grievant mistakenly signed off on the release of a misdemeanor, pretrial inmate from the Jail who was not properly authorized to be released. There was a paperwork mistake. Respondent maintains that the unauthorized release of an inmate is an unforgivable mistake.

Grievant argues that dismissal from his employment is too harsh of a penalty given the circumstances. The record indicates that the Grievant was previously involved in an erroneous release and voluntarily took a demotion. After this incident, Grievant was ordered to not work in booking unless no other officer was available.

The release of a inmate without proper authorization is a serious infraction that is not to be taken lightly. However, Grievant has proven by a preponderance of the evidence that the punishment of dismissal was disproportionate to the offense. This grievance is GRANTED.

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**KEYWORDS:** MOOT; MOOTNESS; ADVISORY OPINION; RESIGNATION

**CASE STYLE:** FIZER v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/MILDRED MITCHELL-BATEMAN HOSPITAL  
DOCKET NO. 2008-1698-DHHR (3/4/2009)

**PRIMARY ISSUES:** Whether grievance became moot when Grievant left job.

**SUMMARY:** Grievant was given a written reprimand for unprofessional conduct which she grieved. Grievant claimed that hospital management decisions were in error, and sought payment for lost hours of work. Grievant left work in the middle of her shift without approval from her supervisor. Grievant did not make a claim for paid leave. Grievant left Respondent's employment before the level one hearing. Grievant's voluntary resignation from employment with Respondent rendered her grievance moot. Grievance DISMISSED.

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**KEYWORDS:** OVERTIME, DISCRIMINATION, ANNUAL LEAVE, SICK LEAVE, RATE OF PAY, WORK WEEK, FORTY HOURS

**CASE STYLE:** HYPES v. DIVISION OF HIGHWAYS  
DOCKET NO. 2008-1648-DOT (3/5/2009)

**PRIMARY ISSUES:** Whether the DOH's policy was arbitrary and discriminatory where it did not permit Grievant to take annual leave and denied her the ability to receive overtime pay for hours she did not actually work?

**SUMMARY:** During the period of time at issue, Grievant's "work group" was working a mandatory fifty-hour workweek. Grievant was not permitted to take annual leave after her initial forty hours, so as to receive overtime pay for leave. Grievant generally alleges that the DOH overtime policy is arbitrary and capricious. She further claims she was discriminated against. She claims that other DOH employees have been permitted to use sick and annual to receive overtime pay.

Respondent DOH argues that it violated no law or rule when it refused to pay Grievant overtime for time she did not work. DOH recognizes that errors have occurred in the past and claims that these errors were promptly corrected.

DOH policy does not permit an employee to use sick or annual leave at the end of a workweek to receive overtime pay. Grievant has cited no law or rule that the policy violates. Grievant has not established, by a preponderance of the evidence, that the DOH policy is arbitrary and capricious. Nor has she established that she was discriminated against. This grievance is DENIED.

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**KEYWORDS:** PAY EQUITY; PAY PLAN IMPLEMENTATION POLICY; MANDATORY SALARY INCREASE

**CASE STYLE:** CASTO v. CHILDREN'S HEALTH INSURANCE AGENCY/PROGRAM  
DOCKET NO. 2008-1719-DOA (3/17/2009)

**PRIMARY ISSUES:** Whether Respondent is required to grant Grievant a raise in salary as a result of perceived injustice in comparative salary. (equity raise)

**SUMMARY:** Grievant alleged entitlement to an increase in salary. Discretionary pay increases are currently prohibited by the Governor's office. A salary increase resulting from reallocation of a position is not a discretionary merit increase. Grievant may eventually receive a pay increase as a result of her position's classification; however, Grievant failed to prove her salary was in violation of policy controlling state employee salary ranges and Respondent is required to grant her an increase in pay as a result of applicable provision(s). Grievance is denied.

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**KEYWORDS:** POSTING; JOB OPENING; CLASSIFIED SERVICE; VACANCY; PROMOTION

**CASE STYLE:** HARRIS v. Regional Jail and Correctional Facility Authority/Tygart Valley Regional Jail AND Division of Personnel  
DOCKET NO. 2009-0017-MAPS (3/30/2009)

**PRIMARY ISSUES:** Whether Respondent was required to post a position before filling it.

**SUMMARY:** Grievant argues that he should have been awarded the position of Correctional Officer IV (Sergeant), upon the resignation of the Sergeant that tested higher than Grievant during the competitive process. Grievant cites a violation of the Regional Jail and Correctional Facility Authority policy in not awarding him this promotion. This policy establishes an eligibility listing for each promotion, and the eligibility listing exists for a duration of six months from the date of issue. Grievant was the first applicant numerically on the eligibility list, and the six-month duration period had not lapsed. However, Grievant is a covered employee under the classified service system. As such, the Regional Jail and Correctional Facility Authority is now governed by policies and procedures of the Division of Personnel. Its applicable policy does not allow for eligibility listings when awarding a promotion; for each vacancy necessitating a promotional process, a new posting is required. This grievance is denied.

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**KEYWORDS:** PROGRESSIVE DISCIPLINE, MITIGATION, FALSIFY RECORDS, SECURITY CHECKS, DISCRIMINATION, FAVORITISM

**CASE STYLE:** TOWNSEND, JR. v. DIVISION OF JUVENILE SERVICES/WV INDUSTRIAL HOME FOR YOUTH

DOCKET NO. 2008-1501-MAPS (3/18/2009)

**PRIMARY ISSUES:** Whether mitigation of a three-day suspension is appropriate where Grievant failed to conduct required security checks and falsified facility documents?

**SUMMARY:** Grievant was suspended for three days after it was discovered that he was not conducting required fifteen (15) minute security checks on his assigned unit, yet entering log information indicating he actually completed the security checks. During the time period immediately after Grievant falsely signed off on the log book, a resident he was responsible for was found in his cell unresponsive due to a medical condition. Grievant admits he engaged in the conduct alleged. However, he claims that Respondent failed to follow its progressive discipline policy and the penalty should be mitigated.

West Virginia Division of Juvenile Services Policy 138.00 provides that suspension is permitted for a serious, singular incident. Grievant's conduct was serious, with safety issues for the residents and potential liability and security consequences for the Respondent. Grievant did not demonstrate the Respondent violated its progressive discipline policy. Nor has he established that mitigation is appropriate. Insofar as the Grievant's allegations could be construed to allege discrimination or favoritism, Grievant has not met his burden of proving these claims by a preponderance of the evidence. This grievance is DENIED.

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**KEYWORDS:** RESIGNATION, RESCIND, VERBAL ACCEPTANCE

**CASE STYLE:** NUGEN v. DIVISION OF MOTOR VEHICLES

DOCKET NO. 2009-0431-DOT (3/11/2009)

**PRIMARY ISSUES:** Whether Grievant rendered his resignation void by rescinding it before Respondent accepted it?

**SUMMARY:** Grievant admits that he voluntarily resigned his employment with the DMV to accept a position with another employer. However, he asserts that he rescinded his resignation before DMV accepted it. If Grievant withdraws his offer to resign before it is accepted, the resignation has no effect. However, the evidence shows that Respondent accepted Grievant's offer to resign and the resignation was binding on both parties. The grievance must be DENIED.

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**KEYWORDS:** SECONDARY EMPLOYMENT; IMPROPER USE OF OFFICE EQUIPMENT

**CASE STYLE:** FRAZIE v. INSURANCE COMMISSION

DOCKET NO. 2009-0663-DOR (3/23/2009)

**PRIMARY ISSUES:** Whether Grievant was properly suspended for using her work computer and email to send personal emails and to conduct secondary employment duties during her work time.

**SUMMARY:** Grievant was suspended for five days for sending personal emails and for conducting duties for secondary employment during work hours. Her work began to suffer as a result. Respondent met its burden. Grievance is DENIED.

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**KEYWORDS:** SUSPENSION; INSUBORDINATION; MITIGATION; REPRISAL

**CASE STYLE:** LYNN v. MONONGALIA COUNTY HEALTH DEPARTMENT

DOCKET NO. 2009-0452-MONCH (3/27/2009)

**PRIMARY ISSUES:** Whether Grievant should have been suspended for failing to conduct a home care visit for a patient and engaging in disruptive behavior.

**SUMMARY:** Grievant received an oral reprimand for tardiness, and was suspended three days for insubordination. Respondent demonstrated that Grievant reported to work late; refused to complete leave requests when she was late; refused to take a directive regarding a home care visit; and was disrespectful to her supervisors. Respondent proved Grievant's conduct constituted insubordination, and Grievant failed to offer any evidence in support of mitigating the suspension. In addition, Grievant failed to produce evidence in support of her claim that the suspension was motivated by reprisal. This grievance is denied.

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**KEYWORDS:** TERMINATION

**CASE STYLE:** JONES, SR. v. DIVISION OF HIGHWAYS

DOCKET NO. 2009-0830-DOT (3/11/2009)

**PRIMARY ISSUES:** Whether Grievant was wrongfully terminated

**SUMMARY:** Grievant was terminated because he lost his CDL as a result of a DUI. Respondent asserted Grievant could not meet the minimum qualifications of the position. Grievant grieved termination. Grievance denied.