

**WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**SYNOPSIS REPORT**

**Decisions Issued in September 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:** COMPARATIVE WAGES; DISCRIMINATION; JOB RESPONSIBILITIES; SIMILARLY SITUATED; AGENCY POLICY; GREENBOOK; QUALIFICATIONS

**CASE STYLE:** WATSON, ET AL. v. MARSHALL UNIVERSITY  
DOCKET NO. 2008-1789-CONS (9/9/2009)

**PRIMARY ISSUES:** Whether Grievants are entitled to salary increases because a new faculty member was hired with a greater salary than theirs.

**SUMMARY:** Grievants asserted they were entitled to a salary increase because of a newly hired faculty member with a larger salary than theirs. Agency policy and an applicable settlement agreement mandated evaluation for comparable compensation. The new faculty member was not similarly situated to Grievants as she had different job responsibilities and contract. Grievants contend that the denial of their salary increases is arbitrary and capricious, discriminatory, and in violation of applicable procedures. Grievants did not meet their burden of proof and demonstrate they had been discriminated against. However, it is established that the evaluation and comparison process as utilized by Respondent was faulty. The totality and severity of the errors in the review process utilized by both the Faculty Personnel Committee and the University President rendered the process arbitrary and capricious.

This grievance is GRANTED, IN PART. This grievance is hereby REMANDED to the extent Respondent is ORDERED to conduct a proper evaluation and equitably determine the amount of comparable compensation Grievants may or may not be entitled.

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**KEYWORDS:** INTERVIEW, ARBITRARY AND CAPRICIOUS, SELECTION, MOST QUALIFIED, SIGNIFICANT FLAW

**CASE STYLE:** VICARS v. BLUEFIELD STATE COLLEGE AND DEBORAH J. HALSEY-HUNTER, INTERVENOR

DOCKET NO. 2008-1645-BSC (9/9/2009)

**PRIMARY ISSUES:** Whether Grievant should have been selected for the James H. Shott Endowed Chair in the School of Business over the successful applicant.

**SUMMARY:** Grievant submitted an application for the James H. Shott Endowed Chair in the School of Business. Intervenor, Deborah J. Halsey-Hunter, also submitted an application for the position. Grievant and Ms. Halsey-Hunter were the only applicants for the Shott Chair. The competition for the Shott Chair in Business is a merit-based competition to be decided based on relative qualifications. The President is charged with making the appointment of the most highly qualified candidate after a required three level review and recommendation process. The evidence established that two of those three levels of review, the Department Chair and the Provost levels, did not take place or failed to follow the appropriate procedure as required by the selection policy. Grievant established that the selection process was flawed, and the selection decision was arbitrary and capricious. However, Grievant did not prove he is more qualified. As relief, Respondent is ordered to repeat the selection process for the position, following all applicable rules, policies and selection committee procedures, and after considering relative merit and qualifications of the candidates. This grievance is GRANTED IN PART, AND DENIED IN PART.

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

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**KEYWORDS:** DIRECTOR OR COORDINATOR OF SERVICES; PAY SCALE, CLASSIFICATION; ARBITRARY AND CAPRICIOUS

**CASE STYLE:** SHROADS v. HANCOCK COUNTY BOARD OF EDUCATION  
DOCKET NO. 2009-1582-HANED (9/8/2009)

**PRIMARY ISSUES:** Whether Grievant's should be classified as a coordinator or director.

**SUMMARY:** Grievant became the Coordinator of Special Education July 1, 2007, having bid upon the posted position, and she is paid under the professional pay scale. After serving in the position for some period of time she realized that other Central Office Administrators were titled Directors, and were paid substantially more than she under the administrative pay scale. The Superintendent recommended to the Board of Education that Grievant be made a Director, but the Board rejected this recommendation by a vote of 3-2. One of the Board members based her decision upon inaccurate information. Grievant argued Respondent had a duty to properly classify her as a Director. She did not demonstrate, however, that there exists any legal distinction between a Director and a Coordinator, or that Respondent was required to classify her position as a Director. Grievant did demonstrate that the decision of the Board of Education was arbitrary and capricious. The proper remedy in this case is to require the Board of Education to reconsider its decision. Accordingly, this grievance is GRANTED IN PART AND DENIED IN PART.

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

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**KEYWORDS:** TIMELINESS, EVALUATION, REPRISAL; ESTOPPEL; IMPROVEMENT PLAN, EMPLOYEE CODE OF CONDUCT, EXTRA-DUTY ASSIGNMENTS; SENIORITY RIGHTS; RETALIATION

**CASE STYLE:** SEELEY v. UPSHUR COUNTY BOARD OF EDUCATION  
DOCKET NO. 2008-1718-UPSED (9/30/2009)

**PRIMARY ISSUES:** Whether the grievance was timely filed, and whether Grievant proved that his evaluation was not conducted in an “open and honest manner.”

**SUMMARY:** On April 22, 2008 Grievant received an unsatisfactory evaluation from Upshur County Schools’ Director of Transportation. On May 9, 2008 a letter was sent to the Director’s attention from Grievant’s Representative requesting information pertaining to the evaluation. There was no agreement to extend the time line for filing this grievance to a date after Grievant received a response to this request for information. This grievance was not filed by Grievant until June 3, 2008. This grievance is untimely. In any event, Grievant failed to meet his burden of proof that the evaluation was flawed, inaccurate or otherwise violated any statute, rule, regulation or policy or that it was arbitrary, capricious or an abuse of discretion. In addition, no reprisal has been demonstrated and Grievant failed to offer any instances of lost opportunities for extra-duty assignments. Accordingly, this grievance is dismissed.

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**KEYWORDS:** DISCRIMINATION, UNIFORMITY; CONTRACT TERMS; STANDING; EMPLOYMENT TERM; SIMILARLY SITUATED; LIKE ASSIGNMENT AND DUTIES

**CASE STYLE:** YOUNG v. MARSHALL COUNTY BOARD OF EDUCATION  
DOCKET NO. 2008-1770-MARED (9/18/2009)

**PRIMARY ISSUES:** Whether Grievant has standing to challenge the employment terms of a position for which he did not apply.

**SUMMARY:** Grievant asserts that his status as a 260-day contract custodian, and Respondent's posting of vacated custodian positions at 220-day contract terms instead of 260-day contract terms, violates the statutory requirement that salaries be uniform throughout the county. He also claims discrimination. Respondent maintains that its decision on which vacated custodian positions were posted as 220-day contract terms was based on legitimate, need related criteria, and that it has not engaged in discrimination. Grievant lacks standing to challenge the employment terms of the position as he did not apply or bid for the position. The employment term of that custodian position did not affect Grievant in any way. This grievance is DENIED.

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**KEYWORDS:** POSTING; CONSOLIDATION; NEW POSITIONS; SCHOOL;  
SENIORITY; MERGER; REDUCTION IN FORCE

**CASE STYLE:** YOUNG v. MARSHALL COUNTY BOARD OF EDUCATION

DOCKET NO. 2009-0813-MARED (9/22/2009)

**PRIMARY ISSUES:** Whether Respondent's selection of a 260-day custodian position at a consolidated school was arbitrary and capricious.

**SUMMARY:** Grievant is currently assigned to an elementary school that will cease to exist as a result of consolidation at the end of the 2008-2009 school year. One other elementary school is also slated to be consolidated at the end of the 2008-2009 school year, both will be consolidated into Hilltop Elementary School. Grievant is the only custodian at his current elementary school on a 260-day contract. The service personnel of Marshall County voted to give preference to employees at schools that are closed by consolidation in the filling of new positions at the new school.

Grievant bid on a posted 260-day contract position at Hilltop Elementary School; however, he was not selected for the position because an applicant with more seniority applied. The successful applicant had previously been employed under a 200-day contract at one of the elementary schools closed due to consolidation. Grievant argues that he should have been directly transferred into the available 260-day position at Hilltop Elementary School without the posting process. Respondent counters that it filled the new positions at Hilltop Elementary School from the five custodians at the elementary schools that were consolidated on the basis of seniority. Grievant failed to prove the procedure used by Respondent was arbitrary and capricious, or otherwise wrong. This grievance is DENIED.

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**KEYWORDS:** TERMINATION; DISMISSAL; NOMINAL DAMAGES; RATIONAL NEXUS; IMMORALITY; MARIJUANA POSSESSION; OFF-DUTY MISCONDUCT; DUE PROCESS; MITIGATION; DISPROPORTIONATE; NOTICE OF CHARGES; RESIDUE; MISDEMEANOR PLEA

**CASE STYLE:** CONRAD v. GRANT COUNTY BOARD OF EDUCATION  
DOCKET NO. 2009-1458-GRAED (9/30/2009)

**PRIMARY ISSUES:** Whether Respondent provided Grievant with the required notice of the charges against her, and whether Respondent proved misconduct on the part of Grievant.

**SUMMARY:** Grievant was dismissed from her employment as a custodian at Petersburg High School after marijuana residue was found in her car, which was parked on school property, and a subsequent search of her home, which she shared with her boyfriend, resulted in the authorities finding 44 grams of marijuana. Respondent did not give Grievant notice of the charges against her, resulting in nominal damages being awarded to Grievant. Respondent proved Grievant engaged in immoral conduct by bringing marijuana onto school property, and pleading no contest to the charge of possession of marijuana. Respondent did not demonstrate a rational nexus between Grievant's off-duty conduct and her job as a custodian. The penalty imposed was so clearly disproportionate to the offense proven that it reflected an abuse of discretion. Grievant's dismissal was reduced to a 15 day suspension without pay. This grievance is GRANTED.

**TOPICAL INDEX**  
**STATE EMPLOYEES**

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**KEYWORDS:** DISCIPLINE; REPRIMAND; CREDIBILITY; CAUSE

**CASE STYLE:** BIAS, JR. v. DIVISION OF HIGHWAYS

DOCKET NO. 2008-1520-DOT (9/22/2009)

**PRIMARY ISSUES:** Whether Grievant, in the circumstances of this case, is subject to a written reprimand for ill advised employee conduct not per se forbidden conduct.

**SUMMARY:** Respondent issued a written reprimand to Grievant for conduct it deemed inappropriate for an employee of the Division of Highways. Sleeping on the job, among other delineated offences, is a duly identified and sanctionable violation of agency policy. Grievant acknowledges awaiting the arrival of co-workers in a prone like position, but denies he was asleep.

Grievant's actions were ill advised, an example of poor judgement and totally unprofessional. Grievant is unequivocally on notice that this type of conduct is unacceptable. Nevertheless, in the circumstance of this grievance, it was not established by a preponderance of the evidence that Grievant was in violation of an agency rule or regulation. Accordingly, this grievance is GRANTED.

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**KEYWORDS:** DISCRIMINATION; HEARSAY; RECORDING; INTERVIEW TAPE; INVESTIGATION; GENERAL ORDERS; POLICY; RELIEF; GARRITY WARNING; INTERPRETATION; DEFERENCE; NOTICE; NATURE OF COMPLAINT; ADVISORY OPINION

**CASE STYLE:** COOK v. DIVISION OF NATURAL RESOURCES

DOCKET NO. 2009-0801-CONS (9/22/2009)

**PRIMARY ISSUES:** Whether Respondent's interpretation of its General Orders was reasonable; whether Respondent followed its own General Orders; and, whether Grievant demonstrated an adverse impact.

**SUMMARY:** Grievant is a Conservation Officer employed by the Division of Natural Resources. The various issues in this consolidated grievance arose primarily out of Grievant's disagreement with Respondent's General Orders, and Respondent's interpretation of its General Orders. In several instances, Grievant's reading of the General Orders was incorrect, as was his reading of a statute he cited in support of his asserted right to record an investigatory interview. Where the General Orders were ambiguous, Respondent's interpretation was entitled to deference. Many of Grievant's complaints about changes in General Orders had not affected Grievant in any way, and represented merely a philosophical disagreement with his employer's rules, which is not grievable. Finally, the changes in the General Orders were not discriminatory, as they apply to all DNR officers. This grievance is DENIED.

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**KEYWORDS:** DISCRIMINATION; PAY EQUITY; PAY DISPARITY; ARBITRARY AND CAPRICIOUS

**CASE STYLE:** WILLIAMS v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR PUBLIC HEALTH

DOCKET NO. 2008-1458-DHHR (9/9/2009)

**PRIMARY ISSUES:** Whether the disparity in pay between Grievant and a new employee was the result of unlawful discrimination?

**SUMMARY:** Grievant, who is employed in the classification of Health and Human Resources Specialist (“HHR”), filed a grievance because another person was hired by the same agency, in the same classification, two and a half years after he was, at a significantly higher rate of pay. Grievant seeks to have his pay increased to the same or higher annual salary as the new employee, retroactively to the date the new employee was hired. The annual salaries received by Grievant and the new employee are both within pay grade thirteen which is the appropriate pay grade for their classification. Grievant has failed to prove that the difference between his salary and the salary of the new employee constituted unlawful discrimination or was arbitrary and capricious. The grievance is DENIED.

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**KEYWORDS:** DRUG, CONTROLLED SUBSTANCE, LORTAB, ATTEMPT, HOSTILE WORK ENVIRONMENT, GOOD CAUSE, DOLLY PARTON, PROGRESSIVE DISCIPLINE, CREDIBILITY, DISMISSAL LETTER, NOTICE OF DISMISSAL, MITIGATION

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

DOCKET NO. 2009-1381-DOT (9/16/2009)

**PRIMARY ISSUES:** Whether “good cause” existed for Grievant’s dismissal where he asked several coworkers for a controlled substance and created a hostile work environment?

**SUMMARY:** Grievant was employed by DOH as a permanent Accountant Auditor 2. After working for DOH for approximately one month, Grievant was dismissed. Grievant asked several other employees for a controlled substance, Lortab. Further, Grievant created a hostile work environment for female employees. He made statements inferring that he would get an erection if he continued to look at pictures of Dolly Parton in the workplace. He grabbed a female coworker from behind and made her very uncomfortable. He told this same coworker that when he left his wife he would look her up, and “older women have needs.”

Grievant argues that DOH has not proven the charges against him and that progressive discipline was not followed. DOH maintains that Grievant violated policies related to drugs in the workplace and workplace harassment, and the infractions were serious in nature.

Respondent has met its burden of proving the Grievant attempted to obtain a controlled substance from various employees and created a hostile work environment. DOH did not violate its progressive discipline policy. Mitigation is inappropriate in light of the totality of the circumstances. Accordingly, this grievance is DENIED.

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**KEYWORDS:** FAIR LABOR STANDARDS ACT; FLSA; COMPENSATION; TRAVEL; COMPENSABLE WORK TIME; PRINCIPAL ACTIVITY; WORK SITE

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

DOCKET NO. 2009-0287-DOT (9/30/2009)

**PRIMARY ISSUES:** Whether Grievant should be compensated for travel time from his work site to the District Office to perform supervisory activities.

**SUMMARY:** Grievant seeks payment for the time he was required to travel from his job site to the DOH District office in order to enter data through a computer program and have his work checked by his supervisor. Grievant indicated that had he been able to access an internet connection and enter the contractor documentation at the job site that would have been done at the job site because this was an integral part of his supervisory activities on that project. DOH counters that this activity was not required of his job, was incidental to his work, occurred after his work activity had ceased and he was traveling from work to his home. The record established that the travel time of Grievant in this case was an integral and indispensable part of his assignment as supervisor on that project and should have been compensated. This grievance is GRANTED

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**KEYWORDS:** GRIEVABLE ISSUE; SALARY ADJUSTMENT; RAISE; ELIGIBILITY

**CASE STYLE:** OGLESBEE v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILDREN AND FAMILIES

DOCKET NO. 05-HHR-470 (9/30/2009)

**PRIMARY ISSUES:** Whether Grievant was improperly denied an 'across-the-board' raise granted state employees by the Legislature.

**SUMMARY:** Grievant filed a grievance in 2005, when he learned he was not eligible for an across-the-board salary adjustment approved by the West Virginia Legislature, because the authorizing legislation provided that only persons who were permanent state employees on May 2, 2005, were eligible. Grievant became an employee after that date. HHR did not make the decision which gave rise to this grievance, nor did it have any discretionary authority with regard to this matter, so it does not constitute a grievable issue. This grievance is DENIED.

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**KEYWORDS:** INSUBORDINATION, WILLFUL, HOSTILE WORK ENVIRONMENT, SUPERVISOR, IMPROVEMENT PLAN, VAGUE, TIMELINESS, CONTINUING PRACTICE

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

DOCKET NO. 2008-1642-DOR (9/15/2009)

**PRIMARY ISSUES:** Whether Respondent has proven by preponderant evidence that Grievant intentionally violated a directive or policy.

**SUMMARY:** Grievant, an attorney with the Office of Insurance Commission, was issued a written reprimand for various offenses. Thereafter, he was suspended five days for insubordination. Grievant's direct challenge of the written reprimand is untimely as it was not filed within the requisite statutory time frame. Grievant's other claims are timely.

Respondent has failed to meet its burden of proving, by a preponderance of the evidence, the allegations contained within the five-day suspension letter. Grievant has not established his claim of hostile work environment against his supervisor by a preponderance of the evidence. Accordingly, this grievance is GRANTED, in part, and DENIED, in part.

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**KEYWORDS:** RESIGNATION; DISCRIMINATION; ARBITRARY AND CAPRICIOUS; AUTHORITY; SIMILARLY SITUATED

**CASE STYLE:** HOUSE v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILDREN AND FAMILIES

DOCKET NO. 2008-0719-DHHR (9/17/2009)

**PRIMARY ISSUES:** Whether the Division of Personnel may require an appointing authority to dismiss an employee?

**SUMMARY:** Grievant was dismissed from employment with the DHHR on October 12, 2008. Grievant did not contest his dismissal but requested that he be allowed to resign rather than have his employment terminated. The Commissioner for Bureau for Children and Families initially rejected Grievant's request and Grievant filed a grievance arguing that other similarly situated employees were allowed to resign rather than be dismissed. At level one, Respondent decided to allow Grievant to resign but was told by a representative of the Division of Personnel that the Division would not allow Grievant to resign and he had to be dismissed. Based solely upon the determination of the Division of Personnel, Respondent refused Grievant's request and would not allow him to resign. Since Respondent's decision was based solely upon the misapprehension that it was legally required to follow the directive of the Division of Personnel, the decision was arbitrary and capricious. Accordingly, the grievance is Granted.

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**KEYWORDS:** SELECTION; MOST QUALIFIED, SENIORITY; CLEARLY WRONG, ARBITRARY AND CAPRICIOUS; QUALIFICATIONS; DISCRIMINATION

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

DOCKET NO. 2009-0173-DOT (9/29/2009)

**PRIMARY ISSUES:** Whether Respondent s non-selection of the Grievant for a posted position was clearly wrong or arbitrary and capricious.

**SUMMARY:** This grievance was filed after Grievant was not selected for a Transportation Crew Supervisor I position with the Department of Transportation/Division of Highways. Grievant alleges that he should have been selected for a position because he has more seniority than the successful applicants. After the interview process, two other employees were deemed more qualified than Grievant. Grievant has not established by a preponderance of the evidence that Respondent s selection of other applicants was arbitrary and capricious or clearly wrong. This grievance is DENIED.

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**KEYWORDS:** SELECTION; MOST QUALIFIED, SENIORITY; DISCRETION

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

DOCKET NO. 2008-1833-DOT (9/22/2009)

**PRIMARY ISSUES:** Whether Respondent's non-selection of the Grievant for the position of Supervisor III was clearly wrong or arbitrary and capricious?

**SUMMARY:** This grievance was filed when Grievant was not selected for a Supervisor III position in the Respondent's Driver License Section. Grievant had served as a customer service representative lead in that section of Driver Services for several years. After the interview process, an employee deemed more qualified with less seniority than Grievant was selected for the position. Grievant has not established by a preponderance of the evidence that the Respondent's selection of another applicant was arbitrary and capricious. This selection decision was not clearly wrong. This grievance is DENIED.

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**KEYWORDS:** TIME LIMITS; DEFAULT; JUSTIFIED DELAY; NEGLIGENCE; AFFIRMATIVE DEFENSE

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

DOCKET NO. 2008-1253-DOTDEF (9/23/2009)

**PRIMARY ISSUES:** Whether Respondent had a statutory defense for failing to hold a hearing within the statutory time lines.

**SUMMARY:** Grievant filed a written request to prevail by default alleging that a level one hearing was not scheduled within the time lines mandated by the statute. Specifically, the grievance was transferred to the new grievance procedure by an Order dated March 8, 2008, and Grievant received a notice, dated May 27, 2009, that a level one hearing was scheduled for June 9, 2009. Respondent demonstrated that the unusually long period for scheduling the hearing was the result of “a justified delay not caused by negligence or intent to delay the grievance process.” W. Va. Code § 6C-2-3(b)(1). Accordingly, the request to enforce the grievance by default is denied.

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**KEYWORDS:** WORKPLACE SECURITY POLICY, FIREARM, GUN, MITIGATION, GOOD CAUSE, INTENTIONAL DISREGARD, WORK HISTORY

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

DOCKET NO. 2009-1472-DOT (9/29/2009)

**PRIMARY ISSUES:** Whether the penalty of dismissal was disproportionate to the offense committed by the Grievant in light of the totality of the circumstances.

**SUMMARY:** Grievant, a seventeen-year employee of DOH, is a firearm enthusiast. On May 6, 2009, he unknowingly and unintentionally brought a satchel into the workplace that contained a firearm. He had previously used this satchel to transport firearms to and from a shooting range. A co-worker stumbled upon the firearm and reported her find. Grievant was then required to take the firearm home, secure it and return to work. He was thereafter dismissed from his employment and filed this grievance.

The Respondent has established, by a preponderance, of the evidence that the Grievant violated the Workplace Security Policy when he brought a firearm inside the workplace. Possession of a firearm inside the workplace is a serious offense that cannot be taken lightly. Nevertheless, the penalty of dismissal is disproportionate to the offense in light of the Grievant’s unblemished seventeen-year record of service and the totality of the circumstances.

Accordingly, this grievance is GRANTED, in part and DENIED, in part.