

**WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**SYNOPSIS REPORT**

**Decisions Issued in December 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**  
**COUNTY BOARDS OF EDUCATION**  
**PROFESSIONAL PERSONNEL**

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**KEYWORDS:** PLANNING PERIOD; COMPENSATION; CLASS; REGULAR SCHOOL DAY; ARBITRARY AND CAPRICIOUS

**CASE STYLE:** BAKER v. POCAHONTAS COUNTY BOARD OF EDUCATION  
DOCKET NO. 2009-0457-POCED (12/8/2009)

**PRIMARY ISSUES:** Whether Grievant was improperly denied a planning period.

**SUMMARY:** Grievant argued that Respondent acted in an arbitrary and capricious manner when it denied her a planning period when her class periods were increased to more than one-half the class periods of the regular school day. Respondent counters that Grievant has failed to meet the threshold requirement of teaching more than one-half of the class periods. The plain meaning of W. Va. Code § 18A-4-14(2) mandates that every teacher who is regularly employed for a period of time more than one-half the class periods of the regular school day must be provided a planning period. The record demonstrates that Grievant does work more than one-half the class periods of the regular school day, and, therefore, should have been provided a planning period. While Grievant is not entitled to all the relief requested, she is to be compensated for that time period she was deprived of her planning period at her prorated daily rate of pay. This grievance is GRANTED, IN PART.

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**KEYWORDS:** SELECTION, DEAN OF STUDENTS, QUALIFICATIONS, OTHER MEASURES, INTERVIEW, ARBITRARY AND CAPRICIOUS

**CASE STYLE:** FRENCH v. MERCER COUNTY BOARD OF EDUCATION

DOCKET NO. 2009-0822-MERED (12/8/2009)

**PRIMARY ISSUES:** Whether Grievant was the most qualified applicant for the Dean of Students position.

**SUMMARY:** Grievant was not the successful applicant for the position of Dean of Students. She argues that the manner in which the selection was made was improper. Grievant had more years of service than any other applicant. Respondent BOE maintains that its selection decision was not arbitrary and capricious or contrary to law because it considered the necessary statutory factors when making its selection decision.

Grievant has not established, by a preponderance of the evidence, that she was the most qualified applicant for the position. While she has approximately thirty-one years of teaching experience, experience is but one consideration. Unlike the Grievant, the successful applicant held a Masters of Arts in Administration, had experience with the West Virginia Educational Information System, had worked with the Evaluation Leadership Institute and exuded a “team player attitude.” The successful applicant received a greater overall rating when compared to the Grievant. There is no indication that a flaw in the selection process occurred. The BOE’s selection decision was not unreasonable. Accordingly, this grievance must be DENIED.

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**KEYWORDS:** SELECTION; QUALIFIED; ASSISTANT SUPERINTENDENT;  
BOARD OF EDUCATION; POSTING; CERTIFICATION; FIRST SET  
OF FACTORS; ARBITRARY AND CAPRICIOUS; RETALIATION;  
REPRISAL; DISCRETION

**CASE STYLE:** GUIDO v. HARRISON COUNTY BOARD OF EDUCATION AND  
LINDY L. BENNETT, INTERVENOR

DOCKET NO. 2009-0456-CONS (12/4/2009)

**PRIMARY ISSUES:** Whether Respondent's non selection of Grievant for the posted position of assistant superintendent was arbitrary and capricious, and a violation of statutory standards.

**SUMMARY:** Grievant asserts he was the most qualified candidate for the position of Assistant Superintendent of Schools for Harrison County because he possesses a Doctorate Degree, a superintendent certification, and has vast experience in educational programs. Intervenor does not have a doctorate degree. There was no requirement that the Assistant Superintendent possess a doctorate degree. In addition, Respondent determined Central Office administrative experience was important, given the duties of the position. Respondent's decision to hire the Intervenor was not arbitrary and capricious. In addition, Grievant failed to demonstrate that he was the victim of reprisal. This grievance is DENIED.

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

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**KEYWORDS:** CLASSIFICATION; UNIFORMITY; DISCRIMINATION; FAVORITISM; LIKE ASSIGNMENT AND DUTIES; SIMILARLY SITUATED

**CASE STYLE:** SISSON v. RALEIGH COUNTY BOARD OF EDUCATION  
DOCKET NO. 2009-0945-CONS (12/18/2009)

**PRIMARY ISSUES:** Whether it is proper for this multi-classified grievant to establish entitlement to a 261-day contract by comparing himself to multiple individuals' classifications to establish same and/or similarly duties.

**SUMMARY:** Grievant, a multi-classified employee, employed under a 240-day annual contract filed a grievance asserting that he is entitled to compensation and benefits comparable to those received by 261-day contract employees who do the same or substantially similar duties. Grievant alleges a violation of W. Va. Code §§ 18A-4-5b and 6C-2-2(g)(1).  
Respondent contends Grievant is not similarly situated or performing like assignment and duties as the classified employee(s) whom Grievant seeks to compare himself. Respondent maintains that no other service employee employed holds the identical multi-classified title as Grievant, (citing Flint v. Board of Education, 207 W.Va. 251, 531 S.E.2d 76 (1999)). Grievant did not identify a single 261-day employee who holds the exact same multi-classification. Employees who do not have the same classification titles are not performing "like assignments and duties" and, therefore, are not subject to comparison in establishing a claim under W. Va. Code §18A-4-5b or on the basis of discrimination or favoritism. Id  
Grievance is DENIED

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**KEYWORDS:** DISCRIMINATION; FAVORITISM; HARASSMENT; TRANSFER; BUS ROUTE; SENIORITY; BUS OPERATOR; UNIFORMITY; ARBITRARY AND CAPRICIOUS; HOURS

**CASE STYLE:** PRICKETT v. MONONGALIA COUNTY BOARD OF EDUCATION  
DOCKET NO. 2009-0699-MONED (12/8/2009)

**PRIMARY ISSUES:** Whether Respondent violated the uniformity provisions of West Virginia Code § 18A-4-5b, and whether Respondent discriminated against or harassed Grievant, or showed favoritism or acted in an arbitrary and capricious manner when it reconfigured bus routes.

**SUMMARY:** Grievant complained that less senior bus operators were assigned bus routes that resulted in them working more hours than she. Grievant was placed on transfer and did not contest her transfer. Many bus operators had their routes changed for the 2008-2009 school year due to the closure of University High School, and its reopening in a new location. Transfers are not based on seniority, but on the needs of the school system. Further, Grievant did not demonstrate the Respondent acted in an arbitrary and capricious manner. Grievant also argued that the uniformity provisions should be applied to the hours worked by bus operators. Grievant did not demonstrate that bus routes can be made uniform. Finally, Grievant did not prove her claims of favoritism, discrimination or harassment. This grievance is DENIED.

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**KEYWORDS:** INTERVENTION, REDUCTION IN FORCE, RIF, TIMELINESS, SENIORITY, MULTICLASSIFICATION, ABSURD RESULT DOCTRINE, PARA MATERIA, LACK OF NEED

**CASE STYLE:** SHANKLIN v. KANAWHA COUNTY BOARD OF EDUCATION  
DOCKET NO. 2009-1450-KANED (12/28/2009)

**PRIMARY ISSUES:** Whether the BOE's non-retention of a more senior General Maintenance worker was contrary to law?

**SUMMARY:** Grievant and the moving Intervenor were reduced in force ("RIF'd") from their positions as General Maintenance workers. The BOE retained a less senior, multiclassified employee in the General Maintenance classification. Ms. Harper, the moving Intervenor, did not timely file a grievance or intervention. Her application for intervention is denied.

Grievant maintains that her RIF was contrary to law because she had more seniority than the individual who retained his position in the General Maintenance classification. Grievant has established that the BOE failed to retain the most senior employee within the classification when reducing its workforce. Nevertheless, even if the BOE would have followed the appropriate procedure, Grievant was not the most senior RIF'd employee and is therefore not entitled to a position. Accordingly, this grievance must be DENIED.

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**KEYWORDS:** TERMINATION; DRUG TEST

**CASE STYLE:** GREEN v. KANAWHA COUNTY BOARD OF EDUCATION  
DOCKET NO. 2009-0764-KANED (12/9/2009)

**PRIMARY ISSUES:** Whether Grievant was properly terminated after Respondent received a drug screen which was positive for amphetamines after Grievant's bus backed into a parked car.

**SUMMARY:** Grievant is a bus operator. On September 30, 2008, she backed her bus into a parked car. Pursuant to Division of Transportation ("DOT") regulations, Grievant was immediately taken for a drug screen. The results of that screen showed amphetamines in Grievant's system. Respondent asserts that, due to a positive result on the post-accident drug screen, Grievant has violated State Board Policy 4336 §16. Therefore, Respondent terminated Grievant on December 2, 2008, by letter. Grievant asserts the result was a false positive, caused by the over-the-counter and prescription medicine she was taking. Respondent has met its burden of proof in this matter. This grievance is DENIED.

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**KEYWORDS:** UNIFORMITY, DISCRIMINATION, LIKE ASSIGNMENTS AND DUTIES, SIMILARLY SITUATED, EXTRACURRICULAR CONTRACT, TIMELINESS, GRANDFATHER CLAUSE, PROSPECTIVE APPLICATION, CROCK

**CASE STYLE:** CLARK, ET AL. v. PUTNAM COUNTY BOARD OF EDUCATION  
DOCKET NO. 2009-0597-CONS (12/1/2009)

**PRIMARY ISSUES:** Whether Grievants were treated in a discriminatory and non-uniform manner.

**SUMMARY:** Grievants are employed as bus operators by the BOE. They allege that the BOE's refusal to award them separate contracts for two "shuttle runs" constitutes discrimination and violates the uniformity requirement of West Virginia Code § 18A-4-5b. Respondent BOE maintains that the Grievants' claims are untimely and, assuming timeliness, the employee to which Grievants compare themselves is "grandfathered" in by West Virginia Code § 18A-4-5b. Lastly, the BOE argues that even if comparison is made, Grievants have still not established they are performing like assignments and duties.

Grievants' claims were timely filed. Nevertheless, Grievants have not established, by a preponderance of the evidence, that the BOE acted in a discriminatory or non-uniform manner because the person to whom they compare themselves is not a comparable employee. Our Legislature intended the uniformity requirement to apply in a prospective fashion. Even when comparison is made, Grievants still have not proven their claims by preponderant evidence. Accordingly, this grievance is DENIED.

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

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**KEYWORDS:** DISCIPLINE, SUSPENSION, EXCESSIVE FORCE, HOSTILE ENVIRONMENT, DISCRIMINATION, PRONE OUT, APOLOGY

**CASE STYLE:** LEWIS v. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY/SOUTH CENTRAL REGIONAL JAIL  
DOCKET NO. 2009-1682-MAPS (12/17/2009)

**PRIMARY ISSUES:** Whether CO may be suspended for use of excessive and inappropriate force in forcing an inmate to comply with commands.

**SUMMARY:** Grievant was suspended for inappropriate and excessive use of force against an inmate. Respondent was able to prove that Grievant used a dangerous and unnecessary technique in attempting to subdue an inmate and submitted a false report regarding that incident. Grievant failed to demonstrate that Respondent's disciplinary action was improper in any way. A fifteen-day suspension was justified and appropriate. Accordingly, the grievance is DENIED.

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**KEYWORDS:** DISCIPLINE, SUSPENSION, MITIGATION, PERFORMANCE IMPROVEMENT PLAN

**CASE STYLE:** GIBSON v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILD SUPPORT ENFORCEMENT  
DOCKET NO. 2009-1475-DHHR (12/2/2009)

**PRIMARY ISSUES:** Whether employee should be suspended for ten days for on-going poor performance.

**SUMMARY:** Respondent asserts that Grievant was not meeting performance expectations. Grievant was provided with a Performance Improvement Plan to provide guidance regarding Respondent's expectations, and meetings were scheduled to discuss how those expectations might be met. DHHR argues that Grievant did not improve her performance and did not comply with the provision of the plan, therefore, discipline was justified. Grievant alleges that her performance met standards and that she was not given training necessary to help her succeed in areas where her skills may have been weak.

Respondent proved that Grievant failed to successfully meet the expectations set out in her Performance Improvement Plan and discipline was justified.

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**KEYWORDS:** DISCIPLINE, SUSPENSION, PSYCHOLOGICAL, MEDICAL, EXAMINATION, EVALUATION, THREAT, WORKPLACE, SECURITY, IMPAIRMENT, DISABILITY

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

DOCKET NO. 2009-0436-DHHR (12/9/2009)

**PRIMARY ISSUES:** Whether Grievant presented a threat to the safety of her co-workers and should meet conditions resulting from an independent psychological examination before being allow to return to work.

**SUMMARY:** Grievant was suspended without pay after she made statements to a medical professional that included an ambiguous threat regarding killing her co-workers. As a result of the threat, Respondent suspended Grievant pending the outcome of an independent medical/psychological evaluation to determine her fitness to return to work.

Respondent stated that if the independent physician cleared Grievant to return to work she would be reinstated and reimbursed for all pay and benefits lost during the period of suspension.

Respondent's authority to subject employees to an independent medical or psychological evaluation is strictly limited under the Americans With Disabilities Act ("ADA"). When viewed in light of the ADA restrictions, the independent physician's report cleared Grievant to return to work. The grievance is GRANTED.

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**KEYWORDS:** DISCRIMINATION; GENDER; PUCCIO MEMO

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

DOCKET NO. 2009-0478-DOT (12/31/2009)

**PRIMARY ISSUES:** Whether Respondent discriminated against Grievant by not giving her the same percentage salary increase that was given to other employees four years earlier.

**SUMMARY:** Grievant received a five percent pay increase when she was promoted from a Transportation Worker 2, Equipment Operator to a Transportation Worker 3, Equipment Operator on October 1, 2008. She contends that she should have received a ten percent pay increase because four male employees, who received the same promotion in or before 2004, received a ten percent increase. Grievant asserts that Respondent unlawfully discriminated against her by not giving her the same percentage pay increase that was previously given to the male employees.

Respondent counters that the ten percent increase that was previously paid to the employees was made up of a five percent required increase and a five percent discretionary increase. DOH quit giving employees the discretionary increase after a memorandum was issued by the Governor's Chief of Staff in April 2005. Respondent argues that after the 2005 memorandum all employees, including Grievant, have received the same five percent salary increase upon promotion, so the raise given to Grievant was not discriminatory.

Grievant did not prove that the five percent salary increase she received with her promotion was discriminatory. The grievance is DENIED.

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**KEYWORDS:** DISCRIMINATION; REPRISAL; RETALIATION; HARASSMENT;  
FAIR TREATMENT; SIMILARLY SITUATED

**CASE STYLE:** COOK v. DIVISION OF NATURAL RESOURCES  
DOCKET NO. 2009-0661-DOC (12/28/2009)

**PRIMARY ISSUES:** Whether Grievant was discriminated against or received unfair treatment when DNR implemented an employee grievance procedure.

**SUMMARY:** Grievant is a Conservation Officer employed by the Division of Natural Resources. On September 2, 2008, the Division of Natural Resources (“DNR”) implemented an employee grievance procedure. The policy applies to all employees, and was adopted to make certain that each employee is treated equally in the grievance process. Grievant asserts that new policy acts to discourage employees from filing grievances and discriminates against Grievant. Grievant also claims the new policy was enacted by his employer as a means of reprisal and for the purpose of harassment. Grievant failed to establish that he was treated differently from similarly situated employees. In addition, Grievant did not prove that he was the victim of reprisal or harassment. This grievance is DENIED.

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**KEYWORDS:** FUNCTIONAL DEMOTION, GOOD CAUSE, SLEEPING, INSUBORDINATION, COMMON-LAW RIGHT TO PRIVACY, SUBSTANTIVE AND PROCEDURAL DUE PROCESS, LIBERTY AND PROPERTY INTEREST, FIRST AMENDMENT FREEDOM OF ASSOCIATION, INTIMATE ASSOCIATION, NO-CONTACT DIRECTIVE, MITIGATION

**CASE STYLE:** WATSON, JR. v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/MILDRED MITCHELL-BATEMAN HOSPITAL  
DOCKET NO. 2009-0558-DHHR (12/31/2009)

**PRIMARY ISSUES:** Whether Respondent Bateman Hospital could restrict a Grievant's contact with others outside the workplace?

**SUMMARY:** Grievant was suspended pending an investigation into a copper theft. Upon conclusion of the investigation, Respondent found the Grievant had no involvement in the theft. Nevertheless, it suspended Grievant for five days and demoted him from security guard to Food Service Worker because the Grievant admitted during an interview that he "dozed off" when working night shift. Grievant was further disciplined because he spoke with other employees, outside the workplace and after working hours, when Respondent instructed him to have no contact with anyone employed by Bateman.

Respondent's no-contact directive is overly broad and encroaches upon the Grievant's fundamental right to freedom of association, and his fundamental and common-law right to privacy. Accordingly, it is void and the Grievant should not and cannot be disciplined for contacting his colleagues after working hours.

Upon consideration of the totality of the evidence, Grievant openly and honestly admitted during the investigation that he sometimes "dozed off" during the night shift. This admission was very general and unrelated to any particular incident. The penalty of a five-day suspension plus demotion was clearly disproportionate to the offense.

Accordingly, this grievance must be GRANTED.

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**KEYWORDS:** MOOT, ADVISORY OPINION, EXCEPTIONS TO MOOTNESS, VIDEO SURVEILLANCE, SECURITY CAMERA, LOUNGE AREA, EMPLOYEE COMFORT, EXPECTATION OF PRIVACY

**CASE STYLE:** COBB, ET AL. v. DIVISION OF HIGHWAYS

DOCKET NO. 2009-1017-CONS (12/31/2009)

**PRIMARY ISSUES:** Whether this Grievance is moot where the DOH placed a camera in a lounge area and then removed it after the Grievance was filed.

**SUMMARY:** Grievants, Transportation Workers for the DOH, challenge the DOH's placement of a security camera in an area used for the personal comfort of employees. Grievants seek removal of the camera. Since the filing of the initial grievance, DOH has removed the camera.

This Grievance Board does not issue rulings upon moot questions or abstract propositions. There is no indication that this is the type of scenario that fits within an exception to the mootness doctrine.

Accordingly, this grievance is DENIED.

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**KEYWORDS:** RES JUDICATA; DUTIES; RESPONSIBILITIES; CHANGE IN CIRCUMSTANCES; FRAUD; MISTAKE; CONCEALMENT; MISREPRESENTATION

**CASE STYLE:** DECAPIO/BEAUTY v. DIVISION OF HIGHWAYS

DOCKET NO. 06-DOH-329R (12/23/2009)

**PRIMARY ISSUES:** (1) Did the DOH reorganization result in a change of job classification, duties, or responsibilities that would constitute a change of circumstances such that res judicata should not apply, and (2) Did any fraud, mistake, concealment, or misrepresentation take place during the first grievance, which prevented fair litigation of the issues such that it should preclude the application of res judicata to this second grievance.

**SUMMARY:** This matter was remanded solely for consideration of the following two issues: (1) Did the DOH reorganization result in a change of job classification, duties, or responsibilities that would constitute a change of circumstances such that res judicata should not apply, and (2) Did any fraud, mistake, concealment, or misrepresentation take place during the first grievance, which prevented fair litigation of the issues such that it should preclude the application of res judicata to this second grievance. Grievants did not demonstrate that the DOH reorganization resulted in a change of job classification, duties, or responsibilities that would constitute a change of circumstances, or that any fraud, mistake, concealment, or misrepresentation took place during the first grievance, which prevented fair litigation of the issues.

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**KEYWORDS:** SELECTION; DISCRIMINATION; MOST QUALIFIED; CLEARLY WRONG; ARBITRARY AND CAPRICIOUS; INTERVIEW; QUALIFICATIONS; EXPERIENCE

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

DOCKET NO. 2009-0484-DOT (12/18/2009)

**PRIMARY ISSUES:** Whether Respondent s non-selection of the Grievant for the position of Transportation Engineering Technician Trainee was clearly wrong or arbitrary and capricious.

**SUMMARY:** Grievant is employed as a Transportation Worker 3 - Mechanic with the Department of Transportation/Division of Highways. He applied for a Transportation Engineering Technician position and was not the successful applicant. He alleges that he should have been selected for the position because he has more experience than the successful applicants. Further, Grievant alleges he was not selected because of his age. The position was posted again some time later and Grievant once again applied for the position. Grievant was interviewed and shared with his employer additional information concerning his qualifications. Grievant was offered the position. Grievant did not accept the offer.

Grievant has not established by a preponderance of the evidence that the Respondent's initial selection of other applicants for the position was arbitrary and capricious. Moreover, Grievant did not establish that he was the victim of discrimination. This grievance is DENIED.

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**KEYWORDS:** SELECTION; QUALIFICATIONS; SENIORITY; JOB MATCH ASSESSMENT

**CASE STYLE:** JUSTICE v. DEPARTMENT OF ENVIRONMENTAL PROTECTION

DOCKET NO. 2008-1518-DEP (12/17/2009)

**PRIMARY ISSUES:** Whether Grievant was the most qualified applicant for the position.

**SUMMARY:** Grievant asserts he should have been selected for the Environmental Resource Specialist 3 position, as he was most qualified. Grievant avers that he was not selected based on his score on the Profile XT Assessment ("Assessment") test which is designed to determine if the test taker meets established benchmarks for the position. Grievant argues this is arbitrary and capricious. Respondent asserts it considered the Assessment, as required by its policy, and when Grievant's score on the Assessment was factored in, he was not the successful applicant. Grievant has met his burden of proof. This grievance is GRANTED.

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**KEYWORDS:** SUSPENSION; CONDITION YELLOW

**CASE STYLE:** CLIVER v. DIVISION OF CORRECTIONS/MOUNT OLIVE  
CORRECTIONAL COMPLEX

DOCKET NO. 2008-1069-MAPS (12/31/2009)

**PRIMARY ISSUES:** Whether Grievant was properly suspended for not calling a Condition Yellow when his inmate count failed to clear.

**SUMMARY:** Grievant was suspended for 5 days without pay for violating policies and procedures. Respondent asserts that on November 29, 2007, Grievant failed to update the Daily Log and the Mount Olive Work Camp Log Book upon relieving Correctional Officer (“CO”) Jason Bragg. Respondent avers that on that day, Grievant also failed to follow policy and declare a condition yellow when an inmate was unaccounted for.

Grievant asserts he worked at the Mount Olive Work Camp, and because the Work Camp was quite different than Mount Olive Correctional Complex (“MOCC”), the General Policies of MOCC are impractical for most purposes associated with the Work Camp’s day to day operation. Grievant further argues that when it was brought to his attention that an inmate was unaccounted for, Grievant checked all possible locations to determine the inmate’s whereabouts. Immediately upon concluding his search, without finding the inmate, Grievant spoke with Associate Warden Paul Parry. Grievant avers that he used his best judgement given the situation.

Respondent has met its burden and this grievance is DENIED.

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**KEYWORDS:** TIMELINESS; GRIEVABLE EVENT; CONTINUING PRACTICE; CONTINUING DAMAGE; DISCOVERY RULE; SALARY; MERIT RAISE; DISCRIMINATION; FAVORITISM

**CASE STYLE:** HUTCHINSON v. STATE FIRE COMMISSION  
DOCKET NO. 2010-0442-MAPS (12/23/2009)

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

**SUMMARY:** Grievant alleges entitlement to the benefits stemming from a merit raise granted office wide in January of 2005. Grievant contends information which became known to him in 2009 and further information, he believes to be, evident in Respondent's personnel records establishes that Respondent inexcusably denies him the benefit(s) of the merit raise. Respondent moved to dismiss this grievance.

Respondent argues that this grievance was not timely filed in that Grievant was aware of the material facts of the grievance in 2005. Not being granted the increase in salary in January 2005 was the grievable event. The grievance as filed does not allege discrimination or favoritism with the granting of the 2005 merit raise(s). This grievance, as filed in 2009, was not timely filed as the Grievant knew of the grievable event in 2005. The discovery rule exemption to toll Grievant's time limit for filing his grievance is not applicable in this case. This claim is untimely and the merits of this grievance need not be reached. Respondent's "Motion to Dismiss" is GRANTED and the above-styled action is DISMISSED.

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**KEYWORDS:** TOLL COLLECTOR, HAND, INJURY, BOOTH, WILLFUL, PATRON, AT-WILL EMPLOYEE, RETALIATION, CREDIBILITY, SUBSTANTIAL PUBLIC POLICY

**CASE STYLE:** SHORES v. PARKWAYS, ECONOMIC DEVELOPMENT AND TOURISM AUTHORITY

DOCKET NO. 2009-1583-DOT (12/1/2009)

**PRIMARY ISSUES:** Whether dismissal was appropriate where the Grievant willfully and wantonly injured a patron.

**SUMMARY:** Grievant, a toll collector, willfully and wantonly grabbed a toll patron's fingers as the patron pulled away in his vehicle. Grievant let go of the patron's fingers after the patron cried out in pain. Thereafter, the Grievant told a co-worker that he would bet that the patron would never do that again. The patron suffered injury causing him to seek medical attention. Grievant was discharged from his employment.

Though Grievant was an at-will employee, Respondent accepted the burden of proving the incident in question by a preponderance of the evidence. Assuming it had the burden, Parkways has proven its claim by a preponderance of the evidence. Grievant has not established by preponderant evidence that his discharge violated a substantial public policy. Accordingly, this grievance is DENIED.