

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in March 2012

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: TERMINATION; HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA); PATIENT CARE; WRITTEN AUTHORIZATION; GROSS MISCONDUCT; CONFIDENTIALITY

CASE STYLE: GRIMES v. WEST VIRGINIA UNIVERSITY
DOCKET NO. 2011-1273-WVU (3/28/2012)

PRIMARY ISSUES: Whether Respondent met its burden of proof that Grievant was guilty of gross misconduct.

SUMMARY: Grievant was employed as a Dental Assistant in the Office of Clinic Administration at the West Virginia University School of Dentistry. Grievant was terminated for multiple violations of the Health Insurance Portability and Accountability Act. Respondent was able to meet its burden of proof and demonstrate that Grievant's termination was justified. Accordingly, this grievance is DENIED.

KEYWORDS: TERMINATION; PROGRESSIVE DISCIPLINE; HEARSAY TESTIMONY; PROOF

CASE STYLE: CALE v. WEST VIRGINIA UNIVERSITY
DOCKET NO. 2011-1711-WVU (3/22/2012)

PRIMARY ISSUES: Whether Respondent proved the charges against Grievant.

SUMMARY: Grievant's employment was terminated by Respondent based on allegations made in a email directed to an employee in the same department as Grievant. The person sending the email was not identified or called as a witness, nor was any explanation given for the failure to call this person as a witness. The record does not reflect that any investigation into the allegations was conducted, or even that the identity of the sender of the email was verified. These email allegations amount to unreliable hearsay which will not be considered by the undersigned. Respondent failed to prove the charges against Grievant. Accordingly, this grievance is GRANTED.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: INTENDED TO FILE, TARDINESS, TIMELY FILED, MANDATORY TIME PERIOD, UNEQUIVOCALLY NOTIFIED; DISMISSAL, TERMINATION

CASE STYLE: ROSE v. RALEIGH COUNTY BOARD OF EDUCATION
DOCKET NO. 2012-0188-RALED (3/28/2012)

PRIMARY ISSUES: When Grievance was filed and whether Grievance should be dismissed because it was untimely filed.

SUMMARY: Grievant was notified that her employment was terminated by letter dated June 29, 2011. The only grievance form signed by Grievant is dated August 4, 2011. Grievant sent a letter dated July 25, 2011, to the Board's Personnel Director indicating that she intended to file a grievance and asking for specific documents. Given the totality of the facts, it is clear that the grievance was not filed within the mandatory statutory time frame and must be dismissed.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: EXTRACURRICULAR ASSIGNMENTS; STEP UP; BUS RUN; NEXT IN LINE; ROTATION LIST

CASE STYLE: GARNER v. MONONGALIA COUNTY BOARD OF EDUCATION
DOCKET NO. 2011-1421-MONED (3/30/2012)

PRIMARY ISSUES: Whether Respondent denied Grievant the opportunity to step-up into available extracurricular assignments.

SUMMARY: Grievant asserted he was denied the opportunity to step-up into extracurricular assignments when the employees holding those assignments were absent. While there is some question as to whether Respondent's rotation list for these assignments was being properly maintained, once Grievant brought the issue to his supervisor's attention, Grievant was offered and accepted two opportunities to step-up into extracurricular assignments. Grievant did not demonstrate that he was next in line to receive any other step-up opportunities. Accordingly, this grievance is DENIED.

KEYWORDS: POSTING; BUS RUN; BUS OPERATOR; LEAVE OF ABSENCE; SENIORITY; TIMELINESS

CASE STYLE: BARKER v. WAYNE COUNTY BOARD OF EDUCATION

DOCKET NO. 2011-1262-WAYED (3/29/2012)

PRIMARY ISSUES: Whether grievance was timely filed and whether Respondent is required to post a vacant position after a regular employee's absence extends beyond thirty working days.

SUMMARY: Grievant asserts that Respondent should have posted bus run No. 9927 at the end of the regular bus operator's medical leave of absence. He asserts that if the position would have been posted at some point before June of 2010, then he would have been awarded the position and received a regular bus operator position under the retirement and benefit system in effect at that time. Grievant asserts that Respondent violated West Virginia Code §§18A-4-15 and 18A-4-8b by not posting and filling the position for regular bus run No. 9927 after the regular bus operator's absence from work extended beyond thirty working days. Respondent asserts that Grievant failed to prove he would have been "next in line" in bus operator seniority for bus run No. 9927 if it had in fact been posted before June of 2010. Also, Respondent argues that the grievance is untimely as it was not filed until February 22, 2011. Grievant failed to timely file his grievance within 15 days of learning that the bus operator performing bus run No. 9927 was absent from her position for longer than thirty working days. In addition, Grievant failed to demonstrate that he would have been "next in line" for the position. Accordingly, this grievance is DENIED.

KEYWORDS: SELECTION; QUALIFICATIONS; COMPETENCY TEST;
TIMELINESS; IN-SERVICE TRAINING; ULTRA VIRES ACTS

CASE STYLE: PORTER v. WAYNE COUNTY BOARD OF EDUCATION AND
JERRY CASTEEL, INTERVENOR

DOCKET NO. 2011-1337-CONS (3/30/2012)

PRIMARY ISSUES: Whether the Grievant was qualified for the position at issue, whether the Grievant should have been selected for the position at issue, and whether the grievance was timely filed.

SUMMARY: Grievant filed three grievances concerning his application for a multi-classified position with Respondent. Grievant took the painter's competency test required for one position, but did not pass it. Grievant argued that a competency test he had previously taken in 2008 during the application process for another position should have been used to qualify him for this position, and that he should not have been required to take the painter's competency test. The test Grievant took and passed in 2008 was a general maintenance competency test, not a painter's competency test. The general maintenance test cannot be substituted for the painter's test. Because Grievant did not pass the painter's competency test, he was not qualified for the position he sought. Accordingly, Grievant failed to meet his burden of proving his claim by a preponderance of the evidence. However, even if he had met his burden, Respondent met its burden of proving that the grievance was untimely filed. Grievant failed to present a proper basis for excusing his untimely filing. Further, Respondent failed to afford Grievant with the required in-service training prior to taking the required competency test(s). However, Respondent met its burden of proving that this grievance was untimely filed. Grievant failed to present a proper basis for excusing his untimely filing. Lastly, Grievant alleged that Intervenor failed the required competency test, but was still selected for the position. Grievant presented no evidence to support this claim. From the evidence presented, Intervenor passed the required competency tests. Grievant failed to present sufficient evidence to prove his claim by a preponderance of the evidence. For these reasons, this grievance is DENIED.

TOPICAL INDEX
STATE EMPLOYEES

KEYWORDS: EMPLOYEE PERFORMANCE APPRAISAL (EPA); EVALUATION;
JOB PERFORMANCE; WORK ENVIRONMENT; ARBITRARY AND
CAPRICIOUS

CASE STYLE: BOWMAN, ET AL. v. DEPARTMENT OF HEALTH AND HUMAN
RESOURCES/WILLIAM R. SHARPE, JR. HOSPITAL
DOCKET NO. 2011-0422-CONS (3/6/2012)

PRIMARY ISSUES: Whether Grievants' supervisor abused his discretion in evaluating the
Grievants' work performance.

SUMMARY: Grievants contend that their Employee Performance Appraisal rating
as it relates to work place treatment of a co-worker was not
supported by their work performance. Grievants were not able to
demonstrate, by a preponderance of the evidence, that the
evaluations were an abuse of discretion or an arbitrary or capricious
action. The grievance is denied.

KEYWORDS: NETWORK VIOLATION REPORT (NVR), ZERO TOLERANCE, GOOD CAUSE, JUST CAUSE, PORNOGRAPHY, INTERNET, COMPUTER, SEXUALLY EXPLICIT, YEARS OF SUCCESSFUL SERVICE, DISPROPORTIONATE PENALTY

CASE STYLE: MATNEY v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/WELCH COMMUNITY HOSPITAL

DOCKET NO. 2011-0972-DHHR (3/30/2012)

PRIMARY ISSUES: Whether Respondent proved that Grievant allowing his computer to be used to access prohibited internet web sites was good cause for terminating his employment after twenty-five years of successful service.

SUMMARY: Respondent terminated Grievant's employment when it was discovered that the computer assigned to him at the Hospital had been used to access web-sites which had been prohibited by his employer. Respondent characterized the content of these web sites to be pornography. Respondent argues that it has a zero-tolerance policy related to accessing pornography from work computers and therefore Grievant had to be dismissed.

Grievant admitted that he left his computer turned on and unattended for a period of ninety minutes to two hours each morning, including the day that the pornography was accessed. He demonstrated that he was not present at the computer when it was used to access the prohibited sites. Grievant violated policy related to information security, but this violation was not sufficient to justify the termination of his employment given his quarter of a century of commendable work performance.

The grievance is Granted in part, and Denied in part.

KEYWORDS: SUSPENSION; INMATES; PAT DOWN SEARCH; PROGRESSIVE DISCIPLINE; MITIGATION

CASE STYLE: PRICE v. DIVISION OF CORRECTIONS/LAKIN CORRECTIONAL CENTER

DOCKET NO. 2011-1583-MAPS (3/16/2012)

PRIMARY ISSUES: Whether the discipline imposed for Grievant's failure to conduct a pat down search of inmates was excessive.

SUMMARY: Grievant was suspended for five days without pay for failing to conduct a pat down search of work crew inmates prior to their departure from the facility, as she was required by post order to do. Grievant admitted that she failed to conduct the search, and that she knew she was supposed to do so. Grievant felt the discipline imposed was too severe because officers at the facility have a habit of not conducting the required pat down searches of work crew inmates, she was under time restraints on the day in question, and she did not have any latex gloves with which to conduct the search. She also proved that a fellow officer had been given a written reprimand for the same infraction. Grievant demonstrated that the discipline imposed was clearly excessive. Accordingly, this grievance is GRANTED.

KEYWORDS: SUSPENSION; INSUBORDINATION; MITIGATION; WORK PERFORMANCE; INAPPROPRIATE CONDUCT

CASE STYLE: VOGEL v. DIVISION OF HIGHWAYS

DOCKET NO. 2011-1184-DOT (3/14/2012)

PRIMARY ISSUES: Whether Grievant engaged in conduct constituting insubordination and whether his ten-day suspension was justified.

SUMMARY: Grievant was issued a 10-day unpaid suspension for insubordination. Respondent met its burden of proof and demonstrated that Grievant's actions constituted insubordination. Grievant argued that a lesser disciplinary action should have been imposed due to existence of mitigating circumstances. The record of the grievance did not support mitigation of the punishment imposed by Respondent. Accordingly, this grievance is DENIED.

KEYWORDS: SUSPENSION; UNAUTHORIZED LEAVE; EMPLOYEE PERFORMANCE APPRAISAL (EPA); ATTENDANCE; ABSENCES; DOCKED PAY; HARMLESS ERROR

CASE STYLE: CRAWFORD v. DIVISION OF CORRECTIONS/MOUNT OLIVE CORRECTIONAL COMPLEX
DOCKET NO. 2011-1662-MAPS (3/6/2012)

PRIMARY ISSUES: Whether Respondent's suspension of Grievant was void due to technical error related to docking his pay.

SUMMARY: Grievant was suspended for ten working days for taking unauthorized leave on two separate days in February 2011. The ten-day suspension was issued because Grievant had been previously disciplined on other occasions for similar offenses. Grievant does not contest that he took unauthorized leave but rather argues that Respondent failed to strictly follow the procedures for docking his pay set out on the West Virginia Division of Personnel's Administrative Rule Section 14.6 requiring that an employee's pay be docked during the next pay period. Respondent proved the reasons for the suspension by a preponderance of the evidence. Grievant was unable to prove that Respondent committed any procedural error which effected the outcome of his disciplinary action in any way. Accordingly, the grievance is DENIED.

KEYWORDS: SUSPENSION; VERBAL ALTERCATION; INSUBORDINATION; HOURS; PAY; PREDETERMINATION HEARING/MEETING; DISCIPLINARY ACTION

CASE STYLE: FARLEY v. DIVISION OF CORRECTIONS/LAKIN CORRECTIONAL CENTER
DOCKET NO. 2011-1643-MAPS (3/9/2012)

PRIMARY ISSUES: Whether Grievant's conduct violated DOC policies, and whether the discipline imposed upon Grievant was appropriate.

SUMMARY: Grievant confronted the Deputy Warden of the correctional facility at which he is employed regarding a comment the Deputy Warden had made to Grievant, and a heated verbal altercation ensued. Such occurred in the lobby of the facility in front of other employees. During the confrontation, Grievant raised his voice, used profanity toward the Deputy Warden, and appeared angry and/or agitated. As a result, Respondent suspended Grievant from his employment for forty hours, without pay for behavior in violation of Division of Corrections policies. Grievant alleges that Respondent exaggerated his behavior, that his suspension was inappropriate, and that his predetermination hearing/meeting was conducted improperly. Respondent demonstrated that Grievant's conduct violated its policy, and that the discipline it imposed was appropriate. Grievant failed to prove that his suspension was clearly excessive, disproportionate to his offense, or an abuse of discretion. Further, Grievant failed to offer sufficient evidence in support of mitigating his suspension. Therefore, this grievance is DENIED.

KEYWORDS: TERMINATION; PHYSICIAN'S STATEMENT; DOP L-3 FORM; ABSENCE; GOOD CAUSE; FALSIFIED DOCUMENT

CASE STYLE: SURBAUGH v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/LAKIN HOSPITAL

DOCKET NO. 2011-1637-DHHR (3/16/2012)

PRIMARY ISSUES: Whether Grievant violated the DHHR Absence Control Policy by submitting a falsified Physican's/Practioner's Statement.

SUMMARY: Grievant was dismissed from employment for violating the DHHR Absence Control Policy by falsifying all, or a portion of, a Physican's/Practioner's Statement that she submitted related to her absence from work for the period of May 10, 2011 through May 13, 2011. Respondent proved that the form had several irregularities including a signature that was different from the doctor Grievant actually saw. Grievant alleged that the form was filled out by an assistant who mistakenly placed the wrong name on the form. Given the totality of the evidence, Respondent proved the reasons for the dismissal by a preponderance of the evidence. Accordingly, the grievance is DENIED.