

**WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**SYNOPSIS REPORT**

**Decisions Issued in August 2011**

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**

---

**KEYWORDS:** SUSPENSION; TEACHER; INAPPROPRIATE CONDUCT;  
EMPLOYEE CODE OF CONDUCT; INSUBORDINATE; DUE  
PROCESS

**CASE STYLE:** LEHMAN v. MARSHALL COUNTY BOARD OF EDUCATION  
DOCKET NO. 2011-1046-MARED (8/9/2011)

**PRIMARY ISSUES:** Whether Grievant was insubordinate when he made an inappropriate comment to a student at the conclusion of a human growth and development class.

**SUMMARY:** Grievant was teaching a class on the topic of human growth and development to a boys only class at his elementary school. At the conclusion of the class, a student asked to go to the restroom. Grievant then made a statement to the student asking if he was going to check for pubic hair. The student was naturally embarrassed and later complained to his mother. After an investigation, Grievant was suspended for one day without pay for violation of the Employee Code of Conduct. Respondent proved its charge of insubordination by a preponderance of the evidence. Grievant's due process violation claim was not established. Accordingly, this grievance is DENIED.

---

**KEYWORDS:**

SUSPENSION; TERMINATION; INSUBORDINATION; WILLFUL  
NEGLECT OF DUTY; INAPPROPRIATE CONDUCT;  
IMPROVEMENT PLAN; CREDIBILITY; CRUELTY; MITIGATION

**CASE STYLE:**

BAILEY v. KANAWHA COUNTY BOARD OF EDUCATION

DOCKET NO. 2011-0070-KANED (8/1/2011)

**PRIMARY ISSUES:**

Whether Grievant's conduct and attitude toward her students constituted a justifiable basis for the termination of her employment.

**SUMMARY:**

Grievant was suspended and ultimately terminated by Kanawha County Board of Education, Respondent, from her position as a kindergarten teacher at Dunbar Primary School. Grievant has previously been on an improvement plan and suspended for inappropriate employee behavior. Grievant, by Counsel, contends her termination should be overturned in that there is insufficient credible evidence that Grievant committed a disciplinary offense. Respondent maintains Grievant has demonstrated conduct which constituted cruelty, insubordination and willful neglect of duty. An employee of a county board of education may be suspended or dismissed for immorality, incompetency, cruelty, insubordination, willful neglect of duty or unsatisfactory performance of duties. Respondent, by a preponderance of the evidence, met its burden of proof and established that Grievant's conduct violated applicable professional standard. Grievant has not established Respondent's disciplinary action was unlawful, arbitrary and/or capricious. Respondent established and demonstrated cause for termination of Grievant's employment. This grievance is DENIED.

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

---

**KEYWORDS:** CLASSIFICATION; SENIORITY; MULTICLASSIFICATION;  
POSTING; QUALIFICATIONS

**CASE STYLE:** MILLER v. PRESTON COUNTY BOARD OF EDUCATION  
DOCKET NO. 2011-0107-PREED (8/9/2011)

**PRIMARY ISSUES:** Whether it is arbitrary and capricious for Respondent to award multiclassified positions by considering the candidate with the greatest seniority in any one of the classification titles of a multiclassified position.

**SUMMARY:** Grievant and successful applicant applied for the same Coordinator of Services, Accounts Payable Supervisor, Payroll Supervisor and Auditor position, and both were qualified for the position. The successful applicant had greater seniority in one of the class titles than Grievant, but had less overall seniority. Respondent awarded the multiclassified position by considering the applicant with the greatest seniority in any one of the classification titles. Grievant did not demonstrate that this action was arbitrary and capricious or a violation of policy. This grievance is DENIED.

---

**KEYWORDS:** CUSTODIAN; VACANCIES; MEDICAL CONDITION; CONTRACT; TEMPORARY ASSIGNMENT; CHEMICALS; SENIORITY

**CASE STYLE:** BOWE v. BOONE COUNTY BOARD OF EDUCATION

DOCKET NO. 2010-0760-BOOED (8/1/2011)

**PRIMARY ISSUES:** Whether Respondent is required to transfer Grievant to a non-custodial position due to his medical condition pursuant to W. Va. Code §18A-4-8(o).

**SUMMARY:** Grievant is employed as a custodian at Madison Middle School. Grievant has a medical condition relating to his sinuses that is believed to be aggravated by exposure to chemicals, such as cleaning chemicals. Grievant's physician wrote two letters that were provided to Respondent in which the physician asked that Respondent move Grievant to another work site to prevent his exposure to chemicals. Grievant's physician indicated in these letters that the exposure to chemicals was affecting Grievant's health and would lead to additional surgical interventions to treat his condition. Thereafter, Grievant was placed in two non-custodial temporary assignments. After these temporary assignments ended, Grievant was returned to his custodian position, but with modified duties. Grievant asserts that W. Va. Code §18A-4-8(o) grants him the right to a transfer from his custodian position to a position in maintenance. Grievant is seeking a transfer to a maintenance position due to his medical condition. Grievant has misinterpreted the meaning and the purpose of W. Va. Code §18A-4-8(o). Grievant has failed to meet his burden in this matter. Therefore, this grievance is DENIED.

---

**KEYWORDS:** EXTRACURRICULAR ASSIGNMENT; BUS RUN; SENIORITY; POSTING; HARMLESS ERROR; STANDING

**CASE STYLE:** PRICKETT, ET AL. v. MONONGALIA COUNTY BOARD OF EDUCATION  
DOCKET NO. 2011-0557-CONS (8/31/2011)

**PRIMARY ISSUES:** Whether Grievants have standing to grieve the issue of Respondent's failure to post extracurricular assignments as required by statute.

**SUMMARY:** Grievants complained that several extracurricular bus operator assignments and a regular bus run had not been posted for the required five day period. Respondent admitted its error, but pointed out that the extracurricular assignments had all been filled by bus operators who had held the assignments the preceding school year, as required by law, thus reposting the assignments would not change the end results. As to the regular bus run, Grievants did not demonstrate that any Grievant was harmed by the failure to follow the statutory posting requirements. Respondent's failure to post the assignments for five working days, as required by statute, was harmless error. Accordingly, this grievance is DENIED.

---

**KEYWORDS:** EXTRACURRICULAR ASSIGNMENT; MID-DAY ASSIGNMENT; FAVORITISM; DISCRIMINATION; DUTIES AND RESPONSIBILITIES; JOB POSTING; UNIFORMITY; SIMILARLY SITUATED; OVERTIME

**CASE STYLE:** JARRELL v. BOONE COUNTY BOARD OF EDUCATION  
DOCKET NO. 2011-1835-CONS (8/17/2011)

**PRIMARY ISSUES:** Whether Grievant proved that she performs an extracurricular assignment and that she should be compensated for the same.

**SUMMARY:** Grievant asserts that she should either be compensated for performing an extracurricular mid-day bus run or compensated with overtime pay for the time she works past 3:30 p.m. on Monday through Thursday. Respondent argues that Grievant is not performing an extracurricular run and that Grievant does not work over 40 hours a week. Grievant failed to prove that she performs an extracurricular run or that she works in excess of 40 hours in a workweek. Grievant argues violations of favoritism, discrimination and uniformity. Grievant failed to demonstrate that she is similarly situated to an employee who receives extra compensation for performing like duties and assignments. Accordingly, this Grievance is DENIED.

---

**KEYWORDS:** SUSPENSION; BURDEN OF PROOF; DUE PROCESS; WILLFUL  
NEGLECT OF DUTY

**CASE STYLE:** HOWES v. LOGAN COUNTY BOARD OF EDUCATION

DOCKET NO. 2011-0609-LOGED (8/11/2011)

**PRIMARY ISSUES:** Whether Respondent demonstrated that Grievant violated transportation rules and regulations which led to his five-day suspension and if Grievant was provided due process prior to being suspended.

**SUMMARY:** Logan County School Bus Operators are required to govern their actions in accordance with rules and regulations applicable to the transportation of students, e.g., West Virginia School Bus Transportation Policy and Procedures Manual. On the day in discussion, Grievant was entrenched in an ill-advised verbal exchange with a grandparent of two students scheduled to be on his bus. Respondent determined Grievant violated 126 C.S.R. 92 §§ 13.7 and 13.8. Respondent sanctioned Grievant for exiting his bus, containing students, without turning off the engine and removing the key. It is a well-settled principle of law that an employee who possesses a recognized property right or liberty interest may not be deprived of that right without due process of law. Grievant was not provided written notice of the charge against him, an explanation of the evidence, and an opportunity to respond to the charge prior to Respondent's decision to impose discipline. Respondent failed to establish essential facts fundamental to the alleged violation of duty. Accordingly, this grievance is Granted.

---

**KEYWORDS:** SUSPENSION; FELONY; CRIMINAL CHARGE; INDICTMENT;  
RATIONAL NEXUS; DISCRIMINATION; OFF-DUTY CONDUCT

**CASE STYLE:** CLARK v. KANAWHA COUNTY BOARD OF EDUCATION

DOCKET NO. 2011-0987-KANED (8/17/2011)

**PRIMARY ISSUES:** Whether it was proper for Respondent to suspend Grievant without pay pending the outcome of Grievant's criminal charges for which she was indicted.

**SUMMARY:** Grievant argues that she should not be suspended for conduct that is alleged to have occurred away from work. She also notes that "indictment on felony charges" is not one of the reasons set out in W. Va. Code § 18A-2-8 for suspending or dismissing a school employee. Grievant argues that Respondent is without statutory authority to suspend her in this instance. In fact, the statute provides that an employee charged with a felony may be reassigned to duties where he/she has no contact with students. Finally, Grievant alleges that Respondent has discriminated against her by suspending her without pay even though Respondent has not done the same with other employees who were charged with drug related offenses. Respondent counters that the case law supports the authority of a school board to suspend an employee who has been charged with a felony. Respondent acknowledges that W. Va. Code § 18A-2-8 grants authority for it to reassign Grievant rather than suspend her, but it argues that provision is discretionary. Finally, the Board alleges that it has consistently suspended employees charged with drug related felonies pending the outcome of the criminal proceedings. Respondent has met its burden of proof and the grievance is DENIED.

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

---

**KEYWORDS:** DUTIES; POSTING; REASSIGNMENT; REPRISAL; RETALIATION; CLASSIFICATION

**CASE STYLE:** HYPES v. DIVISION OF HIGHWAYS  
DOCKET NO. 2010-0389-DOT (8/1/2011)

**PRIMARY ISSUES:** Whether Grievant proved that her reassignment to duties within her classification was arbitrary and capricious, or the result of retaliation or reprisal.

**SUMMARY:** Grievant Hypes had been a TW2CW at the Look Out Substation for many years. She mostly worked in the office of the substation doing clerical and janitorial work as well as answering the phone and operating the radio. She spent very little time on the road crews helping with the maintenance of the highways. Grievant asserts that she was assigned to perform duties on the road maintenance crews instead of office duties in retaliation for her questioning the DOH policy related to workers wearing uniforms. Respondent counters that they do not typically have office workers in substations now because it is not an efficient use of resources. When DOH officials realized that Grievant was still assigned primarily to office duties, even though her classification was a TW2CW, they took action to assign her duties more consistent with her job classification. Grievant failed to prove that her reassignment to duties within her classification was arbitrary and capricious, or the result of retaliation or reprisal. The grievance is DENIED.

---

**KEYWORDS:** NON-SELECTION; SUPERVISORY DUTIES; QUALIFICATIONS; TRAINING; CERTIFICATES; SENIORITY

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

DOCKET NO. 2010-0751-DOT (8/31/2011)

**PRIMARY ISSUES:** Whether Respondent's selection of the successful applicant for the posted Highway Equipment Supervisor II position was arbitrary and capricious.

**SUMMARY:** This grievance was filed after Grievant was not selected for a Highway Equipment Supervisor II position with the Department of Transportation/Division of Highways. Subsequent to the interview process, an employee other than Grievant was deemed more qualified for the posted position. Grievant alleges that he should have been selected for the position because he has more seniority than the successful applicant. Grievant has not established by a preponderance of the evidence that Respondent's selection was improper. Respondent's selection decision was not arbitrary and capricious or clearly wrong. This grievance is DENIED.

---

**KEYWORDS:** SELECTION; DISCRIMINATION; INTERVIEW; QUALIFIED; FLAWED

**CASE STYLE:** MIHALIAK v. DIVISION OF REHABILITATION SERVICES

DOCKET NO. 2010-1384-DEA (8/9/2011)

**PRIMARY ISSUES:** Did Grievant prove that the selection process was flawed, or that the selection decision was arbitrary and capricious or that she was the victim of discrimination.

**SUMMARY:** Grievant was not selected for the posted position of Area Administrator, and believes she should have been selected because she believes she has been doing the job, and running the office, for years. She concluded that she was not selected because she is female. Grievant presented little evidence comparing her qualifications to those of the successful applicant. She failed to demonstrate that the selection process was flawed or that the decision made was arbitrary and capricious. Further, she did not demonstrate that she was treated differently from any other applicant so as to prove a case of discrimination under the grievance procedure. Accordingly, this grievance is DENIED.

---

**KEYWORDS:** SUSPENSION; MITIGATION; PORNOGRAPHY; INTERNET; COMPUTER; WEBSITES

**CASE STYLE:** HENRY v. DIVISION OF HIGHWAYS  
DOCKET NO. 2011-0944-DOT (8/31/2011)

**PRIMARY ISSUES:** Whether Respondent proved Grievant attempted to access pornographic websites and whether the 20-day suspension should be mitigated.

**SUMMARY:** Grievant, a supervisor, was suspended for 20 days without pay for accessing and attempting to access pornographic websites on his state computer. Grievant acknowledged that someone had committed this network violation utilizing the identification number assigned to him, but denied that it was he. Grievant's explanation was that he, and others at his worksite, never logged off the computers, and anyone coming into the storeroom to order supplies could access the internet on his computer under his identification number. Respondent demonstrated that Grievant attempted to access a website which is categorized as pornographic by the Office of Technology around 8:00 a.m., on August 27, 2010. Access to this website had been blocked, and access was denied. Respondent did not demonstrate that it was Grievant who accessed and attempted to access pornographic material using Grievant's computer and identification number before Grievant arrived at work, and again later in the day. Grievant demonstrated that the punishment should be mitigated. Accordingly, this grievance is GRANTED IN PART, AND DENIED IN PART.

---

**KEYWORDS:** TERMINATION; ABUSIVE LANGUAGE; INSUBORDINATION; GOOD CAUSE; MISCONDUCT

**CASE STYLE:** SPEEDY v. DIVISION OF CULTURE AND HISTORY  
DOCKET NO. 2011-0313-DEA (8/24/2011)

**PRIMARY ISSUES:** Whether Grievant was dismissed from his employment for good cause.

**SUMMARY:** Grievant was dismissed from his employment at the Grave Creek Mound Archaeological Complex for insubordination after he continually engaged in disruptive and insubordinate behavior toward his supervisor. The termination followed progressive disciplinary measures for insubordination and other infractions. Respondent met its burden of proving good cause for the dismissal, and the grievance is denied.

---

**KEYWORDS:** TERMINATION; GOOD CAUSE; GROSS MISCONDUCT;  
ATTENDANCE; INFORMATION SECURITY POLICY; LEAVE  
RESTRICTION; ABSENCES; REPRISAL; PRIMA FACIE

**CASE STYLE:** COTSMIRE v. OFFICE OF TECHNOLOGY

DOCKET NO. 2011-0391-CONS (8/8/2011)

**PRIMARY ISSUES:** Whether Respondent abused its discretion when it determined that Grievant's actions constituting gross misconduct, warranted termination.

**SUMMARY:** Respondent terminated Grievant for gross misconduct. Grievant inappropriately used State resources, during work hours, for non-work related purposes. Respondent lost faith in Grievant when he sent emails describing his attempted plan of disrupting wv.gov web pages. Grievant argues that Respondent was improperly monitoring his work email account. Grievant asserts that Respondent monitoring his work emails and ultimately terminating him were acts of retaliation against him for making public comments against his employer and participating in union rallies. Therefore, this grievance is DENIED.

---

**KEYWORDS:** TERMINATION; INAPPROPRIATE CONDUCT; PERFORMANCE IMPROVEMENT PLAN; EMPLOYEE PERFORMANCE APPRAISAL (EPA); GOOD CAUSE; LACHES; DUE PROCESS

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

DOCKET NO. 2011-0885-DHHR (8/11/2011)

**PRIMARY ISSUES:** Whether Grievant was properly dismissed and whether mitigation is appropriate.

**SUMMARY:** Grievant sights a number of perceived errors in the disciplinary action taken against him. He alleges Respondent violated 143 C.S.R. 1 § 12.2 by not advising Grievant at the predetermination conference that termination of his employment was being considered. Grievant further alleges that by waiting for over a month between the incident that gave rise to his dismissal and the actual disciplinary action Respondent is barred from dismissing Grievant by the doctrine of laches. Additionally, Grievant argues that Respondent failed to prove the charges against Grievant by a preponderance. Finally, Grievant believes that the penalty of dismissal was grossly disproportionate to any offense he may have committed and therefore should be reduced. Respondent conducted a complete investigation of the charges that led to Grievant's dismissal. DHHR proved the charges against Grievant and the delay in taking disciplinary action while the investigation was being conducted was not unreasonable. The termination of Grievant's employment was not so disproportionate to his actions as to require mitigation. The grievance is DENIED.

---

**KEYWORDS:** TIMELINESS; UNTIMELY; LEVEL ONE; LIGHT DUTY; MOTION TO DISMISS; EEO COMPLAINT

**CASE STYLE:** DEAN, JR. v. DIVISION OF JUVENILE SERVICES/ROBERT L. SHELL JUVENILE CENTER

DOCKET NO. 2011-0829-MAPS (8/5/2011)

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

**SUMMARY:** Grievant suffered a knee injury in July 2009. In February or March of 2010, Grievant learned that other employees were performing light duty assignments.. Grievant filed an Equal Employment Opportunity (EEO) complaint on July 30, 2010. The EEO complaint was closed as unsubstantiated on September 17, 2010. Grievant did not file this grievance until November 1, 2010. This grievance was untimely filed. Accordingly, this grievance is DISMISSED.