

**WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**SYNOPSIS REPORT**

**Decisions Issued in December 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**  
**HIGHER EDUCATION EMPLOYEES**

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<b><u>KEYWORDS:</u></b>	DISMISSAL ORDER; TIMELINESS; UNTIMELY; LEVEL THREE; APPEAL; TIMELINES
<b><u>CASE STYLE:</u></b>	<u>FROST v. BLUEFIELD STATE COLLEGE</u> DOCKET NO. 2011-0578-BSC (12/30/2011)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant's filing of his level three appeal was timely.
<b><u>SUMMARY:</u></b>	Respondent has proven by a preponderance of the evidence that the grievance should be denied. This grievance was not timely appealed to level three. Grievant did not demonstrate a proper basis to excuse his failure to timely file a level three appeal. Accordingly, Respondent's motion is Granted and this matter is DISMISSED.

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<b><u>KEYWORDS:</u></b>	NON-RENEWAL; CONTRACT; AT-WILL EMPLOYEE; GOOD FAITH; WHISTLE-BLOWER; WRONGDOING; PROPERTY INTEREST; FUNDING
<b><u>CASE STYLE:</u></b>	<u>SCHADE v. WEST VIRGINIA UNIVERSITY</u> DOCKET NO. 2011-0591-WVU (12/21/2011)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent decision not to renew Grievant's employment contract was related to any whistle-blowing activity.
<b><u>SUMMARY:</u></b>	Grievant was an at-will, non-classified employee, employed pursuant to an annual contract, whose contract was not renewed. Grievant's annual appointment was dependent on funding for the position. Respondent's funding sources dramatically declined, and Respondent had to cut a number of positions, including Grievant's. Grievant's claim that her contract was not renewed because of her whistle-blowing activity more than five years prior to the non-renewal of her contract, was not proven. Respondent's Director was not even aware of the whistle-blowing. Accordingly, this grievance is DENIED.

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**KEYWORDS:** PROMOTION; TENURE; TEACHING; EVALUATION; PROFESSOR; STUDENT EVALUATIONS; FACULTY EVALUATIONS; TERMINAL CONTRACT, PROFESSIONAL ACTIVITY; SCHOLARLY ACTIVITY; PUBLICATIONS

**CASE STYLE:** GALL v. WEST LIBERTY UNIVERSITY

DOCKET NO. 2011-1649-WLU (12/14/2011)

**PRIMARY ISSUES:** Whether Grievant's applications for promotion and tenure should have been granted.

**SUMMARY:** Grievant applied for promotion to Professor and tenure in the Fall of 2010. His Department Chair and the Promotion and Tenure Committees all supported his promotion and tenure. The Interim Dean of the College of Liberal Arts, the Provost, and the President of West Liberty University did not support his promotion or tenure requests, asserting that Grievant had not demonstrated excellence in either the areas of professional/scholarly activity or teaching. Both applications were denied by the President, and Grievant was given a terminal contract of employment. Grievant demonstrated that the Interim Dean, the Provost, and the President did not fairly evaluate his professional/scholarly activity or his teaching, that they acted in an arbitrary and capricious manner, and that the conclusions of those in his department that he had met the standards for promotion and tenure had a sound basis in fact and should be upheld. Accordingly, this grievance is GRANTED.

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

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**KEYWORDS:** DISMISSAL ORDER; REMEDY; RELIEF; MOTION TO DISMISS

**CASE STYLE:** WELLS v. UPSHUR COUNTY BOARD OF EDUCATION  
DOCKET NO. 2010-0131-UPSED (12/9/2011)

**PRIMARY ISSUES:** Whether Grievant was requesting a remedy wholly unavailable through the grievance procedure.

**SUMMARY:** Grievant's employment was terminated by Respondent while she was serving as principal of Buchannon Upshur High School. Grievant challenged this termination, but was unable to articulate what relief she sought. The undisputed record of this grievance established that reinstatement was not an available remedy. After months of delay in responding to an order of the Grievance Board, Grievant disclosed that she sought reinstatement to her former position to continue her reforms at the high school. Accordingly, Respondent's Motion to Dismiss is granted.

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

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**KEYWORDS:** CLASSIFICATION; LIKE ASSIGNMENT AND DUTIES; MULTICLASSIFICATION; EMPLOYMENT TERMS; CONTRACT TERMS; QUALIFICATIONS; UNIFORMITY

**CASE STYLE:** MOYE v. RALEIGH COUNTY BOARD OF EDUCATION  
DOCKET NO. 2010-1643-RALED (12/16/2011)

**PRIMARY ISSUES:** Whether Grievant should be classified as an Accounts Payable Supervisor and receive a 261-day employment term.

**SUMMARY:** Grievant holds a position that had been placed in the Accounts Payable Supervisor classification for many years prior to her taking it in 2008. She argues that the duties of the position have not changed and the duties meet the classification definition set out in W. Va. Code § 18A-4-8(l) because her duties are primarily related to Accounts Payable functions. Respondent argues that the use of the words “has primary responsibility” used in the classification definition for Accounts Payable Supervisor implies a singularity that is inconsistent with having more than one employee in the department with that title. The Board notes that Grievant’s supervisor will absorb some duties related to Accounts Payable from another position and he alone will have the Accounts Payable Supervisor Classification. Grievant asserts that Respondent’s interpretation of the classification definition is too limited and points to the fact that it has traditionally had more than one Accounts Payable Supervisor and it presently has three Payroll Supervisors even though the definition for that classification has nearly identical language related to “primary responsibilities” as is found in the definition for Accounts Payable Supervisor. Grievant has met her burden of proof and the Grievance is GRANTED.

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**KEYWORDS:** DISCRIMINATION; FAVORITISM; OVERTIME ASSIGNMENTS; SENIORITY; EXTRA DUTY ASSIGNMENTS; SIMILARLY SITUATED

**CASE STYLE:** ADKINS v. KANAWHA COUNTY BOARD OF EDUCATION  
DOCKET NO. 2011-0967-KANED (12/29/2011)

**PRIMARY ISSUES:** Whether Grievant was entitled to extra duty assignments and whether he was discriminated against.

**SUMMARY:** Grievant contends that he should have been given two extra duty assignments awarded to another employee with less seniority. Concerning one assignment, the record established that Grievant was not qualified to do the work and, therefore, was not similarly situated to the employee called out to perform the extra duty assignment. The same was not the case for the other extra duty assignment. Grievant and the other employee were similarly situated, the difference in treatment was unrelated to the job assignment, which Grievant was qualified to perform, and was not agreed to in writing. Therefore, Grievant was able to prove discrimination. Accordingly, this grievance is GRANTED, in part, and DENIED, in part.

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**KEYWORDS:** EXTRA-DUTY ASSIGNMENTS; ALTERNATIVE PROCEDURE

**CASE STYLE:** STATLER v. MONONGALIA COUNTY BOARD OF EDUCATION  
DOCKET NO. 2011-0296-MONED (12/16/2011)

**PRIMARY ISSUES:** Whether the procedure used for making extra-duty assignments by seniority was properly approved by bus operators and the board of education.

**SUMMARY:** Grievant asserted that the procedure used by Respondent for at least the last 20 years to make extra-duty assignments was not properly approved by the bus operators or the board of education. The preponderance of the evidence put forth at the level three hearing demonstrated that an alternative procedure for making extra-duty assignments was properly approved in 1993, and that it remains in effect and continues to be the procedure used by MBOE. Accordingly, this grievance is DENIED.

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**KEYWORDS:** POSTING; SELECTION; HIRING; SENIORITY; CONSTRUCTION;  
CONTRACT; NEW SCHOOL; CLEAN-UP

**CASE STYLE:** KIRK, ET AL. v. MCDOWELL COUNTY BOARD OF EDUCATION  
AND DEPARTMENT OF EDUCATION

DOCKET NO. 2010-0603-CONS (12/1/2011)

**PRIMARY ISSUES:** Whether the provisions for hiring service personnel set out in WV Code §18A-4-8b apply to clean-up work performed by a subcontractor in preparing a new school for occupancy.

**SUMMARY:** The McDowell County Board of Education had contracted with a company to build a Bradshaw Elementary School. The contractor subcontracted with a second company to clean the school after construction so that it could be occupied by the students and staff at the beginning of the school year. The subcontractor hired some of the Board's employees to perform this clean-up work at times they were not working for the Board. Grievants argue that this clean-up work was actually work for the Respondent Board and the duties should have been posted and filled pursuant to the procedures set out in W. Va. Code § 18A-4-8b. They contend that if these procedures had been followed, they would have been awarded the jobs because of their advance seniority. Therefore they are seeking pay for this work. Respondent notes that this clean-up was the sole responsibility of the contractor who was building the school and the employees were hired and paid by a subcontractor, not the Board. Since the employees were not performing the clean-up work for the Board, the provisions of W. Va. Code § 18A-4-8b did not apply and the grievances are DENIED.

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**KEYWORDS:** SENIORITY; ACTIVITY RUN; SUBSTITUTE; BUS RUN, LOSS WAGES

**CASE STYLE:** HORTON v. MCDOWELL COUNTY BOARD OF EDUCATION AND DEPARTMENT OF EDUCATION  
DOCKET NO. 2011-0466-MCDED (12/16/2011)

**PRIMARY ISSUES:** Whether Grievant would have had the opportunity to receive one of the activity runs had it been properly offered to regular bus operators on the basis of seniority.

**SUMMARY:** Substitute bus operators were utilized to perform the duties of identified “activity runs” from August 2 through August 13, 2010. Grievant, a regularly employed bus operator of the McDowell County School system, grieves for alleged lost wages. If the duty had been properly made available to regular bus operators on the basis of seniority, there were other regular bus operators with greater seniority rights than Grievant who were also eligible to perform an activity run,. Respondent MCBE acknowledged that error(s) transpired regarding the administrative processing of the identified bus runs. The Level One Decision determining a violation of applicable West Virginia Code occurred, granting the grievance, but did not award Grievant any monetary relief. Grievant did not establish by a preponderance of the evidence that a sufficient number of the more senior regular bus operators would have declined an available activity run and thus made a run available to Grievant. This Grievance is DENIED.

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**KEYWORDS:** SPLIT SHIFT PAY; COMPENSATION; MAINTENANCE; TRANSPORTATION

**CASE STYLE:** LAWRENCE v. BARBOUR COUNTY BOARD OF EDUCATION  
DOCKET NO. 2011-0793-BARED (12/19/2011)

**PRIMARY ISSUES:** Whether Grievant is entitled to receive a split shift pay for working an interrupted work schedule.

**SUMMARY:** Grievant asserts that he should receive split shift pay for his duties as a bus operator and mechanic. Grievant is not entitled to split shift pay because maintenance of school buses falls within the transportation program of each county and, therefore, is not entitled to the additional compensation afforded by paragraph (f) of W. Va. Code § 18A-4-8. In addition, Grievant does not hold one of the classifications listed in the statute providing for split shift pay. Accordingly, this grievance is denied.



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**KEYWORDS:** TERMINATION; EVALUATION; IMPROVEMENT TEAM; JOB PERFORMANCE; IMPROVEMENT PLAN; UNSATISFACTORY PERFORMANCE; OPEN AND HONEST

**CASE STYLE:** WOODRUM v. BOONE COUNTY BOARD OF EDUCATION  
DOCKET NO. 2011-0529-BOOED (12/12/2011)

**PRIMARY ISSUES:** Whether Grievant proved that Respondent violated W.Va. Code § 18A-2-8, W.Va. Code § 18A-2-12, and Policy AEAAA by failing to implement procedures for the staff evaluation policy, failing to conduct evaluations in an open and honest manner, and relying on arbitrary and capricious evaluations to support a decision of dismissal.

**SUMMARY:** Respondent asserts that Grievant failed to successfully perform his cleaning duties as a Custodian III and that he abused work hours by socializing during his eight hour work shift. Respondent asserts that Grievant was terminated in compliance with W.Va. Code § 18A-2-12a and Respondent's Policy AEAAA. Respondent argues that Grievant's evaluations were "open and honest" and that he was given repeated opportunities to improve his work deficiencies. Grievant asserts that he did not spend excessive time chatting at work and stayed on task. Grievant argues that the evaluation forms are flawed and that he should have been given the opportunity to work with an improvement team. There is no indication on the evaluation form as to how an employee earns points. There is no guidance on the evaluation form on what to do about counting areas that are marked not applicable (N/A) to the custodian being evaluated. Respondent did not consistently use the same method for counting areas marked N/A. Grievant successfully met his burden of proof to demonstrate that Respondent violated W.Va. Code § 18A-2-8, W.Va. Code § 18A-2-12, and Policy AEAAA by failing to implement procedures for the staff evaluation policy, failing to conduct evaluations in an open and honest manner, and relying on arbitrary and capricious evaluations to support a decision of dismissal. Accordingly, this grievance is GRANTED.

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

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<b><u>KEYWORDS:</u></b>	CLASSIFICATION; DUTIES; RESPONSIBILITIES; BETTER FIT; ARBITRARY AND CAPRICIOUS; REALLOCATION; POSITION DESCRIPTION FORM; PDF
<b><u>CASE STYLE:</u></b>	<u>DILLON, ET AL. v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/WELCH COMMUNITY HOSPITAL AND DIVISION OF PERSONNEL</u> DOCKET NO. 2010-0779-CONS (12/12/2011)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievants proved their positions should be classified as Office Assistant 3s instead of Office Assistant 2s.
<b><u>SUMMARY:</u></b>	Grievants assert that during a period of time when a supervisory OA3 position was vacant, that they performed duties of an OA3. Respondents assert that Grievants did not perform work outside of their job classification of an OA2 and are properly classified as OA2s. Grievants did not assume the duties and responsibilities of an OA3 during the time the OA3 position was vacant. The predominant duties of Grievants' positions did not significantly changed in kind or level while the OA3 position was vacant. Grievants have not met their burden of proof. Respondent DOP's determination that the OA2 classification is the best fit for the Grievants' positions was not clearly wrong. Accordingly, this grievance is DENIED.

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**KEYWORDS:** CLASSIFICATION; DUTIES; RESPONSIBILITIES; CLEARLY WRONG; ARBITRARY AND CAPRICIOUS; REALLOCATION; POSITION DESCRIPTION FORM; PDF; PAY GRADE

**CASE STYLE:** BURKHART v. INSURANCE COMMISSION AND DIVISION OF PERSONNEL

DOCKET NO. 2010-1303-DOR (12/7/2011)

**PRIMARY ISSUES:** Whether Grievant proved that DOP's classification of her position was wrong.

**SUMMARY:** Grievant, an employee of the Insurance Commission, seeks to have her position reallocated from the classification of Office Assistant 3 at pay grade 7 to the classification of an Insurance Program Specialist classification at pay grade 15. The Division of Personnel is charged with making classification determinations. After reviewing the documents related to Grievant's position and performing an on-site audit, the Division of Personnel determined that Grievant's position best fit into the classification of Office Assistant 3. Grievant did not prove that Respondent DOP's classification decision was clearly wrong. Grievant did not prove that her position should be reallocated to the classification of Insurance Program Specialist. This grievance is DENIED.

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**KEYWORDS:** DEFAULT; LEVEL ONE; HEARING; TIME LINES  
**CASE STYLE:** KOBLINSKY v. PUTNAM COUNTY HEALTH DEPARTMENT  
DOCKET NO. 2011-1415-PUTCHDEF (12/8/2011)

**PRIMARY ISSUES:** Whether default occurred at level one of the grievance process.

**SUMMARY:** Grievant filed this grievance on April 1, 2011, requesting a hearing at Level One. On April 21, 2011, Respondent, by its Administrator, Jacqueline Fleshman, scheduled the Level One hearing to be held on April 22, 2011. On that same day, the Administrator learned that Grievant's supervisor would not be available to appear on April 22, 2011. Also on this date, Grievant's Representative advised Respondent's Administrator, by email, that neither he nor the Grievant would be available to appear on the scheduled date. Respondent's Administrator emailed Grievant's Representative that same day requesting his and Grievant's available dates near the beginning of May. Grievant's Representative failed to respond to this email communication. On May 2, 2011, Respondent's Administrator scheduled the Level One hearing to be conducted on May 11, 2011, and notified Grievant's Representative of the same by email. On May 2, 2011, Grievant, by her Representative, filed a "Motion for Default Judgement (sic)" which read as follows: "In the above-styled matter, Grievant by representative moves for entry of default judgement (sic) granting his (sic) grievance." Respondent originally scheduled the Level One hearing within the fifteen-day time frame as required by law. This hearing had to be rescheduled because Grievant, Grievant's Representative, and Grievant's Supervisor were unavailable on the selected date. Respondent was then prevented from scheduling the Level One hearing within the fifteen-day time frame because of Grievant's supervisor's illness. Respondent acted in good faith to schedule the Level One hearing within the time frame established by law. Respondent did not intentionally delay, or hinder, the grievance process. Further, Grievant contributed to the delay in scheduling the Level One hearing when Grievant's Representative failed to respond to Respondent's April 21, 2011 scheduling email. Accordingly, the request for default judgment is denied.

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**KEYWORDS:** DISMISSAL ORDER; WRITTEN REPRIMAND;  
INSUBORDINATION; MOTION TO DISMISS; MOOT; EMPLOYER;  
EMPLOYEE; STANDING

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

DOCKET NO. 2012-0231-DOC (12/9/2011)

**PRIMARY ISSUES:** Whether Grievant had standing to file a grievance since she is no longer an employee of Respondent.

**SUMMARY:** Grievant was given a written reprimand for conduct which she grieved. Grievant severed her employment relationship with Respondent on or around October 15, 2011. This was after the level one hearing, but before the matter was scheduled for a mediation session. Grievant's resignation of her employment with Respondent rendered her grievance moot. Accordingly, this grievance is dismissed.

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**KEYWORDS:** DISMISSAL ORDER; WRITTEN REPRIMAND; PERFORMANCE IMPROVEMENT PLAN; MOTION TO DISMISS; MOOT; EMPLOYER; EMPLOYEE; STANDING

**CASE STYLE:** BLANEY v. BOARD OF MEDICINE

DOCKET NO. 2012-0135-BBC (12/19/2011)

**PRIMARY ISSUES:** Whether Grievant had standing to file a grievance since she is no longer an employee of Respondent.

**SUMMARY:** Grievant was placed on a performance improvement plan and given a written reprimand for conduct which she grieved. Grievant severed her employment relationship with Respondent on November 15, 2011. This was after the level one hearing, but before the matter was scheduled for a mediation session. Grievant's resignation from her employment with Respondent rendered her grievance moot. Accordingly, this grievance is dismissed.

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**KEYWORDS:** SUSPENSION; WRITTEN REPRIMAND; INVESTIGATION; MITIGATION; CONDUCT; THREATENING COMMENTS; INAPPROPRIATE

**CASE STYLE:** HAMILTON v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR MEDICAL SERVICES

DOCKET NO. 2011-1751-DHHR (12/23/2011)

**PRIMARY ISSUES:** Whether the written reprimand given to Grievant for inappropriate comments was justified.

**SUMMARY:** Grievant made comments to her co-workers that she felt were innocent, but which caused them concern. She was suspended while her employer investigated the incident and ultimately received a letter of reprimand. Grievant believes her supervisors over reacted and seeks training for them in addition to removal of the Reprimand from her file. Given the totality of the circumstances, Respondent was justified in its actions and the grievance is Denied.

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**KEYWORDS:** TERMINATION; JOB ABANDONMENT; LEAVE USE; MEDICAL LEAVE OF ABSENCE; GOOD CAUSE; PHYSICIAN'S STATEMENT

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

DOCKET NO. 2011-1392-DHHR (12/22/2011)

**PRIMARY ISSUES:** Whether Respondent has good cause to terminate Grievant from her employment.

**SUMMARY:** Grievant was terminated from employment with Respondent based upon Respondent's assertion that she abandoned her job when she did not return to work on March 22, 2011. Under the DOP Administrative Rule 143 C.S.R. 1 § 14.8(c), Medical Leave, an injured or ill permanent employee shall be granted a medical leave of absence without pay not to exceed six months within a twelve month period. Grievant had been on approved MLA from September 21, 2010, through March 21, 2011. Respondent contends that Grievant not returning to work on March 22, 2011 constituted job abandonment under 143 C.S.R. 1 § 12.2(c). Grievant had provided a physician's statement that stated she needed to be off work until April 6, 2011. Grievant provided physician's statements and contacted Respondent the day after receiving an inquiry into her intention of returning to work. Grievant continued to contact Respondent and provide updates on her test results, treatments and anticipated physician's release to return to work. Grievant's actions were not those of an individual who intended to abandon her job. Given the totality of the circumstances, Respondent did not prove that it had good cause for the termination of Grievant's employment. Accordingly, this grievance is GRANTED.

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**KEYWORDS:** TERMINATION; NEGLIGENCE; HEARSAY; GOOD CAUSE; VERBAL ABUSE; PHYSICAL ABUSE; CREDIBILITY

**CASE STYLE:** FURR v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/WILLIAM R. SHARPE, JR. HOSPITAL  
DOCKET NO. 2011-0988-CONS (12/7/2011)

**PRIMARY ISSUES:** Whether Respondent presented credible evidence to justify the termination of Grievant's employment based on the charge of patient abuse.

**SUMMARY:** Grievant was dismissed from his employment as a licensed practical nurse at the William R. Sharpe, Jr. Hospital. This action by Respondent was based upon allegations that Grievant engaged in patient abuse. Respondent attempted to meet its burden to establish the charges by offering testimony at level three that lacked credibility, and by offering reports that contained both hearsay and exculpatory evidence. Respondent did not meet its burden of proof in this grievance based upon the record offered in support of Grievant's termination. Accordingly, this grievance is GRANTED.