

**WEST VIRGINIA EDUCATION AND STATE EMPLOYEES  
GRIEVANCE BOARD**

**SYNOPSIS REPORT**

**Decisions Issued in January 2005**

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:** CLASSIFICATION

**CASE STYLE:** ARIGAN, ET AL. v. MARSHALL UNIVERSITY  
DOCKET NO. 03-HE-240 (1/5/2005)

**PRIMARY ISSUES:** Whether Grievants are misclassified.

**SUMMARY:** Grievants all allege they are entitled to placement in a higher pay grade. MU asserts that Grievants are properly classified and placed in the correct pay grades.  
DECISION: Mercer point factor discussions establish that Grievants are not entitled to higher pay grades. Grievance DENIED.

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**KEYWORDS:** DISMISSAL; INSUBORDINATION; UNSATISFACTORY PERFORMANCE; CREDIBILITY; MITIGATION; ADA; PROCEDURAL IRREGULARITIES; DEPRESSION; REQUEST FOR ACCOMMODATION; MANAGEMENT DECISIONS; PROGRESSIVE DISCIPLINE

**CASE STYLE:** SWAYNE v. WEST VIRGINIA STATE UNIVERSITY  
DOCKET NO. 04-HE-125 (1/14/2005)

**PRIMARY ISSUES:** Whether Grievant was properly terminated from his position.  
Whether the ADA was violated or procedural irregularities occurred.

**SUMMARY:** Grievant was discharged from his position for insubordination, poor work performance; and absence from his work area. Grievant had received multiple written warnings and a suspension for these same behaviors.  
Respondent met its burden of proof and established Grievant had done the things of which he is accused, and had not improved despite the multiple warnings. Grievance DENIED.

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**KEYWORDS:** POSTING; HIRING; SELECTION; ARBITRARY AND CAPRICIOUS

**CASE STYLE:** MCCALLISTER/JESSUP v. MARSHALL UNIVERSITY  
DOCKET NO. 04-HE-158 (1/10/2005)

**PRIMARY ISSUES:** Whether error in posting invalidated it, and whether most qualified applicant was selected.

**SUMMARY:** Respondent posted a position as non-exempt when it was actually exempt. Grievants applied and someone else was selected. Grievants failed to prove error in posting caused any harm, as it was corrected at the interviews and did not deny any opportunity to hire. Grievants also challenged selection criteria, but failed to prove it was unreasonable or that either was more qualified than the successful candidate. Grievance DENIED.

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

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**KEYWORDS:** SELECTION; CONTRACT; TIMELINESS; REQUIRED TO POST

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

DOCKET NO. 04-03-370 (1/14/2005)

**PRIMARY ISSUES:** Whether Respondent properly filled the position evening adult education coordinator at the Career Center.

**SUMMARY:** Grievant served as the Evening Adult Education Coordinator the prior school year. Respondent was required by statute to post the position every year. Grievant did not receive the position the following year. Grievant did not assert she was more qualified than the successful applicant.

This grievance was untimely. Grievant knew at the end of the prior year that the position would be posted, and she had no entitlement to the position, but she did not file a grievance at that time. Grievant agreed Respondent was required to post the position, but then stated she was entitled to receive it, even though she was not more qualified. Grievance DENIED.

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**KEYWORDS:** SUSPENSION; CREDIBILITY; INSUBORDINATION; POLICY; EMPLOYEES CODE OF CONDUCT; UNPROFESSIONAL; INAPPROPRIATE

**CASE STYLE:** DOMINGUES v. FAYETTE COUNTY BOARD OF EDUCATION

DOCKET NO. 04-10-341 (1/28/2005)

**PRIMARY ISSUES:** Whether Respondent properly suspended Grievant for three days.

**SUMMARY:** Grievant was suspended for three days for pointing a knife at a student while discussing the student's inappropriate conduct. Grievant did not mean to threaten the child, but the child felt threatened.

Respondent established Grievant had violated State Board Policy 5902 and was insubordinate when he did so. Grievance DENIED.

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

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**KEYWORDS:** DISMISSAL; WILLFUL NEGLECT OF DUTY; ABSENCES

**CASE STYLE:** STRICKLER v. HAMPSHIRE COUNTY BOARD OF EDUCATION  
DOCKET NO. 04-14-133 (1/24/2005)

**PRIMARY ISSUES:** Should Grievant have been terminated after she repeatedly failed to show up for work or report her absences?

**SUMMARY:** Grievant was hired as cafeteria manager, but had no previous training or experience in that type of position. She had a personality conflict with her supervisor, complained her training was inadequate, had difficulty learning details of the job, and the other cafeteria workers were uncooperative. Therefore, after only a few weeks on the job, Grievant began failing to report for work, and only reported her absence on two occasions. After being warned and having the call-off procedures explained to her, Grievant still failed to call in or show up for work several times, so her termination for willful neglect of duty was appropriate. Grievance DENIED.

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**KEYWORDS:** EVALUATION; POSTING AND FILLING; TIMELINESS; QUALIFICATIONS; SENIORITY

**CASE STYLE:** SMALLS v. MERCER COUNTY BOARD OF EDUCATION  
DOCKET NO. 04-27-255 (1/10/2005)

**PRIMARY ISSUES:** Whether a permanent secretary position was posted and filled in a timely manner and whether Grievant would have received position but for allegedly unfair evaluations.

**SUMMARY:** Grievant alleged a violation of the timelines for filling a permanent secretary position that she had been filling as a substitute. Grievant alleged that, had it been timely filled, she would have gotten the position because the negative evaluations that affected her application had not been done yet. She also claimed she should not have been evaluated.  
Grievant failed to prove that her evaluations were improper or incorrect, and failed to prove that without the evaluations, she would have been the most qualified candidate even though she had greater seniority. Grievance DENIED.

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**KEYWORDS:** EXTRACURRICULAR ASSIGNMENT

**CASE STYLE:** POLING v. TUCKER COUNTY BOARD OF EDUCATION

DOCKET NO. 04-47-361 (1/24/2005)

**PRIMARY ISSUES:** Whether Grievant was entitled to an extracurricular assignment which conflicted with his regular run.

**SUMMARY:** Grievant was not offered an extracurricular run which conflicted with his regular summer run. During the regular school year TCBE will hire a substitute employee to allow a regular employee the opportunity to accept the more lucrative extra runs, but does not do so in the summer, when substitutes are difficult to secure.

DECISION: Employees making application for extracurricular assignments must be available to assume the duties at the times designated by the board of education, and Grievant was not available. Grievance DENIED.

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**KEYWORDS:** EXTRACURRICULAR ASSIGNMENT; EMERGENCY

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

DOCKET NO. 04-20-395 (1/24/2005)

**PRIMARY ISSUES:** Whether Grievant was entitled to an extracurricular assignment.

**SUMMARY:** When neither a regular nor a substitute bus operator or mechanic, could not be located for an extracurricular trip, a regular employee was allowed to accept the assignment, and a substitute was called for that run. Grievant alleges that he could have taken the run; however, it would have required rearrangement of his work schedule. DECISION: Although KCBE acknowledges that this situation was a deviation from its usual practice, it was necessary to ensure the trip could be made. Such actions in emergency conditions are permissible. Grievance DENIED.

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**KEYWORDS:** LEAVE OF ABSENCE; WRITTEN REQUEST; SUBSTITUTE SERVICE PERSONNEL

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

DOCKET NO. 04-03-275 (1/19/2005)

**PRIMARY ISSUES:** Whether the Board of Education abused its discretion by not assigning the grievant as a substitute for the maintenance director where the maintenance director had not submitted a written request for a leave of absence when he was temporarily off of work due to surgery.

**SUMMARY:** The grievant was unable to prove that he was entitled to act as a substitute for the maintenance director who was temporarily absent from work due to surgery. The maintenance director had not submitted a written request for a leave of absence. There was no requirement that the Board of Education hire a substitute for the maintenance director. The Board of Education did not abuse its substantial discretion in dividing the maintenance director's duties among two administrators and a foreman in the maintenance department during the director's temporary absence. Grievance DENIED.

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**KEYWORDS:** SALARY; COMPENSATION; EXTRACURRICULAR ASSIGNMENT; UNIFORMITY; VOLUNTEER; VOLUNTARY

**CASE STYLE:** SPROUT v. HARRISON COUNTY BOARD OF EDUCATION

DOCKET NO. 02-17-375 (1/10/2005)

**PRIMARY ISSUES:** Was Grievant entitled to compensation for performing duties as a yearbook sponsor for several years?

**SUMMARY:** Grievant performed the duties of a yearbook sponsor at her middle school for several years, knowing it was an uncompensated position. In 1999, she was awarded the same position pursuant to competitive bid and began receiving extra pay. She sought compensation for performing the duties prior to 1999. Pursuant to Grievance Board decisions, an employee cannot claim compensation for voluntary duties after the fact. Grievance DENIED.

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**KEYWORDS:** WORK EXPERIENCE CREDIT; SALARY; DISCRIMINATION;  
FAVORITISM; BOARD POLICY

**CASE STYLE:** SPROUT v. HARRISON COUNTY BOARD OF EDUCATION  
DOCKET NO. 03-17-010 (1/5/2005)

**PRIMARY ISSUES:** Was Grievant entitled to work experience credit for her private sector work?

**SUMMARY:** Grievant successfully proved that it was discriminatory for Respondent to grant work experience credit to employees in the Accountant III classification, but not to school secretaries who are multiclassified as Accountant IIs. However, pursuant to Board's policy, an employee is only entitled to experience credit for identical or similar work performed in the private sector. Grievant's evidence was quite vague, and failed to establish she previously performed work similar to her current duties. Grievance DENIED.

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

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<b><u>KEYWORDS:</u></b>	DEFAULT; EXCUSABLE NEGLECT
<b><u>CASE STYLE:</u></b>	<u>HEADLEY v. DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS</u> DOCKET NO. 04-DOH-397DEF (1/27/2005)
<b><u>PRIMARY ISSUES:</u></b>	Whether the failure to issue a level two decision in a timely manner was due to excusable neglect.
<b><u>SUMMARY:</u></b>	A level two decision was not timely issued due to the District Engineer's mistaken belief that days he was out of the office on DOH business were not to be counted. DOH asserts this constitutes excusable neglect. DECISION: While there is no indication of bad faith present, a mistaken belief does not constitute excusable neglect for the failure to timely file a decision. Default GRANTED.

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<b><u>KEYWORDS:</u></b>	DISMISSAL; FITNESS FOR DUTY; CREDIBILITY; ESSENTIAL DUTIES; ADA; DISCRIMINATION
<b><u>CASE STYLE:</u></b>	<u>ADKINS v. DIVISION OF LABOR</u> DOCKET NO. 04-DOL-071 (1/25/2005)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant was properly terminated because of his inability to perform the essential duties of the position.
<b><u>SUMMARY:</u></b>	Grievant was dismissed from his position because of his inability to perform the essential duties of the position. Respondent met its burden of proof and established Grievant could not perform the essential functions of a Labor Inspector I. Grievant did not demonstrate any discrimination. Grievance DENIED.

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**KEYWORDS:** DISMISSAL; RETALIATION; INSUBORDINATION; ARBITRARY, DISPROPORTIONATE; REPRISAL

**CASE STYLE:** MALCOLM v. WORKERS' COMPENSATION OFFICE OF JUDGES  
DOCKET NO. 04-WCC-291 (1/25/2005)

**PRIMARY ISSUES:** Whether Grievant's termination was retaliation for grievance and lawsuit filings.

**SUMMARY:** Grievant was dismissed for insubordination after she attached portions of confidential EEO reports to subpoenas issued for a level four hearing. Grievant had been ordered to maintain confidentiality and not to discuss issues at work. Persons who received the documents did not need the information, and Grievant redacted information that would damage her case. Grievant refused to admit any wrongdoing, negating prospects of rehabilitation. Grievant claimed dismissal was retaliation for ongoing grievances, EEO complaints and a lawsuit, but Respondent successfully rebutted presumption of reprisal by showing legitimate and substantial reason for action. Grievance DENIED.

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**KEYWORDS:** POSTING; SELECTION

**CASE STYLE:** WRISTON v. DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS  
DOCKET NO. 04-DOH-302 (1/24/2005)

**PRIMARY ISSUES:** Whether a posted vacancy was invalid because it did not state that the successful applicant would function as the Assistant District Engineer.

**SUMMARY:** Grievant was not selected for a Highway Engineer position in the Construction Division, and alleges various faults occurred while filling the vacancy. DOH asserts that the selection of an applicant with less seniority but more relevant experience was proper.  
DECISION: Grievant does not allege a violation of any statute, rule, regulation, or policy. There was no showing that DOH acted improperly in this case. Grievance DENIED.

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**KEYWORDS:** REPRISAL; TRANSFER; MANAGEMENT DECISIONS

**CASE STYLE:** ERBY v. DEPARTMENT OF ADMINISTRATION/GENERAL SERVICES DIVISION

DOCKET NO. 04-ADMN-385 (1/25/2005)

**PRIMARY ISSUES:** Whether Grievant's transfer to night shift was improper punishment for unfounded EEO claim against him.

**SUMMARY:** Grievant had been cleared of an EEO complaint against him, and shortly thereafter was transferred to night shift. He claimed retaliation, but it was assumed he meant he was being punished for something he did not do. However, he failed to meet burden of proving decision to transfer him to night shift, justified by Respondent as a legitimate work-related need, violated any policy or rule, even though it presented a great personal hardship for Grievant. Grievance DENIED.

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**KEYWORDS:** SELECTION; ARBITRARY AND CAPRICIOUS; QUALIFICATIONS; SENIORITY; RES JUDICATA

**CASE STYLE:** JORDAN v. DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS

DOCKET NO. 04-DOH-202 (1/26/2005)

**PRIMARY ISSUES:** Should Grievant have been selected for a craftworker position?

**SUMMARY:** Grievant claimed that he, rather than an individual who was not previously a state employee, should have been selected for a craftworker position. Grievant's seniority was not relevant, because 29-6-10 only requires consideration of seniority when both applicants are state employees. Evidence did not establish that the selection was arbitrary and capricious. Successful applicant was qualified, had performed the duties for DOH before, and performed better during the interview process. Grievant's attempt to raise issues regarding his previous assignments with DOH had previously been grieved and was prohibited by res judicata doctrine. Grievance DENIED.

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**KEYWORDS:** SUSPENSION; ARBITRARY AND CAPRICIOUS; RATIONAL NEXUS; FELONY INDICTMENT

**CASE STYLE:** HENSLEY v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES

DOCKET NO. 04-HHR-375 (1/28/2005)

**PRIMARY ISSUES:** Whether Grievant's suspension was proper.

**SUMMARY:** Grievant was suspended pending an investigation into an allegation of welfare fraud that occurred prior to her employment with DHHR. After investigation was concluded, Respondent continued to extend Grievant's suspension a total of 120 days in 30-day increments, but took no other action. Charges were referred to law enforcement, but no indictment ensued until days before the level four hearing. Charges had nothing to do with Grievant's employment and there was no harm in permitting her to work until formally charged. DECISION: Suspensions were improper. Grievant was not given requisite 8-day notice prior to suspension and if she had been, investigation would have concluded prior to suspension, negating its necessity. Grievance GRANTED.

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**KEYWORDS:** TIMELINESS; DISCOVERY; GRIEVABLE EVENT

**CASE STYLE:** HAMRICK v. DIVISION OF CORRECTIONS/HUTTONSVILLE CORRECTIONAL CENTER

DOCKET NO. 04-CORR-426 (1/26/2005)

**PRIMARY ISSUES:** Was the grievance untimely?

**SUMMARY:** Grievant was removed from training to become a canine officer in August of 2002, because trainers did not believe he had the appropriate personality for that type of work. Grievant was a fairly new employee at that time, but he had taken a brief grievance training course and knew other employees who had filed grievances. He did not file this grievance until October of 2004, after doing "research" into the propriety of his employer's actions. This constitutes discovery of a legal theory, which does not excuse an untimely filing. Grievance DISMISSED.