

**WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**SYNOPSIS REPORT**

**Decisions Issued in August 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; PLANNING TIME; ARBITRARY AND CAPRICIOUS; SCHEDULING; TEAM PLANNING

**CASE STYLE:** SCHIFANO v. MONONGALIA COUNTY BOARD OF EDUCATION  
DOCKET NO. 2009-0829-MONED (8/18/2009)

**PRIMARY ISSUES:** Whether Respondent could schedule a team planning meeting during Grievant's planning period, and whether Respondent acted in an arbitrary and capricious manner in the scheduling of the meeting.

**SUMMARY:** Grievant argued that Respondent acted in an arbitrary and capricious manner when a Student Assistance Team meeting was scheduled during her planning period on one occasion. She asserted that this meeting could have been scheduled during her free time at 8:00 a.m. or during her second planning period, which was a team planning period. The team spent this meeting planning for the needs of the student being discussed. Respondent did not violate W. Va. Code § 18A-4-14(2) by scheduling this meeting during Grievant's planning period. Further, the Assistant Principal had tried to schedule this meeting at a time other than during Grievant's planning period, but had been unable to do so, and had only a few days left in which she could schedule the meeting. This was not unreasonable conduct. This grievance is DENIED.

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

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**KEYWORDS:** BUS OPERATOR CERTIFICATION, DRIVING UNDER THE INFLUENCE, DUI, SUSPENSION, INCOMPETENCY, COMPETENCY, RATIONAL NEXUS, OFF-DUTY CONDUCT

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

DOCKET NO. 2009-1075-FAYED (8/5/2009)

**PRIMARY ISSUES:** Whether Respondent BOE erroneously dismissed Grievant where she did not hold the legally required certification to perform her job because of a driving under the influence charge?

**SUMMARY:** Grievant, while off duty, was arrested for driving under the influence. Her school bus operator certification was suspended for two years by the State Board of Education. Grievant agreed to accept the two-year suspension. Thereafter, she was dismissed from her position as a school bus operator by the BOE because she did not hold the required certification.

Grievant alleges a violation of West Virginia Code § 18A-2-8 because a temporary suspension of certification is not specifically listed as a ground in which an employee may be dismissed. The BOE maintains that Grievant lacks the legal prerequisite to perform her assigned duties. Further, the BOE avers that the relief sought by the Grievant is speculative and premature.

The BOE has established, by a preponderance of the evidence, that the Grievant's dismissal complied with the provisions of West Virginia Code § 18A-2-8 and was not arbitrary and capricious. This grievance is DENIED.

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**KEYWORDS:** BUS OPERATOR; HARASSMENT; TRANSFER; BUS ROUTE; CHANGE IN SCHEDULE; MOOT

**CASE STYLE:** TIBBS v. HANCOCK COUNTY BOARD OF EDUCATION AND BETTY COLVIN, INTERVENOR

DOCKET NO. 2009-0375-HANED (8/4/2009)

**PRIMARY ISSUES:** Whether grievance regarding change in bus route was rendered moot by Grievant being placed on transfer, and whether Grievant was subjected to harassment.

**SUMMARY:** Grievant challenged changes made to her route after she received a letter stating she had been taken off the transfer list, and requested that her old bus route be reinstated. Grievant was again placed on transfer for the 2009-2010 school year, rendering this part of the grievance moot, as Respondent may make any necessary changes to Grievant's route. Grievant also claimed harassment by the Transportation Coordinator. While the Transportation Coordinator's actions did irritate and annoy Grievant, his behavior was not contrary to that expected by law, policy, or profession. In particular, it is the job of the Transportation Coordinator to make necessary adjustments to bus schedules in order to best serve the needs of the students and the Board of Education. This grievance is DENIED.

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**KEYWORDS:** COMPENSATION; EXTRA DUTY RUNS; MILEAGE; REIMBURSEMENT; BACK PAY; SUBSTITUTE

**CASE STYLE:** WIMMER v. BRAXTON COUNTY BOARD OF EDUCATION  
DOCKET NO. 2008-1812-BRAED (8/6/2009)

**PRIMARY ISSUES:** Whether Grievant was overpaid for his extracurricular runs.

**SUMMARY:** Grievant asserts he should not be required to pay any money back to Respondent for the extracurricular runs he drove while he was prohibited from performing his regular duty run. He argues that since he was not allowed to perform his regular duty run, there is no reason to deduct for a substitute driver. In addition, Grievant asserts he was told by the Superintendent he would not have to take the deductions. Respondent avers that W. Va. Code §6B-2-5(1) prohibits public employees from receiving double compensation for performing two assignments during the same hours, unless such compensation is reduced on a pro rata basis. Respondent asserts allowing Grievant to keep the overpayment is a violation of the law. Respondent further argues that, even though Grievant was not allowed to perform his regular duty run for a period of time, Grievant was still assigned that morning and afternoon run and was paid for those runs, though a substitute drove them. Lastly, Respondent does not contest Grievant was told he would not have to take the deductions for the extracurricular runs. Respondent asserts that given the uniqueness of this specific situation, incorrect information was provided to Grievant. However, Respondent avers it attempted to correct the issue as soon as it became known. Grievant has not carried his burden in this matter. This grievance is DENIED.

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**KEYWORDS:** COMPETENCY EXAMINATION; DISCRIMINATION; FAVORITISM; ARBITRARY AND CAPRICIOUS; SAFETY

**CASE STYLE:** HOKE v. MONROE COUNTY BOARD OF EDUCATION  
DOCKET NO. 2008-1661-MNRED (8/28/2009)

**PRIMARY ISSUES:** Whether Grievant should have been allowed to retest for bus operator certification after multiple failures.

**SUMMARY:** Grievant had taken the skills competency examination for bus operator several times and failed each time. She also had great difficulty obtaining her commercial drivers license. MCBOE did not want to recommend her for retesting, although it had recommended two other applicants for retesting. Given this set of facts the administrative law judge concluded there was no discrimination or favoritism and no violation of rules or statutes. Grievance DENIED.

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**KEYWORDS:** EXTRACURRICULAR ASSIGNMENT; COMPENSATION; BUS RUN; TERMINATION; NOTICE

**CASE STYLE:** STEPHENS v. WAYNE COUNTY BOARD OF EDUCATION  
DOCKET NO. 2009-0360-WAYED (8/4/2009)

**PRIMARY ISSUES:** Did Respondent improperly terminate Grievants' extracurricular bus run?

**SUMMARY:** Grievant asserts her extracurricular assignment, which was performed from 7:30 am to 8:40 am and 1:00 pm to 1:30 pm was terminated without proper notice as required in W. Va. Code §18A-2-7. Grievant was then offered an alternative extracurricular assignment to be performed from 10:30 am to 12:20 pm, but the time slot interfered with her private employment, and Grievant did not accept the position. Grievant argues this offer of an alternative assignment does not satisfy Respondent's obligation to Grievant for improperly terminating the assignment on which she bid. □

Respondent argues that after level I, it was determined that it did not properly notify Grievant that her extracurricular assignment was being terminated. Pursuant to the level I decision, Respondent paid Grievant the money she would have earned until the alternative assignment became available. Respondent avers that when Grievant declined to accept the alternative position, it had met its obligation and stopped paying Grievant.

Respondent has met its obligations. This grievance is hereby DENIED

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**KEYWORDS:** MISCLASSIFICATION, ELECTRICIAN, DUTIES, RESPONSIBILITIES, SUPERVISE, COORDINATE, DIRECT

**CASE STYLE:** ROBERTSON v. WAYNE COUNTY BOARD OF EDUCATION  
DOCKET NO. 2009-0698-WAYED (8/6/2009)

**PRIMARY ISSUES:** Whether the Grievant should be classified as a Coordinator of Electrical Services where he does not direct a division or department?

**SUMMARY:** Grievant is one of two employees in the BOE maintenance department whose position is classified as “Electrician II.” After the retirement of the Coordinator of Electrical Services, Grievant claimed that his position was misclassified, and his position should be classified as the Coordinator of Electrical Services. However, Grievant is not the immediate supervisor of any employee. He does not direct electrical, electronic or technology projects. Nor does the Grievant coordinate contractors for projects.

Grievant has not established that it is more likely than not the duties of his position are more closely related to the “Director or Coordinator of Services” classification. Accordingly, this grievance is DENIED.

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**KEYWORDS:** SIMILARLY SITUATED; VEHICLE USAGE; DISCRIMINATION;  
WORK SITE; BOARD'S AUTHORITY

**CASE STYLE:** MIDCAP v. MARSHALL COUNTY BOARD OF EDUCATION  
DOCKET NO. 2009-0028-MARED (8/5/2009)

**PRIMARY ISSUES:** Whether Grievant is similarly situated to other maintenance employees who are allowed to take their assigned board owned vehicles to and from home.

**SUMMARY:** Grievant conceded at level three that Respondent is not required to provide transportation to the maintenance employees to and from home. However, having committed to doing so for some employees, Respondent is obligated to extend the same privileges to all similarly situated employees. Grievant contended that he is similarly situated to the employees who are permitted to take a county owned vehicle home. Respondent countered that Grievant is not similarly situated to the other employees with whom he compares himself. In particular, Grievant was not assigned cross-county responsibilities, does not work in the same classification as other maintenance employees, and was not called out for emergencies. Grievant failed to establish by a preponderance of the evidence a case of discrimination.

Grievant also claimed he should be permitted to use a county vehicle to and from home based upon a statutory violation. Grievant failed to establish that Respondent had violated any statute, rule, regulation, or policy. Respondent's decision on how it assigned its vehicles was within its discretion, pursuant to statute, and was a management determination. This grievance is DENIED.

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**KEYWORDS:**

TIMELINESS; GRIEVABLE EVENT; DISMISSED

**CASE STYLE:**

BENNETT v. RANDOLPH COUNTY BOARD OF EDUCATION

DOCKET NO. 2009-0652-RANED (8/4/2009)

**PRIMARY ISSUES:**

Whether the grievance was timely filed.

**SUMMARY:**

Grievant alleges a violation of policy because a special needs student was placed on his bus route without an aide or without providing him with proper training. The special needs student's mother signed off on the IEP for her child not to ride the special needs bus; however, Grievant argues this does not change the fact that the student needs properly trained staff to supervise him while he is in the care of Randolph County Schools. Respondent counters that Grievant has failed to timely file his grievance as a matter of law. In addition, Respondent argues that Grievant has failed to assert a grievable event upon which relief can be granted. The record of this matter demonstrates that Grievant failed to file a grievance within fifteen days following the occurrence of the event upon which the grievance is based. Accordingly, this grievance is dismissed.

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

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**KEYWORDS:** COMPUTER USAGE, INTERNET, SUSPENSION, MITIGATION, PROXY ANONYMIZER, FILE SHARING, DOWNLOAD, PORNOGRAPHY

**CASE STYLE:** VAUGHAN v. DIVISION OF HIGHWAYS  
DOCKET NO. 2009-1521-DOT (8/25/2009)

**PRIMARY ISSUES:** Whether the DOH abused its progressive discipline plan and whether a 15-day suspension should be mitigated where the Grievant utilized internet websites to circumvent the computer security system in an effort to access sites that are known to traffic in illegally copyrighted media?

**SUMMARY:** Grievant knowingly utilized internet tools to circumvent the DOH's network security and web filtering. He did this in an effort to download files from webpages that are known to illegally traffic copyrighted material. Grievant admits circumventing computer security and accessing certain web pages. However, Grievant argues that the DOH violated its progressive discipline policy and his 15-day suspension was disproportionate to the offense.

According to DOH policy, an employee may be suspended for a single serious incident. The DOH did not err when interpreting the language of its policy. The Grievant has not met his burden of establishing, by a preponderance of the evidence, that mitigation is appropriate. This grievance is DENIED.

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**KEYWORDS:** DEMOTION, SALARY, PAY, SOCIAL WORKER

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

DOCKET NO. 2009-0812-DHHR (8/28/2009)

**PRIMARY ISSUES:** Did Respondent prove, by preponderance, that Grievant failed to maintain a valid license to practice social work?

**SUMMARY:** Grievant was demoted for one pay period for failure to maintain a license to practice social work. Respondent asserts that Grievant's license expired on December 2, 2008 and he failed to provide documentation of an extension granted by the Board of Social Work Examiners. Respondent's policy on the matter mandates that all employees assigned to a classification that requires a social work license must be properly licensed pursuant to state law. The evidence demonstrated that Grievant was properly licensed by the Board of Social Work Examiners on December 2, 2008 and Grievant properly maintained a valid license to practice social work. The evidence further demonstrated that this information concerning Grievant's license renewal on December 2, 2008 was communicated to his supervisor. Respondent failed to prove by a preponderance of the evidence that Grievant did not maintain his license to practice social work. This grievance is granted and Grievant's request for back pay is granted.

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**KEYWORDS:** EQUITABLE ESTOPPEL, BACK PAY, PAY DIFFERENTIAL, ULTRA VIRES ACT; EQUITY; SUPERVISOR

**CASE STYLE:** CIRCOSTA, ET AL. v. DIVISION OF VETERAN'S AFFAIRS AND DIVISION OF PERSONNEL

DOCKET NO. 2009-0257-CONS (8/17/2009)

**PRIMARY ISSUES:** Whether an employer is bound by the promise of an agent who does not have the authority to make the promise.

**SUMMARY:** Grievants filed this grievance requesting back pay for a shift differential from October 1, 2007 to January 31, 2008 that was not approved by the State Personnel Board until February 1, 2008. Grievants claim that sometime prior to October 1, 2007, when they began working the evening shift, their former supervisor promised them that they would get a one dollar per hour shift differential when they started the evening shift. Grievants argue that equity requires they receive the shift differential back pay for the hours already worked. Division of Personnel Administrative Rules provide a mechanism by which agencies can submit requests to the State Personnel Board to establish shift differential pay for their employees. Shift differentials are not mandated by law. The supervisor who made the promise to Grievants was not authorized to do so and the Division of Veterans Affairs is not bound by it. Grievants failed to prove that they are entitled to back pay. This grievance is DENIED.

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**KEYWORDS:** IMPROVEMENT PLAN, MOOTNESS, SUSPENSION, CONSTRUCTIVE DISCHARGE

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

DOCKET NO. 2009-0496-CONS (8/18/2009)

**PRIMARY ISSUES:** Whether Grievant's performance improvement plan and disciplinary actions were proper, and whether her subsequent resignation was actually a constructive discharge.

**SUMMARY:** Grievant was employed by Respondent at Mildred Mitchell Bateman Hospital, and during the course of her employment she was subject to a performance improvement plan and subsequent performance-related disciplinary actions, until she resigned. Grievant contends her resignation was forced by the continued unjustified disciplinary actions, and was therefore a constructive discharge. She failed to prove her claim, and Respondent met its burden of proving the discipline was justified, therefore the Grievances are denied.

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**KEYWORDS:** NON-SELECTION; STANDING; EMPLOYEE; EMPLOYER

**CASE STYLE:** RITTER v. DIVISION OF JUVENILE SERVICES/J. M. BUCKBEE  
JUVENILE CENTER AND SCHOOLS FOR THE DEAF AND BLIND  
DOCKET NO. 2009-0662-MAPS (8/4/2009)

**PRIMARY ISSUES:** Whether Grievant is an “employee” for purposes of standing to file a grievance.

**SUMMARY:** Grievant, an employee of the Division of Juvenile Services, applied for a position with the West Virginia School for the Deaf and Blind which is operated by the Department of Education and is not under the direction or control of the DJS. Grievant filed a grievance after not being selected for the position and as relief seeks to be placed in the position. Grievant’s requested relief is beyond the authority of his present employer and he cannot bring a grievance against a different state agency that is not his employer. This grievance fails to state a claim upon which relief may be granted. This grievance is DISMISSED.

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**KEYWORDS:** PHYSICAL LIMITATIONS; WORKERS COMPENSATION; WORK INJURY; LESS THAN FULL DUTY

**CASE STYLE:** GRIFFON v. DIVISION OF MOTOR VEHICLES  
DOCKET NO. 2008-1271-DOT (8/17/2009)

**PRIMARY ISSUES:** Whether Respondent had the authority to refuse to allow Grievant to return to work.

**SUMMARY:** Grievant has some physical limitations, and had received some accommodations from Respondent in order to be able to perform her job duties. Grievant suffered a back sprain and filed a Workers Compensation claim, and took sick leave. She was released by her doctor to return to work, subject to the previous restrictions. Respondent requested additional information from Grievant’s doctor, and refused to let her return to work until this information was provided. Respondent had the right to require additional information before deciding whether Grievant should be allowed to return to work. This grievance is DENIED.

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**KEYWORDS:** REPRESENTATION; LEGISLATIVE INTENT; NOTIFICATION OF RIGHTS

**CASE STYLE:** KNIGHT v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILD SUPPORT ENFORCEMENT  
DOCKET NO. 2008-0981-DHHR (8/6/2009)

**PRIMARY ISSUES:** Whether Grievant was entitled to representation during an investigatory interview.

**SUMMARY:** Grievant asserted she was entitled to representation during a investigatory interview, and this right was established by W. Va. Code § 6C-2-3(g). Grievant did not meet her burden of proof. The rules of statutory construction, as well as a review of the history of the statute before final passage, was utilized to reach this conclusion. Grievance DENIED.

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**KEYWORDS:** SELECTION; FAVORITISM; SENIORITY; MOST QUALIFIED; INTERVIEW

**CASE STYLE:** COMPTON v. DIVISION OF HIGHWAYS  
DOCKET NO. 2009-0357-DOT (8/4/2009)

**PRIMARY ISSUES:** Whether Respondent's non-selection of the Grievant for the position of Transportation Crew Supervisor 1 was clearly wrong or arbitrary and capricious?

**SUMMARY:** This grievance was filed when Grievant was not selected for an inmate supervisor position. Grievant was the most senior applicant. The employee who was selected for this position had more experience supervising inmates than Grievant, and was deemed better qualified for this reason. This selection was not arbitrary and capricious or clearly wrong. This grievance is DENIED.

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**KEYWORDS:** SUSPENSION, MITIGATION, CREDIBILITY, INAPPROPRIATE LANGUAGE

**CASE STYLE:** ELLIOTT v. DIVISION OF JUVENILE SERVICES/GENE SPADARO JUVENILE CENTER  
DOCKET NO. 2008-1510-MAPS (8/28/2009)

**PRIMARY ISSUES:** Whether the fifteen day suspension was proper and not disproportionate to Grievant's offenses?

**SUMMARY:** Grievant was involved in a short altercation with a resident while on duty. As a result of the investigation into the incident, Grievant was charged with a variety of policy violations and suspended for fifteen working days which is the equivalent of three work weeks. Respondent proved that Grievant violated DJS policy and procedures, but did not prove that Grievant's acts were as egregious as alleged. The suspension of Grievant is upheld. However, the length of the suspension was disproportionate to the offense and mitigation is granted.

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**KEYWORDS:** TERMINATION, WHISTLE-BLOWING, SUPERVISOR, DISMISSAL, GOOD CAUSE

**CASE STYLE:** BOURNE v. DIVISION OF VETERAN'S AFFAIRS  
DOCKET NO. 2009-0437-MAPS (8/25/2009)

**PRIMARY ISSUES:** Whether Grievant was terminated for good cause.

**SUMMARY:** Grievant has been practicing as a Licensed Practicing Nurse (LPN) for a number of years and was employed as a charge LPN at the Veterans Nursing Facility. Grievant's position was supervisory in nature. As a charge LPN, Grievant was in charge of his shift when working and was the overseer of the facility and residents. In September 2008, an investigation revealed that Grievant, as well as a Registered Nurse also on duty that particular night, had been sleeping in recliners in the TV room during their shift. Grievant acknowledged that, while not sleeping on the job, he was reclining with his eyes shut for a substantial amount of time. This resulted in a clear neglect of duty since to be available to residents a nurse would have to be within earshot of the audible signal that a resident seeks assistance or be able to look down the hallways and see the visible lights signifying a call for attention. Respondent proved the charges against Grievant and established he was dismissed for good cause. Grievant neither presented evidence in mitigation of the punishment nor argued for mitigation in his submissions. The other assertions made by Grievant are moot or without merit. This grievance is DENIED.

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**KEYWORDS:** TIMELINESS, SICK, SICK LEAVE, ANNUAL LEAVE, LEAVE ABUSE, UNAUTHORIZED LEAVE

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

DOCKET NO. 2009-0005-DOT (8/4/2009)

**PRIMARY ISSUES:** Whether Grievant abused his sick leave where he was in the hospital and called into work while a patient in the hospital?

**SUMMARY:** Grievant was taken by ambulance from his home to the hospital on May 19, 2008. He was admitted to the hospital for four days. While in the hospital, he called the DOH and informed it that he would not be able to make it into work. The day he returned to work, he provided the DOH a physician's excuse. Thereafter, Grievant was given a written warning, placed on leave restrictions and given unauthorized leave time for part of his absence during his hospital stay, and a one-day absence which directly followed the absences required by his physician. Grievant argues there was no "just cause" for this disciplinary action.

Respondent DOH has a motion to dismiss pending. It argues that this grievance was not timely filed because the grievance was not filed within fifteen days of the Grievant being reprimanded and placed upon leave. Further, DOH maintains that even if this matter was timely filed, in recognition of the particular facts in this matter, it was not erroneous for the Grievant to be reprimanded and placed on leave restrictions.

The statutory time limit for filing this grievance was extended due to the Grievant's sickness. Therefore, dismissal for untimeliness is inappropriate. The Respondent has failed to establish that the Grievant abused his sick leave. The unequivocal evidence establishes that the Grievant was sick during the time period in question. This grievance is GRANTED.