KEVIN BENNETT,

Grievant,

v. **Docket No. 01-DJS-127**

DIVISION OF JUVENILE SERVICES/
INDUSTRIAL HOME FOR YOUTH,

Respondent.

DECISION

Kevin Bennett ("Grievant") filed this grievance directly at level four on April 10, 2001, challenging his dismissal from employment as a correctional officer at the Industrial Home for Youth ("IHY"). Although Grievant was a probationary employee at the time of his discharge and not entitled to the expedited grievance process, (See footnote 1) Respondent did not object to this matter being processed at level four. Accordingly, a level four hearing was held in the Grievance Board's office in Westover, West Virginia, on July 6, 2001. Grievant represented himself, and Respondent was represented by counsel, Jendonnae Houdyschell, Assistant Attorney General. This matter became mature for consideration upon receipt of the parties' fact/law proposals on August 2, 2001.

The following findings of fact are made from a preponderance of the evidence introduced at the level four hearing.

Findings of Fact

1. Grievant began employment as a correctional officer at IHY on September 17, 2000. He was placed on an initial six-month probationary period. 2. Respondent's internal policy requires employees to call off work at least two hours before their scheduled shift begins.

3. On September 28, 2000, Grievant was approximately 25 minutes late for work, because his babysitter was late.

4. On October 29, 2000, Grievant did not report for work as scheduled, and he could not be

contacted.

5. Between November 23 and 27, 2000, Grievant was off work due to a death in his family.

6. On December 5, 2000, Grievant called in approximately one hour and 25 minutes after his assigned shift began, stating that his car had broken down.

7. Grievant was off work on December 7, 10, and 11, 2000, due to illness. (See footnote 2)

8. On December 17, 2000, Grievant was involved in an auto accident on his way to work and missed two days of work.

9. On January 19, 2001, Grievant did not report to work and did not call. He later informed his supervisor that his wife had been in the hospital for two days, and Grievant had tried to call from a pay phone, but ran out of change.

10. Grievant was off work on January 28, 29, and 30, 2001, due to illness.

11. On February 5, 2001, Grievant called in one half hour before his scheduled shift, stating he would not be in due to illness.

12. On February 6, 2001, Grievant was counseled by Charles Collins, his shift supervisor, who informed him that his use of leave was becoming excessive, along with histardiness. Grievant was told that he needed to stop calling off work and show up on time.

13. On February 15, 2001, Grievant called in approximately ten minutes before his scheduled shift, stating he could not come to work, because he did not have his uniform. Grievant was having domestic problems and had moved in with his brother, who had locked Grievant's uniform in his house. Grievant was later told by his supervisors that he could have come to work without his uniform and performed non-security duties.

14. Officer Collins met with Grievant again on February 19, 2001, telling Grievant that he needed to stop using so much leave and stop being tardy, or that disciplinary action would be taken.

15. Grievant reported late for work on February 26, 2001, after having a car accident on his way to work.

16. Grievant reported late for work on February 27, and March 4, 2001, stating he overslept.

17. Grievant called in sick on March 11, 2001.

18. Grievant reported late for work on March 12, 2001, stating his wife had misread his schedule.

19. Grievant exhausted all his sick leave, and had to be removed from the payroll, on at least

one occasion.

20. On March 14, 2001, Grievant was notified by Alvin Ross, IHY Superintendent, that he was being suspended, pending an investigation into allegations that Grievant had been arrested on March 12, 2001, for violation of bond and resisting arrest. These charges were dismissed on April 19, 2001.

21. Grievant had previously been arrested for domestic battery on February 26,2001, to which he pleaded no contest and paid court costs.

22. On March 28, 2001, Grievant was dismissed from his employment for failure to meet established performance standards, specifically for being tardy, failing to follow established call-off procedures and exhausting sick leave, during his probationary period.

Discussion

When a probationary employee is terminated on grounds of incompetency or unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the employer carries no burden of proof in a grievance proceeding. The employee has the burden of establishing by a preponderance of the evidence that his services were satisfactory. Bonnell v. W. Va. Div. of Corrections, Docket No. 89-CORR-163 (Mar. 8, 1990). See Bowman v. W. Va. Educ. Broadcasting Auth., Docket No. 96-EBA-464 (July 3, 1997); Walker v. W. Va. Public Serv. Comm'n, Docket No. 91-PSC-422 (Mar. 11, 1992); See also, Simmons v. Bureau of Employment Programs, Docket No. 97-BEP-531 (Nov. 25, 1998). A dismissal for abuse of leave and/or attendance problems is a termination for unsatisfactory performance and is not disciplinary in nature. See Giberson v. W. Va. Div. of Corrections, Docket No. 98-CORR-002 (May 29, 1998).

A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

If Grievant can establish that his services were satisfactory, then the agency's decision would be deemed arbitrary and capricious. Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it

cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE- 081 (Oct. 16, 1996). While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the employer. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

Due to Grievant's probationary status, his rights are limited. Moreover, employees of the Division of Juvenile Services are governed by the provisions of W. Va. Code § 49- 5E-5a, which states that they are classified-exempt. A classified-exempt employee is not covered under the civil service system and is an at-will employee. Bellinger v. W. Va. Dep't of Public Safety, Docket No. 95-DPS-119 (Aug. 15, 1995); Parker v. W. Va. Health Care Cost Review Auth., Docket No. 91-HHR-400 (June 30, 1992). At-will employees may be terminated for good cause, bad cause, or no cause. Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1995). However, the West Virginia Supreme Court of Appeals has held that an employer may be liable for damages if an employee was discharged in contravention of some substantial public policy. Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978). Subsequently, in Birthisel v. Tri-Cities Health Serv., 188 W.Va. 371, 377, 424 S.E.2d 606 (1992), the Court identified sources of public policy as follows:

> To identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, we look to established precepts in our constitution, legislative enactments, legislatively approved regulations, and judicial opinions. Inherent in the term "substantial public policy" is the concept that the policy will provide specific guidance to a reasonable person.

Accordingly, as a probationary, at-will employee, Grievant bears a substantial burden in this case, which he simply has not met. Grievant has contended that he should be given his job back, because the charges for which he was arrested in March of 2001 were dismissed. However, it is clear from Grievant's dismissal letter that he was discharged for excessive absenteeism and tardiness, resulting in his services being unreliable. Grievant also has argued that he was taken by surprise when he was dismissed for the reasons cited, after he had been placed on suspension due to his arrest. While Grievant's surprise is understandable, it is undisputed that Grievant had been counseled on more than one occasion for his attendance problems, which continued after his notification.

The undersigned sympathizes with Grievant's personal difficulties, which have ranged from marital troubles to personal and family illness. However, due to his probationary, at-will status, Respondent

was under no legal obligation to continue to employ Grievant, especially after his unreliability became obvious. Grievant has not proven his services to have been satisfactory, nor has he alleged his termination violated any public policy principle. Therefore, he has failed to prove his termination was improper or unlawful.

The following conclusions of law support the decision reached.

Conclusions of Law

1. When a probationary employee is dismissed for unsatisfactory performance, the employee has the burden of establishing by a preponderance of the evidence that his services were satisfactory. Bonnell v. W. Va. Div. of Corrections, Docket No. 89-CORR- 163 (Mar. 8, 1990). See Bowman v. W. Va. Educ. Broadcasting Auth., Docket No. 96- EBA-464 (July 3, 1997); Walker v. W. Va. Public Serv. Comm'n, Docket No. 91-PSC-422 (Mar. 11, 1992); See also, Simmons v. Bureau of Employment Programs, Docket No. 97- BEP-531 (Nov. 25, 1998).

2. A dismissal for abuse of leave and/or attendance problems is a termination for unsatisfactory performance and is not disciplinary in nature. See Giberson v. W. Va. Div. of Corrections, Docket No. 98-CORR-002 (May 29, 1998).

3. Employees of the Division of Juvenile Services are classified-exempt employees. W. Va. Code § 49-5E-5a.

4. A classified-exempt employee is not covered under the civil service system and is an at-will employee. Bellinger v. W. Va. Dep't of Public Safety, Docket No. 95-DPS- 119 (Aug. 15, 1995); Parker v. W. Va. Health Care Cost Review Auth., Docket No. 91- HHR-400 (June 30, 1992).

5. At-will employees may be terminated for good cause, bad cause, or no cause. Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1995).

6. An at-will employee is subject to dismissal for any reason which does not contravene some substantial public policy principle. Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978).

7. Grievant has failed to prove that his services were satisfactory, and he hasnot proven that his dismissal contravened any substantial public policy.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred, and such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: August 17, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Probationary employees discharged for unsatisfactory performance, like Grievant, are required to go through the entire four-step grievance process.

Footnote: 2

Respondent has not disputed that Grievant's illness-related absences were excused by physician's statements.