CHARLES CARPENTER,

Grievant,

v. Docket No. 02-DOH-437

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Charles Carpenter, a probationary employee, filed this grievance against his employer, the Division of Highways ("DOH"), on October 16, 2002, after he was dismissed for unsatisfactory performance. Grievant's Statement of Grievance reads: " Dismissal; Workplace Security; Discrimination." (See footnote 1) **The Relief Sought was:**

> **Reinstatement of Grievant's position under the umbrella of Civil Service with all back pay, transfer of Mr. McGuire, Mr. Tim Hudnall, Mr. Tim James, and Mr. Larry Holstein; all documents pertaining to this proceeding and resulting in this grievance filing be removed from personnel file. To be made whole in every way.**

As Grievant was a probationary employee when he was dismissed, this grievance was filed at Level I on October 16, 2002. This grievance was denied at all lower levels, and Grievant appealed to Level IV on December 27, 2002. Three days of hearing were held at Level IV on April 4, and 22, and May 9, 2003. (See footnote 2) **This case became mature for decision on July 15, 2003, when the undersigned Administrative Law Judge received the last of the parties' arguments and responses. The original date for submission was June6, 2003, but DOH asked for and Grievant agreed to an extension to June 27, 2003, and then the parties exchanged additional motions.**

Issues and Arguments

Respondent maintains Grievant was discharged for unsatisfactory performance during the probationary period. Respondent did not believe Grievant could carry out the prescribed and

essential duties of the position, especially in the area of working successfully with his supervisees and following the orders of his supervisors. Grievant also engaged in some activities Respondent believed Grievant could have been disciplined for, but chose not to take any action in these areas, instead DOH chose to terminate Grievant for unsatisfactory performance at the end of the probationary period.

Grievant alleges his performance was satisfactory, and the employees conspired against him to get him fired because he made them work and controlled their illegal use of leave time. He also asserts he has been discriminated against because some people did not like him. Further, in the alterative, Grievant appears to argue Respondent failed to train him properly for the position; thus, his failure to meet expected standards was not his fault. (See footnote 3)

Grievant asserted in his Level IV Findings of Fact and Conclusions of Law a violation of the whistle-blower laws. This was the first time this issue had been addressed. DOH objected as it was not on prior notice of these allegations, and it had no opportunity to respond to them. Grievant responded that during his testimony he had used the word whistle-blower one time. Since Grievant did not allege a violation of the whistle-blowerlaws in his Statement of Grievance, did not raise this issue as an amendment to his grievance during the Level IV hearing, and only mentioned the word once during the course of three days of hearing, this whistle-blower issue will not be addressed further. However, the issue of the "falsified" time sheet which is the source of Grievant's whistle blower allegations will be examined as Grievant previously stated that his monitoring of leave time was a reason his supervisees wanted him dismissed.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact. Many examples of Grievant's behavior were given in the evidence, and not all of these will be addressed individually in this decision.

Findings of Fact

1. Grievant first hired by DOH on December 5, 2002, as a temporary worker in the Design Section.

2. His work in that area was satisfactory, and Grievant was seen as a capable employee and a quick learner.

3. He applied and was interviewed for the posted position of Highway Administrator II. The job duties were included in the posting.

4. During the interview, Grievant was informed of the basic duties and expectations of the position. He was also told Paul Lyttle would be the immediate supervisor for the position, and he was expected to schedule his own supervisory training with the Division of Personnel.

5. Grievant was hired for the position, partially based on his past supervisory experience. Before he began the new position, and while he was still employed as atemporary worker, he was given time to review the manual and policies for his new position.

6. Grievant began his work as a Highway Administrator II on April 1, 2002. As he had no experience in highway work, he was directed to work closely with Mr. Lyttle and Tim Hudnall, the individual who was the acting Highway Administrator II before Grievant was selected for the position. On-the-job training is the usual method for instructing in this type of position.

7. In April 2002, Grievant informed John Dawson, the District Engineer, and his top supervisor, that one of his employees had falsely reported the leave he had taken by a couple of hours. Grievant was directed to get statements about this situation and turn them in to Mr. Dawson. Mr. Dawson investigated the situation and found the employee may have incorrectly reported his time by approximately 25 minutes while he went to the doctor on his lunch time. Mr. Dawson saw no need for discipline. (See footnote 4)

8. Grievant told the crew leaders that a sick employee could not leave the work site until he was contacted, and he gave his approval. He also informed one employee he could only take sick leave if he gave Grievant 24-hour's notice. (See footnote 5) **He also told employees, who had already worked 40 hours, that they could not take any time off at the end of the week. 9. Grievant's foremen tried to explain to Grievant this actions were incorrect and did not follow past practice and the direction of Mr. Lyttle. Grievant stated his practice would continue. The employees then called Mr. Lyttle about these matters, and Mr. Lyttle advised Grievant he could not take these actions, and the foremen, who were on site with the employees, were to OK sick leave.**

10. Grievant was upset because his supervisees had called Mr. Lyttle, and he threatened to take away their overtime.

11. After about a month, Grievant ceased to listen to the advice of Mr. Lyttle and Mr.

Hudnall. At times, Grievant intentionally disregarded the orders he was given by Mr. Lyttle, and he engaged in this behavior in front of his employees. **(See footnote 6)**

12. Grievant failed to attend the required monthly staff meeting two out of six times without explanation or prior excuse. One purpose of these meetings is to review policies and practices and to receive training and consultation on problems supervisors are having.

13. Mr. John Walker, a Transportation Analyst II, is the Environmental Coordinator, and he had difficulty getting Grievant to attend required training on environmental issues. Mr. Walker would schedule a meeting with Grievant, go to Grievant's office, and then Grievant would not show up without prior notice. This training was essential. 14. Grievant was a hard taskmaster and was seldom pleased with the performance of his employees. He frequently screamed at his employees and occasionally cursed them. The morale of the employees decreased, and the foremen found the employees felt as if "nothing was ever good enough."

15. The district office received several complaints from the public stating Grievant had been rude to them. Grievant's supervisees confirmed that this conduct had occurred. Mr. Lyttle checked out these complaints as well, and he apologized to these individuals.

16. Grievant frequently delayed returning phone calls resulting in these people calling again.

17. Grievant made arrangements to pave the road of another DOH employee without first consulting Mr. Lyttle or checking to see what the ramifications would be to the District's budget.

18. Many events occurred that the employees did not tell anyone about until they requested a meeting with management in late July or early August 2002. Mr. Dawson told the employees to put their complaints in writing, and then he would meet with them.

19. On August 22, 2002, Mr. Lyttle and Mr. King met with the employees while Mr. Dawson talked to Grievant. At that time the employees brought to light several problems management had not been aware of before the meeting. These problems included:

1) Grievant came upon two white employees shoveling sewage from a broken sewage line. He asked where "the black boy" was, and he was told the employee's name was Brian. Grievant then took the two white men out of the ditch and put Brian in. Hestood next to the

ditch while Brian shoveled and constantly hollered at Brian not to splash him;

2) When a dump truck full of asphalt got stuck in the "up" position due to mechanical difficulty, Grievant screamed and cursed at the driver and told him the next time anything like this happened he would be written up, no questions asked. He also screamed at the summer help to "Shovel, shovel, shovel," and when told they are shoveling, Grievant said, "It is my job to light a fire under their asses." All this was done in front of members of the public.

3) Grievant treated the female summer help differently than the male summer help. He took two female summer employees to lunch when one of them had a birthday, but did not take any of the summer male employees out except when he took all employees out;

4) After the Chelyan crew got new T-shirts, Grievant said they should shine up their trucks, put the summer female help on top of them, take a picture, and send it to the other districts so they could see what type of equipment they had at Chelyan; and

5) Grievant worked older employees in hard labor positions, and then lied about doing it.

20. After Mr. Lyttle, Mr. King, and Mr. Dawson reviewed these complaints from the employees, they had a meeting with Grievant and the foremen.

21. Then Grievant met with Mr. Dawson, Mr. King, and Mr. Lyttle. Grievant was given advice and direction for resolving the problems at Chelyan, and was then told to return to work. 22. The employees put their previous complaints in writing at Mr. Dawson's request. The employees wrote a petition dated September 11, 2002, which all but two of them signed. The final sentence stated, "We the employees at WVDOH Chelyan Headquarters, Org. 0123, oppose the employment of Charles Carpenter as our supervisor."

23. The end of the probationary period was arriving, and Mr. Dawson saw no major improvement in Grievant's performance. On September 16, 2002, Grievant met with Mr. Dawson who informed Grievant that he was not recommending his retention, and the problems Grievant had during his employment were discussed. Grievant was given a letter dated that same date which specified Grievant was dismissed "because of unsatisfactory performance during your probationary period of employment." Grievant was then given an opportunity to meet with Mr. Dawson on September 17, 2002, to respond.

24. On September 17, 2002, Grievant met with Mr. Dawson, and they completed Form

RL-546 indicating Grievant and Mr. Dawson had discussed the dismissal, and Grievant would be taking further action to protest his dismissal. (See footnote 7)

25. By letter dated September 30, 2002, Jeff Black, Director of Human Resources, informed Grievant he was being dismissed for:

> **unsatisfactory performance during the probationary period in that you have not demonstrated the necessary leadership skills to effectively manage the Chelyan maintenance organization, you have been less than honest withupper management, and you have demonstrated an insubordinate attitude. More specifically, twenty-two of the Chelyan organization have signed a document complaining of your treatment of employees. In addition, your immediate supervisor has reported that you told him false information on several occasions when reporting on work related matters. You also disobeyed your supervisor's instruction on at least one occasion and made known to employees in your presence that you intended to disobey those instructions.**

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 that his services were satisfactory. Bonnell v. W. Va. Dep't 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. Pub. 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).

Grievant was dismissed for unsatisfactory performance, and although some of his actions could be seen as misconduct or insubordination, DOH decided to view all Grievant's behavior as unsatisfactory performance during the probationary period. Respondent especially saw Grievant's performance as unsatisfactory in his dealings with his employees, supervisors, and the public. Accordingly, Grievant has the burden of proof in this grievance.

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 & HumanResources, 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.

I. Unsatisfactory performance

The first issue to discuss is whether Grievant was properly dismissed for unsatisfactory performance. Classified employees are subject to the provisions of the Division of Personnel's Administrative Rules. Numerous Rules and Sections are applicable to the issues raised by Grievant, and they will be listed below.

The Division of Personnel's Rule 3.75 defines the "Probationary Period" as "[a] specified trial work period prescribed by the State Personnel Board designed to test the fitness of an employee selected from a competitive list of eligibles for the position for which an original appointment has been received."

The Division of Personnel's Rule 10.1 discusses the "Nature, Purpose, and Duration" of the probationary period.

> **(a) The probationary period is a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program of the agency. It is an integral part of the examination process and the appointing authority shall use the probationary period for the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work.**

Section 10.2 Conditions Preliminary to Permanent Appointment

> **(a) Four weeks prior to the end of the probationary period, the appointing authority shall obtain from the probationary employees supervisor a statement in writing recommending that the employee be continued or not be continued in service. This statement shall include an appraisal of the employees services and should include a service rating in conformity with the system of performance evaluation prescribed by the Director. If the appointing authority determines that the services of the employee shall beretained, the appointing authority shall notify the employee and the Director of Personnel of the action no later than the last day of the probationary period.**

Section 10.5 Dismissal during Probation

> **If at any time during the probationary period, the appointing authority determines that the services of the employee are unsatisfactory, the appointing authority may dismiss the employee in accordance with Section 12.2 of this rule. If the appointing authority gives the fifteen calendar days notice on or before the last day of the probationary period, but less than fifteen calendar days in advance of that date, the probationary period shall be extended fifteen days from the date of the notice and the employee shall not attain permanent status. This extension shall not apply to employees serving a twelve month**

probationary period.

Section 12.2 Dismissals

> **Fifteen (15) calendar days after notice in writing to an employee stating specific reasons, the appointing authority may dismiss any employee for cause. The appointing authority shall allow the employee a reasonable time to reply to the dismissal in writing, or upon request to appear personally and reply to the appointing authority or his or her designee. The appointing authority shall file the reasons for dismissal and the reply, if any, with the Director of Personnel. Fifteen days notice is not required for employees in certain cases when the public interests are best served by withholding the notice or when the cause of dismissal is gross misconduct. An appointing authority may dismiss an employee after oral notice, confirmed in writing, when the dismissed employee's action(s) constitute a threat to the safety or welfare of persons or property.**

The first issues to address are whether Grievant has proven his services were satisfactory, and whether his dismissal was arbitrary and capricious. The term "unsatisfactory," as used in the Administrative Rule, is not defined, but the American Heritage Dictionary defines satisfactory as "giving satisfaction sufficient to meet a demand or regulation; adequate." (2d college ed. at 1092).

"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 mannercontrary 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)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

Although Grievant asserted his performance was satisfactory, he did not prove this was so. His subordinates were displeased with his treatment of them, and they gave specific

instances of rude, negative behavior. Grievant's supervisors were also displeased with Grievant's performance, and they also identified specific instances to support this opinion. Additionally, it is clear there were complaints from the public about Grievant's treatment of them.

Grievant contended production was up during his tenure, but his supervisor disagreed. He asserted he reacted to concerns quickly, but his Office Assistant noted Grievant frequently did not return calls, and she kept handing him phone call slips from the same people. Grievant attempted to demonstrate his response time by the submission of e-mails he received and responded to during his tenure. A review of these e-mails establishes long periods of time for which Grievant did not submit any e-mails. Forexample, there are periods of approximately a month, two weeks and three weeks that Grievant did not submit any e-mails into evidence.

Grievant also maintained if his performance was unsatisfactory, it was because he did not receive sufficient training and counseling. Multiple witnesses identified the type of training, directions and the counseling they gave Grievant, but Grievant asserts this did not occur because there was no documentation of this training. Just because Mr. Lyttle, Mr. Hudnall, Mr. King, and Mr. Dawson did not write down the assistance and training they gave Grievant, does not mean it did not occur. They testified under oath about this training, and guidance. Training and counseling does not have to be written down each time it occurs.

Additionally, Grievant was not cooperative with Mr. Walker when he attempted to give Grievant the required training on environmental issues and permits, Grievant did not attend all the mandatory, monthly meetings which would have included a training element, and Grievant did not seek the assistance of his Supervisor, Mr. Lyttle, and, in fact, did not follow his explicit directions on several occasions. Further, Grievant did not attend the Division of Personnel's supervisor training programs which were a required part of his responsibility as a supervisor, and were explained to him during his interview.

Grievant also seemed to assert he did not know his job duties, but testified he obtained a copy of his class specifications, reviewed it, and at the Level IV hearing testified he completed all the tasks listed.

Grievant appears especially troubled by the failure of DOH to give him written documentation, written reprimands, or verbal warnings for the behavior that could havebeen

considered misconduct. (See footnote 8) A review of the events of Grievant's probationary period reveals that Grievant's supervisors were not aware of most of these behaviors until late August 2002, and at that time decided to talk to Grievant and provide direction in that manner instead of instituting disciplinary action. After that time, the probationary period was almost up, and DOH decided not to retain Grievant as a permanent employee.

Grievant also maintains that because he did not receive written notice of his deficiencies, DOH failed to follow the Division of Personnel's Employee Performance Appraisal ("EPA") Policy. This Policy notes an EPA2 is the form to use when a probationary employee's evaluation is to be completed. DOH completes this form on a probationary employee just prior to the end of the probationary period prior to the employee becoming a permanent employee, pursuant to Division of Personnel Rule 10.2. Since Grievant did not become a permanent employee, this form was not completed.

Grievant also asserted the fact that no grievances were filed during his tenure as proof that his performance was satisfactory. First, this is not the only measure of unsatisfactory performance. Additionally, a foreman was going to file a grievance about Grievant's treatment of him, but he talked to Grievant's supervisors first, Grievant was directed to change his treatment of the employee, and the grievance was settled before it was filed.

Grievant has not proven DOH's decision to dismiss his for unsatisfactory performance was arbitrary and capricious.

II. Workplace security Grievant alleged DOH failed to provide him a secure workplace. He asserted two employees threatened to hit him, and that Mr. Dawson's telling him to return to work after he received the written allegations dated September 11, and 17, 2002, from the employees and Mr. Lyttle, placed him in a dangerous situation. The Division of Personnel's Workplace Security Policy defines "Threatening Behavior" as "Conduct assessed, judged, observed, or perceived by a reasonable person to be so outrageous and extreme as to cause severe emotional distress or cause, or is likely to result in, bodily harm." See Workplace Security Policy at II. at M.

The two incidents Grievant complained of do not rise to the level of threatening behavior as defined in the Policy. Tim James, a crew leader, reported at the August 22, 2002 meeting that after Grievant yelled at him and shook his finger in his face about sick leave, that in his

younger days he would not have taken that, and he would have hit Grievant. Another employee, Larry Holstein, told the Office Assistant, Debbie Carrow, that he felt like hitting Grievant after Grievant had treated him rudely.

These two comments were not made to Grievant, and were reported later to demonstrate the level of frustration these two employees felt about Grievant's treatment of them. This was not conduct that could be "perceived by a reasonable person to be so outrageous and extreme as to cause severe emotional distress or cause, or is likely to result in, bodily harm." Additionally, Mr. Dawson's directing Grievant to return to work at Chelyan was not threatening, nor it did expose Grievant to a hostile work environment.

III. Discrimination

Grievant has alleged he has been discriminated against, but these allegations were poorly defined and were related to the employees' statements in the September 11, 2002memo, Mr. Hudnall's remark that Grievant was not fair to the men, and a feeling that people did not like him because he was hired from the register. Discrimination is defined in W. Va. Code § 29-6A-2(d), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 9) of discrimination under W. Va. Code § 29-6A-2(d) must demonstrate the fol lowing:

> **(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);**
>
> **(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;**
>
> **and,**
>
> **(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.**

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Once a grievant establishes a prima facie case of discrimination and/or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep'tof Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Grievant has not met his burden of proof, as he has failed to establish a prima facie case of discrimination. He did not compare himself to any similarly situated employee, nor did he show another employee who was treated more favorably than he. (See footnote 10)

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. When a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is upon the employee to establish that his services were satisfactory by a preponderance of the evidence. Bonnell v. W. Va. Dep't of Corrections, Docket No. 89- CORR-163 (Mar. 8, 1990).

2. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

3. Grievant has failed to prove, by a preponderance of the evidence, that his performance was satisfactory, and DOH's decision to dismiss him was arbitrary and capricious. Bowman v. W. Va. Educ. Broadcasting Auth., Docket No. 96-EBA-464 (July 3, 1997); Smith v. W. Va. Div. of Labor, Docket No. 93-LABOR-347 (Oct. 29, 1993); Walker v. W. Va. Pub. Serv. Comm'n, Docket No. 91-PSC-422 (Mar. 11, 1992); Bonnell, supra.

4. Grievant failed to prove DOH violated any statute, policy, rule, or regulation in

dismissing him from employment. Goard v. W. Va. Div. of Corrections, Docket No. 95- CORR-068 (Mar. 20, 1995).

5. Discrimination is defined in W. Va. Code § 29-6A-2(d), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

6. A grievant, seeking to establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d) must demonstrate the following:

> **(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);**
>
> **(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;**
>
> **and,**
>
> **(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.**

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

7. Once a grievant establishes a prima facie case of discrimination and/or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v.W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

8. Grievant has not met his burden of proof, as he failed to establish a prima facie case of discrimination.

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. Any 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: July 30, 2003

Footnote: 1

Grievant then cited several sections of the Department of Transportation Handbook and several policies of the Division of Personnel as well. Grievant also mentioned the Human Right Laws and the case of Bonnell v. Corrections, Docket No. 89-CORR-163 (Mar. 8, 1990).

Footnote: 2

Grievant was represented by his fiancee, Carol Bradley, and Respondent was represented by its Attorney Barbara Baxter.

Footnote: 3

At the Level IV hearing, Grievant filed two motions, one to delete documents admitted below, and another to switch the burden of proof. These motions were denied.

Footnote: 4

The employee who was accused of leave abuse could not read, and another employee, Mr. Hudnall, filled out the form for him, and the employee signed it.

Footnote: 5

This employee had a sick baby, his wife had already used up her sick leave, and this employee had sick leave available.

Footnote: 6

For example, Grievant and his foremen were on the speaker phone with Mr. Lyttle discussing a big project.

Mr. Lyttle directed Grievant to pave the road first, and then take care of the ditch. After they got off the phone one of the foremen then said, "So we'll pave the road first, and then do the ditch?" Grievant said, "No we will do the ditch first."

Footnote: 7

One of the reasons Grievant asserted his dismissal was disciplinary is because his notification at the meeting was completed on Form RL-546. This form is accompanied by Form RL-544 when it is used for disciplinary action, with 544 specifying the reason for the disciplinary action, and notice of the type of disciplinary action that would be taken. Form RL-544 was not used, instead Grievant received the letter dated September 16, 2002, indicating his dismissal was for unsatisfactory performance.

Footnote: 8

Grievant's supervisors indicated they prefer to use discussion, direction, and training during the probationary period, instead of taking disciplinary action.

Footnote: 9

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th ed. 1968).

Footnote: 10

Grievant also made a notation about a violation of the "Human Rights Laws", but this remark was not explained and will not be addressed further.