WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

JEFFREY KELLER,

Grievant,

v. **Docket No. 05-CORR-305**

DIVISION OF CORRECTIONS/ST. MARYS

CORRECTIONAL CENTER,

Respondent.

D E C I S I O N

Grievant, Jeffrey Keller, a probationary employee, filed this grievance against his employer, the Division of Corrections (Corrections) on August 25, 2005, after his dismissal for unsatisfactory performance. The dismissal letter cites as the reason for Grievant's dismissal: “[y]our work performance does not meet the standards established to obtain permanent employee status as a Correctional Officer for the Division of Corrections.” Grievant contests his dismissal, and seeks reinstatement and back pay.

This grievance was initially scheduled for hearing in October 2005. However, Grievant was called to active military duty, and this matter was held in abeyance. On November 1, 2007, a Level IV hearing was conducted at the Charleston Grievance Board Office. This case became mature for decision on or about December 10, 2007, the deadline for the submission of the parties' proposed findings of fact and conclusions of law.

Synopsis

Respondent discharged Grievant during his initial one-year probationary period of employment. Respondent did not believe Grievant's job performance as a Correctional Officer 1 sufficiently demonstrated his ability to perform the prescribed and essential duties of the position, especially in the area of controlling the activity of prisoners and following established procedure. Respondent elected to terminate Grievant during the probationaryperiod, citing unsatisfactory job performance. Grievant alleges his performance was satisfactory and appears to argue Respondent conspired against him. Grievant did not meet his burden of proof and demonstrate his performance was satisfactory. Grievant failed to prove violation of any statute, policy, rule, or regulation. Grievance DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1 1. The Division of Corrections utilizes a one year probationary period for a Correctional Officer 1 position.

2 2. Grievant was a probationary Correctional Officer 1, initially employed by Respondent at the St. Marys Correctional Center (SMCC) on February 15, 2005.

3 3. Grievant was assigned to work under the supervision of Unit Manager Sandy Tanzcyn.

4 4. Respondent expected Grievant to learn and implement Division of Corrections Policy Directives, SMCC Operational Procedures, and Unit Rules, among other responsibilities.

5 5. During Grievant's probationary period, Respondent found it necessary to address with Grievant a number of performance issues which involved and included his

ability to control the movements and actions of inmates under his supervision.

6 6. Supervisor Tanzcyn addressed with Grievant concerns of having inmates on the smoke yard after the yard had been closed for the night, and during a fog line with no other supervision. It is a serious security concern that inmates would be allowed to exit assigned unit without adequate supervision. 7 7. Ms. Tanzcyn also found the entrance door to the housing area open (improper), and Grievant sitting at the Officer Station with his feet propped up on a chair watching television. Grievant response to Ms. Tanzcyn's admonition indicated Grievant did not seem concerned or to recognize the matter to be serious.

8 8. Supervisor Tanzcyn's concerns with Grievant's job performance included, but were not limited to, attitudinal problems, failure to follow procedure, and dubious call-offs.

9 9. Officer Donald Smith observed suspicious activity in the housing unit where Grievant was working on July 16, 2005:

9.a a.
Officer Smith, during a perimeter check, observed 8 to 10 inmates gathering in a bedroom that should have only had 4 inmates.

9.b b.
Grievant was instructed to check out the situation.

9.c c.
Officer Smith subsequently returned to the same area, he then saw Grievant sitting at the foot of an inmate's bed with the inmate in the bed (Improper CO conduct). When Grievant noticed Officer Smith at the window he stood up and walked out of the room.

9.d d.
Officer Smith reported the incident to his supervisor, Sgt. Greg Maine, who discussed the matter with Grievant.

10 10. Sgt. Maine prepared an incident report indicating that he had addressed his concerns with Grievant. Along with the events of July 16, 2005, Sgt. Maine related in

his report that this was his second discussion with Grievant; Grievant had previously allowed inmates to stay up and watch television after hours.

11 11. Three different officers reported that an incident occurred on July 31, 2005, in Inmate Housing Unit 72, where Grievant was assigned to work during the midnight shift.

11.a a.
Officer Steven Aguilar prepared a report in which he reported observing movement in Grievant's assigned unit after count.

11.a.i i.
Officer Aguilar reported that he stopped at room 4 when he heard an inmate yell “co” “co” as if the inmates were lookouts.

11.a.ii ii.
Officer Aguilar reported seeing inmates in a football huddle with two inmates on their knees in front of them, and saw two inmates hugging on bed 30.

11.a.iii iii.
Officer Aguilar contacted the shift commander, Captain Berryman.

11.b b.
Captain Berryman (See footnote 1) went to observe unit 72 after being advised of a problem by Officer Aguilar.

11.b.i i.
Captain Berryman found an unusual amount of activity in Unit 72 and observed inmates watching the windows as if they were lookouts.

11.b.ii ii.
Captain Berryman observed several inmates in the day room and traffic from room 5.

11.c c.
Captain Berryman with Lieutenant VanCamp observed the rear of unit 72 from unit 73, and reported seeing inmate movement and inmates watching out of rear windows of room 5.

11.c.i i.
Both officers reported seeing inmates from room 5 watching television.

11.c.ii ii.
As the two approached the unit, an inmate was heard yelling “co”.

11.d d.
When the officers (Berryman and VanCamp) entered Unit 72 they observed an extremely high percentage of inmates awake and several fully clothed lying on their bunks.

12 12. When questioned, Grievant responded that he did not see inmates watching TV, yet he had entered room 5 twice.

13 13. Grievant was assigned to another housing unit, and his unit manager was contacted.

14 14. Subsequent to the July 31, 2005, incident, and in light of other concerns, Unit Manager Tanzcyn recommended Grievant be dismissed from his probationary position. 15 15. Associate Warden of Programs, Patrick Mirandy concurred with the recommendation to dismiss Grievant, and referred the matter to the Deputy Warden.

16 16. In an August 1, 2005 memorandum, Associate Warden Patrick Mirandy stated;

> [T]here have been complaints issued by inmates about (Grievant's) job performance, that [sic] carry little weight, however (4) other Correctional Officer's that have witnessed his poor job performance and documented the same. This job performance as reported is detrimental to the security of the institution and should not be overlooked. He has been addressed in the past about his performance by his supervisor Sandy Tanczyn and [neither] she nor I have seen improvement.

17 17. Deputy Warden Lemasters met with Grievant on August 1, 2005, and conducted a pre-determination meeting with him.

18 18. Based on his review of reports provided, concerns expressed, and Grievant's statements during the pre-determination meeting, Deputy Warden Lemasters concluded that Grievant's work performance was not satisfactory.

19 19. After the August 1, 2005, meeting Deputy Warden Lemasters recommended Grievant's dismissal to the Warden.

20 20. Pursuant to subsequent dismissal letters, (See footnote 2) Warden William M. Fox duly dismissed Grievant from employment, giving him 15 days notice/pay.

Discussion (See footnote 3)

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 Corr.*, 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).

Grievant was dismissed for unsatisfactory performance of job duties during his probationary employment period. Respondent especially perceived Grievant's performance as unsatisfactory in his dealings with the activity of inmates and failure to adhere to applicable operational procedures. Accordingly, Grievant has the burden of proof in this grievance.

As employees in the classified service of the state, Corrections employees are subject to the provisions of the Division of Personnel's Administrative Rule. Enlightening

to the issues raised by this grievance are the Rules and Sections set forth 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.

> 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 10.5 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 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 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)." *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.

Grievant contended his job performance was consistent with standard behavior; however, other than his own testimony, he offered no evidence to substantiate this position. Grievant's supervisors were displeased with Grievant's performance, and they identified specific instances to support this opinion. Additionally, it is clear that supervisory personnel communicated directly with Grievant regarding operational procedure and jobperformance expectations. Thus, although Grievant asserted his performance was satisfactory, he did not prove this was so.

If Grievant had established that his services were satisfactory, then the agency's decision could be deemed arbitrary and capricious. However, in the facts of this case

Respondent specified criteria reasonably intended to be considered in analyzing the job performance of a probationary Correctional Officer. Grievant has not proven that Correction's decision to dismiss him for unsatisfactory performance was arbitrary and capricious. Respondent did establish that it dismissed Grievant during a duly recognized probationary period of employment for job performance it deemed unsatisfactory. 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 his judgment for that of the employer. *See generally, Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982). Respondent dismissed Grievant from his probationary employment because he had not met the required performance standards or shown the proficiency and ability to meet the required standards.

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Conclusions of Law

1. Termination of a probationary employee for unsatisfactory performance is not disciplinary in nature, and the burden of proof is upon the probationary employee to prove by a preponderance of the evidence that his performance was satisfactory, and that he should not have been dismissed. *McClure v. Dep't of Health and Human Res.*, 03-HHR- 236(December 17, 2003); *Dixon v. Div. of Corr.*, Docket No. 98-Corr-243 (August 24, 1998). *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); *Walkerv. W. Va. Pub. Serv. Comm'n*, Docket No. 91-PSC-422 (Mar. 11, 1992); *Bonnell v. W. Va. Dep't of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990).

2. Grievant has failed to prove, by a preponderance of the evidence, that his performance was satisfactory, and Correction's decision to dismiss him was arbitrary and capricious. *Carpenter v. W. Va. Div. of Transportation,* Docket No. 02DOH-437 (July 30, 2003); *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.*

3. Grievant failed to prove Respondent violated any statute, policy, rule, or regulation in dismissing him from employment. *Goard v. W. Va. Div. of Corr.*, Docket No. 95-CORR-068 (Mar. 20, 1995).

4. Respondent did not act arbitrarily and capriciously or lack a rational basis for dismissing Grievant from his probationary employment. *Goard v. W. Va. Div. of Corrections*, Docket No. 95-CORR-068 (Mar. 20, 1995). Respondent established that it dismissed Grievant for job performance it deemed unsatisfactory.

5. In dismissing Grievant during a probationary period of employment Respondent complied with applicable provisions of the Division of Personnel Administrative Rules governing such failure to hire.

Accordingly, this grievance is **DENIED**.

Any party 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 (repealed, *See Footnote 3, supra)*. 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 notbe 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.

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Landon R. Brown

Administrative Law Judge

Date:___ February 27, 2008

Footnote: 1

Captain Berryman is now deceased.

Footnote: 2

There was an error in the initial dismissal letter thus a subsequent letter revised the effective date of discharge. This correction did not change the specifics of the original four page dismissal letter.

Footnote: 3

In 2007, the Legislature abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes and rules, which continue to control the proceedings in this case.