THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TRISTAN A. CHESTER,
Grievant,

Docket No. 2024-0583-DHS

DEPARTMENT OF HOMELAND SECURITY/
PARKERSBURG CORRCTIONAL CENTER
AND JAIL,
Respondent.

DECISION

Grievant, Tristan A. Chester, was employed by Respondent, Department of Homeland Security/Parkersburg Correctional Center and Jail as a probationary Correctional Officer 1 ("CO1"). On February 26, 2024, Grievant filed his grievance directly to level three pursuant to W.VA. CODE § 6C-2-4(a)(4) against Respondent. Grievant filed a lengthy statement of grievance, which is incorporated in full by reference. Essentially, Grievant claims Respondent failed to follow its progressive discipline policy by not first offering a verbal warning for excessive abuse of leave prior to his dismissal. Grievant contends that he should have been allowed to work his full year of probation. For relief, Grievant seeks reinstatement of his job or alternatively, back pay in the amount of $6,537.60 representing the remainder of available workdays on his one-year probation period consisting of 320 hours at $20.43 per hour.

A level three hearing was held on June 14, 2024, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared in person, *pro se*[1]. Respondent appeared by Superintendent of Parkersburg Correction Center, Aaron Westfall and was represented by counsel, Jodi B. Tyler Esq., Assistant Attorney

[1] For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

General. This matter became mature for decision on July 17, 2024, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a CO1 under a one-year probationary period. Grievant grieves his termination claiming Respondent failed to follow its progressive discipline policy by not first offering a verbal warning for excessive abuse of leave prior to his dismissal. Respondent met its burden to demonstrate it acted reasonably when it terminated Grievant during his one-year probationary period for excessive abuse of the leave policy. Respondent placed Grievant on a written leave restriction that prohibited Grievant from taking any unsupported leave for six months with the goal of lowering his absentee percentage rate from 23% to 5%. Respondent did not arbitrarily or capriciously terminate Grievant when Grievant failed to adhere to the leave restriction requirements by continuing to take unsupported leave and only lowering his absentee percentage to 16.7%. Accordingly, the grievance must be dismissed.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant was employed by Respondent as a CO1 at Parkersburg Correctional Center and Jail as a one-year probationary employee. (*See Respondent's EX. 5, Termination Letter*).

2. As a CO1, Grievant job duties included providing security over the inmates at the correctional facility while encouraging their rehabilitation within the structured programs of the facility and provide protection of co-workers and the public from

incarcerated inmates. (*See Respondent's Ex. 5; Testimony* of *Sargeant Kyle Blackwell; Testimony of Superintendent Aaron Westfall*).

3. Grievant was aware that before he could be considered to becoming a permanent employee of Respondent that he had to successfully complete a 12-month probationary period beginning May 05, 2023.

4. During Grievant's time as a probationary employee, he began to experience frequent absences from work.

5. Due to having frequent absences, Grievant exhausted all of his annual and sick leave. Without any annual or sick leave, Grievant began to request unpaid personal leave when he desired to be absent from work.

6. When Grievant would request unpaid personal leave, it was often for non-emergency reasons. On one occasion, Grievant requested unpaid personal leave to attend a concert. When Grievant learned he was not going to be paid on the day of the concert, Grievant decided to take unpaid personal leave for the entire weekend.

7. Grievant's frequent absences began to cause concern for his supervisor Sargent Kyle Blackwell as it caused a scheduling problem and a safety concern at the jail. Sargent Blackwell reported his concern to the Superintendent of Parkersburg Correctional Center, Aaron Westfall.

8. Superintendent Westfall ordered Sargent Blackwell to conduct an absentee report to determine what percentage Grievant was absent from his work schedule for the purpose of determining whether Grievant was misusing Respondent's leave policy.

9. The West Virginia Division of Corrections and Rehabilitation ("WVDCR") Policy Directive 129.09 dealing with "Leave Misuse" became effective December 1, 2020.

The lease misuse policy was created "[t]o establish and maintain an acceptable level of staff attendance and procedures for administering corrective action." (*See Respondent Ex.7 Policy Directive*).

10. WVDCR Policy Directive 129.09 states that "[a]ttendance is an essential element of every job. An undependable employee is of questionable value to the DCR and poor or unacceptable attendance shall be dealt with promptly." (*Id).*

11. When a supervisor determines that an employee may be misusing their leave, WVDCR Policy Directive 129.09 states that the supervisor can request "the appropriate human resource/payroll staff to calculate the employee's absenteeism rate which should generally not exceed 5%." (*Id*).

12. WVDCR Policy Directive 129.09 III C states that:

> Misuse of leave may be determined to occur when unsupported sick leave hours are equal to or greater than five percent (5%) of the time available for work in a given six (6) month period. This figure is calculated by dividing the total number of unsupported sick leave hours taken by the time available for work during the given period and multiplying that figure by 100 (unsupported sick leave/time available for work= ____ x 100 = _____%).

(*Id*).

13. To properly identify and correct the misuse of leave, WVDCR Policy Directive 129.09 directly dictates that a supervisor "should consider factors including number, frequency and duration of absences; patterns of leave use; excessive use of emergency annual leave; tardiness; and excessive use of unsupported sick leave." (*Id*).

14. On October 11, 2023, Sargent Kyle Blackwell, sent a letter to Superintendent Aaron Westfall, requesting a "Leave Restriction" for Grievant after completing an absentee report on Grievant. The letter specifically stated:

> I am requesting leave restriction for CO1 Tristan Chester on 11 October 2023. I completed his absenteeism report after all annual leave and sick leave was exhausted. His current percentage rate is 23%, since he started on 05 May 2022. He has also used unpaid personal leave multiple times due to all sick and annual leave being exhausted, and is currently on his probationary period.

(*See Respondent's Ex. 2; Testimony of Kyle Blackwell*).

15. Grievant was placed on a six month leave restriction from October 11, 2023, to April 11, 2024. Under the leave restriction, Grievant was instructed to correct and reduce his absenteeism rate with the goal of achieving no less than 5% absentee rate percentage. (*See Respondent Ex. 2, Ex. 7 Leave Restriction Acknowledgement*).

16. While on leave restriction, Grievant was not permitted to accumulate any unsupported sick leave usage. Grievant was informed that failure to adhere to the leave restriction could result in disciplinary action, up to and including dismissal. (*See Id., Testimony of Sargent Kyle Blackwell*).

17. Superintendent Westfall met with Grievant and counseled him regarding his absenteeism. Superintendent Westfall does not ordinarily meet with Correctional Officers, but he wanted to know what was going on with Grievant and if anything could be done to help Grievant improve his absenteeism.

18. Superintendent Westfall allowed Grievant to adjust his work schedule to better accommodate his needing to be absent from work to bring his absentee percentage down. Grievant was permitted to change his work schedule three times.

19. After Grievant was allowed to change his work schedule, Vivian Willey, Administrative Lieutenant, became Grievant's new supervisor.

20. Despite having a new work schedule and being informed he could face disciplinary actions for excessive absenteeism, Grievant continued to be absent from work for both supported and unsupported leave.

21. On February 5, 2024, Superintendent Westfall directed Lieutenant Willey to run Grievant's absenteeism report a second time for the period between August 1, 2023, to February 1, 2024. (*See Respondent Ex. 3, Testimony of Lieutenant Willey, Testimony of Superintendent Westfall*).

22. Grievant's second absenteeism report originally determined that for a total of six months, Grievant had 1080 total hours scheduled with 77.5 hours of supported leave and 209.75 hours of unsupported leave. It was calculated that Grievant's absentee percentage was 21%. (*See Respondent Ex. 8, Testimony of Vivian Willey*).

23. At the level 3 hearing, it was determined that Grievant's second absenteeism report incorrectly calculated his absentee percentage due to failing to account for Grievant's mandatory Covid leave for the period of December 15-21, 2023. Respondent recalculated Grievant's second absentee report and determined that Grievant had been scheduled for 1080 hours and Grievant took 128.25 hours off with supported leave and 159 hours off with unsupported leave. Grievant's recalculated absentee percentage was 16.7%. (*See Respondent's Supplemented Ex. 8).*

24. After reviewing Grievant's second absenteeism report, Superintendent Westfall determined that Grievant was still misusing his leave and was undependable as a CO1. (*See Testimony of Superintendent Westfall*).

25. On February 15, 2024, Respondent held a predetermination conference with Grievant regarding his attendance. (*See Respondent Ex. 4*).

26. On February 15, 2024, Respondent notified Grievant of his termination by letter that informed Grievant his termination was effective March 1, 2024. The termination letter cited Respondent's leave misuse policy and WVDCR Policy Directive 129.00 "Code of Conduct and Progressive Discipline" that became effective August 8, 2022. (*See Respondent Ex. 4*).

27. Grievant's termination letter stated that Grievant was charged with several violations of Policy Directive 129.00; failure to comply with written instructions, unsatisfactory attendance, abuse of state work time, and instances of inadequate or unsatisfactory job performance. The termination letter also stated that Superintendent Westfall concluded that Grievant failed to make a satisfactory adjustment to the demands of his position to meet the required standards of work. (*Id*).

Discussion

If a probationary employee is terminated on the grounds of misconduct, the termination is disciplinary, and the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *See Cosner v. Dep't of Health and Human Resources/William R. Sharpe, Jr. Hospital*, Docket No. 08-HHR-008 (Dec. 30, 2008); *Livingston v. Dep't of Health and Human Res.,* Docket No. 2008-0770-DHHR (Mar. 21, 2008). *See also* W. VA. CODE ST. R. § 156-1-3 (2018). *See also Lott v. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999). 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. *Bonnell v. W. Va. Dep't of*

Corrections, Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. Dep't of Health and Human Res*., Docket No. 2008-0958-DHHR (Mar. 13, 2009).

Grievant "is required to prove that it is more likely than not that his services were, in fact, of a satisfactory level." *Bush v. Dep't of Transp.,* Docket No. 2008-1489-DOT (Nov. 12, 2008). "However, the distinction is one that only affects who carries the burden of proof. As a practical matter, an employee who engages in misconduct is also providing unsatisfactory performance." *Livingston v. Dep't of Health and Human Res*., Docket No. 2008-0770-DHHR (Mar. 21, 2008) (citing *Johnson v. Dep't of Transp./Div. of Highways*, Docket No. 04-DOH-215 (Oct. 29, 2004)). "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 & Human Res*., Docket No. 92-HHR-486 (May 17, 1993). If the evidence is equally balanced, the party with the burden of proof has not met that burden. *See Leichliter v. W. Va. Dep't of Health and Human Res.,* Docket No. 92-HHR-486 (May 17, 1993).

The Division of Personnel's administrative rule discusses the probationary period of employment, describing it as "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." W. VA. CODE ST. R § 143-1-10.1.a. (2022). The same provision goes on to state that the employer "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." *Id*. A probationary employee may be dismissed at any point during the probationary period that the employer determines his services are

unsatisfactory. *Id*. at § 10.5(a). Therefore, the Division of Personnel's administrative rules establish a low threshold to justify termination of a probationary employee. *Livingston v. Dep't of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008).

> A probationary employee is not entitled to the usual protections enjoyed by a state employee. The probationary period is used by the employer to ensure that the employee will provide satisfactory service. An employer may decide to either dismiss the employee or simply not to retain the employee after the probationary period expires.

Hammond v. Div. of Veteran's Affairs, Docket No. 2009-0961-MAPS (Jan. 7, 2009) (citing *Hackman v. W. Va. Dep't of Transp.*, Docket No. 01-DMV-582 (Feb. 20, 2002)).

"[W]hile an employer has great discretion in terminating a probationary employee, that termination cannot be for unlawful reasons, or arbitrary or capricious. *McCoy v. W. Va. Dep't of Transp.*, Docket No. 98-DOH-399 (June 18, 1999); *Nicholson v. W. Va. Dep't of Health and Human Res.*, Docket No. 99-HHR-299 (Aug. 31, 1999*)." Lott v. W. Va. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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 Res., Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

"'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "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]." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

Grievant argues Respondent improperly terminated him due to not following its own progressive disciplinary procedures by not first providing him with a verbal warning before terminating him. Grievant claims he is entitled to reinstatement of his job or alternatively, back pay in the amount of $6,537.60 representing 320 hours at $20.43 per hour for the remaining available work time for his one-year probationary period. Respondent argues it properly followed its policy when it terminated Grievant during his probationary period for excessive absenteeism. Respondent contends that it properly gave Grievant ample notice to reduce his absenteeism to a reasonable 5% rate, which Grievant failed to do.

Respondent terminated Grievant for abusing its leave policy and is disciplinary in nature. Respondent met its burden to prove it was justified in terminating Grievant during Grievant's one-year probationary period. The record established that Respondent acted reasonably by placing Grievant on a leave restriction once it determined that Grievant had an absentee rate of 23%. The leave restriction of having a goal of having an absentee percentage rate less than 5% with no unsupported leave time was reasonable. The nature of Grievant's job as a CO1 dealt with public safety and having an absentee percentage rate of more than 5% made Grievant undependable and put the public's safety at risk. Respondent acted reasonably by allowing Grievant ample opportunity to reduce his absentee rate by allowing Grievant to change his work schedule three times. Despite being aware of the strict leave restrictions of not being permitted any unsupported leave, Grievant continued to take unsupported leave. A second absentee percentage calculation showed that Grievant had an unsupported leave rate of 16.7%.

Respondent did not act arbitrarily and capriciously by terminating Grievant before the expiration of Grievant's six month leave restriction. Grievant was clearly informed that failure to adhere to the leave restriction could result in disciplinary action, up to and including dismissal. It was reasonable for Respondent to terminate Grievant prior to expiration of the six-month leave restriction due to the nature of Grievant's occupation as a CO1. Correction Officers are vital to the security of jails and are expected to be dependable. Grievant's excessive absenteeism created a scheduling problem and a safety concern at the jail. Clearly, Grievant could not be considered dependable to help keep the jail safe by continuing to take unsupported personal leave for non-emergencies, such as attending weekend concerts. Grievant was provided with written notice of his

strict leave restrictions. Grievant clearly failed to adhere to his leave restrictions by continuing to take unsupported leave and having an absentee percentage of 16.7%.

Accordingly, Grievant's grievance is DENIED.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. If a probationary employee is terminated on the grounds of misconduct, the termination is disciplinary, and the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *See Cosner v. Dep't of Health and Human Resources/William R. Sharpe, Jr. Hospital*, Docket No. 08-HHR-008 (Dec. 30, 2008); *Livingston v. Dep't of Health and Human Res.,* Docket No. 2008-0770-DHHR (Mar. 21, 2008). *See also* W. VA. CODE ST. R. § 156-1-3 (2018). *See also Lott v. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999).

2. 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. *Bonnell v. W. Va. Dep't of Corrections*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. Dep't of Health and Human Res*., Docket No. 2008-0958-DHHR (Mar. 13, 2009).

3. Grievant "is required to prove that it is more likely than not that his services were, in fact, of a satisfactory level." *Bush v. Dep't of Transp.,* Docket No. 2008-1489-DOT (Nov. 12, 2008). If the evidence is equally balanced, the party with the burden of proof has not met that burden. *See Leichliter v. W. Va. Dep't of Health and Human Res.,* Docket No. 92-HHR-486 (May 17, 1993).

4. “However, the distinction is one that only affects who carries the burden of proof. As a practical matter, an employee who engages in misconduct is also providing unsatisfactory performance.” *Livingston v. Dep’t of Health and Human Res*., Docket No. 2008-0770-DHHR (Mar. 21, 2008) (citing *Johnson v. Dep't of Transp./Div. of Highways*, Docket No. 04-DOH-215 (Oct. 29, 2004)).

5. “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 & Human Res*., Docket No. 92-HHR-486 (May 17, 1993). If the evidence is equally balanced, the party with the burden of proof has not met that burden. *See Leichliter v. W. Va. Dep't of Health and Human Res.,* Docket No. 92-HHR-486 (May 17, 1993).

6. The Division of Personnel’s administrative rules establish a low threshold to justify termination of a probationary employee. *Livingston v. Dep’t of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008).

> A probationary employee is not entitled to the usual protections enjoyed by a state employee. The probationary period is used by the employer to ensure that the employee will provide satisfactory service. An employer may decide to either dismiss the employee or simply not to retain the employee after the probationary period expires.

Hammond v. Div. of Veteran’s Affairs, Docket No. 2009-0161-MAPS (Jan. 7, 2009) (citing *Hackman v. W. Va. Dep’t of Transp.*, Docket No. 01-DMV-582 (Feb. 20, 2002)).

7. “[W]hile an employer has great discretion in terminating a probationary employee, that termination cannot be for unlawful reasons, or arbitrary or capricious. *McCoy v. W. Va. Dep’t of Transp.*, Docket No. 98-DOH-399 (June 18, 1999);

Nicholson v. W. Va. Dep't of Health and Human Res., Docket No. 99-HHR-299 (Aug. 31, 1999*)." Lott v. W. Va. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999).

8. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

9. "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 Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

10. "'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*).

11. "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]." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty.

Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

12. Respondent met its burden to demonstrate it acted reasonably when it terminated Grievant during his probationary period. Respondent placed Grievant on a written leave restriction that prohibited Grievant from taking any unsupported leave for six months with the goal of lowering his absentee percentage rate from 23% to 5%. Respondent did not arbitrarily or capriciously terminate Grievant when Grievant failed to adhere to the leave restriction requirements by continuing to take unsupported leave and having an absentee percentage of 16.7%. Accordingly, the grievance must be dismissed.

Accordingly, the grievance is **DENIED.**

"The decision of the administrative law judge is final upon the parties and is enforceable in the circuit court situated in the judicial district in which the grievant is employed." W. VA. CODE § 6C-2-5(a) (2024). "An appeal of the decision of the administrative law judge shall be to the Intermediate Court of Appeals in accordance with § 51-11-4(b)(4) of this code and the Rules of Appellate Procedure." W. VA. CODE § 6C-2-5(b). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such an appeal and should not be named as a party to the appeal. However, the appealing party must serve a copy of the petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

DATE: August 28, 2024

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Wes White
Administrative Law Judge