THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RICHARD DORSEY,

Grievant,

v. **Docket No. 2025-0253-DOT**

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant, Richard Dorsey, was employed by Respondent, Division of Highways, as a probationary employee when he failed a drug test. On September 17, 2024, Respondent dismissed Grievant. On September 18, 2024, Grievant filed this grievance, stating, "I was terminated after a week of work due to a drug test which I feel was mishandled." As relief, Grievant requests reinstatement and a clean record.

Grievant filed directly to level three of the grievance process.[1] A level three hearing was held by videoconference on February 18, 2025. Grievant appeared and was self-represented. Respondent appeared by Gordon Cook, Coordinator for Drug Testing, and was represented by Brian Maconaughey, Esquire. This matter became mature for decision on March 19, 2025. Only Respondent submitted proposed findings of fact and conclusions of law (PFFCL).

Synopsis

Grievant was a probationary employee with Respondent when he failed a drug test. Respondent dismissed Grievant for misconduct in violating its drug policy.

[1]West Virginia Code § 6C-2-4(a)(4) permits a grievant to proceed directly to level three of the grievance process when the grievance deals with the discharge of the grievant.

Respondent proved Grievant engaged in misconduct. Accordingly, this grievance is DENIED.

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 began as a Transportation Worker 1 probationary employee with Respondent, Division of Highways (DOH), on September 10, 2024.

2. On September 9, 2024, prior to starting, Grievant signed an acknowledgement of various policies including Respondent's Drug and Alcohol-Free Workplace policy.

3. Earlier, on July 26, 2024, Grievant signed a Drug/Alcohol Testing Notification & Consent form. In signing the form, Grievant acknowledged that he would be required to "submit to a controlled substance test involving collection of a urine sample which will be tested for the presence of … [a]mphetamines" and that "a positive drug test will disqualify me for employment/transfer/promotion with the West Virginia Division of Highways/Parkways Authority."

4. On September 10, 2024, Grievant provided Respondent with a urine sample for drug testing. The test revealed that Grievant was positive for amphetamines.

5. On September 17, 2024, Respondent issued Grievant a letter of termination for violating the Department of Transportation's Drug and Alcohol Testing Policy in testing positive for the presence of amphetamines in his urine.

6. Respondent routinely dismisses probationary employees who test positive for prohibited drugs.

Discussion

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 on the employee to establish by a preponderance of the evidence that his services were satisfactory. *Bonnell v. Dep't of Corr*., 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). However, 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 Res*., 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). "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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

The evidence shows that Grievant was a probationary employee and was dismissed due to positive drug test results for amphetamines. Respondent labels this misconduct rather than unsatisfactory performance. "[T]he 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)).

As a probationary employee, Grievant was not entitled to the usual protections. "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. Dep't of Transp*., Docket No. 01-DMV-582 (Feb. 20, 2002)).

Nevertheless, "while 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).

Respondent was clearly within its right to terminate a probationary employee for testing positive for a prohibited drug. Respondent routinely terminates probationary employees when they test positive for prohibited drugs. Respondent is sensitive to the unique safety issues to both its highway workers and the public that exist when its employees work on highways. Respondent's drug testing policy is tailored to these concerns. As such, Respondent proved it acted reasonably in terminating Grievant's probationary employment after he tested positive for prohibited drugs.

Grievant did not challenge his positive test results. Rather, he hinted that they could be explained as either a mishandling of the urine sample or a false positive caused by medication. These are affirmative defenses that could negate the test results. "Any

party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2018). Grievant did not present any witnesses, make any arguments, or submit PFFCL. Grievant did state in his one sentence statement of grievance that his drug test was mishandled. Grievant also submitted into evidence a single page exhibit regarding medications that could cause a false positive on a drug test. A few of these medications correlated to false positives for amphetamines, the drug found in Grievant's urine sample. Looking past the issue of the validity of this list due to a lack of provenance, Grievant did not specify that he was using any medication, let alone that he had a prescription for any medication that could cause a false positive. Thus, Grievant failed to prove an affirmative defense to his positive drug test.

The following Conclusions of Law support the decision reached.

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 on the employee to establish by a preponderance of the evidence that his services were satisfactory. *Bonnell v. Dep't of Corr*., 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). However, 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 Res*., 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). "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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. "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. Dep't of Transp*., Docket No. 01-DMV-582 (Feb. 20, 2002)).

3. "[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)).

4. Respondent proved by a preponderance of the evidence that Grievant engaged in misconduct as indicated by a positive test for a prohibited drug and that it did not act arbitrarily and capriciously in dismissing him.

5. “Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence.” W. VA. CODE ST. R. § 156-1-3 (2018).

6. Grievant did not prove by a preponderance of the evidence any affirmative defense to his positive drug test.

Accordingly, this 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) (2024).

DATE: April 16, 2025

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Joshua S. Fraenkel
Administrative Law Judge