

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**CHERALITA GRIGGS,
Grievant,**

v.

Docket No. 2024-0675-DOR

**DEPARTMENT OF REVENUE/
TAX DIVISION,
Respondent.**

DECISION

Grievant, Cheralita Griggs, was employed by Respondent, Department of Revenue, as a Tax Audit Clerk Trainee. On April 8, 2024, Grievant filed this grievance directly to level three stating, “‘Surprise’ Termination/Wed March 20, 2024.”¹ For relief, Grievant seeks “(1) My supporting documentation to be reviewed thoroughly; (2) Those who knowingly supplied ‘information’ that is not 100% accurate to be disciplined; (3) Re-instatement as a direct hire to different unit/floor-or division; employment needed.”

A level three hearing was held on October 25, 2024, before Administrative Law Judge Wesley H. White at the Grievance Board’s Charleston, West Virginia, office. Grievant appeared in person and was self-represented. Respondent appeared by Director of Tax Account Administration Stacy Acree and was represented by counsel, Assistant Attorney General William E. Longwell. The matter was reassigned to the undersigned on December 11, 2024, for administrative reasons.² The matter became

¹ Grievant goes on to cite several provisions of the Division of Personnel’s Administrative Rule.

² The undersigned listened to the audio recording of the level three hearing and had all the exhibits at her disposal.

mature for decision on December 11, 2024, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a probationary Tax Audit Clerk Trainee. Grievant was dismissed by Respondent four months into her probationary period for unsatisfactory work performance. At the level three hearing, Grievant failed to meet her burden of proof by a preponderance of the evidence that she performed her duties satisfactorily and that the termination of her probationary employment was arbitrary and capricious. Accordingly, the 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 was employed by Respondent as a probationary Tax Audit Clerk Trainee on November 20, 2023.
2. All probationary employees are subject to a probationary period of up to 12 months, the purpose of which is to assess whether an employee is a "good fit for the position."³
3. Upon hire as a probationary Tax Audit Clerk Trainee, employees go through a series of trainings by Respondent. Those trainings are set up in four, two-week blocks

³ Interestingly, at the time of her employment—and unbeknownst to Respondent—Grievant was an active employee of the Department of Health and Human Resources ("DHHR"). Grievant did not immediately resign her position with DHHR because she "wanted to make sure the Tax job worked out" first; so, she, too, was offering Respondent a "probationary period."

and build upon one another. Each block is supervised/trained by different employees of Respondent.

4. Trainees work in training teams. Grievant's team consisted of Grievant and two other trainees.

5. Trainings began promptly at 8:30 a.m. each day, and trainees were expected to be ready to go right to work at that time.

6. An Employee Performance Appraisal ("EPA") 1 was completed by Assistant Director Heather Casdorff on December 12, 2023. The purpose of the EPA 1 was "Setting Expectations and Goals." The EPA 1 was divided into multiple "Universal Competencies"—Dependability, Teamwork and Collaboration, Customer Service, Professionalism and Ethics, Change Readiness and Adaptability—which Grievant was expected to demonstrate as an employee. In it, Ms. Casdorff noted the following expectations under each designated category:

- a. Dependability: "It is fundamental for you to be in the office as much as possible while in a learning environment. Your team depends on you for what you bring to the discussions and your perspective is important."
- b. Teamwork and Collaboration: "As a member of the training program, you will be working in a team environment and providing feedback, collaborating, and sharing of information to problem solve and help your teammates reach goals that have been set. Please continue to provide practical information to your team and feedback to the unit instructors as you move along the training prog [sic]."

- c. Customer Service: “At this time in your training program you will not be assisting customers.”
- d. Professionalism and Ethics: Ms. Casdorph merely reiterated the outlined expectations listed on the EPA 1 form itself.
- e. Change Readiness and Adaptability: “During the training program it is important to be flexible. You will be learning different tax types as well as moving throughout the building to work with each section in addition to working from home periodically.”

Grievant signed the EPA 1 on December 13, 2023, acknowledging that she had “met with [her] supervisor and received and underst[ood] the contents of this evaluation.”

7. The first two-week block of training (following general orientation) was onboarding, which was led/supervised by Catherine Mitchell.

8. Aside from the first day, Grievant came into work late every day. Despite being late, Grievant would take time to settle in, getting herself a drink and unpacking her things and delaying the start of the training. Ms. Mitchell explained to Grievant that “we go to work at 8:30” and that she could not come in late and then take extra time to get situated.

9. Grievant was also tardy in returning from lunch and other breaks.

10. Ms. Mitchell could not begin the training until Grievant joined the group; so, Grievant’s tardiness was an inconvenience for everyone.

11. Neither of Grievant’s teammates was ever late during the onboarding block.

12. Ms. Mitchell also observed that Grievant would nod off in class almost every day. Ms. Mitchell was forced to go over information again for Grievant's benefit once she was roused from her sleep.

13. Ms. Mitchell adjusted her training style to make it more interactive in hopes of engaging Grievant more, but it did not seem to work.

14. Ms. Mitchell addressed both issues with Grievant in the second week of training.

15. Additionally, Grievant did not participate in group discussions unless specifically prompted.

16. Ms. Mitchell spent an extra day training Grievant in GenTax, which is a fundamental program used by Tax Audit Clerks, because Grievant's absences and nodding off during onboarding caused her to lag behind in the necessary skills to move on to the next training block.

17. Ms. Mitchell documented her concerns and reported them to her supervisors.

18. Grievant's performance did not improve in the remaining training blocks (business registration, tax withholding, and personal income tax). Each of her supervisors in those blocks reported the same issues with Grievant: excessive tardiness, nodding off in training, and inability to keep up with the material.

19. Christina Davidson supervised the tax withholding block. She noted that training teammates were intended to help each other through each block. While Grievant relied on her two teammates heavily to help her each day, she was not able to return the

favor because she did not grasp the material. Grievant struggled to master even basic skills and concepts.

20. Grievant was not asked to do any tasks that she had not been specifically trained to do; so, there was no reason for her difficulty in successfully completing tasks. Her teammates did not seem to be struggling.

21. Ms. Davidson did notice Grievant nodding off in class a couple of times, but she did not address the issue with Grievant. It put Grievant more behind in training.

22. Ms. Davidson did, however, document her concerns and reported them to her supervisors.

23. Canishia Shepherd supervised the personal income tax block. She noticed that while Grievant was often late for training or returning from breaks, Grievant was often actually in the building. She just was not where she was supposed to be, hanging out in the kitchen or in the hallways instead.

24. Ms. Shepherd found Grievant's work product to not only lag behind that of her teammates but also to lack accuracy. This was in spite of extra training that was afforded to Grievant.

25. Rachel Bostic supervised the business registration block, but she did not testify at the level three hearing.

26. An EPA 3: Final Evaluation was completed by Ms. Casdorff on January 11, 2024. In it, Grievant scored 2.8 out of 5 and was given an overall rating of "Meets Expectations." Nonetheless, the following concerns were noted:

- a. Change Readiness and Adaptability: "In the training program, the team is frequently exposed to change, and [Grievant] has handled it well in

most cases. As the training program progresses it is imperative to the success of each of the trainees to be able to navigate tax software and Google.” Ms. Casdorph gave Grievant a rating of “3 Meets Expectations.”

- b. Dependability: “Tardiness and returning from lunch late have been a concern thus far in the training program. Team 4 is a ‘team’ and when one person is late the instructor must wait to start the next session, this has at times put the program behind. In the present few weeks, the tardiness has gotten better but it is imperative that you are at work ready to work in order for you to obtain the knowledge necessary for success in the training program. Each unit builds from the previous, it is designed that way. [Grievant] at times struggles with task [sic]; example: after completing Business Registration she could not add an employer withholding account in the next unit.” Ms. Casdorph gave Grievant a rating of “2 Needs Improvement.”
- c. Teamwork and Collaboration: “[Grievant] actively engages in conversation with her peers, but they seem to support her more than she supports them. Everyone learns at their own pace and the training program is designed for all but at times [Grievant] often falls asleep which causes her to miss valuable information.” Ms. Casdorph gave Grievant a rating of “2 Needs Improvement.”

- d. Customer Service: The trainees are not assisting customers at this time. Ms. Casdorff gave Grievant a rating of “3 Meets Expectations.”⁴
- e. Professionalism and Ethics: “[Grievant] adheres to the law, rule, and policy on ethics and professional behavior under which the Tax Division operates. Maintains appearance appropriate to the job, role, and expectations of the agency.” Ms. Casdorff gave Grievant a rating of “3 Meets Expectations.”
- f. Quantity and/or Quality of Work, in regard to Google Sites GenTax: “The trainee program continues to build their knowledge of Google as they navigate the program.” Ms. Casdorff gave Grievant a rating of “3 Meets Expectations.”

27. Grievant noted on the EPA 3 form that she took issue with Ms. Casdorff’s “notations regarding the rating about the ‘helping Teammates’ comment,” and stated that she “disagree[d] with their findings on that” and she included reasons why in a “Journal Entry,” but that document is apparently contained in a database belonging to the agency and is not available to the undersigned. At the level three hearing, however, Grievant explained that her teammates did not need help from her but acknowledged that she did seek help from them. Moreover, teammates are encouraged to help one another.

28. Grievant, though, relied on her teammates excessively, “much more than [she] should be.”

⁴ Obviously, this score was a “mulligan” that helped boost Grievant’s overall rating because employees cannot otherwise be evaluated on a skill they are not asked to perform.

29. Grievant denied that anyone ever discussed with her that she was falling asleep in training. Grievant never denied that she had fallen asleep, however. Grievant did suggest that perhaps her blood pressure medicine was to blame and sought information from Human Resources about “forms” regarding her medical condition, but she learned that she was not eligible for coverage under the Family Medical Leave Act until she was employed for one year or worked at least 1250 hours in a 12-month period.

30. Likewise, Grievant did not deny she was frequently tardy when returning from breaks or that she frequently nodded off in training. Rather, she disputed that her supervisors ever discussed those concerns with her.

31. Regarding being late in the mornings, Grievant “entered time” (she took sick or annual leave) on those days. Grievant acknowledged, though, that submitting time for late arrivals does not change the fact that she was late to work on those days.

32. Some tardiness may be excused, especially when one does not have reliable transportation and has children; but Grievant’s tardiness was habitual.

33. Further, the GenTax software program is essential to the performance of the permanent Tax Audit Clerk job. Even after four months of training, Grievant could not correctly use the program and did not seem to understand the information that needed to be input into the program. Grievant could work through parts of the program, but, overall, it was a continued struggle.

34. On March 20, 2024, Grievant was hand-delivered a letter advising her that she was being dismissed from her probationary employment due to “unsatisfactory work performance.” The dismissal was effective April 4, 2024, but Grievant was immediately

separated from the agency and paid severance pay, pursuant to Division of Personnel Administrative Rules 10.1, 10.5, and 12.2.

35. More specifically, the letter, signed by Director Stacy Acree, stated that, “[h]aving evaluated your work during your probationary period, I have concluded that you have not made a satisfactory adjustment to the demands of your position, nor have you met the required standards of work.” The letter noted these particular concerns:

- a. Ms. Mitchell noted multiple occasions of Grievant falling asleep, not participating in discussions, being away from her desk for long periods, and being late in the mornings.
- b. Ms. Bostic noted that Grievant was often tardy; fell asleep on multiple occasions; and struggled to grasp the tax software and the application of concepts learned, despite additional training.
- c. Ms. Davidson noted that Grievant fell asleep on multiple occasions and struggled to move from task to task.
- d. Ms. Shepherd was concerned that Grievant had not demonstrated enough progress in her training block; continued to be tardy frequently; failed to keep up with the work/complete tasks as expected; and failed to demonstrate consistency, despite one-on-one training.

36. Ms. Acree concluded that no “additional management intervention would bring [Grievant’s] performance to an acceptable standard.”

Discussion

When a probationary employee is terminated on grounds of unsatisfactory performance—as opposed to misconduct—the termination is not disciplinary; and the

burden of proof is upon the employee to establish by a preponderance of the evidence that his or her 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). That is, Grievant "is required to prove that it is more likely than not that his [or her] services were, in fact, of a satisfactory level." *Bush v. Dep't of Transp.*, Docket No. 2008-1489-DOT (Nov. 12, 2008); *see also 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 employee has not met his or her burden. *Id.*

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

Still, “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).

Here, the Tax Audit Clerk probationary period was structured in such a way as to give a probationary employee every opportunity to succeed. The first eight weeks of the probationary period were broken down into four training units designed to impart the knowledge and skills necessary for permanent employees to successfully navigate both their job duties and the software (GenTax) required to perform them. The training was progressive, with each unit building on the skills learned in prior units. Additionally, it was offered in small groups, allowing a more focused and personalized experience. Thus, Respondent’s probationary period for Tax Audit Clerks fell easily in line with the Division of Personnel’s Administrative Rule. See W. VA. CODE ST. R. § 143-1-10.1.a. (2022).

In this case, Grievant simply did not progress in her training and demonstrated that she was not likely to be a successful Tax Audit Clerk. Whether it was a lack of ability or a lack of diligence on the part of Grievant is less clear. Regardless, the record demonstrates plainly that Grievant was often late in the mornings, frequently tardy in returning from breaks, nodded off in training sessions, and failed to participate in group discussions. She did not even dispute these matters; Grievant simply argued that no one

discussed these issues with her before they dismissed her. Again, though, because Grievant was a probationary employee, she was “not entitled to the usual protections enjoyed by state employees,” such as progressive discipline (to which Grievant seems to elude). *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)).

All of these things alone are reason enough to find that a probationary employee is not a good candidate for permanent employment. In Grievant’s case, however, these issues were compounded by the fact that they prevented Grievant from successfully and/or effectively absorbing the important information she needed to learn to satisfactorily perform her job duties. After four months of group training, discussions with her teammates, and extra one-on-one training with multiple supervisors in different blocks, Grievant still struggled to understand and use the GenTax software that was essential to doing her job. She simply could not do the job.

The expectations and goals for Grievant were set out in her EPA 1 and were reiterated to her from block to block in her training. Grievant did not meet those goals. Respondent’s reasons for dismissing Grievant were reflective of her failure to meet expectations, and it cannot be said that Respondent acted arbitrarily and capriciously or was clearly wrong in dismissing Grievant’s probationary employment.

Grievant failed to prove by a preponderance of the evidence that her performance and services during her probationary period were satisfactory. Accordingly, the grievance must be denied. The following Conclusions of Law support the decision reached:

Conclusions of Law

1. When a probationary employee is terminated on grounds of unsatisfactory performance—as opposed to misconduct—the termination is not disciplinary; and the burden of proof is upon the employee to establish by a preponderance of the evidence that his or her 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). That is, Grievant “is required to prove that it is more likely than not that his [or her] services were, in fact, of a satisfactory level.” *Bush v. Dep’t of Transp.*, Docket No. 2008-1489-DOT (Nov. 12, 2008); *see also Leichter 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 employee has not met his or her burden. *Id.*

2. A probationary employee may be dismissed at any point during the probationary period that the employer determines his services are unsatisfactory. W. VA. CODE ST. R. § 143-1-10.5(a) (2022).

3. Thus, 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).

4. “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)).

5. Still, “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).

6. 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)).

7. “[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).

8. Grievant failed to meet her burden of proof because she failed to demonstrate that her work during her probationary period was satisfactory.

9. Respondent's dismissal of Grievant during her probationary period was supported by fact and circumstance and based on reasonable criteria. Thus, Respondent did not act arbitrarily and/or capriciously.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals in accordance with W. VA. CODE § 51-11-4(b)(4) 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: January 29, 2024

Lara K. Bissett
Administrative Law Judge