THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

WILLIAM L. CONLEY, III,

Grievant,

v. **Docket No. 2016-0399-MAPS**

DIVISION OF CORRECTIONS/HUNTINGTON WORK RELEASE CENTER,

Respondent.

DECISION

Grievant, William L. Conley, filed an expedited level three grievance dated September 24, 2015, against his employer, Respondent, Division of Corrections/Huntington Work Release Center, challenging his dismissal from employment. As relief sought, the Grievant seeks, "[f]ull reinstate (sic) with backpay, and attorney's fees."[1]

The level three hearing was conducted on November 3, 2015, and December 7, 2015, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person, and by counsel, B. Luke Styer, Esquire. Respondent appeared by counsel, John H. Boothroyd, Esquire, Assistant Attorney General. This matter became mature for decision on January 13, 2016, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

[1] It is noted that the Grievance Board has no authority to award relief for tort-like claims or punitive damages. *See Vest v. Bd. of Educ. of County of Nicholas*, 193 W. Va. 222, 225, 227 n. 11 (1995).

Synopsis

Grievant, a probationary employee, was dismissed from his position as a Correctional Officer II for alleged misconduct. Grievant denies Respondent's claims, and argues that dismissal was improper. Respondent demonstrated that Grievant engaged in unprofessional conduct, and encouraged two inmates in his charge to violate the facility rules in order to orchestrate a prank on another correctional officer, and that Grievant's dismissal was justified. Therefore, 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. At all times relevant herein, Grievant was employed as a Correctional Officer II at the Huntington Work Release Center ("HWRC"). Grievant began working at HWRC on or about December 1, 2014, as a full-time probationary employee. Grievant's probationary period was to last twelve months.

2. On August 10, 2015, Grievant was suspended without pay from his position at HWRC pending investigation into allegations of misconduct made by an inmate. The suspension letter indicates that Grievant was to be suspended for thirty days, and that he was expected to return to work on September 8, 2015. The suspension letter stated that if the allegations were determined to be unfounded, Grievant would be compensated for the period of suspension and his personnel file would be purged of any documentation thereof.[2]

[2] *See*, Respondent's Exhibit 1, August 10, 2015, suspension letter.

3. Stanley P. Janiszewski, Investigator II, was appointed to conduct an investigation into the allegations the inmate made against Grievant. Upon investigation, those allegations were found to be unsubstantiated.[3] However, during the investigation, Mr. Janiszewski learned of other allegations of misconduct against Grievant, and proceeded to investigate the same. Mr. Janiszewski's report of his investigation noted that the initial allegations made by the inmate were unsubstantiated, but concluded that Grievant had engaged in other misconduct and unprofessionalism.[4] Such alleged misconduct and unprofessionalism were detailed in the report.

4. Grievant was scheduled to return to work on September 10, 2015, at the end of the thirty-day suspension. Based upon the investigative report, Assistant Commissioner Paul Simmons decided to terminate Grievant's employment. Assistant Commissioner Simmons based his decision on the investigative report, and did not ask for additional information from anyone at HWRC, or for Grievant's performance appraisals. Further, Assistant Commissioner Simmons made this decision without first having met with Grievant or providing him a predetermination meeting. Also, it is noted that as the Investigative Report was dated September 25, 2015, it appears that Grievant was dismissed from employment before the Investigative Report was issued.

5. Assistant Commissioner Simmons's decision to terminate Grievant's employment was somehow communicated to Sharon R. Stubblefield, Administrator of the

[3] As these allegations were found to be unsubstantiated, they were not considered in the decision to dismiss Grievant from his employment. Accordingly, these allegations will not be further discussed herein.

[4] *See*, Investigative Report dated September 25, 2015; Respondent's Exhibit 14; Grievant's Exhibit 1.

HWRC.[5] As Ms. Stubblefield was not at the HWRC facility that day, she communicated the decision to Unit Manager Donna Tromboli, and directed Ms. Tromboli to meet with Grievant. A dismissal letter was prepared for Ms. Stubblefield's signature, and Ms. Tromboli signed the same for Ms. Stubblefield, with her permission. The record is unclear as to who drafted this letter.[6]

6. Ms. Tromboli met with Grievant on September 10, 2015, at which time she informed him that his employment was being terminated. While this meeting has been characterized as a "predetermination meeting" by Respondent, Ms. Stubblefield testified that the decision to terminate Grievant had been made before the meeting and that the meeting was to have no effect on it. She further indicated the meeting was *pro forma*.[7] Ms. Tromboli hand delivered the dismissal letter to Grievant either at, or immediately following the meeting. The record is somewhat unclear as to when the letter was given to Grievant.[8] However, the record suggests that Grievant was not given advance notice of the predetermination meeting.

7. The dismissal letter dated September 10, 2015, indicated that Ms. Stubblefield had made the decision to terminate Grievant's employment, and that such would be effective September 25, 2015.[9] Further, it states that Grievant is being

[5] The record is somewhat unclear as to how the decision was communicated to Ms. Stubblefield.
[6] *See*, testimony of Sharon R. Stubblefield.
[7] *See*, testimony of Sharon R. Stubblefield. It is further noted that Grievant was allowed to have his counsel present during this meeting, but Respondent prohibited him from speaking during the same. While it is unclear as to why he was not allowed to speak, the parties do not dispute this occurred.
[8] *See*, Respondent's Exhibit 2, dismissal letter dated September 10, 2015.
[9] Despite this statement, Ms. Stubblefield testified that she had not made the decision to terminate Grievant's employment. Instead, that decision had been made at the Central Office.

dismissed for "unacceptable conduct," and that Grievant had "failed to comply with security related instructions and became overfamiliar with multiple female Inmates (sic) during the course of your employment (Apr 2015-Aug 2015)(sic). . . Further, throughout the course of your employment (Apr2015-Aug 2015)(sic) you have displayed inappropriate and unprofessional behavior while performing your duties at the Huntington Work Release Center. . . You have also, on or about the last week of May 2015, influenced Inmates [D.B. and N.M.] get into bed together and act as if they were engaged in a sexual act to play a joke on Correctional Officer Michael Ellis." This letter further indicates that Grievant was being dismissed from his employment as a result of his "misconduct."[10]

8. Respondent sent Grievant an "Amended Dismissal Letter" dated September 16, 2015, which changed the effective date of his dismissal to September 26, 2015.[11] No other amendments to the letter have been identified.

9. Despite the fact that the allegations that prompted the investigation were found unsubstantiated, Grievant was not compensated for the time period he was suspended pending the investigation.

10. While employed at the HWRC, Grievant received an initial evaluation from his supervisor, Sergeant William Beach, when he was first hired in December 2014. However, Grievant received no other evaluations during his employment at HWRC

[10] *See*, Respondent's Exhibit 2. The inmates mentioned in the letter are only being identified by their initials in accordance with Grievance Board practice. They are not parties to this action, and were not called as witnesses by either party.
[11] *See*, Respondent's Exhibit 3, September 16, 2015, letter.

despite there being a policy that requires probationary employees be evaluated every two months.

11. During the first week of his employment at HWRC, Grievant attended Orientation for his initial training. Grievant completed Orientation on or about December 5, 2014. Grievant was given credit for 80 hours of training for attending Orientation. However, Grievant had not attended 80 actual hours of training during this time. It is unknown how many minutes are in one credit hour, but somehow Grievant received 83 credit hours of required training in a three or four day period.[12] Grievant began working independently soon after his first week on the job. Further, at times Grievant and another probationary employee were the only officers scheduled to work the evening shift.[13]

12. It was not uncommon for officers to engage in pranks during work time at HWRC.[14]

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 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).

[12] *See*, Respondent's Exhibit 10, Grievant's Individual Training Record; testimony of Jennifer Henderson.
[13] *See*, testimony of Michael Ellis, who appeared telephonically at the level three hearing.
[14] *See*, testimony of Michael Ellis.

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 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 (2008). *See also Lott v. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999). "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). Where the evidence equally supports both sides, the employer has not met its 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) (2008). 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. *See Livingston*

v. Dep't of Health and Human Res., Docket No. 2008-0770-DHHR (Mar. 21, 2008). Further,

> [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)).

The parties somewhat dispute which of them bears the burden of proof in this matter. At the level three hearing, Respondent argued that Grievant has the burden of proof because he was terminated for unsatisfactory performance even though, Respondent has repeatedly indicated that Grievant was terminated for misconduct. In its proposed Findings of Fact and Conclusions of Law, Respondent argues that Grievant's dismissal was for both misconduct and unsatisfactory performance. Grievant argues that Respondent has the burden of proof as he was dismissed for alleged misconduct. Given that the dismissal letter expressly states that Grievant's employment was being terminated for misconduct, and as Respondent has presented its case-in-chief accordingly, the undersigned concludes that the dismissal was for misconduct, and not for unsatisfactory performance. Therefore, Respondent bears the burden of proof in this matter, and must prove the charges against Grievant by a preponderance of the evidence.

Respondent argues that during its investigation into the initial allegations that were found to be unsubstantiated, it was discovered that Grievant had engaged other conduct that warranted his dismissal. Specifically, in the September 10, 2015, dismissal letter, Respondent alleged that Grievant had failed to comply with security related instructions,

and became overfamiliar with multiple female inmates during his employment. Further, Respondent alleged that Grievant displayed inappropriate and unprofessional behavior while performing his duties, along with having two female inmates to pretend they were engaging in a sexual act in order to play a joke on another correctional officer. Grievant argues that he received inadequate training, that pulling pranks was an accepted part of the culture at HWRC, and that he was never given performance evaluations as are required by policy. Further, Grievant asserts that he acted no differently than any of the other officers, and thought he was following policy and procedures. As such, he was not aware that any of his behaviors could be considered misconduct, or violating policy. Grievant asserts that his suspension and dismissal were not warranted.

The undersigned will first briefly address the suspension. On August 10, 2015, Grievant was suspended without pay for thirty days pending investigation into an inmate's allegations of Grievant's misconduct.[15] Rule 12.3 of the Administrative Rule of the West Virginia Division of Personnel states as follows:

> [s]uspension.—An appointing authority may suspend any employee without pay for cause or to conduct an investigation regarding an employee's conduct which has a reasonable connection to the employee's performance of his or her job. The suspension shall be for a specific period of time, except where an employee is the subject of an indictment or other criminal proceeding. Accrued leave shall not be paid to employees during any period of suspension. . . .

Also, Division of Corrections Policy Directive 129.00, Section V. (G)(2) "Suspension" states as follows:

[15] As these allegations were found to be unsubstantiated, there is no reason to discuss them in detail. It is sufficient to state that the inmate alleged that Grievant engaged in serious misconduct toward her.

> [i]ssued where minor infractions/deficiencies continue beyond the written warning or when a more serious singular incident occurs. Additionally, an employee may be suspended without pay while the agency conducts an investigation because of the threat of continuing danger to persons/property, to protect the integrity of evidence or pending court action. Elements of a suspension are:
>
> a. Predetermination meeting with employee to advise him/her of the contemplated disciplinary action;
>
> b. Three (3) working days written notice, prior to the effective date of the action;
>
> c. Specific written reason(s) for suspension;
>
> d. Specific period of time for the suspension (except where the employee is the subject of a criminal proceeding or indictment);
>
> e. Written notice of opportunity to respond, either in person or in writing, prior to the effective date. Immediate suspension without written notice can occur in limited situations, but requires written confirmation; and
>
> f. Notice of appeal rights specifying to whom the appeal should be directed and the time limits to appeal the suspension[.]
>
> g. A copy shall be placed in the employee's personnel file, with a copy forwarded to the Division of Corrections' Director of Human Resources and the Director, Division of Personnel.[16]

Given the serious nature of the inmate's complaint against Grievant, a thirty-day suspension, without advance notice, pending investigation into the allegations is permitted under both the Administrative Rule and DOC Policy Directive 129.00, and it appears that Respondent properly followed the same.

[16] *See*, Respondent's Exhibit 6, Policy Directive 129.00, Progressive Discipline.

The issue now becomes whether Respondent proved the charges alleged against Grievant that resulted in his dismissal. Respondent asserts that Grievant engaged the following behaviors and that the same constitutes misconduct in violation of Policy Directive 129.00 and 129.24: playing jokes on inmates; scaring inmates by jumping out and saying "boo!"; lifting inmates' mattresses up while the inmates were sleeping on them; discussing his personal life with inmates; and, having two female inmate pretend to be engaging in a sexual act in a bed as a prank on another correctional officer.[17] In its dismissal letter, however, Respondent did not identify which policies it was alleging Grievant had violated. Respondent cited the above-referenced policies in its case at level three.

At the level three hearing, Assistant Commissioner Paul Simmons testified that Grievant's behavior in scaring inmates and lifting up inmates' mattresses while they were sleeping was horseplay and unprofessional. Explaining how such behavior is "overfamiliarity," Assistant Commissioner Simmons testified that such does not establish a clear line of acceptable conduct between officers and inmates, and causes the relationship to be more like friendship. Simmons indicated that such could also raise security concerns for the facility, as well as safety concerns for the inmates. Simmons further testified that Grievant's conduct violated Policy Directive 129.24, and that such behaviors should have been reported to management, but were not. Policy Directive

[17] The dismissal letter also stated that Grievant had admitted to allowing only a certain inmate sit in the front seat of the van during transports. It does not appear that Grievant ever admitted such, and it appears that allegations regarding such were unsubstantiated during the investigation. Further, Respondent did not address the same in its proposed Findings of Fact and Conclusions of Law. As such, this allegation is not being considered in this decision, and will not be further addressed herein.

129.24, entitled "Staff and Inmate Interaction Guidelines," does not mention horseplay. However, it states, in part, as follows:

> All correctional staff, regardless of job assignment, is responsible for providing proper care and supervision for the inmate population, In order to accomplish this, all correctional staff shall maintain a professional and business like manner, while interaction with the inmate population and/or parolees.
>
> 1. Correctional staff shall not become over-familiar with inmates or parolees by discussing their personal life, the personal life of another correctional staff member nor another inmate/parolee, to include their families and/or acquaintances. . . .

Grievant's conduct in scaring inmates and lifting their mattresses up while they were sleeping is certainly not professional and businesslike. Respondent did not specify which provision of Policy Directive 129.00 it alleged Grievant violated.

Respondent's claim that Grievant shared personal information about his personal life with inmate(s) was not established by a preponderance of the evidence. Apparently, during the investigation, some female inmates claimed that Grievant showed one or more of them photos of himself and his late wife on his personal cell phone. They also claimed to have knowledge about Grievant's vacation at the beach, that he had previously served in the military, and that he had either visited Florida or planned to move to Florida. Grievant denied all of the claims, except that he once told a male inmate that his wife had committed suicide. In his interview with the investigator, Grievant explained that the male inmate had mentioned that his wife was dealing with the suicide of a relative, and that pursuant to the "askable and approachable" training, he told the man about what had happened to his wife, and gave him some words of encouragement. It is noted that the investigator interviewed no male inmates. Grievant further explained that he had talked

to coworkers about his vacation, possibly moving to Florida, and being in the military. No evidence was presented at the level three hearing to establish the credibility of the female inmates making the claims. Further, even if the inmates knew these things about Grievant, there was no evidence presented to establish that he provided the information to them. It is just as likely that the inmates learned about Grievant's vacation and such from other staff members or by overhearing private conversations not meant for them. In fact, Assistant Commissioner Simmons testified that in the past inmates had known things about him that he had never told them. As for the female inmates' claims that he had showed them photos, Grievant denied the same, and there was no credible evidence presented to support their allegations.

Grievant's prank on Officer Ellis involving the two female inmates is troubling. Grievant apparently does not deny getting the two inmates involved in the prank or what happened, but asserts that such was only a harmless prank. Grievant also appears to argue that any wrongdoing on his part was the result of his lack of training. While the undersigned agrees that Grievant's lack of training and oversight is a huge factor in this grievance, this was not just a harmless prank. Grievant was in a position of authority within the HWRC, and the inmates were in his charge. Grievant was well aware that inmates were prohibited from being in the same bunk together and that sexual contact between inmates was prohibited. If Officer Ellis caught them engaging in such behavior, it would likely embarrass him, and he would have to bring them down to Control for rules violations. Such was the nature of the prank on Officer Ellis. Not only did Grievant encourage two inmates to break a serious rule for the sake of a prank, for which they could have been written up, his inclusion of the inmates in the prank tinged what should

be a businesslike, professional relationship with an element of friendship and comradery. This runs afoul of Policy Directive 129.24.

The issue then becomes whether Grievant's dismissal was warranted. "[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). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *See 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." *Id.* (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).

Further, the "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. *See Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*citing In re Queen*, 196 W. Va. 442, 473

S.E.2d 483 (1996)). “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); *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001).

It is apparent that Grievant did not receive adequate training. He had very little formal training, and appears to have been assigned, at times, to shifts where only he and another probationary employee were the only officers working at the facility, or section. There was a lack of on-the-job training by more experienced officers. Further, there appears to have been a culture of pranking at the facility that resulted in his learning improper behaviors. It is noted that Grievant indicated that other officers had been involved in lifting the inmates’ mattresses, and the undersigned does not doubt that. Assistant Commissioner Simmons indicated that such behaviors should have been reported, but apparently, they were not. Such suggests that this behavior was at least somewhat accepted at the facility. Also, Sergeant Beach testified that he should have been conducting performance appraisals on Grievant, and all probationary employees, every two months, but did not. While Respondent argues that as Beach did not know that the pranking and such was going on, it would not have been addressed in any such evaluation, such is not the point. While it is possible the conduct would not have been reflected in the evaluations, it is likely that had Grievant’s, and other employees’, performance been monitored and evaluated as policy requires, this improper conduct would have been discovered and corrected. Most of the conduct complained of in this grievance could have been corrected if more attention had been given to the training and

evaluation. The fact that there are problems at HWRC became readily apparent during the level three hearing when Assistant Commissioner Simmons learned during the hearing that probationary employees were not being evaluated every two months as policy requires, and when none of the Respondent's witnesses could agree on what "askable and approachable" meant and to whom it applied.

However, the fact that Grievant knowingly encouraged two inmates to break the rule prohibiting them from being in the bunk together in an effort to pull a prank on Mr. Ellis crossed a line, and cannot be excused. The two inmates were under Grievant's charge and he influenced them to break rules that could have resulted in them getting into trouble. This cannot be tolerated. While the undersigned can certainly understand why Grievant might not know that startling inmates, and annoying them violated the rules, he had to know that having the inmates violate the rules that applied to them was improper and a violation of policy. Given this, and the fact that there is a low threshold to justify termination of a probationary employee, the undersigned cannot find that Respondent's decision to terminate Grievant's employment was unreasonable, or arbitrary and capricious. Therefore, this grievance is 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, 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, 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 (2008). *See also Lott v. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999).

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 & Human Res*., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

3. The probationary period of employment 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." W. VA. CODE ST. R. § 143-1-10.1(a) (2008).

4. An 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." W. VA. CODE ST. R. § 143-1-10.1(a) (2008). 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. *See Livingston v. Dep't of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008).

5. "[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).

6. The "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. *See Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). "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); *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001).

7. Respondent proved by a preponderance of the evidence that Grievant encouraged two inmates to violate facility rules that applied to them in order to orchestrate a prank on another correctional officer. Further, Respondent proved by a preponderance of the evidence that Grievant failed to behave in a professional and businesslike manner

with inmates in his charge in violation of DOC policies. Given such, Respondent has proved that Grievant's dismissal was justified.

Accordingly, this Grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

DATE: February 16, 2016.

_____

Carrie H. LeFevre
Administrative Law Judge