**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**KIMBERLY MARIE CONLEY,**
**Grievant,**

**v.** **Docket No. 2017-2142-MAPS**

**REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY/ SOUTHWESTERN REGIONAL JAIL,**
**Respondent.**

## DECISION

Grievant, Kimberly Marie Conley, was employed by Respondent, Regional Jail and Correctional Facility Authority, as a probationary employee at Southwestern Regional Jail. On May 2, 2017, Grievant filed this grievance against Respondent stating, "Dismissal as a result of alleged misconduct under Regional Jail Authority Code of Conduct: Policy 3010. Grievant was dismissed without cause in violation of WV Division of Personnel Rule 12.2 and in direct conflict with WV Division of Personnel policy of progressive corrective action. The discipline [imposed] is not reasonably related to seriousness of the offense, is inconsistent with past practices, and discriminatory." For relief, Grievant seeks "[r]econsideration and [r]einstatement."

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on June 27, 2017, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by by counsel, James Alexander Meade, Kuenzel Law, PLLC. Respondent was represented by counsel, William R. Valentino, Assistant Attorney General. This matter became mature for decision on July 28, 2017, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

## Synopsis

Grievant was employed by Respondent as a probationary correctional officer at Southwestern Regional Jail. Grievant's probationary employment was terminated for Grievant's misconduct in violating multiple provisions of Respondent's Code of Conduct. Respondent proved the alleged misconduct occurred and its decision to terminate Grievant's probationary employment for the misconduct was not 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 correctional officer at Southwestern Regional Jail.

2. Employees are expected to abide by Respondent's Policy and Procedure Statement #3010, Code of Conduct. Grievant acknowledged receipt of the policy by her signature dated January 3, 2017. Grievant was instructed to, and did, read the policy.

3. On March 23, 2017, a search of inmate E.W.'s cell revealed a handwritten letter addressed to "Kim." The letter obviously was addressed to a jail employee, as it references talking on the "box"[1] and asks, "Plz [sic] don't write me up for this." In the letter, E.W. states, "I don't really know how [to] take ya [sic]" and asks for her number to talk more.

[1] An intercom system that connects the tower and the jail cells. Officers stationed in the tower observe the floor, control interior doors, and answer communications. Inmates can use the intercom system to contact the officer on duty in the tower. All communications are recorded.

4. Lieutenant Toby Allen concluded the letter had been addressed to a correctional officer and he only knew of one correctional officer named “Kim,” which was Grievant.

5. Lt. Allen reviewed recordings from the intercom system and discovered eight conversations between Grievant and E.W. that were improper and violated Respondent’s employee code of conduct.

6. The conversations were very casual and friendly in tone and not that which would be expected between a correctional officer and an inmate. Grievant laughed and joked with E.W. and allowed conversation beyond the scope of her official duties. She used profanity and responded to E.W. very casually. The tone was that of friends and not of correctional officer and inmate. Grievant’s communications were not professional. E.W. called Grievant “babe” and told her that he loved her multiple times. E.W. stated that he was “depressed” because Grievant had told him that she was married. E.W. asked Grievant to tuck him in. At no time in the conversations did Grievant correct E.W.’s improper comments. Of greatest concern are the following: E.W. asked Grievant to pass information from E.W. to a female inmate, a violation of jail rules, and Grievant told him she did so; and that Grievant told E.W. “you’d better not do that crap when someone’s looking.”

7. This type of behavior is of particular concern because it tends to escalate. Allowing an inmate to feel a personal relationship with an officer leads to danger for both the officer and the inmate, affects the credibility of the officer, and can lead to favoritism or contraband. An improper relationship starts small, with overly friendly conversation and exchange of personal information, and then escalates. This is a pattern that has

been observed many times by Lt. Allen, and Lt. Allen saw this pattern emerging with Grievant. Grievant had already agreed to help E.W. break the rules by telling him she had passed on the message to the female inmate.

8. Lt. Allen reported his findings in a call to Chief of Operations, J.T. Binion, on March 23, 2017. Mr. Binion directed Lt. Allen to verbally suspend Grievant, and Lt. Allen did so.

9. By letter of the same date, Director of Human Resources, April M. Darnell, suspended Grievant pending investigation into "inappropriate conduct."

10. On March 27, 2017, Lt. Allen and Sergeant Paula Thomas interviewed Grievant regarding her communications with E.W. and played the recordings for Grievant. Grievant admitted that it was she on the tape and that E.W. had been saying such things for approximately two weeks. Grievant asserted she had not received any written communication from E.W.

11. On the same day, Lt. Allen reported his findings to Mr. Binion in the form of an incident report. Grievant also prepared an incident report to Lt. Allen in which she admits to the above conversations with E.W. and additional conversations in person but states, "I laughed it off and took it as a joke." She also stated that, during one of the last times she was posted as a rover[2], E.W. had said, "I love you. I have something for you" but that she had walked away without responding.

12. Although E.W.'s attempt to give her something was a clear violation of rules, Grievant did not file an incident report.

[2] A correctional officer assigned to the floor responsible for direct contact with inmates.

13. On April 12, 2017, Ms. Darnell, Mr. Binion, Capt. Slater, Lt. Allen, Assistant Director of Human Resources Katrina Kessel, and Suzanne Summers held a predetermination conference with Grievant.

14. By letter dated April 19, 2017, Ms. Darnell dismissed Grievant from employment for her participation in and failure to report the inappropriate conversations with E.W. in violation of Respondent's Code of Conduct. The letter cites violation of the following sections of the Code of Conduct:

- 13. Employees shall develop only those relationships with inmates which are necessary for the professional conduct of business. The development of personal, emotional, romantic, or sexual relationships with inmates is prohibited. Any employee who attempts to use their position to develop an inappropriate relationship shall be subject to disciplinary action.
- 14. Employees have an affirmative duty to and shall promptly report, in writing to their supervisor, any information which comes to their attention indicative of an unusual incident, a violation of the law, rules, and/or regulations by either an employee or an inmate.
- 16. All employees shall remain alert, observant, and occupied with facility business during their tour of duty. All employees shall conduct themselves in a manner with will reflect positively upon the Authority and its employees.
- 19. All employees shall conduct themselves, whether on or off duty, in a manner which earns the public trust and confidence inherent to their position. No employee shall bring discredit to their professional responsibilities, the Authority, or public service.
- 26. Improprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and inmates are not allowed. It is recognized that inmates and staff are encouraged to interact on a personal level; however, this association shall be limited to those times when the individual employee is performing duties directly relating to matter pertaining to Authority interests.
- 33. At all times, employees shall maintain a professional demeanor and are to be respectful, polite, and courteous, and refrain from using abusive and obscene language in

> their contacts with inmates, other employees, and the public. This is a prime factor in maintaining order, control and good discipline in the facility.

**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 (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). 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) (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. *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)).

"[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).

Grievant asserts that her dismissal was not justified, that Respondent failed to prove she violated the code of conduct, that Respondent failed to follow progressive discipline, and that Respondent failed to train Grievant. Respondent asserts it proved the charges of misconduct against Grievant and that the decision to dismiss Grievant from employment was not arbitrary and capricious.

Although the evidence of Grievant's alleged misconduct is not in dispute, as it was recorded or admitted to by Grievant, Grievant does assert she did not receive proper training. Accordingly, the undersigned must make credibility determinations. In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for

honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher & William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Grievant was not credible. Her demeanor was poor. She fidgeted, had poor eye contact, and grinned and laughed at inappropriate times during her testimony. She did not appear to take either the conduct of which she was accused or the grievance proceeding seriously. On cross examination she was hostile, reactive, and argumentative. It is not necessary to evaluate the credibility of other witnesses as Grievant's dismissal was based on audio recordings and behavior Grievant admitted in the recorded interview and in her incident report. Although Grievant accused Respondent's witnesses of lying about whether she raised the issue of her training in the predetermination conference, her accusation is not credible, and whether she raised the issue of training or not is not determinative in this case.

Respondent was not required to show good cause for the termination of Grievant's employment. Respondent was only required to prove the misconduct occurred and that the decision to terminate Grievant's employment was not arbitrary and capricious. Grievant's conduct is not in question as the majority of her conduct was recorded on audio tape and Grievant admitted to other conduct. As outlined in the findings of fact above, Grievant allowed an inmate to be disrespectful and overly-personal, Grievant's responses

to the inmate were also friendly, casual, and unprofessional, Grievant used obscene language, Grievant allowed the inmate to interrupt her other duties for conversation, Grievant encouraged and participated in the inmate's violation of jail regulations, and Grievant failed to report Grievant's violation of the rules by attempting to get her to pass a note to a female inmate and his attempt to give Grievant something. This behavior violated multiple sections of the code of conduct.

Grievant asserts that she was not trained on the code of conduct. Despite this assertion, Grievant admitted in her level three testimony that she was required to, and did, read the code of conduct during her initial training. Her attempted qualification on cross examination that she "barely" read it, only shows her failure to take her training seriously, which was also shown when she laughed on direct examination when she said the code of conduct meant you don't have sex with inmates. Furthermore, additional training should not be required for a correctional officer to know that the behavior she displayed herself and allowed from the inmate was unacceptable.

Grievant argues that Respondent failed to follow progressive discipline and termination was disproportionate to her offense. Grievant provided no evidence that Respondent was required to follow progressive discipline for a probationary employee. Grievant testified that two of the correctional officers giving training had made racist remarks to correctional officers and were only suspended and that another correctional officer was only suspended for horseplay. Neither of these circumstances are similar to Grievant's misconduct. The trainers were not probationary employees and it is unclear whether the other correctional officer was probationary or not. Regular employees are

entitled to protections probationary employees are not. In addition, the alleged misconduct of the officers is not similar to Grievant's misconduct.

Grievant's misconduct clearly shows her unsuitability as a correctional officer. Her recorded conversations with E.W. speak for themselves and show her lack of judgement. Such behavior erodes the authority of the correctional officer and is dangerous to the officer, the inmate, and the security of the facility. Respondent's decision to terminate Grievant's probationary employment was not arbitrary and capricious as it was supported by both substantial evidence and a rational basis.

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 (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). 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).

3. 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)).

4. "[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).

5. 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).

6. 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).

7. Respondent's decision to terminate Grievant's probationary employment was not arbitrary and capricious as it was supported by both substantial evidence and a rational basis.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

**DATE: September 28, 2017**

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**Billie Thacker Catlett**
**Chief Administrative Law Judge**