THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JARED CHRISTIAN WHITE,

Grievant,

v. **Docket No. 2017-1174-DOT**

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant, Jared Christian White, filed an expedited level three grievance dated November 10, 2016,[1] against his employer, Respondent, Division of Highways ("DOH"), challenging a suspension without pay, stating as follows: "1. Received a three day suspension for unjust cause[.] 2. Denied my right to Representation during investigatory/pre-disciplinary meeting[.]" As relief sought, the Grievant states, "[s]uspension removed, backpay for all lost wages, to be made whole[.]" Grievant filed an amended statement of grievance on February 10, 2017. The only change noted therein was the name of his representative.

A level three hearing was held on June 13, 2017, before the undersigned administrative law judge at the Raleigh County Commission on Aging in Beckley, West Virginia. Grievant appeared in person, and by counsel, John E. Roush, Esquire, American Federation of Teachers-WV, AFL-CIO. Respondent appeared by counsel, Keith A. Cox, Esquire, DOH Legal Division. This matter became mature for decision on

[1] While Grievant's signature on the statement of grievance is dated November 10, 2016, the same was not mailed to the Grievance Board until November 12, 2016. Accordingly, given the post mark of November 12, 2016, such is the date the statement of grievance is considered filed with the Grievance Board.

August 1, 2017, upon the receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Respondent charged Grievant with falsifying time sheets to indicate he was working when he was not, and imposed a three-day suspension without pay for the same. Grievant denied Respondent's claims, and argued that his time was reported accurately. Grievant also argued that Respondent denied him his right to representation at a meeting with his supervisor, and that Respondent did not give him the required notice prior to the start of his suspension. Respondent proved its claims by a preponderance of the evidence. Grievant failed to prove his claim that he was denied representation at the meeting with his supervisor, and failed to prove his claim that he was denied the required notice of his suspension. Accordingly, this grievance is DENIED.

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

Findings of Fact

1. Grievant, Jared Christian White, is employed by Respondent as a Highway Engineer in Training, in DOH District 10 in Princeton, West Virginia. While Grievant reports to work at the District 10 office parking lot each day, he is assigned a state vehicle, and routinely travels to various locations and jobsites to perform his duties.

2. Kristen Shrewsbury is the Human Resources Manager for District 10. Terra Goins is the Construction Engineer in District 10, and has been so employed since July 2015. Ms. Goins is Grievant's immediate supervisor.

3. Grievant's work week consists of four ten-hour days rather than five eight-hour days.

4. In or about September 2016, Ms. Goins received a call about there being a DOH state vehicle parked at a Beckley shopping plaza for about forty-five minutes on September 13, 2016. It was discovered that the car in question was assigned to Grievant. Neither Grievant nor his car were scheduled, or reported, to be in the area of the shopping plaza that day. This forty-five minutes was not reported on Grievant's timesheet for that day, and Respondent knew of no work-related reason for the car to be at the shopping plaza.

5. Grievant's timesheet for September 13, 2016, reported that he worked from 7:00 a.m. until 5:00 p.m. with no lunch. However, Ms. Goins saw Grievant arrive in the work parking lot that morning, and a review of security camera video footage for that day and the next revealed a discrepancy in Grievant's time reporting. Ms. Goins's review of the security camera footage indicated that Grievant left the work parking lot in his state vehicle at 7:36 a.m.

6. Grievant reported on his September 14, 2016, timesheet that he worked 7:00 a.m. until 5:00 p.m. with no lunch. However, based upon her review of security camera video footage, Ms. Goins found there to be additional discrepancies in Grievant's time reporting. Ms. Goins's information indicated that Grievant arrived at work in the parking lot at 7:39 a.m. and left for the day in his personal vehicle at 4:24 p.m.

7. Grievant reported on his September 15, 2016, timesheet that he worked 8:00 a.m. until 4:00 p.m. and 4:00 p.m. until 6:30 p.m. with no lunch. On this date, Grievant attended a training class. Afterward, Grievant reported that he went to work at

the Turnpike Office before returning to the District Office at the end of his day. Ms. Goins found discrepancies in this reporting as the class reportedly ended at 3:00 p.m., there were no projects or anything else going on at the Turnpike office that day what would cause Grievant to return there, and her review of the video footage indicated that Grievant left the District Office at 5:27 p.m.

8. On September 22, 2016, Gerald K. Boyd informed Grievant that he would like to meet with him to discuss some issues. Grievant appeared for the meeting as scheduled. Also in attendance was Matt Lilly, Turnpike DOH Office Manager/District 9 Area Engineer. At this meeting, Mr. Boyd informed Grievant about the complaint received about his car being at the shopping plaza and asked Grievant for his response, as well as discussing with Grievant the discrepancies found in his time sheets for September 13-15, 2016. This meeting lasted for approximately three hours. Grievant did not have a union representative with him during this meeting.

9. On September 29, 2016, Respondent issued Grievant an RL-544 "Notice to Employee" informing him that management was recommending that he be suspended without pay for three days for "poor performance and misconduct" with respect to Grievant's time reporting on September 13-15, 2016. This document and attachments were prepared by Kristen Shrewsbury, and signed by Terra Goins and Gerald K. Boyd, another supervisor.[2] Terra Goins delivered the RL-544 and its attachments to Grievant.

[2] In this attachment, management details the discrepancies it asserts were found in Grievant's time sheets for September 13-15, 2016. The last paragraph of the attachment states that "[t]he DOH expects its employees to meet certain standards of work performance and conduct which include reporting for regular duty as required, not leaving your work assignment without permission, and correctly reporting information on a DOT12 or not falsifying information. Due to your poor performance and misconduct, a 3 day suspension is being recommended." *See*, Respondent's Exhibit 4.

On the RL-544, it is noted that "[f]or any disciplinary action, you are hereby given an opportunity to respond in writing or in person to the Agency Representative. If you desire to meet in person, an appointment has been scheduled for you on 10/6/2016 at 9:30 a.m. in Acting D10 Engineers Office-Princeton (place). Written comments shall be made no later than five days after your receipt of this notice."[3]

10. Grievant refused to sign the September 29, 2016, RL-544 and its attachment, and failed to appear for the October 6, 2016, meeting referenced therein. However, Grievant emailed his written "rebuttal" D. Alan Reed, District Manager, on October 4, 2016. Such is reflected on the RL-546 "Employee's Verification of Disciplinary Action" signed by Mr. Reed on October 7, 2016.[4]

11. Grievant's October 4, 2016, email "rebuttal" sent to D. Alan Reed states as follows:

> [r]ebuttal this date 10/04/2016 to Jared White's reprimand dated 09/29/2016. This email is being sent to all parties involved and pertaining to this rebuttal being filed. This is my rebuttal to these false accusations based on hearsay contained in my reprimand. I deny all accusations made hear (sic) within. I still feel that I am being singled out and used as a scapegoat. I feel this is still considered spying, harassment and bullying by intimidation and similar to events based on my past two grievances I have filed with the State Grievance Board. I feel this reprimand is retaliation for my most recent ongoing grievance filed. This should not continue to keep happening in any professional workplace environment, since I feel this is more personal now and is considered an attack on my credibility and a direct vendetta and character assassination.[5]

[3] *See*, Respondent's Exhibit 4, RL-544 dated September 29, 2016, and attachment.
[4] *See*, Respondent's Exhibit 4, RL-546 dated October 7, 2016, and attachment.
[5] *See*, Respondent's Exhibit 4, email from Grievant dated October 4, 2017, attached to the RL-546.

Grievant did not otherwise address the specific allegations made against him in the RL-544 and its attachment. Grievant sent this email to Terra Goins, Kristen Shrewsbury, and Gerald K. Boyd, in addition to Mr. Reed.

12. By letter dated October 28, 2016, Grievant was suspended for three days without pay for "failure to meet the standards of work performance and conduct and falsification of time reports. More specifically, but not limited to: [i]t was recently discovered that you falsified time reports on September 13, 14, and 15, 2016. You have been previously warned and counseled on the importance of accurate time keeping."[6] This letter was signed by Kathleen Dempsey, Director, Human Resources Division.

13. The evidence is unclear as to how and when Grievant received his suspension letter. No certified mail receipt was presented at the level three hearing. No evidence was presented to suggest that Grievant picked up his mail at his post office box every day.

14. Grievant served his suspension on November 15, 2016, through November 18, 2016. Grievant's suspension was based upon three eight-hour days, rather than three ten-hour days. Therefore, during the week of his suspension, Grievant was suspended for three eight-hour days, and worked two eight-hour days.

15. In November 2015, Grievant received a written reprimand for allegedly failing to accurately report his time worked on his time sheets, leaving his work assignment without permission, and failing to report for regular duty as required.[7]

[6] *See*, Respondent's Exhibit 8, October 28, 2016, letter.
[7] *See*, Respondent's Exhibit 9, November 3, 2015 RL-544.

16. Grievant has filed two prior grievances. One was settled at level one, and the other, which involved a reprimand, was withdrawn by Grievant at level three at about the time the current disciplinary action commenced. Grievant has explained that he withdrew his grievance regarding the reprimand in order to concentrate on the instant grievance.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. When the claim is non-disciplinary, Grievant bears the burden of proof. W.VA. CODE ST. R. § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988). "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.*

Grievant argues that he was suspended without just cause and that he was denied the right to representation during his meeting with his supervisor on September 22, 2016. Grievant denies allegations of wrongdoing. Respondent asserts that Grievant falsified his time sheets for September 13, 14, 15, 2016, and that the three-day suspension it imposed on Grievant was proper and warranted. It is noted that while Grievant testified that Respondent had singled him out, treated him with hostility, and retaliated against him for filing a grievance, none of those claims were raised in his statement of grievance. Grievant did not amend his statement of grievance to include any additional claims.

Further, Grievant did not address the issues of reprisal or hostile work environment in his proposed Findings of Fact and Conclusions of Law. Grievant argued only that Respondent displayed hostility toward Grievant and that such was related to the suspension imposed. Accordingly, only the claims raised in Grievant's statement of grievance will be addressed herein.

In this grievance, most of the facts are in dispute. As such, credibility determinations must be made. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995)*; Perdue v. Dep't of Health & Human Res.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

The Grievance Board has applied the following factors to assess a witness's testimony: 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 administrative law judge should consider the following: 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. *See Id.; Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Respondent asserts that Grievant submitted "falsified" time sheets for the dates September 13, 14, and 15, 2016, that overstated his time worked. Grievant denies Respondent's claims, and asserts that his time sheets were accurate. In support of its claims, Respondent offered, primarily, the testimony of Terra Goins. Later, Respondent offered the testimony of Matt Lilly in rebuttal. Grievant testified in his case in chief, and called as a witness James Thornton, who is employed by Respondent as a Storekeeper. Mr. Thornton appeared telephonically.

Terra Goins, Construction Engineer District 10, appeared in person and testified at the level three hearing. Ms. Goins demonstrated the appropriate demeanor and maintained good eye contact during her testimony. Ms. Goins answered the questions asked of her, and was not evasive. Ms. Goins behaved in a professional manner, and her answers were clear and thorough. Ms. Goins was not only the member of management who sought the discipline imposed on Grievant, but she also testified that she was an eyewitness to Grievant's arrival at the office parking lot and his departure in the state vehicle on the morning of September 13, 2016. While Ms. Goins does not have a traditional interest in the outcome of this matter, she initiated the review of Grievant's time sheets, arrivals and departures, and she recommended the discipline grieved in this matter. As such, her involvement in the discipline imposed could be perceived as a bias, or a motive to be untruthful. Nonetheless, Ms. Goins appeared credible.

Ms. Goins testified that on September 13, 2016, she saw Grievant pull into the office parking lot in his personal vehicle at well after 7:00 a.m. and get out of his car. She

noted the same on a sheet of paper, and went to Kristen Shrewsbury to see if there was anything that could document what she saw, or "back" her "up." Ms. Shrewsbury had access to the security video that covered the work parking lot. Ms. Goins testified that Ms. Shrewsbury pulled the video and they reviewed it together. Ms. Goins testified that the recording showed Grievant pull in, park, get out of his car and into the state vehicle. She testified that the recording showed Grievant leaving the parking lot in his state vehicle at 7:36 a.m.[8] Ms. Goins testified that based upon the video records, Grievant misrepresented his time worked on September 14 and 15, 2016, as well. Ms. Shrewsbury printed screen shots from the video, for September 13, 14, and 15, 2016, and such were offered as exhibits at the level three hearing. However, the photos presented do not show Grievant at all, and do not show his entire comings and goings. It is noted that the actual video was not presented as evidence at the hearing.

In support of Ms. Goins' testimony, Respondent offered a screen shot photo of a state vehicle, purported to be Grievant's, leaving the work parking lot timestamped September 13, 2016 at 7:36 a.m.[9] Respondent also offered a screen shot photo of a darker colored SUV, purported to be Grievant's, leaving the work parking lot which is timestamped September 13, 2016, at 5:02 p.m.[10] However, Respondent offered no printed photos of Grievant's personal vehicle arriving at the office parking lot, him getting out of his car, or him getting into his state vehicle on September 13, 2016. Respondent presented a photo of a darker colored SUV, purported to be Grievant's, arriving in the work parking lot bearing the timestamp September 14, 2016, at 7:39 a.m., as well as one

[8] *See*, Respondent's Exhibit 5, pg. 5, photo timestamped 2016-09-13 07:36:15 AM.
[9] *See*, Respondent's Exhibit 5.
[10] *See*, Respondent's Exhibit 5.

of a state vehicle arriving in the work parking lot on September 14, 2016, bearing the timestamp 4:21 p.m.[11] Also, Respondent presented a photo of a darker colored SUV leaving the work parking lot in a photo bearing the timestamp September 14, 2016, at 4:24 p.m.[12] Respondent presented a photo of a darker colored SUV leaving the work parking lot timestamped September 15, 2016, at 5:27 p.m.[13] The photos Respondent offered into evidence are not printed on photo paper and cannot be described as "color" photos. They appear to have some semblance of color, but mostly appear black and white. It is also noted that Ms. Shrewsbury was not called as a witness at the level three hearing.

Grievant testified at the level three hearing. Obviously, Grievant is an interested party and has a motive to be untruthful as he is seeking the removal of his suspension. During his direct examination by his attorney, Grievant appeared calm, but did not maintain good eye contact with his attorney or the ALJ. Grievant looked down often during this testimony. Also, at times, Grievant's voice sounded monotone, and he seemed easily confused. However, he answered the questions asked of him. During his cross examination by the DOH attorney, at times Grievant appeared defiant, and was evasive. For example, Grievant testified that it was *possible* his state vehicle was at the shopping plaza for forty-five minutes on September 13, 2016, but noted that the picture is not date or timestamped. Grievant did not deny his car was at the plaza that day, but offered no explanation. Further, Grievant testified that the car in Respondent's Exhibit 5 may be his state car, but he could not say for sure. Additionally, he testified that Ms.

[11] *See*, Respondent's Exhibit 6.
[12] *See*, Respondent's Exhibit 6.
[13] *See*, Respondent's Exhibit 7.

Goins was wrong about seeing him in the parking lot at the times she indicated, and that he does not agree with “any of it.”

Further, Grievant denied that his time records for the three dates were inaccurate. Instead, Grievant testified that he arrived at work just as reported on both September 13 and 14, 2016, but that he went directly to the storekeeper in his personal vehicle to get supplies before heading to the work parking lot and getting into his state vehicle. The storekeeper is housed in another building which is about a minute’s drive away from the work parking lot. Further, Grievant testified that he could not state for certain if the state vehicle and the SUV in the Respondent’s photos were his. He noted that license plates were not showing, the color in the photos was bad, and there are other state cars in that lot that have light bars on their tops. Grievant also testified that there were many other similar SUVs driven by employees who parked in the same lot, and there were several other state vehicles like his there, as well. Despite all of this, it appears that Grievant asserts that if Ms. Goins saw him on September 13, 2016, and if that is his personal vehicle and state vehicle in Respondent’s photo screen shots, it was after he had been to the storekeeper to get supplies.

Grievant testified that he was at the storekeeper on both September 13 and 14, 2016, for fifteen or twenty minutes before heading to his state vehicle in the work parking lot to leave for the workday. Ms. Goins acknowledged that it was possible that Grievant went to the storekeeper for supplies before entering the work parking lot. However, such should not have taken more than ten minutes, and that does not explain the nearly forty minutes between his reported start times on September 13 and September 14 and his

arrival/departure from the parking lot. Grievant also noted that there was a good chance he went to the restroom while at the storekeeper building.

James Thornton, the storekeeper working on the days at issue, testified telephonically at the level three hearing. While the undersigned could not see Mr. Thornton during his testimony, his tone and demeanor were appropriate. Mr. Thornton is not known to have any interest, bias, or motive to be untruthful. He is not known to socialize with Grievant outside of work, and did not know Grievant before working with him at DOH. Mr. Thornton testified that he recalled Grievant coming to get supplies on September 13 and 14, 2016. However, he was not clear on the time. His testimony was that it could have been anywhere been 6:30 a.m. and 7:30 a.m. Further, he testified that it would have taken him no longer than ten minutes at the most to get Grievant the supplies he asked for. Mr. Thornton appeared credible.

While Mr. Thornton's testimony supports Grievant's claim that he went to the storekeeper to get supplies on two of the mornings in question, Mr. Thornton could not corroborate the time Grievant was there, and contradicted Grievant's testimony on how long it took to get the supplies. Mr. Thornton's testimony with respect to how long it would take to get supplies was consistent with Ms. Goins' testimony. As for the time reported for September 15, 2016, Grievant simply disagreed with Ms. Goins and the screen shot photo. He said it was not his car leaving at 5:27 p.m. However, the evidence presented demonstrated that the class let out at 3:00 p.m., and not 4:00 p.m. as he reported, and there were no projects for him to work on at the Turnpike Office. Also, Grievant testified that he took a thirty-minute lunch, but reported on his timesheet that he took no lunch.

With respect to Grievant's departure times, it is his word against the screen shot photos. While some of Grievant's testimony is supported slightly by that of Mr. Thornton, overall, Grievant was not a credible witness. He was evasive and defiant, and suggested as an explanation for the inconsistencies that the photos could have been altered. He offered no plausible explanation for his car being at the shopping plaza for forty-five minutes on September 13, 2016, and he also did not want to admit that it was his car, even though the license plate confirms it. Based on the evidence presented, it is more likely than not that Grievant misrepresented his work time on his timesheets for the dates September 13, 14, and 15, 2016, as alleged by Respondent.

The next issue is whether Respondent's issuance of a three-day suspension for Grievant misrepresenting his work time on his time sheets was proper. 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).

The undersigned ALJ cannot find that the three-day suspension without pay was unreasonable. Grievant, admittedly, received a reprimand for time reporting issues in 2015. Grievant denied the allegations, though, and argued that the charge was based upon hearsay and was unfair. Grievant filed a grievance about the same, but withdrew the same. Nonetheless, this was the second time Grievant had time reporting issues, and Respondent moved up to a suspension. Such is permissible under the DOH Administrative Operating Procedures regarding disciplinary actions and progressive discipline.[14] While Respondent was not required to suspend Grievant, it was permitted to do so.

Grievant has also alleged that he was denied representation at his September 20, 2016, meeting with Gerald K. Boyd and Matt Lilly. Grievant has the burden of proving this claim as it is not disciplinary in nature. W.VA. CODE ST. R. § 156-1-3 (2008). An

[14] *See*, Respondent's Exhibit 10, DOH Operating Procedures, "Disciplinary Action," pp. 5, 9-13.

employee is entitled to have a representative present during meetings with management where disciplinary action is being contemplated. *See* W. VA. CODE § 6C-2-3(g). "If the topic of the meeting is conduct of the employee that could lead to discipline, the employee has a statutory right to have a representative present, *if she makes such a request*." *Koblinsky v. Putnam County Health Dep't*, Docket No. 2010-1306-CONS (Nov. 8, 2010) (emphasis added).

Grievant testified that he requested that his union representative be present at the beginning of the meeting. However, Matt Lilly testified that Grievant did not mention the same until near the end of the three-hour meeting, and that he said that in the future he would like either his lawyer, or union rep., present for these meetings. Mr. Boyd is now retired and did not testify at the hearing. However, an email of his was introduced into evidence that mentions the meeting and the union rep. exchange. In this email, Mr. Boyd noted that Grievant asked that in the future he would like his union rep at such meetings. However, the undersigned is troubled that Mr. Boyd goes on to state that "I stated that I did not think that was required. I also told him if there was an issue that needed addressed I wasn't going to wait on his Union Rep. to get there to talk about it. That might take months, who knows."[15] While this email is hearsay, this is Mr. Boyd's account of what he said, and the undersigned has no reason to doubt it. As stated above, "[i]f the topic of the meeting is conduct of the employee that could lead to discipline, the employee has a statutory right to have a representative present, *if [he] makes such a request*." While Mr. Lilly tried to say this was not a disciplinary meeting, the topic of the meeting was conduct that could lead to discipline. The issue is whether Grievant made a request and when.

[15] *See*, Respondent's Exhibit 1.

Everyone appears to agree that he made the request, but they disagree as to when. If Grievant made the request near the end of the meeting, his rights were not violated because he consented to the meeting without making the request. If he made the request at the beginning, they were. Grievant presented only his own testimony, which has been found not credible, to support his position that he asked at the beginning of the meeting. Grievant has the burden of proof on this claim, and he simply did not prove it by a preponderance of the evidence.

Lastly, Grievant has asserted that he did not get proper notice of his suspension because he picked it up at the mail box the day before the suspension was to start. Grievant testified that he received his suspension letter when he picked up his mail at the post office on November 9, 2016. The letter was dated October 28, 2016. Ms. Goins testified that she got the letter from Ms. Shrewsbury, and gave it to Grievant's supervisor to deliver to him. It is unclear how this letter got to Grievant, or when. However, if it were mailed on October 28, 2016, it should have been delivered well before November 9. Grievant offered no documentary evidence to support his claim that the letter was delivered to his post office box on November 9. Grievant testified that is when he picked it up. Grievant did not appear to assert that he went every day and got his mail, and he certainly did not testify that it was hand-delivered to him. Even if Grievant did not get the letter until November 9, if he was not checking his mail daily, that is not Respondent's fault. Therefore, Grievant has failed to prove his claim that he did not receive the required notice for his suspension. Therefore, this grievance is denied.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. When the claim is non-disciplinary, Grievant bears the burden of proof. W.VA. CODE ST. R. § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988). "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.*

2. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995)*; Perdue v. Dep't of Health & Human Res.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

3. The Grievance Board has applied the following factors to assess a witness's testimony: 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

administrative law judge should consider the following: 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. *See Id.; Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

4. 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).

5. 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).

6. Respondent proved by a preponderance of the evidence that Grievant misrepresented his time worked on his time sheets for September 13, 14, and 15, 2016, thereby justifying his three-day suspension without pay.

7. An employee is entitled to have a representative present during meetings with management where disciplinary action is being contemplated. *See* W. VA. CODE § 6C-2-3(g). "If the topic of the meeting is conduct of the employee that could lead to discipline, the employee has a statutory right to have a representative present, *if she makes such a request*." *Koblinsky v. Putnam County Health Dep't*, Docket No. 2010-1306-CONS (Nov. 8, 2010) (emphasis added).

8. Grievant failed to prove by a preponderance of the evidence his claim that he was denied representation at the September 20, 2016, meeting with his supervisor.

9. Grievant failed to prove by a preponderance of the evidence his claim that he was denied the required notice of his suspension.

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: November 21, 2017.

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Carrie H. LeFevre
Administrative Law Judge