

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

WAYNE BRUCE BLACKSHIRE

Grievant,

v.

Docket No. 2018-0332-DOR

TAX DEPARTMENT,

Respondent.

DECISION

Grievant, Wayne Bruce Blackshire, filed an expedited level three grievance¹ dated September 6, 2017, against his employer, Respondent, Tax Department, stating as follows: “[o]n September 5, 2017 I received a (sic) email at work telling me I had a meeting at 1:45 pm. After arrivin[g] I was told by Danny Morgan that I was being dismissed from employment. Due to a list of accusations that Mr. Morgan had gave to me. . . .” In his handwritten attachment to the statement of grievance, Grievant also asserts that he was not given proper notice of his dismissal pursuant to Rule 12.2.a.3 of the Administrative Rule. As relief sought, Grievant asks “[t]o have my job back or be allowed to transfer in another dept. And payed (sic) back lost wages.”

The level three hearing was conducted on October 12, 2017, before the undersigned administrative law judge at the Grievance Board’s Charleston, West Virginia, office. Grievant appeared in person, *pro se*. Respondent appeared by counsel, Cassandra L. Means, Esquire, Assistant Attorney General. This matter became mature for decision on November 20, 2017, upon receipt of the last of the parties’ proposed Findings of Fact and Conclusions of Law.

¹ See West Virginia Code § 6C-2-4(a)(4).

Synopsis

Grievant was employed as a probationary employee by Respondent. Respondent dismissed Grievant for unsatisfactory work performance. Grievant argued that his work performance was satisfactory, and that he should not have been dismissed from his employment. Respondent denied Grievant's claims. Grievant failed to prove by a preponderance of the evidence that his work performance was satisfactory. Therefore, 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 Mail Runner in its Operations Division. Grievant began working for Respondent on May 1, 2017. At all times relevant herein, Grievant was a probationary employee.

2. Barry Williams is employed by Respondent as a Building Manager, and served as Grievant's immediate supervisor. Vickie Marcum is the Purchasing Manager. Ms. Marcum served as Mr. Williams' direct supervisor. She also supervised Grievant. Danny Morgan is the Assistant Commissioner for Operations. Assistant Commissioner Morgan is Ms. Marcum's supervisor.

3. Gene Harrison is employed by Respondent as a Mail Runner. At all times relevant herein, Mr. Harrison was also a probationary employee. Mr. Harrison was already employed in this capacity when Grievant was hired. Mr. Harrison was hired by Respondent as a Mail Runner, probationary employee, on or about February 21, 2017.

4. Even though he was still a probationary employee, Mr. Harrison trained Grievant in his duties and responsibilities as a Mail Runner.

5. Grievant's official work station was the Tax Department's Hansford Street Warehouse in Charleston, West Virginia. Grievant's supervisors were not stationed at this location. Grievant and Mr. Harrison were the only two people stationed at the warehouse.

6. As a mail runner, Grievant's job duties included delivering and picking up daily mail, packages, and special delivery items for all agencies within the Department of Revenue. Grievant's route was to be run twice each day. Some of the locations on Grievant's route included the Revenue Center, the State Capitol Complex, Office of Tax Appeals, the Lottery Building, and other locations in downtown Charleston. Grievant was also assigned duties at the warehouse that included receiving, shipping, tracking inventory, and completing related paperwork.

7. Within the first month of Grievant's employment, Mr. Williams and Ms. Marcum informed Assistant Commissioner Morgan that they had concerns about Grievant's ability to perform his job. They explained to Assistant Commissioner Morgan that Grievant was arriving late and leaving early, and that he had problems delivering on time and finding places. It was decided that Grievant be issued an EPA-1 as an "intervention" to address Grievant's job performance issues. No EPA-1 had been done for Grievant since he was hired. According to Assistant Commissioner Morgan, such should have been done within his first thirty days.²

² See, testimony of Danny Morgan.

8. On June 15, 2017, Ms. Marcum and Mr. Williams gave Grievant an Employee Performance Appraisal Form EPA-1 ("EPA-1") setting out his specific duties and responsibilities as a mail runner, as well as his "performance standards and expectations" which were as follows:

Responsibilities: Essential duties and responsibilities as identified in the functional job description.

Responsibilities will be but are not limited to:

- * Must check email a minimum of 5 times per day. (Upon arrival in the a.m.; before lunch; after lunch; immediately upon return from the afternoon run; and again before leaving for the evening.)
- * Pick-up, sort, and delivery of mail to a minimum of 6 building (sic) with multiple pickup/drop-off points within each location on a daily basis.

Must memorize the pickup/drop-off points for each buildings (sic). Must be able to run route independently w/out assistance & free of errors.

- * Must have agency issued cell phone and keys on your person at all times while on duty.
- * Orders must be shipped through the FedEx shipping system without assistance. Work must be error free.
- * Organize the inventory of all the envelopes & forms currently stored in the warehouse. Must be able to update the electronic database without errors.
- * May be required to shuttle individuals from the Revenue Center to various Charleston locations.
- * Keep the delivery vehicles neat and clean at all times. Make sure the vehicles are serviced on a regular basis.
- * Must process all orders upon receipt.
- * Assist coworker to ensure all agency work is complete before taking a break.
- * Must keep warehouse neat & clean at all times.
- * Must be self motivated (sic). If something needs done and you're not busy, do it. Do not wait on coworkers to become free to start new tasks.

Performance Standards and Expectations: Objectives to be accomplished during this rating period.

- * Arrive to and depart from work at your regular schedule (sic) time (8:00 a.m. to 4:00 p.m.) Any deviations from this schedule should be approved by your Supervisor or Manager prior to changing the schedule.

- * Must be willing to adjust work schedule to accommodate “special runs[.]”
- * Must maintain a minimum of 80 hours of Sick/Annual. (24 hours of which must be annual leave.)
- * Keep supervisor informed timely of any unresolved issues.
- * Conduct yourself professionally and be respectful of others by using low voice tones, keeping area clean and tidy, being aware and respectful of others (sic) workloads.
- * You are expected to adhere and fully abide by all agency policies and procedures at all times.
- * Must be able to operate a computer, printer, and scanner without assistance.
- * Must maintain a valid drivers license and a clean driving record.
- * Must be drug/alcohol free at all times.

At this meeting, Ms. Marcum went over each of the items listed in the EPA-1 with Grievant. Ms. Marcum and Mr. Williams used this meeting as a coaching session. This EPA-1 was signed by Mr. Williams and Grievant on that same date.

9. Grievant did not grieve the June 15, 2017, EPA-1, or any of its terms.

10. Following the issuance of the EPA-1, Grievant’s attendance improved. However, management saw no improvement on the other aspects of Grievant’s job performance.

11. Ms. Marcum received most of the information about Grievant’s job performance issues from Gene Harrison, and she did not independently verify Mr. Harrison’s claims.³ Mr. Williams reported to Ms. Marcum that he had received complaints about Grievant not delivering mail properly. However, the number of complaints Mr. Williams received and reported to Ms. Marcum is unknown. Further, it is unknown what, if any, performance issues Mr. Williams personally witnessed. It is noted that Mr. Williams was not called as a witness at the level three hearing.

³ See, testimony of Vickie Marcum.

12. Grievant was supposed to carry a state-issued cell phone with him while on his route and at the warehouse because, given the nature of his job, that was the only way he could be reached during the workday. During his probationary period, Ms. Marcum called Grievant on his cell phone several times to arrange pick-ups, but got no answer. As such, Ms. Marcum had to call Mr. Harrison to get the work done. Ms. Marcum acknowledged that Grievant could have been on another call which would explain his failure to answer the phone. Neither party claimed that Grievant returned, or attempted to return, any of the missed calls.

13. Ms. Marcum personally witnessed only one complaint made about Grievant's job performance. In July 2017, she received a call from the Executive Office of the Tax Department about delivering something to the Secretary of State's Office. She was informed that the Executive Office had "no faith in Grievant's ability" to deliver the parcel. As such, she had to get someone else to make the delivery.⁴

14. In or about July 2017, Grievant misdelivered a check that was being sent to the Revenue Center by the State Treasurer's office which resulted in a delay in the processing of the same.

15. Respondent conducted a predetermination conference for Grievant on September 5, 2017, at which time Grievant's work performance issues were discussed, and Grievant was advised that Respondent was considering dismissing him. In attendance at this conference were Grievant, Assistant Commissioner Morgan, Vickie Marcum, and Robert Stigall, Human Resources Manager.⁵

⁴ See, testimony of Vickie Marcum.

⁵ See, Respondent's Exhibit 2, September 5, 2017, dismissal letter; testimony of Grievant; testimony of Vickie Marcum; testimony of Danny Morgan.

16. By letter dated September 5, 2017, Grievant was informed that Respondent was dismissing him from employment for “unacceptable work performance issues” effective September 20, 2017.⁶ This letter was signed by Assistant Commissioner Morgan, and hand-delivered to Grievant. Included in this letter was the following list of events on which Respondent based its decision to dismiss Grievant:

- On May 5, 2017, you attempted to deliver mail to incorrect offices.
- On May 8, 2017, you indicated that you did not know about rooms in Building 1 and even admitted, “I don’t have a clue.” It was also reported that you had not been carrying your agency-issued cellular telephone.
- On May 17, 2017, you indicated that you were not aware of where mail is to be delivered. It was also reported that you did not know passwords and personal identification numbers (PINs) that are necessary to you performing your duties.
- On May 24, 2017, while picking up mail in the Revenue Division mailroom in the Revenue Center, you failed to pick up mail that was to be delivered to the Secretary of State’s office.
- On May 26, 2017, it was reported that you still did not know passwords and personal identification numbers (PINs) that are necessary to you performing your duties.
- It was reported on multiple occasions that you have been reporting for work as much as ten minutes after the scheduled start of your workday and vacating your assigned workstation as much as seven minutes earlier than the scheduled end of your workday. A review of your time record shows that you have been reporting your time worked as 8 AM to 4 PM every day.
- On July 21, 2017, you were asked by the Executive

⁶ See, Respondent’s Exhibit 2, September 5, 2017, dismissal letter.

Office to hand deliver an item to the Office of the West Virginia Secretary of State. You asked your co-worker what building the Secretary of State's Office was in. While this office is not on your regular delivery route, with as many trips to the State Capitol building that you had made up to this point in your tenure, this is information that you should not have had to ask about.

- Also, on July 21, 2017, you picked up an envelope from the State Treasurer's Office containing a check that was to be delivered to the Revenue Center. Upon arrival at the Revenue Center, you took the envelope to the mail room on [the] second floor and asked where it should go. The envelope was put in Central Mail, returned to the Treasurer's Office and was eventually delivered to the correct person in the Revenue Center by a co-worker on July 25. The handling of checks is a regular duty for this position and the delay caused by your inability to deliver items in a timely manner is not acceptable and cannot be tolerated.
- On August 2, 2017, you went to the Print Shop and picked up items from a box that was not for the Tax Department and delivered them to the Property Tax Division. These items had to be returned to the Print Shop and the correct items had to be picked up and delivered.
- On August 21, 2017, you picked up mail from the second floor of the Revenue Center and took it out of the building. A review of the address on these items would have let you know that these particular items were internal and did not need to be taken out of the building.
- For these reasons, the Executive Office of the State Tax Department has lost all confidence in your ability to perform your duties and discharge your responsibilities as a Mail Runner.

This same list of was provided to Grievant during his predetermination conference, and he was given the opportunity to discuss, and/or explain, each item listed.⁷

⁷ See, testimony of Danny Morgan.

17. Most of Grievant's alleged performance issues, including those specified in the dismissal letter, were reported to Ms. Marcum by Gene Harrison. Mr. Harrison reportedly informed Mr. Williams of such issues before reporting to Ms. Marcum. Mr. Williams was not called as a witness in this matter.

18. After Grievant was dismissed from his employment, he made a written complaint alleging improper conduct against Mr. Harrison, including misuse of his state-issued cell phone and work computer.⁸ Grievant made no complaints to management about Mr. Harrison while he was still employed by Respondent.

19. Grievant never complained to management that he was not being trained properly prior to his dismissal from employment.

20. Grievant has admitted that he made mistakes in his job prior to his dismissal, and admitted to making some of the mistakes that Mr. Harrison alleged.

21. Grievant was given no performance evaluations prior to his dismissal. Grievant was only issued an EPA-1 on June 15, 2017. It is noted that the EPA-1 is designed to set forth the duties and responsibilities of a position, as well as its performance standards and expectations. There is no rating or scoring system involved in an EPA-1. Ratings and/or scores are assigned to evaluate work performance on DOP's EPA-2 and EPA-3 forms. Respondent did not complete any other EPA forms for Grievant prior to his dismissal.

22. Management did not specifically inform Grievant that complaints had been made about his work performance prior to his dismissal.

⁸ See, Grievant's Exhibit 2, handwritten complaint, September 5, 2017.

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 Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. Dep't of Health and Human Res.*, Docket No. 2008-0958-DHHR (Mar. 13, 2009). 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 Res./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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). "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). In this matter, Grievant bears the burden of proof.

Respondent asserts that it dismissed Grievant from employment for unacceptable work performance. Grievant denies the allegations of poor performance that have been made against him. Further, Grievant argued that Mr. Harrison's statements about his performance were untrue. Grievant further argued that he was treated unfairly. In his statement of grievance and at the level three hearing, Grievant also argued that he was not given adequate notice prior to his dismissal. Grievant does not address that claim in his proposed Findings of Fact and Conclusions of Law. As such, the same is deemed abandoned, and will not be addressed herein.

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) (2012). 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 Veterans 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)).

Dismissal of a probationary employee is addressed in Rule 10.5, entitled “Dismissal during Probation.” Rule 10.5.a. states as follows:

[i]f at any time during the probationary period, the appointing authority determines that the services of the employee are unsatisfactory, the appointing authority may dismiss the employee in accordance with subsection 12.2. of this rule. If the appointing authority gives the fifteen (15) calendar days notice on or before the last day of the probationary period, but less than fifteen (15) calendar days in advance of that date, the probationary period shall be extended fifteen (15) days from the date of the notice and the employee shall not attain permanent status. This extension shall not apply to employees serving a twelve-month probationary period.

W.VA. CODE ST. R. § 143-1-10.5.a. (2017).

As he was a probationary employee, Grievant bears the burden of proving that his work performance was satisfactory. Grievant chose to call no witnesses, other than himself, at the level three hearing, even though he was given the opportunity to call and subpoena witnesses. Grievant introduced as exhibits the EPA-1, a written complaint he made about Mr. Harrison after he was dismissed, and his dismissal letter. Grievant also questioned each of the witnesses called by Respondent. However, Grievant did not present evidence to prove that his work performance was satisfactory. Instead, Grievant focused on his belief that he was treated unfairly, that Mr. Harrison “stabbed him in the back,” that he was never given “the chance to redeem himself,” and that he was not

properly trained.⁹ There is no doubt that Grievant was offended by Mr. Harrison discussing his work performance with management. Grievant was also offended by the way he was dismissed, and by Respondent immediately revoking his access to the premises. However, none of this proves that Grievant's work performance was satisfactory.

Grievant asserted that Mr. Harrison's allegations about his work performance were untrue, but Grievant did not explain to which allegations he was referring, and how, or why, such were untrue. Grievant would only state that Mr. Harrison's reports to management were untrue. Grievant admitted to making some mistakes on the job, but denied making all of the mistakes that had been alleged. Grievant specifically denied the allegation that he failed to carry his state cell phone at all times, and the allegation that he did not remember his PINs and passwords. Grievant admitted to writing his PINs and passwords down, and storing them in his phone. However, Grievant did not address each of the specific allegations made against him as stated in the dismissal letter. Grievant would only generally testify that they were untrue, and did not present any evidence to support his claims. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Trustees/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998)(citing *Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995)).

⁹ Grievant made the statement that he was never given the chance to redeem himself several times during the level three hearing, but he did not explain what such meant. The ALJ asked the Grievant what he meant by this, and Grievant stated that such meant that he had no chance to fight his dismissal. Grievant was given a predetermination conference at which he could tell his side of the story, and he filed this grievance to challenge this dismissal. Accordingly, Grievant was given, and has availed himself of the opportunity to fight his dismissal.

Grievant did not specifically argue that Respondent's decision to dismiss him was arbitrary and capricious, but he appeared to suggest his dismissal was unreasonable. "[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 presented no evidence to support his suggestion that Respondent’s decision to dismiss him was unreasonable. Grievant asserted that he did not make any more mistakes than Mr. Harrison, but he offered no evidence to support the same. Given the evidence presented, as well as the low threshold to justify the termination of a probationary employee, the undersigned cannot conclude that the decision to terminate Grievant’s employment was arbitrary and capricious, or otherwise unreasonable.

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 Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. Dep’t of Health and Human Res.*, Docket No. 2008-0958-DHHR (Mar. 13, 2009). 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).

2. 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).

3. "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 Veterans 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. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Trustees/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998)(citing *Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995)).

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. 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)).

7. Grievant failed to prove by a preponderance of the evidence that his services were satisfactory. Further, Grievant failed to prove that his dismissal was arbitrary and capricious, or otherwise unreasonable.

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: January 9, 2018.

Carrie H. LeFevre
Administrative Law Judge