

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PAUL J. GILL,
Grievant,

v.

Docket No. 2018-1118-DOT

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Paul J. Gill, was employed by Respondent, Division of Highways (DOH), in the Inspector 2, classification. He was assigned to the DOH Legal Division. Mr. Gill filed a grievance statement dated April 23, 2018, which was followed by a Level One Grievance form dated April 29, 2018. The statement on the form alleged:

After a "satisfactory 6 month prob. rpt. on my anniv. Date, I was terminated after a complaint alleging unprofessional conduct at an accident scene was received. I am an excellent employee as outlined in my attachment. I firmly believe my actions on scene were misinterpreted as this was the first time I worked with this ofcr.¹

As relief, Grievant seeks to be reinstated to permanent employee status.

By agreement communicated to the Grievance Board on May 7, 2018, Grievant and Respondent waived the lower level and moved the grievance directly to Level Three for hearing.² A Level Three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board over two days: July 26, 2018, and September 26, 2018. Grievant personally appeared and was represented by Sandra Henson Kinney,

¹ The statement appears herein as written on the form. It is a summary of the longer statement Grievant attached. The full grievance statement is incorporated in the record.

² See, W. VA. CODE § 6C-2-4(a)(4).

Esquire, Henson Kinney Law PLLC. Respondent was represented by Kelli D. Talbott, Esquire, Senior Deputy Attorney General. This matter became mature for decision on November 5, 2018, Upon receipt of the last of the parties Proposed Findings of Fact and Conclusions of Law.³

Synopsis

Grievant was employed to inspect highway accident scenes and report damage to State property so the responsible parties may be required to compensate the State. Inspectors must work closely with police agencies investigating the accidents to avoid impeding those investigations. Grievant had a successful probationary performance until an incident occurred less than a week before the end of his probationary period. Respondent terminated Grievant's probationary employment as a result of complaints received from an officer with the Charleston Police Department as a result of this incident.

Grievant contends that his conduct was generally proper during the incident and his words and actions were misinterpreted by the police officer. He also points to his past experience, and successful probationary service, to argue that he should not be terminated for this one incident which he believes was overblown. The standard for dismissal of a probationary employee is much lower than for a regular full-time employee. Respondent presented sufficient evidence to justify the decision to not retain a probationary employee.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

³ Both parties placed their post-hearing submissions in the United States mail on November 2, 2018.

Findings of Fact

1. Paul J. Gill, Grievant, was employed by Respondent, DOH, as an Inspector 2, in the DOH Legal Department in District One.⁴ He was required to serve a six-month probationary period. His first day was October 16, 2017.

2. Prior to being employed by the DOH, Grievant had served as a local police officer and had been through the State Police Academy training twice for two different positions.

3. As an Inspector 2, Grievant was tasked with investigating claims pending in the Court of Claims, performing internal investigations for the DOH, and conducting field investigations for vehicular accidents occurring on public roads. When investigating vehicular accidents, Grievant verified and documented damage to DOH property, and documented the accident scene to generate reports from which liability could be assigned and compensation sought.

4. Grievant had a successful probationary period with the DOH until April 14, 2018. Grievant's immediate supervisor, Larry Vasarhelyi, completed an Employee Performance Appraisal ("EPA-2") for Grievant dated and signed April 16, 2018. The EPA covered Grievant's probationary period, "10/16/17 to 4/16/18." Supervisor Vasarhelyi rated Grievant's performance as "GOOD; MEETS EXPECTATIONS." In the area for comments, he wrote: "Paul is doing a good job. Picks up quickly on what to do and is an

⁴ District One includes Kanawha, Putnam, Boone, Clay, and Mason counties.

asset to the Claims Section.” (Grievant Exhibit 5). Supervisor Vasarhelyi had not been informed of the incident which led to Grievant’s dismissal when this EPA was prepared.⁵

5. Grievant was trained to perform DOH investigations by DOH investigator David Fix. Mr. Fix set out an eight-step process for Grievant to follow⁶. Grievant created a check list form containing each step to ensure that he gathered all necessary information. He added a blank to record tire depth measurements for involved vehicles. (Grievant Exhibit 2, Grievant’s data collection checklist form).

6. Grievant regularly included tire depth measurements in his reports without comment from his supervisor.

7. On April 14, 2018, Grievant responded to a call regarding an accident which occurred on Interstate 77 (“I-77”) near the 101 mile marker in the southbound lane. This was a single vehicle accident involving a City of Charleston garbage truck. There were three city employees in the truck. All were transported to the hospital with serious injuries and one died.

8. Grievant arrived at the accident scene on the northbound lane of I-77 and parked the State vehicle on the shoulder of the road behind some Charleston Police Department (“CPD”) vehicles. He left the vehicle’s yellow lights flashing and got out of his car after donning his yellow safety vest.

⁵ The Fire Chief and a Police Officer for the City of South Charleston testified that they had worked on accident scenes with Grievant. His actions were appropriate and professional.

⁶ The steps were 1. Respond to call and report to the accident scene. 2. Make contact with investigative police officer, fire department, EMS, and wrecker service and obtain contact information. 3. Mesh investigation with other agencies. 4. Photograph all involved vehicles. 5. Photograph scene; vehicles, roadway, lane width, lane markers. 6. Document vehicle locations with GPS. 7. Document where damage first occurred. 8. Type report.

9. Upon exiting his vehicle, Grievant approached a CPD officer near one of the police cars and asked who was in charge of the investigation. The officer replied that it was Sergeant (“Sgt.”) Burford. Grievant did not seek out Sgt. Burford at that time.

10. The garbage truck had rolled over and was near the northbound lane. Grievant was about thirty feet from the vehicle and began taking pictures of the accident perimeter. He then walked to the truck and began taking tire tread measurements. He also intended to take measurements regarding the location of the truck and its GPS⁷ coordinates.

11. While Grievant was checking the tread depth on one of the front tires of the truck, Sgt. Burford noticed him for the first time. Sgt. Burford is the Traffic Accident Investigation Commander for the CPD. At that point Sgt. Burford was approximately twenty-five to thirty yards from the wrecked truck.⁸

12. Sgt. Burford asked Grievant who he was and what he was doing. Grievant answered the questions and then asked Sgt. Burford the same thing. Sgt. Burford answered and told Grievant that he was in charge of the crash scene and Grievant needed to get out on the crash scene. Grievant responded, “seeing that the road belongs to me you’re in my crash scene.”⁹

13. Sgt. Burford was concerned that Grievant might inadvertently alter the air pressure on one or more of the truck tires. He told Grievant to get out of the crash scene until all the police agencies had completed their investigation.

⁷ GPS is the acronym for the Global Positioning System.

⁸ Testimony of Sgt. Burford.

⁹ Respondent Exhibit 1, Sgt. Burford’s contemporaneous report of the incident.

14. While leaving the area of the truck, Grievant was stepping over the guardrail and stepping near a blood pool created where one of the victims had suffered fatal injuries. Sgt. Burford warned Grievant not to step into the blood pool. Grievant expressed surprise and apologized, then asked what he should do. Sgt. Burford told Grievant to stay out of the accident scene. The two then separated to attend to their respective jobs.

15. Subsequently, Sgt. Burford saw Grievant in what he described as the crash scene debris area. Grievant was asking officers nearby to move so he could take pictures he needed for his report.

16. Sgt. Burford approached Grievant and said that he needed to stay out of the debris field. He specified that Grievant was to stay behind the solid white line on the shoulder of the roadway.

17. A short while later Sgt. Burford observed Grievant walking in what he described as the debris field. Grievant was rolling a wheel which is used to take measurements on roadways and other flat surfaces.

18. Sgt. Burford activated the video record function on his cellphone and approached Grievant. Sgt. Burford told Grievant he was in the accident scene and he needed to move. He asked Grievant if he was an accident reconstructionist and Grievant said that he was not. Sgt. Burford said that his officers were accident reconstructions and he and Grievant were in the way of them surveying and recording the scene. He told Grievant that if he saw him in the crash scene area again, he was going to seek warrants to arrest Grievant for obstructing officers. Finally, he instructed Grievant to stay on the other side of the median away from the lane where the accident had occurred.

19. Sgt. Burford was stern but professional in his statements. Grievant was courteous, professional and compliant in his responses. Grievant was courteous in all his responses to Sgt. Burford, with the exception of their initial engagement.

20. Grievant thought that he had been instructed to stay out of the debris field only and did not believe he was in it. After his final discussion with Sgt. Burford, he realized that he was instructed to stay completely out of the accident scene which was marked off by the police cars. At that point, Grievant returned to his vehicle and left the scene.¹⁰

21. There was no evidence that Grievant actually came into contact with any debris or moved any evidence.

22. Grievant called his supervisor and left a message indicating that there had been a problem during the investigation of the accident.

23. DOH Safety Officer, Shane Hudnall also reported to the same accident scene.¹¹ He is not Grievant's supervisor.

24. Sgt. Burford asked Mr. Hudnall to talk to Grievant about staying out of the crash scene. Mr. Hudnall told Sgt. Burford that he was not Grievant's supervisor, but he would talk to him. Mr. Hudnall told Grievant to hang back and let the CPD do their job to

¹⁰ Sgt. Burford testified that the terms "crash scene", "debris field" and "debris area" were synonymous and he used them interchangeably. Grievant believed that the "debris field" was within the "crash scene" but there were areas of the crash scene that did not include the debris field. He felt he was in the "crash scene" but not the "debris field."

¹¹ Mr. Hudnall's duties include ensuring the highway is safe for traffic and the officers investigating the accident.

which Grievant replied something to the effect that “It’s our highway. We can do what we want.”¹²

25. Mr. Hudnall generally confirmed the description of the incident given by Sgt. Burford. He confirmed that Grievant was not disrespectful or loud in his discussion with Sgt. Burford. He further verified that he responded to three or four other accidents with Grievant and there had been no problems with the police officers at those scenes.

26. Sgt. Burford called the DOH on Monday April 16, 2018, to report that incident at the accident scene which occurred on the preceding Saturday. He spoke with Jonathon Storage, DOH General Counsel and Director of the Legal Division.¹³ Sgt. Burford told Director Storage the events which took place, particularly: that Grievant was doing something with the tires on the truck; he had been told numerous times to stay out of the debris field; and, he had nearly stepped in a blood pool. Sgt. Burford stated that he did not want Grievant to respond to any more accidents in the City of Charleston.

27. Shortly after speaking with Sgt. Burford, Mr. Storage contacted the DOH Human Resources (“HR”) office and spoke with Acting HR Director Drema Smith who confirmed that she believed that April 16, 2018, was Grievant’s last day as a probationary employee.

28. Director Storage decided that the incident was egregious enough to warrant not retaining Grievant beyond his probationary period. He was particularly concerned that Charleston was the largest city in the state. Because of the intersecting interstates, the

¹² Mr. Hudnall could not recollect Grievant’s statement verbatim but stated that this was the gist of his comment.

¹³ Mr. Storage is the Director of the unit where Grievant was employed. Grievant’s supervisor, Mr. Vasarhelyi reports to Director Storage.

DOH responds to many incidents in the city. If Grievant could not respond to those incidents it would significantly limit his effectiveness as an investigator. Ultimately, Mr. Storage recommended that Grievant's employment be terminated that day, while he was still a probationary employee. Ms. Smith concurred with the recommendation.

29. HR Director Smith prepared a letter dated April 16, 2018 and gave it to Grievant that day. The letter stated that Grievant's employment was terminated immediately with an effective date of May 1, 2018. Ms. Smith wrote, "Although the effective date of your termination is May 1, 2018, the agency requires your immediate departure from the workplace upon receipt of this letter. The letter listed the reason of Grievant's "non-retention" as poor performance during his probationary period and specifically:

On Saturday, April 14, 2018, you responded you to the scene of an auto accident involving a City of Charleston refuse truck. One city employee perished in the accident. Charleston Police Officers have reported to the Director of the Legal Division that you failed to follow the lawful orders issued to you by Charleston Police Department officers and that your conduct was unprofessional and inappropriate.¹⁴

30. Director Storage did not discuss Grievant's probationary period performance with Mr. Vasarhelyi prior to recommending his dismissal, nor was he aware of the satisfactory evaluation of the supervisor. He stated that this single incident was serious enough to warrant termination and the EPA would not have changed the outcome.

Discussion

The first issue that must be addressed is whether Grievan was a probationary employee on April 16, 2018, or had his probationary period ended at the end of the day

¹⁴ Respondent Exhibit 4, termination letter.

on April 15, 2018. This determination is crucial because the West Virginia Supreme Court of Appeals has held that a permanent state classified employee has a property interest arising out of the statutory entitlement to continued uninterrupted employment." See Syl. Pt. 4, *Waite v. Civil Service Commission*, 161 W.Va. 154, 241 S.E.2d 164 (1977); *W. Va. Dep't of Env'tl. Prot. v. Falquero*, 228 W. Va. 773, 724 S.E.2d 744, (2012). Thus, permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); See also W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012). Accordingly, the standard for dismissal of a permanent employee is much higher than for a probationary employee.

Both parties point to the Division of Personnel ("DOP") Administrative Rule for guidance. The Rule states:

Appointing authorities shall make all original appointments to permanent positions from officially promulgated registers for a probationary period of not more than one (1) year. The Board shall fix the length of the probationary period for each class of position. The appointing authority shall notify the Director when a probationary period has been completed and permanent status has been granted.

W. VA. CODE ST. R. § 143-1-10.1.a.

Both parties note that the Rule does not give any specific guidance to how the days or months of the probationary period is calculated. Predictably, Respondent argues that the probationary period goes through April 16, 2018. Grievant argues that his first

day of probationary performance was October 16, 2017, so his last day of the probationary period should be April 15, 2018, much like the first day of the year is January 1, and the last day is December 31 and not January 1 of the next year.

Fortunately, we have statutory guidance relating to this conundrum.

W. VA. CODE § 2-2-1 (d) states:

In computing any period of time prescribed by any applicable provision of this code or any legislative rule or other administrative rule or regulation promulgated pursuant to the provisions of this code, the day of the act, event, default or omission from which the applicable period begins to run is not included. The last day of the period so computed is included...

The first day of Grievant's probationary period was October 16, 2017. Pursuant to the statute, that day is not included in the six-month calculation. The count starts on October 17, 2017, and ends on April 16, 2018. The statute requires that this last day is included, thus making the last day of Grievant's six-month probationary period April 16, 2018. Grievant was a probationary employee on the date he was dismissed.

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).

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 [her] services were, in fact, of a satisfactory level." *Bush v. Dep't of Transp.*, Docket No. 2008-1489-DOT (Nov. 12, 2008).

"However, the distinction is one that only affects who carries the burden of proof. As a practical matter, an employee who engages in misconduct is also providing unsatisfactory performance." *Livingston v. Dep't of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008) (citing *Johnson v. Dep't of Transp./Div. of Highways*, Docket No. 04-DOH-215 (Oct. 29, 2004)).

"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).

"[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). 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. *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)).

The dismissal letter states that Grievant's "non-retention was "based upon poor performance." However, the evidence demonstrates that the dismissal was based upon a single act of alleged misconduct. Respondent has the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Cosner, supra* and *Livingston, supra*.

The Division of Personnel ("DOP") Administrative Rule describes the probationary period as follows:

10.1.a. The probationary period 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. It is an integral part of the examination process and the appointing authority 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. The same rules state that an employee may be dismissed at any time during the probationary period if the employer finds his or her services are unsatisfactory.

In this case, Grievant was initially selected to fill the Inspector 2 position because he had considerable experience in inspection related positions. Respondent was hoping that he would be able to learn the job and reach full-performance capacity quickly. In fact, that happened throughout most of his probationary period. Supervisor Vasarhelyi noted in Grievant's EPA, "Paul is doing a good job. Picks up quickly on what to do and is an

asset to the Claims Section.” The only blemish on his employment record was the investigation of the accident occurring on April 14, 2018.

Director Storage agreed that the only reason for terminating Grievant’s probationary employment was his actions at that crash scene. He and HR Director Smith felt that single incident was serious enough to not retain Grievant as a permanent employee.

Both Grievant and Sgt. Burford were credible witnesses. Both were appropriate in general demeanor and were generally responsive to questions. Sgt. Burford was somewhat evasive and unresponsive during cross examination but not to an extent that his answers were unreliable. Additionally, the important parts of his testimony were supported by the facts and an additional witness.¹⁵ While there were differences in the details of the incident, the testimony of Sgt. Burford and Grievant regarding the main facts are undisputed. When Sgt. Burford first encountered Grievant, he was near the crashed vehicle taking measurements. Sgt. Burford testified that Grievant was checking the tire pressure on the vehicle which concerned him because Grievant might inadvertently release a significant amount of air from the tire which could cause problems with the accident reconstruction data. However, Grievant testified that he was checking the tire

¹⁵ 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. Additionally, the administrative law judge 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’ information. *Yerrid v. Div. of Highways*, Docket No. 2009-1692-DOT (Mar. 26, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.*, Docket No. 2009-1583-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.*, Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

tread depth and produced a tire depth gauge which was admitted as Grievant Exhibit 1. The tire depth gauge resembles a tire pressure gauge and the two could be easily confused when seen from a distance. Given the additional evidence that Grievant routinely checked tire tread depth and never checked tire pressure it is more likely than not that Grievant was checking the tire tread depth. Because the instruments look so familiar, this matter has no impact on Sgt. Burford's credibility as a witness.

Sgt. Burford asked Grievant who he was. Grievant responded and asked the same question of Sgt. Burford. When instructed to leave the crash scene, Grievant questions Sgt. Burford's authority and jurisdiction rather than simply comply or at least start a constructive discussion regarding how they could cooperatively perform their respective jobs. Additionally, it is not contested that Grievant entered the crash scene after being instructed to remain behind the white line at the shoulder of the road. Even when counseled by his co-worker to hang back and let the CPD do their job he reiterated his dissatisfaction by stating "It's our highway. We can do what we want."

Grievant testified that he did not fully understand what Sgt. Burford meant by the debris field. He thought he was free to go into the crime scene as long as he did not go near debris. However, there was no misunderstanding that he was told to stay behind the white line at the road shoulder and he did not do so. Even if Grievant was right about the concurrent jurisdiction to investigate the accident, ignoring the instructions of the law enforcement officer in charge of police investigation was not the way to address the issue.

Respondent proved the reasons for terminating Grievant's conduct by a preponderance of the evidence. Additionally, Respondent's actions were based upon substantial evidence and were not arbitrary or capricious.

Conclusions of Law

1. The Division of Personnel (“DOP”) Administrative Rule states:

Appointing authorities shall make all original appointments to permanent positions from officially promulgated registers for a probationary period of not more than one (1) year. The Board shall fix the length of the probationary period for each class of position. The appointing authority shall notify the Director when a probationary period has been completed and permanent status has been granted.

W. VA. CODE ST. R. § 143-1-10.1.a.

2. W. VA. CODE § 2-2-1 (d) states: “In computing any period of time prescribed by any applicable provision of this code or any legislative rule or other administrative rule or regulation promulgated pursuant to the provisions of this code, the day of the act, event, default or omission from which the applicable period begins to run is not included. The last day of the period so computed is included...”

3. Grievant was a probationary employee when his employment was terminated on April 16, 2018.

4. 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).

5. The Division of Personnel ("DOP") Administrative Rule describes the probationary period as follows:

10.1.a. The probationary period 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. It is an integral part of the examination process and the appointing authority 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. The same rules state that an employee may be dismissed at any time during the probationary period if the employer finds his or her services are unsatisfactory.

6. "[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). 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. *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)).

7. Respondent proved the reasons for terminating Grievant's conduct by a preponderance of the evidence. Respondent's actions were neither arbitrary nor capricious.

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* 156 C.S.R. 1 § 6.20 (2018).

DATE: December 19, 2018.

**WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE**