THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DIANA L. OVERBERGER,

Grievant,

v. **Docket No. 2018-2033-MAPS**

DIVISION OF CORRECTIONS/SALEM CORRECTIONAL CENTER,

Respondent.

DECISION

Grievant, Diana Overberger, was employed by Respondent, Division of Corrections/Salem Correctional Center. Respondent terminated Grievant on March 29, 2018, during her probationary period. Subsequently, on April 3, 2018, Grievant filed the following grievance against Respondent:

> I started working at the Salem Correctional Center on July 24th 2017. I felt I was separated from the very beginning, and that I was in a hostile working environment. I was constantly being harassed. I was being targeted on different occasions by the captains, the sergeant, and a few lieutenants on August 3, 2017. I hurt my leg; a negligence, of one of the corporals not training me correctly. I continued working under doctors supervision, and restrictions. I was not supposed to be going up the steps more than once every two hours and yet I was still forced to work the assigned units; where I had to go up and down the steps every half hour. When I brought this to their attention, they ignored me, had no remorse, and still put me on the same units. After, I was called "argumentative" – One of the captains, went as far as a yelling at me and asked me if I was refusing to do my post, which I did not refuse, even under my circumstances. I was forced to work in wet clothes, for almost 4 hours. I, again was assigned the same units with stairs, but if I let them know that I was still on the restrictions they call me "argumentative" yet again. I quickly realized that they were trying to have me walk out on my job, so they could fire me, or that I would quit on my own. My doctor scheduled me for surgery, for my injury on November 27th 2017. Deputy Warden Hess took me off the work schedule on November 6th and I was gone for nearly three months.
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> I came back to work with the same restrictions as before; and yet they continued putting me to work, on the units and other places where I was not fit to be working. When I went back to my doctor, he immediately took me off

> work for another month because he insisted I needed more physical therapy. During the time that I was off, on March 1st, I received a letter that I was to go into the Warden's office to face charges March 7th. I went to the meeting, and brought with me, an attorney by the name of the LaVerne Sweeney. When I got there, I was amazed by all the accusations I was being accused of; things that I simply did not do. On March 15th, I received a letter saying that I was going to be dismissed from my job on March 28th. When I read the letter, I realized there were even more fabrications, things that were absolutely not true. As of today, I still feel that I was being targeted, when they realized they couldn't make me quit, or walk out of my job, they fabricated arguments against me and got me fired. If they had done this before Warden Anderson became Warden, I feel I would still have my job. When Warden Jones was in place he came and talked to me, and told me that he would NOT fire me, because he knew that I had the makings of a great officer; that asking questions was my way of learning as I was still new.
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> Now that the new Warden is in place, they took that opportunity to get me fired with some false allegations. I have seen people still working at that facility, that have done things much worse than the things I was wrongly accused of. Those people are still working there even after being compromised, violating security protocol, and falling asleep in the units. I feel my age played a big part and the fact that I can't work in the bigger units with going up and down the stairs every 30 minutes, and they refuse to accommodate me.

For relief, Grievant seeks "Re-instatement and back pay and such other damages are permitted."

Grievant filed directly to level three of the grievance process.[1] A level three hearing was held on July 10, 2018, before the undersigned at the Grievance Board's Westover, West Virginia office. Grievant was represented by LaVerne Sweeney, Esquire. Respondent was represented by John Boothroyd, Assistant Attorney General. This matter became mature for decision on August 24, 2018. Both parties had the opportunity

[1] West Virginia Code § 6C-2-4(a)(4) permits a grievant to proceed directly to level three of the grievance process when the grievance deals with the discharge of the grievant.

to submit written Proposed Findings of Fact and Conclusions of Law, but only the Respondent did so.

Synopsis

Grievant was employed by Respondent on a probationary basis as a Correctional Officer when Respondent terminated her for unsatisfactory performance and misconduct. Whereupon, Grievant alleged that Respondent created a hostile work environment, harassed her, and discriminated against her. Respondent proved that Grievant engaged in misconduct. Grievant failed to prove that her performance was satisfactory or that Respondent created a hostile work environment, harassed her, or discriminated against her. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance.

Findings of Fact

1. On July 24, 2017, Respondent hired Grievant as a temporary Correctional Officer I at the Salem Correctional Center (SCC).

2. On October 28, 2017, Respondent hired Grievant as a probationary Correction Officer I.

3. Grievant was a probationary employee when Respondent terminated her on March 13, 2018.

4. The primary duty of a Correctional Officer I is to provide security in a prison setting. West Virginia Division of Personnel's classifications and functions form 8911 describes the "nature of work" for a Correctional Officer I as "[u]nder direct supervision, performs beginning level Correctional Officer work. The employee is responsible for

enforcing rules, regulations and state law necessary for the control and management of offenders and the maintenance of public safety. The probationary period is twelve months. Performs related work as required."[2]

5. Grievant completed orientation by July 31, 2017. As part of this training, Grievant was assigned to shadow more experienced officers and study key policy directives and security practices.

6. On August 6, 2017, Grievant received her initial Employee Performance Appraisal Form EPA-1[3] setting forth her responsibilities, performances standards, and expectations as a Correctional Officer I at SCC.[4] Grievant's responsibilities included enforcing rules, regulations, and state laws necessary for control and management of offenders and maintenance of public safety, maintaining proper counts of inmates, and maintaining security at the facility. Grievant's performance standards and expectations included reading and following Operational Procedures and Policy Directives, asking questions of experienced staff members and supervisors, being aware of surroundings, and being cooperative.

7. West Virginia Division of Corrections' (Corrections) Director's Protocol 304 (Correctional Officer Uniforms and Grooming) issued on July 30, 2017, sets forth in Section III, Subsection C that "[e]arrings, nose rings, posts or any other visible body piercing jewelry, such as tongue studs, are not authorized for wear by any uniformed officer while on duty."[5]

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[2] See Respondent's Exhibit 20.
[3] An EPA 1 is used for initial planning sessions, coaching, or when responsibilities, standards, or expectations change.
[4] See Respondent's Exhibit 3.
[5] See Respondent's Exhibit 16.

8. Security at SCC is run in a quasi-military style and Correctional Officers are expected to follow the orders and instructions of their supervising officers. If Correctional Officers have workplace issues, including problems with orders and instructions, they must address them through their chain of command or immediate supervising officer.

9. Operational Procedure 300.03, issued on February 1, 2017, reiterates WVDOC Policy Directive 129.24, and states that staff will not be overly familiar with an inmate, give any favor, or compromise their ability to supervise inmates.[6]

10. Within the first two months of work, Grievant was counseled several times about Correctional Officer grooming standards and her overfamiliarity with inmates. Corporal Chris Farley spotted Grievant wearing earrings. He told Grievant that earrings were not permitted and to remove them, only to find Grievant still wearing earrings three hours later during the same shift. Corporal Farley counseled Grievant again and provided her with a copy of Director's Protocol 304. Captain Sherrie Dodd also observed Grievant wearing earrings. She told Grievant that earrings were not permitted, watched Grievant remove the earrings, and a short time later discovered Grievant wearing the earrings again. After Respondent again addressed the issue with Grievant, Grievant appeared at work wearing sticker earrings, which Captain Dodd again told her to remove.[7]

11. On September 14, 2017, Grievant was assigned as the officer in charge of the J-building and required to call in count.[8] Count guidelines are outlined in Operational

[6] See Respondent's Exhibit 5.
[7] See Respondent's Exhibit 13 and level three testimony of Corporal Farley and Captain Dodd.
[8] "Count" is a system to tabulate the number of inmates, is necessary to account for large inmate populations, and is a critical duty of Correctional Officers, specifically those assigned charge of a building.

Procedure # 305.00.[9] In anticipation of count, Grievant was provided with the number of inmates in the building. A radio call went out for count at 10:30 a.m. The other staff in the building heard the call. Grievant failed to call in count for the building, leading to a miscount for the facility.[10] This occurred several days after a similar incident where Grievant failed to call in count, whereupon Respondent had counseled Grievant regarding her responsibility to do so as officer in charge of the building. When confronted on September 14, 2017, Grievant responded lightly to the significance of her blunder.[11]

12. On September 16, 2017, Captain Bailey issued Grievant an Employee Performance Appraisal Form EPA2.[12] The EPA2 informed Grievant that her work performance "does not meet expectation" and further stated that:

> Correctional Officer 1 Diana Overberger has been a temporary employee for 46 days at SCC; in the short amount of time you have been employed at SCC; you have argued the dress code policy sets forth for Correctional Officers. You repeatedly become argumentative when staff attempt to help familiarize you with policy that is currently set in place for the facility. You question your supervising staff when given a direct order to follow. When assigned to the J-Building, a formal count was called, you breached facility security and public safety when you did not conduct a formal count of inmates within that building as policy directs. You even ignored a request from the commissary staff within the J-Building to call the inmate count into Central Control. You have released and received inmates on the 210-housing unit without signing the inmates on or off the unit, or documenting the whereabout of the inmates. If you do not make a significant change you will not be a permanent SCC employee.[13]

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[9] See Respondent's Exhibit 7.

[10] Grievant testified that she did not hear the call for count even though she had a functioning radio.

[11] See Kathy McKinney's testimony and Respondent's Exhibit 10.

[12] An EPA-2 is a progress evaluation and is used for interim or mid-point review and for reviews of probationary employees.

[13] See Respondent's Exhibit 2.

Captain Bailey had serious concerns that Grievant was not grasping or adhering to basic security concepts and that Grievant was not working within her chain of command to follow the instructions of supervising and ranking officers. He listed as performance development needs that Grievant become more familiar with post orders and Operational Procedures and Policy Directives and that she communicate with supervisors and other staff to deal with development and facility issues.

13. On September 21, 2017, Grievant went to her security post without picking up a radio from Central Control. Grievant then had to call Central Control and have a radio sent to her. When supervisors asked Grievant why she did not pick up a radio at the beginning of her shift, she responded that she initially did not think that she needed to take a radio with her. Grievant's failure to get a radio before assuming her post raised concerns about her basic understanding of security. In a prison setting, radios are a critical security tool and are necessary to coordinate essential prison functions, including inmate counts and movement. Radios also are needed so that a Correctional Officer can call for emergency assistance and respond to calls for assistance and other matters.

14. Grievant took leave under workers' compensation between November 3, 2017, through January 30, 2018, and returned to work on January 31, 2018.

15. SCC's Operational Procedure #300.03 (General Security Orders) sets forth that "[s]taff, assigned a two-way radio, will keep control/accountability of radio at all times. Inmates are never permitted to handle staff radios."[14]

[14] See Respondent's Exhibit 5.

16. On February 1, 2018, Grievant was provided a radio from Central Control at the start of her shift. When Grievant could not get the radio to work, she handed the radio to an inmate and asked the inmate to help fix the radio.[15] Correctional Officers Michael Bray and James Howell witnessed the event. Officer Bray immediately retrieved the radio from the inmate and returned it to Grievant.[16] At the time Grievant handed her radio to the inmate, she was located near other staff and Central Control who could have assisted Grievant.

17. Grievant's mishandling of her radio was a serious security breach, resulting in the matter being forwarded to the Acting Associate Warden of Security, Captain Bailey, with a recommendation to dismiss the Grievant.

18. On February 8, 2018, Grievant contacted Lieutenant Carla McCauley to find out when the inmates were going to be informed whether visitation requests were approved. Lt. McCauley informed Grievant that the mail supervisor was working a security post and that inmates would likely be informed the next day. Lt. McCauley also reminded Grievant that Correctional Officers were not supposed to contact other staff on behalf of inmates. Lt. McCauley informed Grievant that inmates needed to go through the unit team or fill out a request form. The next day, Grievant called Roberta Murphy, who was handling the inmate visitation requests, and asked Murphy when the inmates would be informed about visitation. When Murphy gave the same response as Lt.

[15] Grievant admitted at her March 7, 2018 predetermination meeting that she handed the radio to someone so that he could fix it, but that she did not know whether that someone was an inmate or an officer. Inmates are readily recognizable because they are in prison uniform, which is distinct from an officer's uniform or civilian clothing of non-uniformed staff.

[16] See Respondent's Exhibits 17 & 18.

McCauley, Grievant did not accept this response and continued to press Murphy. Grievant's call to Murphy showed a disregard and unwillingness to accept the instructions given her by Lt. McCauley the day before.[17]

19. On March 13, 2018, Respondent sent Grievant a letter informing her that she was being dismissed effective March 29, 2018, due to unsatisfactory work performance and unacceptable conduct during her probationary period.[18]

20. On March 7, 2018, Respondent held a predetermination meeting with Grievant in which Acting Warden John Anderson and Deputy Warden Katherine Hess discussed the nature of Grievant's conduct and performance and that her dismissal was being considered.

21. Corrections' Policy Directive 131.02 (Selection and Promotion/Probationary Term), Section V, Subsection C sets forth that probationary employees will be evaluated initially and then every two months and that probationary employees shall be terminated during their probationary term if they are not performing satisfactorily.[19]

22. Under the West Virginia Division of Personnel Rules, 143 C.S.R. 1, Subsection 10.5a, "if 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."

23. Respondent's procedures for approving requests for termination of an employee, including probationary employees, are governed by Policy Directive 129.00

[17] Grievant testified that she is a humanitarian and felt passionate about not keeping inmates waiting for mail or visitation.
[18] See Respondent's Exhibit 1.
[19] See Respondent's Exhibit 19.

(Progressive Discipline)[20]. This Policy Directive states that prior notice of dismissal is not required in cases of "gross misconduct" where there is a continuing danger to persons, property, or the orderly conduct of the affairs of the agency.

24. Respondent followed procedures for "unsatisfactory performance" rather than "gross misconduct" when it dismissed Grievant. It did so by complying with its progressive discipline procedure in giving Grievant a predetermination meeting on March 7, 2018, giving her 15 days written notice prior to her effective dismissal date, giving her the specific reasons for her dismissal, giving her an opportunity to respond, and informing her of her appeal rights. This was detailed in Respondent's dismissal letter on March 13, 2018, which informed Grievant that she was being dismissed due to unsatisfactory performance.

25. Policy Directive 129.00 allows for dismissal of permanent employees when infractions/deficiencies in performance and/or behavior continue after the employee has had adequate opportunity for correction or the employee commits a singular offense of such severity that dismissal is warranted. Policy Directive 129.00, Section V, Subsection J, sets forth misconduct for which employees are subject to progressive discipline and includes the following misconduct:

> 1) Failure to comply with Policy Directive, Operational Procedures, or Post Orders.
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> 5) Instances of inadequate or unsatisfactory job performance.
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> 14) Failure or delay in following a supervisor's instructions, performing assigned work or otherwise complying with applicable, established written policy or procedures.

[20] See Respondent's Exhibit 22.

48) Failure to properly conduct inmate count.

26. On numerous occasions, when Grievant was informed of her transgressions, she was combative, dismissive, and argumentative and demonstrated an unwillingness to appreciate the seriousness of her actions and the rules she was violating.

Discussion

The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). In disciplinary matters, the burden of proof rests with the employer to prove that the action taken was justified, and the employer must prove the charges against an employee by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3. "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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), ***aff'd***, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

It is uncontested that Grievant was a probationary employee during the period relevant to this grievance. Respondent exercised its prerogative to not permanently employ Grievant. Because Grievant is a probationary employee, Respondent has the authority to terminate her without adhering to the normal employee protection protocol for state employees. 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. (2016). 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).

The Division of Personnel's administrative rules establish a low threshold to justify termination of a probationary employee. *Livingston v. Dep't of Health and Human Res*., Docket No. 2008-0770-DHHR (Mar. 21, 2008).

> A probationary employee is not entitled to the usual protections enjoyed by a state employee. The probationary period is used by the employer to ensure that the employee will provide satisfactory service. An employer may decide to either dismiss the employee or simply not to retain the employee after the probationary period expires.

Hammond v. Div. of Veteran's Affairs, Docket No. 2009-0161-MAPS (Jan. 7, 2009) (citing *Hackman v. Dep't of Transp.,* Docket No. 01-DMV-582 (Feb. 20, 2002)).

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 on the employee to establish by a preponderance of the evidence that his services were satisfactory. *Bonnell v. 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). 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.*, 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).

This case involves a combination of both alleged misconduct and unsatisfactory performance. As the Respondent has made various allegations involving unsatisfactory performance and misconduct, Grievant has the burden of proving that her services were satisfactory and Respondent only has the burden of proving misconduct. Respondent has proven that Grievant engaged in misconduct. Grievant has not proven that her performance was satisfactory.

As there are disputed facts, the undersigned must make credibility determinations. 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); *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); See also *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id*., *Burchell v. Bd. of Trustees*, *Marshall Univ*., Docket No. 97-BOT-011 (Aug. 29, 1997).

Respondent's witnesses were credible, as will be detailed later. Grievant was not credible. Grievant did not present any witnesses beside herself in spite of testifying that she had witnesses who could corroborate her version of events. Grievant displayed a flippant attitude while testifying. She seemed to delight in testifying about her cavalier attitude in the various work situations she found herself in while employed by Respondent. It is clear that a number of Grievant's coworkers and superiors did not like her. The undersigned sees no basis to conclude that this dislike was anything other than a reasonable reaction to Grievant's own attitude and behavior.

Grievant had been counseled through the Employee Performance Appraisal process about problems with her performance and had ample opportunity to correct them. Grievant had worked for three months as a temporary employee prior to being hired as a full-time probationary employee and had plenty of time to learn her job The only evidence of her satisfactory performance Grievant provided is Grievant's own conflicting testimony and statements both denying and excusing wrongdoing, e.g, "I have seen people still working at that facility, that have done things much worse than the things I was wrongly accused of."

Respondent proved that Grievant engaged in numerous incidents of misconduct. The evidence shows that Grievant gave her radio to an inmate on February 1, 2018. Operational Procedure expressly prohibits giving a radio to an inmate under any circumstances. This act violated written procedure and demonstrated a complete lack of understanding of basic security in a prison setting. An officer simply does not hand over her security tools (e.g., keys, pepper spray, tasers, and radios) to inmates. It is unknown what would have happened with the radio had officers not witnessed the event and

intervened. Both Officer Bray and Officer Howell testified that they witnessed this event. Officer Bray and Howell are credible. Their courtroom demeanor was calm. Their version of events is reasonable. They were both within range to view the event. Their story was consistent with the written statements they made within days of the incident and their story did not change under cross examination.

Grievant admitted at her March 7, 2018, predetermination meeting that she handed the radio to someone so that he could fix it, but she did not know whether that someone was an inmate or an officer. This statement is troubling. If true, Grievant was admitting to being unable to distinguish inmates from officers even though uniforms make each readily distinguishable and to handing her radio to a stranger without being certain it was an officer rather than an inmate. At the level three hearing, Grievant contradicted this earlier statement by testifying that she never put the radio in the inmate's hands, since the inmate refused to take the radio and informed her that he was an inmate. Grievant also testified at the same hearing that she was upset and crying during the event. This is also troubling in that it shows Grievant making important security decisions while upset and flustered, a mindset not suited for a Correctional Officer.

On February 9, 2018, Grievant engaged in misconduct when she disregarded her chain of command and Lieutenant Carla McCauley's instructions to not contact staff about the status of inmate visitation. Lt. McCauley testified that on February 8, 2018, she told Grievant that the inmates would get their requests processed and answered through the inmate mail. Lt. McCauley also told Grievant that these types of inmate requests were a matter that officers were prohibited from handling or relaying to staff and that inmates would find out about their visitation requests by mail. Roberta Murphy testified that on

February 9, 2018, Grievant called her and wanted to know about the status of the inmate visitation requests and became argumentative. Grievant indicated to Ms. Murphy her dissatisfaction with Lt. McCauley's answer. Grievant did not deny that she made these calls or that she ignored Lt. McCauley's instructions to not make these requests for inmates. Rather, she explained her behavior as "humanitarian" and indicative of her passion for not keeping inmates waiting for their mail or visitation. Lt. McCauley and Murphy were credible. Their versions were consistent with one another and with Lt. McCauley's contemporaneous memo to Captain Dodd and did not conceal an ulterior motive.

The evidence shows that on September 21, 2017, Grievant went to cover a security post without first picking up a radio. Grievant's failure to get a radio before assuming her post raises concerns about her basic understanding of security and is a basis for unsatisfactory performance. Correctional officers should automatically pick up a radio at the start of their shift. Corporal Theresa Bohon testified that she received a call from Grievant that she needed a radio and that, when asked why she did not have a radio, Grievant answered that she did not think she needed one. Grievant testified that she failed to pick up a radio, offering excuses that she had been told that she did not need to have a radio and that she did not realize until she got to her post that she did not have a radio. Grievant's excuses are inconsistent and are an obvious attempt to cover her blunder. Corporal Bohon's version is consistent and credible. Unlike the Grievant, she had no motive to be untruthful. Her testimony is consistent with her written statement from September 27, 2017.

The record shows that the above events occurred after Grievant received her EPA2 evaluation on September 16, 2017, when Captain Daniel Bailey informed her that her performance did not meet expectations and that she would not become a permanent employee if it did not improve. Grievant was informed that her "performance development needs" included becoming more familiar with policies, procedures, and post orders, and to communicate effectively with supervisors and other staff regarding development and facility issues. Captain Bailey was a credible witness and showed no apparent motive for fabrication.

Respondent has proven that, prior to September 16, 2017, Grievant engaged in misconduct when she failed to follow orders concerning the dress code for correctional officers. Grievant had to be counseled several times about wearing earrings in violation of policy. Corporal Farley testified that he spotted Grievant wearing earrings, that he told Grievant that earrings were not permitted and to remove them, only to find Grievant still wearing earrings three hours later during the same shift. Corporal Farley had to counsel Grievant again and provided her with a copy of Director's Protocol 304. Captain Dodd testified that she also observed Grievant wearing earrings and that she told Grievant that earrings are not permitted, watched Grievant remove the earrings, and later discovered Grievant wearing the earrings again a short time later. She also subsequently saw Grievant wearing sticker earrings and told her to remove them. Both Corporal Farley and Captain Dodd were credible. Their version of events remained consistent. They had no motive to lie. Grievant was non-compliant with direct orders from her superiors to remove her earrings, put them back on during the same shift, and then displayed brazen defiance

in showing up on a subsequent shift wearing sticker earrings. Grievant did not deny Respondent's version or offer any evidence of her own.

Respondent has proven that on September 14, 2017, Grievant was required to call in count and failed to do so. Count guidelines are outlined in Operational Procedure # 305.00. Kathy McKinney testified that Grievant was made aware of the number of inmates in the building in anticipation of count, would have heard the 10:30 a.m. radio call for count that the other staff in the building heard, and failed to call in count, resulting in a miscount for the facility. She testified that Grievant took the significance of her oversight lightly when confronted. She testified that Grievant had been counseled that it was her responsibility to do count as officer in charge of the building after she failed to call in count on a different occasion a few days prior. Ms. McKinney was credible and her testimony was consistent with the written statement she made on the day of the incident. Grievant did not deny Respondent's version or offer any evidence of her own.

Some of Grievant's conduct rose to the level of insubordination. While insubordination is not a necessary element of either unsatisfactory performance or misconduct, Grievant's insubordination contributes to the undersigns determination that some of her behavior was misconduct. "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll*., 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (per curiam). This Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for

implied directions of an employer." *Sexton v. Marshall Univ*., Docket No. BOR2-88-029-4 (May 25, 1988), *aff'd, Sexton v. Marshall University*, 182 W. Va. 294, 387 S.E.2d 529 (1989). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). Grievant willfully failed to obey multiple reasonable and valid orders that she remove her earrings as well as orders that she not ask for updates on behalf of inmates regarding their visitation requests. The flagrant nature of her disregard of these orders manifested itself through her ignoring, arguing with, and defying these orders, going as far as wearing sticker earrings.

Grievant implies in her grievance that Respondent's actions in terminating her were arbitrary and capricious. Respondent's dismissal of Grievant for unsatisfactory performance and failure to follow policy, procedure, instructions, and practices was within its discretion. "[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). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (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), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

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. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ*., 210 W. Va. 105, 556 S.E.2d 72 (2001) (per curiam). "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), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct., Docket No. 01-AA-161 (July 2, 2002), appeal refused, W.Va. Sup. Ct. App., Docket No. 022387 (Apr. 10, 2003).

Grievant was informed in writing of her performance deficiencies and her need to improve overall performance. Grievant did not improve her performance. Grievant instead reported to her post without a radio, handed over her radio to an inmate, and disregarded the instructions of supervising officers on a number of occasions. Respondent lost all trust that Grievant could be relied upon to exercise sound judgment

and carry out her responsibilities as a Correctional Officer. Respondent's decision to dismiss Grievant was not arbitrary or unreasonable.

Grievant also made allegations of harassment, hostile work environment, and age discrimination. As none of these allegations involve discipline, Grievant bears the burden of proof. Grievant provided scant testimony regarding these claims, offered no corroborating evidence or cross examination, and did not request any relief relevant to these claims.

Grievant only raised her concerns regarding harassment, hostile work environment, and discrimination after she was terminated. She presented no evidence as to when these incidents occurred and gave no specifics other than the following tidbits paraphrased from her grievance: that Grievant hurt her leg on the job; that even after her doctor restricted her going up the steps more than once every two hours, Respondent forced Grievant to work the assigned units and use steps every half hour; that, when Grievant brought this to Respondent's attention, they ignored her request and said she was being argumentative; that a supervisor yelled at Grievant and accused her of not reporting to her post; that Respondent forced Grievant to work in wet clothes for almost 4 hours on one occasion; and that Respondent refused to accommodate Grievant's work related injury. Grievant testified that everything went downhill after her superiors found out she was 62 years old.

This Board has held that "[m]ere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Trs./W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998) (citing *Harrison v. W. Va. Bd. of Drs./Bluefield State Coll.,* Docket No. 93-BOD-400 (Apr. 11, 1995)). Grievant failed to give any testimony or

to provide any evidence regarding these allegations. Nevertheless, we will analyze each of these claims.

"'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove: (a) that he or she has been treated differently from one or more similarly-situated employee(s); (b) that the different treatment is not related to the actual job responsibilities of the employees; and, (c) that the difference in treatment was not agreed to in writing by the employee. *Frymier v. Higher Education Policy Comm'n,* 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp., Docket No*. 2008-1594-DOT (Dec. 15, 2008). Grievant did not present any evidence showing that she was treated differently from a similarly-situated employee. The extent of her evidence was her testimony that Respondent discriminated against her due to her age, i.e., Respondent ignored the physical restrictions imposed by her doctor by telling her that she was being difficult and argumentative and that everything went downhill after her superiors found out she was 62 years old. Grievant did not present any documents showing the nature of her injury and the restrictions imposed by her doctor, let alone proof that she presented these to Respondent. The facts established in the record do not prove discrimination by a preponderance of the evidence.

"'Harassment' means repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." W. VA. CODE § 6C-2-2(l). "What constitutes harassment varies based upon the factual

situation in each individual grievance." *Sellers v. Wetzel County Bd. of Educ*., Docket No. 97-52-183 (Sept. 30, 1997). DOP's Prohibited Workplace Harassment Policy defines Nondiscriminatory Hostile Workplace Harassment as: [a] form of harassment commonly referred to as "bullying" that involves verbal, non-verbal or physical conduct that is not discriminatory in nature but is so atrocious, intolerable, extreme and outrageous in nature that it exceeds the bounds of decency and creates fear, intimidates, ostracizes, psychologically or physically threatens, embarrasses, ridicules, or in some other way reasonably overburdens or precludes an employee from reasonably performing her or his work. *Id*. at Section II. H. "'To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment.' *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998). *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006). "As a general rule 'more than a few isolated incidents are required' to meet the pervasive requirement of proof for a hostile work environment case. *Fairmont Specialty Servs., v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 522 S.E.2d 180 (1999), citing *Kinzey v. Wal-Mart Stores, Inc*., 107 F.3d 568, 573 (8th Cir. 1997)." *Marty v. Dep't of Admin*., Docket No. 02-ADMN-165 (Mar. 31, 2006).

Grievant alleged that her superior yelled at her and that she was made to work in wet clothing for a four-hour period. Grievant did not provide any specifics or evidence regarding being yelled at or compelled to work in wet clothes and failed to specify any relief. Because Grievant did not offer specifics regarding her allegation that Respondent made her work in wet clothing, the undersigned is unable to determine that this incident either occurred or constituted harassment or hostile work environment. Grievant did not

sufficiently develop her claim that she was yelled at by her superior and the undersigned is therefore unable to determine that it occurred or constituted harassment or hostile work environment. Without more detail, these alleged incidents are too isolated to meet the requirement for hostile work environment.

Grievant failed to put forth any evidence that her performance was satisfactory. She was difficult, rude, and belligerent from the beginning of her employment. She refused to follow orders and committed serious security breaches. Respondent proved that Grievant committed misconduct. Grievant failed to prove her allegations of a hostile work environment, harassment, and age discrimination.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). In disciplinary matters, the burden of proof rests with the employer to prove that the action taken was justified, and the employer must prove the charges against an employee by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3. "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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct., Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. 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 by a preponderance of the evidence that his services were satisfactory. *Bonnell v. 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). 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.,* 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).

3. The Division of Personnel's administrative rule describes the probationary period of employment 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. (2016). 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).

4. Division of Personnel's administrative rules establish a low threshold to justify termination of a probationary employee. *Livingston v. Dep't of Health and Human Res*., Docket No. 2008-0770-DHHR (Mar. 21, 2008).

> A probationary employee is not entitled to the usual protections enjoyed by a state employee. The probationary

> period is used by the employer to ensure that the employee will provide satisfactory service. An employer may decide to either dismiss the employee or simply not to retain the employee after the probationary period expires.

Hammond v. Div. of Veteran's Affairs, Docket No. 2009-0161-MAPS (Jan. 7, 2009) (citing *Hackman v. Dep't of Transp*., Docket No. 01-DMV-582 (Feb. 20, 2002)).

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. "'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove: (a) that he or she has been treated differently from one or more similarly-situated employee(s); (b) that the different treatment is not related to the actual job responsibilities of the employees; and, (c) that the difference in treatment was not agreed to in writing by the employee. *Frymier v. Higher Education Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp*., Docket No. 2008-1594-DOT (Dec. 15, 2008).

7. "'Harassment' means repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." W. Va. Code§ 6C-2-2(l).

8. "'To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment.' *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998). *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006). "As a general rule 'more than a few isolated incidents are required' to meet the pervasive requirement of proof for a hostile work environment case. *Fairmont Specialty Servs., v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 522 S.E.2d 180 (1999), *citing Kinzey v. Wal-Mart Stores, Inc*., 107 F.3d 568, 573 (8th Cir. 1997)." *Marty v. Dep't of Admin.*, Docket No. 02-ADMN-165 (Mar. 31, 2006).

9. Respondent has proven each of the alleged infractions by a preponderance of the evidence.

10. Respondent has proven by a preponderance of the evidence that Grievant engaged in misconduct.

11. Grievant did not prove by a preponderance of the evidence that her performance was satisfactory.

12. Grievant did not prove by a preponderance of the evidence that Respondent created a hostile work environment, harassed her, or discriminated against her.

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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: September 27, 2018

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Joshua S. Fraenkel
Administrative Law Judge