THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TERRY HAYHURST,

Grievant,

v. **Docket No. 2019-1391-DOT**

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant, Terry Hayhurst is employed by Respondent, Division of Highways. On April 2, 2019, Grievant filed this grievance against Respondent. On April 24, 2019, Grievant filed an amendment, stating, in part, the following:

> I was told on March 29, 2019 by Anthony Palletta, HR Director in District 4 that I was terminated in my position not because of any wrongdoing, not because of any disciplinary issues, and no policies nor rules were ever broken nor ignored but that "I was not a fit for this job." It was the recommendation of Darby Clayton, who chose not to be present to tell me by himself, in person, that this was my last day. I will add that Mr. Palleta also stated that "you did your job and you are a good man, a gentleman and everyone liked you. However you are "not a fit."
>
> I have attached the allegations in the letter I was given on March 29, 2019.
>
> The first allegation says that I failed to set up safety meetings and training and notices. No one took the time to question the 6 county supervisors to validate that I did indeed perform this request.
>
> The second allegation is that I failed to answer TMC about a road incident on I 79 while at a training meeting. Again, I asked for specific date, time, location and the witness who claims that I refused to take the call out. Once again, no one would respond with facts to substantiate that claim.

> Lastly, the claim was that I "failed to provide TMC a way to contact me about accidents" – TMC has company phone as well as my home phone. TMC has a complete record of every call made to me and record of my response to them. Yet, no one seemed willing to contact TMC [to] verify my response. I find it insulting to say I was not available. I have my own documents of times, dates, actions taken. I was also taking these callouts within a month after my hiring date, and several of them involved fatalities. Yet Mr. Clayton said "TMC had no way of contacting me" I can assure you, when you contact them they will give you that information.
>
> This is my life and reputation that is on the line. I never missed a day and never failed to show up for work ready and prepared. I can supply witnesses who will testify in my behalf.

For relief, Grievant seeks, in part, the following:

> Reinstated as an employee of Department of Highways District 4 with back pay and benefits. Also, if reinstated, no threat of Retaliation from the District Engineer due to this request.
>
> A full explanation from Anthony Palatti (sic) and Darby Clayton to what did "not a fit" for this job meant and also, why I was not offered other positions. Protected classes in civil rights documents prevent using this as reason for termination for AtWill employees

Grievant filed directly to level three of the grievance process.[1] A level three hearing was held on July 24, 2019, before the undersigned at the Grievance Board's Westover office. Grievant appeared in person and *pro se*.[2] Respondent appeared through its party representative, Darby Clayton, and by, Jesseca Church, Esq. This

[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.

[2]"*Pro se*" is translated from Latin as "for oneself" and in this context means one who represents oneself in a hearing without a lawyer or other representative. BLACK'S LAW DICTIONARY, 8th Edition, 2004 Thompson/West, page 1258.

matter became mature for decision on August 23, 2019, after receipt of each party's written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed on a probationary basis by Respondent, Division of Highways, as an Occupational Safety Specialist. Respondent terminated Grievant for infractions that amount to unsatisfactory performance. Grievant contests these allegations and implies that termination is too severe. Grievant did not meet his burden of proving that his performance was satisfactory or that mitigation of termination is warranted. Accordingly, this 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 on a probationary basis by Respondent, West Virginia Division of Highways (DOH), in District 4 as an Occupational Safety Specialist (OSS) 1.

2. Grievant was so employed from October 1, 2018, through March 2019.

3. Darby Clayton is the District Engineer/Manager for DOH's District 4 and was Grievant's direct supervisor.

4. Anthony Paletta is the Administrative Service Manager for Respondent's District 4 and met with Grievant monthly to discuss areas of improvement. (Testimony of Mr. Paletta)

5. Occupational Safety Specialists within the DOH have a variety of responsibilities and duties, which include conducting safety inspections, holding safety

meetings, responding to roadway accidents, ensuring compliance with Federal and State workplace safety requirements, preparing reports, and keeping accurate records. An OSS is also required to be on call 24/7 for emergencies. (Testimony of Mr. Clayton and Mr. Paletta)

6. During his job interview, Grievant was made aware of the OSS position duties, including the critical task of being on call for emergency callouts outside of normal work hours. (Respondent's Exhibit 2 & testimony of Mr. Clayton and Paletta)

7. Grievant was immediately provided a working phone when he started in the OSS position. (Testimony of Mr. Paletta)

8. Sarah Marsh is an OSS 2 for DOH's District 7 and provided training and guidance to Grievant. (Testimony of Ms. Marsh)

9. Grievant was also made aware of his OSS duties through orientation. (Testimony of Ms. Marsh)

10. On November 26, 2018, Mr. Clayton again informed Grievant of his job duties through an Employee Performance Appraisal Form EPA-1, which states: "Administers the district Occupational Safety Program to ensure compliance with Federal and State workplace Safety Requirements. Ensures hazardous wastes are disposed of in accordance with applicable regulations. Prepare reports and keep records of all investigations and inspections. Develop and conduct employee Safety Training programs, conduct monthly Safety Meetings with employees. Perform field reviews of employee work practices, evaluate work sites for hazardous conditions. Study and be familiar with Federal and State safety requirements[.] Conduct monthly safety meeting in a professional manner being courteous but firm when necessary[.] Inspect DOH Facilities,

Equipment, and Employees at work at least once a month[.] You are to respond to Traffic Accidents on major routes, especially on the 4-Lane. Collect necessary information and forward to appropriate personnel[.] Review Worker's Comp. forms for accuracy. Each year complete the calculation for the State Safety Awards[.] Assist with Equipment Roadeo (sic) and yearly SRIC Dry Runs[.] Complete training to conduct training in Flagging, Chain Saw, ALICE, Etc." (Respondent's Exhibit 2)

11. Mr. Clayton reviewed Grievant's job duties with him during their monthly meetings and provided details through a printout entitled "Job Duties Described During Safety Officer's Interview". These regular meetings to review job duties are not typical. Grievant failed to fully comprehend his job duties even after attending numerous meetings for this purpose. (Testimony of Mr. Clayton)

12. Bill Keller is an OSS 2 for Respondent's District 5 and provided training and guidance to Grievant. (Testimony of Mr. Keller)

13. Judy VanPelt is the Training Coordinator for Respondent's District 4 and kept Grievant informed of trainings Grievant could attend if he had no other duties. Ms. VanPelt provided training and assistance to Grievant on issues such as completing forms, filing paperwork, and phone and computer usage. (Testimony of Ms. VanPelt)

14. Grievant was provided with on the job training and resources so he could fulfill his job responsibilities. In addition to monthly counseling from Mr. Clayton, Grievant was provided with thumb drives filled with work plans, PowerPoints, lesson plans, electronic forms, and samples. (See testimony of Ms. Marsh, Mr. Keller, Mr. Clayton, Ms. VanPelt, and Mr. Paletta)

15. Ms. VanPelt showed Grievant how to use the thumb drives. She informed Grievant that she was available to assist him and answer questions and told him of training opportunities that would help him succeed in his job. (Testimony of Ms. VanPelt)

16. During his training with Ms. Marsh, Grievant demonstrated a lack of knowledge about basic safety equipment and procedures Ms. Marsh expected Grievant to know. (Testimony of Ms. Marsh)

17. Charles "J.R." Crouse is the Equipment Supervisor for Respondent's District 4 and provided training, guidance, and support to Grievant. Mr. Crouse was also the backup for the OSS position in Respondent's District 4.

18. Grievant told coworkers he was uncomfortable doing emergency callouts, that he did not like overtime, and that the primary reason he accepted the OSS position was the benefits package associated with State employment. (Testimony of Ms. Marsh, Ms. VanPelt, and Mr. Crouse)

19. Even after shadowing Mr. Keller on four or five accident scene callouts, Grievant could not manage an accident scene on his own. (Testimony of Mr. Keller)

20. OSS employees are expected to learn on the job. Some OSS employees receive their first callout within weeks of starting on the job. (Testimony of Ms. Marsh)

21. On October 7, 2018, Grievant received a callout for a major accident involving a chemical spill on Interstate 68. Yet he remained for a time as an attendee at a training that was clearly unnecessary to his position, even though callout is a significant component of his job duties. (Testimony of Mr. Clayton and Mr. Keller)

22. On March 4, 2018, there was an accident on Interstate 79 involving an overturned fuel tanker to which Mr. Keller was summoned. The Maintenance Assistant

for District 4 attempted to call Grievant so he could attend the accident scene as a training opportunity. Even though the accident lasted for two days, Grievant never responded. (Testimony of Mr. Keller)

23. Mr. Crouse responded at least twice to emergency callouts meant for Grievant. Grievant did not respond immediately to one callout and went to the wrong location in another. (Testimony of Mr. Crouse)

24. Grievant's performance was substandard at other callouts. Grievant slept in his car at one scene. He was turned away from another scene by law enforcement because he did not display a DOH badge or uniform. (Testimony of Mr. Clayton and Mr. Crouse)

25. Grievant approached Mr. Crouse about getting out of callout duty and told him he did not know he would be on call 24/7 when he took the position. (Testimony of Mr. Crouse)

26. Ms. VanPelt occasionally worked radio dispatch afterhours and attempted on multiple occasions to phone Grievant for accident callouts but could only leave voicemail due to Grievant's failure to answer his phone. (Testimony of Ms. VanPelt)

27. In February of 2019, Grievant received an EPA-2 evaluation from Mr. Clayton, rating Grievant as "FAIR, BUT NEEDS IMPROVEMENT". The EPA-2 noted areas for improvement, including: "Needs to notify the DE of Safety Meetings with organizations, dates and times. Conduct Safety Meetings as a group setting not with individual employees, and according to the set up established by Charleston. Be available for call outs. When called out by TMC or District personnel be present at call out

site when a sizable incident. Communicate information to employees according to how policy reads. (Respondent's Exhibit 3)

28. Mr. Clayton determined that Grievant did not show necessary improvements after receiving his EPA-2. (Testimony of Mr. Clayton)

29. Over the course of his time in the OSS position, Grievant conducted numerous safety meetings with employees. (see testimony of DOH County Administrators John Cario and Billy Lamb and coworkers Larry Weaver, Ron Cumpston, and Bob Suan)

30. However, there were times Grievant was unprepared for safety meetings, did not use an outline, and simply delivered random thoughts. (Testimony of Mr. Clayton)

31. Grievant failed to schedule safety meetings through the DOH calendar system even after Mr. Paletta showed him how to utilize the calendar system. (Testimony of Mr. Paletta and Mr. Clayton)

32. Despite multiple requests from his direct supervisor, Grievant never provided Mr. Clayton with a calendar event of safety meetings. (Testimony of Mr. Clayton)

33. Grievant was provided every opportunity for assistance and training necessary to succeed as an OSS. (Testimony of Mr. Clayton)

34. On March 29, 2019, Respondent sent Grievant a letter terminating his employment due to his failure "to meet performance standards during [his] probationary period" as manifested in his failure to "set up safety meetings in districts and send out calendar notices of when training meeting in organizations were scheduled", failure to "report a major accident on I-79 during which the road was closed for an extended period", and "failure to provide TMC a way to notify [him] about accidents". (Respondent's Exhibit 4)

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 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). "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 undisputed that Grievant was a probationary employee and that the allegations on which Grievant's termination was based constitute unsatisfactory performance rather than misconduct. This grievance therefore involves a non-disciplinary matter and Grievant has the burden of proof. Grievant contends that his termination for unsatisfactory performance was not justified, given Respondent's failure to properly train him or make him aware of the extent of his job duties. Grievant asserts that Respondent terminated him in retaliation to his request for help. Grievant implies that his termination

warrants mitigation due to the significant improvement in his performance prior to termination, Respondent's failure to properly prepare him for his job, and his lack of prior discipline. Respondent counters that it has much leeway in terminating probationary employees, so long as it does not do so in an arbitrary and capricious manner. Respondent contends that Grievant's poor performance made termination reasonable.

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).

Because Grievant was a probationary employee, Respondent had the authority to terminate him without adhering to the normal employee protection protocol for state employees. 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)).

"[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). "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). 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).

Respondent presented evidence that it provided Grievant adequate resources to succeed but that his performance was unsatisfactory. Grievant provided no contravening evidence or testimony, even after the undersigned explicitly gave him an opportunity to testify. Respondent cited three examples of Grievant’s unsatisfactory performance in its termination letter. The first was that Grievant failed to “set up safety meetings in districts and send out calendar notices of when training meeting in organizations were scheduled”. Witnesses uniformly contradicted the first part of this allegation in testifying that Grievant held safety and training meetings in various DOH county offices. Even Respondent’s party representative, Mr. Clayton, testified that he observed Grievant conduct a safety meeting, noting that Grievant seemed unprepared, did not use an outline, and simply delivered random thoughts. In testifying that Grievant failed to timely text him about upcoming meetings and failed to place them on the calendar even after being trained how to do so, Mr. Clayton implied that Grievant’s infraction was failure to notify him of meetings rather than failure to conduct them. Grievant’s failure to include meetings on the calendar and timely notify Mr. Clayton qualifies as unsatisfactory performance.

The letter also states that Grievant failed to “report a major accident on I-79 during which the road was closed for an extended period”. This appears to be another unintentional misstatement of Grievant’s poor performance, as there was no evidence or testimony that Grievant failed to report this accident. There was, however, testimony that Grievant failed to report to an accident to shadow another OSS for training purposes.

Grievant did not present any contravening evidence or testimony. This failure to report to an accident qualifies as unsatisfactory performance.

The letter further states that Grievant failed "to provide TMC a way to notify [him] about accidents". This also appears to be an unintentional misstatement, as the evidence and testimony presented by Respondent showed that it provided Grievant a phone before attempting to contact him for callouts, but that Grievant did not answer or return calls. Grievant did not present contravening evidence and testimony, only allegations and denials in his pleadings and post hearing proposal. This routine failure to answer or return phone calls qualifies as unsatisfactory performance.

The letter alludes to other infractions when it states that the determination of unsatisfactory performance was not limited to the three stated incidents. Respondent presented testimony about these other incidents. These include Grievant's failure to adequately prepare for his safety meetings, being asleep in his car at an accident scene, being turned away from an accident scene because he did not have a DOH badge or uniform, not immediately leaving an unnecessary training he was observing upon receiving an accident callout, not answering his phone or returning voicemails for accident callouts, and not comprehending job duties even after numerous meetings with Mr. Clayton to review them. In spite of the low threshold for terminating probationary employees, Respondent provided strong justification for terminating Grievant in proving that Grievant's performance was unsatisfactory. The evidence shows that Respondent acted reasonably in terminating Grievant.

Grievant presented no evidence or testimony refuting any of the above incidents but did counter some of them in his pleadings and Proposed Findings of Fact and

Conclusions of Law. The undersigned can give no evidentiary value to allegations that are unsupported by testimony and evidence. "Mere 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)). Similarly, the undersigned can give no evidentiary value to Grievant's refutations that are simply made in pleadings, but which are unsupported by testimony and evidence.

Grievant contends that Respondent retaliated against him as a result of his request for assistance. "No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination." W.VA. CODE § 6C-2-3(h). Reprisal is defined as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W.VA. CODE § 6C-2-2(o).

"In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a *prima facie* case." *Freeman v. Fayette Cty. Bd. of Educ*., 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). In syllabus point six of *Freeman*, the West Virginia Supreme Court of Appeals specifically applied the same elements required to prove a *prima facie* case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating,

> [T]he burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant

> engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

Id., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (*citing* Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1*, Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)). Grievant first raised the issue of retaliation in his Proposed Findings of Fact and Conclusions of Law and did not present any evidence at the hearing in support of a *prima facie* case of retaliation. Thus, he both failed to provide Respondent notice of this claim and to prove it.

Grievant contends that his termination is excessive, given his insufficient training, gradual improvement in performance, and lack of prior discipline. In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ*., Docket No. 95-54-041 (May 18, 1995) (citations omitted). The Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch*

Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). "Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute his judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ*., Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ*., Docket No. 97-06-150 (Oct. 31, 1997)." *Meadows, supra*.

As previously discussed, termination of a probationary employee for unsatisfactory performance is not disciplinary action. Grievant cited no authority for the proposition that the undersigned has the authority to mitigate non-punitive measures by an employer. Further, he did not prove any alternate ground, such as retaliation, that could justify a mitigation type of remedy. Regardless, Grievant failed to prove that termination was an excessive response to his unsatisfactory performance as a probationary employee. The undersigned therefore will not substitute Respondent's judgment with his own. 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 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). "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. 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).

3. 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)).

4. "[W]hile an employer has great discretion in terminating a probationary employee, that termination cannot be for unlawful reasons, or arbitrary or capricious. *McCoy v. W. Va. Dep't of Transp*., Docket No. 98-DOH-399 (June 18, 1999); *Nicholson v. W. Va. Dep't of Health and Human Res*., Docket No. 99-HHR-299 (Aug. 31, 1999)." *Lott v. W. Va. Div. of Juvenile Serv*., Docket No. 99-DJS-278 (Dec. 16, 1999).

5. "No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination." W.VA. CODE § 6C-2-3(h). Reprisal is defined as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W.VA. CODE § 6C-2-2(o).

6. "In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a prima facie case." *Freeman v. Fayette Cty. Bd. of Educ*., 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). In syllabus point six of Freeman, the West Virginia Supreme Court of Appeals specifically applied the same elements required to prove a prima facie case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating,

> [T]he burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was

> subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

Id., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (*citing* Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)).

7. In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ*., Docket No. 95-54-041 (May 18, 1995)(citations omitted). The Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996). "Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute his judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ*., Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ*., Docket No. 97-06-150 (Oct. 31, 1997)." *Meadows, supra*.

8. 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, the grievance is **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The civil action number should be included so that the certified record can be properly filed with the circuit court. *See also* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: September 20, 2019

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Joshua S. Fraenkel
Administrative Law Judge