THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JASON STRICKLAND,

Grievant,

v. **Docket No. 2019-0293-DOR**

WEST VIRGINIA LOTTERY,

Respondent.

DECISION

Grievant, Jason Strickland, filed an expedited level three grievance[1] dated August 23, 2018, against his employer, Respondent, West Virginia Lottery, stating as follows: "I was given an EPA 3 on 8/9/2018 stating I did not meet expectations. I have never received coaching about my job performance. On 8/10/2018, I was given an EPA 2 stating the same thing. Now on 8/22/2018, I was handed a blank EPA1 and told to sign it. I refused to sign a blank form." As relief sought, Grievant asks "I feel that I needed to have notice of coaching if my work was unacceptable. I had no idea and these EPAs wer[e] my first notice. I feel that this is being done because I am ready to get off probation. I would like these changed to verbal notices with an opportunity to improve."

The level three hearing was conducted on November 8, 2018, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person, *pro se*. Respondent appeared by counsel, Cassandra L. Means, Esquire, Assistant Attorney General. This matter became mature for decision on December 14, 2018, upon receipt of the Respondent's proposed Findings

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

of Fact and Conclusions of Law. Grievant did not avail himself of the opportunity to submit proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed as a probationary employee by Respondent. Respondent dismissed Grievant for unsatisfactory work performance. Grievant argued that his work performance was satisfactory, and that he should not have been dismissed from his employment. Grievant also alleged that the manner by which he was dismissed violated rules. Respondent denied Grievant's claims. Grievant failed to prove by a preponderance of the evidence that his work performance was satisfactory. Grievant also failed to prove by a preponderance of the evidence that Respondent violated any rule in dismissing him from employment by telephone. Therefore, the grievance is DENIED.

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

Findings of Fact

1. Grievant was employed by Respondent as a Custodian at The Lottery Building. Grievant began working for Respondent on March 28, 2018. At all times relevant herein, Grievant was a probationary employee.

2. Steve Compston is employed by Respondent as the Maintenance and Security Manager. Mr. Compston was Grievant's direct supervisor. However, Mr. Compston did not work with Grievant during his shift. Instead, a lead worker, Rick Coleman, worked during Grievant's shift.

3. The Lottery Building is located in Charleston, West Virginia. Respondent serves as landlord of the facility. Multiple state agencies are tenants of the facility such

as, the Alcohol Beverage Control Administration, Racing Commission, State Athletic Commission, and the Municipal Bond Commission. Respondent provides its tenants with custodial, maintenance, and security services.

4. The Lottery Building has common areas on the sixth floor that can be utilized by all tenants including a cafeteria, workout room with showers and restrooms, public restrooms, and hallways.

5. At the time Mr. Compston hired Grievant as a Custodian, he also hired several other custodians. At first, Grievant and the others cleaned together as a crew. Later, they were divided up, and each was assigned to clean areas on separate floors. Grievant normally worked from 4:00 p.m. until 12:00 a.m.

6. For a brief time after his hiring, Grievant worked as a mail runner for Respondent during regular business hours, and was not assigned to clean. Grievant was hired as a custodian, though. Being a mail runner did not work out for Grievant and he was returned to his cleaning duties on his regular shift.

7. Grievant's starting hourly wages were set at an amount higher than the usual starting rate because Grievant had six years of custodial experience. Grievant's duties included emptying trash, vacuuming, sweeping, mopping, cleaning restrooms, and dusting.

8. In or about July 2018, after the custodians were split up and assigned different areas of the building to clean, Grievant was assigned to clean the sixth floor common areas, such as the cafeteria, restrooms, workout room, showers, and the hallways. Until this time, Grievant had only cleaned as a member of the cleaning crew.

9. After Grievant was assigned to the sixth floor, Respondent began to receive complaints about the cleanliness of the sixth floor common areas.

10. On or about July 9, 2018, Mr. Compston verbally counseled Grievant about the cleaning deficiencies he found on the sixth floor common areas. Mr. Compston memorialized this verbal counseling by completing an Employee Performance Appraisal Form EPA-2. On this form, Mr. Compston rated Grievant as "Does Not Meet Expectations," and noted that Grievant needed to pay attention to detail.[2]

11. Sometime in early August, Mr. Compston received a complaint that the showers in the workout room were not clean. Mr. Compston personally verified that the showers were visibly dirty. On August 9, 2018, Mr. Compston did a "special rating," or evaluation, of Grievant for the time period of August 1, 2018, to August 9, 2018. Respondent evaluated Grievant on an EPA-3 form. There is no rating on this form. Nonetheless, Mr. Compston listed Grievant's "responsibilities" as "[c]leaning- Complaint about showers work-out room[;] men's shower room was not adequately cleaned." As Grievant's "performance standards and expectations" as "[t]o clean independently without distracting other employees. Pay particular attention to detail." Both Grievant and Mr. Compston signed this form on August 9, 2018.[3]

12. Mr. Compston evaluated Grievant again on August 10, 2018, as a "special rating" for the period August 9, 2018, to August 10, 2018. Using another EPA-2 form, Mr. Compston rated Grievant as "Does Not Meet Expectations." He noted the following in the "Performance Development Needs" section of the form: "[c]leaning—Shower (mens)

[2] *See*, Respondent's Exhibit 5, July 9, 2018, EPA-2.
[3] *See*, Respondent's Exhibit 6, August 9, 2018, EPA-3.

room in work-out room and floor not clean—directed to sweep 1st floor parking garage." In the "General Comments" section, Mr. Compston stated the following: "[t]o clean independently—attention to detail." Both Mr. Compston and Grievant signed this form.[4]

13. On August 22, 2018, Mr. Compston inspected the sixth floor common areas and found the shower and shower room floor to be dirty. There was visible scum in the shower and hair on the floor. Also, the common areas had not been dusted. There was trash in the napkin dispenser in the cafeteria, the cafeteria floor was visibly dirty in spots, and there was debris on the floor. Mr. Compston did his inspection early in the morning hours following Grievant's shift, but before the building was occupied for regular business hour. Mr. Compston took a number of photographs of the cleaning deficiencies he found.[5]

14. On August 22, 2018, Mr. Compston again evaluated Grievant's performance for the time period of August 10, 2018, to August 22, 2018. For this evaluation, Mr. Compston chose to use an EPA-1 form, and noted thereon that this was a "special rating." In the "Responsibilities" section of the EPA-1 form, Mr. Compston wrote the following: "[t]his employee continues to under perform in his areas of assigned. (sic) The fitness area bathroom and the cafeteria continue to be unsatisfactory." In the "Performance Standards and Expectations" section of the form, Mr. Compston wrote as follows: "Mr. Strickland, after being counseled, refuses to take the initiative to clean or recognize uncleanliness. His unwillingness to perform cleaning duties is insubordinate and disruptive to other employees completing the same tasks on other floors."[6]

[4] *See*, Respondent's Exhibit 7, EPA-2 dated August 10, 2018.
[5] *See*, Respondent's Exhibits 10-15, photographs taken August 22, 2018.
[6] *See*, Respondent's Exhibit 8, EPA-1, dated August 22, 2018.

15. When presented with this form on August 22, 2018, Grievant refused to sign the same. It is noted that Grievant alleges that the form presented to him was blank and that he would not sign for that reason. However, for this form, Mr. Compston decided to type his comments onto the form instead of handwriting them as he did on previous EPAs. Typing the comments in very small font saved so much space, as compared to the earlier EPAs, the boxes appear blank at first glance.[7]

16. During the early morning of August 23, 2018, Mr. Compston, again, went to inspect Grievant's work, and found it to be unsatisfactory.

17. Prior to the start of Grievant's shift on August 23, 2018, Mr. Compston and Terri Martin, Human Resources Manager, telephoned Grievant and conducted a predetermination conference with him. During this predetermination conference, the deficiencies in Grievant's cleaning work were discussed and Grievant was informed that discipline up to dismissal was being considered. Grievant asserted that he lacked the proper supplies to clean the areas.

18. Later on August 23, 2018, Mr. Compston again telephoned Grievant and informed him that he was being dismissed from employment, and that he was not to report to work that day.

19. Grievant's dismissal is detailed in a letter dated August 28, 2018, and states that the dismissal is effective September 8, 2018. The stated reason for Grievant's dismissal is unsatisfactory performance. This letter was signed by then-director Alan Larrick. Ms. Martin directed that this letter, along with Grievant's EPA forms attached, be sent to Grievant by FedEx. Ms. Martin did not personally mail the letter and EPA forms.

[7] *See*, Respondent's Exhibit 8, EPA-1 dated August 22, 2018.

She directed someone else to do so. Grievant did not receive the dismissal letter. All he received was a FedEx envelope containing copies of the EPA forms.[8]

20. Mr. Compston did not provide Grievant with a cleaning checklist or instructions. He expected Grievant to clean independently, recognizing that if something is dirty, one cleans it. However, Mr. Compston discussed Grievant's performance deficiencies with him several times before his dismissal.

21. Respondent performed no evaluations of Grievant prior to July 9, 2018, even though he had been a probationary employee since March 28, 2018. All four evaluations of Grievant's work performance were conducted between July 9, 2018, and August 22, 2018.

22. Mr. Compston was not at work during most of Grievant's normal shift. However, Mr. Compston reviewed security camera footage of the hallway on the sixth floor to see how Grievant was performing his work. Mr. Compston had instructed the custodians to leave their carts in the hallways instead of taking them in the various rooms they were to clean. This way, Mr. Compston could determine how long the custodians were spending in each assigned room and how often they returned to their carts. From what he saw on the footage, Mr. Compston concluded that Grievant was visiting another employee on a different floor for extensive periods of time and/or watching television in a room in his assigned areas instead of performing his duties as directed.

23. Both Grievant and Mr. Compston produced photographs of some of the areas Grievant was assigned to clean. Mr. Compston's photos were close-up shots of

[8] *See*, testimony of Grievant, level three hearing; testimony of Terri Martin, level three hearing.

problems he had found, such as dirt, debris, or trash, on the floor, and dirty areas of floors, in areas supposedly cleaned by Grievant hours before. Grievant's photos were wide-angle shots that showed the rooms, or areas, as a whole. They did not reveal close-up details of the areas. Instead they showed the overall appearance of a clean area.

Discussion

When a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is upon the employee to establish 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). "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 employer has not met its burden. *Id*.

Respondent asserts that it dismissed Grievant from employment for unsatisfactory work performance. Grievant denies Respondent's allegations and asserts that his work was satisfactory. Grievant argues that the lead worker who supervised his work never told him he was doing anything incorrectly, and that he was not given notice that Respondent was not satisfied with his work. Grievant also argued that at times he lacked the appropriate cleaning supplies to properly clean his areas. Lastly, Grievant asserts that Respondent did not follow the correct procedure by dismissing him by telephone.

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

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

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

Dismissal of a probationary employee is addressed in Rule 10.5, entitled "Dismissal During Probation." Rule 10.5.a. states as follows:

> [i]f at any time during the probationary period, the appointing authority determines that the services of the employee are unsatisfactory, the appointing authority may dismiss the employee in accordance with subsection 12.2. of this rule. If the appointing authority gives the fifteen (15) days' notice on

> or before the last day of the probationary period, but less than fifteen (15) days in advance of that date, the probationary period shall be extended fifteen (15) days from the date of the notice and the employee shall not attain permanent status. This extension shall not apply to employees serving a twelve-month probationary period.

W.VA. CODE ST. R. § 143-1-10.5.a. (2016).

"[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).

"'[T]he "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).

As he was a probationary employee, Grievant bears the burden of proving that his work performance was satisfactory. Grievant chose to call no witnesses, other than himself, at the level three hearing, even though he was given the opportunity to call and subpoena witnesses. Grievant introduced as exhibits four photos he had taken of his assigned areas. Grievant asserts that these photos show that his areas were cleaned satisfactorily. These photos show four areas to which Grievant as assigned to clean. The photos are of the cafeteria, shower floor, shower room, and a section of the parking garage. They are shot from a wide-angle, and show an overall perspective of the areas. The pictures show areas that appear clean overall. However, these photos do not show small details or feature close-up shots of any of the areas. Mr. Compston's photos are close-up shots of specific areas, such as unclean corners of floors, or trash on a floor, which could not be seen in Grievant's photos. Grievant had the opportunity to question each of the witnesses called by Respondent. He asked questions of Mr. Compston, but

had no questions for Respondent's other witness, Terri Martin. Neither party chose to call lead worker Rick Coleman as a witness at the level three hearing.

While it appears that Mr. Coleman may have given Grievant the impression that his work was sufficient, Mr. Compston, Grievant's supervisor, had made it known to Grievant in early July that his performance was not. Mr. Compston went on to reiterate this to Grievant one month later on August 9, 2018, and again on August 22, 2018. Certainly, Mr. Compston had made it clear to Grievant that he had not cleaned the bathroom/shower room sufficiently in early August, pointing out soap scum and hair left in the shower. Based upon the photos taken by Mr. Compston on August 22, 2018, Grievant's areas were still insufficiently cleaned. Grievant did not present enough evidence to prove by a preponderance of the evidence that his work performance was satisfactory. While Grievant's own testimony is evidence, it is self-serving, and was not supported by other testimony or much other evidence. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Trustees/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998)(citing *Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995)). Further, given the evidence presented, as well as the low threshold to justify the termination of a probationary employee, the undersigned cannot conclude that the decision to terminate Grievant's employment was arbitrary and capricious, or otherwise unreasonable. Grievant was employed as a custodian. It does not appear that Grievant was cleaning his assigned areas in a manner satisfactory to his supervisor. After his shift, as demonstrated by the photographs Mr. Compston took on August 22, 2018, parts of his assigned areas were found to be unclean. This occurred after Grievant had been

counseled on this issue twice before. As such, Respondent's decision to dismiss Grievant is not unreasonable.

Grievant has asserted that Mr. Compston's decision to dismiss him over the telephone was against the rules, and that he was dismissed because he was getting close to completing his probationary period. Grievant did not specify which rule or policy he claimed had been violated. Rule 12.2 of the Division of Personnel's Administrative Rule, "Dismissal," as referenced in Rule 10.5 as the rule to follow if a probationary employee is dismissed for unsatisfactory performance, states as follows:

> 12.2. Dismissal.
>
> 12.2.a. An appointing authority may dismiss any employee for cause. The appointing authority shall file the reasons for dismissal and the reply, if any, with the Director. Prior to the effective date of the dismissal, the appointing authority or his or her designee shall:
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> 12.2.a.1. meet with the employee in a predetermination conference and advise the employee of the contemplated dismissal, provided that a conference is not required when the public interests are best served by withholding the notice or when the cause of dismissal is gross misconduct;
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> 12.2.a.2. give the employee oral notice confirmed in writing within three (3) working days, or written notice of the specific reason or reasons for the dismissal; and,
>
> 12.2.a.3. give the employee a minimum of fifteen (15) days' advance notice of the dismissal to allow the employee a reasonable time to reply to the dismissal in writing, or upon request to appear personally and reply to the appointing authority or his or her designee. Provided, that fifteen (15) days' advance notice is not required when the public interests are best served by withholding the notice or when the cause of dismissal is gross misconduct. . . .

W. VA. CODE ST. R. § 143-1-12.2(a) (2016).

Nothing in Rule 12.2 prohibits dismissal by telephone. Grievant presented no policy or rule to support his claims. Also, nothing in this rule prohibits conducting a predetermination conference by telephone. The evidence demonstrated that the predetermination was conducted on August 23, 2018, before Grievant's shift was to start. Grievant's unsatisfactory work performance issues were discussed during the conference, and Mr. Compston informed Grievant that discipline up to dismissal was being considered. In response to Mr. Compston's statements about his unsatisfactory performance, Grievant claimed that he lacked the proper cleaning supplies to perform the work. Mr. Compston telephoned Grievant later that same day and informed him that he was dismissed from employment. Mr. Compston further informed Grievant that he was not to report to work that day. Grievant filed this grievance on that same day.

The statements Grievant made on his grievance form in the "Statement of Grievance" and the "Relief Sought" sections indicate that he was certainly aware of his dismissal and that unsatisfactory performance was the reason given by Respondent. However, it does not appear that Grievant ever received the August 28, 2018, dismissal letter. Grievant testified that he received an envelope from FedEx from Respondent, but it only contained copies of the EPAs. Ms. Martin testified that the dismissal letter was to have been mailed to Grievant, along with copies of the EPAs, by FedEx. She did not personally prepare these documents for mailing or mail them. It is likely that the person who was to mail the letter to Grievant made a mistake.

The Administrative Rule requires that Respondent confirm an oral notice of dismissal in writing within three working days. Because Grievant was not mailed the dismissal letter, Respondent did not fully comply with the procedures set forth in Rule

12.2. However, in this situation, it is clear that Grievant had notice of his dismissal and of the reason for such. Grievant was also aware of the grievance process, and he did not miss the opportunity to grieve his dismissal. Therefore, any error caused by Respondent's failure to confirm the dismissal in writing was harmless. Grievant presented no evidence to support his allegation that he was dismissed because he was near completion of his probationary period, not unsatisfactory performance. For the reasons set forth herein, this grievance is DENIED.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. When a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is upon the employee to establish that his services were satisfactory. *Bonnell v. W. Va. Dep't of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. Dep't of Health and Human Res*., Docket No. 2008-0958-DHHR (Mar. 13, 2009). Grievant "is required to prove that it is more likely than not that his services were, in fact, of a satisfactory level." *Bush v. Dep't of Transp.,* Docket No. 2008-1489-DOT (Nov. 12, 2008).

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

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

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

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

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

6. Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *See State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

7. Grievant failed to prove by a preponderance of the evidence that his services were satisfactory. Grievant failed to prove that his dismissal was arbitrary and capricious, or otherwise unreasonable. Further, Grievant failed to prove by a preponderance of the evidence that Respondent violated any rule by dismissing him from employment by telephone.

Accordingly, this Grievance is **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2018).

DATE: February 1, 2019.

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Carrie H. LeFevre
Administrative Law Judge