

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SAMANTHA RENAE COLE,

Grievant,

v.

Docket No. 2020-0823-MAPS

**DIVISION OF CORRECTIONS AND REHABILITATION/
BUREAU OF PRISONS AND JAILS/MOUNT OLIVE
CORRECTIONAL COMPLEX AND JAIL,**

Respondent.

DECISION

Grievant, Samantha Renae Cole, filed an expedited level three grievance against her employer, Respondent, West Virginia Division of Corrections and Rehabilitation, Bureau of Prisons and Jails ("DCR"), Mount Olive Correctional Complex and Jail ("MOCCJ") on January 22, 2020, stating as follows: "I, Samantha Cole, was relieved of my duties from Mount Olive Correctional Complex on terms that I committed a "HATE CRIME" and [I] also believe this is faulty, and a poor judgment. We as a class, thought of this as nothing more than a token of respect to our teacher. We were instructed by Ms. Karrie Byrd to do said gesture. We were suspended before the investigation even started, and I think that is unfair. I never received a copy of this picture, and I did not graduate with class #18[.]" As relief sought, Grievant stated, "[e]mployment Reinstated with Backpay."

A level three hearing was held on August 11, 2020, via Zoom video conferencing, before the undersigned administrative law judge who appeared from the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person, *pro se*. Respondent appeared by counsel, Briana J. Marino, Esquire, Assistant Attorney General. Donald Ames, Superintendent of Mount Olive Correctional Complex, appeared as

Respondent's representative. Mr. Ames, Ms. Marino, and Grievant each appeared from different locations. This matter originally became mature for decision on September 11, 2020. However, as of that date, neither party had submitted proposed Findings of Fact and Conclusions of Law. On September 28, 2020, counsel for Respondent emailed the Grievance Board, copying Grievant on the same, and requested an extension of time for her to submit proposed Findings of Fact and Conclusions of Law. Grievant raised no objections to the request, or otherwise responded to Ms. Marino's email. This ALJ granted the request, and the Grievance Board informed both parties by email on September 29, 2020, that any proposed Findings of Fact and Conclusions of Law were to be mailed on or before October 9, 2020. This matter became mature for decision on October 16, 2020, upon receipt of Respondent's proposed Findings of Fact and Conclusions of Law. Grievant failed to avail herself of the opportunity to submit proposed Findings of Fact and Conclusions of Law for consideration.

Synopsis

Grievant was employed as a probationary employee by Respondent as a Correctional Officer I. While at the West Virginia Corrections Academy for training, Grievant and her classmates began saluting their training instructor, Sergeant Karrie Byrd, with the Nazi salute while saying "Hail Byrd!" Saluting Sgt. Byrd in that manner became the class's regular practice and they even did so for a group photograph prior to their graduation. This photograph was later posted to social media which drew nationwide attention and outrage. After it was confirmed that Grievant participated in the Nazi salute in the group photograph, Respondent dismissed her from employment for misconduct and for failing to report such behavior to her superiors. Grievant denies that she engaged

in misconduct, asserting ignorance of the meaning of the salute and that she had no intent to make an offensive, hateful gesture. Grievant claimed that the gesture was only meant to be a “token” of respect for their instructor. Respondent proved that Grievant’s participation in the Nazi salute was misconduct justifying her dismissal. Respondent failed to prove that Grievant’s failure to report the class making the Nazi salute violated any DCR policy or regulation. Therefore, 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 by Respondent, West Virginia Division of Corrections and Rehabilitation, as a Correctional Officer I at Mount Olive Correctional Complex and Jail. Grievant was a probationary employee. It is unknown when Grievant began her employment at MOCCJ.

2. The West Virginia Division of Corrections and Rehabilitation was created by statute on July 1, 2018. Within DCR are the Bureau of Prisons and Jails, the Bureau of Community Corrections, and the Bureau of Juvenile Services. DCR replaced the Division of Corrections, Regional Jail and Correctional Facility Authority, and Division of Juvenile Services.

3. At the times relevant herein, Betsy C. Jividen was employed as the Commissioner of DCR. Jeff S. Sandy was the Cabinet Secretary of the Department of Military Affairs and Public Safety. Donald F. Ames was the Superintendent of MOCCJ.

4. In the regular course of her duties, Grievant was required to attend the West

Virginia Corrections Academy (WVCA) for training from October 21, 2019 to November 27, 2019. Grievant was a member of the Academy's Class #18.¹

5. At the times relevant herein, Sergeant Karrie Byrd was employed as a training officer at the WVCA.²

6. Sometime while at the WVCA, members of Class #18 began addressing Sgt. Byrd by giving the Nazi salute, or the "siege heil" salute, and yelling "Hail Byrd." This behavior quickly caught on among the class members. Thereafter, the Nazi salute accompanied by "Hail Byrd!" became a regular occurrence and class members actively participated in it.

7. Cadets at the WVCA are taught to identify security threat groups and gangs and the symbols, gestures, and signs they use. These groups include white supremacist groups and gangs.

8. The Nazi salute, also known as the "Hitler salute," or the "siege heil," is recognized world-wide as a reference to Hitler, the Nazi party, hate, racism, antisemitism, white supremacy, and the atrocities committed by the Nazis in the 1930s and 1940s. One does not have to be a scholar to know that this gesture has nothing but negative connotations, to say the least. Since the defeat of the Nazis during World War II, this gesture has been adopted and practiced by white supremacist groups world-wide.

9. No one reported Class #18's practice of using the Nazi salute and "Hail Byrd!" to their superiors or to DCR Administration.

¹ See, Respondent's Exhibit 3, DCR Basic Training Class #18, class photo.

² See, Respondent's Exhibit 1, Investigation Report, pg. 1. Sgt. Byrd's current employment status is unknown.

10. Sgt. Byrd condoned Class #18 using the Nazi salute and “Hail Byrd!” to address her while at WVCA. Sgt. Byrd encouraged such behavior and even reveled in it.

11. WVCA takes a group picture of each of its graduating classes. The photographs are taken on the WVCA grounds and the graduating officers are photographed in their uniforms. It is customary for WVCA to take two photos of the graduating classes, a serious photo and a silly one.

12. Like any other WVCA graduating class, Grievant’s class was photographed in uniform at a WVCA facility on an unknown date. However, in its silly photo, almost every member of Grievant’s class, Grievant included, are shown giving the Nazi salute.³ Based upon the evidence presented, it appears that Sgt. Byrd took the photo and encouraged the members of the class to make the gesture for the same.

13. A WVCA employee added the caption, “Hail Byrd!” to the Nazi salute photo before printing it for dissemination. The photo was printed with both the official Seal of the State of West Virginia and the seal of DCR under the photo, along with “West Virginia Division of Corrections and Rehabilitation Basic Training Class #18 21 October through 27 November 2019.” Thereafter, WVCA staff mailed this photo, and presumably, the “serious” version of the group photo, to the class members in their graduation packets.

14. Grievant did not graduate with Class #18, because she had missed some of the classes.⁴ As such, WVCA did not send Grievant a graduation packet or a copy of the photo.

³ Three members of the class who are sitting in the front row have their right arms up and extended, but have their hands made into fists instead of having their hands outstretched with the palms down.

⁴ Superintendent Ames testified that because Grievant missed classes due to illness, he was going to allow Grievant to make-up those classes on a later date. The photograph was discovered before such could happen.

15. In or about late November 2019, after the photos were disseminated to the members of Class #18, someone posted the Nazi salute photo on social media, where it promptly drew nationwide, if not world-wide, attention and outrage.

16. It was only after the photo was posted on social media that DCR administration and other state officials, including Jim Justice, Governor of West Virginia, became aware of it and learned of Class #18's practice of saluting Sgt. Byrd with the Nazi salute.

17. After being briefed about the Nazi salute photo, Governor Justice directed that all employees in the photograph be terminated from their employment. Cabinet Secretary Jeff Sandy was informed of the Governor's directive, and he then informed DCR administration. It is unknown when the Governor gave this directive or how it was communicated.

18. Despite the Governor's directive, on or about December 2, 2019, DCR began an investigation conducted by Corrections Investigation Division (CID) and Equal Employment Opportunity ("EEO") investigators into the Nazi salute photograph and the circumstances surrounding the same, and to determine whether the actions depicted therein created a hostile work environment.⁵ Steve Berthiaume, then Deputy Director of Investigation Division,⁶ and Traci Facciani, EEO Specialist II, were assigned to conduct this investigation.

19. Pursuant to directions he received from the Commissioner's Office, on December 5, 2019, Superintendent Ames suspended Grievant pending the investigation.⁷

⁵ See, testimony of Steve Berthiaume.

⁶ See, Respondent's Exhibit 1, Investigation Report, pg. 73, blank signature line.

⁷ See, testimony of Donald Ames; Respondent's Exhibit 4, January 9, 2020, letter.

20. The members of Class #18 were employed at different correctional facilities across the state. Following their training at the WVCA, they returned to their respective places of employment. In order to interview all known people of interest for the investigation, Deputy Director Berthiaume and Ms. Facciani conducted some interviews themselves, but also dispatched numerous staff members to the various correctional facilities throughout the state to conduct interviews.⁸

21. According to the investigation report drafted by Mr. Berthiaume, the investigation began on December 2, 2019; however, the report itself is undated.⁹ The last interview mentioned in the report is stated to have been conducted on January 2, 2020. The investigators conducted a total of sixty-one interviews, including some follow-up interviews, during the course of the investigation. It does not appear from the investigation report that Grievant was interviewed.

22. After the Nazi salute photo was posted on social media, DCR received complaints. DCR employees who had nothing to do with the photo received threats to their personal safety simply because they were DCR employees. Some employees had to shut down their social media accounts as a result. Further, after inmates at various correctional facilities learned of the photo, there were some incidents. One such incident involved a group of inmates mocking the Class #18 cadets by giving the Nazi salute themselves.¹⁰

⁸ See, Respondent's Exhibit 1, Investigation Report; testimony of Steve Berthiaume.

⁹ See, Respondent's Exhibit 1, Investigation Report.

¹⁰ See, testimony of Steve Berthiaume; testimony of Lance Yardley, Chief of Operations, Prisons and Jails; testimony of Michael Coleman, Deputy Commissioner for Executive Services; testimony of Donald Ames.

23. DCR employs people of various races, ethnicities, religions, and backgrounds. The resident and inmate populations in the DCR facilities are just as diverse, being described as a “microcosm” of society.¹¹ There are white supremacist and other gangs within the resident/inmate population. The actions of the Class #18 Cadets had the potential to make some residents/inmates feel threatened, and others, empowered with false belief that DCR supported white supremacist ideals. This created a security threat for all DCR employees and for its resident/inmate population.¹²

24. On or about January 9, 2020, the Commissioner’s Office directed Superintendent Ames to conduct a predetermination conference with Grievant. Superintendent Ames complied with the directive and held a predetermination conference with Grievant on January 9, 2020.¹³

25. During the predetermination conference, Grievant was given the opportunity to explain her participation in the Nazi salute as shown in the photograph. Grievant initially denied giving the Nazi salute, but Superintendent Ames showed her a copy of the photo which clearly shows her participating in the salute. In defense of her actions, Grievant told Superintendent Ames that she did not understand the meaning of the Nazi salute or what was wrong with it. She stated that she did not understand why discipline was being considered. She has also asserted that their actions were meant to be a “token” of respect for Sgt. Byrd.

26. At the end of the predetermination meeting, Superintendent Ames informed Grievant that she was being dismissed from employment, effective January 24, 2020, for

¹¹ See, testimony of Michael Coleman.

¹² See, testimony of Steve Berthiaume; testimony of Lance Yardley; testimony of Michael Coleman; testimony of Donald Ames.

¹³ See, Respondent’s Exhibit 4, January 9, 2020, letter.

unacceptable conduct. Superintendent Ames provided Grievant with a dismissal letter further detailing the reasons for her dismissal. This letter states, in part, as follows:

The purpose of this letter is to advise you [of] my decision to dismiss you from your probationary employment as a Correctional Officer 1 with the West Virginia Division of Corrections and Rehabilitation, for your unacceptable conduct during your twelve (12) month probationary period, following the conclusion of an investigation. You were placed on suspension pending investigation on December 5, 2019. . .

On January 9, 2020 at 11:00AM, Donald Ames, Superintendent[,], held a discussion with you regarding the nature of your unacceptable conduct. At that time, it was shared with you that your dismissal from employment was being considered. Your response was: "I was in the picture, but I didn't do the gesture. I did not graduate. I don't know why I am being disciplined.["] After reviewing your response and having considered all the information made known to me, I have decided that your dismissal is warranted.

So that you understand the specific reason for your dismissal I recount the following. (sic) During the course of the investigation it was substantiated that you participated in a class photograph of the Basic Training Class # 18 in which a discriminatory, and offensive gesture was being made. Your participation during this incident was largely based on ignorance, along with a remarkable and appalling lack of judgment. Further, you did not report that this incident had occurred.

During the course of the training you had just completed at the time of the taking of the photograph, you had been taught about the need to eliminate discriminatory workplace environments, the necessity to report unusual incidents, cultural diversity, and the need to recognize and deal with hate groups or security threat groups. It is quite obvious that you did not retain any of the information that was meant to be imparted to you. These are some of the core concepts that we expect cadets to not only retain, but to follow, and ensure the compliance of, in the course of his or her duties.

We expect and demand that our employees act in a way that contributes to an environment of respect and professionalism among our ranks. Messages that reflect hate, intimidation,

and discriminatory beliefs have no place in our workplace, and are incompatible with our mission to protect both our incarcerated population and the citizens of West Virginia.

As a result, the Division of Corrections and Rehabilitation has lost trust and confidence in your ability to satisfactorily perform the duties required of your job. The Division has a statutory duty to protect the public and inmates from harm, and your actions show that you would not be capable of doing such. Therefore, upon evaluation of all information made available to me, I have concluded that your action/lack of action creates a great liability for this agency. Moreover, I have lost complete confidence in your ability to carry out your job duties as expected and required. I have no reason to believe you would follow policy in the future with regard to making decisions that are in the best interest of the public and inmates we are responsible to protect. . .

Having evaluated your work during your probationary period, I have concluded that you have not made a satisfactory adjustment to the demands of your position, nor have you met the required standards of work. . . The State of West Virginia and its agencies have reason to expect their employees to observe a standard of conduct which will not reflect discredit on the abilities and integrity of their employees or create suspicion with reference to their employees' capability in discharging their duties and responsibilities. The nature of your misconduct demonstrates a willful disregard of the employer's interests or a wanton disregard of standards of behavior which the employer has the right to expect of its employees. I believe the nature of your misconduct is sufficient to cause me to conclude that you did not meet an acceptable standard of conduct as an employee of Division of Corrections and Rehabilitation, thus warranting your dismissal. . . .¹⁴

27. Respondent introduced no evidence of any policy or rule requiring its employees to report behavior such as that demonstrated in the Nazi salute photograph to their superiors or DCR administration.

¹⁴ See, Respondent's Exhibit 4, January 9, 2020, letter.

28. Grievant did not call any witnesses to testify at the level three hearing, nor did she avail herself of the opportunity to question many of the witnesses Respondent called in its case-in-chief. Grievant chose not to testify at the level three hearing which is her statutory right. Grievant's decision not to testify has no impact on her credibility.

29. It is unknown what, if any, discipline related to the offensive photo and/or the actions depicted therein, Sgt. Byrd, or any other WVCA employee received. None of those individuals were called to testify at the level three hearing.

Discussion

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 employer has not met its burden. *Id.* In this matter, it is undisputed by the parties that Respondent dismissed Grievant for misconduct. Accordingly, Respondent bears the burden of proof in this grievance.

Respondent dismissed Grievant from her probationary employment for misconduct in that she participated in the practice of saluting a WVCA instructor with the Nazi salute while shouting "Hail Byrd," for giving the Nazi salute in the class graduation

group photograph along with the other members of her class, and for failing to report such behavior to her superiors or DCR administration. Grievant does not deny her actions, but denies knowing what the Nazi salute meant, and argues that she and her classmates meant the gesture to be a “token” of respect for their instructor. Grievant asserts that she should not have been dismissed from her employment.

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. *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). 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).

It is undisputed that Grievant can be seen in the photograph giving the Nazi salute along with the other members of Class #18. Also, it is undisputed that the members of Class #18, including Grievant, routinely addressed Sgt. Byrd with the Nazi salute accompanied by a shout of “Hail Byrd!” Grievant did not report this conduct to her superiors or to anyone in DCR administration. Grievant, largely, presented no evidence during the level three hearing. Grievant made brief arguments in her defense at the level three hearing which were ignorance of the meaning of the salute and that the salute was meant to be a “token” of respect for her academy instructor, Sgt. Byrd.

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).

Grievant chose not to testify at the level three hearing. Such is her right. A grievant may not be compelled to testify in a disciplinary grievance. See W. VA. CODE § 6C-2-3(g)(2). The fact that Grievant did not testify does not negatively impact her credibility whatsoever. There was no lower level proceeding as Grievant filed her grievance directly to level three, and there has been no evidence of any written statement made by Grievant. It does not appear that Grievant was interviewed during the investigation; therefore, there are no statements attributed to her in the investigation report. Accordingly, Grievant's credibility can only be assessed based upon the plausibility of her explanation for her conduct.

This ALJ finds that Grievant's claim of ignorance of the meaning of the Nazi salute to be implausible. Given the notorious nature of the Nazi salute itself, as well as it being made while she and the other class members shouted the words "hail" or "heil," there is simply no way Grievant did not know its association with Hitler. One does not have to be a student of history to know, generally, that Hitler and the Nazis were antisemitic, white supremacists who orchestrated the murder of millions of Jewish people. Moreover, it appears that the salute's connection with Hitler and his ruthlessness and brutality was precisely why Class #18 was using it to address Sgt. Byrd. Consistent with Grievant's argument, the class members meant it to be some kind of warped compliment signifying Sgt. Byrd's toughness as an instructor. The evidence presented suggests that Sgt. Byrd

reveled in Class #18's comparison of her to Hitler. All of this is disgraceful. The fact that Class #18 practiced such disgraceful behavior at all, let alone on duty, in uniform, and while representing the State of West Virginia, is certainly misconduct.

When their misconduct came to light as a result of the photo which bore the state seal, not only did it reflect poorly on the State of West Virginia, but also, it immediately caused a security threat to correctional officers, correctional employees, inmates/residents, and the citizens of West Virginia statewide. Creating a security threat and/or placing the lives of others at risk is certainly misconduct warranting discipline. As Grievant was a probationary employee, Respondent has a great deal of discretion in making the decision to terminate her employment. Given the extremely offensive nature of Grievant's misconduct and the threats and security risks that resulted from the same, the decision to suspend Grievant and then to terminate her employment was not unreasonable, arbitrary and capricious, or otherwise improper.

However, Respondent introduced no policy, regulation, or other rule to establish that Grievant was required to report such conduct to her superiors or to DCR administration. As such, this ALJ cannot find that Respondent proved by a preponderance of the evidence that Grievant violated any rule by her failure to report the members of her class addressing Sgt. Byrd with the Nazi salute and "Hail Byrd," or making the gesture in the group photo.

While Grievant does not use the term "mitigation," she argues that because she did not know what the salute meant when she did it, she should not have been dismissed from employment. In other words, she argues that as she did not give the Nazi salute with any discriminatory, racist, or hateful intent, her dismissal was not appropriate. "[A]n

allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996). "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 Resources/Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004).

"When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of*

Educ., Docket No. 2014-0028-RalED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

Grievant has failed to present sufficient evidence to prove by a preponderance of the evidence that mitigation of her dismissal is warranted. Grievant was a probationary employee who was not entitled to the protections to which a regular, full-time state employee is entitled. Grievant could have been dismissed at any time during her probationary employment, but Respondent could not dismiss her for unlawful or arbitrary and capricious reasons. Respondent's decision to dismiss Grievant for her misconduct as detailed herein was certainly justified and it was not disproportionate to her offense. Given the evidence presented, it is more likely that Grievant knew very well that the salute was a reference to Hitler, the Nazis, and their ruthlessness and brutality, but she just did not know that she could be dismissed for doing it. For the reasons set forth herein, this grievance is DENIED.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. 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 employer has not met its burden. *Id.*

2. The probationary period of employment is “a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program of the agency.” 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. 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).

4. “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). 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)).

6. “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).

7. “[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).

8. “[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was ‘clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action.’ *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).” *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996).

9. “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 Resources/Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004).

10. Grievant failed to prove by a preponderance of the evidence that her dismissal was clearly excessive, that it reflected an abuse of agency discretion, or that

there was an inherent disproportion between the offense and the personnel action taken against her.

11. Respondent proved by a preponderance of the evidence that Grievant engaged in misconduct justifying her dismissal from employment.

12. Respondent failed to prove by a preponderance of the evidence that Grievant's failure to report the cadets giving the Nazi salute during their time at the WVCA and in their group photograph violated any DCR rule or regulation.

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: December 3, 2020.

Carrie H. LeFevre
Administrative Law Judge