

# THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**RONALD K. LUTHER JR.,  
Grievant,**

**v.**

**Docket No. 2020-0559-DOC**

**DIVISION OF NATURAL RESOURCES,  
Respondent.**

## **DECISION**

Grievant, Ronald Luther Jr., was a probationary Natural Resources Police Officer (“NRPO”) employed by Respondent, Division of Natural Resources (“DNR”). Officer Luther filed an expedited grievance to level three pursuant to W. VA. CODE § 6C-2-4(a)(4) dated November 5, 2019, stating the following:

The reason for this grievance is due to differing accounts of the events that occurred on October 5, 2019, including Sgt. Parsons and NRPO Carder.

For relief, Grievant wrote:

To get the bottom of where the events differ from the night of Oct. 5, 2019 and figure out who’s account is incorrect so the facts can be correct on the paperwork.

At the hearing, Grievant clarified that he was contesting his dismissal from employment and seeking reinstatement to his job in a different region.

A level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on February 13, 2020. Grievant appeared *pro se*.<sup>1</sup>

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<sup>1</sup> “*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.

Respondent was represented by Jane Charnock, Assistant Attorney General. The matter became mature for decision on March 11, 2020, upon receipt of Respondent's Proposed Findings of Fact and Conclusions of Law.<sup>2</sup>

### **Synopsis**

Grievant was a Natural Resources Police Officer serving a one-year probationary period. After 42 weeks in the probationary program, Grievant's employment was terminated for unsatisfactory performance. Grievant argued that his job performance was satisfactory, and his training officers were overly critical of every mistake he made. He argues that the hypercritical environment caused him to be tentative in making decisions and uncertain of his actions. Respondent demonstrated that Grievant had not progressed to the point where it was believed he could properly function independently as a NRPO despite significant training and opportunities to improve. Grievant did not prove that his probationary job performance was satisfactory.

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

### **Findings of Fact**

1. Grievant, Ronald K. Luther Jr., was employed by Respondent as a Natural Resources Police Officer. His first day in that position was May 18, 2018.

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<sup>2</sup> After presenting his evidence, Grievant stated that he was finished and requested to leave the hearing. He stated on the record that he waived his right to be present during the presentation of Respondent's evidence. He stated that he had no objection to Respondent presenting evidence in his absence and waived his right to cross examine any witnesses who may testify. At that point, Grievant left the hearing and Respondent presented its case. Grievant was accompanied by his father.

2. All beginning NRPOs are required to complete training at the West Virginia State Police Academy ("Academy"). Grievant started that training on August 27, 2018 and graduated on December 14, 2018.

3. All NRPOs must complete a one-year probationary period after graduation from the Academy which begins on the date the officer is certified by the Law Enforcement Training Subcommittee of the Governor's Committee on Crime, Delinquency and Corrections. Grievant was so certified on December 17, 2018, and his probationary period commenced on that date.

4. After graduation from the Academy, NRPOs go through a training protocol based upon the San Diego police department program established in 1970. DNR implemented its training program in 2002 and has used it continuously thereafter.

5. The training protocol is contained in a manual which includes evaluation guidelines requiring training and assessment from different supervisors. Probationary officers are given training exercises, written exams, and supervised field experience. The training program has three phases.

6. Phase one lasts one or two weeks. It is an orientation period for the officer to become acquainted with personnel in his or her assigned area and become familiar with statutes, as well as policies, rules, regulations and procedures, related to DNR.

7. Phase two usually begins in the third week of the probationary period. This phase of training routinely lasts between fourteen and sixteen weeks. During this phase, the probationary officer is supervised by field training officers ("FTO"). The probationary officer works through scenario-based exercises and other activities including occasional

quizzes. They also participate in actual law enforcement activities under the supervision of an FTO.

8. During phase three the probationary officer works without direct supervision. The FTOs monitor the officer's progress and offers advice and counsel. This is the final step prior to the officer achieving regular officer status.

9. Grievant advanced through phase one in two weeks as expected, but remained in phase two for 42 weeks prior to his probationary employment being terminated. He was observed and trained by more than one FTO.

10. On April 24, 2019, Grievant was issued an EPA-2<sup>3</sup> to advise him of areas in which his performance was not meeting expectations and to suggest ways he could improve. The EPA was prepared by Lieutenant M. S. Coberly, Grievant's supervisor. The EPA-2 section entitled "Professional Development Needs" set out specific performance problems that needed to be addressed by Grievant as follows:

#1 – Officer Safety – P.O. failed to exhibit proper officer safety techniques at a recent scenario-based training. P.O. is to seek guidance from FTOs and Sgt. Duffield on how to improve in areas of officer safety, situational awareness, and proper use of force.

#2 – Radio Communication – P.O. is to seek guidance from FTOs on proper radio communication skills and stop location identification.

#3 – Chapter 20 and WV Code knowledge – P.O. needs to greatly improve knowledge of Natural Resources Law/Regulations as well as WV Code and proper application of enforcement.

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<sup>3</sup> Respondent Exhibit 1. Employee Performance Appraisal 2 ("EPA-2"). The EPA-2 is utilized during the first half of a performance rating period to provide feedback to the employee concerning the employee's strengths, weaknesses, and overall performance. The EPA-2 is intended to give the employee notice of any performance expectations which are not being achieved, as well as to provide time and guidance for the employee to correct any performance issues prior to the final appraisal. See Division of Personnel *Supervisor's Guide to the Performance and Appraisal Process*.

#4 – Field Performance – P.O. is to seek guidance from FTOs on techniques for dealing with the public under stress and non-stress situations.

11. Under the heading of “General Comments,” Lt. Coberly wrote:

P.O. Luther is at week 19 of his post academy training but is exhibiting performance that is well below the standard that would be expected at this point in training. P.O. Luther has been advised of numerous areas needing improvement and has been instructed to speak with his present and past FTOs for guidance on how to improve his field performance in these areas. A reassessment of these standards will be conducted after a brief improvement period.<sup>4</sup>

12. On April 11, 2019, a scenario-based training was organized by Regional Training Officer, Sergeant Dwayne Duffield. There were three scenarios conducted during the training: a routine traffic stop; an illegal turkey hunter; and a hunter trespassing on another's land. Lt. Goodson, Sgt. Charles Stephens and Officer William Allen Phillips were present to observe, evaluate and make suggestions regarding the training. Sgt. Duffield and Sgt. Jim Crawley served as the suspects.<sup>5</sup>

13. During the traffic stop scenario, Grievant was instructed to approach a vehicle that had been the subject of information regarding illegal hunting on a wildlife management area. Sgt. Duffield was acting as the driver and Sgt. Crawley played the role of the passenger.

14. One of the basic principles of officer safety is to not let anyone get close enough to encroach upon the officer's reactionary gap. The reactionary gap is the distance an officer must keep from a suspect in order to respond to a sudden threat before the suspect can physically contact him/her.

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<sup>4</sup> *Id.*

<sup>5</sup> See Respondent Exhibit 10, “Scenario- Based Training Evaluation Checklist.”

15. Sgt. Duffield presented threatening and possibly violent behavior. Grievant did not maintain a constant level of officer presence and did not utilize options which were covered at the Academy, as well as additional training, to gain and maintain control of such situations.

16. Grievant allowed Sgt. Crawley to exit the passenger side of the vehicle. Sgt. Crawley got into Grievant's reactionary space and was able to feign stab him with a fake knife.

17. Grievant was given coaching and suggestions and allowed to repeat the scenario three times. He was faked stabbed each time. During one of these attempts, Grievant allowed one of the suspects to reach into his cruiser. Grievant failed to exhibit a proper understanding of the NRPO's use of force policy through a series of tactical errors during the exercise.

18. The second scenario involved a suspected illegal turkey hunter in a blind at the end of an open field. Grievant approached the turkey blind across the open field instead of using the cover of nearby trees to maintain safety. Grievant failed to recognize the threat of an armed turkey hunter.

19. Grievant also failed to follow officer safety procedures of patting the suspect down for weapons or placing the suspect in handcuffs. Grievant was unsure of what code and rule violations with which the suspect could be charged.

20. Grievant successfully completed the trespasser scenario except for turning his back on the suspect at one point which could have resulted in an attack by the suspect.

21. Grievant received the lowest rating of “1” on all scored indicators for scenarios 1 and 2. The indicators are; “Officer Safety and Tactics,” “Criminal Law,” “Decision Making Skills,” “Verbal Commands,” and “Proper Use of Force.”<sup>6</sup>

22. On July 12, 2019, Grievant, FTO Phillips, and Officer Carder, accompanied a State Police trooper in responding to a domestic violence call. Grievant went to the door with the trooper. When a woman answered the door and saw the trooper, she slammed the door in his face. The trooper entered the house and tried to apprehend the woman who resisted strenuously. Grievant did not intervene, feeling that the woman was nearly sixty years old and the trooper could handle the situation. FTO Phillips moved past Grievant and assisted the trooper in bringing the woman under control. Grievant did not follow officer safety guidelines.

23. Grievant regularly sought help in making decisions on routine matters. He took excessive time to write a criminal complaint and took two hours to prepare a request for a search warrant. On written tests, Grievant rarely scored 70 percent or above and scored as low as 30 percent. These issues demonstrated Grievant’s lack of progress in report-writing, problem-solving and decision-making skills.

24. On October 5, 2019, Grievant, Sgt. Parsons and Officer Carder were working a spotlight patrol and they observed an out of place light. They approached the light and encountered four suspects; three in a car and one on a motorcycle. The motorcycle was beside the car.

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<sup>6</sup> Respondent Exhibit 10. Lt. Goodson completed the evaluation checklist. He had to leave before the third scenario and did not score that exercise.

25. Grievant went to the motorcycle. The rider was edging the cycle forward and Grievant told him to stop. Eventually, Grievant reached down and took the key from the ignition. Grievant did not tell the rider to get off the motorcycle and did not check the rider for a weapon.

26. Sgt. Parsons ordered the rider to get off the motorcycle and asked if he had a weapon. Without responding the rider started to pull out a handgun he had in a holster on his hip. Sgt. Parson's shouted "gun" and immediately attempted to get control of the suspect's arms. While they were struggling, Grievant got the gun from the suspect and stepped back from the fight.

27. Officer Carder, seeing the struggle, left the three suspects in the car and assisted Sgt. Parsons with subduing the motorcycle suspect. Grievant had pulled his weapon with one hand while holding the suspect's gun in his other. Had Grievant done the initial weapons check the situation may have been avoided. Grievant failed to follow proper procedures.

28. FTO Phillips sent a memorandum dated July 20, 2019, setting out specific problems with Grievant's job performance over the course of the probationary period. He concluded, "As his Field Training Officer for a period of time, it is my opinion that [Officer Luther] is not a good fit for this department." He listed failure to progress in training as the ultimate reason. (Respondent Exhibit 6)<sup>7</sup>

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<sup>7</sup> FTO Phillips also provided a much shorter memorandum to Lt. Coberly dated October 6, 2019 making the same recommendation. (Respondent Exhibit 7)



29. Sgt. Parsons provided a similar memorandum to Lt. Coberly dated October 3, 2019. He concluded in “I recommend against retaining [Officer Luther] for employment.”<sup>8</sup>

30. In a memorandum dated October 7, 2019,<sup>9</sup> Sgt. Stephens stated the following:

After 41 weeks in the DNR Law Enforcement FTO program, with four different Field Training Officers, Officer Luther is still routinely rated unacceptable in a variety of tasks in weeks where there is considerable activity. When the activity is slow and/or “routine,” Officer Luther performs at a mediocre to acceptable level. This has consistently been documented in his weekly observation reports. Officer Luther has received and kept copies of these reports and still does not make the necessary improvements to succeed within our agency.<sup>10</sup>

31. Lt. Coberly sent a memorandum to Colonel Jerry Jenkins dated October 9, 2019, explaining in detail his concerns about Grievant’s ability to handle stressful situations. He was particularly concerned with deficiency in areas “related to officer safety, recognizing and reacting to dangerous situations, and responding to the aid of fellow law enforcement officers.” As examples, he pointed out Grievant’s difficulties with the scenarios which were performed in a controlled environment.<sup>11</sup> (Respondent Exhibit 11)

32. Grievant attended a predetermination meeting with Colonel Jerry Jenkins and Lieutenant Colonel David Trainer, on October 16, 2019, where he was advised of the

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<sup>8</sup> Respondent Exhibit 9.

<sup>9</sup> Respondent Exhibit 5. The memorandum was addressed to “Colonel J. B. Jenkins (through channels).”

<sup>10</sup> *Id.*

<sup>11</sup> Lt. Coberly discussed other problem areas as well as evaluations and steps taken to assist Grievant to improve.

performance problems as set out by his supervisor and FTOs as well as his failure to advance despite 42 weeks of phase two training.

33. By hand-delivered letter dated October 21, 2019, Grievant was notified by Stephen S. McDaniel, Director of DNR, that he was dismissed from his probationary employment as a Natural Resources Police Officer. (Respondent Exhibit 1)

34. The reason cited for dismissing Grievant was “unsatisfactory work performance during your probationary period.” The letter set out specific examples, several, but not all which, appear in the foregoing findings of fact. *Id.*

### **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 Resources/William R. Sharpe, Jr. Hospital*, Docket No. 08-HHR-008 (Dec. 30, 2008); *Livingston v. Dep’t of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008). See also W. VA. CODE ST. R. § 156-1-3 (2008). See also *Lott v. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999). When a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is upon the employee to establish that his services were satisfactory. *Bonnell v. W. Va. Dep’t of Corrections*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. Dep’t of Health and Human Res.*, Docket No. 2008-0958-DHHR (Mar. 13, 2009). Grievant “is required to prove that it is more likely than not that his services were, in fact, of a satisfactory level.” *Bush v. Dep’t of Transp.*, Docket No. 2008-1489-DOT (Nov. 12, 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. W. Va. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence is equally balanced, the party with the burden of proof has not met that burden. See *Leichliter v. W. Va. Dep’t of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

It is undisputed that Grievant was a probationary employee and his employment was terminated for unsatisfactory performance during his probation. Consequently, Grievant has the burden to prove by a preponderance of the evidence that his job performance was satisfactory. *Bush supra*.

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

10.1.a. The probationary period is a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program of the agency. It is an integral part of the examination process and the appointing authority shall use the probationary period for the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work.

W. VA. CODE ST. R. § 143-1-10.1.a. The same rules state that an employee may be dismissed at any time during the probationary period if the employer finds his or her services are unsatisfactory.

Grievant provided some comments by his supervisors that were complimentary. Unfortunately, they were far outweighed by the criticism he received regarding his performance. His main argument is that he tried very hard to perform all tasks that were

assigned to him and absorb the material and experiences so that he could meet standards. However, he was criticized for minor things on a regular basis. One example of this was in the area of proper uniform. He often cleaned and ironed his uniform and wore it properly. However, he received low marks for his appearance because he had a tattoo on his arm which violated regulations. This seemed particularly unfair because his tattoo was apparent on his arm when he was interviewed and offered the job. Grievant argues that his actions may have seemed tentative and indecisive because he had been criticized so often that he overthought each decision to avoid making a mistake.

It is true that Grievant received a great deal of negative feedback. However, most of it seemed aimed toward correcting problem areas and he was generally directed toward sources where he could get help in meeting expectations. Further, Grievant's argument would be more compelling if he had a single FTO who seemed to be treating him unfairly. However, the training system is set up so that a probationary officer is coached by a variety of FTOs to avoid one individual relationship that might negatively impact the officer's learning potential. That was true in Grievant's situation. He worked with and received feedback from four different FTOs as well as Lieutenant Coberly. They were all consistent in noting that Grievant was indecisive in stressful situations and had difficulty putting his training into action. All noted that he did not follow property safety protocols after 42 weeks in the training program.

Grievant seemed sincere in his desire to complete his training. Additionally, it appeared that he tried very hard. Perhaps FTO Phillips summed up the situation best in saying that Grievant was not a good fit for the department. Grievant did not prove by a

preponderance of the evidence that his services were, in fact, of a satisfactory level. Accordingly, the grievance is **DENIED**.

### **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 Corrections*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. Dep't of Health and Human Res.*, Docket No. 2008-0958-DHHR (Mar. 13, 2009). Grievant "is required to prove that it is more likely than not that [her] services were, in fact, of a satisfactory level." *Bush v. Dep't of Transp.*, Docket No. 2008-1489-DOT (Nov. 12, 2008).

2. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence is equally balanced, the party with the burden of proof has not met that burden. See *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

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

10.1.a. The probationary period is a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program of the agency. It is an integral part of the examination process and the appointing authority shall use the probationary period for the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work.

W. VA. CODE ST. R. § 143-1-10.1.a. The same rules state that an employee may be dismissed at any time during the probationary period if the employer finds his or her services are unsatisfactory.

4. Grievant did not prove by a preponderance of the evidence that his job performance during his probationary period was satisfactory. See *Bush v. Dep't of Transp.*, Docket No. 2008-1489-DOT (Nov. 12, 2008).

Accordingly, the grievance is **DENIED**.

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

**DATE: April 17, 2020**

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**WILLIAM B. MCGINLEY**  
**ADMINISTRATIVE LAW JUDGE**