

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**STEPHEN PODEWELL,**

**Grievant,**

**v.**

**Docket No. 2020-0278-WVU**

**WEST VIRGINIA UNIVERSITY,**

**Respondent.**

**DECISION**

Grievant, Stephen Podewell, was employed on a probationary basis by Respondent, West Virginia University (WVU), when his employment was terminated. On August 30, 2019, Grievant filed this grievance against Respondent, stating:

It is with great enthusiasm that I state that I loved working for West Virginia University! But, for Ed Mason, I would still be there and would have stayed for the next 30 years. What I have found in Mr. Ed Mason is incompetency and lack of accountability! I did my job as Supervisor of Roads & Grounds, with excellence, diligence, and with all of my heart & soul, while keeping in mind the Five Core values of West Virginia University: Accountability, Appreciation, Service, Respect, and Curiosity! ...

In May 2019, I stated to Byron Smith that Troye Forquer continued to create a hostile work environment. I also stated to Byron Smith that Ed Mason was creating a threatening hostile environment for me. Ed Mason has been "hell bent" on becoming the next Director of Roads & Grounds. Ed Mason stated at me that he had been passed by, by a younger person at another job before...he further stated at me, while glaring at me "I will Not let that Happen with You." I assured him that I was only interested in being the Supervisor, yet he seemed determined to destroy me. When he stated that at me, I felt very threatened, both physically and psychologically. How he was going to eliminate me, I wasn't sure. ...

A letter was typed up by Ed Mason on March 22, 2019. I never received a copy of the letter until August 21, 2019 ...

On July 1, 2019 a form was typed up by Ed Mason. Again, a copy was never given to me. The information stated on the letter was neither true, nor accurate. It seemed to be more of a “witch hunt,” than any truth whatsoever. On July 8, 2019 I asked Maria in H.R. for a copy of the letter. She stated she would get me one. One never arrived and was not provided. During the 10 months that I served as the Supervisor of Roads & Grounds, Ed Mason gave no guidance, direction, or demonstration...

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

To be reinstated in my position as Supervisor of Roads & Grounds at West Virginia University ...

A level one conference was held on September 27, 2019. A level one decision denying the grievance was issued on October 16, 2019. Grievant appealed to level two on October 31, 2019. A mediation session was held on February 10, 2020.

Grievant appealed to level three of the grievance process on February 26, 2020, adding:

... I request back pay from August 2019, plus accrued interest (\$40,000+), vacation & sick leave, and punitive damage for their covering up of fraud, intentional infliction of emotional distress, violating whistle blower law, harassment, bullying, and intimidation. The wrongs were committed by Ed Mason, who was relieved of his job at WVU. ...<sup>1</sup>

A level three hearing was held via an online platform. It played out over three days: July 9, 2020; July 16, 2020; and July 22, 2020. Grievant appeared *pro se*.<sup>2</sup> Respondent appeared through Eric Bowles and by counsel Samuel Spatafore, Assistant Attorney General.

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<sup>1</sup>Grievant did not present any arguments or evidence supporting a violation of any whistle blower law. This claim is therefore deemed abandoned and will not be addressed further.

<sup>2</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.

Prior to the first day of hearing, each party subpoenaed witnesses. At the end of the first day of hearing, Grievant requested that Supervisor Ed Mason be subpoenaed. The undersigned granted this request. On the second day of hearing, Grievant called Mr. Mason as a witness. The undersigned phoned Mr. Mason but he refused to testify. Grievant voiced his intent to hold Mr. Mason in contempt for not complying with the subpoena. Grievant was informed that the undersigned did not have contempt authority to enforce subpoenas and that it would be up to Grievant to seek enforcement through the proper mechanism.

On July 27, 2020, Grievant again requested via fax that the undersigned find Mr. Mason in contempt. The undersigned issued an order denying the motion and again explained that the Grievance Board does not have contempt authority. Grievant was given a deadline to announce whether he intended to pursue contempt in the proper venue so these proceedings could be stayed if necessary. On August 17, 2020, Grievant emailed the Board that he was not pursuing a contempt action against Mr. Mason and requested that his grievance move forward.

This matter became mature for decision on September 30, 2020. Each party submitted Proposed Findings of Fact and Conclusions of Law.

### **Synopsis**

Grievant was employed on a probationary basis as Supervisor of Roads and Grounds when WVU dismissed him for unsatisfactory performance and cited prior discipline. Grievant grieves his prior discipline and dismissal. WVU proved that the grievance of prior discipline was untimely. Grievant did not prove a proper basis to excuse his untimely grievance of prior discipline. As for the dismissal, WVU cites two incidents:

that Grievant failed to ensure the quality of landscaping work at Mountaineer Station on July 17, 2019, and that he improperly processed timecards. While Grievant successfully challenged the charge involving landscaping work at Mountaineer Station, he did not address the accusation that he repeatedly failed to properly process timecards. Grievant thereby failed to prove his performance was satisfactory. Accordingly, this grievance is DISMISSED, in part, and DENIED, in part.

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

**Findings of Fact.**

1. Grievant was employed on a probationary basis by Respondent, West Virginia University (WVU), as Supervisor of Campus Services in the Department of Facilities Management, beginning on October 8, 2018. His duties entailed responsibility for landscaping and maintenance.

2. Ed Mason was Grievant's direct supervisor and was employed under an annual contract as the Assistant Director of Facilities Management.

3. WVU's Administrative Procedure 4.2 sets forth the policy for termination of probationary employees, stating, in relevant part, as follows:

A full-time classified employee serving in a probationary period may be separated from University employment during the initial or extended probationary period if the established standards are not met, provided one (1) written warning has been issued.

(Respondent's Exhibit 2c)

4. WVU's Administrative Procedure 4.2 also states that the Probationary Period is for six (6) months of active employment at WVU and "may be extended up to a total of twelve (12) months." (Respondent's Exhibit 2c)

5. Soon after starting, Grievant had performance issues. Consequently, Ed Mason issued Grievant a Letter of Expectations on March 22, 2019, to assist him in the position. (Respondent's Exhibit 2a and the level one decision)

6. The expectations set forth in the Letter of Expectations include the following: (1) to increase job knowledge of existing landscape maintenance procedures and learn to operate all equipment; (2) to improve teamwork by respecting management and making recommendations in a positive and constructive manner; (3) to complete work in an accurate and timely manner and to ensure that all work requests, material requisitions, weekly reports, and invoices are accurate and maintained in an organized manner while meeting operational deadlines. (Respondent's Exhibit 2a)

7. The Letter of Expectations specifically referenced Grievant's problems with timesheets, stating, "I have talked with you on several occasions to make sure correct job codes are on all time sheets and that no time sheets are missing. You do not alert me to missing time sheets and I must review all time sheets to check for incorrect job codes." (Respondent's Exhibit 2a)

8. On March 22, 2019, Ed Mason also provided Grievant an Extension of Probationary Period letter, extending Grievant's probation 90 days until July 8, 2019, to better assess his performance. The letter noted that Mr. Mason had a coaching session with Grievant on February 5, 2019, which covered the three areas of concern discussed in the Letter of Expectations. (Respondent's Exhibit 2b and the level one decision)

9. Grievant did not sign the Letter of Expectations or the Extension of Probationary Period letter to acknowledge receipt. Grievant simply wrote the following unsigned sentence at the end of each document: "My expectations are to deliver my very best work for West Virginia University. I adhere to the core values of Service, Creativity, Respect, Appreciation, and Accountability!" (Respondent's Exhibits 2a & 2b and the level one decision)

10. Grievant did not grieve the Letter of Expectations or the Extension of Probationary Period letter prior to this grievance.

11. On July 1, 2019, Mr. Mason issued Grievant a First Written Warning, stating, "Since that [March 22, 2019] discussion, I am failing to see improvement in your performance, and you do not follow instructions." For example:

- We met on May 16, 2019 and discussed how you had changed my May 14<sup>th</sup> directive in moving relocated plants at the Health Sciences Center and my May 15<sup>th</sup> directive cutting tree stumps and mulching.
- We again met on June 4, 2019 because your failure to follow instructions from me on an assigned task caused great confusion and dissatisfaction with both me and the customer, who had requested the work. I asked you to trim ivy off the air conditioning units and prune the shrubs inside the sidewalk at Bicentennial House. You then instructed your crew to do other work and did not complete the assignment I gave you. The customer expressed dissatisfaction that the work had not been completed as requested and when I talked to you about this, you got indignant with me.

(Respondent's Exhibit 2d)

12. This First Written Warning also referred to prior discipline, stating, "On March 22, 2019 you received a memorandum that documented the conversation I had with you regarding your performance deficiencies." (Respondent's Exhibit 2d)

13. This First Written Warning went on to notify Grievant that his probationary period would be extended an additional 90 days until October 7, 2019. It warned that “[a]ny similar unacceptable behavior or performance, or violations in the future, may lead to further disciplinary action up to and including termination of your employment.” (Respondent’s Exhibit 2d)

14. Grievant refused to sign receipt of the First Written Warning. Disciplinary letters are delivered to the employee in person and the employee is asked to acknowledge receipt by signing the letter. Mr. Mason noted on the letter that Grievant refused to sign, which notation Mr. Mason signed and dated July 1, 2019. (Respondent’s Exhibit 2d and the level one decision)

15. Maria Witt, Executive Human Partner Human Resources at WVU, met with Grievant on July 10, 2019, and advised him of his right to grieve the First Written Warning and to file a formal harassment complaint against Mr. Mason. Grievant informed Ms. Witt that he did not want to do either. (Ms. Witt’s testimony & Respondent’s Exhibit 1)

16. Ms. Witt made contemporaneous notes of this meeting, summarizing their conversation as follows: “Stephen told me that the contents of his written warning are lies, patently false (but also said he did not read the full letter). Ed did not give him a copy of the letter. Blames Ed for sitting on the work order addressed in the letter for over a month before demanding that Stephen get it done.” (Respondent’s Exhibit 1)

17. Grievant did not grieve the First Written Warning letter prior to this grievance.

18. On July 17, 2019, a work crew under Grievant’s supervision landscaped behind Mountaineer Station.

19. That same day, Ed Mason allowed Grievant to leave work for the day before 1:30 p.m. (Testimony of Grievant and Tim Kroll, former landscaper at WVU)

20. Ed Mason was the last supervisor at Mountaineer Station that day, and was present when Mr. Kroll left at 3:30 p.m. (Mr. Kroll's testimony)

21. Mr. Kroll was the last landscape worker to leave Mountaineer Station that day and cleaned up all debris. (Mr. Kroll's testimony)

22. WVU submitted photos of Mountaineer Station into evidence. These photos were purportedly taken by Ed Mason on July 18, 2019. They show grass cuttings strewn over the steps and sidewalk, vines on the railings, and weed bushes still standing. However, Mr. Mason did not authenticate these photos at the level three hearing. There is no evidence that they were properly authenticated at the level one conference. (Respondent's Exhibit 3 and the level one decision)

23. Grievant submitted his own photo of Mountaineer Station. Grievant purportedly took the photo on July 18, 2019. The photo shows a trim landscape with no clipping debris on the stairs and sidewalk, no vines on the railing, and no weed bushes. (Grievant's Exhibit's 5a & 5b)

24. On August 5, 2019, WVU issued Grievant an Intent to Terminate Employment letter. Therein, Mr. Mason cites two incidents of unsatisfactory performance:

On July 17, 2019, you supervised a crew of landscape workers as they cut brush and weeds from the bank behind Mountaineer Station. You told me the following morning that the crew had done a good job in completing that assignment. When I inspected the area that same morning, I found grass debris all over the steps, vines growing over railings, and two weed trees that had not been cut. This highly trafficked area is a main walkway for students, staff, faculty, and visitors from parking lots to the main entrances of the Health Sciences Center. The condition this area was left in is unacceptable and



projects a negative image of Facilities Management and the University.

Additionally, on July 17, 2019, I informed you of several discrepancies in MyTime dating back to July 8th. I had asked you during the previous payroll period to check timecards daily in order to keep up with leave requests and missed punches so these issues could be fixed for a smooth timecard approval. On July 19, 2019, I again asked you to make sure all missing leave submittals and missed punches were corrected by the end of the day. Since you hadn't brought it to my attention that you were unable to complete the MyTime timecard review by the previous July 19th deadline. I had assumed that all leave issues in the system had been corrected, as instructed, and ready for approval. However, when I arrived on July 22, 2019. (sic) To approve payroll, you were just then correcting the timecard issues. This caused unnecessary delays in the approval process.

(Respondent's Exhibit 2e & Exhibit 3)

25. The Intent to Terminate Employment letter informed Grievant that a meeting was scheduled for August 12, 2019, "to present any information that you feel may influence this decision." (Respondent's Exhibit 2e)

26. On August 12, 2019, Grievant met with Mr. Mason, Byron Smith, (Director of Facilities Management) and Ms. Witt to discuss termination. (Respondent's Exhibit 2f)

27. At this predetermination meeting, Grievant did not submit any photos of Mountaineer Station to refute the allegation of shoddy landscaping work and cleanup. Nor did he mention the existence of such photos. (See Grievant's testimony)

28. On August 13, 2019, Respondent sent Grievant its decision to terminate Grievant's employment effective that same day and stated that it was based on the contents of the August 5, 2019 Intent to Terminate Employment letter. (Respondent's Exhibit 2f)

29. The termination letter informed Grievant that he had been provided an opportunity “to present information you felt might influence WVU’s intention to terminate your employment” and that WVU considered “the information that you presented to us on August 12.” (Respondent’s Exhibit 2f)

30. At the level one conference in this matter, Grievant did not present any pictures of Mountaineer Station to rebut the allegations against him. Nor did he mention the existence of such photos. (See Grievant’s testimony)

31. Grievant never addressed or challenged the allegations regarding improperly processed timecards raised in the Intent to Terminate Employment letter.

32. Mr. Mason’s employment with WVU ended with the non-renewal of his contract prior to the level three hearing.

33. Mr. Mason refused to testify at the level three hearing.

### **Discussion**

Grievant was a probationary employee when WVU terminated his employment for unsatisfactory performance. WVU contends that it did so in conjunction with its progressive discipline policy for probationary employees. WVU’s Administrative Procedure 4.2 states that “[a] full-time classified employee serving in a probationary period may be separated from University employment during the initial or extended probationary period if the established standards are not met, provided one (1) written warning has been issued.” WVU asserts that on July 1, 2019, it provided Grievant a First Written Warning and then dismissed him on August 13, 2019, for two subsequent infractions. These subsequent infractions were that Grievant failed to ensure the quality of landscaping work at Mountaineer Station and improperly processed timecards.

Grievant disputes the merits of his prior discipline, including his First Written Warning of July 1, 2019, and both his Letter of Expectations and the Extension of Probationary Period letter issued on March 22, 2019. Grievant also denies culpability for one of the incidents cited for his dismissal, the shoddy work at Mountaineer Station on July 17, 2019, but does not address the allegation that he failed to properly process timecards. Grievant casts a wide net to impugn Supervisor Ed Mason's motive in disciplining him. Grievant argues that Ed Mason saw Grievant as a threat to his promotion for Director of Roads & Grounds and engaged in a witch hunt to eliminate him by harassing and ultimately dismissing him.

In addressing the grievance of prior discipline, WVU asserts untimeliness. Grievant counters that he did not receive the First Written Warning, the Letter of Expectations, or the Extension of Probationary Period letter until August 21, 2019. He contends that he therefore timely grieved prior discipline through his current grievance. "[When an] employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See *Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991)." *Higginbotham v. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997). "The

preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

While the burden is on Respondent to prove the grievance was filed untimely, the code requires that “[a]ny assertion that the filing of the grievance at level one was untimely shall be made at or before level two.” W. VA. CODE § 6C-2-3(c)(1). The level one decision implies that timeliness was asserted at level one when it discusses Grievant’s defense that he did not receive the First Written Warning until late August. WVU renewed its timeliness argument during the level three hearing, thereby satisfying this requirement.

An employee is required to “file a grievance within the time limits specified in this article.” W. VA. CODE § 6C-2-3(a)(1). The Code further sets forth the time limits for filing a grievance as follows:

Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing . . . .

W. VA. CODE § 6C-2-4(a)(1).

“‘Days’ means working days exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice.” W. VA. CODE § 6C-2-2(c).

WVU contends that Grievant implicitly acknowledged receipt of the Letter of Expectations and Extension of Probation Period on March 22, 2019, by writing on each, "My expectations are to deliver my very best work for West Virginia University. I adhere to the core values of Service, Creativity, Respect, Appreciation, and Accountability!" It is uncontested that disciplinary letters are delivered to an employee in person and the employee is asked to sign the letter to acknowledge receipt. Grievant does not deny that he wrote these core values on these letters. This notation is also consistent with the recitation by Grievant in his testimony and grievance of these five core values. Thus, WVU proved that Grievant received the Letter of Expectations and Extension of Probationary Period letter on March 22, 2019. Grievant did not demonstrate a proper basis to excuse his untimely grievance thereof.

WVU also asserts that Ed Mason handed Grievant the First Written Warning on July 1, 2019, but that Grievant refused to accept or sign that he had received it. Supervisor Mason noted on the First Written Warning that Grievant refused to sign it, which notation Mason signed and dated July 1, 2019. The problem is that Mr. Mason refused to testify at the level three hearing and the level one decision makes no findings based on Mr. Mason's testimony at level one. Respondent suggests that the undersigned should consider the level one testimony of Grievant and Mr. Mason. Because level one was a conference rather than a hearing, there is no transcript of the level one testimony.

The only record of the level one conference is the level one decision. The level one decision indicates that Mr. Mason "stated at conference that [Grievant] refused to take the letter" and that Grievant denied receiving the First Written Warning until August 21, 2019. The level one decision does not address the conflict between these statements

or directly adopt the most credible but simply states that “[t]he refusal to sign the letter would be consistent with Grievant’s previous actions.” The level one decision therefore does little to assist the undersigned in determining which statement is more credible. The undersigned cannot assess Mr. Mason’s credibility due to Mr. Mason’s failure to testify at level three.

WVU contends that Grievant changed his story during the level one conference and admitted that he refused to receive the First Written Warning on July 1, 2019. However, the undersigned could find no indication in the level one decision of this alleged admission. WVU further asserts that Maria Witt, Executive Human Partner Human Resources at WVU, testified at level three that Grievant acknowledged receipt when he met with her. It is undisputed that Ms. Witt met with Grievant on July 10, 2019. Grievant testified that Ms. Witt made him aware of the First Written Warning and that he requested her to provide him a copy because he had never received it but that she failed to provide a copy. The undersigned could find no indication in the record that Ms. Witt ever testified that Grievant acknowledged receipt of the First Written Warning or that she provided him a copy.

WVU also points to Ms. Witt’s contemporaneous notes of this meeting, which state, in relevant part, the following: “Stephen [Grievant] told me that the contents of his written warning are lies, patently false (but also said he did not read the full letter). Ed did not give him a copy of the letter. Blames Ed for sitting on the work order addressed in the letter for over a month before demanding that Stephen get it done.” While Grievant testified that he did not remember the details of his meeting with Ms. Witt, he also testified

that he told her he never saw the First Written Warning and never told her he read any part of it.

Thus, credibility determinations are necessary. 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).

Not every factor is relevant to every credibility determination. In this situation, the relevant factors include motive, demeanor, the consistency of prior statements, and plausibility. As in any grievance, this Grievant has an interest in the outcome of this case and thus motive to misrepresent. Grievant seemed consistent in his repeated claims that he never received any of the prior disciplinary letters before he was dismissed on August 13, 2019. He also testified that he could not remember anything said at the July 10<sup>th</sup>

meeting with Ms. Witt. This lack of memory not only seems self-serving given that it was in response to a question he apparently did not want to answer but was also implausible in light of Grievant's testimony that he and Ms. Witt discussed his First Written Warning at this meeting.

As for Ms. Witt, the undersigned could glean no motive that would drive her to untruthfully represent that she made contemporaneous notes of the meeting. Ms. Witt did not appear to have an interest in the outcome of this action, in spite of Grievant's confrontational approach with her. While Ms. Witt was calm and collected, at times she came across as evasive when she asked Grievant to repeat questions. However, this could easily be attributed to Grievant's aggressive approach. Ms. Witt's contemporaneous notes are plausible in that they depict the same tone and words Grievant displayed towards the memory of Ed Mason at the level three hearing. Ms. Witt's notes reflect that Grievant used the terms "lies" and "patently false," which mirrors the language Grievant used at the level three hearing. There was no evidence that Ms. Witt could have heard Grievant's phraseology anywhere but from the Grievant himself when they met on July 10, 2019. Ms. Witt's notes are more credible than Grievant's denial thereof. Ms. Witt's notes indicate that Grievant "said he did not read the full letter." This implies that Grievant read a portion of the First Written Warning and had it in his hands at some point prior to this July 10<sup>th</sup> meeting.

Therefore, the evidence shows that Grievant knew about and had seen the First Written Warning by July 10, 2019, and the Letter of Expectations and Extension of Probationary Period by March 22, 2019. Grievant filed this action on August 30, 2019. Addressing the more recent of these, fifteen working days from July 10<sup>th</sup> is August 1,



2019. Yet Grievant waited another month before grieving his prior discipline. Respondent proved that the prior discipline was untimely grieved. Grievant did not prove a proper basis to excuse this untimely grievance of his prior discipline. “If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep’t of Transp.*, Docket No. 97-DOH-060 (July 16, 1997).” *Carnes v. Raleigh County Bd. of Educ.*, Docket No. 01-41-351 (Nov. 13, 2001). The portion of this grievance challenging prior discipline, including the First Written Warning, the Letter of Expectations, and the Extension of Probationary period, is therefore dismissed.

As for the termination of Grievant’s employment, it is undisputed that Grievant was dismissed for unsatisfactory performance. Grievant was dismissed prior to the expiration of his probationary period since his probation had been extended. When a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is on the employee to establish by a preponderance of the evidence that his services were satisfactory. *Bonnell v. Dep’t of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. Dep’t of Health and Human Res.*, Docket No. 2008-0958-DHHR (Mar. 13, 2009). However, if a probationary employee is terminated on the grounds of misconduct, the termination is disciplinary, and the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. See *Cosner v. Dep’t of Health and Human Res.*, Docket No. 08-HHR-008 (Dec. 30, 2008); *Livingston v. Dep’t of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008).

The probationary period of employment has a specific purpose. During this time, an employee is to learn the duties of his or her position, and the employer assesses the

employee's ability to meet work standards and adjust to its expectations. As previously discussed, Grievant was dismissed in conjunction with the requirements of WVU's Administrative Procedure 4.2. Grievant's supervisors concluded that he was not working out as an employee and that his performance was unsatisfactory. Grievant therefore has the burden to prove that it is more likely than not that his services were satisfactory and his dismissal arbitrary and capricious.

"[W]hile an employer has great discretion in terminating a probationary employee, that termination cannot be for unlawful reasons, or arbitrary or capricious. *McCoy v. W. Va. Dep't of Transp.*, Docket No. 98-DOH-399 (June 18, 1999); *Nicholson v. W. Va. Dep't of Health and Human Res.*, Docket No. 99-HHR-299 (Aug. 31, 1999)." *Lott v. W. Va. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. See *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. See *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (citing

*In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer].” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

As previously mentioned, WVU cites two incidents to justify Grievant’s dismissal. However, Grievant only challenges the allegation of shoddy landscaping work at Mountaineer Station. Grievant takes a twofold approach in countering this allegation. First, he argues that Mountaineer Station was left in good condition and presented a photo that he purportedly took on July 18, 2019, to counter WVU’s representation of the landscaping work. Second, he argues that he left work by 1:30 p.m. on July 17<sup>th</sup> and that, as the last one on site, Ed Mason was responsible for the poor workmanship of the crew. Grievant does not address the charge that he failed to properly process timecards.

WVU counters that Grievant never provided or even mentioned the picture he supposedly took of Mountaineer Station at either his August 12, 2019, predetermination meeting or the level one conference. Grievant argues that his August 12<sup>th</sup> meeting was so sudden he had no idea what it was about, that his belongings were so disorganized for personal reasons such as divorce that he could not find the photo he had taken, and that he felt overwhelmed by being beat down and bullied by Ed Mason and Maria Witt.

WVU submitted its own picture of Mountaineer Station purportedly taken by Mr. Mason on July 18, 2019, the day after the incident, showing weeds strewn over the sidewalks, vines growing on the rails, and large weeds still standing. WVU did not

properly authenticate this picture, as Mr. Mason refused to testify. WVU attempted to authenticate the photos using the hearsay<sup>3</sup> testimony of other witnesses.

“Hearsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings.” *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (Dec. 9, 1997). The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Id.*; *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-H-115 (June 8, 1990). Ed Mason was available to testify and even answered his phone on the record before refusing to testify. WVU had the opportunity to subpoena Mr. Mason to testify and to enforce such subpoena through contempt but failed to request a

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<sup>3</sup>“Hearsay includes any statement made outside the present proceeding which is offered as evidence of the truth of the matter asserted.” BLACK’S LAW DICTIONARY 722 (6th ed. 1990).

subpoena. WVU even objected to Grievant's request to subpoena Mr. Mason after the first day of hearing. Mr. Mason is not a disinterested declarant. Grievant accuses Mr. Mason of bias and of trying to destroy him. Mr. Mason's intentions are at the heart of Grievant's arguments against his dismissal. In consideration of these factors, the undersigned will not deprive Grievant of the opportunity to challenge Mr. Mason's credibility through cross examination by permitting WVU to authenticate Mr. Mason's photo via hearsay after Mr. Mason refused to testify.

Conversely, Grievant personally authenticated a photo of Mountaineer Station he purportedly took on July 18<sup>th</sup>, showing the landscaping in good condition. He also presented in support of this good condition the testimony of Mr. Kroll, a former landscape worker at WVU. Mr. Kroll testified that the landscaping was in good condition and the debris cleared when Mr. Kroll left, that Mr. Kroll was the last landscaper to leave that day. On the other hand, Grievant also presented evidence showing that if the work quality was poor, it was Ed Mason's fault. Mr. Kroll testified that Grievant left by 1:30 p.m. on July 17, 2019, and that Ed Mason was the last supervisor on the scene when Mr. Kroll left at 3:30 p.m. Grievant provided undisputed testimony from Mr. Kroll and himself showing that Ed Mason directly controlled crew staffing for every project including this one and that the crew was short staffed that day. Further, the undisputed evidence showed that Mr. Mason allowed Grievant to leave early that day.

WVU disputes Mr. Kroll's testimony regarding the good condition he left Mountaineer Station in and Grievant's testimony that Grievant took his picture thereof on July 18<sup>th</sup>. WVU argues that Mr. Kroll is not credible because he was fired by Ed Mason. It also argues that Grievant's testimony regarding the date he took the photo is not

credible because he failed to bring the photo to or even mention it at his predetermination meeting or level one conference. WVU contends that even if Grievant left early, he was still responsible for the work of his crew because there were no Leads present. Jamie Kosik, Associate Vice President of Facilities and Services at WVU, verified this but contradicted himself in testifying that Grievant should not be held responsible for failures that occurred while not on the job. Mr. Kosik further testified that if Ed Mason was on the job after Grievant left that day, Mr. Mason should be responsible for any failures that occurred thereafter.

As there are contested facts on both the quality of work that day and Grievant's culpability, credibility determinations are necessary. Not every credibility factor is relevant in every credibility determination. In this situation, the relevant factors include motive, demeanor, the consistency of prior statements, and plausibility. In considering Grievant's testimony that he took the photo of Mountaineer Station on July 18, 2019, plausibility is at issue. In response to WVU's assertion that he did not bring the photo to his predetermination meeting or level one conference or even mention it at these proceedings, Grievant argued that the meeting was sprung on him suddenly and when his life was in disarray. While the undersigned is sensitive to the fact that Grievant had a number of distractions in his life at the time of the predetermination meeting, the Intent to Terminate Employment letter (received by Grievant on August 5, 2019) put Grievant on notice that he had a week to gather any evidence he thought would help counter the allegations that had been leveled against him. Further, the August 13, 2019 letter of dismissal informed Grievant that WVU considered "the information that you presented to us on August 12." Grievant did not contest this statement. Thus, it is clear that even

though Grievant provided information in his defense, he failed to even mention that he had an exculpatory photo. The level one conference occurred on September 27, 2019. Calculated from the August 13<sup>th</sup> effective date of his dismissal, Grievant was unemployed for six weeks leading up to this conference. Yet he again failed to produce the photo or even mention its existence. Thus, the undersigned cannot attribute any credence to this photo.

In considering the condition of landscaping work at Mountaineer Station on July 17<sup>th</sup>, the undersigned still has the testimony of Mr. Kroll for consideration. While Mr. Kroll had motive to dislike Ed Mason after Mr. Mason fired him, Mr. Kroll knew Mr. Mason no longer worked at WVU. Mr. Kroll demonstrated no motive for bias either for or against WVU or Grievant. He credibly testified that he did not fraternize with Grievant outside of work and did not consider him a friend although they were friendly with each other at work. It was clear that Mr. Kroll felt that Grievant treated him fairly and with more respect than Mr. Mason and that he felt Grievant was more competent than Mr. Mason. The undersigned did not see this as having any effect on Mr. Kroll's credibility. Mr. Kroll's demeanor was appropriate for the occasion and his testimony on two different days at level three remained consistent. Mr. Kroll credibly testified that Grievant left work before 1:30 p.m. on July 17, 2019, that Mr. Mason was still on the scene when Mr. Kroll left at 3:30 p.m., that Mr. Kroll was the last landscaper to leave that day, and that Mr. Kroll left the grounds in good condition after cleaning up all debris. Thus, Grievant proved that the work crew responsible for Mountaineer Station did not leave it in a shoddy condition when they left the site on July 17, 2019.

Grievant also proved that he left early with Ed Mason's permission before the landscaping work was completed that day and that Mr. Mason was the last supervisor to leave the scene. As such, even if the work crew had left the landscaping at Mountaineer Station in poor condition on July 17<sup>th</sup>, Grievant proved that he was not responsible for the crew's work after he left.

Nevertheless, Grievant did not provide any evidence to counter or even deny WVU's allegation in its Intent to Terminate Employment letter that Grievant improperly processed timecards on multiple occasions between July 8 and July 22, 2019. In the August 5, 2019 Intent to Terminate Employment letter, Ed Mason provided the following details:

Additionally, on July 17, 2019, I informed you of several discrepancies in MyTime dating back to July 8th. I had asked you during the previous payroll period to check timecards daily in order to keep up with leave requests and missed punches so these issues could be fixed for a smooth timecard approval. On July 19, 2019, I again asked you to make sure all missing leave submittals and missed punches were corrected by the end of the day. Since you hadn't brought it to my attention that you were unable to complete the MyTime timecard review by the previous July 19th deadline. I had assumed that all leave issues in the system had been corrected, as instructed, and ready for approval. However, when I arrived on July 22, 2019. (sic) To approve payroll, you were just then correcting the timecard issues. This caused unnecessary delays in the approval process.

By not countering these timekeeping allegations, Grievant failed to prove that his performance was satisfactory.

In a broad sense, Grievant contests all charges directed at him by Supervisor Mason during his time at WVU through his argument that Mason tried to sabotage Grievant because he saw Grievant as a threat to his promotion. Grievant thereby implies



that his dismissal was arbitrary and capricious. However, the evidence showed that Grievant was given ample notice and opportunity to improve through coaching on February 5, 2018, the Letter of Expectations and the Extension of Probationary Period letter on March 22, 2018, and the First Written Warning on July 1, 2018. Grievant failed to properly and timely grieve any of these actions. They must therefore be accepted as true.

“If an employee does not grieve specific disciplinary incidents, he cannot place the merits of such discipline in issue in a subsequent grievance proceeding. *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); See *Stamper v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dept. of Admin.*, Docket No. 93-ADMN-430 (Mar. 30, 1994). In such cases, the information contained in prior disciplinary documentation must be accepted as true. See *Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994).” *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997), *aff’d*, Mon. Co. Cir Ct. Docket No. 97-C-AP-96 (Dec. 7, 1999), appeal refused, W.Va. Sup Ct. App. Docket No. 001096 (July 6, 2000).

Further, it should be noted that Grievant previously had problems with timekeeping and WVU attempted to help him improve. In the March 22, 2019, Letter of Expectations, Mr. Mason wrote, “I have talked with you on several occasions to make sure correct job codes are on all time sheets and that no time sheets are missing. You do not alert me to missing time sheets and I must review all time sheets to check for incorrect job codes.” Also, the Extension of Probationary Period letter noted that Mr. Mason had a coaching session with Grievant on February 5, 2019, covering the three areas of concern discussed

in the Letter of Expectations. One of these three areas was to complete work in an accurate and timely manner. The Intent to Terminate Employment letter presented multiple incidents of improper timekeeping by Grievant in July of 2019. Grievant did not counter any of these allegations of improper timekeeping from the Intent to Terminate Employment letter. Grievant failed to prove that WVU acted arbitrary and capriciously in terminating his employment.

As for Grievant's remaining claims, these include obstruction of justice, covering up of fraud, harassment, hostile work environment, intentional infliction of emotional distress, bullying, and intimidation. Grievant did not present any evidence that WVU covered up fraud. As for obstruction of justice, Grievant argues this occurred when Ed Mason removed, destroyed, and hide work orders that WVU could not find in response to Grievant's discovery request. Assuming that Mr. Mason did this, it did not harm Grievant. Grievant testified that the reason he needed the work orders was to counter the allegation regarding the shoddy landscaping at Mountaineer Station on July 17<sup>th</sup>. Grievant prevailed on that charge.

Regarding bullying, intimidation, intentional infliction of emotional distress, these fall under harassment and hostile work environment. Even if Grievant had proven harassment and hostile work environment, the relief permissible under these claims is only available if Grievant had retained his employment with WVU. In light of Grievant's dismissal being upheld, it is not possible for the undersigned to grant the sort of relief permissible for harassment and hostile work environment.

When it is not possible for any actual relief to be granted, any ruling issued by the Grievance Board would merely be an advisory opinion. *Smith v. Lewis County Bd. of*

*Educ.*, Docket No. 02-21-028 (June 21, 2002), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 02-AA-87 (Aug. 14, 2003); *Spence v. Div. of Natural Res.*, Docket No. 2010-0149-CONS (Oct. 29, 2009). The Grievance Board does not issue advisory opinions. *Priest v. Kanawha Cnty. Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000); *Biggerstaff v. Mingo Cnty. Bd. of Educ.*, Docket No. 02-29-384D (Mar. 24, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 03-AA-55 (Feb. 10, 2005); *Mitias v. Pub. Serv. Comm'n*, Docket No. 05-PSC-107R (Sept. 22, 2010), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 10-AA-185 (Sept. 11, 2012). "Relief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the [Grievance Board]. *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993). *De minimus* relief is also unavailable. *Carney v. W. Va. Div. of Rehab. Services*, Docket No. VR-88-055 (Mar. 28, 1989)." *Baker v. Bd. of Directors*, Docket No. 97-BOD-265 (Oct. 8, 1997).

"Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003) (citing *Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996)). "A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. BLACK'S LAW DICTIONARY 1008 (6th ed. 1990). As no actual relief can be granted on Grievant's remaining claims, these claims are moot. As for the outcome of the grievance concerning prior discipline and termination of employment, the grievance of the prior discipline is dismissed and the grievance of the termination is denied.

Accordingly, this grievance is DISMISSED, in part, and DENIED, in part. The following Conclusions of Law support the Decision reached.

### **Conclusions of Law**

1. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See *Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

3. An employee is required to “file a grievance within the time limits specified in this article.” W. VA. CODE § 6C-2-3(a)(1). The Code further sets forth the time limits for filing a grievance as follows:

“Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a

continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. . . .”

W. VA. CODE § 6C-2-4(a)(1).

3. “If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep’t of Transp.*, Docket No. 97-DOH-060 (July 16, 1997).” *Carnes v. Raleigh County Bd. of Educ.*, Docket No. 01-41-351 (Nov. 13, 2001).

4. Respondent proved by a preponderance of evidence that the prior discipline was not timely grieved.

5. Grievant did not prove by a preponderance of evidence a proper basis to excuse his untimely grievance of prior discipline.

6. When a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is on the employee to establish by a preponderance of the evidence that his services were satisfactory. *Bonnell v. Dep’t of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. Dep’t of Health and Human Res.*, Docket No. 2008-0958-DHHR (Mar. 13, 2009).

7. “[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).

8. Grievant failed to prove by a preponderance of the evidence that his services were satisfactory or that his dismissal was arbitrary or capricious, or otherwise unreasonable.

9. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003) (*citing Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996)). "Relief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the [Grievance Board]. *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993). *De minimus* relief is also unavailable. *Carney v. W. Va. Div. of Rehab. Services*, Docket No. VR-88-055 (Mar. 28, 1989)." *Baker v. Bd. of Directors*, Docket No. 97-BOD-265 (Oct. 8, 1997).

10. As no actual relief can be granted on Grievant's remaining claims, they are moot.

Accordingly, the grievance is DISMISSED, in part, and DENIED, in part.

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: November 12, 2020**

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**Joshua S. Fraenkel**  
**Administrative Law Judge**