THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

EDWARD SMARR and JOSHUA SCHULTHEISZ,

Grievants,

v. **Docket No. 2020-1488-CONS**

DIVISION OF CORRECTIONS AND REHABILITATION/ BUREAU OF PRISONS AND JAILS/ ST. MARYS CORRECTIONAL CENTER AND JAIL,

Respondent.

DECISION

Grievants, Edward Smarr and Joshua Schultheisz, were employed by Respondent, Division of Corrections and Rehabilitation, at St. Marys Correctional Center and Jail (SMCCJ). Respondent dismissed Grievants during their probationary period of employment.

On January 17, 2020, Grievant Schultheisz filed his grievance (Docket No. 2020-0858-MAPS) stating, "Wrongfully accused of actions according to WV DCR, Commissioner, and Governor. Religious representation sought by state officials before investigation concluded. Wrongful Termination Resulting in permanent dismissal. Penalized for following orders from senior officer." As relief, he requests, "Public apology from all who slandered and settlement for troubled times."[1] On January 19, 2020, Grievant Smarr filed his grievance (Docket No. 2020-0822-MAPS) stating the same.

[1]"The remedy of a public apology is not available as relief from this Grievance Board." *Lawrence v. Bluefield State Coll*., Docket No. 2008-0666-BSC (June 19, 2008); *Emrick v. Wood County Bd. of Educ*., Docket No. 03-54-300 (Mar. 9, 2004); *Hall v. W. Va. Div. of Corr*., Docket No. 89-CORR-687 (Oct. 19, 1990). The undersigned will not further address Grievants' request for an apology.

Grievants filed directly to level three of the grievance process.[2] The two grievances were consolidated into the current action on June 5, 2020. A level three hearing was held on July 8, 2020, before the undersigned at the Grievance Board's Westover, West Virginia office. Grievants appeared *pro se*.[3] Respondent was represented by Briana Marino, Assistant Attorney General. This matter became mature for decision on August 14, 2020. Grievants and Respondent submitted written proposed findings of fact and conclusions of law (PFFCL).

Synopsis

Grievants were employed on a probationary basis as Correctional Officers and sent to the Corrections Academy for training. After seeing a photo of the graduating Class 18 cadets performing a Nazi style salute, Respondent ordered an investigation. When the investigation substantiated Grievants' participation in and failure to report the salute, Respondent terminated Grievants for misconduct. Grievants assert they performed a Roman rather than a Nazi salute, were simply following orders under the peril of dismissal if disobeyed, and were not properly trained to report misconduct. While Grievants lacked hateful intent in performing the salute, Respondent proved that participating in the salute was misconduct. Accordingly, this grievance is DENIED.

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

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[2]West Virginia Code § 6C-2-4(a)(4) permits a grievant to proceed directly to level three of the grievance process when the grievance deals with the discharge of the grievant.
[3]For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

Findings of Fact

1. Grievants Edward Smarr and Joshua Schultheisz were employed by Respondent, Division of Corrections and Rehabilitation (DCR), as probationary correctional officers at St. Marys Correctional Center and Jail (SMCCJ).

2. Grievants attended the Corrections Academy for training as part of Class 18 from October 21, 2019, through November 27, 2019.

3. Among many subjects, Academy training covers the identification of Strategic Threat Groups (STG)[4] and gangs, as well as their symbols and gestures. Some of these include white supremacy groups. However, this training did not cover the Nazi salute. (Respondent's Exhibit 1)

4. Respondent submitted into evidence a document by the American Defamation League (ADL) titled Hate on Display Hate Symbols Database.[5] The Nazi salute is explained as follows: "The Nazi or Hitler salute debuted in Nazi Germany in the 1930s as a way to pay homage to Adolf Hitler. It consists of raising an outstretched right arm with the palm down. In Nazi Germany, it was often accompanied by chanting or shouting 'Heil Hitler' or 'Sieg Heil.' Since World War II, neo-Nazis and other white supremacists have continued to use the salute, making it the most common white supremacist hand sign in the world." (Respondent's Exhibit 2)

[4]STGs are groups of four or more individuals dedicated to certain activities. (Testimony of Matthew Carson, DCR investigator)

[5]Respondent did not argue or present any evidence that this document was used in the training of its employees.

5. A Roman salute is similar to a Nazi salute but differs in its angle. The Roman salute reaches straight up for the sky, the Nazi salute for the horizon. (*See* Grievants' Exhibit 1, Grievants' testimony, & Grievants' Exhibit 1)[6]

6. While the ADL definition of the Nazi salute does not distinguish between the Nazi and the Roman salutes and does not talk about the angle of the salute, the parties agree that the Nazi salute entails an "arm extended approximately ear height." (Respondent's FOF 5 and *see* Grievants' testimony & Grievants' Exhibit 1)

7. Each graduating class participates in class photos at the Correctional Academy facility while in uniform and on the clock. Typically, one professional and one "goofy" picture is taken.

8. Academy Training Officer Karrie Byrd took the "goofy" picture of Class 18 cadets performing a Nazi style salute. (Respondent's Exhibit 1 & 3)

9. The "goofy" picture is captioned "HAIL BYRD!". (Respondent's Exhibit 3)

10. The "goofy" class photo took a number of attempts before everyone raised their arm. Some cadets only raised their arm after a superior said that failure to obey could result in disciplinary action, and then did so with a fist rather than an open hand. (*See* Respondent's Exhibit 1 & Grievant Smarr's testimony)

11. The "goofy" class photo was disseminated to cadets with their Class 18 graduation packet.

12. Upon leaving the Academy, Grievants returned to work at SMCCJ without ever reporting to anyone at the Academy or SMCCJ that cadets had performed a Nazi

[6]Grievants' Exhibit 1 distinguishes between the two salutes by juxtaposing images of Benito Mussolini doing the Roman salute straight up to the sky next to Hitler doing the Nazi salute towards the horizon (almost parallel to the ground).

style salute.

13. Once the “goofy” photo was brought to the attention of the DCR hierarchy, DCR orchestrated a joint investigation between Corrections Investigation Division’s (CID) investigators and Equal Employment Opportunity (EEO) investigators to determine the events surrounding the photo. (Testimony of Michael Coleman, Deputy Commissioner for Executive Services at DCR)

14. On December 5, 2019, Respondent imposed on Grievants a non-disciplinary suspension pending the completion of the investigation. (Respondent’s Exhibit 4)

15. The West Virginia Division of Personnel's Administrative Rule, states:

> 12.3.b. **Non-disciplinary Suspension. -- An appointing authority may suspend any employee without pay indefinitely to perform an investigation regarding an employee's conduct which has a reasonable connection to the employee's performance of his or her job or when the employee is the subject of an indictment or other criminal proceeding. Such suspensions are not considered disciplinary in nature** and an employee may choose to use accrued annual leave during the period of non-disciplinary suspension but is not eligible for any other leave afforded in this rule. The appointing authority shall give the employee oral notice confirmed in writing within three (3) working days, or written notice of the specific reason or reasons for the suspension. A predetermination conference and three (3) working days’ advance notice are not required; however, the appointing authority shall file the statement of reasons for the suspension and the reply, if any, with the Director.
>
> Upon completion of the investigation or criminal proceeding, the appointing authority shall:
> 12.3.b.1. **initiate appropriate disciplinary action as provided in this rule; and,**
> **12.3.b.2. unless the employee is dismissed or otherwise separates from employment prior to completion of the investigation or criminal proceeding, provide retroactive**

> **wages or restore annual leave for the period of suspension**; provided, that such retroactive wages may be mitigated by other earnings received during the period of suspension. Further, the appointing authority and employee may agree to consider all or part of the period of unpaid suspension pending investigation or criminal indictment or proceeding as fulfilling the period of any disciplinary suspension without pay.
> (emphasis added)

W. VA. CODE ST. R. § 143-1-12.3.b. (2016).

16. The EEO investigation entailed interviewing many of those involved in the "goofy" photo and the circumstances leading up to the salute therein. The investigation resulted in the EEO Investigation Summary Report. (Respondent's Exhibit 1)

17. On December 4, 2019, Investigator Carson conducted recorded interviews of each Grievant as part of the investigation. (Respondent's Exhibit 1)

18. The investigation concluded that, even though a number of cadets were seated and did not perform an open palm Nazi style salute, the cadets collectively performed a Nazi salute based on a collective view of the picture. (Mr. Coleman's testimony)

19. The Investigation Report concluded that "[t]he Hail Byrd picture was taken by and at the direction of Instructor Byrd" and that "multiple cadets reported the photo was taken several times due to not everyone participating in the gesture." It further finds that "[t]hey only did it at that time due to fear of not graduating for disobeying the direction of an instructor." ("conclusion" section of Respondent's Exhibit 1)

20. The Investigation Report concluded that "the investigation did not reveal any motivation or intent that this [salute] was a discriminatory act towards any racial, religious or ethnic group but was done out of sheer ignorance and poor judgment.

However, in terms of EEO violations, perception is much more important than intent. This perception is based upon the reasonable person standard which takes the scrutiny away from the two principles in the dispute." (Respondent's Exhibit 1)

21. Respondent determined that intent did not matter due to the security risk resulting from inmate knowledge of the salute photo through the media. Respondent reasoned that some inmates would assume that Grievants hold white supremacist views and are biased against minority inmates. This would lead to riots and violence against all guards, regardless of their participation in the salute. (Mr. Yardley's testimony)

22. The Investigation Report concluded that a lone cadet started using the "Hail Byrd" salute in the second or third week of the Academy as a "sign of respect" for Instructor Byrd, and that the salute was taken up by other cadets over the six weeks of the Academy. (Respondent's Exhibit 1 & Grievants' testimony)

23. The Investigation Report concluded that "[t]he gesture was done with Byrd's knowledge. She encouraged it, reveled in it, and at times reciprocated the gesture. Additionally, Byrd appeared to overrule the corrective actions taken by others and assured the cadets the behavior was acceptable." ("conclusion" section of Respondent's Exhibit 1)

24. Respondent received calls of outrage from the public and interpreted these as evidence that the salute had eroded public trust. (Mr. Coleman's testimony)

25. At the conclusion of the internal investigation, Russell Maston, the Superintendent of SMCCJ, held a predetermination conference with Grievant Schultheisz on January 7, 2020, and Grievant Smarr on January 8, 2020. (Respondent's Exhibit 4)

26. By letter dated January 7, 2020, Respondent dismissed Grievant Schultheisz from his probationary employment, effective January 22, 2020. (Respondent's Exhibit 4)

27. By letter dated January 8, 2020, Respondent dismissed Grievant Smarr from his probationary employment, effective January 23, 2020. (Respondent's Exhibit 4)

28. Each dismissal letter gave the same rationale for dismissal, stating in part the following:

> … 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.
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> During the course of 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.
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> 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 or 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. …
>
> 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 the St. Marys Correctional Center and Jail, thus warranting your dismissal. …

(Respondent's Exhibit 4)

29. Typically, the decision to dismiss a DCR employee is made when the Commissioner approves such recommendation. The superintendent of a facility is normally involved in dismissal decisions. (*See* testimony of Mr. Coleman, Russell Maston, Superintendent of SMCCJ, & Lance Yardley, Chief of Operations for Bureau of Prisons and Jails)

30. In this case, the Commissioner and facility superintendents were not involved in the decision to dismiss. The decision to dismiss participants in the "goofy" photo came from the office of Governor Jim Justice. (Testimony of Mr. Coleman, Yardley, & Mr. Maston)

31. Respondent did not submit or cite any specific policy that Grievants had violated by participating in and failing to report classmates who participated in the Nazi style salutes.

32. Respondent did not submit or cite any specific policy covering Grievants' duty to report misconduct by coworkers.

33. Respondent did not train Grievants on the difference between lawful and unlawful orders and the duty to refuse unlawful orders.

34. Respondent did not present any evidence that the Nazi salute is taught to cadets as a gang gesture or white supremacy identifier but relied on the public knowledge Grievants should have gained through the media and history books that it is generally "a bad thing."

35. Respondent expected cadets who were part of the incident to report the salute even if they had to wait until after graduating from the Academy to do so. (Mr. Coleman's testimony)

36. Respondent determined that returning Grievants to work as Correctional Officers would pose a safety risk to Grievants and their coworkers and would jeopardize their credibility when testifying for the agency. (Testimony of Lance Yardley, Chief of Operations for the Bureau of Prisons and Jails)

37. As a result of the investigation, Respondent grew concerned that minority employees might not feel safe working with Grievants. (Mr. Coleman's testimony)

38. Cadets and their families, and even some correctional officers who were not involved in the salute, have received death threats. (*See* Grievant Smarr's testimony)

39. A group of inmates even mockingly saluted correctional officers shortly after the picture was released. This salute led to discipline of the inmates involved. (Mr. Maston's testimony)

40. Respondent determined that the lack of animus on the part of Grievants was outweighed by the negative public perception of the incident. (Mr. Coleman's testimony)

Discussion

When a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is on the employee to establish by a preponderance of the evidence that his services were satisfactory. *Bonnell v. Dep't of Corr*., Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. Dep't of Health and Human Res*., Docket No. 2008-0958-DHHR (Mar. 13, 2009). However, if a probationary employee is terminated on the grounds of misconduct, the termination is disciplinary, and the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *See Cosner v. Dep't of Health and Human Res*., Docket No. 08-HHR-008 (Dec. 30, 2008); *Livingston v. Dep't of Health and Human Res*., Docket No. 2008-0770-DHHR (Mar. 21, 2008). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

Grievants were probationary employees when Respondent dismissed them for

misconduct. It is uncontested that Grievants engaged in a Nazi style salute for their Corrections Academy graduation photo and then failed to report it. Respondent contends this is misconduct. Grievants assert that they did not commit misconduct because they were simply following orders, they were not trained on reporting, and their salute was Roman rather than Nazi.

As a preliminary matter, Grievants present as proof of their lack of misconduct Grievant Schultheisz' unemployment claim which found "there was no intent to convey any type of a racial message." The findings and conclusions made by an administrative law judge in an unemployment compensation proceeding are not binding on the Grievance Board and do not have the effect of *res judicata*.[7] *Maxey v. West Virginia Department of Health and Human Resources*, Docket No. 93-HHR-007 (Feb. 28, 1995), *aff'd*, Wyoming Cnty. Cir. Ct. Docket No 95-C-110 (Mar. 4, 1997), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 971494 (Dec. 3, 1997). The principles of *res judicata* and *equitable estoppel* therefore do not apply to preclude the undersigned from considering anew the issue of misconduct.

Grievants raise other preliminary matters in their PFFCL. They apparently make a motion to exclude Mr. Coleman's testimony and the American Defamation League's (ADL) Hate on Display Hate Symbols Database. Grievants argue that both are bias and implicitly racist: Mr. Coleman because he used the term "those people" to refer to the cadets in the Class 18 photo and the ADL database because it identifies "White Lives Matter" as a slogan used by white supremacist groups.

[7]"A matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment." BLACK'S LAW DICTIONARY 1305 (6th ed. 1990).

Regarding Mr. Coleman, the undersigned believes Grievants are being ironic in making a farcical rush to "perceive" Mr. Coleman's behavior as racist. It appears that Grievants do so as analog to what they see as Respondent's rush to "perceive" the salute by Class 18 as a white supremacist gesture. Nevertheless, in the context of this hearing, this simply goes to credibility rather than the exclusion of testimony. In line with standard practice, the undersigned will consider witness credibility if a contested fact warrants a credibility determination.

As for the ADL database, while it may be disappointing to Grievants that the term "White Lives Matter" has been coopted by white supremacist groups, the undersigned will not think any less of ADL for their work in cataloging this development. Respondent implies that Grievants should know the various gang symbols and displays detailed therein. Yet, there is no evidence that Grievants were provided with the database prior to the salute. While the undersigned finds this database enlightening, he will not retroactively attribute to Grievants any knowledge gleaned therefrom.

This brings us to the alleged misconduct. The parties agree that Grievants participated in a salute for the Class 18 photo and failed to report their classmates for doing the same. Grievants contend that Respondent never trained them on the Nazi salute. Yet, they also argue that the salute was Roman. They assert they were just following orders from Instructor Byrd, who took the salute photo multiple times until all cadets participated. Grievants state they were informed by their instructors and the cadet handbook that the consequence for failure to obey an order is termination and they were never told they had the option to disobey. Grievants assert they were never trained on the difference between lawful and unlawful commands and their duty to disobey unlawful

orders. They further contend they were not trained to report misconduct. Grievants contend that many instructors and staff at the Academy knew that cadets were saluting Instructor Byrd daily over most of the six weeks of training but never told cadets they were being inappropriate nor did they take any action or even report this conduct up the chain of command.

Respondent concedes that Grievants did not have discriminatory intent but contends that a reasonable person would have perceived the salute as Nazi. While acknowledging that Grievants were not trained on the Nazi salute, it contends they should have recognized the gesture as a "bad thing" from popular culture and history books. In not asserting otherwise, Respondent concedes that Grievants were not trained to recognize the difference between lawful and unlawful orders and to disobey unlawful commands but contends that it is common sense to disobey unlawful orders. In not asserting otherwise, Respondent concedes that Grievants were not trained to report but implies it is common sense to report misconduct. Respondent contends that, even if they were compelled to follow orders, Grievants could have reported their classmates after graduation.

Respondent implies that Grievants did not know the distinction between the Nazi and Roman salutes at the time of the photo. While Grievants testified that their gesture was a Roman salute, Investigator Carson testified that Grievants never mentioned the Roman salute in their interviews when acknowledging they were aware of the historic significance of the Nazi salute. As for whether Grievants were ordered to salute for the photo, Grievant Smarr testified (in the level three hearing), and the Investigation Report concludes, that Instructor Byrd directed the cadets to salute. In spite of the conclusion

reached in the Investigation Report, Respondent does not take a position on this issue, simply saying in its PFFCL that it is "disputed." In so doing, Respondent appears to rely on Investigator Carson's testimony that during the investigative interviews Grievants never told him they were following orders. As for Grievants' duty to report the salute, Respondent did not present any testimony showing whether Grievants had ever been trained on reporting. Grievants contend they were never trained on reporting.

Thus, there is conflicting testimony on whether Grievants engaged in a Roman rather than a Nazi salute and whether they were ordered to salute for the photo. 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 SYSTEM 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 are plausibility, motive, and consistency of prior statements. Grievants did not dispute Investigator Carson's testimony that Grievants told him they were familiar with the Nazi salute and recognized the negative connotations of their salute. However, they testified that the salute was Roman rather than Nazi. In so testifying, they affirmed that they were aware of the Nazi salute. Grievants statements to Investigator Carson confirm that they recognized the negative connotations of their salute, regardless of whether the angle of the salute technically converted it to a Roman salute.

Nevertheless, the undersigned will assess the veracity of Grievants' claim that their salute was Roman. There are a couple of factors that lead the undersigned to conclude that Grievants were not aware of the distinction between a Roman salute and a Nazi salute at the time the photo was taken. Grievants did not present any testimony indicating that at the time the photo was taken cadets thought they were participating in a Roman salute. Grievants had access to the Investigative Report and the summaries of their interviews well before the hearing yet did not reveal any attempts to correct these summaries. While Investigator Carson could have motive to exclude any exculpatory evidence due to the pressure on the agency emanating from the bad publicity, there is no indication that anyone at the agency was concerned that calling the salute anything other than Nazi would affect their determination that it was misconduct. Further, Grievants did not indicate how or when they first learned of a Roman salute. Rather, they submitted a number of printouts from the internet which gave the technical and historic distinctions between the two salutes. Grievants' apparent personal knowledge of the Roman salute seems inconsistent with Grievants' statements as to a vague familiarity with the better-known Nazi salute. The undersigned concludes that Grievants first became aware of the

Roman salute in preparation for this hearing when Grievants scoured the internet for arguments and images in defense of their position.

As for Grievants' credibility in claiming they were just following orders, Investigator Carson at first implied he could not remember, then testified that Grievants never told him they were ordered to salute. It is important to note that Respondent did not take a position on whether Grievants were ordered to salute, simply stating in its PFFCL that it remains "disputed." Grievant Smarr testified that, as Instructor Byrd was trying to decide what to do for the "goofy" photo, a cadet proposed the salute and Byrd then ordered the cadets to do the salute. These statements are not inconsistent. The undersigned cannot find Grievants' testimony in this regard to be untrustworthy. Respondent failed to prove that Grievants were not ordered to salute for the class photo.

Because Grievants participated in the Nazi salute, the other grounds for dismissal are ultimately inconsequential. Nevertheless, the undersigned will address these and Grievants' counterarguments thereto. As for Grievants' contention that they were never trained to report misconduct, neither party presented any testimony or evidence for or against this proposition. While the undersigned finds that Grievants were not trained on reporting misconduct, Grievants nevertheless testified that they did not perceive the salute as wrong and would not have reported it knowing what they knew at the time.

Respondent contends that Grievants engaged in the salute willingly and without protest. This contention is supported by the evidence. Grievants' testified that they did not during the Academy perceive the salute as wrong. They attempted to justify this perception through the following events: A lone cadet started saluting Instructor Byrd during class a few weeks into the Academy; Instructor Byrd then began reveling in and

expecting cadets to salute her and even reassured them that what they were doing was acceptable; Other instructors even passed by and did not report the salute up the chain of command. Grievants testified that in knowing what they now know, they would have reported the salute, but at the time did not see anything wrong with it.

Respondent proved misconduct in showing that Grievants willfully engaged in a Nazi style salute. As probationary employees, Grievants were not entitled to the usual protections afforded state employees. 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 Rule establishes 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). "However, the distinction is one that only affects who carries the burden of proof. As a practical matter, an employee who engages in misconduct is also providing unsatisfactory performance. " *Livingston v. Dep't of Health and Human Res*., Docket No. 2008-0770-DHHR (Mar. 21, 2008) (citing *Johnson v. Dep't of Transp./Div. of Highways*, Docket No. 04-DOH-215 (Oct.

29, 2004)). "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)).

Nevertheless, Respondent could not terminate Grievants for unlawful or arbitrary and capricious reasons. "[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).

Respondent justifiably lost faith in Grievants' ability to exercise proper judgment after they participated in a Nazi style salute. It therefore did not act arbitrarily or capriciously in terminating Grievants. Grievants imply that the Governor fired them without considering the circumstances and actual facts due to the overwhelming negative publicity that followed the dissemination of the picture. They contend that the decision to dismiss them deprived them of due process. However, the evidence shows that the grounds for their dismissal was supported by a thorough investigation.

In addition to misconduct, Respondent justified Grievants' dismissal using the real possibility of violence by minority inmates and gangs who might perceive the class salute as a declaration of allegiance or sympathy for white supremacy gangs. This violence would endanger all employees, not just those who had been a part of Class 18.

Respondent presented evidence that cadets and their families, and even some correctional officers who were not involved in the salute, have received death threats. A group of inmates even mockingly saluted correctional officers shortly after the picture was released. Grievants acknowledged that there are safety concerns. Respondent also voiced concern that the salute would be used by criminal defendants to discredit Grievants when they are inevitably called on to testify about prisoner misconduct. Respondent would have an accompanying duty to disclose Grievants' involvement in the salute every time they are called to testify. After accounting for all considerations, the undersigned finds that Respondent proved that Grievants' dismissal was not arbitrary or capricious.

As for their remaining claims, Grievants bear the burden of proof in a grievance that does not involve a disciplinary matter and must prove their grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). In declaring they were exercising their right to free speech, Grievants make an affirmative[8] defense to their conduct. "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2018).

The West Virginia Supreme Court recently reiterated long standing caselaw on the parameters surrounding the exercise of free speech in the workplace.[9] It relied on syllabus point four of *Alderman v. Pocahontas County Board of Education*, 223 W. Va. 431, 675 S.E.2d 907 (2009), where it had previously held:

[8]"In pleading, matter asserted by defendant which, assuming the complaint to be true, constitutes a defense to it." BLACK'S LAW DICTIONARY 60 (6th ed. 1990).
[9]*Day v. W. Va. Dep't of Military Affairs & Pub. Safety*, 2018 W. Va. LEXIS 398.

> "Under *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), public employees are entitled to be protected from firings, demotions and other adverse employment consequences resulting from the exercise of their free speech rights, as well as other First Amendment rights. However, *Pickering* recognized that the State, as an employer, also has an interest in the efficient and orderly operation of its affairs that must be balanced with the public employees' right to free speech, which is not absolute." Syllabus point 3, *Orr v. Crowder*, 173 W.Va. 335, 315 S.E.2d 593 (1983).

It reiterated the limitations on a public employee's free speech rights set forth in syllabus point five of *Alderman*:

> There are some general restrictions on a public employee's right to free speech. First, an employee's speech, to be protected, must be spoken as a citizen on a matter of public concern. If the employee did not speak as a citizen on a matter of public concern, then the employee has no First Amendment cause of action based on the employer's reaction to the speech. If the employee did speak as a citizen on a matter of public concern, the possibility of a First Amendment claim arises and a second and a third factor are invoked. The second factor that is invoked considers statements that are made with the knowledge that they were false or with reckless disregard of whether they were false, and such statements are not protected. The third factor that is invoked considers statements made about persons with whom there are close personal contacts that would disrupt discipline or harmony among coworkers or destroy personal loyalty and confidence, and such statements may not be protected.

The Grievance Board applied this standard, stating that "[t]he West Virginia Supreme Court has held that 'the burden is properly placed on the public employee to show that conduct is constitutionally protected,' and it must be spoken as a citizen on a matter of public concern. *Alderman v. Pocahontas County Bd. of Educ*., 223. W. Va. 431, 441, 675 S.E.2d 907, 917 (2009)." *Thackston v. Concord University*, Docket No. 2016-1068-CU (March 22, 2017).

Thus, there are a few hurdles Grievants must overcome to prove that their salute was protected free speech. The first hurdle involves two elements: whether Grievants spoke as private citizens and whether the content of their speech covered a matter of public concern. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *See Connick v. Myers*, 461 U.S. 138, 147-48, 103 S. Ct. 1684, 1690, 75 L. Ed. 2d 708 (1983), *cited* by *Alderman* at 918. Grievants' salute did not overlap with their role as private citizens but was simply a manifestation of their relationship to Instructor Byrd and their classmates. Grievants simply went along with the salute because their classmates were doing it and Instructor Byrd told them to do it. Grievants voiced no reason for participating in the salute that could be viewed as a matter of public concern. Grievants failed to meet the elements set forth in *Pickering* and *Alderman*, and thus failed to prove that their speech was protected.

Grievants also assert an Eighth Amendment right against unusual punishment. This argument goes to mitigation. "[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).

Grievants have not proven that the punishment they received in being dismissed was disproportionate to their misconduct. Grievants have not shown that Respondent abused its discretion in dismissing them. Even though Grievants showed that Respondent did not inform them that the Nazi salute was prohibited, it was not unreasonable for Respondent to attribute them knowledge that the Nazi styled salute was a "bad thing." Grievants have not proven their punishment warrants mitigation. Considerable deference is afforded Respondent's judgment, and the undersigned will not

substitute Respondent's decision with his own where the punishment is not clearly disproportionate to the offense.

Grievants assert that the Governor and Mr. Coleman engaged in conduct that, like Grievants' salute, could be perceived as racist, but that they were not even investigated let alone punished. Michael Coleman is the Deputy Commissioner for Executive Services at DCR and testified at the level three hearing in this case. Grievants allege Mr. Coleman's perceived inappropriate conduct occurred during his testimony when he used the term "those people" one time to refer to the cadets in the Class 18 photo. Grievants allege that the Governor engaged in perceived inappropriate conduct when he called minority girls on an opposing team "thugs" after they were involved in a physical altercation with the girls on the team he coached, when he said all Presidents are welcome to the State except President Obama, and through a still shot of the Governor with his hand extended in what they assert appears to be a Nazi salute. Grievants request as a remedy that these individuals be investigated and resign.

"Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication." Syl. Pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003) (*citing* Syl. Pt. 3, *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973)). A grievance is "a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes policies, rules or written agreements applicable to the employee." W. VA. CODE § 6C-2-2(i)(1). The

Grievance Board's role is to determine if such violation, misapplication, or misinterpretation has occurred based on the evidence presented by the parties and to provide relief if proven. The grievance procedure statute does not bestow investigatory powers upon the Grievance Board itself or provide the Grievance Board authority to order an investigation by an outside agency. Further, it does not have the authority to order that anyone resign or be dismissed.

However, the undersigned will address the essence of these claims under a discrimination analysis. "Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove: (a) that he or she has been treated differently from one or more similarly-situated employee(s); (b) that the different treatment is not related to the actual job responsibilities of the employees; and, (c) that the difference in treatment was not agreed to in writing by the employee. *Frymier v. Higher Education Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp*., Docket No. 2008-1594-DOT (Dec. 15, 2008). Unlike the Governor and Mr. Coleman, Grievants are probationary employees and their job entails regular direct contact with the inmate population. Grievants failed to prove they are similarly situated to the Governor and Mr. Coleman.

Grievants request back pay for the period of their suspension. Respondent counters that Grievants were suspended pending the outcome of the investigation into

misconduct. Respondent cites the West Virginia Division of Personnel's Administrative Rule, which states:

> "An appointing authority may suspend any employee without pay indefinitely to perform an investigation regarding an employee's conduct which has a reasonable connection to the employee's performance of his or her job or when the employee is the subject of an indictment or other criminal proceeding. Such suspensions are not considered disciplinary in nature and an employee may choose to use accrued annual leave during the period of non-disciplinary suspension but is not eligible for any other leave afforded in this rule. The appointing authority shall give the employee oral notice confirmed in writing within three (3) working days, or written notice of the specific reason or reasons for the suspension. A predetermination conference and three (3) working days' advance notice are not required; however, the appointing authority shall file the statement of reasons for the suspension and the reply, if any, with the Director."

W. VA. CODE ST. R. § 143-1-12.3.b. (2018). Further, "[t]he suspension of an employee pending investigation of an allegation of misconduct is not disciplinary in nature and the grievant bears the burden of proving that such suspension was improper. *Ferrell and Marcum v. Reg'l Jail and Corr. Facility Auth./W. Reg'l Jail*, Docket No. 2013-1005-CONS (June 4, 2013); W. VA. CODE ST. R. 143-1-12.3.b.

In order to prevail on their request for backpay, Grievants must prove that their suspension was improper. Grievants imply that their unpaid suspension was improper because it resulted in their being punished twice. Grievants failed to address any of the elements necessary to prove their suspension was improper. In accordance with the Administrative Rule, an unpaid suspension without subsequent reimbursement is allowed in order to facilitate an investigation into conduct related to an employee's job performance if the employee is dismissed upon completion of the investigation. Grievants have the burden of proving all elements set forth under the Administrative Rule. Grievants

did not present evidence covering any of these elements. The termination letters confirm that Grievants were dismissed after the investigation ended and that their suspension was only implemented to facilitate the investigation into their alleged misconduct. Grievants failed to present any evidence to the contrary and therefore did not prove by a preponderance of evidence that their suspension was improper. Grievants are therefore not entitled to backpay.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. When a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is on the employee to establish by a preponderance of the evidence that his services were satisfactory. *Bonnell v. Dep't of Corr*., Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. Dep't of Health and Human Res*., Docket No. 2008-0958-DHHR (Mar. 13, 2009). However, if a probationary employee is terminated on the grounds of misconduct, the termination is disciplinary, and the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *See Cosner v. Dep't of Health and Human Res*., Docket No. 08-HHR-008 (Dec. 30, 2008); *Livingston v. Dep't of Health and Human Res*., Docket No. 2008-0770-DHHR (Mar. 21, 2008). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. The Division of Personnel's administrative rule 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).

3. "A probationary employee is not entitled to the usual protections enjoyed by a state employee. The probationary period is used by the employer to ensure that the employee will provide satisfactory service. An employer may decide to either dismiss the employee or simply not to retain the employee after the probationary period expires." *Hammond v. Div. of Veteran's Affairs*, Docket No. 2009-0161-MAPS (Jan. 7, 2009) (citing *Hackman v. Dep't of Transp*., Docket No. 01-DMV-582 (Feb. 20, 2002)).

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

5. Respondent proved by a preponderance of evidence that Grievants engaged in misconduct when they willfully performed a Nazi style salute.

6. The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018).

7. "The West Virginia Supreme Court has held that 'the burden is properly placed on the public employee to show that conduct is constitutionally protected,' and it must be spoken as a citizen on a matter of public concern. *Alderman v. Pocahontas County Bd. of Educ*., 223. W. Va. 431, 441, 675 S.E.2d 907, 917 (2009)." *Thackston v. Concord University*, Docket No. 2016-1068-CU (March 22, 2017).

8. Grievants did not prove by a preponderance of evidence that their salute was protected speech.

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. Grievants did not prove by a preponderance of evidence that their punishment warranted mitigation.

11. “Discrimination’ means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. VA. CODE § 6C-2-2(d). In order to establish a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove: (a) that he or she has been treated differently from one or more similarly-situated employee(s); (b) that the different treatment is not related to the actual job responsibilities of the employees; and, (c) that the difference in treatment was not agreed to in writing by the employee. *Frymier v. Higher Education Policy Comm’n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep’t of Transp*., Docket No. 2008-1594-DOT (Dec. 15, 2008). “The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was ‘clearly excessive or reflects an abuse of the agency['s]

discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. [State] Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Meadows v. Logan County Bd. of Educ*., Docket No. 00-23-202 (Jan. 31, 2001).

12. Grievants did not prove by a preponderance of evidence that they were discriminated against.

13. The suspension of an employee pending investigation of an allegation of misconduct is not disciplinary in nature and the grievant bears the burden of proving that such suspension was improper. *Ferrell and Marcum v. Reg'l Jail and Corr. Facility Auth./W. Reg'l Jail*, Docket No. 2013-1005-CONS (June 4, 2013); W. VA. CODE ST. R. 143-1-12.3.b.

14. Grievants did not prove by a preponderance of evidence that their suspension was improper or that they were entitled to backpay.

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: September 23, 2020

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Joshua S. Fraenkel
Administrative Law Judge