

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**THOMAS E. SMITH, JR.,
Grievant,**

v.

Docket No. 2020-0827-MAPS

**DIVISION OF CORRECTIONS AND REHABILITATION/
BUREAU OF PRISONS AND JAILS/
SALEM CORRECTIONAL CENTER AND JAIL,
Respondent.**

DECISION

Grievant, Thomas E. Smith, Jr., was employed by Respondent, Division of Corrections and Rehabilitation, as a probationary employee at the Salem Correctional Center and Jail. On January 27, 2020, Grievant filed this action against Respondent stating, "Wrongfully accused of accused [sic] of actions according to WV DCR, Commissioner, and Governor. Religious representation sought by state officaials [sic] before investigation concluded. Wrongful termination Resulting in permanent dismissal. Penalized for following orders from senior officer." Grievant seeks reinstatement and back pay along with an apology and "settlement for troubled times."

The grievance was filed directly to Level Three. A Level Three evidentiary hearing was conducted on June 29, 2020, before the undersigned at the Grievance Board's Westover, West Virginia office. Grievant appeared *pro se*. Respondent appeared by counsel, Briana Marino, Assistant Attorney General. This matter became mature for

consideration upon receipt of Respondent's fact/law proposals on July 30, 2020. Grievant did not file proposals.

Synopsis

Grievant was a probationary employee. Respondent became aware of misconduct by Grievant while attending Respondent's Corrections Academy. Respondent conducted an investigation and determined that Grievant was depicted in a graduation photograph participating in a "Nazi salute." Grievant was dismissed from his probationary employment for his participation in, and failure to report, the offensive conduct while attending the Corrections Academy. Respondent proved by preponderance of the evidence that Grievant engaged in the inappropriate and offensive conduct, and that such conduct rendered him incapable of performing the duties of a correctional officer. This grievance is denied.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievant was employed by Respondent as a probationary correctional officer at the Salem Correctional Center and Jail.
2. As part of his job requirements, Grievant attended the Corrections Academy from October 21, 2019, through November 27, 2019.
3. Part of the Corrections Academy training focuses on identification of security threat groups, or gangs, and the symbols and gestures used by the groups. Some of these groups include white supremacy groups, and gestures and symbols used by these groups are connected to the German National Socialist Party.

4. Each graduating class of the Academy participates in class photographs while in uniform and still on the grounds of the Corrections Academy.

5. In late November 2019, Respondent became aware that one of the graduation photographs depicted individual officers participating in a “Nazi salute.” The photograph depicted both the official seal of the State of West Virginia, Division of Corrections and Rehabilitation seal, cadets in uniform, and the caption “Hail Byrd.”

6. Based upon the inappropriate nature of the photograph, Respondent began an investigation to determine the events that led to the photograph, and the origin of the hand gesture, as well as why the photograph was included in the graduation packet.

7. In addition to the costs and disruption to the Respondent’s operations during this process, media attention generated as a result of this incident which likely caused harm to the reputation of Respondent.

8. As a result of the investigation, it was determined that the hand gesture started in the classroom setting as one of the various cadets described it as a “sign of respect” for their Academy Training Officer Karrie Byrd.

9. Grievant did not recognize the use of the gesture while at the Academy for its historical implications, but when advised by fellow cadets of the negative connotations, he failed to report the conduct.

10. The gesture was done with Officer Byrd’s knowledge throughout the training process.

11. At the conclusion of the investigation, Superintendent John Anderson held a predetermination conference with Grievant on January 7, 2020. Grievant responded by

pointing out that the instructor, Karrie Byrd, did not put a stop to the inappropriate gestures and she failed to report the conduct to her superiors.

12. By letter dated January 7, 2020, Grievant was dismissed from his probationary employment for his participation in, and failure to report, the offensive conduct while attending the Corrections Academy.

Discussion

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

If a probationary employee is terminated on the grounds of misconduct, the termination is disciplinary, and the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. See *Cosner v. Dep't of Health and Human Res.*, Docket No. 08-HHR-008 (Dec. 30, 2008); *Livingston v. Dep't of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. Dep't of Health*

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

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.” 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.” 143 CSR 1 § 10.1(a). A probationary employee may be dismissed at any point during the probationary period that the employer determines his services are unsatisfactory. 143 CSR 1 § 10.5(a).

Respondent asserts that Grievant was a probationary employee who was dismissed from employment due to his participation in the “Hail Byrd” photograph and the repeated participation in the “Nazi salute” during Academy class. Grievant was sent to the Academy to be trained as a correctional officer, which included training on identification of security threat groups, such as white supremacist groups. As is common knowledge, such groups can be identified by gestures or symbols, in particular, gestures and symbols relating to the Nazi party. While Grievant made some initial general challenge to his dismissal in his statement of grievance, he represented to the undersigned at the evidentiary hearing he was, in essence, seeking an explanation for why he was dismissed.

Respondent proved, and Grievant acknowledged, that Grievant engaged in actions which included the “Nazi salute” gesture throughout his training. In addition, Respondent introduced a photograph of Grievant displaying this gesture in which he was wearing Respondent’s uniform representing the State of West Virginia. The evidentiary hearing established that Grievant understood there were negative connotations associated with the gesture, that it was associated with racism, anti-Semitic history, and that it could be considered offensive to many groups of society. Initially, Grievant indicated that he was not fully aware of the negative connotations of his actions, but other cadets informed him on some of the historical meanings of the gesture. Grievant failed to report this activity while at the Academy or upon his return to his assignment at the Salem Correctional Center and Jail.

It is undisputed that Grievant was a participant in the “Hail Byrd” photograph and in the offensive conduct during his training. Respondent took this behavior seriously both for what it means to the individuals involved, should they have retained their employments, as well as the community-at-large and the State. Not only is this behavior contrary to the purpose of Respondent to establish a just, humane, and efficient corrections program, such behavior puts the participating officers at risk of harm in a secure setting should inmates take offense to this view. In short, the risk is not only for the Grievant, but it affects any other officer or employee who might work with Grievant and the other cadets in a secure setting. Respondent must act for the good of the agency, employees, and the inmates in its determination as to whether Grievant could effectively perform the duties of a correctional officer.

Grievant engaged in this behavior repeatedly using a symbol of white supremacy while wearing a uniform of the State of West Virginia. Respondent proved Grievant engaged in misconduct, and as a result, did not meet a standard of performance expected of a correctional officer. Respondent demonstrated that Grievant could not effectively perform the duties of a correctional officer without additional risk of serious harm. Respondent also proved by a preponderance of the evidence that Grievant failed to report the conduct of his class, either at the Academy or upon his return to his assigned facility.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. If a probationary employee is terminated on the grounds of misconduct, the termination is disciplinary, and the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. See *Cosner v. Dep't of Health and Human Res.*, Docket No. 08-HHR-008 (Dec. 30, 2008); *Livingston v. Dep't of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. Because Grievant was dismissed from his employment for misconduct, Respondent bears the burden of proof in this case.

3. 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." 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." 143 CSR 1 § 10.1(a).

4. Respondent proved by a preponderance of the evidence that Grievant engaged in offensive conduct while attending the training academy, and that such conduct renders him incapable of adequately performing the duties of a correctional officer.

5. Respondent also proved by a preponderance of the evidence that Grievant failed to report the conduct of his class, either at the Academy or upon his return to his assigned facility.

Accordingly, this grievance is **DENIED**.

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

included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2018).

Date: September 9, 2020

Ronald L. Reece
Administrative Law Judge