

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**BRYON WHETZEL,
Grievants,**

v.

Docket No. 2019-0663-MAPS

**DIVISION OF CORRECTIONS AND REHABILITATION/
BUREAU OF PRISONS AND JAILS/ POTOMAC HIGHLAND
REGIONAL JAIL AND CORRECTIONAL FACILITY,
Respondent.**

DECISION

Grievant, Bryon Whetzel, was employed by Respondent, Division of Corrections and Rehabilitation, at Potomac Highland Regional Jail and Correctional Facility. On October 25, 2018, Respondent dismissed Grievant during his probationary period of employment. On October 30, 2018, Grievant filed this grievance stating, "I feel like I have been singled out during an investigation and targeted by my admin staff. I have attached a report going into detail about this."

Excerpts from the three-page attachment are as follows:

"... I was the tower officer that day. This inmate which had sexual charges was placed into a lock down section where all the employees were aware that they cap their doors. The other inmates were known DMI members and two of which were DMI hitmen that had already been in fights before. That day I radioed for my rover multiple times to come lock them down, and the shift supervisor even came down a few times because the inmates were still out. ... I found the inmate beaten up and reported it soon as I got up front. ... Wrote my report on the assault with my rover later that evening before going home. Again, the reports were never turned in to admin staff. ... Another issue to be brought up is a doctor's note. I personally handed it to my supervisor after coming in. I had called off for a doctors appt me (sic) that day after the doctor called and said he needed to reschedule I decided to go in and help with that shift. I came in and handed a sub and the note to my supervisor, SGT Jeremy Hirsch who advised me to lay it on his desk since they were trying to handle a

situation. I laid them on the desk and went to A-Tower where I was assigned. The note never got turned in. Once I was asked about it I went straight to him and he said he would look for it and that he hoped he didn't throw it away when he threw the sub wrapper away. SGT Rebecca Gray said she heard him say place them on my desk. ... Somehow it was told that I bought a radio and was using it around the facility. I had my name and badge number on a radio that I used in A-Pod as rover. It was passed around from rover to rover and if that rover had a radio I placed it in my locker, so I had a good radio next time I was on the floor. I never once said I bought the radio. I had purchased a radio but couldn't get it to work on the system so returned it and that was 6 months ago. ..."

As relief, Grievant requests, "keep my job."

Grievant filed directly to level three of the grievance process.¹ A level three hearing was held on October 7, 2020, via an online platform. Grievant appeared *pro se*.² Respondent appeared by Superintendent Edgar Lawson and was represented by Briana Marino, Assistant Attorney General. This matter became mature for decision on November 13, 2020. Neither party submitted written proposed findings of fact and conclusions of law (PFFCL).

Synopsis

Grievant was employed on a probationary basis as a Correctional Officer by the Division of Corrections and Rehabilitation (DCR). DCR terminated Grievant for misconduct, citing tardiness after placement on an Attendance Improvement Plan, negligence in allowing three inmates out of administrative segregation and into a cell where they sexually assaulted an inmate, untruthfulness during the ensuing investigation into the assault, failure to provide a doctor's note, and appropriation of a work radio. DCR

¹West 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.

²For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

proved its allegations of misconduct and that its dismissal of Grievant was not arbitrary and capricious. 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.

Findings of Fact

1. Grievant was employed by Respondent, Division of Corrections and Rehabilitation (DCR), on a probationary basis as a Correctional Officer at Potomac Highland Regional Jail and Correctional Facility.

2. Grievant was the Tower Officer in A Pod and was in the tower at all relevant times on July 22, 2018.

3. As cell doors can only be unlocked from the tower, the Tower Officer typically is the person who unlocks cell doors.

4. A Pod Section 6 is an administrative segregation unit and only one inmate is allowed into the dayroom at a time.

5. At 7:19 a.m. on July 22, 2018, Grievant let an inmate into the dayroom of A Pod Section 6 when two inmates were already there. (Grievant's testimony)

6. Within minutes of the third inmate entering the dayroom, Grievant opened the door to cell A-6-2.³

7. The three inmates in the dayroom entered cell A-6-2 and, over the course of eight hours, sexually assaulted the inmate housed therein. (Investigator Roper's testimony)

³"A" refers to the Pod; "6" is the section number; "2" is the cell number.

8. Investigator Roper was assigned to investigate the sexual assault. In conducting the investigation, he interviewed the victim, Grievant, and witnesses; listened to call box recordings of conversations between the inmates and officers; watched three days of video footage; and viewed the victim's medical records. (Roper's testimony)

9. The inmate roster sheet for July 22, 2018, shows cell A-6-2 as occupied by the victim. (Roper's testimony & Respondent's Exhibit 1)

10. Still shots of video surveillance for A Pod on July 22, 2018, show the following: two inmates from administrative segregation in the dayroom of Section 6 at 7:19:45.097 a.m.; Grievant in the tower near the cell door panel box for Section 6 at 7:19:46.203 a.m.; a third inmate from administrative segregation in the dayroom and all three inmates approaching an open door to cell A-6-2 at 7:19:53.672 a.m.; the three inmates exiting cell A-6-2 at 7:23:52.349 a.m.; Grievant and CO1 Isaiah Blancarte in the tower next to the cell door panel box for A Pod Section 6 at 9:29:49.740 a.m.; the three inmates walking towards cell A-6-2 with the victim at 9:29:49.790 a.m. (Respondent's testimony and Respondent's Exhibit 1)

11. The call box recordings of conversations between inmates and Tower Officers for A Pod Section 6 reveal that on July 22, 2018, an inmate asked Grievant, "Will you let my dude out in 5" to which Grievant replied, "Yea" and (at approximately 7:19 a.m.) an inmate said to Grievant, "You let my dude out in 2." The call box recording does not show any inmate asking Grievant to let them into cell 2 to use the toilet between 7:00 a.m. and 7:00 p.m. that day. (Roper's testimony & Respondent's Exhibit 1)

12. On August 8, 2018, Grievant told Roper, in part, that on July 22, 2018, an inmate asked him to open cell A-6-2 to use the toilet because his was broken; that

Grievant did not know that cell A-6-2 was occupied when he allowed the inmate into the cell; that Grievant did not independently verify that the toilet was broken even though he knew the inmate often complained about his toilet being broken so he could cap his door lock upon exit; that Grievant checked the tower log and saw that no one was assigned to cell A-6-2; that Grievant did not know there was an inmate in cell A-6-2 until he was told to retrieve the victim for release at around 4:00 p.m. that same day; that Grievant did not remember an inmate saying to him, "Let my dude out in cell 2;" that Grievant never opened a cell door when another inmate was on recreation; and that Grievant never opened any door when an inmate asked. (Roper's testimony & Respondent's Exhibit 1)

13. Edgar Lawson was the Superintendent of Potomac Highland Regional Jail and Correctional Facility during the relevant period.

14. On August 22, 2018, Superintendent Lawson met with Grievant and informed him that he needed to submit to HR a doctor's note for his August 18, 2018 doctor's appointment because a Facebook posting showed him at his son's football game at the time of the appointment.

15. On August 28, 2018, Investigator Roper sent Superintendent Lawson an investigative report notifying him that Grievant was under investigation for misconduct and numerous violations in relation to facilitating the sexual assault of an inmate. (Respondent's Exhibit 1)

16. On September 6, 2018, Superintendent Lawson sent Grievant a letter of written reprimand, notifying him that he was being placed on an Attendance Improvement Plan due to 42 instances of tardiness between June 1, 2018, through September 1, 2018. The letter goes on to state:

Attendance and punctuality at work are essential elements of your position and the employment relationship. You are expected to be at work and performing your duties between the hours of 0645-1900 hours ...

No element of employment is more basic than the right of the employer to expect employees to report for work as scheduled and to comply with established procedures for such. Your record of frequent tardiness has placed an undue hardship on the Potomac Highlands Regional Jail as well as on your co-workers who must assume your assigned duties.

Your frequent tardiness also interferes with your supervisor's ability to appropriately staff the section/unit based on workflow. Further, your lack of dependability compromises my ability to assign you important projects.

(Respondent's Exhibit 3)

17. After being placed on an Attendance Improvement Plan, Grievant was late multiple times between September 6, 2018, and October 1, 2018. (Grievant's testimony)

18. At some point during his probationary period, Grievant put his name on a work radio. He also told coworkers he had purchased a radio he took in and out of the facility. (Grievant's testimony)

19. On October 25, 2018, Superintendent Lawson sent Grievant a letter of dismissal for misconduct and unsatisfactory performance, citing five separate incidents and numerous rule violations for two of these incidents. (Respondent's Exhibit 5)

20. The first incident reads as follows:

On August 22, 2018, you were called into Mr. Lawson's office to discuss a doctor's note that was required of you for an appointment you stated you had at the Martinsburg VA Medical Center on August 18, 2018 at 0630 hours. Mr. Lawson asked you why there were pictures of you on FaceBook at your son's football game when you were supposed to be at a doctor's appointment. You admitted to going to your son's football game at 0930 hours prior to coming to work because your appointment was at 0630 hours

and you swung by because you had a few extra minutes before coming to work. Mr. Lawson informed you again he was requiring you to turn in a doctor's note. As of this date [October 25, 2018], you have yet to submit the required doctor's note from the appointment. Also, Investigator Roper contacted the Martinsburg VA and confirmed you were not a patient there. It was also verified that the Martinsburg VA Medical Center does not schedule appointments before 0830 hours on Saturdays.

21. The second incident, with the associated policies and procedure violations, states:

On August 28, 2018, Investigator Roper submitted a report to Mr. Lawson, Superintendent due to an investigation involving you for staff misconduct. His findings show you were negligent in your duties by allowing three inmates on Administrative Segregation out of their cells at the same time and allowed them to enter another inmate's cell where alleged assault/battery and sexual assault occurred. According to Investigator Roper's report, you were in violation of the following policies and procedures:

West Virginia Regional Jail and Correctional Facility Authority Policy and Procedure Statement 3010, Page 3, Paragraph 14:

Employees have an affirmative duty to and shall promptly report, in writing to their supervisor, any information which comes to their attention indicative of an unusual incident, a violation of law, rules, and/or regulations by either an employee or inmate.

West Virginia Regional Jail and Correctional Facility Authority Policy and Procedure Statement 3010, Page 3, Paragraph 16:

All employees shall remain alert, observant, and occupied with facility business during their tour of duty. All employees shall conduct themselves in a manner which will reflect positively upon the Authority and its employees.

West Virginia Regional Jail and Correctional Facility Authority Policy and Procedure Statement 3010, Page 4, Paragraph 19:

All employees shall conduct themselves, whether on or off duty, in a manner which earns the public trust and confidence

inherent to their position. No employee shall bring discredit to their professional responsibilities, the Authority, or public service. Employees are required to perform duties with discretion, enthusiasm, and loyalty.

West Virginia Regional Jail and Correctional Facility Authority
Policy and Procedure Statement 3010, Page 5, Paragraph 28:

Employees are not to extend or promise an inmate special privileges or favors not available to all inmates except as provided for through official channels.

West Virginia Regional Jail and Correctional Facility Authority
Policy and Procedure Statement 3010, Page 5, Paragraph 32:

Employees are to be alert to detect and prevent escapes or other incidents and/or violations of institutional regulations.

West Virginia Regional Jail and Correctional Facility Authority
Policy and Procedure Statement 9015, Page 1, Paragraph 1:

Favoritism may not be shown to inmates by regional jail staff.

West Virginia Regional Jail and Correctional Facility Authority
Policy and Procedure Statement 9015, Page 1, Paragraph 6:

Inappropriate inmate behavior shall be documented and appropriate action taken to modify that behavior.

West Virginia Regional Jail and Correctional Facility Authority
Policy and Procedure Statement 9015, Page 2, Paragraph 10:

Employees are to be alert to detect and prevent an escape or other incident, and/or violations of institutional regulations.

West Virginia Regional Jail and Correctional Facility Authority
Policy and Procedure Statement 10001, Page 2, Procedure B, Section 1:

Inmates housed in administrative segregation are not permitted to mingle or associate with inmates in the general population. They shall be restricted to rooms or cells which include furnishings and conditions which are similar to rooms or cells used for general population inmates. ...

Investigator Roper's report shows you were negligent in properly performing your duties, and this facilitated three inmates in committing the following policy/rule violations:

West Virginia Regional Jail and Correctional Facility Authority
Policy and Procedure Statement 15003, Rule 1.1:
Violation of State Law

West Virginia Regional Jail and Correctional Facility Authority
Policy and Procedure Statement 15003, Rule 1.2:
Escape

West Virginia Regional Jail and Correctional Facility Authority
Policy and Procedure Statement 15003, Rule 1.3:
Assault

West Virginia Regional Jail and Correctional Facility Authority
Policy and Procedure Statement 15003, Rule 1.4:
Sexual Assault

West Virginia Regional Jail and Correctional Facility Authority
Policy and Procedure Statement 15003, Rule 1.8:
Possession of Weapon

West Virginia Regional Jail and Correctional Facility Authority
Policy and Procedure Statement 15003, Rule 1.11:
Tampering with Locks

West Virginia Regional Jail and Correctional Facility Authority
Policy and Procedure Statement 15003, Rule 2.3:
Threats

West Virginia Regional Jail and Correctional Facility Authority
Policy and Procedure Statement 15003, Rule 3.6:
Creating a Disturbance

22. The third incident, along with the associated policies and procedure violations, is as follows:

Investigator Roper noted several statements you provided during the course of the investigation were not truthful. This is a violation of West Virginia Regional Jail and Correctional Facility Authority Policy and Procedure Statement 3036, Page 3, Paragraph 7:

Any staff member questioned by a designated investigator is required to provide relevant, truthful and complete information. Failure to do so will result in disciplinary action, up to and including dismissal.

23. The fourth incident reads:

On September 6, 2018, you were served with an Attendance Improvement Plan (AIP) letter, which also served as a written reprimand, due to your chronic tardiness. From June 1, 2018 until September 1, 2018 you were late for work a total of 42 times. On October 1, 2018, Mr. Lawson held a discussion with you regarding your continuing lateness, even after being put on the AIP. From September 6, 2018, the date you received your AIP letter, until October 1, 2018, you were late for 12 times. You have shown no improvement in your tardiness thus far.

24. The fifth incident reads:

On October 2, 2018, it was reported you had a radio in your possession and were telling others you bought it and it belonged to you. Your name was written on a piece of paper, along with your badge number, and taped to the front of the radio. After verifying the radio serial number, it was determined to be the same radio a Sergeant had assigned to him and reported missing.

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.*

It is uncontested that Grievant was a probationary employee and was dismissed for misconduct and unsatisfactory performance. Respondent cites five incidents that led to Grievant's dismissal. Respondent asserts that it has the burden of proving Grievant engaged in misconduct and that Grievant has the burden of proving his performance was satisfactory. It is not clear, though, which of the alleged incidents Respondent considers unsatisfactory performance and which misconduct. "[T]he 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)). Respondent bypassed its opportunity to clarify its position in choosing not to submit a PFFCL. The undersigned will therefore apply Respondent's assertion of misconduct, along with the associated burden of proof, to each of the alleged incidents.

As a probationary employee, Grievant was 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).

“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 Grievant 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).

In its dismissal letter, Respondent cites five incidents to justify Grievant's discharge, including tardiness after being placed on an Attendance Improvement Plan (AIP), negligence in allowing three inmates out of administrative segregation and into a cell where they sexually assaulted another inmate, being untruthful to an investigator, failing to provide a doctor's note, and appropriating a work radio. Grievant admits that he continued to be tardy after Respondent placed him on an AIP. He acknowledges that he let an inmate in the administrative segregation unit into the dayroom with two other inmates but claims he did not see the other inmates there and that he did not let any inmate into victim's cell. As for the remaining allegations, Grievant does not address whether he was untruthful to Investigator Roper, contends he mistook a work radio for one he purchased, and that his wife submitted his doctor's note. Investigator Roper testified that Grievant was untruthful to him. Superintendent Lawson testified that Grievant never submitted the doctor's note. Thus, credibility determinations must be made in order to ferret out the veracity of three of the alleged incidents.

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 necessarily relevant to every credibility determination. In this situation, the relevant factors include demeanor, motive, opportunity to perceive, the consistency of prior statements, and plausibility.

Investigator Roper was professional and displayed an even keel demeanor during his testimony. No bias or self-interest was evident. During his investigation, Roper had opportunity to view firsthand accounts from the sexual assault victim, witnesses, and Grievant, along with call box recordings and video surveillance. This facilitated his insight that a number of statements Grievant made to him were contrary to the evidence. Roper's testimony is plausible and convincing in the consistency of details from his investigative report and the corroborating sources.

Roper also documented various inconsistencies in Grievant's statements. These inconsistencies include Grievant's statement that he let an inmate into cell A-6-2 because the inmate claimed his toilet was broken, that he did not remember an inmate asking him to open cell 2, and that Grievant said he never opened a cell door due to an inmate request. Roper represented that these statements were not only inconsistent with each other but also with video still shots and call box recordings of conversations between inmates and correctional officers. Roper documented that the call box recordings show that an inmate never told Grievant his toilet was broken and that an inmate said, "Let my dude out in cell 2." Still shots submitted by Respondent independently verify Roper's

recitation of the call box recordings and his representation of Grievant's statements. Still shots show that the door to cell A-6-2 opened in conjunction with the call box request. Grievant was at the cell door control panel when the door to cell A-6-2 opened. Thus, Roper was credible in representing that Grievant was untruthful during the course of his investigation.

As for Superintendent Lawson, his demeanor was appropriate, and his testimony revealed no animus towards Grievant. Lawson's testimony that Grievant failed to provide a doctor's note between August 22, 2018, and October 25, 2018, was plausible and consistent. His lack of detail was appropriate because Grievant's affirmative testimony on the issue lacked any specifics for Lawson to counter. In simply stating that Grievant did not submit a doctor's note, Lawson was credible.

As in any grievance, this Grievant has an interest in the outcome and motive to misrepresent. However, the primary factors working against Grievant's credibility include the lack of plausibility in some of his testimony and the lack of consistency between his testimony and statements he wrote in his grievance. Grievant testified that his wife submitted his doctor's note to HR. However, Grievant stated in his grievance that he personally handed the note to his supervisor the day of his doctor's appointment, August 18, 2018, but that it never got turned in by his supervisor. Grievant made no mention in his grievance of his claim that his wife had actually submitted the note. Grievant's credibility is also impacted by other considerations. The date on which Grievant claims to have handed the note to his supervisor is four days prior to the August 22, 2018, meeting where Superintendent Lawson instructed him for the first time to submit the note. Grievant testified that he told HR thereafter that he might have the note at his home.

Grievant did not testify that he ever gave the note to his supervisor, let alone that he told HR he had given it to his supervisor. Grievant also wrote in the grievance that Sgt. Rebecca Gray told him she heard Grievant's supervisor tell Grievant to put the note on his desk and that she would be willing to testify. Yet, Grievant never subpoenaed either Sgt. Gray nor his supervisor to testify.

Grievant testified that he thought he put his name on a radio he purchased and that he thought he was taking this radio out of the facility rather than the work radio he took. Nevertheless, he wrote in his grievance that "[s]omehow it was told that I bought a radio and was using it around the facility. I had my name and badge number on a radio that I used in A-Pod as rover. It was passed around from rover to rover and if that rover had a radio I placed it in my locker, so I had a good radio next time I was on the floor. I never once said I bought the radio. I had purchased a radio but couldn't get it to work on the system so returned it and that was 6 months ago."

In testifying that his wife provided a note on his behalf, Grievant did not provide any specifics including when, where, or how she submitted the note. Grievant could have easily provided these simple details. Grievant also failed to give any details or provide corroboration for when, where, or why he purportedly purchased a radio identical to the work radios. Once Respondent confirmed through the serial number that the radio was a work radio, the typical reaction of blameless person in Grievant's position would have been to provide some exonerating information such as a receipt for the purchased radio, the testimony of a verifying witness, and even his own testimony as to when, where, or why he had purchased it. Further, Grievant's inconsistent statements to Investigator Roper and the damning surveillance video cannot be ignored in weighing the credibility

of his testimony. Thus, Grievant's testimony is not reliable.

The undersign will first address the allegation that Grievant was tardy while on an Attendance Improvement Plan (AIP). Grievant's admission that he was tardy while on an AIP is sufficient in itself to justify his dismissal. Respondent placed Grievant on an AIP on September 6, 2018, after Grievant was late 42 times over the prior three months. The AIP also served as a written reprimand. Grievant makes excuses for his tardiness prior to the issuance of the AIP and letter of reprimand. "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)." *Aginsky 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).

Respondent alleges that Grievant was late twelve times within a month of being placed on the AIP. While Respondent does not cite any policies Grievant violated through his tardiness, employees are generally aware that being on time is a requirement of their job. Nevertheless, Respondent gave Grievant a second chance by notifying him through the AIP that punctuality is one of the "essential elements of your position" and that frequent tardiness "placed an undue hardship on the Potomac Highlands Regional Jail as well as on your co-workers who must assume your assigned duties." When Grievant was

again tardy multiple times within a short period after being placed on the AIP, Respondent did not act unreasonably in dismissing him.

Next, Respondent alleges that Grievant let three inmates out of administrative segregation and into an occupied cell where they sexually assaulted an inmate housed therein. Grievant admits that A Pod Section 6 was an administrative segregation unit where inmates were not permitted to be in the dayroom together. He also admits that he allowed an inmate into the dayroom even though two other inmates were in the dayroom. Grievant denies that he let the first two into the dayroom or that he opened the victim's cell for the inmates. Nevertheless, Grievant's admitted conduct violates the following DCR policies:

West Virginia Regional Jail and Correctional Facility Authority
Policy and Procedure Statement 10001, Page 2, Procedure
B, Section 1:

Inmates housed in administrative segregation are not permitted to mingle or associate with inmates in the general population. They shall be restricted to rooms or cells which include furnishings and conditions which are similar to rooms or cells used for general population inmates. ...

West Virginia Regional Jail and Correctional Facility Authority
Policy and Procedure Statement 3010, Page 3, Paragraph 16:

All employees shall remain alert, observant, and occupied with facility business during their tour of duty. All employees shall conduct themselves in a manner which will reflect positively upon the Authority and its employees.

West Virginia Regional Jail and Correctional Facility Authority
Policy and Procedure Statement 3010, Page 5, Paragraph 32:

Employees are to be alert to detect and prevent escapes or other incidents and/or violations of institutional regulations.

West Virginia Regional Jail and Correctional Facility Authority
Policy and Procedure Statement 9015, Page 2, Paragraph 10:

Employees are to be alert to detect and prevent an escape or other incident, and/or violations of institutional regulations.

West Virginia Regional Jail and Correctional Facility Authority
Policy and Procedure Statement 9015, Page 1, Paragraph 6:

Inappropriate inmate behavior shall be documented and appropriate action taken to modify that behavior.

West Virginia Regional Jail and Correctional Facility Authority
Policy and Procedure Statement 3010, Page 3, Paragraph 14:

Employees have an affirmative duty to and shall promptly report, in writing to their supervisor, any information which comes to their attention indicative of an unusual incident, a violation of law, rules, and/or regulations by either an employee or inmate.

Grievant demonstrated a lack of alertness when he let an inmate from administrative segregation into the dayroom when two inmates were already there. The evidence also shows that Grievant opened the victim's cell. Time stamped still shots show that the victim's cell door was opened while Grievant was near the cell door control panel. Another still shot two hours onward shows a fourth inmate in the dayroom with the other three. Respondent alleges that this fourth inmate was the occupant of cell A-6-2 and the victim of sexual assault by the other three inmates. Even ignoring this finding and deferring to his own admissions, Grievant offers no explanation for how the fourth inmate got into the dayroom. The fourth inmate's appearance in the dayroom should have alerted Grievant that this inmate was either housed in cell A-6-2 or that he had finagled his way out of a different cell without approval. Either way, the comingling of inmates from administrative segregation and the presence of the fourth inmate in the dayroom qualify as unusual incidents that Grievant should have documented.

Regarding the allegation of untruthfulness to an investigator, Respondent relies on

Investigator Roper's rendition of statements Grievant made to him. Respondent cites West Virginia Regional Jail and Correctional Facility Authority Policy and Procedure Statement 3036, Page 3, Paragraph 7, as controlling authority. This policy states, "Any staff member questioned by a designated investigator is required to provide relevant, truthful and complete information. Failure to do so will result in disciplinary action, up to and including dismissal." Grievant did not respond to this allegation.

Roper testified that Grievant made untruthful statements to him during the investigation. Roper reached this conclusion after comparing Grievant's statements to other evidence such as surveillance video and call box recordings. Roper represented that Grievant told him that on July 22, 2018, an inmate asked Grievant to open cell A-6-2 to use the toilet, that Grievant never opened a cell door when another inmate was on recreation, and that Grievant never opened any cell door when an inmate asked. The undersigned previously determined Roper was credible. Thus, Roper's representation of Grievant's statements and the content of call box recordings is reliable. The call box recordings show that no one asked Grievant to open cell 2 to use the toilet and that an inmate said to the tower, "Let my dude out in cell 2." Also, still shots of surveillance video show that two other inmates were already in the dayroom when Grievant allowed a third inmate in and that Grievant was in the A Tower near the Section 6 control panel when the door to cell A-6-2 was opened. Thus, Respondent proved that Grievant was untruthful to a designated investigator.

As for the theft of the work radio, while Respondent does not cite to a policy, it is safe to assume that employees are aware that stealing from their employer can result in disciplinary action. While Grievant admits he put his name on the radio and told

coworkers that it belonged to him, he claims he thought the radio was one he purchased. As the undersigned previously determined that Grievant's testimony in this regard was not credible, Grievant's claim must be rejected. Respondent proved that Grievant knowingly appropriated a work radio.

As for the final incident, it is uncontested that Superintendent Lawson instructed Grievant on August 22, 2018, to provide a doctor's note for his August 18, 2018 appointment. Lawson testified that DCR policy only requires a doctor's note if an employee takes sick leave for three days but that he required Grievant to provide one after Grievant was seen at a football game instead of his doctor's appointment. Nevertheless, Grievant did not take issue with being required to provide a note. Superintendent Lawson testified that Grievant never provided a note and Grievant countered that his wife called the note in. Grievant's testimony in this regard has been discredited and Lawson determined credible. Thus, Respondent proved that Grievant never provide the requested doctor's note.

Respondent proved by a preponderance of evidence that Grievant engaged in misconduct and that it did not act arbitrarily and capriciously in dismissing him.

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 Grievant engaged in misconduct and that it did not act arbitrarily and capriciously in dismissing him.

Accordingly, this grievance is **DENIED**.

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

DATE: December 22, 2020

Joshua S. Fraenkel
Administrative Law Judge