

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**DEREK LEE SNYDER,  
Grievant,**

**v.**

**Docket No. 2021-2406-DOT**

**DIVISION OF HIGHWAYS,  
Respondent.**

**DECISION**

Grievant, Derek Snyder, was employed on a probationary basis by Respondent, Division of Highways, when he was dismissed. On May 5, 2021, Grievant grieved his dismissal directly to level three pursuant West Virginia Code § 6C-2-4(a)(4). As relief, Grievant seeks reinstatement.

A level three hearing was held on September 13, 2021, before the undersigned at the Elkins office of the Public Employees Grievance Board. Grievant appeared in person and was self-represented. Respondent appeared through Angela Broschart and was represented by Keith Cox, Esq. This matter became mature for decision on October 15, 2021. Each party submitted written Proposed Findings of Fact and Conclusions of Law.

**Synopsis**

Grievant was employed on a probationary basis as a Supply Specialist by Respondent, Division of Highways. Grievant's duties included maintaining inventory and invoices. Respondent dismissed Grievant for unsatisfactory performance in failing to properly perform these duties despite repeated direction. Grievant contends he was not properly trained or given a necessary computer and was absent for a period due to illness. Grievant failed to prove by a preponderance of the evidence that his performance was satisfactory or that mitigation appropriate. 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 on a probationary basis as a Highway District Division Supply Specialist by Respondent, West Virginia Division of Highways (DOH).

2. Grievant was so employed from November 2020 through April 2021.

3. Grievant worked in the District 8 storeroom. His duties included organizing and tracking inventory, coding and organizing invoices, and delivering and retrieving inventory. Inventory audits ensure the storeroom functions properly. Proper stocking and invoicing of inventory, and timely processing of paperwork, is a critical aspect of his duties.

4. Richard Teter is a Highway Equipment Specialist in District 8. Mr. Teter had previously worked with Grievant at Napa Auto Parts and recommended Grievant for employment while participating on Respondent's interview panel. (Mr. Teter's testimony)

5. Mr. Teter's optimism subsided after he witnessed Grievant's inability to keep the storeroom organized, which he documented through photos. (Mr. Teter's testimony & Respondent's Exhibits 4 and 5)

6. Lisa Sisolack is a Storekeeper who worked with Grievant in the District 8 storeroom.

7. Ms. Sisolack first noticed performance issues when Grievant failed to properly code inventory. She also noted that Grievant left inventory in the storeroom aisles. (Ms. Sisolack's testimony)

8. Ms. Sisolack instructed Grievant not to leave inventory on the ground or invoices on his desk. (Ms. Sisolack's testimony)

9. When Ms. Sisolack directed Grievant on the proper maneuvering of heavy inventory with a forklift, Grievant became upset and threw inventory. (Ms. Sisolack's testimony)

10. Darl Tim Kelly Jr. was the District 8 Storeroom Supervisor and Grievant's direct supervisor.

11. Supervisor Kelly performed an EPA2 evaluation on Grievant in February of 2021. He noted that "[Grievant] needs to take more interest and/or action to make sure inventory is properly and promptly stocked." (Respondent's Exhibit 2)

12. Supervisor Kelly made multiple attempts to guide Grievant on improving his performance. (Supervisor Kelly's testimony)

13. Supervisor Kelly started keeping contemporaneous notes after Grievant got aggressive towards coworkers. (Supervisor Kelly's testimony)

14. On February 10, 2021, Supervisor Kelly made the following note:

Lead storekeeper Lisa told me about [Grievant's] behavior when she had spoken to him about not completing orders that he was receiving in and safety concerns she had while he was operating the forklift, and he became very upset and angry. ...

After lunch we had [Grievant] in Steve's office to discuss his actions and to confirm his responsibilities for completing orders, date stamping and signing of orders, packing slips, invoices, and delivery tickets. Making sure he had correct authorization codes, explained why these procedures were important to the organization. Derek became angry again with a short outburst toward Steve and I[.] [L]ater that evening he sent me a text message apologizing for his actions.

(Supervisor Kelly's testimony & Respondent's Exhibit 1)

15. On March 16, 2021, Supervisor Kelly made the following note:

Told [Grievant] about paperwork laying around his desk, since his desk is in a[n] open warehouse setting the wind had blown

his paperwork off of his desk. Later found out from others that they had also mentioned this to him.

(Supervisor Kelly's testimony & Respondent's Exhibit 1)

16. On March 30, 2021, Supervisor Kelly made the following note:

Was told that [Grievant] had previous years invoices from file cabinet laying on his desk from days before. I then explained again that he could not leave invoices and packing slips lay around on his desk and out in the open to become lost and that, these types of things need to be processed and filed away.

(Supervisor Kelly's testimony & Respondent's Exhibit 1)

17. By letter dated April 27, 2021, Respondent notified Grievant of his non-retention/dismissal. This letter was reissued on May 10, 2021, to provide Grievant the requisite notice. (Respondent's Exhibit 7)

18. The letter states the following as the basis for dismissal:

The reason for your non-retention is failure to meet performance standards during your probationary period. ... A probationary period is a trial work period designed to allow an employer the opportunity to evaluate if an employee can effectively perform the work of the position and adjust to the organization. You have been a DOH employee for 4 months, while you have been unable to complete job assignments without repeated instructions on how to perform the work.

19. Many of Grievant's duties were computer based. Yet Respondent did not provide Grievant with a computer for three months. (Grievant's testimony)

20. Grievant missed work for a period due to a severe illness. Grievant failed to timely inform Respondent, request any accommodation, or present any proof of his illness to Respondent. (Grievant's testimony)

21. Neither Grievant's lack of a computer nor his computer skills factored into Grievant's non-retention. (Supervisor Kelly's testimony)

22. Grievant's absences were not a major factor in his non-retention.  
(Supervisor Kelly'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). "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 undisputed that Grievant was a probationary employee and that Grievant was dismissed for unsatisfactory performance rather than misconduct. This grievance therefore involves a non-disciplinary matter, which places the burden of proof on Grievant. Respondent dismissed Grievant for unsatisfactory performance in failing to properly maintain inventory and invoices after repeated guidance. Grievant contends that his dismissal was not justified because he was not properly trained, not provided a necessary computer, and absent due to illness. This hints at a claim for mitigation. Respondent counters that it has much leeway in dismissing probationary employees, so long as it does not do so in an arbitrary and capricious manner. Respondent contends that Grievant performed poorly despite repeated direction on maintaining inventory and invoices.

The Division of Personnel's administrative rule describes the probationary period of employment 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).

Because Grievant was a probationary employee, Respondent had the authority to dismiss him without adhering to the normal employee protection protocol for state employees. 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).

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)).

"[W]hile an employer has great discretion in terminating a probationary employee, that termination cannot be for unlawful reasons, or arbitrary or capricious. *McCoy v. W. Va. Dep't of Transp.*, Docket No. 98-DOH-399 (June 18, 1999); *Nicholson v. W. Va. Dep't*

*of Health and Human Res.*, Docket No. 99-HHR-299 (Aug. 31, 1999).” *Lott v. W. Va. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. See *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). “Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997).

The “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency’s actions are valid as long as the decision is supported by substantial evidence or by a rational basis. See *Adkins v. W. Va. Dep’t of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer].” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

Respondent deemed Grievant’s performance unsatisfactory. Respondent documented its repeated attempts to improve Grievant’s performance. These included repeated instructions to Grievant about the importance of properly organizing inventory

and invoices. Grievant does not contest this evidence. Rather, he contends he was not provided a computer for three months, was absent for periods due to illness, and was insufficiently trained. Grievant did not show that his training was insufficient, specifically as to the relevant issues of maintaining inventory and invoicing. Respondent acknowledged it was some time before Grievant received a computer. Grievant did not prove that his performance issues resulted from his lack of a computer or his absences, or that he was insufficiently trained on the proper maintenance of inventory and invoices. Grievant failed to prove by a preponderance of the evidence that his performance was satisfactory or that his dismissal arbitrary or capricious.

It appears that Grievant raises his excuses for unsatisfactory performance to request 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).

As previously discussed, dismissal of a probationary employee for unsatisfactory performance is not disciplinary. Grievant did not prove by a preponderance of the evidence that the undersigned has the authority to mitigate non-disciplinary measures taken by an employer. Nor did he prove by a preponderance of the evidence that his dismissal was an excessive response to his unsatisfactory performance as a probationary employee.

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). "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 describes the probationary period of employment 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).

3. 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).

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).

5. Grievant did not prove by a preponderance of the evidence that his services were satisfactory or that his dismissal was arbitrary and capricious. Nor did he prove by a preponderance of the evidence that mitigation is either warranted or available for non-disciplinary measures.

Accordingly, the grievance is **DENIED**.

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

**DATE: November 3, 2021**

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