

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LACEE MORGAN,

Grievant,

v.

Docket No. 2020-1470-DHHR

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR PUBLIC HEALTH,**

Respondent.

DECISION

Grievant, Lacey Morgan, filed an expedited level three grievance¹ dated May 21, 2020, against her employer, Respondent, Department of Health and Human Resources, Bureau for Public Health, Office of the Chief Medical Examiner, stating as follows: “AFTER the pre-jurisdiction meeting, Nondiscriminatory Hostile Workplace.” As relief sought, Grievant asks “[a]ppeal of dismissal decision.”² Attached to her statement of grievance form, Grievant attached the following written statement:

Appeal against dismissal decision
I wish to appeal against the dismissal made by Catherine C. Slemp.

- Insufficient amount of documentation
- Insufficient investigation of said incidents in which these actions occurred.
- Policies were only implied to particular employees

¹ See West Virginia Code § 6C-2-4(a)(4).

² In her post-hearing submission, Grievant states that: “[t]he only thing I’m requesting is to put my name back on the WV DOP list for possible future use as a morgue tech for the state. I would also like to request that someone seriously look into this office. There are things going on there that aren’t acceptable anywhere else. I only ask because no one else should ever have to face the unfair, harassment, gas-lighting environment that remains in WVOEME.” The Grievance Board has no authority to order investigations of agencies or employers.

- A reprimand was written and sent AFTER the pre-jurisdiction meeting
- Nondiscriminatory Hostile Workplace

This is just a short list of reasons as to why I would like to proceed to a level three hearing. I would like to be accompanied to the appeal meeting by Jeff Magoun, Jeff Burger, Adam Dent, Jessica Foust and Iva Thomas. . . .

The level three hearing was conducted on October 6, 2020, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person, *pro se*.³ Respondent appeared by counsel, Mindy M. Parsley, Esquire, Assistant Attorney General. This matter became mature for decision on November 9, 2020, upon receipt of the parties' proposed Findings of Fact and Conclusions of Law.⁴

Synopsis

Grievant was employed as a probationary employee by Respondent. Respondent dismissed Grievant for unsatisfactory work performance. Grievant argued that her work performance was satisfactory, and that she should not have been dismissed from her employment. Grievant also alleged nondiscriminatory hostile environment. Grievant failed to prove her claims by a preponderance of the evidence. Therefore, the grievance is DENIED.

³ For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

⁴ During the level three hearing, Grievant asked for permission to submit letters of recommendations as exhibits to be considered in deciding this grievance after the hearing as she did not have them on the day of the hearing. This ALJ granted her request and gave Grievant until close of business October 7, 2020, to submit the same to the Grievance Board, copying Respondent's counsel. This ALJ gave Respondent until close of business on October 8, 2020, to make any objections to the same. The Grievance Board received no letters of recommendation from Grievant. As such, the same are not being considered as evidence in this matter.

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 as a morgue technician. Grievant began working for Respondent on or about November 12, 2019. At all times relevant herein, Grievant was a probationary employee.

2. Lisa Sadler is employed by Respondent as the autopsy supervisor for the Office of the Chief Medical Examiner (OCME). She was Grievant's direct supervisor for just under six months.

3. There is no training manual for morgue technicians. However, there is a Morgue Technician Handbook, but it does not provide instruction on the evisceration of the human body, which is the primary duty of morgue technicians. Instead, the handbook serves as a more detailed description of the morgue technician position and its duties, as well as administrative procedures and protocols. Newly employed morgue technicians are almost entirely given hands-on, on-the-job training in autopsy and evisceration by more senior morgue technicians and the doctors employed by OCME.⁵

4. Morgue technicians are assigned to work in teams, and these assignments are not permanent. During training, morgue technicians are assigned to work with different senior morgue technicians and doctors in rotation so that they may get broader experience and learn different techniques.

⁵ See, testimony of Grievant; testimony of Matt Izzo; testimony of Jeff Magoun.

5. The morgue technicians are not given formal, written performance evaluations of their on-the-job training/work in evisceration. They are usually given verbal feedback from the senior morgue technician training them.

6. Jeff Magoun is a morgue technician who works at OCME. Mr. Magoun is the more senior morgue technician who provided Grievant most of her training during her employment. Grievant was assigned to work with him about three times each week. At that time, Mr. Magoun had been employed as a morgue technician for approximately three and a half years. At the time of the level three hearing, Mr. Magoun was training two new morgue technicians.

7. Ms. Sadler does not come into the autopsy suite, participate in autopsies, or evaluate the work of morgue technicians during autopsies. However, Ms. Sadler is responsible for completing employee performance evaluations. To evaluate employee performance with respect to their work during autopsies, she gets information from other morgue technicians and the pathologists. However, it is not clear from the record of this grievance as to whether a formal performance evaluation was ever completed for Grievant.

8. If a pathologist or other employee had a complaint about a morgue technician, he or she would report the same to Ms. Sadler.

9. In early February 2020, Ms. Sadler documented complaints she had received from employees regarding Grievant, as well as some performance issues she had noted. Ms. Sadler then brought the same to the attention of Matthew Izzo, Chief Administrator, OCME. These issues included complaints that Grievant was not doing her work or helping out and being a team player, bringing a textbook to study for a class while

at work, tardiness, working during unauthorized hours, not paying attention, not staying with the morgue technicians to whom she was assigned, and that she would not follow instructions.⁶

10. Ms. Sadler had brought some of these issues to Grievant's attention at the time they had occurred. For example, when Ms. Sadler saw that Grievant was studying for her EMT class during work time, she told Grievant that she was not permitted to do that. However, Ms. Sadler met with Grievant about these issues listed in the February 2, 2020, email on or about February 18, 2020.

11. By letter dated April 27, 2020, Grievant was notified that she was to attend a predetermination conference on April 28, 2020, at 3:00 p.m. in Personnel and Customer Services Supervisor Anne Brown's office to address the following issues: an allegation that Grievant was observed answering a law enforcement officer's questions about a case; refusing to perform job duties "because you don't like how the doctors want you to do it; not completing tasks that are assigned;" "disputing with other staff members;" not wearing PPE; not completing trainings; coming into the office when you are not scheduled, and when your supervisor and the doctors aren't in the office.⁷

12. The predetermination conference was held as scheduled and Lisa Sadler, Annette Brown, and Grievant were in attendance. The issues listed in the April 27, 2020, predetermination conference notice were discussed and Grievant was given the opportunity to respond at that time.⁸

⁶ See, Respondent's Exhibit 6, Email from Lisa Sadler to Matthew Izzo dated February 3, 2020.

⁷ See, Respondent's Exhibit 3, letter dated April 27, 2020.

⁸ See, Respondent's Exhibit 3, letter dated April 27, 2020; Respondent's Exhibit 6, email from Grievant to Annette Brown dated April 28, 2020; Respondent's Exhibit 4, May 11,

13. Following the predetermination conference, Grievant submitted written responses to each allegation listed in the April 27, 2020, predetermination conference by email to Annette Brown. Such email is marked as being sent on April 28, 2020, at 5:06 p.m.⁹

14. It is undisputed that Grievant had a conversation with the officer in the autopsy suite, but Grievant denies that they were discussing a case. It is unclear from the record who reported Grievant speaking with the officer. The evidence suggests it was one of the pathologists, but it is unclear which. Neither Ms. Sadler nor Ms. Brown witnessed the conversation. None of the pathologists were called to testify in this matter. Further, the law enforcement officer was not identified and was not called to testify in this matter.

15. Grievant does not deny that she had a disagreement with one of her coworkers, and problems getting along with some of her coworkers.

16. Grievant does not deny falling asleep at work at least on one occasion.

17. Grievant does not deny bringing a textbook for a class she was taking to work so that she could study while she was there.

18. Grievant does not deny that she asked that she be allowed to work with only one other more senior morgue technician, Jeff Magoun, during her probationary period instead of working with the other morgue technicians on the team. It is undisputed that her request was denied.

2020, Notice of Dismissal; testimony of Grievant; testimony of Annette Brown; and testimony of Lisa Sadler.

⁹ See, Respondent's Exhibit 6, email from Grievant to Annette Brown dated April 28, 2020, 5:06 pm.

19. Grievant admits that she became overwhelmed during autopsies more than once when pathologists had directed her to perform certain procedures. At such times, Grievant felt uncomfortable doing the procedure on her own and she wound up having to leave the autopsy suite to calm down.

20. Grievant does not dispute that she came into the facility once on a Saturday when she was not scheduled to work, and that while she was there, she cleaned and put out some supplies to get ready for the next work day.

21. It is undisputed that Ms. Sadler did not personally observe, or “check-in,” on Grievant’s progress during autopsies. Grievant was not given regular feedback or evaluated on her performance in evisceration and other autopsy procedures. Instead, Ms. Sadler relied on doctors, to tell her things, like if they had a complaint or a compliment, without being prompted. When there were complaints, Ms. Sadler addressed them with Grievant.

22. By letter dated May 4, 2020, Ms. Sadler informed Grievant that she was being given a written reprimand, stating, in part, as follows:

The purpose of this letter is to advise you of the decision to issue progressive discipline as the result of your misconduct, specifically, not following the Morgue Technician Handbook regarding wearing PPE gear and violating the Employee Conduct Policy by not following a directive of management personnel and engaging in insubordination. You have been verbally told and received written notice that you are to wear PPE gear when entering the Autopsy room.

So you may understand why I believe your conduct to be unsatisfactory, and how this prevents or hinders this agency from meeting its objectives, the following is provided:

- On March 16th all Morgue Technicians were verbally instructed by your supervisor to wear PPE gear in the Autopsy room.

- On March 19th Matt Izzo sent an email to all OCME staff regarding the conservation of PPE gear.
- On March 24th Dr. Allen Mock sent an email to your supervisor telling her that all Morgue Technicians are to wear PPE gear.
- On March 24th a posted sign was put on all the Autopsy entry doors that everyone is to wear PPE gear before entering the Autopsy room.
- On April 2nd Matt Izzo sent an email to all OCME staff regarding COVID-19 and the standard precautions and the utilization of PPE gear.
- On May 1, 2020 you were observed in the Autopsy room with only partial PPE gear.

You are reminded that there have been repeated attempts to correct your conduct. Prior to this, corrective action has included You (sic) have been notified verbally on March 16, 2020, that you are to wear your PPE gear, you were part of an email chain that went out to OCME staff. Despite these management interventions, you have consistently failed to meet reasonable expectations.

After considering your conduct, previous corrective actions, and your response, it has been decided a written reprimand is warranted. This action complies with the Department of Health and Human Resources (DHHR) Policy Memorandum 2104, Progressive Correction and Disciplinary Action. Any further neglect of duty or any other infractions will be viewed as unwillingness, rather than inability, to comply with reasonable expectations, and shall result in further disciplinary action.¹⁰

23. Based upon the evidence presented, it does not appear that Grievant appealed the written reprimand.

24. By letter dated May 11, 2020, signed by Catherine C. Slemph, MD, MPH, then-Commissioner of BPH and State Health Officer, Grievant was informed that she was being dismissed from her employment, effective May 26, 2020, stating, in part, as follows: “[h]aving evaluated your work during your probationary period, it has been concluded that

¹⁰ See, Respondent’s Exhibit 7, letter dated May 4, 2020.

you have not made a satisfactory adjustment to the demands of your position, nor have you met the required standards of work.”

25. In the May 11, 2020, dismissal letter, Dr. Slemp identified the following six enumerated areas in which Grievant “demonstrated an inability to conduct [herself] in accordance with WVDHHR, BPH, and OCME policies, procedures and protocols:”

1. You were observed directly by the Chief Medical Examiner having a conversation concerning a case with a law enforcement representative present in the autopsy suite. This is in direct violation of OCME SOP 19-003 “Procedures Regarding Communication Concerning OCME Case Details,” a policy for which you signed receipt of on November 12, 2019. Specifically, OCME SOP 19-003 states *“Any non-physician OCME staff member who is asked a question by an authorized visitor in the OCME facility for which the answer requires: formulation of a medical opinion; speculation concerning any component of the medicolegal investigation; or any other question outside of the scope of the staff member’s formal training or authority must be referred to the forensic pathologist to which the associated case is assigned.”*
2. You have demonstrated to your supervisor a propensity to not follow directions and/or complete assigned tasks. This is in direct violation of DHHR Policy 2108 “Employee Conduct” and the OCME Document 002 “Morgue Technician Protocol Handbook. . .” Specifically, you have been directed by forensic pathologists during the conduct of autopsy to perform certain tasks in the manner directed and have failed to do so. . . Additionally, you have been assigned additional tasks by the Morgue Technician Supervisor that you have failed to complete as assigned, failed to complete in a timely manner[,] and/or failed to complete at all.
3. You have demonstrated to your supervisor the inability to interact appropriately and professionally with other OCME staff members on a consistent basis. This is in direct violation of DHHR Policy 2108 “Employee Conduct” which states *“Employees are expected to conduct themselves professionally in the presence of*

residents/patients/clients, fellow employees and the public.”

4. You have, on multiple occasions, received a reprimand for failure to utilize the required Personal Protective Equipment (PPE) while present in the OCME autopsy suite. This is a direct violation of OCME Document 002 “Morgue Technician Protocol Handbook” which states, “*All persons who directly assist in performance of autopsy shall wear appropriate protective clothing,*” and in violation of numerous verbal and written warnings and posted signage at the entry of the OCME autopsy suite.
5. You failed to complete additional training requirements proscribed by the OCME Administrator, namely FEMA training courses, despite reminders and requests from your supervisor. This is in direct violation of DHHR Policy 2108 which states “*Employees are expected to follow directives of their superiors and be attentive to the responsibilities associated with their jobs.*”
6. Despite being warned and reminded about being in the OCME facility outside of scheduled work timeframes “off the clock,” you failed to follow the directive of your supervisor and entered the facility on more than one occasion without being scheduled for duty. This is in direct violation of a verbal directive given to you by your supervisor and as such is in direct violation of DHHR Policy 2108¹¹

26. Neither party presented copies of any performance evaluations conducted for Grievant during the time she was employed by Respondent.

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,

¹¹ See, Respondent’s Exhibit 4, May 11, 2020, letter.

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.*

Respondent asserts that it dismissed Grievant from employment for unsatisfactory work performance. Grievant denies Respondent's allegations and asserts that her work was satisfactory. Grievant argues that the other morgue technicians and the doctors had told her that she was doing well in her work, she did not receive proper training for the job, and that she was treated unfairly, harassed, singled-out on the job, and that she was given more work to do than other employees. Grievant appears to argue that any performance deficiencies were the result of her being assigned more work than other employees and being held to a different standard than other coworkers. Accordingly, such should not be held against her.

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. See *Livingston v. Dep't of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008).

Further,

[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 Veterans Affairs, Docket No. 2009-0161-MAPS (Jan. 7, 2009) (citing *Hackman v. W. Va. Dep't of Transp.*, Docket No. 01-DMV-582 (Feb. 20, 2002)).

Dismissal of a probationary employee is addressed in Rule 10.5, entitled "Dismissal During Probation." Rule 10.5.a. states as follows:

[i]f at any time during the probationary period, the appointing authority determines that the services of the employee are unsatisfactory, the appointing authority may dismiss the employee in accordance with subsection 12.2. of this rule. If the appointing authority gives the fifteen (15) days' notice on or before the last day of the probationary period, but less than fifteen (15) days in advance of that date, the probationary period shall be extended fifteen (15) days from the date of the notice and the employee shall not attain permanent status. This extension shall not apply to employees serving a twelve-month probationary period.

W.VA. CODE ST. R. § 143-1-10.5.a. (2016).

"[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).

It is undisputed that Grievant was a probationary employee. As such, Grievant bears the burden of proving her work performance was satisfactory. Grievant called one witness, other than herself, at the level three hearing. Grievant introduced no exhibits. Based upon the evidence presented, it appears likely that other morgue technicians and some of the doctors told Grievant that she was doing fine in the work they saw her do. However, Ms. Sadler is Grievant's supervisor, and while she did not directly observe Grievant in the autopsy suite, she observed Grievant's work outside of autopsy and she had discussed certain performance issues with Grievant. For example, Ms. Sadler met with Grievant on February 18, 2020, about job performance issues. Also, when Ms. Sadler saw that Grievant was trying to study while on the job, she told Grievant she was not allowed to do that. Also, when she learned that Grievant was working in the after hours, she told Grievant to stop.

While some of the morgue technicians and doctors likely told Grievant that she was doing fine in her autopsy work, the evidence suggests that others reported issues with her performance to Ms. Sadler. Such would be proper as Ms. Sadler, and not the morgue technicians and doctors, was Grievant's supervisor. Grievant did not call any of the doctors as witnesses at the level three hearing and only called one of the morgue technicians, Mr. Magoun, to testify. Mr. Magoun testified that Grievant's performance during autopsies was "fair" and that she became "proficient." However, autopsy work is not the only aspect of the job of morgue technician.

Grievant has not denied falling asleep at work, failing to wear the required PPE on at least one occasion, attempting to study for her EMT class while at work, having disagreements with coworkers, and leaving the autopsy room after becoming overwhelmed without completing the evisceration she was directed to perform, regardless of the reasons for doing such. Grievant also does not deny falling behind on her work or failing to finish her required online training on time. Grievant has asserted that she fell behind on work because she was unfairly assigned more work than other employees. Grievant argues that she failed to complete her training was because she had been sick, then she was quarantined. When she got back to work, she forgot to do it.

Based upon the evidence presented, this ALJ cannot conclude Grievant proved by a preponderance of the evidence that her work performance was satisfactory. Grievant has admitted enough unsatisfactory performance to justify her dismissal. Given such and the low threshold to justify the termination of a probationary employee, the undersigned cannot conclude that the decision to terminate Grievant's employment was arbitrary and capricious, or otherwise unreasonable.

Lastly, Grievant failed to present sufficient evidence to prove by a preponderance of the evidence her claim that she was subjected to a nondiscriminatory hostile work environment. Without supporting evidence, Grievant's claims are only allegations. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Trs./W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998) (citing *Harrison v. W. Va. Bd. of Drs./Bluefield State Coll.*, Docket No. 93-BOD-400 (Apr. 11, 1995)).

Accordingly, this grievance is DENIED.

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 upon the employee to establish that his services were satisfactory. *Bonnell v. W. Va. 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). Grievant "is required to prove that it is more likely than not that his services were, in fact, of a satisfactory level." *Bush v. Dep't of Transp.*, Docket No. 2008-1489-DOT (Nov. 12, 2008).

2. The Division of Personnel's administrative rules establish a low threshold to justify termination of a probationary employee. See *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 Veterans Affairs*, Docket No. 2009-0161-MAPS (Jan. 7, 2009) (citing *Hackman v. W. Va. 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. 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). An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

6. Grievant failed to prove by a preponderance of the evidence that her performance was satisfactory. Grievant failed to prove that her dismissal was arbitrary and capricious, or otherwise unreasonable.

7. “Mere allegations alone without substantiating facts are insufficient to prove a grievance.” *Baker v. Bd. of Trustees/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998)(citing *Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995)).

8. Grievant failed to prove her claim of nondiscriminatory hostile work environment by a preponderance of the evidence.

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: February 1, 2021.

Carrie H. LeFevre
Administrative Law Judge