THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

WILLIAM STEACH and BENJAMIN THOMAS,
Grievants,

v. **Docket No. 2020-1487-CONS**

DIVISION OF CORRECTIONS AND REHABILITATION/ BUREAU OF JUVENILE SERVICES/ VICKI V. DOUGLAS JUVENILE CENTER/ BUREAU OF PRISONS AND JAILS/ NORTHERN CORRECTIONAL FACILITY,
Respondent.

DECISION

Grievants, William Steach and Benjamin Thomas, were employed by Respondent, Division of Corrections and Rehabilitation (DCR). Grievant Steach was assigned to Bureau of Juvenile Services at Vicki V. Douglas Juvenile Center. Grievant Thomas was assigned to the Bureau of Prisons and Jails at the Northern Correctional Facility. Respondent dismissed Grievants during their probationary period of employment.

On January 23, 2020, Grievant Steach filed his grievance (Docket No. 2020-0825-MAPS) stating:

> On Nov. 25th 2019, we as a class at the academy were order to perform a salute by a superior officer. When not everyone complied we were once again order to do so. We have since been dismiss from work. At the beginning of the academy we were told disobeying orders could result in not graduating, discipline, and/or demerits. After being in the academy six weeks we believed this was a very possible result.

For relief, Grievant Steach seeks "Reinstatement to my job/position."

On January 25, 2020, Grievant Thomas filed his grievance (Docket No. 2020-0826-MAPS) stating:

Being terminated for following an order that was given to our group as a whole (Class 18) by a supervisor. I was in fear of failing out of the academy which would bring embarrassment to my family and I, as well as no income. I was only following the Operational Procedure #1.29-15 subjected Employee Rules and Regulations Number 56. All employees shall promptly and faithfully execute all order/instructions of a supervisor. An employee, believing in good faith that an order is of a questionable nature, may appeal such order at a later time through the administrative structure or the grievance process. Insubordination or refusal to follow an order of a supervisor shall constitute grounds for disciplinary action.

At this time all of the supervisors were notified about such action and nothing was done. The fault of the incident was coming from the commanding officers that were taking advantage of their authority. The fault does not lie on the cadets, we were not properly trained by appropriate instructors at the academy that is supposed to be the foundation of my corrections career. It is very unjust that this opportunity was taken away from me because people were put in charge of something that they were not qualified to do.

Policy and Procedure statement Chapter Personnel Subjected Authority for Negative Personnel Action #3008 under procedure C #2 it states: Probationary employees may receive any disciplinary or corrective action detailed above, up to and including dismissal, for failing to meet the reasonable expectations for work standards of the Regional Jail Authority. Probationary employees will receive the same notifications and time periods relating to misconduct and punitive and corrective actions as were established above for permanent employees.

I feel that policy is violated because presidencies' have been set. There are many employees that are on probationary periods and have no call/no shows, or call off constantly, or come to work late with ZERO disciplinary action. I feel that it is not professional for some employees to break policies with no discipline actions being made against them and I did not even receive a written reprimand. The DCR has had "bad" releases, meaning the department has let a criminal, that is ordered into custody, just allow them to walk out of a building to endanger any of the citizens. As correctional officers your job is public safety, however, even with putting countess lives at risk they still have a job working for the Department of

> Corrections and Rehabilitation, and you chose to terminate me for following a supervisor's order that yes, was in bad taste, but NOT illegal and put no lives in danger.

For relief, Grievant Thomas seeks, "a Public apology from all who slandered, my position back at the assigned facility with all sick/vacation time that would have been occurred as well as any compensation that is owed to me for the emotional and financial strain that this has caused myself and my family."

Grievants filed directly to level three of the grievance process.[1] The two grievances were consolidated into the current action on June 17, 2020. A level three hearing was held via an online platform before the undersigned at the Grievance Board's Westover, West Virginia office on August 25, 2020 and November 17, 2020. Grievants were represented by Rebecca Thomas, wife of Grievant Thomas. Respondent was represented by Briana Marino, Assistant Attorney General. This matter became mature for decision on January 25, 2021. Grievants and Respondent submitted written proposed findings of fact and conclusions of law (PFFCL).[2]

Synopsis

Grievants attended the Corrections Academy during their probationary employment with Respondent as Correctional Officers. A photo of Academy Class 18 cadets performing a Nazi salute led to an investigation. The investigation substantiated that Grievants participated in and failed to report the salute, resulting in their dismissal for misconduct. Grievants assert they were just following orders directing lawful conduct, faced dismissal if they disobeyed, did not know they could disobey, performed a Roman

[1]West Virginia Code § 6C-2-4(a)(4) permits a grievant to proceed directly to level three of the grievance process when the grievance deals with the discharge of the grievant.
[2]Grievants' PFFCL was titled Grievant's Closing Arguments.

rather than a Nazi salute, and reported the incident. Respondent proved Grievants knowingly performed a Nazi salute and violated policy in failing to report unusual conduct, thus justifying their dismissal. 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. Grievants William Steach and Benjamin Thomas were employed by Respondent, Division of Corrections and Rehabilitation (DCR), as probationary Correctional Officers at Vicki V. Douglas Juvenile Center (VDJC) and Northern Regional Jail and Correctional Center (NRJCC) respectively.

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

3. Academy training touched on the identification of Strategic Threat Groups (STG)[3] or gangs, and the symbols and gestures they use. Some of these included white supremacy groups. However, this training did not cover the Nazi salute.

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

[3]STGs are groups of four or more individuals dedicated to certain activities.
[4]Respondent did not argue or present any evidence that this document was used in the training of its employees.

the salute, making it the most common white supremacist hand sign in the world." (Respondent's Exhibit 2)

5. A Roman salute is similar to a Nazi salute but differs in its angle. The Roman salute reaches straight up for the sky, the Nazi salute for the horizon. (*See Smarr and Schultheiz v. DCR/BPJ/SMCCJ,* Docket No. 2020-1488-CONS (Sept. 23, 2020)).

6. Each graduating class participates in class photos at the Corrections Academy facility while in uniform and on the clock. Typically, one professional and one so-called "goofy" photo is taken.

7. Academy Instructor Karrie Byrd took the "goofy" photo of Class 18 cadets performing a Nazi salute. (Respondent's Exhibit 1 & 3)

8. The salute began at the Academy with cadets saluting Instructor Byrd in class. However, Grievants refused to participate. (Respondent's Exhibit 1)

9. The "goofy" photo is captioned "HAIL BYRD!" and shows Grievants performing the Nazi salute. (Respondent's Exhibit 3)

10. The "goofy" photo took several attempts before all cadets raised their arms. Grievants initially refused to salute but complied after Instructor Byrd repeated her order. Grievants did so because they were trained at the Academy that if they did not follow orders they would not graduate and would be dismissed. (Respondent's Exhibit 1)

11. Grievants learned that if they did not agree with an order, they should obey first and report later. Thus, Grievants knew to report the salute. (Grievants' PFFCL)

12. The reporting requirement is triggered when an employee knows of an "unusual incident." (Respondent's Exhibit 4)

13. The reporting requirement may be satisfied verbally or in writing. Grievants

could have reported to a supervisor upon returning to their home facility after graduation. (Investigator Paczewski)

14. The “goofy” class photo was disseminated to cadets in their Class 18 graduation packets.

15. Grievants manifested an awareness that the salute was wrong in refusing Instructor Byrd’s first order to salute, in declining to participate in the daily in-class salutes, and in understanding that the salute was never to be performed outside the classroom. (Respondent’s Exhibit 1 and Investigator Paczewski and Roper’s testimony)

16. Grievants never reported the salute even after they graduated and returned to their home facilities. (Testimony of Investigator Paczewski and Investigator Roper)

17. Once the “goofy” photo was brought to the attention of the DCR hierarchy, DCR orchestrated a joint investigation between Corrections Investigation Division’s (CID) investigators and Equal Employment Opportunity (EEO) investigators to determine the events surrounding the photo. (Testimony of Steve Berthiaume, Acting Director of CID)

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

19. The EEO investigation entailed interviewing many of those involved in the “goofy” photo and resulted in the EEO Investigation Summary Report (Report). (Respondent’s Exhibit 1)

20. On December 5, 2019, Investigator Lucas Roper conducted a recorded interview with Grievant Steach. Investigator Tina Paczewski did the same of Grievant Thomas with a follow-up on December 18, 2019. (Respondent’s Exhibit 1)

21. The Investigation Report documented the interview between Grievant Steach and Investigator Roper, in relevant part, as follows:

> Steach stated his class did attend Security Threat Group/Gang training at the academy and white supremacists were covered, but they did not talk about bad gestures.
>
> Steach stated Byrd took class picture with her cell phone and told the class to do the hand gesture in the photograph. Steach stated that Thomas, Sparks, and himself were reluctant in doing the hand gesture. …
>
> Steach stated that everyone knew it was ok to do it in the classroom but not ok to do it outside of the classroom.

(Respondent's Exhibit 1)

22. The Investigation Report documented the initial interview between Grievant Thomas and Investigator Paczewski, in relevant part, as follows:

> When asked what the Hail sign meant to him, Thomas stated it was a German greeting like "Hello". He stated that after it was said by Johnson in class, some of the cadets looked up the meaning of "Hail" as they wanted to make sure that it wasn't a racist thing. When further questioned on what the Hail sign is perceived by the general public, he responded it is perceived with racial connotations. …
>
> Thomas stated he had gang training and white supremacy training at the academy. …
>
> When asked, Thomas stated that Byrd took the class picture with the "Hail Byrd" gesture two times because some of the cadets, himself included, would not do the "Hail Byrd" gesture. He stated that Sgt. Byrd told them to do the picture again and everyone was to do the gesture. The picture was taken again with everyone making the "Hail Byrd" gesture or using a fist instead of the hand.
>
> Thomas stated that is the one and only time he made that gesture and that was only because he was told to do it by Byrd. He stated that all cadets were told at the beginning of the Academy that if they were given an order by a superior, they were to follow that order or they would not graduate. He

> felt that since Byrd was a higher-ranking officer and an instructor, that he had no choice but to do the gesture or risk not graduating.
>
> When asked if any officers voiced any concerns over this sign, Thomas stated that a lot of people thought it was a bad idea but did it out of fear of not graduating. He stated that some of the cadets, including Johnson, wanted to do the "Hail Byrd" gesture during the graduation but the others told them that it wasn't going to happen, so it was decided to not do it. …

23. The investigation concluded that, even though some cadets did not perform a Nazi salute, the cadets collectively performed one based on a collective view of the picture. (Testimony of DCR Deputy Commissioner Michael Coleman in *Smarr and Schultheiz v. DCR/BPJ/SMCCJ*, Docket No. 2020-1488-CONS (Sept. 23, 2020)).

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

25. The Report concluded that "the investigation did not reveal any motivation or intent that this [salute] was a discriminatory act towards any racial, religious or ethnic group but was done out of sheer ignorance and poor judgment. However, in terms of EEO violations, perception is much more important than intent. This perception is based upon the reasonable person standard which takes the scrutiny away from the two principles in the dispute." (Respondent's Exhibit 1)

26. The Report concluded that a lone cadet started using the "Hail Byrd" salute in the second or third week of the Academy as a "sign of respect" for Instructor Byrd, and

that the salute was taken up by other cadets over the six weeks of the Academy. (Respondent's Exhibit 1)

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

28. At the conclusion of the internal investigation, Respondent held a predetermination conference with each Grievant.

29. By letter dated January 6, 2020, Respondent dismissed Grievant Steach from his probationary employment, effective January 21, 2020. (Respondent's Exhibit 4a)

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

31. Each dismissal letter gave the same rationale for dismissal, stating in part as follows:

> … During the course of the investigation it was substantiated that you participated in a class photograph of the Basic Training Class # 18 in which a discriminatory, and offensive gesture was being made. Your participation during this incident was largely based on ignorance, along with a remarkable and appalling lack of judgment. Further, you did not report that this incident had occurred.
>
> During the course of training you had just completed at the time of the taking of the photograph, you had been taught about the need to eliminate discriminatory workplace environments, the necessity to report unusual incidents, cultural diversity, and the need to recognize and deal with hate groups or security threat groups. It is quite obvious that you did not retain any of the information that was meant to be imparted to you. These are some of the core concepts that we expect cadets to not only retain, but to follow, and ensure the compliance of, in the course of his or her duties.

> We expect and demand that our employees act in a way that contributes to an environment of respect and professionalism among our ranks. Messages that reflect hate, intimidation, and discriminatory beliefs have no place in our workplace, and are incompatible with our mission to protect both our incarcerated population and the citizens of West Virginia.
>
> As a result, the Division of Corrections and Rehabilitation has lost trust and confidence in your ability to satisfactorily perform the duties required of your job. The Division has a statutory duty to protect the public and inmates from harm, and your actions show that you would not be capable of doing such. Therefore, upon evaluation of all information made available to me, I have concluded that your action/lack of action creates a great liability for this agency. Moreover, I have lost complete confidence in your ability to carry out your job duties as expected or required. I have no reason to believe you would follow policy in the future with regard to making decisions that are in the best interest of the public and inmates we are responsible to protect. …
>
> The State of West Virginia and its agencies have reason to expect their employees to observe a standard of conduct which will not reflect discredit on the abilities and integrity of their employees or create suspicion with reference to their employees' capability in discharging their duties and responsibilities. The nature of your misconduct demonstrates a willful disregard of the employer's interests or a wanton disregard of standards of behavior which the employer has the right to expect of its employees. I believe the nature of your misconduct is sufficient to cause me to conclude that you did not meet an acceptable standard of conduct as an employee… thus warranting your dismissal. …

(Respondent's Exhibit 4a & 4b)

32. Typically, the decision to dismiss a DCR employee is made when the Commissioner approves such recommendation. The superintendent of a facility is normally involved in dismissal decisions.

33. In this case, the Commissioner and facility superintendents were not involved in the decision to dismiss the cadets. The decision to dismiss participants in the "goofy" photo came from the office of Governor Jim Justice. (Mr. Coleman's testimony)

34. While Respondent trained Grievants on their duty to obey orders, it did not train them to disobey orders that were unlawful, immoral, or against DCR policy.

35. Respondent did not teach Grievants and other cadets that the Nazi salute is a gang gesture or symbol of white supremacy but relied on the public knowledge Grievants should have gained through the media and history books that it is generally "a bad thing."

36. Respondent did not submit policy language on reporting, just the letter of dismissal stating Grievants had an obligation to report "unusual incidents."

37. Respondent expected cadets who witnessed the salute to report it even if they had to wait until after graduation to do so. (Mr. Coleman's testimony)

38. Respondent considered Grievants' primary offense to be their failure to report rather than their participation in the salute. (Testimony of Mr. Berthiaume, Acting Director of CID)

39. Grievants knew they had an obligation to report questionable conduct.

40. Respondent determined that returning Grievants to work as Correctional Officers would pose a safety risk to Grievants and their coworkers and would jeopardize their credibility when testifying for the agency. (Mr. Coleman's testimony)

41. Grievants' behavior violated prohibitions against a hostile work environment. Respondent grew concerned that minority employees might not feel safe

working with Grievants and that inmates would view officers and even the agency as sympathizing with white supremacists.

42. Cadets and their families, and even some correctional officers who were not involved in the salute, have received death threats.

43. A group of inmates even mockingly saluted correctional officers shortly after the picture was released. This salute led to discipline of the inmates involved. (*See Smarr and Schultheiz v. DCR/BPJ/SMCCJ*, Docket No. 2020-1488-CONS (Sept. 23, 2020)).

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

45. Grievants did not testify or present any evidence that they reported the salute or that their salute was Roman instead of Nazi.

46. The only exhibit Grievants submitted was an article quoting Governor Justice as saying, "I have directed Secretary Jeff Sandy of the Department of Military Affairs and Public Safety to continue actively investigating this incident and I have ordered the termination of all those that are found to be involved in this conduct." (Grievant's Exhibit 1)

47. The only substantive witness Grievants called was Tracey Mason. She was present when the Nazi salute photo was taken and testified that she saw nothing offensive in the gesture but interpreted it as failed satire and only later realized it was a Nazi salute.

48. During the investigation, neither Grievants nor any of the other cadets mentioned the Roman salute. (Mr. Berthiaume's testimony)

49. Grievants had reservations about the salute they performed and knew it would be viewed as a Nazi salute.

Discussion

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

Grievants were dismissed for misconduct after performing a Nazi salute and failing to report it. As probationary employees, Grievants were not entitled to the usual protections afforded state employees. The Division of Personnel's Administrative Rule discusses the probationary period of employment, describing it as "a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the

employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program of the agency." W. VA. CODE ST. R. § 143-1-10.1.a. (2016). The same provision goes on to state that the employer "shall use the probationary period for the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work." *Id*. A probationary employee may be dismissed at any point during the probationary period that the employer determines his services are unsatisfactory. *Id*. at § 10.5(a).

The Division of Personnel's Administrative Rule establishes a low threshold to justify termination of a probationary employee. *Livingston v. Dep't of Health and Human Res*., Docket No. 2008-0770-DHHR (Mar. 21, 2008). "However, the distinction is one that only affects who carries the burden of proof. As a practical matter, an employee who engages in misconduct is also providing unsatisfactory performance. " *Id.* (*citing Johnson v. Dep't of Transp./Div. of Highways*, Docket No. 04-DOH-215 (Oct. 29, 2004)). In other words, an employer has the option of labeling a probationary employee's misbehavior as misconduct or unsatisfactory performance.

While the employer must prove that a permanent employee engaged in substantial misconduct, it has much more leeway in dismissing a probationary employee. This is because it can either accept the burden of proof or transfer it to the probationary employee by choosing which label to apply and does not have to show the misconduct was substantial. The employer's discretion in dismissing a probationary employee is limited only by whether dismissal is arbitrary and capricious or violative of law or policy.

"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, "while 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).

"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)." T*rimboli 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).

Grievants claim they engaged in a Roman rather than a Nazi salute and were never trained on the Nazi salute. Grievants contend they were informed by their instructors and the cadet handbook that the consequence for failure to obey is dismissal and they were never told they had the option to disobey any order, let alone a lawful one. They assert their training and operational procedure directed them to obey questionable orders first and report them later. Grievants assert they did report the salute to their superiors.

Respondent counters that the salute was obviously Nazi and that Grievants never claimed it was Roman during the investigation. Respondent acknowledges it did not train Grievants on the Nazi salute but contends they should have recognized it as a "bad thing" from popular culture and history books. Respondent concedes that Grievants did not have hateful motive and does not deny that Grievants were ordered to engage in the salute but implies it is common sense to disobey immoral orders. It asserts that performing the salute violated the prohibition against a hostile work environment. Respondent claims that Grievants never reported the salute even though they knew to report "unusual incidents." It contends that even if Grievants were compelled to follow orders they could have obeyed first and reported after graduation.

The class photo proves by a preponderance of the evidence that Grievants engaged in a Nazi salute. The salute is by all appearances a Nazi salute. Grievants did

not challenge the accuracy of the photo or present any evidence that the salute was Roman. Grievants manifested an awareness that the salute was wrong in refusing Instructor Byrd's first order to salute, in declining to participate in the daily in-class salutes, and in understanding that the salute was never to be performed outside the classroom. Thus, Grievants knew the salute would be perceived as Nazi.

In arguing they were trained to obey first and report later, Grievants reveal awareness of their obligation to report unusual incidents. Respondent acknowledges that Grievants could have followed orders first and reported later. Thus, the case against Grievants comes down to whether they reported the salute. The dismissal letter notified Grievants that failure to report was one of their infractions. Yet Grievants did not present any evidence to support their contention that they reported the salute. Still, Respondent has accepted the burden of proving that Grievants failed to report.

The only evidence touching on whether Grievants reported the salute is testimony from investigators that Grievants never told them they reported. Investigators Paczewski and Roper interviewed Grievants and documented the interview in the Investigation Report. They testified that Grievants did not say they reported the salute. The Investigation Report also reflects this in leaving out any mention that Grievants said they reported the salute. Because Grievants never told investigators they reported, let alone any specifics, Respondent did not have any leads to pursue. Thus, Respondent did what could be reasonably expected to prove a failure to report.

Due to conflicting claims on failure to report, the undersigned must assess the credibility of the investigators. 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 Systems 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, and the consistency of prior statements.

Investigators Paczewski and Roper did not have motive to misrepresent, having no interest in the outcome of this action. They had opportunity to perceive the failure of Grievants to inform them that they reported and were consistent in not mentioning this failure to report in the Investigation Report. Investigator Roper credibly testified that Grievant Steach never said he reported and Investigator Paczewski credibly testified that she did not recall Grievant Thomas saying he reported. Thus, Respondent proved by a preponderance of the evidence that Grievants failed to report the salute.

Respondent set forth other grounds justifying dismissal. These include the

possibility of violence by minority inmates and gangs who might perceive the class salute as a declaration of allegiance or sympathy for white supremacy gangs. This violence would endanger all employees, not just those who had been a part of Class 18. Cadets and their families, and even correctional officers who were not involved in the salute, received death threats. A group of inmates mockingly saluted correctional officers shortly after the picture was released. As Correctional Officers must testify periodically about prisoner misconduct, Respondent reasoned that the salute would be used by prisoners to discredit Grievants. Thus, Respondent proved by a preponderance of evidence that its dismissal of Grievants was not arbitrary or capricious.

Because Respondent relies primarily on Grievants' failure to report, Grievants' argument that they were obligated to abide by the order to salute is not consequential. Nevertheless, due diligence calls for analysis. The claim of following orders is an affirmative defense.[5] "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2018).

It is true that employees are generally required to follow orders. But there are implied limits to this rule. "'Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.' *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. *See Day v. Morgan Co. Health Dep't*,

[5]"Affirmative defense" means "[i]n pleading, matter asserted by defendant which, assuming the complaint to be true, constitutes a defense to it." BLACK'S LAW DICTIONARY 60 (6th ed. 1990).

Docket No. 07-CHD-121 (Dec. 14, 2007)." *Graham v. Wetzel County Bd. of Educ*., Docket No. 2013-0014-WetED (Feb. 15, 2013), *aff'd, Graham v. Bd. of Educ. of Wetzel Cty*., Docket No. 13-0975, (W. Va. Sup. Ct., Apr. 28, 2014) (*memorandum decision*).

Employees do not have the option to obey orders they know are unlawful. There appears to be some leeway in interpreting what constitutes an unlawful directive. For instance, the Grievance Board has upheld the dismissal of cadets for obeying an order to participate in a Nazi salute, implying the existence of a duty to disobey immoral orders. *See Smarr and Schultheiz v. DCR/BPJ/SMCCJ*, Docket No. 2020-1488-CONS (Sept. 23, 2020). Thus, employees not only have a defense for disobeying unlawful or immoral orders but a duty to disobey them.

There are obviously some orders that are easily recognized as unlawful that any employee would refuse to obey. There are also orders employees may find distasteful but heed because they perceive them as harmless. Training a probationary employee could help them identify immoral orders but is not necessary if the employee has been culturally acclimated against such conduct. An example of acclimation against immoral conduct would be in the realm of bigoted and hateful behavior in the workplace. Acclimation against bigoted conduct would manifest in an employee refusing an order to direct a racial or religious slur against a coworker. It would be reasonable for an agency to expect a probationary employee to refuse orders to direct racial or religious slurs against coworkers even without being trained to do so. This would be the case even if the employee were ordered to make racial or religious slurs outside the presence of coworkers of an effected group and even if the employee were unaware of the employer's policy against a hostile work environment. Add to this scenario that a supervisor openly

records the employee as she directs him to make racial or religious slurs while in agency uniform. The reasonableness of the expectation to disobey is not diminished. This is especially so if the employee is a correctional officer trained on the prevalence of racial identity gangs in the corrections system.

As a society, we have certain behavioral expectations of each other and have been acclimated through popular culture to know that it is wrong to engage in racial and religious slurs, with the Nazi salute being one of the most recognized examples of such a slur. The fact that other cadets engaged in the Nazi salute did not create a defense to the conduct, even though a superior encouraged and ordered the behavior. The failure of the Nuremburg defense illustrates the limits of subordinates shirking responsibility by arguing they were just following orders.

Grievants claim that Respondent denied them due process, breached confidentiality, and subjected them to discrimination. Grievants bear the burden of proof in a grievance that does not involve a disciplinary matter and must prove their grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). Grievants argue they were denied due process because Respondent disseminated the Nazi salute photo, Governor Justice fired them before an investigation was conducted due to the overwhelming negative publicity from the photo, and Mr. Berthiaume (the Acting Director of CID) gave investigators questions to ask Grievants. Grievants assert that Respondent breached their right to confidentiality by releasing the Nazi salute photo to the public, even though their faces were redacted. Grievants did not cite any law or regulation in support of these contentions. Grievants failed to prove by a preponderance of evidence that Respondent breached any right to due process or confidentiality.

Grievants also claim discrimination. "Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). Grievants did not compare themselves to a specific employee and thus failed to show they were treated differently from any similarly situated employee. Grievants did not prove discrimination by a preponderance of evidence.

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. “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)).

3. “[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)).

4. Respondent proved by a preponderance of evidence that Grievants engaged in misconduct by performing and failing to report a Nazi salute, and that their dismissal was not arbitrary and capricious.

5. Grievants did not prove by a preponderance of evidence that Respondent breached any right to due process or confidentiality, or that Respondent discriminated against them.

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: March 8, 2021

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Joshua S. Fraenkel
Administrative Law Judge