THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JARED GREGORY WIGGINS,
Grievant,

v. **Docket No. 2022-0212-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Jared Gregory Wiggins, filed a grievance dated September 9, 2021, against his employer, Respondent, Division of Highways (DOH), stating, in part, as follows:

> I was brought in for a random urine screen, couldn't produce enough sample the first time. They started the "shy bladder" protocol. Failed to give the DER the situation at hand, as the DOT Rule 49 part 40 section 40.193, subpart 1, #4.[1] They waited til Monday. This was on Thursday. They also did not send copy 4 of the CCF to the DER within 24 hrs or the next business day. As of Monday at 4:00 pm they still had not sent the DER nothing in writing. Because I ask for all copies of everything sent to HR. I was never directed to obtain within a evaluation from a licensed physician to make sure there was or wasn't a medical issue at that time that prevented me from giving a full sample. And finally the MRO made his determination of "Failure to Test" or "Refusal" without any possibility of a medical issue. The main HR wrote a letter and stated if I felt it was unwarranted to call her. I called and spoke with Natasha White and layed (sic) out the issues, and failure to follow procedures and her response was that she would "think about it" and give me notice of her decision within 2-3 days.

[1] Grievant is referring to the U.S. Department of Transportation Procedures for Transportation Workplace Drug and Alcohol Testing Programs, 49 CFR. § 40 and 49 CFR § 40.193, "What happens when an employee does not provide a sufficient amount of urine for a drug test?"

As relief sought, Grievant states, “I’d like paid for the time off this has caused. I would like my job back as a full time employee, so there will be other things that will help protect my job. And I’d like to see HR undergo some sort of retraining of procedures to ensure this doesn’t happened to me or anyone else again.”

The level three hearing was conducted via Zoom video conferencing on March 8, 2022, before the undersigned administrative law judge who appeared from the Grievance Board’s Charleston, West Virginia, office. Those participating in this hearing appeared from separate locations. Grievant appeared *pro se*. Respondent appeared by counsel, Jack E. Clark, Esquire, DOH Legal Division, and its representative Gordon Cook. Lori Counts-Smith, Esquire, DOH Legal Division, attended this hearing as observer. Grievant had no objection to Ms. Counts-Smith being present during the hearing. This matter became mature for decision on May 9, 2022, upon receipt of the Respondent’s proposed “Findings of Fact and Conclusions of Law.” Grievant did not submit any post-hearing proposals.

Synopsis

Grievant was employed as a probationary employee by Respondent as a Transportation Worker II (TW2). Respondent dismissed Grievant for “refusal to test” after he was unable to produce enough urine for a drug test. Grievant argued that Respondent failed to follow its drug testing policy in that Respondent failed to refer him to a physician to determine if he had a medical condition preventing him from producing an adequate sample, and that, as such, he should not have been dismissed from employment. While Respondent violated a provision in its Drug and Alcohol Testing Policy, Respondent cured the same by offering Grievant additional time to submit documentation and informing him

that upon receipt, Respondent would re-evaluate Grievant's employment status. Respondent proved by a preponderance that Grievant's failure to produce enough urine for the drug test constituted a refusal to test thereby justifying his dismissal as a probationary employee. Therefore, the 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, a probationary employee, was employed by Respondent as a Transportation Worker II Buildings and Trade (TW2BT) in DOH District 3 in Wood County, West Virginia. Grievant began working for Respondent in April or May 2021. Grievant did not have a Commercial Driver's License (CDL).

2. Hunter Booth is employed by Respondent as a field engineer in District 3. Mr. Booth was Grievant's supervisor. Natasha White is employed by Respondent as the Director of the DOH Human Resources Division.

3. On August 8, 2021, Grievant was selected for a random drug test. Grievant reported to the testing site and gave a urine sample as required. The test results indicated that the sample had an abnormal pH level. As such, the test was "canceled," and the Medical Review Officer (MRO) noted that another urine sample would need to be collected.[2]

4. On August 19, 2021, Grievant was informed that he was required to retest that day. Mr. Booth picked Grievant up at his worksite and drove him to the testing facility. Grievant was unable to produce enough specimen to perform the urine test. As such, the

[2] *See*, Respondent's Exhibit 11, "Specimen Result Certificate," dated August 18, 2021.

MRO implemented the "shy bladder" protocol, which consisted of Grievant being given three hours to consume no more than forty ounces of liquid in an effort to allow Grievant to provide the necessary sample for the test.

5. Despite implementing the shy bladder protocol, Grievant did not produce the necessary amount of urine for the test to be performed. Given such, the MRO declared this a "refusal to test."[3]

6. By letter dated August 23, 2021, Natasha White informed Grievant that he was dismissed from employment effective September 7, 2021, for "your violation of the West Virginia Department of Transportation Drug and Alcohol Testing Policy. More specifically: On August 19, 2021[,] you appeared for a random urine test. The urine sample result is certified by the Agency's Medical Review Officer as a Refusal To Test." The last paragraph of this letter informs Grievant of his "right to respond to this action" by contacting Ms. White by phone or in writing. Ms. White refers to both the Division of Personnel Administrative Rule 12.2 and Section III, Chapter 15 of the DOT Administrative Operating Procedures "which contains the agency's policy on Drug and Alcohol Testing," as authority in this letter.[4]

7. Pursuant to the August 23, 2021, letter, Grievant contacted Ms. White to discuss his dismissal and a telephone conference was scheduled to be held on September 1, 2021. Attending this telephone conference were Grievant, Ms. White, and Mr. Cook. During this conference, Grievant stated that he liked his job with DOH and wished to return to it. However, Grievant offered Ms. White no additional information or

[3] *See*, Respondent's Exhibit 12, "Specimen Result Certificate," dated August 23, 2021.
[4] *See*, Respondent's Exhibit 4, August 23, 2021, letter.

any reason that would cause her to reconsider her decision to terminate Grievant's employment. During this conversation, Ms. White asked Grievant if he had any medical condition that would prevent him from being able to produce a urine sample, and Grievant did not indicate that he had any such condition.[5]

8. As a follow up to their telephone conference on September 1, 2021, by letter dated September 2, 2021, Ms. White informed Grievant that she had "taken [his] statement into consideration and evaluated the circumstances regarding your termination. Unfortunately, I must concur with the previously issued disciplinary action, termination of employment."[6]

9. Grievant filed this grievance on September 10, 2021.[7] As recited on page one of this Decision, Grievant alleged violations of the U.S. Department of Transportation Procedures for Transportation Workplace Drug and Alcohol Testing Programs. One such allegation was that Grievant "was never directed to obtain within [five] days a[n] evaluation from a licensed physician to make sure there was or wasn't a medical issue at that time that prevented [Grievant] from giving a full sample." Grievant also alleged that the MRO made his determination that it was a refusal to test without considering whether there was a medical issue.[8]

10. Upon receipt of Grievant's grievance filing, Respondent conducted a "review" of his grievance and his allegations. It is unknown who ordered this review, who

[5] *See*, testimony of Natasha White.
[6] *See*, Respondent's Exhibit 5, September 2, 2021, letter.
[7] The Statement of Grievance is signed September 9, 2021. It was received at the Grievance Board on September 15, 2021, but it was post marked September 10, 2021. Thus, the filing date is September 10, 2021.
[8] *See*, Statement of Grievance.

exactly conducted the review, or participated therein, and what was done during the review.[9]

11. By letter dated December 1, 2021, from Mr. Clark, Respondent's counsel herein, approximately three months after Grievant's last communication with Ms. White, informed Grievant of the following:

> The Legal Division of the West Virginia Division of Highways has conducted a review of your grievance that was filed on September 9, 2021. In your conversation with Division of Highways Human Resources Division personnel on September 1, 2021, you contend[ed] that you were not given an opportunity to obtain an evaluation from a licensed physician to determine if there was a medical issue at the time of your drug test that prevented you from providing a sample. Rule 8.6 pf the West Virginia Department of Transportation Substance Abuse Policy No: DOT 3.15 (revised January 1, 2020) applies to your employment with the Division of Highways and reads as follows:
>
> > In the event an employee is not able to provide an adequate breath/urine sample, he/she is to be removed from covered duty immediately and be temporarily reassigned non-safety-sensitive duties. The employee is to be advised he/she must provide medical documentation within seven (7) calendar days of the date of referral to a licensed Physician. Failure to do so will be considered as refusing to test and disciplinary action initiated.
>
> Considering the department policy and to address your concerns with the process surrounding the termination of your employment with the Department of Highways, we are extending this opportunity to you now. If you have any medical evidence or information that would account for your inability to provide an adequate urine sample at the time of the drug test (August 19, 2021) please provide that information to me ***no later than Monday, December 13, 2021***. This information will be given all due consideration and your

[9] *See*, Respondent's proposed Findings of Fact and Conclusions of Law, pg. 4; testimony of Natasha White.

> employment status will be re-evaluated upon receipt. If you have any questions or concerns, please feel free to contact me. (Emphasis in original)[10]

12. Grievant did not respond to the December 1, 2021, letter, nor did Grievant submit any medical evidence or other information that would account for his inability to produce the required amount of urine to run the drug test on August 19, 2021.

13. At some point between September 10, 2021, and January 25, 2022, Ms. White "reopened" Grievant's "case," even though he had already been dismissed from employment and had a grievance pending. Ms. White then reviewed Grievant's entire personnel file. In doing so, she found performance issues that she had not considered at the time she dismissed Grievant from employment.[11] No performance issues were mentioned in Grievant's August 23, 2021, dismissal letter.

14. By letter dated January 25, 2022, signed by Ms. White, Respondent informed as follows:

> This letter is intendent to provide you with the most recent information regarding the review of information provided to me in our conversation on September 1, 2021. The personnel action against you has been reconsidered by the Highways Human Resources Division based on additional information relevant to your case.
>
> On December 1, 2021, a letter was sent to you regarding Docket No. 2022-0212-DOT. This letter stated the Legal Division of the West Virginia Division of Highways had conducted a review of your grievance that was filed on September 9, 2021. The letter provided you with instructions on how to provide medical documentation related to your non-retention, as referenced in Rule 8.6 of the West Virginia Department of Transportation Substance Abuse Policy No: DOT 3.15 (revised January 1, 2020). As of January 7, 2022, no information or response was provided by you as required

[10] *See*, Respondent's Exhibit 6, December 1, 2021, letter.
[11] *See*, testimony of Natasha White.

> by the referenced policy to change the disciplinary action against you.
>
> During review and reconsideration, your attendance and performance were re-evaluated. You exhibited habitual lateness, unsatisfactory job performance (as documented in an RL-544 dated June 29, 2021), and violation of the West Virginia Department of Transportation Drug and Alcohol Testing Policy; (sic) refusal to test.
>
> After reconsideration, your non-retention is upheld by the West Virginia Division of Highways because of, but not limited to: Performance-related issues, excessive absenteeism, and failure to provide information or response as requested by the Legal Division of the West Virginia Division of Highways regarding the WVDOT Drug and Alcohol Testing Policy.[12]

Discussion

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). However, 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*

[12] *See*, Respondent's Exhibit 7, January 25, 2022, letter.

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). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Respondent asserts that it dismissed Grievant from employment for misconduct in that he failed to produce enough urine for a random drug test after proper test protocols were followed, which Respondent considers a "refusal to test," in violation of Respondent's "Drug and Alcohol Testing Policy." Grievant denies refusing to test and asserts that Respondent failed to follow the required procedures for when an employee cannot produce enough specimen to conduct a urine test. Specifically, Grievant alleges that Respondent was required to direct him to obtain an evaluation from a licensed physician within five days to determine if there was a medical issue preventing him from being able to give a full urine sample and it failed to do so. Grievant also argues that the MRO failed to send the Custody and Control Form (CCF) to the Designated Employer Representative (DER) within the time period set by the federal regulations.

At some time after Grievant's dismissal and his filing of this grievance, Respondent, by and through Ms. White, reviewed Grievant's entire personnel file and additionally charged Grievant with unsatisfactory performance, which is also a dischargeable offense, in a letter dated January 25, 2022.[13] As of that date, Grievant was no longer employed by Respondent. The only charge listed in Grievant's August 23, 2021, dismissal letter was "refusal to test" in violation of Respondent's Drug and Alcohol Testing Policy.[14] Respondent's decision to add a second charge months after dismissing

[13] *See*, Respondent's Exhibit 7, January 25, 2022, letter.
[14] *See*, Respondent's Exhibit 4, August 23, 2021, letter.

Grievant is not only strange, but also, it is totally irrelevant. Respondent has no authority to "re-discharge" or "double-discharge" a former employee. Respondent gets one chance dismiss an employee, and Respondent did not dismiss Grievant for any performance related issues. Respondent is not entitled to a do-over. It is unknown why Respondent decided to review Grievant's entire personnel file and add the performance-related charges, but it looks like an attempt to bolster its original decision to dismiss Grievant. Accordingly, the performance-related charges Respondent first announced in January 2022, long after Grievant's dismissal and his filing a grievance, are invalid and will not be addressed further herein.

It is undisputed that Grievant was a probationary employee at the time of his dismissal. Respondent did not address any specific, applicable rules, regulations, policy, or law pertaining to probationary employees in its post-hearing submissions. It is noted that in April 2018, Respondent was granted limited authority to establish "special employment procedures for promotions, appointments, and other matters consistent with the establishment of a merit based employment process" outside that of the Division of Personnel (DOP). *See* W. VA. CODE ST. R. § 157-12-1.1 (2018). It is unclear whether the Division of Highways Legislative Rule, "Employment Procedures," was amended between April 2018 and August 2021. Respondent did not discuss how, if at all, its rule(s) in effect on August 23, 2021, pertained the dismissal of probationary employees, as opposed to DOP's Administrative Rule.

It appears that at the time of Grievant's dismissal, Respondent's legislative rule defined the "probationary period" as a "specified trial work period designed to test the fitness of an employee for the position for which an original appointment has been made."

W. VA. CODE ST. R. § 157-12-2.29 (2018). Further, Respondent's 2018 legislative rule states that, "[t]his rule implements the provisions set forth in W. Va. Code § 17-2A-24 regarding special employment procedures for promotions, appointments, and other matters consistent with establishment of a merit based employment process. The Division will follow the Division of Personnel's rule, 143CSR1, for employment related matters not addressed in W. Va. Code § 17-2A-24 or this rule."[15] W. VA. CODE ST. R. § 157-1-1.1 (2018). DOP's Administrative Rule describes the probationary period 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 DOP Administrative Rule 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 if the employer determines that the probationary employee's services are unsatisfactory. *Id*. at § 10.5(a). Therefore, the Division of Personnel's Administrative Rule establishes a low threshold to justify termination of a probationary employee. *See Livingston v. Dep't of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008). Additionally, "[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

[15]A recent search of W. Va. Code § 17-2A-24 indicates this statute has been repealed, despite the fact that W. VA. CODE ST. R. § 157-1-1.5 (2018) states that "the rule shall terminate and have no further effect April 13, 2023.

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)). As Respondent provided no specific policies regarding its probationary period or its employees who hold probationary status other than Policy No: DOT 3.15, and given the language of W. VA. CODE ST. R. § 157-1-1.1 (2018), the DOP Administrative Rule and related case law will be relied upon in this decision.

"[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 & 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 & 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 & 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).

The West Virginia Department of Transportation Policy 3.15, "Substance Abuse," states, in part, as follows:

> 2.0 Scope
>
> This policy follows United States Department of Transportation (USDOT) guidelines and applies to all WVDOT employees. . .
>
> 4.0 Drug and Alcohol Testing Program
>
> 4.1 Participants
>
> A. All employees working in a safety sensitive function (as defined by the DOT Drug and Alcohol Testing Policy) or those employees classified within the Transportation Worker (TW) classification series must adhere to the program and participation as a condition of employment that places these employees in a "covered position" under this program.

B. A safety sensitive function has been defined by the DOT Drug and Alcohol Testing Policy as "Commercial Motor Vehicle (CMV) operators and mechanics who service and maintain CMV's (sic) but do not possess the Commercial Driver's License (CDL)". . .

5.0 Consequences for Prohibited Conduct

5.1 Possession Within the Workplace:

Penalties for possessing unlawful drugs or alcohol in the workplace range from reprimand to dismissal . . . The severity of discipline depends on the type of offense in accordance with DOH Policy 3.6 Disciplinary Action of Highways Administrative Operating Procedures. . .[16]

5.2 Refusal to Participate:

Conduct constituting a refusal to test, besides blatant unwillingness to submit to testing procedures, is . . .

G. failure to provide adequate breath/urine samples without a valid medical reason issued by an acceptable physician to WVDOT . . . .[17]

Further in DOT Policy 3.15 is "The Division of Highways Parkways Authority Drug and Alcohol Testing Policy" states, in part, as follows:

1.0 Purpose

. . .

Federal regulations require drug and alcohol testing of employees whose positions require them to possess a CDL and who operate or repair Commercial Motor

[16] Respondent did not present DOH Policy 3.6 "Disciplinary Action of Highways Administrative Operating Procedures" at the level three hearing. As such, it is unknown what this policy states.

[17] *See*, Respondent's Respondent's Exhibit 8, WVDOT Department of Transportation Policy No: DOT 3.15, Division of Highways Parkways Authority Drug and Alcohol Testing Policy, pg. 4 of 52.

Vehicles(CMVs). This Agency's drug and alcohol testing program is regulated and reports to the Federal Motor Carrier Safety Administration (FMCSA) and the Federal Rail Authority (FRA). Those same regulations provide for drug/alcohol testing of such employees in the following situations: pre-employment, random, reasonable suspicion, post-accident, and return-to-duty/follow-ups. . .

This Policy also includes a testing pool for select employees who do not possess a CDL. Any employee whose position is within the job classification series of Transportation Workers (TWs) is covered by this Policy. All Transportation Workers (TWs) use a variety of tools and power equipment, and usually are performing duties in close proximity to maintenance equipment, traffic, and varying surroundings.

All TW duties are Covered Duties, but only those duties of directly operating or repairing a CMV are defined as Safety-Sensitive. This is, in part, to not confuse or alter the Federal term "safety sensitive" which refers to regulated Transportation, Transit, Aviation, Railroad, and Cost Guard employees. "Covered employee" may also be used when indicating an employee who is covered by the provisions of this Policy. . .

2.0 Definitions

. . .

2.11 Covered Employee—Covered duty means the employee is identified as being classified within the TW's (sic) classification series or the employee's position performs safety-sensitive functions including those functions on an intermittent basis . . .

3.0 Covered Employees

In addition to including all employees involved in job duties defined as safety-sensitive by the USDOT and FMCSA, any employee whose job classification is within the TW classification series will be covered by this Policy as well. Again, all TWs, even those who do

> not possess a CDL or maintain/repair CMVs, are covered employees. . . .[18]

Therefore, DOT Policy No: DOT 3.15 applies to Grievant.

In his letter dated December 1, 2021, counsel for Respondent informed Grievant that "The West Virginia Department of Transportation Policy 3.15, Substance Abuse, Rule 8.6, Refusal to Test," applied to him [at the time he was dismissed] and counsel included the following quotation from 8.6:

> [i]n the event an employee is not able to provide an adequate breath/urine sample, he/she is to be removed from covered duty immediately and be temporarily reassigned non-safety-sensitive duties. The employee us to be advised he/she must provide medical documentation within seven (7) calendar days of the date of referral to a licensed Physician. Failure to do so will be considered as refusing to test and disciplinary action initiated.[19]

Policy No: DOT 3.15, Section 8.0, "Refusal to Test," also states, in part, the following:

> 8.1 [c]overed Employees are required to participate in the testing programs as a condition of employment. Certain behaviors constitute a refusal to test, which automatically initiates a positive result and Disciplinary Action as defined within this policy will be initiated. . .
>
> 8.5 Drug tests require at least 45 milliliters of urine. If the employee cannot provide this minimum amount, the collector will advise the employee to drink not more than forty (40) ounces of fluid. After a period not to exceed three (3) hours, the collector will advise the employee to provide an adequate amount of urine. The original sample is to be discarded. If, after three (3) hours, the employee still cannot provide an adequate sample, the specimen is to be discarded and testing discontinued. The collector will inform the site

[18] *See*, Respondent's Exhibit 8, WVDOT Department of Transportation Policy No. DOT 3.15, Division of Highways Parkways Authority Drug and Alcohol Testing Policy, pp. 7-10 of 52.

[19] *See*, Respondent's Exhibit 6, December 1, 2021, letter.

> supervisor that the employee cannot provide an adequate sample. The site supervisor will inform the Human Resources Division. The Human Resources Division will inform the drug testing program's MRO who will contact the employee and refer him/her to a licensed physician acceptable to the Agency. The physician will determine if there can be a medical reason for the employee's failure to provide an adequate urine sample. If the Physician cannot make such a determination, the test result is to be issued as a Refusal to Test and appropriate discipline will be initiated.[20]

It is undisputed that Grievant was selected for a second drug test after his first showed an abnormal pH, and that Grievant did not produce enough urine to test on the second time. Grievant has alleged that Respondent did not refer him to a physician to determine if he had any condition that would affect his ability to provide a full specimen for analysis, as required. Respondent offered no evidence to dispute this. Based upon the evidence presented, this ALJ finds that Respondent failed to follow the procedures set forth in Section 8.5. However, by his letter dated December 1, 2021, counsel for Respondent offered Grievant the opportunity to submit any medical documents or information that would explain his inability to produce enough urine to test, and that if Grievant did so, Respondent would re-evaluate Grievant's employment status upon receipt. Counsel for Respondent further provided his contact information and invited Grievant to contact him if he had any questions or concerns.[21] Grievant did not submit any medical records or information to counsel for Respondent in response to his letter. While Respondent violated Section 8.5 of Policy No: DOT 3.15, by inviting Grievant to

[20] *See*, Respondent's Exhibit 8, WVDOT Department of Transportation Policy No. DOT 3.15, Division of Highways Parkways Authority Drug and Alcohol Testing Policy, pg. 18 of 52.
[21] *See*, Respondent's Exhibit 6, December 1, 2021, letter.

submit medical evidence to Respondent's counsel and informing Grievant that his employment status would be re-evaluated upon receipt, Respondent cured its violation of policy. It is noted that Grievant has not claimed that he had any medical condition that prevented him from providing enough urine for the drug test, at the level three hearing, or before. Grievant argued that there was a possibility he had such a condition, but he did not know because Respondent failed to refer him to a physician as required by Section 8.5. It appears that Grievant took no steps on his own to seek a medical opinion at any time before the level three hearing.

Policy No: DOT 3.15, "Drug and Alcohol Testing Policy" states in Section 11.0, "Consequences of Prohibited Conduct," 11.1 "First Offense" that, "[a] Refusal to test, a positive test result is received for a drug test or an alcohol concentration of 0.04 or greater result in the workplace, (A) [p]robationary employees shall be dismissed from employment and referred to a SAP (Substance Abuse Professional) also if they possess a CDL."[22] It is undisputed that Grievant did not have a CDL at the time at issue.

Given the evidence presented and the low threshold to justify the termination of a probationary employee, the undersigned cannot conclude that Respondent's decision to terminate Grievant's employment was arbitrary and capricious, or otherwise unreasonable. Respondent reached out to Grievant on December 1, 2021, in an attempt to find out if Grievant had any kind of documented medical condition that would have affected his ability to provide a urine sample. This cured Respondent's policy violation for failing to refer Grievant to a physician after he was unable to produce enough urine to

[22] *See*, Respondent's Exhibit 8,

test on August 19, 2021. Grievant failed to respond to Respondent's December 1, 2021, letter.

As discussed herein, Policy No: DOT 3.15 states that an employee's inability to provide a sufficient specimen for a random drug test after all the proper protocols are followed can be considered a "refusal to test," which can be a dischargeable offense for probationary employees. Given such, the provisions of Policy No: DOT 3.15 as discusses herein, and the low threshold to justify the termination of a probationary employee, Respondent has proved by a preponderance of the evidence that Grievant's actions at his second drug test constitute a refusal to test thereby justifying his dismissal. Accordingly, this grievance is DENIED.

Conclusions of Law

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

of Corr., Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. Dep't of Health and Human Res.*, Docket No. 2008-0958-DHHR (Mar. 13, 2009). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

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 and 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. Respondent proved by a preponderance of the evidence that as a probationary employee, Grievant's inability to produce enough urine for his second drug test constitutes a "refusal to test" as set forth in Policy No: DOT 3.15, justifying his dismissal. Further, Respondent's decision to dismiss Grievant from employment was not arbitrary and capricious, or otherwise unreasonable.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Intermediate Court of Appeals.[23] Any such appeal must be filed within thirty (30) days of receipt of this decision. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

DATE: July 7, 2022.

_____

Carrie H. LeFevre
Administrative Law Judge

[23] On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over "[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]" W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.