VERA DIXON,

Grievant,

v. Docket No. 98-CORR-243

WEST VIRGINIA DIVISION OF CORRECTIONS/
MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent.

DECISION

Vera Dixon (Grievant), was employed by the West Virginia Division of Corrections (Corrections), as a probationary Office Assistant I at the Mount Olive Correctional Complex (MOCC), until her dismissal on July 1, 1998. The dismissal letter from Deputy Warden Howard Painter cites as the reason for Grievant's dismissal: “[y]ou have not met the required performance standards or shown the proficiency and ability to meet the required standards.” Grievant contests her dismissal, and seeks reinstatement, back pay, leave that would have accumulated since her dismissal, and apologies. Although W. Va. Code § 29-6A-4(e) does not grant a probationary employee an automatic right to an expedited grievance process due to a discharge for unsatisfactory performance, this matter was allowed to proceed directly at Level IV, without objection by Corrections, in the interest of a speedy disposition of the grievance. Hale v. Div. of Corrections, Docket No. 97-CORR- 353 (Feb. 20, 1998); See Simms v. W. Va. Div. of Rehabilitation Services, Docket No. 92- RS-250 (July 31, 1992). A Level IV hearing was conducted before the undersigned in the Grievance Board's office in Beckley, West Virginia, on August 17, 1998. At that hearing,Corrections was represented by Leslie Kiser, Esq., and Grievant represented herself. By agreement of the parties, this matter became mature for decision at the conclusion of the Level IV hearing.

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant was a probationary Office Assistant I before being dismissed.

2. Two performance evaluations of Grievant found that she scored below expected standards in accuracy, thoroughness, organization, amount of work produced, ability to work under pressure, following instructions, neatness, knowledge of rules, and technical skills.

3. Grievant was also easily drawn into rumors and gossip, to the detriment of the smooth operation of Corrections.

4. Corrections dismissed Grievant from her probationary employment because she had not met the required performance standards or shown the proficiency and ability to meet the required standards.

DISCUSSION

Termination of a probationary employee for unsatisfactory performance is not disciplinary in nature, and the burden of proof is upon the probationary employee to prove by a preponderance of the evidence that her performance was satisfactory, and that she should not have been dismissed. Bowman v. W. Va. Educational Broadcasting Authority, Docket No. 96-EBA-464 (July 3, 1997); Smith v. W. Va. Div. of Labor, Docket No.93-LABOR-347 (Oct. 29, 1993); Walker v. W. Va. Public Service Commission, Docket No. 91-PSC-422 (Mar. 11, 1992); Bonnell v. W. Va. Dep't of Corrections, Docket No. 89-CORR-163 (Mar. 8, 1990). However, if misconduct is alleged by the employer, the dismissal is disciplinary, and the burden of proof is upon the employer to prove the charges by a preponderance of the evidence. Wolfe v. Dep't of Transp./Div. of Highways, Docket No. 95-DOH-491 (July 31, 1996), citing Skinner v. W. Va. Dept. of Transp./Div. of Highways, Docket No. 91-DOH-339 (Apr. 28, 1992).

Grievant was employed by Corrections, for a six month probationary period, as an Office Assistant I at MOCC. She was dismissed because she had not met the required performance standards or shown the proficiency and ability to meet the required standards. Grievant does not claim she was terminated for any reason other than her alleged unsatisfactory performance. Therefore, it is Grievant's burden to prove, by a preponderance of the evidence, that her performance was satisfactory, and that her dismissal was improper.

In a grievance not involving a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a partyhas not met its burden of proof. Id.

As employees in the classified service of the state, Corrections employees are subject to the provisions of the Division of Personnel's Administrative Rule. (See footnote 1) Section 10.5 of that rule addresses "Dismissal during Probation" and states as follows:

> If 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 Section 12.2 of this rule. If the appointing authority gives the fifteen calendar days notice on or before the last day of the probationary period, but less than fifteen calendar days in advance of that date, the probationary period shall be extended fifteen 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.

At her Level IV hearing, Grievant called no witnesses, and presented no evidence, to prove that her performance at Corrections was satisfactory. Grievant also did not allege or prove that Corrections violated any statute, policy, rule or regulation in dismissing her from employment. Corrections, however, presented two performance evaluations of Grievant in which she scored below expected standards in accuracy, thoroughness, organization, amount of work produced, ability to work under pressure, following instructions, neatness, knowledge of rules, and technical skills. Associate Warden of Programs, Teresa Waid (Waid), testified that she recommended Grievant's termination because she was also easily drawn into rumors and gossip, to the detriment of the smooth operation of Corrections. Waid testified, without contradiction from Grievant, that Grievant acknowledged that her job at MOCC exceeded her qualifications. Waid also testified thatGrievant's performance did not improve after her first performance evaluation brought her shortcomings to her

attention. One of Grievant's supervisors, Inmate Jobs Coordinator Terri Arthur, testified that Grievant's job performance was not up to standards, and that she agreed with Grievant's dismissal. Another of Grievant's supervisors, Religious Services Coordinator Lewis H. Childers, Jr., also testified that Grievant's job performance was not up to standards, and also stated that he agreed with Grievant's dismissal.

Grievant has failed to prove, by a preponderance of the evidence, that her performance was satisfactory, and that she should not have been dismissed.

Similarly, the evidence of record will not support a finding or conclusion that Corrections acted arbitrarily and capriciously or lacked a rational basis for dismissing Grievant from her probationary employment. Goard v. W. Va. Div. of Corrections, Docket No. 95-CORR-068 (Mar. 20, 1995).

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In a grievance not involving a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. Grievant has failed to prove, by a preponderance of the evidence, that her performance was satisfactory, and that she should not have been dismissed. Bowman v. W. Va. Educational Broadcasting Authority, Docket No. 96-EBA-464 (July 3, 1997); Smith v. W. Va. Div. of Labor, Docket No. 93-LABOR-347 (Oct. 29, 1993); Walker v. W. Va.Public Service Commission, Docket No. 91-PSC-422 (Mar. 11, 1992); Bonnell v. W. Va. Dep't of Corrections, Docket No. 89-CORR-163 (Mar. 8, 1990).

3. Grievant failed to either allege or prove that Corrections violated any statute, policy, rule or regulation in dismissing her from employment.

4. Corrections did not act arbitrarily and capriciously or lack a rational basis for dismissing Grievant from her probationary employment. Goard v. W. Va. Div. of Corrections, Docket No. 95-CORR-068 (Mar. 20, 1995).

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7(1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and

transmitted to the appropriate court.

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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated August 24, 1998

Footnote: 1 *This Rule became effective July 1, 1998, the date of Grievant's dismissal.*