HELEN NICHOLSON,

Grievant,

v. DOCKET NO. 99-HHR-299

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU OF CHILD SUPPORT ENFORCEMENT,

Respondent.

DECISION

Grievant Helen Nicholson filed this grievance against Respondent, Department of Health and Human Resources ("HHR"), directly at Level IV on July 15, 1999, following her dismissal from employment as a probationary employee. (See footnote 1) She sought as relief, "reinstatement in another office with back pay. Removal of incident frompersonnel file." (See footnote 2)

Grievant was employed by HHR on April 15, 1999, for a six month probationary period, as an Office Assistant II. She was dismissed by HHR effective July 19, 1999, when HHR discovered Grievant had accessed her own active case file, after she had been told specifically not to do so. Section 10.05 of the West Virginia Division of Personnel's Administrative Rules provides that an employee may be dismissed at any time during the probationary period when the employer determines that her services are unsatisfactory. Termination for unsatisfactory performance is not disciplinary, per se, and the burden of proof is upon the probationary employee to prove by a preponderance of the evidence that her performance was satisfactory, and she should not have been dismissed. Goard v. W. Va. Div. of Corrections, Docket No. 95-CORR- 068 (Mar. 20, 1995); Smith v. W. Va. Div. of Labor, Docket No. 93-LABOR-347 (Oct. 29, 1993). 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. Dep't of Transp./Div. of Highways, Docket No. 91-DOH-339 (Apr. 28, 1992).

The stated reason for Grievant's termination was insubordination. The dismissal letter further states:

> **Your insubordinate conduct makes it difficult for management in general,and your supervisor in particular, to carry out leadership responsibilities while you are at the work place. Your wilful and blatant insubordination is further aggravated by the fact that by accessing your own case file, in spite of explicit directions to the contrary, completely destroys your trustworthiness as an employee, which is one of the most serious failings that an employee in your position can have. This agency cannot take the chance that you will not access your case file or those of others (e.g., family, friends, neighbors, etc.) in the future and cannot afford to have someone watch your every move to prevent you from doing so.**
>
> **By accessing your personal file, this agency is unable to ensure that the accuracy of your records has been maintained and that the integrity of the information contained therein has not been compromised. Furthermore, by accessing your personal file this agency is unable to determine whether you have used the information you obtained, which is generally not available to the public, through your position of public employment, to improperly and unethically benefit yourself or another.**

Accordingly, the dismissal was disciplinary, and Respondent accepted the burden of proving the charges.

Grievant, however, did not dispute that she had been told not to access her own active case file with the agency using the computer, and that she accessed her file. **(See footnote 3)** **She admitted she was wrong, and stated she was extremely sorry. She denied that she had changed anything in her file, stating she accessed the file to see when a check was coming, as she and her children live from check to check. Grievant made no effort to hide the fact she had accessed her file. She had told a co-worker she wasgoing to do so. However, when the co-worker reminded her she was not supposed to do so, she said she knew that, but she was going to do it anyway.**

Grievant argued the punishment imposed was too severe, and pointed to HHR's Progressive Discipline Policy. She did not understand why she was not suspended, rather than dismissed. She asked for a second chance, and stated she would never do this again. Grievant offered no evidence that her performance was otherwise satisfactory, or that other

mitigating factors should be considered.

HHR argued the Progressive Discipline Policy, 2104, is not applicable to probationary employees, because it applies to classified employees, and addresses a tenured employee's due process rights. HHR further argued that even if Policy 2104 were applicable, Grievant's action was so severe that dismissal would be appropriate.

Policy 2104 provides guidelines for "employees in the classified service." It does not state that it is not applicable to probationary employees, nor does it provide a definition of "employees in the classified service." It states, however, that authority for the policy "is derived in part from West Virginia Division of Personnel Administrative Rule, Sections: 10.03, Demotions during Probation; 11.04, Demotions; 12.02, Dismissals; and, 12.03, Suspensions." (Emphasis added.) In addition to this reference to the probationary employee within the Policy itself, the referenced Division of Personnel Administrative Rule provides various definitions which make it clear that both probationary and permanent employees are included within the definition of "employees in the classified service." See §§ 3.19, 3.21, 3.37, 3.39, 3.68, and 3.74, defining classified employee, classified service, employee, existingemployee, probationary period, and permanent employee. In fact, page six of Policy 2104 explains the appeal rights of "permanent classified employees," which in Personnel's Rule is someone who has completed the probationary period, as distinguished from a classified employee, who can be either permanent or probationary. While, as HHR points out, page seven discusses procedural due process, it states these safeguards apply to "a tenured State employee," which is not the same as an "employee in the classified service." This reference to tenured employees does not indicate that the entire policy applies only to tenured employees. If this were the intent, it certainly would have been easy enough to use the words "tenured employees in the classified service," rather than "employees in the classified service" in the section where the Policy states its applicability. Policy 2104 applies to probationary employees.

The Policy provides that discipline will progress from a verbal warning, to a written warning, to a suspension, to a demotion, and to dismissal. However, Policy 2104 is merely a guideline for discipline. The language of HHR's Policy 2104 on progressive discipline, "does not create a mandatory duty to follow a progressive disciplinary approach." Artrip v. W. Va. Dep't of Health and Human Services/Huntington State SAU, Docket No. 94-HHR-146 (Sept. 13,

1994); See also, Thompson v. W. Va. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 94-HHR-254 (Jan. 20, 1995). The Policy further states, "[d]ue to the sensitive and essential nature of services the Department must provide the public, and the standards of service required in many program areas, there may be instanceswhere more severe levels of discipline are initially imposed for some infractions." In particular, the Policy provides that dismissal "may be issued . . . if an employee commits a singular offense of such severity warranting dismissal."

HHR determined that Grievant's blatant insubordination regarding such a sensitive matter during her probationary period was sufficiently severe to warrant her termination. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects of rehabilitation. Overby v. W. Va. Dep't of Health and Human Resources, Docket No. 96-HHR-183 (Oct. 3, 1996). Upon consideration of the fact Grievant was a probationary employee, and she was specifically told not to access her active file, but knowingly chose to do so anyway, certainly a very serious act for someone in a position with HHR, the undersigned cannot find the discipline imposed was clearly disproportionate to the offense or an abuse of the agency's broad discretion in dealing with a probationary employee.

The following Findings of Fact are made based upon the evidence presented at Level IV.

Findings of Fact

1. Grievant was employed by HHR as a probationary employee on April 15, 1999. She was at first employed in HHR's Weston office, and was transferred to the Sutton office, which is closer to her home. Prior to her employment, Grievant received services from HHR, and her two case files were in active status at the time she became an employee. 2. On her first day of employment, Grievant was told by Roger Harris, Child Advocate Team Leader in Lewis County, that she was not, under any circumstances, to access her own case files in either the automated system or hard copy in the filing system. Mr. Harris also told Grievant that if she had any questions or concerns about her Bureau of Child Support Enforcement ("BCSE") case, she should contact either him or Barbara Lawrence, the Team Leader in Braxton County.

3. On June 16, 1999, while still a probationary employee, Grievant accessed her BCSE

case file on the computer.

4. Grievant was dismissed from her probationary employment for insubordination.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Section 10.05 of the West Virginia Division of Personnel's Rules and Regulations provides that an employee may be terminated at any time during the probationary period when it is determined by the employer that her services are unsatisfactory. Termination for unsatisfactory performance is not disciplinary, per se, and the burden of proof is upon the probationary employee to prove by a preponderance of the evidence that her performance was satisfactory, and she should not have been dismissed. Goard v. W. Va. Div. of Corrections, Docket No. 95-CORR- 068 (Mar. 20, 1995); Smith v. W. Va. Div. of Labor, Docket No. 93-LABOR-347 (Oct. 29, 1993). 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 apreponderance 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. Dep't of Transp./Div. of Highways, Docket No. 91-DOH-339 (Apr. 28, 1992).

2. Grievant was dismissed for insubordination. Her dismissal was disciplinary.

3. Grievant admitted to the charge against her.

4. HHR's Progressive Discipline Policy, 2104, is applicable to employees in the classified service, including probationary employees.

5. The language of HHR's Policy 2104 on progressive discipline, "does not create a mandatory duty to follow a progressive disciplinary approach." Artrip v. W. Va. Dep't of Health and Human Services/Huntington State SAU, Docket No. 94-HHR- 146 (Sept. 13, 1994); See also, Thompson v. W. Va. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 94-HHR-254 (Jan. 20, 1995).

6. HHR's Policy 2104 further states, "[d]ue to the sensitive and essential nature of services the Department must provide the public, and the standards of service required in many program areas, there may be instances where more severe levels of discipline are initially imposed for some infractions." In particular, the Policy provides that dismissal "may

be issued . . . if an employee commits a singular offense of such severity warranting dismissal."

7. Grievant's act of insubordination was so blatant and involved matters of such significance that HHR's decision to terminate her probationary employment was not clearly disproportionate to the offense or an abuse of discretion.

Accordingly, this grievance is DENIED.

Any party or the Division of Personnel may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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. 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 appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Date: August 31, 1999

Footnote: 1

Grievant bypassed the lower levels of the grievance procedure, relying upon W. Va. Code § 29-6A-4(e). Grievant, however, as a probationary employee had no right to appeal directly to Level IV, as the dismissal of a probationary employee is not disciplinary, per se. Smith v. W. Va. Div. of Labor, Docket No. 93-LABOR-347 (Oct. 29, 1993). Neither party brought Grievant's employment status to the undersigned's attention until the day before the scheduled Level IV hearing. This issue was taken up at the beginning of the Level IV hearing, held on August 19, 1999. Grievant asked that this grievance be allowed to proceed at Level IV, rather than being remanded to Level I, and Respondent concurred that a remand would serve no useful purpose. Further, a number of witnesses had traveled from the Weston and Sutton areas to Charleston for the hearing. Finally, the dismissal was for an act of insubordination. Given these circumstances, the undersigned allowed this grievance to proceed at Level IV as

an unusual exception to the rule.

Footnote: 2

Grievant appeared pro se, and HHR was represented by Tiffany M. Bost, Esquire. This matter became mature for decision upon the conclusion of the Level IV hearing.

Footnote: 3

Respondent also presented evidence regarding Grievant removing a letter from an envelope which pertained to Grievant's case, and reading the letter. This incident was not referenced in the dismissal letter, and there is no evidence that it was considered by Commissioner Lena S. Hill when she decided to dismiss Grievant. It likewise will not be considered by the undersigned. It is noted that Grievant denied she had been told not to take correspondence out of the envelope, but admitted she was aware she was not to look at correspondence concerning her case.