WILLIAM HACKMAN,

Grievant,

v. DOCKET NO. 01-DMV-582

W.VA. DEPARTMENT OF TRANSPORTATION/

DIVISION OF MOTOR VEHICLES,

Respondent.

DECISION

Grievant William Hackman challenges his termination with this grievance filed directly at Level IV on or about November 20, 2001. At the hearing held on January 11, 2002 at the Grievance Board's Charleston office, Grievant appeared *pro se* and Respondent was represented by Janet James, Esq., Assistant Attorney General. The parties elected to file their proposed findings of fact and conclusions of law by February 11, 2002, whereupon the matter became mature for decision (See footnote 1) .

On November 9, 2001, Grievant was dismissed from his probationary position (See footnote 2) as a customer service representative at Respondent's Kanawha City Mall office. The reasons for his dismissal were stated in a termination letter from, Stephen A. Edens, Respondent's Director of Personnel, as follows:

> 1. On September 27, 2001, a customer found $180.00 cash in the lobby and turned it in to you. Later that same day, another customer informed you that he lost his money. He asked you if any had been turned in. Your response to him was that no money had been given to you. Another employee witnessed this conversation and confirmed an individual did in fact ask if any money had been turned in.
>
> When confronted and questioned by management, you admitted to receiving the money and putting it in a stack of duplicate title applications. You also admitted that a customer did ask you about the lost money. You then stated that you could tell by looking at him, that the money was not his. Your supervisor questioned why you had not turned in the money or informed someone that it was in your possession. You said you forgot to tell anyone that you had it.
>
> 2. On October 16, 2001, a customer came in to renew his registration. He explained that he had lost the original plate previously purchased two (2) months ago. When you sold him the replacement, he questioned what he should do if the original plate was

found. You advised him to sell it to someone else. When management questioned you about this, you said that you were just messing with the guy.

3. [On] October 24, 2001, you openly stated to other employees in the office that you had performed some title work for the Greyhound Race Track [sic]. You also stated they sent you $100.00 in dinner and gambling vouchers, which you used the night before and won $700.00. When asked about this, you said, since it came to your home address, you did not see why you could not keep it, and you indicated that you had already spent the money.

4. You have been counseled several times for leaving license plate decals on top of your cash register while on break or away from your work area.

5. Customer complaints have been made regarding inappropriate behavior towards female customers on several occasions. You have been counseled regarding this behavior.

6. You have been warned about tardiness and leave abuse.

In addition to the specific incidents of misconduct, your overall performance is considered unsatisfactory and does not meet a reasonable standard of conduct as an employee of the Division of Motor Vehicles, thus warranting immediate dismissal. This action is in accordance with West Virginia Administrative Rule 26-6-10 Section 10.5, “Dismissal During Probation.”

The following findings of fact are based on a preponderance of the relevant evidence adduced at the hearing:

FINDINGS OF FACT

1. Grievant was employed by Respondent as a Customer Service Representative at its Kanawha City Mall office. He had been employed there for four months before he was dismissed from employment on November 9, 2001, and was at all relevant times a probationary employee.

2. Grievant admitted the behaviors cited in Nos. 2 through 4 of the dismissal letter cited in Finding of Fact No. 2 above.

3. Grievant's flirtatious manner caused two female customers and a female coworker to complain to his supervisor that Grievant's inappropriate manner made them uncomfortable. When

instructed by his supervisor to attend sexual harassment training, Grievant willfully left the seminar before it started and went home.

4. Grievant did receive a sum of money that was reported as found in the lobby, and placed it in a stack of forms. He failed to report the found money to his supervisor until he was asked about the money.

5. Grievant was not counseled about leave abuse, but displayed a pattern of tardiness and was counseled about this behavior.

6. Grievant repeatedly failed to follow the required procedure to call the next customer when he was finished helping a prior customer.

7. Grievant showed a disregard for the customer service representative who was assigned to train him and would not take notes on procedures and safeguards. 8. Grievant repeatedly left registration stickers unattended at his workstation within reach of customers, despite specific instructions on safeguarding them.

9. Grievant showed an unprofessional attitude towards the importance of his work and a general lack of interest in improving.

DISCUSSION

"Where a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is upon the employee to establish that his services were satisfactory. Bonnell v. W. Va. Dep't of Corrections, Docket No. 89-CORR-163 (Mar. 8, 1990)." Brown v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-016 (Oct. 28, 1999). Respondent, however, bears the burden of proving its allegations of misconduct by a preponderance of the evidence. *See* Wolfe v. Dep't of Transp./Div. of Highways, Docket No. 95-DOH-491 (July 31, 1996); Nicholson v. W.Va. Dep't of Health and Human Resources/Bureau for Child Support Enforcement, Docket No. 99-HHR-299 (Aug. 31, 1999). In this matter, however, Respondent expressly stated it would assume the burden of proof at the beginning of the hearing.

Grievant was a probationary employee of Respondent, and as such was 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. In this case,

Respondent considered a number of factors in deciding that Grievant should be dismissed for both unsatisfactory performance and formisconduct. His supervisors felt Grievant would make an unsuitable candidate for long- term employment.

The relevant part of the DOP Administrative Rule, which governs dismissal during a probationary period, states:

> 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 subsection 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.

143 C.S.R. 1 § 10.5(a) (July 1, 2000). Thus, although Respondent bears the burden of proof, in order to support its dismissal of Grievant, it must only prove that his services were unsatisfactory, a very low threshold to overcome.

While Mr. Edens, who cited the reasons for Grievant's dismissal in his November 9 letter, had no personal knowledge of the events and conduct of Grievant, Respondent presented the testimony of Grievant's supervisor, Linda Ellis. She testified that many of Grievant's performance shortfalls were simply part of the learning experience, but that he did not take seriously attempts to counsel him about his behavior and performance. She was advised by Mr. Edens to document Grievant's performance, and he made the determination to dismiss based on her statements.

Grievant admitted the charges listed in the dismissal letter Nos. 2 through 5, but argued that these incidents were not serious enough to warrant dismissal. This argument only serves to reinforce Respondent's position that Grievant fails to take the businessconducted at its office seriously, and resists efforts to improve his conduct and performance.

While the incident described under No. 1 in the dismissal letter was not entirely disputed by Grievant, his account of the incident does differ somewhat from that stated in the letter. He admitted that while working at the information/reception desk he received an amount of cash that a customer reported having found in the lobby. He did place the money in a stack of forms, and he did fail to immediately report the find to his supervisor. However, he stated that at the time he was too busy to do so, and that he forgot about it until asked. He stated that he had never received instruction as to what to do in this type of case. He also stated that he did not deny having received the money, but

instead gave it to his supervisor as soon as it was asked for.

The directly conflicting accounts as to whether Grievant admitted having received the money would appear to necessitate a credibility determination. “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 and William C. Jackson, *Representing the Agency before the United States Merit Systems Protection Board* 152-153 (1984). Additionally, the Administrative Law Judge 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.,[citations omitted].” Hill v. W.Va. Dep't of Administration/General Services Division, Docket No. 01-ADMN-062 (Oct. 30, 2001).

Respondent's version of this event was introduced as hearsay testimony. Grievant'soverall supervisor, Linda Ellis, related the event as described to her by a lower-level supervisor, Darryl Cunningham. Ms. Ellis had no first-hand knowledge of what happened when Mr. Cunningham asked Grievant about the money, and the undersigned is unable to evaluate the original relator's demeanor or attitude. Grievant appeared forthright regarding other aspects of the incident, but his admitted action of secreting the money where only he could find it is inconsistent with his testimony that he intended to inform management about it. If nothing else, the incident exposes a lack of good judgment on Grievant's part that Respondent reasonable considers unacceptable in an employee.

Grievant also disputed that he was counseled about leave abuse, and the evidence bears him out. At one point when he had used all his sick leave, it was explained to him how leave was accrued and how he was using it, but there is no documentation that his use was characterized as abuse at the time. However, testimony does indicate that he was reminded on more than one occasion that he needed to be at his workstation on time and that he should limit his break time to allowable periods.

A number of examples of Grievant's unacceptable performance were not explicitly cited in the dismissal letter, but were presented at the Level IV hearing. Among these were Grievant's perceived attitude that certain workplace procedures were not very important. Grievant, while in training, refused to keep written notes of the advice of his trainer. He was cautioned more than once about leaving valuable registration stickers unattended and within reach of customers. He was tardy for work on multiple occasions, and denied having the duty of being at his station ready to receive

customers by his 9:00 a.m. start time. Instead, he seemed to be arguing that if he was in the office, regardless of whether he was ready to work, he was not tardy. Grievant also demonstrated on more than one occasion inappropriate flirtatious behavior with female customers and at least one coworker. He was counseled about this behavior, yet resisted using a more professional demeanor, resulting in complaints from female customers. When Grievant was directed to attend sexual harassment training, he resisted doing so on the ground that he had previously had the training. Despite the express directive of his supervisor to repeat the training, he admitted that he went to the seminar and then left before it started. He stated that the person who conducts the training told him he did not have to go through it again, so he went home. He then called his supervisor, who told him to report directly to work, but he called personnel to verify whether he had to go back to work. His behavior in this incident clearly demonstrates a lack of respect for his supervisor's authority and his penchant for insubordinate behavior.

Respondent presented enough credible evidence to support its reasons for finding Grievant's work performance unsatisfactory, and that he generally showed an unwillingness or inability to improve to the level of professionalism expected by Respondent, warranting his dismissal during his probationary period.

CONCLUSIONS OF LAW

1. "Where a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is upon the employee to establish that his services were satisfactory. Bonnell v. W. Va. Dep't of Corrections, Docket No. 89-CORR-163 (Mar. 8, 1990)." Brown v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-016 (Oct. 28, 1999). Respondent, however, bears the burden of proving its allegations of misconduct by a preponderance of the evidence. *See* Wolfe v. Dep't of Transp./Div. of Highways, DocketNo. 95-DOH-491 (July 31, 1996); Nicholson v. W.Va. Dep't of Health and Human Resources/Bureau for Child Support Enforcement, Docket No. 99-HHR-299 (Aug. 31, 1999). Respondent did establish that Grievant both engaged in misconduct and exhibited unacceptable performance.

2. The DOP Administrative Rule, which states in part,

> 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 subsection 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.

establishes a low threshold of merely proving that Grievant's performance was unsatisfactory to it. 143 C.S.R. 1 § 10.5(a) (July 1, 2000).

3. "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 and William C. Jackson, *Representing the Agency before the United States Merit Systems Protection Board* 152-153 (1984). Additionally, the Administrative Law Judge 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., Rosenau v. Tucker County Bd. of Educ., Docket No. 99-47-192 (Nov. 1, 1999); Jarvis v. W. Va. Dept. of Health and Human Services, Docket No. 97-HHR-318 (July 22, 1999); Burchell v. Bd. of Trustees, Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997)." Hill v. W.Va. Dep't ofAdministration/General Services Division, Docket No. 01-ADMN-062 (Oct. 30, 2001).

4. Respondent met its burden of proving its found Grievant's work performance unsatisfactory, and that he generally showed an unwillingness or inability to improve to the level of professionalism expected by Respondent, warranting his dismissal during his probationary period.

Accordingly, this grievance is hereby **DENIED**.

Any party 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. However, the appealing party is required by W. Va. Code §29-5A-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.

DATED: February 20, 2002 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Respondent's brief was received by fax on February 11, 2002. No brief was received from Grievant.

Footnote: 2

Because Grievant was charged with misconduct as well as unsatisfactory performance, and Respondent did not object to allowing the case to proceed directly to Level IV, Grievant was allowed to bring the matter directly to Level IV without having been heard at any lower levels.