WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

RICKY R. BUSH,

Grievant,

v. **Docket No. 2008-1489-DOT**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

Ricky R. Bush ("Grievant") filed this grievance at level three on April 21, 2008, challenging the termination of his probationary employment with the Division of Highways ("DOH"). A level three hearing was held in the Grievance Board's office in Westover, West Virginia, on August 20, 2008. Grievant was represented by Glenn Oden, and DOH was represented by counsel, Barbara Baxter. This matter became mature for consideration upon receipt of the parties' fact/law proposals on September 29, 2008.

Synopsis

Grievant's probationary employment was terminated, due to DOH's determination that his performance was unsatisfactory, specifically with regard to properly performing his duties and taking direction from his foremen. When a probationary employee is terminated, it is his burden to prove his services were satisfactory. In this case, Grievant failed to meet this burden, and the evidence supported the conclusion that Grievant repeatedly failed to follow proper procedures for performing his assigned duties and resisted direction from his superiors. Therefore, this grievance is denied.

Findings of Fact

1. Grievant began employment with the DOH on December 19, 2007, as a Transportation Worker 2, Equipment Operator.

2. On February 28, 2008, Darrell Parsons, Acting County Supervisor for Berkeley County DOH, compiled a list of incidents which he believed indicated poor job performance on Grievant's part, which included:

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Foremen reported that Grievant frequently complained about having to flag, instead of operating equipment.

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While on flagging duty working near Glenwood Forest, Grievant was not using a “stop and go” paddle. Ronnie Allen, the foreman, instructed Grievant that he needed to use the paddle, instead of just placing cones in the road, which Grievant believed was all that was needed for the particular job.

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While flagging on Route 11 during a tree cutting, Grievant had his back to traffic, contrary to the safety training given to all DOH employees.

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During SRIC (See footnote 1) season, after Grievant had finished clearing his normal primary road, he was instructed to clear an additional road, but ended up going to the wrong area and treating a road which he was not supposed to clear.

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On one occasion when Grievant drove a plow during SRIC, when he returned to the DOH garage at the end of the shift, a pin was missing from the front of the truck, causing the plow portion to “hang” crooked. Driving the plow in this condition for very long could have caused extensive damage.

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Grievant operated a snow plow without cleaning the chute, which can cause it to become clogged with chemicals over time, resulting in uneven distribution of treatment products onto roads.

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Grievant drove a truck and noticed that it felt like the truck might have a flat tire. He kicked the tires, decided there was no problem, and did not report it. The following day, while another worker was driving the same truck, the wheels fell off.

3. Mr. Parsons discussed the allegations set forth above with Grievant, documenting the conversation in a “memo” dated March 3, 2008. (See footnote 2) Grievant's Exhibit 2. In addition, Mr. Parsons mentioned an incident on February 29, 2008, when Grievant was flagging on Little Georgetown Road, and Mr. Parsons believed he saw Grievant without a safety vest or a stop and go paddle. Grievant denied this, along with providing explanations for the other incidents.

4. Grievant complained to Mr. Allen about having to flag, although this is a common assignment for new DOH employees. Mr. Allen had to tell Grievant on more than one occasion to use proper safety practices, such as use of a paddle and safety vest, and where to stand while flagging.

5. While flagging at Glenwood Forest, Grievant did not use a stop and go paddle, because he assumed traffic cones were sufficient.

6. Grievant knew he was to face traffic while flagging. When confronted by Mr. Parsons about one incident when he was turned away from traffic, Grievant said the cold wind was blowing in his face.

7. Mark Baker was the foreman on the occasion when Grievant plowed the wrong road. Grievant had not lived in West Virginia for very long and was not familiar with many of the roads, so Mr. Baker explained to him where he should have gone. 8. Mr. Baker was also supervising Grievant when he was flagging at Little Georgetown. He did not require the flaggers on that job to use a paddle, because they were only on the road for short periods of time. Mr. Baker has had several disciplinary actions taken against him recently, including a 30-day suspension for personal use of state property.

9. Grievant did not know the pin had come out of the plow while he was driving it, until it was called to his attention shortly after he returned to the garage at the end of his shift. A welder who

repaired the truck believed that the pin had only been out for a very short time, because it would have caused more damage if it had been out for a longer period. Mr. Parsons was at the garage when Grievant returned from his shift that evening, and he immediately noticed the pin was out. Grievant's response was that he assumed other pins came out and this was not the first time it had happened.

10. All DOH operators are trained to inspect their equipment prior to and after each shift and, during SRIC season, to keep the chute clean so it does not become clogged with salt and/or cinders used to treat the roads.

11. Mr. Parsons instructed foremen to tell their operators to clean the chutes on SRIC vehicles, and all of the foremen who supervised Grievant reminded their workers to always keep their chutes clean. Grievant did not clean his chute, claiming no one ever told him to do so, but he saw other drivers inspecting their chutes at the end of their shifts. 12. While driving a truck during his regular work shift, Grievant thought something did not feel “right.” He thought it felt like it had a flat tire, so after completing his shift, he kicked all the tires to check their air and did not notice any problems. He did no furtherinspection, concluded that nothing was wrong, and did not report his observations to anyone.

13. The following day, Virgil Evans drove the same truck and removed chains from the tires before driving it. The wheels fell off the truck after Mr. Evans had operated it for a few hours. (See footnote 3)

14. Mr. Parsons received reports from Mr. Allen that Grievant was complaining about having to flag and not properly performing his flagging duties, along with not taking direction well when operating equipment. He met with the foremen, including Mr. Allen, Mr. Baker, and Brice Sparkman, along with one or two others, to discuss Grievant's performance. All agreed that Grievant was not “picking up on things” very quickly and had to be given direction and reminders frequently regarding how to perform his duties. With the exception of Mr. Sparkman, who did not believe anyone should be terminated, the foremen agreed that Grievant was not working out.

15. By letter dated March 10, 2008, Mr. Parsons advised Grievant that, due to his unsatisfactory work performance, he was recommending termination of his probationary employment. Specifically, Mr. Parsons mentioned Grievant's failure to follow the instructions of the foremen and “failure to follow proper safety procedures for flagging.”

16. On March 11, 2008, Grievant met with Mr. Parsons and Leslie Staggers, Administrative

Services Manager for District 5, to discuss his termination. He was angry and denied the claims against him, cursing and yelling. Following this meeting, Jeff Black,DOH Human Resources Director, advised Grievant of his termination, effective May 2, 2008.

Discussion

When a probationary employee is terminated on grounds of incompetency or unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the employer carries no burden of proof in a grievance proceeding. The employee has the burden of establishing by a preponderance of the evidence that his services were satisfactory. *Bonnell v. W. Va. Div. of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Bowman v. W. Va. Educ. Broadcasting Auth.*, Docket No. 96-EBA-464 (July 3, 1997); *Walker v. W. Va. Public Serv. Comm'n*, Docket No. 96-PSC-422 (Mar. 11, 1992). "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. W. Va. Dep't of Health & Human Res.*, Docket No. 92- HHR-486 (May 17, 1993).

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.” 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.” 143 CSR 1 § 10.1(a). A probationary employee may be dismissed at any point during theprobationary period that the employer determines his services are unsatisfactory. 143 CSR 1 § 10.5(a).

Grievant has provided various explanations for many of the incidents brought to his attention by Mr. Parsons. He contends that Mr. Allen did not like him and waited until he did something wrong before calling problems to his attention. He testified that he was never instructed to clean the chute on a snow plow and that he did not complain about having to flag. Grievant believes that several incidents have been mischaracterized, such as the night that he cleared the wrong road, because he was somewhat unfamiliar with the area. He does not feel he did anything wrong regarding the pin that came out of the plow, nor is he responsible in any way for the truck that lost its wheels. His explanation for why he was terminated is that he confronted a day shift employee who had allegedly

accused Grievant of leaving his truck in “filthy” condition after his SRIC shift the night before, and Grievant contends that the other employee was teased for being “told off” by the “new guy” [Grievant].

While there do seem to be logical explanations for some incidents that have been described as poor performance on Grievant's part, such as the night he plowed the wrong road or wheels falling off a truck, Mr. Parsons and Mr. Allen described Grievant as having “more problems than most” new DOH employees. It is also apparent that Grievant was not perceived as having a positive attitude toward learning new things and taking direction from his superiors. He has been described as making excuses for his mistakes and reacting negatively and angrily when told his performance was not satisfactory.

As described in DOP's Rule, the probationary period of employment has a specific purpose. During this time, an employee is to learn the duties of his or her position, and theemployer assesses the employee's ability to meet work standards and adjust to the expectations of the agency. In this case, Grievant's superiors simply concluded that he was not working out as an employee and did not seem to be grasping the expectations of his position. While Grievant has provided excuses for some of the allegations against him, he is required to prove that it is more likely than not that his services were, in fact, of a satisfactory level. Unfortunately, the evidence introduced in this case does not meet that burden.

With one exception, all the foremen agreed that Grievant's termination was appropriate. Despite instructions to the contrary, Grievant repeatedly failed to follow proper procedures for flagging and operation and care of equipment, and he demonstrated a resistant attitude when given instructions and direction by his supervisors. It is understandable that DOH perceived his “adjustment” to the agency to be less than “effective” and concluded that he was not effectively meeting the requirements of the job. Accordingly, Grievant has failed to establish by a preponderance of the evidence that his services were satisfactory or that DOH violated the provisions regarding termination of probationary employees.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. When a probationary employee is terminated on grounds of incompetency or unsatisfactory

performance, rather than misconduct, the termination is not disciplinary, and the employer carries no burden of proof in a grievance proceeding. The employee has the burden of establishing by a preponderance of the evidence that his services were satisfactory. *Bonnell v. W. Va. Div. of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990);*Bowman v. W. Va. Educ. Broadcasting Auth.*, Docket No. 96-EBA-464 (July 3, 1997); *Walker v. W. Va. Public Serv. Comm'n*, Docket No. 96-PSC-422 (Mar. 11, 1992).

2. A probationary employee may be dismissed at any point during the probationary period that the employer determines his services are unsatisfactory. 143 CSR 1 § 10.5(a).

3. Grievant has failed to prove by a preponderance of the evidence that his work for Respondent was satisfactory; it was within his employer's discretion to terminate his probationary employment.

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* 156 C.S.R. 1 § 6.20 (2008).

Date: November 12, 2008

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

"Snow Removal and Ice Control."

Footnote: 2

This document does not actually have a title, but is basically a narrative statement of the allegations against Grievant and the conversation between him and Mr. Parsons.

Footnote: 3

While it was never really explained why a truck's wheels would fall completely off, there were some opinions offered that there may have been loose lug nuts or missing ones, which would cause this to happen.