THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

TRACI LIVINGSTON,

Grievant,

v. Docket No.2008-0770-DHHR

DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/LAKIN

STATE HOSPITAL,

Respondent.

D E C I S I O N

Grievant, Traci Livingston, was employed by the Department of Health and Human Resources ("HHR") at Lakin State Hospital ("Lakin") as a probationary housekeeper. She filed this grievance over her termination on November 13, 2007. Her Statement of Grievance indicates she was terminated for failure to pass the required background check. For relief, Grievant sought a chance to tell her side of her story.

This grievance was filed directly to level three on November 20, 2007, and a level three hearing was conducted in the Grievance Board's Charleston office on January 3, 2008. Grievant represented herself, and HHR was represented by Jennifer Akers, Assistant Attorney General. This matter became mature at hearing, as the parties elected not to submit proposed Findings of Facts and Conclusions of Law. (See footnote 1)

Synopsis

Respondent established Grievant had been convicted of a misdemeanor, fraudulent use of a credit card, prior to her employment with HHR. As the result of this conviction,Grievant was

placed on probation for three years. HHR points to 64 C.S.R. 13 § 4.16.c.4.A and notes the rules that govern Lakin's licensure prevent it from hiring an employee who has committed such an act. Grievant affirmed that while she did engage in the act, was convicted, and is currently on probation, she has learned her lesson, was a good employee, and needs this employment.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant began her employment with HHR on October 24, 2007, as a probationary housekeeper.

2. On October 17, 2007, prior to beginning employment, Grievant signed an "Employment Affidavit" which stated:

> My signature below attest to the fact that nothing of extraordinary merit will be found on my background check, CIB check (See footnote 2) , or drug/alcohol testing. I understand that my employment with Department of Health and Human Resources, Lakin Hospital, is contingent upon a favorable background check, CIB check, or drug/alcohol testing. Any of the aforementioned can be grounds for employment termination if any should reveal something the Hospital deems extraordinary or unacceptable.

Resp. Exh. 1.

3. On October 31, 2007, Lakin received the CIB report from the West Virginia State Police. It indicated that on January 17, 2007, Grievant had been arrested for the misdemeanor offense of "fraudulent use of a credit card." (See footnote 3) On July 24, 2007, Grievant wasconvicted of the charge, assessed a fine, and placed on probation for three years. Resp. Exh. 1.

4. On November 13, 2007, Grievant was terminated from her employment, effective November 29, 2007, because of the "unfavorable Criminal Background Check" received from the West Virginia State Police. Resp. Exh. 4.

5. Grievant was offered the opportunity to talk with Melissa Wamsley, the CEO of Lakin. Grievant did meet with Ms. Wamsley, and the reasons for the termination were discussed.

Discussion

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 that his/her services were satisfactory. *Bonnell v. W. Va. Dep't of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990). Grievant's dismissal for misconduct is disciplinary, and the burden of proof rests with the employer. HHR must meet that burden by proving the charges against Grievant by a preponderance of the evidence. *See Nicholson v. W. Va. Dep't of Health & Human Res./Bureau for Child Support Enforcement*, Docket No. 99-HHR-299 (Aug. 31, 1999); *Wolfe v. Dep't of Transp./Div. of Highways*, Docket No. 95-DOH-491 (July 31, 1996).

However, the distinction is one that only affects who carries the burden of proof. As a practical matter, an employee who engages in misconduct is also providing unsatisfactory performance. *Johnson v. Dep't of Transp./Div. of Highways*, Docket No. 04-DOH-215 (Oct. 29, 2004). Division of Personnel Administrative Rule 143 C.S.R. 1 §10.5(a), establishes a low threshold to justify termination of a probationer. *See Hackman v. Dep't of Transp./Div. of Motor Vehicles*, Docket No. 01-DMV-582 (Feb. 20, 2002). This Rule states in pertinent part:

> [i]f 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.

Here, Grievant was aware before she was hired that a background check was necessary, and her employment with HHR/Lakin was contingent upon a favorable result from this check. She was clearly informed by the release she signed, that failure to pass the background check would be grounds for termination. The CIB report revealed Grievant had been arrested in January 2007 and convicted and placed on probation for three years in July 2007, for using someone else's credit card. Although Grievant testified the events resulting in her conviction were 18 months ago, this is not true. At the time of her termination it had been ten months since the arrest, and at the level three hearing it had not yet been a year since her arrest.

This case is similar to *McCoy v. Division of Highways*, Docket No. 98-DOH-499 (June 18, 1999). In that case, *McCoy*, a newly hired, probationary employee, was required to take and pass drug test to retain his employment. His test results were positive for marijuana, and he was dismissed during his probationary period. The Grievance Board upheld Grievant's dismissal. The same result must be reached here. Additionally, even if the undersigned Administrative Law Judge were to find in Grievant's favor, Lakin could not re-employ her. The rules governing licensure of nursing homes, like Lakin, are found at 64 C.S.R. 13 § 1, et seq. 64 C.S.R. 13 § 4 deals with Resident's Rights, and § 4.16.c.4.A discusses employees who would not be fit for service in a nursing home. This Section states nursing home staff who have engaged in the following behavior would be unfit for service in a nursing home:

> **Actions by a court of law which indicate unfitness for service include . . . conviction of an offense or action related to bodily injury, theft or misuse of funds or property or other crime related to public welfare. . . .**

Grievant's conviction prevents her employment by Lakin.

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. 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 that his services were satisfactory. *Bonnell v. W. Va. Dep't of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990). Dismissal for misconduct is disciplinary, therefore the burden of proof rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *Johnson v. Dep't of Transp./Div. of Highways*, Docket No. 04-DOH-215 (Oct. 29, 2004). *See Nicholson v. W. Va. Dep't of Health & Human Res./Bureau for Child Support Enforcement*, Docket No. 99-HHR-299 (Aug. 31, 1999); *Wolfe v. Dep't of Transp./Div. of Highways*, Docket No. 95-DOH-491 (July 31, 1996).

2. Division of Personnel Administrative Rule 143 C.S.R. 1 § 10.5(a), establishes a low threshold to justify termination of a probationer. *See Hackman v. Dep't ofTransp./Div. of Motor Vehicles*, Docket No. 01-DMV-582 (Feb. 20, 2002). This Rule states in pertinent part:

> **[i]f 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.**

3. Respondent has met its burden of proof and demonstrated Grievant's termination during her probationary period for failure to pass her background check did not violate any statute, policy, rule, or regulation. *McCoy v. Div. of Highways*, Docket No. 98- DOH-499 (June 18, 1999).

4. As Grievant's past conviction prevents her employment in a nursing home, her termination is upheld.

Accordingly, this grievance is DENIED.

This decision is final upon the parties and is enforceable in the Circuit Court of Kanawha County. Any party may appeal this decision to the Circuit Court of Kanawha County within thirty days of receipt of the decision. This decision is not automatically stayed pending the outcome of the appeal. W. Va. Code § 6C-2-5(c). 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.

JANIS I. REYNOLDS

ACTING CHIEF ADMINISTRATIVE LAW JUDGE

Dated: March 21, 2008

Footnote: 1

HHR had previously submitted a Motion to Dismiss and relied on the arguments presented in this Motion.

Footnote: 2

The acronym CIB stands for Criminal Identification Bureau.

Footnote: 3

According to the CIB report, the two charges of forgery/uttering were dismissed.