THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

SEAN KEATING,

Grievant,

v. Docket No. 07-HHR-153

DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/BUREAU

FOR CHILDREN AND FAMILIES,

Respondent.

D E C I S I O N

Grievant, Sean Keating, was employed by the Department of Health and Human Resources ("HHR") at the Bureau for Children and Families ("BCF") as an Economic Service Worker. He filed this grievance over his termination on May 2, 2007. His Statement of Grievance indicates he was terminated for misconduct that occurred before he began employment, his work product during his probationary period was satisfactory, and "a grave injustice had occurred."

> **Relief Sought: I seek full and immediate restoration to my former position, without lapse in tenure, or delay in anniversary date/end of probationary period. Further, I request a complete, transparent, and unredacted copy of all documents, including the investigation in question, contained in my personnel file be provided for my personal review.**

This grievance was filed directly to Level IV on May 2, 2007, and a pre-hearing conference was conducted on June 12, 2007. The Level IV hearing was conducted in the Grievance Board's Charleston office on August 2, 2007. Grievant was represented by Gordon Simmons from the West Virginia Public Workers Union, and HHR was represented by B. Allen Campbell,

Senior Assistant Attorney General. This matter became mature for decision on September 4, 2007, after the submission of the parties' proposals.

Synopsis

Respondent established and Grievant admitted he had committed welfare fraud prior to his employment with HHR. This misconduct was not investigated, established, or admitted until after Grievant began employment with HHR. As an Economic Service Worker, Grievant would be determining clients' eligibility for the very programs he defrauded. HHR asserts there is a rational nexus between Grievant's responsibilities as an Economic Service Worker and Grievant's admitted welfare fraud. HHR notes an Economic Service Worker determines the eligibility of a client for a variety of economic assistance programs. Additionally, an Economic Service Worker may obtain repayment from clients who have been issued economic assistance erroneously. HHR asserts it is not in the best interest of the agency, or the clients it serves, to employ an individual who had defrauded the Agency, and that there is a rational nexus between the duties Grievant must perform and his illegal act. Respondent also asserts that if Grievant's welfare fraud had been known to the agency, he would not have been hired.

Grievant notes his welfare fraud occurred before he was hired, and these prior acts should not be used to terminate his employment at this time. Grievant notes his work during his time with HHR was satisfactory. (See footnote 1) **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 his employment with HHR on November 1, 2006, as a probationary Economic Service Worker. The purpose of the probationary period is to allow the agency to assess the ability of an employee to perform the duties of the position and to meet the standards of the position.

2. The Economic Service Worker position requires the employee to determine eligibility for a variety of economic assistance programs, and to verify personal, financial and social information. An Economic Service Worker may obtain repayment from clients who have been issued economic assistance erroneously. Two of the assistance programs offered by HHR are Low Income Energy Assistance Payments ("LIEAP") and Emergency Low Income Energy

Assistance Payments ("Emergency LIEAP").

3. On November 13, 2006, Sharon O'Dell, the Director of the Office of Inspector General, authorized Robert F. Cooper, a Criminal Inspector in that Office, to investigate Grievant for alleged welfare fraud.

4. Mr. Cooper investigated this issue, including two interviews with Grievant. During these interviews, Grievant confirmed he had not truthfully and accurately reported that another person was living in his household on December 1, 2005. Grievant was aware he should report this information and knew failure to report information was a criminal act. He signed a statement on December 6, 2005, at the time he requested benefits, which read, "I understand it is a criminal violation of federal and state law to provide false ormisleading information for the purpose of receiving benefits to which by law I am not entitled." Resp. No. 1, Application Form at p. 12.

5. On December 27, 2006, during the second interview, Grievant signed a Repayment Agreement in which he confirmed he accepted $382.27 in benefits he was not entitled to receive from December 2005 to April 2006, and he agreed to repay these funds. These benefits were for LIEAP and Emergency LIEAP.

6. On April 23, 2007, Grievant's supervisor, Anita Adkins, Community Services Manager, met with Grievant to discuss the welfare fraud issue and to give Grievant an opportunity to respond.

7. Following the discussion of April 23, 2007, Grievant was given a termination letter, that same day, stating his dismissal was necessary because there was a rational nexus between his misconduct, welfare fraud, and the duties of his position, determining the eligibility of clients for various types of assistance. The letter explained the State had the right to hold its employees to a reasonable standard of conduct, and that Grievant's misconduct was sufficient to conclude he had not met this reasonable standard.

8. If HHR had been aware that Grievant had committed welfare fraud at the time it was considering him for employment, he would never have been hired. Test. Kimbler, Regional Manager, Level IV Hearing.

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 dismissalfor 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). (See footnote 2)

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.

The administrative rules of the West Virginia Division of Personnel also provide that an employee in the classified service may be dismissed for "cause." 143 C.S.R. § 12.2, Administrative Rule, W. Va. Div. of Personnel. The phrase "good cause" has been determined by the West Virginia Supreme Court of Appeals to apply to the dismissal of employees whose misconduct was of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." Syl. Pt. 2, *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). As Grievant was employed less than five months, a close examination of his work record is not required in determining whether discharge is an

appropriate disciplinary measure. *Buskirk, supra. See Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982).

The issues presented are whether Respondent proved the facts upon which the dismissal was based, and whether HHR established a rational nexus between Grievant's welfare fraud and his position as an Economic Service Worker.

The first issue is established; Grievant admitted he committed welfare fraud. This criminal act was not prosecuted as the amount was below $500.00, but Grievant did sign a repayment agreement.

As for the second issue, this grievance does not present the standard dismissal case. Usually, an agency dismisses an employee for behavior engaged in during the employment period. Here, HHR contends that Grievant, pursuant to policy, would havenever been hired, if his criminal activity had been known. In essence, Respondent maintains his dismissal is to correct this error.

Respondent asserts there is a rational nexus between Grievant's duties as an Economic Service Worker and welfare fraud. In *Golden v. Board of Education*, 169 W. Va. 63, 285 S.E.2d 665 (1981), the West Virginia Supreme Court of Appeals held that in order to discipline a school employee for acts performed at a time and place separate from his employment, the board must demonstrate a "rational nexus" between the conduct performed outside the job, and the duties the employee is to perform. The West Virginia Supreme Court of Appeals also held in *Rogliano v. Fayette County Board of Education*, 176 W. Va. 700, 347 S.E.2d 220 (1986), that a rational nexus exists if the conduct performed outside of the job directly affects the performance of the occupational responsibilities of the employee. Criminal acts directly involving a school board employee's occupational responsibilities were found to have a rational nexus; thus, these were actions for which the employee could be dismissed. *Bledsoe v. Wyoming County Bd. of Educ.*, 183 W. Va. 190, 394 S.E.2d 885 (1990). *See Messer v. Mingo County Bd. of Educ.*, Docket No. 00-29-332 (May 16, 2001).

This case is similar to *M.T. v. Department of Health and Human Resources*, Docket No. 05-HHR-281 (December 30, 2005). In that case, HHR averred there was a rational nexus between the grievant's responsibilities as a Family Support Specialist, and the finding she was a maltreating parent whose child received serious physical injury. HHR noted the Family

Support Specialist position required the employee to assess a family's need for social services, counsel the family, and provide or arrange for needed social services. HHR asserted it was not in the best interest of the agency or the clients it servedto employ an abusive parent, and there was a rational nexus between the duties grievant performed and the maltreatment of her own child.

The undersigned Administrative Law Judge found M.T.'s termination was for "good cause" as she was an identified maltreating parent, and HHR's assessment that she should not work with families in crisis and should never been hired, was not be seen to be incorrect. *See Smith v. Bureau of Employment Programs*, Docket No. 03-BEP-043 (July 7, 2003).

In this case, the evidence before HHR established a valid basis for concern about Grievant's ability to carry out his responsibilities as an Economic Service Worker. This judgment is supported by the West Virginia Supreme Court of Appeals ruling in *Thurmond v. Steele*, 159 W. Va. 630; 225 S.E.2d 210 (1976) in which the Court stated:

> **Indeed, the cases which we have found from other jurisdictions clearly indicate that if a State employee's activities outside the job reflect upon his ability to perform the job or impair the efficient operation of the employing authority and bear a substantial relationship to the effective performance of the employee's duties, disciplinary action is justified. . . .**

***Id*. at 225 S.E.2d 212.**

HHR maintains Grievant would never have been hired because of his past history/welfare fraud, and that it was not in the best interest of the agency for him to continue in a position that determines clients' eligibility for benefits. Here, Grievant admitted to a criminal act that was directly related to the duties he performed as an Economic Service Worker. Accordingly, Respondent has established a rational nexus, and the dismissal must be upheld. *M.T., supra*.

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 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 & Human Res./Bureau for Child Support Enforcement*, Docket No. 99-HHR-299 (Aug. 31, 1999).

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 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.

3. An employee in the classified service may be dismissed for "cause." 143 C.S.R. § 12.2, Administrative Rule, W. Va. Div. of Personnel. The phrase "good cause"has been determined by the West Virginia Supreme Court of Appeals to apply to dismissals of employees whose misconduct was of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." Syl. Pt. 2, *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980).

4. "[I]f a State employee's activities outside the job reflect upon his ability to perform the job or impair the efficient operation of the employing authority and bear a substantial relationship to the effective performance of the employee's duties, disciplinary action is justified. . . ." *Thurmond v. Steele*, 159 W. Va. 630; 225 S.E.2d 210 (1976).

5. HHR established a rational nexus between Grievant's responsibilities as an Economic Service Worker and his admitted welfare fraud.

6. As Grievant's act of welfare fraud was of "a substantial nature, and not trivial or

inconsequential, nor a mere technical violation of statute or official duty without wrongful intention," his termination is upheld. Syl. Pt. 2, *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985). *See M.T. v. Dep't of Health and Human Res.*, Docket No. 05- HHR-281 (Dec. 30, 2005).

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. *See* W. Va. Code § 29-6A-7 (*See Footnote 2, supra; repealed by* Senate Bill No.442, March 7, 2007*)* (*but see Executive Order No. 2-07*, May 8, 2007). 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 appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ACTING CHIEF ADMINISTRATIVE LAW JUDGE

Dated: March 12, 2008

Footnote: 1

Grievant also asserts the dismissal did not properly advise him of his grievance rights as the dismissal letter directed him to file at Level I. It is noted that Grievant was a probationary employee, and as such would typically start a dismissal grievance at Level I, unless his dismissal was for cause. If there had been any confusion on this matter about the timeliness and place of filing, they would have been resolved in favor of the Grievant. No such issues were raised, Grievant is properly at Level IV for hearing, thus, the issue is moot.

Footnote: 2

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-

6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.