THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JONATHON K. ROBERTS,

Grievant,

v. **DOCKET NO: 2008-0958-DHHR**

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/ LAKIN HOSPITAL,

Respondent.

DECISION

Grievant, Jonathon K. Roberts, was employed as a probationary Food Service Worker at Lakin Hospital, in Mason County, West Virginia. Lakin Hospital is a facility operated by the West Virginia Department of Health and Human Resources ("DHHR"). On November 26, 2007, Grievant was given a letter informing him that he was being dismissed from probationary employment with DHHR due to unsatisfactory performance. Grievant filed a level one grievance form on December 12, 2007, contesting his dismissal and seeking reinstatement to his job. A level one hearing was held at Lakin Hospital on December 27, 2007, and a decision denying the grievance was issued January 7, 2008. Grievant and DHHR participated in a level two mediation and an order was entered on September 2, 2008, verifying that the mediation attempt was unsuccessful. Grievant appealed to level three and a hearing was held at the Charleston office of the Public Employees Grievance Board on February 17, 2009. Grievant was present and aided by his grandmother, June Roberts. DHHR was represented by B. Allen Campbell, Senior Assistant Attorney General. All parties submitted post hearing fact /law proposals, the last

of which was received from DHHR on March 5, 2009. The grievance became mature for decision on that date.

Synopsis

DHHR dismissed Grievant from his probationary Food Service Worker position due to unsatisfactory performance. Respondent demonstrated that Grievant's performance was regularly evaluated and that he was given several opportunities to improve before he was dismissed. Grievant was not able to meet his burden of proof to demonstrate that his job performance was satisfactory. The grievance must be denied.

The following findings of fact result from a thorough review of the record.

Finding of Fact

1. Grievant was employed as a temporary, part-time Food Service Worker at Lakin Hospital early in 2007.

2. Throughout his entire employment at Lakin Hospital, Grievant's immediate supervisor was Betty Young. Ms. Young is employed as a Food Services Supervisor. Ms. Young's supervisor is Rebecca Grueser, a Nutritionist 2. Both Ms. Young and Ms. Grueser worked with Grievant and observed his job performance.

3. On March 13, 2007, Ms. Grueser held a formal counseling session with Grievant and reviewed, in detail, all of the duties involved in Grievant's job to help him improve his job performance. Ms. Grueser listed these job duties on a counseling form that Grievant signed and Grievant was given a copy of the form for his own use. Respondent's Exhibit 1.

4. A full-time position for a Food Service Worker became available at Lakin Hospital and Grievant applied. Ms. Grueser was concerned about Grievant's inadequate job performance in his temporary position, but ultimately recommended Grievant for the full-time position after receiving assurances from Grievant that he would try hard to improve his work.

5. On June 29, 2007, Grievant signed a document reflecting that he had been hired as probationary employee for the period of June 16, 2007 through December 16, 2007. The conditions of his probationary employment were set out on the document and were explained to Grievant before he signed it. Respondent's Exhibit 2.

6. Probationary Employees at Lakin Hospital are observed regularly during their six-month probationary period and are given a written performance appraisal each month, on or near the anniversary date of their hiring. Respondent followed this process with Grievant.

7. On July 19, 2007, Grievant received his first monthly written performance appraisal from Betty Young. He received a rating of "Fair, But Needs Improvement." The main comment was that Grievant needed to improve getting his work done on time. Grievant signed the evaluation and received a copy. Respondent's Exhibit 3.

8. Grievant received and signed his second evaluation on August 16, 2007. He was again rated "Fair, But Needs Improvement." It was noted that Grievant got along well with his co-workers. However, Ms. Young commented that "Jonathon needs to improve on speed and memory skills, likes to walk around and talk to everyone when he should be working. Has to be reminded daily to be sure he has all his work done." Respondent's Exhibit 4.

9. Another written evaluation was given to Grievant and he signed it on September 17, 2007. In this appraisal Ms. Young rated Grievant's performance as "Does Not Meet Expectations." Ms. Young noted that Grievant had worked in the position as a temporary employee and for three months as a probationary employee and he was still unable to remember his duties and finish his work. Respondent's Exhibit 5.

10. Grievant received a second rating of "Does Not Meet Expectations" on October 24, 2007. Ms. Young again noted that Jonathon had a good personality, but he still failed to complete his work and forgot regularly scheduled tasks. Respondent's Exhibit 6.

11. On the November 15, 2007, performance appraisal, Betty Young noted that:

> Jonathon is still not performing duties according to Dietary standards, has to be reminded every day of something he hasn't done. Has been given several job descriptions which list jobs in order with time schedule and still doesn't do the job. Has to have help every day.

Respondent's Exhibit 7. Like all of the other evaluations, Grievant signed this appraisal and received a copy of it.

12. On November 13, 2007, Betty Young submitted a form to her supervisor, stating that she did not recommend Grievant for permanent status. Respondent's Exhibit 8.

13. Melissa Kinnaird, CEO of Lakin Hospital, met with Grievant on November 26, 2007. At that meeting, Ms. Kinnaird gave Grievant a letter stating that he was dismissed from probationary employment due to unsatisfactory work performance. The letter outlined Grievant's work performance as reflected in his monthly evaluations and explained his

rights and options. Grievant signed a copy of the letter to acknowledge that he had received it.

14. Grievant testified that Ms. Young always brought the evaluations to him at a busy time of the day. She told him he needed to sign the evaluation but did not discuss it with him. Grievant acknowledged that he did meet with Ms. Grueser a number of times regarding his work performance and she counseled him on ways to improve.

15. Grievant was pinched and poked by another worker on occasions. He complained about this to Ms. Young and Ms. Young confronted the offending worker. The offensive behavior ended immediately after Ms. Young's intervention.

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 Corrections*, Docket No. 89-CORR-163 (Mar. 8, 1990).

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 C.S.R. 1 § 10.1(a).

A probationary employee may be dismissed at any point during the probationary period that the employer determines his services are unsatisfactory. 143 C.S.R. 1 § 10.5(a). The Division of Personnel's Administrative Rules establish a low threshold to justify termination of a probationary employee. *Livingston v. Dep't of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008). A probationary employee is

> 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.

Hackman v. W. Va. Dep't of Transp., Docket No. 01-DMV-582 (Feb. 20, 2002); cited in *Hammond v. Div. Of Veteran's Affairs,* Docket No. 2009-0961-MAPS (Jan. 7, 2009).

Grievant testified that he took his job very seriously and did everything he was told to do. He complained that one co-worker would stick a finger down his pants when he bent over and pinch him on the breast when he walked by, which hampered his job performance. Finally, Grievant complained that Betty Young didn't actually talk to him about his performance appraisal. Rather, she simply had him sign the form and walked away.

Grievant's complaints about the treatment from his co-worker are serious, and it appears that his supervisor took them seriously. When Grievant complained about this behavior to Ms. Young, she confronted the co-worker and the offensive behavior ended immediately.[1]

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[1] The is no evidence on the record as to whether disciplinary action was taken against the offending co-worker. The important point in this grievance is that the supervisor addressed the problem as soon as it was reported and the behavior no longer affected Grievant's ability to do his job.

Ms. Young provided Grievant with a copy of each performance appraisal. There should have been no doubt in his mind that his supervisor felt his performance was unsatisfactory. Additionally, Ms. Grueser counseled Grievant regarding his job performance on several occasions and Grievant admitted that she gave him suggestions on how he could improve.

Since this is a grievance where a dismissed employee is contesting being released from probationary employment, Grievant "is required to prove that it is more likely than not that his services were, in fact, of a satisfactory level." *Bush v. Dep't of Transp.*, Docket No. 2008-1489-DOT (Nov. 12, 2008). If the evidence is equally balanced, the party with the burden of proof has not met that burden. *See Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Grievant did not meet his burden. DHHR has presented substantial evidence to demonstrate that Grievant's performance regularly failed to meet agency standards. Grievant was given ample notice that his work was not meeting expectations and significant efforts were made to assist him. Grievant's assertions that he did everything he was told do not overcome the substantial evidence submitted to the contrary. Consequently, the grievance must be denied.

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/her services were satisfactory. *Bonnell v. W. Va. Dep't of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990).

2. The Division of Personnel's Administrative Rule 143 C.S.R. 1 § 10.5(a), establishes a low threshold to justify termination of a probationary employee. *Livingston v. Dep't of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008).

3. Grievant did not demonstrate his performance was satisfactory during his probationary period.

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: March 13, 2009

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE