THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

WALTER RAY WILLIAMS,

Grievant,

v. **DOCKET NO. 2009-0184-MAPS**

DIVISION OF JUVENILE SERVICES/
JAMES H. "TIGER" MORTON JUVENILE CENTER,

Respondent.

DECISION

Walter Ray Williams ("Grievant") challenges his dismissal from employment as a probationary Correctional Officer 1, by Respondent West Virginia Division of Juvenile Services/James H. "Tiger" Morton Juvenile Center ("DJS"). This grievance was filed directly to Level Three on August 1, 2008.

The August 1, 2008, statement of grievance provides that

> It is my belief that Policy 138.00, Section 2(c), Instances of inadequate unsatisfactory job performance and Section 10.1(a) and 10.5(a) of the Administrative Rule of West Virginia Division of Personnel have been misapplied or misinterpreted.[1]

As relief, the Grievant seeks to be reinstated and awarded permanent status.

A Level Three hearing was held before the undersigned at the Grievance Board's Charleston, West Virginia, office on January 7, 2009. Grievant appeared in person and through his representative, Jack Ferrell. The DJS appeared by and through its counsel, Steven R. Compton, Esquire. Both parties waived their right to submit proposed findings

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[1] Grievant's statement of grievance was approximately four pages long and discussed several instances of misconduct that were cited in his termination letter of July 11, 2008.

of fact and conclusions of law. This matter became mature for decision at the end of the Level Three hearing on January 7, 2009.

Synopsis

Grievant was employed as a probationary Correctional Officer 1. Respondent dismissed Grievant during his initial one year probationary period of employment. DJS counseled the Grievant numerous times about his work performance. Grievant admits he violated DJS policy and procedure. However, Grievant maintains his performance was satisfactory.

Probationary employees may be dismissed at any time for unsatisfactory job performance. The Grievant has failed to meet his burden of proving that his performance was satisfactory. This grievance is denied.

Based upon a detailed review of the record, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievant began his employment with DJS in approximately August, 2007,[2] as a Correctional Officer 1 with a probationary period of one year.

2. On August 27, 2007, Grievant was nominated for August Employee of the Month by Corporal Paul J. King.[3]

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[2] Grievant's precise start date is not included in the record. However, it appears he was very close to his twelve month anniversary.

[3] James H. "Tiger" Morton Juvenile Center employs four corporals. Each corporal leads a platoon. Every month, each corporal submits a name of a member of his or her platoon to the Director as a nomination for the employee of the month award. The Director then selects one employee for the award. Though nominated, Grievant was never selected as employee of the month.

3. On October 4, 2007, Grievant was verbally counseled for unprofessional conduct while in the control room.[4] Grievant was involved in a verbal altercation with a co-worker. Grievant used inappropriate language in this incident.

4. On December 5, 2007, Grievant was counseled regarding the amount of time he spent in the control room and the amount of time he spent on the telephone conducting personal business. Grievant was instructed by Facility Director Marshall L. Berger to only work in the control room when juvenile residents were in their cells. Grievant was found in the control room when juvenile residents were out of their cells. Grievant used the telephone in the control room to conduct personal business.

5. On February 7, 2008, Grievant was again counseled regarding time spent in the control room.

6. On February 8, 2008, Grievant received an initial employee performance appraisal advising him of his responsibilities, performance standards and expectations. The performance standards and expectations specifically provided that it was the duty of the Grievant to "perform daily duties as assigned by supervisor efficiently and professionally" and "limit personal business" in the workplace.

7. On March 5, 2008, Grievant was counseled for unprofessional conduct and rudeness toward an office assistant. Grievant spoke in a loud voice to an office assistant over his pay check.

8. On April 16, 2008, Grievant received an employee performance appraisal

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[4] The "control room" is the brains of the detention facility. It contains controls that lock access to doors within the facility. It contains surveillance screens through which the juvenile residents' conduct can be observed.

"coaching." The coaching specifically advised the Grievant that "some of the problems you [Grievant] have encountered working here are somewhat self-inflicted. It is very important to always stay within the perimeters of policies and procedures. They are in place to help us and to provide guidance in our actions."

9. On March 12, 2008, Grievant was counseled regarding unprofessional conduct and inappropriate conversations with a juvenile resident. Grievant was horse playing and choked the resident. Further, Grievant made "explicit statements" to a resident. He told the resident that he would bring an "AK"[5] and shoot the resident. The juvenile resident complained of Grievant's conduct after the resident was disciplined for an unrelated event.

10. On May 28, 2008, Grievant received an employee performance appraisal "interim" rating. His progress was evaluated as "does not meet expectations." His performance development needs included several cautions and advisories about following established policy and procedure.

11. On June 16, 2008, Grievant was once again counseled for spending too much time in the control room. He was in the control room when juvenile residents were not in their cells.

12. In June, 2008, Grievant was nominated for May, 2008, employee of the month.

13. By letter dated July 11, 2008, Grievant received a written letter advising him that he would be dismissed fifteen (15) days from the date of the letter. Citing specific examples, the letter indicated that the Grievant was being dismissed for unsatisfactory

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[5] Presumably, the Grievant was referring to an AK-47 assault rife. For more on this rifle *see* Larry Kahaner, *AK-47: The Weapon that Changed the Face of War* (Wiley Pub. 2007).

performance. Grievant was required to immediately separate from the workplace.

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. *See Bonnell v. W. Va. Div. of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990). The term satisfactory can be generally defined as "giving satisfaction sufficient to meet a demand or regulation; adequate." *Brown v. W. Va. Dep't of Health & Human Res.*, Docket No. 99-HHR-026 (Oct. 28, 1999)(citation omitted). "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 Grievant's termination was based upon his unsatisfactory performance and is not disciplinary. Hence, the Grievant bears the burden of proving his performance was satisfactory.

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." 143 C.S.R. 1 § 10.1(a). 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." *Id*. 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).

Grievant was a probationary employee. He is not entitled to the usual protections enjoyed by a regular state employee. An employer may outright dismiss a probationary employee for unsatisfactory performance. *See Hackman v. Dep't of Transp./Div. of Motor Vehicles*, Docket No. 01-DMV-582 (Feb. 20, 2002). In this case, the DJS dismissed the Grievant because of unsatisfactory performance.

The Grievant has not established that his work performance was satisfactory. Throughout his testimony at Level Three, Grievant admits receiving numerous counseling sessions and admits that he did not always follow the policies and procedures of the workplace.

However, Grievant does argue that the circumstances surrounding the control room incidents indicate that the "rules were misinterpreted and misapplied."[6] Grievant admits he was instructed by Director Berger to work in the control room only at designated times. He testified that his acting supervisor would often instruct Grievant to work in the control room in direct contravention of the orders he received from Director Berger. The record indicates that Grievant did not follow the Director's order and never made Director Berger aware of the situation *when it occurred*.[7]

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[6] Grievant admits that he was on the telephone conducting personal business during one incident.

[7] Director Berger testified that he met with the Grievant on several occasions to discuss his performance. Director Berger also used these meetings to encourage the Grievant. He stated that he wanted the Grievant to make it through the probationary

The record indicates that the Grievant's work performance was inconsistent. He received two nominations for employee of the month. He also received many warnings and counseling sessions. These counseling sessions were given when the incidents occurred. Grievant was also advised during employee performance appraisals to follow DJS policy and procedure. He failed to do so in a consistent manner. "The ability to follow instructions is a clear need of the employer that may be considered when determining whether to retain a probationary employee in light of his or her job performance." *Cosby v. W.Va. Div. of Juv. Services/Anthony Corr. Cntr.,* 2009-0086-MAPS (Nov. 13, 2008). Likewise, consistent, reliable work performance is a clear need of the employer. The Grievant has not established that his performance was satisfactory.

In summation, the Grievant has not established, by a preponderance of the evidence, that his performance during the probationary period was satisfactory. Nor can it be said that the decision of the DJS was unreasonable. The facts indicate that the Grievant had a difficult time consistently following the policies and procedures of the workplace. The following Conclusions of Law support the decision reached.

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).

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period.

"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).

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

3. Grievant has failed to prove, by a preponderance of the evidence, that his performance was satisfactory and that he should not have been dismissed. It was within the employer's discretion to dismiss him from 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 Order. *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 (eff. July 7, 2008).

Date: January 16, 2009

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Mark Barney
Administrative Law Judge