THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

KENNETH RAY HAMMOND II,
Grievant,

v. **DOCKET NO. 2008-0161-MAPS**

DIVISION OF VETERAN'S AFFAIRS,
Respondent.

DECISION

Grievant, Kenneth Ray Hammond II, filed this grievance against his former employer, the Division of Veteran's Affairs, at level three of the grievance procedure, on July 28, 2008, contesting the termination of his probationary employment for unsatisfactory performance. As relief Grievant sought, "[j]ob back, if possible-action to be taken against individual or individuals responsible."

A level three hearing was held before the undersigned Administrative Law Judge on November 12, 2008, in the Grievance Board's Westover office. Grievant represented himself, and Respondent was represented by Christie S. Utt, Deputy Attorney General. This matter became mature for decision upon receipt of Respondent's written argument, on December 8, 2008. Grievant chose not to submit written argument.

After the level three hearing, on November 20, 2008, Grievant filed a Motion requesting that the testimony of Respondent's witnesses be stricken from the record, on the grounds that Respondent did not submit a witness list prior to the hearing, as is required by the Grievance Board's procedural rules (156 C.S.R. 1 § 6.5.1), and the Notice of Hearing entered in this matter. Grievant did not raise this issue at the hearing, nor did

he indicate that he was prejudiced in any way by the failure to submit the witness list. Grievant cross-examined each witness at the hearing, and did not request any additional time to prepare for cross-examination. The purpose of the requirement that the parties submit witness lists is to assist the parties in their hearing preparation. While a party should not blatantly ignore the requirement, the undersigned does not find Grievant's suggested extreme remedy to be appropriate in this situation. Grievant suffered no harm from Respondent's failure to submit a witness list, except that the witnesses provided testimony which was not favorable to Grievant. The Motion is Denied.

Synopsis

Grievant was dismissed from his probationary employment as a Veterans Service Officer I, in the Elkins Field Office, for unsatisfactory performance. Grievant's primary job responsibility was to interview veterans and help them obtain benefits. Respondent received complaints from veterans about Grievant, and veterans began traveling from Elkins to Clarksburg to obtain services in order to avoid Grievant. Grievant's co-workers personally observed Grievant's interactions with veterans, and stated that he failed to listen to veterans, would interrupt them before they finished, and was accordingly, too quick to decide what action could be taken on behalf of the veteran, and that he did not conduct himself in a professional manner, using slang terminology. When Grievant's co-workers attempted to explain to him how his actions were inappropriate, Grievant would argue with them, and tell them why his approach was correct. Grievant's co-workers found Grievant to be disrespectful and argumentative, and to lack good communication and people skills. Respondent determined that Grievant was not a good fit for the agency. Grievant produced no evidence that his performance was satisfactory, other than his own opinion that he was

never rude, and provided information to clients in a professional manner. Grievant did not demonstrate his performance was satisfactory.

The following Findings of Fact are made based upon the record developed at level three.

Findings of Fact

1. Grievant began his employment as a Veterans Service Officer I with the Division of Veteran's Affairs ("DVA"), at the Elkins Field Office, on March 17, 2008. He was hired as a probationary employee.

2. A Veterans Service Officer I interviews veterans, determines what benefits they are eligible for based upon their individual circumstances, explains to veterans the benefits available to them, and completes and submits the paperwork necessary for veterans to receive benefits. An essential requirement of the job is that the employee be very courteous. The employee must also be familiar with benefits available, and must be able to use the reference materials available to determine eligibility.

3. Lillie Fitzgerald is also assigned to the Elkins Field Office. Ms. Fitzgerald has been an Assistant Veterans Service Officer for six years. She performs most of the same duties as a Veterans Service Officer I, but cannot be placed in that classification because she is not a veteran. She was available to assist Grievant with learning the duties of his position, and offered him assistance.

4. Grievant was Ms. Fitzgerald's supervisor. Grievant told Ms. Fitzgerald that he was in charge of the Elkins Field Office, and it would be run his way. When Ms. Fitzgerald would offer Grievant suggestions as to ways to better perform his duties, Grievant would argue with her.

5. In April 2008, Keith Gwinn, who was at that time Deputy Director of DVA, telephoned Charles M. “Mike” Lyons, who was the Claims Manager in the Huntington Field Office, and asked him to go to Elkins to talk to Grievant. Mr. Gwinn told Mr. Lyons that veterans were traveling from Elkins to the Clarksburg Field Office for services, about a one hour drive, and DVA was receiving complaints from veterans that Grievant was speaking down to them and giving them inaccurate information.

6. On April 22, 2008, Mr. Lyons and Larry Linch, the retiring Director of DVA, went to the Elkins Field Office to speak with Grievant. They instructed Grievant to spend one day a week in the Clarksburg Field Office observing the Veterans Service Officer I, Stephen Goff, to go with Veterans Service Officer I Jeff Rossiter on trips to various off site locations, referred to as “itinerants,” and observe him, and to use Ms. Fitzgerald as a resource. During this visit, Mr. Lyons found Grievant to be arrogant and unwilling to accept advice.

7. Grievant began observing and working with Mr. Goff and Mr. Rossiter as he had been directed, but the complaints from veterans continued.

8. Veterans told Mr. Rossiter that they found Grievant’s actions toward them and his speech demeaning, and that they were upset by the slang terminology he used when speaking with them. Mr. Rossiter explained to Grievant that he needed to correct these problems. Grievant ceased using certain slang terminology that he had been using, such as “good to hook,” but substituted other slang terminology which the veterans found just as upsetting. When Mr. Rossiter would tell Grievant he was wrong, Grievant would disagree with him, and tell him his way was correct.

9. Mr. Goff, Mr. Rossiter, and Ms. Fitzgerald observed Grievant interviewing clients, and found him to be too quick to react to situations, and that he did not listen to veterans. Ms. Fitzgerald observed Grievant using slang terminology when speaking to veterans, and being disrespectful. She did not believe he had good communication skills or people skills, and found him difficult to work with. On one occasion Ms. Fitzgerald was assisting a client outside Grievant's office, when she and the client heard Grievant tell the client he was interviewing that Ms. Fitzgerald's work on the client's claim was "shoddy." On another occasion, Grievant interrupted Ms. Fitzgerald when she was assisting a client, and asked the client to leave, stating he had an emergency. Ms. Fitzgerald believed the situation Grievant found to be an emergency could have waited until she had finished with her client.

10. In June 2008, Mr. Gwinn, who had been promoted to Director of DVA, told Mr. Lyons, the new Deputy Director, that he needed to deal with Grievant. On June 25, 2008, Mr. Lyons telephoned Grievant to advise him that Respondent had been receiving complaints about him from veterans, and that he was going to be dismissed from his employment. Grievant appeared to be surprised by this. Mr. Lyons spoke with Director Gwinn, and called Grievant again and informed him that he would be given 30 days to change his attitude. Grievant asked who had made the complaints. Mr. Lyons did not disclose this information to Grievant, because he was concerned that Grievant would attempt to contact the complainants.

11. Mr. Lyons traveled to the Elkins Field Office on June 26, 2008, and spoke with Grievant about his performance. He instructed Grievant on research, and explained the need to be respectful of veterans, and to provide accurate information in a professional

manner. He told Grievant that veterans complained that he was rude, disrespectful, and that he provided incorrect information. He also told Grievant that Ms. Fitzgerald's experience should be of great benefit to him.

12. After June 26, 2008, Respondent continued to receive complaints from veterans about Grievant, and Mr. Lyons saw no improvement in Grievant's performance. Around this time period, Grievant canceled his regularly scheduled itinerant trips to Philippi and Parsons to assist veterans, without consulting his supervisor. Mr. Lyons would not have approved of these trips being canceled, or placed on call. Grievant did not ask Ms. Fitzgerald for assistance in improving his performance, but instead, started avoiding her, keeping his door closed. Grievant took no specific steps designed to improve his performance.

13. On July 25, 2008, Grievant was informed that he was being dismissed from his employment by DVA, effective August 9, 2008, for unsatisfactory performance.

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).

Grievant disputed that his performance was unsatisfactory, but offered only his opinion that he was never rude to any clients, and that he provided information in a professional manner. 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). Grievant's belief regarding his interactions with clients differs substantially from what his co-workers observed, and demonstrates Respondent's point that when a co-worker tried to tell Grievant a better way to handle a situation, Grievant's response was to argue that his way was right. It is clear that Grievant did not have the skills needed to perform the duties of his position, and was unwilling to change his behavior, or accept the advice of others. Grievant has not demonstrated his performance was satisfactory.

The following Conclusions of Law support the Decision reached.

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 or the Division of Personnel 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

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BRENDA L. GOULD
Administrative Law Judge

Date: January 7, 2009