THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JERRI KELLEY,
Grievant,

v. **Docket No. 2009-0317-DOT**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,
Respondent.

DECISION

Jerri Kelley ("Grievant") filed this grievance at level three on September 5, 2008, challenging the termination of her probationary employment with the Division of Highways ("DOH"). A level three hearing was held in the Grievance Board's office in Westover, West Virginia, on March 9, 2009. Grievant was represented by Gordon Simmons, Steward, UE Local 170. DOH was represented by its counsel, Jennifer Francis Alkire. This matter became mature for consideration upon receipt of the parties' fact/law proposals on April 9, 2009.

Synopsis

Grievant's probationary employment was terminated, due to DOH's determination that her performance was unsatisfactory, specifically with regard to properly performing her duties and taking direction from her supervisors. When a probationary employee is terminated, it is her burden to prove her services were satisfactory. In this case, Grievant failed to meet this burden, and the evidence supported the conclusion that Grievant repeatedly failed to follow proper procedures for performing her assigned duties and resisted direction from her supervisors. Therefore, this grievance is denied.

After a thorough review of the entire record, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievant was hired by DOH on February 1, 2008, as Transportation Worker 2, Equipment Operator.

2. Charles "Chuck" Richards is a District Four Maintenance Assistant. Until April 1, 2008, Mr. Richards was the Doddridge County Administrator and Grievant's immediate supervisor.

3. Grievant was informed by Mr. Richards in her employment interview and orientation that, as an Equipment Operator, her duties would include such activities as flagging, cutting brush, shoveling and raking blacktop, and operating equipment. Grievant indicated that she understood and accepted these duties.

4. Grievant complained to Mr. Richards about having to flag, although this a common assignment for new DOH employees. Mr. Richards had to tell Grievant on more than one occasion to use proper safety practices, and where to stand when flagging.

5. During the time that Mr. Richards was Grievant's supervisor, Grievant committed a number of infractions against DOH policy. These ranged from the refusal to work mandatory overtime, the failure to call in prior to work time to report that she would be late, to insubordination. Mr. Richards provided informal counseling to Grievant regarding her conduct.

6. Larry Williams became the Doddridge County Administrator in early April 2008. At that time, he became Grievant's immediate supervisor.

7. Mr. Williams documented Grievant sitting in a truck reading a book while she was assigned flagging duty to protect the safety of the employees working on the highway. Grievant admitted to reading a book when she was assigned to be flagging, but attempted to justify her actions by explaining it was a low traffic area.

8. Anthony Lopez, Doddridge County Administrator, became Grievant's supervisor on July 1, 2008, when Grievant was on a medical leave of absence.

9. After overhearing Grievant use inappropriate language, Mr. Lopez counseled Grievant in regard to the use of such language.[1] Grievant did not deny using inappropriate language in the workplace. Mr. Lopez reviewed the agency's sexual harassment policy with Grievant.

10. Mr. Lopez witnessed Grievant speaking and behaving disrespectfully toward others. In one instance, Paul Kopp, the individual in charge of safety issues in District Four, was speaking on proper flagging policy and procedures to employees. During the presentation to DOH employees, Grievant said to Mr. Kopp: "When was the last time you did my job? What makes you think you can read a book and tell me how to do my job?"

11. Mr. Lopez received reports from Grievant's two prior supervisors, Chuck Richards and Larry Williams, that Grievant was complaining about having to flag and not properly performing her flagging duties, along with not taking direction well, and not being willing to accept a variety of responsibilities. He met with the Grievant's foremen, including Terry Leeson and Henry Ahouse, along with one or two other supervisors, to discuss Grievant's performance. All agreed that Grievant needed improvement in a number of

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[1]While not immediately clear from the record, this incident involved a saucy comment by Grievant about a co-worker and his pony tail.

areas as a result of her unwillingness to accept assignments such as flagging, and her inability to work well with others to achieve the organization's goals.

12. By letter dated September 10, 2008, Jeff Black, Director of Human Resources, advised Grievant that, due to Mr. Lopez's recommendation that Grievant not be retained as an employee of the DOH and with his concurrence, her employment was terminated. Mr. Black indicated the reason for Grievant's dismissal was unsatisfactory performance during her probationary period. Specifically, Mr. Black pointed to Grievant's "poor job performance and output including, but not limited to, questioning instructions and job assignments, inappropriate use of language, failure to follow procedures regarding use of leave time and inability to work well with others."

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. *Bonnell v. W. Va. Div. of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Bowman v. W. Va. Educ. Broadcasting Auth.*, Docket No. 96-EBA-464 (July 3, 1997); *Walker v. W. Va. Public Serv. Comm'n*, Docket No. 96-PSC-422 (Mar. 11, 1992). "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 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 CSR 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 CSR 1 § 10.5(a).

Grievant's argument is essentially that she was dismissed as a result of discrimination as opposed to unsatisfactory work performance. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant did not demonstrate in this case that she was assigned flagging duties an unreasonable percentage of the time in relation to a similarly situated employee. Neither did Grievant demonstrate she was assigned more flagging duties than any other probationary employee classified as a Transportation Worker Equipment Operator. Grievant presented no evidence that females who have been employed in the agency, and who performed traditionally male jobs, left the agency for any reason related to their gender or, more specifically, for reasons of gender discrimination. By contrast, the record revealed a number of reasons why female employees left the agency having nothing to do with gender discrimination, such as accepting higher paying jobs and being able to work closer to home.

As described in DOP's Rule, the probationary period of employment has a specific purpose. During this time, an employee is to learn the duties of his or her position, and the employer assesses the employee's ability to meet work standards and adjust to the expectations of the agency. In this case, Grievant's superiors concluded that she was not working out as an employee and did not work well with others. While Grievant has provided excuses for some of the charges against her, and offered some co-worker testimony that she performed satisfactory work on specific days, she is required to prove that it is more likely than not that her services were, in fact, of a satisfactory level. Unfortunately, in light of the undisputed incidences of disrespectful behavior, the evidence introduced in this case does not meet that burden.

Despite instructions to the contrary, Grievant repeatedly failed to follow proper procedures for flagging, and she demonstrated a resistant attitude when given instructions and direction by her supervisors. It is understandable that DOH made a finding of unsatisfactory performance based upon the reasons stated in the letter of September 10, 2008, and set out above. Accordingly, Grievant has failed to establish by a preponderance of the evidence that her services were satisfactory or that DOH violated the provisions regarding termination of probationary employees.

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); *Bowman v. W. Va. Educ. Broadcasting Auth.*, Docket No. 96-EBA-464 (July 3, 1997); *Walker v. W. Va. Public Serv. Comm'n*, Docket No. 96-PSC-422 (Mar. 11, 1992).

2. 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).

3. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

4. Grievant did not demonstrate in this case that she was assigned flagging duties an unreasonable percentage of the time in relation to a similarly situated employee. Neither did Grievant demonstrate she was assigned more flagging duties than any other probationary employee classified as a Transportation Worker Equipment Operator.

5. Grievant has failed to prove by a preponderance of the evidence that her work for Respondent was satisfactory; it was within her employer's discretion to terminate her 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 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: April 23, 2009

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Ronald L. Reece
Administrative Law Judge