THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MATTHEW T. BIAS,
Grievant,

v. **Docket No. 2009-1518-DOT**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Matthew T. Bias, filed a grievance against his employer, Division of Highways ("DOH"), on May 5, 2009. Grievant is grieving his termination as a probationary employee. For relief, Grievant seeks, "continued employment with retro active pay."[1]

A level III hearing was held at the Grievance Board's Charleston office on July 5, 2009, with a second day being held on July 31, 2009.[2] Grievant was represented by Gordon Simmons, UE Local 170, WV Public Workers' Union, and Respondent was represented by Krista Duncan, Esq. This case became mature on August 13, 2009, upon the parties' submissions of findings of fact and conclusions of law.

Synopsis

Grievant, a probationary employee, was terminated prior to the completion of his probationary period. Respondent asserts Grievant was terminated for disruptive behavior, damaging a snow plow, putting the wrong fuel in a dump truck, and having to be continually

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[1]Grievant made a motion at the hearing to amend this relief to include interest. Respondent objected.

[2]This case was originally assigned to Administrative Law Judge ("ALJ") Mark Barney, but for administrative reasons, it was reassigned.

reminded to check and treat his designated highway area during Snow Removal Ice Control ("SRIC") season.

Grievant argues Respondent did not prove he engaged in disruptive behavior. Grievant also avers the damage to the snow plow happened in the normal course of business and because of the age and rust on the plow. Grievant asserts putting the wrong fuel in the dump trunk was an accident. Lastly Grievant argues Respondent should have properly evaluated Grievant's work so as to correct any issues with training on how to perform the job.

Grievant has not met his burden in this matter. This grievance is denied.

Findings of Fact

1. Grievant was hired by Respondent as a Transportation Worker 2 - Equipment Operator. He was assigned to District 2.

2. Grievant began work on November 14, 2008. His duties included fueling and operating a State-owned vehicle to perform SRIC duties.

3. At the time of his employment, Grievant was placed on a probationary period for 6 months and was still considered a probationary employee at the time of his termination.

4. Charlene Pullen, Grievant's supervisor, began receiving complaints from Grievant's fellow employees concerning both Grievant's attitude and his preferred topics of discussion around the garage. Specifically, coworkers were complaining because

Grievant stood around and continually showed a letter from the FBI allowing him to carry a concealed weapon.[3]

5. For SRIC season, Grievant was assigned an area of Interstate 64. Grievant was responsible for treating and clearing snow and ice from the Exit 18 ramp to Exits 20-A and 20-B ramps.

6. On December 7, 2008, Ms. Pullen spoke with Grievant concerning him sitting around when it was snowing and not taking initiative to check his area. She explained the importance of keeping the roads clear from snow and ice and his responsibility to continually check his assigned area. Grievant simply stated, "Ok," and grinned. Level 3, Respondent's Exhibit 12.[4]

7. On January 18, 2009, Ms. Pullen spoke with Grievant concerning his continual talk of FBI background checks and stalking. She indicated to him that this type of conversation made his fellow employees uncomfortable and instructed him not to engage in these conversational topics. Grievant laughed and told Ms. Pullen it did not bother him that some of his coworkers were upset at the topics he chose to discuss. He indicated part of the reason he discussed these issues was to bother his coworkers. Ms. Pullen explained this was not a funny situation and the talk bothered her. She reiterated that it needed to stop. Level 3, Respondent's Exhibit 13.

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[3]The reason the letter from the FBI was continually discussed by Grievant at work was unclear. This letter was submitted by Grievant as part of the grievance form.

[4]The date on this exhibit is December 7, 2009. However, the testimony indicated this actually occurred in 2008.

8. On January 27, 2009, Ms. Pullen once again spoke with Grievant about having to repeatedly tell him to check and treat his assigned area of Interstate 64. She explained to him the importance of staying active in fighting snow accumulation. Grievant said, "Ok," and sort of laughed. Level 3, Respondent's Exhibit 14.

9. On January 29, 2009, Ms. Pullen spoke with Grievant concerning his choice of discussion topics while at work. She told him to stop talking about Regina[5], stalking, and guns, as it makes her and others uneasy. Grievant smiled and told Ms. Pullen that he says things when he does not sleep. He also indicated that when he is having issues with sleep, he takes caffeine pills and caffeine drinks to stay awake. Ms. Pullen reiterated Grievant should not talk about these issues while at work. Level 3, Respondent's Exhibit 15.

10. On January 30, 2009, Ms. Pullen once again spoke with Grievant about his topics of conversation while at the shop. While other employees were discussing food, Grievant started asking about how to communicate with someone who does not want to talk or communicate to you. When confronted by Ms. Pullen, Grievant responded, "he always talks crazy when he doesn't get sleep." Level 3, Respondent's Exhibit 16.

11. On February 3, 2009, there was severe damage to Grievant's snow plow while he had it on the road working his assigned area.

12. On that date, Ms. Pullen spoke with Grievant concerning the damage to the snow plow. She asked Grievant about the incident and what caused the damage.

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[5]Several of Respondent's witnesses indicated they had heard Grievant talk about Regina. However, none of the witnesses were able to articulate who Regina was or why Grievant would speak of her routinely.

Grievant laughed and told her he did not know what he hit or even where he was on the route when he hit it.

13. Prior to SRIC season, this plow was scraped and painted, and during that process no one noticed any structural problems with the plow. During the month of January 2009 the plow was used by other workers and there were no complaints.

14. An accident report was completed concerning the damaged plow. In that report, it states, "employee [Grievant] states was plowing snow off edge of roadway and hit something-could not move plow left:***Supervisor asked several times what he hit. To do this damage would have to have jarred him. Employee stated he hit things different times and was jared [sic] but couldn't say when or where. Supervisor told employee if he hit something that hard he should get off and look @ what hit and for damage. State he did but still can't say what he hit or where." Level 3, Respondent's Exhibit 17.

15. Grievant was responsible for fueling his own truck, and upon completion of that, he was required to complete a fuel ticket. Ms. Pullen then reviews the fuel tickets for accounting purposes.

16. On February 6, 2009, Ms. Pullen spoke with Grievant concerning the fuel report. In completing this required report, she discerned the diesel fuel tank was over, but the regular fuel tank was short. After a short investigation, she was told Grievant put gas in the dump truck, instead of diesel. Ms. Pullen confirmed this information by reviewing the fuel ticket Grievant completed on that date. The gas tank of the truck had to be drained. When Ms. Pullen questioned Grievant, he told her he put diesel in the truck. Ms. Pullen pressed the issue, and Grievant continued to deny the mistake. After further pressing, Ms.

Pullen told Grievant to pay attention to what he was doing, and Grievant grinned and said, "Ok." Level 3, Respondent's Exhibit 18.

17. Ronald Bowen, Crew Supervisor, supervised the day shift and was Grievant's supervisor when he worked that shift.

18. Mr. Bowen also had complaints from Grievant's coworkers concerning Grievant's discussion of Regina and gun permits. Mr. Bowen spoke with Grievant concerning these complaints.

19. Mr. Bowen also received complaints from Grievant's coworkers about Grievant standing around instead of working. Mr. Bowen spoke with Grievant concerning these complaints as well.

20. Mr. Bowen was aware that Ms. Pullen was having difficulties with Grievant, as were some of the workers on night shift.

21. Mr. Bowen heard Grievant say, "I don't care about doing it [the requested task] for you [Mr. Bowen], but not for her [Ms. Pullen]."

22. Wes King works as a Transportation Worker 3. He is not assigned to Ms. Pullen permanently, but works for her during SRIC season when extra workers are needed. Mr. King trained Grievant on what duties needed to be performed for SRIC season.

23. During SRIC season, Mr. King would treat his area and then would go and assist other workers if needed.

24. The appropriate way to clear an interstate ramp is to ensure the motorist can see both white lines and the pavement should appear a little wet.

25. Mr. King would drive by Grievant's assigned area. The ramps would not be clear. The ramps would have a path made down them.

26. Mr. King had, in years passed, been assigned Grievant's route. Therefore, Mr. King knew the amount of time it would take to properly complete the route. Many times Mr. King would see Grievant returning to the garage within a short period of time.

27. At this particular garage, each driver is responsible for loading his/her own truck with salt prior to making the runs along the assigned areas. This is conveyed to all employees at a meeting at the beginning of SRIC season.

28. Mr. King loaded Grievant's truck with salt until he was told not to do that anymore.

29. On March 17, 2009, Ms. Pullen met with Grievant and Mr. Bowen to discuss Ms. Pullen's recommendation that Grievant be terminated.

30. During that meeting Grievant called Ms. Pullen a "Crazy Chick."

31. On May 5, 2009, Jeff Black, Director of Human Resources, sent Grievant a letter terminating his employment effective May 21, 2009, but requiring "immediate departure from the workplace upon receipt of this letter." Mr. Black explained Grievant was being dismissed for "unsatisfactory performance during probationary period." Level 3, Joint Exhibit 1.

32. Grievant was paid severance pay for the period between the date of the letter and the effective date of May 21, 2009.

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); *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 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.[6] Hence, the Grievant bears the burden

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[6]In consideration of the severity of the Grievant's conduct and the specific facts of this case, the conduct in question was performance-based and not disciplinary in nature. Failure to follow cogent instructions is clearly associated with performance. Decisions generally hold that where a probationary employee's conduct is inextricably linked with performance and not outside the bounds of reasonable workplace behavior, the conduct should be treated as performance-based and the burden should be upon the grievant to prove satisfactory performance. *See Vestal v. W.Va. Div. of Corr./Anthony Corr. Cntr.*, Docket No. 2008-1242-CONS (July 9, 2008) (grievant's failure to follow instruction regarding inmate interaction was performance-related); *Wayson v. W.Va. Div. of Rehab. Servs.*, Docket No. 04-RS-255 (Sep. 22, 2004) (nursing difficulties and problems interacting with others is performance-related); *Giberson v. W. Va. Div. of Corr.,* Docket No. 98-CORR-002 (May 29, 1998) (dismissal for abuse of leave and/or attendance problems are performance-based and not disciplinary in nature); *Smith v. W.Va. Div. of Labor*, 93-Labor- 423 (June 15, 1994) (pulling a female employee's brassiere and spitting on a windshield analyzed under work performance with the burden placed upon the Grievant). One decision analyzed the conduct under both standards. *See Wolfe v. W.Va. Dep't of Trans./Div. of Highways*, Docket No. 95-DOH-491 (July 31, 1996) (selling liquor to inmates is seemingly performance *and* disciplinary based). Where the conduct is *clearly* egregious, it is most often considered disciplinary. *Walker v. W.Va. Pub. Serv. Comm'n*, Docket No. 91-PSC-422 (Mar. 11, 1992) (unauthorized use of a police vehicle and various other acts considered disciplinary); *Johnson v. W.Va. Dep't of Trans./Div. of Highways*, Docket No. 04-DOH-215 (Oct. 29, 2004) (illegal drug use is disciplinary).

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, DOH dismissed the Grievant because of unsatisfactory performance.

There was consistent testimony that Grievant continually engaged in conversation about Regina, stalking, and gun rights. Grievant responded to Mr. Black’s termination in writing and attached the letter to his grievance form. In that letter, Grievant asserts Ms. Pullen was resentful of Grievant’s views on gun rights, his knowledge of the gun laws, his interest in hunting, and his possession of a permit to carry a concealed weapon. There was testimony by other witnesses who are employees of DOH and who are supervised by

Ms. Pullen that they have a concealed weapon permit and have discussed hunting while at the garage. These individuals have suffered no harm or ill treatment.

From the evidence presented, Grievant carried around a letter addressed to him from the FBI. No one was able to explain the significance of this letter, other than to indicate the letter allowed Grievant to obtain a concealed weapons permit. It is clear that the continual discussion and viewing of this letter frustrated employees, to say the least. One witness specifically stated that he was afraid of Grievant because of the topics in which Grievant continually engaged.

Ms. Pullen discussed with Grievant how uncomfortable he was making his fellow employees. Grievant's response, according to Ms. Pullen's testimony, was flippant. The undersigned witnessed Grievant's flippant attitude for herself during several outbursts he had during the hearing.[7]

Mr. Bowen also had several complaints about Grievant's choice of discussion topics, and Mr. Bowen spoke with him as well. Yet, this seemed to have no effect on Grievant. All the while, Grievant was creating a disturbance in the work place, albeit a mild disturbance.

There was also consistent testimony that Grievant did not take initiative to complete his work. He even had another employee load salt into his truck. When Grievant did

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[7]During the hearing, Grievant made a rude comment, and the undersigned told him she was losing her patience with him, and Grievant laughed and asked if the undersigned was now a doctor, attempting to make a play on the word patience. Several times during the hearing, the undersigned requested his representative speak with Grievant concerning the appropriate decorum during the hearing. Lastly, as the undersigned was making a ruling in Grievant's favor, he slammed his hand on the table and requested ALJ Mark Barney.

attempt to perform the duties expected of him, from the testimony he did the minimum amount of work possible.

Grievant asserts if he had been subjected to an evaluation he could have adjusted his performance to meet expectations. Yet, Ms. Pullen spoke with Grievant many times about making sure he was proactive when it came to snow removal. Grievant continued to stand around.

Putting the wrong fuel in the truck can be an honest mistake. What is most troubling about this situation is that when asked about it Grievant lied, not once, but at least two times. This is unacceptable.

During the hearing and in written argument, there was much discussion about Grievant's motivation for his actions. The undersigned will not engage in speculation. The issue is Grievant's job performance. Ms. Pullen's requests were not unreasonable and had a direct bearing on Grievant's job performance. Grievant's responses and lack of improvement was unreasonable, regardless of his motivation.

Grievant has failed to meet his burden in this matter. Therefore, this grievance is DENIED.

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. *See 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 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).

2. "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).

3. 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).

4. 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).

5. Grievant was dismissed for unsatisfactory work performance.

6. Grievant has failed to meet his burden that his work performance was satisfactory.

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: November 4, 2009

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Wendy A. Campbell Elswick
Administrative Law Judge