THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

BRIAN DIBACCO,
Grievant,

v. **DOCKET NO. 2010-1222-DHHR**

DEPARTMENT OF HEALTH AND
HUMAN RESOURCES,
Respondent.

DECISION

Grievant, Brian Dibacco, filed this grievance at level three of the grievance procedure,[1] against his former employer, the Department of Health and Human Resources, on March 10, 2010, contesting the termination of his probationary employment. As relief Grievant seeks to be reinstated to his position and backpay.

A level three hearing was held before the undersigned Administrative Law Judge on August 30, 2010 in the Grievance Board's Westover office. Grievant was represented by James T. Carey, Esquire, Manypenny & Carey, and Respondent was represented by Heather L. Laick, Assistant Attorney General. This matter became mature for decision upon receipt of Respondent's Proposed Findings of Fact and Conclusions of Law on October 5, 2010. Grievant did not submit written argument, nor did he submit oral argument at the level three hearing.

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[1] Respondent did not object to the grievance proceeding at level three.

Synopsis

Grievant was dismissed from his probationary employment for unsatisfactory performance and for misconduct. Grievant repeatedly failed to disclose important information to his supervisor or misrepresented facts, he failed on more than one occasion to respond to requests made by his supervisor, and he demonstrated a lack of understanding of basic concepts necessary to the performance of his job after many weeks of intensive training. Grievant did not demonstrate that 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 Child Protective Services Worker with the Department of Health and Human Resources ("HHR") on September 1, 2009. He was hired as a probationary employee, with a twelve month probationary period.

2. HHR terminated Grievant's probationary employment by letter dated February 17, 2010, effective March 5, 2010. The dismissal letter relates several separate incidents which led to the decision to dismiss Grievant during his probationary employment period.

3. Grievant was assigned to HHR's Weirton, West Virginia office. From the time he began his employment with HHR until late January 2010, Grievant was only in the Weirton office for a few hours on Fridays, as Grievant was in training in Weston, West Virginia.

4. Probationary employees in the Weirton HHR office are often assigned to transport clients when they are not in training. Grievant had been asked at his interview whether he would be able to transport clients and he indicated this would not be a problem.

5. The Weirton HHR office uses rental cars when employees transport clients. In September 2009, Grievant appeared at the Enterprise rental car office to rent a car to transport clients. He was unable to rent a car because he did not have a drivers' license. Grievant had a document which gave him occupational driving privileges only. Grievant had not informed anyone at HHR of this limitation on his driving privileges, nor had he inquired of his employer or of Enterprise as to whether this would be a concern in renting a car prior to this date.

6. In December 2009, Grievant was involved in an accident while driving a rental car and reported this accident to Enterprise and to the appropriate HHR personnel. Grievant was injured and was off work for some period of time. Grievant filed a Workers' Compensation claim.

7. When Judith Quinn-Goff, Financial Clerk for HHR, was processing the accident claim, she discovered that there were two claim numbers. When she inquired about this, she was informed that Grievant had been involved in another accident on November 16, 2009. Grievant had told Enterprise that he had run over a parking block in the parking lot at the Weston HHR office. Ms. Quinn immediately advised Teresa Haught, Community Service Manager, of this accident.

8. Grievant had not advised his supervisor, Donna White of the first accident. While Ms. White was out of the office at times during this period, Grievant had a computer, and email access, but did not advise Ms. White of the accident by email. When Ms. White

asked Grievant on January 15, 2010, about the first accident he responded that he thought he had told her about it, he was not aware that there was any damage to the vehicle, and that Enterprise personnel had told him it was not a problem. The vehicle sustained over $1,000.00 in damages. Ms. White made clear to Grievant that he was to inform her immediately of any problem encountered while driving either a state owned vehicle or a rental vehicle.

9. In January 2010, Grievant and a co-worker were traveling back to Weirton from training using a rental car, and ran out of gasoline on the highway. Grievant contacted Enterprise roadside assistance to obtain assistance. While waiting on the Enterprise roadside assistance a state trooper and state highways personnel stopped to assist Grievant. They put gasoline in the car and Grievant called Enterprise to cancel the roadside assistance call. Grievant did not report this problem to anyone at HHR, because he decided he did not need to do so after he canceled the call for assistance. He did not mention this incident to Ms. White during the January 15, 2010 meeting with her, even after she made clear to him that he needed to inform her of any problems with the rental cars. HHR received a bill for the roadside assistance and Ms. White had to ask Grievant what had happened.

10. Ms. White needed access to Grievant's calendar while he was in training. She emailed Grievant on at least four separate occasions from September through December 2009, asking him to provide her with access to his calendar. Grievant did not respond to these emails, nor did he provide Ms. White with access to his calendar until some period of time after the fourth request. Grievant did not ask Ms. White for help with

his computer so that he could provide her with access. In order to allow Ms. White to access his calendar, Grievant simply needed to check the large box that says "allow."

11. During the January 15, 2010 meeting with Ms. White, Grievant told Ms. White his training was going well, and that he had scored 100% on his last four tests. When Ms. White received Grievant's scores she discovered that this was not true. Grievant had scored 100% on only one test.

12. Grievant was not assigned any cases during the time he was in training, and his supervisor, Donna White, had very little contact with him during this period. Although probationary employees are supposed to be evaluated monthly, Ms. White did not evaluate Grievant until January 8, 2010, because of Grievant's training schedule.[2] Grievant was still in training when this first evaluation was completed.

13. Grievant's first evaluation on January 8, 2010, noted no deficiencies in performance, but noted that Grievant had not yet completed his training. The evaluation primarily commented on Grievant's prompt submission of time sheets and expense accounts, and use of leave. It did not note that Grievant had not provided his supervisor with access to his calendar as requested, or that he had failed to advise his supervisor of the accident involving the rental car, or any other issues with his performance.

14. Grievant's second evaluation was in February 2010, after he had completed training, but before he was assigned a case load. That evaluation stated that Grievant was "not forthcoming with information to his supervisor," and that he was unwilling to accept

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[2] Although Grievant elicited testimony on the lack of evaluations, he did not present any argument on this issue. The undersigned cannot make Grievant's arguments for him, particularly in this instance where he was represented by counsel. Accordingly, this issue will not be further addressed.

responsibility, noting that Grievant had not informed his supervisor of the drivers' license issue, that he had run over a parking bumper, or that he had called Enterprise emergency services, and that he had provided inaccurate information to his supervisor regarding his test scores. Under knowledge of the job, the evaluation stated that Grievant appeared "to have difficulty understanding how CPS works," and "is unsure of how to research FACTS to find a history of referrals and cases on a client." The evaluation noted that Grievant "fails to follow simple instructions, like providing access to or entering his training schedule on his outlook calendar," he "did not obtain a social work licensing supervisor until his supervisor followed up with him to do so," and he "did not complete the pre-requisite Web-CT courses for his trainings even though he was provided a new worker training outline and was instructed by his supervisor to complete the Web-CT courses listed." Ms. White concluded on the evaluation that Grievant's pattern of behavior was unacceptable.

15. Grievant was assigned a case load after he completed training, and Ms. White at that point sent him an email requesting his weekly goals. Grievant did not respond to this email, nor did he talk to Ms. White about this request. When Grievant did not respond, Ms. White set Grievant's goals for him. Grievant was to complete one family assessment and one initial assessment by the end of the week. Grievant did not complete these assessments by the end of the week, nor did he ask Ms. White for help.

16. Two weeks after he had completed his training, Grievant asked Ms. White what the difference was between a safety assessment and an initial assessment. This disturbed Ms. White because this is important, relatively basic information provided during training.

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 Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990). When a probationary employee is dismissed for misconduct, the dismissal is disciplinary in nature, and the burden of proof rests with the employer. DHHR must meet that burden by proving the charges against Grievant by a preponderance of the evidence. *See Nicholson v. W. Va. Dep't of Health & Human Res./Bureau for Child Support Enforcement*, Docket No. 99-HHR-299 (Aug. 31, 1999); *Wolfe v. Dep't of Transp./Div. of Highways*, Docket No. 95-DOH-491 (July 31, 1996). Grievant's dismissal was for a combination of unsatisfactory performance and misconduct.

Grievant's right to maintain his employment was limited as a probationary employee. 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).

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 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).

Grievant did not demonstrate that his performance was satisfactory. Grievant basically admitted that he was having problems working the cases he was assigned. Grievant testified that he asked a co-worker for help, and that he asked Ms. White for help both with completing his work and when Ms. White had asked him for access to his calendar, and that neither the co-worker nor Ms. White would help him. He testified that he tried to reach Ms. White regularly and was unable to reach her, and that she did not return his telephone calls. While it would be disturbing that Grievant's supervisor would refuse to help him and not return his calls, the undersigned frankly finds this difficult to believe.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29,

1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

Grievant has a history with his employer of failing to disclose information, and exaggerating. When he was told he would have to transport clients, he chose not to disclose that there were limitations on his driving ability. He chose not to disclose that he had run over a parking bumper while driving a rental vehicle. While Grievant testified that he told Ms. Quinn of this incident, Ms. Quinn appeared surprised when she learned of the first accident while processing the paperwork for the second. Grievant admitted in his testimony that he did not advise his supervisor of this accident, stating as his excuse that she was out of the office. However, Grievant had access to email at this time, and could have informed his supervisor of this accident by email, or by handwriting her a note. Grievant chose not to inform his supervisor that he had run out of gasoline on the highway and called Enterprise roadside assistance, even after he had clearly been told to inform his supervisor of any issues with a rental car. Grievant admitted he had told his supervisor

he had scored 100% on his last several tests during training, when he had scored 100% on only one test.

Grievant offered no reason why Ms. White would have refused to help him when he was having trouble completing his work assignments, and it is difficult to believe that a supervisor would completely ignore a new employee in this manner. In particular, Ms. White testified that she asked Grievant via email on at least four occasions to give her access to his calendar, and that he did not do so, even though it was a simple process to provide her with this access. It would have been much easier to tell Grievant how to provide the access had he asked for help, than to continue to send him the same request over and over, and there would have been no reason to keep asking Grievant to provide access to the calendar if Ms. White had been informed that he did not know how to perform this task. The undersigned does not find Grievant to be a credible witness. It is clear why Respondent felt they could not trust him. Respondent proved that Grievant repeatedly failed to disclose important information to HHR personnel during his probationary period, and that Grievant's performance was not satisfactory.

Grievant asserted in the filing accompanying his grievance form that his termination "may have been in retaliation for filing a workers' compensation claim." Grievant presented no additional argument to explain this assertion, and the only evidence presented to support this claim was testimony from Ms. White that she was made aware by Grievant, on the day he was informed that his employment was being terminated, that his Workers' Compensation claim was open, and he asked for additional time off work for physical therapy.

Discrimination against Workers' Compensation claimants is prohibited under W. VA. CODE § 23-5A-1: "No employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits under this chapter." Discrimination in that context is defined by W. VA. CODE § 23-5A-3, which states in part:

> (a) It shall be a discriminatory practice within the meaning of section one of this article to terminate an injured employee while the injured employee is off work due to a compensable injury within the meaning of article four of this chapter *and is receiving or is eligible to receive temporary total disability benefits*, unless the injured employee has committed a separate dischargeable offense. A separate dischargeable offense shall mean misconduct by the injured employee wholly unrelated to the injury or the absence from work resulting from the injury. A separate dischargeable offense shall not include absence resulting from the injury or from the inclusion or aggregation of absence due to the injury with any other absence from work.

(Emphasis added.)

> That phrase, "or is eligible to receive . . . benefits" is somewhat open to interpretation, but several prior decisions have determined that the legislature did not intend appeals to extend protection after the TTD benefits had been discontinued. *See Addair v. Dep't of Health and Human Res.*, Docket No. 03-HHR-147 (Feb. 2, 2004). *See also Syl. Pt. 6, Rollins v. Mason County Bd. of Educ.*, 200 W. Va. 386, 489 S.E.2d 768 (1997); *Baire v. Div. of Corrections*, Docket No. 97-CORR-129 (March 11, 1998).

Little v. Dep't of Envrtl. Protection, Docket No. 05-DEP-248 (May 2, 2006).

In this case, no evidence was produced that Grievant was ever receiving TTD benefits, or if he was, that these benefits were continuing. Grievant could still establish that he was discriminated against because of his Worker's Compensation Claim, however. *Little, supra.* "In order to make a prima facie case of discrimination under W. VA. CODE, 23-5A-1, the employee must prove that:

(1) an on-the-job injury was sustained;

(2) proceedings were instituted under the Workers' Compensation Act, W. VA. CODE, 23-1-1, *et seq.*; and

(3) the filing of a workers' compensation claim was a significant factor in the employer's decision to discharge or otherwise discriminate against the employee."

Syl. Pt. 1, Powell v. Wyoming Cablevision, Inc., 184 W. Va. 700, 403 S.E.2d 717 (1991). Grievant presented no evidence which would support a finding that the filing of his Workers' Compensation claim was a factor at all in Respondent's decision to terminate his employment.

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). When a probationary employee is dismissed for misconduct, the dismissal is disciplinary in nature, and the burden of proof rests with the employer. DHHR must meet that burden by proving the charges against Grievant by a preponderance of the evidence. *See Nicholson v. W. Va. Dep't of Health & Human Res./Bureau for Child Support Enforcement*, Docket No. 99-HHR-299 (Aug. 31, 1999); *Wolfe v. Dep't of Transp./Div. of Highways*, Docket No. 95-DOH-491 (July 31, 1996).

2. 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 permanent 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); *Roberts v. Dep't of Health and Human Res./Lakin State Hosp.*, Docket No.2008-0958-DHHR (Mar. 13, 2009).

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

4. Grievant's repeated failure to disclose information to HHR personnel rendered him untrustworthy during his probationary period.

5. An employer is precluded by law from discriminating against an employee because the employee has filed a Workers' Compensation claim. W. VA. CODE § 23-5A-1. *Powell v. Wyoming Cablevision, Inc.*, 184 W. Va. 700, 403 S.E.2d 717 (1991)*; Little v. Dep't of Envrtl. Protection*, Docket No. 05-DEP-248 (May 2, 2006).

6. Grievant did not demonstrate that the filing of a Workers' Compensation claim was a factor in the decision to terminate his employment.

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).

BRENDA L. GOULD
Administrative Law Judge

Date: November 1, 2010