THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARGIE DAWN KIPER,
Grievant,

v. **Docket No. 2010-0156-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILD SUPPORT ENFORCEMENT,
Respondent.

DECISION

Grievant Margie Dawn Kiper filed a grievance against her employer on August 13, 2009. The statement of grievance reads, "Terminated without good cause." For relief Grievant seeks, "To be made whole including restoration of job with backpay [sic] and interest and full tenure."

A level three hearing was held at the Grievance Board's Charleston office on February 10, 2010. Grievant was represented by Gordon Simmons, United Electrical Radio and Machine Workers of America (UE), and Respondent was represented by Jennifer Akers, Assistant Attorney General. This case became mature on March 12, 2010, upon receipt of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant was a probationary employee. She was dismissed during her probationary period due to poor performance. Grievant asserts she was not given proper training and guidance while learning the job. Grievant avers Respondent made changes to the computer system and did not provide her with adequate training on the new screens. Grievant argues she was told she could not ask her co-workers questions. Grievant asserts this made it difficult for her to learn, as her supervisor was not always available.

Respondent argues Grievant was adequately trained. Respondent provided Grievant with both an abbreviated version of training from a co-worker when she first began, and then sent her to the first unit of training. Respondent asserts Grievant failed the first level of training. Respondent avers Grievant had difficulty retaining and applying information to her case work, and as such she was terminated.

Grievant has not met her burden of proof in this matter, and therefore, this grievance is DENIED.

Findings of Fact

1. At the beginning of February 2009, Grievant was hired on a probationary status as a Child Support Technician 1.

2. Grievant was housed in the Central Auditing Unit. This Unit performs financial audits of child support cases.

3. There are four levels of training for the Child Support Technician 1 position.

4. Before Grievant attended the first level of training, she was given an abbreviated version of the information by Karla Caudill, Financial Trainer. Grievant also sat and observed tenured workers in her unit.

5. In early April 2009, Grievant attended the first level of training which lasted four days.

6. After the training, the trainees were required to pass a proficiency exam. Grievant did not pass this test.

7. Respondent did not inform Grievant of the failing grade on the proficiency exam.

8. Grievant's work was reviewed by her immediate supervisor, Robin Sheppard. Ms. Sheppard would review a collection of Grievant's work, make notes regarding the needed corrections, and give the documents back to Grievant. Some documents were given back to Grievant more than once for correction.

9. Grievant was given her first two Employee Performance Appraisals ("EPA") at the same time. One EPA covered the Rating Period of February 17, 2009, through March 15, 2009, and the other EPA covered the rating period of March 16, 2009, through April 15, 2009. Both EPA's indicate Grievant was doing well with the computer program.[1]

10. During the time Grievant was working for Respondent, some screens on the computer program utilized by the office changed. All employees received informal training on the changes.

11. Grievant's third EPA indicated issues with Grievant's performance. It stated, "Margie [Grievant] is still having a lot of problems working single set balance cases." Attached to the EPA was documentation to support the assertion.[2]

12. Due to Grievant's performance issues, she was placed on a Corrective Action Plan on May 20, 2009. The Plan was implemented for thirty days, with a review of Grievant's progress at the end of that time period.

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[1]Ms. Sheppard reviewed Grievant's EPA and a co-worker's EPA at the same time. Grievant has intimated this was inappropriate. However, Grievant, as well as other witnesses, testified that Grievant and the co-worker gave their permission to review the EPA's simultaneously.

[2]The third EPA states it is for the rating period of March 16, 2009, through April 15, 2009. This is the same rating period as the other two EPA's. While this was never specifically addressed during the testimony, it appears as though this third EPA was actually referencing the time period from April to May, as it was signed on May 20, 2009.

13. The Corrective Action Plan was extended because Grievant missed thirteen days of the original thirty-day Plan due to illness.

14. At some point, an email was sent to employees in Grievant's unit instructing them not to assist Grievant. Grievant was told not to go to her co-workers for assistance.

15. On July 22, 2009, Grievant received an EPA for the rating period of April 16, 2009, through May 15, 2009. The appraisal stated the Grievant was still having difficulties and contained a narrative that outlined the problems with Grievant's case work.

16. On August 11, 2009, Grievant was terminated from her probationary position due to poor performance.

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). Since the Grievant's termination was based upon her unsatisfactory performance, she bears the burden of proving her 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 her services are unsatisfactory. 143 C.S.R. 1 §10.5(a).

Grievant was a probationary employee. She 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).

Grievant was given an abbreviated training session when she was hired. She then sat and observed senior employees. Grievant then attended formal training. At the end, she was required to take a proficiency exam, and Grievant did not pass this test. It is bothersome to the undersigned that Respondent did not inform Grievant that she did not pass this exam. However, it cannot be argued that Grievant did not know there were

problems with her performance. While Grievant's initial two EPA's were positive, by May Grievant had been provided with the EPA that resulted in the Corrective Action Plan.

In addition, Grievant's work was returned to her after Ms. Sheppard reviewed it for accuracy. Testimony from Ms. Sheppard indicated there were times when Grievant's work was returned multiple times due to incorrect information. Grievant asserts Ms. Sheppard was frequently absent, and therefore, it would take an inordinate amount of time for Grievant to know what errors she had made. However, a compilation of Grievant's work with Ms. Sheppard's comments indicate that, at least during the Corrective Action Plan, Grievant's work was reviewed and provided to her for corrections within a reasonable time.

Consistent testimony was presented that Ms. Sheppard did not want Grievant asking her co-workers for help. Ms. Sheppard testified that she had received some complaints from the other workers who were concerned about getting their own work completed. Also, Ms. Sheppard wanted to monitor the specific issues Grievant was having so as to better assist in correcting them. Ms. Sheppard would attempt to lead Grievant to discern the answer on her own, instead of providing the answer to her. Ms. Sheppard attempted to assist Grievant, answer her questions, and timely notify her of the issues with her work. Unfortunately for Grievant, her performance issues continued despite the assistance.

Grievant has failed to meet her 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). "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. 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 her services are unsatisfactory. 143 C.S.R. 1 §10.5(a).

3. Grievant has not met her burden of proof in this matter.

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 13, 2010

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Wendy A. Elswick
Administrative Law Judge