THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

FREDA M. PARSONS,
Grievant,

v. **Docket No. 2009-0255-DHHR**

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES
WELCH COMMUNITY HOSPITAL,
Respondents.

DECISION

Grievant Freda M. Parsons was employed as an Office Assistant 2 by the West Virginia Department of Health and Human Resources ("DHHR"). She was a probationary employee assigned to the Admissions Department of Welch Community Hospital ("Hospital"). Grievant was terminated from her employment by letter dated August 11, 2008. On August 27, 2008, Ms. Parsons filed a level one grievance contesting her dismissal. There is not a clear statement of remedy set out in the grievance document but it is clear from the context that Grievant wishes to be reinstated to her position at the hospital.

A level one hearing was held at the Hospital on September 23, 2008, and a decision was entered on October 6, 2008, denying the grievance. A level two mediation was held on June 16, 2009, and on September 4, 2009, an Order was entered reflecting the outcome of the mediation efforts. Grievant appealed to level three and a level three hearing was held in Beckley, West Virginia, on January 25, 2010. Grievant appeared at the hearing and was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent DHHR was represented by B. Allen Campbell, Supervising

Senior Assistant Attorney General. At the close of the hearing, the parties agreed to submit Proposed Findings of Fact and Conclusions of Law. Both parties submitted fact/law proposals, the last of which was received at the West Virginia Public Employees Grievance Board on March 1, 2010. This grievance became mature for decision on that date.

Synopsis

Grievant was a probationary employee who worked in the Admissions Department at the Hospital. Grievant was dismissed for violating the Absence Control Policy and for violating the Workplace Security Policy. Respondent was able to prove that Grievant had a pattern of missing work and that she verbally threatened to physically assault one of her co-workers. This misconduct was sufficient to justify the dismissal of a probationary employee. The grievance is denied.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant was employed by the DHHR on April 1, 2008. She worked at the Hospital Admissions Department in the Office Assistant 2 classification.

2. On June 30, 2008, Acting Admissions Supervisor, Melissa Wellman, gave Grievant a verbal warning regarding a pattern of call-ins in violation of the Hospital's Absence Control Policy. Grievant called in sick on April 19, 2008, May 21, 2008, June 6, 7 and 21, 2008. There was no evidence that Grievant was not ill on these days and Grievant did not contest the verbal warning.

3. On June 28, 2008, James Young received complaints from employees in the Admissions Department that a co-worker had been threatened by Grievant and was afraid of Grievant. At that time, James Young was the Hospital's Acting Resources Director.

4. James Young reported the complaints to Walter J. Garrett, the Chief Executive Officer ("CEO") for the Hospital. CEO Garrett assigned Mr. Young and Melissa Wellman to investigate the complaint.

5. On July 2, 2008, Mr. Young and Ms. Wellman took statements from seven employees of the Hospital: Nancy Wooldridge, Jennifer Stumbo, Rhonda Francis, Tommi Mongeni, Grievant Freda Parsons and Tina Dillon. Ms. Stumbo and Ms. Francis no longer work for the Hospital.

6. After interviewing these employees, Mr. Young and Ms. Wellman wrote a memorandum to CEO Garrett stating that they believe Grievant threatened to kick Tommi's ass all over the parking lot for ratting Grievant out about the smoke breaks. They reported that Ms. Mongeni was uncomfortable in the workplace and felt she had to look over her shoulder. They both recommended that Ms. Parsons be suspended at the least or receive more severe discipline. Respondent Exhibit 1.

7. Grievant told a co-worker, Nancy Wooldridge, that Tommi Mongeni had reported Grievant to her supervisor, Melissa Wellman, for taking too long on her smoke breaks. Grievant told Ms. Wooldridge that when Ms. Mongeni came back to work Grievant was going to confront her about it and "she would take her ass [Mongeni] out in the parking lot and beat the fucking shit out of her." Respondent Exhibit 2 and level three testimony of Nancy Wooldridge.

8. On June 26, 2008, Grievant was working with Jennifer Stumbo. Grievant told Ms. Stumbo that she knew Ms. Mongeni was "ratting her out" for taking too many smoke breaks. Grievant told Ms. Stumbo that if Grievant got in trouble "she would kick Tommi's ass all over the parking lot." Respondent Exhibit 3, signed statement of Jennifer Stumbo.

9. In late June, Grievant was working with Rhonda Francis. Grievant told Ms. Francis that Grievant was concerned that Ms. Mongeni might complain because Grievant was spending time in the emergency area of the Hospital where Grievant's mother was being treated. Grievant told Ms. Francis that if Tommi caused her any trouble over that Grievant would "whip her ass all over the parking lot." Respondent Exhibit 4, signed statement of Rhonda Francis.

10. Both Ms. Stumbo and Ms. Francis told Ms. Mongeni about what Grievant had told them. The statements made by Grievant frightened Ms. Mongeni and she worried about her safety at work and in the parking lot.

11. Grievant did not make a threat to Ms. Mongeni. Grievant does not have a history of violent behavior with her co-workers.

12. After receiving the report from Mr. Young and Ms. Wellman, CEO Garrett held a predetermination conference with Grievant. Grievant denied making any threats against Ms. Mongeni when Grievant made her statement to Mr. Young and at the predetermination conference.

13. Following the predetermination meeting, CEO Garrett dismissed Grievant from employment by letter dated August 11, 2008.

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). Grievant's dismissal for misconduct is disciplinary, 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).

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 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).

CEO Garrett cited two reasons for dismissing Grievant. First, she had been previously warned about missing too much work. Second, she threatened to physically assault a co-worker. Very little evidence was submitted regarding the missed work. Grievant was given a verbal warning that she was missing too much work and she did not contest that action. This behavior contributed to CEO Garrett's decision to terminate Grievant's employment but it was certainly not the deciding factor.

The main reason for the dismissal was the threat Grievant made regarding her co-worker, Tommi Mongeni. Respondent avers that this behavior violates the Division of Personnel's ("DOP") Workplace Security Policy which contains a prohibition against "threatening or assaultive behavior." As noted in *Mercer v. Bd. of Barbers & Cosmetologists*, Docket No. 2010-0392-CONS (Apr. 22, 2010), the DOP Workplace Security Policy provides some guidance for determining when threats against others meet the definition of threatening and abusive behavior that requires remedial action by the agency. First the policy contains the following definition:

> Threatening Behavior: Conduct assessed, judged, observed, or perceived by a reasonable person to be so outrageous and extreme as to cause severe emotional distress or cause, or is likely to result in, bodily harm.

In Section III (c) the Workplace Security Policy states the following:

> Threatening or assaultive behavior will not be tolerated and must be resolved by managers/supervisors on a case-by-case basis. Any employee engaging in such behavior shall be subject to disciplinary action, up to and including dismissal. . . In determining whether an individual poses a threat or a danger, consideration must be given to the context in which a threat is made and to the following:
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> - the perception that a threat is real;
> - the nature and severity of potential harm;
> - the likelihood that harm will occur;
> - the imminence of the potential harm;
> - the duration of risk, and/or;
> - the past behavior of an individual.

The co-workers who heard Grievant's threat regarding Ms. Mongeni perceived the threat to be real. They warned Ms. Mongeni that the threat had been made and complained to Mr. Young and their supervisor, Ms. Wellman. Ms. Mongeni also perceived the threat to be serious because she also reported the situation to Mr. Young and testified that she was so upset that she was losing sleep and afraid to come to work. The nature of the potential harm would be that Grievant might physically attack Ms. Mongeni and could cause her serious harm. The threat was investigated shortly after it was made so the time period for the threat was relatively short and no evidence was presented that Grievant had a history of violence.

Ultimately, these threats may not have been severe enough to justify dismissal of a permanent state employee. *See Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965). *See also Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600

S.E.2d 554, 558 (2004) (per curiam).[1] However, the threshold for dismissal of a probationary employee is much lower. Given the totality of Grievant's short work history, it was reasonable for Respondent to conclude that Grievant did not meet the standards for employees that the Hospital wished to retain. *See* 143 C.S.R. 1 § 10.1(a).

Grievant contends that she did not make the threatening statements about Ms. Mongeni. Grievant testified that Ms. Wooldridge had made racial comments about her in the past and opined that she may have made up the story related to Ms. Mongeni to get her in trouble. She gave different reasons as to why the other two employees might have cooperated in the plan.[2]

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).

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[1] These cases hold that in order to justify the dismissal of a permanent classified state employee the employer must prove that the employee's actions constituted "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention."

[2] Grievant indicated that she had previously reported Ms. Wooldridge's racial comments but there was no testimony as to whether the allegations were investigated and resolved. Obviously, such allegations must be taken seriously when they surface.

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*.

The three employees who heard Grievant make the threat against Ms. Mongeni were consistent in what they reported they heard. There were minor differences in each statement but the basic threat was the same. These minor differences are a good indicator that the three co-workers did not work up a story together. Additionally, there was very little incentive for the co-worker to concoct a story to get Grievant in trouble. Two of the three workers have left employment with the Hospital. Under the circumstances, the versions of the incident set out in the statement of the co-workers and the testimony of Ms. Wooldridge are more credible than the blanket denial and conspiracy proposed by Grievant. Consequently, the grievance is denied.

Conclusions of Law

1. Even though Grievant is a probationary employee, her dismissal for misconduct is disciplinary, 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. In determining whether threats in the workplace violate the DOP Workplace Security Policy the following factors must be considered:

- the perception that a threat is real;
- the nature and severity of potential harm;
- the likelihood that harm will occur;
- the imminence of the potential harm;
- the duration of risk, and/or;
- the past behavior of an individual.

See Mercer v. Bd. of Barbers & Cosmetologists, Docket No. 2010-0392-CONS (Apr. 22, 2010).

4. Given the low threshold for dismissal of a probationary employee and the totality of Grievant's short work history, Respondent demonstrated that the dismissal of Grievant was justified.

Accordingly, the 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: JUNE 15, 2010,

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE