# THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**HAROLD BIRCHFIELD,**

**Grievant**,

**v.** **Docket No. 2010-1498-DOT**

**WEST VIRGINIA DIVISION OF HIGHWAYS**,

**Respondent.**

## DECISION

Grievant, Harold Birchfield, was employed by the West Virginia Division of Highways ("DOH") in the Transportation Worker 1 classification. DOH employees in that classification are also called Crafts Workers and perform a wide variety of general labor duties. Grievant was initially employed at the Mason County DOH Facility and was dismissed from employment during his probationary period. Harold Birchfield[1] filed a level three grievance form dated October 10, 2010, stating that he was "[t]erminated without cause." As relief Grievant seeks:

> To be made whole, including restoration to job with back pay and interest and lost tenured benefits.

A level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on May 25, 2010. Grievant appeared in person and was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent DOH was represented by Jason Workman, Esquire, DOH Legal Division. Following the hearing the parties submitted proposed Findings of Fact and Conclusions of

---

[1] Grievant is commonly referred to as Rick by his co-workers.

Law, the latter of which was received by the West Virginia Public Employees Grievance Board December 1, 2010. This grievance became mature for decision on that date.

## Synopsis

Grievant was a probationary employee who was dismissed for unsatisfactory job performance. Such dismissals are not considered to be disciplinary in nature. Grievant has the burden to prove by a preponderance of the evidence that his job performance was satisfactory. Grievant's direct supervisors testified that Grievant did his work as directed and that his performance was satisfactory. Respondent noted that Grievant had not taken training that he was directed to take and that there had been occasional complaints by some workers that Grievant was not helpful. Because the supervisors who monitored Grievant's work on a daily basis testified that his work performance was satisfactory the Grievance must be granted.

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 started work as a full-time probationary employee of the DOH on December 1, 2009. Grievant was in the classification of Transportation Worker 1 - Crafts Worker ("TW 1") and was assigned to the Mason County DOH Facility.

2. As a TW 1, Grievant performed various duties as a general laborer including flagging, shoveling blacktop, removing trees, and putting up signs. During the winter, Grievant assisted with snow removal and ice control ("SRIC") by loading chemicals and abrasives into the plow vehicles and operating a one-ton truck with a snow plow.

3. Craft Workers are not required to have any specific formal education nor are they required to hold a Commercial Driver's License ("CDL") when they are employed by the DOH. However, a TW 1 may be required to obtain a CDL after employment. Respondent's Exhibit 1.[2]

4. Donald Wyant is a Crew Leader for the Mason County DOH section. Grievant was a flag-man for his crew a few days in the spring of 2010 and he observed Grievant on crew changes during SRIC. Grievant did all duties he was asked to do by Mr. Wyant and did not disobey any of his directives.

5. Gregory Forbes is a Crew Supervisor at the Mason County DOH section. He has been a Crew Supervisor for approximately fifteen years. Grievant worked under the supervision of Supervisor Forbes for a month shoveling blacktop. Supervisor Forbes had no problem with Grievant during this period and Grievant's work was satisfactory.

6. Shawn Huffman has been a Crew Leader for the Mason County DOH section for 10 to 15 years. During SRIC, Mr. Huffman observed Grievant inside the garage watching television during his shift while other employees were working outside. Crew Chief Huffman did not assign Grievant work to do and he did not know how long Grievant stayed in the Garage.

7. Grievant remembered the specific incident described by Crew Chief Huffman. The weather was particularly cold during that shift and the crew was taking turns coming

---

[2] *See also* West Virginia Division of Personnel Classification Specifications for the Transportation Worker 1 classification which under the heading of "Special Requirement" lists: "A valid West Virginia Motor Vehicle Operator's License is required. A Commercial Driver's License may be required after employment."

inside to get warm after loading trucks. Grievant was taking his turn when he was observed by Mr. Huffman.

8. Crew Chief Huffman testified that Grievant was a new employee and did not always know what to do. He felt it was the Crew Chief's responsibility to keep new employees busy and on task.

9. Kendal Ashworth is employed by the DOH at the Mason County Facility as a Transportation Worker 3 - Equipment Operator. During the entire time that Grievant was employed by the DOH, Kendal Ashworth was a Crew Chief

10. Kendal Ashworth was Grievant's immediate supervisor during the vast majority of the time Grievant was employed by the DOH.[3] Mr. Ashworth supervised Grievant's work closely on a daily basis during all times that Grievant was not assigned to another crew chief as set out above.

11. During all the time that Grievant worked for Kendal Ashworth, Grievant was a good worker who labored as hard as the other employees on the crew. Grievant followed instructions and did not have to be told to perform a task more than once. Mr. Ashworth had to show Grievant how to perform certain tasks properly, but once Grievant was shown the right way to do things he did them as well as the other workers.

---

[3] Mr. Ashworth specifically stated that Grievant was under his direct daily supervision for ninety percent of the time Grievant was employed by the DOH. Given the fact that Grievant worked for Supervisor Forbes for approximately a month during one period, Mr, Ashworth's estimate is probably a little high. No one disputes that Grievant was under Mr. Ashworth's close daily supervision during all times except on the rare occasions when Grievant was specifically assigned to other Crew Leaders as described in Findings of Fact 4 and 5 *supra.*

12. In late February or early March 2010, a large room had to be prepared and painted at the Mason County Facility. Mr. Ashworth and Grievant were to help two other employees scrape the floor prior to the painting and assist with the painting. On the two days that the actual painting was taking place Grievant and Mr. Ashworth were performing periodic road work tasks and were in and out of the Mason County Facility. Grievant did not help with the painting on those days and the employees who were painting complained to the DOH County Administrator, Brian Herdman.

13. Jerry Herdman was one of the employees who complained about Grievant not helping with the painting. He only worked with Grievant on one other occasion. On that other occasion the crew was shoveling blacktop and Grievant worked the same as the other employees on the crew.

14. Dewey Bryant Wroten is the Chief Mechanic at the Mason County Facility. On one occasion during SRIC he put three plows on trucks and Grievant watched him. Mr. Wroten complained to Brian Herdman that he should not have to be putting the plows on the trucks. Mr. Wroten did not attempt to show Grievant how to put the plows on the trucks.

15. DOH County Administrator Brian Herdman is the top manager at the Mason County Facility. He prepared an Employee Performance 1 ("EPA") form for Grievant on April 2, 2010. The EPA 1 document is the first step in the annual employee performance evaluation process and should be used to set out the duties and performance objectives for the employee at the beginning of the performance rating period. *See* The West Virginia Division of Personnel "Supervisor's Guide to the Performance Management and Appraisal Process" ("Supervisor's Guide"). In this form, Mr. Herdman set out

responsibilities for Grievant and listed eight general performance standards and objectives. Grievant's Exhibit 1.[4]

16. For probationary employees such as Grievant, the rating period is the six-month probationary period. On all the EPA forms Administrator Herdman completed for Grievant, he listed the rating period as December 1, 2009 through June 1, 2010.

17. On April 15, 2010, Administrator Herdman shared an EPA 2 form with Grievant. The EPA 2 is the second step in the employee performance appraisal process and should be completed near the middle of the rating period. *See* Supervisor's Guide.

18. The EPA 2 is an opportunity for the supervisor to bring performance deficiencies to the employee's attention so that the employee may have an adequate opportunity to correct the problems. *See* Supervisor's Guide. Administrator Herdman rated Grievant's performance as "does not meet expectations." Administrator Herdman listed the following comments on the EPA 2:

> **B. Performance Development Needs:**
> Needs to improve on his work ethic and housekeeping skills.
> Needs to sign up for classes that are offered to employees.
> Needs to work with others as a team and participate with all activities that are going on, and not stay to self.
>
> **C. General Comments:**
> Harold shows no interest in advancement in operating equipment or general labor skills. He was offered to sign up for mower training and skid steer training and was told several times to sign up but never did.

Grievant's Exhibit 1.

---

[4] The Supervisor's Guide indicated that the EPA 1 should be reviewed with the employee within "the first 30 days of each performance rating period."

19. Administrator Herdman completed and shared with Grievant an EPA 3 form on May 24, 2010. The EPA 3 is the third and final review step in the evaluation process for each rating period. "The purpose of the final review session is to provide employees with a formal rating of their overall job performance throughout the entire rating period and to generate information to be used as the basis for future performance planning." Supervisor's Guide. The EPA 3 requires the manager to rate the employee on a set of specific performance criteria and then come up with a composite "alpha score" that rates the employee's overall performance.

20. On the EPA 3, Administrator Herdman rated Grievant on twenty-three criteria. He scored Grievant as "meets expectations" on fourteen criteria, and "needs improvement" on nine criteria. Based upon these ratings, Grievant received a numerical score of 1.609.

21. The Key provided on the EPA 3 for determining the employees alpha score from the numerical score states the following:

| | **NUMERICAL SCORE** | | **ALPHA SCORE** |
|---|---|---|---|
| _____ | Rating of 2.51 to 3.00 | =_____ | Exceeds Expectations |
| _____ | Rating of 1.51 to 2.50 | = | Meets Expectations |
| | Rating of 1.00 to 1. 50 | = | Needs Improvement |

Grievant's numerical score of 1.609 equates to an alpha score of Meets Expectations" pursuant to the EPA 3 Key, yet Administrator Herdman gave Grievant an overall rating of "Needs Improvement."[5] Grievant's Exhibit 1.

---

[5] When asked about the discrepancy in his rating and the rating set out on the EPA 3, Administrator Herdman had no explanation beyond the possibility that he had added the numbers incorrectly. Since the EPA 3 was part of the evidence, the undersigned checked the total of the ratings made by Administrator Herdman and found that all of his calculations were correct. The only error apparent on the form was Administrator Herdman's overall rating of "Needs Improvement."

22. When Grievant was hired, he was told that he did not have to have a CDL for the job. Thereafter, Grievant was told by other employees that additional training for equipment was optional. The first time Administrator Herdman spoke to Grievant about his job performance was when he reviewed the EPA 1 with Grievant. After Mr. Herdman made it clear to Grievant that he was expected to take additional training, Grievant attempted to sign up for a training but was too late.

23. Grievant met with John McBrayer, the DOH District Engineer on May 27, 2010, and was given a DOH Form RL-546 which verifies that Grievant was given an opportunity to explain his side of why he was being dismissed from employment. Respondent's Exhibit 3.

24. Grievant was provided with a letter dated May 28, 2010, from Jeff Black, Director of the DOH Human Resources Division, informing him that his probationary employment had been terminated for "unsatisfactory performance during [his] probationary period." Respondent's Exhibit 4.

25. Director Black sent Grievant another letter dated June 9, 2010, verifying that Grievant had personally met with him to discuss the termination of his employment, but the meeting did not change the agency's decision. Respondent's Exhibit 5.

26. Administrator Herdman made his decision to recommend Grievant's dismissal based upon his limited observation and comments he said he received from the crew leaders.

## 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 services were satisfactory. *Bonnell v. W. Va. Dep't of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990). When a grievant's dismissal for misconduct is disciplinary, and the burden of proof rests with the employer, Respondent must meet that burden by proving the charges against the 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 Rule establishes 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 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); *Bauguess v. Dept. of Natural Res.,* Docket No. 2011-0410-DOC (Feb. 22, 2011).

While the threshold for termination of a probationary employee for unsatisfactory performance is low, it is not the same as an "at will" employee who may be discharged for good cause, bad cause, or no cause, unless the termination contravenes some substantial public policy. *Walker v. Dept. of Public Safety/W. Va. State Police*, Docket No. 98-DPS-056 (Sept. 11, 1998); *Wilhelm v. Dep't of Tax and Revenue*, Docket No. 94-L-038 (Sept. 30, 1994), *aff'd per curiam, Wilhelm v. W. Va. Lottery*, 198 W. Va. 93, 479 S.E.2d 602 (1996); *Harless v. First National Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978). The burden of proof rests with the employee, but if the employee proves by a preponderance of the evidence that his performance was satisfactory he must be reinstated. *Bonnell supra.*

Four Crew Leaders who are employed at the Mason County DOH Facility gave sworn testimony regarding Grievant's overall work performance. Crew Leader Shawn Hoffman stated that Grievant had never worked on his crew so he had not observed his daily work. Crew Leader Huffman did note that he saw Grievant sitting in the garage

watching television on one occasion while other employees were working outside. He did not comment on the situation to Grievant and opined that if there was a problem it was because Grievant's supervisor had not given him something to do. Grievant explained that on that particular evening the crew was on SRIC loading trucks with chemicals and it was very cold. The workers were taking turns coming inside to get warm and Crew Leader Huffman came by when Grievant was taking his turn. Crew Leader Huffman concluded his testimony by noting that he had never seen Grievant doing anything improper.

Crew Leader Donald Wyant testified that Grievant worked as a flag-man for his crew a few days in the spring of 2010 and he observed Grievant on crew changes during SRIC. Crew Leader Wyant stated that Grievant did all duties he was asked to do and did not disobey any of Mr. Wyant's directives. Crew Leader Wyant found Grievant's work performance to be satisfactory.

Gregory Forbes is a Crew Supervisor at the Mason County DOH Facility. Grievant worked under the close daily supervision of Supervisor Forbes for a month, shoveling blacktop. Supervisor Forbes had no problem with Grievant during this period and he testified Grievant's work that he observed was satisfactory.

During the vast majority of time that Grievant was a DOH employee, he worked under the supervision of Crew Leader Kendal Ashworth. Mr. Ashworth was in the position to observe Grievant's work performance on a daily basis over the entire course of his employment. Crew Leader Ashworth characterized Grievant as a good worker who labored as hard as the other employees on the crew. Mr. Ashworth noted that Grievant had previously not been doing the same type of work as the DOH crew was involved with and he had to show Grievant how to perform certain tasks properly. Once Grievant was

shown the right way to do things he did them as well as the other workers. Mr. Ashworth noted that Administrator Herdman came by their jobs occasionally to check on things and when he asked about Grievant's performance Mr. Ashworth told him that Grievant was learning and working as hard as the rest of the crew.

Ultimately, all of the Crew leaders to whom Grievant had been assigned, and who had the opportunity to observe Grievant on a daily basis, testified that his work was satisfactory and that Grievant had not done anything improper.

A fellow employee testified that Grievant would not help on a painting job to which they were both assigned. Administrator Herdman also testified that he had seen Grievant sitting and watching the other workers paint on that day. Crew Leader Ashworth noted that he and Grievant had been in and out of the building several times that day doing various tasks that needed to be done on the roads. He did not believe that Grievant could have been sitting around for long periods of times between those tasks. Also on that day, Administrator Herdman told Grievant to empty the trash. He meant for Grievant to empty all of the trash cans in the facility but Grievant only emptied the trash can that Administrator Herdman had pointed to.

In April 2010, Administrator Herdman began the evaluation process with Grievant. He noted that was the first time he had spoken with Grievant about his job performance even though Grievant was over half way through his probationary period by that time. Up to that point, no one had mentioned to Grievant that he might have to take additional training. In fact, when Grievant was initially employed he was told that he did not need a CDL. Since that time, other employees had told Grievant that additional training was optional. After Administrator Herdman made it clear to Grievant that additional training was

mandatory, Grievant attempted to sign up for a training but the forms had already been returned to the Charleston office.

On May 24, 2010, Administrator Herdman conducted the final step of the performance evaluation process for Grievant's probationary period. Mr. Herdman utilized an EPA 3 form and rated Grievant on twenty-three separate indicators. The overall rating given to Grievant by Administrator Herdman was "Needs Improvement" based upon a numerical score of 1.609. Grievant's Exhibit 1. However, a numerical score of 1.609 equates to an overall rating of "Meets Expectations." Consequently, Administrator Herdman's evaluation of Grievant's performance conducted near the end of the probation period indicated that his overall job performance was satisfactory and met expectations. There is no doubt that Grievant has improvements to make in his performance and that he needs to take additional training to be a more valuable employee for the DOH Mason County Facility. However, since all of his Crew Leaders testified that his work was satisfactory and his final evaluation performed by Administrator Herdman resulted in an overall alpha score of "meets expectations" Grievant has proven by a preponderance of the evidence that his work performance was satisfactory and the grievance is Granted.

One issue remains to be resolved and that is the Grievant's obligation to mitigate any damages he might have incurred as a result of a wrongful termination of his employment. The West Virginia Supreme Court of Appeals addressed this obligation in the case of *Mason County Bd. of Educ. v. State Superintendent of Schools*, 170 W.Va. 632, 295 S.E.2d 719 (1982). In syllabus points two and three Justice Neely wrote:

> 2. Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area,

> and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, will be deducted from any back pay award; however, the burden of raising the issue of mitigation is on the employer.
>
> 3. Wages from any job taken by a wrongfully discharged employee will be deducted from his or her back pay award whether the work taken is comparable to the work contracted for or not, if the employee's performance of the job would have been incompatible with his or her performance of the contract.

Id.

At the end of the testimony at the level three hearing, counsel for Respondent raised the issue of mitigation of damages. Counsel believed that Grievant had been working since his dismissal and, that in the event that Grievant was ultimately reinstated, Respondent requests that any back pay award be offset by those earnings. Accordingly, the issue of mitigation of damages was raised by the Respondent and must be considered. Respondent's dismissal of Grievant was not malicious. There was no evidence presented to indicate that Administrator Herdman had a nefarious intent. In fact, until his mistake was indicated at the hearing, Mr. Herdman was under the impression that the alpha score for Grievant's final evaluation was less than satisfactory.[6] Under these circumstances, Grievant is obligated to mitigate his damages. Any wages Grievant earned between the time he was released from employment and the time he is reinstated must be deducted from any back pay Grievant may receive. *See Keller v. Dept. of Highways*, Docket No. 2009-1440-DOT (Sept. 8, 2010).

---

[6] It is also noteworthy that Administrator Herdman testified that he based his decision to dismiss Grievant, to a great extent, upon complaints he had received from his crew leaders. When asked about their uniform testimony that Grievant's performance was satisfactory, Mr. Herdman refused to characterize their statements as untruthful, but surmised that they must have forgotten about their prior complaints.

## 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 services were satisfactory. *Bonnell v. W. Va. Dep't of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990). When a grievant's dismissal for misconduct is disciplinary, and the burden of proof rests with the employer, Respondent must meet that burden by proving the charges against the 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. While the threshold for termination of a probationary employee for unsatisfactory performance is low, it is not the same as an "at will" employee who may be discharged for good cause, bad cause, or no cause, unless the termination contravenes some substantial public policy. *Walker v. Dept. of Public Safety/W. Va. State Police*, Docket No. 98-DPS-056 (Sept. 11, 1998); *Wilhelm v. Dep't of Tax and Revenue*, Docket No. 94-L-038 (Sept. 30, 1994), *aff'd per curiam, Wilhelm v. W. Va. Lottery*, 198 W. Va. 93, 479 S.E.2d 602 (1996); *Harless v. First National Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978). The burden of proof rests with the employee, but if the employee proves by a preponderance of the evidence that his performance was satisfactory he must be reinstated. *See Bonnell supra.*

3. Grievant proved by a preponderance of the evidence that his work performance during his probationary period was satisfactory.

4. "Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, will be deducted from any back pay award; however, the burden of raising the issue of mitigation is on the employer. Wages from any job taken by a wrongfully discharged employee will be deducted from his or her back pay award whether the work taken is comparable to the work contracted for or not, if the employee's performance of the job would have been incompatible with his or her performance of the contract." *Syl. pts.* 2 & 3, *Mason County Bd. of Educ. v. State Superintendent of Schools*, 170 W.Va. 632, 295 S.E.2d 719 (1982); *Keller v. Dept. of Highways*, Docket No. 2009-1440-DOT (Sept. 8, 2010).

5. Respondent properly raised the issue of mitigation of damages at the level three hearing and the wrongful discharge of Grievant from employment was not malicious. Grievant was obligated to mitigate any damages he may have incurred as a result of the wrongful discharge. *Keller v. Dept. of Highways*, Docket No. 2009-1440-DOT (Sept. 8, 2010).

Accordingly, the grievance is GRANTED and the Respondent DOH is ORDERED to reinstate Grievant Birchfield to full-time employment with back pay and benefits back to the date he was dismissed. Any wages Grievant earned between the time he was initially dismissed and the time he is reinstated shall be deducted from the back pay award.

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 5, 2011.**

_____
**WILLIAM B. MCGINLEY**
**ADMINISTRATIVE LAW JUDGE**