THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ELISA MARIE HUGHES,
Grievant,

v. **DOCKET NO. 2011-1071-MAPS**

DIVISION OF VETERAN'S AFFAIRS,
Respondent.

DECISION

Grievant, Elisa Marie Hughes, filed this grievance against her former employer, the Division of Veteran's Affairs, at level three of the grievance procedure, on February 2, 2011, contesting the termination of her probationary employment for unsatisfactory performance. As relief Grievant sought, "[t]o have no adverse information in my personnel file, to have the right to apply later for positions at the WVVNF, and be able to work at the WVVNF through USNN."

A level three hearing was held before the undersigned Administrative Law Judge on June 14, 2011, in the Grievance Board's Westover office. Grievant represented herself, and Respondent was represented by Mary M. Downey, Assistant Attorney General. This matter became mature for decision on July 14, 2011, the deadline for submission of written argument. Grievant chose not to submit written argument.

Synopsis

Grievant was dismissed from her probationary employment as a Nurse Supervisor at the Veterans Nursing Home because of her excessive absenteeism and failure to attend scheduled weekly meetings. During her 3 ½ months of employment, Grievant called off

work 10 ½ days. Grievant's position had to be filled by another Nurse Supervisor working a double shift, or by a contract nurse when Grievant was not there. It was critical for Grievant to report to work as scheduled. Respondent could not depend on Grievant to report to work as scheduled and fulfill her duties as a supervisor. Grievant did not demonstrate that her performance was satisfactory as a probationary employee. Grievant did demonstrate that it was improper for Respondent to withhold severance pay when Grievant chose not to report to work after she was notified of her dismissal.

The following Findings of Fact are made based upon the record developed at level three.

Findings of Fact

1. Grievant began her employment as a Nurse III ("Nurse Supervisor") with the Division of Veteran's Affairs ("DVA"), at the West Virginia Veterans Nursing Facility in Clarksburg, West Virginia, on October 1, 2010. She was hired as a probationary employee, with a six-month probationary period. Grievant worked as the supervisor of nursing on the 11:00 p.m. to 7:00 a.m. shift.

2. Grievant was absent from work on October 19, 26, and 27, November 29, and 30, and December 29 and 30, 2010, and January 5, 6, and 7, 2011, and one-half of the day on November 6, 2010. For some of these absences she submitted a doctor's excuse.

3. As a Nurse Supervisor, when Grievant was absent, either the other Nurse Supervisors would have to cover her shift at the last minute, resulting in them working double shifts, or an agency nurse would have to be hired to cover her shift, at the rate of $300 for an eight hour shift. When Grievant did not report to work as scheduled it created

a hardship for the facility. Good attendance is important in this position, and Grievant had been made aware of this.

4. On October 25, 2010, Margie Brown, Director of Nursing at the Veterans Nursing Facility, sent an email to Grievant and the other Nurse Supervisors advising them that there would be weekly "QI/QM" meetings every Monday morning "to discuss clinical Quality Indicators and Quality Measures." Subjects to be discussed at these meetings were listed as "[r]estraints, falls, weights, wounds, incontinence, declining ADLS and med errors." These were critical care issues at the facility. The email stated, "[e]veryone receiving this email should make every effort to attend this meeting weekly."

5. Grievant did not attend any QI/QM meetings.

6. Grievant did not attend a mandatory in-service training session on January 11, 2011, regarding "Reporting and Investigating Allegations of Abuse, Neglect and Theft," because she had a high fever.

7. By letter dated January 19, 2011, Grievant was advised that she was being dismissed for unsatisfactory performance, effective February 3, 2011. Grievant was given 15 days' notice, and she was to continue to work at the Facility through February 3, 2011. The letter states that Grievant's unsatisfactory performance was related to her poor attendance record.

8. Grievant did not wish to continue to work at the facility after she received her dismissal notice, and at some point shortly after January 19, 2011, she turned in her keys and did not report to work. She was paid only for 2 days out of the 15 days from January 19 through February 3, 2011, because she did not report to work during this period.

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 Corrections*, Docket No. 89-CORR-163 (Mar. 8, 1990). Grievant "is required to prove that it is more likely than not that [her] services were, in fact, of a satisfactory level." *Bush v. Dep't of Transp.*, Docket No. 2008-1489-DOT (Nov. 12, 2008).

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 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).

While Respondent acknowledged that Grievant did her job well when she came to work, the problem was that she frequently called off work at the last minute. Grievant testified that on at least three occasions this was due to illness, and that she had submitted a doctor's excuse, and on one occasion she went home with what she described as a migraine headache. She did not explain the reasons for her remaining seven absences. Grievant was in a critical supervisory position, and her position had to be filled for the safety of the residents, whether Grievant reported to work or not. While Grievant may have been able to fill some less critical position, it is clear that Respondent could not count on Grievant to fulfill her duties as a supervisor, and that Respondent needs someone in that position who will report to work as scheduled. Grievant further demonstrated a disregard for the needs of the facility by her failure to attend *any* of the QI meetings. Grievant testified that she and another Nurse Supervisor were told they could alternate attendance. Assuming this to be true, Grievant did not attend every other meeting either. Grievant did not demonstrate that her performance was satisfactory.

The only remaining issue is whether Grievant should be paid for the remaining days during her notice period, after she turned in her keys and refused to report to work. Respondent argued that Grievant had abandoned her position, and was not entitled to severance pay. Grievant stated that she felt very uncomfortable about returning to work after she had been fired, and pointed out that the Division of Personnel's Rules state that the employee cannot be required to work after being notified that they are being dismissed.

Grievant is clearly correct. While Respondent is correct that an employee who abandons her job is not entitled to severance pay, Respondent's argument that Grievant abandoned her position after her dismissal is specious.

The Division of Personnel's Rule 12.2 provides with regard to the 15-day notice period, as follows:

> (b) An appointing authority may require that an employee dismissed for cause immediately vacate the workplace, or an employee dismissed for cause may elect to do so. If the appointing authority requires a dismissed employee to immediately vacate the workplace in lieu of working during the notice period, or if an employee who receives notice of dismissal for cause elects to immediately vacate the workplace, the employee is entitled to receive severance pay attributable to the time he or she otherwise would have worked, up to a maximum of fifteen calendar days after vacating the workplace. Receipt of severance pay does not affect any other right to which the employee is entitled with respect to the dismissal.
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> (c) An appointing authority may dismiss an employee for job abandonment who is absent from work for more than three consecutive workdays without notice to the appointing authority of the reason for the absence as required by established agency policy. The dismissal is effective fifteen calendar days after the appointing authority notifies the employee of the dismissal. Under circumstances in which the term job abandonment becomes synonymous with the term resignation, an employee dismissed for job abandonment is not eligible for severance pay.

An employee is not required to work during the 15-day notice period after she has been notified of her dismissal. Grievant chose not to work after being notified of her dismissal, but was paid for only two days. She is entitled to payment for the remaining days.

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).

2. The Division of Personnel's Administrative Rule 143 C.S.R. 1 § 10.5(a), 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).

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

4. An employee who is dismissed is not required to report to work during the 15-day notice period. 143 C.S.R. 1 § 12.2.

5. Grievant demonstrated that Respondent was required to pay her for the days she chose not to report to work during the 15-day notice period.

Accordingly, this grievance is **GRANTED IN PART, AND DENIED IN PART**. Respondent is **ORDERED** to pay Grievant her salary for the days during the 15-day notice period after she received notice of her dismissal, less the 2 days for which she was paid, including any additional pay for any annual leave accrued during the 15-day notice period for which Grievant has not been previously paid. The remainder of the grievance is **DENIED**, and Grievant will not be reinstated to her position with Respondent.

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: July 29, 2011