WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MICHAEL WILLIAM BAUGESS,
Grievant,

v. **Docket No. 2011-0410-DOC**

DIVISION OF NATURAL RESOURCES,
Respondent.

DECISION

Grievant, Michael William Baugess filed a grievance against his employer, Division of Natural Resources, on September 7, 2010. Grievant alleges he was wrongfully terminated. His relief sought is, "I want my job back and this 'misunderstanding' off my records. I am pursuing my education in wildlife management and will be applying for a state job in the future."

A level three hearing was held at the Grievance Board's Beckley office on November 17, 2010.[1] Grievant appeared *pro se*, and Respondent was represented by William R. Valentino, Assistant Attorney General. This case became mature for decision on December 15, 2010, upon Respondent's submission of proposed findings of fact and conclusions of law.[2]

Synopsis

Grievant was a probationary employee working at Pipestem Resort State Park. Respondent asserts Grievant produced a falsified return to work slip purportedly from his physician stating Grievant could only return to light duty. Respondent terminated Grievant.

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[1]Pursuant to W. VA. CODE § 6C-2-4 (a) (4) Grievant waived levels one and two and appealed his dismissal directly to level three.

[2]Grievant chose not to submit proposed findings of fact and conclusions of law.

Grievant avers he knew he was allowed to return to work at full capacity, but his mother, concerned for his health, wrote the portion concerning light duty on the return to work slip. Grievant argues he did not review the return to work slip before providing it to his employer, and therefore, did not know the light duty information had been added.

This grievance is DENIED.

Findings of Fact

1. Grievant was hired by Respondent as a Groundskeeper at Pipestem Resort State Park on or around November 23, 2009. At all times relevant to this grievance, Grievant was a probationary employee. As a Groundskeeper, Grievant's job requires Respondent trust him.

2. Grievant worked up to March 19, 2010.

3. On March 22, 2010, Grievant did not appear for work, but called in and advised he would be off work due to health problems.

4. On March 25, 2010, Grievant faxed a doctor's excuse to Tammy Mansfield, Administrative Services Assistant. The doctor's excuse stated Grievant would be off work from March 20, 2010 until March 27, 2010.

5. Ms. Mansfield received a second doctor's excuse stating Grievant would be off work from March 28, 2010 until March 30, 2010.

6. On April 9, 2010, Grievant had still not returned to work, and Superintendent David W. Caplinger sent Grievant a letter advising him that he had exhausted all available leave. Superintendent Caplinger's letter explained that Grievant, as a probationary employee, was not eligible for a medical leave of absence, but was eligible for a personal

leave of absence. Superintendent Capliner also included forms for the Leave Donation Program. Grievant did not respond to the letter.

7. On May 20, 2010, Grievant called and spoke to Ms. Mansfield's secretary asking that Respondent provide him with documentation stating there was no light work available. Respondent needed a doctor's excuse explaining Grievant could not return to full duty.

8. On July 22, 2010, Grievant faxed a work excuse to Ms. Mansfield stating that he had surgery on May 12, 2010 and may return to work on August 9, 2010. The word "Light" was written in the restrictions section. Ms. Mansfield became suspicious of the document because the word "Light" appeared in a different handwriting than the rest of the excuse. Another anomaly was that it appeared as if someone had used white out in the restrictions section because part of the line was missing where the word "Light" was written.

9. Ms. Mansfield sent a request to Grievant's physician asking that he verify Grievant was to return to work with light duty.

10. The nurse who works for Grievant's physician checked Grievant's medical file and informed Ms. Mansfield that Grievant was allowed to return to work at full duty and no one in the office had written the restriction of light duty. The nurse conveyed that Grievant had requested light duty, but was told the physician would not do that.

11. On August 9, 2010, Superintendent Caplinger and Nathan Hanshaw, Assistant Superintendent, met with Grievant concerning his work excuse. Grievant told the supervisors that his mother probably changed the wording. Superintendent Caplinger

informed Grievant he was suspended indefinitely pending an investigation and that the Superintendent was recommending Grievant's dismissal for falsifying medical records.

12. A predetermination meeting was held with Grievant, and on August 24, 2010, Grievant was terminated for knowingly allowing a false document to be created and having willfully and deceivingly presented this false document to support a return to work on light duty.

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). 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 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).

Respondent terminated Grievant for misconduct in willfully presenting a falsified document to gain a benefit to which he was not entitled. Therefore, Respondent bears the burden in this matter.

Grievant is not contesting that the light duty representation on the return to work slip was placed there by someone other than his physician. Grievant argues his mother wrote it on there. Grievant testified that his mother routinely believed he would overdo working and that would put a strain on his health. Therefore, Grievant believes she wrote "Light" in an effort to remind him to take it easy. When questioned about the missing lines that

looked like white out had been used, Grievant testified his mother probably used white out because he did not have restrictions. This particular portion of Grievant's testimony is troubling, in that if there was nothing written in the blank portion, there would be nothing to delete. Grievant's logic on this issue is nonsensical.

Nothing in Grievant's testimony or argument explained why Grievant presented the return to work slip with the "Light" restriction. Grievant, at some point, asserted he did not know that his mother had written "Light" in the restriction. It is Grievant's responsibility to ensure that he submits a proper return to work slip.

Grievant submitted a return to work slip where the "Light" restriction was not placed on there by his physician. It is clear when looking at the slip, along with the testimony of Ms. Mansfield, that Grievant submitted a falsified document in an attempt to obtain a benefit, in this case light duty assignments, to which he was not entitled. Respondent has met its burden in this matter. Therefore, this grievance is DENIED.

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). 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 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. Respondent bears the burden of proof in this matter.

3. The Division of Personnel's Administrative Rules 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).

4. 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 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).

5. Respondent has met its burden 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: February 22, 2010

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Wendy A. Elswick
Administrative Law Judge