WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ARTHUR TEETS,
Grievant,

v. **Docket No. 2012-0180-DEA**

DIVISION OF REHABILITATION SERVICES,
Respondent.

D E C I S I O N

Grievant, Arthur Teets, filed this grievance against his employer the West Virginia West Virginia Division of Rehabilitation Services ("DRS"), Respondent, on August 16, 2011. Grievant protests his dismissal from employment by Respondent for unsatisfactory work performance during his probationary period. The grievance statement provides "Termination without good cause." For relief Grievant requests, "[t]o be made whole, including all back pay with interest & benefits restored."

As authorized by W. VA. CODE § 6C-2-4(a)(4), the grievance was filed directly to level three of the grievance process. Level three proceedings were duly set, however, continuances were requested and granted for cause.[1] Ultimately, a level three hearing was held before the undersigned Administrative Law Judge on June 27, 2012, at the Grievance Board's Charleston office. Grievant appeared in person and was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by Katherine A. Campbell, Assistant Attorney General. This matter became

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[1] A continuance had been granted pursuant to the illness of a crucial witnesses, and the representation that the parties were poised for settlement. However, after further negotiations, no settlement was reached by the parties, and this matter was once again set for hearing.

mature for decision on July 31, 2012, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

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 and/or his dismissal was unlawful. Grievant's direct supervisor(s) who monitored Grievant's work on a regular basis established that Grievant's work quantity was below the standard by which Respondent measures disability evaluation specialists (Grievant's job classification). Grievant was aware and acknowledges the production standards of the position. Grievant is of the opinion an exception is warranted.

Probationary employees may be dismissed at any time for unsatisfactory job performance. Grievant did not demonstrate that his performance was satisfactory as a probationary employee. Grievant failed to establish that he should not have been dismissed. It was within Respondent's discretion to dismiss Grievant from probationary employment. This 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 as a probationary disability evaluation specialist (examiner) trainee on September 16, 2010, by the Disability Determination Section (DDS) in Clarksburg, West Virginia with the Division of Rehabilitation Services, Respondent.

2. At all relevant times to this matter, Grievant was in a trainee position on probation.

3. A probationary period is a trial work period designed to allow an 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. *See* Administrative Rules of the West Virginia Division of Personnel (DOP) 143 C.S.R. 1 § 10.1(a).

4. At the time relevant to this grievance, Pauline Collins ("Collins") was employed as the Rehabilitation Office Supervisor, assigned to the Trainee Unit. She supervised trainees along with examiners.

5. Collins had been the Training Lead since 2007, prior to taking the position of Rehabilitation Office Supervisor, which she assumed in August 2010. As the Training Lead, Collins had multiple years of experience training new examiners, known as "trainees," prior to assuming her responsibilities of Rehabilitation Office Supervisor.

6. Pauline Collins was promoted to supervisor of the training unit, to which Grievant was assigned in August 2011. The training unit supervised by Collins was organized differently than previous methods of training new hires, with a lower ratio of veteran examiners assigned to the same unit as the trainees and a lesser number of experienced examiners readily available.

7. Collins modified and added to a development worksheet to be used by trainees as a tool in performing case development. (G Ex. 3) Use of the development worksheet was encouraged, but not required. The training protocol which started with

classroom work on October 4, 2010, ending on December 13, 2010. A final examination was administered on December 15, 2010.

8. Trainees, including Grievant, were given cases on November 8, 2010. The caseload begins with only a few cases and then continues to increase over the probationary period.

9. Trainees are subjected to a quality assurance review for 50% of developed cases, and Grievant achieved an accuracy rating of at least 94%.

10. The quality of Grievant's work was good; however, his quantity was not meeting production goals desired by Respondent.

11. Collins created "to-do" lists in order to assist Grievant in managing his caseload; however, Grievant struggled with time management and meeting the production goals.

12. Collins counseled Grievant numerous times regarding his failure to meet the production goals. Collins documented that Grievant was failing to meet the production standards in both his Employee Performance Appraisals in January and March 2011. (R. Ex. 2 and 3)

13. On April 22, 2011, the Grievant was placed on a Performance Improvement Plan in order to permit him to meet production goals. At the time of the implementation of this Plan, Collins and another examiner cleaned up all of Grievant's pending cases so that Grievant could begin anew with his cases with no pending actions. R. Ex. 4.

14. Grievant is of the opinion that he received "very little" one-on-one mentoring.

15. Grievant failed to achieve the quantity of case work Respondent specified as appropriate. The quality of Grievant's work product was not identified by Respondent as

an issue of concern. Respondent objected to the quantity of Grievant's work product, the amount of cases completed by Grievant.

16. Supervisor Collins recommended Grievant's dismissal.

17. Grievant was of the opinion that, if given more time, he could have met the target quotas for quantity of cases developed.

18. Earl Langley, Area Administrator, also Pauline Collins' supervisor was consulted on actions taken by Collins pertaining to Grievant.

19. When Collins met with Grievant in the pre-determination meeting, along with Earl Langley, Area Administrator, and Steven Phillips, friend of Grievant's, Grievant was not surprised by the dismissal action. Grievant acknowledged that he had been unable to meet production goals.

20. The Disability Determination Section (DDS) of DRS is fully funded by the federal government. The DDS is responsible for making determinations of social security disability eligibility. As such, there are time limitations for processing cases along with production goals that are set for the federal government.

21. Grievant offered explanation for his failure and/or slowed down ability to meet production goals at the pre-determination meeting.

22. Grievant was ultimately dismissed from his position via letter dated August 15, 2011. G. Ex. 2.

23. Donna Morgan is a senior examiner in the five-member Quality Assurance ("QA") unit of Clarksburg DDS. As a QA examiner who had 'qualified' knowledge of Grievant's work, Morgan described it as "thorough," "correct," "excellent," and "complete."

Ms. Morgan was of the opinion that the quality of Grievant's work was superior to some individuals working for Respondent.

24. Jean Burnworth, QA examiner in the Clarksburg office with eighteen years tenure at the agency, who also had 'qualified' knowledge of Grievant's case development, described Grievant's work product by saying that he did an "excellent job, very thorough." Comparing Grievant's work to some regular examiners, Burnworth was of the opinion that Grievant produced quality, reliable work product.

25. Three witnesses from the Quality Assurance Section who testified that Grievant was a really "nice" person and his quality of work was good. The witnesses who testified regarding the quality of Grievant's work product, had little knowledge of Grievant's production goals nor did they work with him on a daily basis. None were supervisors in Grievant's chain of command.

26. Thirty-two DDS employees in Clarksburg signed an August 16, 2011, petition asking Respondent to reconsider Grievant's nonretention. G. Ex. 1.

30. Collins, Grievant's supervisor, checked Grievant's work product on a routine basis prior to it being reviewed by Quality Assurance. Grievant did not maintain identified and duly recognized production "quantity" standards.

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).

Quantity (i.e. production goals), along with quality, were part of the requirements of the Grievant's position. The quality of Grievant's work product is not at issue. During his pre-determination conference Grievant admitted that production standards, which are related to federal government guidelines, were not met by him. Grievant did not demonstrate that his work performance was satisfactory during the probationary period.

None of Grievant's complaints about his supervisor demonstrate that Grievant's performance was satisfactory. Nor is it established that Supervisor Collin's training procedure is the reason that Grievant is unable to achieve the desired production goals. It was opined that Supervisor Collin's training procedure was different than the prior supervisor. This may be true, however, said information doesn't mandate a change in agency standard or require Respondent to employ Grievant. It is not established that Supervisor Collins training methods are inadequate. It is clear that Grievant is well-liked by co-workers. He is, for all practical purposes, a good person. Grievant, as well as a significant number of Respondent's employees, believe Grievant would make a fine disability evaluation specialist. Regrettably, the agents of Respondent with authority to determine Grievant's employment status do not concur and/or are unwilling to give Grievant the amount of time necessary for him to achieve the proficiency required to accomplish the production standard deemed acceptable.

In summation, Grievant has not established, by a preponderance of the evidence, that his performance during the probationary period was satisfactory. Nor can it be said that the decision of the Respondent was unreasonable. The facts indicate that the Grievant had a difficult time consistently meeting the applicable production standards of his probationary position. *Respondent had options in the circumstance(s) of this matter,* nevertheless Respondent chose not to retain the services of Grievant. (Emphasis added) Relevant Division of Personnel's Administrative Rule discusses a probationary period of employment 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). Respondent's determination to not hire Grievant is well within its recognized range of discretion and authority. Grievant failed to establish that he should not have been dismissed.

The following conclusions of law are appropriate in this matter:

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).

2. WV Division of Personnel's Administrative Rule describes the probationary period of employment. The time period is to be used to evaluate the employee and to

dismiss those employees that are unable to meet the requirements of the position (i.e. work is unsatisfactory) at any time during the probationary period. *See* W. Va. Code R. 143-1-10.

3. 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).

4. A probationary employee may be dismissed at any point during the probationary period that the employer determines that his services are unsatisfactory. 143 C.S.R. 1 § 10.5(a).

5. Grievant did not demonstrate that his performance was satisfactory during his probationary period.

6. Grievant has failed to prove, by a preponderance of the evidence, that his performance was satisfactory and that he should not have been dismissed.

7. It was within the employer's discretion to dismiss him from probationary employment.

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: November 30, 2012

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Landon R. Brown
Administrative Law Judge