THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

BRANDON JAMES ROY,
Grievant,

v. **DOCKET NO. 2012-0950-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Brandon James Roy, filed this grievance against his former employer, the Division of Highways, at level three of the grievance procedure, on February 2, 2011, contesting the termination of his probationary employment for unsatisfactory performance. As relief Grievant sought, "phone call with Jeff Black." At the level three hearing, Grievant clarified that he wanted to be reinstated to his position.

A level three hearing was held before the undersigned Administrative Law Judge on September 10, 2012, in the Grievance Board's Westover office. Grievant appeared *pro se*, and Respondent was represented by Jason C. Workman, Esquire, Attorney, Legal Division, Department of Transportation. This matter became mature for decision on October 12, 2012, the deadline for submission of written argument. Grievant chose not to submit written argument.

Synopsis

Grievant was dismissed from his probationary employment as a Transportation Worker I because of unsatisfactory performance. Grievant did not demonstrate that his performance was satisfactory as a probationary employee.

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

Findings of Fact

1. Grievant began his employment with the Division of Highways ("DOH") on August 22, 2011, as a Transportation Worker I. He was hired as a probationary employee, with a six-month probationary period, and worked in Mineral County in District 5. Grievant's main duties were flagging traffic, and doing general laborer duties, such as putting out signs and cleaning out ditches.

2. Grievant's employment was terminated effective March 8, 2012, for unsatisfactory job performance. His probationary period was extended for 14 days in order to allow for the 15-day notice of termination. More specifically, Grievant was not retained because of excessive use of his cell phone when he was assigned to flagging duties, and for failure to perform the assigned work.

3. Grievant's supervisor was Kevin McRobie, a Foreman. During the six months that Grievant worked for DOH, Mr. McRobie told Grievant several times not to use his cell phone while he was working, but Grievant continued to use his cell phone during work time, including when he was performing flagging duties. On November 14, 2011, Grievant was using his cell phone while flagging, and Mr. McRobie told him several times that he was not to use his cell phone while flagging. On December 12, 2011, Mr. McRobie caught Grievant texting on his cell phone while he was performing flagging duties. Again on December 14, 2011, Grievant was using his cell phone while flagging, and Mr. McRobie told him several times to move away from the truck and put his phone away.

4. Don Wilson, District 5 Safety and Compliance Officer, provides instruction to employees on proper flagging techniques. Mr. Wison explained that it is important that employees focus their attention on their duties when flagging, because the flagger is charged with keeping the work zone safe and the flagger needs to give the traffic his full attention. He instructs employees that they are not to be talking on their cell phones while they are performing flagging duties, and they are not to sit in the truck while flagging, unless it is a moving construction site.

5. Mr. Wilson was conducting a field crew inspection on November 15, 2011, and observed Grievant playing with his cell phone while he was flagging. He told Grievant to put the cell phone away, and Grievant did so. Later that day, Grievant was walking back to where he would resume his flagging duties and he was again looking at his cell phone, oblivious to the dangers of the traffic passing by.

6. Mr. McRobie also had difficulty getting Grievant to focus on duties other than flagging. On September 19, 2011, Mr. McRobie asked Grievant several times to assist with cutting brush, but Grievant would stop working and talk to a co-worker, Joe Smith. On November 3, 2011, Grievant was shoveling hot mix. Grievant stopped working several times so that he could talk to Mr. Smith. On November 16, 2011, Grievant was sitting in a truck while other employees were working. When Mr. McRobie told him to get out of the truck and perform flagging duties, Grievant responded that no one had told him what to do. Mr. McRobie had told all the employees their assignments that morning.

7. On a few occasions Grievant worked on a crew supervised by Timothy Jones, Senior. On one occasion when Mr. Jones had assigned Grievant to flagging duties, Mr. Jones drove by the location where Grievant was supposed to be working and observed

Grievant sitting in the truck talking on his cell phone. Mr. Jones told Grievant he needed to be out in the road performing his flagging duties. Later that day Mr. Jones again observed Grievant sitting in the truck talking on his cell phone rather than performing his flagging duties.

8. On one occasion Grievant was assigned to work for Michael Paugh, a Crew Supervisor I in Mineral County, on an orphan road project. Mr. Paugh asked Grievant to assist a temporary employee who was cleaning out a pipe. Mr. Paugh observed that, rather than doing the assigned task, Grievant continually returned to the truck where the flagger was, and he could not keep Grievant focused on the task at hand.

9. On another occasion when Grievant was working for Mr. Paugh as a flagger, Grievant allowed three cars to come through the work area when he was supposed to be stopping traffic and having the cars wait until it was safe. When the flagger on the other end tried to contact Grievant to inquire as to what was going on, he could not raise Grievant on the radio. Mr. Paugh went to check to see why this had occurred and found Grievant sitting in a pick-up truck instead of standing out in the road performing his flagging duties.

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 on 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 his 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).

Grievant admitted that he had used his cell phone while on the job, but denied that this had occurred frequently, and stated that he had put his phone away when told to do so. Grievant opined that Mr. McRobie had treated him differently from other employees, in that other employees were allowed to sit in the truck when it was cold, while he was told

he had to remain outside the truck to perform flagging duties. Mr. McRobie and Mr. Wilson explained that if the operation is a moving operation, then the employee can sit in the truck while flagging. Grievant also stated that Mr. McRobie had yelled at him and called him a pussy, which Mr. McRobie denied. Grievant complained that Mr. McRobie had not told him what he was to do or how to perform his duties, and had yelled at him in front of other employees and taken a shovel out of his hands and shown him how to use the shovel. Grievant thought there was only one way to use a shovel and did not understand the purpose of the demonstration or appreciate it.

None of Grievant's complaints about Mr. McRobie demonstrate that Grievant's performance was satisfactory. It is clear that Grievant and Mr. McRobie did not get along, but it is also clear that Grievant did not take his probationary period seriously. The probationary period was Grievant's opportunity to demonstrate that he was a good worker, which he did not do.

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 on 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 his performance was satisfactory during his probationary period.

Accordingly, this grievance is **DENIED.**

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
Acting Deputy Chief
Administrative Law Judge

Date: November 15, 2012