THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

FAN ZHANG,
Grievant,

v. **DOCKET NO. 2013-0777-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR PUBLIC HEALTH,
Respondent.

DECISION

Grievant, Fan Zhang, filed this grievance on November 14, 2012, against Respondent, Department of Health and Human Resources ("DHHR"), Bureau for Public Health, challenging her employer's decision to terminate her employment as a Data Analyst 2 for the Division of Infectious Disease Epidemiology ("DIDE") at the end of her six-month probationary period. As permitted by W. Va. Code § 6C-2-4(a)(4), this grievance was submitted directly to Level Three where a hearing was held before the undersigned Administrative Law Judge on May 13, 2013, in Charleston, West Virginia. Grievant was represented by Gordon Simmons with UE Local 170 of the West Virginia Public Workers Union. DHHR was represented by Assistant Attorney General Michael Bevers. This matter became mature for decision on June 25, 2013, upon receipt of post-hearing arguments from all parties.

Synopsis

Grievant began her employment with Respondent DHHR in May 2012 as a probationary Data Analyst 2 working in DIDE. On November 5, 2012, before the

expiration of her six-month probationary period, Grievant's employment was terminated based upon a determination that she had not made a satisfactory adjustment to the demands of the position, and that she was not performing her duties in accordance with established standards. Grievant was not able to establish by a preponderance of the credible evidence of record that her work performance was satisfactory so as to require Respondent to continue her employment beyond her probationary period. Therefore, this grievance must be DENIED.

The undersigned Administrative Law Judge makes the following Findings of Fact based upon the record developed at the Level Three hearing.

Findings of Fact

1. At the time of the events which are the subject of this grievance, Grievant was employed by the West Virginia Department of Health and Human Resources ("DHHR") as a probationary Data Analyst 2 in the Division of Infectious Disease Epidemiology ("DIDE"), which is part of the Office of Epidemiology and Prevention Services ("OEPS") in the Bureau for Public Health ("BPH").

2. Grievant's probationary employment in DIDE began on or about May 15, 2012.

3. Grievant's job duties as a Data Analyst 2, as set forth in the functional job description attached to her EPA-1 issued on August 9, 2012, included the following:

> **Data Analyst II**
> **Division of Infectious Disease Epidemiology (DIDE)**
>
> Description:
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> Under limited supervision from the ELC Epidemiologist, and in collaboration with other professional staff, the Data Analyst II (DAII) has core

responsibility for independently maintaining and managing the infectious disease surveillance system. The employee is expected to ensure that surveillance information is appropriately collected and managed, correctly analyzed, and promptly disseminated. Quality and timeliness of surveillance information is essential.

Core Responsibilities:

1. Complete organization and oversight of surveillance for infectious diseases for the State of West Virginia, including referral of cases and laboratory reports for investigation by local health departments, collection of laboratory an investigation data; referral to the appropriate staff member for investigation, case ascertainment, and review of data completeness and validity. Data systems include: the NETSS system[,] WVDESS, and Influenza surveillance. Due to the rapidly changing and evolving nature of infectious disease epidemiology, these systems routinely change and grow; and the employee must maintain flexibility in management of these surveillance systems, and the development of new systems to manage surveillance for new diseases.

2. Manages reporting of infectious diseases in a state report on communicable disease, to include: guiding and organizing staff in 'closing out' the previous year's data, organizing a plan for the data report, development of a population file for analysis of data, development of a plan for data analysis, planning for presentation of data effectively using graphs, tables and maps; collaboration with other professional staff in analysis and organization of data and information in the report; organization, editing and formatting of the final report; and oversight and proving of publication.

3. Systematically organizes the development, production, and regular (monthly) dissemination of disease reports to local health departments and other partners. Collaborates with other professional staff on revisions and updates to the monthly disease report on a periodic basis, e.g. Epi-log.

4. Response to special and other surveillance data requests from persons in transit and extrinsic to DHHR; coordinate and serve as a liaison between DIDE and county, state and/or federal entities as well as the public while assuring compliance with surveillance regulations and standards. Reviews results with appropriate professional staff person prior to release of information.

> 5. Develops and reviews policy for maintenance of electronic and paper records of disease investigation activities. Reviews policy periodically with other professional staff and BPH staff attorney. Maintains disease records according to policy.
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> 6. Leads surveillance projects and provides consultation and technical assistance, trainings, and lectures for other professional staff.
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> 7. Attends meetings, conferences, and trainings relevant to infectious disease surveillance and applies knowledge and skills learned.
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> 8. Participation in emergency response.
>
> 9. Other duties as assigned.

DHHR Ex 1 (emphasis in original).

4. Grievant's immediate supervisor was Leena Anil, Ph.D. ("Dr. Anil"), an Epidemiologist 2, who began her employment with DHHR on May 1, 2012. Dr. Anil previously worked in the department of health for the State of Florida.

5. Maria del Rosario, M.D. ("Dr. del Rosario") has been working for DHHR since 2005 as the Director of Surveillance in DIDE. Dr. del Rosario was Grievant's second-level supervisor.

6. During the first few months of Grievant's employment, Dr. del Rosario, Dr. Anil, and Grievant would usually meet weekly to discuss pending projects and work that needed to be accomplished, among other subjects.

7. Grievant has a Master of Public Health degree from Drexel University and an undergraduate bachelor of science degree in biology.

8. Grievant received a structured orientation and training program during her first two or three months as a new DIDE employee. *See* DHHR Exs 5 & 6.

9. Approximately one month after Grievant began working in DIDE, she and Dr. Anil attended a training program entitled "Developing Public Health Computer Systems Using Epi Info 7 Course" presented by The Centers for Disease Control and Emory University in Atlanta, Georgia, from June 21 through 25, 2012.

10. Between June and August 2012, Grievant completed Level 2 and 3 training in Access, Level 4 training in PowerPoint, and Level 5 and 6 training in Excel, conducted by the West Virginia Office of Technology.

11. During the first five months of Grievant's employment as a Data Analyst 2, Dr. Anil and Dr. del Rosario encountered multiple situations where Grievant experienced difficulty completing assignments in a timely manner or understanding the specific requirements of the work assigned by her supervisors. *See* DHHR Ex 4.

12. On October 25, 2012, Grievant attended a scheduled meeting with Dr. Anil, Dr. del Rosario, Dr. Hardy and Crystal Lowe, an Administrative Services Worker 3 who serves as Human Resources Coordinator for OEPS. This meeting served as a predetermination conference for Grievant's dismissal. *See* DHHR Ex 8.

13. On November 5, 2012, Dr. Marian L. Swinker, BPH Commissioner and State Health Officer, issued written notice of Grievant's dismissal, which notice included the following statements pertinent to this grievance:

> The purpose of this letter is to inform you of my decision to dismiss you from your employment as a Data Analyst II with the West Virginia Department of Health and Human Resources, Bureau for Public Health, Office of Epidemiology and Prevention Services (OEPS), Division of Infectious Disease Epidemiology (DIDE). This action complies with Division of Personnel Administrative Rule, Section 12.2 and provides for the required fifteen (15) calendar day notice period. Your period of probationary employment will be extended to accommodate the timing of this dismissal

in accordance with Section 10.5 Of the Administrative Rule and you will not achieve permanent employment status.

Although the dismissal will not be effective until November 20, 2012 after one hour, as authorized by West Virginia Code Chapter 29-6-10(12), I am requiring your immediate separation from the work place. Therefore, you will be paid for one hour on November 5, 2012 and up to a maximum of fifteen (15) calendar day's severance pay instead of being given the opportunity to work out the fifteen (15) calendar day notice period. You will also be paid for all annual leave accrued and unused as of your last work day. Your final paycheck will be available for you to pick up and sign for within 72 hours of the date of your dismissal letter.

A predetermination conference was held between you, your supervisor Leena Anil, Ms. Anil's supervisor Maria Del Rosario, MD, and Loretta Haddy, PhD, OEPS Director, on October 25, 2012 concerning this matter. During the conference you were given the opportunity to respond to the issues and explain your behavior. I have considered all information and have decided that your dismissal is appropriate.

You were advised during the interviewing and orientation process that it would be necessary for you to successfully complete a six-month probationary period. This probationary period is a trial work period designed to allow the agency an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust him or herself to the organization and programs of the agency. The probationary period is an integral part of the examination process and is utilized for the most effective adjustment of a new employee and for the elimination of those who do not meet the employer's required standards of work. Having evaluated your work during your probationary period, I have concluded that you have not made a satisfactory adjustment to the demands of your position, nor have you met the required standards of work.

To further explain the reasoning for your dismissal, the following are examples of deficiencies noted in your work performance:

Limited capacity to work on projects simultaneously:
● Assigned to parse (separate) selected variables on disease reports. This is a task that had been done by a previous Data Analyst and was accomplished with in a month. In your case, the task took at least 6 weeks to complete, with the help of your supervisor.
● To prepare for the Influenza season, you were asked to create a new chart and table. You complain that you were overworked and needed extra time (at least half a day) To Work on the Influenza Reporting and requested

to work on a holiday to get the task done. The task was ultimately given to another employee, who completed it within a few minutes.

Difficulty demonstrating newly learned skills:

● You were sent to Atlanta in June 2012 to undergo a week long Epi Info Training (Basic, Intermediate and Advanced). Within two weeks of the training you were asked to summarize the Derecho storm surveillance data, such as categorize reports by age-group. This skill is included in the Epi Info Training. You asked Dr. Del Rosario how to create categories. You were reminded about the recent training you attended. You then found the Epi Info book and opened to the page discussing the topic and motioned for Dr. Del Rosario to read it. She advised you that you needed to accomplish this task. You then proceeded to reading the book. (*sic*.)

● You recently attended two Excel training courses provided by the state. Within a month of receiving the training, you were asking another employee how to perform some basic tasks, e.g. freeze frame, changing a chart color, unable to delete information from an old spreadsheet to replace with a new one.

Exhibits difficulty in understanding basic concepts:

● DIDE regularly discusses surveillance principles and applications. This summer, DIDE conducted a one-day Epidemiology 101 training to new sanitarians where you were one of the attendees. At a meeting in early October, you were asked about the purpose of surveillance. Your response – 'so we can show to the public the data we collected and the graphs we made'. Further, you were asked what type of data should be fed back to local health to improve disease reporting completion and timeliness. Your response – 'patient contact information and vaccination information'.

● You were one of the staff who helped create a database for the derecho storm surveillance. Two months later, while developing the Power Point slides (for the West Virginia Public Health Association conference) to summarize the findings, you were asked her (*sic*.) to look at the risk factors/exposures and show results on the slides. You then asked what the risk factors were and where could you find them. You were reminded of the database you developed which had to be described to you. It took some time before you understood what was being described.

● You were tasked with summarizing a meeting you attended with the Centers for Disease Control (CDC) during the CDC National Electronic Disease Surveillance System (NEDSS) site visit so you could share with DIDE during the surveillance meeting. To date, a report has not received from you. (*sic*.)

G Ex 1 & DHHR Ex 9.

14. Grievant's work performance during her probationary period as a Data Analyst 2 did not meet the reasonable expectations of her supervisors in regard to learning new tasks, meeting established deadlines, and developing a thorough understanding of the mission and priorities of DIDE.

15. Grievant did not receive a performance evaluation from her employer during her probationary period.

16. Since February 4, 2013, Grievant has been employed by the Philadelphia Department of Public Health, in a position which pays more than her previous position with DHHR.[1]

Discussion

When a probationary employee is terminated on grounds of unsatisfactory performance, rather than for alleged misconduct, the termination is not disciplinary, and the burden of proof is on the employee to establish that her services were satisfactory. *Greco v. Monongalia County Health Dep't*, Docket No. 2012-1293-MonCH (Apr. 22, 2013); *Kiper v. Dep't of Health & Human Res.*, Docket No. 2010-0156-DHHR (Apr. 13, 2010); *Bonnell v. W. Va. Dep't of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990). More particularly, Grievant is required to prove that it is more likely than not that her services were performed, in fact, at a satisfactory level. *Bush v. Dep't of Transp.*, Docket No. 2008-1489-DOT (Nov. 12, 2008). *See* Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). Where the evidence equally supports both

[1] Had Grievant prevailed on the merits of her grievance, any entitlement to back pay would have ceased as of February 4, 2013, when she obtained subsequent employment at a rate of pay greater than she had been receiving from Respondent DHHR.

sides, Grievant has not met her burden. *See Leichliter v. W. Va. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993).

The status of probationary employees is governed by provisions in Section 10 of the West Virginia Division of Personnel's Administrative Rule ("Administrative Rule"), 143 C.S.R. 1 § 10 (2012). Under the Administrative Rule, the probationary period of employment is "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) (2012). Further, 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." *Id*. Finally, a probationary employee may be dismissed at any point during the probationary period that the employer determines his or her services are unsatisfactory. 143 C.S.R. 1 § 10.5(a) (2012). *See Bush, supra*. In accordance with the forgoing provisions, the Administrative Rule establishes a low threshold to justify the termination of a probationary employee. *Livingston v. Dep't of Health & Human Res*., Docket No. 2008-0770-DHHR (Mar. 21, 2008). *See Hackman v. W. Va. Dep't of Transp*., Docket No. 01-DMV-582 (Feb. 20, 2002).

Grievant was hired to work as a Data Analyst 2 in DHHR's Division of Infectious Disease Epidemiology ("DIDE"). A Data Analyst 2 is expected to perform full-performance work in the collection, compilation and analysis of data obtained from various sources. Grievant has a college degree in biology and a master's degree in

public health. A Data Analyst 2 is not an apprentice or analyst-in-training position. After a reasonable orientation to the specific work performed in DIDE, Grievant was expected to gather and manipulate data to create various statistical analyses, reports and presentations using various software tools and programs that the agency has adopted to accomplish its mission.

Grievant's immediate supervisor, Dr. Anil, issued a DOP Form EPA-1 to Grievant on August 9, 2012, setting forth certain performance standards and expectations. G Ex 2. Grievant was not issued a performance appraisal at any time prior to her termination, nor was she placed on a performance improvement plan. However, there is no law, rule or regulation which requires that a probationary employee receive a written evaluation or be placed on a performance improvement plan before they can be terminated for unsatisfactory performance.

Dr. Marian L. Swinker, Commissioner of the Bureau of Public Health and State Health Officer, communicated her decision to terminate Grievant's probationary employment in a letter dated November 5, 2012. G Ex 1. Grievant testified that only some of the alleged "deficiencies" described in Dr. Swinker's letter were discussed with her by her supervisors during the predetermination meeting on October 25, 2012. Indeed, Grievant stated that only two of the seven examples described in the correspondence were actually discussed in that meeting. Therefore, Grievant does not believe she received a fair opportunity to respond to these statements. However, Dr. Anil testified that this meeting with Grievant lasted over one hour, and all of the issues concerning Grievant's performance were addressed with Grievant. In any event, contrary

to Grievant's argument, she received all of the due process to which she was entitled, given her probationary status. *See Baker v. Hancock County Bd. of Educ*., Docket No. 97-15-447 (May 5, 1998), *aff'd sub nom*. *Baker v. Bd. of Educ*., 207 W. Va. 513, 534 S.E.2d 378 (2000) (*per curiam*). *See generally Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Bd. of Regents v. Roth*, 408 U.S. 564 (1972).

Grievant testified that she was unfairly compared to another employee who had performed similar tasks, contending that the employee with whom she was being compared was not required to prepare data spanning the same number of years. Grievant had two additional years of data to parse in preparing certain reports and she needed an additional two weeks to prepare the reports. *See* G Ex 4. Grievant explained that she was asked by Dr. Anil and Dr. del Rosario to analyze data for 2007 through 2011. According to Grievant, the employee who completed this task in a month, rather than the six weeks required by Grievant, was only required to analyze data from 2006 through 2008, a three-year period. Dr. Anil testified that parsing and cleaning these reports involves a straightforward task for which no employee should require as much time to accomplish as Grievant needed. Dr. del Rosario expanded on this testimony, noting that there was no comparison to another employee, but only to the amount of time it should take any employee in that position to perform the particular task at issue. Both supervisors believed that Grievant needed more time to accomplish this task than was necessary.

Grievant also took exception to the statement that she was asking another employee how to perform certain tasks using Excel software, such as the "freeze frame"

function, in that this topic was not covered in either of two Information Technology classes she attended as a DIDE employee. Grievant explained that this skill was not taught in the Level 5 and 6 Excel classes she attended. *See* G Ex 6. Prior to working in DIDE, Grievant knew the basic skill of freezing frames in Excel for a row and a column individually, but not for a row and a column simultaneously, a skill which she believes is covered in the Level 3 class conducted by the Office of Technology. *See* G Ex 3.

Grievant also disagreed with the statement that she was asked to "create a new chart and table" to prepare for reporting influenza, explaining that it was actually necessary to create 5 charts and 24 tables. Grievant agreed that she asked to work on a holiday because she was not able to meet the deadline for completion of these charts. According to Dr. Anil, this task was reassigned to another employee who completed it in a few minutes. Dr. Anil also indicated that Grievant's description of this task exaggerated the amount of time needed to complete the assignment and the complexity of the project. Similarly, Dr. del Rosario's testimony suggested that Grievant either did not understand the assignment or was intentionally making it more complex than what was required.

Grievant further disagreed with the statement that, in the context of preparing a report on the derecho storm, she asked her supervisors what the risk factors were and where they could be found. Grievant testified that she had previously identified the risk factors, developed tables and slides on her own, and was simply asking whether the slides she had prepared were "clear enough" to present the risk factors. *See* G Exs 3 & 7. Strangely, Grievant indicates that she never got any feedback from her supervisor on this question. Dr. del Rosario testified that the conversation regarding risk factors did, in fact,

take place, but this happened well before Grievant created the slides. Grievant denied the conversation, or any like it, ever took place.

Dr. Anil testified that she worked closely with Grievant during her employment in DIDE. From her perspective, Grievant's job performance was not satisfactory, despite numerous efforts to counsel Grievant and obtain improvement. According to Dr. Anil, most of the tasks assigned to Grievant were not accomplished in a timely manner. Dr. Anil generally met with Grievant on a weekly basis to discuss her performance and progress. Typically, Grievant would not complete tasks on time. Dr. Anil recalled that she would permit Grievant to determine how much time she needed for a project, but she nonetheless failed to complete the task in accordance with the deadlines they agreed on.

The Data Analyst 2 position which Grievant held on a probationary basis is critical to the operation of an important public health program. Grievant, Dr. Anil, and Dr. del Rosario, provided conflicting testimony concerning the various events which led to termination of Grievant's probationary employment. Dr. Anil and Dr. del Rosario were in general agreement that Grievant was not performing her duties with the speed and efficiency they expected, or at the level of competency and expediency which the Data Analyst 2 position requires. Grievant contradicted their testimony on several specific and relevant details.

In assessing credibility of these well-educated and articulate witnesses, the undersigned Administrative Law Judge notes that the documentary evidence, which was considerable, tended to support the version presented by Respondent's witnesses. Most critically, while noting that only the derecho analysis involved a true "emergency,"

Grievant never contested that timely completion of assigned tasks relating to epidemiology data is not a critical element of the position she held. Grievant had been hired with the expectation that someone with her credentials would be able to "hit the ground running" in her job, and her performance never met that expectation. This situation represents the essence of probationary employment status, where the employer may reasonably determine that the newly-hired employee is just not a good fit for the requirements of the position.

It is not enough for Grievant to show that she was capable of performing the work, provided that she received sufficient training, and had time to learn the process. Grievant's burden is to show that she did the work at a reasonable level of proficiency to meet the reasonable requirements of her employer during her probationary period. She simply did not meet this burden.

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, by a preponderance of the evidence that her services were satisfactory. *Kiper v. Dep't of Health & Human Res.*, Docket No. 2010-0156-DHHR (Apr. 13, 2010). *See Bonnell v. W. Va. Dep't of Corr.*, Docket No. 89-CORR-163 (Mar 8, 1990); Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). The term "satisfactory" can generally be defined as "giving satisfaction sufficient to meet a demand or regulation; adequate." *Brown v. W. Va. Dep't*

of Health & Human Res., Docket No. 99-HHR-026 (Oct. 28, 1999). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, Grievant has not met her burden. *Id*.

2. Under the West Virginia Division of Personnel's Administrative Rule, the probationary period of employment is "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) (2012). Further, 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." *Id*.

3. The West Virginia Division of Personnel's Administrative Rule, 143 C.S.R. 1 § 10.5(a) (2012), establishes a low threshold to justify termination of a probationary employee. *Livingston v. Dep't of Health & Human Res*., Docket No. 2008-0770-DHHR (Mar 21, 2008). *See Hackman v. W. Va. Dep't of Transp*., Docket No. 01-DMV-582 (Feb. 20, 2002).

4. Grievant was unable to establish by a preponderance of the evidence that her performance met the required standards of Respondent DHHR for a Data Analyst 2.

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 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).

DATE: June 28, 2013

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LEWIS G. BREWER
Administrative Law Judge