THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JODI CAMP,
Grievant,

v. **Docket No. 2012-1408-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
LAKIN HOSPITAL,
Respondent.

DECISION

Grievant, Jodi Camp, is employed by Respondent, Department of Health and Human Resources/Lakin Hospital. On June 11, 2012, Grievant filed this grievance against Respondent stating, "Grievant was telephoned on (sic) to discuss evaluation at which time she was advised that the continuation of her employment would need to be discussed with Linda Dailey, CEO. Another call informed her that based on her attendance employment was terminated." For relief, grievant seeks "[t]o be made whole in every way including but not limited to: immediate reinstatement with lost wages, benefits, annual and sick leave, holidays, seniority, and shift preference."

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on December 10, 2012, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Cassy Lee, Respondent was represented by counsel, Michael E. Bevers, Assistant Attorney General. This matter became mature for decision on January 25, 2013, the date the parties' written Proposed Findings of Fact and Conclusions of Law were due. Respondent submitted Proposed Findings of Fact and Conclusions of Law; Grievant did not.

Synopsis

Grievant, a probationary employee, was terminated for unsatisfactory performance at the end of her six-month probation period. Grievant's job skills were satisfactory, but she was frequently absent from work. Grievant's absences rendered her undependable; therefore she could not meet her burden of proving her performance was satisfactory. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant was previously employed as a probationary employee by Respondent at Lakin Hospital. Grievant was employed as a Nurse II, which is a supervisory position.

2. Grievant's probationary period began December 16, 2011. During her probationary period, Grievant was scheduled to work three days per week.

3. Grievant almost immediately began to miss work, leaving work early on her third day and calling in for an entire shift within the first two weeks.

4. Grievant's one-month evaluation, from December 16, 2011 through January 16, 2012, indicated that her performance was "fair, but needs improvement," noting that she needed improvement for both job performance and attendance.

5. On February 23, 2012, Grievant received coaching for attendance for four unscheduled absences, one tardy and one leave early during the period of January 19th through February 17th.

6. Grievant's two-month evaluation, from January 16, 2012 through February 26, 2012, was again "fair, but needs improvement," stating that Grievant met expectations regarding duties but needed improvement in attendance.

7. Grievant received a special evaluation on April 10, 2012 to address her attendance problems, which she signed on April 1, 2012. She was rated "does not meet expectations" for eight instances of excessive leave usage in January, February, and March. The evaluation requires Grievant to provide a DOP-L3 for any claims of sick leave for herself or a family member.

8. On April 26, 2012, Grievant received her three-month evaluation, from February 16, 2012 through March 16, 2012, which rated her as "does not meet expectations" due to unscheduled leave usage. For performance development Grievant was instructed to have no unscheduled leave usage during the next review period. The comments state, "Jodi is very task orientated (sic). She is thorough + has excellent follow up on Resident concerns. She gets along well [with] coworkes (sic)."

9. Grievant's four-month evaluation, from March 16, 2012 through April 16, 2012, rated her "fair, but needs improvement." During this period, Grievant had improved her attendance, having one call in. For performance development, Grievant was instructed to have no unscheduled leave usage during the next review period. The comments state, "Jody (sic) does a good job; communicating well [with doctor]; helps Nurses, is able to assist [with] task (sic) that sometimes Nurses have a hard time completing."

10. Grievant's five-month evaluation, from April 16, 2012 through May 16, 2012, rated her "fair, but needs improvement" for attendance issues. The evaluation

notes Grievant had called off twice, providing the required physician practice statements. For performance development, Grievant was instructed to have no further attendance issues.

11. Due to Grievant's attendance issues, Grievant's supervisor did not recommend Grievant for permanent status at the end of her probationary period.

12. Grievant provided four letters from co-workers praising her performance and expressing dismay that Respondent terminated Grievant.

13. Grievant provided three doctor's excuses for absences for her child's illness. One of excuses was for a date Grievant was not scheduled to work.

14. Grievant also provided numerous Clinical Summaries for doctor's visits for her child. Of the portion of visits that occurred during Grievant's probationary period, only two of the doctor's visits occurred while Grievant was scheduled to work. Furthermore, these records do not document a serious illness, but rather a series of common illnesses.

15. During her probationary period, Grievant ran out of leave and had to be taken off payroll three times.

16. By the end of her probationary period, Grievant had twenty-three attendance occurrences: being either tardy or leaving early thirteen times, and being absent for her entire shift ten times. These twenty-three occurrences were particularly significant considering that Grievant's regular schedule included only three shifts per week.

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 Corrections*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. W. Va. Dep't of Health and Human Res.*, Docket No. 2008-0958-DHHR (Mar. 13, 2009). 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). If the evidence is equally balanced, the party with the burden of proof has not met that burden. *See Leichliter v. W. Va. Dep't of Health and Human Res.,* Docket No. 92-HHR-486 (May 17, 1993).

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." W. VA. CODE ST. R. § 143-1-10.1(a) (2008). 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." *Id*. A probationary employee may be dismissed at any point during the probationary period that the employer determines his services are unsatisfactory. *Id*. at § 10.5(a). Therefore, 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.

Hammond v. Div. Of Veteran's Affairs, Docket No. 2009-0961-MAPS (Jan. 7, 2009) (citing *Hackman v. W. Va. Dep't of Transp.*, Docket No. 01-DMV-582 (Feb. 20, 2002)).

Grievant asserts she was a good charge nurse, that her attendance problems were mainly the result of her infant daughter's frequent illnesses, that she was never told she was close to termination, and that if she had been given an opportunity to improve she would have improved. Respondent asserts it was justified in denying Grievant permanent status because her excessive absenteeism rendered her job performance unsatisfactory. Respondent readily admits that Grievant's nursing skills were never in question, but asserts that Grievant's attendance was so poor as to render her undependable.

It is Grievant's burden to show her job performance was satisfactory, and Grievant cannot meet that burden. Grievant's poor attendance was particularly troubling considering this was a probationary period in which she was supposed to prove her worth as an employee. Grievant had attendance problems twice in her first six shifts, a pattern which never showed true improvement. In six months she had twenty-three occurrences while she was working only three shifts a week. Despite Grievant's assertion, Grievant had numerous opportunities to improve because her unsatisfactory attendance was discussed in every single monthly evaluation as well as

during an additional special evaluation and coaching. Due to her poor attendance, Grievant never received an evaluation in which she met expectations. It is disingenuous for Grievant to assert she was unaware her employment might be terminated. Further, the record indicates Grievant reported her child's illness most frequently as reason for her absences, but Grievant also had attendance issues due to daycare problems, her own non-serious illness, and oversleeping. While Grievant's circumstances are unfortunate, she simply has to be available to work her schedule and she was not. As Grievant was not a dependable employee due to her absenteeism, her job performance could not be satisfactory.

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 services were satisfactory. *Bonnell v. W. Va. Dep't of Corrections*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. W. Va. Dep't of Health and Human Res*., Docket No. 2008-0958-DHHR (Mar. 13, 2009). 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). If the evidence is equally balanced, the party with the burden of proof has not met that burden. *See Leichliter v. W. Va. Dep't of Health and Human Res.,* Docket No. 92-HHR-486 (May 17, 1993).

2. 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." W. VA. CODE ST. R. § 143-1-10.1(a) (2008). 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*. A probationary employee may be dismissed at any point during the probationary period that the employer determines his services are unsatisfactory. *Id*. at § 10.5(a). Therefore, 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).

3. "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." *Hammond v. Div. Of Veteran's Affairs,* Docket No. 2009-0961-MAPS (Jan. 7, 2009) (citing *Hackman v. W. Va. Dep't of Transp.*, Docket No. 01-DMV-582 (Feb. 20, 2002)).

4. Grievant could not meet her burden of proving her job performance was satisfactory. Grievant's nursing skills were satisfactory. However, Grievant's excessive absences, which persisted despite continuous feedback from Respondent that she was failing to meet expectations, rendered her undependable.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: March 25, 2013

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Billie Thacker Catlett
Administrative Law Judge