THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JEANNISE DIANE GRECO,
Grievant,

v. **DOCKET NO. 2012-1293-MonCH**

MONONGALIA COUNTY HEALTH DEPARTMENT,
Respondent.

DECISION

Grievant, Jeannise Diane Greco, filed this grievance against her former employer, the Monongalia County Health Department, at level three of the grievance procedure, on or about May 16, 2012, contesting the termination of her probationary employment. As relief Grievant sought to have "these actions to be removed from my permanent record. I should not have been fired or forced to give up my benefits. I am requesting this matter be settled appropriately and sufficiently."

A level three hearing was held before the undersigned Administrative Law Judge on December 19, 2012, in the Grievance Board's Westover office. Grievant was represented by Gregory H. Schillace, Schillace Law Office, and Respondent was represented by Phillip M. Magro, Monongalia County Assistant Prosecuting Attorney. This matter became mature for decision on March 14, 2013, the deadline for submission of the last of the parties' written proposals.

Synopsis

Grievant was dismissed from her probationary employment as a Nutritionist I with the Monongalia County Health Department for misconduct and unsatisfactory performance.

Prior to the dismissal, however, Respondent offered to let Grievant continue to be employed as an hourly employee without benefits, in lieu of dismissal. This action undermines the assertion that Grievant was not meeting the expectations of her job. Respondent did not demonstrate that Grievant engaged in misconduct, and Grievant demonstrated that her performance was satisfactory.

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

Findings of Fact

1. Grievant began her full-time employment as a Nutritionist I with the Monongalia County Health Department ("MCHD"), on December 5, 2011. She was hired as a probationary employee, with a six-month probationary period. Grievant had previously worked for MCHD as a Nutritionist I, as an hourly employee since 2006.

2. By letter dated May 1, 2012, Grievant was advised by MCHD Executive Director James H. Strosnider that she was being dismissed from her employment effective May 15, 2012, due to unprofessional behavior and unacceptable conduct, and that she had not met "the required standards of work." The dismissal letter detailed the specific reasons for the dismissal as follows:

> Leaving your workplace prior to the end of the work day without supervisory approval and leaving before all clients were served. Documented on 1/9/2012 and 3/19/2012; however, additional dates have been reported by coworkers.
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> Insubordination with use of the company vehicle on 3/19/2012, despite being specifically instructed in January not to take the vehicle on late clinic days.
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> Unprofessional conduct with coworkers and in the presence of clients, creating strained relationships and a high level of stress and tension in the

> office. Reports from coworkers documented from December 2011 through April 2012 regarding unprofessional conduct.
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> Failure to properly secure confidential participant information. On 4/24/2012 at 7:58 a.m., a day that you were not at the office because you reported off work on sick leave, you left a message about a WIC family who was seen on 4/10/12 on your supervisor's voice mail. The voice mail included detailed participant information including: the participant's ID# (mom and new baby), Certification date, that a breastfeeding assessment was done, mom's category on the computer when they were seen on 4/10/12 and that they were not on the schedule but were seen as a walk in. The detailed information provided must have been documented by you and taken out of the office.

The letter went on to state that, "[t]he importance of working well with others and communicating effectively to obtain program goals was emphasized" when Performance Standards and Expectations were reviewed with Grievant on December 27, 2011. The letter further detailed counseling and coaching sessions on January 6 and 11, 2012, and March 20 and 29, 2012, and a meeting with Grievant's supervisor on April 23, 2012, when Grievant was told her dismissal was being considered.

3. When Grievant was advised that she was going to be dismissed from her employment, Mr. Strosnider offered to let Grievant resign as a full-time employee and remain employed by MCHD as a part-time, hourly employee, without benefits. Kathy Kerin, Personnel Benefits Coordinator, also told Grievant that she had the option to resign or to "ask to decrease her time to less than benefit[t]ed as she used to be and go back to working the entire 6 co[unty] region." (From notes made by Ms. Kerin on April 25, 2012, part of Respondent's level three Exhibit Number 2.)

4. On December 27, 2011, Grievant and Brenda Fisher, Grievant's supervisor, discussed the expectations of Grievant's position, as set forth on an EPA-1, which is to be used for "initial planning session, coaching, or when responsibilities, standards, or

expectation must change." The objectives to be accomplished during the rating period, as set forth on the EPA-1, were:

> 1. Provides quality nutrition and breastfeeding education and counseling to WIC clients as outlined by the LA Nutrition Education Plan and defined by State Policy. Provides NE by incorporating emotion based lesson plans. Promotes breastfeeding by education and counseling to increase initiation and duration rates.
> 2. Treats all customers with respect and responds to customer needs within appropriate time frames.
> 3. Works well with others and communicates effectively to obtain program goals.
> 4. Messages responded to within appropriate time frames. Written reports are accurate and submitted by 3rd working day of the month.
> 5. Works well with others on outreach efforts.
> 6. Counsels participants concerning diet and food selections. Develops and documents a nutrition care plan for each individual nutrition education contact.
> 7. Use of RTF formula in [sic] included in Nutrition Care Plan.
> 8. Schedules clients appropriately for BF, PPBF, FF class and evening appointments.
> 9. Achieves proficiency in performing lab duties.[1]

5. Grievant was assigned to work primarily in the Harrison, Marion, and Taylor County offices of MCHD. Her normal work hours were 8:30 a.m. to 4:30 p.m. One day per month, Grievant worked a late clinic at the Taylor County office, and her work hours on those days were 10:00 a.m. to 6:00 p.m.

6. On December 28, 2011, Kellie Walker, Assistant Staff Supervisor, sent an email to Ms. Fisher and to Anne McBride, Program Manager for Nutrition Services,

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[1] Ms. Kerin testified that Grievant never learned how to perform the lab duties, although she did not indicate how she would have knowledge of this in her role as the Benefits Coordinator. Grievant testified that her trainer told Ms. Fisher that she was doing an excellent job with her lab training. Ms. Fisher did not offer any testimony on this point. There is no documentation to support a finding that Grievant was not making sufficient progress in this area. Further, the dismissal letter does not indicate that there was a deficiency in this area. Accordingly, this allegation will not be further addressed.

informing them that Grievant had reported to her that she was continuing to have problems with a co-worker in the Harrison County office, Lori Rowden. The problem that day concerned the temperature in the office, which Grievant found to be too cold. Grievant had told Ms. Walker that Ms. Rowden and Patricia Johnson, "PJ," were hiding the furnace key and that Ms. Rowden refused to turn the heat up. Ms. Walker reported that Grievant had told her Ms. Rowden was "always yelling at her or embarrassing her over anything and everything," and that Grievant was "requesting a supervisory meeting with the Harrison County Office or just a meeting with her and Lori with supervisory staff in hopes of resolving issues with Lori."

7. On December 30, 2011, Ms. Walker sent an email to Ms. Fisher and Ms. McBride informing them of a call she had from Ms. Johnson complaining about Grievant. Ms. Johnson had told Ms. Walker that Grievant had been talking about Ms. Johnson to co-workers, and complaining that Ms. Johnson schedules too many clients in Taylor County for Grievant to see, and that she should not be scheduling them for times that are after Ms. Johnson leaves for the day. Ms. Johnson also reported to Ms. Walker that she had the furnace key and that she was keeping the key hidden from Grievant because Grievant wants the temperature in the office set at 70 degrees, and "other staff" become "extremely hot" at this temperature, including Ms. Rowden. At the end of the email Ms. Walker reported, however, that Ms. Johnson stated "she is thinking about setting the furnace to 70 degrees, locking it and giving the key back to Louie."[2]

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[2] Apparently, Louie is the landlord. Ms. Kerin testified that when she checked on the situation, she determined that the landlord controlled the temperature. This testimony is inconsistent with the information in this email.

8. On January 4, 2012, Ms. Walker sent an email to Ms. McBride, telling her that she had asked Ms. Rowden "about any issues that she wanted to share," and that Ms. Rowden had told her Grievant "does not like her now," that Grievant was always rude to her, "makes negative comments about her to staff," and questions her work.

9. On January 5, 2012, Ms. Fisher and Ms. McBride met with Grievant. Ms. Fisher documented the discussion at the meeting on January 6, 2012. The documentation refers several times to Grievant's comments as Grievant's "claims." It states that Grievant "claims" that Ms. Rowden makes mistakes and mistreats clients, that Ms. Rowden "'goes off" on Grievant, and that Grievant "claims she wants to work this out. She does not want to fight with anyone." The documentation shows that Ms. Fisher "specifically told Jeannise that she is NOT to speak negatively about others," and that Grievant had stated that she never said anything negative to anyone. The documentation does not indicate that Grievant's concerns, as set forth in the December 27, 2011 email, were addressed.

10. As a follow-up to the meeting with Grievant, on January 6, 2012, Ms. Fisher provided Grievant with a memorandum which stated that concerns had "surfaced" in the office that needed to be discussed and addressed immediately, and that "[u]nacceptable behavior will be monitored and documented. . . . The following issues need to be addressed. If they are not, further disciplinary action will occur. 1. At all times, be respectful of staff and clients. Do not talk negatively about other staff members. 2. Chain of command - If you have a problem with someone or something, you need to call me. I am your immediate supervisor. If you cannot get in touch with me, you can call Kellie or Anne."

11. Neither Ms. Fisher nor Ms. McBride witnessed Grievant engaging in unprofessional conduct, or treating co-workers in a disrespectful manner. The record does not reflect that an investigation was conducted into the allegations made by a few co-workers about Grievant, or by Grievant about her co-workers.

12. Grievant's second level supervisor, Ms. McBride, allowed Grievant to take a van owned by MCHD to travel to the Taylor County office, but she was required to return the van to Harrison County in time for another employee, Angie Rebrook, to use it to travel to the United Hospital Center, also in Harrison County, to see clients. This meant that Grievant had to leave the Taylor County office one-half hour early, and she was to make up this half-hour the next day.

13. Ms. Johnson also had to travel to the Taylor County office to work some days, but she always had to use her own vehicle to do so. On January 9, 2012, Ms. Johnson reported to Ms. McBride that Grievant had left the Taylor County office at 5:00 p.m. This was a clinic day when Ms. Greco's normal work hours were 10:00 a.m. to 6:00 p.m.

14. Ms. McBride and Ms. Fisher communicated by email on January 10, 2012, regarding the allegation that Grievant had left early the preceding day. Ms. McBride stated in her email, "I don't know that we ever talked about how that would or would not work on a 10-6 day in Taylor County," referring to letting Grievant take the MCHD van and leave early from Taylor County. Ms. Fisher's email states, "Jeannise should have stayed until 6pm. Correct? Or would we allow her to leave at 5:30 to get to Harrision by 6pm.???" Prior to January 10, 2012, neither Ms. Fisher nor Ms. McBride had made clear to Grievant

whether she was allowed to take the van to Taylor County on clinic days, or what time she was to leave on clinic days.

15. On January 11, 2012, Ms. Fisher spoke with Grievant about Grievant leaving the Taylor County office on January 9, 2012, prior to 6:00 p.m. Grievant acknowledged to Ms. Fisher that she had left before 6:00 p.m., indicating that she was allowed to do so, but told Ms. Fisher that she arrived at the Harrison County office at 6:00 p.m.

16. Ms. Fisher sent an email to Ms. McBride on January 12, 2012, stating that she had spoken with Grievant the previous day about leaving the Taylor County office early on a clinic day. The email states, "I told her she needed to work 10-6 in Taylor or take AL. I told her on the late days she will need to drive herself b/c Angie will need the van and she cannot get back in time for Angie to use it. She talked around and around like it's a windy road and it's dark when she leaves and she can't take a chance on anything happening to her. I told her the days would be getting longer and it would be daylight later. She didn't think so b/c it was only January. Then she said hardly anyone comes in in Taylor after 5 pm. I think she was trying to say she didn't need to be there. I didn't respond to that. I told her on the regular days, she can leave at 4pm to get back to Clarksburg so Angie can have the van by 4:30pm. Then she needs to call me the next day when she comes in at 8am to make up the ½ hour."

17. After this discussion with Ms. Fisher, Grievant did not believe that she had been directed not to take the MCHD van to Taylor County on clinic days, and that she was

not allowed to leave the workplace one half hour early on those days and make up the time the next morning.[3]

18. Neither Ms. Fisher nor Ms. McBride provided Grievant with written instructions at any time prior to March 29, 2012, regarding the circumstances under which she was allowed to use the van owned by MCHD, or what time she was allowed to leave the Taylor County office and how she was to make up any time when she left early. After the incident on January 9, 2012, neither Ms. Fisher nor Ms. McBride documented in writing to Grievant that she was not to take the MCHD van to the Taylor County office on clinic days, and that she was not to leave early on those days, nor did Ms. Fisher give Grievant a clear directive on this issue, until March 29, 2012.

19. On March 20, 2012, Ms. Johnson reported to Ms. Walker that she had been told by another co-worker that Grievant had told yet another co-worker that Ms. Johnson did not want that person working with her in Taylor County. Ms. Johnson denied to Ms. Walker that she had said this. At that same time Ms. Johnson reported to Ms. Walker that Grievant had left the Taylor County office at 4:50 p.m. on March 19, 2012, a clinic day. Ms. Rebrook also told Ms. Fisher that she had talked to Grievant at 4:50 p.m., and Grievant had told her she was in the van and getting ready to leave the Taylor County office. Ms. Rebrook told Ms. Fisher that Grievant arrived at the Harrison County office between 5:35 and 5:40 p.m.

20. On March 20, 2012, Ms. Fisher spoke to Grievant about leaving early the previous day. Ms. Fisher's notes reflect that Grievant told her that she left the Taylor

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[3] In fact, Grievant did not even recall having a conversation with Ms. Fisher on January 11, 2012, about not taking the van to the Taylor County office on clinic days.

County office at 5:20 p.m., not 4:50 p.m., and that she told Grievant she would have to take 45 minutes of annual leave. These notes also state, "Made it clear to her that . . . on the late days, she is to stay there the entire time 11-7."[4]

21. On March 29, 2012, Ms. Fisher met with Grievant in a coaching session. Ms. Fisher completed an Employee Performance Appraisal, EPA-1, attaching a one page document which for the first time put into writing to Grievant that "effective April 2, 2012 you will no longer be permitted to use the company vehicle to travel to your designated work site. . . . Due to this change you will no longer work a flex schedule starting on Tuesday mornings at 8:00 a.m.. You will work a regular schedule on Tuesdays from 8:30 to 4:30." Grievant did not use the MCHD van after April 1, 2012, and she worked 8:30 a.m. to 4:30 p.m. The document went on to state that "[a]ll strife and discord with any co-workers is to be put aside."

22. In March and April 2012, Ms. Johnson complained to Ms. Fisher, Ms. Walker, and Ms. Kerin that Grievant was rude to her, Grievant had talked to other people about Ms. Johnson, Grievant tried to boss her around, Grievant questioned her work, Grievant caused trouble at the office, and that Ms. Johnson was physically, mentally and emotionally stressed. Ms. Johnson also placed in a written statement that Grievant "tries to tell me how to do my job, even in front of clients." Ms. Johnson did not indicate when she alleged that this had occurred. Ms. Johnson placed in a written statement on April 4, 2012, that Grievant had asked her, in front of a client, who had been in the office during lunchtime.

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[4] It appears that at some point during the beginning of the year the clinic hours changed from 10:00 a.m. to 6:00 p.m., to 11:00 a.m. to 7:00 p.m., although it is not clear when or if this occurred.

Ms. Johnson apparently continued the conversation in front of the client, asking Grievant what she meant, and Grievant told her someone had been "going through her things."

23. On April 24, 2012, Grievant called Ms. Fisher at work at 7:58 a.m., and left her a message on her voicemail. Grievant was calling from her home. The message was regarding a client situation that had taken place on April 10, 2012, that Grievant stated she needed to tell Ms. Fisher about while she was thinking about it. The message left by Grievant stated that a mother and her baby had come in for services, and were seen by Ms. Rebrook, even though they were not on the schedule. Grievant left the ten-digit client identification number in the voicemail. The first six digits of this number can be the same for several clients. Grievant's supervisors did not ask Grievant whether she took client information home with her, but rather assumed that she had done so. Grievant did not share client information with anyone outside MCHD, and did not take client information home with her.

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/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 [her] services were, in fact, of a satisfactory level." *Bush v. Dep't of Transp.*, Docket No. 2008-1489-DOT (Nov. 12, 2008). Where a probationary employee's dismissal is disciplinary, the burden of proof rests with the Respondent, and Respondent must meet that burden by proving the charges against

the Grievant by a preponderance of the evidence. *Livingston v. Dep't of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008). "However, the distinction is one that only affects who carries the burden of proof. As a practical matter, an employee who engages in misconduct is also providing unsatisfactory performance. *Johnson v. Dep't of Transp./Div. of Highways*, Docket No. 04-DOH-215 (Oct. 29, 2004)." *Id.*

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 pointed out that while Respondent was in the process of dismissing her for misconduct and because some of her co-workers complained about her conduct, it was on the other hand offering her continued employment in the very same position, but with reduced hours and no benefits. This in and of itself undermines Respondent's assertion that Grievant was not meeting the expectations of her job. If her conduct was so bad that she could not be retained past the probationary period, then it would be irrational to continue to employ her in any capacity. While Mr. Strosnider testified that he "probably" would never have called her to come to work as a part-time, as-needed employee, Grievant was not told this when the offer was made, and it is certainly a convenient excuse now. Regardless of what Mr. Stronider might have done, Grievant would have still been an employee, subject to being called upon to work with the very same people, performing the very same duties.

Nonetheless, the undersigned will address the allegations in the dismissal letter, which are likewise questionable. First, with regard to the allegations of unprofessional conduct, the only thing that is clear is that Ms. Johnson did not like Grievant, and took every opportunity to complain to her supervisors about her. However, Ms. Johnson was not called as a witness to attest to the allegations made in her many complaints. Ms. Johnson's complaints are hearsay.

The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the

statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements.[5] *Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (1997); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-8-115 (June 8, 1990).

While many of Ms. Johnson's complaints were in writing and signed, they were not attested to, nor was anyone with first hand knowledge called to testify. No reason was given for not calling anyone with first hand knowledge of Grievant's alleged inappropriate behavior. Ms. Johnson appears to have complained about Grievant incessantly about anything that happened, and to everyone. Ms. Johnson, however, had worked for MCHD for a long time, and her complaints were given more credence than Grievant's complaints about Ms. Rowden, and when Ms. Johnson reported that Grievant did something, it was taken as fact. When Grievant told her supervisors that she was having a problem with Ms. Rowden, and asked for help, her supervisors did absolutely nothing to try to resolve the situation, except to dress down Grievant. While it is clear that the women in the Harrison County office were having trouble getting along, it is not so clear that it was Grievant who was responsible for the discord. Respondent did receive some complaints from a few

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[5] The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing hearsay. *See Borninkhof v. Department of Justice*, 5 MSBP 150 (1981).

other co-workers about Grievant, none of whom were called as witnesses, but most of the complaints were from Ms. Johnson. Based on the information in the record, however, it is just as likely that the interpersonal problems in the office were instigated by Ms. Johnson's issues with Grievant as they were by Grievant's actions.

Moreover, Ms. Fisher testified that she had never witnessed Grievant exhibiting any unprofessional conduct. Ms. McBride did not indicate that she had witnessed any unprofessional conduct by Grievant. She testified that Grievant carried out the basic functions of her job and that she had no complaints from clients about Grievant. The undersigned concludes from the evidence presented that Grievant did not exhibit unprofessional behavior during the course of her employment.

The charge that Grievant failed to properly secure client information has less of a foundation. It is based solely on an assumption made by Grievant's supervisors and Ms. Kerin. They concluded that the information left by Grievant on a voicemail for Ms. Fisher was too detailed to have been recalled from memory. Ms. Kerin asserted that Grievant maintained information in a notebook, and she drew the conclusion that Grievant kept client information in this notebook because when she asked her whether she had written client information in the notebook Grievant hesitated before she answered. No one ever witnessed Grievant writing client information in a notebook. No one ever saw client information written in a notebook taken home by Grievant. Grievant did not release client information to anyone not employed by MCHD. Ms. McBride acknowledged that Grievant could have recalled the client information left in the voicemail for Ms. Fisher from memory, although she thought it would be unusual given the detail in the voicemail; but, she never

asked Grievant if she had taken client information home with her. The undersigned cannot conclude from this speculation that Grievant took client information home with her.

As to the charges that Grievant left work early on two occasions without approval, and that she took the MCHD van to Taylor County on clinic days after she had been told not to do so, these actions would fit in the category of insubordination, as well as unsatisfactory performance. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). *See Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and c) the order (or rule or regulation) must be reasonable and valid." *Butts, supra.* In other words, there must be not only a refusal to obey a reasonable and valid order, but the refusal must be wilful. *Id.* "[F]or a refusal to obey to be 'wilful,' the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." *Id.*

It is clear from the emails between Ms. McBride and Ms. Fisher that when Grievant left work early on January 9, 2012, neither of Grievant's supervisors had a clear understanding of what Grievant was to do on clinic days, and therefore, could not have told Grievant that clinic days were different from any other day in Taylor County. If Grievant's

supervisors did not know whether she could leave work early on these days, then Grievant cannot have done something wrong when she left early. Grievant denied leaving at 5:00 p.m. as alleged by Ms. Johnson, and no evidence was presented to support a conclusion that Grievant left earlier than 5:30 p.m. on January 9, 2012, other than Ms. Johnson's unreliable hearsay. Grievant did nothing improper on January 9, 2012.

Even after this incident, neither Ms. Fisher nor Ms. McBride put anything in writing to Grievant so that everyone was clear on when Grievant could take the van and when she could leave one-half hour early, until March 29, 2012. It appears from Ms. Fisher's email to Ms. McBride that Ms. Fisher's discussion with Grievant about leaving early and using the van on clinic days ended with Grievant asking for reconsideration and Ms. Fisher, once again, not making clear what was expected. Grievant did not even recall Ms. Fisher speaking with her about this issue in January, so, whatever Ms. Fisher told Grievant, it did not make an impression. It is a supervisor's responsibility to make clear to employees what the expectations are of the employee, and what the employee is doing that needs to be corrected. Ms. Fisher did not fulfill this responsibility with respect to this issue, and Grievant cannot be faulted for continuing to take the MCHD van to the Taylor County office on clinic days after January, or for leaving one-half hour early.

As to the claim that Grievant left work more than an hour early on March 19, 2012, once again, this allegation is based on the hearsay statements of Ms. Johnson, although in this instance, Ms. Rebrook also gave a written statement that Grievant arrived in Clarksburg around 5:35 or 5:40 p.m. Grievant told Ms. Fisher that she had left the Taylor County office 5:20 p.m. Certainly, these contradictory reports raise a concern, and it was appropriate for Ms. Fisher to make clear to Grievant that she could not leave early without

supervisory approval. However, even were the undersigned to make a conclusion that Grievant left work early without approval one time, this does not equate to unsatisfactory performance.

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/her services were satisfactory. *Bonnell v. W. Va. Dep't of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990). 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). Where a probationary employee's dismissal is disciplinary, the burden of proof rests with the Respondent, and Respondent must meet that burden by proving the charges against the Grievant by a preponderance of the evidence. *Livingston v. Dep't of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008). "However, the distinction is one that only affects who carries the burden of proof. As a practical matter, an employee who engages in misconduct is also providing unsatisfactory performance. *Johnson v. Dep't of Transp./Div. of Highways*, Docket No. 04-DOH-215 (Oct. 29, 2004)." *Id.*

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 demonstrated that her performance was satisfactory during her probationary period.

Accordingly, this grievance is **GRANTED.** Respondent is **ORDERED** to reinstate Grievant to full-time employment as a Nutritionist I, with back pay and benefits to the date she was dismissed, with a 30-day probationary period.

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).

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BRENDA L. GOULD
Administrative Law Judge

Date: April 22, 2013