

## THE WEST VIRGINIA PUBLIC EMPLOYEES GREIVANCE BOARD

**CHRISTOPHER PECK,  
Grievant,**

**v.**

**Docket No. 2023-0067-DOT**

**DIVISION OF HIGHWAYS,  
Respondent.**

### **DECISION**

Christopher Peck, Grievant, filed this grievance at level three on or about July 27, 2022, challenging the termination of his probationary employment with the Division of Highways ("DOH"). A level three hearing was held on January 24, 2023, and January 30, 2023, in the Grievance Board's office in Charleston, West Virginia, before Administrative Law Judge Carrie H. LeFevre. Grievant appeared *pro se*. DOH was represented by its counsel, Lori D. Counts-Smith, Legal Division. This case was reassigned to the undersigned on or about April 6, 2023, for administrative reasons. This matter became mature for consideration upon receipt of the parties' Findings of Fact and Conclusions of Law on March 20, 2023.

### **Synopsis**

Grievant's probationary employment was terminated, due to DOH's determination that his performance was unsatisfactory, specifically regarding behavior that was in violation of policy. When a probationary employee is terminated, it is his burden to prove his services were satisfactory. In this case, Grievant failed to meet this burden, and the evidence supported the conclusion that Grievant repeatedly failed to follow proper procedures for performing his assigned duties. Grievant established a *prima facie* claim

of retaliation; however, Respondent established a non-retaliatory motive. Therefore, this grievance is denied.

The following Findings of Fact are based on the record of this case.

### **Findings of Fact**

1. Grievant was employed by Respondent, Division of Highways, as a Transportation Division Manager 2, and assigned to work in Charleston, West Virginia.

2. The Transportation Division Manager 2 is a managerial position within the Human Resources Division. The employee in the position is required to perform multiple duties and tasks, including assisting with general operations, applying procedures, and providing support to subordinate employees in the unit.

3. The Department of Transportation Operating Procedures set out certain standards of work performance that DOH expects its employees to meet. Respondent Exhibit No. 1.

4. During all times of his employment with DOH, it is undisputed that Grievant was within his six-month probationary period. Respondent Exhibit No. 1 and No. 5.

5. On or about June 28, 2022, Grievant received an in-person evaluation from his immediate supervisor and was also issued an employee performance review form. Grievant was rated as “unsatisfactory” and areas of improvement were expressed to him in writing.

6. Grievant was given the opportunity to respond to the performance review form and did so in writing. Grievant was given the opportunity to improve in his performance.

7. Grievant did not improve and his non-retention as a probationary employee was recommended.

8. On July 27, 2022, Grievant was notified that it was being recommended that he not be retained and was issued a notice of non-retention of probationary employee. Grievant was given the opportunity to respond to the recommendation in a predetermination meeting. Grievant choose not to appear for the meeting.

9. By letter dated August 2, 2022, Grievant's employment was terminated.

10. Grievant was released from employment due to violations of the standards of work performance and conduct. Grievant demonstrated that he did not possess the minimum basic skills required for the position, including basic computer skills, basic managerial skills, leadership skills, the ability to delegate tasks to subordinates and a willingness to learn fundamental aspects of the position. Testimony of Tanya Harrison, Natasha White, Kathryn Hill, Jeff Long, Crystal Bryant, and Leslie Adkins.

11. Grievant asserted that he did not receive adequate training and was not afforded a sufficient opportunity to perform certain job functions.

12. Grievant asserted that he was terminated as a form of retaliation for the filing of a prior grievance.

13. The record demonstrated that Grievant was unable to perform the basic minimum skills required for the position for which he was hired. Grievant lacked basic skills that DOH expected of him at the time of hire based on the information he provided during the hiring process. In particular, his represented background and experience, included basic management skills, basic computer skills, and basic leadership skills.

14. Grievant had difficulty grasping and retaining basic or fundamental aspects of the position, which prohibited further growth. Grievant was provided with training and coaching during his employment with the DOH. Testimony of Tanya Harrison, Natasha White, Kathryn Hill, Jeff Long, Crystal Bryant, and Leslie Adkins.

15. DOH provided computer and classroom training to the Grievant. DOH also provided ongoing one-on-one training about the basic concepts and skills of the tasks performed by his unit.

16. Grievant had difficulty grasping the basic understanding of the tasks or role of the unit, had difficulty retaining and applying the information provided through training, seemed to lack a basic understanding of the tasks to be performed, and seemed to not fully understand the role he was to play as part of the unit. Testimony of Tanya Harrison, Natasha White, Kathryn Hill, Jeff Long, Crystal Bryant, and Leslie Adkins.

17. Grievant acknowledged that he was having difficulty performing his job. DOH suggested that he apply for different jobs and tried to assist him in finding another job within the agency.

18. It is undisputed that Grievant filed a previous grievance against DOH. The record did not support a finding of retaliation. The DOH provided sufficient evidence of legitimate reasons for its action to terminate Grievant's employment.

### **Discussion**

When a probationary employee is terminated on grounds of incompetency or unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the employer carries no burden of proof in a grievance proceeding. The employee has the burden of establishing by a preponderance of evidence that his services were

satisfactory. *Bonnell v. W. Va. Div. of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Bowman v. W. Va. Educ. Broadcasting Auth.*, Docket No. 96-EBA-464 (July 3, 1997); *Walker v. W. Va. Public Serv. Comm'n*, Docket No. 96-PSC-422 (Mar. 11, 1992). "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).

The West Virginia Department of Transportation Policy indicates that probationary employees are identified as "an employee in the first six months of employment for permanent employees hired from a DOT certified register. During this period, there is a possibility for non-retention due to unsatisfactory performance." In addition, the Policy provides that the "DOH expects its employees to meet certain standards of work performance and conduct regardless of the type of work or unit which they are assigned. These standards include, but are not limited to, the following information and examples.

A. Possession of the required qualifications for a job and the ability to satisfactorily perform the job skills after a fair training period."

Historically, the probationary period of employment has a specific purpose. During this time, an employee is to learn the duties of his or her position, and the employer assesses the employee's ability to meet work standards and adjust to the expectations of the agency. *Hackman v. W. Va. Dep't of Transp.*, Docket No. 01-DMV-582 (Feb. 20, 2002). In this case, DOH has established that Grievant's non-retention was based upon unsatisfactory work performance. Grievant carries the burden of proof to establish by a preponderance of the evidence that his services to Respondent were satisfactory. The record is without evidence that Grievant's services to Respondent were satisfactory. It is

understandable that DOH made a finding of unsatisfactory performance based upon the reasons stated in the letter of August 2, 2022, and set out above. Accordingly, Grievant has failed to establish by a preponderance of the evidence that his services were satisfactory or that DOH violated the provisions regarding termination of probationary employees.

Grievant's primary argument in support of his case is that he was the victim of reprisal. WEST VIRGINIA CODE § 6C-2-2(o) defines "reprisal" as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." A grievant alleging reprisal or retaliation in violation of WEST VIRGINIA CODE § 6C-2-2(o), in order to establish a *prima facie* case, must establish by a preponderance of the evidence:

- (1) that he was engaged in activity protected by the statute (e.g., filing a grievance);
- (2) that his employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;
- (3) that, thereafter, an adverse employment action was taken by the employer; and
- (4) that the adverse action was the result of retaliatory motivation or the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.<sup>1</sup>

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<sup>1</sup> See *Coddington v. W. Va. Dep't of Health & Human Res.*, Docket Nos. 93-HHR-265/266/267 (May 19, 1994); *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991). See generally *Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). Once a *prima facie* case of retaliation has been established, the inquiry shifts to determining whether the employer has shown legitimate, non-retaliatory reasons for its actions. *Graley, supra*. See *Mace v. Pizza Hut, Inc.*, 180 W. Va. 469, 377 S.E.2d 461.

Grievant has established a *prima facie* case for reprisal. Grievant engaged in a protected activity in filing a previous grievance. Grievant's employer clearly had knowledge of it. An adverse action was taken against Grievant by his employer. The period of time between the time of the prior grievance and the disciplinary action were such as to infer a retaliatory motive. Nevertheless, Grievant failed to prove the termination of his employment was retaliatory. Respondent set forth specific evidence of unsatisfactory work performance which is a legitimate, nondiscriminatory reason for its action to terminate Grievant's probationary employment.

The following conclusions of law support the Decision reached.

### **Conclusions of Law**

1. When a probationary employee is terminated on grounds of incompetency or unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the employer carries no burden of proof in a grievance proceeding. The employee has the burden of establishing by a preponderance of the evidence that his services were satisfactory. *Bonnell v. W. Va. Div. of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Bowman v. W. Va. Educ. Broadcasting Auth.*, Docket No. 96-EBA-464 (July 3, 1997); *Walker v. W. Va. Public Serv. Comm'n*, Docket No. 96-PSC-422 (Mar. 11, 1992).

2. A probationary employee may be dismissed at any point during the probationary period that the employer determines his services are unsatisfactory. West Virginia Department of Transportation Policy.

3. Grievant has failed to prove by a preponderance of the evidence that his work for Respondent was satisfactory; it was within his employer's discretion to terminate his probationary employment.

4. A grievant alleging reprisal or retaliation in violation of WEST VIRGINIA CODE § 6C-2-2(o), in order to establish a *prima facie* case, must establish by a preponderance of the evidence:

- (1) that he was engaged in activity protected by the statute (e.g., filing a grievance);
- (2) that his employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;
- (3) that, thereafter, an adverse employment action was taken by the employer; and
- (4) that the adverse action was the result of retaliatory motivation or the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred. Citations omitted.

5. Grievant established a *prima facie* claim of retaliation; however, Respondent established a non-retaliatory motive for its action.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Intermediate Court of Appeals.<sup>2</sup> Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the

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<sup>2</sup>On April 8, 2021, Senate Bill 275 was enacted, creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over "[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]" W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend W. VA. CODE § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.

appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

**Date: April 28, 2023**

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**Ronald L. Reece**  
**Administrative Law Judge**