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WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

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KAREN BONNELL

v. Docket No. 89-CORR-163

WEST VIRGINIA DEPARTMENT OF CORRECTIONS

D E C I S I O N

Grievant Karen Bonnell through her attorney filed a level four grievance on April 15, 1989. Counsel made the following salient points:

- Mrs. Bonnell was discharged from her job at the W. Va. Industrial Home for Youth on March 21, 1989;
- Her oral discharge was followed by a written discharge of March 22, 1989 effective April 7, 1989;
- Her discharge was grieved by Mrs. Bonnell in writing on March 23, 1989 and by me on March 28, 1989[.]

A level four hearing was conducted May 9, 1989.[1] Mr. James Ielapi, Superintendent of the West Virginia Industrial Home for Youth (Home), appeared and testified on behalf of respondent Department of Corrections (CORR) as did Hilda L. Williams, personnel officer. The grievant and her husband, Roger Bonnell,

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[1] W.Va. Code §29-6A-4(e) provides an expedited grievance process whereby an employee may grieve a final action of the employer involving dismissal, demotion or suspension exceeding 20 days directly to the hearing examiner.

also testified. Submissions of fact/law proposals were received from the parties by May 30, 1989.

At the outset of the level four hearing, CORR's counsel moved to dismiss the grievance on the ground that grievant was a probationary employee at the time of her dismissal since she had not served the required six-month probationary period and, therefore, was not entitled to invoke the grievance procedure outlined in W.Va. Code §§29-6A-1 et seq. CORR argued that the statute's definition of an employee refers only to a permanent employee and not a probationary employee. Grievant's counsel responded and alleged that grievant had been transferred from a provisional position to a permanent position on March 1, 1989. Because the grievant's employment status was in controversy, CORR's motion was taken under advisement and it was directed to go forth with its case in order that the merits of the grievance be heard.

An initial determination must be made with respect to grievant's employment status. At hearing grievant's personnel documents were placed into the evidence. Notably, an initial WV-11[2] establishes that grievant was hired on a provisional

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[2]A "WV-11" is a form used statewide to record and document personnel actions involving state employees. Ordinarily, the WV-11 records all changes in an employee's status and notes whether the action relates to New Employment, Separation/Layoff or Other. "Other" denotes actions involving salary adjustment/advancement, promotion, class changes and the like. The WV-11 originates with the appointing agency which prepares the "request" for the change and is further processed by Finance and Administration and perhaps the governor's office. According to the form, Civil Service and Payroll are copied.

basis to a Nurse I position effective December 27, 1988.[3] Grievant completed a civil service Application for Examination, and her name appeared on a proper register thereafter. According to Mr. Ielapi, grievant's name was picked from the register, and he instituted procedures to document the employment change on or about February 15, 1989. The pertinent WV-11 denotes the change of grievant's employment from that of provisional Nurse I to "PERM" Nurse I, effective March 1, 1989. Justification for the change was noted on the appropriate section of the form as "Provisional Status To Perm Status 3-1-89," There was no adjustment made to grievant's salary as a result of the personnel action and her wages were not upgraded from that of her provisional status. See Gr. Ex.1(15-16).

The evidence in this case indicates that grievant understood she had to fulfill a probationary period of employment. At hearing CORR'S witnesses testified the notation "PERM" on a WV-11 simply meant that the employee had been hired from the register for permanent employment to a permanent position and did not necessarily describe the employment status. The grievant agreed that she had been told by a staff member in the Home's personnel office that she was a probationary employee and her salary would increase after six months. She did not rely on

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[3]According to civil service regulations, a provisional appointment to a vacant permanent position can be effected when there are no available applicants on the register; time spent in the provisional status can be computed to fulfill probationary employment.

the content of the February 1989 WV-11 to make claim to permanent status for the enhanced salary mandated at the completion of the six-month probationary term or for any other purpose prior to the incidence of her dismissal, subject of this grievance. Therefore, for the purposes of this grievance, it is found and determined that grievant herein was a probationary employee at the time of her dismissal.[4]

On the issue of whether a probationary employee has standing to prosecute a grievance pursuant to W.Va. Code §§29-6-1 et seq., CORR's motion and argument[5] cannot be upheld. In the past employees of the classified service were governed in such matters by regulations promulgated by the West Virginia Civil Service System, now known as the Division of Personnel. Those regulations provided a multiple-step grievance forum for classified employees reviewable by the Civil Service Commission after the third level; probationary employees were not expressly prohibited from invoking the procedure. Certain grievous matters including dismissal and other disciplinary actions were specifically excluded from consideration. A separate appeals

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[4]The notation "PERM" on the WV-11 creates some ambiguity. In fact, an argument could be made that an employee has a right to rely on the documentation and information in her employment files, but grievant did not directly make such an argument. However, the testimony of CORR's witnesses about the employment of personnel to permanent positions reinforces determinations hereinafter made about the grievance procedure and standing of a probationary employee.

[5]There is no legal precedent on this matter and CORR offered no legal authority or further argument at hearing or in its brief.

procedure was in place for "permanent" employees to appeal directly to the Commission in the event of dismissal, suspension in excess of thirty days, demotion and various forms of "discrimination in any incident of employment" including, among others, handicap and "other nonmerit based personnel action." See 143 CSR 1-14,23.

Effective July 1, 1988, the newly-enacted grievance procedure contained in W.Va. Code §§29-6A-1 et seq. superseded the civil service regulations and created an entirely different grievance procedure for certain state employees, including workers in the classified service and classified-exempt public employees who formerly did not have a grievance forum. The plain language of Code §29-6A-2(e) defines covered employees as,

> any person hired for permanent employment [emphasis added], either full or part-time, by any department, agency, commission or board of the state created by an act of the Legislature, except those persons employed by the board of regents or by any state institution of higher education, members of the department of public safety, any employees of any constitutional officer unless they are covered under the civil service system and any employees of the Legislature. The definition of "employee" shall not include any patient or inmate employed in a state institution.

A distinction is readily seen between a "permanent employee," the only type of employee permitted the direct Commission level appeal in the civil service regulations, and "any person hired for permanent employment."[6] Not only did the Legislature

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[6]Distinctions about employments are also made in civil service regulations which tend to support this reasoning. The regulations create temporary employments for limited and (Footnote Continued)

see fit to include a broad population of public employees not previously covered, except those specifically excluded, but it does not appear that it intended that probationary employees hired for permanent employment be excluded from relief in employment matters which give rise to a grievance, especially since classified probationary employees appeared to have had some grievance rights in the civil service regulations.

The West Virginia Supreme Court of Appeals in State ex rel. Bowlick v. Board of Educ., 345 S.E.2d 824 (W.Va. 1986), found the statutory language at issue in that case to have "sufficient clarity" to apply syllabus Point 2 of State ex rel. Underwood v. Silverstein, 278 S.E.2d 886 (W.Va. 1981): "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation. Syllabus Point 2, State v. Elder, 152 W.Va. 571, 165 S.E.2d 108 (1968)." Bowlick at 826. Sufficient clarity is found in the language of Code §29-6A-2(e) to apply this maxim and to conclude that all employees of covered state governmental entities hired for permanent employment have standing in the grievance

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(Footnote Continued)
emergency purposes. Those temporary personnel do not attain certain benefits accorded personnel employed for permanent employment such as accrual of sick and personal leave days, seniority, and pension participation. The regulations provide a process for such permanent employment, e.g., candidates must compete via established means for open and vacant permanent positions and do so in anticipation of employment to said permanent positions. When an employment is effectuated, it is for a permanent position and the employee immediately attains the aforementioned benefits of employment, despite his or her probationary status, see n.4.

procedure, regardless of their employment status. Reasonable limits are still preserved, thus persons retained for temporary, emergency and other such assignments not intended to be permanent assignments are excluded from the grievance procedure.

Insofar as it can be found that the statute provides a forum for probationary employees hired for permanent employment to prosecute a grievance, it nonetheless does not endow him or her with greater employment rights than the probationary employment status provides, as respondent correctly argues in the alternative. W.Va. Code §29-6A-6 provides that the burden of proof shall rest with the employer in disciplinary matters, Mayfield v. W.Va. Dept. of Natural Resources, Docket No. 89-DNR-442 (Sept. 29, 1989), but the termination of a probationary employee hired for permanent employment is not a per se disciplinary action. Moreover, this grievant has raised an issue of discrimination and a grievant must prove the allegations of his or her complaint by a preponderance of the evidence, Hanshaw v. McDowell Co. Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). It is therefore reasonable that a probationary employee must advance a grievance complaint, including a challenge to separation from employment through discharge purportedly based on determinations of unsatisfactory performance, through the procedural levels and prove his or her case by a preponderance of the evidence to prevail on the complaint.

The events which gave rise to grievant's dismissal must be reviewed; however, the parties are not in total accord about

those matters. On Wednesday, March 1, 1989, grievant slipped on ice on the Home's parking lot and injured herself. She called Mr. Ielapi, her supervisor, in his office and told him that she had fallen but would finish the shift after she rested a while. He said that on Thursday, March 2, grievant called to report off work that day and told him she was scheduled to go to the doctor the next day, Friday. He said he understood grievant's absence because he believed she had sustained a severe fall according to what he had heard about the matter, and he did not protest or dispute her Workers' Compensation claim. He said she next contacted him by telephone on Friday to tell him the doctor advised that she needed at least a week off. He stated that he waited until Wednesday, March 8, to call her and inform her that her sick and personal leave days were exhausted as of 12 noon.

Although Mr. Ielapi's testimony was somewhat confusing about what transpired during each of the three calls, during one of them he told her that he needed a written request from her for two and one-half days unpaid personal leave which he would grant because of her telling him the doctor said she could be released for work on Monday, March 13. Mr. Ielapi said he also told grievant he would need her doctor's written release in order for her to resume work on the 13th, according to him. During his direct testimony about the telephone calls, Mr. Ielapi stated that "I think she said that I threatened her." He said what he did was read to her the civil service regulations about sick and personal leave for probationary employees, but she said she would be back to work Monday.

According to Mr. Ielapi, he had to "play nurse" in the clinic on Tuesday the 7th because he was short-handed due to his other staff nurse being on sick leave, and a counselor and correctional officer he trained to do intakes assisted him. Mr. Ielapi said when grievant reported to work Monday, March 13, he asked to see her. He said he had a standing rule at the Home not to wait until a probationary employee completed the six-month probationary period to say, "these are your deficiencies, we're going to have to let you go." He said when he had to perform the "nurse work" a superintendent did not ordinarily have to assume, he found some work deficiencies on grievant's part which needed to be brought to her attention because of her probationary status. He and the deputy superintendent met with grievant, he told her of the deficiencies and she responded verbally. Mr. Ielapi memorialized the meeting via a March 13, 1989, memorandum:

> You met with Lowell McAfee and myself on March 13, 1989 about your work performance as a registered nurse here at the Industrial Home for Youth.
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> In meeting with us we brought the following deficiences [(sic)] to your attention.
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> 1. Regular Commitments and Diagnostic Commitments files mixed up.
> 2. [The files of] [r]esidents who have been discharged remain in the active residents files instead of being sent to the Administrative Building with the discharged file.
> 3. Keeping up with the medication sheets.
> 4. Remembering residents here at the Industrial Home for Youth.
> 5. Cleanliness of the clinic.

These problems should be corrected and will not be tolerated if you want to remain employed as a nurse at this institution.

Grievant responded to the memorandum with a written response dated March 15, 1989, in which she addressed the five-point criticism. She wrote that she acknowledged the first error and had corrected it; that she had overlooked some files of discharged residents and all those files had been corrected; that she had difficulty accepting the third deficiency; that she acknowledged the deficiency about remembering the residents' names and would continue to place special emphasis on placing names with faces; and that the last deficiency should be retracted because she felt she should not be blamed for the condition of the clinic while repairs and other matters were ongoing. She concluded with an apology to Mr. Ielapi and a statement that she enjoyed working with the youth at the Home and wished to remain employed there.

Mr. Ielapi testified that he had already told grievant orally that the fifth deficiency would be eliminated because it was not all her fault that the clinic was in the condition that it was. He said that she continued to work at an acceptable level, "really picked up the pace," and was trying to make "an honest attempt to correct this in my eyes." He said that grievant did voice complaints about her back hurting but told him she would make it. According to him, he told her the other nurse who had been off for several weeks for surgery would be back on Monday, the 20th, and her workload would then be relieved.

He testified that on Monday morning, March 20, grievant notified the shift supervisor that she would not be coming into work. According to Mr. Ielapi, the other nurse, who did report for the shift, subsequently called the grievant, who explained that she would not be in until the doctor said she could return to work. Mr. Ielapi related that on Tuesday, March 21, the grievant's husband appeared at his office with something he said was from grievant's doctor. Mr. Ielapi testified that he thought the doctor's slip that Mr. Bonnell tried to give him was "dated back to March 3 to disabled, no time frame on it," and he told him that he could not accept it. He said he did not hear from grievant again. He thereafter composed grievant's dismissal letter. The letter was dated March 22, 1989, and stated, in part:

> Prior to your dismissal, you were counseled about unsatisfactory areas in your job performance and you were in the process of correcting these areas when you exhausted all of your accrued sick and annual leave. I am aware that this is due to a[] [work-related] injury . . . . However, because you are a probationary employee and are not eligible to be granted a medical leave of absence, it is unfortunate that this has placed you in a position wherein you have lost the opportunity to continue to improve your job performance. Regulations of state government do not permit me to grant you the time a permanent employee might receive in order to have a chance to work this out. Thus, based upon the factors noted above, I have no other recourse but to dismiss you.
>
> You shall be given the opportunity to meet with me to present a written explanation for the purpose of communicating why you think the reason presented in this letter is in error, or why you think this action is not warranted.

The grievant offered more to the story about events following her injury and leading to her dismissal. She said when

she reported to Mr. Ielapi her doctor's advice that she needed time off from work to recuperate, Mr. Ielapi threatened her with termination. Because her husband's work was uncertain and due to other personal financial difficulties, she felt she had to keep her job; therefore, on a follow-up visit to her doctor on March 10, she urged him to release her for work even though more tests were scheduled. She stated that when she spoke to Mr. Ielapi on the phone to tell him she would be returning to work March 13, he told her he wanted her to stop by his office on the morning of the 13th.[7] She said she thought he wanted her to sign a paper about her return to work, or something like that, and had no idea that he intended to counsel her for work deficiencies because nothing had been brought to her attention prior to her injury except for one occasion when she had car trouble and a Mr. Gregory reminded her to be on time. She later recalled that Mr. Ielapi orally counseled her once about "remembering names to faces."[8]

At hearing it was discovered that Mr. Ielapi used several documents as support when he conducted the March 13 counseling

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[7]The grievant claimed Mr. Ielapi kept her waiting in the hall for a half-hour or more before he finally saw her that morning which made her apprehensive, and the inclusion of Mr. McAfee during the conference was also very intimidating.

[8]During cross-examination, Mr. Ielapi expressed concern about grievant's lack of recall of residents' names, especially those who had medical problems. He said that when he would ask grievant about "Jeff," a diabetic, she could not recall the youth. Also, she could not remember the name of a resident who had a hernia, which she discovered.

session. One was a document purporting to be an incident report handwritten by Chief Correctional Officer Ash, dated January 26, 1989, and initialed "JI 2/7/89," "JI" being Mr. Ielapi's initials. Another "Incident Report" on the Home's form and signed March 13, 1989, stated the complained-of "incidents" occurred March 10, 1989, a day when grievant was still on sick leave. For the most part, the several incidents listed predated March 10. All of the complaints were those mentioned in the post-counseling memorandum.

In addition, the two documents had never before been given to, shared with or otherwise mentioned to grievant and her attorney before hearing, despite her counsel's written request for any data in her file used as support for the dismissal action. Mr. Ielapi explained that he did not always place such documents in an employee's personnel file. Nevertheless, the documents existed, were certainly part of grievant's personnel file at least at the Home, and should have been presented to her at the counseling session at the earliest.

Grievant further testified that after the counseling conference on March 13 she corrected the filing in a very few minutes. She said she then asked Mr. Ielapi on several occasions to check the clinic personally but he told her he believed her if she said it was done. She managed to work the week of March 13-17 despite her pain, but finally realized she was really not capable of continuing, in part, due to the effect of her medications which made her drowsy and ill, according to her. She stated that she felt concerned that she could not deliver

proper care to the residents under the circumstances. Grievant's testimony that Mr. Ielapi called her on March 20 about her inability to resume work that week and again threatened her with termination was not refuted.

Mr. Bonnell testified that he went to his wife's doctor's office to pick up her medical excuse because she was too sick to drive. He continued to the Home and presented the slip to Mr. Ielapi who refused to accept it. He said he asked Mr. Ielapi several times about his wife's employment status and Mr. Ielapi said she was "dismissed" effective immediately, as of right now or words to that effect.

Grievant introduced into evidence Dr. Weinstein's medical excuse dated March 21, 1989, which indicated that the grievant was under his care from "3/3/89 to 4/14/89," was unable to work because "Disabled" and was scheduled for further tests. During the hearing, the authenticity of the document was established by a telephone call to Dr. Weinstein's office and his nurse's sworn testimony. CORR's counsel, in essence, admitted that Mr. Ielapi was mistaken about what he had seen on the slip when Mr. Bonnell attempted to present it to him on March 21.

The grievant maintains she was "promoted to a permanent Nurse I position on March 1, 1989," and was illegally discharged on Tuesday March 21, 1989, because it

a. was not for good cause. W.Va. Code 29-6-15;

b. was upon trivial, inconsequential and technical reasons. *Oakes v. W.Va. Dept. of Fin. & Admin., 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Serv. Comm'n, 141 S.E.2d 364 (W.Va. 1965);

c. was without adequate prior specific notice of details of time, date, place and nature of offense. *Snyder v. Civil Serv. Comm'n, 238 S.E.2d 842 (W.Va. 1977);

d. was arbitrary and capricious and not for good cause. 143 CSR 1-14.1(g);

e. did not provide the grievant with a "fair shake". 143 CSR 1-23.2;

f. discriminated against the occupationally handicapped. Coffman v. W.Va. Bd. of Regents, [386 S.E.2d 1 (W.Va. 1988)], W.Va. Code 23-5A-1; [and]

g. violated due process. Oakes, [supra].

Gr. Fact/Law Prop. (*parallel cites omitted). Grievant asks for relief in the form of reinstatement, without back wages but including full benefits and seniority; attorney fees; costs, fees and expenses; and damages for mental anguish, loss of honor, dignity, reputation and good name.

Conversely, CORR's stance in this matter is that it properly exercised its discretion to terminate grievant in accordance with existing civil service regulations which permit the dismissal of a probationary employee at any time during the six-month trial working period when a determination is made that the probationer's services are unsatisfactory; that "good cause" does not have to be established for dismissal of the probationer because "the test for a probationary employee is much less strenuous than that afforded a permanent employee," CORR Brief at 13; that applicable state laws do not establish any procedural or substantive requirements other than those found in civil service regulations, and other jurisdictions offer guidance that only permanent civil service appointees, not probationers, are constitutionally entitled to pretermination hearings; that grievant was afforded all the notice and process due

her; and the "Fair Shake" test grievant relies upon is part of the civil service grievance regulations superseded by the statutory grievance procedure.

With respect to grievant's allegations of discrimination and retaliatory discharge of an occupationally-injured worker, CORR further argues that in the leading case interpreting Code §23-5A-1, Shanholtz v. Monongalia Power Company, 270 S.E.2d 178 (W.Va. 1980), the Court implied that recipients of Workers' Compensation benefits who felt discriminated against by an employer had recourse to maintain a cause of action in circuit courts having jurisdiction over the employer. CORR urges that the Court certainly would not permit such matters to be "litigated by the Civil Service appellate body."

CORR concedes that the grievant was "aggrieved by the actions of Mr. Ielapi," CORR's Brief at 19. The question in this grievance is whether she has proved by a preponderance of the evidence any of her challenges about her dismissal. Grievant's claim for redress and damages on an allegation of discrimination under Coffman and W.Va.Code §23-5A-1 was not developed. In Coffman, the dismissal of an injured worker, held to be occupationally disabled, was nevertheless affirmed because a reasonable accommodation could not be made for her disability after she was released for work but still unable to perform all the functions of her position. In the instant case, the grievant was not a ready-and-willing worker denied continued employment on the basis of her handicap; rather, she had, at least temporarily, lost her ability to work at her job at all.

Further, Shanholtz instructs from Code §23-5A-1 that the retaliatory dismissal of a recipient of workers' compensation benefits is a cause of action for damages. In this case, the grievant's receipt of benefits because of her occupational injury was not protested by CORR nor did her claim for benefits serve as the catalyst for her dismissal.[9] Moreover, the West Virginia Education and State Employees Grievance Board will not entertain a cause of action or requests for relief for speculative, punitive or "compensatory" damages such as grievant requests for mental anguish and other complaints in that vein. See Terek v. Ohio Co Bd. of Educ., Docket No. 35-87-276-3 (April 4, 1988).

The purpose and intent of the grievance procedure is to resolve work-related differences between employee and employer. See W.Va. Code §§29-6A-1 et seq. §29-6A-2(i) defines a grievance as a claim by one or more affected state employees alleging, among other things, "any discriminatory or otherwise aggrieved application of unwritten policies or practices of their employer." Grievant did not make clear her claim of discrimination in the context of the grievance statute, in that of retaliation for claiming workers' compensation benefits or that of her dismissal's being predicated on inability to fully perform her duties due to occupational handicap. Most of the

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[9]In fact, it is clear that Mr. Ielapi had no ill-will toward grievant because she had been occupationally injured, rather he was upset because she could not report for work and he had to assume some "nurse" duties.

grievant's other contentions and arguments likewise have no merit because they speak to the issue of the employment rights and benefits of a classified public employee who has attained permanent status.

The only remaining issue in this grievance to address is whether the grievant was denied any process due her as a probationary employee. In essence, grievant's counsel argued that grievant had a property interest in her in continued employment protected by due process of prior notice, specifics of events and the right to respond. He, however, urged at hearing that "all employees of the state are protected from unfair, unjust or unreasonable dismissal, probationary or not."

According to regulation,[10] the process due a probationary employee whose retention is not desired because of unsatisfactory work is notice by written statement of the basis for the

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[10]The regulation, 143 CSR 1-11.6(a), then provided, in pertinent part:

> If at any time during the probationary period, it is determined the services of the employee are unsatisfactory, the employee may be separated from the service, but such action shall take place only after the person to be discharged has been presented with the reasons for such discharge . . . stated in writing, and has been allowed a reasonable time to reply thereto in writing or upon request to appear personally and reply to the head of the department . . . . . [(Portion omitted)] Notification of the termination of his services shall be given to the employee fifteen (15) calendar days prior to the effective date of his release . . . .

Exceptions to the fifteen-day notice are reserved for certain dismissals, and the appointing authority has discretion on the matter for any dismissals involving gross misconduct.

discharge, i.e., reasons why his or her work has been deemed unsatisfactory, and a reasonable period of time to respond to the notice. Grievant was denied the process due her when Mr. Ielapi refused her medical excuse and stated to grievant's husband that she was dismissed or even "fired." Mr. Ielapi admitted during cross-examination that he did tell Mr. Bonnell that grievant was fired. The flaw was not corrected when Mr. Ielapi composed the dismissal letter and served it on grievant because her opportunity to reply had already been compromised. Mr. Ielapi stated during the hearing that if grievant had requested a personal leave[11] after she received her discharge letter, he would have considered the request and maybe "we would not be here today."

If those were Mr. Ielapi's true feelings, he communicated them very poorly prior to the hearing. The dismissal letter was couched in terms of his inability to grant grievant more time to

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[11]Civil service regulations in effect at all times relevant to this grievance provided employees various attendance and leave situations. The relevant regulation, 143 CSR 1-16.8(a), provided, in pertinent part:

> Personal leave - Upon application in writing to, and written approval of the appointing authority, a permanent, probationary, or provisional employee may be granted a leave of absence without pay for a specific period of time which normally should not exceed one year. A leave of absence without pay may exceed the normal one (1) year limitation and may be granted at the discretion of the appointing authority based on the department's personnel needs. Time spent by probationary employees for leaves of absence shall not be construed as time served in completing the probationary period.

"improve" her job performance, and misleading at that, because he had previously told her that he believed her statements that her clinic "deficiencies" had been corrected. Furthermore, he had the authority to recommend a personal leave of absence upon her request as he belatedly admitted at hearing. Mr. Ielapi did not expressly deny that he threatened grievant with termination if she could not promptly return to work. In fact, the record as a whole supports a finding that Mr. Ielapi staged some very threatening events in order to keep grievant on the job and dispose of her if she could not. Given all of those circumstances, grievant had no recourse than to believe further communication with him would be useless.[12]

In the case of Major v. DeFrench, 286 S.E.2d 688, 694 (W.Va. 1982), the Court relied on other jurisdictions to express its view on the right to an extended probationary term:

> In the usual case the probationary period will expire one year from the date it commences. However, in order to fulfill the purposes for which the probationary period was designed, it is necessary for the probationer to engage in actual service for the full probationary term. See McCabe v. Spokane County Civil Service Comm'n, 14 Wash.App. 864, 545 P.2d 575 (1976). Consequently, where the probationer is prevented from serving the full probationary period by forces beyond his or her control, the probationary period must be extended to provide the probationer, as well as the employer, the full benefit of the probationary period.

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[12]Mr. Ielapi's threats to grievant of dismissal if she could not resume work could possibly be construed as a form of harassment, an illegal practice according to the grievance statutes. In any event, the materialized threat would further compromise any hope that the grievant could have entertained about conferring with Mr. Ielapi and possibly convincing him that his decision was erroneous or unwarranted.

See McCabe v. Spokane County Civil Service Comm'n, supra; McVey v. New York, 116 N.Y.S. 908 (1906).

The Major Court determined that the Legislature intended the same result for civil service police officers under W.Va. Code §§8-14-11, 8-14-20, because the statutes required that the probationer be provided a written statement of the reasons for removal and a hearing.

W.Va. Code §29-6-10 (1988), in effect at all times relevant to this grievance, authorized the civil service system "to promulgate, amend or repeal rules . . . to implement the provisions" of Article 6, Subsection 7 "[f]or a period of probation not to exceed one year before appointment or promotion may be made complete with the classified service," and, Subsection 11, for

> discharge or reduction in rank or grade only for cause of employees in the classified service. Discharge or reduction of these employees shall take place only after the person to be discharged or reduced has been presented with the reasons for such discharge or reduction stated in writing, and has been allowed a reasonable time to reply thereto in writing, or upon request to appear personally and reply to the appointing authority or his deputy. The statement of reasons and the reply shall be filed as a public record with the director. Notwithstanding the foregoing provisions of this subdivision, no permanent employee shall be discharged from the classified service for absenteeism upon using all entitlement to annual leave and sick leave when such use has been due to illness or injury . . . [(emphasis added)].

The statute sets forth the right of permanent employees for retention after exhausting leave time; however, no other distinctions are made between permanent and probationary employees. In other words, the Legislature intended procedural protections for the discharge or reduction of probationary as well as

permanent employees. The civil service regulations reflect an understanding of this requirement. 143 CSR 1-13.2 provides that a permanent employee may be discharged for cause upon fifteen days' notice stating specific reasons therefor. "The employee shall be allowed a reasonable time to reply thereto in writing, or upon the request to appear personally and reply to the appointing authority or his deputy." 143 CSR 1-11.6 provides that a probationer may be discharged if it is determined at any time during the probationary period that the employee's services are unsatisfactory upon fifteen days' notice stating the reasons for the discharge. Likewise, the probationary employee must be "allowed a reasonable time to reply thereto in writing or upon request to appear personally and reply to the head of the department or his deputy."

There appears to be little difference in the civil service regulations describing the procedural protections afforded probationary and permanent employees who have been identified for separation or dismissal from the classified service. Indeed, the regulations are similar in many respects to the statutory language of Code §§ 8-14-11, 8-14-20 which governs the employment rights of civil service police employees, both permanent and probationary.

In the instant case, CORR admits that grievant was dismissed because she could not work through no fault of her own, but it also insists she was legally terminated because of unsatisfactory work. In any event, the grievant was denied any meaningful discourse with Mr. Ielapi about the matter, despite

the completion of the paper requirements, for he had already made up his mind that grievant was "fired." The regulations require a determination of unsatisfactory work, but Mr. Ielapi assured the grievant that if she said she had the charts and clinic in order, he was satisfied that that was the case. Grievant was effectively denied her probationary employment through no fault of her own, although it seems that for the purposes of the grievance action Mr. Ielapi would have granted her some reasonable time to take an unpaid personal leave of absence for recuperation. Given Mr. Ielapi's pronouncement and extrapolating and applying the cited pronouncements in Major to the instant matter, it is determined that grievant is entitled to an opportunity to complete her probationary employment as long as her work remains satisfactory.

In addition to the foregoing narration and factual and legal conclusions, additional findings are presented in the remainder of this decision as well as formal conclusions of law.

FINDINGS OF FACT

1. Beginning December 1988, the grievant served as a Nurse I at the Industrial Home for Youth (Home), respondent CORR's facility. She was first retained on a provisional basis because her employment had not been effected via the established procedure of original appointment from a civil service register. Grievant eventually completed a civil service application.

2. Thereafter, grievant's name was ultimately selected from the register, and she was formally appointed to the permanent nurse position in the classified service, effective March 1, 1989. However, true to her own understanding of her employment status, she remained a probationer on entry level wages pending completion of the requisite trial work period.

3. On March 1, 1989, grievant suffered a compensable injury while at work. She was not able to work the two remaining days of that week and the week thereafter. CORR's administrator, James Ielapi, led grievant to believe that her job was in jeopardy if she did not, in fact, return to work after one full week of sick leave and grievant secured her doctor's release to return to work March 13, 1989, because of her need for employment and fear of termination.

4. When grievant returned to work on March 13, without prior warning Mr. Ielapi "counseled" grievant and orally presented to her several complaints of her work. He memorialized the meeting and listed the deficiencies in a writing to her that day.

5. Mr. Ielapi had in his possession but withheld from grievant several documents purporting to be incident reports of complaints of her work but those listed items appeared on the post-counseling memorandum.

6. Inasmuch as most of the listed and complained-of items had not been brought to her attention in any manner, it is reasonable to find and conclude that the matters complained of could and should have been known to the administration and could

and should have been made known to her prior to March 13, 1989, if the deficiencies were of any importance or consequence.

7. Grievant resumed her nursing duties the week of March 13-17, 1989, and quickly took care of some minor problems with charts as were pointed out to her. She remained on medication for her injury and experienced pain for much of the work-time.

8. Grievant called the Home on March 20, 1989, and said that she was not able to work. Her husband hand-delivered a doctor's statement to Mr. Ielapi on March 21, 1989, stating that grievant needed further time off for medical testing. Mr. Ielapi refused to accept the statement because he mistakenly thought it faulty as to dates and told Mr. Bonnell that grievant was fired.

9. By letter dated March 22, 1989, Mr. Ielapi formally notified grievant of the dismissal previously voiced.

10. At hearing Mr. Ielapi stated that he would have granted grievant a personal leave of absence after issuance of the termination letter had she requested it, and "we wouldn't even be here today," but his prior oral pronouncement to grievant's husband that she was fired effectively discouraged any communication with him on her part.

11. According to regulation, probationary employees are permitted up to one year's leave of absence, or more, at the discretion of management. Grievant's dismissal was processed on a WV-11 by CORR on March 23, 1989, with effective date of April 7, 1989, thus Mr. Ielapi's statement that he would have "un-dismissed" her had she personally come forward was false.

12. CORR admits that grievant was aggrieved by Mr. Ielapi's actions, CORR Brief at 19.

CONCLUSIONS OF LAW

1. With the exception of certain expressly excluded employees, the plain and unambiguous language of W.Va. Code §29-6A-2(e) defines covered state "employee" as any person hired for permanent employment, either full or part-time. The term employee is not limited to "permanent employees" and, therefore, probationary employees hired for permanent employment may file grievances under W.Va. Code §§29-6A-1 et seq.

2. W.Va. Code §29-6A-6 provides that the burden of proof shall rest with the employer in disciplinary matters, Mayfield v. W.Va. Dept. of Natural Resources, Docket No. 89-DNR-442 (Sept. 29, 1989), but the termination of a probationary employee hired for permanent employment is not a per se disciplinary action.

3. A grievant must prove the allegations of his or her complaint by a preponderance of the evidence, Hanshaw v. McDowell Co. Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988), and a probationary employee ordinarily must advance a grievance complaint, including a challenge to separation from employment for unsatisfactory performance, through the procedural levels and prove his or her case by a preponderance of the evidence to prevail on the complaint.

4. While a separated probationary employee's rights to continued employment are limited, grievant's right to notice of an impending termination due to unsatisfactory work and right to be heard by her department head prior to final action on the separation, per 143 CSR 1-11.6, was violated when Mr. Ielapi orally fired her in advance of written notice, rendering further communication on her part futile. Given the testimony at level four, this failure to comply with the regulation was prejudicial to the grievant.

5. If a probationer in the classified service cannot complete the probationary employment through no fault of her own, she must be permitted a reasonable time to complete the trial work period when deficiencies were fabricated or exaggerated simply to facilitate a termination. See Major v. DeFrench, 286 S.E.2d 688 (W.Va. 1982)

6. In most cases, it probably would be unreasonable for a state employer to retain an employee, medically unable to work due to an on-the-job injury, for more than one year on an unpaid leave of absence. See Casto/Lallathin v. W.Va. Dept. of Corrections, Docket Nos. CORR-89-022/191 (Nov. 30, 1989).

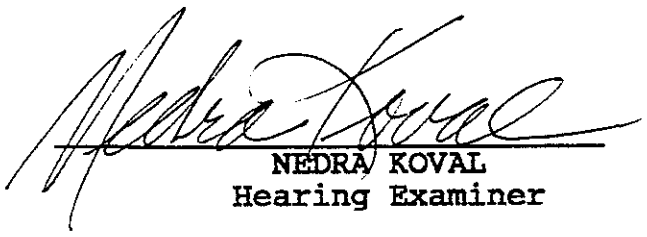
7. W.Va. Code §§29-6A-1 et seq., do not expressly empower a hearing examiner to award costs and fees for grievance proceedings at level four unless a party alleges and proves bad faith pursuant to section seven of the statute.

8. Grievance Board hearing examiners have no authority to award attorney's fees. See Smarr v. Wood Co. Bd. of Educ., Docket No. 54-86-062 (June 16, 1986).

Accordingly, this grievance is **GRANTED** but only to the extent that grievant shall have a reasonable amount of time to recover from her work-related injury, not to exceed one year from the effective date of her discharge, April 7, 1989, and she shall be offered an opportunity to complete her probationary employment providing her work is satisfactory. Respondent Department of Corrections is **ORDERED** to reinstate grievant to her probationary employment if she presents herself medically able to work in the prescribed time, otherwise her termination shall be final. The grievance is **DENIED** as to all other relief requested.

Either party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Doddridge County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

DATED: March 8, 1990



NEDRA KOVAL
Hearing Examiner