THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

GINA HAYS,
Grievant,

v. **Docket No. 2015-0591-DHHR**

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

DECISION

Grievant, Gina Hays, was employed by Respondent, Department of Health and Human Resources ("DHHR"), Bureau for Children and Families. Grievant had worked for about eight months of a twelve-month probationary period in the Child Protective Worker Trainee classification. Pursuant to WEST VIRGINIA CODE § 6C-3-4(a)(4) Ms. Hays filed an expedited grievance to level three dated November 15, 2014, alleging that she had been dismissed from employment without cause and seeking reinstatement to her position with back pay and interest, as well as the restoration of all benefits.

After this matter was twice continued for good cause shown by the moving parties, a level three hearing was held on two separate days (July 1, 2015 and March 28, 2016) in the Charleston office of the West Virginia Public Employees Grievance Board. Grievant appeared personally and was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by Harry C. Bruner, Jr., Assistant Attorney General. This grievance became mature for decision on June 2, 2016, upon receipt of the Proposed Findings of Fact and Conclusions of Law submitted by the parties.

Synopsis

Respondent terminated Grievant's probationary employment after a number of incidents caused it to believe that her job performance was unsatisfactory. These incidents indicated that she was not cooperative with other members of the Multidisciplinary Treatment Teams which operate to provide a group based approach to care for vulnerable children.

Grievant contended that her performance was satisfactory if not meritorious. She believed that the problems with the other team members were the result of misunderstanding or unreasonable vendettas against her for her zealous pursuit of assistance for this at-risk population.

Grievant did not prove that her performance was satisfactory.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Gina Hays, was employed by Respondent, Department of Health and Human Resources ("DHHR"), Bureau for Children and Families, as a Child Protective Worker Trainee.

2. Grievant worked in the DHHR Kanawha District office in Charleston and was a probationary employee. She had worked for about eight months of a twelve-month probationary period in the classification before her employment was terminated.

3. After a series of incidents, Grievant's supervisors made the determination that her performance was unsatisfactory and terminated her probationary contract effective November 25, 2014. This action was communicated to Grievant by letter dated

November 10, 2014, from Regional Director, Cheryl Salamacha and citing Division of Personnel ("DOP") Administrative Rule §§ 10.5 and 12.2 as authority.[1]

4. Director Salamacha determined that Grievant had not "made a satisfactory adjustment to the demands of [her] position," and had not "met the required standards and conduct of work." Director Salamacha specifically cited the following incidents as examples.

> 1. On the PL case you were observed to engage in inappropriate conduct during a Multidisciplinary Treatment Team (MDT) meeting. Specifically, the Guardian ad Litem (GAL) reported that she had seen you "physically and inappropriately comforting the respondent father in an MDT Hearing".
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> 2. On the BS case the same Guardian ad Litem reported that you had permitted the respondent parents in this case to have unsupervised visits in spite of being advised there were concerns with unknown people being in this home. She stated she communicated with you about her concerns specifically asking if you had investigated the allegations that another family was living in the parent's home and if you had talked with BS's therapist. She stated you had not investigated these matters and would not change the visitation unless the prosecutor told you to do so. The Prosecuting Attorney on this case advised the GAL he had not agreed to unsupervised visitations. She further stated that "Ms. Hays' emails read as demanding and rude, unnecessarily".
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> 3. This GAL went on to state "Ms. Hays was dishonest with me and despite asking me what she needed to do, ignored my recommendation, stating that other people know "the case and family better than anyone so she felt comfortable with the decision". This placed BS in danger and that cannot be tolerated.
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> 4. This GAL further stated "I do not trust that Ms. Hays and I have no other choice but to move the Court to remove her from my cases. In support of these motions I will have to inform the

[1] DOP Administrative Rule §10.5 provides that "[I]f at any time during the probationary authority determines that the services of the employee are unsatisfactory, the appointing authority may dismiss the employee in accordance with subsection12.2 of this rule."

Court of my and other attorney's experiences with her ability as a caseworker."

5. On September 12, 2014, you sent an email to the Assistant Prosecuting Attorney (PA) with the subject of: **"NAKED PHOTOS of TWO COURT APPOINTED ATTORNEYS"**. You did this in an attempt to get his attention so he would respond in a timely manner to your need for assistance. Unfortunately, that was not the reaction received. This PA took exception to the email and stated: "since I view her inappropriate email as sexual harassment in nature I do have a legitimate conflict and will not represent her. And if I'm made to I will appeal this to the Supreme Court and contact the press as well."

6. On the case of DF, you made arrangements for this child to be returned to the home of a relative with whom she had lived prior to coming into the custody of the department and being placed in Highland Hospital, against the recommendation of the hospital personnel who had worked with DF. When questioned about the action you told your supervisor you were not aware a discharge plan had been completed and thus felt your intention to place the child was appropriate. In fact the discharge plan was developed on September 10, 2014, and arrangements were made for DF to be released to the Barboursville School. You were aware of this plan because the hospital advised you of it when you were there on September 15, 2014. After you visited the child at Highland Hospital on September 15 she (DF) advised hospital staff that she really liked her new worker (you) as you had been molested and knew how she felt. Later that day a representative called you to discuss the reasoning behind the Barboursville School referral. You stated you are not in agreement with it and felt that DF was being punished due to being a victim of sexual abuse. This representative spoke with Dr. Devaraj about your position on this matter and the Dr. stated he would write a letter addressing the court if the patient did not go to Barboursville School as planned due to DF's abuse reactive behaviors.

Director Salamacha also noted that Grievant had met with her supervisor regarding these issues and was not receptive to suggestions. She further noted that when Grievant disagreed with the direction provided by her supervisor she simply did not follow that direction, and that Grievant's effectiveness as an employee was "greatly

diminished due to [her] inability and/or unwillingness to follow policy, court orders, medical provider's instructions/recommendations and the directives of [her] supervisor in the completion of [her] duties. (Respondent Exhibit 1).

5. A predetermination conference was held on October 17, 2014. Grievant was present with representatives Joe Watkins and Gordon Simmons. Also present were: Social Service Coordinator, Sandra Wilkerson; Child Protective Service Supervisor, LaDella Blair; and Community Service Manager, Anita Adkins. When confronted with the foregoing allegations, Grievant alleged that she had received no direction concerning her cases, she did not realize there was a discharge plan for DF, the assistant prosecuting attorney was "after" her and that she had not rubbed the back of the respondent father at the Multi Discipline Team meeting. *Id.*

6. At a Multidisciplinary Team, meeting the Assistant Prosecutor was challenging a parent for allegedly appearing at the meeting under the influence of alcohol. Grievant comforted the parent by rubbing his back while the confrontation was taking place.

7. Grievant allowed a child to have an unsupervised overnight visit with parents from whom the child had been removed. The visit was not consistent with a Court Order without confirming the visits with the child's appointed Guardian ad Litem or the Assistant Prosecuting Attorney assigned to the case.

8. After the foregoing incidents, the Guardian ad Litem, who regularly represents children in the DHHR cases and on MDTs, wrote a letter to Grievant's supervisors stating that she no long felt she could trust Grievant and was going to move the Court to remove Grievant from her cases.

9. On September 12, 2014, Grievant sent an email to the Assistant Prosecuting Attorney (PA) with the subject of: **"NAKED PHOTOS of TWO COURT APPOINTED ATTORNEYS."** The first line of the e-mail stated, "CPS social workers say you don't read or respond to emails, so I hope the subject was at least enough for you to start to read this. The remainder of the email consisted of questions and concerns regarding client situations. This email was sent at a time when the Kanawha County Prosecuting Attorney was the subject of intense media scrutiny.

10. Following this incident, the Assistant Prosecuting Attorney advised Grievant's supervisor, LeDella Blair, that he would no longer work on cases to which Grievant was assigned. His decision was based upon this incident as well as other matters set out above. Subsequently, Grievant sent a text message asking the Assistant Prosecuting Attorney about a case and apologizing for the inappropriate subject line. The Prosecutor responded to the question and told Grievant to not contact him in the future. He stated that all contact had to come through Grievant's supervisor because he had received too many complaints from other lawyers and his staff. Grievant continued to engage in the texting until the Assistant Prosecutor threated to charge her with harassment. (Grievant Exhibit 5).[2]

11. On September 10, 2014, a discharge plan was developed by Highland Hospital for the transfer on DF to the Barboursville School. Grievant was made aware of the plan on September 15, 2014, when she visited DF at Highland. Grievant disagreed with this plan and made alternative arrangements for the child to be returned to a relative

[2] The text messages were copied and printed from Grievant's cell phone. They are dated for September 4, September 11, and September 19, 2014.

where she lived before being admitted. The doctor in charge of DF's care insisted that DF go to the Barboursville School due to the "abuse reactive behavior and was prepared to contact the court if the discharge plan was not implemented.

12. Grievant presented three letters from clients who expressed appreciation for her work and concern on behalf of children in their care. (Grievant Exhibit 8). Grievant apparently had some successes during her short tenure, but also managed to alienate most of the professionals with whom she needed to work closely, especially on Multidisciplinary Teams, to provide proper care and treatment for the clients she served by ignoring procedures and orders when she disagreed.

Discussion

When a probationary employee is dismissed for misconduct, the dismissal is disciplinary and the burden of proof rests with the employer. Respondent must meet that burden by proving the charges against the grievant by a preponderance of the evidence. *Mendenhall v. Dep't of Health & Human Res./Bureau for Children & Families,* Docket No. 2011-0997-CONS (Apr. 26, 2011); *Birchfield v. Div. of Highways,* Docket No. 2010-1498-DOT (Apr. 5, 2011); *Grueser v. Dep't of Health & Human Res.,* Docket No. 2010-1341-DHHR (Dec. 1, 2010); *Nicholson v. W. Va. Dep't of Health & Human Res./Bureau for Child Support Enforcement*, Docket No. 99-HHR-299 (Aug. 31, 1999); *Wolfe v. Dep't of Transp./Div. of Highways,* Docket No. 95-DOH-491 (July 31, 1996).

When, as in this case, a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is upon the employee to establish that his services were satisfactory. *Bonnell v. W. Va. Dep't of Corr*., Docket No. 89-CORR-163 (Mar. 8, 1990);

Roberts v. Dep't of Health & Human Res., Docket No. 2008-0958-DHHR (Mar. 13, 2009); *Birchfield v. Div. of Highways*, Docket No. 2010-1498-DOT (Apr. 5, 2011).

The Division of Personnel's Administrative Rule at Section 10, describes the probationary period of employment 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." It further states 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).

Grievant gives the impression of being intelligent, articulate and organized. She also appeared to feel strongly about providing assistance to the vulnerable population she was charged with protecting. These are all valuable characteristics for success as a child protective service worker, but they are not the exclusive characteristics.

West Virginia has adopted a team approach to child protection. The court is an essential component as well as the prosecuting attorney, a Guardian ad Litem to protect the child's interest in the legal and placement proceedings. Medical professionals participate to promote the physical and mental health of the children. Service providers, social workers and CPS workers are essential to ensure that the children and their families receive necessary assistance. so that the future safety and welfare of the clients may be promoted. Essential to this team process is the willingness to work together, to respect the roles and opinions of the other providers and to abide by the decisions made by appropriate team members, especially Court orders.

Grievant became frustrated with the pace of response from team members and took insulting and inappropriate steps to get responses without regard to the workload of others. Worse yet she ignored the decisions of team members with particular expertise when she disagreed with their determinations, even to the extent of attempting to circumvent the discharge plan developed by mental health professionals including a client's treating physician. Her conduct became so problematic that essential team members in the Kanawha County court system lost trust in her judgement and refused to work with her.

Grievant attempts to justify her actions by stating that others were unclear in their instructions or overly sensitive. However, regardless of what she may have been told by another social worker, she allowed a child to have an unsupervised visit with parents, which was prohibited by a court order without verifying with the Guardian ad Litem or Assistant Prosecuting Attorney that the legal circumstances had changed. She also alleged that she was unaware that Highland Hospital had developed a discharge plan for a client when the evidence indicated that she was aware of the plan but hoped to circumvent it. While some there may have been some measure of overreaction by team members in particular instances, it is clear that the cumulative effect of Grievant's behavior was to render her future participation in the Multidisciplinary Team process ineffectual at best.

While Grievant appears to have had some success in her job, given the totality of the evidence, Grievant failed to prove that her job performance was satisfactory. In fact, Respondent proved, by a preponderance of the evidence, that Grievant's job

performance was unsatisfactory and it was justified in terminating her probationary contract. Accordingly, the grievance is DENIED.

Conclusions of Law

1. When, as in this case, a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is upon the employee to establish that his services were satisfactory. *Bonnell v. W. Va. Dep't of Corr*., Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. Dep't of Health & Human Res.,* Docket No. 2008-0958-DHHR (Mar. 13, 2009); *Birchfield v. Div. of Highways*, Docket No. 2010-1498-DOT (Apr. 5, 2011).

2. The Division of Personnel's Administrative Rule at Section 10, describes the probationary period of employment 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." It further states 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).

3. Given the totality of the evidence, Grievant failed to prove that her job performance was satisfactory. In fact, Respondent proved, by a preponderance of the evidence, that Grievant's job performance was unsatisfactory and it was justified in terminating her probationary contract.

Accordingly, the grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA.

CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: SEPTEMBER 7, 2016.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE