THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KELLY CLARK,
Grievant,

v. **Docket No. 2017-2133-CONS**

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

DECISION

Grievant, Kelly Clark, started employment with Respondent, Department of Health and Human Resources ("DHHR") on May 31, 2016. She was assigned to the Bureau for Children and Families, as a Child Protective Service ("CPS") Worker Trainee. Ms. Clark filed a level one grievance form dated February 24, 2017, alleging she was disciplined without cause due to a false allegation. As a remedy, Grievant seeks to have the discipline reversed and removed from her record. Ms. Clark filed a level three grievance form dated April 19, 2017, seeking an expedited hearing[1] contesting the termination of her employment without good cause. In this grievance, she seeks reinstatement with back pay and interest as well as all benefits restored. The two grievances were consolidated by Order dated May 15, 2017.

A level three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board on August 28, 2017. Grievant was present and represented

[1] *See* W. VA. CODE § 6C-2-4(a)(4).

by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by James "Jake" Wegman, Assistant Attorney General. This matter became mature for decision on October 16, 2017, upon receipt of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Respondent terminated Grievant's probationary employment for violating DHHR policies by using profane words and derogatory comments when talking to a client. Grievant argued that she was following her training by using the same language used by the client. Respondent proved that DHHR policies prohibit use of profanity when dealing with clients and that it is counter to the program philosophy to denigrate clients by questioning their intelligence.

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, Kelly Clark, started employment with the DHHR on May 31, 2016. She was a Child Protective Service[2] Worker Trainee in the Bureau for Children and Families.

2. CPS Trainees serve a one year probationary period in which they receive extensive training. They are given a smaller caseload which increases gradually until they have a full caseload at the end of the probationary period.

[2] ("CPS")

3. Grievant was a probationary employee. She had completed her training and was working a substantial caseload when her employment was terminated. She had not been subjected to any discipline prior to the events leading to her dismissal.

4. CPS workers are required to assess referrals of abuse and neglect and make decisions about the safety of children in their homes. If children are at risk, the CPS worker must assess if an in-home safety plan can be implemented. If not, judicial intervention may be sought to temporarily remove the children from the home. The ultimate goal is to return the children to the family if that can be done safely. Part of the CPS worker's job is to build the clients up by modeling ethical behavior and treating them with respect and dignity. The workers try to empower clients with knowledge and services which allow them to properly cope with difficult circumstances and care for their children.[3]

5. Multi-disciplinary teams including health care professionals, social workers, attorneys and prosecutors, work together to provide training and guidance to the family.

6. Grievant was assigned a case with H.C. and her children. H.C.[4] had a multi-disciplinary team which included Grievant and Rebecca Johnson, an attorney representing H.C.'s interests. H.C. had complained to Ms. Johnson about the way Grievant treated her.

7. H.C. was a dancer at night clubs. Grievant tried to get H.C. other jobs so she could be with her children more in the evenings. H.C. did not like to get up early and had trouble holding day jobs. She told Grievant that she enjoyed dancing and would

[3] Testimony of Cheryl Salamacha, DHHR Regional Manager.
[4] Initials are used instead of the name of the client to protect her privacy interest in receiving services from the DHHR.

continue to earn money that way. Grievant also got H.C. a bus pass for transporting herself and her children, but H.C. rarely used it because she did not like to ride the bus.[5]

8. H.C. was receiving services at a provider called Children First. Two staff members were working with H.C. to develop parenting skills and monitoring visitation with her children. Grievant met H.C. at the provider to check on how she was progressing on some issues related to the children.

9. Grievant had a scheduled meeting with H.C. while she was at Children First. H.C. was upset because she had brought cash in her purse, and she believed some of it had been stolen by staff members at the provider. This was part of the discussion which took place during the meeting. Grievant was telling H.C. that she should not lie about the service providers.

10. H.C. recorded part of her discussion with Grievant. She did not hide the fact that she was recording the meeting and Grievant was aware of it. H.C. took the recording to her counsel, Rebecca Johnson. Ms. Johnson became upset about a number of things said on the recording. She recorded the conversation from H.C.'s cell phone to her own cell phone, and then made a complaint to DHHR about Grievant's comments to H.C.

11. The original recording captured only part of the conversation between Grievant and H.C. and Ms. Johnson did not record all the original recording. The sound quality was poor on the rerecording.

12. By letter dated March 29, 2017, Grievant was given notice for a predetermination conference. The reason for the conference was alleged violation of

[5] Grievant testified without contradiction that H.C. had missed 72 meetings with her children because she did not like to ride the bus.

DHHR Policy 2108 – *Employee Conduct* "Improper language with customer base you are employed to serve." (Respondent Exhibit 3).

13. On April 3, 2017, a predetermination conference was conducted with Grievant to determine if disciplinary action would be taken related to the statements made to H.C. by Grievant which were captured on the taped recording. Grievant was present with her representative, Gordon Simmons. Also present were, Maureen Rogers, Interim Community Services Manager ("CSM"), Melissa Shepperd, Social Service Coordinator, and Meaghan Goffreda, CPS Supervisor.

14. At the predetermination conference, Grievant was asked about the taped conversation. It was noted that Grievant was heard to say to H.C. "when you are fucking someone" when letting H.C. know she was aware of who H.C. was having sexual relations with. Grievant also told H.C., "you're a ho,[6] we already know you are a ho." Grievant also told H.C. "unfortunately, your level of intellect is not where it should be" when H.C. was saying she did not know what Grievant was telling her or she misconstrued what Grievant had said. H.C. said on the recording that Grievant called her a "bitch." She told her attorney that she was afraid of Grievant.

15. Grievant acknowledged that it was her voice on the recording and that she had made the statements they were discussing. Grievant responded that she had been trained to use the client's language. She said that H.C. had called herself a ho and Grievant was just using H.C.'s words. She also said the comment about H.C.'s intelligence was related to H.C. discussing not being where she ought to be in course

[6] In this context "ho" is defined as, "a sexually promiscuous woman; a prostitute; a whore." *Dictionary.com Unabridged*. Random House, Inc. 27 Oct. 2017. <Dictionary.com http://www.dictionary.com/browse/ho>.

work for getting a G.E.D.[7] Grievant said H.C. was lying about calling her a bitch, and being afraid of her. Grievant became strident about her position and would not accept that she had done anything wrong.

16. Grievant also told H.C. that she could not walk her children to daycare or use a taxi. She said she was trying to get H.C. to consider riding the bus as part of her plan to transport her children. Many clients walk their children to daycare and a taxi is a viable alternative if the client can afford it.

17. The DHHR *Child Protective Services Policy,* Section 1.2, *Philosophical Principals,* states *inter alia,* the following:

> **Philosophical beliefs about child maltreatment and their effects on families are the single most important variable in the provision of quality CPS.** (Emphasis in original).
>
> The most basic and powerful influence of helping in CPS is expressed by consistently applying professional beliefs and values.
>
> Respect for families is essential for effective intervention. It is a value demonstrated by staff communication, behavior, and interaction with children and caregivers throughout the SAMS process.

(Respondent Exhibit 6).

18. DHHR Policy Memorandum 2108 – *Employee Conduct* states *inter alia* "Employees are expected to: refrain from profane, threatening or abusive language toward others . . ." *Id.* § VIII, 2d ¶.

19. By letter from Regional Director, Cheryl Salamacha, dated April 19, 2017, Grievant was notified that she was dismissed from her position as a CPS Worker Trainee.

[7] Graduate Equivalency Diploma. This is an alternative study program for people who have not graduated from high school.

Director Salamacha stated the following about Grievant's work performance during her probationary period:

> Having evaluated your work during your probationary period, I have concluded that you have not made a satisfactory adjustment to the demands of your position, nor have you met the required standards of work. Although you have demonstrated an accomplished logistical understanding of the position, you have demonstrated unprofessional behaviors to clients associated with your job.

(Respondent Exhibit 5).

20. After recounting the things Grievant said to H.C. during their recorded meeting, Director Salamacha wrote:

> [U]sing curse words and derogatory statements regarding a parent's character is considered outside the scope of a practicing Social Worker, in the capacity of Child Protective Service Worker Trainee. It is also in disregard to **Child Protective Service Policy 1.2 which speaks to respect for families; the rights of children and caregivers, and the child centered and family focused practices.**

Id. (Emphasis in original). Director Salamacha also wrote that Grievant's conduct violated DHHR Policy Memorandum 2108, VIII, Employee Conduct which provides:

> ***Employees are expected to conduct themselves professionally in the presence of residents/patients/clients fellow employees and public; . . .*** [and] ***refrain from profane, threatening or abusive language toward others.***

Id. (Emphasis in original).

Discussion

Grievant, Kelly Clark, was employed as a Child Protective Worker Trainee, by Respondent DHHR for a one year probationary period. She had served nearly eleven months of that period when her employment was terminated.

If a probationary employee is terminated on the grounds of misconduct, the termination is disciplinary, and the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *See Cosner v. Dep't of Health and Human Resources/William R. Sharpe, Jr. Hospital*, Docket No. 08-HHR-008 (Dec. 30, 2008); *Livingston v. Dep't of Health and Human Res.,* Docket No. 2008-0770-DHHR (Mar. 21, 2008). *See also* W. VA. CODE ST. R. § 156-1-3 (2008). *See also Lott v. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999). When a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is upon the employee to establish that his services were satisfactory. *Bonnell v. W. Va. Dep't of Corrections*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. Dep't of Health and Human Res*., Docket No. 2008-0958-DHHR (Mar. 13, 2009). Grievant "is required to prove that it is more likely than not that [her] services were, in fact, of a satisfactory level." *Bush v. Dep't of Transp.,* Docket No. 2008-1489-DOT (Nov. 12, 2008). "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." *Livingston v. Dep't of Health and Human Res*., Docket No. 2008-0770-DHHR (Mar. 21, 2008) (citing *Johnson v. Dep't of Transp./Div. of Highways*, Docket No. 04-DOH-215 (Oct. 29, 2004)). "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). If the evidence is equally balanced, the party with the burden of proof has not met that burden. *See Leichliter v. W. Va. Dep't of Health and Human Res.,* Docket No. 92-

HHR-486 (May 17, 1993). In this case, the Respondent put on its evidence first and assumed the burden of proof.

The Division of Personnel ("DOP") Administrative Rule describes the probationary period as follows:

> 10.1.a. The probationary period is a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program of the agency. It is an integral part of the examination process and the appointing authority 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.

W. VA. CODE ST. R. 143-1-10.1.a. The same rules state that an employee may be dismissed at any time during the probationary period if the employer finds his or her services are unsatisfactory.

Respondent followed the procedural requirements of the Division of Personnel Administrative Rule by giving Grievant a predetermination conference, oral and written notice of the reason for the contemplated disciplinary action, and an opportunity to respond. *See,* W. VA. CODE ST. R. § 143-1-12.2.

The reasons for terminating Grievant's probationary employment were clearly set out in Regional Salamacha's letter.[8] Grievant's use of profanity in saying H.C. was a "ho" discussing her "fucking someone" and stating that H.C.'s "level of intellect is not where it should be" violated DHHR Policy Memorandum 2108 – *Employee Conduct* and DHHR *Child Protective Services Policy,* Section 1.2 which states:

[8] *See* FOFs 19 & 20 *supra.*

> The most basic and powerful influence of helping in CPS is expressed by consistently applying professional beliefs and values.
>
> Respect for families is essential for effective intervention. It is a value demonstrated by staff communication, behavior, and interaction with children and caregivers throughout the SAMS process.

Id.

Grievant argues that the discipline is completely based upon the recording of the conversation between Grievant and H.C. She urges that the content of the recording should be given no weight because it is hearsay, out of context, and the person who made the original recording did not testify. Grievant argues that without the recording Respondent cannot prove any misconduct by Grievant.

The audio recording on its own is problematic as evidence because it is hearsay, as well as a recording of a recording which rendered the sound quality poor. Additionally, there is no first hand testimony regarding how the recording was produced.

With regard to the hearsay objection, the issue is not admissibility but one of weight. An administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a proceeding. *Warner v. Dep't of Health and Human Resources*, Docket No. 07-HHR-409 (Nov. 18, 2008)*; Miller v. W. Va. Dep't of Health and Human Resources*, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996). That means that hearsay evidence, while generally admissible, will be subject to scrutiny because of its inherent susceptibility to being untrustworthy. *Lunsford and Kelly v. Reg. Jail and Corr. Facility Auth.,* Docket No. 2016-1388-CONS (Sept. 28, 2016).

In applying that scrutiny, administrative law judges apply 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. *See, Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (March 11, 2010) (affirmed by the Circuit Court of Kanawha County, WV, June 9, 2011).

"'[T]he primary reason for the exclusion of hearsay is that there is no way for the trier of fact to judge the trustworthiness of the information.' *Handbook on Evidence for West Virginia Lawyers,* Vol. 2, 4th Edition, Franklin D. Cleckley, © 1994. The evidence is inherently unreliable because; it denies the accused the opportunity for cross examination of the speaker at the time it is being made, it often lacks the sanction of being made under oath, and it facilitates the use of perjured evidence. *Id." Lundsford and Kelly v. Reg'l Jail & Corr. Facility Auth.,* Docket No. 2016-1368-CONS (Sept. 28, 2016).

Most, if not all, the problems with the reliability of the recorded hearsay evidence are solved by Grievant's testimony. Respondent's main reason for dismissing Grievant is her inappropriate statements to H.C. Grievant admitted to making the offending statements both in the predetermination conference and under oath at the hearing. The

statements are no longer hearsay but are provided by live testimony of Grievant and those attending the predetermination conference. Additionally, Grievant was given the opportunity to put the statements in context.[9]

Respondent proved that Grievant said to the client "you're a ho, we already know you are a ho," "when you are fucking someone" and "unfortunately, your level of intellect is not where it should be." Grievant attempted to explain her use of this language by noting that she had been trained to use the language of her clients and H.C. had used the term "ho" and "fuck' in describing her own activities.

Social Services Coordinator, Melissa Shepperd agreed that CPS Worker Trainees are taught to speak on the client's level. That means to use words they understand and not talk down to the client. This is particularly important with CPS Workers when speaking with children or parents who have had little formal education. However, Ms. Shepperd noted that Trainees are specifically told not to use profanity. Further, it is against the basic philosophy of the program to use the words of the client to belittle them.

The DHHR *Child Protective Services Policy,* Section 1.2, *Philosophical Principals* specifically states that "Respect for families is essential for effective intervention. It is a value demonstrated by staff communication, behavior, and interaction with children and caregivers throughout the SAMS process," and DHHR Policy Memorandum 2108 – *Employee Conduct* states: "Employees are expected to: refrain from profane, threatening or abusive language toward others." *Id.* Respondent proved by a preponderance of the

[9] W. Va. Code § 6C-2-3(g)(2) provides; "An employee may not be compelled to testify against himself or herself in a disciplinary grievance hearing."

evidence that Grievant used unprofessional, profane, and disparaging language in her meeting with her client, which violated DHHR Policies and CPS program principals.

Director Salamacha emphasized that it was particularly troubling that Grievant insisted that she did nothing wrong and did not acknowledge her mistakes. The probationary period is a time for the worker "to adjust himself or herself to the organization and program of the agency." W. VA. CODE ST. R. 143-1-10.1.a. Ms. Salamacha specifically noted that Grievant had "demonstrated an accomplished logistical understanding of the position, [but also] demonstrated unprofessional behaviors to clients associated with your job." She was concerned that Grievant would not adjust to the basic philosophy of the CPS program if she could not recognize her mistakes and correct them.

Grievant argues that her supervisors had trouble understanding that she was very confident and assertive. They mistook that for an unwillingness to learn. At the hearing, Grievant appeared to be intelligent, articulate, and professional. Certainly, confidence and assertiveness are important qualities for success. However, those qualities must be tempered with acceptance of constructive criticism, and willingness to correct performance problems. Especially during a probationary period when the employer is evaluating the employee's ability and willingness to make necessary adjustments to meet job standards.

Accordingly, Respondent proved that Grievant's conduct warranted termination of Grievant's probationary employment. The Grievance is DENIED.

Conclusions of Law

1. If a probationary employee is terminated on the grounds of misconduct, the termination is disciplinary, and the Respondent bears the burden of establishing the

charges against the Grievant by a preponderance of the evidence. *See Cosner v. Dep't of Health and Human Resources/William R. Sharpe, Jr. Hospital*, Docket No. 08-HHR-008 (Dec. 30, 2008); *Livingston v. Dep't of Health and Human Res.,* Docket No. 2008-0770-DHHR (Mar. 21, 2008). *See also* W. VA. CODE ST. R. § 156-1-3 (2008).

2. When a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is upon the employee to establish that his services were satisfactory. *Bonnell v. W. Va. Dep't of Corrections*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. Dep't of Health and Human Res*., Docket No. 2008-0958-DHHR (Mar. 13, 2009).

3. "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." *Livingston v. Dep't of Health and Human Res*., Docket No. 2008-0770-DHHR (Mar. 21, 2008) (citing *Johnson v. Dep't of Transp./Div. of Highways*, Docket No. 04-DOH-215 (Oct. 29, 2004)). "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).

4. The Division of Personnel ("DOP") Administrative Rule describes the probationary period as follows:

> 10.1.a. The probationary period is a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program of the agency. It is an integral part of the examination process and the appointing authority 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.

W. VA. CODE ST. R. 143-1-10.1.a. The same rules state that an employee may be dismissed at any time during the probationary period if the employer finds his or her services are unsatisfactory.

Id.

5. DHHR *Child Protective Services Policy,* Section 1.2 states:

> The most basic and powerful influence of helping in CPS is expressed by consistently applying professional beliefs and values.
>
> Respect for families is essential for effective intervention. It is a value demonstrated by staff communication, behavior, and interaction with children and caregivers throughout the SAMS process.

6. DHHR Policy Memorandum 2108 – *Employee Conduct* states, "Employees are expected to: refrain from profane, threatening or abusive language toward others."

7. When assessing hearsay evidence, administrative law judges apply 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. *See,*

Kennedy v. Dep't of Health and Human Resources, Docket No. 2009-1443-DHHR (March 11, 2010) (affirmed by the Circuit Court of Kanawha County, WV, June 9, 2011).

8. Respondent proved by a preponderance of the evidence that termination of Grievant's probationary employment was justified because Grievant used unprofessional, profane, and disparaging language in her meeting with her client, which violated DHHR Policies and CPS program principals.

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: November 1, 2017.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE