THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

SHELLY BOSLEY,
Grievant,

v. **Docket No. 2018-0374-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL,
Respondent.

DECISION

On September 13, 2017, Grievant, Shelly Bosley, filed this action to Level Three, against her employer, Department of Health and Human Resources, William R. Sharpe, Jr. Hospital. Grievant alleges that she was dismissed without good cause and was denied due process. As relief, Grievant asks to be made whole, including back pay with interest and benefits restored. A Level Three hearing was conducted before the undersigned on May 10, 2018, at the Grievance Board's Westover office. Grievant appeared in person and by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Brandolyn N. Felton-Ernest, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on July 3, 2018.

Synopsis

Grievant was employed at the William R. Sharpe, Jr. Hospital as a probationary Registered Nurse II. Grievant was dismissed following Respondent's determination that her performance was unsatisfactory, and she demonstrated unprofessional behavior

toward co-workers. When a probationary employee is terminated for reasons other than discipline, it is her burden to prove her services were satisfactory. In the instant case, Grievant was not able to meet her burden of proof and demonstrate that her performance was satisfactory; however, the record did establish that Respondent violated its policy and applicable provisions regarding termination of probationary employees. The manner in which Respondent terminated Grievant's employment was arbitrary and capricious.

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

Findings of Fact

1. Grievant was employed by the Department of Health and Human Resources as a probationary Registered Nurse II with Sharpe Hospital.

2. During the orientation process, Grievant was advised that it would be necessary for her to successfully complete a six-month probationary period.

3. Grievant was hired by Sharpe Hospital as a full-time employee on May 1, 2017; therefore, her six-month probationary period would have been over on November 1, 2017.

4. On July 12, 2017, a coaching session was issued to Grievant by Laura Pritt, Nurse Manager at Sharpe Hospital. The coaching provided to Grievant involved failing to conduct herself in a professional manner as several of Grievant's co-workers had filed formal complaints about the work environment Grievant created while at work.

5. As part of the coaching, Grievant was informed that subsequent incidents of misconduct could result in disciplinary action. If there were no further problems, Grievant could request that any coaching reference be removed from her administrative file in twelve months.

6. Michelle Farris, Nurse Clinical Coordinator, explained an incident that occurred on August 12, 2017, involving Grievant. Grievant was on the unit and was informed that she was going to have to stay until 7:00. Grievant informed Ms. Farris that she was not going to be able to stay, and that she could only work eight-hour shifts. Ms. Farris explained to Grievant that if she had lost her privileges for her twelve and sixteen hour shifts, that did not mean she could not be mandated to work over. Grievant told Ms. Farris that she would get an excuse which would allow her not to be mandated to work overtime.

7. Ms. Farris had concerns with the excuse presented by Grievant. Ms. Farris indicated that Grievant came into her office and gave her a doctor's excuse that was stated for light duty, but it said she had been under that doctor's care on August the eighth and the light duty excuse was dated for the twelfth. The excuse slip only addressed light duty and did not make any restriction concerning Grievant's ability to work an extended shift.

8. Subsequently, a memorandum was included in Grievant's administrative file regarding a verbal reprimand. The memorandum indicated that on August 15, 2017, there was a discussion with Grievant regarding her attendance issue because she had called off on ten different occasions the past two months.

9. Grievant was told that any effort to be at work would be appreciated. Grievant agreed to find coverage for her shifts instead of calling off and it was explained to Grievant that the verbal reprimand was being put in her administrative file.

10. According to the Absenteeism Evaluation Assessment Form, misuse of leave may be determined to have occurred when the absenteeism rate is equal to or greater than 5% during a work period of six months. Grievant's absenteeism rate was 8%. If a

determination of leave misuse is made, attendance expectations counseling, leave restrictions or discipline may be imposed.

11. On August 24, 2017, a Notice of Written Reprimand was prepared. The purpose of the letter was to advise Grievant of the decision to issue progressive discipline as a result of her misconduct, specifically regarding what occurred on August 12, 2017, which left the unit without a registered nurse from 3:00 p.m. to 7:00 p.m.

12. In the Notice of Written Reprimand, it is noted that management was of the opinion that Grievant's conduct was unsatisfactory. It is also noted that this was not the first time Grievant was advised that her conduct needed to improve. In the letter, it is noted that Grievant continued to fail to conduct herself in a professional manner.

13. It is also noted that after considering Grievant's conduct, and a previous corrective action plan, it was decided that a written reprimand was warranted and any further neglect of duty or any other infractions would be viewed as unwillingness, rather than inability, to comply with reasonable expectations.

14. Danielle Radabaugh, Licensed Practical Nurse, indicated that she had several altercations with Grievant and it reached a boiling point on July 9, 2017. Ms. Radabaugh felt that there were several employees that had issues with Grievant's demeanor and the way she spoke to them. Grievant made comments about how LPNs were not nurses, how a one year degree did not compare to her four-year degree, and that she would usually speak down to them and Health Service Workers.

15. By letter dated September 8, 2017, Grievant was dismissed from her probationary employment. The letter stated that after evaluating Grievant's work during

the probationary period, it was concluded that she had not made a satisfactory adjustment to the demands of her position and she had not met the required standards of work.

16. The letter also stated that when Grievant was mandated to work over, she stated she had an excuse and could not work more than eight hours leaving the unit without a registered nurse. The notice also stated that after consideration of Grievant's performance during the probationary period, it was decided that her dismissal was warranted.

17. It is undisputed that Laura Pritt, Respondent's Nurse Manager, approached Grievant, with guards, while she was doing rounds on her unit and handed her the notice of dismissal. Grievant asked Ms. Pritt why she was being served with this notice, and Ms. Pritt responded that there was no time to discuss the matter, and Grievant was escorted to her locker and her badge was demanded.

18. Although a predetermination meeting is required by Respondent's policy in matters involving dismissal, it is undisputed that Grievant was denied such a meeting.

Discussion

When a probationary employee is terminated on grounds of incompetency or unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the employer carries no burden of proof in a grievance proceeding. The employee has the burden of establishing by a preponderance of the evidence that her services were satisfactory. *Bonnell v. W. Va. Div. of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Bowman v. W. Va. Educ. Broadcasting Auth.*, Docket No. 96-EBA-464 (July 3, 1997); *Walker v. W. Va. Public Serv. Comm'n*, Docket No. 91-PSC-422 (Mar. 11, 1992). "The

preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

The Division of Personnel's Administrative Rule discusses the probationary period of employment, describing it as "a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program of the agency." The same provision goes on to state that the employer "shall use the probationary period for the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work." 143 CSR 1 § 10.1(a). A probationary employee may be dismissed at any point during the probationary period that the employer determines his services are unsatisfactory. 143 CSR 1 § 10.5(a).

As described in the Division of Personnel's Rule, the probationary period of employment has a specific purpose. During this time, an employee is to learn the duties of his or her position, and the employer assesses the employee's ability to meet work standards and adjust to the expectations of the agency. In this case, Respondent denied Grievant permanent employment status because she did not meet the required standards of work. Respondent evaluated Grievant's work during his probationary period and concluded that Grievant did not make a satisfactory adjustment to the demands of her position and did not meet the required standards of work.

In the instant case, Grievant has failed in her burden to establish that her services were satisfactory. Respondent was entitled to dismiss Grievant at any point that they

determined her services were unsatisfactory during her probationary period. Grievant was dismissed from probationary employment due to her failure to meet job expectations. Grievant called in ten times in a two-month period resulting in her loss of twelve and sixteen hour shift privileges, when mandated to work over she said she could not work more than eight hours, and she demonstrated poor conduct and unprofessional behavior toward her co-workers. After being coached regarding her conduct and unprofessional behavior toward her co-workers, additional complaints and documentation of similar behavior were received which resulted in a written warning.

The record supports a finding that Grievant failed to conduct herself in a professional manner, and engaged in absenteeism during her short tenure at the hospital. Grievant has failed to establish by a preponderance of the evidence that her services were satisfactory; however, the record did establish that Respondent violated its policy and applicable provisions regarding termination of probationary employees.

The Division of Personnel Rule provides that "[I]f at any time during the probationary period, the appointing authority determines that the services of the employee are unsatisfactory, the appointing authority may dismiss the employee in accordance with subsection 12.2 of this rule." Division of Personnel Administrative Rule 143 CSR 1 § 10.5.a. Rule 12.2 provides that "[A]n appointing authority may dismiss any employee for cause. The appointing authority shall file the reasons for dismissal and the reply, if any, with the Director. Prior to the effective date of the dismissal, the appointing authority or his or her designee shall: meet with the employee in a predetermination conference and advise the employee of the contemplated dismissal, provided that a conference is not required when the public interests are best served by withholding the notice or when the

cause of dismissal is gross misconduct." Division of Personnel Administrative Rule 143 CSR 1 § 12.2.a., 12.2.a.1.

Respondent's policy on corrective and disciplinary action states, "[C]lassified state employees have a liberty/property interest arising out of a constitutional entitlement to continued, uninterrupted employment. To protect those interests, disciplinary actions must be only for cause. Further, the employee must be provided due process - that is, notice of the alleged offense, a predetermination opportunity to respond, and a post-action opportunity for administrative hearing." Respondent's Exhibit No. 17, Policy Memorandum 2104.

The West Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (*citing Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). "What is required to meet procedural due process under the Fourteenth Amendment is controlled by the circumstances of each case." *Barker v. Hardway*, 238 F. Supplement 228 (W. Va. 1968); *See Buskirk*, *supra*; *Edwards v. Berkeley County Bd. of Educ.*, Docket No. 89-02-234 (Nov. 28, 1989).

It is a well-settled principle of constitutional law, under both the State and Federal Constitutions, that an employee who possesses a recognized property right or liberty interest in his employment may not be deprived of that right without due process of law. *Buskirk*, *supra*; *Clark*, *supra*. "An essential principle of due process is that a deprivation

of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

In the instant case, it is undisputed that Respondent failed to conduct a predetermination meeting prior to separating Grievant from her employment. Not only does this undisputed fact raise constitutional concerns, it was a direct violation of Respondent's policy on dismissal. It is axiomatic that an "administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977); *Bailey v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-389 (Dec 20, 1994).

It was unreasonable and in complete disregard of Grievant's request for the reasons behind her dismissal and an opportunity to be heard on the matter to dismiss Grievant in the manner that took place. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind,* Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An

action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id.* (*citing Arlington Hosp. v. Schweiker,* 547 F. Supp. 670 (E.D. Va. 1982)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. *See generally, Harrison v. Ginsberg,* [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." *Trimboli*, *supra*. Respondent's termination of Grievant's employment was arbitrary and capricious.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. When a probationary employee is terminated on grounds of incompetency or unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the employer carries no burden of proof in a grievance proceeding. The employee has the burden of establishing by a preponderance of the evidence that his services were satisfactory. *Bonnell v. W. Va. Div. of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Bowman v. W. Va. Educ. Broadcasting Auth.*, Docket No. 96-EBA-464 (July 3, 1997); *Walker v. W. Va. Public Serv. Comm'n*, Docket No. 91-PSC-422 (Mar. 11, 1992).

2. "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).

3. An employee may be dismissed at any time during the probationary period

if the employer finds his or her services are unsatisfactory. The employer must comply with the procedures set out in subsection 12.2 of the Division of Personnel Administrative Rule when dismissing the employee. Division of Personnel Administrative Rule 143 CSR 1 § 10.5.a.

4. The Division of Personnel Administrative Rule requires Respondent to meet with the employee in a predetermination conference and advise the employee of the contemplated dismissal. Division of Personnel Administrative Rule 143 CSR 1 § 12.2.

5. Respondent's policy on corrective and disciplinary action states, "Classified state employees have a liberty/property interest arising out of a constitutional entitlement to continued, uninterrupted employment. To protect those interests, disciplinary actions must be only for cause. Further, the employee must be provided due process - that is, notice of the alleged offense, a predetermination opportunity to respond, and a post-action opportunity for administrative hearing." Respondent's Exhibit No. 17, Policy Memorandum 2104.

6. It is axiomatic that an "administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977); *Bailey v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-389 (Dec 20, 1994).

7. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for*

the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

8. It was unreasonable and in complete disregard of Grievant's request for the reasons behind her dismissal and an opportunity to be heard on the matter to dismiss Grievant in the manner that took place. The manner in which Respondent terminated Grievant's employment was arbitrary and capricious.

Accordingly, Grievant's request for back pay and interest is **GRANTED** .

Respondent is **ORDERED** to provide Grievant back pay from that date her employment was terminated, September 8, 2017, until the day of the Level Three Hearing, May 10, 2018, plus statutory interest.

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: August 2, 2018

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Ronald L. Reece
Administrative Law Judge