

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KARMYN GOUCH,
Grievant,

v.

Docket No. 2018-1207-DHHR

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

DECISION

Grievant, Karmyn Gouch, was employed by Respondent, Department of Health and Human Resources ("DHHR"), on February 5, 2018, as a Child Protective Service Worker Trainee. Ms. Gouch filed an expedited grievance¹ form dated May 14, 2018, alleging that she was dismissed from her employment without good cause. As relief, Grievant seeks to be reinstated with backpay and interest as well as restoration of all benefits.

A level three hearing was held on September 4, 2018, in the Charleston office of the West Virginia Public Employees Grievance Board. Grievant personally appeared and was represented by Gordon Simmons, UE Local 170, WVPWU.² Respondent was represented by Brandolyn Felton-Ernest, Assistant Attorney General. This matter became mature for decision on October 15, 2018, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

¹ See W. VA. CODE § 6C-2-4(a)(4).

² West Virginia Public Workers Union.

Synopsis

Grievant's employment was terminated after completing less than five months of a twelve-month probationary period. Respondent decided that Grievant's job performance was unsatisfactory because she had improperly reported her work time, violated the State Vehicle Use Policy, ignored or resisted specific directions from her supervisor after the issues were noted in her performance evaluation, and continuously failing to complete her training exercises by listing not her own thoughts and experiences rather than copy and paste her responses from web resources.

The time reporting problems Grievant experienced could be explained by not understanding the policies and procedures. However, her failure to properly complete her training exercises and her resistance to reasonable supervision were sufficient to support her dismissal from probationary employment for unsatisfactory performance.

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, Karmyn Gouch, was employed by the DHHR on or about February 5, 2018, as a child protective service worker trainee. She was assigned to the Wood County office in Parkersburg.

2. A child protective service ("CPS") worker must successfully serve a one-year period as a probationary employee during which time he or she is classified as a CPS worker trainee. During the probationary period, the CPS worker trainee attends training classes and shadows more senior employees to learn the policies and procedures necessary to fully perform the duties of the CPS worker position. The training

is extremely important because the CPS workers are front line employees charged with taking steps to ensure the safety of at risk children while trying not to disrupt family units.

3. Grievant's one-year probationary period would have ended on or about February 5, 2019.

4. When Grievant began her employment with Respondent, her immediate supervisor was Cory Delbaugh. Mr. Delbaugh did not note any difficulties with Grievant's performance nor give her any negative feedback.

5. In March 2018, CPS Supervisor Stacy Smith, became Grievant's immediate supervisor. Supervisor Smith has been employed by Respondent for a total of twelve years.

6. Grievant had to drive about one-half hour from her home to the office in Parkersburg.

7. During the time reporting period on April 14, 2018 through April 27, 2018, Grievant attended training in Fairmont, West Virginia. She used a State car to travel to and from the training and stayed in a hotel during the training period.³ To do this she had to drive from her home to the office in Parkersburg to pick up the car. Grievant had to drive past her home to the office to return the State car and then drive her own vehicle home.

8. On her "Timecard" Grievant reported the time she drove from home to pick up the State vehicle as work time on Kronos.⁴ She also included the time she drove home

³ This activity was consistent with the DHHR travel policy.

⁴ This State's payroll software.

from dropping off the State car as time worked.⁵ These times are considered commute time by the DHHR travel policy and are not work time.

9. In an email dated April 13, 2018, Grievant was asked by her supervisor why she reported on her timecard for April 4, 2018, working until 6:00 p.m. when her training was dismissed 2 hours earlier. Grievant replied that she was returning from the training and an hour of that time included driving past her home to drop off the State vehicle and then driving home. Grievant's supervisor, Stacy Smith, advised her that she could not include commute time on her timecard. (Respondent Exhibit 9, email chain).

10. Supervisor Smith received an email from Kimberly Davis dated April 20, 2018. Ms. Davis is one of the DHHR trainers and was an instructor at the training Grievant attended in Fairmont. In the email Ms. Davis and others were informed that the session on April 19, 2018 had ended early and the trainees were released at 2:15 p.m.

11. On Grievant's Kronos timecard she initially listed that her workday ended at 6:30 p.m. (Respondent Exhibit 11, page 1) After Grievant was informed that she could not include her commute time she listed her quit time as 5:30 p.m. (Respondent Exhibit 11, page 2). After learning of the email from Ms. Davis, Grievant listed her work day as ending at 3:45 p.m., on April 19, 2018. (Respondent Exhibit 11, page 3).

12. Grievant corrected her timecard during both pay periods to comply with the instructions given to her by Ms. Smith.

13. During the training in Fairmont, the trainees were given written exercises to complete. The trainees were expected to reflect their own training experiences in the

⁵ Respondent Exhibit 11. Grievant's "Timecard" from Kronos.

answers, so the trainers could evaluate if each trainee was grasping the material being taught.

14. Supervisor Smith received an e-mail dated April 10, 2018, from one of the DHHR trainers for the sessions Grievant was attending.⁶ The trainer, Maryanne Sheehan, was expressing her concern about Grievant's responses on several exercises. Grievant had copied and pasted material from webpages instead of giving her own answers. Ms. Sheehan gave the following five examples:

- Extended Family as a Resource - Trainee is asked to write pros and cons of using the extended family as a resource: The trainer found that Grievant's answer had been copied verbatim from a web page.
- Determining What Must Change – Trainees read two scenarios – selects Protective Capacities to fit the impending dangers and write what behaviors must change and what they will look like: Grievant copied and pasted two paragraphs from South Dakota's Protective Services website.
- Trainees are asked what they think their role will be as a PCFA worker: Grievant copied and pasted from a handout defining the roles of workers from *Policy 1.4 Roles*.⁷
- CW Laws Discussion – Trainees are supposed to post a blog about laws that cover child welfare and comment on another person's blog: Grievant copied and pasted information from a website.
- Writing Activity – Trainee answers four questions based on the Blackboard⁸ lesson and reading were similar to another trainee's answers: Both were required to redo the activity.

Ms. Sheehan discussed this problem with her Program Manager, David Shaver. They were troubled because they could not properly assess Grievant's grasp of the materials that were presented since her answers did not reflect her personal knowledge. They were

⁶ Respondent Exhibit 14.

⁷ No further explanation was given regarding Policy 1.4.

⁸ "Blackboard" is a training software utilized by the DHHR.

also concerned with the ethical considerations of Grievant failing to cite the sources of the copied material and attempting to pass the answers off as her own. Grievant was given until the end of that week to do the assignments again providing her own answers.⁹

15. Supervisor Smith sent Grievant an e-mail dated April 13, 2018, complaining that Grievant continued to leave without checking in with her, and that Grievant had not given Ms. Smith her assignments to review as she was instructed to do. Ms. Smith also noted that Grievant had attended a court proceeding without talking to her and that she needed to talk to Grievant about the e-mail she had received from her trainers. (Respondent Exhibit 13).

16. Grievant responded on April 16, 2018. She said that Ms. Smith had only asked for one assignment and that all her assignments had been completed and submitted. Consequently, she would have to “navigate them and find them and send them to you to look at.” She also stated:

Also it is all about the experience and I did not see the big deal about going to a court case to receive the experience, but apparently it's an issue and I will not do it anymore, I left before that email was sent out from you about checking in with you on when we are leaving and who we are with and when we walk into the office and our every move.¹⁰

17. Supervisor Smith completed Grievant's *Probationary Employee Monthly Evaluation*, for the period of March 5, 2018 through April 5, 2018. She and Grievant signed the evaluation on April 20, 2018. Ms. Smith expressed concern regarding Grievant's performance in a number of areas which included the following:

⁹ Respondent Exhibits 15, 16, & 17 were copies of Grievant's answers and the website materials which were copied.

¹⁰ Respondent Exhibit 13, It is not surprising that Supervisor Smith was not pleased with the tenor of Grievant's reply.

- Attitude: “Karmyn appears to be struggling with accepting supervision... Karmyn has been asked to provide training documents to her supervisor to which she responded, ‘Checking in, and my work is already submitted and I felt that I didn’t need my work checked over.’”¹¹ Ms. Smith also noted that Grievant said she was being micro managed and she did not appreciate it.
- Knowledge of Job: “It is hard for this supervisor to assess her job knowledge when she did not complete the exercises from her own thoughts.”
- Work Habits: “There is an issue with Karmyn following directions from her supervisor. She has been informed she needs to check with her supervisor before going out with other workers however she continues to go out in the field with other workers without conferring with her supervisor.”
- General Comments: “Karmyn does not appear to work well under supervision. She challenges what her supervisor asks of her and does not follow directions given to her if she does not feel they are relevant.

18. Supervisor Smith wanted Grievant to check in with her before going into the field because she was occasionally going with workers who were not doing CPS work. Grievant’s first supervisor allowed this, but Ms. Smith wanted Grievant to get more relevant field experience.

19. Grievant was given another exercise in which she was supposed to document specific observations regarding placements she visited while accompanying child protective service workers to specific locations. In an e-mail to Grievant dated April 24, 2018, at 3:18 p.m. Ms. Sheehan wrote the following regarding this assignment:

I reviewed your Children in Care TOL assignment you submitted today. The questions in part II are not answered appropriately. Your answers need to be based upon actual visits you observed. The answers you provided appear to be

¹¹ This response was sent prior to April 5, 2018, and before the e-mail exchange on April 16, 2018, wherein Grievant stated she had not been told to share all her assignments with her supervisor.

policy or articles and studies from other websites. Please redo the questions in your own words based upon the observations of the visits you attended.¹²

20. After receiving the second set of answers to the assignment Ms. Sheehan sent the following e-mail to Program Director Shaver at 5:00 p.m. on April 24, 2018.¹³

Karmyn's first attempt of the Children in Care TOL was sent at 9:42 a.m. the day the TOL was to be completed showing she would have only spent a little over an hour to complete a 6-hour TOL. She was asked to redo the assignment. This is Karmyn's second attempt at the Children in Care TOL. I have found at least 3 different websites she used for her answers.

21. Director Shaver sent an e-mail to Supervisor Smith at 5:18 p.m. on April 24, 2018. He described the problems with Grievant's responses to her assignment. He noted that after receiving the second set of answers from Grievant, Ms. Sheehan called her and went through each question in section two and explained the information which was needed. Ms. Sheehan received a third set of responses ten minutes later in which Grievant, once again, did not include specifics about placement visits she attended. Due to the problems with Grievant's assignment responses, the managers agreed that Grievant was not ready for the competency test she was schedule to take the next day with other trainees in her cohort.¹⁴

22. Grievant checked out a State vehicle and kept it at her home over night. She returned the vehicle to the office the next day and retrieved her vehicle. This action was in violation of the DHHR Policy related to use of State vehicles.¹⁵

¹² Respondent Exhibit 18, first page.

¹³ Respondent Exhibit 18, third page.

¹⁴ Respondent Exhibit 18, second page.

¹⁵ Respondent Exhibit 5, Region 1 Standard Operating Procedures related to "Use of Vehicles." Grievant stated that she checked out the State car because she thought she was going to use it to go to her comprehensive test the next day.

23. Grievant was given written notice that a predetermination conference had been scheduled for April 27, 2018. Grievant acknowledged receipt of the notice. The notice was signed by Delbert D. Casto II, Community Service Manager (“CSM”) for Wood District. The reason listed for the conference were:

There have been concerns reported from the training unit and your supervisor regarding behavior and following directions. The Probationary Employee monthly evaluation states issues with the training unit on your work product and concerns with following instructions of your supervisor. Your travel and work time are concerning regarding following appropriate procedures.

24. Grievant attended the predetermination conference with her representative, Gordon Simmons. Also attending the conference were; CSM Casto; Laurea Ellis, Social Service Coordinator; and Supervisor Smith.

25. By letter dated May 14, 2018, Regional Director, Cree Lemasters informed Grievant that she was dismissed from her employment with the DHHR. The reasons stated for Grievant’s dismissal were that:

- Grievant cut and pasted answers to her assignments rather than reflect her own thoughts and demonstrate her ability to process the information. This hampered the ability of the trainers to assess Grievant’s grasp of skills necessary to succeed as a CPS worker.
- After this issue was discussed with her and her supervisor, Grievant repeated the behavior prompting the training staff to determine she was unable to sit for her competency testing.
- Grievant admitted that she violated State policy¹⁶ by keeping a State-owned vehicle at her personal residence without permission.
- Grievant misrepresented time as worked on her time sheet that was in conflict with the actual training schedule and claimed time as work, which required her time sheets to be corrected to accurately reflect the time Grievant worked and avoid overpayment of salary.¹⁷

¹⁶ *State Owned Vehicles* W. VA. CODE ST. R. §143-3-9.2.

¹⁷ Respondent Exhibit 24. The letter was hand-delivered to Grievant and she signed a receipt for it the same day.

Discussion

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 Respondent “concluded that [Grievant had] not made satisfactory adjustment to the demands of [her] position, nor [had she] met the required standards of work.”¹⁸ Consequently, Grievant was dismissed as a probationary employee and she had the burden of proving that she performed at a satisfactory level. *Bush, supra*.

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.

The probationary period for a Child Protective Service Worker is one year. This is twice as long as the probationary period for many other classified positions. The reason for this lengthy period is to allow for extensive training in the laws, policies and techniques necessary to properly perform a job which has very high stakes. The CPS worker is charged with investigating allegations of child abuse and neglect and taking initial and long-term action to ensure the health and safety of those children. The worker must

¹⁸ Respondent Exhibit 24, dismissal letter.

understand the dynamics of family situations and, where possible, keep the family unified. Because of the intricate and emotional nature of this work it is imperative that the workers be as prepared as possible before embarking on the job independently.¹⁹

During her training period, Grievant was given several assignments to be completed in the computer training programs. The purpose of the assignments was to allow the trainers and Grievant's supervisor to assess whether she was retaining the material and practices necessary to successfully complete her challenging job. To that end Grievant and the other trainees were instructed to express their own thoughts, experiences and knowledge derived from training and shadowing exercises so that their actual progress could be assessed. If problems were discovered by the trainers, they could remediate the issues with additional training.

Grievant did not express her own thoughts on the assignments. Rather, she went to other websites and copied material and pasted it in her answer spaces. This occurred on at least five exercises prior to April 10, 2018, when Trainer Sheehan brought the issue to the attention of her manager and Grievant's supervisor. Because Grievant had not answered the questions from her own knowledge, it was impossible for the trainers or her supervisor to know how well she was progressing in her training. Additionally, the CPS worker position is controlled by many policies and legal standards. The worker's reports and testimony serve as the basis for many important decisions made by the agency and the courts effecting the future and safety of the children involved. It is important for the workers to exhibit high ethical standards to earn and maintain the trust of the those who must rely upon their reports and actions. Grievant's efforts to pass off the materials found

¹⁹ Testimony of Trainer Maryanne Sheehan and CPS Supervisor Stacy Smith.

at other web pages as her own raise serious and reasonable concerns about her ethical standards with the trainers. Grievant was required to redo the assignments which put her behind in the training.

Supervisor Smith had instructed Grievant to share her exercise responses with her so that she could monitor her progress. Grievant indicated that she did not need her work looked over and failed to comply with this directive. After being informed of Grievant's failure to properly respond to her exercises, Supervisor Smith again directed Grievant to follow her prior directives to provide her exercise responses and check in with her before going into the field so that she could ensure that Grievant was getting appropriate field experience. These directives were not unreasonable in light of the problems discovered with Grievant's training. Grievant's response was sarcastic and demonstrated that she did not grasp the need to improve. *See, FOF 16, supra.*

Grievant was again found to be completing an assignment by copying information from websites to her answer spaces. In her email dated April 24, 2018, Trainer Sheehan noted that the log time on the program demonstrated that Grievant spent a little over one hour to complete the assignment which is listed as a six-hour exercise. Grievant was instructed to redo the exercise. Trainer Sheehan found that Grievant had copied answers from various websites and failed "to document specific observations regarding placement visits she had attended."²⁰ After failing to properly complete the exercise a third time, the Training Department decided the Grievant was not prepared to take her comprehensive examination.

²⁰ Respondent Exhibit 18

Grievant testified that once she was told not to copy and paste her answers to her exercises she did not do it again. However, the first instance was brought to her attention on or about April 10, 2018. The final event was document on April 24, 2018, two weeks later. Grievant's apparent lack of credibility on this issue indicates that the Training Department's concern about her ethical standards were not misplaced.²¹

Grievant made errors on properly reporting her work time, and on at least one occasion which violated Respondent's reasonable use policy. These lapses are problematic but certainly correctable. Grievant corrected her time sheet when she was made aware of her mistake and there is no indication that she had additional problems. These problems alone might not be sufficient to demonstrate that her overall performance was unsatisfactory.²² However, these incidents do add to the general lack of attention to detail and unreasonable resistance to supervision exhibited by Grievant in her training and interaction with Supervisor Smith.

Grievant did not prove by a preponderance of the evidence that her job performance during her probationary period was satisfactory. To the contrary Respondent proved that Grievant's performance during her training activities was significantly unsatisfactory and that termination of her probationary employment was justified. Accordingly, the grievance is **DENIED**.

²¹ Grievant also testified that other trainees had told her that they wrote some of their answers word for word from the policies. No evidence was introduced indicating that other trainees copied and pasted their answers onto their answer spaces.

²² Regional Director Lemasters' characterization of these incidents as "fraud" and "insubordination" was hyperbolic and not supported by the record.

Conclusions of Law

1. 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).

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). 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).

3. 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.

4. Grievant did not prove by a preponderance of the evidence that her job performance during her probationary period was satisfactory. Respondent proved that Grievant's performance during her training activities was significantly unsatisfactory and that termination of her probationary employment was justified.

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 (2018).

DATE: November 8, 2018

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE