THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

IVY DAN,
Grievant,

v. **Docket No. 2020-1076-DHHR**

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

DECISION

Grievant, Ivy Dan, was employed by Respondent, Department of Health and Human Resources/Bureau of Children and Families (DHHR/BCF). On March 25, 2020, Grievant filed a grievance stating:

> I was hired and began working on 03/16/2020. I was discharged at the end of the working day, 03/16/2020. I was told that I misrepresented myself on my application and did not clear the background check. The application I filed out on line asked if I had any felony convictions. I do not. The fingerprinting form clearly stated that I should list any felony crimes, but not include any disorderly conduct charges. I specifically asked the fingerprinting clerk at the Martinsburg DHHR office if I should list a petty disorderly persons charge I had in NJ 4 or 5 years ago and was told no. Petty disorderly persons is a misdemeanor in both NJ and WV. The charge was for using profanity in a public building.

As relief, Grievant seeks:

> I would like my job reinstated. I am a highly trained, educated, experienced social worker in child welfare service. The grounds of my dismissal are unjust. I would be a valuable asset to the BCF, without question. I would like the circumstances of the non-felony charge in my background to be considered. I was the victim of date rape. I was unwilling to press charges. The police officer was pushing me. I told him he was an asshole and tried to leave the police station. He arrested me. I was a victim, not a criminal. I will have this charge expunged next year, under NJ law.

Grievant filed directly to level three of the grievance process.[1] A level three hearing was held on January 19, 2021, before the undersigned via an online platform. Grievant appeared and was represented by attorney S. Andrew Arnold. Respondent appeared by Melanie Urquhart, Director of Social Services at BCF, and was represented by Jake Wegman, Assistant Attorney General. After an extension of the deadline, this matter became mature for decision on March 22, 2021. Each party submitted Proposed Findings of Fact and Conclusions of Law (PFFCL).

Synopsis

Grievant was hired as a probationary employee by BCF, pending a background check. Grievant was dismissed at the end of her first day when her background check revealed two misdemeanors. Grievant asserts that BCF told her to leave those misdemeanors off her application and that it would determine its course of action after completing her background check. Grievant failed to prove that her dismissal was arbitrary and capricious. Accordingly, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant was hired on a probationary basis as a Social Service Worker 3 (SSW3) for the adoption unit by the Bureau for Children and Families (BCF).

2. The duties of an SSW3 in the adoption unit include working on adoptions for children in foster care; testifying in court; and regularly interacting with children,

[1]West Virginia Code § 6C-2-4(a)(4) permits a grievant to proceed directly to level three of the grievance process when the grievance deals with the discharge of the grievant.

parents, attorneys, and the court system.

3. On March 6, 2020, Grievant completed and signed a Statement of Criminal Record (SOCR) as part of her job application. The SOCR instructions did not exclude misdemeanors or seemingly minor offenses such as driving violations or disorderly conduct. (Respondent's Exhibit 2)

4. Grievant mistakenly believed that she did not have to account for seemingly minor offenses on the SOCR.

5. Grievant circled "I have not" "been convicted of any crime, pled guilty, or pled nolo contendere to any crime."

6. In signing the SOCR, Grievant acknowledged the "Understanding" section of the SOCR, which states:

> I understand that pending charges or conviction of a felony offense or pending charges or conviction of more than one misdemeanor offense may result in denial of being a provider for the care of children or adult, or in the denial of employment with the above named facility.
>
> Failure to disclose convictions, charges or indictments may result in denial of being a provider for the care of children or adults, or in the denial of employment with the above named facility.

7. Grievant's background check showed that she was convicted in 2018 for speeding and driving while her license was suspended and in 2016 for disorderly conduct.

8. On March 16, 2020, at the end of Grievant's first day of work, Respondent gave Grievant a Notice of Dismissal terminating her employment that day "due to your criminal background, as well as false statements made by you on your Statement of Criminal Record." (Respondent's Exhibit 3)

9. On April 9, 2020, Respondent provided Grievant with an AMENDED Notice

of Dismissal giving her a 15-day notice in conjunction with the Administrative Rule and making her dismissal effective on March 31, 2020. (Respondent's Exhibit 4)

10. Grievant testified that her 2016 conviction for disorderly conduct was expunged, that she told her interviewers about her misdemeanor convictions, and that DHHR employee Brenda Hughes told her not to include these on her application.

11. Grievant currently has a valid West Virginia driver's license. (Grievant's testimony)

12. Respondent deems the credibility of its social service workers as relevant to their duties. (Testimony of Melanie Urquhart, Director of Social Services at BCF)

Discussion

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 on the employee to establish by a preponderance of the evidence that his services were satisfactory. *Bonnell v. Dep't of Corr*., 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). 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 Res*., 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).[2]

[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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

"However, the distinction [between misconduct and unsatisfactory performance] 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)). Grievant was dismissed after her background check revealed two misdemeanors which Grievant left off her application. These incidents entailed driving without a license and disorderly conduct for cursing at an officer out of frustration when Grievant went to the police station as a rape victim. Respondent did not label Grievant's conduct as either misconduct or unsatisfactory performance. At the beginning of the level three hearing, Respondent asserted that Grievant had the burden of proof and that her dismissal was non-disciplinary, implying it was based on unsatisfactory performance. The undersigned therefore informed the parties that the hearing would proceed under the assumption that the burden of proof was on Grievant and that Grievant could argue otherwise in her PFFCL. Grievant accepted the burden of proof in her PFFCL.

The Division of Personnel's Administrative Rule establishes a low threshold to justify termination of a probationary employee. *Id*. 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." W. VA. CODE ST. R. § 143-1-10.1.a. (2016). 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." *Id*. A probationary employee may be dismissed at any point during the probationary period that the employer determines his services are unsatisfactory. *Id*. at § 10.5(a).

"A probationary employee is not entitled to the usual protections enjoyed by a state employee. The probationary period is used by the employer to ensure that the employee will provide satisfactory service. An employer may decide to either dismiss the employee or simply not to retain the employee after the probationary period expires." *Hammond v. Div. of Veteran's Affairs,* Docket No. 2009-0161-MAPS (Jan. 7, 2009) (*citing Hackman v. Dep't of Transp*., Docket No. 01-DMV-582 (Feb. 20, 2002)). Nevertheless, "while an employer has great discretion in terminating a probationary employee, that termination cannot be for unlawful reasons, or arbitrary or capricious. *McCoy v. W. Va. Dep't of Transp*., Docket No. 98-DOH-399 (June 18, 1999); *Nicholson v. W. Va. Dep't of Health and Human Res*., Docket No. 99-HHR-299 (Aug. 31, 1999)." *Lott v. W. Va. Div. of Juvenile Serv*., Docket No. 99-DJS-278 (Dec. 16, 1999).

"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 Res*., Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998). "'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions

are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ*., 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "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 [the employer]." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001), ***aff'd*** Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

Respondent contends that it dismissed Grievant for two misdemeanor convictions on her background check and for making false statements on her Statement of Criminal Record (SOCR). Respondent claims these misdemeanor convictions impact the credibility required to perform duties as a social service worker. Grievant implies that her dismissal was arbitrary and capricious because the application said not to list her misdemeanors, Respondent told her not to include the incidents in her application, Respondent said it would determine what to do after completing her background check, and her conviction for disorderly conduct was expunged.

Grievant did not present any authority for the proposition that Respondent is prohibited from using an applicant's misdemeanor convictions, including driving with a suspended license and disorderly conduct, as a bar to employment, or that it is barred

from considering an expunged conviction.[3] Respondent could have waited to make its hiring decision until it received Grievant's background check, leaving Grievant without this remedy if not hired. Respondent instead chose to hire Grievant pending review of her background check. Grievant acknowledged that Respondent informed her it would decide how to treat her convictions after completing her background check. Even if Grievant was simply following Respondent's verbal and written directives on the application, Respondent acted reasonably in dismissing Grievant when her background check later confirmed the two misdemeanors.

Nevertheless, because Respondent also dismissed Grievant for making false statements[4] on her SOCR, due diligence necessitates further analysis. Grievant claims that she was simply following verbal directives and written instructions on the application in leaving her convictions off her SOCR.[5] The claim of following orders is an affirmative defense[6] to the allegation that Grievant made false statements on her SOCR. "Any party

[3]Nevertheless, Grievant did not present any evidence that her conviction for disorderly conduct was expunged.

[4]"False statement" means "[s]tatement knowingly false, or made recklessly without honest belief in its truth, and with purpose to mislead or deceive." BLACK'S LAW DICTIONARY 602 (6th ed. 1990).

[5]"'Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.' *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. *See Day v. Morgan Co. Health Dep't*, Docket No. 07-CHD-121 (Dec. 14, 2007)." *Graham v. Wetzel County Bd. of Educ*., Docket No. 2013-0014-WetED (Feb. 15, 2013), *aff'd, Graham v. Bd. of Educ. of Wetzel Cty*., Docket No. 13-0975, (W. Va. Sup. Ct., Apr. 28, 2014) (*memorandum decision*).

[6]"Affirmative defense" means "[i]n pleading, matter asserted by defendant which, assuming the complaint to be true, constitutes a defense to it." BLACK'S LAW DICTIONARY 60 (6th ed. 1990).

asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2018).

Grievant did not provide or reference any written instructions that allowed her to exclude any conviction, let alone misdemeanors, from her SOCR application. The "Understanding" section of the SOCR clearly outlines the penalty for such failure in stating that "[f]ailure to disclose convictions, charges or indictments may result in denial of being a provider for the care of children or adults, or in the denial of employment with the above named facility." This section arguably creates some confusion in stating that "conviction of more than one misdemeanor offense may result in denial of being a provider for the care of children or adult, or in the denial of employment with the above named facility," because it implies that only multiple misdemeanors are actionable. Nevertheless, this language does not excuse the non-disclosure of even a single misdemeanor. Even so, Grievant was convicted of multiple misdemeanors. Further, the term "any crime" in the "Declaration" section of the SOCR meant that Grievant had to account for all convictions. This section specifically instructed Grievant to declare whether she had "been convicted of any crime, pled guilty, or pled nolo contendere to any crime." Grievant circled that she had not.

As for verbal directives, Grievant credibly[7] testified that while Brenda Hughes was fingerprinting her, Ms. Hughes told Grievant to leave misdemeanors off the SOCR. The

[7]Due to conflicting testimony regarding the accusation that Grievant made false statements on the SOCR, the undersigned must assess the credibility of the witnesses. In situations where "the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required." *Jones v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In

relevant factors to Grievant's credibility were her demeanor, opportunity to perceive, and the consistency of prior statements. These enhanced Grievant's credibility. Grievant credibly testified that she told interviewers about her misdemeanors and knew these would come out in her background check. Conversely, Ms. Hughes credibly testified that she did not recall telling Grievant to exclude minor offenses but that she generally tells applicants to err on the side of inclusion. Nevertheless, the undersigned is convinced that Grievant did not exclude her misdemeanors with reckless indifference or with the purpose of deceiving Respondent.

Ultimately, Grievant failed to prove by a preponderance of evidence that Respondent acted in an arbitrary and capricious manner in dismissing her. Grievant acknowledged that Respondent told her it would consider what to do about her convictions after receiving her background check. Respondent received Grievant's background check during her first day at work and summarily dismissed her. Thus, Respondent did not act in an arbitrary and capricious manner in dismissing Grievant.

The following Conclusions of Law support the decision reached.

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

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assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id*., *Burchell v. Bd. of Trustees*, *Marshall Univ*., Docket No. 97-BOT-011 (Aug. 29, 1997).

of proof is on the employee to establish by a preponderance of the evidence that his services were satisfactory. *Bonnell v. Dep't of Corr*., 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). However, 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 Res*., 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). "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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), ***aff'd***, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. "A probationary employee is not entitled to the usual protections enjoyed by a state employee. The probationary period is used by the employer to ensure that the employee will provide satisfactory service. An employer may decide to either dismiss the employee or simply not to retain the employee after the probationary period expires." *Hammond v. Div. of Veteran's Affairs*, Docket No. 2009-0161-MAPS (Jan. 7, 2009) (*citing Hackman v. Dep't of Transp*., Docket No. 01-DMV-582 (Feb. 20, 2002)).

3. "[W]hile an employer has great discretion in terminating a probationary employee, that termination cannot be for unlawful reasons, or arbitrary or capricious. *McCoy v. W. Va. Dep't of Transp*., Docket No. 98-DOH-399 (June 18, 1999); *Nicholson v. W. Va. Dep't of Health and Human Res*., Docket No. 99-HHR-299 (Aug. 31, 1999)."

Lott v. W. Va. Div. of Juvenile Serv., Docket No. 99-DJS-278 (Dec. 16, 1999). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

4. Grievant did not prove by a preponderance of evidence that Respondent was arbitrary and capricious in dismissing her after her criminal background check confirmed her conviction on two misdemeanors.

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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: April 5, 2021

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Joshua S. Fraenkel
Administrative Law Judge