

# **THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**JENNIFER WENTZ,  
Grievant,**

**v.**

**Docket No. 2021-1916-CONS**

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

## **DECISION**

Jennifer Wentz, Grievant, was employed by Respondent, Department of Health and Human Resources (“DHHR”) in the Bureau for Public Health (“Bureau”). She was a probationary employee assigned to the Office of Subrecipient Grants (“OSG”) in the Bureau’s Central Finance Unit. Ms. Wentz filed three grievance forms dated December 3, 2020. One alleged, “Violation of Employee Performance Appraisal Policy.” A second grievance alleged, “Violation of Progressive Discipline Policy.” The third grievance alleged, “Termination without cause.” All the grievances intended to challenge the termination of Grievant’s probationary employment and were properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). As relief, Grievant seeks, “reinstatement, back pay, interest, and retirement benefits restored.” The grievances were consolidated for hearing and decision.

A level three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board on March 1, 2021, via the Zoom video platform. Grievant personally appeared and was represented by Chester Sprankle. Respondent appeared through Rebecca Shapero, Director of Subrecipient Grants. Respondent was represented

by James “Jake” Wegman, Assistant Attorney General. This matter became mature for decision on April 7, 2021, upon receipt of the last Proposed Findings of Fact and Conclusions of Law submitted by the parties.

### **Synopsis**

Grievant was dismissed from her probationary employment in the Office of Subrecipient Grants for failing to meet employment standards during her probationary period. Among other reasons, Grievant allegedly failed to consistently complete grant submissions without numerous rejections for errors, including the same grants being rejected twice for the same reasons. Grievant argues that she did not receive an EPA 2 and the predetermination notice did not advise her that dismissal was being contemplated. She alleges that these errors resulted in her not receiving adequate notice that her performance was substandard. Grievant failed to prove by a preponderance of the evidence that her performance was satisfactory. Respondent demonstrated that Grievant was regularly counseled and advised that her performance needed to improve. Additionally, the predetermination conference notice set out specific allegations and Grievant was given the necessary written notice and opportunity to respond to the allegations before her dismissal.

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

### **Findings of Fact**

1. Jennifer Wentz, Grievant, was employed by Respondent, Department of Health and Human Resources (“DHHR”) in the Bureau for Public Health (“Bureau”).

2. Grievant was a probationary employee assigned to the Office of Subrecipient Grants (“OSG”) in the Bureau’s Central Finance Unit. Her position was in the Administrative Services Assistant 1 (“ASA 1”) classification.

3. Grievant began work as a full-time employee on June 22, 2020. Immediately prior to her full-time employment Grievant had been working as a temporary employee in the same unit since March 2020. The probationary period for Grievant was six months beginning the first day of her regular employment.

4. A subrecipient grant is grant money from large Federal and State grants that is sub-granted out in small grants to other organizations within the state of West Virginia. The employees in the OSG work with program staff, grantees, accountants, DHHR central finance, and others to get the documents and information needed for the subrecipient grant to be submitted and approved.

5. All information and forms are entered into a computer data program (“CRM”) which must contain all the information necessary for completion and processing the grant.<sup>1</sup> The ASAs like Grievant are required to enter all the information and documentation for the grant into the CRM.

6. All the entries related to the grants must be accurate and precise. There are several levels of review for each grant which include the following levels:

- |                                     |                               |
|-------------------------------------|-------------------------------|
| 1. Program and Grantee Review       | 2. Sub-recipient Review       |
| 3. Program Review                   | 4. Director Review            |
| 5. Finance Review (BPH CF staff)    | 6. Bureau Commissioner Review |
| 7. Three Reviews by Central Finance | 8. GAAR to Grantee            |

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<sup>1</sup> Where the meaning of an acronym such as CRM and GAAR, is not noted in the text, no testimony was given revealing the meaning.

7. If an error is found, the grant is rejected and sent back to the ASA for correction and resubmission. The ASA must contact the program staff or grantee staff to get the correct information to make the grant complete. This process can take a considerable amount of time which often results in significant delays. Delays are problematic because they impede the grant funds from getting to the groups and recipients who need it.

8. Due to the importance of the grants in providing money for important projects and people in need, the Governor's office and the DHHR Commissioner's office closely monitor the grant process to ensure that it provides a timely flow of grant money to designated recipients.

9. Grievant received the same training and materials as all other ASAs who were hired by the OSG. She was initially provided with a manual which outlines in step-by-step detail how grant information and documents are entered into the CRM program. There are different kinds of grants which require specific actions which are explained in the manual. Grievant could keep the manual for reference.

10. The training and experience Grievant received as a temporary worker was relevant to the work she was doing as a probationary employee. The duties Grievant was performing in both positions were virtually the same.

11. Grievant was also given two weeks of on-the-job training with an experienced ASA. Additionally, ASA 2 Ashley Levandoski, was available as a lead worker to answer any questions. If Ms. Levandoski could not provide the answers, she would refer Grievant to the OSG Director, Rebecca Shapiro. Ms. Shapiro recognized the

complicated nature of the grant process and was regularly available to help staff to keep the grants flowing as smoothly as possible.

12. The OSG holds weekly staff meetings where issues and problems are discussed. The agenda and discussions address specific processes for expediting grant requests and provided specific instructions on areas where staff have questions. Because the agendas addressed specific issues and instructions, they often contained two following warnings.

“This agenda contains a lot of directions. I expect staff to follow these directions from this date forward. Failure to do so could result in disciplinary action.”

“Repeated rejections regarding the directions reviewed in this agenda could lead to disciplinary action.”

13. Grievant asked ASA 2 Levandoski a lot of questions which was not generally unusual. However, Ms. Levandoski noted that Grievant did not seem to be grasping the procedures and was not taking notes regarding the answers she was given. It became common for Grievant to repeatedly ask the same questions regarding an issue or procedure. Other trainees did not encounter these problems. Director Shapiro noted the same problem.

14. Grievant often became agitated and angry when problems arose. It was difficult for Director Shapiro to calm her down to address the main issues and determine exactly what was the source of problems. This behavior also occurred with program staff and grantees.<sup>2</sup> Grievant was also reluctant to contact grantees for information needed to

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<sup>2</sup> In this regard, ASA 2 Levandoski noted that Grievant “tended to be very aggravated with just the whole process, kind of to an extreme sometimes.” “[Grievant] would get really worked up over things that were beyond our control.” “[Even] after giving her a solution, [Grievant] would still focus upon the problem.”

properly submit grants and to make corrections when grants were rejected. Rather, she relied on program staff who did not always have the specific information thus causing additional delay in grant processing. Director Shapiro counseled Grievant regarding this behavior, but it persisted.

15. Director Shapiro produced a report from the CRM database which lists the number of grants Grievant has entered, the number which were completed without rejections, as well as the total number of rejections for each grant.<sup>3</sup> The goal is to enter grants correctly without rejections. Single rejections are not uncommon but should not be the norm. The report demonstrates the following:

Total Grants	63
Total Grants Without Rejections	17 – 27%
Total Grants With 1 or More Rejections	46 – 73%
Total Rejections	131
Total Grants With Multiple Rejections	28 – 44%

16. Respondent produced four more exhibits demonstrating that on four separate occasions Grievant had four separate grants rejected twice for the same reason noted in the original rejection.

17. Grievant submitted a “Grant Workflow Associated View” document which shows that during the six months period of December 2, 2019, through August 18, 2020, two other ASAs each had three grants rejected.

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<sup>3</sup> Respondent Exhibit 2.

18. Many of the grants were very similar in nature. Once an ASA successfully completed a grant in that category there are typically few or no rejections in that type of grant thereafter. This was not the case with Grievant.

19. Director Shapiro completed an initial Employee Performance Appraisal (“EPA 1”) on July 7, 2020. This document set out Grievant’s predominate duties as well as performance standards and expectations. No EPA 2 was prepared to assess Grievant’s job performance.

20. Grievant received an EPA 3 from Director Shapiro dated September 9, 2020. She received a rating of “Meets Expectation” for all criteria except: “Work is organized and presented professionally”; “Work product is thorough and complete”; and “Work product is free of flaws and error.”. For these criteria Grievant received a rating of “Needs Improvement.” In the “Comment” area for these criteria, it was noted that Grievant needed to work on organizing her files and notes on the shared drive and emails. “She will also need to work on making sure the work she puts into CRM is correct.” Director Shapiro also wrote, “Jennifer has been counseled on these issues by both the Director and the CFO via telephone and e-mail.”

21. During most of the time Grievant was working with OSG, they were working remotely due to the pandemic. The ASAs were expected to be at their computers with the Skype program noting that the employee was “available for work.” On June 29, 2020, the OSG was holding a meeting via Skype for all the ASAs and managers. Grievant’s

computer indicated that she was “available for work” yet she did not appear for the meeting and did not respond to telephone calls or text messages.<sup>4</sup>

22. Grievant was given a notice of a predetermination conference dated November 23, 2020. The conference was scheduled for December 1, 2020 but was held a day later so Grievant’s representative could be present. The notice listed specific deficiencies including: failure to “be thorough and accurate when completing her records,” failure to “follow direction of management personnel,” and “conduct [herself] professionally in the presence of . . . clients, fellow employees, and the public.” It also recounted alleged incidents of “direct insubordination” related to failing to follow remote working guidelines and failure to work with grantees as well as program staff to receive and complete required information for grants, after being instructed to do so. The notice did not specifically say what disciplinary action was being contemplated but stated that the purpose of the meeting was “to give [Grievant] an opportunity to respond to the aforementioned items and provide input for our consideration.” (Respondent Exhibit 13)

23. Grievant was issued a notice of dismissal from probationary employment dated December 3, 2020. The reason for dismissal was Grievant not making a satisfactory adjustment to the demands of her position during her probationary period. The specific reasons set forth in the notice of the predetermination conference were the same reasons listed in the dismissal letter. Those reasons included *inter alia*: failure to accurately and thoroughly complete business records relating to excessive rejection of grants she submitted; Grievant’s reluctance to contact stakeholders outside the OSG for

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<sup>4</sup> The next day Grievant informed her supervisor that her dogs got out while it was raining and she was out looking for them.



information necessary to complete and correct grants even after being counseled to do so; Grievant's unprofessional conduct related to continually becoming upset and aggravated while seeking assistance and information; and failure to follow specific instructions related to remote working. (Respondent Exhibit 1)

### **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, as in this case, a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is upon the employee to establish that his services were satisfactory. *Bonnell v. W. Va. Dep't of 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 his services were, in fact, of a satisfactory level." *Bush v. Dep't of Transp.*, Docket No. 2008-1489-DOT (Nov. 12, 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. 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).

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.

Grievant disagreed with Respondent's assertions regarding the constant errors that led to rejection of most of the grants she loaded on the CRM program. However, she did not provide any evidence to demonstrate that the error rejection report Respondent produced from the CRM database was incorrect. Additionally, Grievant provided documentation indicating that two other ASAs each had three grants rejected during a six-month period. This evidence only highlights the severity of Grievant's performance problems since she had forty-six grants rejected during a five-month time span.

Grievant also denied that she behaved unprofessionally and asserts that any emails or conversations she conducted merely raised legitimate questions. She states that she was not agitated or aggressive. Often there are legitimate differences in perception of a person's demeanor. While one person may see a statement as proper

advocacy another might view it as aggressive rather than assertive. Nevertheless, Respondent provided examples of long emails sent by Grievant complaining about issues over which the OSG had no control. These communications were not helpful in addressing the problem at hand. Either way, if this issue were ignored there remains the most troubling problem of Grievant failing to successfully submit grants. The multiple rejections and the process of making appropriate corrections caused significant delays in the grant appropriations reaching the recipients in need.<sup>5</sup>

Grievant also argued that Respondent failed to provide Grievant with an EPA 2. She also noted that the predetermination notice did not contain language indicating that Respondent was considering discipline up to and including dismissal. She points to the Division of Personnel (“DOP”) Procedural Rule as requiring such notice be given to an employee. The DOP rule provides the following regarding predetermination conferences prior to dismissal. The employer must, “meet with the employee in a predetermination conference and advise the employee of the contemplated dismissal.” Virtually the same argument put forward by Grievant was made in the case of *Catalina v. Dep’t of Health & Human Res.*, Docket No. 2011-0885-DHHR (Aug. 11, 2011). In that case, the grievant argued that the respondent did not advise him that dismissal was being contemplated, which allegedly violated the DOP Procedural Rule.

Addressing the argument, the Administrative Law Judge (“ALJ”) found that the purpose of the legislative rule requiring a predetermination conference is to protect the grievant’s due process rights to be given notice of the charges against him and the right to respond to those charges before disciplinary action is taken. See, *Buskirk v. Civil Serv.*

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<sup>5</sup> Some delays might be a matter of days, while others could be months.

*Comm'n*, 175 W. Va. 279, 332 S.E.2d -12- 579 (1985); *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994); *Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, (1981). The ALJ noted that the grievant was given notice of the specific charges against him, an opportunity to respond and he was told that disciplinary action was being contemplated. Respondent's decision not to use the specific word dismissal did not diminish the grievant's rights in this process. In fact, the generic term "discipline" was specifically used in an effort to avoid prejudgment. Under these circumstances, Respondent complied with the requirements of 143 C.S.R. 1 § 12.2(a) and observed Grievant's due process rights. *Catalina v. Dep't of Health & Human Res.*, Docket No. 2011-0885-DHHR (Aug. 11, 2011).

As in *Catalina*, Grievant was given specific written notice of the charges against her in the predetermination conference notice. Those charges were reiterated in the predetermination meeting and Grievant was able to have a representative present and respond to the allegations. There can be no doubt based upon the notice that discipline was being contemplated. The fact that Grievant sought representation indicates she understood that result was possible. As in *Catalina*, Respondent complied with the requirements of 143 C.S.R. 1 § 12.2(a) and observed Grievant's due process rights. Again, Respondent's decision to not specify the discipline being considered was an effort to avoid prejudgment.

Additionally, Grievant failed to demonstrate that a probationary employee must receive an EPA 2, before being dismissed for unsatisfactory performance. The DOP Administrative rule provides that any time the employer "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.” 143 C.S.R. 1 § 10.5. As a probationary employee, Grievant is not entitled to the usual protections enjoyed by a regular state employee. An employer may outright dismiss a probationary employee for unsatisfactory performance. See *Hackman v. Dep't of Transp./Div. of Motor Vehicles*, Docket No. 01-DMV-582 (Feb. 20, 2002). *Cosby v. Div. of Juvenile Ser.*, Docket No. 2009-0086-MAPS (Nov. 13, 2008).

In this case, the DHHR dismissed the Grievant because of unsatisfactory performance. Under those circumstances Grievant has the burden of proving that her performance was satisfactory. Grievant did not prove by a preponderance of the evidence that her performance was satisfactory. In fact, the evidence clearly proved otherwise. Accordingly, the grievance is **DENIED**.

### **Conclusions of Law**

1. When, as in this case, a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is upon the employee to establish that his services were satisfactory. *Bonnell v. W. Va. Dep't of 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 his services were, in fact, of a satisfactory level.” *Bush v. Dep't of Transp.*, Docket No. 2008-1489-DOT (Nov. 12, 2008).

2. The purpose of the DOP Administrative Rule requiring a predetermination conference is to protect the employee’s due process rights to be given notice of the charges against him and the right to respond to those charges before disciplinary action

is taken. *See, Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d -12- 579 (1985); *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994); *Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, (1981).

3. Respondent complied with the requirements of 143 C.S.R. 1 § 12.2(a) and observed Grievant's due process rights.

4. A probationary employee is not entitled to the usual protections enjoyed by a regular state employee. An employer may outright dismiss a probationary employee for unsatisfactory performance. *See Hackman v. Dep't of Transp./Div. of Motor Vehicles*, Docket No. 01-DMV-582 (Feb. 20, 2002). *Cosby v. Div. of Juvenile Ser.*, Docket No. 2009-0086-MAPS (Nov. 13, 2008).

5. Grievant did not prove by a preponderance of the evidence that her performance was satisfactory.

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: May 6, 2021**

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**WILLIAM B. MCGINLEY**  
**ADMINISTRATIVE LAW JUDGE**