

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**ROBERT BURKETT,
Grievant,**

v.

Docket No. 2021-2106-DHHR

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

DECISION

Grievant, Robert Burkett, was employed by Respondent, Department of Health and Human Resources within the Bureau of Children and Families as a probationary employee. On January 22, 2021, Grievant filed this grievance against Respondent stating, "Unjustified Termination." For relief, Grievant seeks "[t]o be made whole in every way, including, but not limited to, reinstatement of job with back pay and interest."

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on October 27, 2021, before the undersigned at the Grievance Board's Charleston, West Virginia office via video conference. Grievant appeared and was represented by Samantha Crockett, Field Organizer, UE Local 170. Respondent appeared by Michael Hale and was represented by counsel, James "Jake" Wegman, Assistant Attorney General. Written Proposed Findings of Fact and Conclusions of Law ("PFFCL") were due to be submitted on December 6, 2021. The time to file was extended at the request of Grievant's representative, with no objection by Respondent, to December 17, 2021. Grievant's representative failed to file PFFCL and did not request further extension of the time to file. Therefore, this matter became mature for decision on December 20, 2021, upon final receipt of Respondent's PFFCL.

Synopsis

Grievant was employed by Respondent as a probationary Child Protective Services Worker. Grievant was dismissed from his probationary employment for unsatisfactory performance. Grievant failed to complete required mandatory training. Grievant failed to prove that his services were satisfactory. Accordingly, the 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 employed by Respondent as a probationary Child Protective Services Worker (“CPSW”).

2. As Grievant was initially hired as a temporary employee, Grievant’s date of hire as a regular probationary employee during the summer of 2020 is not clear in the record. However, as the probationary period for CPSWs is one year, Grievant was clearly still within his probationary period when his employment was terminated.

3. Prior to his employment with Respondent, Grievant had worked in social services outside of West Virginia for forty-four years, including many years of service in management positions, including service as the director of an agency.

4. During their year of probation, CPSWs are statutorily required to complete extensive training and pass a competency examination. Because each state’s statutes and model are different, new CPSWs are required to complete training regardless of experience they may have accumulated in another state. CPSWs are not eligible to sit for the competency examination until they complete this training.

5. Training is provided through Respondent's Division of Training and lasts for twelve weeks.

6. During this training period, CPSWs receive four hours of instruction a day from Division of Training trainers and are under the direction of their regular supervisor for the remainder of the day.

7. Due to the ongoing pandemic, training for Grievant's cohort was provided virtually through the "Blackboard" online platform. The training was conducted by Stacy Smith and Jessica Ball.

8. Regardless of the new online training platform, CPSWs are required to be computer proficient due to the need to use Respondent's specific computer program, FACTS, extensively in performing their regular duties. Operation of a computer is a requirement of the classification specification.

9. CPSWs must complete 240 hours of classroom training on FACTS, statutory requirements, and Respondent's policies and procedures.

10. CPSWs also receive on-the-job training by shadowing experienced CPSWs. In the training, this is called a "Transfer of Learning" activity, which must be documented, signed by a supervisor, and recorded in Blackboard.

11. Upon hire, Grievant was initially assigned to the regular supervision of Jenny Chapman.

12. Ms. Chapman observed that Grievant had unusual difficulty operating a computer. Grievant frequently discussed how he would be better utilized in an administrative role and it appeared to Ms. Chapman that Grievant "felt he was above training" due to his prior experience. Grievant also missed deadlines in his training and

for timekeeping. Grievant was frequently away from his computer when he was supposed to be in training on his computer.

13. Grievant complained about Ms. Chapman as his supervisor, alleging dissatisfaction with her management style and alleging she asked him, “are you people mentally retarded,” which he took to be racially motivated. Ms. Chapman denied this allegation and Grievant did not make a formal complaint regarding her alleged behavior. However, he was assigned a new supervisor, Emily Petry.

14. Ms. Petry observed the same difficulties with Grievant that Ms. Chapman had regarding his computer proficiency and compliance with instructions. Under Ms. Petry’s supervision, Grievant continued to be away from his computer and failed to complete assignments.

15. Despite both Ms. Petry and Ms. Chapman instructing Grievant not to work after hours without permission, he repeatedly made telephone calls to them and Ms. Walker after working hours.

16. During his training, on multiple occasions, Grievant muttered under his breath stating that the training was “stupid” and “bullshit.”

17. Ms. Ball and Ms. Smith also observed that Grievant had significant difficulty with the computer despite their assistance and additional offers of assistance. Throughout his employment Grievant continued to struggle with basic computer skills and required almost daily assistance from Kelly Walker, Information Systems Associate.

18. On August 7, 2020, Ms. Ball notified Grievant by email of six assignments Grievant had failed to complete in Blackboard.

19. On September 2, 2020, Ms. Smith notified Grievant that the same six assignments had not been completed and that they must be completed before Grievant could sit for the competency test.

20. By email dated September 11, 2020, Ms. Smith again notified Grievant the same six assignments had not been completed and that they must be completed before Grievant could sit for the competency test. Ms. Smith also notified Grievant that his "Transfer of Learning" activities had not been completed.

21. On October 16, 2020, Ms. Petry issued an EPA-2, rating Grievant as "does not meet expectations" due to his failure to complete training.

22. On October 21, 2020, Grievant protested the EPA-2 through email asserting that he had "never been trained in any of the computer applications," and that he had been unable to complete the training due to "technological problems" and illness.

23. As of November 4, 2020, Grievant still had not completed three of the six outstanding assignments and had only partially completed one of the eight required "Transfer of Learning" activities. Grievant had only attended 189.97 hours of the required 240 hours of classroom training.

24. On January 20, 2021, Lance Whaley, Regional Director, terminated Grievant's probationary employment citing Grievant's failure to complete the mandatory training that would allow him to sit for the required competency test.

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 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). “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).

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). Therefore, the Division of Personnel’s administrative rules

establish a low threshold to justify termination of a probationary employee. *Livingston v. Dep't of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008).

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. 2009-0961-MAPS (Jan. 7, 2009) (citing *Hackman v. W. Va. Dep't of Transp.*, Docket No. 01-DMV-582 (Feb. 20, 2002)).

Although Grievant admits he did not finish his required training, he asserts that he was only missing a few assignments and that he should be excused because the training was deficient, he experienced technological problems, and he was absent due to illness. Respondent asserts Grievant failed to prove that his services were satisfactory because he had ample opportunity to complete his training within the normal timeframe and had already received significant assistance to help him complete the training.

Grievant asserts that Respondent's witnesses were untruthful regarding his deficiencies and Grievant's testimony was the only evidence offered to prove that his services were satisfactory. 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 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).

Jenny Chapman's demeanor was calm and forthright. She admitted when she did not remember specific details. Although Grievant asserted prejudice against him due to the alleged statement Ms. Chapman made to Grievant, Grievant's testimony was the only evidence offered to prove that the statement was made. Grievant offered no evidence Ms. Chapman would be motivated to lie over that incident even if it had occurred. Further, Ms. Chapman's testimony regarding Grievant's deficiencies is supported by the testimony of Ms. Petry, who experienced the same difficulties as Ms. Chapman. Ms. Chapman is credible.

Emily Petry's demeanor was appropriate, though slightly scattered at times. However, Ms. Petry answered questions readily, and appeared to have an appropriate level of memory. There is no allegation of bias as Grievant testified he believed he had a good working relationship with Ms. Petry. Ms. Petry's testimony was consistent with the EPA-2, the testimony of Ms. Chapman, and the testimony and documentation of the trainers. Ms. Petry is credible.

Stacy Smith and Jessica Ball were professional and forthright. Both had a good memory of events with Ms. Smith supplying particularly detailed testimony. There is no

allegation of specific bias or interest. Their testimony was consistent with each other and their documentation. Ms. Smith and Ms. Ball are credible.

Kelly Walker's demeanor was very straightforward and sure. She does not appear to have any bias or interest and Grievant had stated he thought he had a good working relationship with her. Ms. Walker's testimony was appropriately detailed and she appeared to have a good recall of events. Ms. Walker is credible.

Meaghan Goffreda's testimony was very brief but her demeanor was appropriate. There was no indication of untruthfulness or motivation to lie. She was certain in her testimony that Grievant stated that the training was "stupid and pointless." Her testimony was consistent with the statements Ms. Smith and Ms. Ball testified Grievant made. Ms. Goffreda was credible.

Grievant's demeanor was initially professional and appropriate but he became emotional later in his testimony. During cross-examination he refused to directly answer some questions. Grievant's testimony that he was not given an appropriate opportunity to correct his deficiencies is not supported by the documentary evidence of the emails and EPA-2 that clearly notified him of the expectations. Grievant's own testimony and demeanor during the level three hearing support Respondent's assertion that Grievant could not conform himself to his lesser role as a line worker. Grievant was not credible.

It is Grievant's burden to prove that his services were satisfactory. It is clear from the evidence, including Grievant's own testimony, that Grievant's services were not satisfactory because Grievant was unable to conform to his new role as a line worker with Respondent. Grievant had last worked as the director of an agency and had been in a management role for many years in another state. In contrast, the CPSW position he

held with Respondent is not a management or policy-making position; it is a practical, boots-on-the ground job that requires strict adherence to the guidelines and deadlines established in West Virginia law. Because of his prior management experience in a state that had a greatly different model from West Virginia's model, Grievant was dismissive of West Virginia's model and Respondent's required training. Despite Respondent's repeated attempts to direct Grievant to focus on his training in the required procedures for his new role, Grievant, even into his level three testimony continued to focus on policy-making concerns, ignoring his position within Respondent's hierarchy. During his employment, he repeatedly failed to follow the instructions of his supervisors and criticized their supervisory style based on his prior management philosophies. On multiple occasions he insulted the training calling it "stupid" and "bullshit." In training, he repeatedly discussed the other state's model and resources as preferable although that model was irrelevant to the training.

He continued this pattern during his level three testimony. He referred to his coworkers as his employees before correcting himself. He referred to his supervisor as "young lady." Grievant described that when he came to the agency he saw that Respondent worked with only one managed care organization while he had worked with twelve in his former management role. He stated that he thought "with my knowledge I could help them and we could grow together." Grievant testified further, "I just want this young man, Mr. Hale, to acknowledge that I could help the agency." Mr. Hale, as the Community Services Manager, occupies a higher-level management position, has many years of experience with Respondent, and is not a young man.

Grievant, by his own admission, did not complete the required training to allow him to fulfill his duties. Grievant's stated reasons why he failed to complete the training do not excuse his failure to complete the training. Respondent offered appropriate levels of assistance to Grievant to help him complete training and it was Grievant who failed to put forth the required effort to address his computer deficiencies. Grievant failed to prove Respondent was under any obligation to allow Grievant additional time to complete the training, especially in light of Grievant's clear refusal by his actions to conform himself to his role as a CPSW.

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 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).

2. 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). 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 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).

4. The Division of Personnel's administrative rules establish a low threshold to justify termination of a probationary employee. *Livingston v. Dep't of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008).

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. W. Va. Dep't of Transp.*, Docket No. 01-DMV-582 (Feb. 20, 2002)).

5. Grievant failed to complete required mandatory training and failed to conform himself to the requirements of his position. Grievant failed to prove that his services were 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: February 4, 2022

**Billie Thacker Catlett
Chief Administrative Law Judge**