BRIANA SIMMONS,

Grievant,

v. DOCKET NO. 97-BEP-531

WEST VIRGINIA BUREAU
OF EMPLOYMENT PROGRAMS,

Respondent.

DECISION

Grievant, Briana Simmons, challenges her termination as a probationary employee with the West Virginia Bureau of Employment Programs ("BEP"), and seeks reinstatement to her position. This grievance was filed directly at level four on December 1, 1997, pursuant to the expedited grievance procedure set forth in W. Va. Code § 29-6A-4. (See footnote 1) **After being held in abeyance for an extended period of time at Grievant's request, a level four hearing in this matter was held in the Grievance Board's office in Morgantown, West Virginia, on September 2, 1998. This matter became mature for decision on November 2, 1998, upon receipt of the parties' post-hearing submissions. Grievant was represented by counsel, Roger Cutright, and BEP was represented by Joy Cavallo, Assistant Attorney General.**

The following findings of fact are made from a preponderance of the evidence ofrecord.

Findings of Fact

1. Grievant was hired by BEP on May 16, 1997, as an Employment Programs Interviewer in the Fairmont Unemployment Compensation Office.

2. Grievant's position as an Interviewer was within the classified service for the State of West Virginia, and her first six months of employment were probationary.

3. Grievant's job duties consisted of interviewing potential claimants seeking unemployment compensation benefits and processing those initial claims.

4. From the inception of her employment with BEP, Grievant had difficulty with conducting interviews quickly. This was, in part, due to her "socializing" too much with claimants and discussing information irrelevant to the claim.

5. Grievant was tardy on several occasions during her probationary period, ranging from ten minutes to one hour each time.

6. On September 15, 1997, Grievant received a performance evaluation for the period from May 16, 1997, through August 18, 1997. She received "good" ratings in most performance categories, but only received a "satisfactory" rating for "use of time." Grievant also received one "very good" rating, in the category of "human relations," which refers to how well employees get along with coworkers and maintenance of a clean and safe workarea.

7. Lou Taylor, Employment Programs Office Supervisor, discussed Grievant's evaluation with her on September 16, 1997. She explained to Grievant that she needed to improve the speed and quality of her work. Grievant was specifically instructed to spend less time discussing unnecessary information with claimants. Ms. Taylor also told Grievant she would have to cease being tardy for work.

8. Although she did not believe Grievant was performing well enough to be retained as a permanent employee, Ms. Taylor was "overly generous" on the September evaluation, hoping it would encourage Grievant to improve.

9. On October 8, 1997, Grievant informed Ms. Taylor that she was pregnant.

10. On approximately eight occasions from late August, 1997, through October 16, 1997, Grievant was counselled by Ms. Taylor about spending too much time on initial interviews and processing claims.

11. By letter dated October 24, 1997, from BEP Commissioner William Vieweg, Grievant was informed that she was being dismissed from her employment, and the reasons were stated as follows:

> The specific reasons for this action are work performance. It has been determined that your overall knowledge of your duties and responsibilities is limited; the quality of your work output as measured by completeness and accuracy is marginal; you are unable to satisfactorily apply sound judgement when performing your assigned duties and you show little self-motivation and function poorly under minimal supervision. It has been reported that you are frequently tardy showing poor judgement in the use of your accrued leave.

Discussion

When a probationary employee is terminated on grounds of incompetency orunsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the employer carries no burden of proof in a grievance proceeding. Rather, the employee has the burden of establishing that her services were satisfactory. Bonnell v. W. Va. Dept. of Corrections, Docket No. 89-CORR-163 (Mar. 8, 1990). Although Grievant had argued that she should not bear the burden of proof in this case, the burden of proof is specifically placed upon the employer only in disciplinary cases. See W. Va. Code § 29-6A-6. Dismissal of a probationary employee for unsatisfactory performance is not disciplinary in nature. See Bonnell, supra; Walker v. W. Va. Public Service Comm'n, Docket No. 91- PSC-422 (Mar. 11, 1992); Bowman v. W. Va. Educational Broadcasting Authority, Docket No. 96-EBA-464 (July 3, 1997). Grievant was clearly dismissed for unsatisfactory performance, not for any disciplinary causes.

Grievant's argument is twofold. First, she contends that her performance was not unsatisfactory, and, second, she believes that she was the subject of discrimination as a result of her pregnancy. Classified employees are subject to the provisions of the Division of Personnel's (DOP) Administrative Rule (6/95). Section 10.05 of that rule addresses “Dismissal during Probation” and states as follows:

> If at any time during the probationary period, the appointing authority determines that the services of the employee are unsatisfactory, the appointing authority may dismiss the employee in accordance with Section 12.02 of this rule. If the appointing authority gives the fifteen calendar days notice on or before the last day of the probationary period, but less than fifteen calendar days in advance of that date, the probationary period shall be extended fifteen days from the date of the notice and the employee shall not attain permanent status. This extension shall not apply to employees serving a twelve month probationary period.

In turn, Section 12.02, referred to in the above-cited section, provides:

> Dismissals _ The appointing authority, fifteen (15) calendar days after noticein writing to an employee stating specific reasons therefor, may dismiss any employee for cause. The employee shall be allowed a reasonable time to reply to the dismissal in writing, or upon request to appear personally and reply to the appointing authority or his/her designee. The reasons for dismissal and the reply, if any, shall be filed with the Director of Personnel. Fifteen days notice is not required for employees in certain cases when the public interests are best served by withholding the notice of when the cause of dismissal is gross

misconduct. An appointing authority may dismiss an employee after oral notice, confirmed in writing, when the dismissed employee's action(s) constitute a threat to the safety or welfare of persons or property.

As stated above, Grievant must prove that her services were, indeed, satisfactory. The term "unsatisfactory," as used in the Administrative Rule, is undefined. Grievant introduced the testimony of her coworkers regarding her interviewing skills. Roy Bourne, also an Interviewer, testified that Grievant performed extremely poorly during her first three months, but that she dramatically improved. He was "very surprised" that she was let go, because her interviews became more focused and quicker. Danny Barth, who worked as an Interviewer, also believed that Grievant's interviews improved during the last couple of months of her employment.

As noted by Respondent, neither of these employees functioned in a supervisory capacity over Grievant, and they did not review her written work. Respondent introduced into evidence a sample of Grievant's written work, a "Factfinding Statement" prepared in September of 1997 after an initial interview with a claimant. This report does, indeed, seem to contain a large amount of extraneous information unnecessary to processing of an unemployment claim. Grievant did not introduce any examples of better quality work.

As to her interviewing skills, Grievant also introduced her time sheets, indicating that she averaged approximately 30 minutes per initial interview, which is the acceptable standard set by BEP. However, Ms. Taylor testified that the time sheets are prepared bythe employee, so these times were not verified. Ms. Taylor stated that, based upon her own observations, Grievant frequently spent more than thirty minutes conducting interviews, often spending as much as an hour on them. Grievant's coworkers stated that they did not time her interviews, although they felt she did improve. There is no evidence of record which disputes Ms. Taylor's statements. Additionally, Grievant has not disputed that Ms. Taylor spoke to her on numerous occasions regarding the time spent on initial claims.

Ms. Taylor testified that, based upon a variety of factors, including the length of interviews, quality of written work, and overall professionalism, she did not believe Grievant was where an employee should have been after five months in the position. In addition to the performance issues, Ms. Taylor stated that Grievant seemed to spend a significant amount of

time on personal phone calls and socializing with coworkers. Furthermore, Grievant was frequently tardy during her probationary period, conduct which quite logically is unacceptable in a probationary employee who wants to became permanently employed.

The undersigned finds that Grievant has not proven that her performance was satisfactory. This is not a case in which, as Grievant contends, pretextual reasons for her termination were fabricated merely to "get rid of her." BEP has documented specific, relevant reasons for not continuing Grievant's probationary employment, which is all it is required to do. Section 10 of DOP's Administrative Rule states that the probationary period is a trial work period designed to allow the employer an opportunity to evaluate the ability of the employee to effectively perform the work required. Although "unsatisfactory performance" is a phrase subject to broad interpretation, BEP in this case has provided ample evidence that Grievant did not meet the agency's standards for performance as anInterviewer, and it acted within its authority under the regulations in terminating her probationary employment.

Grievant and Respondent have both submitted extensive arguments regarding the issue of termination of a pregnant employee under the West Virginia Human Rights Act, Code §5-11-1, et seq. However, both have failed to take note of the West Virginia Supreme Court of Appeals' ruling in Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995), where it was held that the Grievance Board does not have subject matter jurisdiction to determine liability for claims that arise under the Human Rights Act. The Grievance Board only has the authority to provide relief for discrimination as it is defined in the grievance statute, Code §29-6A-2, which may cover discriminatory acts which also violate the Human Rights Act. See Vest, supra; Bowman, supra; Prince v. Bd. of Trustees, Docket No. 97-BOT-276 (Nov. 5, 1997); Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1997); Currey v. Dept. of Transp., Docket No. 95-DOH- 579 (Aug. 6, 1996). Accordingly, the undersigned does not have jurisdiction to determine liability under the Human Rights Act.

"Discrimination" is defined by W. Va. Code § 29-6A-2(d) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees. A prima facie case of discrimination requires the grievant to prove the following:

(a) that she is similarly situated, in a pertinent way, to one or more other employees;

(b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Hindman v. W. Va. Div. of Corr., Docket No. 94-CORR-262 (Feb. 27, 1997); Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996).

Grievant has failed to establish a prima facie case of discrimination, because she has not identified any "similarly situated employees" who have been treated differently than her with respect to probationary employment. Therefore, Grievant's discrimination claim must also fail.

Consistent with this discussion, the following conclusions of law are appropriate.

Conclusions of Law

1. When a probationary employee is terminated for unsatisfactory performance, the employee bears the burden of proving that her services were satisfactory. Bonnell v. W. Va. Dept. of Corrections, Docket No. 89-CORR-163 (Mar. 8, 1990).

2. Section 10.05 of the Division of Personnel Administrative Rule allows dismissal of an employee at any time during the probationary period for unsatisfactory performance.

3. Grievant has failed to prove by a preponderance of the evidence that her performance as an Interviewer for BEP was satisfactory.

4. The Grievance Board does not have subject matter jurisdiction to determine liability for claims that arise under the Human Rights Act. Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995); See Bowman v. W. Va. Educational Broadcasting Authority, Docket No. 96-EBA-464 (July 3, 1997); Prince v. Bd. of Trustees, Docket No. 97-BOT-276 (Nov. 5, 1997); Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099(Dec. 18, 1997); Currey v. Dept. of Transp., Docket No. 95-DOH-579 (Aug. 6, 1996).

5. Grievant has failed to establish a prima facie case of discrimination as defined by W. Va. Code § 29-6A-2(d).

Accordingly, this grievance is DENIED.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred, and such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

Date:

November 23, 1998

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

A telephone conference was conducted on April 7, 1998, at which time Grievant's counsel argued that this matter was disciplinary in nature, placing the burden of proof upon the employer. By Order dated April 15, 1998, the undersigned held that this matter was, in fact, not disciplinary. Probationary employees are not entitled to the benefits of the expedited grievance procedure of Code § 29-6A-4. Hale v. Division of Corrections, Docket No. 970CORR-353 (Feb. 20, 1998). However, BEP did not object to consideration of this matter at level four, so it was not remanded to the lower levels of the grievance procedure.