WALTER GIBERSON,

Grievant,

v. DOCKET NO. 98-CORR-002

WEST VIRGINIA DIVISION

OF CORRECTIONS,

Respondent.

DECISION

Grievant, Walter Giberson, challenges his dismissal from probationary employment with the Respondent Division of Corrections (DOC), and seeks reinstatement with back pay. Grievant had initially filed this grievance directly at level four, but it was subsequently remanded for a level three hearing, because of Grievant's status as a probationary employee. A level three hearing was held on December 5, 1997, followed by a written decision denying the grievance dated December 11, 1997. Grievant appealed to level four on December 30, 1997, and a hearing was conducted in the Grievance Board's office in Charleston, West Virginia, on February 27, 1998, where Grievant was represented by Jack Ferrell of the Communication Workers of America, and DOC was represented by its attorney, Leslie Kiser. At the conclusion of that hearing, the parties' representatives requested permission to file proposed findings of fact and conclusions of law by March 27, 1998, but none were submitted. At the level four hearing and in a subsequent phone call, the undersigned requested that DOC provide a copy of the lower level record, as required by W. Va. Code § 29-6A-6, which was not submitted until May 18, 1998.

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

Findings of Fact

1. Grievant began probationary employment at Mount Olive Correctional Complex as a

correctional officer on August 1, 1996.

2. Grievant has health problems due to high blood pressure and having only one kidney.

3. Between September 22, 1996, and October 20, 1996, Grievant called off work twelve times, all but one being due to illness. He had been scheduled for thirty shifts during this time period. Grievant had a doctor's excuse for five of those twelve days.

4. On October 23, 1996, Grievant received verbal counseling from his supervisor, Lt. Craig Hale, concerning his excessive absences. Lt. Hale informed Grievant that, if his attendance record did not improve, he would not likely be retained for employment beyond his six-month probationary period.

5. During the October 23, 1996, counseling session, Grievant inquired whether he could be moved to a less stressful assignment, such as perimeter duty. Lt. Hale informed Grievant that no such assignments were available, and that he should possibly consider other employment. Grievant decided to continue to try to perform his duties as assigned.

6. Grievant called in sick on November 2, 3, and 4, 1996, and provided a doctor's excuse.

7. Grievant called in sick on November 7, 1996, without an excuse.

8. Grievant requested and received an unpaid medical leave of absence from November 18 through 27, 1996.

9. Grievant mailed his doctor's excuse for the November leave of absence tothe payroll office in late November.

10. When Grievant showed up for work on November 28, 1996, he was sent home by the shift commander, because he did not have a doctor's excuse.

11. The payroll office was closed for the holidays until December 2, 1996, so Grievant was not allowed to return to work until that time, so that his doctor's excuse could be verified.

12. Grievant attempted to return to work on November 29 and 30, 1996, and December 1, 1996, but was turned away, because he did not have a doctor's excuse. Grievant made no effort during this time period to procure another copy of the doctor's excuse he had previously obtained from his physician.

13. Grievant called in or went home sick on December 5, 16, and 19, and used family sick leave on December 27 and 28, 1996. He also called in sick on January 9, 1997.

14. Grievant was taken off the payroll, because he did not have any accumulated sick leave to use, on approximately thirteen occasions (in addition to the authorized medical leave of absence).

15. In a letter dated January 10, 1997, Grievant was notified by Howard Painter, Deputy Warden, that he was being dismissed from his probationary employment, effective January 25, 1997. In addition, the letter stated, as the reason for the dismissal:

> **You were initially hired as a Correctional Officer at [MOCC] on 01 August 1996. During the first month of your employment you maintained perfect attendance; however, beginning in September, you began to develop a disturbing pattern of possible leave abuse. On 23 October 1996 you were counseled by Lt. Craig Hale concerning your absences. The documentation provided reveals that from 22 September 1996 through 20 October 1996, a period in which you were scheduled to work approximately thirty (30) shifts, you called off twelve (12) times. Lt. Hale informed you that if your attendance did not improve it would be unlikely that your employment wouldcontinue.**
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> **In addition, I have been informed by the Payroll Department that since your employment began you have been scheduled to work approximately 109 days. You have missed thirty-two (32) of those days. The Payroll Department has had to adjust your paycheck four (4) times and due to the fact that you missed work three (3) days in December, they will have to adjust your paycheck again.**
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> **.**
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> **Mr. Giberson, your attendance record is totally unacceptable. You were hired as a Correctional Officer in a maximum security institution. As you are aware, we operate on chain-of-command with officers being assigned security posts which must be manned at all times. Your excessive absences have caused an undue hardship on your fellow officers. As Deputy Warden at MOCC, I cannot allow your abuse of leave time to continue. Your behavior demonstrates that you are unable or unwilling to conform to the acceptable standards of conduct expected from a Correctional Officer. Therefore, I believe this dismissal from your probationary employment to be warranted.**
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> **I met with you in my office today, 10 January 1997, at approximately 1505 hours. You informed me that after you completed the basic DOC academy your blood pressure medicine just quit working. You stated you were currently on new medication. You informed me you take medicine for blood pressure and water retention. I can empathize with your medical problems; however, as I explained in our meeting, the nature of this institution makes it imperative that we have reliable employees who report to work as scheduled. We owe an obligation to the staff, inmates, and the general public to ensure that the institution operates as safely and securely as possible. We cannot accomplish this task if employees are permitted to abuse leave time.**

> You may respond to this matter in writing or you may meet with me in person with an explanation of any reason why you may think the facts and grounds contained in this letter are in error and why you may think this action is inappropriate, provided you do so within eight (8) calendar days of receipt of this letter.

16. Grievant wrote to Deputy Warden Painter, requesting reconsideration of the decision to dismiss him. (See footnote 1) The deputy warden and warden met and reviewed Grievant's file,deciding that they could not continue to employ Grievant, for the reasons stated previously.

Discussion

Where a probationary employee is terminated on grounds of incompetency or unsatisfactory 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 his services were satisfactory. Bonnell v. W. Va. Dept. of Corrections, Docket No. 89-CORR-163 (Mar. 8, 1990). The instant case is not one involving misconduct; clearly, Grievant was dismissed because of excessive leave usage and consequent unreliability. 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).

As employees in the classified service of the state, DOC 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 employeesserving 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 notice in 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.**

In the instant case, Grievant does not deny that he did, indeed, call off work on the numerous occasions cited. Rather, he contends that, because he had to miss work for medical reasons, this should not be held against him. Additionally, Grievant argues that he should have been given an opportunity to meet with his superiors and plead his case prior to receipt of the termination letter, and that DOC has violated provisions of Section 10.02 (a) of the Administrative Rule.

Grievant's contentions do not constitute proof that his performance was satisfactory, as required by Bonnell, supra, and its progeny. As stated by his supervisor, Lt. Hale, Grievant was so frequently absent that, not only was he an unreliable employee who frequently placed a heavier burden on others, but that it was nearly impossible to assess his performance as a correctional officer. 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 of the position, and to eliminate those employees who do not meet the required standardsof work. It was clearly within DOC's rights to determine that Grievant's physical limitations and excessive absences rendered him unsuitable for the position, which is amply supported by the record. In fact, in spite of his claims that his medication had resolved his difficulties exhibited in late 1996, Grievant introduced into evidence at level four a report from his treating physician stating that he “has been completely disabled” since 1995. Although dated February 5, 1998, well after Grievant's dismissal, this report only lends support to the belief that Grievant was unable to

perform this job. **(See footnote 2)**

Grievant has made much of the fact that he was not allowed to return to work in late November of 1996, because he had mailed his doctor's excuse to the closed payroll office. Grievant contends that he was unaware of MOCC's policy of requiring presentation of a doctor's excuse to the shift commander on duty upon return to work from excused medical leave; thus, it was unreasonable for institution officials to deny him the right to return to work. However, this is of no consequence. Even if the absences during this time period, on November 28, 29, 30 and December 1, are excluded from this discussion, Grievant was still absent 28 days of approximately 100 he was scheduled to work. Regardless of the fact that some of these absences were supported by physician excuses, this is still overwhelming evidence that Grievant could not be considered an able and reliable employee, a reasonable expectation of any employer. See Prince, supra.

Section 10.02 of DOP's Administrative Rule addresses "Conditions Preliminary to Permanent Appointment." It requires that, four weeks prior to the end of the probationaryperiod, the employee's supervisor must provide a written statement either recommending that the employee be permanently employed or not. The appointing authority, after having been provided this statement, must determine whether the employee should be retained, notifying the employee by the end of the probationary period. Having begun his employment on August 1, 1996, Grievant's probationary period would have ended on February 1, 1997. Accordingly, Grievant is correct in his assertion that DOC did not comply with Section 10.02. However, there is no provision or implication in the Administrative Rule that failure to comply with Section 10.02(a) entitles the employee to permanent employment. Rather, as provided in Section 10.02(b), the employee does attain permanent status only if the employer takes no action regarding his employment status prior to the expiration of the probationary period. The employer's failure to follow the provisions of Section 10.02 does not entitle Grievant to any relief.

In this case, DOC elected to exercise its rights under Section 10.05, dismissing Grievant prior to the end of his probationary period, taking action upon his status as mandated by Section 10.02(b). Dismissal under Section 10.05 is allowed "at any time during the probationary period." (Emphasis added.) Accordingly, DOC was perfectly within its rights to

implement the provisions of this regulation in dismissing Grievant. The Administrative Rule neither states nor implies that an employer cannot dismiss an employee for unsatisfactory performance during the last four weeks of the probationary period.

As to Grievant's contention that he was not given advance notice of his impending dismissal, this claim is simply not supported by the facts. In this case, DOC followed the letter of Sections 10.05 and 12.02 relating to dismissals. Grievant was allowed to meet with the Deputy Warden on January 10, 1997, when the dismissal letter was issued, and givenan opportunity to plead his case. In addition, the dismissal was not to take effect until January 25, 1997, giving Grievant the required fifteen days' notice. Grievant was also given the opportunity to respond to the dismissal letter, of which Grievant did avail himself. No further rights are accorded a probationary employee in the dismissal process.

Finally, Grievant presented the testimony at level four of David Martin, a permanently employed correctional officer, who had been allowed to move to a lighter duty position after suffering a heart attack. Although not articulated, this appears to be an attempt to claim discrimination. “Discrimination” is defined by 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 he is similarly situated, in a pertinent way, to one or more other employees;
>
> (b) that he has, to his detriment, been treated by his 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 not established a prima facie case of discrimination. He cannot claim he is "similarly situated" to Mr. Martin for a variety of reasons. First, and most significant, is that Mr. Martin was a permanently employed classified employee, and not in the probationary status of having to prove his abilities to perform the job. In addition, MOCC officials have stated that, at the time of Grievant's request, there simply were no "light duty"positions available. Accordingly, Grievant was not similarly situated to Mr. Martin.

In accordance with the foregoing findings and discussion, the following conclusions of law are appropriate.

Conclusions of Law

1. Where 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. Dept. of Corrections, Docket No. 89-CORR-163 (Mar. 8, 1990).
2. Grievant did not prove by a preponderance of the evidence that his performance as a correctional officer at Mount Olive Correctional Complex was satisfactory.
3. 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.
4. The Division of Corrections fully complied with the provisions of Division of Personnel Administrative Rule Sections 10.05 and 12.02 in dismissing Grievant from his probationary employment.
5. Grievant did not establish a prima facie case of discrimination as defined in W. Va. Code § 29-6A-2(d).

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to thecircuit 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. 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: May 29, 1998

V. DENISE MANNING

Administrative Law Judge

Footnote: 1

Grievant did not introduce copies of this correspondence, so it is unknown what arguments he made or reasons he gave in order to persuade MOCC to change itsdecision.

Footnote: 2

See Prince v. Bd. of Trustees, Docket No. 97-BOT-276 (Nov. 5, 1997), for a discussion of case law supporting the proposition that an employer is not obligated to retain an employee who has exhibited an inability to perform the essential duties of his or her position, due to a medical condition.