THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KRISTINA COSBY,

GRIEVANT,

v.

DOCKET NO. 2009-0086-MAPS

DIVISION OF JUVENILE SERVICES,

GENE SPADARO JUVENILE CENTER,

RESPONDENT.

DECISION

Kristina Cosby ("Grievant") (See footnote 1) challenges her dismissal from employment as a probationary Correctional Officer 1, by Respondent West Virginia Division of Juvenile Services, Gene Spadaro Juvenile Center ("DJS"). This grievance was filed directly to Level Three on July 14, 2008.

The July 14, 2008, Statement of Grievance provides that

> I Kristina Sue-Allen Cosby state that Ralph [T]erry Director of Gene Spadaro Juvenile [C]enter has violated codes 138.001 and the Progressive Discipline [P]lan code 128.00 was not followed in result of my unlawful discharge [*sic*].

As relief, the Grievant states that she desires "this matter to be maid [*sic*] aware of and justice for others wrongdoing" [*sic*].

A Level Three hearing was held at the Grievance Board's office in Beckley, West Virginia, on October 1, 2008. Grievant appeared *pro se*. The DJS appeared by and through its counsel, Steven R. Compton, Esquire. This matter became mature for decision on or about October 20, 2008, the date proposed findings of fact and conclusions of lawwere due. The Respondent has submitted proposed

findings of fact and conclusions of law. The Grievant has not.

Synopsis

DJS dismissed Grievant during her initial one year probationary period of employment. Grievant was employed as a probationary Correctional Officer 1. DJS counseled the Grievant numerous times about her work performance. Specifically, the Grievant was not following policy and procedures. Grievant claims that the Respondent erred in failing to follow progressive discipline. Further, she maintains that she was treated unfairly.

Probationary employees may be dismissed at any time for unsatisfactory job performance. The Grievant has failed to meet her burden of proving that her performance was satisfactory. For the reasons set forth below, this grievance is denied.

Based upon a detailed review of the record in its entirety, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievant began her employment with DJS on August 16, 2007, as a Correctional Officer 1 with a probationary period of one year.

2. On September 21, 2007, Grievant was verbally counseled regarding inappropriate comments she made about a contract employee in the presence of several juvenile residents.

3. An undated Employee Performance Appraisal, covering the rating period of August 26, 2007, to March 1, 2007, informed the Grievant that she is expected to reportto work on time and maintain a good attendance record. Likewise, the performance appraisal notified Grievant that she was to “show pride in uniform by wearing it in a neat and orderly fashion.” (See footnote 2)

4. DJS Policy Number 133.00, Paragraph g, provides that “earrings, nose rings, posts or any other visibly piercing jewelry, such as tongue studs, are not authorized for wear by any uniformed officer while on duty.” (See footnote 3) Similarly, DJS Procedure Number GS- 133.00-01 provides that nose rings are not authorized for wear by any “youth specialist or shift supervisor while on duty.” (See footnote 4)

5. On November 2, 2007, Grievant wore a nose ring to work and was advised by Shift Supervisor Amber Kirk that DJS policy and procedure did not permit her to wear a nose ring. On or about November 6, 2007, Grievant again wore a nose ring to work. She was again advised that she needed to remove the nose ring and was informed wearing a nose ring was against policy and procedure.

That same month, on November 24, 2007, Grievant once again reported to work wearing a nose ring and was advised by Supervisor Kirk not to wear this type of jewelry.

6. Grievant's December 18, 2007, Employee Performance Appraisal evaluated the Grievant's level of work performance as “[f]air, but needs improvement.” The appraisal cited the Grievant's need for greater professionalism. The appraisal also indicated that the Grievant maintained a good working relationship with co-workers and residents.

7. On January 8, 2008, Grievant was counseled by Shift Supervisor Brenda Huffman about giving out a co-worker's telephone number in regard to a work-related question that the Grievant could not answer. (See footnote 5) Grievant indicated that she was not aware of this policy and stated that it would not happen again.

8. On May 7, 2008, Grievant was verbally counseled regarding her physical contact with a resident. Specifically, the Grievant was instructed not to style juvenile residents' hair as DJS had a “hands-off” policy. Three days after the verbal counseling, on May 11, 2008, the Grievant again styled the hair of a juvenile resident. *See* May 11, 2008, Letter, Respondent's Exhibit 3.

9. On May 12, 2008, Grievant wore a nose ring to work. She was verbally counseled.

10. On May 19, 2008, Grievant wore a nose ring to work. She was verbally counseled.

11. On June 18, 2008, Grievant wore a nose ring to work. Grievant received a written warning for her conduct. *See* June 18, 2008, Letter, Respondent's Exhibit 3.

12. An Employee Performance Appraisal dated June 14, 2008, described the Grievant's level of work performance as “[f]air, but needs improvement.” The appraisal recognized the Grievant's tardiness, absenteeism and excessive use of sick time. It also provided that the Grievant was verbally counseled numerous times during the applicableperformance review period.

13. On July 8, 2008, a pre-determination hearing was held. Director Ralph Terry, Manager John Ferda and Grievant were present at the hearing. Grievant was notified that she would be dismissed from her probationary employment.

14. By letter dated July 10, 2008, Grievant received a written letter advising her that she would be dismissed fifteen (15) days from the date of the letter. Citing specific examples, the letter indicated that the Grievant was being dismissed for unsatisfactory performance. Grievant was required to immediately separate from the workplace.

15. Grievant repeatedly wore a nose ring to work.

16. Grievant styled an inmate's hair.

17. Grievant was occasionally tardy for work. (See footnote 6)

Discussion

When 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. The employee has the burden of establishing, by a preponderance of the evidence, that her services were satisfactory. *See Bonnell v. W. Va. Div. of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Bowman v. W. Va. Educ. Broadcasting Auth.*, Docket No. 96-EBA-464 (July 3, 1997); *Walker v. W. Va. Public Serv. Comm'n*, Docket No. 96-PSC-422 (Mar. 11, 1992). The termsatisfactory can be generally defined as "giving satisfaction sufficient to meet a demand or regulation; adequate." *Brown v. W. Va. Dep't of Health & Human Res.*, Docket No. 99- HHR-026 (Oct. 28, 1999)(citation omitted). "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). The Grievant's termination was based upon her unsatisfactory performance and is not disciplinary. (See footnote 7) Hence, the Grievant bears the burden of proving her performance was satisfactory.

The Division of Personnel's Administrative Rule discusses the probationary period of employment, describing it as “a trial work period designed to allow the appointingauthority 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.” 143 C.S.R. 1 § 10.1(a). 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 her services are unsatisfactory. 143 C.S.R. 1 § 10.5(a).

Grievant was a probationary employee. She 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). In this case, the DJS dismissed the Grievant because of unsatisfactory performance. The DJS did not err when it failed to follow progressive discipline. Indeed, Grievant's

dismissal was *not* disciplinary in nature but was based upon unsatisfactory performance.

The Grievant has not established that her work performance was satisfactory. Grievant has done little to challenge the allegations against her. She admits receiving numerous warnings about wearing a nose ring in the workplace. She merely claims that she continuously forgot. Additionally, she admits that she received warnings for various other types of conduct. (See footnote 8) As a defense, the Grievant claims that she was treated unfairly,"pointed out" (See footnote 9) and picked upon by the Respondent.

The Grievant's argument is unpersuasive. The record clearly indicates that many warnings were provided to the Grievant. She was instructed to follow the rules of the workplace. She failed to do so. This is not a scenario where equity must intervene. The Grievant failed to follow directions, even after repeated reminders of the rules and procedures. The ability to follow instructions is a clear need of the employer that may be considered when determining whether to retain a probationary employee in light of his or her job performance. The Grievant has not established that her performance was satisfactory.

In summation, the Grievant has not established, by a preponderance of the evidence, that her performance during the probationary period was satisfactory. Nor can it be said that the decision of the DJS was unreasonable. The facts indicate that the Grievant had a difficult time following the clear policies and procedures of the workplace. This grievance must be denied.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. When 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. The employee has theburden of establishing by a preponderance of the evidence that her services were satisfactory. *Bonnell v. W. Va. Div. of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990). "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).

2. A probationary employee may be dismissed at any point during the probationary period that the employer determines that her services are unsatisfactory. 143 C.S.R. 1 § 10.5(a).

3. Grievant has failed to prove, by a preponderance of the evidence, that her performance was

satisfactory and that she should not have been dismissed. It was within the employer's discretion to dismiss her from probationary employment.

Accordingly, this 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 Order. *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 (eff. July 7, 2008).

Date: November 13, 2008

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Mark Barney Administrative Law Judge

Footnote: 1

Sometimes referred to in the record as Kristina Neal.

Footnote: 2

An Employee Performance Appraisal dated February 12, 2008, also used the same language indicating the expectations of timeliness and uniformity of dress.

Footnote: 3

By an acknowledgment form dated January 13, 2008, Grievant acknowledged that she read and understood Policy Number 133.00.

Footnote: 4

By an acknowledgment form dated April 4, 2008, Grievant acknowledged that she read and understood Procedure GS 133.00-01 relating to "Grooming and Appearance Standards for Uniformed Personnel."

Footnote: 5

It is unclear from the record exactly who the Grievant gave the co-worker's telephone to.

Footnote: 6

Based upon the record, it is difficult to determine whether the Grievant abused her sick and vacation leave. The Respondent generally claims she called in too much. The Grievant argues otherwise. In light of the circumstances in this case, it suffices to say that the Grievant liberally used her sick and vacation leave. However, liberal use does not equate

to abuse in light of the evidence presented.

Footnote: 7

In consideration of the severity of the Grievant's conduct and the specific facts of this case, the conduct in question was performance-based and not disciplinary in nature. The conduct was based upon specific violations of specific rules and procedures. Indeed, failure to follow cogent instructions is clearly associated with performance. Decisions generally hold that where a probationary employee's conduct is inextricably linked with performance and not outside the bounds of reasonable workplace behavior, the conduct should be treated as performance-based and the burden should be upon the grievant to prove satisfactory performance. See Vestal v. W.Va. Div. of Corr./Anthony Corr. Cntr., Docket No. 2008-1242-CONS (July 9, 2008)(grievant's failure to follow instruction regarding inmate interaction was performance-related); Wayson v. W.Va. Div. of Rehab. Servs., Docket No. 04-RS-255 (Sep. 22, 2004)(nursing difficulties and problems interacting with others is performance-related); Giberson v. W. Va. Div. of Corr., Docket No. 98- CORR-002 (May 29, 1998)(dismissal for abuse of leave and/ or attendance problems are performance-based and not disciplinary in nature); Smith v. W.Va. Div. of Labor, 93-Labor- 423 (June 15, 1994)(pulling a female employee's brassiere and spitting on a windshield analyzed under work performance with the burden placed upon the Grievant). One decision analyzed the conduct under both standards. See Wolfe v. W.Va. Dep't of Trans./Div. of Highways, Docket No. 95-DOH-491 (July 31, 1996)(selling liquor to inmates is seemingly performance and disciplinary based). Where the conduct is clearly egregious, it is most often considered disciplinary. Walker v. W.Va. Pub. Serv. Comm'n, Docket No. 91-PSC-422 (Mar. 11, 1992)(unauthorized use of a police vehicle and various other acts considered disciplinary); Johnson v. W.Va. Dep't of Trans./Div. of Highways, Docket No. 04-DOH-215 (Oct. 29, 2004)(illegal drug use is disciplinary).

Footnote: 8

Grievant does not dispute that she styled an inmate's hair. Nor does she dispute that she gave out a co-worker's telephone number.

Footnote: 9

The Grievant testified that Shift Supervisor Brenda Huffman came to her in private and told her to be careful because people are "watching." Grievant claims that Respondent was hyper-critical. In light of the sheer volume of warnings the Grievant received, it is clear that the advice from Supervisor Huffman was sound. The Grievant does not allege she was being treated differently when compared to other employees. As a probationary employee, the Grievant could be dismissed for unsatisfactory performance at any time.