THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

FONDA COSNER,

Grievant,

v.

DOCKET NO. 08-HHR-008

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/WILLIAM R. SHARPE, JR. HOSPITAL,

Respondent.

DECISION

Grievant, Fonda Cosner, filed this grievance against her former employer, the Department of Health and Human Resources/William R. Sharpe, Jr. Hospital, contesting the termination of her probationary employment. The grievance was filed at level one of the grievance procedure on March 30, 2007. (See footnote 1) The statement of grievance reads:

> I received a letter dated 03-21-07, informing me that I have been dismissed from my job (cook) because of an article printed in the local paper stating I committed a Felony. I haven't been convicted of this. During my numerous interviews this issue wasn't questioned. I answered truthfully the question on the application: “Have you been convicted of a felony in the last 7 yrs.? ”NO. I wasn't deceitful. I feel that I did execute

> reasonable standards ofconduct as an employee of Sharpe Hosp. I feel I have been discriminated against and unfairly dismissed.

As relief Grievant sought, "[t]o be returned to my job as a cook, benefits plus salary and any other way be made whole."

The record does not reflect what occurred at level one. A level two conference was held on April 5, 2007, and the grievance was denied at that level on April 6, 2007. Grievant appealed to level three, where the grievance was placed in abeyance, at Grievant's request, pending the outcome of the criminal investigation. Grievant pled guilty to a charge of petit larceny and embezzlement on August 13, 2007, but did not notify the level three grievance evaluator, or Respondent, of this event. After a Show Cause Order was entered at level three, on April 8, 2008, Grievant requested that she be allowed to proceed to level four of the grievance procedure, and an Order was entered at level three on April 8, 2008, (See footnote 2) permitting the waiver of the grievance to level four.

On May 5, 2008, Grievant filed an amended statement of grievance, seeking "to have my name cleaned-up with Human Resources - A clean slate - Due to my dismissal I cannot be considered for employment through Human Resources for any given position." Grievant also requested back pay "from April 2007 through June 2008 or up to the date my name is cleared through Human Resources so that I may be considered for future employment with other agencies or facilities." (See footnote 3)

A level four hearing was held before the undersigned Administrative Law Judge on October 28, 2008, in the Grievance Board's Westover office. Grievant represented herself, and Respondent was represented by Jennifer K. Akers, Assistant Attorney General. This matter became mature for decision upon receipt of Respondent's written argument, on November 26, 2008. Grievant chose not to submit written argument.

Synopsis

Grievant was dismissed from her probationary employment after her indictment on three felony counts was published in the local newspaper. This report, one week after Grievant began her employment, came as a total surprise to Respondent, as Grievant had not made her employer aware of the possibility that she would be indicted. Grievant's indictment, and her failure to disclose the charges against her, caused Respondent to question Grievant's integrity, and lose confidence in her. Grievant subsequently pled guilty to a misdemeanor, and was sentenced to three years' probation.

Respondent demonstrated sufficient justification for the dismissal of Grievant during her probationary period. This grievance is denied.

The following Findings of Fact are made based upon the record developed at level four.

Findings of Fact

1. Grievant began her employment as a Cook with the Department of Health and Human Resources ("HHR"), at William R. Sharpe, Jr. Hospital, on March 1, 2007. She was hired as a probationary employee. 2. Grievant was aware that a criminal background check would be conducted, and that her employment could be terminated if the background check did not show a clean criminal record.

3. On March 7, 2007, the local newspaper, the Weston Democrat, reported that Grievant had been indicted on three felony counts, for embezzlement, grand larceny by fraudulent scheme, and grand larceny.

4. The employment application completed by Grievant asked the applicant if he or she had ever been convicted of a felony. Grievant answered this question, "no," which was accurate at the time. Grievant did not disclose on her employment application, or in any interviews or other discussions with any HHR personnel, that she was aware of the charges against her which resulted in her indictment. She was aware of the possibility of indictment when she began her employment with HHR.

5. On March 8, 2007, Kathy Marsh, Nutritional Services Director, approached Grievant when she reported to work, to speak with her about the reported indictment. Grievant acknowledged that she was guilty of the charges, except as to the dollar amount she was alleged to have taken illegally, and apologized for not informing Ms. Marsh, or anyone else at HHR of the potential for an indictment. Grievant explained that her attorney had told her not to disclose this information to potential employers, because she had not been convicted.

6. By letter dated March 21, 2007, signed by Jack C. Clohan, Jr., Chief Executive Officer, William R. Sharpe, Jr. Hospital, Grievant was dismissed from her employment by HHR, effective April 5, 2007. She was dismissed because the indictment on felony charges, and the failure by Grievant to come forward with this information on theindictment until after it had been published, caused HHR to question Grievant's honesty and integrity, her ability to serve as a role model to subordinates, and

her ability "to interact with your co-workers and supervisors in an effective and responsible manner."

7. On August 13, 2007, Grievant pled guilty to one count of petit larceny and embezzlement, a misdemeanor, and was sentenced to three years' probation.

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/her services were satisfactory. *Bonnell v. W. Va. Dep't of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990). Where a probationary employee's dismissal is disciplinary, the burden of proof rests with the Respondent, and Respondent must meet that burden by proving the charges against the Grievant by a preponderance of the evidence. *Livingston v. Dep't of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 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. *Johnson v. Dep't of Transp./Div. of Highways*, Docket No. 04-DOH-215 (Oct. 29, 2004)." *Id.* Division of Personnel Administrative Rule 143 C.S.R. 1 § 10.5(a), establishes a low threshold to justify termination of a probationary employee. This Rule states, in pertinent part:

> (a) 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 subsection 12.2. of this rule. . ..

Grievant was dismissed when HHR discovered, one week after she began her employment, that Grievant had been indicted on three felony counts. Grievant was aware when she began her employment with HHR that this indictment was a possibility, and she was aware that whether she had a criminal record was important to HHR. Nevertheless, Grievant chose not to make her new employer aware of the charges being brought against her, and her employer learned of the indictment only by reading the newspaper. Grievant noted that she did not lie when she stated on her employment application that she had never been convicted of a felony, as she had not been indicted or convicted at that time. However, this question on the employment application certainly served to make Grievant aware of HHR's interest in any such matter. Nonetheless, Grievant declined to advise her new employer of her situation. If the indictment itself was not sufficient to cause HHR to question

Grievant's honesty, her failure to disclose this pertinent information, particularly when indictment was at hand, certainly did so. HHR questioned Grievant's honesty and integrity, did not have confidence in Grievant, and dismissed her from her probationary employment.

The dismissal letter provides a very good statement of the situation:

> Sharpe Hospital is mandated to protect and care for a segment of the mentally challenged population of the State of West Virginia. Individuals who are placed in residence at the Hospital and entrusted to our care are often emotionally, mentally and physically vulnerable. As part of that mandate, it is our responsibility to hire the most qualified, professional staff to serve in all our positions, not just our direct care ones. One segment of professionalism that we, as an employer, cannot put enough emphasis on is truth. Another is trust. [Our] inherent job responsibility in all of our positions is to be truthful and forthright. If we, as an employer, cannot trust and put faith in the truth of the employee's word, we have nothing.
>
> Also, when employees are hired for positions within the hospital, they serve a six month probationary period. That period is designed specificallyto see if the employee and the employer are going to make a good work team for the benefits of the patients we serve. It is designed as a trial work period to allow the employer an opportunity to evaluate the ability of the employee to effectively perform the work of their position and to adjust to the organization and its programs. It is an integral part of the examination process and the employer is charged to use the probationary period as the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work.
>
> It is my belief that the circumstances surrounding your indictment, even if only partially true, could be considered detrimental in our efforts to protect the public trust. Given this, I believe that your integrity as an employee and co-worker is damaged to the point that your further employment would be counter productive. Even though, as you indicated earlier, you might not be “handling money” in your position, stealing can be about much more than just money. It is also about truth. As a Cook in our facility, it is your responsibility to role model ethical and honest behavior to subordinates in the nutritional department. Your conduct has been such that it has caused me to lose faith in your ability to carry out your duties and to interact with your co-workers and supervisors in an effective and responsible manner.
>
> Further, I believe the State of West Virginia has reason to expect its employees to observe a standard of conduct which will not reflect discredit on their abilities or integrity, or create suspicions with reference to their capacity to discharge their duties and responsibilities. I believe the nature of your misconduct is sufficient to cause me to conclude that you have not met a reasonable standard of conduct as an employee of the West Virginia Department of Health and Human Resource, Sharpe Hospital.
>
> I have concluded that you have not taken seriously your role or the conduct

> required of employees and have violated [the] Hospital's ability to have continued trust in your ability to function as a Cook. For this reason, I believe it is in the best interest of this hospital, the patients and staff that I take this personnel action.

Grievant's right to maintain her employment was limited as a probationary employee. 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.

Hackman v. W. Va. Dep't of Transp., Docket No. 01-DMV-582 (Feb. 20, 2002). HHR was justified in terminating Grievant's employment as soon as it learned of the indictment. Under these circumstances, HHR was not required to continue to employ Grievant through the end of her probationary period. *Livingston, supra.; Hackman, supra*.

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/her services were satisfactory. *Bonnell v. W. Va. Dep't of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990). Where a probationary employee's dismissal is disciplinary, the burden of proof rests with the Respondent, and Respondent must meet that burden by proving the charges against the Grievant by a preponderance of the evidence. *Livingston v. Dep't of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008).

2. "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. *Johnson v. Dep't of Transp./Div. of Highways*, Docket No. 04-DOH-215 (Oct. 29, 2004)." *Livingston, supra.*

3. Division of Personnel Administrative Rule 143 C.S.R. 1 § 10.5(a), establishes a low threshold to justify termination of a probationary employee. *Livingston, supra.*

4. Respondent was justified in terminating Grievant's probationary employment.

Accordingly, this grievance is **DENIED**.

Any party or the 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." Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* W. Va. Code § 29-6A-7 (*See Footnote 1*). 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 appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

_____

BRENDA L. GOULD

Administrative Law Judge

Date: December 30, 2008

Footnote: 1

In 2007, the Legislature in S.B. 442 abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are being decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. Any references in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 2

The date on the Order is April 8, 2007, but this is obviously a typographical error.

Footnote: 3

West Virginia Code § 29-6A-3(k), which applies to this grievance, states that, "[A]ny change in the relief sought by the grievant shall be consented to by all parties or may be granted at level four within the discretion of the hearing examiner." Respondent objected to the claim for backpay, on the grounds that the Grievant had requested that this grievance be placed in abeyance pending the outcome of the criminal proceedings againsther, and then took no action to pursue the grievance after the criminal matter was resolved in August 2007.