THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DAVID EUGENE GRUESER,
Grievant,

v. **Docket No. 2010-1341-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
Respondent.

DECISION

Grievant David Eugene Grueser filed a grievance against his employer, Department of Health and Human Resources ("DHHR"), on April 5, 2010. His statement of grievance reads, "Terminated on 3/30/2010 without good cause." For relief, Grievant is seeking, "To be made whole, including restoration of pay, tenure and benefits with interest."

Because this grievance is contesting a dismissal, Grievant elected to file directly to level three of the Public Employees Grievance Procedure. *See* W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held at the Grievance Board's Charleston office on September 2, 2010. Grievant was represented by Gordon Simmons, United Electrical Radio and Machine Workers of America 170, and Respondent was represented by Heather Laick, Assistant Attorney General. This case became mature for decision on October 29, 2010, upon the parties' submissions of findings of fact and conclusions of law.

Synopsis

Grievant was a probationary employee. Respondent received complaints alleging Grievant made inappropriate comments about African Americans, homosexuals, Muslims, and women. Respondent conducted an investigation and sustained the allegations. Respondent then terminated Grievant for gross misconduct.

Grievant avers his comments were not racially motivated and were innocuous. Grievant asserts the termination letter does not state with specificity what comments were the basis for his termination. Grievant further argues that the allegations of racial and inappropriate comments can only be regarded as his co-workers' readiness to believe the worst about Grievant.

Respondent has met its burden of proof in this matter. This grievance is DENIED.

Findings of Fact

1. Grievant was hired as a probationary employee and was employed as an Economic Service Worker in Respondent's Kanawha District Office.

2. On March 19, 2010, Grievant informed a DHHR client that he was ineligible for emergency services. The client became verbally abusive, and brandished an unopened pocketknife.

3. The client was led out of the building, but returned needing his utility cancellation notice. Grievant attempted to retrieve the photocopy he had just made.

4. The client became angry again and cussed Grievant. The client asked for Grievant's name and quitting time stating, "I'll be back to see him then."

5. An African American co-worker provided Grievant's name and quitting time to the irate client.

6. Grievant immediately reported this incident to his supervisor, Carolyn Ekers. Grievant did not know the co-worker's name.

7. At a staff meeting on March 24, 2010, attended by 15-20 people, workplace safety was discussed.

8. Grievant related the incident from March 19th, and Grievant was questioned about who provided the information to the irate client.

9. Grievant explained he did not know the worker's name, but she "was as wide as she was tall and I'm [Grievant] not prejudiced or anything, but they all look alike, like oompa loompas."[1]

10. After the staff meeting, several employees who were in the meeting complained about Grievant's inappropriate statement, believing it to be racially motivated.

11. Maureen Rogers, Family Assistance Coordinator, spoke with Grievant in the presence of Carolyn Ekers, Economic Services Supervisor, and explained to Grievant that the comment was inappropriate.

12. Ms. Rogers then notified the Regional Director, James Kimbler, about the incident.

13. Don Raynes, EEO Officer, was contacted and asked to perform an investigation. During the investigation, Grievant was removed from direct contact with clients.

14. Mr. Raynes spoke with several employees concerning Grievant's comment.

15. During the EEO investigation, other alleged comments came to light.

16. Grievant had, in the past, referred to Debra Thaxton, a co-worker, as a "wench."

17. Grievant referred to people of Middle Eastern descent as "rag heads."

18. Grievant used the terms "fags" and "queers" when referring to homosexuals.

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[1]Testimony was that oompa loompas are characters from the children's book and popular Tim Burton flick "Charlie and the Chocolate Factory."

19. Mr. Raynes spoke with Grievant during the EEO investigation. Grievant admitted to making the statement in the staff meeting on March 24, 2010, as well as using the term "rag head." Grievant denied making all other statements.

20. At the conclusion of the EEO investigation, Mr. Raynes sustained the allegations and informed Grievant of such by letter dated March 30, 2010.

21. After a predetermination meeting, Grievant was terminated by letter dated March 30, 2010. The letter states:

> After considering your response [during the March 30th meeting] in comparison to the behavior you exhibited I have decided that your dismissal from our agency is warranted. Essentially the comments you made were so inappropriate and contradictory to our agencies [sic] mode of business conduct that they constitute gross misconduct which is the basis for your dismissal.

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 Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990). Grievant's dismissal for misconduct is disciplinary, and the burden of proof rests with the employer. DHHR must meet that burden by proving the charges against Grievant by a preponderance of the evidence. *See Nicholson v. W. Va. Dep't of Health & Human Res./Bureau for Child Support Enforcement*, Docket No. 99-HHR-299 (Aug. 31, 1999); *Wolfe v. Dep't of Transp./Div. of Highways*, Docket No. 95-DOH-491 (July 31, 1996).

The Division of Personnel's Administrative Rules 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." 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." 143 C.S.R. 1 § 10.1(a).

A probationary employee may be dismissed at any point during the probationary period that the employer determines his services are unsatisfactory. 143 C.S.R. 1 § 10.5(a). 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 permanent 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 retain the employee after the probationary period expires. *Hackman v. W. Va. Dep't of Transp.*, Docket No. 01-DMV-582 (Feb. 20, 2002); cited in *Hammond v. Div. of Veteran's Affairs,* Docket No. 2009-0961-MAPS (Jan. 7, 2009); *Roberts v. Dep't of Health and Human Res./Lakin State Hosp.*, Docket No.2008-0958-DHHR (Mar. 13, 2009).

Respondent terminated Grievant for gross misconduct, and therefore bears the burden of proof in this matter. Respondent asserts Grievant was a probationary employee who was terminated due to inappropriate comments about African Americans, homosexuals, women and Muslims. Respondent serves individuals from many different

ethnic, cultural, and religious backgrounds and cannot continue to employ an individual who uses derogatory terms.

Grievant argues that the termination letter was not specific enough to put him on notice as to what comments were taken as a basis of the disciplinary action. However, Grievant was aware of the extent of the comments because he was interviewed during the EEO investigation and supplied Mr. Raynes with explanations to each allegation of inappropriate comments.

Grievant testified to using the term "rag heads" when discussing the shooting at Fort Hood. At that point, he was told that comment was inappropriate. Grievant also admitted to the statement made during the staff meeting. Grievant argues it is a reference to the individuals being short and rotund. This argument does not help Grievant's position. While Grievant points out it was an insensitive comment, it shows disrespect for his fellow employees.

In reference to the comment made at the staff meeting, Grievant avers that he made the caveat, "I'm not racist or anything" because he spent twenty years in the military and was taught to always use such preface when making a statement made about anyone other than a Caucasian male. Because the undersigned cannot speak to the validity of Grievant's explanation and because Grievant denies making other comments, the undersigned must make a credibility determination.

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. Dept. of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dept. of Health & Human Res.*, Docket No. 95-HHR-066 (May

12, 1995). The undersigned is charged with assessing the credibility of the witnesses, and where the evidence has been submitted on the record, this is an especially difficult task, as the undersigned has not had the opportunity to observe the witness' demeanor. Nevertheless, demeanor is only one of the factors to be considered in assessing the credibility of a witness. Other factors include the witness' opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of witness' information. *See Perdue v. Dept. of Health & Human Res.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

The various witnesses who testified for Respondent were consistent in their rendition of the statements made by Grievant. One witness, Ms. Thaxton, even admitted to making a rude comment to Grievant after being called a “wench.” She testified and admitted to calling Grievant a “sneakin’ deacon” after his comment to her. Grievant’s denial of the use of “wench” is not credible. Grievant testified that if he did call Ms. Thaxton a “wench” he only meant “fellow serf.” He goes on to argue that the meaning of “wench,” country lass, working or servant girl, or a young woman, is benign and innocuous. It is not benign. It is offensive, and no woman should be referred to in such a way.

Grievant also denied using the terms “queer” and “fag.” However, Grievant made it clear during the EEO investigation that he was conservative and did not believe in the homosexual lifestyle, and had voiced that opinion at work. Grievant also produced a

journal entry stating his feelings of guilt and sadness for a homosexual client whom Grievant could not assist.

The journal entry also made reference to the time he used the term “rag head.” Grievant’s testimony at the hearing was that the only time he had used that term was in reference to the shooting at Fort Hood. However, during the EEO investigation, Grievant stated he remembered “slamming the phone down and calling the customer that was on the phone a rag head.” (Respondent Exhibit 1). That scenario is very different from the one testified to by Grievant and his supervisor. This gives the undersigned pause to wonder how many times this type of situation has occurred.

With respect to the capacity to perceive and communicate, the witnesses against Grievant did not seem overly sensitive, as has been suggested by Grievant. Instead, the witnesses seemed to try and deal with the issues as they came, instead of attempting to have management intervene. Only after the particularly blatant and egregious comment referring to co-workers as “oompa loompas,” did it reach a point where the co-workers did not feel they could or should tolerate such insensitive comments and behaviors.

When juxtaposing the witnesses’ ability to perceive and communicate against that of Grievant, it is clear that Grievant does not understand the terms he uses are offensive. These terms create animosity among co-workers and create an atmosphere of chaos, as is evident from the atmosphere at DHHR. Everyone is entitled to be treated respectfully, and Grievant did not choose to do that.

Respondent has met its burden of proof in this matter. Accordingly, this grievance is DENIED.

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 Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990). Grievant's dismissal for misconduct is disciplinary, and the burden of proof rests with the employer. DHHR must meet that burden by proving the charges against Grievant by a preponderance of the evidence. *See Nicholson v. W. Va. Dep't of Health & Human Res./Bureau for Child Support Enforcement*, Docket No. 99-HHR-299 (Aug. 31, 1999); *Wolfe v. Dep't of Transp./Div. of Highways*, Docket No. 95-DOH-491 (July 31, 1996).

2. Because Grievant was terminated for gross misconduct, Respondent bears the burden in this matter.

3. The Division of Personnel's Administrative Rules 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." 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." 143 C.S.R. 1 § 10.1(a).

4. A probationary employee may be dismissed at any point during the

probationary period that the employer determines his services are unsatisfactory. 143 C.S.R. 1 § 10.5(a). 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 permanent 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); cited in *Hammond v. Div. of Veteran's Affairs,* Docket No. 2009-0961-MAPS (Jan. 7, 2009); *Roberts v. Dep't of Health and Human Res./Lakin State Hosp.*, Docket No.2008-0958-DHHR (Mar. 13, 2009).

5. Respondent has met its burden in this matter.

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 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* 156 C.S.R. 1 § 6.20 (2008).

DATE: December 1, 2010

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Wendy A. Elswick
Administrative Law Judge