THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ANTHONY JASON AMENTA,
Grievant,

v. **DOCKET NO. 2010-0697-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Anthony Jason Amenta, filed this grievance at level three of the grievance procedure, against his former employer, the Division of Highways, contesting the termination of his probationary employment, on November 19, 2009. As relief Grievant seeks, "to have a fair chance at employment. I don't feel as if I was given the opportunity to give my 100% at work due to the medical conditions that I was diagnosed with and am currently successfully being treated for."

A level three hearing was held before the undersigned Administrative Law Judge on April 9, 2010, in the Grievance Board's Westover office. Grievant represented himself, and Respondent was represented by Jason C. Workman, Attorney Legal Division. This matter became mature for decision upon receipt of the parties' written arguments, on May 17, 2010.

Synopsis

Grievant was dismissed from his probationary employment for unsatisfactory performance, after he was repeatedly late for work. Grievant did not dispute this, but asked for another chance, as he is now taking medication for his health conditions, and

believes he is now able to report to work on time. While it was certainly within Respondent's discretion to give Grievant another chance, Respondent chose not to do so. Grievant's work performance during his probationary period was not satisfactory, and DOH had the authority to terminate his employment.

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

Findings of Fact

1. Grievant began his employment as a Transportation Engineering Technician Enrollee 2, working as a Utilities Inspector in Berkeley, Jefferson, and Morgan Counties, District 5, with the Division of Highways ("DOH"), on June 15, 2009. He was hired as a probationary employee, with a six month probationary period.

2. Grievant reported to work each day at the Berkeley County Headquarters in Martinsburg each day. His supervisor, Thomas Caldwell, Jr., worked in Burlington, West Virginia, one and one half hours away. Grievant was required to work independently most of the time. One of his duties was to document the time spent by utility companies performing work in DOH rights of way, so it was important that he be at the work site when the work began. Sometimes Grievant had appointments with utility company representatives, sometimes the utility company employees could not begin work until Grievant arrived on site, and sometimes he needed to be at the work site before the work began in order to get equipment in place. DOH considered timeliness and dependability to be essential functions of this position. Grievant usually was required to report to work at 7:00 a.m., but on occasion he was required to report to work earlier for particular projects.

3. On July 16, 2009, Grievant was to meet a co-worker at the Berkeley County Headquarters at 5:50 a.m. to travel to Elkins for the Compass Test. Grievant did not arrive at work until 7:00 a.m., and he did not call to inform anyone that he would be late. Mr. Caldwell was told by a co-worker of Grievant's that Grievant was often late reporting to work, and at that point Mr. Caldwell told Grievant to call him every day as soon as he reported to work. Mr. Caldwell kept a record of the time Grievant called in each day.

4. Grievant was late reporting to work on many occasions, but only those occasions when he was late by 15 minutes or more were considered significant by Mr. Caldwell. Grievant was late to work by 15 minutes or more 3 times from July 21 to July 31, 2009, and 3 times in August 2009. On 5 of these occasions, Grievant was late by 40 minutes or more. Mr. Caldwell repeatedly advised Grievant that it was important for him to report to work on time.

5. On August 31, 2009, Grievant was advised by Leslie Staggers, Administrative Services Manager for District 5, that it had been recommended by Mr. Caldwell and Lee Thorn, District Engineer for District 5, that he not be retained by DOH, because of his continual failure to report to work on time. Grievant was advised that he could meet with Mr. Thorn on September 10, 2009, to discuss this recommendation.

6. Grievant met with Mr. Thorn on September 10, 2009. Mr. Thorn advised Grievant at that time that DOH was not intending to retain him as an employee due to his continuing problems with tardiness. Grievant advised Mr. Thorn that he had some personal and medical issues which were disrupting his sleeping patterns. Mr. Thorn reiterated to Grievant that he needed to report to work on time.

7. Mr. Thorn met with Ms. Staggers and Jeff Black, Director of the DOH Human Resources Division, regarding Grievant after the September 10th meeting. Mr. Thorn believed they should postpone any action for a few weeks and see if Grievant's punctuality improved. Ms. Staggers and Mr. Black agreed. The following Friday, September 19, 2009, Grievant reported to work 40 minutes late.

8. Grievant was late to work by 15 minutes or more 4 times in September 2009; 4 times in October 2009; and on November 3, 2009. On 2 of these occasions he was late by 40 minutes or more.

9. Mr. Thorn and Mr. Black reached the conclusion that Grievant was not going to change his pattern of reporting to work late. By letter dated November 4, 2009, Mr. Black advised Grievant that his employment with DOH was being terminated, effective November 20, 2009, for unsatisfactory performance, specifically, his continuing inability to report to work on time.

Discussion

Grievant was dismissed due to unsatisfactory performance during his probationary period. 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).

Grievant's right to maintain his 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).

The Division of Personnel's Administrative Rule 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 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).

Grievant acknowledged that he had been late reporting to work on a number of occasions, and he agreed that this was not acceptable conduct. Grievant, however, believed he should be given another chance to show that he could come to work on time. He has been getting psychological counseling and taking medication to control and improve his mental well-being. He began taking medication in late September, and stated that it took several weeks before the medication was effective.

While it was certainly within Respondent's discretion to give Grievant another chance, Respondent chose not to do so. Grievant's work performance during his

probationary period was not satisfactory, and DOH had the authority to terminate his employment. Under these circumstances, DOH was not required to continue to employ Grievant through the end of his 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).

2.. The Division of Personnel's Administrative Rules (143 C.S.R. 1 § 10) 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).

3. Grievant did not demonstrate that his performance was satisfactory during his probationary period.

Accordingly, this grievance is **DENIED**.

Any party or the Division of Personnel 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: June 9, 2010