THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHARLES T. MENDENHALL,
Grievant,

v. **Docket No. 2011-0997-CONS**

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILDREN AND FAMILIES,
Respondent.

DECISION

Grievant, Charles T. Mendenhall, filed two grievances against Respondent, West Virginia Department of Health and Human Resources/Bureau for Children and Families. Grievant's first grievance was filed on September 3, 2010, in response to a suspension without pay by Respondent. For relief, Grievant sought reinstatement with back pay. Grievant's second grievance was filed on December 21, 2010 in response to dismissal by Respondent. For relief, Grievant sought reinstatement with back pay. Upon agreement of both parties, the grievances were consolidated by Order on January 24, 2011.

As this grievance contests a termination, Grievant filed directly to level three of the grievance procedure. A level three hearing was held on February 22, 2011, before Administrative Law Judge Wendy Elswick[1] at the Public Employees Grievance Board in Charleston, WV. Grievant was represented by Thomas H. Peyton, Esq., and Respondent was represented by Heather L. Laick, Assistant Attorney General. This matter became mature for decision on April 6, 2011, upon final receipt of the parties' proposed findings of fact and conclusions of law.

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[1]ALJ Elswick conducted the level three hearing on behalf of the undersigned.

Synopsis

Grievant, a Child Protective Service Worker, was employed as a probationary employee on or about August 2, 2010. On August 10, 2010, Respondent learned that Grievant had been arrested on June 1, 2010 for felony cultivation of marijuana. Subsequently, Grievant was suspended from his employment with Respondent without pay. On October 18, 2010, Grievant plead guilty to the reduced misdemeanor offense of possession of more than fifteen grams of a controlled substance. Grievant was terminated by letter dated December 15, 2010, for misconduct. Grievant argues there is no rational nexus between Grievant's conviction of marijuana possession and his employment as a child protective service worker to justify his termination. Grievant asserts that although he is a probationary employee, he should not have been terminated because his work performance was not unsatisfactory. Respondent argues that because a probationary employee is not entitled to the usual protections enjoyed by a state employee, it did not violate any statute, rule or regulation by terminating Grievant. Respondent asserted that its lack of trust of Grievant and Grievant's conviction were the grounds for terminating Grievant during his probationary period. Respondent has met its burden of proof. This grievance is DENIED.

Findings of Fact

1. Grievant was hired as a probationary employee on or about August 2, 2010, as a Child Protective Service Worker for Respondent. Grievant was employed in Respondent's Boone County office.

2. As required for all new employees upon hiring, Grievant was required to

provide his fingerprints[2] so that a Criminal Background Check could be performed by the West Virginia State Police.

3. Days following the hiring of Grievant, Respondent anonymously received a copy of a news article which showed that Grievant had been arrested on June 1, 2010 for felony cultivation of marijuana after growing thirty-one marijuana plants on his property.

4. As a result of learning of the pending criminal charge, Gary Barker, Community Service Manager for Respondent, and Tina McKinney, Child Protective Supervisor for Respondent at that time, met with Grievant on or about August 10, 2010, to discuss the criminal charge.

5. By letter dated August 10, 2010[3], Grievant was suspended from his position pending the outcome of the criminal investigation into the matter. The letter stated:

> This suspension is based upon your being under investigation by civil authorities.
> .....
> If the allegations are determined to be unfounded, you will be compensated for the periods of suspension, and your personnel file purged of any documentation thereof. If, however, it is determined the allegations are true, additional disciplinary action may be taken.

6. Grievant sent James Kimbler, Regional Director for Respondent, a letter[4] dated August 13, 2010, asserting his desire to continue working for Respondent. In the letter, Grievant referenced the criminal investigation and stated, "My involvement has been as an informant for several years on my own and with others mostly contacting law

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[2]Grievant's Exhibit No. 1

[3]Respondent's Exhibit No. 4

[4]Respondent's Exhibit No. 14

enforcement with information."

7. Mr. Kimbler testified at the level three hearing that the August 13, 2010 letter from Grievant made him concerned about Grievant's qualifications to perform the work and represent the agency as a Child Protective Service Worker.

8. By letter[5] dated September 10, 2010, Respondent extended Grievant's suspension pending the investigation by civil authorities.

9. On September 21, 2010, Respondent received the results[6] of Grievant's Criminal Background Check from the WV State Police. It stated that Grievant had been arrested for cultivation of marijuana and manufacturing or delivering a controlled narcotic substance on June 1, 2010.

10. On October 18, 2010, Grievant entered a Guilty Plea[7] to the misdemeanor offense of possession of more than fifteen grams of marijuana. Grievant's Guilty Plea for a misdemeanor offense was part of a plea agreement with the Putnam County Prosecuting Attorney in exchange for the State dismissing the felony charge.

11. On December 9, 2010, Grievant was sentenced by the Circuit Court of Putnam County, WV, to eighteen months of supervised probation which required monitoring by his probation officer and random drug testing.[8] The Sentencing Order required that Grievant "shall refrain from frequenting unlawful and disreputable places or

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[5]Respondent's Exhibit No. 7

[6]Respondent's Exhibit No. 6

[7]Respondent's Exhibit No. 8

[8]*See* Grievant's Exhibit No. 5

consorting with disreputable persons. He shall not associate with any person or be at any places prohibited by his probation officer."

12. Grievant was terminated by letter dated December 15, 2010.[9] The letter stated, "the drug charges will affect your credibility working with families, law enforcement and the court system."

13. The termination letter further stated, "The nature of your misconduct is sufficient to cause me to conclude you have not met a reasonable standard of conduct as an employee of the West Virginia Department of Health and Human Resources as set forth in Policy Memorandum 2108 Employee Conduct."[10]

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 Corrections*, Docket No. 89-CORR-163 (Mar. 8, 1990).

Respondent, however, bears the burden of proving its allegations of misconduct by a preponderance of the evidence. *See Wolfe v. Dep't of Transp./Div. of Highways*, Docket No. 95-DOH-491 (July 31, 1996); *Nicholson v. W. Va. Dep't of Health & Human Res./Bureau for Child Support Enforcement*, Docket No. 99-HHR-299 (Aug. 31, 1999).

The DOP Administrative Rule that establishes a low threshold of merely proving that

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[9]Respondent's Exhibit No. 9

[10]The first sentence addressing employee conduct under the section titled Policy and Procedures of the DHHR Policy Memorandum 2108 states, "Employees are expected to: comply with all relevant Federal, State and local laws..." Grievant acknowledged receipt of this Policy on August 2, 1010. Respondent's Exhibit No. 11

Grievant's performance was unsatisfactory to it, states in part,

> 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. 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 employees serving a twelve month probationary period.

143 C.S.R. 1 § 10.5(a) (July 1, 2000). *Hackman v. Dep't of Transp./Div. of Motor Vehicles*, Docket No. 01-DMV-582 (Feb. 20, 2002). 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. Department of Transportation*, Docket No. 04-DOH-215 (Oct. 29, 2004).

Grievant was a probationary employee who was terminated for misconduct. Respondent asserts it terminated Grievant because Grievant could not be trusted based upon statements allegedly made by Grievant to Respondent. Also, Respondent asserts it terminated Grievant for admittedly cultivating marijuana plants. Respondent argued it could not trust Grievant to work with families who are dealing with addictions to controlled substances when Grievant himself admitted to cultivating a controlled substance.

Respondent claims that Grievant told Ms. McKinney and Mr. Barker during the August 10, 2010 meeting that he was growing marijuana at the direction of an undercover police officer, with whom he was working for as an informant. Mr. Barker and Ms. McKinney both testified at the level three hearing that they did not find Grievant's story to be believable. Grievant denies saying he was working formally with the police as an informant during the August 10, 2010 meeting. Grievant asserts that he was informally

providing information to law enforcement authorities regarding drug activity in Putnam County, WV, e.g. calling a hotline.

Grievant was not terminated solely for allegedly claiming to be a formal police informant. Respondent's lack of trust in Grievant also stemmed from Grievant's admitted marijuana cultivation and the role Grievant would have as a Child Protective Service Worker ("CPSW"). Mr. Kimbler testified that one reason Grievant was terminated was because as a CPSW, Grievant would be required to work with families who have serious drug problems of their own and that Respondent feared Grievant's conviction would affect his credibility when working with these families, law enforcement and the court system. Mr. Kimbler went on to explain that he was concerned because after working for Respondent for 39 ½ years he has found that for the majority of cases, when the state must intervene in a family's life, it's because of difficulties with addictions and use of controlled substances.

Grievant argues that following *Rogliano v. Fayette Board of Education*, 176 W.Va. 700, 347 S.E.2d 220 (1986), there is insufficient evidence to establish a rational nexus between the Grievant's conviction and his employment. In *Rogliano*, the West Virginia Supreme Court found that in order for an employer to dismiss a state employee for misconduct performed at a time and place separate from employment, the employer must demonstrate a rational nexus between the conduct performed outside the job and the duties the employee is to perform.

The employee in *Rogliano* was not in a probationary period. Furthermore, Mr. Kimbler's explanation that the majority of cases CPSWs intervene in involve addictions or use of controlled substances, demonstrated a rational nexus between Grievant's conduct

of admittedly cultivating marijuana on his property and the duties Grievant is to perform.

The Division of Personnel's Administrative Rule establishes 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 has met its burden of proof.

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 Corrections*, Docket No. 89-CORR-163 (Mar. 8, 1990). Respondent, however, bears the burden of proving its allegations of misconduct by a preponderance of the evidence. *See Wolfe v. Dep't of Transp./Div. of Highways*, Docket No. 95-DOH-491 (July 31, 1996); *Nicholson v. W. Va. Dep't of Health & Human Res./Bureau for Child Support Enforcement*, Docket No. 99-HHR-299 (Aug. 31, 1999).

2. Respondent bears the burden of proof in this matter.

3. The DOP Administrative Rule that establishes a low threshold of merely

proving that Grievant's performance was unsatisfactory to it, states in part,

> 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. 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 employees serving a twelve month probationary period.

143 C.S.R. 1 § 10.5(a) (July 1, 2000). *Hackman v. Dep't of Transp./Div. of Motor Vehicles*, Docket No. 01-DMV-582 (Feb. 20, 2002).

4. 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. Department of Transportation*, Docket No. 04-DOH-215 (Oct. 29, 2004).

5. The Division of Personnel's Administrative Rule establishes 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).

6. 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: April 26, 2011

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Jennifer Lea Stollings-Parr
Administrative Law Judge