WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MATTHEW S. QUEEN
Grievant,

v. **Docket No. 2013-0038-MAPS**

REGIONAL JAIL and CORRECTIONAL FACILITY AUTHORITY/SOUTH CENTRAL REGIONAL JAIL,
Respondent.

D E C I S I O N

Matthew S. Queen, Grievant, filed this grievance against Regional Jail and Correctional Facility Authority/South Central Regional Jail, Respondent, on July 13, 2012, contending he was discharged without cause and wrongfully terminated. Grievant's requested relief is to be reinstated with back-pay.

A conference/hearing was held at level one on July 26, 2012, and the grievance was denied at that level on July 27, 2012. Grievant appealed to level two on August 6, 2012, and a mediation session was held on November 19, 2012. Grievant appealed to level three on November 28, 2012. A level three hearing was held before the undersigned Administrative Law Judge on February 25, 2013, at the Grievance Board's Charleston office. Grievant did not appear in person, but was represented by legal counsel, Paul M. Stroebel, Esquire, Stroebel & Johnson, P.L.L.C. Respondent was represented by its then counsel Travis E. Ellison, III, Esquire. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about March 27, 2013, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

Synopsis

Grievant was a probationary Correctional Officer employed at the South Central Regional Jail. Respondent terminated Grievant's employment for misconduct during the prescribed period of probationary employment. Respondent alleges violations of the West Virginia Division of Personnel's Policy on Non-Discriminatory Workplace Harassment and the West Virginia Regional Jail & Correctional Facility Authority Code of Conduct Policy No. 3010. Respondent established that Grievant engaged in a pattern of conduct which assisted to created a hostile work environment for an identified co-worker. The discretionary decision not to hire Grievant was well within Respondent's purview of authority, reasonable and lawful. This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was classified as a probationary Correctional Officer I at the South Central Regional Jail in Kanawha County, West Virginia. At all relevant times to this matter, Grievant was employed by Respondent at a position within a duly recognized and acknowledged probationary period.

2. A probationary period is a trial work period designed to allow an 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. *See* Administrative Rules of the West Virginia Division of Personnel (DOP) 143 C.S.R. 1 § 10.1(a).

3. Grievant is the son of Corporal Bobbie Jo Steele. Cpl. Bobbie Jo Steele is married to Cpl. Jeff Steele. During the time period relevant to facts of the instant matter, all three individuals were employed by West Virginia Regional Jail & Correctional Facility Authority ("WVRJA"), Respondent, at South Central Regional Jail.

4. Some time during May 2012, then Administrator Steve Tucker and Lt. Craig Adkins counseled Correctional Officer Tonya Swayne regarding her conduct and interaction with inmates, one particular inmate was identified to be of particular concern. The "counseling" included informing CO Swayne of how her actions could be placing her in danger and identifying alternative methods of conduct. CO Swayne acknowledged the information and indicated her intent to correct any behavior perceived to be ill-advised. CO Swayne was not issued any formal reprimand. There was no further investigation authorized or ordered regarding CO Swayne by Respondent.

5. On May 17, 2012, Correctional Officer II, Tonya Swayne, completed an Equal Employment Opportunity Complaint form with regard to Corporal Bobbie Jo Steele (Grievant's mother), alleging that Cpl. Bobbie Jo Steele was discriminating and/or harassing her. Resp. Ex. 1.

6. Correctional Officer Swayne filed Incident Reports, Resp. Ex. 2a, 2b, 2c and an EEO complaint, Resp. Ex. 1, referencing events that she believed demonstrated dubious behavior of Cpl. Bobbie Jo Steele and/or others creating a hostile work environment.

7. An internal investigation was conducted by Respondent and an investigation was conducted by the West Virginia Equal Employment Office ("WVEEO" or "EEO") regarding the complaint(s) filed by CO Swayne.

8. CO Swayne is an African-American female. The allegations toward Cpl. Bobbie Jo Steele levied by Correctional Officer Swayne were initially perceived as racial discrimination.

9. A variety of correctional officers were interviewed and requested to provide information regarding various events and/or interactions between Cpl. Bobbie Jo Steele and CO Swayne. Individuals interviewed include: Correctional Officers Tonya Swayne, Jediah Walls, Marvin Hively, Frank Wright II, Austin Jordan, Dustin Williams and Nathan Roop; Sergeants Norman Atkins and Richard Savilla; Corporals Anthony Leonard, Bobbie Jo Steele and Jeff Steele; Lieutenant Ronald Craig Adkins; Administrator Steven Tucker, Grievant and James Rollins with the WV EEO. *See* Resp. Ex. 7 and 9.

10. EEO Investigator, James Rollins, conducted an investigation into the merits of a race-based hostile work environment. Mr. Rollin's investigation concluded that based upon the statements obtained, CO Swayne's allegations could not prove a *prima facie* case of racial discrimination, but concluded that some form of discrimination against CO Swayne had taken place and should be referred back to the WVRJA as an administrative matter. *See* Resp. Ex. 7.

11. Respondent's internal investigation of Correctional Officer Swayne's allegations of discrimination and/or hostile work environment was done by Crystal Wieble, then Investigator II for the WVRJA.

12. Respondent's interpretation of the allegations levied by Correctional Officer Swayne matured over the course of time. The perception that the allegations were the premise of a racial discrimination matter shifted toward that of a hostile work environment investigation.

13. During the course of Respondent's investigation, information became known to Respondent which indicated that Grievant was actively participating with a so-called investigation in association with Cpl. Bobbie Jo Steele (his mother) regarding the actions of CO Swayne.

14. Respondent was made aware of actions and comments by Grievant regarding CO Swayne and her employment which generated concerns regarding Grievant's suitability to be a Correctional Officer at South Central Regional Jail.

15. CO Jediah Walls was asked by Cpl. Bobbie Jo Steele to write reports on anything unusual he may have seen in regard to CO Swayne and to not get an incident report number from the control room, but to give the report directly to Grievant or her husband, Cpl. Jeff Steele. This is not normal procedure. Cpl. Bobbie Jo Steele told CO Walls that CO Swayne was a "dirty officer" and that, "they needed to get some female officers who are not sleeping with inmates and other officers."

16. As a Corporal, Bobbie Jo Steele was a supervisor and was responsible for overseeing correctional officers such as CO Swayne; however, Cpl. Bobbie Jo Steele was not CO Swayne's direct supervisor.

17. CO Walls generated two incident reports regarding CO Swayne. Resp. Exs. 3a, and 3b.

18. Grievant approached CO Walls and communicated with him regarding an incident report generated by CO Walls. Grievant expressed an opinion regarding at least one of the reports which were allegedly confidential. Grievant quoted a line of an incident report that CO Walls had given to Cpl. Bobbie Jo Steele.

19. Grievant told CO Jediah Walls that CO Swayne was a, "dirty officer." Grievant also informed CO Walls that, "we need to get rid of her." Grievant told CO Walls that he could talk to COs Wright or Williamson because they were "in on it." Walls, L-3 Testimony, *also see* Resp. Ex. No. 3a and 3b.

20. Grievant told CO Walls that "he [Grievant] was the lead investigator regarding an investigation into the actions of CO Swayne." *Id*.

21. Grievant was a probationary Correctional Officer, he is not authorized to conduct investigations on other employees. Sgt. Atkins L-3 testimony, *also see* Resp. Ex. 14, WVRAJ policy regarding Investigations.

22. Grievant told CO Nathan Roop that CO Swayne was being investigated in regards to her relationship with an inmate. Further, it was noted by Grievant that if CO Swayne gets fired, they [Roop and Grievant] can both get to the academy earlier. CO Roop indicated to Grievant that he had never seen CO Swayne do anything that would warrant her being fired. Roop L-3 Testimony, also *see* Resp. Ex. 4.

23. CO Roop was of the opinion that the "Steeles" would retaliate against anyone that goes against them.

24. Grievant told Sgt. Richard Savilla that CO Swayne was being investigated for possible misconduct between her and some inmates. Sgt. Savilla was of the opinion that CO Swayne was a good officer, he reportedly never witnessed anything unusual with CO Swayne. Savilla L-3 Testimony, *also see* Resp. Ex. 6.

25. CO Swayne spoke to Corporal Anthony Leonard complaining that Grievant and Cpl. Bobbie Jo Steele were picking on her all the time. Cpl. Leonard is normally Officer Swayne's immediate supervisor. Cpl. Leonard has worked for WVRJA for nineteen years.

26. Respondent was made aware of certain actions by Grievant regarding CO Swayne and her employment at South Central Regional Jail which generated concern regarding Grievant's suitability to be a Correctional Officer working at South Central Regional Jail. Respondent's internal investigation report concluded that Grievant created a non-discriminatory hostile work environment through persistently demeaning, ridiculing and slandering CO Tonya Swayne in front of other employees. Wayne Armstrong, Director of Personnel, L-3 Testimony, *also see* Resp. Ex 9.

27. In review of the EEO investigation report and the internal investigation report into this matter, Wayne Armstrong, Director of Personnel at the WVRJA, was of the opinion that Grievant violated West Virginia Division of Personnel's Policy on Non-Discriminatory Workplace Harassment and WVRJA's Policy 3010, concluding that termination was the proper discipline in this matter.

28. West Virginia Division of Personnel's Policy on Non-Discriminatory Workplace Harassment is described as: "[A] form of harassment commonly referred to as "bullying" that involves verbal, non-verbal or physical conduct that is not discriminatory in nature but is so atrocious, intolerable, extreme and outrageous in nature that it exceeds the bounds of decency and creates fear, intimidates, ostracizes, psychologically or physically threatens, embarrasses, ridicules, or in some other way unreasonably over burdens or precludes an employee from reasonably performing his or her work." *West Virginia Division of Personnel Prohibited Workplace Harassment Policy.* Resp. Ex. 11.

29. The West Virginia Regional Jail & Correctional Facility Authority has promulgated a Code of Conduct Policy 3010 ("Policy") which among other things, requires:

> "***Procedure 16*** - ***All employees shall remain alert, observant, and occupied with facility business during their tour of duty. All employees shall conduct themselves in a manner which will reflect positively upon the Authority and its employees;***
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> . . .
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> ***Procedure 19*** - ***All employees shall conduct themselves, whether on or off duty, in a manner which earns the public trust and confidence inherent to their position. No employee shall bring discredit to their professional responsibilities, the Authority, or public service."***

Resp. Ex. 12.

30. Grievant received copies of WVRJA's Code of Conduct Policy and WVDOP's Policy regarding workplace harassment when he commenced employment with Respondent, and agreed to abide by the policies therein. Further, Grievant was aware that he could be disciplined, or terminated, for violating either policy.

Discussion

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 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); *Bauguess v. Dept. of Natural Res.,* Docket No. 2011-0410-DOC (Feb. 22, 2011).

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). Respondent, however, bears the burden of proving 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 distinction is one that 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).

It is uncontested that Grievant was a probationary employee during the time period relevant to this grievance matter. Respondent decided to dismiss Grievant for conduct

perceived unsuitable for a Correctional Officer working at South Central Regional Jail. Respondent's internal investigation report concluded that Grievant created a non-discriminatory hostile work environment through persistently demeaning, ridiculing and slandering an identified co-worker.[1] Therefore, Respondent bears the burden in this matter.[2] Grievant did not testify at the level three hearing on February 25, 2013.

Non-discriminatory Hostile Workplace Harassment is defined in the Division of Personnel's Prohibited Workplace Harassment Policy as:

> A form of harassment commonly referred to as "bullying" that involves verbal, non-verbal or physical conduct not discriminatory in nature that is so atrocious, intolerable, and so extreme and outrageous as to exceed bounds of decency and which creates fear, intimidates, ostracizes, psychologically or physically threatens, embarrasses, ridicules, or in some other way unreasonably over burdens or precludes an employee from reasonably performing her or his work.

This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13,1997). The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, at 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75 (1998) (quoting *Harris, supra*). These circumstances "may

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[1] "CO I Matthew Queen [Grievant] has attempted to slander Tonya Swayne, get her fired, and tried to collect reports for which he has no authority." Resp. Ex. 9.

[2] Grievant's dismissal for misconduct is disciplinary, and the burden of proof rests with the employer. Respondent must meet that burden by proving the charges against Grievant by a preponderance of the evidence. *See Nicholson, supra; Wolfe, supra.*

include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance," but are by no means limited to them, and "no single factor is required." *Harris, supra* at 23; *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.,* Docket No. 2009-0685-MAPS (Apr. 23, 2009). "'To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment.' *Napier v. Stratton,* 204 W. Va. 415, 513 S.E.2d 463, 467 (1998). *See Hanlon v. Chambers,* 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006). "As a general rule, 'more than a few isolated incidents are required' to meet the pervasive requirement of proof for a hostile work environment case. *Fairmont Specialty Servs.,* [*v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 522 S.E.2d 180 (1999)], *citing Kinzey v. Wal-Mart Stores, Inc.,*107 F.3d 568, 573 (8th Cir. 1997)." *Marty v. Dep't of Admin.,* Docket No. 02-ADMN-165 (Mar. 30, 2006).

"Certainly, an employer is entitled to expect its employees to conform to certain standards of civil behavior. *Redfearn v. Dep't of Labor*, 58 MSPR 307 (1993). All employees are 'expected to treat each other with a modicum of courtesy in their daily contacts.' *See Fonville v. DHHS*, 30 MSPR 351 (1986)(*citing Glover v. DHEW,* 1 MSPR 660 (1980)). " *Corley, et al., supra.*

Grievant actively sought to undermine CO Swayne's credibility as a correctional officer. Inflammatory and insulting statements were made by Grievant. Several witnesses testified as to what Grievant said and did with regard to Tonya Swayne's employment status and her reputation among co-workers. There are two investigative reports which

provide collaborating data. *See* Resp. Ex. 7 and 9. Relevant incident reports are also of record. It is one thing to posses an opinion regarding a co-worker, it is entirely another thing to attempt to actively engineer the demise of that co-worker's career. Grievant acted in concert with his mother, Cpl. Bobbie Jo Steele. Respondent established that Grievant engaged in conduct that was in violation of applicable WVRJA's policies (eg., Code of Conduct Policy) and that the misconduct substantially and significantly affected the public interest. Respondent established by a preponderance of the evidence that Grievant's conduct violated *West Virginia Division of Personnel Prohibited Workplace Harassment Policy.* By Grievant demeaning, ridiculing and slandering CO Swayne in front of other employees on a persistent basis and by conducting an unauthorized investigation, he assisted in creating a non-discriminatory hostile work environment. Further, this is conduct which undermines the efficiency of the agency.

This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion." *Dickens v. West Virginia Regional Jail & Correctional Auth'ty*, Docket No. 2009-0534-CONS, (March 23, 2009).

Given the nature of the offenses, and the fact that the Grievant was a probationary employee, termination of Grievant's employment is not found to be improper. "The argument that discipline is excessive given the facts of the situation is an affirmative defense and Grievant bears the burden of demonstrating the penalty was clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the

offense and the personnel action." *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (W. Va. Educ. St. Empl. Griev. Bd., Aug. 8, 1989). As noted above, Grievant did not testify at hearing, the evidence offered was not deemed sufficient to find that the disciplined imposed upon him was excessive. Grievant has failed to demonstrate that Respondent's decision to terminate his employment was clearly excessive or an abuse of discretion. A preponderance of the evidence establishes that Grievant actively participated in conduct sufficiently pervasive to alter the workplace conditions of an of a co-worker, in violation of applicable codes of conduct. This is sufficient justification to dismiss a probationary employee.

The following conclusions of law are appropriate in this matter:

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. Respondent 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. 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).

3. 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). West Virginia 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 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 Trans.,* Docket No. 01-DMV-582 (Feb. 20, 2002).

4. Non-Discriminatory Workplace Harassment is described as: "[A] form of harassment commonly referred to as "bullying" that involves verbal, non-verbal or physical conduct that is not discriminatory in nature but is so atrocious, intolerable, extreme and outrageous in nature that it exceeds the bounds of decency and creates fear, intimidates, ostracizes, psychologically or physically threatens, embarrasses, ridicules, or in some other way unreasonably over burdens or precludes an employee from reasonably performing his or her work." *West Virginia Division of Personnel Prohibited Workplace Harassment Policy.*

In accordance with DOP's *Prohibited Workplace Harassment Policy,* "employees have the right to be free from illegal harassment on the job, and the State has the moral and legal obligation to ensure that such harassment does not occur.

5. A preponderance of the evidence establishes that Grievant assisted in creating a non-discriminatory hostile work environment for an identified co-worker. Grievant's conduct was in violation of *West Virginia Division of Personnel Prohibited Workplace Harassment Policy.*

6. Respondent determined Grievant's conduct was unsatisfactory and unsuitable state employee conduct, choosing to dismiss Grievant during his probationary period.

7. Respondent has met its burden in this matter.

8. Grievant did not demonstrate that Respondent's action of not retaining his services was unlawful.

9. For the conduct established herein, by a preponderance of the evidence, it is reasonable and within Respondent's discretionary authority to dismiss Grievant 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 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: June 5, 2012

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Landon R. Brown
Administrative Law Judge