THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

LEVENNA SWIGER,
Grievant,

v. **Docket No. 2012-1386-DVA**

DEPARTMENT OF VETERANS ASSISTANCE,
Respondent.

DECISION

Grievant, Levenna Swiger, filed this grievance on June 4, 2012, directly to level three challenging her dismissal from employment. Grievant seeks to be made whole with back pay and benefits restored. A level three hearing was conducted before the undersigned Administrative Law Judge on July 22, 2013, at the Grievance Board's Westover office location. Grievant appeared in person and by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its attorney, Jennifer S. Greenlief, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on September 10, 2013.

Synopsis

Grievant was employed at the West Virginia Veterans Nursing Facility as a Health Service Worker, on probationary employment status. During her probationary period of employment, Grievant missed fourteen days of work. Grievant was dismissed from her employment for unsatisfactory attendance during her probationary period. Grievant did not

meet her burden of proof and establish that her services were satisfactory as a probationary employee.

The following findings of fact are based upon the record developed at level three.

Findings of Fact

1. Grievant was employed with the West Virginia Veterans Nursing Facility as a Health Service Worker ("HSW"). This facility is operated by the West Virginia Department of Veterans Assistance.

2. At the beginning of her employment, Grievant was advised that she was a probationary employee. Grievant was advised that the probationary period of her employment was a six-month trial period during which she would be evaluated to determine whether her employment with Respondent would continue.

3. Grievant acknowledged receipt of Respondent's policy addressing the work expectations of a HSW. Grievant was advised that she was expected to come to work as scheduled and consistently demonstrate dependability and punctuality. Grievant also acknowledged receipt of Respondent's absence control policy.

4. During the four months of her employment with Respondent, Grievant missed fourteen days of work. Grievant called off work due to being sick on twelve of those days. On one occasion Grievant called off work because of snow and ice. On one occasion Grievant called off work due to car and transportation problems.

5. On several of these occasions, Grievant had not accrued sufficient leave, either sick or annual, to cover her time off from work, and Grievant thus took leave without pay and was removed from the payroll.

6. Anytime a HSW calls off from work the Respondent must either obtain an agency replacement, mandate a HSW to continue to work after the end of his or her shift, or work with fewer HSWs than scheduled. Any of these scenarios have the potential to lead to a decrease in the quality of resident care.

7. On April 6, 2012, Grievant met with her supervisors to discuss her absenteeism, especially within the six-month probationary period. Following the meeting, Grievant missed seven additional days over the course of five weeks.

8. In May 2012, Nursing Director Tom McVay met with the facility's administrator, Dr. Kevin Crickard, to discuss Grievant's poor attendance during her probationary term. Mr. McVay viewed Grievant's attendance as spotty, and observed that attendance is key during the probationary period to allow for an assessment of whether an employee is a good fit for the nursing home.

9. Following the meeting, Dr. Crickard decided to discharge Grievant from her employment. By letter dated May 24, 2012, Grievant was advised of Dr. Crickard's decision to terminate her employment due to her unsatisfactory attendance during her probationary period.

Discussion

When a probationary employee is terminated on grounds of incompetency or unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the employer carries no burden of proof in a grievance proceeding. The employee has the burden of establishing by a preponderance of the evidence that his services were satisfactory. *Bonnell v. W. Va. Div. of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Bowman v. W. Va. Educ. Broadcasting Auth.*, Docket No. 96-EBA-464 (July 3, 1997);

Walker v. W. Va. Public Serv. Comm'n, Docket No. 96-PSC-422 (Mar. 11, 1992). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92- HHR-486 (May 17, 1993).

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 CSR 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 CSR 1 § 10.5(a).

As described in the Division of Personnel's Rule, the probationary period of employment has a specific purpose. During this time, an employee is to learn the duties of his or her position, and the employer assesses the employee's ability to meet work standards and adjust to the expectations of the agency. In this case, Grievant's superiors concluded that she was not working out as an employee due to her poor attendance. Grievant is required to prove that it is more likely than not that her services were, in fact, of a satisfactory level. The record of this case does not support a finding that Grievant has met her burden of proof.

Grievant does not dispute that she was absent for the days identified by Respondent. Grievant counters that most of her absences were due to sickness and that she had no control over those absences. Respondent concedes that point, but made clear that not all of her absences were due to sickness. Respondent also conceded that Grievant should not come to work when sick, but, nevertheless, could not depend on Grievant to be at work. The record established that attendance is an important component of successful employment at the nursing facility, and Respondent demonstrated the importance of dependability and consistent attendance for employees during the probationary period.

The undersigned agrees with Respondent that Grievant's poor attendance was of particular concern considering that she was in her probationary period in which she was expected to demonstrate that she could perform the duties of her position. While it was unfortunate that most of Grievant's absences were due to illness, over which Grievant admittedly had no control, they resulted in a compromise to resident care. Grievant has failed to establish by a preponderance of the evidence that her services were satisfactory or that Respondent violated the provisions regarding termination of probationary employees.

The following conclusions of law support the decision reached.

Conclusions of Law

1. When a probationary employee is terminated on grounds of incompetency or unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the employer carries no burden of proof in a grievance proceeding. The employee has the burden of establishing by a preponderance of the evidence that his services were

satisfactory. *Bonnell v. W. Va. Div. of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Bowman v. W. Va. Educ. Broadcasting Auth.*, Docket No. 96-EBA-464 (July 3, 1997); *Walker v. W. Va. Public Serv. Comm'n*, Docket No. 96-PSC-422 (Mar. 11, 1992).

2. 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).

3. Grievant has failed to prove by a preponderance of the evidence that her work for Respondent was satisfactory; it was within her employer's discretion to terminate her 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: October 7, 2013

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Ronald L. Reece
Administrative Law Judge