THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

SUE ELLEN SILER,
Grievant,

v. **DOCKET NO. 2013-0576-DVA**

DIVISION OF VETERANS ASSISTANCE,
Respondent.

DECISION

Grievant, Sue Ellen Siler, filed this grievance against her former employer, the Division of Veterans Assistance, at level three of the grievance procedure, on September 26, 2012, contesting the termination of her probationary employment for unsatisfactory performance. As relief Grievant sought, reinstatement to her position, "reinstate my insurance, my retirement, and all the annual and sick leave I would have accrued." At the level three hearing, Grievant testified that on February 7, 2013, she was told by a medical professional that due to her medical issues, she would not be able to work as a Nurse, and she is not seeking reinstatement. She is seeking back pay from October 1, 2012, to February 7, 2013.

A level three hearing was held before the undersigned Administrative Law Judge on April 26, 2013, in the Grievance Board's Westover office. Grievant represented herself, and Respondent was represented by Jennifer S. Greenlief, Assistant Attorney General. This matter became mature for decision on May 6, 2013, on receipt of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was dismissed from her probationary employment as a Licensed Practical Nurse at the Veterans Nursing Home because of her excessive absenteeism. It was critical for Grievant to report to work as scheduled, and Respondent determined that it could not depend on Grievant to report to work as scheduled and fulfill her duties, which placed patients at risk. Respondent took into consideration that Grievant had suffered an injury while serving in the military, but believed patient care was the paramount consideration. Grievant did not demonstrate that her performance was satisfactory as a probationary employee.

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

Findings of Fact

1. Grievant began her employment as a Licensed Practical Nurse ("LPN") with the Division of Veterans Assistance ("DVA"), at the West Virginia Veterans Nursing Facility in Clarksburg, West Virginia, on October 16, 2011. She was hired as a probationary employee, with a six-month probationary period.

2. By letter dated September 17, 2012, Grievant was advised by Dr. Kevin Crickard, Administrator at the Facility, that she was being dismissed from her probationary employment effective October 2, 2012. The letter states, "[y]our unapproved absences, no call/no shows, and leave without pay occurrences are too numerable to list. In the month of August alone you missed 18 shifts. In the month of July you missed 11 shifts. . . . This level of gross absenteeism is totally unacceptable, and your absence has placed

a hardship on our existing staff and potentially placed our resident care at risk. . . . Your frequent absences also interfere with your supervisor's ability to properly staff the nursing unit. Further, your lack of dependability compromises our ability to provide consistent, effective nursing services. Your failure to consistently report to work placed the residents at a potential for risk."

3. Grievant had surgery and was off work from February 1, 2012, through May 31, 2012, due to an injury she incurred while she was serving in the military. The military paid Grievant during this time, and she was off Respondent's payroll. Grievant had notified her employer in advance that she would be off work for an extended period of time for this surgery and recovery period. Grievant attempted to return to work on June 1, 2012, but her ankle became swollen and she was off work from June 1 through July 16, 2012, due to this complication from her injury and surgery. She worked 49 minutes on July 17 and 4 hours and 14 minutes on July 18, and was then off work again through July 23, 2012, because of this medical issue. When Grievant returned to work she was restricted to eight hour shifts, and generally was limited to doing treatments unless the facility was short-staffed.

4. Grievant was off work on unauthorized leave, and off the payroll due to having no leave available to use, on July 26, 2012. Grievant worked 2 hours and 48 minutes on July 30, 2012, and was on unauthorized leave, and off the payroll, the rest of that day. Grievant's supervisor sent Grievant home on one of these days because she was so ill.

5. Grievant became ill with pneumonia, and was off work from August 1 through 7, 2012, and was off the payroll. Grievant worked 7 hours and 45 minutes on August 8,

2012, and was off work and off the payroll for 15 minutes that day, and she worked 3 hours and 45 minutes on August 9, 2012, and was then off work and off the payroll the rest of that day through August 29, 2012. During part of this time she was hospitalized with pneumonia and swine flu, and advised the Director of Nursing, Thomas McVay that she was in the hospital and would be off work for awhile. She presented Respondent with doctor's excuses for the period from August 8 through 10, and August 14 through 30, 2012.

6. Grievant returned to work on August 30, 2012, but her supervisor sent her home after 3 hours and 15 minutes, because she was sick. Grievant was off work and off the payroll on September 1, 2012, and the leave on September 1, 2012, was unauthorized.

7. Grievant was off work and off the payroll from September 5 through September 11, 2012, and presented a doctor's excuse for the period September 5 through September 9, 2012, and for September 12 and 13, 2012.

8. Grievant was off work and off the payroll on unauthorized leave after working 4 hours and 30 minutes on September 14, 2012, and she was off work and off the payroll on unauthorized leave on September 16, 2012.

9. On one of the occasions that Grievant failed to report to work for her scheduled shift, she had told Mr. McVay, that she did not have enough money to get to work the next day.

10. When Grievant came to work she did a good job and the residents loved her.

11. In calculating when the six-month probationary period would end, the extended periods of time when Grievant was off the payroll were excluded, so that Grievant had not completed her six-month probationary period as of October 2, 2012.

12. It is critical that nursing staff at the Veterans Nursing Facility report to work. When a nursing staff member does not report to work as scheduled, the shift is either covered by forcing another staff member to work mandatory overtime; hiring an agency nurse, if available, thereby increasing costs to the Facility; or, if neither of these options is available, then the shift is short-staffed. Even with notice, an agency nurse may not be available due to nursing shortages. All of these options may affect patient care. Even if the shift is covered by an agency nurse, that nurse may not be familiar with the patients, and this affects patient care.

13. Mr. Crickard considered Grievant's military status and that she was a good nurse in making the decision to let her go, and he believed he had been very patient with Grievant's situation. He believed that he could not count on Grievant to be at work, and the risk to the patients was of paramount importance.

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/her services were satisfactory. *Bonnell v. W. Va. Dep't of Corrections*, Docket No. 89-CORR-163 (Mar. 8, 1990). Grievant "is required to prove that it is more likely than not that [her] services were, in fact, of a satisfactory level." *Bush v. Dep't of Transp.*, Docket No. 2008-1489-DOT (Nov. 12, 2008).

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 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 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).

Grievant pointed out that most of her absences were due to her the injury during her military service, and that she had no control over this. Respondent acknowledged this, but pointed out that not all of Grievant's absence were due to this injury, she did not present doctor's excuses for all her absences, and Respondent could not depend on her to be at work.

While Grievant's situation is truly unfortunate, it was clear to Respondent that she was not going to be able to fulfil her employment obligations, placing the care of the patients at risk, and increasing the burden on the other employees of the Facility. Mr. Crickard took into account that Grievant herself was a veteran, and that she was a good

nurse, but he believed the patient needs took priority, and he did not believe he could continue to place the patients at risk. The Grievance Board has previously found that an employee who has excessive absenteeism during the probationary period cannot demonstrate that their performance is satisfactory. *Hughes v. Division of Veteran's Affairs*, Docket No. 2011-1071-MAPS (July 29, 2011).

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 Rule 143 C.S.R. 1 § 10.5(a), 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).

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

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 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 18, 2013