WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SABRINA ANNA-MARIE SHRADER,
Grievant,

v. **Docket No. 2011-1855-DHHR**

DEPARTMENT OF HEALTH AND
HUMAN RESOURCES/ BUREAU FOR
CHILDREN AND FAMILIES, REGION IV,
Respondent.

DECISION

Grievant, Sabrina Shrader, was employed by Respondent, Department of Health and Human Resources (DHHR), in the Region IV office of the Bureau for Children and Families ("Bureau") on March 3, 2011. She was classified as a Child Protective Service Worker. On June 27, 2011, Ms. Shrader filed a level three grievance form[1] contesting the termination of her employment. Ms. Shrader attached a four-page letter and other documents to her grievance form alleging that she was dismissed without good cause and that she has been subjected to workplace harassment as described in Interpretative Bulletin DOP-B6 *Prohibited Workplace Harassment.* As relief, Grievant states the following:

> I would like for the evaluations, termination letter, and any other inaccurate documents removed from my personnel file. Furthermore, I want James Long and Yvonne Stephens-Walker reprimanded for causing a hostile work environment. Additionally, I would like an apology from James Long and Yvonne Stephens-Walker for their inappropriate behavior toward me.

A level three hearing was held in Beckley, West Virginia on July 27, 2012. Grievant appeared *pro se,* and Respondent was represented by James Wegman,

[1] *See* W. VA. CODE § 6C-2-4(a)(4) for provisions related to filing an expedited grievance at level three.

Assistant Attorney General. Both parties submitted Proposed Findings of Fact and Conclusions of law, the last of which was received by the West Virginia Public Employees Grievance Board on September 4, 2012. This matter became mature for decision on that date.

Synopsis

Respondent dismissed Grievant from her probationary position on June 6, 2011, claiming that Grievant was having difficulty fitting in with the remaining staff and separating her personal experiences from her work as a Child Protective Services Worker ("CPSW"). Grievant was not able to prove that her performance was satisfactory to require that she remain employed past her probationary period. Additionally, Grievant was unable to prove that she was dismissed as reprisal for her protected activities of reporting suspected child abuse and suspected workplace sexual harassment.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Sabrina Shrader, was employed by DHHR as a CPSW in the McDowell County office, on March 3, 2011. She began a training and probationary employment period which was scheduled to last twelve months.

2. Respondent keeps its case files in an electronic database known as "FACTS."[2] A great deal of personal and confidential information regarding the agency's customers is in the case files. Each employee is required to sign a confidentiality agreement limiting their access to the information and forbidding the unnecessary

[2] FACTS is an acronym for Families And Children Tracking System.

dissemination of confidential information. One paragraph of the agreement states the following:

> I agree to use my special access to information only as is absolutely necessary to administer the system(s) for which I am responsible, and will not obtain confidential information for any unauthorized persons or uses.

3. Grievant received and signed this agreement on March 1, 2011, her first day of employment. Respondent's Exhibit 3.

4. On March 3, 2011, Grievant's immediate supervisor, James Long, met with her to discuss her job duties and training she would receive. Grievant spent a lot of the meeting telling Mr. Long about her difficult childhood with an abusive father and her present health problems.

5. Shortly after Grievant had been employed, she came to Mr. Long to discuss a family she knew where she believed the children were abused or neglected. During the discussion Grievant admitted that she had not actually seen any abuse or neglect, but she surmised that abuse was taking place because when Grievant "was petting [their] dog . . . when [she] looked the dog in the face, the dog turned his head, and [she] knew the dog had never done that before, so she knew something [was]going on with the family." Out of an abundance of caution, Mr. Long referred the case for an investigation even though he was surprised by Grievant's assessment.

6. Grievant was given a password to access the FACTS system, but she had no reason to access any of the files because she had no cases.

7. Grievant would often engage other employees in long conversations regarding her personal issues, keeping them from their regular duties. In discussions with Mr. Long, and during her formal training sessions, Grievant expressed ideas

regarding how her work should be performed based upon her past perceptions rather than the methods and policies of the agency. Mr. Long advised Grievant that she had to separate her personal life from her professional life and follow her training.

8. At approximately 8:30 a.m. on March 15, 2011, Grievant came to Mr. Long's office and told him about a situation at a close relative's home. There was a disabled adult female in the home who also had an infant child. Grievant had conducted an investigation and prepared a handwritten report about the situation. Grievant's Exhibit 14. Grievant was seeking to have the two dependents removed from the relative's home. Mr. Long informed Grievant that he would refer the material she had given him to a case worker in Wyoming County since it involved her relative and that she was not to have anything else to do with the case since it involved her family members.

9. On March 16, 2011, the case was entered into the FACTS system at 10:45 a.m. as an intake assigned to a caseworker in Wyoming County. Respondent's Exhibit 2.[3] Mr. Long advised Grievant that an investigation was opened by the Wyoming County office. Mr. Long explained to Grievant that the family had a right to privacy and that neither she nor anyone else in the McDowell County office was to access the file or be involved in the case.

10. The FACTS reporting system shows that Grievant accessed this case file at 2:28 p.m. on March 16, 2011, notwithstanding Mr. Long's specific instruction to the contrary.

[3] Respondent's Exhibit 2 is a print out from the FACTS system showing when and by whom the case was accessed and what action was taken.

11. On March 21, 2011, Grievant began attending group training for CPSWs in Beckley, West Virginia. The trainers reported that Grievant was prompt and enthusiastic, but she always had a comment or story to tell[4] during the training which was often not pertinent to the topic. Additionally, the trainer specifically noted:

> Sabrina will need a lot of direction as a Child Welfare Worker. She has her own ideas and opinions that at times do not match the agency's philosophy. Life experience may hinder her in working with families.

Respondent's Exhibit 4. The trainers also stated that Grievant dominated the group discussions and other trainees were frustrated by this. Grievant sometimes indicated that she already knew the material and expressed her opinions regarding how policies and practices should be implemented. At one point, one of the trainers became frustrated with Grievant's comments and asked Grievant if she would like to teach the class.

12. During a few days of the training, Grievant sat with trainees from another county. A male trainee was having a dispute with a female trainee from that county. Evidently he was drawing unflattering caricatures of the woman and Grievant. Grievant reported this activity to a trainer who said she would report it to the supervisors of the county office for the male trainee.

13. Grievant also contacted Yvonne Walker, the Community Services Manager ("CSM") for the McDowell County Office, and told the CSM she wanted to file a sexual harassment charge against the male employee. CSM Walker told Grievant that the problem would be addressed by the supervisor in the other county, that she did not believe the activity amounted to sexual harassment, and that Grievant should not involve herself in disputes between other trainees.

[4] These stories often related to Grievant's own family history.

14. On March 28, 2011, Grievant called Mr. Long from her training location and told him that she had been reviewing case files for her family and friends on the FACTS system. She indicated that she told other trainees what she was doing and they told her that they had been instructed to stay out of the FACTS system until they were trained. Mr. Long reiterated to Grievant that she should not be accessing these case files.

15. As a probationary CPSW Grievant received monthly evaluations of her performance. While Mr. Long praised Grievant's attitude and apparent dedication in the March 2011 evaluations, he listed the following concerns:

> **Attitude:** "Sabrina is quick to report her co-worker's for things they are saying."
> **Knowledge of Job:** "Sabrina is developing some preconceived notions of areas she has not been trained on as of yet. . . Sabrina thinks she understands areas of this job that I don't believe she really does."
> **Work Habits:** "Sabrina will talk for extended periods of time about non-work related issues."
> **Employee and Public Concerns:** "I get mixed reactions from several of Sabrina's co-workers. Some are concerned that Sabrina talks too much about her personal life and problems. Sabrina informed me of a situation where she believed one of her co-workers was sleeping and later she heard the same co-worker saying something negative about his supervisor. I'm not sure Sabrina is bonding well with several of her co-workers.[5]

16. The second month evaluation contained similar concerns including the following:

> **Attitude:** ". . . each week Sabrina would tell me of a different problem with someone [at her training]. Sabrina's attitude about the trainers was not always positive and it appears she is having problems getting along with her fellow trainees."
> **Work Habits:** . . . according to the trainer, Sabrina seems to spend a lot of time dealing with drama issues. Sabrina involves herself in problems between other trainees. This would pose a problem with good work habits.

[5] Grievant's Exhibit 3.

> **Employee and Public Concerns:** This is an area of great concern. Sabrina is not doing very well interacting and getting along with fellow co-workers. It has been reported that Sabrina does not get along with most of her classmates. Sabrina has been involving herself in matters that do not concern her . . . Sabrina said certain people were calling her names and drawing pictures of her with explicative comments about her over the pictures. Sabrina has told me about other trainees talking about her and not allowing her to sit at the lunch table. Sabrina has told me about the trainers even getting upset with her and she was once asked by a trainer if she would like to come up and teach the class. The trainer felt Sabrina thought she knew more then she really did.[6] Also, some of Sabrina's co-workers here in the McDowell office have expressed concerns that Sabrina may not be fitting in too well because of her attitude.[7]

17. On May 13, 2011, a predetermination conference was held with Grievant, Pamela McPeak,[8] CSM Walker and Mr. Long. The concerns related to Grievant's performance previously laid out in the monthly evaluations, as well as the incidents of her accessing case files of friends and family, were discussed with Grievant and she was given an opportunity to respond to those concerns.

18. Grievant's probationary employment with Respondent was terminated by Joseph Bullington, Region IV, Regional Director, in a letter dated June 6, 2011.

Discussion

Grievant Shrader was a probationary employee who was terminated for unsatisfactory performance. Grievant was accused of improperly accessing case files of her family members in the FACTS system, spending an inordinate time discussing personal matters with co-workers, and having difficulty establishing productive working relationships with co-workers and fellow trainees. When a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the

[6] The two trainers verified these allegations in their testimony at level three.
[7] Grievant's Exhibit 3. Second month evaluation signed by Grievant and Supervisor Long on April 29, 2011.
[8] Ms. McPeak is an acquaintance of Grievant who attended the meeting at Grievant's request.

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); *Roberts v. W. Va. Dep't of Health and Human Res.,* Docket No. 2008-0958-DHHR (Mar. 13, 2009).

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).

Grievant had significant problems separating her personal life from her professional responsibilities which affected her job performance. She spent inappropriate amounts of time discussing her personal life with co-workers which not only took time away from performing official duties, but made it difficult for Grievant to foster positive working relationships. Additionally, the trainers and Grievant's supervisors noted that she had preconceived notions about how child welfare cases should be handled which interfered with her ability to follow established practices in such cases. This problem became particularly apparent when Grievant repeatedly accessed the case files of her relatives and friends to see how they were being processed. This activity specifically violated the confidentiality agreement which Grievant signed stating:

> I agree to use my special access to information only as is absolutely necessary to administer the system(s) for which I am responsible.

It was clearly not necessary for Grievant to access these files and she had no responsibility in working these cases. In fact, on March 15, 2011, she was specifically told to have absolutely nothing to do with these cases. Grievant argues that she did not access her father's case file after March 16, 2011. Rather, she accessed the case file for the disabled person whom she thought should be removed from her father's home. This is clearly a distinction without a difference. Those two individuals were involved in the investigation which Mr. Long told Grievant to stay away from. Accessing either file was inappropriate. Grievant did not prove that her probationary performance was acceptable.

Grievant argues that her employment was actually terminated because she reported a fellow trainee for sexual abuse and because she reported her father for child abuse. While Grievant does not specifically use the terms she indicates she was the victim of a retaliatory discharge. In all situations of retaliatory discharge, the employee must demonstrate that she was participating in protected activity and that the protected activity was a cause for the discharge. In *Kelley v. Dep't of Trans./Div. of Highways,* Docket No. 2008-1485-CONS (Aug. 8, 2008), the grievant alleged she was disciplined for exercising constitutionally protected, free speech. The Administrative Law Judge noted that the burden of proof is on a grievant to demonstrate that his/her conduct is protected, and that the conduct was "a substantial factor" in the employer's decision to discipline him/her. *Id.* (Citing *Orr v. Crowder,* 315 S.E.2d 593 (W.Va. 1983). The same is true under the Human Rights Act. *See, Frank's Shoe Store v. W. Va. Human Rights*

Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986), and the "Whistle Blower" statute. *See,* W. VA. CODE § 6C-1-4.

There is no doubt that the reports made by the Grievant were protected activities. As a CPSW, Grievant had an obligation to report suspected workplace sexual harassment and suspected child abuse.[9] However, Grievant did not prove that her dismissal was related to these reports. Respondent was able to offer legitimate, non-retaliatory reasons for its action.

Supervisor Long took Grievant's report of child abuse by her father very seriously. He assigned the case to the Wyoming County office where it could be appropriately investigated without the appearance of conflict of interest. Grievant was not dismissed for reporting this activity. The activity that contributed to Grievant's dismissal was when she continued to access the case files related to this report after she was specifically instructed to stay away from the investigation. Such access was not protected activity. In fact, it was prohibited as a conflict of interest and a breach of confidentiality.

Additionally, Grievant's supervisors took no adverse action regarding to the allegation of sexual harassment. The accused employee was employed in another DHHR region and CSM Walker determined that any action taken regarding his activities should be taken by his supervisors. Grievant's supervisors did not take this complaint as seriously as she did, but there was no evidence that it had any impact on the termination of Grievant's employment.

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[9] *See* Division of Personnel Interpretive Bulletin on *Prohibited Workplace Harassment,* for reporting requirements for workplace sexual harassment, and W. VA. CODE § 49-6A-1(a) for mandatory reporting of suspected child abuse or neglect.

Respondent dismissed Grievant for the non-retaliatory reason that she was unable to separate her personal life from her professional responsibilities. This problem adversely affected her performance by interfering with work time, her ability to establish proper working relationships with co-workers and her ability to follow specific instructions related to important agency policies. Accordingly, the Grievance is DENIED.

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 Corrections*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. W. Va. Dep't of Health and Human Res.,* Docket No. 2008-0958-DHHR (Mar. 13, 2009).

2. Under the Division of Personnel's Administrative Rule, the probationary period of employment is "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 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. Grievant was unable to prove by a preponderance of the evidence that her performance met the required standards of the DHHR for a Child Protective Service Worker.

Accordingly, the 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: FEBRUARY 15, 2013.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE