THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

PERRY BLAKE,
Grievant,

v. **Docket No. 2013-0615-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL,
Respondent.

DECISION

Grievant, Perry Blake, filed this grievance directly to level three on October 5, 2012, challenging the termination of his probationary employment with the Department of Health and Human Resources. He seeks to be made whole, including back pay and interest, all benefits restored, and treble damage payment on final wages.[1] A level three hearing was conducted on April 8, 2013, before the undersigned Administrative Law Judge at the Grievance Board's Westover office location. Grievant appeared in person and by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, B. Allen Campbell, Supervising Senior 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 May 8, 2013.

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[1]The Grievance Board does not have subject matter jurisdiction to determine liability for claims made pursuant to the West Virginia Wage Payment and Collections Act. *Lunsford v. Dep't of Health and Human Res./William R. Sharpe, Jr. Hosp.* Docket No. 2010-1386-CONS (Dec. 8, 2010).

Synopsis

Grievant's probationary employment was terminated, due to Respondent's determination that his performance was unsatisfactory, specifically with regard to properly performing his duties. When a probationary employee is terminated for reasons other than discipline, it is his burden to prove his services were satisfactory. In this case, Grievant failed to meet this burden, and the evidence supported the conclusion that Grievant repeatedly failed to follow proper procedures for performing his assigned duties. Therefore, this grievance is denied.

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

Findings of Fact

1. Grievant was a probationary employee employed at the William R. Sharpe, Jr. Hospital as a Food Service Worker. Grievant's probationary period of employment began at his hire date in April 2012.

2. Grievant was given an initial Employee Performance Appraisal at the beginning of his probationary period. Grievant and his supervisor went over the essential duties and responsibilities of the position, as well as the performance standards and expectations of his position.

3. Both Grievant and his supervisor signed a written acknowledgment that they had a discussion of the duties, responsibilities, performance standards and expectations on April 7, 2012.

4. From April 2012 to September 2012, Grievant had several instances in which his work performance failed to meet expectations. Terry Small, Assistant Administrator for the Hospital, indicated that supervisors had brought several instances of Grievant's poor work performance to her attention.

5. Examples of Grievant's poor work performance included the following:

> May 15, 2012 - Grievant left the dish room machine and floor in a mess. Grievant told peers he does not like the room and does not care what it looks like.
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> May 24, 2012 - Grievant left the dining room with nine deficiencies. Grievant was counseled for this poor performance.
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> May 27, 2012 - Grievant left the C dining room with 10 deficiencies. Grievant was again counseled for his poor performance.
>
> July 9, 2012 - Grievant called another co-worker, Adolfo Rivera, a "dirty Mexican."
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> August 19, 2012 - Grievant left the Snack bar dirty. Grievant attempted to blame his co-worker and said his co-workers were being mean to him. Grievant was pulled from the Snack bar so he did not have to work with these two employees.
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> September 7, 2012 - Grievant became involved in a screaming match with another employee over a dirty pan. The incident escalated to the point that the Human Resources Director had to be called in to settle the argument.
>
> Throughout his employment, employees reported that Grievant was taking food items and not paying for them.

6. Ms. Small decided that since there were so many problems with Grievant's work performance that she would recommend to the Chief Executive Officer, Parker Haddox, that Grievant not be retained past his probationary period.

7. Judy Fisher, Food Services Supervisor, was one of two supervisors who supervised Grievant. On May 15, 2012, and May 26, 2012, Ms. Fisher documented that

Grievant had failed to properly clean and maintain his assigned areas. Again, on May 27, 2012, Ms. Fisher documented that Grievant's assigned areas were dirty, and she counseled Grievant on her observations and his failure to perform his duties.

8. Ms. Fisher also reported that other employees had reported that Grievant would put his bare hands in the prepared food, and would eat food made for another employee.

9. Adolfo Rivera, a Cook at the hospital, reported that Grievant would call him names and put signs on his back. Mr. Rivera signed a statement on July 9, 2012, documenting that Grievant had called him a "dirty Mexican."

10. Debbie Cook, Human Resources at the Hospital, reported an incident in which Grievant and another employee had a very heated screaming match that included shaking fingers in each other's face. Grievant noted that the other employee told him the dirty pan needed to be scrubbed in a loud and nasty tone. Grievant stated that he didn't feel that employee had the right to tell him to wash the pan. Ms. Cook gave both employees a coaching session on how to better approach these situations in the future.

11. Ms. Cook explained that Grievant could not be retained because of his work performance, cleanliness issues, not performing his duties, his inability to get along with his co-workers, and eating food that did not belong to him.

12. A predetermination conference was held between Grievant, Ms. Cook, and Ms. Small on September 21, 2012. Grievant attended this conference with his union representative. During the conference the Grievant was given the opportunity to respond to the employment issues as noted above.

13. On October 1, 2012, Grievant was notified of the Chief Executive Officer's decision to dismiss him from employment as a Food Service Worker with the West Virginia Department of Health and Human Resources at William R. Sharpe, Jr. Hospital.

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 he was not working out as an employee and did not work well with others. Grievant is required to prove that it is more likely than not that his services were, in fact, of a satisfactory level. The record of this case does not support a finding that Grievant has met his burden of proof.

Despite numerous counseling sessions and coaching from his supervisors, Grievant failed to clean his work areas on numerous occasions. Grievant called an employee a derogatory name related to his ethnicity. Grievant had continual problems in working with various co-workers, getting into a screaming match at one point over a dishwashing issue. In addition, Grievant ate food at different times from the Dietary Department without paying for it. Grievant has failed to establish by a preponderance of the evidence that his 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 his work for Respondent was satisfactory; it was within his employer's discretion to terminate his 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 11, 2013

Ronald L. Reece
Administrative Law Judge