SCOTT SHOEMAKER, .

.

Grievant, .

.

v. . Docket No. 95-RMA-218

.

WEST VIRGINIA DEPARTMENT OF .

TRANSPORTATION, DIVISION OF .

RAILROAD MAINTENANCE AUTHORITY, .

.

Respondent. .

D E C I S I O N

This is a grievance by Scott Shoemaker (Grievant), submitted directly to Level IV in accordance with W. Va. Code § 29-6A-4(e), challenging his dismissal from employment with the Railroad Maintenance Authority (Employer or RMA) on May 30, 1995. An evidentiary hearing in this matter was conducted in Moorefield, West Virginia, on July 13, 1995. Following receipt of timely post-hearing submissions from both parties, this case became mature for decision on August 21, 1995. Consistent with W. Va. Code § 29-6A-4 and the practice of this Grievance Board, this disciplinary action has been advanced on the docket for an expedited decision.

The basis for Grievant's dismissal is set forth in a May 11, 1995, letter from Terry G. Gaynor stating the following:

> In accordance with Section 12.02 of the West Virginia Administrative Rule, you are hereby dismissed from your duties as a Railroad Technician with the WestVirginia State Rail Authority, effective May 30, 1995 at the close of business.
>
> The reason for your dismissal is violation of the West Virginia Department of Transportation Policy on Drug and Alcohol Testing. More specifically,

> The urine sample provided by you on April 27, 1995, in follow-up to your having completed a substance abuse rehabilitation program, tested Positive for cocaine.

J Ex 1.

Grievant was employed by RMA as a Railroad Technician. According to Terry Gaynor, Superintendent of the South Branch Valley Railroad (SBVR), Grievant was certified as an Engineer sometime in 1988. As an Engineer, Grievant is engaged in train crew operations in the course of his duties at SBVR.

Grievant self-referred for drug rehabilitation in November 1994, returning to work on January 24, 1995. While Grievant was undergoing treatment, Mr. Gaynor called the Preston Addiction Treatment Center (PATC) where Grievant was undergoing treatment and spoke with a Dr. Kaschak. (See footnote 1) Mr. Gaynor needed confirmation of Grievant's status from PATC to authorize payment of accrued annual and sick leave. Dr. Kaschak later came to SBVR and discussed Grievant's treatment with Mr. Gaynor and his immediate supervisor, John Hedrick. In the course of discussing Grievant's treatment and future status, Dr. Kaschak recommended that Grievant undergo follow-up drug testing after returning to duty at SBVR. Mr. Gaynoragreed that such testing was appropriate, given Grievant's admitted problem with drug abuse.

Mr. Gaynor subsequently received Grievant's "Aftercare/Continuing Care Agreement" from Dolores Fullmer, Grievant's counselor at PATC. The agreement refers to Grievant attending "AA" and "NA" meetings on a daily basis but makes no reference to any drug testing. R Ex 1. In addition to the voluntary commitments contained in his Aftercare Agreement, RMA, through Mr. Gaynor, notified Grievant that he would be undergoing follow-up drug testing by the Employer. The first of these follow-up tests was performed on March 24, 1995, with negative results for the presence of illegal drugs. R Ex 2.

On April 27, 1995, another follow-up test was conducted wherein Grievant was asked to submit a urine sample for testing. Kenneth Schneider, an employee of Examination Management Services, Inc., collected Grievant's specimen on April 27. Mr. Schneider testified extensively regarding the strict procedures and safeguards followed in establishing and maintaining a proper chain-of-custody for Grievant's specimen. This test resulted in a positive result for the presence of cocaine, as certified

by a Medical Review Officer. R Ex 3.

Mr. Schneider also recalled that as he left the worksite on April 27th, he stopped at a railroad crossing where he observed Grievant operating the engine of a passing train.

Consistent with his right under W. Va. Code §29-6A-6, Grievant did not testify at the Level IV hearing.

The West Virginia Department of Transportation issued a Drug and Alcohol Testing Policy on January 1, 1995. That policy contains the following provisions pertinent to this grievance:

DEFINITIONS

SUBSTANCE ABUSE PROFESSIONAL - A licensed physician, or a licensed or certified psychologist, social worker, employer assistance professional, or addiction counselor (certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission) with knowledge of, and clinical experience in, the diagnosis and treatment of alcohol and controlled substance-related disorders.

* * * *

STATE RAIL AUTHORITY

DRUG AND ALCOHOL TESTING POLICY

The U.S. Department of Transportation, through the Federal Railroad Administration, has issued rules for drug and alcohol testing of employees in the railroad industry as a result of the Omnibus Transportation Employee Testing Act of 1991. The rules include an express prohibition of alcohol misuse and/or non-medical use of controlled substances by railroad employees in safety-sensitive positions. In addition, alcohol use is prohibited during, and four hours prior to, the performance of covered duties. Covered employees are required to participate in the various programs described in this policy as a condition of employment. This policy is being rendered under the authority established in Title 49 Code of Federal Regulations, part 40 and part 219, with the exception of Random, Reasonable Suspicion/Cause, and Pre-employment alcohol testing, which is being established under the authority of the West Virginia Department of Transportation.

The West Virginia Department of Transportation will conduct drug/alcohol screenings on West Virginia State Rail Authority employees as required by the drug and alcohol testing rules. The testing will be accomplished either through the collection of a urine sample or breath alcohol concentration as determined by the Evidential Breath Testing Device. Employees in safety-sensitive positions, as defined by the Hours of Service Act, are required to be tested in the following categories:

1. Pre-Employment

2. Random

3. Reasonable cause

4. Post-Accident

5. Return-to-Duty/Follow up

* * * *

The drug screening will be used to detect the following substances:

1. Marijuana (THC Metabolite)

2. Cocaine

3. Amphetamines

4. Opiates

5. Phencyclidene (sic) (PCP)

Employees covered by this policy include:

Any person who performs duties subject to the Hours of Service Act; and,

Any person who is subject to be dispatched to perform duties defined as covered by the Hours of Service Act.

For the purpose of this policy, a positive test result is one in which an illegal controlled substance is detected as a result of drug screening.

* * * *

Alcohol and drug use is prohibited and will result in Disciplinary Action, up to and including dismissal, for any covered employee performing safety-sensitive service.

* * * *

POSITIVE TEST RESULTS

Under this policy, employees testing positive for alcohol/drugs are suspended without pay until a Substance Abuse Professional certifies the date/time of a covered employee's initial visit for treatment. Employees are allowed a leave status, consistent with the West Virginia Division of Personnel's Administrative Rules, upon verification by the Substance Abuse Professional that the employee is seeking professional treatment regarding a substance abuse problem.

First Offense

When an employee is determined, by the Drug Testing Program's designated Medical Review Officer, as producing a positive test for the presence of the established illegal controlled substances, he/she is to be removed from their covered duties immediately. Any employee testing positive for the presence of illegal drugs must be referred to a Substance Abuse Professional. A Disciplinary Action, up to and including dismissal, will be initiated. Any employee testing positive for the presence of illegal substances, as defined by this policy and is still employed, can return to a covered, safety-sensitive position no less than nine (9) months after his/her removal from their covered position or he/she can return to duty under a rehabilitation program established by a Substance Abuse Professional.

* * * *

Upon expiration of the nine (9) month period and the employee still maintains an employment relationship, or, an employee returns to duty under the rehabilitation program established by a Substance Abuse Professional, he/she must comply with all aspects of the Substance Abuse Professional's Rehabilitation Program prior to his/her return to duty, produce a negative alcohol/drug return to duty test result, and be subject to the follow-up testing provisions of the federal regulations.

VOLUNTARY REFERRAL PROGRAM

An employee covered by the Hours of Service Act and, who, of their own accord, seeks treatment through a Substance Abuse Professional, may maintain an employment relationship with the West Virginia State Rail Authority prior to being charged with conduct that is in violation of these drug and alcohol testing rules.

The West Virginia State Rail Authority will, to the extent necessary as defined by a Substance Abuse Professional, grant any employee seeking self help for an alcohol misuse or drug abuse problem, a Leave Status not to exceed 45 days in order to meet initial rehabilitation demands. The employee can be returned to duty on the recommendation of a Substance Abuse Professional and approval will not be unreasonably withheld by the management of the West Virginia State Rail Authority. However, before the employee can be returned to duty under this program, a full return-to-service medical examination, initiated by the employee at his/her own expense, must be completed as a condition of reinstatement to covered service.

In order to invoke the benefits of this Voluntary Referral Policy, the employee must report to the Superintendent (or his/her designee), (1) during non-duty hours (i.e., at a time when the employee is off duty) or (2) while unimpaired and otherwise incompliance with the West Virginia State Rail Authority's Drug And Alcohol Policy.

CO-WORKER REPORTING PROGRAM

This aspect of the West Virginia State Rail Authority's Drug and Alcohol Policy provides that a covered employee may maintain an employment relationship if he/she is reported by a fellow

employee as showing signs and symptoms commonly associated with drug abuse and/or alcohol misuse during working hours, subject to the following terms and conditions:

The alleged violation must come to the attention of the West Virginia State Rail Authority management as a result of co-worker reporting that an employee was apparently unsafe to with or appeared to be in violation of the established workplace drug and alcohol rules. The employee is to be removed from covered service pending the results of a drug screening and/or alcohol test. No disciplinary action will be taken on a first offense of this nature (reported by a co-worker), but a Disciplinary Action, up to and including dismissal, will be taken in regard to any subsequent violation. If the drug screening/alcohol test is positive, the West Virginia State Rail Authority will recommend a substance abuse professional be consulted for evaluation. The employee will be placed in a Leave Status immediately upon receipt of positive test results. The employee must initiate a substance abuse evaluation within five (5) days of notification regarding a positive drug and/or alcohol test result.

The Substance Abuse Professional must schedule necessary consultations with the employee and complete an evaluation within ten (10) days of the request for evaluation. If further evaluation is necessary, all must be completed within twenty (20) days of the initial contact for substance abuse problems.

If the Substance Abuse Professional determines that the employee is affected by psychological or chemical dependence regarding illegal use of drugs or alcohol misuse, or by another identifiable and treatable mental or physical disorder involving drub abuse or alcohol misuse as a primary manifestation, the following procedures are applicable:

a. The West Virginia State Rail Authority will, to the extent necessary for treatment and/or rehabilitation, grant the employee a Leave Status for the period necessary to complete primary treatment and establish control over the employee's drug abuse/alcohol misuse problem. This policy will allow for up to 45 days of necessary treatment as established by a substance abuse professional.

b. The West Virginia State Rail Authority will return to duty, based upon recommendation of the Substance Abuse Professional, the employee affected by this section of policy. The employee must successfully complete a return-to-service medical examination at his/her own expense. Approval to return to duty will not be unreasonably withheld.

c. Following return to service, the employee, as a condition of the West Virginia State Rail Authority not initiating a disciplinary action, may be required to participate in a follow-up testing program for a period not to exceed two years from the date of original removal from service.

* * * *

FOLLOW UP/RETURN-TO-DUTY

An employee who has been removed from covered service as a result of a positive test results under this policy, and still maintains an employment relationship with the West Virginia State Rail Authority, cannot return to duty until:

He/she has been evaluated by a Substance Abuse Professional to determine if the employee is affected by a psychological or physical dependence regarding alcohol misuse, prohibited controlled substance use or by another identifiable and treatable mental or physical disorder involving alcohol misuse and or drug/abuse as a primary manifestation.

He/she has successfully completed any program of counseling or treatment determined to be necessary by a Substance Abuse Professional; and,

Presented a urine/blood/breath sample for testing, which must show a negative response.

Any employee returned to duty under this policy must continue any program of counseling or treatment deemed necessary by the Substance Abuse Professional and shall be subject to unannounced follow up tests. The number and frequency is to be determined by the Substance Abuse Professional, but shall consist of at least six tests in the first twelve months following the employee's return to duty. Follow up testing shall not exceed a period of sixty months from the employee's return to duty. The Substance Abuse Professional may terminate the requirement for follow up testing at any time after the first six tests are administered if he/she certifies testing is no

longer necessary.

R Ex 4.

Robert Armstrong, Administrative Assistant to the Director of Human Resources for the West Virginia Department of Transportation, testified that he was the primary author of the above-quoted drug and alcohol testing policy. In Mr. Armstrong's opinion, the actions taken in Grievant's case were consistent with the provisions of the testing policy.

DISCUSSION

In disciplinary matters, W. Va. Code § 29-6A-6 places the burden of proof on the employer. Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). The Employer's policy on drug and alcohol abuse has been extensively quoted above because Grievant believes these rules were not followed in this disciplinary action. It is well-settled law that "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). This Grievance Board has previously applied this principle, requiring a state employer to comply with its clear and unambiguous policies. See, e.g., McFadden v. W. Va. Dept. of Health & Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995); Bailey v. W. Va. Dept. of Transp., Docket No. 94-DOH-389 (Dec. 20, 1994).

Having carefully reviewed the Employer's Drug and Alcohol Testing Policy, with particular attention to the provisions previously recited herein, as well as the regulations of the Federal Railroad Administration pertaining to control of alcohol and drug abuse contained in Title 49, Part 219 of the Code ofFederal Regulations, the undersigned finds that the Employer did not substantially deviate from its established policy in regard to the course of action followed in this disciplinary matter.

Although the Employer's policy was not in effect in November 1994, Grievant's voluntary submission to drug abuse treatment at PATC substantially complied with the provisions of the Employer's Voluntary Referral Program. When Grievant returned to duty in January, following what was deemed a "successful" completion of a drug rehabilitation program, the Employer opted to require that Grievant participate in the same follow-up testing regimen that is compulsory for employees who return to duty following a positive test result.

Contrary to Grievant's contentions, the provisions which require follow-up testing when an

employee is returned to duty following a positive test do not preclude such testing when an employee returns to duty after completing a voluntary referral program. The Voluntary Referral Program makes no reference to follow-up testing, although such testing is specifically authorized elsewhere and in the federal regulations. Thus, the Employer's written policy neither sanctions nor prohibits such a course of action.

Under the circumstances present here, the Employer's imposition of a follow-up testing requirement was not an abuse of discretion, nor does it violate any identified law, rule or regulation. Indeed, Mr. Gaynor's testimony suggests that the testing was intended to help the employee achieve his goal of remaining drug-free, while also protecting the interests of the employer and public safety. In any event, these latter considerations provide rational and compelling justifications for the follow-up testing requirement imposed on Grievant.

Grievant correctly notes that the Employer has not strictly followed certain provisions of its Drug and Alcohol Testing Policy. In particular, Grievant was not required to undergo a drug test before being returned to duty after completing his rehabilitation program, Grievant was not referred to a Substance Abuse Professional after his follow-up test was reported as positive, and the Superintendent, who is likewise subject to testing, was advised of "unannounced" tests the day before. However, Grievant has not demonstrated how strict compliance with these particular provisions would have generated a different result in this matter. Thus, he has not shown "harmful error" in the application of the Employer's policy, as applied to the facts and circumstances of his dismissal. See McFadden v. W. Va. Dept. of Health & Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995). See generally, Parker v. Defense Logistics Agency, 1 M.S.P.B. 489 (1980).

Grievant's complaint that another employee who tested positive for marijuana was treated more leniently is without merit since the Employer explained, through the testimony of Mr. Gaynor, that this individual was only "subject to" performing "covered service" and did not operate a train. Mr. Gaynor also noted that while Grievant had a prior "problem" with drugs, as evidenced by his self-referral for rehabilitation, the other employee was not known to have hadany prior involvement with drugs. Accordingly, while Grievant and the other employee were "similarly situated," in that both tested positive for drugs, the Employer articulated a rational basis for differentiating in their penalties.

The judicial standard in West Virginia requires that "dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interest of

the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Serv. Comm'n, 332 S.E.2d 579, 581 (W. Va. 1985); Oakes v. W. Va. Dept. of Finance and Admin., 264 S.E.2d 151 (W. Va. 1980); Guine v. Civil Serv. Comm'n, 141 S.E.2d 364 (W. Va. 1965).

The public has a significant interest in insuring that personnel who operate railroad equipment are not doing so while under the influence of drugs. Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989). Grievant worked for RMA in a safety-sensitive position, performing "covered service" as a train engineer. Thus, RMA demonstrated that Grievant's misconduct was of a substantial nature affecting the rights and interests of the public. The West Virginia Supreme Court of Appeals has recognized that "the work record of a long time civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." Buskirk, supra, at 585. However, given the nature of Grievant's employment, RMA has established that discharge is an appropriate penalty,notwithstanding that this was Grievant's first offense after more than seven years of employment.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are made in this matter.

FINDINGS OF FACT

1. Grievant was employed by the Railway Maintenance Authority as a Railroad Technician.

2. Grievant's duties as a Railroad Technician included operating trains as an engineer.

3. In November 1994, Grievant self-referred to a substance abuse rehabilitation program conducted by the Preston Addiction Treatment Center (PATC).

4. Upon returning to duty after completing the PATC rehabilitation program, Grievant was required to undergo follow-up drug testing to include at least six tests in the first twelve months following his return to duty.

5. Grievant participated in follow-up drug testing on March 24, 1995, and April 27, 1995, with the former test resulting in a negative report for illegal drugs, and the latter test resulting in a positive report for the presence of cocaine.

6. Another RMA employee who tested positive for the presence of marijuana on one occasion was referred to a Substance Abuse Professional, allowed to complete a rehabilitation program and

permitted to return to duty. This employee did not test positive following completion of rehabilitation and was not performingsafety-sensitive "covered service" at the time of his infraction.

CONCLUSIONS OF LAW

1. In disciplinary matters, the burden of proof is upon the employer and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Brown v. W. Va. Dept. of Commerce, Labor & Envtl. Resources, Docket No. 92-T&P-473 (Apr. 8, 1993).

2. Dismissal of a civil service employee must be for "good cause, which means misconduct of a substantial nature affecting rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Serv. Comm'n, 332 S.E.2d 579, 581 (W. Va. 1985).

3. "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977); McFadden v. W. Va. Dept. of Health & Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995); Bailey v. W. Va. Dept. of Transp., Docket No. 94-DOH-389 (Dec. 20, 1994).

4. An employee raising an affirmative defense must establish such a defense by a preponderance of the evidence. Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991), aff'd, 192 W. Va. 540, 453 S.E.2d 374 (1994). See also Parker v. Defense Logistics Agency, 1 M.S.P.B. 489 (1980).

5. The Employer demonstrated by a preponderance of the evidence that Grievant abused cocaine in violation of the Department of Transportation policy on drug and alcohol abuse.

6. Under the circumstances present here, Grievant's use of an illegal drug provides an appropriate basis for his dismissal from employment. See Brown v. W. Va. Dept. of Commerce, Labor & Envtl. Resources, Docket No. 92-T&P-473 (Apr. 8, 1993); Davis v. W. Va. Dept. of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 22, 1990).

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va.

Code § 29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

Administrative Law Judge

Dated: September 29, 1995

Footnote: 1"Dr. Kaschak" was not called as a witness. It was not established if this person was a medical doctor or held some other form of doctoral degree.