JOYCE L. SMITH,

Grievant,

v. Docket No. 98-HHR-512

DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Respondent.

D E C I S I O N

Grievant, Joyce L. Smith, employed by the Department of Health and Human Resources (Respondent) as an Economic Service Worker, filed a complaint directly to level four, as is permitted by W. Va. Code §29-6A-4(c), following her dismissal on December 18, 1998. Grievant failed to appear at the level four hearing scheduled for February 19, 1999, and the matter was rescheduled for April 26, 1999. Grievant appeared pro se, and Respondent was represented by Tiffany Bost, Assistant Attorney General. The matter became mature for decision on May 21, 1999, the deadline for filing post-hearing submissions.

By letter dated December 2, 1998, Respondent's Region I Director, Louis Palma, notified Grievant that she would be suspended without pay for twenty-one (21) working days, from December 14, 1998 through January 11, 1999. The nine page letter stated the suspension was being imposed as a result of a number of violations of the State Drug-Free Workplace Policy, and Respondent's Policy Memorandum 2108 “Employee Conduct”, as well as her unsatisfactory work performance. The following specific matters addressed by Mr. Palma, are reproduced here in chronological order.

July 31, 1997 - A client complained that when she met with Grievant at 3:30 p.m. that day, Grievant's eyes were glassy, her words were slurred, and she had the smell of alcohol on her breath, leading the client to conclude she was drunk. Ronald Pattison,Community Service Manager for Ohio and Marshall Districts, met with Grievant and Pam Adams, her immediate supervisor, on August 5, 1997, to discuss the complaint. At that time Grievant agreed that she had reported to work on several occasions during the previous year with alcohol in her system. Mr. Pattison issued Grievant a warning letter citing her unacceptable behavior, and warning her of impending disciplinary action if another incident should occur.

He reminded Grievant that reporting to work with alcohol in her system was in violation of the

Drug-Free Workplace Police, and was sufficient reason for dismissal. Grievant was advised that her appearance at work smelling of alcohol, with slurred speech, or demonstrating any signs of inebriation, would result in an assumption that she was under the influence. In that situation she would be allowed to voluntarily submit to a Breathalyzer, or blood alcohol test, to disprove the assumption. Refusal to submit to a test when her conduct, performance, and/or appearance indicated that she was under the influence would result in Grievant being escorted home.

Mr. Pattison advised Grievant that in addition to the unacceptable behavior involving the alcohol, her work performance was below standard, as evidenced by her failure to return phone calls, and complete reports, in a timely manner. In an effort to remedy this aspect of her conduct, Grievant was notified that Ms. Adams would be completing monthly evaluations of her job performance until her work was determined to be at a satisfactory level.

September 12, 1997 - Following lunch, Grievant's coworkers observed the smell of alcohol on her breath, and that she was acting in a loud and disruptive manner. **November 1997 through April 1998** - Grievant demonstrated a pattern of excessive use of sick leave and tardiness, resulting in her pay being docked. Because Grievant had not used any sick leave since May 7, 1998, when she was advised that a doctor's statement would be required for future approved leave, Mr. Palma concluded that she was abusing the leave until that time.

May 28, 1998 - Grievant's pay was docked fifteen minutes when she reported to work late.

July 14, 1998 - During an afternoon break Grievant was observed by a coworker, Mary Bennington, purchasing a six pack of Natural Lite beer from a convenience store near the office. As the coworker was returning to the office she was stopped by a man who handed her a plastic bag containing capsules. The man stated they had been dropped by a woman of Grievant's description. Ms. Bennington reported this information to Ms. Adams, who proceeded to locate Grievant in a stall in the second floor employee restroom. Grievant did not exit the stall, and Ms. Adams advised her that she would put the medication on Grievant's desk. Ms. Adams did not confront Grievant about the beer, but waited outside the restroom door for a few minutes. Grievant did not follow her out, and she proceeded downstairs to Grievant's desk.

When Grievant saw the supervisor waiting at her desk, she proceeded to a restroom in the client waiting room. Ms. Adams was briefly detained at this point and instructed another co-worker to let her know where Grievant went. This coworker entered the client restroom and observed Grievant raising

up from the wastebasket and then leaving. An empty, wet, Natural Lite beer can was found in the waste basket under some paper towels. The coworker then proceeded to the second floor restroom and found three more wet beer cans in the wastebasket. Upon receiving this information, Ms. Adams confronted Grievant, who denied that she had just consumed the beer, but stated that the cans were from her car. Grievant declined to submit to a Breathalyzer test and was sent home for the remainder of the day.

An investigation was conducted of this incident, and on July 17. 1998, Grievant admitted that she had bought the beer, but claimed that she had taken it to a friend who was waiting in the parking lot. She alleged that she had agreed to the Breathalyzer test but had been told by the supervisor that she preferred Grievant leave the office. Grievant also denied telling Ms. Adams that she had cleaned out her car and had brought the cans inside to throw them away.

July 15 and 16, 1998 - Grievant reported to work fifteen minutes late each day and her pay was again docked.

July 16, 1998 - A second client complaint was filed, this time alleging that Grievant had mismanaged her case causing her to lose benefits, that Grievant would not return her phone calls, and that Grievant smelled of alcohol.

July 16, 1998 - Mr. Pattison and Supervisor Diana Bumgardner met with Grievant to discuss her unacceptable job performance, and the client complaint. Grievant was again provided a copy of the Drug Free Workplace Policy, and was advised that Ms. Bumgardner would randomly monitor her interviews and interaction with the public.

July 24, 1998 - A third client complaint stated that Grievant was under the influence and abusive. In a written statement, the client alleged that Grievant had stated, “I have800 goddamn clients and you expect me to remember every fucking one.” The client also stated that she detected a strong odor of alcohol on Grievant's person.

September 22, 1998 - A fourth client complaint stated that she came to the office for review on September 11, 1998, and Grievant sent her away without even turning on her computer to see why she was there. The inaction could have resulted in the client losing her food stamps.

October 1, 1998 - A fifth client complained that she had applied for Emergency Assistance, and reapplied for food stamps on August 7, 1998. Although Grievant had processed the Emergency Assistance, she advised the client there was not enough time that day to process the food stamps,

and she would take care of it later. The client stated that she had heard nothing from Grievant since that time.

October 20, 1998 - At approximately 8:30 a.m., Ms. Bumgardner observed a strong odor of alcohol emanating from Grievant's breath. Grievant denied that she had been drinking that morning but admitted that she had been drinking the night before, as she was upset over the notice of a death in the family. Grievant requested, and received emergency annual leave, effective at noon that day. However, due to the strong odor of alcohol, Ms. Bumgardner could not permit Grievant to interview clients for the remainder of that morning.

November 20, 1998 - Grievant was late for work and her pay docked fifteen (15) minutes. That afternoon Mr. Pattison and Ms. Bumgardner observed that she smelled of alcohol and appeared disoriented, leading them to conclude she was intoxicated. Grievant refused the opportunity to take a Breathalyzer test and was sent home. **January 1, 1997 through December 18, 1998** - Two evaluations completed for 1997 rated Grievant's performance as “fair”. Monthly evaluations completed in 1998 indicated her work was “fair” to “unsatisfactory”. Mr. Palma noted that Grievant had demonstrated an inability to manage her caseload with the RAPIDS computer system, and effective July 14, 1998, was removed from a caseload, and placed on intake status.

Mr. Palma stated that Respondent had accommodated Grievant's alcoholism for many years by granting leaves of absence without pay, and permitting her to use accrued paid leave for more recent absences. He indicated he was aware that Grievant had participated in therapy from August 6, 1997, through at least June 1998, but stated it did not mitigate her behavior or excuse her from meeting established standards of behavior and performance. Mr. Palma emphasized that the letter was a final warning to Grievant that she would be dismissed “with the very next occurrence of your bringing alcohol onto work site premises or being under the influence of alcohol at a time during which you are engaged to perform State business, or not meeting other conditions for continued employment sited below.”

The five conditions listed by Mr. Palma were as follows:

1. You will provide me with written documentation of new enrollment or continuing participation in a Substance Abuse Program within fifteen (15) days of the date of this letter.

2. You will provide written reports from your counselor or physician, once every thirty days, for at least three months, confirming your attendance and documenting your progress.

3. You will successfully complete the substance abuse program and provide written documentation of such.

4. You will be dismissed with the very next occurrence of your being under the influence of alcohol at a time during which you are engaged to perform State business, or the odor of alcohol on your person which precludes your interactions with clients, in violation of the State's Drug-Free Workplace policy, regardless of any commitment to, or successful completion of treatment.

5. You will successfully complete requisite agency computer training and become proficient in using the RAPIDS computer system within thirty (30) days as demonstrated by a rating of at least 3 (satisfactory) on an evaluation of your work performance as completed by your supervisor and Mr. Pattison.

Grievant signed and dated the letter on the morning of December 2, 1998, indicating that she accepted the terms of continued employment. In the afternoon of December 2, 1998, Grievant reported to work with alcohol on her breath, and was slurring her words. Grievant declined the opportunity to disprove the charge by voluntarily submitting to a Breathalyzer test, and was sent home for the remainder of the day. Mr. Palma advised Grievant by letter dated December 3, 1998, that she was dismissed from her employment, effective December 18, 1998, and suspended her until that time.

Discussion

In disciplinary matters, the employer has the burden of proving each element of the charges by a preponderance of the evidence. W. Va. Code §29-6A-6; Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha CountyBd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

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 Service Comm'n, 175 W. Va.

279, 332 S.E.2d 579, 581 (1985); Oakes v. W. Va. Dept. of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Service Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965). Violation of the West Virginia Drug-Free Workplace Policy is an offense which may warrant dismissal of a civil service employee. Rodak v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R- 536 (June 23, 1997); Perdue v. Dept. of Health & Human Resources, Docket No. 93-HHR- 050 (Feb. 4, 1994); Kuhens v. W. Va. Div. of Highways, Docket No. 92-DOH-221 (Sept. 30, 1992).

The West Virginia Drug-Free Workplace Policy prohibits an employee from reporting to work under the influence of alcohol, or having alcohol in the body system. Perdue, supra. Respondent's Policy Memorandum 2108, “Employee Conduct”, states that employees are expected to “refrain from the possession of or consumption of alcohol or illegal substances on State property. . . .” Through the testimony of Mr. Pattison, Ms. Adams, Ms. Bumgardner, and a number of Grievant's coworkers, Respondent has met its burden in proving the allegations set forth in the December 2, 1998, suspension letter, and that she reported to work with alcohol in her system on the afternoon of December 2, 1998, in violation of the Drug-Free Workplace Policy. In response to the charges, Grievant stated that while she has had alcohol on her breath, she has not consumed alcohol on office premises, and the beer cans found in the office trash cans were brought in from her car. She asserts that other employees have come to work with alcohol on their breath and were not dismissed. Grievant concedes that she has experienced difficulty in learning the RAPIDS computer program, but argues that as an employee with twenty-two (22) years of service, her performance could not be that poor. In response to the client complaints cited by Respondent, Grievant submitted a number of written statements by clients who were pleased with her service. Grievant concludes that she has attempted to meet all of Respondent's demands to provide doctor's reports, and seek counseling, and requests that she be reinstated.

Grievant's claim that other employees have reported to work smelling of alcohol but were not dismissed, constitutes a claim of discrimination, defined by W. Va. Code §29-6A- 2(d) as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.”

An employee seeking to establish unlawful discrimination must first establish a prima facie case by demonstrating the following:

(a)that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b)that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c)that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s)and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason to substantiate its actions. Thereafter, a grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

Grievant did not identify any individual who reported to work with alcohol on his/her breath and was not disciplined. Therefore, she has failed to establish a prima facie case of discrimination.

Grievant also refers to her long tenure with Respondent. In Buskirk, supra, the Supreme Court of Appeals of West Virginia stated 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.” Id. At 585. In this case, Grievant has been progressively counseled, warned, and suspended in an effort to correct her alcohol-related problem which has repeatedly and continually interfered with her ability to perform in a satisfactory manner. Therefore, dismissal was appropriate in these circumstances, notwithstanding Grievant's many years of service.

In addition to the foregoing narration it is appropriate to make the following formal findings of fact and conclusions of law.

Findings of Fact

1. Grievant was employed by Respondent for approximately twenty-two years, and was classified as an Economic Service Worker at all times pertinent to this decision.

2. Grievant's duties as an Economic Service Worker included meeting with and interviewing clients, and completing reports. To perform her duties, Grievant was required to learn and use a computer program referred to as RAPIDS.

3. Grievant has suffered from alcoholism for an unspecified period of time. Respondent has

docked her pay for her habitual tardiness in reporting to work, and has counseled, warned, and suspended Grievant for alcohol-related incidents.

4. Grievant was unable to master a computer program used by Respondent in processing client claims.

5. Grievant's overall work performance was evaluated as “fair” to “unsatisfactory” for the years 1997 and 1998.

6. Grievant was notified on December 2, 1998, that she was to be suspended for twenty-one (21) days, after she had reported to work smelling of alcohol, and appearing disoriented, on November 20, 1998.

7. Grievant was advised verbally and in writing that she would be dismissed from employment with Respondent if she reported to work under the influence again.

8. Grievant returned to work on the afternoon of December 2, 1998, with alcohol on her breath and slurring her words.

9. Grievant was notified of her dismissal by letter dated December 3, 1998.

Conclusions of Law

1. In disciplinary matters, the employer has the burden of proving each element of the charges by a preponderance of the evidence. W. Va. Code §29-6A-6; Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

2. Dismissal of a civil service employee must 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 statue or official duty without wrongful intention.” Syl. Pt. 2, Buskirk v. Civil Service Comm'n, 175 W. Va. 279, 332 S.E.2d 579, 581 (1985); Oakes v. W. Va. Dept. of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Service Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965).

3. Violation of the West Virginia Drug-Free Workplace Policy is an offense which may warrant dismissal of a civil service employee. Rodak v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-536 (June 23, 1997); Perdue v. Dept. of Health & Human Resources, Docket No. 93-HHR-050

(Feb. 4, 1994); Kuhens v. W. Va. Div. of Highways, Docket No. 92-DOH-221 (Sept. 30, 1992).

4. W. Va. Code §29-6A-2(d) defines discrimination as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." 5. Grievant failed to establish a prima facie case of discrimination by showing that other employees had not been disciplined for reporting to work with alcohol in their system and/or poor work performance.

6. "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.

7. Respondent has established that dismissal was appropriate, notwithstanding Grievant's many years of service.

Accordingly, the grievance is **DENIED.**

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). 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. 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 record can be prepared and properly transmitted to the appropriate circuit court.

Date: June 1, 1999 _____

Sue Keller

Senior Administrative Law Judge