MONTY McCOY,

Grievant,

v. Docket No. 98-DOH-399

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondents,

D E C I S I O N

Grievant, Monty McCoy, a probationary employee, filed this grievance directly to Level IV on November 4, 1998, after he was dismissed. His Statement of Grievance reads:

> **I was dismissed because of a drug screening which was supposed to be dirty[,] but I had my own drug test done and it was clean[.] I feel I have been treated on (sic) fairly. I am willing to have another drug test done any time. Relief sought: I am asking for my job back and my name be cleared.**

As no party disagreed, this grievance was allowed to remain a Level IV even though probationary dismissals are typically remanded to Level I. See Bonnell v. Div. of Corrections, Docket No. 89-CORR-163 (Mar. 8, 1990).

The first day of hearing in this grievance was held on November 30, 1998. At that hearing, Respondent Department of Transportation/Division of Highways ("DOH") agreed to view the case as disciplinary, accepted the burden of proof, and placed its case on the record first. Respondent was represented by Attorney Timbera Wilcox, and Grievant was represented by Delegate Greg Butcher. The testimony of one of Respondent's key witnesses, Dr. Robert Pflug, was taken telephonically without objection. Although this testimony was heard by the parties involved, it was not recorded. As soon as this error by the undersigned Administrative Law Judge was discovered, the parties were informed of the problem, and options and possible solutions were given to the parties in a December10, 1998 letter. This December 10, 1998 letter indicated all other portions of the hearing were recorded. This letter was followed

by a second letter dated January 7, 1999, scheduling a telephone conference on the problem for January 15, 1999.

This recorded telephone conference was held as scheduled, and the parties agreed, after listening to the undersigned Administrative Law Judge's notes of the prior hearing, that these repeated statements accurately reflected the testimony of Dr. Pflug, could be utilized to replace his missing testimony, and there would be no need to retake Dr. Pflug's testimony.

Mr. Butcher then indicated he had not known prior to the Level IV hearing on November 30, 1998, that the repetition of the verbal information he had received from a local doctor would be seen as hearsay and not accorded the weight given to the testimony of a witness under oath and available for cross-examination. He questioned whether the undersigned Administrative Law Judge could call an expert witness, on her own, for additional information. It was explained this is not allowed, and that the undersigned Administrative Law Judge was to assess the evidence presented by the parties. Grievant and Mr. Butcher then indicated they wished an opportunity to call an expert or medical witness. As neither Grievant or his representative were attorneys, and the Grievant had not gone through the lower levels, this request was granted over the objection of Respondent. Grievant then indicated he would probably retain the services of an attorney for the next hearing as recommended by Mr. Butcher. Respondent indicated if Grievant called an expert witness it would call an additional expert. This grievance was thencontinued until a date to be specified by the parties after witnesses had been obtained. This grievance was then set for hearing on April 15, 1999.

At the start of this hearing, Grievant's attorney, Paul Stroebel, stated he expected Respondent to re-present all of its evidence, and his understanding was that none of the prior hearing had been recorded. Mr. Stroebel also did not appear aware, prior to the off- the-record discussion at hearing, of how the non-recorded testimony of Dr. Pflug had been dealt with by the agreement of the parties, and the letters of December 10, 1998, and January 7, 1999. **(See footnote 1)** **Mr. Stroebel objected to the majority of what had occurred in the case prior to his presence. He objected to the reading of the undersigned Administrative Law Judge's notes in place of Dr. Pflug's testimony, he objected to Respondent's failure to not re-present its case at this hearing and averred Grievant was entitled to a full hearing with an opportunity to rebut. Mr. Stroebel also stated that when Grievant had waived his rights at the prior hearing,**

Grievant did so without counsel, without proper information, and was prejudiced by this action. (See footnote 2) Mr. Stroebel cited no case law to support his Motion/Demand for Respondent to re-present its case. Mr. Stroebel also indicated he might wish a continuance to obtain an expert witness.

Respondent objected to this request, and noted Dr. Pflug was currently on stand-by to respond to the testimony of the medical witness to be presented by Grievant. When the undersigned Administrative Law Judge learned that Dr. Pflug was currently on stand-by, she suggested that many of Grievant's objections could be cured by the retaking of his testimony, with Mr. Stroebel being given an opportunity to cross-examine him. Respondent agreed to this proposal.

Mr. Stroebel then objected to Dr. Pflug's testimony (from Louisiana) being telephonic and cited Syllabus Point 3, Fox v. University of West Virginia/Board of Trustees, 197 W. Va. 91, 475 S.E.2d 91 (1996), to support this objection. He argued the ruling in Fox prevented the taking of telephonic testimony at grievance hearings as such testimony was inherently unreliable. The undersigned Administrative Law Judge overruled Grievant's objection at hearing with the understanding Grievant could again argue this Motion in his post-hearing proposals.

Dr. Pflug's testimony was then retaken, and Grievant was again given the opportunity to cross-examine him. After Respondent re-presented this evidence, Grievant elected to present no further evidence and did not further request a continuance to obtain medical testimony. This case became mature for decision on May 17, 1999, after receipt of the parties' proposed findings of fact and conclusions of law.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant applied for a permanent position with DOH. He had served as a temporary employee prior to that time.

2. On August 14, 1998, Grievant received and signed a "Drug/Alcohol Testing Notification and Consent" form. Because Grievant would be performing as a Mechanic and had a CDL (Commercial Drivers' License), and these are considered safety-sensitive

functions; drug testing was required. See Resp. Ex. Nos. 2 & 3. This form indicated the following:

> **I understand, as required by Title 49, Code of Federal Regulations, Part 40 and Part 382, and by the West Virginia Department of Transportation, Division of Highways . . . any prospective employee . . . who is to perform a safety-sensitive function:**
>
> *** Must submit to a controlled substance test involving collection of a urine sample which will be tested for the presence of:**
>
> **Marijuana**
>
> **Cocaine**
>
> **Opiates**
>
> **Amphetamines**
>
> **Phencyclidine (PCP);**
>
> **AND,**
>
> *** Must submit to a breath alcohol testing consisting of a deep lung sample that is to be provided to and analyzed by, an Evidential Breath Testing Device (EBT).**
>
> **I understand, if I test positive or have breath alcohol concentration of 0.02 or greater, that I am considered medically unqualified to perform a safety-sensitive function . . . . I also understand I will be given reasonable opportunity to confer with the Agency's Medical Review Officer before any positive drug test is reported to the Human Resources Division/Office of the Director of Operations and Training.**
>
> **It is understood a positive drug test result and/or breath alcohol concentration of 0.02 or greater will disqualify me for employment with the West Virginia Division of Highways . . . and my test result will not be released to any additional parties without my written consent.**
>
> **I hereby agree to submit to a urine drug test and a breath alcohol test as a precondition of my employment.**

3. Mr. Wayne Armstrong, Administrative Assistant in DOH's Division of Human Resources, told Grievant on September 21, 1998, to report to Charleston on September 22,

1998, for his drug testing.

4. On September 21,1998, Grievant was hired on a conditional basis until the results of the drug test were received. He was not allowed to perform in safety-sensitive areas. **(See footnote 3)**

5. Grievant reported for this drug test on September 22, 1998.

6. Grievant was asked to urinate in a cup and to sign paperwork that the sample was divided and sealed in his presence. Grievant signed papers which indicated the dividing and sealing of the urine sample were done in his presence.

7. The urine sample was sent to a federally approved testing laboratory in Overland, Kansas. Two separate tests are required and were conducted on the urine sample. The first test is a screening test, and, if the results are positive for a specific drug, another test is run for two reasons; 1) to double check the first test; and 2) to determine the amount of the substance. Because Grievant's first test was positive for marijuana, the second test was conducted and was again positive for marijuana at an unacceptable level. 8. Dr. Robert Pflug, a certified Medical Review Officer, called Grievant on September 30, 1998, and informed him the drug test showed marijuana in his urine. Grievant was given an opportunity to explain this finding, and to indicate whether he had a medical prescription for marijuana. Grievant told Dr. Pflug the urine sample was divided and sealed in his presence. **(See footnote 4)**

9. Grievant informed Dr. Pflug he did not have a medical prescription for marijuana.

10. Grievant also indicated he had been exposed to second-hand marijuana smoke over the weekend before the test, on the 18th.

11. Dr. Pflug informed Grievant the level of marijuana in his drug test was too high to be the result of second-hand smoke. and he must tell the employer something. Grievant then stated, "You can tell them I smoked it Saturday for all I care."

12. Grievant had 72 hours to decide whether to have the second half of his split sample tested at another approved laboratory, and Dr. Pflug informed Grievant of this right. Grievant did not elect to have this sample tested.

13. Dr. Pflug reported the results of this conversation to DOH.

14. The level of marijuana in Grievant's urine sample was too high to be the result of second-hand smoke.

15. On September 30, 1998, Jeff Black, DOH's Director of the Human Resources Division, wrote Grievant informing him he would be dismissed at the end of business on that day because his urine sample tested positive for marijuana. This same letter reminded Grievant of the Consent Form he had signed which indicated a positive drug test would disqualify him from employment with DOH.

16. Grievant worked the fifteen days of his notice in non-safety-sensitive areas.

17. On October 1, 1998, Grievant went to Logan General Hospital and requested that a drug profile be performed on another urine sample. These results were negative for marijuana as well as other drugs.

Issues and Arguments

Grievant argued that because Dr. Pflug did not perform the testing himself, he had no foundation upon which to base his results. Grievant also argued Dr. Pflug's testimony should be considered unreliable and inadmissable because it was telephonic. Further, Grievant argued that the drug test performed by Logan General Hospital revealed no marijuana in Grievant's system. Grievant maintained Respondent did not meet its burden of proof.

Respondent argued it has met its burden of proof and demonstrated Grievant's drug test was positive for marijuana; and thus, he was disqualified for the position pursuant the Consent Form and the federal and DOH requirements for employees in safety-sensitive positions.

Discussion

The burden of proof in disciplinary matters rests with 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; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id. In Walker v. Public Service Commission, Docket No. 91-PSC-422 (March 11, 1992), this Grievance Board

ruled that when the employee is a probationary, if misconduct is alleged, the employer retains the burden of proof pursuant to W. Va. Code §29-6A-6, which provides in pertinent part, "[t]he burden of proof shall rest with the employer in disciplinary matters."

Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the 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. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); See also Sections 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1998). The West Virginia Supreme Court of Appeals has also stated that "the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is anappropriate disciplinary measure in cases of misconduct." Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985). See Blake v. Civil Serv. Comm'n, 172 W. Va. 711, 310 S.E.2d 472 (1983); Serreno v. W. Va. Civil Serv. Comm'n, 169 W. Va. 111, 285 S.E.2d 899 (1982). This standard only applies when terminating non-probationary employees, and it was specifically rejected for probationary employees in Walker, supra. See W. Va. Div. of Personnel Administrative Rules, Sections 11.01 & 11.06.

The first issue to address is whether Dr. Pflug's testimony in prohibited as unreliable because it was taken by telephonic means. Syllabus Point 3 in Fox states:

> **Although formal rules of evidence do not apply to grievance procedures under W. Va. Code § 18-29-6, we hold that nolo contendere pleas are unreliable as evidence of particular acts in a subsequent grievance or other administrative proceeding.**

A review of this statement, and a review of the Fox case does not support Mr. Stroebel's objection. The Fox case dealt with a nolo contendere plea, and whether this plea could be accepted as an admission of guilt. It does not speak to telephone testimony in any way, but does note the formal rules of evidence do not apply to grievance procedures. Thus, after a further review of Mr. Stroebel's Motion, it still must be denied.

The next issue is to address the merits of the grievance and decide if Respondent has met

its burden. Respondent has met its burden of proof. Both drug tests performed on Grievant's urine sample clearly established Grievant had marijuana in his system when he took the test. See Resp. Ex. Nos. 2 & 3. Grievant told Dr. Pflug that he had smoked marijuana on the weekend before the test. Although he later denied this was exactly what he said, and he only meant to say that if the doctor thought the level was too high to besecond-hand smoke then the doctor should say what ever he thought was right, this does not alter the outcome. Dr. Pflug had no reason to invent testimony.

Additionally it is revealing that Grievant did not choose to have the second half of the sample tested, but within the 72 hours that he could have had the previous urine sample tested, paid for a second test on his own. The fact that a second test, taken over a week after the first test, revealed negative results proves nothing about the first test. Although Grievant was allowed to admit the hearsay testimony (See footnote 5) **of a Dr. Stewart through his representative, that marijuana would stay in the system for a long time, and if the first test was positive the second test would be as well, this testimony cannot be afforded much weight. Respondent was not allowed to cross-examine this physician, it is unknown what facts he had in his possession at the time he rendered his judgement, the term "long time' was not quantified, and this statement was not in written form. It was also unclear if this doctor had any expertise in the area of drug testing. Accordingly, this testimony was afforded little weight Grievant's explanation that he did not understand he could have the second sample tested, and he did not understand what Dr. Pflug said to him when he was offered this option, cannot be sustained. This decision was an important one, and if Grievant did not understand his options he had a duty to clarify the information he received.**

Although Grievant contended the chain of custody was not maintained, and that one doctor in Charleston should complete all the taking of samples and testing, as well as the calling of the employee, this argument is without merit. Respondent stated without contradiction that only certain laboratories are approved by the Federal Government for this required testing, and none of these laboratories are in West Virginia. (See footnote 6) **Dr. Pflug testified that all the evidence he had before him indicated the chain of custody had been maintained and this statement was not disproved. Thus it is clear that Respondent had presented evidence "that a reasonable person would accept as sufficient that a contested fact**

is more likely true than not", and Respondent has met its burden of proof Leichliter, supra.

Conclusions of Law

1. When a probationary employee is alleged to have committed misconduct, and this is the reason for his discharge, the employer retains the burden of proof pursuant to W. Va. Code §29-6A-6. Walker v. Public Serv. Comm'n, Docket No. 91-PSC-422 (Mar. 11, 1992). 2. Respondent has met its burden of proof and demonstrated by a preponderance of the evidence that Grievant is disqualified for employment with DOH because his pre-employment urine sample was positive for marijuana.

Accordingly, this 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: June 18, 1999

Footnote: 1

It must be noted that at no time did Mr. Stroebel request a copy of the grievance file or a copy of the tapes from the first hearing or the telephone conference from this Grievance Board. Additionally, he did not discuss the situation with Respondent's counsel. Further, it appeared Grievant had not shared this information with his attorney, as both letters written after the discovery of the error, and the conference itself were clear that only the testimony of Dr. Pflug was missing.

Footnote: 2

Mr. Stroebel did not clarify what rights Grievant had waived, or whether these were waived at the prior hearing or in the telephone conference. It must be noted that Grievant was informed several times, at the first hearing by the undersigned Administrative Law Judge, that he did not have to testify, but Grievant elected to do so.

Footnote: 3

Apparently, Grievant had been allowed incorrectly, as a temporary employee, to perform safety-sensitive functions without prior drug testing.

Footnote: 4

At hearing, Grievant testified he did not see the sample divided and sealed.

Footnote: 5

Relevant hearsay is admissible in administrative hearings. W. Va. Code §29-6A-6. The key question is what weight to give this testimony.

In Borninkhof v. Department of Justice, 5 MSBP 150, (1981), the Merit System Protection Board identified several factors that affect the weight hearsay evidence should be accorded. These factors are: 1) the availability of persons with first hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. Id.; Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't, Docket No. 90-8-115 (June 8, 1990).

Footnote: 6

Volume 61 of the Federal Register identifies the list of acceptable laboratories.