WALTER FARMER, Jr.,

Grievant,

v.

Docket No. 01-DOH-046

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS

Respondent.

DECISION

Walter Farmer, Jr. (Grievant) was employed by the West Virginia Division of Highways (DOH), as a Transportation Worker II at DOH's District Ten in Raleigh County until his dismissal on January 22, 2001. This grievance was filed directly at Level IV on February 1, 2001.

A Level IV hearing was held on April 19, 2001, before the undersigned Administrative Law Judge, at the Grievance Board's Beckley office. DOH was represented by Jennifer Francis, Esq., and Grievant represented himself. The parties agreed that this grievance would become mature for decision at the conclusion of the Level IV hearing. (See footnote 1) The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant was employed by DOH as a Transportation Worker II at its District Ten in Raleigh County.

2. On November 28, 2000, Grievant was driving a DOH crew cab pickup truck during work hours, accompanied by another DOH employee, Raymond Duncan (Duncan) and two Work Release

employees.

3. That morning, Grievant stopped the truck at a friend's trailer and retrieved a bag of marijuana he had left there the previous night. Grievant smoked some of the marijuana, using a pipe, while he drove the truck, and offered some to his fellow employees, who declined.

4. Grievant smoked more marijuana during his lunch break.

5. Grievant was dismissed on January 22, 2001, for violating the West Virginia Division of Personnel's Drug Free Workplace Policy, engaging in illegal conduct while on the job, and operating a state vehicle while under the influence of a controlled substance.

DISCUSSION

In disciplinary matters, the employer has the burden of proving the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6; Evans v. Dep't of Health & Human Resources, Docket No. 97-HHR-280 (Nov. 12, 1997), Miller v. W. Va. Dep't 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 theevidence is defined as “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

The administrative rules of the West Virginia Division of Personnel (DOP) provide that an employee in the classified service may be dismissed for "cause." 143 CSR § 12.2, Administrative Rule, W. Va. Div. of Personnel (July 1, 1998). The phrase "good cause" has been determined by the West Virginia Supreme Court of Appeals to apply to dismissals of employees whose misconduct was of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1985); Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); See Hundley v. W. Va. Div. of Corrections/Mount Olive Correctional Complex, Docket No. 97- CORR-197A (May 12, 1999).

DOH dismissed Grievant for violating DOP's Drug- Free Workplace Policy, engaging in illegal

conduct while on the job, and operating a state vehicle while under the influence of a controlled substance. Grievant argues that he should not have been dismissed, as he was the victim of discrimination, alleging that other employees committing similar offenses were not dismissed. Grievant did not specify what relief he seeks. DOP's Drug-Free Workplace policy, DOP-P2 (1991), states that "[i]t is the policy of West Virginia State government to ensure that its workplaces are free of illegal drugs and controlled substances by prohibiting the use, possession, purchase, distribution, sale, or presence in the body system, without medical authorization, of illegal or controlled substances." The policy further provides that "[e]mployees who are in violation. . . shall be subject to disciplinary action up to and including termination[.]"

Grievant credibly testified that he could not deny acquiring and smoking marijuana while driving a DOH crew cab pickup truck during work hours, accompanied by Duncan and two Work Release employees, and offering some to his fellow employees. However, he argues that he was the victim of discrimination, alleging that other employees committing similar offenses were not dismissed, but were merely relieved of their driving duties by DOH.

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." To establish a prima facie case of discrimination, Grievant must show:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his 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.

Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Id. However, the

grievant may still prevail if he can demonstrate the reason given by the respondent was mere pretext. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant established that he was similarly situated to other DOH employees subject to DOP's Drug-Free Workplace policy. He also established that he was treated differently than other employees who violated the policy, in a significant particular, by being dismissed. However, DOH established that his different treatment was related to his actual job responsibilities.

DOH Director of Human Resources Jeff Black credibly testified that the employees with whom Grievant seeks to compare himself were found to have drugs in their systems from use away from the workplace, whereas Grievant acquired and used drugs on the job, and while driving, an offense of a much more substantial nature. Buskirk, supra; Edens v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 98-DOH-255 (Feb. 26, 1999)(DOH employee's drinking and driving on the job constituted good cause for dismissal). DOH's argument has merit. Accordingly, Grievant has failed to establish a prima facie case of discrimination.

Therefore, the undersigned has no choice but to conclude that Grievant's misconduct in acquiring and smoking marijuana at his state workplace violated DOP's Drug-Free Workplace policy, constituting good cause for his dismissal. Buskirk, supra. Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In disciplinary matters, the employer has the burden of proving the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6; Evans v. Dep't of Health & Human Resources, Docket No. 97-HHR-280 (Nov. 12, 1997), Miller v. W. Va. Dep't 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.).

2. Dismissal of an employee in the classified service must be for good cause, which means misconduct of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1985); Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Hundley v. W. Va. Div. of Corrections/Mount Olive Correctional Complex, Docket No. 97-

CORR-197A (May 12, 1999).

3. Grievant failed to establish a prima facie case of discrimination.

4. Grievant's acquiring and smoking marijuana at his state workplace violated DOP's Drug-Free Workplace policy, constituting good cause for his dismissal.

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.

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ANDREW MAIER

Administrative Law Judge

Dated: April 24, 2001

Footnote: 1

Consistent with this Grievance Board's policy, this dismissal grievance has been advanced upon the docket for an expedited decision.