GARY BOYD, et al.,

Grievant,

v .

DOCKET NO. 00-PEDTA-243

WEST VIRGINIA PARKWAYS ECONOMIC

DEVELOPMENT AND TOURISM AUTHORITY,

Respondent.

D E C I S I O N

Grievant, Gary Boyd, filed this grievance against his employer, the West Virginia Parkways Economic Development and Tourism Authority ("PEDTA"), directly to level four on July 25, 2000:

> Effective the 18th day of July 2000 I was terminated from my employment with the WVPEDTA.
>
> This action is in violation of my human rights and my right to due process.
>
> Moreover, this is only the latest example of the departments' contrivances and negative actions meant to single me out and treat me differently than other similarly "covered" employees.
>
> This pattern of disparate and discriminatory practices has now reached the level of depriving me of my property rights as it relates to my tenure, livelyhood and benefits. These unjust actions have been perpetrated against me for wholly arbitrary and capricious reasons that are inconsistent with actions taken against other employees ostensibly for the same infraction which has been applied to me.
>
> Therefore, I pray for legal relief, through your good offices and just deliberations.
>
> Relief sought: Reinstatement to my former position with all due back pay plus interest back to the effective date of my termination and any and all legalremedies which may be justly applied in such other manner as to make me whole in every way.

A level four hearing was held in the Grievance Board's Beckley, West Virginia, office on November 9 and December 15, 2000, and this case became mature for decision on February 7,

2001, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by Mr. Boyd Lilly and Mr. Steve Rutledge, AFSCME, and PEDTA was represented by A. David Abrams, Esq.

SUMMARY OF EVIDENCE

PEDTA Exhibits

Ex. 1 -

West Virginia Department of Transportation Policy, Drug and Alcohol Testing, effective January 1, 1995.

Ex. 2 -

West Virginia Department of Transportation, The Parkways Economic Development and Tourism Authority, Statement of Receipt, signed by Gary Boyd, December 2, 1994.

Ex. 3 -

West Virginia Department of Transportation Drug and Alcohol Testing Policy Receipt, signed by Gary Boyd, March 27, 1995.

Ex. 4 -

West Virginia Department of Transportation, Division of Highways, Parkways Economic Development and Tourism Authority, Drug/Alcohol Testing Notification & Consent, signed by Gary Boyd, March 27, 1995.

Ex. 5 -

July 23, 1990 memorandum from D. L. Lake to George A. McIntyre re: (CDL) Commercial Drivers Licenses.

Ex. 6 -

March 15, 1990 Certificate of Recognition to Gary Boyd for completing Commercial Drivers License Training Program.

Ex. 7 -

Undated Memo for the Record from Tyrone Gore re: Positive Test for Marijuana Gary Boyd.

Ex. 8 -

Certified copy of February 29, 1996 reported toxicology results from Medical Review Services.

Ex. 9 -

September 13, 2000 letter from Tyrone Gore from Marcia Hebert, Medical Review Services, Inc., re: Certification of Drug Testing Record for Gary Boyd, with attachments: September 12, 2000 letter from Tyrone Gore to Dr. Pflug; Medical Review Services Drug Screen Result Report, Feb. 29,1996; MRO Verification Worksheet; Custody and Control Forms.

Ex. 10 -

West Virginia Department of Transportation, Removal from Covered Duty of Gary Boyd, March 6, 1996.Ex. 11 -

West Virginia Department of Transportation, Authorization for the Release of Substance Abuse Professional Documentation for Gary Boyd, March 6, 1996.

Ex. 12 -

July 16, 1997 letter from Bill C. Short, Mental Health Council, Inc. to Tyrone Gore re: Gary Boyd, with attachments.

Ex. 13 -

February 29, 2000 memorandum to the file by Tyrone Gore re: Gary Boyd.

Ex. 14 -

West Virginia Department of Transportation, Refusal to Test/Cooperate with Testing Process re: Gary Boyd on July 6, 2000.

Ex. 15 -

West Virginia Department of Transportation, Removal from Covered Duty of Gary Boyd, July 6, 2000.

Ex. 16 -

July 12, 2000 suspension letter from Lawrence F. Cousins, General Manager, to Gary Boyd.

Ex. 17 -

July 6, 2000 memorandum to the file by Tyrone Gore re: Gary Boyd.

Ex. 18 -

July 17, 2000 termination letter from Lawrence F. Cousins, General Manager, to Gary Boyd.

Ex. 19 -

July 23, 1990 memorandum from D. L. Lake to George A. McIntyre re: (CDL) Commercial Drivers License.

Ex. 20 -

Utility Dept., 2000 Holidays Coverage Schedule.

Ex. 21 -

Job Description for Apprentice Utility Technician.

Ex. 22 -

West Virginia Parkways Authority Job Description for Utility Technician I.

Grievant's Exhibits

Ex. 1 -

December 7, 1999 memorandum to Utility Dept. Personnel from Roger Johnson re: vehicle assignments.

Ex. 2 -

July 6, 1998 memorandum from Rick Deeds to Richard Patterson and Undersigned.

Ex. 3 -

89-90 Petition from employees in electrical department.

Ex. 4 -

August 5, 1997 memorandum from Rick Deeds to Jerry Young re: co-worker complaint.

Ex. 5 -

May 2, 1991 Beckley Register-Herald newspaper clipping; May 7, 1991 Charleston Gazette newspaper clipping.

Ex. 6 -

Job Description for Utility Technician.

Ex. 7 -

July 6, 2000 Employee Disciplinary Report from Roger Johnson re: Gary Boyd.

Ex. 8 -

July 19, 2000 Physical Examination Form for Gary Boyd.

Ex. 9 -

State of West Virginia Division of Motor Vehicles Driver Record for Gary Boyd as of November 13, 2000.

Ex. 10 -

July 6, 1998 memorandum from Rick Deeds to Richard Patterson and Undersigned.

Testimony

PEDTA presented the testimony of Tyrone Gore, Kenneth Schneider, Lawrence Cousins, and Darrell Richard Deeds. Grievant testified in his own behalf, and presented the testimony of Steve Light, Tommy Graley, Mike Cottle, Brian Grose, Terry Wriston, Larry Treadway, Elijah Kincaid, Norman Jones, Earnest Dunford, Jeff Vealey, Paul Perdue, and Boyd Lilly.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts material to the resolution of this grievance.

1. Grievant was employed by PEDTA as a utility technician in its utility shop near Beckley, West Virginia, from June, 1988 through July 17, 2000.

2. Since 1990, all employees in PEDTA's utility shop have been required to have a valid Commercial Driver's License (CDL). Grievant complied with this requirement and maintained a CDL from 1990 through March 24, 2000.

3. As a result of the requirement to hold a CDL, and pursuant to applicable federal statutes, regulations and PEDTA's Drug and Alcohol Testing Policy, implemented in 1995, Grievant was subject to random drug and breath alcohol testing as a condition of his employment. See PEDTA Ex. 1.

4. Grievant voluntarily surrendered his CDL to the West Virginia Department of Motor Vehicles on March 24, 2000, and concealed that fact from PEDTA. Without a valid CDL, Grievant did not meet the qualifications and requirements of his job position.

5. Because PEDTA was not aware Grievant had surrendered his CDL, he was permitted to continue in his normal employment duties until July 6, 2000. 6. On July 6, 2000, Grievant was selected for a random alcohol and drug test pursuant to the Drug and Alcohol Testing Policy.

7. On July 6, 2000, Grievant appeared at the testing site, took and successfully passed the alcohol breath portion of the test, but refused the drug (urine), portion of the test.

8. The Drug and Alcohol Testing Policy provides that, since participation in testing is a requirement of employment, a refusal to participate will result in dismissal. PEDTA Ex. 1, p. 4. An employee who refuses to participate in testing is determined to have a positive test result.

9. The Drug and Alcohol Testing Policy also provides for dismissal after a second positive test result.

10. Grievant had tested positive for marijuana during a random drug test in 1996. He was removed from covered employment, underwent counseling by a substance abuse professional during a 12-week drug rehabilitation period, and was restored to full duty in 1997 after successfully completing the rehabilitation period and counseling.

11. On July 6, 2000, Tyrone Gore, PEDTA's Drug Test Administrator, again removed Grievant from covered employment as a result of his refusal to submit to the random drug test.

12. On July 13, 2000, Grievant was served with a letter dated July 12, 2000, from General Manager Lawrence Cousins, advising him that the utility shop, his duty assignment, had no “non-covered” duty assignments available, and he was being placed on administrative leave, without pay, until he had reacquired a valid CDL at his ownexpense. The letter reserved judgment about Grievant's further employment status while the agency undertook a review of the applicable drug and alcohol testing policy to determine the proper method of treating the refusal to test on July 6, 2000.

13. By letter dated July 17, 2000, the agency terminated Grievant's employment as a result of his refusal to undergo the drug portion of the mandatory random testing, pursuant to the applicable provisions of the Drug and Alcohol Testing Policy.

DISCUSSION

In disciplinary matters, the burden of proof is upon the employer to prove 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 & Environmental Resources, Docket No. 92- T&P-473 (Apr. 8, 1993); Ramey v. W. Va. Dept. of Health, Docket No. H-88-005 (Dec. 6, 1988). A preponderance of the evidence is "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. Dept. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Employees of PEDTA are classified exempt, that is, their positions are not included in the classification and compensation plan adopted by the West Virginia Division of Personnel pursuant to W. Va. Code § 29-6-10. See Simmons v. W. Va. Parkways, Economic Dev. and Tourism Auth., Docket No. 96-PEDTA-019 (July 31, 1996); Graley v. W. Va. Parkways, Economic Dev. and Tourism Auth., Docket No. 91- PEDTA-225 (Dec. 23, 1991). The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee, i.e, one in the classified service, is of a "substantial nature directly affecting rights and interests of the public." House v. Civil Serv. Comm'n, 181 W. Va. 49, 380 S.E.2d 226 (1989). "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 interests 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, 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 Service Comm'n, 141 S.E.2d 364 (W. Va. 1965)." Scragg v. Bd. of Directors W. Va. State College, Docket No. 93-BOD-436 (Dec. 30, 1994).

PEDTA dismissed Grievant from his employment in the utility shop because he refused to participate in the drug portion of the agency's Drug and Alcohol Testing Policy when he was randomly selected to submit to the test. Further, Grievant's refusal to participate was the equivalent of a positive drug test result, and as Grievant had already had one positive result, this made, two, which, under the policy, mandates employee dismissal. See Ferrell v. W. Va. Dept. of Transp., Docket No. 00-DOH-237 (Dec. 22, 2000).

It is well settled that an administrative body must abide by the remedies and procedures it establishes to conduct its own affairs. See, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1997);

Shoemaker v. W. Va. Dept. of Transp., Docket No. 95-RMA-218(Sept. 29, 1995). PEDTA's policy on drug and alcohol abuse controls that area of the agency's interaction with its covered employees. The Policy states, in pertinent part, that

> The regulations (See footnote 1) required the Agency, as an employer, to implement drug and alcohol testing programs for employees involved in job duties defined as safety-sensitive by the Federal Highway Administration. For the purpose of this policy, covered duties are those that relate to the operation and/or repair of a commercial motor vehicle as defined in 49 CFR part 382.107 and the employee is required to possess a Commercial Driver's License as a condition of employment.
>
> . . .
>
> COVERED EMPLOYEES under this policy are those who:
>
> * **Are required to possess a Commercial Drivers License to operate a commercial motor vehicle as described above (Equipment Operators); or,**
>
> * **Are subject, at any given time, to be dispatched to operate a commercial motor vehicle as described above that requires a Commercial Drivers License to operate (Specific Craftsworkers, Mechanics, other intermittent operators).**
>
> . . .
>
> **PARTICIPATION**
>
> Participation by all covered employees is a condition of employment. Refusal to participate in the testing programs is considered as refusing to test and will result in employee dismissal. Employees are to comply with all instructions received from the Breath Alcohol Technician/urine sample collector. Failure to cooperate with the Breath Alcohol Technician/urine sample collector will result in employee dismissal. A supervisory presence, with the authority to remove the employee from duty, will be maintained atthe collection site in case an employee engages in prohibited behavior associated with the drug and alcohol testing rules.

PEDTA Ex. 1. (Emphasis in original).

A careful review of the Drug and Alcohol Testing Policy, with particular attention to the circumstances of this grievance, establishes that PEDTA did not deviate from its policy in this matter. The Policy provides that refusal to participate in the drug testing program is considered as refusing to test and will result in employee dismissal. Clearly, failure to cooperate with the sample collector will result in employee dismissal. Other circumstances can also be determined to represent a refusal to test such as tampering with or attempting to adulterate a specimen or collection procedure, not reporting to the collection site in the time allotted, or inability to provide adequate urine samples without a valid medical reason. These other circumstances which can be determined to be a refusal to test are dealt with by appropriate disciplinary action which, unless it represents a second positive test result, may be dealt with by something other than dismissal. See, Ferrell, supra; Henderson v. W. Va. Div. of Highways, Docket No. 99-DOH-189 (Nov. 15, 1999). There is a marked distinction between intentional and knowing refusal to participate in the testing process and other circumstances which crop up and which, for one reason or another, are considered refusals to test, e.g., circumstances where the employee cannot provide an adequate sample without a good medical reason. PEDTA had the right to dismiss Grievant for his intentional refusal to participate in the testing program. Moreover, Grievant's conduct also amounted to the equivalent of two positive drug test results since the implementation of thePolicy in January of 1995. The Policy provides for the dismissal of an employee after two positive drug test results. But see Ferrell, supra.

Grievant does not deny that he refused to participate in the drug portion of the Policy on July 6, 2000, but does raise several affirmative defenses which will be discussed below. Therefore, PEDTA has proven the charges against Grievant by a preponderance of the evidence, and proven that dismissal was warranted under its own Drug and Alcohol Testing Policy.

AFFIRMATIVE DEFENSES

Grievant raises several defenses to his dismissal, and bears the burden of proving any defense by a preponderance of the evidence. Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1995). Grievant maintains that he was denied due process; that his dismissal was

discriminatory; and that he has been harassed by PEDTA as a result of his union activities. Grievant also maintains that his particular assignment in the utility shop was not safety-sensitive, and thus he was not required to hold a valid CDL. As noted above, Grievant voluntarily surrendered his CDL without informing PEDTA, as a result of his belief that he should not be required to hold one.

In an impressive bit of pretzel logic, Grievant asserts that, since he did not hold a safety-sensitive position, he should not have been required to hold a valid CDL, and hence would not have been subject to random drug testing. Meshed with the assertion that he should not have had to carry a CDL are claims of discrimination and harassment because of Grievant's union activities.

Regarding the CDL requirement, this Grievance Board has recently upheld PEDTA's policy of requiring Grievant and others in the utility shop to maintain valid CDL's in Patterson, et al. v. W. Va. Parkways, Economic Development and Tourism Authority, Docket No. 99-PEDTA-448 (Dec. 15, 2000). Grievant was a party to that grievance, and any assertions he makes in the instant grievance regarding the validity of PEDTA's CDL policy in the utility shop are governed by the Patterson decision, and will not be discussed in this decision.

Since it has been held that Grievant and others in the utility shop must adhere to PEDTA's CDL policy, it follows that Grievant was required to participate in PEDTA's random drug testing policy as well. PEDTA had every right to expect that Grievant would comply with all the terms of his employment, including that he obtain and maintain a valid CDL. PEDTA argues that Grievant attempted to avoid the drug test because of continued drug use. Whether Grievant believed he was making a statement with regard to the validity of the CDL policy, or whether he believed he would be able to avoid a drug test due to continued drug use is unclear, and irrelevant; when Grievant voluntarily surrendered his CDL, he disqualified himself from further employment in PEDTA's utility shop, and rendered himself subject to being removed from covered employment under the Drug and Alcohol Testing Policy. Grievant's surrender of his CDL amounted to an act of insubordination.

Insubordination involves the “willful failure or refusal to obey reasonable orders of a superior entitled to give such order.” Riddle v. Bd. of Directors/So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ.,Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a

charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). “Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.” Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. Maxey v. W. Va. Dept. of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995).

Grievant had no valid reason or excuse to let his CDL lapse while continuing to work in PEDTA's utility shop. Although he was not specifically disciplined for insubordination, the evidence certainly demonstrates that Grievant was, in fact, insubordinate.

Grievant also claims he has been discriminated against and harassed by PEDTA as a result of his union activities. Grievant presented numerous co-workers who testified to alleged acts of discrimination and harassment they had suffered at the hands of PEDTA, also as a result of their union activity. It is not necessary to discuss each and every incident which was testified to by Grievant and his co-workers on this issue, because the defense is nothing but a red herring. Grievant was dismissed because he refused to participate in a random drug test. Whether or not Grievant also engaged in union activitiesis completely irrelevant to that very basic fact, and has absolutely no bearing on his decision to refuse to participate in drug testing.

Grievant also claims he has been discriminated against with respect to the discipline imposed for refusing to participate in the random drug test, and for the discipline imposed for voluntarily surrendering his CDL. 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.” In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the 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.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). Grievant identified three co-workers who allegedly refused to participate in drug testing, or otherwise violated the testing procedures of the Policy, who were not dismissed: Tommy Graley, Mike Cottle, and Paul Perdue. Tommy Graley testified that twice when he was called for random drug testing, he could not physically produce a urine sample. The first time, he did not produce enough urine, but the tester took the sample. The second time, the tester made him stay and gave him water to drink over a period of time. Graley felt that PEDTA had no right to make him stay until he could give a sample. Both Tyrone Gore and Kenneth Schneider, the EMSI representative, (See footnote 2) testified that, according to the Drug and Alcohol Policy, once an employee makes a first attempt to provide a sample, he then has three hours to complete the test. In cases of “shy bladder”, the Policy provides that the employee be given 40 ounces of water to drink and he must be observed while drinking the water. Then the employee is given a second chance to produce a sample. If the employee still cannot produce a sample, he can go to a physician to rule out a medical reason. If no medical reason is found, the employee's “failure to provide” is considered a refusal and a positive result. LIV Test., Gore; Schneider; R. Ex. 1. Consequently, contrary to Graley's claim that PEDTA had no right to make him stay and drink water, PEDTA had every right to, and in fact, was mandated to according to the applicable provisions of the Drug and Alcohol Policy.

With regard to Grievant's claim of discrimination vis-a-vis Graley, he has failed to make a prima facie case. Grievant and Graley were not similarly situated in this instance,because Grievant flat out refused to take the drug test, whereas Graley was physically unable to provide a sample in the first attempt, but was allowed to drink water, and successfully provided a sample on the second attempt.

There was no refusal by Graley to participate in the drug test.

Mike Cottle testified that he reported to work one day, and heard Gore mention there would be a random drug test that day. Cottle was sick with a stomach virus that day, and told a co-worker, Brian Grose, to tell his supervisor he was sick and went home. LIV Test., Cottle. Subsequently, Gore testified that he called Cottle's supervisor to tell him that Cottle was being called for the random drug test, and learned that Cottle had gone home sick. Gore testified that according to the Policy, once an employee has been notified he is being called for random drug testing, Gore records it, and then if the employee leaves work, it is considered a refusal. There was a question in Gore's mind whether Cottle had been properly notified of the test prior to going to home, so Gore allowed Cottle to come back in to work to take the test, as long as he returned within the allowable three-hour period. Cottle did return and took the drug test. LIV Test., Gore. Cottle later received a written reprimand from his supervisor for leaving work without notifying him. LIV Test., Cottle.

With respect to Cottle, Grievant has failed to make a prima facie case of discrimination, because Cottle did not refuse to take the random drug test. Once he was properly notified he was being called for testing, Cottle returned to work within the allowable three-hour time period and participated in the drug test.

Paul Perdue testified he was called for random drug testing once, and upon reviewing his information, noticed the tester had the wrong identification number besidehis name. The tester excused him from taking the test that day because of the documentation error. LIV Test., Perdue. Gore testified that there are safeguards in place to ensure accurate reporting, and the error with Perdue's identification number was the only error since 1995, or approximately 300 tests. LIV Test., Gore.

Again, with respect to Perdue, Grievant has failed to make a prima facie case of discrimination. Perdue did not refuse to take the drug test; he was excused by the tester for a valid reason.

With regard to Grievant's discrimination claim regarding his CDL license, he identified another employee who had voluntarily surrendered his CDL, but had not been disciplined for that offense. Steve Light, assigned to Chelyan maintenance, had once voluntarily surrendered his CDL to the Department of Motor Vehicles, and had not been dismissed. Light testified he did give up his CDL, and told his supervisor immediately afterwards. Light assumed the CDL was optional. LIV Test., Light. General Manager Cousins informed Light that the CDL was not optional, and that he had to get

it back. LIV Test., Cousins. Light was told to contact Don Lake, who had responsibility for oversight of the CDL program. Lake called the DMV at the Kanawha Mall to see if Light could get his CDL back, and told them that Light was coming to get it. At the DMV, Light had to sign a paper agreeing that he did not surrender the CDL, and his license was returned to him. Light did not have to take the CDL test again. LIV Test., Light.

When Grievant surrendered his CDL, he was told by DMV that he would have to take the entire CDL test again if he ever wanted the license back. After PEDTA became aware Grievant had surrendered his license, he was ordered to get it back. Grievant hadto set up a date with DMV for the test, which includes a written test and a physical examination. Grievant claims he was discriminated against vis-a-vis Light because no one at PEDTA helped him get his license back. LIV Test., Boyd.

General Manager Cousins testified that Lake merely called DMV in Light's case to see if he could get the CDL back, but that neither Lake nor PEDTA made it happen for Light. LIV Test., Cousins. As no official from DMV was called to testify to this matter, it is unknown why Light was able to get the CDL back without taking the entire test again. However, the fact that Light had just given it up and informed his supervisor may have made it easier for him to retrieve the license when he did. Grievant, on the other hand, never informed PEDTA he had given up his CDL, and it was months later when he was ordered by PEDTA to get the CDL back. In any event, it appears the decision to allow Light to get his CDL back without taking the entire test again was made by DMV, not PEDTA, and Grievant's claim that PEDTA discriminated against him by not letting him get his CDL back without taking the test must fail.

Grievant also contends his due process rights were violated. On the day in question, July 6, 2000, after Grievant refused to submit to the drug test, and informed Gore that he had surrendered his CDL, he was immediately placed on administrative leave without pay until he had completed the steps necessary to reacquire a valid CDL, and pending a determination of the further ramifications of his intentional refusal to test. Subsequently, PEDTA discovered Grievant had intentionally surrendered the CDL more than three months prior to the July drug test and concealed that fact from PEDTA. Once satisfied that a refusal to test called for dismissal, PEDTA's termination letter to Grievantmade clear that the voluntary surrender of the CDL did not exempt him from the testing and the other requirements of the Drug and Alcohol Policy. Grievant claims that these various acts of discipline “subjected [him] to quadruple jeopardy with a verbal suspension, a written reprimand, a

written suspension and, eventually dismissal _ all for the same alleged infractions on July 6, 2000." Grievant's Proposed Findings of Fact and Conclusions of Law. It is common practice for employers to suspend employees with or without pay pending investigation into wrongful conduct, and then to subsequently dismiss them from employment. In those instances where the investigation fails to substantiate the charges, the employee is reinstated with back pay for the period he served the suspension. In this case, PEDTA took every procedural caution in disciplining Grievant, and Grievant has failed to show he was denied due process.

Finally, Grievant maintains that his discipline should be mitigated, and points to this Grievance Board's recent decision in Ferrell v. W. Va. Department of Transportation, Docket No. 00-DOH-237 (Dec. 22, 2000), in which the Administrative Law Judge reversed the dismissal of an employee who had been dismissed under the West Virginia Department of Transportation's ("DOT") Drug and Alcohol Policy for a second positive drug test. The grievant, Ferrell, was an Equipment Operator required to hold a CDL and thus subject to random drug testing under the Policy. The ALJ found the Federal regulations do not mandate that employees who test positive for drugs be fired; rather that rehabilitation is the critical component of the testing program. Since Ferrell had been an excellent employee for at least ten years, with only one prior disciplinary action against him, a five day suspension for testing positive for drugs, the ALJ held dismissal was too severe a penalty. Specifically, the ALJ recognized that, while DOT's Policy states clearly that a second positive result will result in dismissal,

> DOT cannot, by adopting a policy, define good cause and eliminate consideration of the employee's work record espoused in Buskirk, supra. See Conley v. Div. of Corrections, Docket No. 00-CORR-109 (June 30, 2000). DOT's Policy simply clearly defines the agency's view of good cause, and is one of the factors which must be considered.

In support of her opinion, the ALJ pointed to the recent United States Supreme Court decision in Eastern Associated Coal Corp. v. United Mine Workers of America, District 17, 2000 U.S. Lexis 8083, Appeal No. 99-1038 (Nov. 28, 2000). In Eastern, the Court upheld an "arbitrator's decision that a second positive drug test did not amount to "'just cause" for termination of an employee, where the labor contract provided that an employee could only be terminated for 'just cause'". Ferrell, supra. Finding the Court's discussion of public policy in that case instructive regarding the remedial aims of the Federal Omnibus Transportation Employee Testing Act of 1991, and the arbitrator's decision that

no “just cause” had been demonstrated for the employee's dismissal in Eastern, the ALJ found that mitigation was appropriate in Ferrell, given the employee's long-standing, excellent employment record with DOT.

PEDTA utilizes the same Alcohol and Drug Policy as the West Virginia Department of Transportation; thus, the ALJ's analysis and decision in Ferrell are precedential in determining whether “just cause” exists under that Policy for Grievant's dismissal, or whether his dismissal deserves to be mitigated. I find that it does not. In Ferrell, the ALJ took into account the fact that the Federal regulations do not require dismissal for a second positive drug test. She took into account Ferrell's excellent work record, and the fact thatthere was no evidence he had ever reported to work under the influence of drugs, and found the second positive test was not just cause for his dismissal, conditioned upon Ferrell's enrollment in a substance abuse program.

In the instant case, Grievant flat-out refused to take the mandatory random drug test, for which dismissal is also mandated by the Policy. However, unlike Eastern or Ferrell, in the case of a flat-out refusal, just cause does exist for an employee's dismissal. While rehabilitation may be the critical component of any drug testing policy, it is certainly not without limits regarding its imposition. An employee cannot simply decide to opt out of random drug testing without suffering the consequences. The whole purpose of a random drug test is to screen employees for potential drug use. If an employee has unfettered discretion to take or not take the test without risk of dismissal, then the entire underlying purpose of the test is thwarted. In this case, Grievant's second positive result was merely the consequence of refusing to take the drug test, and his insubordination in that regard cannot go unpunished. Granting Grievant a reversal of his dismissal only would serve to send a dangerous message to other employees subject to random drug testing as a condition of employment that they are free to disregard that mandate. I decline to be the messenger.

CONCLUSIONS OF LAW

1. Pursuant to W. Va. Code § 29-6A-6, 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. Ramey v. W. Va. Dept. of Health, Docket No. H-88-005 (Dec. 6, 1988). 2. PEDTA proved the charges against Grievant.

3. The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a “substantial nature directly affecting rights and interests of the public.” House v. Civil Serv. Comm'n, 181 W. Va. 49, 380 S.E.2d 226 (1989). “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 interests 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, 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 Service Comm'n, 141 S.E.2d 364 (W. Va. 1965).” Scragg v. Bd. of Directors W. Va. State College, Docket No. 93-BOD-436 (Dec. 30, 1994).

4. “An administrative body must abide by the remedies and procedures it properly establishes to conduct is affairs.” Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977); McFadden v. W. Va. Dept. of Health and 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).

5. PEDTA's Drug and Alcohol Testing Policy provides for a penalty of dismissal in the event of a refusal to test.

6. Under the circumstances present here, Grievant's refusal to participate in the testing program, under the applicable testing policy, results in dismissal. The Policy also provides that certain circumstances can be considered the same as a refusal to test andwill be considered the same as a positive test result. In either case, Grievant is subject to the penalty of dismissal from employment. See Brown v. W. Va. Dep't 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); Shoemaker v. W. Va. Dept. of Transp., Docket No. 95-RMA-218 (Sept. 29, 1995).

7. Insubordination involves the “willful failure or refusal to obey reasonable orders of a superior entitled to give such order.” Riddle v. Bd. of Directors/So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31,

1995).

8. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. Maxey v. W. Va. Dept. of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995).

7. Grievant's refusal to participate in mandatory random drug testing constitutes insubordination. 8. Grievant bears the burden of proving any affirmative defenses by a preponderance of the evidence.

9. 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." In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the 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.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

10. Grievant has failed to establish a prima facie case of discrimination.

11. Grievant has failed to establish any due process violations with respect to his removal from covered service, suspension, and subsequent dismissal. 12. Grievant has failed to establish that the discipline imposed upon him is disproportionate to the offense or otherwise arbitrary and capricious, warranting mitigation of 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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MARY JO SWARTZ

Administrative Law Judge

Dated: February 28, 2001

Footnote: 1

The U. S. Department of Transportation regulations can be found in Title 49, CFR, part 40, and part 382.

Footnote: 2

PEDTA contracts with EMSI to provide testing services under the Drug and Alcohol Policy.