BRUCE ROBERTS,

Grievant,

v. **DOCKET NO. 02-23-395**

LOGAN COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant Bruce Roberts filed this grievance against Logan County Board of Education, (Respondent) on December 2, 2002, stating:

> The Respondent has dismissed Grievant, a former regularly employed carpenter/mason, on the basis of a failed drug test. The Grievant contends that he is not subject to drug testing and that the test is invalid as it was improperly administered and the testing did not otherwise comply with the federal regulations. The Grievant additionally contends that the Respondent did not follow its own policy, has engaged in disparate treatment of the Grievant, and that dismissal by the Respondent is too harsh a penalty. The Grievant alleges a violation of West Virginia Code § 18A-2-8 and § 18A-2-7.

Grievant stated the relief sought as: “Grievant seeks reinstatement to his employment as a regularly employed carpenter/mason, retroactive wages, benefits, regular employment seniority, and the removal of all references to this dismissal from Respondent's personnel records. The Grievant also seeks interest on all monetary sums.”

A level four hearing was held in the Grievance Board's Charleston office on March 12, 2003. Grievant was represented by John E. Roush, Esq. of the W. Va. School Service Personnel Association, and Respondent was represented by counsel, Leslie Tyree, Esq. This matter became mature for decision on September 19, 2003, the deadline filing of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

At the conclusion of the hearing, Respondent requested additional time to produce documents

that had been subpoenaed by Grievant and not produced. These documents may have shown that other employees of Respondent with positive drug test results were also terminated. Respondent never produced the requested documents, but argued that such was the case, even though Superintendent David Godbey testified at the hearing that he did not believe Respondent had ever had to deal with an employee who failed a drug test. Grievant, by counsel, filed a motion stating:

> I move that pursuant to the powers granted by West Virginia Code § 18-29- 5b that you:
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> 1 * disregard the names of the employees presented to you by Respondent;
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> 2 * eliminate said names from the record;
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> 3 * enter a finding that Grievant has been a victim of disparate treatment;
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> 4 * award Grievant back pay between the level IV hearing on March 12, 2003 through July 8, 2003 payable regardless of the final outcome of the grievance; and
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> 5 * set a briefing schedule for final disposition of the case.

Two telephone conferences were held to discuss Grievant's motion. Respondent's counsel agreed to provide the names of other employees who had been terminated, and allowed Grievant's counsel to review the Board's meeting minutes and other records. No other drug test results were ever produced, and no disciplinary records of other employees who tested positive for drug use were produced. Respondent offered an affidavit by Superintendent Godbey to affirm its assertions, but any such affidavit would necessarily contradict his sworn testimony. Accordingly, Grievant's motion is GRANTED with respect to points "a" and "b." Because no evidence that other employees either tested positive fordrugs or were disciplined therefore will not be admitted, the undersigned has no reference for comparison by which to find Grievant has been subjected to disparate treatment. Point "c" and is therefore denied, and a briefing schedule was set by agreement of the parties.

Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. On November 22, 2002, Grievant was dismissed from his position as a Mason/Carpenter/Asbestos Worker. His termination letter stated, "This action is being taken due to your positive drug test. As an employee of the Logan County Board of Education, you received and signed a copy of the Drug Free Workplace Policy on November 9, 1994, [t]hereby agreeing to abide by the terms and conditions set forth in this policy." Grievant's Exhibit No. 2.

2. On September 25, 2002, Grievant was randomly selected for a drug test, that was positive for metabolites of THC (cannabinoids) at 55 ng/ml, suggesting recent marijuana use. It was the first time he had been tested.

3. Grievant denied smoking marijuana, but stated he had been in the presence of people who were smoking it. In his pretermination hearing, Grievant stated that everyday, after work, from about 3:30 p.m. until about 8:00 p.m., he visited with friends and played dominoes, and that while they played, his friends typically smoked "blunts," (See footnote 2) subjecting him to second-hand marijuana smoke.

4. Respondent's Drug-Free Workplace/Drug testing Policy states, in part:

> The Logan County Board of Education will conduct drug/alcohol testing on all bus drivers, mechanics, all Persons required to maintain a CDL, and any other person who transports students or Personnel as a part of their employment duties with the Logan County Board of Education and as required by the drug and alcohol testing rules. . . . Employees in safety sensitive positions, as defined by the Federal Highway Administration, are required to be tested in the following categories:
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> f a
> Pre-Employment
>
> g b
> Random
>
> h c
> Reasonable Cause
>
> i d
> Post-Accident
>
> j e
> return-to-Duty/Follow-up
>
> All employees to which this Policy is applicable will be tested at the initiation of this Policy. Regulations concerning Pre-employment testing will be followed.

> Procedures outlined in 49 CFR Part-219, as established by the U.S. Department of Transportation, are in Place to assure the integrity of the samples collected for analysis.
>
> . . .
>
> Alcohol and drug use is Prohibited and will result in disciplinary Action, up to and including dismissal, for any covered employee Performing safety- sensitive service.

5. Grievant's position does not require a CDL, nor does he transport students or personnel. He does drive a county vehicle, use power tools and equipment, and work in school buildings near children.

6. The drug test was administered by Occutest, a professional drug testing administrator, whose representative collected the urine sample and sent it to a Labcorp facility that is authorized by the U.S. Department of Transportation (DOT) to perform drug testing. 7. Grievant has always received good work performance evaluations, and neither his supervisor nor coworkers have ever observed him working in a way they thought was unsafe, and he never seemed to be impaired.

DISCUSSION

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). Respondent asserts grievant was subjected to random drug testing, tested positive for marijuana use, and should therefore be dismissed from employment. Grievant asserts that by the terms of Respondent's own policy, he should not have been tested, that the test did not show he used marijuana, and he should not have been terminated. "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.

Respondent's independent drug test administrator randomly selected Grievant to be tested, and did so by collecting a urine sample under controlled conditions, and sending it to a DOT-approved drug testing laboratory. The laboratory reported a level of cannabinoids in Grievant's urine of 55.0 ng/ml. Respondent's expert witness testified that a level that high was not consistent with second-hand smoke. This contradiction of Grievant's testimony calls into question his credibility. Accordingly, the undersigned must make a credibility determination. In assessing the credibility of witnesses, some factors to be considered are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and William C. Jackson. Representing the Agency before the United States Merit Systems Protection Board 152-153 (1984). Additionally, the Administrative Law Judge should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id.; Burchell v. Bd. of Trustees, Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

Grievant was well-spoken, consistent, and his demeanor was forthright. There was no evidence suggesting he had a reputation for dishonesty; in fact, several witnesses testified he was outspoken and had a tendency to say what he thought even when it caused friction with his superiors. While the possibility of retaining his job does provide a motive to prevaricate, it does not in and of itself create a presumption that he would lie. Respondent's expert, Donna Cook, on the other hand, relied on information she had no hand in developing, and studies she did not conduct and which did not duplicate the conditions under which Grievant said he was exposed to second-hand smoke. Her demeanor was likewise forthright, and she readily admitted on cross examination that cannabinoids stayed in the bloodstream for up to 30 days, and that they did accumulate. She said it was possible to get a positive result from second-hand smoke, but the studies in which this occurred were done under conditions a normal person could not stand, and the levels did not reach the 50 ng/ml level.

Ms. Cook cited a study in which 6 people played cards in a 120 ft.^{2} room for three hours, and the four non-smokers in the group tested positive at levels that did not exceed7ng/ml. (See footnote 3) She also presented copies of articles on which she relied, none of which were from peer-reviewed journals, and all but one of which appeared to have been copied from the Internet. The general trend of these articles indicated it was possible, although highly unlikely, for a person to exhibit high

enough levels of marijuana metabolites to test positive in a urine screen, from second-hand smoke.

The undersigned finds this evidence does not outweigh Grievant's assertion, and resolves the credibility determination in his favor. Accordingly, Respondent has failed to meet its burden of proving Grievant's positive drug test shows he actually used marijuana. Respondent's policy states, "Alcohol and drug use is Prohibited and will result in disciplinary Action, up to and including dismissal, for any covered employee Performing safety-sensitive service." This language does not make punishable mere positive test results, only actual use. As, in this case on these particular facts, Grievant's test result is not conclusive of actual use, it does not support disciplinary action under Respondent's policy.

Grievant also contended he should never have been tested, as he is not in a DOT- defined "safety-sensitive" position. Respondent presented no evidence that he was, only that, in the opinion of Grievant's supervisor, any employee working in a school, with power tools or driving a county vehicle, was in a safety-sensitive position. Respondent's policy, however, defines "safety sensitive" not in terms of Grievant's supervisor's common-sense approach, but in terms of Federal Highway Administration (FHA) regulations. Respondent cited no particular FHA policy, rule or regulation defining this term. The undersigned could not find a definition of “safety sensitive position” in any of the Regulations governing the FHA, however, 49 C.F.R. 382.107 defines, for purposes of drug and alcohol testing, "Safety-sensitive function" as:

> [A]ll time from the time a driver begins to work or is required to be in readiness to work until the time he/she is relieved from work and all responsibility for performing work. Safety-sensitive functions shall include:
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> > (1) All time at an employer or shipper plant, terminal, facility, or other property, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the employer;
> >
> > (2) All time inspecting equipment as required by Secs. 392.7 and 392.8 of this subchapter or otherwise inspecting, servicing, or conditioning any commercial motor vehicle at any time;
> >
> > (3) All time spent at the driving controls of a commercial motor vehicle in operation;

> (4) All time, other than driving time, in or upon any commercial motor vehicle except time spent resting in a sleeper berth (a berth conforming to the requirements of Sec. 393.76 of this subchapter);
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> (5) All time loading or unloading a vehicle, supervising, or assisting in the loading or unloading, attending a vehicle being loaded or unloaded, remaining in readiness to operate the vehicle, or in giving or receiving receipts for shipments loaded or unloaded; and
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> (6) All time repairing, obtaining assistance, or remaining in attendance upon a disabled vehicle.

"Driver" is defined therein as "any person who operates a commercial motor vehicle." As Respondent has chosen to use these regulations as the basis for its policy, its own regulation excludes Grievant from being subjected to random drug testing.

Respondent has failed to prove Grievant was under the influence of or used illegal drugs while occupying a safety-sensitive position. He was not seen to use drugs at work,was not seen to be under the influence of or impaired by drugs at work, and he does not perform a safety-sensitive function under the definition used by Respondent.

Although there is a strong public policy against illegal use of drugs in the workplace, especially our schools, even if Grievant's positive drug test were proven to be indicative of drug use, dismissal is too harsh a penalty. In a previous case concerning a state Department of Transportation employee in a safety-sensitive position, the Grievance Board held "As a long-time employee with a good work record, with only one other disciplinary action against him, with no allegation that Grievant ever operated equipment while under the influence of drugs or alcohol, with no allegation that Grievant was a habitual user, and given the rehabilitative goals of the federal law requiring random drug testing of employees holding CDLs, dismissal was too severe a penalty in this instance for a second positive drug test for marijuana." Ferrell v Dep't of Trans./Div. of Highways, Docket No. 00-DOH- 237 (Dec. 22, 2000). In that case, the respondent had a policy that explicitly mandated dismissal upon a second failed drug test. In the instant case, Grievant has an unblemished work record, does not work in a safety-sensitive position, and has only had one positive drug test. Further, Respondent's own

policy does not mandate dismissal upon a positive test, and it presented no credible evidence that other similarly-situated employees were summarily fired upon testing positive for marijuana.

The following conclusions of law support this decision:

CONCLUSIONS OF LAW

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). "The preponderance standard generallyrequires 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.

2. In assessing the credibility of witnesses, some factors to be considered are the witness': 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and William C. Jackson. Representing the Agency before the United States Merit Systems Protection Board 152-153 (1984). Additionally, the [Administrative Law Judge] should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id.; Burchell v. Bd. of Trustees, Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

3. Grievant's testimony that he had not smoked marijuana but had instead absorbed second-hand smoke was not incredible. The testimony of Respondent's expert regarding the effects of second-hand smoke on drug testing was unreliable.

4. Grievant does not perform a safety-sensitive function.

5. Even though he tested positive for marijuana metabolites, dismissal is too harsh a penalty for a long-time employee with a good work record, no record of disciplinary action, no allegation that he ever operated equipment while under the influence of drugs or alcohol, and no allegation that he was a habitual drug user. *See,* Ferrell v Dep't of Trans./Div. of Highways, Docket No. 00-DOH-237 (Dec. 22, 2000). (See footnote 4) For the foregoing reasons, this grievance is hereby **GRANTED**.

Respondent is ordered to reinstate Grievant to his position and to expunge his record of this disciplinary action. Grievant is further awarded back pay from October 7, 2002, including any lost benefits, with interest, and Respondent is ordered to credit him with all applicable seniority.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Logan County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: October 14, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

No brief was received from Respondent.

Footnote: 2

"Blunts" are hollowed-out cigars in which the tobacco is replaced by marijuana, and usually contain much more of the substance than a typical "joint" or marijuana cigarette.

Footnote: 3

Ms. Cook did not actually read the study she cited, but an online article reporting on the study, which also stated, "The authors concluded that the amount of THC metabolites detected in the urine of nonsmokers is clearly dependent on the size and ventilation of the room and on the amount of marijuana smoked." Drug Testing Quarterly, Norchem Drug Testing Laboratory, Winter, 2001.

Footnote: 4

This decision was reversed by the Kanawha County Circuit Court, Civil Action No. 00-AA-4- 0. Circuit court decisions are not considered to be precedent by the Grievance Board.