MICHAEL JOHNSON,

Grievant,

v. DOCKET NO. 04-DOH-215

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

On May 2, 2004, Grievant filed a grievance against Respondent, challenging his termination for failing a drug test. Specifically, he stated:

> I had been seeing Dr. Faro a foot doctor about my right foot. I was having a lot of pain in my right foot and I took a pill on Sunday called (Hydroco- Apap) that had been prescribed to me before, for pain. On Tuesday May 18, 2004 they gave me a urine test and it came back positive for the presence of Opiates. I feel that I was done wrong because I had a prescription that was in my name for a pain pill I took. I feel that I should have been given another urine test.

As relief, Grievant seeks reinstatement.

As a dismissal was at issue, the grievance was filed directly to level four, and a hearing was held in the Grievance Board's Charleston office on August 18, 2004. Grievant was represented by counsel, Erica Smith of Hunt & Lees, LC. Respondent was represented by counsel, Barbara Baxter. The matter became mature for decision onOctober 15, 2004, the deadline for submission of the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the evidence adduced at the level four hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant was a probationary employee working for Respondent as a Transportation Worker

2/Equipment Operator. As a requirement of his job, he holds a Commercial Driver's License (CDL) and was subject to pre-employment and random drug testing.

2. Grievant passed his pre-employment screening, but on May 18, 2004, he was randomly selected for another drug test.

3. A urine sample was collected and sent to a federally-certified laboratory in North Carolina. The sample tested positive for opiates, as did a second confirmation test.

4. Under federal laws governing testing CDL holders for controlled substances, the laboratory's Medical Review Officer (MRO) must contact the tested individual prior to reporting a positive result to the employer.

5. Dr. Ernest Raba is the MRO for Corporate Support Systems, Inc., the contractor who performed the testing for Respondent. He called Grievant on May 24, 2004 to discuss the results.

6. Grievant told Dr. Raba he had taken his mother's pills because his own doctor had refused to prescribe them to him. He did not then have a prescription for the medicine, but had one in the past. Grievant did not know what it was he had taken.

7. Grievant provided Dr. Raba with evidence that in 2002 he had had a prescription for hydrocodone. 8. Hydrocodone is not an opiate and does not show up in the type of test used on Grievant's urine. Under Federal law, Respondent is prohibited from testing for hydrocodone.

9. As Grievant could not provide Dr. Raba with any evidence that he was authorized to take the drug that showed up in the test, Dr. Raba reported the positive result to Respondent.

10. Respondent's Drug and Alcohol Testing Policy covers testing of CDL holders. The policy prohibits use of prohibited drugs at any time. It further describes the punishment for a positive drug test. Upon a first offense, the employee is to be suspended and given the opportunity to enter a treatment program with a substance abuse professional. The employee will be placed on leave status pending completion of the professional's rehabilitation plan, whereupon the employee will be retested and reinstated. If the employee fails to complete the entire plan of the substance abuse professional, he will be terminated. Upon a second offense, the employee will be terminated.

11. Respondent's Human Resources Director, Jeff Black, believed the policy required dismissal of probationary employees on a first offense. The policy makes no distinction between regular and probationary employees. Mr. Black believed the policy had been modified to this effect by a later memorandum, but it was not produced. (See footnote 1)

12. The policy was modified by two memoranda after its effective date of January 1, 1995. One, issued on November 26, 1996, changed the punishment for a first offense to a minimum 5-day suspension and treatment by a professional. The second, issuedOctober 21, 2002, modified the discipline on a second offense to require dismissal only if the second positive test occurs within five years of the first positive test.

13. Respondent has in the past terminated probationary employees for a first- offense failed drug test.

14. Grievant's supervisor, Brian Herdman, describes him as the “perfect employee” and never observed Grievant in an impaired state while at work.

DISCUSSION

When a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is upon the employee to establish that his services were satisfactory. *Bonnell v. W. Va. Dep't of Corrections*, Docket No. 89-CORR-163 (Mar. 8, 1990). However, dismissal for misconduct is disciplinary, and illegal use of drugs is misconduct, therefore the burden of proof 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; *See Wolfe v. Dep't of Transp./Div. of Highways*, Docket No. 95-DOH-491 (July 31, 1996); *Nicholson v. W. Va. Dep't of Health & Human Res./Bureau for Child Support Enforcement*, Docket No. 99-HHR-299 (Aug. 31, 1999).

However, the distinction is one that only affects who carries the burden of proof; as a practical matter, an employee who engages in misconduct is also providing unsatisfactory performance. The Division of Personnel Administrative Rule, which states in part,

> [i]f at any time during the probationary period, the appointing authority determines that the services of the employee are unsatisfactory, the appointing authority may dismiss the employee in accordance with subsection 12.2. of this rule. If the appointing authority gives the fifteen calendar days notice on or before the last day of the probationary period, butless than fifteen calendar days in advance of that date, the probationary period shall be extended fifteen days from the date of the notice and the employee shall not attain permanent status. This extension shall not apply to employees serving a twelve month probationary period.

establishes a low threshold of merely proving that Grievant's performance was unsatisfactory to

Respondent in order to justify termination of a probationer. 143 C.S.R. 1 § 10.5(a) (July 1, 2000). *Hackman v. Dep't of Transp./Div. of Motor Vehicles*, Docket No. 01-DMV-582 (Feb. 20, 2002).

Respondent easily meets this burden. Grievant does not dispute that he was properly subject to random drug testing, does not dispute the manner in which the testing was done, and does not dispute the result. In addition, the evidence shows the Statement of Grievance filed in this matter is almost entirely a work of fiction.

Dr. Raba, the medical review officer overseeing the drug test, gave credible testimony of Grievant's statements to him at the time he was questioned about the positive result. Dr. Raba reported that he called Grievant to ask if there were any circumstances that he should take into account before he reported the result to Grievant's employer. Grievant was unable to provide any legitimate grounds for having the proscribed drug in his system, so Dr. Raba reported to Respondent that Grievant failed his drug test. Up to this point, there is little dispute over the facts.

Grievant argues, however, that dismissal is too harsh a penalty for a failed drug test, even for a probationary employee such as himself, given Respondent's stated policy prescribes an attempt at rehabilitation for a first offense of this type by an employee subject to random drug testing. Respondent counters that the Division of Personnel's Administrative Rule applies, giving it the authority to dismiss Grievant, as a probationary employee, without proving the same cause as it would need to dismiss a regular employee. While it is true the Administrative Rule gives agencies this discretion, it is axiomatic that "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs. Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977)." *Morris v. Kanawha County Bd. of Educ.*, Docket No. 99-20-200 (July 27, 1999). Respondent has a policy in place that covers Grievant in this instance and, in contrast with the discretionary authority provided by the Administrative Rule, the provisions of Respondent's own policy are mandatory. Although Respondent argues its Drug and Alcohol Testing Policy only applies to permanent employees, that argument is belied by the express language in the policy. A "Covered Employee" is defined therein as an employee who is "required to possess a Commercial Drivers License to operate a commercial motor vehicle . . . (Equipment Operators)[.]" There is no exception anywhere in the policy that distinguishes a probationary or permanent employee. Instead, the distinction is made solely based on job responsibilities, and there is no dispute Grievant was required to have a CDL and was an Equipment Operator. Therefore, he was a "Covered Employee." No later

amendments to the policy, despite Mr. Black's assertion, added such a distinction. (See footnote 2)

It is also obvious, by the October, 2002 amendment to the Policy, that Respondent in general favors rehabilitation of its employees when they have substance abuse problems. That change made it possible for a back-sliding employee to retain his job even after failing a drug test a second time.

Respondent argued that Grievant was not being dismissed for misconduct, but for unacceptable performance. This argument flies in the face of the facts. Grievant's supervisor observed his work and described him as “the perfect employee.” There were no problems with Grievants work performance or reliability, and he never appeared as being under the influence of any substance while at work.

Nevertheless, while I find Grievant is entitled to reinstatement, the revised policy does mandate a minimum five-day suspension. Given that Grievant lied about the reason he failed his drug test, thirty days is more appropriate.

The following Conclusions of Law support this decision:

CONCLUSIONS OF LAW

1. 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*.

2. Respondent met its burden of proving Grievant failed a random drug test by having opiates in his system while at work.

3. The DOP Administrative Rule, which states in part,

> If at any time during the probationary period, the appointing authority determines that the services of the employee are unsatisfactory, the appointing authority may dismiss the employee in accordance with subsection 12.2. of this rule. If the appointing authority gives the fifteen calendar days notice on or before the last day of the probationary period, butless than fifteen calendar days in advance of that date, the probationary period shall be extended fifteen days from the date of the notice and the employee shall not attain permanent status. This extension shall not apply to employees serving a twelve month probationary period.

establishes a low threshold of merely proving that Grievant's performance was unsatisfactory to it. 143 C.S.R. 1 § 10.5(a) (July 1, 2000). *Hackman v. Dep't of Transp./Div. of Motor Vehicles*, Docket No. 01-DMV-582 (Feb. 20, 2002).

4. It is axiomatic that "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs. Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977)." *Morris v. Kanawha County Bd. of Educ.*, Docket No. 99-20-200 (July 27, 1999).

5. Grievant is a "covered employee" under Respondent's Drug and Alcohol Testing Policy.

6. Respondent is required by its Drug and Alcohol Testing Policy to permit a Covered Employee, upon a first-offense failed drug test, to take leave in order to seek treatment from a substance abuse professional, and to return to full duty upon completion of such treatment.

For the foregoing reasons, this grievance is **GRANTED**. Respondent is ordered to reinstate Grievant, and to convert his dismissal to a thirty-day suspension. Respondent is further ordered to permit Grievant to enter a substance abuse treatment plan in accordance with its Drug and Alcohol Testing Policy if he desires to do so. Grievant is awarded back pay (See footnote 3) and restoration of benefits as if he had been suspended for thirty days, if and only if he completes treatment and successfully returns to work. Neither the periodof the suspension or any leave used by Grievant to complete treatment applies to completion of the probationary period.

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, and such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: October 29, 2004 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Grievant objected to Respondent's request to hold the record open so additional evidence that may contain these modifications could be produced. This objection was sustained, and Respondent was not permitted to search for and enter such evidence.

Footnote: 2

While it may not seem apparent at first blush that Respondent intended to alter its authority to dismiss a probationary employee, Respondent's unsuccessful argument that it had amended the Drug and Alcohol Testing policy to make an exception for probationers is taken as an admission it did intend the Policy to apply to regular and probationary employees alike.

Footnote: 3

As no interest was requested, none is awarded. Attorney's fees and costs are not available at this level of the grievance procedure.