REBECCA A. HINKLE,

Grievant,

v. Docket No. 05-DJS-291

DIVISION OF JUVENILE SERVICES/DAVIS CENTER,

Respondent.

D E C I S I O N

Rebecca Hinkle ("Grievant"), employed by the Division of Juvenile Services ("DJS") as a Laundry Worker at the Davis Center, filed a grievance directly to level four, as is permitted by W. Va. Code § 29-6A-4(e), seeking reinstatement following her dismissal. An evidentiary hearing was conducted in the Grievance Board's Elkins office on September 20, 2005. Grievant represented herself, and DJS was represented by Steven R. Compton, Assistant Attorney General. Both parties waived their right to file post-hearing findings of fact and conclusions of law, and the grievance became mature for decision at the close of the hearing.

The following facts are undisputed.

Findings of Fact

1. Grievant was employed by DJS as a Laundry Worker at the Davis Center, a juvenile facility. Nearly all of the individuals incarcerated at the Davis Center suffer serious substance abuse problems.

2. On July 27, 2005, Davis Center Superintendent Stephanie Bond learned from the local newspaper that members of the State Police and the Tucker County Sheriff's Department had discovered marijuana, methamphetamines, drug paraphernalia, and approximately $14,000.00 in cash, at Grievant's home. An arrest warrant for Grievant'sdaughter had been issued, and Grievant was cited for possession of less than 15 grams of marijuana.

3. Superintendent Bond immediately suspended Grievant pending an investigation, and asked her to submit to a drug test the same day.

4. The results of the drug screening indicated Grievant was positive for marijuana. The nurse who completed the test also noted that the "urine was very slightly yellow in color. Employee stated she had been drinking a lot of water."

5. By letter dated July 27, 2005, Cynthia Largent-Hill, Acting Director of DJS, notified Grievant that her employment was terminated for misconduct, effective August 11, 2005, with her immediate separation from the workplace.

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 & Human Res., Docket No. 92- HHR-486 (May 17, 1993). 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 & 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). At hearing, Superintendent Bond testified that dismissal was appropriate in this situation because all employees at the Davis Center are role models for the juveniles who are incarcerated there. Further, Grievant was aware of the West Virginia State Drug-Free Workplace Policy, as indicated by the certification form she signed on October 18, 2001. That form placed Grievant on notice that any violation of the policy would subject her to disciplinary action up to and including termination.

Grievant did not challenge the test, or the policy, but stated that she had been a good employee, and that she could not distinguish her actions from those employees who partake of alcohol when off the job. (See footnote 1) Grievant's comments indicate that she was asserting discrimination, and requesting mitigation of the penalty.

"Discrimination" means 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. W. Va. Code § 29-6A-2(d). 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, grievant must show:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that she has, to her detriment, been treated by her 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.

The Bd. of Educ. of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004).

Grievant offered no specific evidence of employees consuming alcohol; however, it is reasonably certain that they do. Nevertheless, she is not similarly situated to those employees for two reasons. Grievant was found to have an illegal drug in her system, and she was charged with a crime for possession of the illegal drug. Therefore, Grievant did not prove that DJS had engaged in discrimination when it terminated her employment.

An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). See Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997). "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense thatit indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). Grievant

questions whether she should have been given the opportunity to seek rehabilitation prior to her dismissal. While that is an option, it is not required. The record does not reflect how long Grievant has worked at the Davis Center, but it has been at least fourteen years. There is no indication of any past misconduct; however, she was aware of the Drug-Free Workplace Policy as indicated by her signature on the certificate. Given the nature and notoriety of this incident, and the individuals housed at the Davis Center, the decision to impose the ultimate level of discipline was not arbitrary and capricious.

In addition to the foregoing findings of fact and discussion, the following formal conclusions of law are appropriate.

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). 2. 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 & 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). 3. DJS has proven that Grievant violated the State Drug-Free Policy, an act which constitutes "good cause" for her dismissal.

4. "Discrimination" means 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. W. Va. Code § 29-6A-2(d).

5. 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, grievant must show:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that she has, to her detriment, been treated by her 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.

The Bd. of Educ. of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004).

6. Grievant failed to show that she was similarly situated to other employees, and that DJS had engaged in discrimination.

7. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). See Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989). 8. Grievant failed to prove that her dismissal was clearly excessive, disproportionate to the offense, or an abuse of the employer's discretion.

Accordingly, the grievance is DENIED.

Any party 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.

DATE: SEPTEMBER 29, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 ***There was no evidence submitted relating to discipline imposed upon any other employee who had tested positive for marijuana.***