WARREN SHIRKEY,

Grievant,

v. **Docket No. 04-DOH-310D**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

On June 6, 2002, Grievant, Warren Shirkey, filed a grievance against his employer, the Division of Highways ("DOH"). His Statement of Grievance reads, "Did not follow fedrale [sic] or state guidelines for drug testing." The Relief Sought was "asking for 5 days with DOH[,]50 hours with quick Del[ivery][;] asking for compensation incured[,] [sic] this is retaliation do [sic] to geivance [sic] filed[.]" In essence, Grievant asserts the required guidelines for drug testing, notification of a positive result, and split sample testing were not followed. (See footnote 1)

On April 21, 2004, Grievant filed a motion for default with this Grievance Board, stating his employer had defaulted on this grievance when it failed to issue a Level III decision within the required time frames. A Level IV default hearing was held June 22, 2004, and default was granted by order dated July 30, 2004. A hearing on whether the relief requested was contrary to law or clearly wrong was held on September 30, 2004, and this issue was to become mature for decision on that day, as the parties elected not tosubmit proposals. (See footnote 2) However, Grievant contacted the Grievance Board on October 29, 2004, and stated he had changed his mind and did want to submit proposals. By letter dated November 8, 2004, the undersigned Administrative Law Judge notified the parties that Grievant's request had been granted, and this grievance would now become mature for decision on November 29, 2004, after receipt of the parties' proposed findings of fact and conclusions of law. Neither Grievant nor Respondent submitted these proposals.

Issues and Arguments

At the Level IV default remedy hearing, Grievant addressed the testimony of many witnesses at

the Level III hearing and made numerous assertions of wrongdoing by many people. Respondent objected to this testimony as not reflecting the actual testimony from the Level III hearing, and suggested the record, including the transcript and exhibits from that hearing, be admitted into the record. Grievant agreed.

Upon a review of the lower level record, the undersigned Administrative Law Judge finds the vast majority of Grievant's assertions are not borne out by the Level III Transcript. Additionally, as pointed out by the parties, a portion of Dr. Glenn Wright's testimony is missing due to a recording malfunction. Grievant's assertion that this missing testimony occurred during direct examination is again not borne by the Level III Transcript. The missing testimony occurred after both direct and cross examinations had been completed, and during the redirect portion of the examination. Further, a letter in the Level III recordnotes the parties were asked if they wished to retake the testimony of Dr. Wright, and the response from both sides was in the negative.

After a detailed review of the entire record, including the information from Level III, the undersigned Administrative Law Judge makes the following Findings of Fact. (See footnote 3)

Findings of Fact

1. Grievant is employed as a Transportation Worker 2, with the North Charleston Headquarters. This is a safety-sensitive position.

2. On May 17, 2002, Grievant was selected for random drug testing as required by state and federal law. The Code of Federal Regulations, Title 49 C.F.R. § 40 controls this testing process.

3. Grievant's sample was found positive for cocaine. (See footnote 4) Because the drug testing company did not have Grievant's correct telephone number, attempts to reach him were unsuccessful. The director of the company that obtained the samples for testing, Jim Boggs, called DOH for the number and was put through to Grievant at work. Grievant was informed he had tested positive, and Mr. Boggs set up a telephone appointment time for Dr. Wright, the Medical Review Officer ("MRO") for Mr. Boggs's company, to call Grievant to discuss possible reasons for the positive test result. (See footnote 5) Grievant was informed shortly thereafter that he would have to stand down from his safety-sensitive position. Stand-downis "[t]he practice of temporarily removing an employee from the performance of safety-sensitive functions based only on a report from a laboratory to the MRO of a confirmed positive test for a drug or drug metabolite, an adulterated test, or a substituted

test, before the MRO has completed verification of the test result." 49 C.F.R. 40.3.

4. Dr. Wright tried to call Grievant at the specified time and numerous times thereafter to discuss the test results with Grievant and left messages which were not returned. (See footnote 6) Because he could not talk to Grievant about the positive test result after these numerous attempts, he went ahead and verified a positive result to DOH on or about May 28, 2002. (See footnote 7) Resp. No. 7 at Level III, Department of Transportation Drug and Alcohol Testing Policy.

5. One of the circumstances in which an MRO may verify a result without an interview is when the MRO has made and documented "all reasonable efforts . . . to contact the employee within ten days of the date on which the MRO receives the confirmed test result from the laboratory." 49 C.F.R. 40.133(a)(1).

6. After DOH received the verified test result from Dr. Wright, Grievant was informed by letter dated May 30, 2002, he was suspended for five days pursuant to the Department of Transportation's Drug and Alcohol Testing Policy. DOH policy mandates a five-day suspension for a first offense. Grievant was directed to obtain the required evaluation by a substance abuse professional and informed he would not be returned to safety-sensitive work until he had completed the prescribed treatment plan and passedanother drug test. The requirement to see a substance abuse professional is mandated both by federal law and DOH Policy. See 49 C.F.R. 40.285 & 291.

7. On or about June 3, 2002, Grievant called Jeff Black and requested his second/split sample be tested. (See footnote 8) Contrary to Grievant's assertions, DOH did not refuse to perform the split test. The first lab sent this sample to the second lab on June 3, 2002. Dr. Wright received these test results on June 6, 2002, and the results were again positive for cocaine. (See footnote 9) Grievant's assertions that there was no record of his drug tests is incorrect as demonstrated by many of Respondent's exhibits. Resp. No. 5 at Level III.

8. Contrary to Grievant's assertions, Dr. Wright did not refuse to speak to him, and on or about June 6, 2002, Dr. Wright and Grievant discussed the drug test results. Grievant could not provide any medical reason for having tested positive for cocaine. Test. Wright, Level III Hearing.

9. Grievant also demanded the second sample be given to him to have it tested at a lab of his choice. This request was not granted, as it is not allowed.

10. Grievant saw a substance abuse professional on June 7, 2002, and Grievant was required to receive ten hours of education and to have two successive negative drug tests prior to returning to

a safety-sensitive position. Resp. Ex. 9 at Level III. This number of sessions is somewhat unusual. Test. Black, Level IV Hearing. 11. Grievant stated it took from June 7, 2002, to January 8, 2003, to complete these ten sessions. Grievant was vague as to why it took this amount of time to have ten sessions, other than his counselor went on vacation.

12. Grievant remained employed with DOH in a nonsafety-sensitive position at his regular salary while he completed these sessions with his counselor. Grievant could not be returned to his safety-sensitive position until he was released by the substance abuse professional. See 49 C.F.R. 40.285(c) & 49 C.F.R. 40.305.

13. An employer is not required by federal regulations to return the employee to a safety-sensitive position. See 49 C.F.R. 40.305.

Discussion

W. Va. Code § 29-6A-3, discusses what happens once a default has been found. The employer may request a hearing for the purpose of showing that the remedy sought by the grievant would be contrary to law or clearly wrong. W. Va. Code § 29-6A-3 states:

> In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of that presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted to comply with the law and to make the grievant whole.

When determining whether the remedy requested is contrary to law or clearly wrong, it is presumed the grievant prevailed on the merits of the grievance. This Grievance Board has placed the burden of proof on the respondent to prove by clear and convincing evidence that the remedy requested would be contrary to law or clearly wrong. This standard requires a respondent to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond areasonable doubt. Lohr v. Div. of Corr., Docket No. 99-CORR-157D (Nov. 15, 1999). This default remedy case does not fit the usual standard, as it involves the federal laws that govern drug testing, as well as a long-term DOH policy that follows these federal rules and regulations. DOH policy mandates what discipline follows a positive drug test, a five-day suspension.

Pursuant to Federal Regulations, Respondent was required to test its employees randomly, and Grievant's name was selected. Grievant failed his drug test, as it was positive for cocaine. The split test performed by another lab gave the same positive result. When a failed drug test is verified by an

MRO, that employee must be removed from his safety-sensitive position. 49 C.F.R. 40.23. Additionally, this employee must be seen by a substance abuse professional for the length of time this counselor deems is necessary. See 49 C.F.R. 40.1 & 40.11. All this is what happened here.

The statutory presumption requires the undersigned Administrative Law Judge to find Grievant prevailed on the merits. In this case that would mean finding Grievant established DOH did not follow the federal drug testing regulations and its own policy in face of overwhelming evidence to the contrary. This finding would be an absurd result, and would not be in keeping with the purpose and goal of the federal drug testing regulations, which is to keep employees, co-workers and the public safe.

The undersigned Administrative Law Judge is charged with assessing whether the remedy sought by Grievant is clearly wrong or contrary to law. This requested relief will be addressed point by point. First, Grievant requests DOH to compensate him for 50 hours of work with another employer. Pursuant to Grievant's testimony, his other employer was going to hold his position open for him, but since he took so long to finish his counseling,this employer finally had to hire someone else for the position. DOH had no control over how long Grievant took to complete his ten sessions, and Grievant was unable to give a reasonable explanation for this length of time.

Second, Grievant asserted retaliation. At the Level III hearing, there was no mention whatsoever of retaliation. Grievant did not testify at Level III, and this assertion is deemed abandoned.

Third, Grievant asserted for the first time at the Level IV default remedy hearing, that he wanted to be reimbursed for the cost of his portion of the counseling sessions. Grievant was required to go to a substance abuse professional pursuant to federal law. Apparently, this professional believed therapy would be in Grievant's best interest. This type of medical expense should not be DOH's responsibility.

Fourth, Grievant asserted he should receive overtime because he missed part of the SRIC season. It would appear Grievant missed SRIC season because he did not complete his assigned counseling sessions in a timely manner. These sessions began the first of June, and the undersigned Administrative Law Judge was given no credible reason why they were not completed sooner. Again, DOH should not be held responsible for Grievant's failure to attend these ten sessions in a timely manner.

The last issue is the removal of the five-day suspension required by DOH's policy for a first

offense. The undersigned, as an administrative law judge, does not believe she has the jurisdiction and/or authority to countermand federal regulations and long-standing DOH policy. It is clear Grievant had a verified, positive result for cocaine, and there was no testimony to contradict this finding. The undersigned Administrative Law Judge finds the evidence presented by Respondent is clear and convincing, and the suspension shouldnot be overturned in this case. To rule otherwise would be contrary to law and clearly wrong.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. When determining whether the remedy requested is contrary to law or clearly wrong, it is presumed the grievant prevailed on the merits of the grievance. W. Va. Code § 29-6A-3(a)(2).

2. The Grievance Board has determined a respondent's standard of proof that the relief sought is clearly wrong or contrary to law, once a default claim is proven, is by clear and convincing evidence. Lohr v. Div. of Corr., Docket No. 99-CORR-157D (Nov. 15, 1999). See W. Va. Code § 29-6A-3.

3. DOH has proven by clear and convincing evidence that Grievant violated both federal drug testing regulations and DOH policy when he tested positive for cocaine.

4. To grant the relief sought in this case would be contrary to law and clearly wrong.

Accordingly, this grievance is **DENIED**, and Grievant's suspension is upheld.

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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JANIS I. REYNOLDS

Administrative Law Judge

Dated: February 28, 2005

Footnote: 1

Grievant was employed in a second job with a private employer, Quick Delivery, at the time of this positive test result, and this finding resulted in Grievant's termination from this employment. Additionally, Grievant is requesting compensation for the overtime he would have received during SRIC season, but he did not present any evidence on this matter.

Footnote: 2

Grievant represented himself at Level IV, and Respondent DOH was represented by Barbara Baxter, Esq. At the Level III hearing, Grievant was represented by Alva Page, Esq.

Footnote: 3

The Level III decision dated June 25, 2004, was not considered, as the default had been filed at the time it was written.

Footnote: 4

Because of cocaine's "very unique molecule" there are no other substances that will cause a false positive in a drug test. Test. Wright, Level III Hearing.

Footnote: 5

Cocaine may used for medicinal purposes in a variety of nasal surgeries.

Footnote: 6

Grievant was not at home at the prearranged time.

Footnote: 7

Dr. Wright indicated he does not have number blocking on his telephone, and Grievant and his family would have known he placed the calls.

Footnote: 8

A "Split specimen" is "a part of the urine specimen that is sent to a first laboratory and retained unopened, and which is transported to a second laboratory in the event that the employee requests that it be tested following a verified positive test of the primary specimen or a verified adulterated or substituted test result." 49 C.F.R. 40.3

Footnote: 9

Grievant asserted numerous incorrect dates during his testimony. His assertions were in direct contradiction with the testimony of others and the attached documentation.