THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

LEE ANN MARTIN,

Grievant,

v. **Docket No. 06-DJS-211**

Denise M. Spatafore,

Administrative Law Judge

DIVISION OF JUVENILE SERVICES/

CHICK BUCKBEE JUVENILE CENTER,

Respondent.

DECISION

Lee Ann Martin ("Grievant") filed this grievance directly at level four on June 20, 2006, challenging the termination of her employment as a cook at the Chick Buckbee Juvenile Center. A level four hearing was held in Westover, West Virginia, on August 28 and September 22, 2006. Grievant represented herself in this matter, and the Division of Juvenile Services ("DJS") was represented by Steven R. Compton, Assistant Attorney General. This matter became mature for consideration at the conclusion of the hearing on September 22, 2006.

The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant was employed at Chick Buckbee as a cook; the exact date of employment is not contained in the record. 2. On May 31, 2006, Grievant was subjected to a random drug test, which tests are conducted on all employees of juvenile facilities. The test results were sent to two

separate, accredited laboratories.

3. Grievant's urine drug test was positive for cannabinoids, which indicates inactive metabolized marijuana, at a level of 150 ng/ml. She was also subjected to a blood test, which was also positive for cannabinoids at a level of 26.62 MCG/L.

4. In urine drug screens, any result greater than 50 ng/ml is considered positive. For blood testing, peak concentrations of 15-100 MCG/L are shown in individuals who have used marijuana within one to two hours, which decreases to 4-20 MCG/L twelve hours after use. Grievant's test result indicated marijuana use within a day before the test, at most.

5. Grievant has been a productive employee of DJS with no disciplinary history.

6. There was no evidence that Grievant has ever been impaired or under the influence of any controlled substance at work or at any other time.

7. At the outset of her employment, as with all state employees, Grievant signed a verification that she had read and would abide by the Division of Personnel's ("DOP") Drug- and Alcohol-Free Workplace policy.

8. Grievant denies ever having used marijuana.

9. Grievant's employment was terminated, effective June 30, 2006, as a result of her violation of the Drug- and Alcohol-Free Workplace policy.

Discussion

Dismissal of a civil service employee must 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 orofficial duty without wrongful intention. (See footnote 1) The employer bears the burden of proving the charges against the employee by a preponderance of the evidence. (See footnote 2) "Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." (See footnote 3) Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute her judgement for that of the employer. (See footnote 4)

Respondent contends that it has a "zero tolerance" policy when it comes to drug use by DJS employees. However, no specific DJS policy violation was cited as the basis of Grievant's

termination, but only the DOP policy. That policy provides, in pertinent part:

> It is the policy of West Virginia state government to ensure that its workplaces are free of alcohol, illegal drugs and controlled substances by prohibiting the use, possession, purchase, distribution, sale, or having such substances in the body system.

Further, the policy states that “having an illegal drug in the body system” is “prohibited in the workplace.” Employees who violate the policy are subject “to disciplinary action, up to and including dismissal.” In accordance with this policy, DJS contends that the presence of an illegal drug in Grievant's system, and more importantly at a level indicating recent drug use, justified the termination of her employment. Throughout this proceeding, Grievant has adamantly denied ever smoking marijuana. She contended that the only possible explanation she could “come up with” for her test result was her use of a “tan accelerator” lotion, which she applied during her frequent use of a tanning bed. Because the product contained hemp seed oil, which is derived from the marijuana plant, she believes that this lotion was the only possible cause of her positive drug test.

Unfortunately, Grievant's contentions were not supported by the evidence submitted by Respondent's expert witness, Dr. James Kraner, Chief Toxicologist for the Office of the West Virginia Medical Examiner. As Dr. Kraner explained, any product applied to the skin would normally not enter the bloodstream, and even if so, it would be in very small amounts. Because the skin acts as a barrier to protect the body from harmful substances, the metabolites shown on a positive drug test could not enter the body through the person's skin. Further, even if a small amount of the hemp seed in the lotion did enter the body, it would only show up as a very low concentration in the urine, and could not possibly show up in the blood. Moreover, Grievant's blood test result was fairly high, indicating very recent use of marijuana. Dr. Kraner further testified that, even when tests have been conducted to determine what level of marijuana enters the system through secondhand smoke, test results were at less than 15 ng/ml, while Grievant's was significantly higher at 50.

Obviously, the testimony given by Grievant and by Dr. Kraner is directly contradictory. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinationsare required. (See footnote 5) The undersigned is charged with assessing the credibility of the witnesses. Demeanor is only one of the factors to be considered in assessing the credibility of a witness. Other factors include the witness' opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the

action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of witness' information. *(See footnote 6)* Although Grievant seemed extremely forthright, remained consistent in her contentions, and is obviously very upset about her termination, her testimony regarding the tanning lotion simply is totally contradicted by qualified scientific testimony. As pointed out by Dr. Kraner, if hemp seed oil so easily entered the body system, in light of the many products on the market containing this ingredient, it would seem that numerous people would be testing positive for marijuana. Moreover, there is no evidence to dispute Dr. Kraner's qualified medical explanation of how it simply is not possible for a substance to enter the bloodstream through the skin to cause a positive test result.

It is obvious that Grievant has every reason to try to save her job and provide an explanation of some sort for her positive test result. However, the uncontradicted scientific evidence establishes that she had marijuana in her system, in an amount consistent with recent drug use. Grievant's testimony that the test result came from tanning lotion issimply not plausible. Therefore, not only has Respondent established that she violated a policy for which the penalty can be dismissal, but that she fabricated a story to cover it up.

It has been held by this Grievance Board that termination for a single positive marijuana test result is not arbitrary and capricious, when the employee works for a juvenile facility. Because many of the children housed at such facilities have drug problems of their own or come from homes with substance abuse problems, all employees of the facility must serve as role models. (See footnote 7) Therefore, the undersigned cannot find that dismissal was improper under these circumstances.

The following conclusions of law support this decision.

Conclusions of Law

1. Dismissal of a civil service employee must 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. *Buskirk v. Civil Serv. Comm'n*, 332 S.E.2d 579 (W. Va. 1985).

2. The employer bears the burden of proving the charges against the 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).

3. "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 Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996).

4. State employees are prohibited from having illegal drugs present in their system while in the workplace, and employees who violate the policy are subject "to disciplinary action, up to and including dismissal." Division of Personnel, Drug- and Alcohol-Free Workplace Policy.

5. Respondent has established by a preponderance of the evidence that Grievant violated the Drug- and Alcohol-Free Workplace Policy, for which termination of employment is an appropriate penalty. *See Hinkle v. Division of Juvenile Services*, Docket No. 05-DJS-291 (Sept. 29, 2005).

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.

Date: October 4, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Buskirk v. Civil Serv. Comm'n, 332 S.E.2d 579 (W. Va. 1985).

Footnote: 2

W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988).

Footnote: 3

Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

Footnote: 4

Jordan v. Mason County Bd. of Educ., Docket No. 99-26-8 (July 6, 1999)

Footnote: 5

Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996).

Footnote: 6

See Perdue v. Dep't of Health & Human Resources, Docket No. 93-HHR-050 (Feb. 4, 1994).

Footnote: 7

Hinkle v. Division of Juvenile Services, Docket No. 05-DJS-291 (Sept. 29, 2005).