THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

FRANK MAZZIE,
Grievant,

v. **Docket No. 2009-0872-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Frank Mazzie ("Grievant") filed this grievance directly at level three on January 13, 2009, after he was dismissed from his employment with Respondent Division of Highways, effective March 9, 2009. Grievant was notified on December 18, 2008, of his supervisor's recommendation that he be dismissed from his employment. Grievant sought as relief to be "made whole, including restoration of job, benefits and lost pay with interest." A level three hearing was held on April 21, 2009, at the Board's Westover Office before the undersigned Administrative Law Judge. Grievant appeared in person and was represented by Gordon Simmons, UE local 170. Respondent was represented by its counsel, Jennifer F. Alkire. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on May 19, 2009.

Synopsis

As an employee required to hold a commercial driver's license, Grievant was subject to random drug testing. Grievant was suspended for five days for testing positive for marijuana during a mandatory random drug testing. Respondent had adopted a drug and alcohol abuse policy that required an opportunity to rehabilitate after a first failed drug test. Respondent's policy required that Grievant provide verification to the agency that he had made arrangements with a substance abuse professional to be evaluated and receive

either inpatient or outpatient drug rehabilitation treatment. Despite warnings from Respondent, Grievant failed to follow through on his prescribed plan of rehabilitation required by Respondent's policy. Over the course of eleven months, Respondent made numerous attempts to verify that Grievant had completed the prescribed rehabilitation program. Grievant was dismissed due to his failure to comply with the agency's drug testing program requirements. Grievant offered no meaningful reason why he failed to comply with the requirements. Respondent proved by a preponderance of the evidence that Grievant's employment was terminated for good cause. This grievance is denied.

Based upon a detailed review of the record in its entirety, the undersigned makes the following Findings of Fact:

Findings of Fact

1. Grievant had been employed by the Division of Highways ("DOH") as a Transportation Worker, Equipment Operator for some six years. 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. On October 23, 2007, Grievant tested positive for marijuana.

3. DOH'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. Once the substance abuse assessment is complete, and the rehabilitation plan calls for outpatient treatment, the employee is eligible to return to work. Commercial drivers and safety-sensitive employees are assigned alternative duties until the substance abuse professional

determines that they are eligible to return to their normal job duties, at which time a return-to-duty drug test and/or alcohol test is conducted.

4. Grievant had received and indicated by his signature that he had read and understood DOH's Drug and Alcohol Testing Policy. Respondent's Exhibits 2 and 3.

5. Grievant was referred to a substance abuse professional at United Summit Center in Clarksburg, West Virginia, but chose not to use United Summit Center because his sister-in-law works at the Center.

6. Grievant chose to see a practitioner named Larry Bell at Resolutions, LLC, Bridgeport, West Virginia. Mr. Bell is not a registered substance abuse professional.[1] This was not fatal to the treatment plan because DOH informed Mr. Bell that he could obtain certification and continue the program with Grievant.

7. In a correspondence to Grievant from Jeff Black, DOH Director of Human Resources Division, dated October 31, 2007, Grievant was informed that any deviation from his prescribed rehabilitation plan would be cause for dismissal.

8. Grievant signed a "West Virginia Department of Transportation Authorization for the Release of Substance Abuse Professional Documentation," dated October 31, 2007. On this form, the following instructions are given by the employee to the treating substance abuse professional:

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[1]A substance abuse professional is defined as "[a] licensed physician (Medical Doctor or Doctor of Osteopathy); or a licensed or certified psychologist, social worker, or employee assistance professional; or an addiction counselor (certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission or by the International Certification Reciprocity Consortium/Alcohol and Other Drug Abuse). All must have knowledge of and clinical experience in the diagnosis and treatment of alcohol and controlled substances-related disorders." DRUG AND ALCOHOL TESTING POLICY 1.16, Respondent's Exhibit 1.

> At the conclusion of the treatment program, please provide our Program Coordinator with a statement indicating the employee has completed the prescribed treatment program . . . In addition, we ask that you notify the Program Coordinator if this employee deviates from the prescribed treatment plan immediately.

9. On November 7, 2007, Larry Bell notified DOH in writing that Grievant was to undergo the Alcoholics Anonymous 12-Step Recovery Program.

10. For the remainder of Grievant's employment with DOH, the agency provided him alternate job duties, leaving his Equipment Operator position unfilled.

11. Over the next eleven months, the DOH made numerous attempts to contact both Grievant and Mr. Bell to determine what stage of treatment Grievant had obtained or if he had completed the prescribed rehabilitation program.

12. The only written progress report by Mr. Bell was submitted on July 14, 2008, eight months after his initial consultation with Grievant, stating that Grievant had not yet obtained the 12-Step Program book to begin treatment. Grievant met only twice with Mr. Bell, once for the initial assessment and again in July 2008.

13. Grievant received a warning by way of correspondence from Jeff Black dated August 4, 2008, that the agency was considering his dismissal for failing to comply with his prescribed rehabilitation plan. Grievant was encouraged to demonstrate that he was, in fact, pursuing a treatment plan.

14. Grievant offered no meaningful explanation in the delay of compliance except to say that he was unable to find the 12-Step Program book, Mr. Bell had neglected to make a copy of the book for him, and that he worked a lot over the winter months.

15. On February 23, 2009, sixteen months after testing positive for marijuana; fifteen months after his initial assessment with Mr. Bell and receipt of his drug treatment

plan; and after neglecting to follow through with his prescribed rehabilitation plan, Grievant was dismissed from his employment with the DOH for failure to comply with the agency's drug testing program requirements.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *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). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Permanent 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 and 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). "The 'term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees.' *Graley v. W. Va. Parkways Economic Dev. &*

Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). *See Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002)." *Jaggers-Green v. Bur. of Empl. Programs*, Docket No. 03-BEP-026 (July 30, 2004).

Grievant presented no real challenge to the overwhelming evidence which supported his termination at either the predetermination conference or the level three hearing. The reason for Grievant's dismissal was his failure to comply with the agency's drug testing program requirements. Grievant's termination letter provided the following:

> You tested positive on a Random Drug Test administered on October 23, 2007. As a result you were prescribed a follow up treatment plan by Larry Bell, M.S., L.C.P. You were notified by letter dated October 31, 2007 that deviation from the prescribed program would result in your termination from employment. On August 4, 2008, the agency sent you a letter advising you that you must comply with the treatment program or be terminated. To date, the agency still has not received any notification from you or the Substance Abuse Professional that you have complied with the program requirements. As a result, you continue to be unable to perform you [sic] equipment operator duties as a result of your positive test.

Grievant asserts that despite terminating Grievant for failing to comply with the agency's drug testing program requirements, DOH was unable to offer any clear or direct evidence of such a deviation, or even a clear account of the nature of the treatment that was actually prescribed. The undersigned disagrees. The responsibility was that of the Grievant's to provide notification to DOH from a substance abuse professional that he had complied with a treatment program. In addition, DOH's stated policy prescribes an attempt at rehabilitation for a first offense of this type by an employee subject to random drug testing; however, this treatment period cannot be based on an open-ended time frame. Grievant had been notified on a number of occasions that deviation from his prescribed

treatment plan and failure to comply with the agency's policy would result in his dismissal. In particular, Grievant was notified by Jeff Black, Director of Human Resources Division on August 4, 2008, of the following:

> Inasmuch as it appears you have not pursued the indicated substance abuse recovery program in the 8 months that have ensued since your initial assessment, this is to advise that the agency is considering your dismissal from employment. You have the right to respond to me, either personally or in writing, for the purpose of communicating any reason you feel it is unwarranted.

"An 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). DOH has a policy in place that provides, "[e]mployees testing positive for drugs or having a breath alcohol concentration of 0.04 or greater must follow all treatment recommendations and participate in the follow-up testing program as directed by the SAP (substance abuse professional) or be subject to dismissal from employment." DOH has met it burden of proof and demonstrated that Grievant failed to comply with DOH's policy by failing to effectively begin, and certainly to complete, the 12-Step Program prescribed by Mr. Bell. Therefore, the undersigned cannot find that dismissal was improper under these circumstances.

The following Conclusions of Law support the decision reached:

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. Procedural Rules of the W. Va. Public Employees

Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. Permanent 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 and 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. "An 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).

4. DOH has met it burden of proof and demonstrated that Grievant failed to comply with DOH's drug testing policy by failing to effectively begin, and certainly to complete, the 12-Step Program prescribed by Mr. Bell. Respondent has proven by a preponderance of the evidence that Grievant's employment was terminated for good cause.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: June 30, 2009

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Ronald L. Reece
Administrative Law Judge