WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DAVID L. HICKMAN, SR.,
Grievant,

v. **Docket No. 2010-0008-DOT**

DIVISION OF HIGHWAYS,
Respondent.

D E C I S I O N

Grievant, David L. Hickman, Sr., filed this grievance against the West Virginia Department of Transportation, Division of Highways ("DOH"), Respondent on July 1, 2009, challenging his June 25, 2009, termination for a second violation of the West Virginia Department of Transportation's Drug and Alcohol Testing Policy. Grievant's statement of grievance provides:

> Comment from supervisor causes belief that urine sample was tampered with causing dismissal. Personal businesses were made available to other employers, violating policy act. On several occasions supervisor belittled me in front of several other employees on location and in meetings.

The relief requested was "immediate reinstatement to position and benefits. Privacy policy enforced."

In accordance with W. VA. CODE § 6C-2-4(a)(4) Grievant filed this matter directly to Level Three of the Grievance process. A Level Three Hearing was held before the undersigned Administrative Law Judge on October 2, 2009, at the Grievance Board's facilities in Beckley, West Virginia. Grievant appeared *pro se*, representing his interest. Respondent was present by Jeff Black, Human Resources Division, and legal counsel Jennifer F. Alkire, Esquire. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law documents on October 23, 2009. Both parties submitted closing documents.

Synopsis

As an employee required to hold a Commercial Driver's License, Grievant was subject to random drug testing. Respondent's drug and alcohol abuse policy provides an opportunity to rehabilitate after a first failed drug test. This was Grievant's second positive test, and he was dismissed in accordance with the Department of Transportation's Drug Testing Policy. Grievant did not establish that his supervisor engineered his positive drug test. Respondent established by a preponderance of the evidence good cause for the termination of Grievant's employment. Grievance Denied.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was employed by Respondent as a Transportation Worker II, Equipment Operator. Grievant had been in the employment of Respondent for approximately eight or nine months.

2. As an Equipment Operator, Grievant was required to have a Commercial Driver's License ("CDL"). Therefore, pursuant to United States Department of Transportation ("USDOT") and DOH regulations and policies, Grievant was subject to random drug and breath alcohol testing as a condition of his employment.

3. 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 consequences 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,[1] 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. (Resp. Ex. 1).

4. Drug testing requires production of a urine specimen by the subject.

5. Respondent contracts with a third party administrator (private corporation) to conduct random drug and alcohol testing on DOH employees.

6. On November 6, 2008, during a mandatory random drug testing, Grievant tested positive for cocaine. (Resp. Ex. 2).

7. Federal Drug Testing Custody and Control Forms are attached to results of DOT Control Substance Test providing the chain of custody of the urine sample. This form is generally recognized as to validate/authenticate the chain of custody. (Resp. Ex. 2,4,6).

8. Per DOT's Drug and Alcohol Testing Policy, Grievant was suspended for a minimum of five days, or until he verified through documentation to the agency that he had made arrangements with a substance abuse professional to be evaluated and receive drug rehabilitation treatment.

9. Pursuant to a November 18, 2008, letter signed by Human Resources Director, Jeff Black, Grievant was notified of his suspension. Grievant was provided specific information about the reason for his suspension, the duration of the suspension, a substance abuse professional referral and other relevant information. Grievant was informed of his responsibilities during suspension and that he would be "subjected to follow-up testing as required by Policy." (Resp. Ex. 3).

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[1]Until they are eligible to return to their normal job duties, Commercial drivers and safety sensitive employees are assigned alternative duties.

10. The November 18, 2008 suspension letter stated that any future positive controlled substance test results will be cause for dismissal. The letter also sets forth Grievant's due process rights.

11. Pursuant to a random follow-up test conducted on June 15, 2009, Grievant again tested positive for cocaine.

12. There was a Federal Drug Testing Custody and Control Form attached to Grievant's Results of the June 15, 2009, DOT Controlled Substance Test documenting and attesting to the chain of custody of Grievant's urine sample.[2] (Resp. Ex. 4).

13. Pursuant to a June 25, 2009 letter (Resp. Ex. 5) signed by Human Resources Director, Jeff Black, Grievant was informed of his termination. In relevant part, the letter stated:

> The reason for your dismissal is a second violation of the West Virginia Department of Transportation's Drug and Alcohol Testing Policy. More specifically:
>
> > The following-up urine sample you provided on June 15, 2009, has been certified by the Agency's Medical Review Officer as being positive for the presence of Cocaine. You were advised by letter dated November 18, 2008, that any future positive control substance test result will be cause for dismissal.

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[2]The Supreme Court of Appeals of West Virginia has specifically addressed whether a hearing examiner in an administrative hearing abused his discretion in admitting drug test results. The Court found no abuse of discretion where the hearing examiner found "no breaches of protocol occurred" in the submission of the specimen, and that the laboratory "did not indicate irregularities with regard to the sample." *Stewart v. W. Va. Bd. of Examiners for Registered Professional Nurses*, 197 W. Va. 386, 475 S.E.2d 478 (1996). Applying this principle to the facts here, the undersigned finds that the testing of the instant case was conducted according to established policies, and that the appropriate documents show the chain of custody was maintained. This is sufficient, absent evidence to the contrary, to establish that the testing was in fact properly conducted upon a urine specimen provided by Grievant and that cocaine was found to be present in Grievant's system. Grievant offered no reliable proof of tampering.

14. Grievant requested a second analysis of his original urine sample by another laboratory.

15. Grievant's sample was sent to another laboratory for testing. The July 11, 2009 fax stamp indicated "LabCorp." (Resp. Ex. 6).

16. The results of the split specimen testing done by a secondary laboratory also indicated positive for cocaine. (Resp. Ex. 6).

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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, a party has not met its burden of proof. *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).

Grievant had been employed by the Division of Highways for approximately eight months when he was terminated from employment as a result of testing positive for cocaine. As an equipment operator, Grievant was required to hold a commercial driver's license. Grievant was subject to random drug testing pursuant to the Federal Motor Carrier Safety Regulations (49 C.F.R. §§ 382.101, et seq.) promulgated by the United States Department of Transportation ("USDOT"), and the West Virginia Department of Transportation's ("DOT") Drug and Alcohol Testing Policy. This was Grievant's second positive test, and DOT's Policy states that a second positive test results in dismissal. Resp. Ex. 1, p.18 at ¶ 11.3. Grievant had previously tested positive in November 2008, seven months earlier. Misconduct of this nature has been found to be proper grounds upon which to dismiss a Division of Highways' employee. *Ferrell v. W. Va. Dept. of Transp.,* Docket No. 00-DOH-237 (Dec. 22, 2000), *rev'd*, *W. Va. Dept. of Transp. v. Ferrell*, Civil Action No. 01-AA-6 (Kan. Co. Cir. May 29, 2002).

In this case DOT's Drug and Alcohol Testing Policy states clearly that a second positive test will result in dismissal. Grievant readily acknowledges this information, and provides it is exactly that knowledge, coupled with his sense of responsibility and family obligations, that the undersigned needs to recognize and assign due weight when analyzing the facts of this case. Implicit in this Grievant's request for restoration is a request for mitigation of the punishment. Along with a truly heart felt equity plea, Grievant

sought to make several arguments in this case challenging the veracity of the facts and validity of the test. Grievant presented no evidence which supported his conjecture. Grievant suggested that there were alternative possibilities to explain a positive drug test other than volunteer consumption on his part.

Grievant provided that his supervisor had fostered an uncomfortable work environment for him, in particular, and specifically bragged of the ability to see to it that Grievant failed his drug test. Grievant presented for consideration his good faith belief that the integrity of the testing process *could have* been compromised. Grievant highlighted that his urine sample was not sealed in his presence and such occasion was opportunity for tampering, despite the documented chain of custody. Further, Grievant questioned the independence of the second testing facility.

It is clear to the undersigned that Grievant does not wish to lose his job; nevertheless, Respondent's position in this matter is unsympathetic and lawful. Grievant is a "covered employee" under Respondent's Drug and Alcohol Testing Policy. There is an established and unambiguous drug testing policy which complies with federal regulations, and the policy requires that the first failure of a random drug test results in an immediate five day suspension and treatment, and that a second failure results in dismissal. Grievant was covered by this policy, had notice of the policy, and was terminated in accordance with the policy.

_____Respondent has proven the charges against the Grievant. However, the undersigned may mitigate the discipline imposed if the penalty assessed is clearly excessive or clearly disproportionate to the offense. Factors to be considered in this analysis include the employee's past disciplinary record, the clarity of notice to the

employee of the rule violated, whether the employee was warned about the conduct, and mitigating circumstances. *Stewart v. W. Va. Alcohol Beverage Control Comm'n*, Docket No. 91-ABCC-137 (Sept. 19, 1991)*; Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985). Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. *See Pingley v. Div. of Corr.*, Docket No. 95-CORR-252 (July 23, 1996). The Grievance Board has held that "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 that it 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).

Respondent presented reliable evidence to verify proper notice to Grievant. Grievant presented no evidence to dispute that he was aware of the Policy. Grievant is not an employee with a long and distinguished history of employment with Respondent. Grievant's contention that his urine sample was "tampered with" is not supported by an iota of proof. Other than his own testimony, Grievant offered no evidence to substantiate a plausible explanation for the facts of this matter. This case is not appropriate for mitigation. Grievant had a verified, positive result for cocaine, and there was no reliable evidence to contradict this finding. The evidence presented by Respondent is clear and convincing; the disciplinary measure taken was in accordance with applicable policy. Under the

circumstances present here, Grievant's dismissal is proper and should not be overturned. 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. 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). In dismissal cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for dismissing an employee. *Davis v. W. Va. Dep't. of Motor Vehicles*, Docket No. 89-DMV-569 (Jan.22, 1990); *Broughton v. W. Va. Div. of Highways*, Docket No. 92-DOH-325 (Dec. 31, 1992).

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. "[M]itigation 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 that it 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). Mitigation is not warranted by the facts of this case.

4. Respondent has met its burden of proof and demonstrated by a preponderance of the evidence that Grievant violated applicable Drug and Alcohol Testing Policy and that Grievant's termination was consistent with West Virginia Department of Transportation's Drug and Alcohol Testing Policy.

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: November 4, 2009

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Landon R. Brown
Administrative Law Judge