THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ANDREW RYAN SNIDER,
Grievant,

v. **DOCKET NO. 2010-1253-DHHR**

DEPARTMENT OF HEALTH AND
HUMAN RESOURCES,
Respondent.

DECISION

This grievance was filed at level three of the grievance procedure by Grievant, Andrew Ryan Snider, on March 19, 2010, contesting the termination of his employment by Respondent for "performance deficiencies" and gross misconduct. The relief sought by Grievant is "[r]einstatement of my job, if not in Marion County then the opportunity in another county, and/or lost wages, severance pay, possible recovery of losses due to wrongful termination and defamation of character."[1]

A level three hearing was held before the undersigned Administrative Law Judge on July 21, 2010, at the Grievance Board's Westover, West Virginia office. Grievant appeared *pro se*, and Respondent was represented by Jennifer K. Akers, Assistant Attorney General. This matter became mature for decision on or about August 17, 2010, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

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[1] The Grievance Board does not award punitive or tort-like damages. *Miker v. W. Va. Univ.*, Docket No. 06-HE-133 (July 18, 2006);*Spangler v. Cabell County Bd. of Educ.,* Docket No. 03-06-375 (Mar. 15, 2004); *Walls v. Kanawha County Bd. of Educ.*, Docket No. 98-20-325 (Dec. 30, 1998); *Hall v. W. Va. Dep't of Transp*., Docket No. 96-DOH-433 (Sept. 12, 1997); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997).

Synopsis

Grievant was dismissed from his employment by Respondent after he appeared for a work related court hearing smelling of alcohol. Grievant was confronted by an Assistant Prosecuting Attorney about this, and he was offered a Breathalyzer test by a law enforcement officer, which he declined. He was advised by the Assistant Prosecuting Attorney to report to Magistrate Court for an alcohol/drug screen associated with a bond posted for him a few months before on criminal charges. Grievant did not report for this screening, nor did he speak to a supervisor prior to leaving the premises and beginning his annual leave about an hour earlier than had been approved. Respondent demonstrated that Grievant appeared for work under the influence of alcohol, and that he had violated his bond conditions. His dismissal was for just cause.

The following Findings of Fact are made based upon the record developed at the level three hearing.

Findings of Fact

1. Grievant was employed by the Department of Health and Human Resources ("HHR" or "Respondent"), as a Social Service Worker III in Marion County, West Virginia. He began his employment with Respondent on February 16, 2009. Grievant worked with youth, most of whom had been involved in some type of illicit activity, and he was required to work with law enforcement officers in Marion County, and the Marion County Prosecuting Attorney's Office on a regular basis in the course of performing his duties. The ability to work with the law enforcement community was a critical part of his job.

2. On March 2, 2010, Grievant attended the quarterly judicial review hearings before Judge Fox in Fairmont, Marion County, West Virginia, for the purpose of providing a report on the status of his HHR cases involving juveniles.

3. Leanne Hawkins, Assistant Prosecuting Attorney for Marion County, was present for judicial review hearings on March 2, 2010. Ms. Hawkins observed that Grievant appeared disheveled, and that he smelled strongly of alcohol. She sat next to him in the Courtroom, and observed that his eyes were bloodshot and glossed over. When Grievant gave his reports to the Court, she observed that he was unable to give a concise report, and his reports did not make sense. Ms. Hawkins came to the conclusion that Grievant was intoxicated, and did not believe he should be participating in the hearings.

4. William Feathers, a Child Protective Services Worker in Marion County, employed by HHR, attended the March 2, 2010 judicial review hearings. He also observed that Grievant's eyes were bloodshot, and that he smelled strongly of alcohol.

5. Ms. Hawkins notified Michelle Michael, an HHR supervisor, that she believed Grievant to be under the influence of alcohol. Ms. Michael relayed this information to Kandy Pudsell, HHR Social Services Coordinator for Marion and Monongalia Counties. Ms. Pudsell called Ms. Hawkins, who advised her of the situation and that she should have someone else cover Grievant's afternoon hearings. Ms. Pudsell asked Ms. Hawkins to tell Grievant to call his supervisor.

6. Ms. Hawkins also asked that someone from the city police department administer a Breathalyzer test to Grievant. Officer Donnie Neal of the Fairmont City Police spoke to Grievant on March 2, 2010, before lunch, and offered him a Breathalyzer test.

Grievant told Office Neal that he had used Listerine, and he declined to take the Breathalyzer test.

7. Ms. Hawkins was aware that Grievant had been arrested on December 6, 2009, and that alcohol consumption had been involved in that arrest. She believed that a condition of Grievant's bond would have been that he not consume alcohol. She spoke with someone in the Magistrate's Office and confirmed that this was a condition of Grievant's bond. Personnel in the Magistrate's Office told Ms. Hawkins to have Grievant report for a drug/alcohol screen.

8. During the lunch break, Grievant contacted his attorney. His attorney told him not to submit to any alcohol testing. Grievant stated that had he submitted to the testing he would have sat in jail for three months for breaking the conditions of his bond.

9. Ms. Hawkins advised Grievant after the lunch break that his afternoon hearings would be covered by another employee, he was to go to the Magistrate's Office for a drug/alcohol screen, and that he needed to call his supervisor. Grievant did not respond to Ms. Hawkins, but did leave the Courtroom.

10. Grievant did not report to the Magistrate's Office for a drug/alcohol screen on March 2, 2010, as Ms. Hawkins had directed him to do. Instead, Grievant left the Courthouse around 1:20 p.m., got in his vehicle, and proceeded to drive to Parkersburg, West Virginia, on a personal matter.

11. Grievant had been approved for annual leave to begin on March 2, 2010, at 2:30 p.m. Grievant did not obtain permission to begin his leave at 1:20 p.m.

12. Kim Davis, Social Services Supervisor, was Grievant's supervisor. Ms. Davis tried to contact Grievant by telephone, but Grievant did not answer his cell phone.[2] Ms. Davis told other members of her staff to cover Grievant's afternoon hearings. Ms. Davis went to the Marion County Courthouse, but was unable to locate Grievant. She called him again at 1:47 p.m., and Grievant answered the call. Grievant told Ms. Davis he was on his way to Parkersburg, and he was not going to do a drug/alcohol screen. Ms. Davis advised Grievant that he was suspended because he smelled of alcohol and had refused a Breathalyzer test, and he was not present for her to determine otherwise.

13. Grievant tried to contact Ms. Davis and Justin Ash, Child Protective Services Supervisor, by telephone beginning at 1:27 p.m. Mr. Ash did not answer Grievant's telephone call because he did not know what to tell him. Ms. Davis' cell phone was on silent, and she did not answer the call. Grievant did not go to HHR's office to talk to a supervisor prior to leaving for Parkersburg.

14. Grievant was dismissed from his employment by HHR on March 4, 2010, for "performance deficiencies and your exhibition of gross misconduct on March 2, 2010." The dismissal letter recounts the events of March 2, 2010, and concludes that Grievant's gross misconduct on March 2 "has crippled your ability to effectively work with the Marion County criminal justice system as well as your services to our agency."

15. The performance deficiencies outlined in the dismissal letter were related to Grievant's failure to report to required training on April 15, 2009, and failure to call in to

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[2] Grievant asserted that Ms. Davis had not tried to call him, pointing to his cell phone records which did not register an incoming call from Ms. Davis. However, these records would not show an incoming call unless it had been answered by Grievant.

report off work, and Grievant's failure to attend a hearing in late February 2010, which he had agreed to cover for someone else. Grievant did not report to training on April 15, 2009, and he did not call into the office to report off work. Grievant had agreed to cover a hearing for a co-worker in late February 2010, but did not do so, and did not receive a supervisor's approval to skip the hearing.[3]

16. On December 6, 2009, Grievant was arrested in Marion County, and charged with domestic battery, disorderly conduct, and two counts of obstructing an officer. Grievant had been drinking, and was belligerent during the arrest and during his arraignment toward the arresting officers and the Magistrate. The Magistrate set a cash bond of $4000, and Grievant was held at the North Central Regional Jail until his bond was posted. Grievant damaged his relationship with the law enforcement community in Marion County by his conduct during the arrest and arraignment.

17. Grievant was a probationary employee at the time of his arrest. Grievant missed work on December 7, 2009, as he was in jail, and was suspended without pay, pending an investigation. Grievant met with Paula Taylor, Community Services Manager, Mr. Ash, and Ms. Davis, on December 8, 2009. Ms. Taylor offered Grievant help with his alcohol abuse issues, and Grievant declined any assistance.

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[3] Grievant offered as an excuse for his failure to attend training that he was at a friend's house, and did not have his car or cell phone, and could not find a telephone number for the office, which had recently moved to a temporary location. Clearly, Grievant did not report to work, or properly report off work, due to the poor choices which he made the evening before. Grievant offered as an excuse for his failure to attend the hearing that he had agreed to cover that it was not his hearing, the office was short handed and really busy that day and he was covering the phones, and that his supervisor did not bother to come to work that day when she was really needed. Grievant's supervisor did not come to work because she was ill. It was not up to Grievant to decide whether covering the phones was more important than covering a hearing which he had said he would cover.

18. On December 23, 2009, the suspension was revoked and Grievant was issued a written reprimand for the December 6 incident and arrest. The written reprimand noted that "Policy Memorandum 2108, Employee Conduct, clearly states in Section VIII that " 'Employees are expected to : comply with all relevant Federal, State, and local laws. . .' By violating the above-mentioned laws, you placed your credibility with our customers and with the community at risk." The letter went on to state that Grievant be "prepared to apologize to the police officers and the magistrate who were involved in processing your arrest and arraignment," and that "[i]f there are future incidents of this nature, you will be facing further disciplinary action which may include dismissal."

19. Grievant's probationary employment period ended in February 2010.

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. *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 and 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*.

The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226

(1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee 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.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, ___,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

Grievant denied being intoxicated on March 2, 2010, and asserted that Ms. Hawkins was "in cohoots" with the Magistrate who had it in for him, and that Mr. Feathers could not be believed because he did not like Grievant.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3)

reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

First, although Grievant denied being intoxicated on March 2, 2010, he did not deny that he had been drinking. In fact, Grievant made the statement that, had he been tested, he would have sat in jail for three months for breaking the conditions of his bond, which indicates to the undersigned that Grievant had, in fact, been drinking. Although Grievant stated he wished he could have cleared his name, and sought to rely on the advice of counsel defense for his action in declining any testing for the presence of alcohol, Grievant declined the Breathalyzer test offered by Officer Neal *before* he spoke to his attorney.

Grievant asserted that Ms. Hawkins had fabricated her allegations against him because she had a vendetta against him, and was "in cohoots" with the Magistrate who set his bond, and that he was the subject of a "witch hunt." He asserted that the Magistrate he appeared before in December had it out for him, as evidenced by the fact that she set what he viewed as an "excessively high" bond for him of $4000. Ms. Hawkins testified that she barely knew Grievant, and had no personal relationship either with him or the Magistrate assigned to his arraignment in December. She stated she had been informed of Grievant's arrest in December by the Fairmont Chief of Police, who had called her to see whether she knew Grievant, because Grievant had said he knew her and she would see that the police paid for his arrest. It was her understanding that the bond was $1000 per

charge, and that the Magistrate would have released Grievant on his own recognizance, but that Grievant had been uncooperative and belligerent toward the arresting officers, and he continued to berate the Magistrate and be uncooperative during the arraignment, resulting in the Magistrate requiring a cash bond. Ms. Hawkins pointed out that she had not asked that Grievant's bond be revoked.

While Grievant and Mr. Feathers were not best friends, Grievant was unable to produce any evidence that Mr. Feathers had any reason to lie about Grievant.

It is clear that Grievant's accusations are unfounded, and that he chose to place blame on others, rather than accepting responsibility for his own actions. Ms. Hawkins was a credible witness, as was Mr. Feathers. Respondent has proven the charges against Grievant.

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. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee 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.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, ___,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

3. Respondent demonstrated good cause for dismissal of Grievant from his employment.

Accordingly, this grievance is **DENIED.**

Any party or the Division of Personnel 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: September 14, 2010