THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PAUL BURDETTE,

Grievant,

v. **Docket No: 2010-0003-DOT**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION / DIVISION OF HIGHWAYS,

Respondent.

DECISION

By letter dated June 25, 2009, Grievant Paul Burdette was notified that his employment with the West Virginia Department of Transportation/Division of Highways ("DOH") would be terminated effective July 15, 2009. The reason given for Grievant's dismissal was "a second violation of the West Virginia Department of Transportation's Drug and Alcohol Testing Policy." On July 10, 2009, Paul Burdette filed a grievance directly to level three[1] contesting the termination of his employment.[2] Grievant alleges that his employment was terminated "without good cause." As relief, he seeks "restoration of [his] job with backpay, interest, benefits and to otherwise be made whole."

A level three hearing was conducted on two separate days in the Charleston office of the West Virginia Public Employees Grievance Board. The dates for the hearing were October 15, 2009 and December 16, 2009. Grievant Burdette appeared on both days of

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[1] W. VA. CODE § 6C-2-4 (a) (4) permits an employee to proceed directly to level three to contest a discharge from employment.

[2] The grievance form is dated as signed on June 29, 2009, but it was stamped as hand delivered to the West Virginia Public Employees Grievance Board on July 10, 2009.

the hearing and was represented by Gordon Simmons, UE Local 170, WVPWU.[3] Respondent was represented by Barbara L. Baxter, Esquire, DOH Legal Division. At the conclusion of the hearing, the parties agreed to submit Proposed Findings of Fact and Conclusions of Law, the last of which was received at the Grievance Board on January 25, 2010. This grievance became mature for decision on that date.

Synopsis

Grievant tested positive for the presence of a controlled substance on two random drug tests administered by his employer roughly one year apart. Grievant did not contest the results of the first test nor the suspension that resulted therefrom. However, Grievant did contest his dismissal from employment as a result of the second positive test. Grievant avers that drug testing procedures are generally unreliable and that the required procedures were not followed in the analysis of his specific test sample. Respondent proved by a preponderance of the evidence that the required testing procedures were followed and the disciplinary action was justified.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant Burdette was employed by the DOH in 1990 as a mechanic. For several years he has been working as a Heavy Equipment Operator and classified as a Transportation Worker 3. As a Heavy Equipment Operator, Grievant was required to hold a commercial drivers license ("CDL").

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[3] West Virginia Public Workers Union.

2. Because Grievant was a Heavy Equipment Operator and was required to maintain a CDL as a condition of employment, he was considered to be employed in a safety-sensitive job and subject to mandatory random drug and alcohol testing pursuant to regulations promulgated by the United States Department of Transportation and the West Virginia Department of Transportation. 49 C.F.R. §§ 382.101, et seq. and West Virginia Department of Transportation Drug and Alcohol Testing Policy.

3. On April 20, 1995, Grievant signed a receipt acknowledging that he received a copy of the DOH Drug and Alcohol Testing Policy and that he was an employee covered by the policy. Respondent's Exhibit 1.

4. Grievant was suspended for five working days on July 25, 2008, because a random urine sample he provided on July 21, 2008, gave a positive result for marijuana. Grievant did not contest this suspension. Respondent's Exhibit 3.

5. As a result of the positive test, Grievant was required to be evaluated by a substance abuse professional prior to being allowed to return to work. Grievant was also subjected to monthly follow-up drug and alcohol tests after his return to work.

6. Grievant has been tested for drugs and alcohol, with negative results for the presence of drugs or alcohol, on each of the following dates:

February 21, 1995;	June 06, 2000;	July 25, 2002;
January 16, 2004;	June 8, 2005;	September 21, 2005;
November 2, 2006;	September 18, 2008;	November 21, 2008;
December 15, 2008;	February 19, 2009;	March 23, 2009;
April 27, 2009;	May 13, 2009.	

Grievant's Exhibits 4 through 17.

7. On June 16, 2009, Grievant was required to give a urine sample for a drug and alcohol screening pursuant to the DOT Drug and Alcohol Testing Policy. Grievant gave a split sample which means that part of the sample was used for the initial test and a part of the same sample was preserved so that Grievant could have it tested at a second separate laboratory if the first sample came back as positive.

8. All drug and alcohol testing for the DOH is conducted under the direction of a third party administrator who contracts with the agency. The company conducting the testing in June of 2009 was Joe Boggs and Associates. The collector who took Grievant's sample on June 29, 2009, was trained and qualified to collect such test samples pursuant to federal regulations.

9. Grievant's sample was properly sent to Medtox Laboratories Inc., which is a laboratory approved by the United States Department of Health and Human Services to process employment drug and alcohol test samples.[4]

10. The initial test of Grievant's sample produced a positive result for marijuana.[5] Medtox then conducted a more stringent gas chromatograph test which confirmed the presence of the marijuana metabolite in Grievant's sample in a sufficient concentration to produce a positive finding.

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[4] Respondent produced pages from the Federal Registry listing laboratories approved to process drug and alcohol samples. Medtox Laboratories Inc. was listed on page 496 of Volume 73, Number 2 of the Federal Registry dated January 3, 2008. Respondent's Exhibit 6.

[5] The tests for drugs do not measure the actual presence of the drug in the subject's urine. Rather the test confirms the presence of specific metabolites that confirm that the drug was present and processed by the test subject's system. For marijuana the metabolite is a substance identified as 9 Delta THC.

11. Joe Boggs and Associates employs Dr. Glenn Wright to be their Medical Review Officer. Dr. Wright obtained training and was certified as a Medical Review Officer in 1998. He continues to update his education with information he receives as a member of the American Association of Medical Review Officers.

12. Dr. Wright called Grievant to tell him that the test result was positive for marijuana. As the Medical Review Officer, Dr. Wright explained the results to Grievant and asked what types of prescription and over-the-counter medications Grievant was taking. He also asked Grievant if he had used hemp products, consumed marijuana in any form or had been exposed to others smoking marijuana.

13. Grievant was suffering from what he described as a stomach virus at the time of the test and was taking over-the-counter remedies to relieve the symptoms. Grievant was taking Pepto-Bismol and a pain reliever.[6] Grievant was also taking Synthroid and Lasix, which are drugs that were prescribed by his doctor. Grievant stated that he had not been drinking alcohol nor had he been around any one who was smoking marijuana.

14. None of the substances that Grievant was taking would cause a false positive in the confirmation test for the marijuana metabolite.

15. Grievant requested that his split sample be tested by a separate laboratory. The second half of the split specimen was sent to Laboratory Corporation of America ("Lab Corp").[7] When he received the split sample, the Lab Corp technician verified the

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[6] Grievant did not remember whether the pain reliever was Tylenol or Advil.

[7] Laboratory Corporation of America was listed as a certified laboratory to conduct drug and alcohol testing listed on page 495 of Volume 73, Number 2 of the Federal Registry dated January 3, 2008. Respondent's Exhibit 6.

donor number and the sample number of the split sample and that all bottle seals remained intact. Respondent's Exhibit 9.

16. The split sample submitted to Lab Corp also tested positive for marijuana metabolites.

17. There was sufficient documentation from the collector and the two laboratories to show that the chain of custody was unbroken, appropriate protocols were followed and neither bottle of the split sample had been tampered with prior to testing.

18. Prior to the Federal Government implementing a certification process and mandatory test procedures, a study of employment drug tests indicated that 60 to 70 percent of the tests produced false positives.[8] No similar study has been conducted after the implementation of the certification process and mandatory test procedures to test the impact of the changes on the accuracy of employment drug and alcohol tests.[9]

19. The certification process requires that specimen collectors, lab technicians and medical review officials receive specified training and follow stringent procedures in the collection and testing of employee drug and alcohol samples. Samples must be taken and tests conducted according to specific protocols for facilities to maintain their approved status. Laboratories certified by the United States Department of Health and Human

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[8] A false positive occurs when the test indicates the presence of a prohibited substance in the employee's system when that substance is not actually there.

[9] Testimony of Lewis L. Maltby, founder and president of the National Workrights Institute. Mr. Maltby has testified before Congress concerning drug testing and other work place issues. His comments have been featured in the New York Times, Washington Post, Wall Street Journal, Time and Newsweek. A graduate of the University of Pennsylvania College of Law, Mr. Maltby has published articles in many scholarly journals, testified as an expert witness in federal litigation and is presently an adjunct professor at the Rutgers School of Management and Labor Relations.

Services are periodically tested for accuracy with blind samples submitted by that agency.

Discussion

The sole reason Grievant was discharged from employment was that on two separate occasions he tested positive for marijuana on random drug tests. The West Virginia Department of Transportation Drug and Alcohol Testing Policy mandates that a DOH employee, working in a safety sensitive position, be dismissed after a second positive drug or alcohol test. No other factors are considered.

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 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "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). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant was a permanent state employee in the classified service. 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). *See also Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004)(per curiam). "*Oakes v. W.Va. Dept. of Finance and Administration*, *supra*, requires that a violation sufficient to support a dismissal be of a substantial nature and that if it involves a violation of a statute or official duty it must be done with wrongful intent." *Serreno v. West Va. Civil Serv. Comm'n*, 169 W. Va. 111, 115, 285 S.E.2d 899, 902 (1982)(per curiam). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. West Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988).

There is no doubt that Grievant works in a safety sensitive position. He operates heavy equipment such as backhoes, graders and large trucks for plowing snow and removing ice from the highways during dangerous weather conditions. Further his classification requires that he maintain a CDL. Because he is employed in such a position, Grievant must submit to mandatory random drug and alcohol tests. If he tests positive for a banned substance on two separate tests he must be dismissed. 49 C.F.R. §§ 382.101, et seq. and West Virginia Department of Transportation Drug and Alcohol Testing Policy ("DOH Policy"). Grievant was aware of the policy and the potential consequences of testing positive on random drug tests. Respondent's Exhibit 1.

The Grievance Board has addressed this policy and has recently confirmed that testing positive on two separate drug tests is good cause for dismissal. *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), W. Va. Sup. Ct. refused, Appeal No. 030040 (May 15, 2003); *Hickman v. Div. of Highways*, Docket No. 2010-0008-DOT (Nov. 4, 2009). In *Ferrell supra*, the Administrative Law Judge ("ALJ") found that in addition to the test results, other factors typically considered in a good cause determination[10] should be examined to decide if dismissal was warranted. On appeal, the Circuit Court of Kanawha County noted that the employee, like Grievant, was a DOH employee holding a CDL licence and operating heavy equipment. The circuit judge held that, for such an employee, a positive result on two separate drug tests constituted good cause for dismissing the employee under the state and federal regulations related to drug testing. No other factors related to good cause needed to be considered. The West Virginia Supreme Court refused to hear Mr. Ferrell's appeal. Consistent with this ruling, Grievant's long and successful employment history cannot, unfortunately, be considered as a mitigating factor.

Grievant did not contest the five-day suspension he received because of a positive result for marijuana on July 25, 2008. Rather, he asserts that he learned from that mistake and has not ingested cannabis in any form since that time. Grievant points to the negative results of seven random tests he has taken between September 2008 and May 2009 as proof of this assertion. Those tests do not negate the fact that the June 2009 test was

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[10] Factors typically considered in a "good cause" 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). "[T]he work record of a long time civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." *Buskirk v. Civil Service Comm'n*, 332 S.E.2d 579, 581 (W. Va. 1985). *Ferrell, supra*.

positive for marijuana and it is noted that Grievant also had seven negative random test results before his positive test in July 2008. Grievant's Exhibits 4 through 17; *See* Finding of Fact 6 *supra.*

Next, Grievant infers that the test result was a false positive, triggered by other substances that he was taking at the time he gave his urine. Grievant listed specific over-the-counter remedies he was using to combat a stomach virus and drugs that he had been prescribed by his physician. Dr. Wright interviewed Grievant and was made aware of all the medications Grievant was taking. Dr. Wright testified that none of those substances would cause a false positive on a drug test. He also pointed out that false positives were generally limited to the initial screening test. The gas chromatograph is much more expensive but also extremely accurate in identifying specific marijuana metabolites. Due to the expense, this test is only used as the second test to verify a positive finding. Grievant did not produce any evidence that the remedies or medications he was taking could cause a false positive result.

Grievant argues that the chain of custody for the urine sample was not complete and therefore the sample results are not reliable evidence. The Grievance Procedure does not require adherence to the formal rules of evidence and is not intended to be a procedural quagmire which non-lawyers cannot traverse. *Spahr v. Preston County Board of Education*, 182 W.Va. 726, 730, 391 S.E.2d 739, 743 (1990). However, even applying the more stringent rule of a criminal proceeding, "'It is only necessary that the trial judge, in his discretion, be satisfied that the evidence presented is genuine and, in reasonable probability, has not been tampered with.'" *State v. Dillon,* 191 W. Va. 648, 447 S.E.2d 583

(1994) (citing *State v. Davis*, 164 W. Va. 783, 266 S.E.2d 909 (1980)). The West Virginia Supreme Court of Appeals 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). *Ferrell supra.*

The Respondent's exhibits demonstrate that a certified technician obtained the split sample from Grievant, assigned discrete numbers to identify the employee and the sample, divided the single sample into two containers, labeled the containers and sealed them. The split sample was sent to Medtox where a certified lab technician verified the numbers on the two bottles and the fact that both were sealed when he received them. That technician opened and tested the contents of one bottle and placed the second bottle in storage. Upon Grievant's request for an independent test, the second bottle was shipped to Lab Corp. When Lab Corp received the second bottle, a certified Lab Corp technician verified that the numbers for the sample donor and the sample, that appeared on the bottle label, were the same as those assigned by the collecting technician. The lab technician also verified that the seals on the bottle remained intact. He then opened the sample and tested it. Based upon the evidence presented, there is more than a reasonable probability that the evidence is genuine, the samples were not tampered with, and there were no breaches in testing protocol.

Finally, Grievant presented the testimony of Lewis Maltby as to the reliability of employment drug and alcohol test generally. Mr. Maltby has extensive credentials related

to work place issues and drug testing. His testimony was engaging and informative. However, he did not provide any evidence that the testing conducted in the two laboratories involved in this case was faulty or that either laboratory has a history of giving unreliable results. Drug test results obtained by certified laboratories, pursuant to the procedures mandated by the United States Department of Health and Human Services, are admitted as evidence in criminal and civil procedures and have been relied upon by the Grievance Board, as long as the judge is satisfied that the proper protocols were followed. *Ferrell supra.* Mr. Maltby's testimony did not provide any reason why the tests conducted in this case should not be given the same credence.

The Respondent proved by a preponderance of the evidence that Grievant received a positive result for the presence of marijuana in two separate tests which were conducted just less than one year apart. Because of Grievant's classification and duties, the second positive test result was good cause for dismissal pursuant to the DOH Policy. Accordingly, the grievance is denied.

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 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

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). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. West Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988).

3. Pursuant to the state and federal regulation related to drug testing, a positive result on two separate drug tests, for a DOH employee holding a CDL licence and operating heavy equipment, constitutes good cause for dismissing the employee. 49 C.F.R. §§ 382.101, et seq. and West Virginia Department of Transportation Drug and Alcohol Testing Policy; *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), W. Va. Sup. Ct. refused, Appeal No. 030040 (May 15, 2003); *Hickman v. Div. of Highways*, Docket No. 2010-0008-DOT (Nov. 4, 2009).

4. Respondent proved by a preponderance of the evidence that Grievant received a positive result for the presence of marijuana in two separate tests which were conducted just less than one year apart. Because of Grievant's classification and duties, the second positive test result was good cause for dismissal pursuant to the Respondent's policy. West Virginia Department of Transportation Drug and Alcohol Testing Policy.

Accordingly, The 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: March 8, 2010

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE