THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

BRYAN LEE WEASE-JONES,
Grievant,

v. **Docket No. 2010-1625-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL,
Respondent.

DECISION

Bryan Lee Wease-Jones ("Grievant"), employed by the Department of Health and Human Resources ("DHHR") as a Health Service Worker at the William R. Sharpe, Jr. Hospital, filed an expedited grievance to level three, as is permitted by W. VA. CODE § 6C-2-4(a)(4), following the termination of his employment, effective May 24, 2010. Grievant seeks reinstatement and to be made whole, including lost pay, benefits, tenure and interest. An evidentiary hearing was conducted before the undersigned Administrative Law Judge in the Grievance Board's Westover office on October 1, 2010. Grievant appeared by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. DHHR was represented by Assistant Attorney General Heather L. Laick. The grievance became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on November 29, 2010.

Synopsis

Respondent was provided with a report that Grievant may have been consuming alcohol prior to transporting a patient to another hospital. Based on this report, Respondent had reasonable suspicion to conduct a secondary test. Respondent's policy also provided for the testing of other listed controlled substances. Grievant was informed

that a test would be conducted for alcohol and drugs, to which he consented. After the results of the drug test proved positive, Grievant admitted that he had used marijuana. Nothing improper about the secondary testing appeared in the record, and Respondent established good cause for the termination of Grievant's employment.

The following findings of facts are based upon the record developed at level three.

Findings of Fact

1. Grievant was employed as a Health Service Worker at William R. Sharpe, Jr. Hospital, a psychiatric facility operated by the West Virginia Department of Health and Human Resources located in Weston, West Virginia.

2. Grievant was terminated from his position on May 24, 2010, for gross misconduct based upon an alleged violation of the drug and alcohol free workplace policy.

3. Respondent alleges that on May 19, 2010, based upon a report from another health care facility, that they had reason to suspect that Grievant might have been under the influence of alcohol while on duty. Respondent asked that Grievant undergo a drug and alcohol test, which tested negative for alcohol. A few days later, Respondent was notified by the drug testing company that Grievant had a positive test for marijuana.

4. The underlying facts of this grievance began on the evening shift of May 19, 2010, when Grievant transported a patient, who had fallen at the facility, to the emergency room of Stonewall Jackson Memorial Hospital, and waited there while the patient was treated.

5. Sally Russell, a nurse at Sharpe Hospital, received a report from Stonewall Jackson Memorial Hospital's emergency room that Grievant reeked of alcohol. Ms. Russell did not testify at level three; however, a written account of the evening events was

offered by Respondent as an exhibit. Respondent's Exhibit No. 4.

6. Ms. Russell reported the following, unedited by the undersigned, on May 21, 2010, concerning the events of May 19, 2010: "I was called by Liz after 7:30PM. Mr. L was found on floor with a laceration to the back of his head. Liz was puzzled because he had been sleeping prior to the fall. Liz, Dr. Zafar, Brian Jones and Aaron or Tammy were in the room with the patient. Patient was marginally responsive to commands and non verbal. I remember Tammy kept calling the patient's name to keep him awake. I asked Dr. Zafar what his assessment was, he verbalized that he thought the patient had a seizure, since he was obtunded seemed post-ictal, and had had some spittle around his mouth. He wanted to send him to the ER for assessment.

I did not get close to the patient but did stand about 2 feet from Brian during the interaction. We got vitals and continued to discuss the patient. I did not smell any alcohol while in the room with others . . . I'm not sure how much later I got a call from Dr. Gregory at the SJMH ER. He told me the patient's BAL was 360 and I asked him to repeat it. He did and then said that his ER staff reported that 'both the Patient and his sitter both reeked of alcohol.' I did politely cast doubt on his statement by saying something like - 'I was with both the patient and the HSW but did not smell anything.' He repeated that this was firmly reported by his ER staff. I asked him if he wanted the staff member removed from duty at this time and he declined. I told him I would talk to the MD and the administrator on call and call him back. In retrospect I wish I would have told him that I would come there immediately and assess the situation myself, but I was a little panicky.

I checked with Dr. Zafar and with Liz, they both reinforced my assessment - both said they never smelled and ETOH on either, Liz said that other unit staff who had worked

with both the pt and the HSW and smelled nothing. Dr. Zafar was incredulous-asked for a repeat of the BAL and a CPK and UDS too.

I called Terry Small explained the situation and she instructed me to call Debbie Cook. I told Debbie Cook what was going on and she said she would call her 'testing guy' in and she would come here too. We agreed to let Brian stay down at SJMH since we knew that staff there were monitoring the situation.

Liz then came in with a bottle of hand sanitizer and a 20 oz. Coke bottle with yellowish liquid that smelled of alcohol. She said that patient had been drinking from the coke bottle and had the sanitizer in his room, which reportedly had been obtained from off unit groups. Dr. Zafar ordered a BAL and UDS on him too. It wasn't much later that we got work from SJMH that Mr. L admitted to drinking hand sanitizer.

Debbie and Terry stayed in my office till the testing guy came at around 1130P. I suggested that we only need do a test for alcohol, since that was the only accusation, but they disagreed." Respondent's Exhibit No. 4.

7. Once Grievant arrived back at Sharpe Hospital, Ms. Small and Ms. Cook informed him of the allegations from Stonewall Jackson Memorial Hospital and told him that they would like to conduct a secondary test. Grievant replied to Ms. Cook and Ms. Small that he had no problem with having the test administered because he had not been drinking. Grievant also indicated that he understood that he was being tested for both drugs and alcohol, he assured them that both tests would be negative.

8. Grievant signed the drug testing company's consent form in Ms. Cook's presence and was escorted to the restroom by the test administrator for a urine sample.

9. Ms. Cook indicated that the hospital always did a drug screen in addition to

testing for alcohol. The applicable policy does indicate that the sample will be tested for at least alcohol and a number of listed controlled substances.

10. Grievant's drug test results indicated that he was positive for marijuana. Ms. Small met with Grievant regarding the results of his drug test. Grievant admitted to Ms. Small that he had lied about not using drugs because he thought the marijuana would have been out of his system by the time he was tested. Grievant stated to Ms. Small that he liked to kick back and smoke a little pot now and then.

11. Ms. Small conceded that she did not get close enough to the Grievant to determine whether or not he smelled of alcohol. She indicated that when she met with Grievant after the testing had been conducted she did not notice that he lacked capacity or seemed impaired, but that testing would have been necessary even if she had not observed impairment before the test was conducted because the Respondent had received a complaint that Grievant smelled of alcohol.

12. The governing policy for testing for substance use is the *Bureau for Behavioral Health Facilities Drug and Alcohol Testing Policy*. Respondent's Exhibit No. 3.

13. That policy provides, in pertinent part, the following:

V. Procedures

2. For Cause Drug Testing Protocol

a. All current and contract employees of DHHR may be subject to testing for reasonable suspicion under any of the following circumstances;

1. If the employee's performance, behavior, appearance or odor cause reasonable suspicion that the employee is engaging in illegal drug use, inappropriate use of prescribed mediation or is under the influence of drugs or alcohol . . .

b. If any of the foregoing factors are present or observed, the person

> observing them should report then immediately to the Human Resource Director who will then contact the employee's immediate supervisor. The Human Resource Director and supervisor will meet with the employee to assess the situation. If it is found that testing should be conducted, the arrangement for the test will be done by the Human Resource Director in consultation with the Chief Executive Officer or his/her designee. If the Director of Human Resources is unavailable during normal working hours, the person who has observed any of the above-mentioned factors shall contact the employee's immediate supervisor . . .
>
> c. The reporting employee or the employee's immediate supervisor, whichever the case may be, shall immediately, but before the end of the shift, document the behavior or conditions giving rise to the report by completing the "For Cause Drug Testing Form".
>
> d. The Director of Human Resources, or the Administrator on Call, as the case may be, in consultation with the Chief Executive Officer, shall determine whether it is appropriate to require the employee to submit to drug or alcohol testing. Such person may elect to interview the employee before making a decision.
>
> f. The sample will be collected in accordance with the testing procedures established for the facility. This sample will be tested for at least the following substances: alcohol, marijuana, cocaine, opiates, amphetamines, phencyclidine (PCP), barbiturates, oxycodone, benzodiazepines, propoxyphene and methadone or derivatives thereof. The sample may be tested for other drugs as deemed prudent and/or necessary.

14. Ms. Cook noted that employees are responsible for the patient care and cannot be permitted to work impaired. Employees must be alert at all times because patients can hurt themselves, staff, or other patients. In the instant case, the patient was at another hospital, so there were also concerns that the patient could hurt a member of the public or Stonewall Jackson Hospital staff if the Grievant was impaired.

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 & 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).

Grievant was employed by DHHR as a Health Service Worker at William R. Sharpe, Jr. Hospital in Weston, West Virginia. Sharpe Hospital is a state-operated mental health facility. By letter dated May 24, 2010, Acting Chief Executive Officer Terry Small informed Grievant of her decision to dismiss him, citing, in pertinent part, the following:

> Your dismissal is the result of your violation of the drug and alcohol free workplace policy which is considered gross misconduct. On Wednesday, May 20, 2010, based on a report from another health care facility, we had reason to suspect that you might have been under the influence while on duty. We asked that you undergo a drug and alcohol test. You cooperated and performed the test. At that time, you tested negative for alcohol and your drug test was sent to the lab. Debbie Cook, Human Resource Director and I spoke to you about the issue and you assured us that you could not drink alcohol due to a medical condition and that if you did, you became very sick. You also promised us that nothing would come back on the drug test and that you were clean. On May 24, 2010, we were notified by the drug testing company that you had a positive drug test.
>
> On May 20, 2010, a meeting was held with you, Madonna Roach, Chief Nursing Executive, Janice Woofter, Assistant Chief Nursing Executive,

> Debbie Cook, Human Resource Director and me. Ms. Cook informed you that we had a problem and you indicated that you knew and reported that the drug testing company had contacted you that morning. When Ms. Cook asked what your thinking was, you said that sometimes on your days off, you like to "kick back and smoke a little pot." I asked you about what you told Ms. Cook and me the night you were tested about being clean and the promise you had made to which you replied, "I thought it would be out of my system by then." When Ms. Cook asked if you knew what would happen now, you indicated that you did. I have considered your response and have decided that your dismissal is appropriate and I will proceed with that personnel action.

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).

Grievant argued in his pre-hearing *Motion In Limine*, which was treated as a motion to exclude or suppress, as well as in his proposals, that Respondent did not have a reasonable good faith suspicion of drug usage by Grievant and violated his right to privacy in conducting a drug screen. In essence, no evidence produced by the illegal and unwarranted invasion of Grievant's privacy should be admitted in evidence against him. That is a somewhat compelling argument, and if there were any basis for it in the policy, case precedent, or statute, it would likely be the prevailing argument. However, this Grievance Board has not adopted a general "exclusionary rule" precluding admission of evidence obtained in violation of Fourth Amendment rights. *R.H.S. v. RESA*, Docket No. 96-RESA-348 (Mar. 31, 1997). Indeed, the United States Supreme Court has declined to

expand the exclusionary rule to a federal civil proceeding. *United States v. Janis*, 428 U.S. 433, 447 (1976).

Both parties do point to the West Virginia Supreme Court of Appeals' case which is controlling on the issue of drug testing. *Twigg v. Hercules Corporation*, 185 W. Va. 155, 406 S.E.2d 52 (1990), held that there were two times an employer could require drug testing of an employee: the first is when an employee's job involves public safety and the second is when the employer had reasonable good faith objective suspicion of an employee's drug use. The court stating in Syllabus Point 2 that "[D]rug testing will not be found to be violative of public policy grounded in the potential intrusion of a person's privacy where it is conducted by an employer based upon reasonable good faith objective suspicion of an employee's drug usage or while an employee's job responsibility involves public safety or the safety of others."

The Respondent has met its burden of proof in this grievance because they had reasonable suspicion to conduct the secondary testing, and it demonstrated that Grievant violated Respondent's drug and alcohol free workplace policy. Based upon the report coming from Stonewall Jackson Memorial Hospital's emergency room that Grievant smelled of an odor of alcohol, Respondent clearly had reasonable suspicion to conduct the alcohol test on Grievant. Thereafter, not only did Respondent follow its policy to test for alcohol and a list of controlled substances, the undersigned finds no violation of Grievant's right to privacy due to the undisputed fact that Grievant's job responsibility involved public safety and the safety of others.

It is important to remember that what is reasonable depends upon all the facts and circumstances of the particular situation. *R.H.S., supra*. Respondent had reasonable

suspicion to test Grievant for alcohol and complied with the standard for testing in West Virginia; Grievant was made aware that a drug screen would also be conducted pursuant to policy, to which he consented; Grievant made admissions against his own interest when confronted with the drug test result when he acknowledged marijuana use. In addition to Grievant's admissions of marijuana use, Respondent properly considered the laboratory results in deciding to terminate Grievant's employment for being in clear violation of the drug and alcohol workplace policy.

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 Bd. 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 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. *Twigg v. Hercules Corporation*, 185 W. Va. 155, 406 S.E.2d 52 (1990), held that there were two times an employer could require drug testing of an employee: the first is when an employee's job involves public safety and the second is when the employer had reasonable good faith objective suspicion of an employee's drug use.

4. Respondent had reasonable suspicion to conduct a secondary alcohol and drug screen on Grievant based on the facts and circumstances of this grievance.

5. Respondent met its burden of proof in establishing the charge of gross misconduct against the Grievant in violating its drug and alcohol free workplace policy. Grievant was dismissed 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: January 19, 2011

_____
Ronald L. Reece
Administrative Law Judge