THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JEFFREY JAY YOHO,
Grievant,

v. **DOCKET NO. 2011-0523-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

This grievance was first filed at level three of the grievance procedure by Grievant, Jeffrey Jay Yoho, on September 29, 2010, when his employer, Respondent, the Division of Highways, suspended him for five days without pay after his blood alcohol level registered above the threshold limit for employees holding a Commercial Drivers License, during random drug and alcohol testing. The statement of grievance reads:

> I failed a breathalizer [sic] due to prescribed medication and was suspended for 5 days.

The relief sought by Grievant is, "I want the 5 days suspended paid for and the 3 days annual I had to take because I couldn't return to work replaced."

A level three hearing was held before the undersigned Administrative Law Judge on January 1, 2011, at the Grievance Board's Westover, West Virginia office. Grievant appeared *pro se*, and Respondent was represented by Jason Workman, Esquire, Division of Highways Legal Division. This matter became mature for decision on or about February

16, 2011, upon receipt of Respondent's Proposed Findings of Fact and Conclusions of Law. Grievant declined the opportunity to submit written argument.

Synopsis

Grievant was suspended for five days without pay after he tested above the threshold limit for blood alcohol concentration during random drug and alcohol testing. Grievant contended that he had used an inhaler shortly before the testing, and it was the alcohol from the inhaler which had caused him to test above the threshold limit. Respondent demonstrated that Grievant did not use the inhaler during the waiting period between the first Breathalyzer and the second, and that any residual alcohol in the mouth from the inhaler would have dissipated during this waiting period.

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

Findings of Fact

1. Grievant is employed by the Division of Highways ("DOH" or "Respondent"), as a Transportation Worker 2/Equipment Operator in Marshall County, West Virginia. He began his employment with DOH on March 8, 2010, and completed his probationary period on or about September 8, 2010.

2. As an Equipment Operator, Grievant holds a Commercial Drivers License ("CDL"), and is subject to random drug and alcohol testing by DOH, and Grievant was aware of this. This testing is performed by employees of Joe Boggs & Associates.

3. Shortly after he arrived at work on September 16, 2010, Grievant was advised that he was to report to the Marshall County DOH Headquarters in Moundsville for

drug and alcohol testing. Grievant arrived at Headquarters at 8:25 a.m., and was placed in a waiting room with other DOH employees who were waiting to be tested.

4. Grievant suffers from asthma and uses an inhaler, known by the brand name ProAir. Grievant had been using the inhaler frequently during this period of time, and he used the inhaler while he was in the waiting room. The inhaler contains alcohol.

5. Robert Turner, an employee of Joe Boggs & Associates, took Grievant from the waiting room to the testing area. Grievant used his inhaler again on the way to the testing area. Mr. Turner was not aware that Grievant used his inhaler.

6. Mr. Turner administered a Breathalyzer test to Grievant. The Breathlyzer registered a blood alcohol concentration of .080.

7. When the test registers a blood alcohol concentration above .040, which is the threshold limit for a person holding a CDL, a second test is administered after at least a 15 minute wait. During this waiting period Grievant started to use his inhaler again, and Mr. Turner advised him that he was not allowed to use it during this time, and that it contained alcohol. Grievant did not use his inhaler during the time between the first and second tests.[1] Grievant did not mention to Mr. Turner that he had used his inhaler before the first test.

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[1] Although there was some discrepancy in the times noted on the testing forms, and Grievant indicated he had been allowed to use the restroom at some point during the testing, Grievant testified on cross examination that Mr. Turner told him he could not use the inhaler during the waiting period between tests, and that he did not use it during this time.

8. The second Breathalyzer was administered to Grievant by Mr. Turner 17 minutes after the first test. The Breathalyzer registered a blood alcohol concentration of .077.

9. The drop in the blood alcohol concentration was consistent with the consumption of alcohol. The alcohol residue in Grievant's mouth from use of the inhaler would have dissipated during the 17 minute wait and would have registered a negligible amount of alcohol on the test, if any.

10. Grievant admitted he drank approximately four or five beers from 4:30 p.m. to 11:00 p.m. the night before the test. Grievant is of average build and weight.

11. On September 16, 2010, Grievant was suspended from his employment for five days without pay for "a violation of the West Virginia Department of Transportation Drug and Alcohol Testing Policy," that is, testing as positive for alcohol. Grievant was also directed to provide DOH with "documentation verifying the fact that you have made arrangements to be evaluated by a substance abuse professional" prior to the conclusion of his suspension, and that he would need to be so evaluated before he could return to work. Respondent's Exhibit Number 5.

12. DOH's Drug and Alcohol Testing Policy states that, "[a] first offense positive drug result or alcohol concentration of .04 and above will carry a minimum suspension of five working days. The suspension can be longer if the employee does not comply with the Policy's requirement to consult a substance abuse professional." Respondent's Exhibit Number 3.

13. Grievant complied with the requirement that he contact a substance abuse professional, and he was allowed to return to work pending the completion of an evaluation

by a substance abuse professional. The evaluation was completed on September 28, 2010, and did not find Grievant to "meet the criteria for a diagnosis of either substance abuse or dependence," and did not recommend therapeutic intervention.

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*.

Grievant did not dispute the results of the Breathalyzer test, but alleged that the reason the test registered alcohol in his system was because he had used an inhaler for his asthma. Respondent did not seem to dispute that if a person had used an inhaler shortly before submitting to a Breathalyzer, there would be sufficient "mouth alcohol" residue to cause the test to show the presence of alcohol. However, Respondent's medical witnesses testified that the mouth alcohol residue from an inhaler would dissipate within a few minutes. The 17 minute waiting period between the first and second Breathalyzer administered to Grievant would have been a sufficient period of time for any mouth alcohol from an inhaler to have almost completely dissipated. The second test should have shown a minimal amount of alcohol, if any. Dr. Glen Wright, a Medical Review

Officer employed by Joe Boggs & Associates who reviewed the test results, testified that the drop in blood alcohol level between the first and second tests was consistent with what would be expected if someone had consumed alcohol. Respondent demonstrated that Grievant failed the random alcohol test and was subject to a five day suspension, consistent with DOH 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. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. Respondent demonstrated that Grievant tested above the threshold limit for blood alcohol concentration during random alcohol testing, and that this was the result of alcohol in Grievant's system. The five day suspension was consistent with Respondent's Policy.

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: March 4, 2011