WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MICHAEL STEPHEN SMITH,
Grievant,

v. **Docket No. 2011-0799-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/MILDRED MITCHELL-BATEMAN HOSPITAL,
Respondent.

DECISION

Grievant, Michael Smith, was employed as a registered nurse at Mildred Mitchell-Bateman Hospital ("Hospital"), which is operated by the Respondent, Department of Health and Human Resources ("DHHR"). Nurse Smith filed a level one grievance form dated November 11, 2010, contesting the termination of his employment after an employment-related drug test confirmed the presence of marijuana in his system. As relief, Grievant seeks "To get my job back". Upon the request of the Grievant, the grievance was waived to level three by Order dated December 2, 2010.[1]

After a number of continuances, a level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on April 5, 2012. Grievant appeared and was represented by Jeff Watson, Employee Representative for UE Local 170. Respondent DHHR was represented by James "Jake" Wegman, Assistant Attorney General. The grievance became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law at the West Virginia Public Employees Grievance Board on May 14, 2012.

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[1] W. VA. CODE § 6C-2-4(a)(4) authorizes a grievant to proceed directly to level three when contesting the termination of his employment.

Synopsis

Grievant was dismissed after he tested positive for the presence of marijuana in his body system while he was at the workplace. Grievant argues that there was not a sufficient reason to require him to submit to a drug test, the urine sample was not correctly collected and that dismissal was too severe under all the circumstances of the case. Grievant was observed by three co-workers having extreme difficulty staying awake. While there may have been non-drug related reasons for this behavior, it created a reasonable basis for the drug testing. Respondent proved that there was no reasonable possibility that the sample was tampered with and Respondent did not abuse its discretion in choosing to dismiss Grievant rather than impose a lesser penalty. Consequently, the grievance is DENIED.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Michael Smith, Grievant, was employed by DHHR at Mildred Mitchell-Bateman Hospital as a registered nurse. Grievant had been employed at the Hospital for nine months and has been a registered nurse for sixteen years.

2. Until the incident that led to the termination of his employment, Grievant had a good record of employment with the Hospital.

3. On October 28, 2010, Grievant was working in the dining room where patients were eating. Grievant was assigned to Unit 4 and was sitting at a table with other staff.

4. Three employees reported to their Nurse Manager, Raymond Brillantes, that

they observed Grievant behaving strangely. The employees were: Health Service Worker, Pam Hughs, Sarah McCoy and Licensed Practical Nurse ("LPN"), Jessica Kellogg. Each of these employees stated that Grievant was having difficulty staying awake, seemed unaware of his surroundings and appeared to nod off even when he was standing.

5. Nurse Manager Brillantes reported the incident to Kieth Anne Worden, Human Resources Director for the Hospital. She directed Nurse Manager Brillantes to have the employees write statements of what they observed.

6. At Mr. Brillantes' instruction, each employee wrote out their observations.[2] LPN Kellogg also completed a *Behavior Incident Report* form in which she stated that she:

> Noticed above mentioned person [Grievant Smith] appeared to be falling asleep while sitting at staff table. Also observed him standing and while walking would stagger and while standing still appeared to be falling asleep.[3]

7. Nurse Manager Brillantes gave the statements and *Behavior Incident Report* to Kieth Anne Worden the next day. Director Worden stamped the report and each of the hand-written statements of the employees as received in the Human Resources office at 11:28 a.m. on October 29, 2010.

8. On October 28, 2010, Grievant was working a double shift.[4] This was the third double shift Grievant had worked that week.

9. Grievant was called to the Human Resources office and told that, due to

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[2] The hand-written statements of each of the employees were admitted into the level three record as Respondent's Exhibits 1, 2 and 3.

[3] Respondent's Exhibit 4.

[4] A double shift occurs when an employee works a second eight hour shift immediately after completing his normal eight hour shift. This generally occurs because the employee is needed to work overtime due to another employee calling in ill.

reports of his behavior, he would be required to take a drug screening test. Grievant did not resist taking the test and did not request to have a representative present.

10. Grievant waited in Director Worden's office for the test to be administered. Director Worden testified that Grievant's behavior seemed unusual because he was "smiley."[5] Grievant was nervous about taking the drug screening test.

11. While waiting to take the drug test, Grievant explained that he had smoked marijuana a few days earlier while he was camping with friends. He was suffering from a long-term medical problem of bone spurs in his shoulder that caused him constant pain. A doctor had prescribed OxyContin[6] to relieve to the pain and Grievant had been taking this medication three times daily for about a year. Grievant had become addicted to this drug. Some time before the camping trip, Grievant changed his insurance carrier and he could no longer get the OxyContin. While on the camping trip, Grievant began to experience symptoms of withdrawal which included; nausea, cramps, vomiting and sweating. A friend offered him some marijuana to help control the nausea and vomiting and Grievant smoked some of it.[7]

12. An alcohol breath sample and a urine sample were taken from Grievant by a certified technician from Joe Boggs and Associates Inc., which is a company under

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[5] Level three testimony

[6] OxyContin (oxycodone) is a opioid pain reliever similar to morphine. It is used to treat moderate to severe pain that is expected to last for an extended period of time. OxyContin is used for around-the-clock treatment of pain. *http://www.drugs.com/oxycontin.*

[7] Grievant testified that he had not previously used marijuana since he had become a registered nurse and had not used it since. The only reason he smoked it on that weekend was to help him get through the withdrawal symptoms.

contract with DHHR to take samples for drug testing from DHHR employees. The urine sample was analyzed by Medtox Laboratories Inc. Respondent's Exhibit 5.

13. The procedure for collecting a urine sample for drug screening is set out in the Department of Health and Human Resources Bureau for Behavioral Health and Health Facilities *Drug and Alcohol Testing Policy for State Facilities/Hospitals.* Respondent's Exhibit 8. There are thirteen specific steps to be followed to ensure that the sample is not contaminated. Of these steps, the following were not followed in taking Grievant's urine sample. The collector did not: require Grievant to empty his pockets; seal the faucets in the room; add a coloring agent to the urinal water; or watch Grievant urinate into the cup. The collector did: give Grievant a sealed collection cup which Grievant unsealed; filled with urine and returned to the collector; checked the temperature of the sample; divided the sample into two samples; and sealed the samples and initialed the seals. Grievant was watching the collector take these steps. Grievant did not contaminate or dilute the sample in any way.[8]

14. Grievant was suspended from employment pending the outcome of the drug test. Respondent's Exhibit 10, letter of suspension.

15. The results of the drug screening test were verified on November 2, 2010, and received by the Hospital on November 4, 2010. The results were positive for marijuana in Grievant's system on the day that he was tested.

16. Grievant was dismissed from employment by letter dated November 3, 2010.[9]

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[8] Level three testimony of Grievant Smith.

[9] Apparently the Hospital was made aware of the test results before the actual document arrived.

Grievant was dismissed for "having an illegal drug in [his] body system" while in the workplace, in violation of West Virginia Division of Personnel Policy DOP-P2[10] and the Drug Free Workplace Act. Respondent's Exhibit 11.

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. 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.*,

[10] This policy is also referred to as the West Virginia Division of Personnel *Drug- and Alcohol-Free Workplace* policy.

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).

Grievant was required to take a drug screen test after it was reported by three of his co-workers that he was having difficulty staying awake, seemed unaware of his surroundings and appeared to nod off even when he was standing. One of these co-workers indicated that Grievant was staggering when he walked. Grievant points out that he was in the middle of his third double shift that week and it was understandable that he might be having trouble staying awake. He argues that these statements were not sufficient reasons to require him to take a drug test. He notes that the only other observation was made by Director Worden who said that Grievant was unusually "smiley."

The West Virginia Supreme Court of Appeals has held that:

> Drug testing will not be found to be violative of public policy grounded in the potential intrusion of a person's right to 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.

Syllabus Point 2, Twigg v. Hercules Corp., 185 W.Va. 155, 406 S.E.2d 52 (1990). The DHHR has determined that reasonable suspicion is present, "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 medication or is under the influence of drugs or alcohol."[11] The West Virginia Supreme Court has upheld the drug testing of a public employee for "reasonable suspicion" under a similar policy. *See Legg v. Felinton,* 637 S.E.2d 576, 219 W. Va. 478 (2006).[12] The observations reported by Grievant's co-workers are consistent with illegal drug use and provided reasonable suspicion to require a drug test under the Hospital's policy. The fact that there might be another valid reason for Grievant's behavior does not negate that fact.

Grievant argues that the drug test results are invalid because the collection technician did not follow all of the specified procedures for collecting the sample. Specifically, the technician did not: make Grievant empty his pockets; seal the faucets; nor add dye to the urinal water. The West Virginia Supreme Court of Appeals has addressed this issue. Even applying the more stringent standards of a criminal proceeding, the Court held, "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)); *See 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

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[11] Department of Health and Human Resources Bureau for Behavioral Health and Health Facilities *Drug and Alcohol Testing Policy for State Facilities/Hospitals.*

[12] The policy in *Legg, supra,* provided, "Reasonable suspicion for requiring an employee to submit to drug and/or alcohol testing shall be deemed to exist when an employee manifests physical or behavioral symptoms or reactions commonly attributed to the use of controlled substances or alcohol."

(Kan. Co. Cir. May 29, 2002), W. Va. Sup. Ct. refused, Appeal No. 030040 (May 15, 2003). In this case, Grievant admitted that; the technician gave him a sealed; empty collection cup; Grievant urinated in the cup and gave it to the technician; who then split the sample into two cups which were sealed and initialed in Grievant's presence. Grievant testified that he did not dilute or contaminate the sample. Given the additional fact that Grievant admitted to recent use of marijuana, it is reasonably probable that the test result based upon this sample is accurate.

Finally, Grievant's employment was terminated for violating West Virginia Division of Personnel Policy DOP-P2. That policy states in part:

> It is the policy of West Virginia State government to ensure that its workplaces are free of alcohol, illegal drugs and controlled substances by prohibiting the use, possession, purchase, distribution, sale, or having such substances in the body system.

The policy also states that "Employees who are in violation of the provisions of the Drug-Free Workplace Act, or this policy, shall be subject to disciplinary action, up to and including dismissal." Respondent proved by a preponderance of the evidence that Grievant violated DOP policy DOP-P2 by having a controlled substance (marijuana) in his "body system" while he was at work. Consequently, disciplinary action was mandatory. However, Grievant accurately points out that Respondent was not required to terminate his employment. Grievant notes that he had a good employment record, his use of marijuana was under unusual and difficult circumstances, and he did not try to conceal it when the issue arose. Grievant argues that under these circumstances, termination of his employment is disproportionate to the offense he committed and an abuse of discretion.

"Whether to mitigate the punishment imposed by the employer, depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case-by-case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995) (citations omitted). 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); *Vance v. W. Va. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2011-1705-MAPS (Feb. 22, 2012).

Grievant had not been working for the Hospital for a year when this incident occurred. While his employment record appears to be unblemished, it is certainly not long. Respondent points out that the patients at the Hospital are mentally and physically fragile. The presence of an employee who is impaired due to drug usage poses a significant risk to the safety of the patients as well as staff members. Therefore, the Hospital has taken a hard line on violation of the Drug Free Workplace Policy. Grievant's situation was difficult, but he had a number of better options he could have chosen rather than use of a controlled substance. While the Respondent could have chosen a lesser penalty, given the nature of its patient population and Grievant's responsibilities in their treatment,

Respondent's decision to dismiss Grievant from employment did not constitute an abuse of discretion. Accordingly, mitigation is not appropriate and 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. 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).

3. Drug testing will not be found to be violative of public policy grounded in the potential intrusion of a person's right to 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. *Syllabus Point 2, Twigg v. Hercules Corp*., 185 W.Va. 155, 406 S.E.2d 52 (1990).

4. Respondent proved that there was sufficient evidence regarding Grievant's behavior to constitute reasonable suspicion that Grievant was under the influence of a controlled substance to require that he submit to a drug screening test.

5. Respondent proved by a preponderance of the evidence that Grievant was at work while he had a controlled substance (marijuana) in his body system, in violation of Division of Personnel Policy DOP P-2, which was the grounds for the termination of his employment.

6. 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. *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996); *Vance v. W. Va. Reg'l Jail & Corr. Facility Auth*., Docket No. 2011-1705-MAPS (Feb. 22, 2012).

7. Given the totality of the circumstances, Respondent's decision to dismiss Grievant from employment did not constitute an abuse of discretion. Mitigation of the penalty is not appropriate in this matter.

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: SEPTEMBER 6, 2012

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE