THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

AMANDA NICOLE JUSTUS,

Grievant,

v. **Docket No. 2022-0365-DOT**

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant, Amanda Nicole Justus, filed an expedited level three grievance on October 25, 2021, against her employer, Respondent, Division of Highways ("DOH"), stating as follows: "[t]hey said that I failed a drug test that was taken on October 5, 2021. I asked for a hair test and they refused. I told them that I would pay for it." As relief sought, the Grievant requests, "I want my name cleared[,] my job back[,] and my out of pocket spending."

A level three hearing was held on June 7, 2022,[1] and June 30, 2022, via Zoom video conferencing before the undersigned administrative law judge who appeared from the Grievance Board's Charleston, West Virginia, office. The parties appeared from separate locations. Grievant appeared *pro se*. Grievant was unable to use the video feature for these two hearings, and instead participated by telephone via Zoom. Respondent appeared by counsel, Jack E. Clark, Esquire, Division of Highways, Legal Division. Respondent appeared by its representative, Gordon Cook, Coordinator of the DOH Drug and Alcohol Testing Program. This matter became mature for decision on

[1] *See*, Order of Continuance and Amended Notice of Hearing entered June 22, 2022, which is part of the record of his grievance.

August 15, 2022, upon the receipt of the last of the parties' proposed post-hearing written submissions.

Synopsis

Grievant was employed by Respondent as a Transportation Worker 1 Craft Worker (TW1CW). After being off work for more than thirty days, Grievant was required to submit to drug testing before returning to work. At this drug test, Grievant was unable to provide an adequate urine sample; therefore, it was considered a "refusal to test." Respondent then suspended Grievant for "at least five working days," then referred to a substance abuse professional (SAP). Grievant did not grieve this suspension. After completing the SAP's program, she was scheduled to do a series of follow-up tests, the last of which performed indicated the presence of cocaine in her sample. Respondent dismissed Grievant for violating its policy on "Drug and Alcohol Testing." Grievant grieved her dismissal asserting that she did not use cocaine, that the test results were incorrect, and that she was not given a second drug test to confirm the first test's accuracy. Respondent failed to prove by a preponderance of the evidence that Grievant's October 5, 2021, drug test was positive for the presence of cocaine and that Grievant's dismissal was warranted. Accordingly, this grievance is GRANTED.

The following Findings of Fact are based upon a review of the record created in this grievance:

Findings of Fact

1. Grievant was employed by Respondent as a Transportation Worker 1 Craft Worker (TW1CW), in McDowell County.[2] Grievant was employed by Respondent for eleven years. It is unknown what, if any, other classifications Grievant held during her tenure. Grievant's regular job duties are unknown.

2. Gordon Cook is employed by Respondent as the Coordinator of the DOH Drug and Alcohol Testing Program.

3. Grievant signed Respondent's Drug and Alcohol Testing Policy Receipt form indicating that she had received the Drug and Alcohol Testing Policy on December 10, 2019. She signed Respondent's Drug/Alcohol Testing Notification & Consent form on that same date.[3] Even though Grievant had been employed at DOH for eleven years, no older versions of these forms were presented.

4. Grievant broke her ankle at work on or about September 17, 2021, and had to be on workers' compensation leave for nine months. As Grievant was off work for more than thirty days, Respondent's policy required her to submit to a drug test before returning to work. Pursuant to its policy, Respondent scheduled Grievant for a "new pre-employment or return to service drug test," pursuant to its Substance Abuse policy, DOT 3.15.[4]

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[2] Respondent states in its proposed Findings of Fact and Conclusions of Law that Grievant was last employed as a Transportation Worker 1 Laborer (TW1LAB). However, the testimony offered at the level three hearing and in Respondent's exhibits, Grievant is identified as having held the position of TW1CW at the time of her dismissal. As such, Grievant's classification will be identified as TW1CW in this decision.

[3] *See*, Respondent's Exhibit 2, "Notification & Consent Entry Into Drug and Alcohol Testing" and "Drug and Alcohol Testing Policy Receipt."

[4] *See*, Respondent's Exhibit 2, "West Virginia Department of Transportation Policy: Substance Abuse," "Division of Highways Parkways Authority Drug and Alcohol Testing Policy," Section 6.0 "Required Tests—Drugs and Alcohol," Subsection 6.1, "Pre-Employment," Paragraph "D."

5. Grievant returned to work on June 1, 2021. Grievant was scheduled to have her "new pre-employment or return to service drug test" performed on June 16, 2021. On that day, Grievant appeared for her drug test at a MedExpress location as directed. This testing cite was over an hour and a half from where she was assigned to work. She drove herself to the testing site, but was, ultimately, unable to provide the amount of urine required for testing. Respondent's Medical Review Officer (MRO), Dr. Kirk Roberts, M.D., deemed it a "refusal to test."[5] These results were reported to Respondent's human resources office and Gordon Cook. DOH considers a "refusal to test" to be a positive test.

6. At level three, Grievant averred that she did not refuse the first drug test, explaining that she dropped and spilled her initial urine sample, and that such was her fault. Grievant did not contest that she was given the opportunity to drink liquid and try again afterward. Mr. Cook did not acknowledge that Grievant dropped her sample, but during his testimony about the events of the June 16, 2021, testing, he stated that, "[t]he MedExpress Team. . . Um . . . She had. . . Well, just. . . The details are that within a three-hour period, she could not produce ample amount of urine and the medical review officer (inaudible) refusal to test."

7. By letter dated June 17, 2021, signed by Matthew A. Ball, Assistant Director, Human Resources Division, Grievant was suspended without pay for five working days citing the "State Division of Personnel Division Administrative Rule and Section III, Chapter 15 of the Department of Transportation Administrative Operating Procedures, Drug and Alcohol Testing" policy. Mr. Cook drafted much of this letter. Grievant's

[5] *See*, Respondent's Exhibit 7, "Specimen Result Certificate," June 16, 2021.

suspension was to begin at the close of business on that same date.[6] This letter also informed Grievant that before the end of her suspension, she was to make arrangements to be evaluated by a substance abuse professional (SAP) before the end of her suspension. Grievant did not grieve this suspension.[7] This disciplinary action was deemed a "first offense" pursuant to DOH Policy 3.15, Section 11.0, "Consequences of Prohibited Conduct."

8. Grievant served her five-day suspension as directed and made the arrangements to be evaluated by a SAP, as Respondent required. Grievant contacted Dr. Frank Masters, an SAP, whose contact information was listed at the bottom of the first page of Respondent's June 17, 2021, letter.

9. Grievant was evaluated by Dr. Masters on July 13, 2021. He recommended Grievant to six hours of substance abuse disorder education which she completed on July 14, 2021. Dr. Masters stated in his July 16, 2021, letter to Mr. Cook, that Grievant had attended all of her sessions, met her treatment plan goals, and successfully complied with SAP recommendations. Dr. Masters also stated that Grievant had to produce a negative "Return-To-Duty" drug test before returning to work. In this letter, Dr. Masters further stated that, "[a]fter Ms. Justus produces a negative Return-To-Duty drug screen, please

[6] *See*, Respondent's Exhibit 3, June 17, 2021, letter.

[7] "If an employee does not grieve specific disciplinary incidents, he cannot place the merits of such discipline in issue in a subsequent grievance proceeding. *Jones v. W. Va. Dept. of Health & Human Resources,* Docket No. 96-HHR-371 (Oct. 30, 1996); *See Stamper v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dept. of Admin.*, Docket No. 93-ADMN-430 (Mar. 30, 1994). In such cases, the information contained in prior disciplinary documentation must be accepted as true. *See Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994)." *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997), *aff'd*, Monongalia Cnty. Cir. Ct. Docket No. 97-C-AP-96 (Dec. 7, 1999), *appeal refused*, W.Va. Sup Ct. App. Docket No. 001096 (July 6, 2000).

be advised that her Follow-Up Testing Plan must be observed and conducted independent of any other testing. No continuing care is recommended for Ms. Justus at this time."[8]

10. Attached to the July 16, 2021, letter was Dr. Masters' "Follow-Up Testing Plan," which required Grievant to be tested once each week for the first two months following her return to duties, then two tests each month in month 3, one test each month for months four through six, and one test each quarter for months seven through twelve.

11. Grievant complied with her SAP's testing schedule and each of her tests was negative for drugs until October 5, 2021. On that date, Grievant appeared at the same MedExpress as before for one of her SAP follow-up drug tests, and provided a urine sample. The test results for this test was positive for the presence of cocaine.[9] The MRO, Dr. Brian Heinen, verified the drug test results on October 19, 2021, and reported the same to Mr. Cook on that date. Grievant was informed of her these test results on October 19, 2021.

12. It took MRO Heinin from October 5, 2021, until October 19, 2021, to certify the October 5, 2021, testing results. MRO Roberts verified Grievant's June 16, 2021, test results one day later on June 17, 2021.

13. By letter dated October 19, 2021, Respondent informed Grievant that she was being dismissed from employment effective November 3, 2021, for her "violation of the West Virginia Department of Transportation Drug and Alcohol Testing Policy," in that the urine sample she provided on "October 5, 2021, [was] certified by the Agency's

[8] *See*, Respondent's Exhibit 4, Letter from Dr. Frank Masters dated July 16, 2021.
[9] *See*, Respondent's Exhibit 5, "Specimen Result Certificate," signed by the MRO on October 19, 2021.

Medical Review Officer as being positive for the presence of cocaine."[10] This was Grievant's second violation of the WVDOT Substance Abuse Policy, Drug and Alcohol Testing Policy since June 2021.

14. Neither Respondent nor Grievant called Dr. Masters, the person who collected Grievant's sample at MedExpress on October 5, 2021, or Dr. Brian N. Heinin, the MRO who certified Grievant's October 5, 2021, test results.

15. On October 28, 2021, Grievant had her own drug test performed and the results were negative for the presence of drugs, such as cocaine.[11]

16. As of the date of the level three hearing, Grievant was employed and had been so employed since January 2022.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Grievant argues that she did not do cocaine or other drugs and that the test results showing the presence of cocaine was incorrect. In her statement of grievance, she asserted that she asked for "a hair test and they refused. I told them that I would pay for

[10] *See*, Respondent's Exhibit 6, October 19, 2021, dismissal letter.
[11] *See*, Grievant's Exhibit 1, October 28, 2021, testing results.

it." Respondent argues that it properly drug tested Grievant's pursuant to policy on October 5, 2021, that the result was positive for the presence of cocaine, and that it properly dismissed her pursuant to its Substance Abuse and Drug and Alcohol Testing Policy.

Permanent state employees who are in the classified service can only be dismissed "for good cause, which means 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); *Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*). *See also* W. VA. CODE ST. R. § 143-1-12.02 (2016). "Although it is true that dismissal is inappropriate when the employee's violation is found to be merely a technical one, it is also true that seriously wrongful conduct can lead to dismissal even if it is not a technical violation of any statute. . . The test is not whether the conduct breaks a specific law, but rather whether it is potentially damaging to the rights and interests of the public." *W. Va. Dep't of Corr. v. Lemasters*, 173 W. Va. 159, 162, 313 S.E.2d 436, 439 (1984). "'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. W. Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988) (*per curiam*).

There are many applicable DOT/DOH policies regarding drug testing submitted in the record of this grievance that must be reviewed. The West Virginia Department of Transportation Policy 3.15: "Substance Abuse," Section 5.0, "Consequences for

Prohibited Conduct," Subsection 5.2, "Refusal to Participate," states, in part, that, "Conduct constituting a refusal to test, besides blatant unwillingness to submit to testing procedures, is . . . G. failure to provide adequate breath/urine samples without a valid medical reason issued by an acceptable physician to WVDOT . . . ."[12]

WVDOT Policy 3.15: "Substance Abuse," includes the "Division of Highways Parkways Authority Drug and Alcohol Testing Policy, Section 2.0, "Definitions," states, in part, the following:

> 2.10 **Confirmation Test—Drug Test:** A second analytical procedure to identify the specific drug(s) that is independent of the initial screening test and that uses a different technique and chemical principle from that of the screening. The Confirmation Test uses a different technique and chemical principle from that of the screening test in order to ensure reliability and accuracy. Gas Chromatography/Mass Spectrometry is the only authorized confirmation method for cocaine, marijuana, opioids, amphetamines, and phencyclidine. . .
>
> 2.11 **Covered Employee**—Covered duty means the employee is identified as being classified within the TW's classification series or the employee's position performs safety-sensitive functions including those functions on an intermittent basis.

Section 6.0, "Required Tests—Drug and Alcohol," states, in part, as follows: "Regulations require the Agency to drug screen COVERED EMPLOYEES for the presence of:" Marijuana, Cocaine, Amphetamines, Opioids, and Phencyclidine (PCP)[.] The five different situations that require mandatory participation for drug/alcohol testing by all COVERED EMPLOYEES are as follows[:]

> 6.1 **Pre-Employment:** All candidates approved for employment and identified as Covered Employees are required to produce a negative drug screen prior to

[12] *See*, Respondent's Exhibit 1, pg. 4 of 52.

performing safety-sensitive duties. There is no exception to this rule. . .

D. On occasion an employee is directed to start employment prior to his/her drug test being reported. In these cases, an employee may be assigned to core duties of the position, but must, consistently, be prohibited from performing safety-sensitive duties of the position until a negative test result is received. . . Upon an employee's return to service after a leave of absence over thirty calendar days, or if any other situation might separate the employee from the testing pool for that period, the employee will be required to report for a "new" pre-employment or return to service drug test.

6.5 **Return to Duty/Follow-Up**: The Agency shall ensure that before a Covered Employee returns to covered duty after engaging in conduct that is prohibited under this policy, the employee is to undergo a return to duty . . . must provide certified negative, drug test result. This type of testing is required for employees who have been evaluated by a SAP and participated in a substance abuse assistance program . . .

Following the Agency's receipt of an SAP's confirmation that the employee has complied with his/her recommendations and is eligible to return to safety-sensitive duties, the Agency shall ensure the employee is subject to unannounced follow-up alcohol/drug testing as directed by the SAP. . . .

8.0 REFUSAL TO TEST

8.1 Covered Employees are required to participate in the testing programs as a condition of employment. Certain behaviors constitute a refusal to test, which automatically initiates a positive result and Disciplinary Action as defined within this policy will be initiates a positive result and Disciplinary Action as defined within this policy will be initiated. . .

8.5 Drug tests required at least 45 milliliters of urine. If the employee cannot provides this minimum

amount, the collector will advise the employee to not drink not more than forty (40) ounces of fluid. After a period not to exceed three (3) hours, the collector will advise the employee to provide an adequate amount of urine. The original sample is to be discarded. If, after three (3) hours, the employee still cannot provide an adequate sample, the specimen is to be discarded and testing discontinued. . . The Human Resources Division will inform the drug testing program's MRO who will contact the employee and refer him/her to a licensed physician acceptable to the Agency. The physician will determine if there could be medical reason for the employee's failure to provide an adequate urine sample. If the physician cannot make such a determination, the test result is to be issued as Refusal to Test and appropriate disciplinary action will be initiated. . . .

9.0 TESTING PROCEDURES

9.1 Drug Testing Procedures

D. At the collection site, employees will be asked to provide a urine sample analysis. The split sample method of collection will be utilized, meaning the larger sample will be divided into two (2) smaller ones. Both bottles will be sealed and shipped in a single container to the laboratory for analysis. . . A MRO, a licensed Physician, certifies the results of the drug test to the Human Resources Director.

E. If the test result of the primary sample is positive, the employee may request the secondary sample be analyzed at a different certified laboratory for the presence of the drug(s) initially certified as positive by the MRO. The employee will be required to pay for the second sample to be shipped and tested, currently two-hundred dollars ($200) but subject to change as per the Agency's

drug testing vendor contract. Every reasonable attempt will be made to contact the employee to discuss whether a medical or other condition may have triggered the positive result. The employee will be allowed 72 hours from the time of positive test notification to request the second analysis be conducted.

Any employee providing a certified positive urine sample is to be removed immediately from covered safety-sensitive duty until the end of the current shift, referred to a SAP and disciplined under the authority of this Policy. . .[13]

11.0 Consequences of Prohibited Conduct

11.1 **First Offense:** A Refusal to test, a positive test result is received for a drug test or an alcohol concentration of 0.04 or greater result in the workplace. . .

G. All conditions set forth by the SAP must be met in order to return to safety-sensitive duties. A Return-to Duty test, showing . . . a negative drug test result, is required of the employee. Using the SAP's report, the Agency holds the final authority to make fitness for duty determinations for Covered Employees. Follow-up testing, at a rate directed by the SAP, will be conducted on an unannounced basis and shall be at a frequency of not less than six (6) during the first twelve (12) months following the employee's return to work. Follow-up testing cannot exceed a period of 60 months from the employee's return to duty. Only the SAP may modify the follow-up testing requirement at any time after the completion of the first twelve (12) months of assigned tests. Any employee who does not follow the entire plan set forth by the SAP will be

[13] *See generally,* Respondent's Exhibit 1, DOH Policy 3.15, "Substance Abuse."

terminated upon written verification of such.[14]

11.2 **Second Offense:** A Refusal to test, a positive test result is received for a drug test or an alcohol concentration of 0.02 or greater result in the workplace **beyond** the five (5) year period from the collection date of the prior offense.

- Dismissal and safety-sensitive employees will be referred to a SAP as well. . . .[15]

During the time in question, Grievant was submitting to the drug testing as recommended by the SAP. Grievant understood that and had been informed that she would be required to submit to drug testing for a time period and frequency set by the SAP. Grievant was not provided advance notice of when these tests would be conducted. Grievant did not grieve her first drug test, which was deemed to be a "refusal to test," or the five-day suspension Grievant received for her first offense prohibited conduct. Therefore, the procedures, processes, and validity of that test will not be addressed herein. It is only being mentioned herein to establish the facts and the timeline involved in this grievance. Grievant only grieved her dismissal based upon the October 5, 2021, test, and challenges the test results, and possibly, the testing procedures. Grievant called no witness other than herself to challenge Respondent's decision or the testing procedures used for this test. Respondent called only Mr. Cook. Respondent did not call the MRO, or anyone from the collection/testing site.

Based upon the evidence presented, Grievant complied with the treatment plan set by her SAP, completed her return-to-duty drug test, which was negative, and she

[14] *See*, Respondent's Exhibit 1, pp. 24-26 of 52.
[15] *See*, Respondent's Exhibit 1, pg. 26 of 52.

returned to work. Mr. Cook began following the SAP's testing recommendations, set up Grievant's follow-up drug testing schedule. Thereafter, Grievant began appearing for drug testing when so notified. The dates of the follow-up testing prior to October 5, 2021, are unknown, but it is undisputed that Grievant provided a negative sample for all those occurring before that date. Then, Grievant tested positive for the presence of cocaine on October 5, 2021.

The question now becomes whether Respondent followed its drug testing policy regarding that issue. Respondent made no mention of performing a second test to confirm the results of the October 5, 2021, test. "Confirmation Test" is defined in DOH Policy 3.15 as, "[a] second analytical procedure to identify the specific drug(s) that is independent of the initial screening test and that uses a different technique and chemical principle from that of the screening. The Confirmation Test uses a different technique and chemical principle from that of the screening test in order to ensure reliability and accuracy. Gas Chromatography/Mass Spectrometry is the only authorized confirmation method for cocaine, marijuana, opioids, amphetamines, and phencyclidine." Further, pursuant to DOH Policy 3.15, Respondent uses the "split sample method of collection," therefore, there should have been a second sample to test that day. While the policy does not require that the second sample be tested, it states, " . . . the employee may request the secondary sample to be analyzed at a different certified laboratory for the presence of the drugs initially certified as positive by the MRO. The employee will be required to pay for the second test . . . Every reasonable attempt will be made to contact the employee to discuss whether a medical or other condition may have triggered the

positive result. The employee will be allowed 72 hours from the time of the positive test notification to request the second analysis be conducted."

Respondent presented no evidence about the actual testing methods used on October 5, 2021. Mr. Cook was not present when the test was performed at MedExpress. Further, Respondent failed to contact Grievant within 72 hours of her test results being received to see if she had any medical conditions that could have triggered the positive result or to inform her of the results so that she could then ask for the second test. Grievant paid for her own personal test. Given that and her testimony at level three, it appears likely that she would have done so right after her test. However, Grievant missed her 72 hour deadline because she was not informed of the test results until October 19, 2021. Even if the 72 hour count began on October 19, 2021, no one contacted her about possible medical issues nor did anyone go forward on her request for the second test while the second sample was still available.

Assuming Respondent followed the proper procedures for testing listed in Policy 3.15, and that the results were only received on October 19, 2021, a second sample should have been available for testing as of October 19, 2021. Grievant indicated to Respondent that she wanted a second test, which is demonstrated not only by the record of this grievance, but also by the fact that she has vehemently denied cocaine use throughout the grievance process, and she went for blood testing on her own on October 28, 2021, and paid for it herself. Of course, that test was twenty-three days after her initial positive test, and could not be the same as the sample provided on October 5, 2021.

Based upon the evidence presented, Respondent has failed to meet its burden of proving that Grievant's October 5, 2021, drug test was positive for the presence of cocaine

and failed to prove that her dismissal was justified. Therefore, this grievance is GRANTED.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

2. Permanent state employees who are in the classified service can only be dismissed "for good cause, which means 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); *Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*). *See also* W. VA. CODE ST. R. § 143-1-12.02 (2016).

3. Respondent failed to prove by a preponderance of the evidence that Grievant violated DOH Policy 3:15 "Substance Abuse," on or about October 5, 2021, and that Grievant's dismissal was justified.

Accordingly, this Grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to her position of Transportation Worker 1 Craft Worker (TW1CW), or comparable classification, if the TW1CW classification is no longer available/exists, to pay Grievant back pay and benefits with statutory interest, retroactive to the date of her dismissal, to be offset again any wages she has received from employment following her dismissal from DOH on or about November 3, 2021, to restore all benefits lost, including seniority and tenure, and to remove all references to this disciplinary action from any and records it maintains.

Any party may appeal this decision to the Intermediate Court of Appeals.[16] Any such appeal must be filed within thirty (30) days of receipt of this decision. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

DATE: September 27, 2022.

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Carrie H. LeFevre
Administrative Law Judge

[16] On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over "[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]" W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.