

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**KENDALL ALAN GOODEN,  
Grievant,**

**v.**

**Docket No. 2023-0365-DHS**

**DEPARTMENT OF HOMELAND SECURITY/  
HUTTONSVILLE CORRECTIONAL CENTER AND JAIL,  
Respondent.**

**DECISION**

Grievant, Kendall Gooden, filed this grievance on or about November 10, 2022, following his termination from employment as a Correctional Officer III at the Huttonsville Correctional Complex on October 26, 2022. Grievant filed this action directly to level three. A level three hearing was held before the undersigned on January 23, 2023, by Zoom video conference originating at the Grievance Board's Westover office. Grievant appeared *pro se*. Respondent appeared by Jonathan M. Calhoun, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' Findings of Fact and Conclusions of Law on February 24, 2023.

**Synopsis**

Grievant was employed as a Correctional Officer III at the Huttonsville Correctional Center. Grievant was arrested for driving under the influence of alcohol in May 2021 and May 2022. Grievant's employment was terminated after his second arrest and conviction for driving under the influence. Respondent established by a preponderance of the evidence that Grievant's conduct was in violation of established policy, and that his employment was terminated for good cause.

The following Findings of Fact are based on the record of this case.

### **Findings of Fact**

1. Grievant was employed at Huttonsville Correctional Center as a Correctional Officer III.

2. Grievant was terminated from his position as a Correctional Officer III because of two separate incidents of the Grievant being arrested for driving under the influence of alcohol.

3. Grievant's termination letter dated October 26, 2022, set out that he was being dismissed from employment following a guilty plea to DUI 1<sup>st</sup> offense in agreement with the State of West Virginia reducing the charge of DUI 2<sup>nd</sup> offense, in Randolph County Magistrate Court on October 12, 2022.

4. Grievant's termination also notified him that employees were to "[C]onduct themselves in such a manner that their activities both on and off duty will not discredit either themselves, other employees, or the Division. Conduct themselves in a manner that creates and maintains respect for the Division and the State of West Virginia. . . Avoid any action which might result in, or create the appearance of, affecting adversely the confidence of the public in the integrity of the Division or the State of West Virginia."

5. Per Policy Directive 129.00(IV)(D)(4), Associate Superintendent, Robert Kesling, indicated termination "may be issued when infractions/deficiencies in performance and/or behavior continue after the employee has had adequate opportunity for correction or the employee commits a singular violation of such severity that dismissal is warranted."

6. Associate Superintendent Kesling explained that the second arrest of Grievant for driving under the influence of alcohol and the ensuing guilty plea to DUI first offense, a reduced charge from the original DUI second offense, were of such severity that Respondent believed dismissal was warranted.

7. A coworker of Grievant had also been arrested for a crime and was incarcerated in jail for six days. Associate Superintendent Kesling indicated that this situation was distinguishable because the Grievant in this case had been arrested twice for driving under the influence of alcohol and convicted for DUI, whereas the coworker had only been arrested a single time.

8. Grievant acknowledged that he was arrested twice for DUI in May 2021 and May 2022 while employed at Huttonsville Correctional Center. The record supports a finding that Grievant plead guilty to DUI 1<sup>st</sup> offense in agreement with the State of West Virginia reducing the charge of DUI 2<sup>nd</sup> offense, in Randolph County Magistrate Court on October 12, 2022. Grievant was sentenced to twenty days in jail and court costs.

### **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 Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2018); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). The generally accepted meaning of preponderance of the evidence is “more likely than not.” *Riggs v. Dep't of Transp.*, Docket No. 2009-0005-DOT (Aug. 4, 2009) citing *Jackson v. State Farm Mut. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). See *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. *Leichliter, supra*.

The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 51, 380 S.E.2d 216, 218 (1989). The judicial standard in West Virginia requires that "dismissal of a civil service employee be 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. 2, *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); Syl. Pt. 1, *Oakes v. W. Va. Dept. of Finance & Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). See *Guine v. Civil Service Comm'n*, 149 W. Va. 461, 468, 141 S.E.2d 364, 368-69 (1965); *Smith v. Clay County Health Dep't*, Docket No. 2012-0451-ClaCH (Apr. 17, 2012).

Respondent proved by preponderance of the evidence that Grievant engaged in conduct which violated Respondent's Policy Directives 129.00 Code of Conduct on multiple occasions. Grievant acknowledged that he was arrested for driving under the influence of alcohol in May 2021 and May 2022. The record supports a finding that Grievant plead guilty to DUI 1<sup>st</sup> offense in agreement with the State of West Virginia reducing the charge of DUI 2<sup>nd</sup> offense, in Randolph County Magistrate Court on October 12, 2022. Grievant was sentenced to twenty days in jail and court costs. Grievant admitted that he spent several days in jail following his arrest for second offense DUI. The undisputed facts of this case demonstrate the seriousness of this unacceptable

conduct. Respondent demonstrated that Grievant was released from employment for good cause.

Grievant alleged that a similarly-situated employee was also convicted of a crime and spent six days in jail. However, that employee was able to continue his employment. Grievant alleges discrimination. Discrimination is defined as “any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

- (a) that he or she has been treated differently from one or more similarly-situated employee(s);
- (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
- (c) that the difference in treatment was not agreed to in writing by the employee.

*Frymier v. Higher Education Policy Comm’n*, 655 S.E.2d 52, 221 W. Va. 306 (2007);  
*Harris v. Dep’t of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Based upon the limited record of this case, Grievant has failed to establish a claim of discrimination. Grievant presented no evidence that a similarly-situated employee with two criminal arrests or convictions was treated differently than Grievant. The only evidence offered was that a similarly-situated employee was not terminated following one arrest which was followed by a short period of incarceration. This can be distinguished from the instant case as Grievant was not terminated following his first arrest for DUI. Grievant was not treated differently than this coworker.

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 Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2018); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). The generally accepted meaning of preponderance of the evidence is "more likely than not." *Riggs v. Dep't of Transp.*, Docket No. 2009-0005-DOT (Aug. 4, 2009) citing *Jackson v. State Farm Mut. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). See *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. *Leichliter, supra*.

2. The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 51, 380 S.E.2d 216, 218 (1989). The judicial standard in West Virginia requires that "dismissal of a civil service employee be 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. 2, *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); Syl. Pt. 1, *Oakes v. W. Va. Dept. of Finance & Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). See *Guine v. Civil Service Comm'n*, 149 W. Va. 461, 468,

141 S.E.2d 364, 368-69 (1965); *Smith v. Clay County Health Dep't*, Docket No. 2012-0451-ClaCH (Apr. 17, 2012).

3. Respondent proved by preponderance of the evidence that Grievant's conduct violated applicable policy and his dismissal from employment amounted to good cause.

4. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

*Frymier v. Higher Education Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

5. Grievant failed to establish a claim of discrimination.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Intermediate Court of Appeals.<sup>1</sup> Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. W. VA.

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<sup>1</sup>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 W. VA. CODE § 6C-2-5, it appears an

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: March 28, 2023**

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**Ronald L. Reece**  
**Administrative Law Judge**

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appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.