

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**NICOLE J. RICHARDSON,
Grievant,**

v.

Docket No. 2024-0135-DOT

**DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,
Respondent.**

DECISION

Grievant, Nicole J. Richardson, employed as a Transportation Worker 2 by the Division of Highways, filed this action on or about August 29, 2023, challenging a five-day disciplinary suspension. Grievant seeks “backpay for the five day I have had to miss along with restitution for out of pocket expenses that have occurred to keep my job. A written apology from all parties involved along with all my records since my hiring date. No more discrimination against me in future events and to be treated equally and fairly.” A level three evidentiary hearing was conducted before the undersigned on January 31, 2024, at the Grievance Board’s Westover office. Grievant appeared *pro se*. Respondent appeared by its counsel, Jason D. Nicholas, Division of Highways, Legal Division. This matter became mature for consideration and a ruling upon receipt of the last of the parties’ fact/law proposals on or about March 1, 2024.

Synopsis

Grievant is employed by the Division of Highways as a Transportation Worker 2, Equipment Operator. Grievant is required to submit to random drug/alcohol screening. In August of 2023, during a random screening, Grievant was provided with three hours and several cups of liquids to provide an adequate sample. Grievant was unable to

provide an adequate urine sample. Grievant was provided with a shy bladder evaluation report for a licensed physician to identify any medical reason for Grievant's inability to provide an adequate urine sample. No medical reason was provided on the record as to why Grievant was unable to provide an adequate urine sample. Upon receiving confirmation of a verified refusal, Grievant was subject to a five-day suspension without pay. Respondent proved by a preponderance of the evidence that the suspension of Grievant, while unfortunate given the totality of the circumstances, was mandated under the West Virginia Department of Transportation's Substance Abuse Policy. Accordingly, this grievance is denied.

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

Findings of Fact

1. Grievant is employed by the Division of Highways as a Transportation Worker 2, Equipment Operator, and assigned to work in Sistersville, West Virginia.
2. The position of Transportation Worker 2, Equipment Operator, requires the employee to maintain a commercial driver's license. The person in the position is to perform multiple duties, including operating various equipment and performing manual tasks.
3. Both the United States Department of Transportation and the Division of Highways require that all employees in "safety-sensitive" positions, including those that maintain a commercial driver's license, be subjected to drug and alcohol screening.
4. Respondent requires employees to participate when subjected to testing and are classified as refusing when they are unable to produce an adequate sample after being provided a minimum of three hours and forty ounces of fluid to provide the sample.

5. If employees are still unable to provide an adequate sample after three hours, they are provided an opportunity to have a licensed physician submit documentation identifying a medical condition for the inability to provide an adequate sample prior to the refusal being considered verified and final.

6. Throughout her employment with the Division of Highways, Grievant has been subject to the requirements of drug and alcohol testing. Grievant has always complied with the requirements of the testing in providing a sample and all those samples have been negative for drugs and alcohol.

7. On or about August 9, 2023, Grievant was subjected to a random urine drug screen.

8. Grievant was provided with three hours and several cups of liquids to provide an adequate sample. Grievant was unable to provide an adequate urine sample.

9. Grievant was removed from safety-sensitive duties. Grievant was provided with a shy bladder evaluation report for a licensed physician to identify any medical reason for Grievant's inability to provide an adequate urine sample.

10. Grievant was given the opportunity to find a licensed physician who could complete the shy bladder report and return it to the Medical Review Officer. No medical reason was provided on the record as to why Grievant was unable to provide an adequate urine sample.

11. On August 22, 2023, Respondent sent a letter to Grievant informing her that, pursuant to policy, she was being suspended for five days without pay, and would be required to see a substance abuse professional before being permitted to return to work.

12. Grievant responded to the letter by calling and speaking with Natasha White, Director of Human Resources, and Gordon Cook, Transportation Human Resources Specialist Senior, on August 25, 2023. Grievant requested that the discipline be lifted, but provided no new information that would alter the application of policy for a refusal. Ms. White informed Grievant that her five-day suspension would stand.

13. The record established that all transportation workers are required by the United States Department of Transportation regulations and the Division of Highways policy to be subjected to alcohol and drug screening.

14. Mr. Cook indicated that upon receiving confirmation of a verified refusal, any transportation worker would be required to submit to a five-day suspension without pay along with having to seek treatment from a substance abuse professional and be subjected to subsequent return-to-work screens.

15. Grievant's position was that she should have been provided with a urine/toilet hat at the time of the request for production of a urine sample. This contention was not supported by any medical evidence or other documentation. Mr. Cook was not familiar with this request and opined that neither the United States Department of Transportation regulations nor the Division of Highways policy require that a urine hat be provided to an employee during a drug screening.

16. Sherry Klug, Transportation Human Resources Specialist Assistant, confirmed that Grievant was provided with water and at least three hours to provide a urine sample, and at no time did she request a toilet hat or any type of accommodation to assist her in providing a sample.

17. Grievant acknowledged that she did not request a toilet hat at the testing site.

18. Grievant was subjected to the same discipline under the applicable policy that any transportation worker who has a verified refusal on a drug/alcohol screening would be given.

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 applicable policy in this case reads, in pertinent part, as follows:

“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.” Division of Highways Drug and Alcohol Testing Policy 8.1.

“Other conduct constituting a refusal to test are listed in the . . . Policy, Refusal to Participate.” Division of Highways Drug and Alcohol Testing Policy 8.3.

“Conduct constituting a refusal to test, besides blatant unwillingness to submit to testing procedures is . . . failure to provide adequate breath/urine samples without a valid medical reason issued by an acceptable physician to WVDOT. . .” Division of Highways Drug and Alcohol Testing Policy.

“Consequences of Prohibited Conduct: First Offense: A Refusal to test . . . The employee shall be relieved from safety-sensitive duties, incur a five (5) day unpaid suspension at the close of the day upon notification of test results, and shall be referred to a SAP.” Division of Highways Drug and Alcohol Testing Policy 11.1.

Grievant argued at the level three hearing that she should have been provided accommodation by way of a toilet hat¹ while undergoing a random drug/alcohol screening on August 9, 2023. The limited record of this case does not support such a finding. It is important to note to Ms. Richardson that the undersigned is expected to make his decision based on the evidence and law that is developed and offered on the record.

Respondent established by a preponderance of the evidence that Grievant received the Drug and Alcohol Testing Policy upon being hired in 2017. Grievant had submitted to tests, from the date of hire to August 9, 2023, without previously being unable to provide an adequate sample. Grievant was unable to provide an adequate sample on August 9, 2023, after being given liquids and three hours to do so. Grievant was not provided with a toilet hat due to the lack of any regulatory requirements. Grievant did not request a toilet hat or any other accommodation to assist her in providing a urine sample during those three hours at the time of the screening. Grievant was given the opportunity to find a licensed physician who could complete the shy bladder report and return it to the Medical Review Officer. No medical reason was provided on the record that Grievant was unable to provide an adequate urine sample and negate a conclusion of refusal. Respondent proved by a preponderance of the evidence that the suspension of Grievant, while unfortunate given the totality of the circumstances, was mandated under the West

¹ The particulars of such a device were not provided to the undersigned.

Virginia Department of Transportation's Substance Abuse Policy. The undersigned cannot make a determination that this was an abuse of discretion.

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 Board, 156 C.S.R. 1 § 156-1-3 (2018); *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. Respondent proved by a preponderance of the evidence that the suspension of Grievant, under the totality of the circumstances, was mandated under the West Virginia Department of Transportation's Substance Abuse Policy.

3. The Grievant failed to demonstrate that Respondent violated their policy, or that the discipline was in any disparate treatment or reflects an abuse of discretion.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Intermediate Court of Appeals.² Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. W. VA.

²On 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 appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.

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: April 2, 2024

Ronald L. Reece
Administrative Law Judge