

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

RALPH LINGER,
Grievant,

v.

Docket No. 2016-0963-CONS

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL,**
Respondent.

DECISION

This grievance was filed directly to Level Three of the grievance procedure by Mr. Linger, on October 15, 2015, after he was dismissed from employment as a Health Service Worker at Sharpe Hospital due to being intoxicated at work. The Statement of Grievance is "dismissal without good cause/discrimination." Grievant seeks "to be made whole in every way including back pay with interest & benefits restored." By Order dated December 22, 2015, this grievance consolidated three grievances which dealt with the suspension of Grievant pending an investigation that led to his dismissal.

A Level Three hearing was held before the undersigned on March 9, 2017, at the Grievance Board's Westover office. Grievant appeared in person and by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Steven R. Compton, Deputy Attorney General. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on April 14, 2017.

Synopsis

Grievant was terminated from his position as a Health Service Worker after it was reported to hospital administration that Grievant was under the influence of alcohol. Grievant was confronted and agreed to a drug and alcohol test. Grievant's alcohol test showed that Grievant had a blood alcohol level of .143. Drug and alcohol testing was appropriate because there was undisputed evidence that Grievant reported to work in an intoxicated condition, smelled of an alcoholic beverage and admitted that he had been drinking alcohol. Respondent demonstrated that Grievant was dismissed for good cause. Accordingly, this grievance is denied.

The following Findings of Fact are based upon the record of this case

Findings of Fact

1. Grievant was employed at Sharpe Hospital as a Health Service Worker.
2. On September 20, 2015, while working, two patients reported to staff members that Grievant was drunk. Staff reported that Grievant was walking oddly and smelled of an alcoholic beverage.
3. Nurse Clinical Coordinator Patrick Nettles was called and also reported that Grievant was walking unsteadily and smelled of alcohol. Nurse Nettles contacted Archie Polling, Assistant Director of Nursing, and Debbie Quinn, Human Resource Director. Ms. Quinn indicated that Grievant smelled of alcohol and that he admitted drinking alcohol during work hours.
4. Grievant agreed to drug and alcohol testing. His alcohol test showed that

Grievant had a blood alcohol level of .143. Grievant was notified at that time that he was suspended from employment pending an investigation.

5. On October 6, 2015, Janice Woofert, Director of Nursing and Archie Poling, held a predetermination conference with Grievant. On the recording of that meeting, Grievant admits that the allegations regarding his intoxication and drinking alcohol on duty were true. Grievant admits to drinking alcohol while on duty and that he went to his car in the hospital parking lot to consume the alcohol.

6. Grievant was notified by letter that his employment with Sharpe Hospital was terminated effective October 31, 2015.

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 & 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.*

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).

In the instant case, the public has a significant interest in employees of state-operated psychiatric hospitals strictly complying with rules and policies that are established to require the sobriety of its employees. Grievant's violation of these rules and policies by reporting to work intoxicated constitutes gross misconduct of a substantial nature affecting the rights and interests of the public. The "term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (citing *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). See *Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002).

Requiring Grievant to submit to drug and alcohol testing was appropriate in this case. The West Virginia Supreme Court of Appeals in *Twigg v. Hercules Corporation*, 185 W. Va. 155, 406 S.E.2d 52 (1990), held that there were two times an employer could require drug testing of an employee: the first is when an employee's job involves public safety and the second is when the employer had reasonable good faith objective suspicion of an employee's drug use. The court stating in Syllabus Point 2 that "[D]rug testing will not be found to be violative of public policy grounded in the potential intrusion of a person's 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."

The Respondent has met its burden of proof in this grievance because they had reasonable suspicion to conduct the secondary testing, and it demonstrated that Grievant violated Respondent's drug and alcohol free workplace policy. Grievant reported to work in a clearly intoxicated condition, smelled of an alcoholic beverage and admitted that he was drinking on the job.

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 Bd. 156 C.S.R. 1 § 3 (2008); *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. 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).

3. *Twigg v. Hercules Corporation*, 185 W. Va. 155, 406 S.E.2d 52 (1990), held that there were two times an employer could require drug testing of an employee: the first is when an employee's job involves public safety and the second is when the employer had reasonable good faith objective suspicion of an employee's drug use.

4. Respondent had reasonable suspicion to conduct a secondary alcohol and drug screen on Grievant based on Grievant's admission, and the facts and circumstances of this grievance.

5. Respondent met its burden of proof in establishing the charge of gross misconduct against the Grievant in violating its drug and alcohol free workplace policy. Grievant was dismissed for good cause.

Accordingly, this 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: May 12, 2017

Ronald L. Reece
Administrative Law Judge