

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

CECIL ROBERTS,

Grievant,

v.

DOCKET NO. 2017-1140-DOT

DIVISION OF HIGHWAYS,

Respondent.

DECISION

On October 31, 2016, Cecil Roberts (“Grievant”) filed a grievance directly at Level Three of the grievance procedure asserting that he had been dismissed without good cause by his employer, the Division of Highways (“Respondent” or “DOH”). Following a continuance, requested by Grievant’s representative, for good cause shown, a Level Three hearing was held before the undersigned Administrative Law Judge at the Grievance Board’s office in Charleston, West Virginia, on April 18, 2017. Grievant was represented by Gordon Simmons with UE Local 170 of the West Virginia Public Workers Union. Respondent was represented by Keith A. Cox, Esquire, with the Legal Division of the DOH. DOH presented testimony by a Medical Review Officer, Dr. Charles Moorefield, and Gordon Cook, Coordinator for the Drug and Alcohol Testing Program for all agencies within the Department of Transportation. Grievant testified in his own behalf.

This matter became mature for decision on May 24, 2017, upon receipt of the last of the parties’ Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was dismissed from his employment as a Transportation Worker 2 – Equipment Operator for testing positive for amphetamines and methamphetamines during a follow-up random drug test. In an earlier random test, Grievant tested positive for the same prohibited substances, and received a five-day suspension. Respondent established that the urine test was conducted in accordance with established testing procedures. Further, the Medical Review Officer provided credible expert testimony to refute Grievant's claim that the only possible basis for the test result was his use of a prescribed medication, CONTRAVE. Accordingly, Respondent demonstrated good cause for Grievant's dismissal by a preponderance of the evidence.

The following Findings of Fact are made based upon the record developed at the Level Three hearing.

Findings of Fact

1. Grievant was employed by DOH as a Transportation Worker 2 – Equipment Operator, in Kanawha County, West Virginia.
2. Grievant has either held a Chauffeur's License or Commercial Driver's License (CDL) on an almost continuous basis since he was 16 years old.
3. Before coming to work for DOH, Grievant was employed as a truck driver for several businesses over an extended period of time. During over 20 years as a truck driver in the private sector, Grievant worked in positions requiring a CDL, and was thereby subject to both pre-employment and random drug testing.

4. At all times pertinent to this grievance, Division of Highways employees, including Grievant, were subject to the Drug and Alcohol Testing Policy of the West Virginia Department of Transportation, contained in Volume III, Chapter 15, of the West Virginia Department of Transportation Administrative Operating Procedures, which provides, in pertinent part, as follows:

REQUIRED TESTS – DRUGS AND ALCOHOL

* * *

DEFINITIONS

* * *

CHAIN OF CUSTODY – Procedures to account for the integrity of each urine specimen by tracking its handling and storage from point of specimen collection to final disposition of the specimen.

COLLECTION SITE – A place designated by the Agency where individuals present themselves for the purpose of providing a specimen to be analyzed.

* * *

CONFIRMATION TEST – In drug testing, a second analytical procedure to identify the specific drug that is independent of the screening test and that 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, opiates, amphetamines, and phencyclidine. In alcohol testing, a second test, following a screening test with a result of 0.02 or greater, that provides quantitative data of alcohol concentration.

MEDICAL REVIEW OFFICER (MRO) – A licensed physician responsible for receiving laboratory results generated by the Agency's drug testing program who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's confirmed positive test result together with his/her medical history and any other relevant biomedical information.

PERFORMING A SAFETY-SENSITIVE FUNCTION – The employee is considered to performing a safety-sensitive function during any period in which he/she is actually performing, ready to perform, or immediately available to perform covered duty.

SCREENING TEST (OR INITIAL TEST) – In drug testing, an immunoassay screen to eliminate negative urine screens from further analysis. In alcohol testing, an analytic procedure to determine whether an employee may have a prohibited concentration of alcohol in a breath specimen.

* * *

COVERED EMPLOYEES

The regulations require the Agency, as an employer, to implement drug and alcohol testing programs for employees involved in job duties defined as safety-sensitive by the Federal Highway Administration. For the purpose of this policy, covered duties are those that relate to the operation and/or repair of a commercial vehicle as defined in 49 CFR part 382.107 and the employee is required to possess a Commercial Driver's License as a condition of employment.

* * *

COVERED EMPLOYEES under this policy are those who:

- Are required to possess a Commercial Driver's License to operate a commercial vehicle as described above (Equipment Operators); or,
- Are subject, at any given time, to be dispatched to operate a commercial motor vehicle as described above that requires a Commercial Driver's License to operate (Specific Craftworkers, Mechanics, other intermittent operators).

* * *

PARTICIPATION

Participation by all covered employees is a condition of employment. Refusal to participate in the testing programs is considered as refusing to test and will result in employee dismissal.

* * *

REQUIRED HOURS OF COMPLIANCE/PROHIBITED BEHAVIOR

* * *

Use and ingestion of prohibited drugs is not allowed at any time, whether at work or not.

REQUIRED TESTS – DRUGS AND ALCOHOL

Regulations require the Agency to screen COVERED EMPLOYEES for the presence of:

- Marijuana
- Cocaine
- Amphetamines
- Opiates
- Phencyclidine (PCP)

* * *

Five different drug/alcohol testing programs require mandatory participation by all COVERED EMPLOYEES. They are:

* * *

5. Return to Duty/Follow Up: The Agency shall ensure that before a COVERED EMPLOYEE returns to covered duty after conduct that is prohibited under this policy, the employee is to undergo a return to duty alcohol test indicating an alcohol concentration of 0.02 or less and/or a certified negative drug test result.

In the event return to duty testing is required, the employee must have been evaluated by a Substance Abuse Professional (SAP) and participate in any substance abuse assistance program as prescribed.

Following the determination that an employee is in need of assistance in resolving problems associated with substance abuse and his/her return to covered duty, the Agency shall ensure the employee is subject to unannounced follow up alcohol/drug testing as required by the Substance Abuse Professional (SAP). Federal regulations require the employee be subject to a minimum of six (6) follow up tests during the first twelve (12) months.

* * *

CONSEQUENCES OF PROHIBITED CONDUCT

* * *

Return to Duty/Follow up Positive Drug Test Result/Alcohol Concentration of 0.02 or Greater

Dismissal

* * *

R Ex 3.

5. On August 29, 2014, Grievant signed a Drug/Alcohol Testing Notification & Consent form in which he agreed to submit to a controlled substance test for the presence of certain prohibited substances, including amphetamines. See R Ex 6.

6. On some unspecified date in late 2015, while employed by DOH, Grievant began taking CONTRAVE, a prescription medication prescribed by his personal physician, Dr. Jennifer Ranson. See G Ex D.

7. On December 29, 2015, Grievant was required to submit to a random drug test as authorized under DOT's Drug and Alcohol Testing Policy. See R Exs 3 & 4.

8. On January 4, 2016, Health Research Systems, a DOT contractor, reported that Grievant had tested positive for amphetamines and methamphetamine. See R Ex 4.

9. On January 4, 2016, Grievant was issued a five-day suspension without pay for violating DOT's Drug and Alcohol Testing Policy. R Ex 5.

10. Grievant served his five-day suspension and did not file a grievance challenging this disciplinary action.

11. Grievant began and completed substance abuse treatment required by the disciplinary suspension between January 11 and January 13, 2016. See G Exs A, B & C.

12. Grievant was advised in the correspondence administering his five-day suspension that “any future positive controlled substance test result or alcohol concentration of 0.02 or greater within the next five (5) years will be cause for dismissal.” See R Ex 5.

13. Grievant was required to participate in a substance abuse counseling program as one of the conditions of his return to regular driving duties after serving the five-day suspension. Grievant received correspondence confirming that he successfully completed the program as of January 13, 2016. See G Exs. A, B & C.

14. In conjunction with the five-day suspension, Grievant was required to provide a urine sample which needed to be tested negative as a condition for his return to duty. In addition, upon returning to duty, he was required to submit to follow-up drug testing in accordance with DOT’s Drug and Alcohol Testing Policy. See R Ex 5.

15. Grievant’s return to duty was delayed because he was not informed that he had been scheduled for a return to duty drug test.

16. Grievant’s return to duty drug test was negative for any prohibited substances.

17. After Grievant returned to duty, he was required to submit to unannounced drug testing on at least six occasions, over the following year. Grievant’s

first four drug tests after returning to duty were negative for the presence of any prohibited substances.

18. On October 13, 2016, Grievant provided a urine sample for a fifth unannounced, follow-up drug test. See R Exs 1 & 2.

19. On October 19, 2016, the test results for Grievant's specimen were certified as positive for amphetamines and methamphetamine by the Medical Review Officer, Dr. Charles Moorefield, and duly reported to DOH by Health Research Systems.

20. Dr. Charles Moorefield has been engaged in the practice of medicine since 1981, when he graduated from the Medical University of South Carolina. Dr. Moorefield has been continually licensed as a certified Medical Review Officer ("MRO"), having taken the required training and passed the required examination, as well as periodic recertification training and examinations.

21. Dr. Moorefield is employed by ClearStar, Inc., in Melbourne, Florida, which is a separate business entity unrelated to Medtox Laboratories, Inc., in St. Paul, Minnesota, the company which performed the screening and confirmatory drug tests in this matter.

22. The medical literature provided to Grievant by the pharmacy where he filled his prescription for CONTRAVE includes the following pertinent information from Takeda Pharmaceuticals: "If you take a urine drug screening test, CONTRAVE may make the medical drug screening test positive for amphetamines. If you tell the person

giving you the drug screening test that you are taking CONTRAVE, they can do a more specific drug screening test that should not have this problem.” G Ex E.

23. Dr. Moorefield, having been recognized by the undersigned Administrative Law Judge as an expert witness in matters relating to drug testing, testified that CONTRAVE, the prescription medication which Grievant was taking at the time he tested positive for methamphetamine and amphetamines in October 2016, may generate a false positive for amphetamines and methamphetamine in the initial immunoassay screening test for the presence of those substances. The initial screening test performed by Medtox involved a relatively simple immunoassay test.

24. Dr. Moorefield explained that of the two active ingredients in CONTRAVE, naltrexone hydrochloride and bupropion hydrochloride, it is the latter ingredient that generates a false positive for amphetamines in the initial screening test.

25. It was Dr. Moorefield’s expert opinion that CONTRAVE would not generate a false positive result for amphetamines or methamphetamine in the confirmatory test by Medtox employing Gas Chromatography Mass Spectrometry (GCMS) because that test is exclusive to the particular substances it has been programmed to identify.

26. In Dr. Moorefield’s expert opinion, taking CONTRAVE pursuant to a doctor’s prescription would not change Grievant’s positive drug testing result for amphetamines and methamphetamine in October 2016.

27. On October 29, 2016, Kathleen C. Dempsey, Director of DOH's Human Resource Division, issued correspondence notifying Grievant that his employment was being terminated, in pertinent part, as follows:

Pursuant to Section 12.2 of the State Division of Personnel Administrative Rule and Section III, Chapter 15 of the Department of Transportation Administrative Operating Procedures, which contains the agency's policy on Drug and Alcohol Testing, your position as a Transportation Worker 2 Equipment Operator with the Department of Transportation, Division of Highways is hereby terminated effective November 3, 2016. Although the effective date of your termination is November 3, 2016, the agency requires your immediate departure from the workplace. Therefore, you will receive severance pay in accordance with State Division of Personnel Administrative Rule 12.2(b).

The reason for your dismissal is your second violation of the West Virginia Department of Transportation Drug and Alcohol Testing Policy. More specifically:

The random urine sample provided by you on October 13, 2016 has been certified by the Agency's Medical Review Officer as being positive for the presence of amphetamines and methamphetamine. You were advised by letter dated January 4, 2016 that any future positive controlled test result will be cause for dismissal.

Federal regulations require you be referred to a substance abuse professional. A substance abuse professional may be consulted through [name and address redacted.]

As a State employee you have the right to file a grievance regarding your dismissal with the West Virginia Public Employees Grievance Board

In addition, you have the right to respond to this action by contacting me, either personally or in writing, for the purpose of communicating why you feel this action is unwarranted. If you choose to respond, please do so prior to November 3, 2016.

R Ex 7.

28. The West Virginia Division of Personnel Administrative Rule, 143 C.S.R. 1

§ 12.2. (2012), Dismissal, provides as follows:

An appointing authority may dismiss any employee for cause. Prior to the effective date of the dismissal, the appointing authority or his or her designee shall:

1. meet with the employee in a predetermination conference and advise the employee of the contemplated dismissal;
2. give the employee oral notice confirmed in writing within three (3) working days, or written notice of the specific reason or reasons for the dismissal; and,
3. give the employee a minimum of fifteen (15) calendar days advance notice of the dismissal to allow the employee a reasonable time to reply to the dismissal in writing, or upon request to appear personally and reply to the appointing authority or his or her designee.

The appointing authority shall file the reasons for dismissal and the reply, if any, with the Director. A predetermination conference and fifteen (15) days notice are not required when the public interests are best served by withholding the notice or when the cause of dismissal is gross misconduct.

(b) An appointing authority may require that a classified employee dismissed for cause immediately vacate the workplace, or a classified employee dismissed for cause may elect to do so. If the appointing authority requires a dismissed employee to immediately vacate the workplace in lieu of working during the notice period, or if an employee who receives notice of dismissal elects to immediately vacate the workplace, the employee is entitled to receive severance pay attributable to the time he or she otherwise would have worked, up to a maximum of fifteen (15) calendar days after vacating the workplace. Receipt of severance pay does not affect any other right to which the employee is entitled with respect to the dismissal.

29. Grievant made no effort to contact Ms. Dempsey prior to the date his termination became effective. Grievant initiated this grievance on October 31, 2016, prior to the effective date of his termination.

Discussion

Because this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges against Grievant by a preponderance of the evidence. Procedural Rule of the W. Va. Pub. Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *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.*

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) (*per curiam*); 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). Not only shall good cause be alleged in the dismissal of such an employee, it must be proved in the event of an appeal of the dismissal. *Guine, supra*, at 468, 368.

DOH presented evidence that Grievant was previously administered a five-day suspension when he tested positive for amphetamines and methamphetamine in a random drug test. Grievant did not file a grievance contesting this earlier disciplinary action. Accordingly, the merits of a prior disciplinary action which Grievant failed to timely grieve when it was administered is not at issue here. *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997); *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996). Indeed, all such information contained in the documentation of Grievant's prior discipline must be accepted as true. *Aglinsky, supra*. See *Womack v. Dep't of Admin.*, Docket No. 93-ADMN-430 (Mar. 30, 1994); *Perdue v. Dep't of Health & Human Res.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

Grievant was terminated on the basis of a urine sample which allegedly tested positive for the presence of amphetamines and methamphetamine. 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 suspicion of an employee's drug usage or while an employee's job responsibility involves public safety or the safety of others. Syl. Pt. 2, *Twigg v. Hercules Corp.*, 185 W. Va. 155, 406 S.E.2d 52 (1990). Grievant was employed by DOH in a safety-sensitive position as an equipment operator/truck driver which satisfies the requirement in *Twigg* for superseding any arguable right to privacy. In addition, Grievant had previously tested positive for amphetamines and methamphetamine which made him subject to follow up unannounced testing under DOH regulations governing drug and alcohol testing. See R Ex 3.

Respondent introduced documentary evidence from Medtox to support the allegation that Grievant had amphetamines in his system while on duty with DOH on October 13, 2016. These documents constitute hearsay evidence. An Administrative Law Judge must determine what weight, if any, is to be given hearsay evidence in a disciplinary proceeding. *Comfort v. Regional Jail & Corr. Facility Auth.*, Docket No. 2013-1459-CONS (Apr. 18, 2013); *Hamilton v. W. Va. Dep't of Health & Human Res.*, Docket No. 2011-1785-DHHR (Sept. 6, 2012); *Furr v. Dep't of Health & Human Res.*, Docket No. 2011-0988-CONS (Dec. 7, 2011); *Kennedy v. Dep't of Health & Human Res.*, Docket No. 2009-1443-DHHR (Mar. 11, 2010), *aff'd*, Cir. Ct. of Kanawha County, No. 10-AA-73 (June 9, 2011); *Miller v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996). The Grievance Board has applied the following factors in assessing hearsay testimony: (1) the availability of persons with first-hand knowledge to testify at the hearings; (2) whether the declarant's out of court statements were in writing, signed, or in affidavit form; (3) the agency's explanation for failing to obtain signed or sworn statements; (4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; (5) the consistency of the declarant's accounts with other information, other witnesses, other statements, and the statement itself; (6) whether collaboration for these statements can be found in agency records; (7) the absence of contradictory evidence; and (8) the credibility of the declarants when they made their statements. *Simpson v. W. Va. Univ.*, Docket No. 2011-1326-WVU (May 3, 2012); *Cale v. W. Va. Univ.*, Docket

No. 2011-1711-WVU (Mar. 22, 2012); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996), *aff'd*, Cir. Ct. of Kanawha County, No. 97-AA-17 (June 4, 1998).

Respondent presented testimony from Dr. Charles Moorefield, who participated in the hearing via telephone. Dr. Moorefield has practiced medicine since 1981 and is certified as a Medical Review Officer. His credentials qualify him as an expert in matters relating to drug testing. See W. Va. Rules of Evidence 72. See generally, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993), *cert. denied*, 571 U.S. 1129 (1994). Dr. Moorefield agreed with the literature produced by Grievant which indicates that certain active ingredients in CONTRAVE, the medication Grievant was prescribed by Dr. Ranson, may generate a false positive for amphetamines and methamphetamine in a drug screening test. See G Exs D & E.

The medical literature provided to Grievant by the pharmacy where he filled his prescription includes the following pertinent information: "If you take a urine drug screening test, CONTRAVE may make the medical drug screening test positive for amphetamines. If you tell the person giving you the drug screening test that you are taking CONTRAVE, they can do a more specific drug screening test that should not have this problem." G Ex E.

Dr. Moorefield explained that the initial screening test performed by Medtox involved a relatively simple immunoassay test. He further noted that of the two active ingredients in CONTRAVE, naltrexone hydrochloride and bupropion hydrochloride, it is

the latter ingredient that generates a false positive for amphetamines in the initial screening test. For that reason, as well as the general policy that a positive test result will not be based upon the outcome of the initial screening test alone, the laboratory performed a more specific confirmatory test using a gas chromatograph mass spectrometer ("GCMS") to analyze a portion of the urine sample provided. This GCMS test is the "more specific drug screening test" referenced in the medical literature accompanying Grievant's CONTRAVE prescription. Dr. Moorefield testified that there is no known problem where the GCMS test generates a false positive for amphetamines and methamphetamine in a person who is taking CONTRAVE.

Grievant testified that he was taking CONTRAVE on a daily basis before he tested positive for amphetamines and methamphetamine in December 2015, and he continued taking the same daily dosage of CONTRAVE each day thereafter until he was terminated. Following his five-day suspension, Grievant submitted to a return-to-work drug test before he was restored to his normal duties operating a truck. After he returned to duty, Grievant submitted to follow-up testing on at least four occasions. None of these tests were positive for methamphetamine or any other prohibited substance included in the testing protocol. While Grievant asserts that the only reason he could possibly test positive for the presence of methamphetamine is the CONTRAVE he was taking, he offered no logical or scientific explanation for why his five other drug tests were negative until the test which generated this dismissal action. If CONTRAVE inevitably causes a false positive from the confirmatory GCMS test

procedure, each of Grievant's tests following his suspension in January 2016 should have been reported as positive.

Although Grievant told the physician who was prescribing CONTRAVE that he was a truck driver, he does not recall any warning that the drug might cause a false positive for methamphetamine. Grievant claims that he first became aware that CONTRAVE could generate a false positive drug test when he read the literature accompanying his prescription for CONTRAVE several months after his suspension. Upon making this discovery, Grievant did not follow up with his prescribing physician, to explore whether this result would still be generated by a more sophisticated GCMS test, nor did he bring this to the attention of anyone in DOH. Grievant testified that he simply folded the informational handout and placed it in his pocket, for use in the event he tested positive for methamphetamine in the future. He also tried to inform the employees of the contractor collecting his urine specimen for testing that he was taking CONTRAVE, but was told they were not authorized to accept that information.¹

Grievant's explanation is insufficient to refute the expert testimony of Dr. Moorefield that CONTRAVE may mislead the screening test, but does not confuse the more specific confirmatory GCMS test. As Dr. Moorefield explained, the GCMS test uses sophisticated technology to identify particular substances in extremely small quantities measured in nanograms. The cut-off levels for reporting a positive result are set at a threshold which is established to eliminate any false positives from inadvertent exposure to prohibited substances.

¹ The proper person to receive this information was the Medical Review Officer, Dr. Moorefield, who, in fact, was made aware that Grievant was taking CONTRAVE, and determined that it would not generate a false positive result in the confirmatory GCMS test.

Respondent presented no witnesses with direct knowledge of the chain of custody for Grievant's urine sample. The chain of custody is an important aspect of the drug testing process which must be followed in each and every testing situation. However, Grievant did not present any evidence demonstrating that there was some anomaly or deficiency in the chain of custody. Dr. Moorefield was cross-examined regarding the drug testing records presented by Respondent without indicating that there were any problems with the chain of custody. This evidence is adequate to meet Respondent's burden of proving the allegations by a preponderance of the evidence. See *Smith v. Dep't of Health & Human Res.*, Docket No. 2011-0799-DHHR (Sept. 6, 2012); *McCoy v. W. Va. Dep't of Transp.*, Docket No. 98-DOH-399 (June 18, 1999). Indeed, even applying the more stringent "beyond a reasonable doubt" evidentiary standard of a criminal proceeding, the West Virginia Supreme Court of Appeals has stated: "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, 662, 447 S.E.2d 583, 597 (1994), citing *State v. Davis*, 164 W. Va. 783, 786-87, 266 S.E.2d 909, 912 (1980).

Grievant also complains that Dr. Moorefield did not recall speaking with Grievant in regard to whether CONTRAVE may have generated a false positive. The testimony at hearing suggested that Grievant spoke with Dr. Moorefield's assistant, who conferred with Dr. Moorefield, who confirmed that CONTRAVE would not generate a false positive during the confirmatory GCMS test. This procedure, while less than ideal, nonetheless provided substantial compliance with the requirement that the MRO review the test

results with the employee to determine whether there was some medical condition or other circumstance that might have caused a positive test for prohibited drugs. Certainly, there is no evidence that a direct conversation between Grievant and Dr. Moorefield would have resulted in a different response. Therefore, any deviation from the prescribed protocol was not demonstrated to constitute harmful procedural error. *See McFadden v. W. Va. Dep't of Health & Human Res.*, Docket No. 94-HHR-428 (Feb. 17, 1995). *See generally, Parker v. Defense Logistics Agency*, 1 M.S.P.B. 489 (1980).

Grievant testified under oath in this proceeding, denying that he ever used methamphetamine at any time. This testimony directly contradicts the results of the drug tests conducted by Respondent's contractor. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *Massey v. W. Va. Pub. Serv. Comm'n*, Docket No. 99-PSC-313 (Dec. 13, 1999); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). *See Harper v. Dep't of the Navy*, 33 M.S.P.R. 490 (1987). *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). Some factors to consider in assessing the credibility of a witness include the witness' demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the fact finder should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. *Rogers v. W.*

Va. Reg'l Jail & Corr. Facility Auth., Docket No. 2009-0685-MAPS (Apr. 23, 2009); *Massey, supra*.

Although Grievant displayed no indication of deception in his testimony, his denial is contrary to substantial scientific evidence. Grievant stated that he would never use any prohibited substances, such as methamphetamine, because he knew it could cause him to lose his job, which constitutes his livelihood. However, there was no evidence he did anything but go through the motions during his drug rehabilitation program, ostensibly because it was cheaper than losing available overtime during ice and snow removal season. Moreover, despite the fact that Grievant's five-day suspension may not have represented a significant financial setback, Grievant was given explicit notice that a second positive drug test would result in his termination. In these circumstances, it is simply incredible that Grievant made no greater effort to ascertain the cause for his positive test result, or failed to exercise his right to have his split urine sample tested in another laboratory. See *McCoy v. W. Va. Dep't of Transp.*, Docket No. 98-DOH-399 (June 18, 1999). The inference to be drawn from all of this is that Grievant was aware of the reason for his positive test, and knew that testing a second portion of his split sample in another laboratory would inevitably yield the same result.

Grievant also complained that he was not afforded a predetermination hearing. Although no conference was held before Grievant was notified that he was being dismissed, Grievant was provided with notice explaining the basis for his termination and an opportunity to be heard before the termination became effective. This

procedure is explicitly permitted under § 12.2 of the Division of Personnel's Administrative Rule. Grievant had been warned in his previous suspension notice that any further violation of Highways' policy on drug and alcohol abuse would result in termination. Grievant made no effort to avail himself of the opportunity to meet with Ms. Dempsey before his termination became effective. In these circumstances, Grievant received sufficient procedural due process in this termination matter. *See Baker v. Div. of Highways*, Docket No. 2015-0236-DOT (Mar. 18, 2015).

"Mitigation of the punishment imposed by the 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 & Human Res.*, Docket No. 96-HHR-183 (Oct. 3, 1996). *See Lanham v. W. Va. Dep't of Transp.*, Docket No. 98-DOH-369 (Dec. 30, 1998); *Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). This was Grievant's second positive test for having a prohibited substance in his body system. DOT's policy specifically calls for dismissal of the employee in such circumstances. *See R Ex 3 at 13*. Misconduct of this nature provides a proper basis for termination of a Division of Highways employee. *Hickman v. Div. of Highways*, Docket No. 2010-0008-DOT (Nov. 4, 2009); *Ferrell v. W. Va. Dep't of Transp.*, Docket No. 00-DOH-237 (Dec. 22, 2000), *rev'd*, Cir. Ct. of Kanawha County, No. 01-AA-6 (May 29, 2002).

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. Pub. Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

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) (*per curiam*); 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). Not only shall good cause be alleged in the dismissal of such an employee, it must be proved in the event of an appeal of the dismissal. *Guine, supra*, at 468, 368.

3. If an employee does not grieve specific disciplinary incidents, he cannot place the merits of such discipline in issue in a subsequent grievance proceeding. *Koblinsky v. Putnam County Health Dep't*, Docket No. 2011-1772-CONS (Oct. 23,

2012), *aff'd*, Cir. Ct. of Kanawha County No. 12-AA-131 (July 24, 2013); *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997); *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996). See *Stamper v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dep't 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. Dep't of Health & Human Res.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

4. 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 suspicion of an employee's drug usage or while an employee's job responsibility involves public safety or the safety of others. Syl. Pt. 2, *Twigg v. Hercules Corp.*, 185 W. Va. 155, 406 S.E.2d 52 (1990).

5. An Administrative Law Judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. *Comfort v. Regional Jail & Corr. Facility Auth.*, Docket No. 2013-1459-CONS (Apr. 18, 2013); *Hamilton v. W. Va. Dep't of Health & Human Res.*, Docket No. 2011-1785-DHHR (Sept. 6, 2012); *Furr v. Dep't of Health & Human Res.*, Docket No. 2011-0988-CONS (Dec. 7, 2011); *Kennedy v. Dep't of Health & Human Res.*, Docket No. 2009-1443-DHHR (Mar. 11, 2010). See *Warner v. Dep't of Health & Human Res.*, Docket No. 07-HHR-409 (Nov. 18, 2008).

6. The Grievance Board has applied the following factors in assessing hearsay testimony: (1) the availability of persons with first-hand knowledge to testify at the hearings; (2) whether the declarant's out of court statements were in writing, signed,

or in affidavit form; (3) the agency's explanation for failing to obtain signed or sworn statements; (4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; (5) the consistency of the declarant's accounts with other information, other witnesses, other statements, and the statement itself; (6) whether collaboration for these statements can be found in agency records; (7) the absence of contradictory evidence; and (8) the credibility of the declarants when they made their statements. *Simpson v. W. Va. Univ.*, Docket No. 2011-1326-WVU (May 3, 2012); *Cale v. W. Va. Univ.*, Docket No. 2011-1711-WVU (Mar. 22, 2012); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996), *aff'd*, Cir. Ct. of Kanawha County, No. 97-AA-17 (June 4, 1998).

7. Hearsay evidence is admissible in the grievance procedure for public employees, but there is no requirement, statutory or otherwise, that it be afforded any particular weight. Generally, written statements, even affidavits, may be discounted or disregarded unless the offering party can provide a valid reason for not presenting the testimony of the persons making them. *Comfort v. Regional Jail & Corr. Facility Auth.*, *supra*. See *Simpson v. W. Va. Univ.*, *supra*; *Cook v. W. Va. Div. of Corr.*, Docket No. 96-CORR-037 (Oct. 31, 1997).

8. Dr. Charles Moorefield, Respondent's contract Medical Review Officer, is qualified as an expert witness in the field of drug testing. See W. Va. Rules of Evidence 72. See generally, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993), *cert. denied*, 571 U.S. 1129 (1994).

9. Dr. Moorefield's expert testimony provided corroboration for Respondent's hearsay drug test result documents sufficient to establish the allegation that Grievant had amphetamines and methamphetamine in his body system at work On October 13, 2016, by a preponderance of the evidence.

10. "Mitigation of the punishment imposed by the 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 & Human Res.*, Docket No. 96-HHR-183 (Oct. 3, 1996). See *Lanham v. W. Va. Dep't of Transp.*, Docket No. 98-DOH-369 (Dec. 30, 1998); *Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

11. Respondent established by a preponderance of the evidence that Grievant's termination was consistent with the Department of Transportation's Drug and Alcohol Testing Policy. See *Hickman v. Div. of Highways*, Docket No. 2010-0008-DOT (Nov. 4, 2009). Further, the penalty imposed was not disproportionate to the offense or an abuse of the employer's substantial discretion in such matters.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: June 2, 2017

LEWIS G. BREWER
Administrative Law Judge