

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**MARCUS STRADER,
Grievant,**

v.

Docket No. 2016-1585-CONS

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

DECISION

Grievant, Marcus Strader, filed this action challenging his suspension pending investigation and subsequent dismissal from employment as a Housekeeper at Sharpe Hospital due to testing positive for marijuana use. The Statement of Grievance is “dismissal without good cause/discrimination.” The relief sought by Grievant is “to be made whole in every way including back pay with interest & benefits restored.” This grievance was consolidated at Level Three by order dated May 3, 2016.

A Level Three hearing was conducted on August 8, 2016, and August 21, 2017, before the undersigned 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 or about October 2, 2017.

Synopsis

Respondent was provided with a report that Grievant appeared sluggish, slow in speech and his eyes were bloodshot when he started his work shift. Based on this report, Respondent had reasonable suspicion to conduct a for-cause drug and alcohol test. Respondent's policy also provided for the testing of other listed controlled substances. Grievant was informed that a test would be conducted for alcohol and drugs, to which he consented. The results of that testing were positive for marijuana. Grievant admitted to using marijuana during the predetermination conference. Nothing improper about the testing appeared in the record, and Respondent established good cause for the termination of Grievant's employment.

The following Findings of Facts are based upon the record developed at Level Three.

Findings of Fact

1. Grievant was employed at Sharpe Hospital as a Housekeeper.
2. On April 3, 2016, Grievant was late for work that day and had not called in. After appearing for work, it was reported by various staff that Grievant appeared sluggish, slow in speech and his eyes were bloodshot.
3. As a result, Grievant was asked to take a for-cause drug test. The results of that testing were positive for marijuana. Grievant was suspended pending investigation at that time.
4. A predetermination conference was held and recorded on April 13, 2016. During the conference, Grievant admitted to using marijuana and stated that he needed help for his use of marijuana. Grievant denied smoking marijuana on the job.

5. The governing policy for testing for substance use is the *Bureau for Behavioral Health Facilities Drug and Alcohol Testing Policy*.

6. That policy provides, in pertinent part, the following:

V. Procedures

2. For Cause Drug Testing Protocol

a. All current and contract employees of DHHR may be subject to testing for reasonable suspicion under any of the following circumstances;

1. If the employee's performance, behavior, appearance or odor cause reasonable suspicion that the employee is engaging in illegal drug use, inappropriate use of prescribed medication or is under the influence of drugs or alcohol . . .

b. If any of the foregoing factors are present or observed, the person observing them should report them immediately to the Human Resource Director who will then contact the employee's immediate supervisor. The Human Resource Director and supervisor will meet with the employee to assess the situation. If it is found that testing should be conducted, the arrangement for the test will be done by the Human Resource Director in consultation with the Chief Executive Officer or his/her designee. If the Director of Human Resources is unavailable during normal working hours, the person who has observed any of the above-mentioned factors shall contact the employee's immediate supervisor . . .

c. The reporting employee or the employee's immediate supervisor, whichever the case may be, shall immediately, but before the end of the shift, document the behavior or conditions giving rise to the report by completing the "For Cause Drug Testing Form".

d. The Director of Human Resources, or the Administrator on Call, as the case may be, in consultation with the Chief Executive Officer, shall determine whether it is appropriate to require the employee to submit to drug or alcohol testing. Such person may elect to interview the employee before making a decision.

f. The sample will be collected in accordance with the testing procedures established for the facility. This sample will be tested for at least the following substances: alcohol, marijuana, cocaine, opiates, amphetamines, phencyclidine (PCP), barbiturates, oxycodone, benzodiazepines,

propoxyphene and methadone or derivatives thereof. The sample may be tested for other drugs as deemed prudent and/or necessary.

7. The Division of Personnel Policy DOP-P2 "*Drug and Alcohol Free Workplace*" was enacted to "[m]ake every effort to institute and maintain drug-and-alcohol-free workplace."

8. Under Policy DOP-P2, "[i]t is the policy of West Virginia State Government to ensure that its workplaces are free of alcohol, illegal drugs and controlled substances by prohibiting the use, possession, purchase, distribution, sale, or having such substances in the body."

9. For the previously outlined policy reasons, Grievant was notified by letter that his employment with Sharpe Hospital was terminated effective April 30, 2016.

10. Grievant denied being under the influence of the effects of marijuana while at work. Grievant tried to explain that his slurred speech and other issues were the result of being sick and from recent dental work he had had performed. Ultimately, Grievant conceded that he used marijuana during the time he was employed at Sharpe.

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 complying with rules that are established to require sobriety of its employees. Grievant’s violation of these rules by reporting to work intoxicated constitutes misconduct of a substantial nature affecting the rights and interests of the public. *West Virginia Department of Health and Human Resources v. Early*, Civil Action No. 16-AA-90 (March 6, 2017) reversing Docket No. 2016-1157-DHHR (August 31, 2016).

Requiring Grievant to submit to drug and alcohol testing was appropriate in this case. The Supreme Court of Appeals of West Virginia has held in *Twigg v. Hercules Corporation*, 185 W. Va. 155, 406 S.E.2d 52 (1990), 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."

In the present matter, requiring for-cause drug testing was appropriate when various staff had stated that Grievant appeared impaired and that he was acting sluggish, slow in speech and his eyes were bloodshot. This created a reasonable suspicion which allowed for the drug testing. That test revealed that Grievant did have marijuana in his system, in violation of several drug-free policies.

The Respondent has met its burden of proof in this grievance because they had reasonable suspicion to conduct the testing, and it demonstrated that Grievant violated Respondent's drug and alcohol free workplace policy. Based upon the report coming from various co-workers that Grievant appeared to be under the influence, Respondent clearly had reasonable suspicion to conduct a for-cause drug and alcohol test on Grievant. The undersigned finds no violation of Grievant's right to privacy due to the undisputed fact that Grievant's job responsibility involved public safety and the safety of others. Contrary to the assertions of Grievant in his proposals, the medical review officer in this matter did attempt to contact Grievant and the medical review officer was advised that Grievant did not wish to challenge the results of Respondent's drug test. In addition to Grievant's admissions of marijuana use, Respondent properly considered the laboratory results in deciding to terminate Grievant's employment for being in clear violation of the drug and alcohol workplace policy.

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 for-cause alcohol and drug screen on Grievant based on the facts and circumstances of this grievance.

5. Respondent met its burden of proof in establishing that Grievant violated 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: October 20, 2017

Ronald L. Reece
Administrative Law Judge