THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JOSEPH LEE SMITH,

Grievant,

v. **Docket No. 2018-0993-DOT**

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant, Joseph Lee Smith, filed an expedited level three grievance on February 20, 2018, against his employer, Respondent, Division of Highways ("DOH"), stating as follows:

> [h]aving failed a required (sic) drug test last year, I was required (sic) to submit to 6 tests over the next year that involved me to drop my pants and have someone view my body parts as I urinated. I completed 8 of these tests. One test had to be repeated due to an error at the testing site to check the correct box. These tests were humiliating and caused undo stress. On 2/8 I refused to take another test exposing my body parts as I had already over met requirements. Once I filled my requirements at 6 tests, I should have been permitted to go back to regular testing without the humiliation of exposing my body on additional tests. I was forced to submit to extra test with my body parts exposed after I met the requirements as stated by James Vance. I did not refuse a drug test, I refused to continue to allow someone to basically strip search me and view my body parts. This additional testing without merit shows discrimination and harassment from my superiors. I have passed every single drug test since I entered into the treatment program with James Vance. I should have been allowed to continue with my current random drug testing policy and not been forced to expose myself after I met my required tests. This has caused great humiliation in front of my fellow employees and those conducting the test. This has also caused extreme stress on my day to day life.

As relief sought, the Grievant requests, "[f]or this selective discrimination to end, and to be reinstated and compensated with back pay and interest. To be allowed to follow the regular policy on drug testing with out (sic) the added humiliation of showing body parts and to be made whole in every way."

A level three hearing was held on May 15, 2018, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person, *pro se*. Respondent appeared by counsel, Jason Workman, Esquire. This matter became mature for decision on June 25, 2018, upon the receipt of Respondent's proposed Findings of Fact and Conclusions of Law. Grievant did not avail himself of the opportunity to submit proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a Transportation Worker 3 (Bridge) After having tested positive for drugs on a required drug test, pursuant to the requirements of Respondent's policy, Grievant entered into a rehabilitation program. After he returned to duty Grievant was required to take eight follow-up drug tests over the next year. Grievant took and passed five valid drug tests. Grievant refused to cooperate with testing on his sixth test, and such was counted as a positive test. Respondent dismissed Grievant for his refusal to test and a second offense violation of the applicable drug and alcohol policies. Grievant denied refusing to test, argued that he was only required to take six tests which he had done, and raised claims of discrimination and harassment. Respondent proved by a preponderance of the evidence that Grievant refused to take a

required drug test and that such is good cause for his dismissal. Grievant failed to prove his claims of discrimination and harassment. Accordingly, this grievance is DENIED.

The following Findings of Fact are based upon a review of the record created in this grievance:

Findings of Fact

1. Grievant, Joseph Lee Smith, was employed by Respondent as a Transportation Worker 3 (Bridge), in Respondent's District 1. Grievant was employed by Respondent for nearly five years. It is unclear what other classifications, if any, Grievant held during his tenure.

2. Grievant signed Respondent's Drug and Alcohol Testing Policy Receipt form indicating that he had received the Drug and Alcohol Testing Policy on March 6, 2017. He also signed Respondent's Drug/Alcohol Testing Notification & Consent form on March 6, 2017.[1]

3. On or about March 7, 2017, Grievant was required to take a "pre-employment" drug test. This was undisputed by the parties. It is unclear from the record why Grievant was taking a "pre-employment" drug test as he was already employed by Respondent. However, it is noted in DOH policy that "pre-employment" testing is also required for employee transfers and promotions.[2]

4. Grievant complied with the March 7, 2017, drug testing requirement by appearing at the test site at the appropriate time and providing a urine sample. This

[1]*See*, Respondent's Exhibits 14 and 15, respectively.
[2]*See*, Respondent's Exhibit 13, West Virginia Department of Transportation Administrative Procedures, Volume III, Chapter 15, "Substance Abuse," Section C, "Drug and Alcohol Testing Policy," Subsection, "Required Tests-Drug and Alcohol," pg.12.

sample tested positive for amphetamines, methamphetamines, and marijuana. These results were reported to Respondent's human resources office and provided to Gordon Cook, Coordinator of the DOH Drug and Alcohol Testing Program.

5. By letter dated March 14, 2017, signed by then-Human Resources Director, Kathleen Dempsey, Grievant was suspended without pay for five working days citing Section III, Chapter 15 of the Department of Transportation Administrative Operating Procedures. Grievant's suspension was to begin at the close of business on that same date.[3] Grievant served his five-day suspension as directed and consulted a substance abuse professional as required by agency policy.

6. Grievant complied with the agency's drug and alcohol testing policies by being evaluated by a Substance Abuse Professional (SAP) before the end of his suspension. Grievant chose to see the SAP who was listed in the March 14, 2017, letter, James E. Vance MA, SAP.[4]

7. Mr. Vance assessed Grievant on or about March 17, 2017. He recommended that Grievant complete eight hours of substance abuse counseling and education. Grievant began a treatment program on March 27, 2017, and completed it on May 16, 2017.

8. Mr. Vance conducted Grievant's follow-up evaluation on May 16, 2017. By letter to Gordon Cook that same date, Mr. Vance stated that he has determined that Grievant had complied with his recommendations and may be considered for return to safety-sensitive duty at the discretion of DOH and after he submits a negative return to

[3] *See*, Respondent's Exhibit 2, March 14, 2017, letter.
[4] *See*, Respondent's Exhibit 2, March 14, 2017, letter.

duty test. Mr. Vance recommended that "Grievant be tested for drugs eight times during the first twelve months following his return to safety-sensitive duties."[5]

9. On May 18, 2017, Grievant took his return-to-duty drug test and passed the same.[6] He returned to duty on May 23, 2017.[7] Thereafter, Gordon Cook began setting up Grievant's follow up drug testing schedule.

10. Grievant submitted to drug testing on June 27, 2017, July 26, 2017, September 7, 2017, October 17, 2017, October 24, 2017, and December 5, 2017. Pursuant to Respondent's policies, which are based upon federal law, these follow-up tests had to be directly observed by someone at the testing site.[8]

11. The October 17, 2017, test was rejected by the medical review officer because its paperwork was not marked as directly observed. Without such, this test was not a valid test and could not be counted.[9] Grievant repeated the drug test on October 24, 2017.

12. Grievant tested negative for drugs on all the valid tests. The rejected test showed no results.

13. Grievant was scheduled to take another drug test on February 8, 2018. Such was considered his sixth test because the one from October 17, 2017, had been rejected.

14. Grievant told his supervisor, Tracy Brown that he had already taken the six tests that Mr. Vance had recommended, and that he was tired of the humiliation of being

[5] *See*, Respondent's Exhibit 3, May 16, 2017, letter.
[6] *See*, Respondent's Exhibit 5, test report.
[7] *See*, Respondent's Exhibit 4, spreadsheet.
[8] *See*, Respondent's Exhibits 7-11, test reports.
[9] *See*, Respondent's Exhibit 9, test report.

directly observed providing the urine sample. Mr. Brown explained to Grievant that pursuant to policy, a refusal to test is counted as a positive result. Grievant offered to leave a urine sample; however, such does not meet the requirements of policy or law.[10]

15. Grievant did not submit to the drug testing on February 8, 2018. Accordingly, such was counted as a positive result.

16. By letter dated February 8, 2018, Respondent informed Grievant that he was being dismissed from employment, effective February 23, 2018, for his refusal to take the drug test on that same date, which was his second violation of the WVDOT Drug and Alcohol Testing Policy.[11]

17. Grievant presented no evidence to support his claim that he only had to complete six drug tests. Grievant testified that his paperwork stated that he was required to complete only six, not eight, but he failed to bring his paperwork to the level three hearing. Grievant testified on his own behalf at the level three hearing, but presented no other witnesses or evidence to support his claims.

18. Even if the rejected drug test were counted as a valid test, Grievant still had not completed eight drug tests.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. In nondisciplinary matters, the burden is on the Grievant to prove the necessary elements of his claim by a preponderance of the evidence. W.VA. CODE ST. R. § 156-1-3 (2008).

[10] *See*, testimony of Tracy W. Brown.
[11] *See*, Respondent's Exhibit 16, February 8, 2018, dismissal letter.

"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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Grievant argues that he was wrongly dismissed from his employment because he successfully completed six drug tests as required by his Substance Abuse Professional's rehabilitation plan. Grievant denies that he refused testing. Grievant also asserts that all of his tests were directly observed. Respondent denies Grievant's allegations. Respondent argues that Grievant was required to successfully complete eight drug tests, but he only successfully completed five and that the one he refused to take would have been his sixth. Respondent asserts that such violates policy which is based upon federal law, and that the discipline it imposed on Grievant was proper and warranted.

Permanent state employees who are in the classified service can only be dismissed "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. 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); *Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*). *See also* W. VA. CODE ST. R. § 143-1-12.02 (2016). "Although it is true that dismissal is inappropriate when the employee's violation is found to be merely a technical one, it is also true that seriously wrongful conduct can lead to dismissal even if it is not a

technical violation of any statute. . . The test is not whether the conduct breaks a specific law, but rather whether it is potentially damaging to the rights and interests of the public." *W. Va. Dep't of Corr. v. Lemasters*, 173 W. Va. 159, 162, 313 S.E.2d 436, 439 (1984). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. W. Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988) (*per curiam*).

It is undisputed that in March 2017, Grievant was found to have violated the Respondent's Drug and Alcohol policy by testing positive for drugs on a required urine test. Such is not being grieved in this matter. However, it is necessary to mention that incident because such set in motion the events that lead to the instant grievance. The West Virginia Department of Transportation Administrative Procedures, Volume III, Chapter 15, "Substance Abuse," Section A, "WVDOT Drug Free Workplace & Overview of WVDOT Drug and Alcohol Testing," Subsection II, "Drug Free Workplace Policy," states, in part, as follows:

> It is the policy of the West Virginia Department of Transportation to ensure that its work places are free of illegal drugs and controlled substances by prohibiting the use, possession, purchase, distributions, sale, or presence in the body system without medical authorization, of illegal or controlled substances. This is applicable while employees are engaged in any work-related activity, which includes performance of Agency business during regularly scheduled work days, meal breaks and/or social occasions having a connection or dispensation of alcohol and/or a controlled substance; the reporting to work under the influence of a controlled substance or alcohol; the presence of non medically (sic) prescribed controlled substance or alcohol in the body system or possession of drug paraphernalia, are all prohibited in the work place.
>
> As a condition of employment all employees will:

1) Abide by the terms of this policy statement;

2) Notify his or her supervisor of any criminal drug statute conviction for a violation occurring in the work place, no later than five (5) days after such conviction; and

3) Sign the "Employee Drug Awareness Certification Form."

Violation of this policy will lead to appropriate personnel actions. Disciplinary action may range from a reprimand or dismissal and, employees may be required to participate in a drug rehabilitation program or an assistance program. . . .[12]

Grievant received a copy of the West Virginia Department of Transportation Drug and Alcohol Testing Policy on March 6, 2017.[13] On that same date, Grievant also signed the "West Virginia Department of Transportation, Division of Highways, Parkways Economic Development and Tourism Authority Drug/Alcohol Testing Notification & Consent" form whereby he agreed to submit to a urine test and a breath test as a precondition of employment/transfer/promotion.[14]

The West Virginia Department of Transportation Administrative Procedures, Volume III, Chapter 15, "Substance Abuse," Section C, "Drug and Alcohol Testing Policy," Subsection "Consequences for Prohibited Conduct," further states the following, in part:

First Offense-Random/Reasonable Suspicion/Employee Transfer/Promotion Positive Drug Test Result/Alcohol Concentration of 0.04 or Greater Result

The employee is to be relieved from covered duty until the end of the current shift and be suspended at the close of the day upon notification of test results. If the employee seeks the guidance of a Substance Abuse Professional. He/she will be

[12] *See*, Respondent's Exhibit 13, pg. 3, WVDOT.Drug Free Workplace Policy & Overview of WVDOT Administrative Procedures Vol. III, Chap. 15, Sec. A.
[13] *See*, Respondent's Exhibit 14, WVDOT Drug and Alcohol Testing Policy Receipt.
[14] *See*, Respondent's Exhibit 15, "Drug/Alcohol Testing Notification & Consent."

> allowed a Leave Status upon receipt by the Division/District of the date and time of initial visit from the SAP, in order to initiate a treatment program established by the Substance Abuse Professional. The employee must report to a SAP within seven (7) calendar days of positive test result notification, and failure to report will result in employee dismissal. If the Substance Abuse Professional's rehabilitation plan includes out-patient treatment, the employee shall be temporarily returned to duty in another capacity. . .All conditions set forth by the SAP must be met in order to return to work performing duties as defined in COVERED EMPLOYEES. A Return to Duty, showing an alcohol concentration of 0.02 or less or a negative drug test, is required of the employee. Follow up testing at a rate directed by the SAP, will be conducted on an unannounced basis and shall be at a frequency of not less than six (6) during the first twelve (12) months following the employee's return to work. . . Any employee who does not follow the entire plan set forth by the Substance Abuse Professional will be terminated upon written verification of such.
>
> **Second Offense- Random/Reasonable Suspicion/ Employee Transfer/Promotion Positive Drug Test Result/Alcohol Concentration of 0.04 of Greater Result**
>
> Dismissal[.][15]

Based upon the evidence presented, Grievant's positive drug test in March 2017, was his first offense, and it appears that all of the steps required in Respondent's Drug and Alcohol Testing Policy, Subsection "Consequences for Prohibited Conduct" were followed or were being followed until February 8, 2018. Grievant had consulted an SAP, Mr. Vance, as required by policy, who made recommendations for his rehabilitation plan. Mr. Vance recommended that Grievant complete eight hours of substance abuse counseling and education, and Grievant successfully complied. Mr. Vance completed his follow-up evaluation with Grievant on May 16, 2017. Mr. Vance concluded that Grievant

[15] *See*, Respondent's Exhibit 13, pp. 19-20, WVDOT.Drug Free Workplace Policy & Overview of WVDOT Administrative Procedures Vol. III, Chap. 15, Sec. C.

"complied with my initial recommendations and may be considered for return to safety-sensitive duty at the discretion of the WV Division of Highways and after he submits a negative return to duty test." Mr. Vance then recommended that Grievant be tested for drugs eight times during his first twelve months following his return to safety-sensitive duties.

Grievant completed his return-to-duty drug test on May 18, 2017, and it was negative. Grievant returned to duty on or about May 23, 2017. Following Mr. Vance's recommendations, Mr. Cook began the process of setting up Grievant's follow-up drug testing schedule. After Grievant's return-to-duty test, Mr. Cook set up eight dates for Grievant's follow-up drug tests. Thereafter, Grievant began appearing for drug testing when so notified. These follow-up drug tests were required by both federal law and policy to be directly observed by a urine sample collector. *See* 49 C.F.R. § 40.67(b). The West Virginia Department of Transportation Administrative Procedures, Volume III, Chapter 15, "Substance Abuse," Section C, "Drug and Alcohol Testing Policy," Subsection "Participation," states, in part, as follows:

> 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. Employees are to comply with all instructions received from the Breath Alcohol Technician/urine sample collector. Failure to cooperate with the Breath Alcohol Technician/urine sample collector will result in employee dismissal. A supervisory presence, with the authority to remove the employee from duty, will be maintained at the collection site in case an employee engages in prohibited behavior associated with the drug and alcohol testing rules.[16]

Subsection "Testing Procedures" of the same policy further states, in part, as follows:

[16] *See*, Respondent's Exhibit 13, pg. 11.

> The collector will inform the employee of the procedures necessary to fulfill his/her obligation under the drug testing rules. The employee's privacy will be maintained and all for individual privacy unless there is reason to believe that a particular individual may alter or substitute the specimen to be provided.
>
> For purposes of this policy, the following circumstances are the exclusive grounds constituting a reason to believe that a particular individual may alter or substitute the specimen, mandating a witnessed collection: . . . The employee has previously been determined to have used a controlled substance without medical authorization and the particular test was being conducted under this policy providing for follow up testing upon or after return to service.
>
> Only the urine sample collector has authority to witness an employee's providing of a urine sample, and he/she must be of the same gender as the person providing the sample. . . .[17]

Therefore, a follow-up urine test conducted without direct observation would be invalid. One of Grievant's tests was rejected as invalid because its accompanying paperwork was not marked as "directly observed."

Grievant tested negative for drugs on the five valid follow-up tests. Grievant was scheduled to test again on February 8, 2018, and he was informed of the same. Grievant objected to this test arguing that he had already completed six tests that were all directly observed, and he did not want to go through the humiliation of another directly observed test. It was explained to Grievant that the one test had been rejected because it was not marked as "directly observed" and that the Medical Review Officer made that decision. It was also explained to Grievant that the test had to be directly observed to comply with DOT policy and federal law. Further, Grievant's supervisor, Mr. Brown, explained to him that a refusal to test would be counted as a positive result. Despite this, Grievant

[17] *See*, Respondent's Exhibit 13, pp. 16-17.

indicated he would not participate in a directly observed test again, but offered to leave a urine sample. Such is not permitted by policy and law. In the end, Grievant did not take the test on February 8, 2018, and as a result, he was dismissed from his employment.

The West Virginia Department of Transportation Administrative Procedures, Volume III, Chapter 15, "Substance Abuse," Section B, "Official Memorandums Affecting Changes in WVDOT Drug and Alcohol Testing Policy," states, in part, as follows: "2) [a] refusal to test, failure to provide a sample without a valid medical reason, refusal to sign step 2 of the Breath Alcohol Form, or adulteration of a sample will be treated as a positive test for disciplinary purposes. This includes random and reasonable suspicion tests." Further, the West Virginia Department of Transportation Administrative Procedures, Volume III, Chapter 15, "Substance Abuse," Section C, "Drug and Alcohol Testing Policy," Subsection "Refusal to Test," further states, in 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 by this policy, will be initiated.
>
> Employees are required to follow all instructions provided by the Breath Alcohol Technician/urine sample collector and/or the collection site's supervisory presence. Cooperation in the drug/alcohol testing process is a mandatory condition of employment.
>
> Other conduct constituting a refusal to test are:
>
> - Tampering with or attempting to adulterate the specimen or collection procedure, not reporting to the collection site in the time allotted, or leaving the scene of an accident as defined by this policy without a valid reason before testing has been conducted.

- Failure to provide adequate breath/urine samples without a valid medical reason also constitutes a refusal to test. . . .[18]

Grievant's objections to being directly observed while providing a urine same are understandable. However, direct observation is required by DOT policy and federal law for follow-up drug testing. As Grievant did not provide a sample as required by policy and law, such amounts to a refusal to cooperate with the testing process. Pursuant to policy, this refusal is considered a positive test, which became Grievant's second offense violation of Respondent's Drug and Alcohol Testing Policy. The consequence for a second violation, as stated in policy, is dismissal.[19]

Grievant repeatedly argued that all of his papers said that he only had to complete six follow-up drug tests, not eight. However, Grievant did not bring any of his documents to the level three hearing. The May 16, 2017, letter from Mr. Vance clearly states that he recommended "eight (8)" follow-up drug tests during Grievant's first twelve months following his return to safety-sensitive duties. There was no evidence presented to suggest otherwise. It is noted that the DOT Drug and Alcohol Testing Policy states that the federal regulations require the employee to be subject to a *minimum* of six (6) follow-up tests during the first twelve months.[20] Therefore, while the minimum of follow-up tests is six, the SAP may recommend more. This difference may have caused some confusion. Nonetheless, the evidence presented establishes that Grievant failed to complete his eight follow-up drug tests as required. Respondent has met its burden of proving that

[18] *See*, Respondent's Exhibit 13, pg. 15, WVDOT.Drug Free Workplace Policy & Overview of WVDOT Administrative Procedures Vol. III, Chap. 15, Sec. C.
[19] *See*, Respondent's Exhibit 13, pg. 20.
[20] *See*, Respondent's Exhibit 13, pp. 15, 19.

Grievant violated its applicable drug and alcohol policies. As Grievant worked in a safety-sensitive job, and was submitting to follow-up testing because of a previous positive drug test, failure to cooperate with the testing requirements and procedures is not simply a technical violation of policy. Grievant's work can affect the safety of the public. It is in the best interests of the public that those in safety-sensitive jobs be free of drugs. As Grievant refused to cooperate with the drug testing requirements, such constitutes good cause for his dismissal.

From his statement of grievance and his testimony at the level three hearing, it appears that Grievant is arguing that Respondent harassed and discriminated against him with respect to how he was treated during his follow-up testing, and the decision to dismiss him from employment. Discrimination for purposes of the grievance process has a very specific definition. "'Discrimination' means 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). "'Harassment' means repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." W. VA. CODE § 6C-2-2(l). "What constitutes harassment varies based upon the factual situation in each individual grievance." *Sellers v. Wetzel County Bd. of Educ.,* Docket No. 97-52-183 (Sept. 30, 1997). Grievant offered no evidence to support these allegations other than his own testimony. From the evidence presented, Respondent appears to have followed its policies on drug testing and the consequences of negative testing results when dealing with Grievant. Grievant complied with the policy until the February 8, 2018, test. Grievant failed to cooperate with testing procedures and his

refusal to test resulted in his second offense violation of the stated drug and alcohol policies. Under these circumstances, dismissal is allowed by policy. Grievant presented no evidence to suggest that other employees did not have to submit to directly observed drug testing, or that others were not dismissed for such conduct. As such, Grievant failed to prove his claims by a preponderance of the evidence. Therefore, for the reasons set forth herein, this grievance is denied.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. In nondisciplinary matters, the burden is on the Grievant to prove the necessary elements of his claim by a preponderance of the evidence. W.VA. CODE ST. R. § 156-1-3 (2008). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), ***aff'd***, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

2. Permanent state employees who are in the classified service can only be dismissed "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. 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); *Sloan v.*

Dep't of Health & Human Res., 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*). *See also* W. VA. CODE ST. R. § 143-1-12.02 (2016).

3. Respondent proved by a preponderance of the evidence that Grievant violated certain provisions of the West Virginia Department of Transportation Administrative Procedures, Volume III, Chapter 15, "Substance Abuse," on or about February 8, 2018, and that such constitutes good cause for Grievant's dismissal.

4. "'Discrimination' means 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).

5. "'Harassment' means repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." W. VA. CODE § 6C-2-2(l).

6. Grievant failed to prove his claims of discrimination and harassment by a preponderance of the evidence.

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 (eff. July 7, 2008).

DATE: August 21, 2018.

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Carrie H. LeFevre
Administrative Law Judge