THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRENDA JUSTICE,
Grievant,

v. **Docket No. 2018-0362-DEP**

DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.

DECISION

Grievant, Brenda Justice, was employed by Respondent, Department of Environmental Protection ("DEP"), in the Division of Land Restoration's Office of Environmental Remediation ("REAP"). She worked in the DEP headquarters in Charleston, West Virginia. Ms. Justice filed a hand-written grievance on September 8, 2017. She alleges that she was wrongfully terminated for an alleged violation of the Division of Personnel *Drug- and Alcohol-Free Workplace Policy* due to a false positive breathalyzer reading. Grievant seeks reinstatement to her position and back pay.[1] Since Grievant was contesting the termination of her employment the grievance was filed at level three pursuant to W. VA. CODE § 6C-2-4(a)(4).

[1] Grievant did not file her grievance on an official grievance form. However, the document is titled "Notice to file a grievance against being fired Aug. 25, 2017." Grievant set out a detailed narrative of her allegations which is more than sufficient to notify Respondent of her claim. Given the West Virginia Supreme Court's mandate that the Grievance Board apply "the principles of substantial compliance and flexible interpretation to achieve the legislative intent of a simple and fair grievance process, as free as possible from unreasonable procedural obstacles and traps." This document substantially complied with statutes and rules related to the filing of a grievance. *Hale v. Mingo County Bd. of Educ.*, 199 W. Va. 387, 484 S.E.2d 640 at 646 (1997) (citing, *Duruttya v. Board of Educ*., 181 W.Va. 203, 382 S.E.2d 40 (1989) and *Spahr v. Preston County Bd. of Educ*., 182 W. Va. 726, 391 S.E.2d 739 (1990)).

The initial hearing was continued for good cause. Thereafter, Respondent files a "Notice to raise and Preserve the Issue of Mitigation of Damages." After another continuance for good cause, the Level Three hearing was held at the West Virginia Public Employees Grievance Board Charleston office on June 11, 2018. Grievant appeared *pro se*[2] and Respondent was represented by Anthony D. Eates II, Deputy Attorney General. This matter became mature for decision on July 20, 2018, upon receipt of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Based upon reasonable suspicion that Grievant was impaired at work, Respondent sent Grievant for drug and alcohol testing. Grievant was administered three tests related to blood alcohol content. Additionally, the lab techs were unable to draw blood from Grievant for the most accurate method of determining blood alcohol content. The tests produced contradictory results. Respondent terminated Grievant's employment for a violation of the Division of Personnel *Drug- and Alcohol-Free Workplace Policy* based solely upon a positive test result indicating Grievant had alcohol in her body while at work. Respondent did not prove by a preponderance of the evidence that Grievant had alcohol in her body while at work. The issue of mitigation of damages is also raised. While Respondent proved that Grievant failed to seek other employment to mitigate her damages, Respondent provided no evidence that such employment was available or what amount Grievant could have been paid had she exercised due diligence.

[2] "*Pro se*" is translated from Latin as "for oneself" and in this context means one who represents oneself in a hearing without a lawyer or other representative. *Black's Law Dictionary,* 8th Edition, 2004 Thompson/West, page 1258.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Brenda Justice, Grievant, was employed by Respondent DEP, until she was dismissed for allegedly violating the Division of Personnel ("DOP") *Drug- and Alcohol-Free Workplace Policy.* She worked in the Division of Land Restoration's Office of Environmental Remediation ("REAP") as an Office Assistant 3.

2. Grievant suffers from Lupus.[3] In an effort to control the symptoms of this chronic autoimmune disease, Grievant has been prescribed Immunosuppressants, as well as Morphine, Xanax, and Oxycodone. She is supposed to take two 30 MG Morphine tablets every six hours.[4] Additionally, she takes the Oxycodone as needed for pain and Xanax as needed for anxiety. Grievant was advised by her doctor that she could not drink any alcohol because, with the immunosuppressants she was taking, it could cause immediate and severe liver damage.[5]

3. Grievant tries not to take the Oxycodone or Xanax at work because it causes her to be very drowsy. When she must do so to alleviate severe pain or anxiety she alerts a supervisor, so they will know if she falls asleep or suffers some other serious side effect.

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[3] Lupus is a systemic autoimmune disease that occurs when your body's immune system attacks your own tissues and organs. Inflammation caused by lupus can affect many different body systems — including your joints, skin, kidneys, blood cells, brain, heart and lungs. Mayo Clinic website, *Patient Care & Health Information, Diseases & Conditions,* https://www.mayoclinic.org/diseases-conditions/lupus/symptoms-causes/syc-20365789.

[4] Grievant Exhibit 1, copies of prescription information from Grievant's pharmacy.

[5] Grievant's fiancé, Christopher Woods testified that he has known Grievant since 2010 and she has never taken a drink of alcohol in that time because with the medicine she takes it could kill her.

4. Grievant and five other employees attended a meeting in the DEP headquarters on August 17, 2017. The meeting started around 9:30 a.m. and lasted approximately one hour. During the meeting Grievant was having difficulty staying awake. She nodded off about six times and had to be nudged by a coworker to wake up.

5. Following the meeting a coworker, Niki Davis, filled out a *Drug- and Alcohol-Free Workplace Incident Report* ("incident report") indicating that during the meeting Grievant appeared sleepy and fatigued and exhibited slow speech. She also noted that Grievant was sitting with her head slumped over. The incident report was given to Sandra Rogers, Grievant's immediate supervisor. (Respondent Exhibit 2). Ms. Rogers also completed an incident report regarding the same meeting noting similar behavior by Grievant including nodding off to sleep with her mouth "drooping open." (Respondent's Exhibit 5).

6. Grievant was sick that night with a fever and body aches. She was up most of the night with these symptoms. She took her normal dose of Morphine around 3:30 a.m. and a Xanax tablet two hours later. She rode the bus to work and arrived before 7:00 a.m. on August 18, 2017. Grievant took an Oxycodone tablet after she arrived at work.[6] Shortly after that she fell asleep at her desk.

7. Shortly after 7:00 a.m. Susan Wheeler arrived at work and saw Grievant asleep at her desk. Ms. Wheeler reported to her supervisor, Niki Davis, that Grievant was asleep around 7:00 a.m., and seemed barely awake at 7:30 a.m. Ms. Davis went to Grievant's cubicle, ostensibly on a work-related issue and woke Grievant after speaking

[6] Grievant testified that in hindsight she was not well enough to come to work but did so because she did not have any accumulated leave.

her name three times. Ms. Davis asked Grievant if she was alright and Grievant nodded that she was. Ms. Davis reported Grievant's status to Grievant's supervisor, Sandra Rogers by e-mail. (Respondent Exhibit 4). She subsequently returned to Grievant's cubicle and took a picture with her cellphone showing Grievant asleep at her desk. (Respondent Exhibit 5).

8. At 9:27 a.m., Ms. Rogers forwarded the e-mail she had received to her supervisor John Dempsey, and DEP Human Resources Director Chad Bailey. (Respondent Exhibit 6).

9. At approximately 9:00 a.m., and prior to receiving Mr. Rogers' e-mail, Chad Bailey went to Grievant's cubical and found Grievant asleep at her desk. Mr. Bailey took a picture of Grievant sleeping.[7] Mr. Bailey also filled out an incident report.

10. Grievant was awake around 9:10 a.m. and reported to Mr. Bailey and Mr. Dempsey that she was not feeling well and only came to work because she was out of leave.

11. Based upon the behavior that he had observed, Director Bailey suspected that Grievant was impaired by drugs or alcohol. He directed Grievant to be tested at a private testing laboratory in South Charleston and directed co-workers Stephanie Burdette and Matthew Burdette to transport Grievant to the testing facility.[8]

12. Upon arrival at the testing facility around 10:15 a.m., Grievant was required to fill out paperwork and answer questions. She was administered a breathalyzer test at

[7] (Respondent Exhibit 9). Grievant had put on a sweater between the taking of the two photographs.

[8] Both of the Burdettes typed separate narratives of the trip to and from the testing facility, as well as their observations at the facility. (Respondent Exhibit 7 and 8). Grievant generally did not dispute what was reported in these narratives.

10:30 a.m. which produced a result indicating a breath alcohol reading of .007. Grievant requested a second breath test which produced the same result. (Respondent Exhibit 11).

13. Upon learning the result of the test, Grievant became very upset stating that she did not drink alcohol due to the potential damage to her liver. She asked for a blood test, which was telephonically authorized by Director Bailey.

14. Laboratory Technologists made several attempts to draw blood from Grievant from her arms, feet and hands and were unable to get a blood sample. Grievant again was very upset because she believed the blood test, which was the most accurate indicator of blood alcohol content, would show she had no alcohol in her system.

15. The lab technicians informed Grievant that she could take a urine test, but she had to give a sample prior to 1:30 p.m. for it to be valid. Grievant made several unsuccessful attempts to give a sample. Grievant produced a sufficient urine sample around 1:00 p.m. and she left the facility with her coworkers at approximately 1:10 p.m.[9] This was well within the deadline established by the testers for giving a valid sample.

16. The urine test produced a result that Grievant had no alcohol in her system.

17. By letter dated August 25, 2017, Grievant was dismissed from her employment with the DEP. This letter was hand delivered after a predetermination conference was held on the same day. The sole reason for the termination of Grievant's employment was that she allegedly violated the DOP *Drug- and Alcohol-Free Workplace Policy* by "having alcohol in [her] body system at work." *Id.* § III (C).

[9] (Respondent Exhibit 8), typed narrative of Matthew Burdette.

18. Grievant did not seek any employment in other positions after her employment was terminated by Respondent.[10]

Discussion

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

> . . . *See* [*Watkins v. McDowell County Bd. of Educ.,* 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

W. Va. Dep't of Trans., Div. of Highways v. Litten, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

The sole grounds for the termination of Grievant's employment was that she violated the DOP *Drug- and Alcohol-Free Workplace Policy.* The policy states in pertinent part:

> The possession, use, distribution, or dispensation of alcohol; the reporting to work under the influence of alcohol, or *having alcohol in the body system at work, whether the alcohol was consumed at work*

[10] Grievant testified that she did not seek employment based upon advise from her lawyer.

> *or away from work, are all prohibited in the workplace*. When reasonable suspicion exists that an independent contractor, volunteer, or employee has reported to work under the influence of alcohol, illegal drugs, or is impaired due to abuse or misuse of controlled substances or prescribed medications, the individual may be subject to assessment and disciplinary action or termination of service agreement. (Emphasis added). *Id.*

Respondent argues that Grievant had alcohol in her body while at work in violation of the foregoing highlighted policy language. Respondent relies upon the result of the breathalyzer tests to prove this violation. Grievant's use of her prescribed medication is not sighted to support the disciplinary action.

Grievant does not deny that she was asleep at her desk or that she was having difficulty functioning normally while at work on August 18, 2017. Nor does she deny that her behavior constituted reasonable suspicion of impairment justifying her being subjected to drug and alcohol testing. She alleges that the behavior resulted from the ingestion of her lawfully prescribed medication and not alcohol. Grievant states that she never drinks alcohol in any form because her doctor stressed that if she did in combination with her medications she could suffer immediate and possible fatal liver damage. Respondent offered no evidence to refute this assertion.

For Respondent, Grievant's behavior at work only provided reasonable suspicion that Grievant was impaired by drugs or alcohol. It provided no proof that she had alcohol in her body system which is the prohibition established in the DOP policy. The only evidence Respondent produced to prove Grievant violated the policy was the result of the two breathalyzer tests. Conversely, there is also evidence provided by a urine test conducted by the same technicians that Grievant had no alcohol in her system.

Respondent points out that the urine test was taken after the breath tests and are

less reliable. However, Respondent's witnesses and exhibits demonstrate that the urine sample was taken within the proper time period established by the laboratory to render its results valid. Respondent did not provide any evidence from any source that indicated that the result was invalid. Given the record of this case, it is just as likely that the breathalyzer tests were flawed. The Grievance Board has held on numerous occasions, "Where the evidence equally supports both sides, a party has not met its burden of proof." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

The contradictory tests are sufficient to find that Respondent has failed to meet the burden of proof in this case. Given Grievant's grave medical condition, her insistence that she avoids alcohol because it could kill her is certainly plausible. Given the totality of the evidence it is more likely than not that Grievant did not have alcohol in her system on August 18, 2017. Respondent did not prove by a preponderance of the evidence that Grievant violated the DOP *Drug- and Alcohol-Free Workplace Policy.* Accordingly, the grievance is GRANTED.

There remains the issue of the measure of damages. Grievant would normally receive back pay plus interest from the time she was dismissed until the time she is reinstated. However, Respondent properly raised the Grievant's obligation to mitigate her damages. W. VA. CODE § 55-7E-3(a) requires:

> (a) In any employment law cause of action against a current or former employer, regardless of whether the cause of action arises from a statutory right created by the Legislature or a cause of action arising under the common law of West Virginia, the plaintiff has an affirmative duty to mitigate past and future lost wages, regardless of whether the plaintiff can prove the defendant employer acted with malice or malicious intent, or in willful disregard of the

> plaintiff's rights. The malice exception to the duty to mitigate damages is abolished. Unmitigated or flat back pay and front pay awards are not an available remedy. Any award of back pay or front pay by a commission, court or jury shall be reduced by the amount of interim earnings or the amount earnable with reasonable diligence by the plaintiff. It is the defendant's burden to prove the lack of reasonable diligence.

The statue was apparently passed to remove the exception to the plaintiff's obligation to mitigate damages where it is proven that the discharge was malicious.[11] *Martinez v. Asplundh Tree Expert Co*., 239 W. Va. 612, 613-614, 803 S.E.2d 582, 583-584, (2017).

As required by the statute, Respondent proved through Grievant's testimony that she lacked reasonable diligence in seeking new employment to mitigate her damages. Respondent provided no evidence to show the amount of earnings Grievant would have earned through reasonable diligence. Without such evidence the Administrative Law Judge is left to speculate whether comparable jobs were available to grievant through a reasonably diligent search and what Grievant might have earned in such employment. Speculation is not sufficient to meet the proof burden. *See, Coleman v. Dep't of Health & Human Res.,* Docket No. 03-HHR-318 (Jan. 27, 2004). Without such evidence it is impossible to accurately establish an appropriate amount to deduct from Grievant's back pay award.

The West Virginia Supreme Court of Appeals found that the obligation to mitigate damages applied to grievants in the public employees grievance procedure in the case

[11] *See, Mason County Board of Education v. State Superintendent of Schools*, 170 W.Va. 632, 295 S.E.2d 719 (1982), for the mitigation of damages rule including the exception for malicious discharge as it existed before the passage of W. VA. CODE § 55-7E-3.

of *Kanawha County Bd. of Educ. v. Fulmer*, 719 S.E.2d 375, 380-381, 228 W. Va. 207, 212-213, 2011. In that case the Court found that the respondent had properly raised the issue of mitigation at the hearing and the Administrative Law Judge ruled that if the grievant prevailed the issue of proper mitigation of damages would be heard and decided in a separate hearing. The grievant did prevail but no separate hearing was held and the back-pay damages were not mitigated. The Court held:

> Based upon this Court's review of the matter, we find that the current damages award is deficient and inaccurate based upon the failure to integrate an assessment of Mr. Fulmer's mitigation of damages. Consequently, this matter must be remanded to the circuit court with directions to order a hearing before the administrative law judge for the development of salient facts in that forum and for the explicit purpose of determining an appropriate damages award which includes an assessment of Mr. Fulmer's mitigation of damages.

Id.

In the present case, the issue of mitigation of damages was not delayed for a second hearing and Respondent had the obligation to present at least minimal proof that comparable jobs existed in the area and the pay Grievant might have received had she made reasonable efforts to acquire one of them. Without such evidence, it is impossible to determine the appropriate amount to deduct from Grievant's back pay. It is simply not enough to demonstrate that that Grievant failed to mitigate her damages. At least some evidence must be presented upon which the Administrative Law Judge can determine the appropriate amount to be deducted from the back pay award. Accordingly, Respondent failed to prove by a preponderance any amount should be deducted from the damages awardable to Grievant because she failed to mitigate her damages.

Conclusions of Law

1. As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. Respondent did not prove by a preponderance of the evidence that Grievant violated the DOP *Drug- and Alcohol-Free Workplace Policy* by having alcohol in her body system while at work.

3. W. VA. CODE § 55-7E-3(a) requires:

> (a) In any employment law cause of action against a current or former employer, regardless of whether the cause of action arises from a statutory right created by the Legislature or a cause of action arising under the common law of West Virginia, the plaintiff has an affirmative duty to mitigate past and future lost wages, regardless of whether the plaintiff can prove the defendant employer acted with malice or malicious intent, or in willful disregard of the plaintiff's rights. The malice exception to the duty to mitigate damages is abolished. Unmitigated or flat back pay and front pay awards are not an available remedy. Any award of back pay or front pay by a commission, court or jury shall be reduced by the amount of interim earnings or the amount earnable with reasonable diligence by the plaintiff. It is the defendant's burden to prove the lack of reasonable diligence.

4. Respondent proved by a preponderance of the evidence that Grievant lacked reasonable diligence in seeking new employment to mitigate her damages.

5. Respondent did not provide any evidence about the amount of earnings

Grievant would have reasonably earned had she exercised reasonable diligence in seeking interim employment.

6. Without evidence about the amount of earnings Grievant would have reasonably earned, the Administrative Law Judge is left to speculate whether comparable jobs were available to Grievant through a reasonably diligent search and what Grievant might have earned in such employment. Speculation is not sufficient to meet the proof burden. *See, Coleman v. Dep't of Health & Human Res.,* Docket No. 03-HHR-318 (Jan. 27, 2004).

7. Respondent failed to prove by a preponderance any amount should be deducted from the damages awardable to Grievant because she failed to mitigate her damages.

Accordingly, the grievance is GRANTED.

Respondent is Ordered to immediately reinstate Grievant to her position as an Office Assistant 3, pay to Grievant all wages she would have earned from the date of her dismissal to the date of her reimbursement, including statutory interest and to restore all benefits she would have accrued during that time.

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: August 17, 2018.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE