

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**SHARION SPEARS,
Grievant,**

v.

Docket No. 2019-0649-DOT

**DIVISION OF HIGHWAYS,
Respondent.**

DECISION

Grievant, Sharion Spears, is employed by Respondent, Division of Highways. On November 29, 2018, Grievant filed this grievance against Respondent stating, "Improperly charged with violation of drug policy." For relief, Grievant seeks "all fees, wages, holiday pay, interest and overtime including annual and sick time used."

Following the December 18, 2018 level one conference, a level one decision was rendered on January 14, 2019, denying the grievance. Grievant appealed to level two on January 15, 2019. Grievant appealed to level three of the grievance process on March 29, 2019. A level three hearing was held on August 15, 2019, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, Regenia L. Mayne. This matter became mature for decision on September 13, 2019, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a Transportation Worker 2 Equipment Operator, which requires her to hold a commercial driver's license. Grievant protests her suspension from employment. Federal regulations require Respondent to have a

drug and alcohol testing program in place for employees holding a commercial driver's license. Grievant was selected for random drug screening under Respondent's policy and tested positive due to her use of CBD oil for her various medical conditions. Grievant's use of CBD oil was approved by her medical provider. Use of CBD oil is not a valid medical reason per the federal regulations. Although Respondent failed to present the laboratory results, its presentation of the reviewing physician's report and the testimony of the reviewing physician at the level three hearing was sufficient to meet the burden of proof. Accordingly, the grievance is denied.

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

Findings of Fact

1. Grievant is employed by Respondent as a Transportation Worker 2 Equipment Operator, which requires her to hold a commercial driver's license ("CDL").
2. Respondent is required by federal law to have a drug and alcohol testing program in place for employees holding a CDL.
3. Respondent's drug and alcohol policy appears in the West Virginia Department of Transportation Administrative Procedures Volume III, Chapter 15, Sections A through D. In pertinent part the policy prohibits the presence of illegal or controlled substances in the body system without medical authorization, requires random drug and alcohol screening, and, upon first offence requires the removal of the employee from safety sensitive duties and suspension of five days.
4. On November 13, 2018, Grievant was selected for random drug screening and submitted a split urine sample on that date.

5. Grievant tested positive for THC, the abbreviation for the prohibited chemical composition of marijuana.

6. Grievant suffers from multiple medical conditions and experiences chronic pain. Prior to her drug testing, Grievant had been using CBD oil for her conditions with the knowledge and approval of her medical provider.

7. CBD oil, a hemp product, also contains THC, although it is supposed to have only limited amounts of THC. Although uncommon, CBD oil can result in a positive drug screen for THC.

8. Dr. Charles H. Moorefield was the Medical Review Officer for Grievant's drug test. Dr. Moorefield has been a Medical Review Officer since 1991. He is certified by the American Association of Medical Review Officers.

9. Dr. Moorefield properly submitted his Medical Review Officer Report to Respondent in compliance with the federal regulation.

10. By letter dated November 20, 2018, Drema L. Smith, Acting Director of the Human Resources Division, suspended Grievant for five days for violation of Respondent's drug policy.

11. Grievant requested repeat testing of her second urine sample, which also tested positive for THC on November 27, 2018.

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. W.VA. CODE ST. R. § 156-1-3 (2018). "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.*

Grievant argues Respondent failed to meet its burden of proof because the positive drug screen result was due to her use of CBD oil, not marijuana, and because Respondent failed to submit complete and proper documentation of the drug screening results. Respondent asserts it complied with all applicable laws and policies.

Grievant correctly asserts the documentation of the test results was not complete as the actual laboratory test results were not entered into evidence. Grievant cites *Burdette v. Div. of Highways*, Docket No. 2010-0003-DOT (Mar. 8, 2010) to dispute Respondent's assertion that the actual laboratory test results were unavailable because the employer is not provided the actual results due to confidentiality requirements in the regulations. The procedure for testing under the federal regulations is that the laboratory performs the test and sends the results only to the Medical Review Officer, a licensed physician who reviews the laboratory results and evaluates medical explanations. 49 C.F.R. §§ 40.97(b), 40.3. The Medical Review Officer ensures the integrity of the testing process, verifies the laboratory results, interviews the employee to evaluate possible medical explanation for positive results, and reports the results to the employer. 49 C.F.R. §§ 40.123, 40.129, 40.163. Although only the Medical Review Officer is initially provided a copy of the actual numerical results from the laboratory, the laboratory is required to provide the actual results to the employer if the employer requests this information for use in a legal proceeding. 49 C.F.R. §§ 40.97(b), 40.323(c).

Although it would have been best for Respondent to request and present the actual laboratory results as evidence, Respondent has provided sufficient evidence to meet its burden of proof by a preponderance of the evidence. Dr. Moorefield's report complied with the requirements of the federal regulation, which does not require that he provide numerical values in his report. There is no allegation there was any failure of chain of custody or other irregularity in the laboratory procedures. Most importantly, Dr. Moorefield was called to testify. In his testimony Dr. Moorefield referred to and explained the actual laboratory test results by reference to the results contained in his file. Grievant was provided the opportunity to cross examine Dr. Moorefield.

Whether Grievant's positive drug screen was as a result of marijuana use or CBD oil use is immaterial. It is the substance THC that is prohibited. Although CBD oil should have limited amounts of THC, it is possible for THC to be present in higher concentrations in CBD oil. The federal regulations specifically state the Medical Review Officer "must not accept an assertion of consumption or other use of a hemp or other non-prescription marijuana-related product as a basis for verifying a marijuana test negative." 49 C.F.R. § 40.151(f). Even medical marijuana prescribed under state law is not a valid excuse under the federal regulations. 49 C.F.R. § 40.151(e). Therefore, even though Grievant's medical provider was aware and approving of her use of CBD oil, that does not provide medical excuse under the regulations.

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. W.VA. CODE ST. R. § 156-1-3 (2018). "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.*

2. "[A]n employer who receives a verified positive drug test result . . . must immediately remove the employee involved from performing safety-sensitive functions." 49 C.F.R. § 40.23(a).

3. "[T]he consumption or other use of a hemp or other non-prescription marijuana-related product [is not] a basis for verifying a marijuana test negative." 49 C.F.R. § 40.151(f). Even medical marijuana prescribed under state law is not a valid excuse under the federal regulations. 49 C.F.R. § 40.151(e).

4. Respondent proved by a preponderance of the evidence Grievant tested positive for THC and that its suspension of Grievant for the same was justified under the federal regulations and Respondent's policy.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: October 25, 2019

Billie Thacker Catlett
Chief Administrative Law Judge