THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

NICHALOUS H. ANELLO,
Grievants,

v. **Docket No. 2020-1066-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Nichalous Anello, was employed by Respondent, Division of Highways, as a probationary employee. On March 12, 2020, Respondent notified Grievant of his dismissal. On March 19, 2020, Grievant filed this grievance, stating, "Failed drug test, False Positive I do not use street drugs – OTC medication. (Attachment)."

Excerpts from the attachment are as follows:

> I had been out working with the canopy removal crew in the rain and snow. I started getting sick but did not want to miss work, so I was medicating myself with over the counter medication. … On the 5th of March I did my random pee test and told the collector that I had been on medication, she said it may show or may not. On the 11th the lab called and said I had failed the test, again I told them that I had been sick taking OTC medicine and he did not seem to care. He said you failed and that is what I am going to submit. They said I could test the other half for $150.00 and to let them know. It was not until the 18th that I was told the only way to prove my innocence was to test the 2nd half but someone from the DOH would have to call and say that it was OK to test the 2nd half of sample. I contacted Angie Broschart and she said she would have to find out if someone from the state would approve that. I found out on the 19th from Angie, that no one would ok the 2nd test. …

As relief, Grievant requests, "Reinstated at my current, dismissed, position. Benefits restored, back pay."

Grievant filed directly to level three of the grievance process.[1] A level three hearing was held on March 26, 2021, via an online platform.[2] Grievant appeared and was self-represented. Respondent appeared by James Rossi, District Engineer for District 4 & 8, and was represented by Regenia Mayne, Esquire. This matter became mature for decision on April 23, 2021. Each party submitted written proposed findings of fact and conclusions of law (PFFCL).

Synopsis

Grievant was employed by the Division of Highways (DOH) on a probationary basis when he failed a drug test. DOH dismissed Grievant for violating its drug policy. Grievant contends the test misidentified over-the-counter medication and that he requested but was not allowed further testing of the sample. DOH proved the test was accurate and that Grievant engaged in misconduct. Accordingly, this 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 was a Transportation Worker 1 Equipment Operator (TW1EQOP) probationary employee with the Division of Highways (DOH) in District 8 when he tested positive for drugs. (Testimony of Natasha Richardson, Director of DOH Personnel Division)

[1]West Virginia Code § 6C-2-4(a)(4) permits a grievant to proceed directly to level three of the grievance process when the grievance deals with the discharge of the grievant.
[2]The hearing was delayed due to the COVID-19 pandemic.

2. At the time of the drug test, the Department of Transportation (DOT) Policy 3.15 ("Policy: Substance Abuse") applied to all employees within the Transportation Worker (TW) classification series. (Respondent's Exhibit 5)

3. This policy allowed DOH to randomly require covered employees to submit urine samples for drug testing.

4. This policy covered several drug categories, including amphetamines.

5. The policy required DOH to dismiss covered probationary employees after their first positive drug test.

6. Grievant signed a statement acknowledging receipt of the "Department of Transportation's Drug and Alcohol Testing Policy"[3] on November 12, 2019. (Respondent's Exhibit 6)

7. On March 5, 2020, Grievant submitted to a random drug test by providing a urine sample.

8. In conjunction with DOH's drug testing protocol, Grievant's urine sample was forwarded to the lab with the "5-Part Non-Federal Drug Testing Custody and Control Form" to ensure proper chain of custody. (Respondent's Exhibit 4)

9. An initial screening of Grievant's urine sample identified methamphetamine and amphetamine at 500 ng/ml [nanograms per milliliter]. (Respondent's Exhibit 1)

10. Protocol required that a result of 250 ng/ml or higher be reported as positive, with anything lower reported as negative. As such, Grievant was reported as positive. (Testimony of Dr. Valldeperas, the Medical Review Officer at Cynergy)

[3]It appears that the "Drug and Alcohol Testing Policy" referred to in Grievant's signed acknowledgement is DOT Policy 3.15, as Grievant did not argue otherwise.

11. In conjunction with standard practice for a positive screening, a confirmatory test was performed. The standard for confirmatory testing is the chromatography mass spectrometry test, which rules out false positive results such as those from cold medicine. This test is mandated for confirmatory testing and is the gold standard in drug testing. The test analyzes drug levels at the molecular level, similar to DNA testing. The test identified methamphetamine and amphetamine at levels significantly higher than the cutoff.[4] (Testimony of Dr. Valldeperas)

12. As with all positive results, DOH sent the test results to Cynergy, an independent medical review office, on March 11, 2020. That same day, Cynergy's Medical Review Officer, Dr. Salvadore Valldeperas, informed Grievant by phone that his sample had tested positive for drug use. Dr. Valldeperas questioned Grievant about any prescription medications that could account for the positive test result. Grievant did not reveal any such prescription medications. (Testimony of Dr. Valldeperas)

13. Dr. Valldeperas did not ask Grievant about his use of over-the-counter medications because there are none that would have accounted for his positive test result. (Testimony of Dr. Valldeperas)

14. There were no irregularities in testing Grievant's urine sample, as these would have immediately been reported to Gordon Cook, the DOH's Coordinator of Drug and Alcohol. (Testimony of Mr. Cook)

[4]Dr. Valldeperas testified that the confirmatory test showed methamphetamine at 22,000 and amphetamine at 2,000, and that these were significantly higher than the cutoff level. No evidence was presented regarding the meaning of these numbers, *e.g*., nanograms per milliliter.

15. On March 12, 2020, DOH sent Grievant a letter terminating his employment effective March 27, 2020. It based dismissal on the presence of amphetamines in Grievant's March 5, 2020 urine sample in violation of the West Virginia Department of Transportation Drug and Alcohol Testing Policy. (Respondent's Exhibit 3)

16. Grievant independently submitted for drug testing by urinalysis at Davis Medical Center on March 13, 2020. This came back negative for the tested drugs, including methamphetamine and amphetamine. (Grievant's Exhibit 2 and Grievant's testimony)

17. Grievant independently submitted a hair sample by mail for drug testing on May 22, 2020. The hair sample was tested by HairConfirm on June 4, 2020. The resulting Hair Drug Test Report indicates that the tested hair sample was negative for the tested drugs, including methamphetamine and amphetamine, but did not indicate whose hair was tested. (Grievant's Exhibits 1)

18. Grievant again independently submitted for drug testing by urinalysis at Davis Medical Center around September 2020. This came back negative for the tested drugs, including methamphetamine and amphetamine. (Grievant's Exhibits 3)

19. A hair test is different from a urine test in that it reflects the subject's lifestyle and does not document infrequent use. Hair tests are finicky and fail to register positive if drugs are not used frequently for a certain period prior to collection of the hair sample. (Testimony of Salvador Valldeperas)

20. The Hair Drug Test Report was problematic in that it did not indicate the name of the individual whose hair was purportedly being tested or whether the hair was a suitable length to cover the period in question. Further, even if it had, the chain of

custody security that existed with the taking and testing of Grievant's urine sample by DOH did not exist with the hair sample, as the hair test was self-submitted.

21. As for the urine samples collected by Grievant on March 13, 2020, and September 4, 2020, the negative test results therefrom do not repudiate the positive results from the March 5, 2020 urine sample. This is because stimulants are rapid metabolizers that leave the body within 4 days. Each of the later urine samples was collected outside of the requisite 4-day window. (*See* testimony of Dr. Valldeperas)

Discussion

When a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is on the employee to establish by a preponderance of the evidence that his services were satisfactory. *Bonnell v. Dep't of Corr*., Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. Dep't of Health and Human Res*., Docket No. 2008-0958-DHHR (Mar. 13, 2009). However, if a probationary employee is terminated on the grounds of misconduct, the termination is disciplinary, and the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *See Cosner v. Dep't of Health and Human Res*., Docket No. 08-HHR-008 (Dec. 30, 2008); *Livingston v. Dep't of Health and Human Res*., Docket No. 2008-0770-DHHR (Mar. 21, 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 burden has not been met. *Id*.

The evidence shows that Grievant was a probationary employee and was dismissed due to positive drug test results for amphetamines. Respondent labels this misconduct and accepts the burden of proof.[5] "[T]he distinction is one that only affects who carries the burden of proof. As a practical matter, an employee who engages in misconduct is also providing unsatisfactory performance. " *Livingston v. Dep't of Health and Human Res*., Docket No. 2008-0770-DHHR (Mar. 21, 2008) (*citing Johnson v. Dep't of Transp./Div. of Highways*, Docket No. 04-DOH-215 (Oct. 29, 2004)).

As a probationary employee, Grievant was not entitled to the usual protections. DOH Policy 3.15 mandates that a probationary employee must be dismissed after their first positive drug test. Further, the Division of Personnel's Administrative Rule discusses the probationary period of employment, describing it as "a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program of the agency." W. VA. CODE ST. R. § 143-1-10.1.a. (2016). The same provision goes on to state that the employer "shall use the probationary period for the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work." *Id*. A probationary employee may be dismissed at any point during the probationary period that the employer determines his services are unsatisfactory. *Id*. at § 10.5(a). Therefore, the Division of Personnel's Administrative Rule establishes a low threshold to justify termination of a

[5]Respondent suggests in its PFFCL that it does not have the burden of proving that Grievant engaged in misconduct but accepted it to appease the ALJ. Respondent misstates the burden of proof for probationary employees. The burden is on the employer to prove misconduct if it dismissed the probationary employee for misconduct but on the employee to prove satisfactory performance if dismissed for unsatisfactory performance.

probationary employee. *Livingston v. Dep't of Health and Human Res*., Docket No. 2008-0770-DHHR (Mar. 21, 2008).

"A probationary employee is not entitled to the usual protections enjoyed by a state employee. The probationary period is used by the employer to ensure that the employee will provide satisfactory service. An employer may decide to either dismiss the employee or simply not to retain the employee after the probationary period expires." *Hammond v. Div. of Veteran's Affairs,* Docket No. 2009-0161-MAPS (Jan. 7, 2009) (*citing Hackman v. Dep't of Transp*., Docket No. 01-DMV-582 (Feb. 20, 2002)).

Nevertheless, "while an employer has great discretion in terminating a probationary employee, that termination cannot be for unlawful reasons, or arbitrary or capricious. *McCoy v. W. Va. Dep't of Transp*., Docket No. 98-DOH-399 (June 18, 1999); *Nicholson v. W. Va. Dep't of Health and Human Res*., Docket No. 99-HHR-299 (Aug. 31, 1999)." *Lott v. W. Va. Div. of Juvenile Serv*., Docket No. 99-DJS-278 (Dec. 16, 1999). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv*., 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-

322 (June 27, 1997), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

"'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ*., 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001), ***aff'd*** Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), appeal refused, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

Grievant contends his positive drug test resulted from his use of over-the-counter medication and that he requested but was not allowed further testing of the sample. He also argues that his requests for further guidance were ignored by DOH. Grievant did not present any evidence that DOH ignored his requests to facilitate further testing of his March 5, 2020 sample or to render guidance. Even if he had, these claims must fail because Grievant did not present any authority for the proposition that DOH was obligated to facilitate further testing or to provide guidance. The evidence shows that after Grievant delivered his urine sample on March 5, 2020, DOH submitted the sample with a chain of custody form to the lab for an initial screening. A confirmatory test affirmed the positive test results. DOH forwarded the results to Cynergy for an independent medical review,

as it does with all positives. Cynergy's Medical Review Officer, Dr. Salvadore Valldeperas, followed up by questioning Grievant about any prescription medications that could account for the positive, but Grievant did not reveal any.

Grievant testified that he submitted for his own drug testing through urine samples on March 13, 2020 and September 4, 2020, and a hair sample on June 4, 2020. All were negative for amphetamine and methamphetamine, the drugs present when DOH tested the sample collected on March 5, 2020. Grievant testified that he never used these drugs and opined that the March 5, 2020 sample was a false positive from use of over-the-counter medication. Dr. Valldeperas testified that he did not ask Grievant about his use of over-the-counter medications because none would have resulted in his positive test result.

Dr. Valldeperas further testified that the negative results later provided by Grievant were of no probative value in assessing the accuracy of the positive test. The Hair Drug Test Report was problematic because it did not indicate the name of the individual whose hair was purportedly being tested or whether the hair was of suitable length to cover the period in question. Even if it had, the chain of custody security that existed with the taking and testing of Grievant's urine sample by DOH did not exist with the hair sample, as the hair test was self-submitted. Dr. Valldeperas testified that negative results on hair tests do not catch infrequent drug use but instead document routine use indicative of lifestyle and habit. As for the urine samples collected by Grievant on March 13, 2020, and September 4, 2020, Dr. Valldeperas testified that the negative results do not repudiate the positive one from March 5, 2020 because stimulants are rapid metabolizers that leave

the body within 4 days. Grievant collected each of his later urine samples outside of the requisite 4-day window.

The testimony provided by Dr. Valldeperas was valuable in providing expert guidance on drug testing, including the weight and trustworthiness to be accorded each of the positive and negative drug tests. Conversely, Grievant's testimony regarding his negative test results offered no insight as to why the negative results should outweigh his positive one and was ineffective at refuting Dr. Valldeperas' expert testimony. Nevertheless, Grievant did provide relevant fact-based testimony in his claim that he never used the relevant drugs. Thus, credibility determinations are in order.

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." *Jones v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEM PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id., Burchell v. Bd. of Trustees, Marshall Univ*., Docket No. 97-BOT-011 (Aug. 29, 1997). Not every factor is necessarily relevant

to every credibility determination. In this situation, the relevant factors include demeanor, motive, and plausibility.

As a party to this action, Grievant obviously had motive to misrepresent. Nevertheless, his demeanor imparted an air of believability to his denials of drug use. Thus, Dr. Valldeperas' expert testimony is crucial. Dr. Valldeperas did not have any interest in verifying Grievant's positive results. He naturally had motive to stay with his confirmation when presented with Grievant's negative tests. Nevertheless, Dr. Valldeperas expertly detailed why each of the drug tests that Grievant commissioned on his own could not be used to impugn the accuracy of the positive test. The essence of his testimony was that the samples for each of the two urine tests were provided outside of the 4-day window it would take stimulants to pass through Grievant's system and that hair tests document habitual rather than infrequent drug use. The plausibility of his reasoning and his unrattled demeanor made his explanation more credible than Grievant's denial. Thus, Respondent proved by a preponderance of evidence that Grievant engaged in misconduct and that it did not act arbitrarily and capriciously in dismissing him.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. When a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is on the employee to establish by a preponderance of the evidence that his services were satisfactory. *Bonnell v. Dep't of Corr*., Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. Dep't of Health and Human Res*., Docket No. 2008-0958-DHHR (Mar.

13, 2009). However, if a probationary employee is terminated on the grounds of misconduct, the termination is disciplinary, and the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *See Cosner v. Dep't of Health and Human Res*., Docket No. 08-HHR-008 (Dec. 30, 2008); *Livingston v. Dep't of Health and Human Res*., Docket No. 2008-0770-DHHR (Mar. 21, 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 burden has not been met. *Id*.

2. The Division of Personnel's administrative rule discusses the probationary period of employment, describing it as "a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program of the agency." W. VA. CODE ST. R. § 143-1-10.1.a. (2016). The same provision goes on to state that the employer "shall use the probationary period for the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work." *Id*. A probationary employee may be dismissed at any point during the probationary period that the employer determines his services are unsatisfactory. *Id*. at § 10.5(a). Therefore, the Division of Personnel's administrative rules establish a low threshold to justify termination of a probationary employee. *Livingston v. Dep't of Health and Human Res*., Docket No. 2008-0770-DHHR (Mar. 21, 2008).

3. “A probationary employee is not entitled to the usual protections enjoyed by a state employee. The probationary period is used by the employer to ensure that the employee will provide satisfactory service. An employer may decide to either dismiss the employee or simply not to retain the employee after the probationary period expires.” *Hammond v. Div. of Veteran’s Affairs*, Docket No. 2009-0161-MAPS (Jan. 7, 2009) (citing *Hackman v. Dep’t of Transp*., Docket No. 01-DMV-582 (Feb. 20, 2002)).

4. “[W]hile an employer has great discretion in terminating a probationary employee, that termination cannot be for unlawful reasons, or arbitrary or capricious. *McCoy v. W. Va. Dep’t of Transp*., Docket No. 98-DOH-399 (June 18, 1999); *Nicholson v. W. Va. Dep’t of Health and Human Res*., Docket No. 99-HHR-299 (Aug. 31, 1999).” *Lott v. W. Va. Div. of Juvenile Serv*., Docket No. 99-DJS-278 (Dec. 16, 1999). An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

5. Respondent proved by a preponderance of evidence that Grievant engaged in misconduct when he tested positive for prohibited drugs and that it did not act arbitrarily and capriciously in dismissing him.

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

DATE: May 7, 2021

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Joshua S. Fraenkel
Administrative Law Judge