

# **THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**ADAM WINTER,**  
**Grievant,**

**v.**

**Docket No. 2020-1541-DOT**

**DIVISION OF HIGHWAYS,**  
**Respondent.**

## **DECISION**

Grievant, Adam Winter, was employed by Respondent, Division of Highways (DOH), in the Transportation Worker 2 (TW 2) classification. Mr. Winter filed an expedited grievance directly to level three<sup>1</sup> dated June 26, 2020, alleging the following:

The Respondent's June 16, 2020, termination of the Grievant was arbitrary and capricious; contrary to law, rules and policies; in violation of Grievant's due process rights; and excessive.

As relief, Grievant seeks: back pay, with interest and benefits, reinstatement, and removal of all documents related to his dismissal from Respondent's files.

A level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on January 4, 2021. The hearing was conducted via the Zoom video conference platform. Grievant appeared personally and was represented by Mark A. Barney, Esquire, Barney Law PLLC. Respondent appeared in the person of Gordon Cook and was represented by Keith A. Cox, Esquire, DOH Legal Division. This matter became mature for decision on February 26, 2021, upon receipt of the last Proposed Findings of Fact and Conclusions of Law submitted by the parties.

---

<sup>1</sup> West Virginia Code § 6C-2-4(a)(4) permits a grievant to proceed directly to level three of the grievance process when the grievance contests the discharge of the grievant.

## **Synopsis**

Grievant is a probationary Transportation Worker employed by the Division of Highways. His job requires him to be subject to random alcohol and drug testing. Grievant was subjected to a random breath-alcohol test and the results indicated his blood-alcohol level exceeded the permitted limit. Grievant was immediately dismissed from employment based solely upon the results of the breath-alcohol test. Since Grievant was dismissed for misconduct rather than poor performance Respondent has the burden of proving the reasons for the dismissal by a preponderance of the evidence.

The evidence revealed that the blood-alcohol tests were not conducted pursuant to the required policies and procedure which renders the results invalid. Respondent did not prove the reasons for the discharge by a preponderance of the evidence.

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.<sup>2</sup>

## **Findings of Fact**

1. Grievant, Adam Winter, was employed by Respondent, Division of Highways (DOH), in the Transportation Worker 2 (TW 2) classification, at Medina, Jackson County, West Virginia. He was a probationary employee.

2. Grievant's first day of work was January 6, 2020. However, he attended an orientation on November 12, 2019. At that time, DOH human resources employee, Casey Smith reviewed several policies with him including Department of Transportation ("DOT")

---

<sup>2</sup> The parties jointly stipulated that four specific facts were true. Those facts will be incorporated into the Findings of Fact and noted herein.

Policy 3.15 *Substance Abuse*, containing the DOT drug and Alcohol Testing Program.  
(Respondent Exhibit 5)

3. During his employment with the DOH, there were no issues with Grievant's work performance.<sup>3</sup>

4. On Monday, June 15, 2020, Grievant got off work around 4:00 p.m. Thereafter, he went his friend, Joseph Walker's house to purchase a four-wheeler for his son's birthday.<sup>4</sup> He arrived home around 5:30 p.m. or 6:00 p.m. and ate dinner with his girlfriend, Kristina Smith.<sup>5</sup>

5. Grievant lives on a farm. After dinner on June 15, 2020, he fed his farm animals. After feeding his animals, he played a video game online. Around 10:00 p.m. or 10:30 p.m., Grievant took a shower and went to bed.<sup>6</sup>

6. On June 16, 2020, Grievant arrived at the DOH's Medina Shop and met with his co-workers. He was directed by his supervisor, Dale Smith, to take a dump truck, with a trailer loaded with equipment, to a jobsite. Mr. Smith also instructed Grievant to stop by the Jackson County DOH shop, in Ripley, for a random alcohol and/or drug test on his way to the jobsite.

7. Grievant arrived at the DOH's Jackson County facility around 8:15 a.m. or 8:30 a.m.<sup>7</sup> There was no evidence that Grievant had consumed alcohol that morning.

---

<sup>3</sup> Stipulation of the parties, number 4.

<sup>4</sup> Level three testimony of Joseph Walker who is a TW 2 Equipment Operator. He is Grievant's friend and co-worker.

<sup>5</sup> Level three Testimony of Adam Winter and Kristina Smith.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

8. Grievant has a full dark beard and mustache. He habitually dips snuff and has been doing so since he was in middle school.<sup>8</sup> Grievant uses about a can of snuff a day and regularly dips snuff during the workday.<sup>9</sup> Because Grievant is so used to the tobacco he generally does not spit, but rather swallows the tobacco juice.

9. As Grievant was entering the Jackson County facility for his random test, he was finishing a can of soda (either RC Cola or Dr. Pepper).<sup>10</sup> He had snuff in his mouth and was wearing a face covering as required due to the COVID-19 pandemic.

10. Upon his arrival at the Jackson County facility, and prior to the June 16, 2020, breath-alcohol test, Grievant displayed no indications of intoxication, he did not smell of alcohol, and his eyes were not glassy or red.<sup>11</sup>

11. Casey Sims was inside the DOH Jackson County office to facilitate the random drug testing. She had been employed in the District 3 human resources department for twenty months in the Administrative Service Assistant classification at the time of the level three hearing. She attends most drug and alcohol testing in District 3. There were roughly thirty transportation workers being tested that morning. Grievant was among the last employees to arrive and Ms. Sims checked his name off her list.

12. Ms. Sims previously met Grievant at his orientation. When he arrived Grievant sat down at an appropriately social distance<sup>12</sup> from her. They talked about

---

<sup>8</sup> Also known and referred to as “smokeless tobacco.” “Dipping” snuff is defined as the practice of absorbing nicotine by holding in one’s mouth, between the cheek and the gum, a small amount of tobacco, either loose or enclosed in a sachet. *Collins English Dictionary*. Copyright © HarperCollins Publishers.

<sup>9</sup> Level three testimony of TW 2 Equipment Operator Joseph Walker.

<sup>10</sup> Grievant could not remember which one but those are the brands of soda he drinks.

<sup>11</sup> Stipulations of the parties 1, 2, & 3 have been combined into this single finding of fact.

<sup>12</sup> Grievant and Ms. Sims were social distancing like all other employees to prevent the spread of COVID-19.

beekeeping. Ms. Sims did not remember Grievant drinking soda on his arrival. She said it was not apparent that he had snuff in his mouth but agreed that he could have since he wore a face covering.

13. Grievant was soon called into a separate room for a breath-alcohol test to be administered by Robin Arthur, a certified Breath Alcohol Technician (“BAT”) employed by Health Research Systems (“HRS”). HRS had a contract with DOT at that time to conduct drug and alcohol testing for the agency.

14. BAT Arthur could not remember where the test was conducted for Grievant but thought it might have been in Wood County. However, he testified that he remembered giving Grievant his test. He noted that Grievant had a full beard but could not remember whether he was wearing a mask.

15. Department of Transportation, Policy 3.15 *Substance Abuse*, governs substance abuse and testing in the workplace. (Respondent Exhibit 5). Pursuant to that policy, Grievant was subjected to a random breath-alcohol test which was administered by BAT Arthur. *Id.* at p. 13, § 6, ¶ 6.2. Part 9.0 of Policy 3.15 governs testing procedures. *Id.* at p. 19. § 9.2 governs breath-alcohol testing procedures. *Id.* at p. 21.

16. For the initial breath test, if an employee’s breath indicates a result of a blood alcohol concentration greater than .02, a confirmation test must be performed. *Id.* § 9.2 ¶ C. at p. 22. The confirmation test be conducted as follows:

The BAT will instruct the employee in the steps necessary to complete the confirmation test. The confirmation test is to be conducted within thirty (30) minutes, but not less than fifteen (15) minutes, of the initial test.

17. Policy 3.15 § 9.2, ¶ G, 5, provides that a breath-alcohol test is invalid where “[t]he BAT has failed to note in the remarks section of the form with the affixed test result

that the employee has failed or refused to sign the form.” *Id.* at p. 23. The subject form for Grievant’s test did not contain any notation in the remarks section that Grievant failed the breath-alcohol test.<sup>13</sup>

18. Part 11, § 11.1 ¶ A. of DOT Policy 3.15 states that a probationary employee shall be dismissed from employment after the first test with an alcohol concentration of .04 or greater.

19. Part 11 of Policy 315 also requires that:

If, for any reason, errors are made in reporting employee test results which cause the employee monetary loss and/or Disciplinary Action, the affected employee will have his/her status restored as if the error in test result reporting never occurred. All documentation related to a situation such as this will be purged from the Agency’s Drug and Alcohol Testing Records.<sup>14</sup>

20. The breath-alcohol test device utilized to test Grievant’s breath was an Intoximeter ASV XL. The Operator’s Manual titled “RBTV VXL System for EMSI Testing” details use of the subject machine. (Grievant Exhibit 2)

21. The operator’s manual requires that prior to the first test, the BAT show the employee the reverse side of the testing form “where the instructions are.” *Id.* at p. 17. Contrary to the operator’s manual, the testing form utilized for Grievant’s June 16, 2020, tests did not contain any directions for the employee. (Respondent Exhibit 1; Grievant Exhibit 1).

22. Prior to giving a confirmation test the operator’s manual requires that the BAT give the following instructions:

---

<sup>13</sup> Respondent Exhibit 1; Level three testimony of Gordon Cook.

<sup>14</sup> Gordon Cook testified that the DOH followed this rule when occasional mistakes had previously occurred.

Please wait here with me for 15 minutes. During this time please don't eat, drink, chew, or put anything in your mouth. The wait period is for your benefit to ensure that no mouth alcohol will contribute to the result of your final test.

Grievant's Exhibit 2 at p. 26, ¶1, a

23. The operator's manual provides that the "[c]onfirmation test is the final test performed on the employee/donor and is only performed after a 15-minute *deprivation period*." "Deprivation" means that the employee/donor does not have anything in his or her mouth or anything to eat or drink during the 15-minute deprivation period. This is to ensure the reliability of the breath sample. (Emphasis added)

24. If an employee has anything in his or her mouth during the fifteen minutes after the initial test, then a deprivation period has not occurred.

25. At the level three evidentiary hearing, the parties each presented the testimony of two experts in the field of breath-alcohol tests.<sup>15</sup> Grievant offered the expert testimony of David L. Bailey.<sup>16</sup> Respondent offered the expert testimony of Mr. Michael Day<sup>17</sup>

---

<sup>15</sup> Because the Rules of Evidence do not apply to the grievance procedure these witnesses are not recognized as experts in the technical evidentiary sense. However, they are recognized as witnesses who have a great deal of training and experience in their field and whose testimony and opinions are given appropriate weight because of their knowledge and experience.

<sup>16</sup> Mr. Bailey is an accident reconstructionist and a retired deputy sheriff in Putnam County, West Virginia. Mr. Bailey has experience in applying federal DOT standards as part of special law-enforcement training. Mr. Bailey likewise has experience in breath-alcohol testing procedures insofar as he gave breath-alcohol tests as part of his duties as a deputy sheriff and testified in courts regarding breath-alcohol testing procedures and the reliability of such procedures. Mr. Bailey has testified in courts regarding breath-alcohol tests in approximately 250-300 cases. Mr. Bailey received training from the West Virginia State Police in breath-alcohol testing and received an award for his work in DUI cases.

<sup>17</sup> Mr. Day has been the owner and operator of HMS, Inc. since January 1, 1991. Mr. Day has experience in breath-alcohol testing based upon his training and years of experience in the industry. Mr. Day has been trained by the Intoximeter Company in the operation of

26. The experts agree that 49 C.F.R. § 40.251 and 49 C.F.R. § 40.267 of the Federal Procedures for Transportation Workplace Drug and Alcohol Testing Programs applied to the tests administered to Grievant and if a flaw occurs in the administration of the test the results must be thrown out.

27. 49 C.F.R. § 40.251 provided the following:

Concerning the waiting period<sup>18</sup> you must tell the employee:  
(i) Not to eat, drink put anything (e.g., cigarette, chewing gum) into his or her mouth, or belch;  
(ii) The reason for the waiting period (i.e., to prevent the accumulation of mouth alcohol from leading to an artificially high reading);  
(iii) That following your instructions concerning the waiting period is to the employee's benefit; and  
(iv) That the confirmation will be conducted at the end of the waiting period, even if the instructions are not followed. *Id.*

28. Prior to administering the first breath-alcohol test to Grievant, BAT Arthur did ask not any of the people being tested, including Grievant, whether he had anything to eat, or drink before the test, or if he had anything else in their mouth. Nor did he check to see if Grievant had anything in his mouth. BAT Arthur thought someone on site named Amanda gave these instructions before the employees came in for the test. He relied on that person to tell the employees this information prior to the first breath-alcohol test.<sup>19</sup>

---

the Intoximeter ASV XL. He holds USDOT certifications as a BAT, a BAT trainer and Intoximeter Calibration Technician. Mr. Day has conducted more than 10,000 breath-alcohol tests as a DOT certified BAT. (Respondent Exhibit 10)

<sup>18</sup> The waiting period is the deprivation period between the initial test and the confirmation test.

<sup>19</sup> Joseph Walker testified that he had been randomly tested for breath-alcohol a few weeks before Grievant and no one asked him about eating or drinking prior to the test, nor whether he had anything in this mouth. There was no one named Amanda at the test site on the day Grievant was tested.



29. BAT Arthur did not show or give Grievant any written instructions which are supposed to be on the reverse side of the testing form as required by the Intoximeter operations manual.

30. Grievant was not told that he needed to take the snuff, or anything else, from his mouth before he took the test. Because Grievant usually had snuff in his mouth, he did not think about it. Grievant had snuff in his mouth during the first test and the confirmation test.

31. Grievant's results from the first breath-alcohol test indicated that Grievant had a blood alcohol concentration of 0.073.

32. BAT Arthur told Grievant that a second test would need to be conducted to confirm the results of the first test. BAT Arthur testified that he told Grievant not to eat or drink anything during the fifteen-minute waiting period. BAT Arthur did not ask Grievant if he had anything in his mouth nor instruct Grievant that he could not have anything in his mouth. He did not instruct Grievant not to belch. BAT Arthur did not tell Grievant the reason for the waiting period (i.e., to prevent an accumulation of mouth alcohol from leading to an artificially high reading), or that following the instructions concerning the waiting period was to his benefit. BAT Arthur did not instruct Grievant that the confirmation test would be conducted at the end of the waiting period, even if the instructions have not been followed. Grievant was not provided any written instruction regarding the breath-alcohol tests.<sup>20</sup>

---

<sup>20</sup> Level three testimony of Robin L. Arthur, BAT

33. Grievant and BAT Arthur remained together in the testing room for the waiting period and then Grievant was administered a second blood-alcohol test. Grievant had snuff in his mouth during the waiting period and while taking the confirmation test.

34. Grievant's results from the confirmation breath-alcohol test indicated that Grievant had a blood alcohol concentration of 0.068.

35. The breath-alcohol test result form provides that the time of the first test was started at 9:51:29 and the confirmation started at 10:08:29. There was some confusion regarding these times in testimony, but it is more likely than not that the times set out on the form are accurate.

36. It is more likely than not that BAT Arthur did not notice that Grievant was dipping snuff because it was hidden by Grievant's beard and because Grievant was wearing a mask when not blowing into the test apparatus.

37. The brand of snuff Grievant had in this mouth during the entire testing process was Red Seal Brand Wintergreen or Natural Long Cut.<sup>21</sup> An ingredient of Red Seal snuff is alcohol.<sup>22</sup>

38. Grievant went into the office area and talked with Ms. Sims while he waited for action related to the breath-alcohol test results. Ms. Sims took Grievant into a separate room and informed him that she needed to contact Gordon Cook for instructions. Mr. Cook informed Ms. Sims that he would be providing a letter for Grievant shortly.

39. Ms. Sims wrote in a subsequent statement that Grievant told her he had been to a friend's birthday party the night before and drank some until about 10:30 or

---

<sup>21</sup> Level three testimony of Grievant.

<sup>22</sup> Level three testimony of David L. Bailey.

11:00 p.m. She did not see any signs that Grievant was intoxicated. Ms. Sims noted that she was very busy doing paperwork related to more than thirty test and dealing with supervisor's regarding Grievant's test. Grievant denied making that statement and believes she misunderstood him when he was talking about going to a friend's house to buy a vehicle for his son's birthday.<sup>23</sup>

40. Mr. Cook sent a letter of dismissal to Ms. Sims and she read it to him before giving him a copy. The letter was dated June 16, 2020, and was signed by H. Julian Woods, Executive Director Human Resources Division. The sole reason given for Grievant's dismissal was the following:

On June 16, 2020, a random alcohol test was conducted. Your initial alcohol screen was conducted at 9:51 a.m. and the Breath Alcohol Technician (BAT) certified that your concentration was 0.073. In accordance with the procedures a confirmation screen was conducted at 10:08 a.m. and the Breath Alcohol Technician (BAT) certified that your alcohol concentration was 0.068.<sup>24</sup>

41. After the confirmation test but before his dismissal, Grievant asked if he could get a blood test at a nearby hospital to show that he did not have alcohol in his blood. The request was not granted.

### **Discussion**

There is no dispute that Grievant had not finished his probationary period at the time of his dismissal. If a probationary employee is terminated on the grounds of misconduct, the termination is disciplinary, and the Respondent bears the burden of

---

<sup>23</sup> This statement was written on July 7, 2020, long after Grievant was dismissed. There is no evidence that Respondent knew the details of any discussion between Grievant and Ms. Sims when he was dismissed nor that it had any bearing upon his dismissal.

<sup>24</sup> Respondent Exhibit 1.

establishing the charges against the Grievant by a preponderance of the evidence. See *Cosner v. Dep't of Health and Human Resources/William R. Sharpe, Jr. Hospital*, 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). See also W. VA. CODE ST. R. § 156-1-3 (2008). See also *Lott v. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999).

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 upon the employee to establish that his services were satisfactory. *Bonnell v. W. Va. Dep't of Corrections*, 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). Grievant "is required to prove that it is more likely than not that [her] services were, in fact, of a satisfactory level." *Bush v. Dep't of Transp.*, Docket No. 2008-1489-DOT (Nov. 12, 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. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence is equally balanced, the party with the burden of proof has not met that burden. See *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

"[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). The "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. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985).

The parties stipulated that during his employment with the DOH, there were no issues with Grievant's work performance.<sup>25</sup> The dismissal was based upon a single act of alleged misconduct, the results of a random breath-alcohol test. Respondent has the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Cosner, supra* and *Livingston, supra*.

The West Virginia Department of Transportation ("DOT") has adopted *Substance Abuse* Policy DOT 3.15 ("DOT Policy 3.15") which requires random drug and alcohol testing for all its employees who are required to hold a Commercial Drivers' License (CDL) in compliance with the requirements of the Federal Motor Carriers Safety Administration. The policy follows United States Department of Transportation ("USDOT") guidelines and applies to all DOT employees. Policy 3.15. Grievant was selected to participate in a random breath-alcohol test on June 16, 2020.

---

<sup>25</sup> Stipulation 4 of the parties' stipulations.

Grievant was dismissed pursuant to DOT Policy 3.15 Part 11, § 11.1 ¶ A which states that a probationary employee shall be dismissed from employment after the first test with an alcohol concentration of .04 or greater. Grievant's breath-alcohol tests registered an alcohol concentration of .073 and 0.068, which exceed the limits found in the policy. These test results are the sole reason for the termination of Grievant's employment. If the test results stand so does the dismissal. Conversely, if the tests were not performed pursuant to policy and procedures, the dismissal must fail.<sup>26</sup>

As reflected in Mr. May's testimony, breath-alcohol testing is an indirect method of determining the amount of alcohol in the blood. It involves the measurement of microscopic particles of alcohol in a person's mouth and is based on the assumption that alcohol in the blood can be measured by a person's breath. Procedure can affect the reliability of the breath-alcohol tests. When breath testing, it is critical that such tests be done with precision and in accordance with established procedures. Variances in procedures can result in variances in results. Accordingly, West Virginia Supreme Court of Appeals has set specific facts which must be proven before a breath test may be admitted in a criminal case by stating:

[T]he necessary foundation before the admission of the results of any test are: (1) That the testing device or equipment was in proper working order; (2) that the person giving and interpreting the test was properly qualified; **(3) that the test was properly conducted; and (4) that there was compliance with any statutory requirements. *Jones v. Forrest City*, 239 Ark. 211, 388 S.W.2d 386 (1965); *State v. Quinn*, 182 N.W.2d 843 (Minn. 1971); *Otte v. State*, 172 Neb. 110, 108 N.W.2d 737 (1961); *State v. Miller*, 64 N.J. Super.**

---

<sup>26</sup> Since the propriety of the tests is the sole issue, evidence of whether Grievant had consumed alcohol the night before is of little import. Nor is the difference between testimony of Grievant, Ms. Smith, and Mr. Johnson to the statement given by Ms. Sims on that topic.

262, 165 A.2d 829 (1960); *People v. Donaldson*, 319 N.Y.S.2d 172, 36 A.D.2d 37 (1971); *State v. Sickles*, 25 Ohio App. 2d 1, 265 N.E.2d 787 (1970); *Pruitt v. State*, 216 Tenn. 686, 393 S.W.2d 747 (1965); *State v. Magoon*, 264 A.2d 779 (Vt. 1970); *State v. Baker*, 56 Wash. 2d 846, 355 P.2d 806 (1960); *Slough & Wilson, Alcohol and the Motorist: Practical and Legal Problems of Chemical Testing*, 44 Minn. L. Rev. 673 (1960).

*State v. Hood*, 155 W. Va. 337, 342, 184 S.E.2d 334, 337 (1971). Proper administration of the test and compliance with the statutory and procedural requirements in the DOH is likewise emphasized in Part 11 of DOT Policy 3.15 which states:

If, for any reason, errors are made in reporting employee test results which cause the employee monetary loss and/or Disciplinary Action, the affected employee will have his/her status restored as if the error in the error in test result reporting never occurred. All documentation related to a situation such as this will be purged from the Agency's Drug and Alcohol Testing Records.<sup>27</sup>

One of the main issues in breath-alcohol testing is that the employees being tested be instructed to not have anything to eat or drink directly before the testing and that they have nothing in their mouths "to prevent the accumulation of mouth alcohol from leading to an artificially high reading." 49 C.F.R. § 40.251. BAT Arthur did not ask Grievant, or any of the tested employees, these questions assuming that was done by the person checking them in. Unsurprisingly, Ms. Sims did not specifically ask Grievant if he had anything in his mouth given that such questions are the responsibility of the BAT. Had someone asked Grievant that question it would more likely that not have reminded him that he was dipping snuff and he would have removed it. Instead, Grievant kept the snuff

---

<sup>27</sup> *Id.*

in his mouth during both tests. Given the fact that the brand of snuff Grievant was using contains alcohol, it could have affected the reading made by the Intoxicator.<sup>28</sup>

49 C.F.R § 40.267 of the Federal Procedures for Transportation Workplace Drug and Alcohol Testing Programs applied to the tests administered to Grievant and requires that if a flaw occurs in the administration of the test the results must be thrown out.<sup>29</sup>

The confirmation breath-alcohol test requires the following:

Concerning the waiting period, you must tell the employee:

(i) Not to eat, drink put anything (e.g., cigarette, chewing gum) into his or her mouth, or belch;

(ii) The reason for the waiting period (i.e., to prevent the accumulation of mouth alcohol from leading to an artificially high reading);

(iii) That following your instructions concerning the waiting period is to the employee's benefit; and

(iv) That the confirmation will be conducted at the end of the waiting period, even if the instructions are not followed.

49 C.F.R. § 40.251. Additionally, the Intoximeter Operators Manual require the BAT to tell the employee "Please wait here with me for 15 minutes. During this time please don't eat, drink, chew, or put anything in your mouth. The wait period is for your benefit to ensure that no mouth alcohol will contribute to the result of your final test."

BAT Arthur testified that he remained in the room with Grievant the entire time between the first and the confirmation test which was given a little more than fifteen minutes later. He testified that he told Grievant not to eat or drink anything because it

---

<sup>28</sup> See Barry K. Logan and Sandra Distrefano, *Ethanol of Various Foods and Soft Drinks and their Potential for Interference with Breath-Alcohol Test*; *Journal of Analytical Toxicology*. The *Journal of Analytical Toxicology* Vol. 22, May/June 1998, recognizing that many everyday food and drink items contain alcohol that may create false positive breath-alcohol test results.

<sup>29</sup> See testimony of the two expert witnesses: Mr. Day for Respondent and Mr. Bailey for Grievant and DOT Policy 3.15.



would mess up the test. BAT Arthur did not ask Grievant if he had anything in his mouth nor instruct Grievant that he could not have anything in his mouth. He did not instruct Grievant not to belch. BAT Arthur did not tell Grievant the reason for the waiting period (i.e., to prevent an accumulation of mouth alcohol from leading to an artificially high reading), or that following the instructions concerning the waiting period was to his benefit. BAT Arthur did not instruct Grievant that the confirmation test would be conducted at the end of the waiting period, even if the instructions have not been followed.

Mr. Arthur's testimony was problematic from the beginning. He did not know where the test was conducted. He said he relied on the office person to instruct the employees not to eat or drink anything before the test but was wrong about who that person was. He said he remembered Grievant because he had a beard but that does not mean he remembered the specifics of that test. During cross examination he did make eye contact and repeatedly looked off screen to his right at something which could not be seen on the Zoom. Given his obvious lack of memory of the day it was difficult to tell what he specifically told Grievant from what he is generally supposed to tell employees. Therefore, his testimony regarding the instructions given on that particular day, lacked credibility.<sup>30</sup>

---

<sup>30</sup> The Grievance Board has applied the following factors to assess a witness's testimony: (1) demeanor; (2) opportunity or capacity to perceive and communicate; (3) reputation for honesty; (4) attitude toward the action; and (5) admission of untruthfulness. Additionally, the administrative law judge 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' information. *Yerrid v. Div. of Highways*, Docket No. 2009-1692-DOT (Mar. 26, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.*, Docket No. 2009-1583-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.*, Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

On the other hand, grievant was calm and appropriate in his demeanor. He made maintained eye contact and was not evasive in his responses. Grievant gave detailed answers which were consistent with other facts. Grievant had an obvious motive to be misleading (to get his job back) but he showed no signs of prevarication. His testimony was credible.

Respondent did not prove by a preponderance of the evidence that the Breath Alcohol Technician followed the requirement of 49 C.F.R. § 40.251 for proper administration of the confirmation breath-alcohol test. Even more troubling is the lack of the required “deprivation period.” According to the Intoximeter Owner’s Manual “‘deprivation’ means that the employee/donor does not have anything in his or her mouth or anything to eat or drink during the 15-minute deprivation period.” In this case no deprivation period occurred. Grievant had snuff in his mouth during both tests. Without the deprivation period the confirmation test is invalid. As the West Virginia Supreme Court wrote in *State v. Hood, supra*:

[T]here is authority that the subject of any breath test should be observed for at least fifteen minutes to determine that he takes no food, drinks or other substance into his mouth during this period, **since any foreign substance in the mouth or taken during this period will destroy the validity of the test.** (Emphasis Added)

There is no evidence that Grievant kept the snuff in his mouth to intentionally invalidate the tests. He was not familiar with the testing procedure. He was accustomed to having a dip of snuff in his mouth and likely did not even think about it. It was the BAT’s responsibility to bring this to the employee’s attention which he failed to do. Ultimately, the issue is not whether the snuff ultimately caused a false positive. Rather the issue is

whether the tests were done according to required policies and procedures. They were not, which renders the results invalid. Additionally, failure to follow the methods and standards of breath-testing procedures is arbitrary and capricious conduct. See *State v. Dyer*, 160 W. Va. 166, 172, 233 S.E.2d 309, 312 (1977). Respondent did not prove the stated reason for Grievant's dismissal by a preponderance of the evidence and their action to dismiss Grievant based upon invalid breath-alcohol tests was arbitrary and capricious. Accordingly, the grievance is **GRANTED**.

### **Conclusions of Law**

1. Grievant was a probationary employee. 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 Resources/William R. Sharpe, Jr. Hospital*, 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). See also W. VA. CODE ST. R. § 156-1-3 (2008). See also *Lott v. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999).

2. Grievant's work performance was satisfactory. The dismissal was based upon a single act of alleged misconduct, the results of a random breath-alcohol test. Respondent has the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Cosner, supra* and *Livingston, supra*.

3. "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). If the evidence is equally balanced, the party with the burden of proof has not met that burden. See *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

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). The "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. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

5. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985).

6. [T]he necessary foundation before the admission of the results of any test are: (1) That the testing device or equipment was in proper working order; (2) that the person giving and interpreting the test was properly qualified; (3) that the test was properly conducted; and (4) that there was compliance with any statutory requirements. *Jones v. Forrest City*, 239 Ark. 211, 388 S.W.2d 386 (1965); *State v. Quinn*, 182 N.W.2d 843 (Minn. 1971); *Otte v. State*, 172 Neb. 110, 108 N.W.2d 737 (1961); *State v. Miller*, 64 N.J. Super.

262, 165 A.2d 829 (1960); *People v. Donaldson*, 319 N.Y.S.2d 172, 36 A.D.2d 37 (1971); *State v. Sickles*, 25 Ohio App. 2d 1, 265 N.E.2d 787 (1970); *Pruitt v. State*, 216 Tenn. 686, 393 S.W.2d 747 (1965); *State v. Magoon*, 264 A.2d 779 (Vt. 1970); *State v. Baker*, 56 Wash. 2d 846, 355 P.2d 806 (1960); *Slough & Wilson, Alcohol and the Motorist: Practical and Legal Problems of Chemical Testing*, 44 Minn. L. Rev. 673 (1960). *State v. Hood*, 155 W. Va. 337, 342, 184 S.E.2d 334, 337 (1971) (citations omitted).

7. Proper administration of the test and compliance with the statutory and procedural requirements in the DOH is emphasized in Part 11 of DOT Policy 3.15 which states:

If, for any reason, errors are made in reporting employee test results which cause the employee monetary loss and/or Disciplinary Action, the affected employee will have his/her status restored as if the error in the error in test result reporting never occurred. All documentation related to a situation such as this will be purged from the Agency's Drug and Alcohol Testing Records.

8. 49 C.F.R. § 40.267 of the Federal Procedures for Transportation Workplace Drug and Alcohol Testing Programs applied to the tests administered to Grievant and if a flaw occurs in the administration of the test the results must be thrown out.

9. The confirmation breath-alcohol test requires the following:

Concerning the waiting period, you must tell the employee:

- (i) Not to eat, drink put anything (e.g., cigarette, chewing gum) into his or her mouth, or belch;
- (ii) The reason for the waiting period (i.e., to prevent the accumulation of mouth alcohol from leading to an artificially high reading);
- (iii) That following your instructions concerning the waiting period is to the employee's benefit; and
- (iv) That the confirmation will be conducted at the end of the waiting period, even if the instructions are not followed.

49 C.F.R. § 40.251.

10. [T]here is authority that the subject of any breath test should be observed for at least fifteen minutes to determine that he takes no food, drinks or other substance into his mouth during this period, since any foreign substance in the mouth or taken during this period will destroy the validity of the test.

11. Respondent did not prove by a preponderance of the evidence that the Breath Alcohol Technician followed the requirement of 49 C.F.R. § 40.251 for proper administration of the confirmation breath-alcohol test. According to the Intoximeter Owner's Manual "deprivation' means that the employee/donor does not have anything in his or her mouth or anything to eat or drink during the 15-minute deprivation period." In this case no deprivation period occurred. Without the deprivation period the confirmation test is invalid.

12. Failure to follow the methods and standards of breath-testing procedures is arbitrary and capricious conduct. *See State v. Dyer*, 160 W. Va. 166, 172, 233 S.E.2d 309, 312 (1977).

13. Respondent did not prove the stated reason for Grievant's dismissal by a preponderance of the evidence and their action to dismiss Grievant based upon invalid breath-alcohol tests was arbitrary and capricious.

Accordingly, the grievance is **GRANTED**.

Respondent is **ORDERED** to immediately reinstate Grievant to his prior position, pay him back pay from the date he was dismissed until the date of his reinstatement plus statutory interest, reinstate all benefits to which he was entitled, and remove all records, whether written or electric, of the test and dismissal from any DOH files.

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 (2018).

**DATE: APRIL 1, 2021**

---

**WILLIAM B. MCGINLEY**  
**ADMINISTRATIVE LAW JUDGE**