THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LESLIE ELIZABETH BRAGG,
Grievant,

v. **Docket No. 2022-0303-DACH**

WEST VIRGINIA LIBRARY COMMISSION,
Respondent.

DECISION

Grievant, Leslie Bragg, was employed by Respondent, Library Commission, as a library service technician. She commenced her employment with the Library Commission on August 2, 2021. Ms. Bragg filed an expedited grievance at level three contesting her dismissal for alleged violation of the Division of Personnel ("DOP") Drug – and Alcohol – Free Workplace policy. She alleges, *inter alia,* that Respondent violated her Fifth and Fourteenth Amendment rights recognized in *Garrity v. New Jersey,* and *Miranda v. Arizona,* as well as her due process rights set out in *Board of Education v. Loudermill.*[1]

Grievant seeks, to have her personnel record expunged of the dismissal, PEIA insurance reinstated for three months, annual and sick leave restored for three months and for her severance pay to be extended for three months. At the beginning of the hearing, she also requested reinstatement.

A level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on January 24, 2022. Grievant appeared *pro se.*[2] Respondent was represented by Mark S. Weiler, Assistant Attorney General. This matter

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[1] Grievant attached a long and detailed statement to her grievance for which is part of the record and incorporated herein by reference.
[2] For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

became mature for decision on February 22, 2022, upon receipt of the last Proposed Findings of Fact and Conclusions of Law submitted by the parties.

Synopsis

Grievant was dismissed for possessing a controlled substance (methamphetamine) and alcohol in the workplace in violation of the Division of Personnel Drug – and Alcohol – Free Workplace policy. Grievant argues that the dismissal is invalid because Respondent did not provide her required constitutional due process protections as a result of considering her to be a probationary employee instead of a permanent employee. The employment status of Grievant did not matter because she was provided the required constitutional due process necessary for a permanent employee.

Grievant also argues that her confession to bringing the barred substances into the workplace was improperly obtained as set out in the United States Supreme Court decisions in *Miranda v. Arizona* and *Garrity v. New Jersey.* For reasons fully set out below, these holdings have no relevance to the present case. Respondent proved by a preponderance of the evidence that Grievant violated the Division of Personnel Drug – and Alcohol – Free Workplace policy.

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. Grievant, Leslie E. Bragg, began employment with the Respondent, Library Commission, on August 2, 2021. Her position was classified as a Library Service Technician.

2. Grievant had been working for another state agency for more than a year. She transferred to the Library Commission directly from her previous state agency.[3] Her supervisor, Donna Calvert testified that Grievant was not a probationary employee.

3. On September 8, 2021, a librarian found a small plastic box in a stall in the women's restroom on the floor of the Creative Arts Center near Grievant's workspace. Most of the female employees on that floor, including Grievant, utilize that restroom when necessary. The librarian had stopped by the restroom on her way to lunch around 11:45 am.

4. The box was similar in size and shape to a tin for Altoids Mints. It had latches on the sides that could be used to secure the top to the bottom. The top had a picture of an 8-ball with a decorative coil on each side.[4]

5. Believing that the box might contain feminine hygiene products, upon returning from lunch, the librarian mentioned it to her coworkers and supervisor, Donna Calvert. Ms. Calvert is the Director of Special Services with Respondent.

6. A coworker, Ashley White, went to look at the box and returned to get Director Donna Calvert to accompany her to the restroom. They opened the box and saw that it held a small amount of white powder, a short section of a red straw, and what appeared to be some sort of ID.

7. Ms. White and Ms. Calvert went to the office of Capitol Security Officer Terry Evans at 12:48 p.m. and reported that they found a container in the women's restroom which they believed contained drugs.

[3] Uncontested testimony of Grievant.
[4] Respondent Exhibit 2, an investigative report containing pictures of the box.

8. Officer Evans followed the women to the restroom where he found the container. He asked the women to leave and opened the box. He found that in addition to the small amount of white powder and straw, an ID card was in the container. The card was a PEIA insurance card issued in Grievant's name.

9. Security Officer Evans took the box to the security office and gave it to Capitol Police Officer, John Skull, who opened the container and confirmed the contents described by Officer Evans. Officer Skull conducted a field test on the white powder, and the test results were positive methamphetamines ("meth").[5]

10. Officers Evans and Skull found Grievant in the hall and asked her to come to the security office. They questioned Grievant extensively. It is more likely than not that she was not given a *Miranda* warning prior to or during questioning.

11. Grievant originally denied that the container was hers and said she did not know what it contained. She alleged that she had previously lost her insurance card and did not know how it ended up in the container.

12. After persistent questioning, Grievant admitted that the container was hers and the substance therein was meth. She said that she was going through some very trying circumstances and brought the box with her but did not use any of the meth. She repeatedly volunteered to take a drug test. No test was administered.

13. While Grievant was being questioned, a search was conducted of her workspace. Grievant has a desk in an open cubical located in a large space where other people work.

[5] There was no evidence offered related to the reliability of the field test or ether it was conducted pursuant to proper procedures.

14. The search was conducted by Sam Calvert, Director of Administration for the Department of Arts, Culture and History, Director Donna Calvert and Officer Evans.[6] Two plastic bottles containing alcohol were found in Grievant's workplace. One bottle was found on her desk. It was clear and the alcohol was used in Grievant's duties. The second bottle was found on the floor near her desk. The liquid was amber colored. Both Mr. Calvert and Officer Terry smelled the liquid and agreed that it smelled like bourbon or whiskey.

15. Grievant left the building, at 2:11 p.m., Grievant sent a text to Director Calvert stating:

> Donna I don't know if there is anything you could do to save me but I promise you I'll do anything not to lose this job I messed up and I'm so sorry you have to deal with this. (sic)

(Respondent Exhibit 3)

16. At 2:30 p.m., Grievant participated in a telephone conference with David Riebe, Library Commission HR Coordinator, Karen Goff, Library Commission Executive Secretary, and Director Calvert. During that call Coordinator Riebe suspended Grievant pending an investigation into the possible possession of a controlled substance and alcohol which had been found at her workstation. Coordinator Riebe confirmed this non-disciplinary suspension by certified letter dated September 9, 2021.

17. On September 13, 2021, a predetermination conference was held telephonically with Grievant. Those present on the conference call, in addition to Grievant, were Executive Secretary Goff, Director Donna Calvert, and HR Coordinator Riebe.

[6] The Library Commission is part of the Department of Arts, Culture and History. Sam Calvert is the son of Donna Calvert. It was not unusual for Mr. Calvert to participate in such searches within the department.

Grievant was advised that dismissal from employment was being considered based upon the findings of the investigation that she had possession of meth and alcohol in the workplace in violation of the Division of Personnel ("DOP") Drug – and Alcohol – Free Workplace policy. Grievant responded by apologizing for the incident. She then explained that she never used meth while on duty as a Library Assistant and was only in possession of the meth by mistake.

18. Later that day, Secretary Goff sent Grievant a certified letter informing Grievant that she was dismissed as a probationary employee effective September 28, 2021. She was separated from employment immediately but was given fifteen days of severance pay to compensate for the remaining days prior to the effective date. (Respondent Exhibit 5)

19. The reason for Grievant's dismissal was possession of alcohol and a controlled substance in the workplace in violation of the DOP Drug – and Alcohol – Free Workplace policy. It was noted that Grievant signed an affidavit certifying that she had received the policy including the provision stating in part, "Employees violating this policy are subject to disciplinary action up to and including dismissal." *Id.*

20. DOP Drug – and Alcohol – Free Workplace policy provides:

> It is the policy of West Virginia State government and its affiliated agencies to ensure that its workplaces are free of alcohol, and illegal drugs by prohibiting the use, possession, purchase, manufacture, distribution, dispensing, sale of, or having such substances in the body system. . . Employees violating this policy are subject to disciplinary action up to and including dismissal . . .

Discussion

Respondent asserts that Grievant was a probationary employee while Grievant insists that she was a permanent full-time employee. No one disputes that Grievant was dismissed for misconduct and not for unsatisfactory performance.[7] 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).

If Grievant is a permanent employee, this remains a disciplinary matter and 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 (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). 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).

[7] Donna Calvert testified that Grievant was still learning her job but was performing satisfactorily considering the amount of time she had been employed.

Respondent must prove the charges by a preponderance of the evidence regardless of whether Grievant is a probationary or permanent employee. The main difference is that a permanent employee is entitled to a greater measure of due process before being dismissed. Grievant argues that she was not given appropriate due process protection under the Supreme Court decision in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985) because she was alleged to be a probationary employee. Whether the employee is called probationary or permanent is not dispositive of whether they were given their constitutional protection to due process prior to dismissal.

"The constitutional guarantee of procedural due process requires 'some kind of hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985)." The West Virginia Division of Personnel Procedural Rule addresses this mandate in Section 12.2 by requiring a predetermination conference wherein an employee is advised that dismissal is being contemplate, the reason for the contemplated action, and an opportunity to respond prior to the employee being dismissed. W. Va. Code St. R. § 143-1-12.2a.

In discussing this provision, the Grievant Board has found that the purpose of the legislative rule requiring a predetermination conference is to protect the grievant's due process rights to be given notice of the charges against her and the right to respond to those charges before disciplinary action is taken. *See, Buskirk v. Civil Serv. Comm'n,* 175 W. Va. 279, 332 S.E.2d -12- 579 (1985); *Board of Education of the County of Mercer v. Wirt,* 192 W. Va. 568, 453 S.E.2d 402 (1994); *Clark v. W. Va. Bd. of Regents,* 166 W. Va.

702, 279 S.E.2d 169, (1981). *Catalina v. Dep't of Health & Human Res*., Docket No. 2011-0885-DHHR (Aug. 11, 2011). A predetermination conference was held in the matter. Grievant was given the reasons why dismissal from employment was being contemplated and an opportunity to address those reasons. Grievant was provided all the constitutional due process protections to which she was entitled as a permanent employee. The use of the term "probationary employee" was probably a mistake, but it had no effect on Grievant being provided her due process rights prior to dismissal.

Grievant argues that her confession to bringing the meth and alcohol to work are not admissible because she was not given proper notice of her rights under the United States Supreme Court decisions *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Garrity v. New Jersey*, 385 U.S. 493 (1967). In *Miranda* the Court overturned criminal conviction because the defendant was not advised of his right regarding self-incrimination prior to being interrogated. The primary holding was that under the Fifth Amendment, any statements that a defendant in custody makes during an interrogation are admissible as evidence at a criminal trial only if law enforcement told the defendant of the right to remain silent and the right to speak with an attorney before the interrogation started, and the rights were either exercised or waived in a knowing, voluntary, and intelligent manner. *Miranda, supra.*

Grievant's reliance on *Miranda* is misplaced. That case applies to criminal proceedings. The grievance procedure challenging Grievant's dismissal is not a criminal proceeding and *Miranda* does not apply. The failure of the officers to give Grievant a *Miranda* warning does not to preclude consideration of her statement.

In *Garrity v. New Jersey*, 385 U.S. 493 (1967) New Jersey municipal police officers were questioned during a state investigation concerning alleged traffic ticket "fixing." Each officer was first warned that: anything he said might be used against him in a state criminal proceeding; he could refuse to answer if the disclosure would tend to incriminate him; if he refused to answer, he would be subject to removal from office based upon a specific state statute. The officers argued that their convictions, based upon their confessions, should be overturned because their confessions were obtained through coercion. The Court held:

> The threat of removal from public office under the forfeiture of office statute to induce the petitioners to forgo the privilege against self-incrimination secured by the Fourteenth Amendment rendered the resulting statements involuntary, and therefore inadmissible in the state criminal proceedings. *Garrity, supra*, Pp. 385 U. S. 496-500.

Once again, this case applies mostly to criminal proceedings.[8] However, the main reason *Garrity* does not apply in this case is there is no evidence that the officers told Grievant that she would be dismissed if she refused to give a statement. Therefore, the requisite indicator of coercion found in *Garrity* is missing from this matter.

Even without Grievant's admissions, the facts that the amber colored alcoholic beverage was found in Grievant's workstation among her belongings and her insurance card was found inside the meth container renders it more likely than not that these items belonged to Grievant. Her statements confirm those facts. Grievant argues that she was

[8] In some jurisdictions employers will give a *Garrity* warning against self-incrimination in certain employee investigations.

not in physical possession of these items when they were discovered. However, she certainly had possession of them when she brought them into the workplace.

Respondent proved by a preponderance of the evidence that Grievant brought alcohol and a controlled substance into the workplace in violation of the DOP Drug – and Alcohol – Free Workplace policy. Accordingly, the grievance is DENIED.

Conclusions of Law

1. 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. If Grievant is a permanent employee, this remains a disciplinary matter and 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 (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). 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).

3. “The constitutional guarantee of procedural due process requires ‘some kind of hearing’ prior to the discharge of an employee who has a constitutionally protected property interest in his employment.” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985).” The West Virginia Division of Personnel Procedural Rule addresses this requirement in Section 12.2 by requiring a predetermination conference wherein an employee is advised that dismissal is being contemplate, the reason for the contemplated action, and an opportunity to respond prior to the employee being dismissed. W. Va. Code St. R. § 143-1-12.2a.

4. The purpose of the legislative rule requiring a predetermination conference is to protect the grievant’s due process rights to be given notice of the charges against her and the right to respond to those charges before disciplinary action is taken. *See, Buskirk v. Civil Serv. Comm'n,* 175 W. Va. 279, 332 S.E.2d -12- 579 (1985); *Board of Education of the County of Mercer v. Wirt,* 192 W. Va. 568, 453 S.E.2d 402 (1994); *Clark v. W. Va. Bd. of Regents,* 166 W. Va. 702, 279 S.E.2d 169, (1981). *Catalina v. Dep’t of Health & Human Res*., Docket No. 2011-0885-DHHR (Aug. 11, 2011).

5. Grievant was provided all the constitutional due process protections to which she was entitled as a permanent employee. The use of the term probationary employee was probably a mistake, but it had no effect on Grievant being provided her due process rights prior to dismissal.

6. The grievance procedure challenging Grievant’s dismissal is not a criminal proceeding and *Miranda* does not apply. The failure of the officers to give Grievant a *Miranda* warning does not preclude consideration of her statement.

7. In this case is there is no evidence that the officers told Grievant that she would be dismissed if she refused to give a statement. Therefore, the requisite indicator of coercion found in *Garrity v. New Jersey* is missing from this matter and that decision does not apply to this case.

8. Respondent proved by a preponderance of the evidence that Grievant brought alcohol and a controlled substance into the workplace in violation of the DOP Drug – and Alcohol – Free Workplace 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* 156 C.S.R. 1 § 6.20 (2018).

DATE: March 18, 2022

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE