WARREN FELIX,

Grievant,

v. **DOCKET NO. 94-DPS-143**

WEST VIRGINIA DEPARTMENT

OF PUBLIC SAFETY,

Respondent.

D E C I S I O N

Grievant, Warren Felix, protests his dismissal from Respondent West Virginia Department of Public Safety's Mountaineer Challenge Academy, effective March 10, 1994. Grievant filed his grievance directly at Level IV on April 13, 1994, and after several continuances, hearing was held on July 21, 1994. Further testimony was taken by telephone on January 13, 1995, again after several continuances, at which time this case became mature for decision.

Grievant was employed as a Counselor at the Mountaineer Challenge Academy from August 12, 1993, until his termination effective March 10, 1994. (See footnote 1) The Mountaineer Challenge Academy (the"Academy") accepts students, ages 16-18, who are considered high risk and have dropped out of school. As a Counselor, Grievant was responsible for establishing and maintaining a therapeutic environment and for projecting a positive role model for the Academy's cadets. R. Ex. 5.

Upon commencement of his duties at the Academy, Grievant was provided with, among other things, a document entitled "West Virginia Division of Personnel Policy Drug Free Workplace". The Policy provides, in pertinent part,

> C. The unlawful possession, use, manufacture, distribution, or dispensation of alcohol and/or a controlled substance; the reporting to work under the influence of a controlled substance or alcohol; the presence of a non-medically prescribed controlled substance or alcohol in the body system; or possession of drug paraphernalia are all prohibited in the workplace.

R. Ex. 3 (emphasis added).

Grievant signed an "Employee Drug Awareness Certification Form" acknowledging receipt of the Policy and awareness "that with any violation of this policy, I will be subject to disciplinary action up to and including termination." R. Ex. 3.

Sometime in August 1993, Sandra Lewis, a Counselor at the Academy, and Cathy Pyles, an instructor, testified that they submitted statements to the Director, Hugh Dopson, that Grievant smelled of alcohol at work. The Deputy Director, Peter Dufficy, investigated these statements and on August 30, 1993, issued Grievant a Letter of Counseling, which stated, in pertinent part:

> [Y]ou have appeared at work with an odor of alcohol, unkempt appearance, and perspiringheavily (while in air conditioning and with no ongoing physical activity). . .
>
> Alcohol impaired duty performance and resultant disheveled appearance are grounds for immediate termination. You are advised to seek counseling for alcohol abuse. This will be your only warning. (See footnote 2)

R. Ex. 2.

Mr. Dufficy testified that he had not personally observed Grievant on the occasion giving rise to this letter, but had no reason to doubt the credibility of the persons who had reported Grievant's condition to him.

On February 5, 1994, the Academy was scheduled to interview prospective applicants, perform physical examinations, and conduct orientation of family members of the applicants. This would be the first time that the students and their families would have ever had contact with the Academy and its staff.

Mr. Dopson was briefing the staff and volunteers the morning of February 5, 1994, when he heard a door open behind him. He smelled a strong smell of alcohol, turned around, and saw it was Grievant who had come in the room. Mr. Dopson completed his briefing, told Grievant he believed Grievant was under the influence of alcohol, and asked Grievant to accompany him to another room. Mr. Dopson called Charles Clayton, the Administrative Logistics Supervisor, to perform an on-site

alcohol, or "urine", test on Grievant.

Mr. Clayton testified he waited outside the latrine while Grievant provided the sample, and that no one entered or left the room other than Grievant. Mr. Clayton testified that a drop of the test material on litmus paper will show a "vivid, bright blue" if there is a strong presence of alcohol in the system, and the color will be less vivid with less alcohol. Grievant's test resulted in a vivid, bright blue or "strong positive" result. Mr. Clayton confirmed that this on-site test does not measure the quantity of alcohol, only the presence of alcohol in the body.

As a result of this testing, Mr. Dopson suspended Grievant on February 7, 1994, pending further investigation. Grievant did not protest this suspension. R. Ex. 4.

On February 22, 1994, Mr. Dopson issued Grievant a letter dismissing him from employment with the Academy. Specifically, the letter states, in pertinent part:

> On February 5, 1994, you reported to duty late with the presence of alcohol upon your person. . . .
>
> You are reminded, on August 12, 1993 the West Virginia Drug Free Work Place Policy was shared with you, and you signed an "Awareness Certification Form", which stated that you had:
>
> a. received a copy of the Policy
>
> b.
>
> agreed to abide by the terms of the Policy, and
>
> c.
>
> were aware that any violation of the Policy would result in disciplinary action up to and including dismissal.
>
> The policy shared with you prohibits the presence of alcohol in the body system while at the work place.

R. Ex. 5.

Grievant responded to the charges against him by letter dated March 3, 1994. G. Ex. 2. Grievant provided medical informationindicating that his sense of smell is impaired as a result of a prior automobile accident. G. Ex. 1. Grievant explained that he had some drinks before retiring the night before, and that the bottle of alcohol had spilled on some sweaters. Because of his impaired sense of smell, he did not notice the spill and wore one of the sweaters to work on February 5, 1994, thus accounting for the smell of alcohol.

Grievant and several witnesses also testified that there was an "informal" policy that staff could not consume alcohol within eight hours of reporting to work. Grievant maintains that he went to bed at 10:00 p.m. and reported to work around 7:30 a.m., and thus did not violate this "informal" policy.

In cases dealing with disciplinary matters, the burden of proof rests with the employer to prove the charges by a preponderance of the evidence. Schmidt v. W. Va. Dept. of Highways, Docket No. DOH-88-063 (March 31, 1989). Based upon the foregoing narrative and the evidence presented, the undersigned finds that Respondent has met its burden of proof.

Grievant was dismissed for having alcohol present in his body system in violation of the West Virginia Drug-Free Workplace Policy. Grievant was not dismissed for being under the influence or for having had a drink within eight hours of reporting to work. Respondent had a reasonable belief that Grievant was under the influence due to the smell of alcohol on his person and administered an on-site alcohol test. The test showed a "strong positive" of presence of alcohol in the system. Given Grievant'sprior warning regarding alcohol, Grievant's sensitive position as a Counselor of troubled and impressionable youth, along with the results of the alcohol test, Respondent was justified in dismissing Grievant from his employment at the Academy.

Conclusions of Law

1. Respondent has met its burden of proving by a preponderance of the evidence that Grievant reported to work with alcohol in his body system in violation of the West Virginia Drug Free Workplace Policy.

2. Grievant has not demonstrated any violation of any law, rule, regulation, or statute with regard to his dismissal from the Mountaineer Challenge Academy.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: February 15, 1995

Footnote: 1 *Although no clear evidence was introduced as to Grievant's employment status, as a civilian employee of the Division of Public Safety, it is assumed that Grievant is not covered by the classified civil service, and is therefore, an at-will employee of the Department. Nevertheless, as the parties did not raise his at-will status, the undersigned will address the merits of the case.*

Footnote: 2 *An employer does not have an affirmative legal duty to enroll and employee in an alcohol abuse or similar rehabilitation program. See Placino v. Dept. of Health and Human Resources, Docket No. 92-HHR-130 (Feb. 26, 1993).*