

**ROBERT W. WOLFE**

**v. Docket No. 95-DOH-491**

**DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS**

**DECISION**

Grievant, Robert W. Wolfe, employed by the Division of Highways (Respondent) as a Transportation Worker II, Equipment Operator, was dismissed effective November 17, 1995, for unsatisfactory job performance during his probationary period. The specific incident which led to this determination occurred on September 1, 1995, when Grievant allegedly sold liquor to two inmates on a work crew from Pruntytown Correctional Center (PCC). Grievant filed an expedited grievance to level four and a hearing was conducted on February 29, 1996. See: W.Va. Code §29-6A-4(e). The matter became mature for decision with the submission of proposed findings of fact and conclusions of law by both parties on June 14, 1996. [\(See footnote 1\)](#)

The evidence of record establishes that on September 1, 1995, PCC inmates returning from a Division of Highways work crew were searched and two bottles of liquor were found. During the ensuing investigation by PCC officials, three inmates stated that Grievant provided the liquor.

At level four Respondent submitted an incident report completed by CO-IV Barbara Adams. Officer Adams briefly wrote "I . . . saw inmate Jeff Hairston get something from a Blue and Primer pick-up truck parked beside fence on Rt side of Mon. Co. Headquarters." A log kept by Officer Adams for that date reflects the same observation. [\(See footnote 2\)](#)

Also submitted were written statements taken from the inmates by PCC Deputy Warden Frank Phares on September 1, 1995. When asked to tell all he knew about the liquor found in his possession, Jeff Hairston responded, "Bob Wolf[e] bought it for us. I joked around with Bob Wolf[e] yesterday about getting me some whiskey. Today he got it for me. When we returned to the shop this evening Bob Wolf[e] told me the whiskey was on the front seat of his truck. I then went to his truck and got the pint of gin from the front seat." Mr. Hairston described the truck as a blue and primered

Chevrolet pick-up. When asked how much he had paid for the whiskey, Mr. Hairston replied "five dollars in quarters." [\(See footnote 3\)](#)

Inmate David Williams' statement indicates that he had no money but that inmate Mitchell Moore offered to split a bottle of whiskey with him if he would carry it into PCC. Mr. Williams observed Mr. Moore speak with a DOH employee who he described as "a fat guy . . . wears glasses . . . drives a blue Chevrolet pick up truck that is part primer color" and then go over to one of the dump trucks and return with the pint of liquor.

Inmate Moore's statement reads in pertinent part:

I knew about both pints of whiskey. I got one pint from the slot in the inside door panel of the drivers side of Bob Wolf[e]'s dump truck. About 2:30 p.m. today. I asked Bob Wolf[e] if he would get me a bottle of liquor. I arranged to get it for inmate David Williams. When we got finished working and returned to the garage at about 3:00 or a little after I asked Bob Wolf[e] if he got the liquor and he, Bob Wolf[e], said yes it was in the door of his truck. I gave Bob Wolf[e] the money for the whiskey at about 2:30 p.m. today. I gave Bob about three dollars and twenty-five cents in quarters. I then went to the truck and got the whiskey.

After retrieving the liquor, Mr. Moore stated that he first put the bottle behind the back seat of Bill Johnson's truck [\(See footnote 4\)](#) and that later he moved it on to the seat for Mr. Williams, who put the bottle in his pocket.

At the level four hearing, Mr. Moore's testimony substantially reflected the written statement. Mr. Hairston changed his version somewhat, stating that he did not know who bought the liquor, and that Grievant did not tell him that it was in the truck. He claims that he gave Grievant the money to hold in case they went to a store and wanted to get something to eat. Not inconsistent with his written statement, he testified that he saw the alcohol in the truck and took it for his own use.

District Engineer Harry Carr and DOH Human Resources Director Jeff Black also testified at the level four hearing. Mr. Carr stated that he reviewed the information from Corrections as well as Grievant's record at DOH. Determining Grievant's actions unacceptable, Mr. Carr recommended that he not be granted permanent status. Mr. Black testified that upon receiving Mr. Carr's recommendation, he concurred in finding that the nature of the charge and Grievant's probationary status warranted the termination of his employment.

Testifying on Grievant's behalf, Transportation Worker II Charles Mackley, stated that he worked with Grievant throughout the day on September 1, 1995, and did not see him speak with an inmate or observe an inmate give anything to Grievant. Another Transportation Worker II, James Compton, testified that he was Grievant's supervisor during his tenure as a temporary employee. Mr. Compton stated that Grievant was always a good worker and he never saw him give an inmate anything.

Grievant recounted his activities of September 1, 1995, a day he did not work with an inmate crew, and specifically denied receiving or holding money, or giving the inmates liquor. Grievant stated that he had received no training or information relating to working with inmates. If inmates got liquor out of his truck, Grievant asserts that he did not know about it and did not know that it was even in the vehicle. When asked if he knew that giving alcohol to an inmate was wrong, Grievant responded that he does now. He claims that he did not provide the liquor, but if he had, he did not previously know that it was unacceptable. Lacking eyewitnesses or other evidence, this is simply a matter of Grievant's word against that of three inmates. Thus, the decision turns on the issue of credibility. Ordinarily, demeanor is a critical factor in evaluating credibility; however, because the undersigned did not conduct the hearing and neither audio tapes nor transcript were available for review, it is impossible to consider this factor, even though Grievant and inmates Moore and Hairston testified at the level four hearing. While the testimony of inmates should always be carefully considered, it is significant that during their separate interviews all three identified Grievant as the source of the liquor. There is no evidence, and Grievant makes no claim, that the inmates acted out of retaliation or had any motive to do him harm. Although Mr. Hairston's testimony differed at hearing somewhat from his written statement, it remained consistent in that he gave Grievant money and took the alcohol from the truck. Grievant is less persuasive when he denies that he provided the liquor and then goes on to state, but if he did, he did not know that it was wrong. Based upon this limited evidence, it must be concluded that Grievant's denial of the charge lacked credibility.

Grievant's actions were in violation of Respondent's Drug Free Workplace Policy. The purpose of that Policy is "to provide guidelines for maintaining a drug free workplace in compliance with the Drug Free Workplace Act of 1988" and prohibits "the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance . . . in the workplace or at any site for the performance of work." Although Grievant argues that liquor is not a "controlled substance," administrative notice is taken that alcohol is specifically addressed in the Division of Personnel Drug-Free Workplace Policy,

is generally included in such policies, and, was in all likelihood, intended to be covered by Respondent's policy. The failure of Respondent's policy to specifically include alcohol does not make the dismissal "fatally defective." Neither does Respondent's citation of Personnel's policy at hearing change the reason for dismissal. The reason for Grievant's dismissal, providing the alcohol to inmates, remains the same. Further, Grievant is subject to Personnel's policy as well as Respondent's.

Grievant actions were also in violation of W.Va. Code §61-5-8(d) which provides:

If any person delivers any alcoholic liquor, nonintoxicating beer, poison, explosive, firearm or other dangerous or deadly weapon, or any controlled substance as defined by chapter sixty-a of this code to an inmate or prisoner in any jail, prison or private prison or to any resident of any juvenile facility or juvenile detention center within this state and is unauthorized by law to do so, or is unauthorized by the administration of said jail or prison, or private prison or juvenile facility or detention center, such person is guilty of a felony, and, upon conviction thereof, shall be fined not less than one thousand nor more than five thousand dollars or imprisoned in the penitentiary not less than one year nor more than five years.

Pursuant to the provisions of W.Va. Code §29-6A-6, the burden of proof in disciplinary matters rests with the employer and the employer must prove the charges by a preponderance of the evidence. Even if the employee retains probationary status, if misconduct is alleged the employer has the burden of proving the allegations by a preponderance of the evidence. Skinner v. W.Va. Dept. of Transportation/Div. of Highways.

Docket No. 91-DOH-339 (April 28, 1992). However, the termination of a probationary employee will not be sustained if the employee affirmatively establishes that the employer unreasonably determined that because of the misconduct the services of the employee were unsatisfactory. Walker v. W.Va. Public Service Commission, Docket No. 91-PSC-422 (March 11, 1992).

Grievant argues that Respondent unreasonably determined that his performance was unsatisfactory because he had satisfactorily completed his duties of Equipment Operator. Several employees testified that Grievant's actual job performance was good. There is no evidence of poor evaluations, reprimands, warnings, or documentation of any corrective action being taken against Grievant. As a second argument, Grievant attempts to shift blame to Corrections for any wrongdoing because he was never provided with any guidelines, training or instruction that possession of certain

items by inmates was prohibited. Grievant avers that Respondent and Corrections simply needed a scapegoat when a potential problem developed due to their apparent neglect. Addressing the inmates' testimony, he notes that the inconsistencies in the statements of the inmates as to whose money was used to buy the alcohol and the inconsistencies between their written statements and level four testimony.

From the time of the incident through the dismissal Grievant was a probationary employee. Division of Personnel Regulations, Section 10, defines the probationary period as a trial work period designed to allow the employer an opportunity to evaluate the ability of the employee to effectively perform the work required of the position, and to eliminate those employees who do not meet the required standards of work. Although Respondent does not allege that Grievant completed the duties of Equipment Operator in an unsatisfactory manner, clearly, his overall performance was not acceptable. Accepting some discrepancies in the inmates' testimony, it has already been found that notwithstanding some variations, their statements were consistent regarding the salient facts, and that they were more credible than Grievant. Grievant's claim that he was given no training in working with inmates is undisputed; however, the record also establishes that Grievant was advised regarding the drug free workplace policy. Absent any training, a reasonable person should deduce that providing alcoholic beverages to inmates is not acceptable. Violation of policy and law at the workplace, on work time, establishes cause for dismissal. Therefore, it must be concluded that Respondent proved, by a preponderance of the evidence, that Grievant engaged in unsatisfactory job performance, and that Grievant did not show that this determination was unreasonable.

In addition to the foregoing narration it is appropriate to make the following formal findings of fact and conclusions of law.

### **FINDINGS OF FACT**

**1. Grievant was hired by the Division of Highways as a temporary employee in November 1994. Grievant was instated as a permanent, probationary employee, classified as a Transportation Worker II, effective May 15, 1995.**

**2. On September 1, 1995, three inmates from Pruntytown Correctional Center participating in a work release program with the Division of Highways were found to have two bottles of alcohol with them upon their return to the institution.**

3. In written statements taken by PCC Deputy Warden Frank Phares, all three inmates identified Grievant as the source of the liquor. Their statements further confirmed that they had given Grievant money that day. 4. There is no evidence that the inmates had any motive to falsely identify Grievant as the source of the liquor.

5. Given the consistency of the inmates' identification of the source of the liquor and the absence of any motive to falsely name the provider, Grievant's denial of the act was less credible than the statements of the inmates.

### **CONCLUSIONS OF LAW**

1. Pursuant to the provisions of W.Va. Code §29-6A-6, the burden of proof in disciplinary matters rests with the employer and the employer must prove the charges by a preponderance of the evidence. Skinner v. W.Va. Dept. of Transportation/Div. of Highways, Docket No. 91-DOH-339 (April 28, 1992).

2. Respondent has proven by a preponderance of the evidence that Grievant exhibited unsatisfactory job performance when he provided liquor to inmates in violation of Respondent's and Division of Personnel's Drug Free Work Place policies, and W.Va. Code §61-5-8(d).

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the "circuit court of the county in which the grievance occurred" 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.

DATE: July 31, 1996 \_\_\_\_\_

SUE KELLER

Senior Administrative Law Judge

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**[Footnote: 1](#)**

***This matter was heard by ALJ Mary Beth Angotti-Hare and was transferred to the undersigned for administrative reasons in June 1996.***

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**[Footnote: 2](#)**

***Officer Adams did not testify at level four; however, John Markley, Supervisor of the Community Work Program at PCC, testified that she was there simply to observe.***

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**[Footnote: 3](#)**

***Although the participants alternatively referred to the alcoholic beverage as whiskey and gin, a violation report completed by Mr. Markley at PCC identified the contraband as Seagrams Extra Dry gin.***

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**[Footnote: 4](#)**

***Mr. Johnson was identified as the DOH supervisor of the inmate crew. Subsequent to this investigation, Mr. Johnson was suspended for four weeks and removed from his assignment as a supervisor.***