ROBERT P. RODAK,

Grievant,

v. **Docket No. 96-T&R-536**

WEST VIRGINIA DEPARTMENT
OF TAX AND REVENUE,

Respondent.

D E C I S I O N

On April 8, 1996, Robert P. Rodak (Grievant) submitted this grievance challenging his dismissal from employment by Respondent Department of Tax and Revenue (T&R). Grievant elected to initiate this grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., at Level I. Following denial of his grievance at Levels I and II, Grievant appealed to Level III, where an extensive hearing was conducted on July 15 and 16, 1996. On December 16, 1996, T&R Secretary James H. Paige adopted the recommended decision of the hearing examiner, denying this grievance at Level III. Grievant timely appealed to Level IV, and, following a continuance which was granted for good cause shown, a hearing in this matter was conducted in this Grievance Board's office in Charleston, West Virginia, on March 11, 1997. At the conclusion of that hearing, the parties agreed on a briefing schedule, and this matter became mature for decision upon receipt of Respondent's brief on April 7, 1997. Consistent with W. Va. Code § 29-6A-4, and the practice of this Grievance Board, this disciplinary action has been advanced on the docket for an expedited decision.

Because Grievant's defense at Level IV is primarily focused on issues which involve questions of law, the salient facts which gave rise to this grievance are essentially uncontroverted. The following findings of fact are derived from the extensive record developed at Level III. (See footnote 1)

FINDINGS OF FACT

1. Grievant was employed by Respondent West Virginia Department of Tax and Revenue (T&R) as an Attorney III. At the time of his dismissal, Grievant had been employed by T&R for a total of eighteen years.

2. Grievant's duties as an Attorney III included representation of T&R in contested petitions for reassessment and/or refund of taxes administered by T&R. Grievant's representational duties required that he travel and appear at hearings on T&R's behalf.

3. On February 23, 1996, Grievant appeared on behalf of T&R at a hearing before the Marshall County Commission sitting as a Board of Equalization and Review in a contested matter involving the appraisal of equipment held by the Bayer Corporation in Marshall County. During that hearing, Grievant had alcohol in his system, and appeared to be under the influence of alcohol. HT I at 185, 187-89; Hartley Deposition at 8; R Ex 38. (See footnote 2) 4. On March 22, 1996, T&R Secretary Paige notified Grievant of his intent to terminate his employment for violation of the West Virginia Drug-Free Workplace Policy on February 23, 1996. Secretary Paige's letter noted that Grievant had previously been counselled regarding his alcohol abuse on numerous occasions, that Grievant had received a three-day suspension on March 24, 1992, for "attempting to perform your work in a debilitated (intoxicated) manner," and had been issued a warning letter on March 30, 1992, that he would be terminated if he was found to be intoxicated while on the job. In addition, it was noted that on October 29, 1991, Grievant had agreed to seek assistance for his "drinking problem" as a condition for avoiding a proposed suspension from employment. R Ex 42.

5. On April 15, 1988, Richard Boyle, then head of T&R's Legal Division and Grievant's immediate supervisor, orally counselled Grievant regarding his alcohol problem, advising Grievant of the availability of an employee assistance program. HT I at 43-48, R Ex 1.

6. On May 30, 1990, Mr. Boyle warned Grievant that he would not be assigned to handle grievance hearings for T&R because he had been drinking. HT I at 55, R Ex 2.

7. On August 6, 1990, Mr. Boyle reprimanded Grievant for appearing as counsel for T&R at a hearing held before Administrative Law Judge Priscilla Gay when he had been drinking. HT I at 56-58, R Ex 3.

8. On or about September 21, 1990, Mr. Boyle provided Grievant with a pamphlet explaining the State of West Virginia Employee Referral Program for assisting individuals with substance abuse problems. HT I at 60-61, R Exs 5, 7 & 8. 9. On September 28, 1990, Mr. Boyle counselled

Grievant in writing regarding his work habits and demeanor, noting that Grievant was continuing "to engage in [his] day-to- day work responsibilities in a debilitated manner" and he was, at times, incoherent during working hours, particularly after returning from lunch. HT I at 65-66; R Ex 9.

10. On October 10, 1990, Mr. Boyle issued another written warning, noting that there had been no improvement since September 28, 1990, and observing that Grievant continued to attempt to perform work for T&R "in a state of apparent inebriation." Grievant was advised to take steps to deal with his drinking problem or face suspension from employment. HT I at 67-68, R Ex 10.

11. On October 14, 1990, Grievant wrote to Mr. Boyle advising that he was seeking outpatient assistance through Southway Treatment Center, an affiliate of Thomas Memorial Hospital. R Ex 11. See HT II at 41. Mr. Boyle subsequently accompanied Grievant to a meeting with his alcohol counselor at the counselor's request. HT I at 74-75.

12. On May 10, 1991, Mr. Boyle confronted Grievant at work where Grievant admitted he had been drinking. Mr. Boyle ordered Grievant home and orally warned Grievant about repeating such conduct. HT I at 76, R Ex 14.

13. On June 4, 1991, Mr. Boyle confronted Grievant regarding a report from another employee that Grievant's breath smelled of alcohol while at work. Grievant denied drinking and indicated that he was attending Alcoholics Anonymous (AA). HT I at 77-79; R Ex 16.

14. On June 7, 1991, Mr. Boyle issued a written warning of impending disciplinary action to Grievant based upon his declining work performance and reports from other employees that Grievant was intoxicated during normal work hours. HT I at 79-80; R Ex 17. 15. Mr. Boyle, Acting Tax Commissioner Alan Mierke, and Mark Morton met with Grievant on September 9, 1991, to discuss his alcohol problem and encourage him to seek treatment. Grievant advised them that he would seek outpatient treatment. HT I at 82-83, 122-23; R Ex 19.

16. On October 23, 1991, T&R Assistant Secretary Mierke notified Grievant of a proposed three-day suspension for continuing to attempt to perform work while in an intoxicated condition. R Ex 20. The proposed punishment was withdrawn after Grievant agreed in writing to seek assistance for his drinking problem, and acknowledged understanding that his employment would be terminated if he returned to work in an intoxicated state. HT I at 82-85; R Ex 21.

17. On December 16, 1991, Grievant acknowledged receipt of a copy of the West Virginia Drug-Free Workplace Policy (hereinafter "Policy"). R Ex 22.

18. The Policy, effective October 1, 1991, prohibits employees from reporting to work under the influence of alcohol, using alcohol in the workplace, or having alcohol in their system while at work. R Ex 23.

19. Sometime after 1990, Mr. Boyle sought guidance from the West Virginia State Bar for obtaining assistance with Grievant's alcohol problem. HT I at 90-94. Mr. Boyle apprised Grievant of the treatment which was available through the Impaired Lawyer's Committee, but Grievant elected to seek treatment through the Charleston Area Medical Center at that time. HT I at 93-94; 127-28, 155-56.

20. On March 24, 1992, T&R Assistant Secretary Mierke suspended Grievant for three days for attempting to perform his work while intoxicated. HT I at 95, R Ex 24. 21. On March 30, 1992, Secretary Paige reviewed Grievant's employment history with Mr. Boyle and Mr. Mierke, and issued a written warning to Grievant advising that he would be dismissed from employment should he be found intoxicated on the job. HT I at 96: R Ex 25.

22. On April 9, 1992, Grievant entered into a written agreement with Mr. Paige and Mr. Boyle to take a daily dose of antabuse and continue outpatient treatment in a medical facility of Grievant's choice for a period of one year as a "recovering alcoholic." HT I at 97- 98, 149-52; R Ex 26.

23. On April 29, 1992, Pat Hedrick of Charleston Area Medical Center's Parkside Recovery Center wrote to Mr. Boyle confirming that Grievant had begun outpatient treatment on April 7, 1992, following a week of inpatient treatment. HT I at 98-99, 159-60; R Ex 27.

24. On June 1, 1992, Ms. Hedrick again wrote to Mr. Boyle, advising that Grievant had successfully completed the primary outpatient program through Parkside Recovery Center on May 18, 1992, and would continue to attend AA meetings and receive outpatient care on a weekly basis. HT I at 99-100, 160; R Ex 28.

25. On June 23, 1992, Mr. Boyle issued Grievant's annual employee evaluation wherein Grievant received an overall rating of "unsatisfactory." It was further noted that Grievant had come "extremely close" to being discharged from employment because of his drinking problem, and that Grievant would be discharged should a relapse occur. HT I at 100-03; R Ex 29. 26. On April 22, 1993, Mr. Boyle received reports from two other T&R employees that Grievant had exhibited signs of being intoxicated at work on April 16, 1993. HT I at 105; R Ex 31.

27. On April 27, 1993, Mr. Boyle was unable to locate Grievant when he did not report for work.

Grievant called Mr. Boyle at home that evening to advise that he had been admitted to Southway Treatment Center at Thomas Memorial Hospital for alcohol treatment. HT I at 108-09; R Exs 34 & 35.

28. On May 4, 1993, Secretary Paige suspended Grievant without pay for five days based upon being inebriated during office hours on three occasions, and being absent without approval for two days. HT I at 110-11; R Ex 35.

29. On May 4, 1993, Grievant entered into another written agreement to take a daily dose of antabuse and to continue in outpatient treatment for alcohol abuse. HT I at 114, 152; R Ex 36.

30. Sometime in June 1995, Grievant was admitted to inpatient treatment for another episode of alcohol abuse. Robert Hoffman, Mr. Boyle's successor as Director of T&R's Legal Division, approved Grievant's medical leave of absence for alcohol treatment. HT I at 179-81; R Ex 39.

31. Excluding the incidents involving alcohol, Grievant was generally considered a "very good" employee. HT I at 103, 140-41, 208.

32. Grievant suffers from the disease of alcoholism. HT II at 98. Respondent T&R was aware of Grievant's alcoholic condition prior to the decision to terminate his employment on March 22, 1996.

33. Prior to being notified of his proposed termination, Grievant did not request any particular accommodation for his alcohol problem from Mr. Boyle, Mr. Hoffman, or Secretary Paige. HT I at 117.

DISCUSSION

In disciplinary matters, W. Va. Code § 29-6A-6 places the burden of proof on the employer. Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). The judicial standard in West Virginia requires that "dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Service Comm'n, 175 W. Va. 279, 332 S.E.2d 579, 581 (1985); Oakes v. W. Va. Dept. of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Service Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965). Violation of the West Virginia Drug-Free Workplace Policy is an offense which may warrant dismissal of a civil service employee. Perdue v. Dept. of Health & Human Resources, Docket No. 93- HHR-050 (Feb. 4, 1994). See Cummings v. W. Va. Dept. of Admin., Docket No. 92- ADMN-255 (Dec. 31, 1992). See also R.H.S. v. RESA IV, Docket No. 96-RESA-348 (Mar. 31, 1997); Jones v. Barbour County Bd. of

Educ., Docket No. 96-01-471 (Feb. 28, 1997); Felix v. W. Va. Dept. of Public Safety, Docket No. 94-DPS-143 (Feb. 15, 1995).

The West Virginia Drug-Free Workplace Policy prohibits an employee from reporting to work under the influence of alcohol or having alcohol in the body system. Perdue, supra. Respondent met its burden in proving that Grievant had alcohol in his system on February 23, 1996, when he appeared at a hearing on behalf of T&R, exhibiting signs ofbeing under the influence of alcohol, in violation of the West Virginia Drug-Free Workplace Policy. See R.H.S., supra; Perdue, supra; Cummings, supra. In Buskirk, supra, the Supreme Court of Appeals of West Virginia stated that "the work record of a long time civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." Id. at 585. In this particular case, Grievant has been progressively counselled, warned, reprimanded, and suspended in an effort to correct his alcohol-related problem which has repeatedly interfered with his otherwise competent and effective work performance. (See footnote 3) Thus, T&R has likewise demonstrated that discharge was appropriate in the circumstances presented.

Grievant alleges that his termination was improper because T&R violated his substantive rights to accommodation as a handicapped individual under the West Virginia Human Rights Act (WVHRA), W. Va. Code §§ 5-11-1, et seq., and/or as a person with a disability under the federal Americans With Disabilities Act (ADA), 42 U.S.C. §§ 12111, et seq. These are statutes under which Grievant works within the definition of "grievance" contained in the grievance procedure for state employees. W. Va. Code § 29-6A-2(i); Hendricks v. W. Va. Dept. of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). See Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996). See also Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995). See generally Belcher v. W. Va. Dept. of Transp., Docket No. 94-DOH-341 (Apr. 27, 1995). Thus, although this Grievance Board does not have authority to determine claims forliability that arise under the WVHRA or the ADA, this Board nonetheless has subject-matter jurisdiction over handicap-based discrimination claims. R.H.S., supra; Smith, supra. See Hendricks, supra. See generally Vest, supra. (See footnote 4)

Generally, an employee asserting an affirmative defense to a disciplinary action must establish such a defense by a preponderance of the evidence. Smith, supra; McFadden v. W. Va. Dept. of Health & Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995); Parham v. Raleigh County

Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991), aff'd, 192 W. Va. 540, 453 S.E.2d 374 (1994); Morris v. W. Va. Dept. of Health, Docket No. 91-DHS-112 (June 25, 1991). See Schmidt v. Safeway, Inc., 864 F. Supp. 991 (D. Or. 1994) See also Parker v. Defense Logistics Agency, 1 M.S.P.B. 489 (1980). The ADA provides that:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112.

A person making a claim of discrimination under the ADA bears the burden of proving a prima facie case of discrimination by a preponderance of the evidence. In a typical ADA case, the claimant must prove that:

(1) he was in the protected class; (2) he was discharged;

(3) at the time of the discharge, he was performing his job at a level that met his employer's reasonable expectations; and

(3) his discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination.

Ennis v. Nat'l Ass'n of Business & Educ. Radio, Inc., 53 F.3d 55 (4th Cir. 1995). See also Doe v. Univ. of Md. Medical System Corp., 50 F.3d 1261 (4th Cir. 1995). The proof analysis for a claim of handicapped discrimination under the WVHRA is essentially identical. See McCauley v. Merrimac, Inc., 194 W. Va. 349, 460 S.E.2d 484 (1995).

Once a claimant has made a prima facie case of discrimination, the burden shifts to the employer to articulate some legitimate, nondiscriminatory explanation, which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action. If the employer meets this burden, the presumption created by the prima facie case essentially "drops out of the picture", and the claimant bears the ultimate burden of proving that he has been the victim of wrongful discrimination. Id.; Smith, supra. See St. Mary's Honor Ctr. v. Hicks, U.S. , 113 S.Ct. 2742 (1993).

Applying these legal principles to the facts previously determined, it is clear that Grievant suffers from the disease of alcoholism, and T&R was aware of Grievant's status as a recovering alcoholic.

Alcoholism is a disability which is covered by the ADA. Flynn v. Raytheon Co., 868 F. Supp. 383 (D. Mass. 1994); Schmidt, supra. See Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980); Whitlock v. Donovan, 598 F. Supp. 126 (D.D.C. 1984). However, the ADA also permits employers to establish and enforce rules prohibiting the use of alcohol on the job. 42 U.S.C. 12114(c). Thus, an employermay hold an employee who is an alcoholic to the same standards of behavior as other employees, even if that behavior is related to the employee's alcoholism. Id. See Schmidt, supra.

In the circumstances presented, the Policy adopted by T&R prohibits employees from coming to work with alcohol in their system, and there is no evidence T&R permitted other employees to report to work with alcohol in their system without facing disciplinary action. Therefore, Grievant has not met his burden of establishing a prima facie case of discrimination because of handicap or disability. (See footnote 5)

Nonetheless, Grievant argues that because T&R was aware of his alcoholism, the employer had a duty to accommodate his disability by proposing and enforcing more effective terms for his rehabilitation and recovery than Grievant was willing to commit to on his own initiative. Grievant has not cited any ADA cases involving an employee with alcoholism where the employer's obligation to identify an accommodation has been extended as Grievant proposes. Grievant's reliance upon Bultemeyer v. Ft. Wayne Community Schools, 100 F.3d 1281 (7th Cir. 1996), involving an affirmative duty to seek out an appropriate accommodation for a mentally disabled employee, is misplaced.

Alcoholism, while it may be a permanent condition, does not necessarily impair an individual to the same degree as a mental disability. In this particular situation, the evidence presented by Grievant's expert witness at Level III indicates that Grievant's condition is treatable, so long as Grievant is willing to accept the necessary terms of suchtreatment. Thus, Grievant has not yet reached a stage where he is constantly inebriated to the point where he is incapable of recognizing the need for an accommodation,. Indeed, Grievant received expert medical treatment for his alcoholism on multiple occasions without proposing to the employer that any further accommodation was in order. In these circumstances, the employer does not have an affirmative obligation to devise a more effective remediation plan than Grievant has heretofore proposed. See Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130 (7th Cir. 1996). Moreover, the employer is not obligated to accommodate an employee's alcoholism by permitting him to come to work under the influence. See LeMere v. Burnley, 683 F. Supp. 275 (D.D.C. 1988); Robinson v. Devine, 37 FEP Cases 728 (D.D.C.

1985).

As for Grievant's complaints that T&R does not have an independent Employee Assistance Program within its agency, or that the Employee Assistance Program conducted by the West Virginia Division of Personnel is not staffed with appropriately qualified personnel to comply with the ADA, related statutes, and executive orders, these contentions are without merit in that Grievant has failed to demonstrate how these purported violations created "harmful error" in the context of his discharge. See Shoemaker v. W. Va. Dept. of Transp., Docket No. 95-RMA-218 (Sept. 26, 1995); McFadden v. W. Va. Dept. of Health & Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995). See generally Parker, supra.

Consistent with the foregoing discussion, the following conclusions of law are properly made in this matter.

CONCLUSIONS OF LAW

1. Pursuant to W. Va. Code § 29-6A-6, the burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Wellman v. W. Va. Dept. of Health & Human Services, Docket No. 93-HHR-079 (Oct. 18, 1993); Ramey v. W. Va. Dept. of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. Dismissal of a civil service employee must be for "good cause, which means misconduct of a substantial nature affecting rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Service Comm'n, 175 W. Va. 279, 332 S.E.2d 579, 581 (1985).

3. Respondent demonstrated by a preponderance of the evidence that Grievant violated the West Virginia Drug-Free Workplace Policy by appearing at a hearing on behalf of his employer with alcohol in his system, and exhibiting signs of inebriation. Thus, Respondent established good cause for Grievant's dismissal, despite Grievant's long tenure with the agency and, excluding numerous incidents of alcohol abuse, a generally acceptable work record, given the multiple opportunities Grievant was afforded to obtain appropriate treatment for his medical condition. See Jones v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Buskirk, supra; Grueser v. W. Va. State Bd. of Rehabilitation, Docket No. 95-RS-084 (June 29, 1995).

4. An employee asserting an affirmative defense to a disciplinary action must establish such a defense by a preponderance of the evidence. Smith v. W. Va. Bureau of Employment Programs,

Docket No. 94-BEP-099 (Dec. 18, 1996); McFadden v. W. Va. Dept. of Health & Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995); Parhamv. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991), aff'd, 192 W. Va. 540, 453 S.E.2d 374 (1994); Morris v. W. Va. Dept. of Health, Docket No. 91-DHS-112 (June 25, 1991). See Schmidt v. Safeway, Inc., 864 F. Supp. 991 (D. Or. 1994). See also Parker v. Defense Logistics Agency, 1 M.S.P.B. 489 (1980).

5. Although this Grievance Board does not have authority to determine claims for liability that arise under the West Virginia Human Rights Act (WVHRA), W. Va. Code §§ 5-11-1, et seq., or the federal Americans With Disabilities Act (ADA), 42 U.S.C. §§ 12111, et seq., this Board nonetheless has subject-matter jurisdiction over handicap-based discrimination claims. R.H.S. v. RESA IV, Docket No. 96-RESA-348 (Mar. 31, 1997); Smith, supra. See Hendricks v. W. Va. Dept. of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). See generally Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995).

6. A person making a claim of discrimination under the ADA bears the burden of proving a prima facie case of discrimination by a preponderance of the evidence. In a typical ADA case, the claimant must prove that:

(1) he was in the protected class;

(2) he was discharged;

(3) at the time of the discharge, he was performing his job at a level that met his employer's reasonable expectations; and

(4) his discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination.

Ennis v. Nat'l Ass'n of Business & Educ. Radio, Inc., 53 F.3d 55 (4th Cir. 1995). See also Doe v. Univ. of Md. Medical System Corp., 50 F.3d 1261 (4th Cir. 1995). 7. Alcoholism is a disability which is covered by the ADA. Flynn v. Raytheon Co., 868 F. Supp. 383 (D. Mass. 1994); Schmidt, supra. See Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980); Whitlock v. Donovan, 598 F. Supp. 126 (D.D.C. 1984).

8. The ADA permits employers to establish and enforce rules prohibiting the use of alcohol on the job. 42 U.S.C. 12114(c). Thus, an employer may hold an employee who is an alcoholic to the same standards of behavior as other employees, even if that behavior is related to the employee's alcoholism. Id. See Schmidt, supra.

9. Grievant has not met his burden of establishing a prima facie case of discrimination because of handicap or disability in regard to his discharge for reporting to work when drinking. See Ennis, supra; Doe, supra; Schmidt, supra.

10. Respondent T&R was not obligated to provide a reasonable accommodation for Grievant's alcoholism where Grievant did not request any additional accommodation until after his discharge was proposed. See Flynn v. Raytheon Co., 868 F. Supp. 383 (D. Mass. 1994). See also Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130 (7th Cir. 1996); LeMere v. Burnley, 683 F. Supp. 275 (D.D.C. 1988); Robinson v. Devine, 37 FEP Cases 728 (D.D.C. 1985).

11. Grievant has failed to prove that he was discriminated against by Respondent under the West Virginia Human Rights Act, W. Va. Code § 5-11-1, et seq., or the Americans With Disabilities Act, 42 U.S.C. § 12111, et seq.

Accordingly, this grievance is **DENIED**.

Any party 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: June 23, 1997

Footnote: 1

Grievant's evidence at Level IV was limited to his rehabilitative efforts since his termination, information that is largely irrelevant to the issues raised in this grievance.

Footnote: 2

All citations are to the Level III hearing transcript and exhibits admitted at that hearing. The two volumes of the hearing transcript will be cited as "HT I" and "HT II."

Footnote: 3

As none of these prior actions were grieved at the time they occurred, their merits are not at issue in this grievance. See Womack v. Dept. of Admin., Docket No. 93-ADMN-430 (Mar. 30, 1994); Perdue, supra.

Footnote: 4

However, this Board's ruling on the merits of Grievant's claims under the ADA or WVHRA has no preclusive effect on the parties in regard to any court proceeding. See Harrison County Bd. of Educ. v. Carson-Leggett, 195 W. Va. 196, 466 S.E.2d 447 (1995); Vest, supra. See also Asaad v. Res-Care, Inc., 478 S.E.2d 357 (W. Va. 1996). See generally Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

Footnote: 5

Likewise, Grievant did not show that he was being treated differently from other similarly situated employees in order to establish a prima facie case of discrimination in violation of W. Va. Code § 29-6A-2(d).