STEPHEN EVANS,

Grievant,

v. DOCKET NO. 97-HHR-280

DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Respondent.

D E C I S I O N

This grievance was filed by Grievant, Stephen Evans, against Respondent, Department of Health and Human Resources ("HHR"), on November 12, 1996, after he was issued a written warning by his supervisor on November 7, 1996, for appearing for work under the influence of alcohol, in violation of the Drug-Free Workplace Policy. Grievant denied the allegation, and also alleged he was being denied due process of law, because he was not given a breathelizer test. (See footnote 1) Asrelief, Grievant sought "to be made whole in every way," and specifically requested that all verbal and written warnings be removed from his personnel files. (See footnote 2)

Discussion

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. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dept. of Health, Docket No. H-88-005 (Dec. 6, 1988). "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. Dept. of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

Grievant's supervisor, Linda Thomas, testified that on November 5, 1996, at about 2:50 p.m., Grievant was walking down the hall to report to work, and she observed him staggering. She stated when he passed by her, she could smell alcohol. Grievant went into the linen room and she followed him. She stated she told him she smelled alcohol, and asked if he had been drinking, and he

responded, "no." She stated when she moved closer to Grievant, he backed away from her. She stated she then told Grievant she could not let him work in that condition. She stated Grievant had a fish sandwich in his hand, and he responded, "just let me eat my fish sandwich, I'll be alright." L III, p. 3. Ms. Thomas sent Grievant home and told him to take that day as his scheduled day off, and to come to work the next day instead, which had been his scheduled day off. L III, p. 10. She felt Grievant's ability to work was impaired that day, and she could not let him work because housekeeping employees work around chemicals, and she could not let anything happen to him or any other employees. L III, p. 4.

Two other employees and a contract worker, William Neal, Buster Long, and Delores Jones, were in the hall when Grievant arrived for work, and were able to observe his behavior. L III, pp. 3. Ms. Jones, the contract worker, testified she observed Grievant walking down the hall, and asked Mr. Long if something was wrong with Grievant. She stated he was not walking as he normally did, and described his walk as "bouncing." She said people normally bounce when they are drunk. She testified she was not close enough to him to tell whether he was drunk. L III, pp. 28-30. She stated that shortly thereafter she heard Grievant arguing with Ms. Thomas, and got Mr. Poole. L III, p. 29. Mr. Long did not testify. Mr. Neal did not observe that Grievant was staggering. L III, p. 32.

Elijah Poole, (See footnote 3) Lead Worker in housekeeping, testified he was stripping the wax from the floors when Grievant walked down the hall to report to work. He stated Grievant stopped and told him he had a fish sandwich for him, and he could smell alcohol on Grievant. He stated he looked Grievant in the eyes and then shook his head, and Grievant walked on, stating, "I'll face the music," or something similar. Mr. Poole stated he told the other workers who were with him, "I think he's about to get it this time." L III, p. 14. Mr. Poole talked further with Grievant after Ms. Thomas told him to go home, and told him Ms. Thomas could not let him work, and that he could smell alcohol on him. L III, pp. 14-17. Joyce Holbrook, the evening supervisor in housekeeping, testified she went into the Housekeeping Office with Mr. Poole and Grievant on November 5, 1996, and she could smell alcohol on Grievant. She stated that if she could smell it, she and Mr. Poole knew anybody could. L III, pp. 23-24.

Mr. Neal, who is a Security Officer at the hospital, testified that he took Grievant home on November 5, 1996. He stated Grievant sat in the front seat of the car beside him during the two to three mile drive, the windows were up, and he did not smell alcohol. He stated he does not drink, but

he knows what alcohol smells like. He further stated Grievant did not act as though he was intoxicated. L III, p. 32.

Grievant stated he was not drunk on November 5, 1996, but he was drunk the night before. He stated he quit drinking around midnight. L III, pp. 35, 42. He denied he was staggering. L III, p. 35. He admitted it was possible that he still smelled of alcohol when he reported to work on the 5th, but thought Ms. Holbrook and Mr. Poole were lying when they told him they smelled alcohol on him. L III, p. 37. He gave no reason why either would lie about such a matter.

Grievant did not report to work the next day. Ms. Thomas testified that when Grievant was called on November 6, 1996, he said he was too sick to come to work, and was charged with a sick day. L III, pp. 10-13. She did not indicate that she had personally spoken with him. Grievant stated that when Ms. Thomas told him the 5th would be his day off, and to work the 6th instead, he told her no, he was taking the 6th as his day off. L III, p. 34. He stated that Mr. Poole told him he would call him the 6th, and when he did so, he told Mr. Poole he was not going to work that day. He did not recall telling Mr. Poole or Ms. Thomas that he was sick. L III, p. 35. Mr. Poole's testimony on this point was the same as Grievant's. Grievant admitted that either Ms. Thomas or Mr. Pooleschedules his days off. He stated, however, that it wasn't right to change his day off as they did without asking if he would agree to the change. L III, p. 36.

The undersigned cannot reconcile the testimony of Ms. Thomas, Mr. Poole, Ms. Holbrook, and Ms. Jones with that of Mr. Neal. While the undersigned did not observe the demeanor of Ms. Thomas, Mr. Poole, Ms. Holbrook, or Ms. Jones, as their testimony was presented only at Level III, the undersigned was presented with no reason why all of them would lie. Their testimony was consistent, and did not appear to be contrived. Likewise, Mr. Neal's testimony did not seem contrived. The undersigned observed his demeanor, and he did not give any sign that he was lying, and Respondent presented no reason why he would lie.

The undersigned concludes, however, that Respondent has proven it is more likely than not that Grievant smelled of alcohol when he arrived at work on November 5, 1996. Grievant admitted he was drunk the night before, and three people smelled the odor of an alcoholic beverage when Grievant was present. It does not appear that Ms. Thomas was out to get Grievant, as she let him have a sick day on November 6, 1997, when he failed to appear for work as she had directed, and she did not discipline him for arguing with her on November 5, 1996. Why Mr. Neal could not smell the odor of an

alcoholic beverage on Grievant is unknown. It is possible that some other smell in the car, such as Grievant's fish sandwich, masked the smell during the short time Grievant was in the car.

HHR has a Drug-Free Workplace Policy (L III Agency Exhibit Number 2), and Grievant received a copy of it. Grievant signed a form on January 17, 1995, acknowledging receipt of the Policy, and that he agreed to abide by its terms. L III, p. 4. The Policy does not require abreathelizer test be given to someone who reports to work smelling of alcohol. The Policy states, in pertinent part:

> 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. . . .
>
> Employees who are in violation of the provisions of the Drug-Free Workplace Act shall be subject to disciplinary action up to and including termination and may be required to participate in a drug rehabilitation or assistance program.

Perdue v. Dept. of Health and Human Resources/Huntington State Hospital, Docket No. 93-HHR-050 (Feb. 4, 1994), held, in Conclusion of Law Number 4, that it was a violation of the Drug-Free Workplace Policy for an employee to report to work with "alcohol on his breath and in his body system." Grievant violated the Drug-Free Workplace Policy by appearing at work with alcohol in his system. It was not necessary for Respondent to prove Grievant was drunk to prove a violation of the Policy, nor was it necessary for Respondent to administer a breathelizer to determine how much alcohol was in Grievant's system. (See footnote 4) It was sufficient proof that Grievant smelled of alcohol.

Ms. Thomas testified that HHR has a Progressive Disciplinary Policy (L III Agency Exhibit 4), and she has to follow it. L III, p. 4. She stated Grievant was given an oral warning on February 2, 1996, because he reported to work smelling of alcohol. She stated on that occasion she and Mr. Poole told him they could smell alcohol, and he responded, "what you're smelling is from the night before." L III, p. 6. She stated she told him at that time that even if it was from the night before, he could not work, and if it happened again, disciplinary action would be taken. L III, p. 7. She relatedthat she did not provide Grievant with documentation on the oral warning, but it was recorded in a book kept on employees, and she told Grievant it was an oral warning. L III, pp. 7, 9.

Mr. Poole stated when he gives an employee an oral warning, he follows up with written

documentation provided to the employee. He stated he may talk to an employee about a problem without giving the employee a warning. He stated he did not give Grievant an oral warning on February 2, 1996. L III, p. 17.

Grievant stated neither Ms. Thomas nor Mr. Poole told him he was being given an oral warning on February 2, 1996. He admitted they told him they smelled alcohol on him, and brought him into the office to talk to him about it. L III, p. 38.

This Grievance Board has determined that the language of HHR's Policy 2104 on progressive discipline, "does not create a mandatory duty to follow a progressive disciplinary approach." Artrip v. W. Va. Dept. of Health and Human Services/Huntington State SAU, Docket No. 94-HHR-146 (Sept. 13, 1994); See also, Thompson v. W. Va. Dept. of Health and Human Resources/Welch Emergency Hospital, Docket No. 94-HHR-254 (Jan. 20, 1995). The Policy states, "[d]ue to the sensitive and essential nature of services the Department must provide the public, and the standards of service required in many program areas, there may be instances where more severe levels of discipline are initially imposed for some infractions." The Policy further provides:

> The goal of discipline is to correct behavior. In order to correct behavior, employees need to know:

. What they did wrong;

. What they should have done;

. What is expected in the future; and

. Future violations carry consequences.The Policy provides that discipline will progress from a verbal warning, to a written warning, to a suspension, to a demotion, and to dismissal. It states that a verbal reprimand/warning "may be issued when the deficiency or misconduct is not of a serious or repetitious nature." A written reprimand/warning "may be issued when minor infractions/deficiencies continue or when a more serious infraction/deficiency is discovered."

The undersigned finds that when Mr. Poole and Ms. Thomas explained to Grievant in February 1996 that it was not appropriate for him to come to work smelling of alcohol, and he was not to do it again, this could be considered an oral warning. The undersigned further finds, however, that Ms. Thomas was not required to give Grievant an oral warning prior to issuing him a written warning for this conduct. It was made clear to him that he was not to report to work smelling of alcohol, and he

ignored this directive. His action may be considered a "more serious infraction/deficiency," and it may also be considered a deficiency or misconduct of a repetitious nature. Previous Grievance Board cases have found that, "appearing at work with alcohol on the breath, particularly by an employee whose job entails working with the general public is not an inconsequential matter and repeated conduct of this nature, if sufficiently proven, certainly can constitute good cause for dismissal...." Seddon v. W. Va. Dept. of Health/Kanawha-Charleston Health Dept., Docket No. 90-8-115 (June 8, 1990), as quoted in Perdue, supra.

The undersigned may mitigate the discipline imposed if the penalty assessed is clearly excessive or clearly disproportionate to the offense. Factors to be considered in this analysis include the employee's past disciplinary record, the clarity of notice to the employee of the rule violated, and whether the employee was warned about the conduct, and mitigating circumstances. Stewart v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-137 (Sept. 19, 1991). In this case,Ms. Thomas and Mr. Poole had previously made it clear to Grievant that he was not to report to work if he smelled of alcohol. The written warning given for doing the very thing he was previously told not to do is not clearly excessive or disproportionate to the offense.

The following Findings of Fact are made based upon the record developed at Levels III and IV.

Findings of Fact

1. Grievant is employed by HHR as a housekeeper at Welch Emergency Hospital.

2. Grievant was given a verbal warning on February 2, 1996, for reporting to work smelling of alcohol.

3. Grievant was drunk the evening of November 4, 1996, and quit drinking around midnight.

4. When Grievant arrived at work on November 5, 1996, shortly before 3:00 p.m., his supervisor, Linda Thomas, and two other employees could smell alcohol when Grievant was present. Ms. Thomas observed Grievant staggering. Delores Jones observed that Grievant was not walking normally, but was "bouncing."

5. Grievant was not scheduled to work on November 6, 1996. Ms. Thomas told him to take November 5, 1996, as his day off, and to report to work the next day instead. Grievant refused to report to work on November 6, 1996.

6. Ms. Thomas gave Grievant a written warning on November 7, 1996, for reporting to work

under the influence of alcohol on November 5, 1996.

The following Conclusions of Law support the Decision reached.

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. Ramey v. W. Va. Dept. of Health, Docket No. H-88- 005 (Dec. 6, 1988).

2. Respondent has proven Grievant reported to work twice smelling of alcohol, in violation of the Drug-Free Workplace Policy.

3. Grievant failed to prove that a written warning was too harsh a penalty for his action.

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.

BRENDA L. GOULD

Administrative Law Judge

Dated: November 12, 1997

Footnote: 1

Grievant also complained because he was charged with a sick day on November 6, 1996, as a net result of the events, but this argument was not addressed in the post-hearing submission, and is considered abandoned. The undersigned will note, however, that it was not improper for Ms. Thomas to send Grievant home on November 5, 1996. She adjusted the schedule to accommodate Grievant, so he would not lose any leave time. However, Grievant chose not to accept the schedule change, and did not come to work on what had been his scheduled day off, November 6, 1996, as directed. Grievant was not sick on November 6, 1996, and should not have been charged with sick leave. Grievant did not appear for work as scheduled, however, and should have been charged with annual leave on November 6, 1997, or leave without pay if he had no annual leave at that time.

Footnote: 2

The grievance was denied at Levels I and II, on November 25, 1996, and December 19, 1996, respectively. A Level III hearing was held on April 8, 1997, and a decision denying the grievance was issued on May 19, 1997. A Level IV hearing was held on August 25, 1997, and this matter became mature for decision on October 9, 1997, upon receipt of Respondent's written argument.

Footnote: 3

Mr. Poole is related to Grievant by marriage.

Footnote: 4

Grievant did not ask that a breathelizer be administered.