R.H.S.,

Grievant,

v. **Docket No. 96-RESA-348**

REGIONAL EDUCATION SERVICE AGENCY IV,

Respondent.

D E C I S I O N

R.H.S. (See footnote 1) (Grievant), submitted this grievance under W. Va. Code §§ 18-29-1, et seq., challenging his dismissal from employment with Respondent Regional Education Service Agency IV (RESA IV) (See footnote 2) on July 31, 1996. Evidentiary hearings in this matter were conducted at the offices of the Braxton County Board of Education in Sutton, West Virginia, on September 26 and October 7, 1996. As agreed at the conclusion of the latter hearing, both parties filed timely post-hearing arguments on or before October 25, 1996. Thereafter, on November 20, 1996, the undersigned wrote to the parties soliciting their comments on the impact, if any, of a November 14, 1996, decision of the West Virginia Supreme Court of Appeals, Wilhelm v. West Virginia Lottery, 479 S.E.2d 602 (W. Va. 1996), which dealt with certain issues raised in this case. Both parties responded to this request by submitting supplemental arguments. Grievant's response included additional documentation which was not presented at the Level IV hearings. Respondent objected to consideration of this additional documentary evidence, and Grievant appropriately filed a Motion to Consider Additional Evidence on December 16, 1996. The undersigned conducted a telephonic hearing on January 13, 1997, wherein Grievant's Motion to Consider Additional Evidence was granted. Thereafter, by Order dated January 31, 1997, Respondent was given until February 14, 1997, to submit additional argument, or request a supplemental hearing to present additional

testimony responding to the additional evidence. As no response was received, this matter became mature for decision on February 14, 1997.

BACKGROUND

Grievant was employed by RESA IV as a Computer Technician. See G Ex A. By letter dated July 25, 1996, RESA IV Executive Director Elmer Pritt notified Grievant that he intended to recommend Grievant's dismissal as follows:

> You are hereby advised that it shall be my recommendation to the RESA IV Board of Directors on July 31, 1996, that your employment as a computer repairman be terminated.
>
> Looking back on the July 1, 1996, incident in which your "disoriented" condition resulted in my directing you to go to the Summersville Memorial Hospital for a blood alcohol test, I find that your having a blood alcohol of .045 at 2:29 p.m. indicates a violation of RESA IV Drug Free WorkplacePolicy. You signed this statement agreeing not to work while under the influence of an illegal drug or alcohol.
>
> The .045 reading at 2:29 p.m. indicated that you: (1) reported to work while under the influence of alcohol; or, (2) were drinking while on the job, or both.
>
> Should you wish to appeal this recommendation to the Board of Directors, please advise me at your earliest convenience. Their next meeting is at 6:30 p.m., Wednesday, July 31, 1996, at the RESA IV Office.

J Ex 1.

On July 31, 1996, Grievant appeared, through counsel, at the RESA IV meeting referenced above, presenting various arguments why Grievant should not be terminated. This was not an evidentiary hearing. The RESA IV board voted to uphold Grievant's termination.

RESA IV supported this action through the testimony of several witnesses who described the events which led to this dismissal. During the lunch hour on July 1, 1996, Steven McMillion, a co-worker at RESA IV, observed Grievant in the employee parking lot of the RESA IV offices in Summersville, West Virginia, attempting to enter Mr. McMillion's pickup truck on the driver's side. Mr. McMillion walked over to Grievant and inquired as to what Grievant was doing, believing that Grievant

was "joking" with him.

Mr. McMillion explained that he drives a white Ford pickup truck while Grievant drives a white Chevrolet pickup. In addition, Mr. McMillion has a metal toolbox mounted in his truck. Grievant did not reply to Mr. McMillion, and instead proceeded to open the door, and started to get into the truck. At that point, Mr. McMillion told Grievant, "hey, that's my truck." Grievant got out of the truck and walked a short distance away.

Robert Hollandsworth, Computer Information Systems Director for RESA IV, also encountered Grievant during the lunch hour on July 1, 1996. At approximately 12:25 p.m.,Grievant approached Mr. Hollandsworth in the parking lot outside RESA IV. Grievant stated, "I seem to have a problem, I can't find my truck." Mr. Hollandsworth noted that Grievant's truck was parked about fifteen feet away, immediately behind Grievant. Mr. Hollandsworth told Grievant "that's your truck right behind you."

Grievant turned to look at his truck and said, "that's not my truck." Mr. Hollands worth looked around the parking lot, observing Mr. McMillion's truck to be the only one similar to Grievant's, although it was easily distinguishable as a different model. Mr. Hollandsworth walked over to Grievant's truck with Grievant. After some "argument," Grievant finally said, "I do believe this is my truck." Grievant then got in his truck.

Mr. Hollandsworth declared that Grievant did not appear to be "responsive" at that point, causing concern that he would be able to drive safely. He noted that Grievant was "very slow" and did not seem to comprehend what was being said to him. Although Grievant's speech was not slurred, it was "very, very slow." When Mr. Hollandsworth suggested Grievant should not drive, Grievant replied, "just leave me alone, I just want to leave." At that point, Mr. Hollandsworth called Mr. McMillion over to join them.

Mr. McMillion came over to Grievant's truck and observed Grievant sitting in his truck where he appeared to be looking for his keys. For several minutes, Mr. McMillion and Mr. Hollandsworth observed Grievant attempting to start his truck by placing coins in the ignition. Mr. McMillion located the keys on the floorboard beneath the seat and held onto the keys, believing Grievant was not fit to drive. Both Mr. McMillion and Mr. Hollandsworth attempted to talk Grievant out of trying to drive. Mr. Hollandsworth went in the RESA IV building, looking for assistance. He encountered Mr. Pritt in his office, described to himwhat he had observed in regard to Grievant, and asked Mr. Pritt to go out to

the parking lot.

After Mr. Hollandsworth went inside the building, Mr. McMillion finally convinced Grievant to go inside. There, he observed Grievant at his work station, examining a computer as if he was working on the device. (See footnote 3) Mr. McMillion attempted to call Grievant's wife, but when he went to another office to make the call, Grievant walked back outside toward the parking lot. Mr. McMillion followed Grievant outside and stayed with Grievant until Mr. Pritt appeared. Grievant again told Mr. McMillion that he was "all right" and to "leave him alone."

Earlier on the morning of July 1, 1996, Mr. McMillion attended a staff meeting between 9 and 10 A.M. where Grievant was in attendance. Mr. McMillion testified that Grievant appeared to be his normal self at that time. Mr. Pritt likewise attended that meeting, and did not observe Grievant doing anything out of the ordinary. He related that Grievant usually says very little in such meetings, but he did not recall Grievant saying anything that morning. At no time that day did Mr. McMillion, Mr. Hollandsworth, or Mr. Pritt detect the odor of alcohol on Grievant, or observe any alcohol in Grievant's vehicle. However, Mr. Pritt observed that if someone has been drinking vodka, the odor of alcohol may not be detectable. Mr. Hollandsworth could not recall if he attended that morning's staff meeting, but he did not observe anything out of the ordinary until he encountered Grievant in the parking lot during the lunch hour. Upon assuming his present position as RESA IV Executive Director in 1994, Mr. Pritt noted the lack of participation in RESA activities by Fayette County. Mr. Pritt questioned Fayette County school officials on this matter, and was told RESA IV had previously sent two employees to work in their schools while seriously impaired, and they were of the opinion that RESA IV had a "bunch of drunks" working for them. In particular, at least one Fayette County Board of Education employee reported that Grievant had been observed performing a service call at one of their schools while smelling of alcohol. Shortly after hearing this report, Mr. Pritt spoke with Grievant about the accusation, and was assured that it would not be a problem in the future. Mr. Pritt then informed Grievant he would not tolerate such conduct.

As Mr. Pritt arrived on the scene on July 1, 1996, he observed Grievant, noting that Grievant's movements and reactions were extremely slow. He recalled that Grievant appeared "disoriented." When Mr. Pritt asked Grievant to go to the hospital, Mr. McMillion heard Grievant tell Mr. Pritt that he had "been through that before." Around 1:00 PM, Grievant agreed to go to the hospital with another computer technician.

In addition to personally observing Grievant's extremely slow actions and apparent disorientation, Mr. Pritt had been told of Grievant's aberrant conduct and argumentative demeanor in the parking lot with Mr. McMillion and Mr. Hollandsworth. He also considered the earlier report that Grievant had been drinking on the job on one other occasion in deciding to send Grievant to the hospital for a blood alcohol test. Mr. Pritt was aware that Grievant had been off work in March due to a brain seizure and that he was taking medication for that condition. However, there was no evidence that Grievant ever informed him of the nature of his medication or any symptoms that might arise if he failed to take themedication. Mr. Pritt noted that if Grievant was in need of medical assistance, proper medical support would likewise be available at the hospital.

John Sherwood, the co-worker selected by Grievant to accompany him to the hospital, testified that he was working in the RESA IV office reception area when Mr. McMillion and Mr. Hollandsworth came in to report that Grievant was "having problems." Mr. Sherwood came outside in time to hear Mr. Pritt tell Grievant that he needed to go to the hospital for a blood test. Mr. Sherwood recalled that Grievant first refused and then consented to the test, and Grievant selected Mr. Sherwood to take him to Summersville Memorial Hospital for the test.

Mr. Sherwood described how Grievant appeared to delay departing for the hospital by going to the bathroom, asking to smoke a cigarette, returning to the shop area to get matches before going to smoke a cigarette, (See footnote 4) and also stopping at a convenience store on the way to the hospital for a soft drink. During this stop, Mr. Sherwood observed Grievant take some pills. He also noted that as they were preparing to leave RESA IV in Mr. Sherwood's vehicle, Grievant attempted to get on the driver's side rather than the passenger's side. (See footnote 5) Grievant was seen by a Dr. Olsen at Summersville Memorial Hospital where his blood was medically tested at 2:29 P.M. and reported to contain 45 milligrams of alcohol per deciliter. See R Ex 7. Dr. William Given, Grievant's family physician, testified in Grievant's behalf, explaining that the medical test for alcohol conducted on Grievant was simply added to a standard "Chem Panel 6" set of tests used for diagnostic purposes, and was not a true forensic blood alcohol test. Dr. Given is certified as a Medical Review Officer, and qualifies as an expert on such matters as blood alcohol testing. He explained that due to differences in the testing procedures, the medical test would yield a result 18 to 20 percent greater than a forensic blood alcohol test. Dr. Given calculated Grievant's blood alcohol level would have been reported as approximately .038, or less than four hundredths of one percent of alcohol, in a

forensic test. For someone holding a commercial driver's license, a .038 result would be reported as "negative," according to Dr. Given. He acknowledged that the average person metabolizes alcohol at the rate of 10 milliliters per hour, but observed that Grievant had experienced a degree of liver function impairment which would have some effect on his metabolism of alcohol.

Dr. Given further opined that Grievant was most likely experiencing some level of seizure activity at the time he was observed acting disoriented at RESA IV on July 1, 1996. He noted that seizure activity can vary from a daze lasting only half a minute to periods of total unconsciousness, followed by complete disorientation for several hours. Dr. Given observed that the levels of Dilantin and carbon dioxide reported in Grievant's blood on the afternoon of July 1, 1996, were consistent with earlier seizure activity. Dr. Given observed that Grievant reported "alcohol abuse" when he first became his patient in 1992. When Grievant experienced a seizure in March 1991, he was admitted to Summersville Memorial Hospital, where he was treated by a Dr. Blackburn who prescribed Dilantin to control the seizures. Dr. Given did not see Grievant until July 10, 1996, several days after the incident that gave rise to his termination. At that time, Dr. Given prescribed an increased dosage of Dilantin. Neither Dr. Blackburn nor Dr. Olsen, the physician who administered the blood test on July 1, 1996, were called as witnesses.

Mr. Pritt explained that "under federal transportation law," a .040 blood alcohol content indicates that a person is impaired for purposes relating to commercial driver's licenses. (See footnote 6) He also considered a chart discussing metabolism of alcohol in the West Virginia Drivers Manual which indicated that Grievant would have had more alcohol in his system at the time he reported for work. (See footnote 7)

On February 2, 1993, Grievant signed a "RESA IV Drug-Free Workplace Verification Statement" which contains the following language:

> I, [R.H.S.], certify that I have received a copy of the West Virginia State Drug- Free Workplace Policy.
>
> As an employee of RESA IV, I agree to abide by the Drug-Free Workplace Policy which states that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance and[/]or alcohol is prohibited in the workplace. Additionally, no employee shall report for work while under the influence of alcohol and/or an illegal drug.
>
> The workplace shall be defined as a worksite where work is performed in connection with the employee's RESA IV employment. The workplace shall include facilities,

> property, buildings, offices, structures, automobiles, trucks, trailers, other vehicles, and parking areas, whether owned or leased by the agency or entity.
>
> The policy is applicable while employees are engaged in any work-related activity which includes performance of agency business during regularly scheduled work days, meal breaks, and/or occasions having a connection with the job or agency.
>
> In addition, I understand that under federal law and as a condition of employment, if I am convicted of any violation of a criminal drug offense in the workplace, I must report this conviction to my supervisor and the appointing authority within five (5) days of the conviction.

R Ex 3.

The "Regional Education Service Agency IV Drug-Free Workplace Policy" referenced above contains the following provision pertinent to this grievance:

> RESA IV believes that drug abuse is an illness that should be treated as such. We believe that those who suffer from drug dependency can recover, and the agency is prepared to offer assistance to those employees who seek treatment. The Board of Directors, however, will not tolerate sub- standard performance caused by the use of controlled substances or alcohol. After reasonable attempts have been made to correct repeated patterns of sub-standard performance caused by probable drug or alcohol abuse, the Executive Director acting in reasonable good faith with objective suspicion may require the employee to submit to a confidential drug or alcohol test. It is in the best interest of the agency for employees with drug or alcohol problems to be diagnosed and treated at the earliest possible date. Employees who fail to seek drug treatment or rehabilitation or those who fail to participate satisfactorily in a treatment or rehabilitation program, are subject to disciplinary action, including suspension or dismissal.

R Ex 2. Grievant's wife testified that she awoke Grievant a little after 6:00 a.m. on July 1, 1996. She did not observe Grievant drinking from the time he got up until he left for work shortly after 7:00 a.m. Mrs. R.H.S. stated that he appeared "normal" when he left home, and she handed him the medication for his seizures, reminding him to take it.

Grievant waived his right to silence under W. Va. Code § 29-6A-6, and testified in his own behalf at Level IV. He admitted to drinking beer and bourbon "off and on" from Friday evening until no later than midnight Sunday, June 30, 1996. Grievant could not recall if he took his seizure medication that morning. He acknowledged that Dilantin should not be taken with alcohol, but claimed to have taken

Dilantin while drinking on prior occasions without suffering any ill effects.

Grievant could not clearly recall the events of the morning of July 1, but substantially agreed that he had behaved as observed by Mr. McMillion and Mr. Hollandsworth in the parking lot. He was not certain, but he did not believe that he had completely passed out from a seizure that morning. He consistently denied drinking any alcohol after midnight on Sunday. He turned over his copy of the laboratory report from Summersville Hospital to Mr. Pritt because he thought that Mr. Pritt would suspend him if he refused. However, he did not wait for Mr. Pritt to make such a threat, nor did he protest turning over the report. Likewise, he signed a document consenting to release of his laboratory report by the hospital without protest. See R Ex 6 & G Ex J.

Grievant explained that he expected Mr. Pritt to obtain a copy of the laboratory report directly from the hospital, to insure that Grievant had not changed the results. He further recalled that Mr. Pritt had confronted him about drinking on a service call to Fayette County, and warned him against any subsequent conduct of that nature. Grievant deniedever drinking on the job, but did not indicate if he had been drinking before reporting to work on that occasion. He acknowledged that he had a more serious alcohol "problem" when he first started seeing Dr. Given in 1992, but claimed to have "cut back" since that time.

DISCUSSION AND ANALYSIS

Ordinarily, the employer has the burden of proving a disciplinary action by a preponderance of the evidence. W. Va. Code § 18-29-6; Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd, 156 C.S.R. 1, § 4.19 (1996); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). However, if an employee is employed in an at-will status, his or her employment may be terminated at any time with or without cause. Williams v. Brown, 190 W. Va. 202, 427 S.E.2d 775 (1993); Myer v. W. Va. Racing Comm'n, Docket No. 95-RC-290 (May 3, 1996); Samples v. Glenville State College, Docket No. 94-BOD-564 (July 28, 1995). An employer which relies on the at-will status of an employee in a dismissal action bears the burden of establishing that status by a preponderance of the evidence. Wamsley v. W. Va. Farm Management Comm'n, Docket No. 91-FMC-333 (Mar. 25, 1992). But see Parker v. W. Va. Health Care Cost Review Auth., Docket No. 91-HHR-400 (June 30, 1992). In this particular case, a determination of Grievant's status is critical to resolving many of the issues raised in this grievance.

RESA IV is a multi-county service agency established by the West Virginia Department of

Education under authority of W. Va. Code § 18-2-26. (See footnote 8) See St. Clair v.RESA-V, Docket No. RESA-88-186 (Apr. 27, 1990). This Grievance Board has pre-viously determined that "[t]he various statutes under Section 18A of the West Virginia Code governing the contract and procedural rights of county board of education employees do not apply to employees of the several state Regional Education Services Agencies." St. Clair, supra. See Sark v. RESA IV, Docket No. 89-RESA-131 (Aug. 30, 1989). Generally, this Grievance Board attempts to follow the doctrine of stare decisis (See footnote 9) in adjudicating grievances that come before it. Berry v. Logan County Bd. of Educ., Docket No. 95-23-421 (Mar. 29, 1996); Adams v. Cabell County Bd. of Educ., Docket No. 94-06-520 (May 15, 1995); Chafin v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-132 (July 24, 1992). See Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974). "This adherence is founded upon a determination that the employees and employers whose relationships are regulated by this agency are best guided in their actions by a system that provides for predictability, while retaining the discretion necessary to effectuate the purposes of the statutes applied. Consistent with this approach, this Grievance Boardfollows precedents established by the Supreme Court of Appeals of West Virginia as the law of this jurisdiction. Likewise, prior decisions of this Grievance Board are followed unless a reasoned determination is made that the prior decision was clearly in error." Belcher v. W. Va. Dept. of Transp., Docket No. 94-DOH-341 (Apr. 27, 1995). Thus, in accordance with this Board's prior decisions in St. Clair and Sark, supra, RESA employees are generally excluded from the panoply of protection provided by the statutes covering county board of education employees. (See footnote 10) West Virginia does not recognize "an implied contract of continued employment in the public employment sector." Williams, supra, at 207. See also Suter v. Harsco Corp., 403 S.E.2d 751 (W. Va. 1991). This interpretation is consistent with the general rule that "government employment, in the absence of legislation, can be revoked at the will of the appointing officer." Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961). See Parker, supra. However, unlike the employees in Williams and Wilhelm, who were legislatively declared to "serve at the pleasure" of their respective employers, (See footnote 11) RESA employees serve at-will by virtue of the fact that they do not fall under the definition of "school personnel" contained in W. Va. Code §§ 18-1-1 or 18A-1-1. See St. Clair, supra; Sark, supra. Therefore, it is arguable that RESAs have authority to issue policies, rules, or regulations which alter this at-will status. See Patterson v. W. Va. Dept. of Public Safety, Docket No. 95-DPS-572 (May 28, 1996). See also Powell v. Brown,

160 W. Va. 723, 238 S.E.2d 220 (1977). Without conceding that RESA employees normally hold at-will status, Grievant contends that such status was altered by his acceptance of various terms of employment contained in the 1995 edition of the RESA IV Personnel Policy (Policy) which was promulgated during his employment. The Policy contains the following pertinent provisions:

EMPLOYMENT

> When a position is open, the Board of Directors of RESA IV will fill the vacancy on the recommendation of the Executive Director as provided for in the State Board of Education's resolution regarding the establishment of regional education service agencies. Employment shall be consistent with approved component project grants.
>
> Vacancies and job specifications will be publicly announced, particularly within the six counties constituting RESA IV, and an invitation will be extended to all qualified personnel to apply for the position.
>
> Federal and State regulations prohibit discrimination in employment practices related to recruiting, testing, screening, selection, promotion, transfer, benefits, pay and other related functions because of race, religion, age, sex, national origin or handicap. RESA IV will abide by these regulations in all employment related decisions.
>
> Successful applicants will be notified of the decision of the Board of Directors to employ them by a letter of appointment (1.05). Returning the signed letter of appointment will indicate acceptance of employment with RESA IV.

The "Letter of Appointment" referenced above states:

> The Board of Directors of RESA IV, at their regular meeting on , approved your appointment as .
>
> Your employment will commence on . Your services will be under the direction of the Executive Director or his designee and will be performed at such place or places as may be designated by the Board.
>
> Your employment is contingent upon: (1) The satisfactory perfor mance of assigned duties with the Executive Director being the evaluator; and (2) The availability of funds allocated to the Board of Directors.

> Your salary has been set at per calendar month, which will be paid biweekly on the 10th and the 25th.

There was some testimony at the Level IV hearing which indicated Grievant had been issued a contract consistent with the foregoing provisions. However, neither party introduced a copy of such contract. At best, Grievant might be entitled to reinstatement until the expiration of his current employment contract. But see Myer v. W. Va. Racing Comm'n, Docket No. 95-RC-290 (May 3, 1996).

In any event, the critical issue to be decided is whether the foregoing Policy establishes a promise on which Grievant could reasonably rely. The better view is that "an employee handbook or similar document creates enforceable contractual rights only when specific procedures have been prescribed by positive and mandatory language." Doe v. First Nat'l Bank of Chicago, 865 F.2d 864, 872 (7th Cir. 1989). See St. Peters v. Shell Oil Co., 77 F.3d 184 (7th Cir. 1996); Tolmie v. United Parcel Service, 930 F.2d 579, 581 (7th Cir. 1991). In West Virginia, a handbook may alter an at-will employment relationship only if a "clear intent" to alter the employee's status is expressed in the language of the employee handbook. See Eaton v. City of Parkersburg, No. 22846 (W. Va. Sup. Ct. July 16, 1996). In this case, the term, "satisfactory performance of assigned duties with the Executive Director being the evaluator," suggests that such decisions rest in the discretion of the Executive Director, Mr. Pritt. The Policy does not express a "clear intent" to alter Grievant's at-will employment status. (See footnote 12) See Eaton, supra. Because Grievant was employed in an at-will status, his complaints that the RESA IV Drug-Free Workplace Policy suffers from various technical infirmities need not be addressed in detail. The Supreme Court of Appeals of West Virginia established in Williams v. Brown, 190 W. Va. 202, 427 S.E.2d 775 (1993), that at-will public employees are not owed a duty of good faith and fair dealing by their employer. See Barbor v. County Court, 85 W. Va. 359, 101 S.E. 721 (1920).

The only exception to this rule is that at-will employees may not be dismissed for a reason which contravenes some substantial public policy principle. Wilhelm v. W. Va. Lottery, 479 S.E.2d 602 (W. Va. 1996); Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978); Rephann v. Office of the Adjutant General, Docket No. 95-ADJ-298 (Dec. 13, 1995); Bellinger v. W. Va. Dept. of Public Safety, Docket No. 95-DPS-119 (Aug. 15, 1995). See McClung v. Marion County Comm'n, 178 W.

Va. 444, 360 S.E.2d 221 (1987). In this regard, our Supreme Court of Appeals has declared:

> The rule that an employer has an absolute right to discharge an at will employee must be tempered by the principle that where the employer's motivation for the discharge is to contravene some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by this discharge.

Syllabus, Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978). Subsequently, in Birthisel v. Tri-Cities Health Services, 188 W. Va. 371, 424 S.E.2d 606 (1992), the Court identified sources of public policy as follows:

> To identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, we look to established precepts in our constitution, legislative enactments, legislatively approved regulations, andjudicial opinions. Inherent in the term "substantial public policy" is the concept that the policy will provide specific guidance to a reasonable person.

Birthisel at 377, (footnotes omitted).

Courts have recognized such conduct as submitting a claim for back wages under the Veterans Reemployment Rights Act [Mace v. Charleston Area Medical Ctr. Found., 188 W. Va. 57, 422 S.E.2d 624 (1992)], refusing to conceal alleged environmental violations committed by the employer [Bell v. Ashland Petroleum, Inc., 812 F. Supp. 639 (S.D. W. Va. 1993)], filing a workers' compensation claim [Shanholtz v. Monongahela Power Co., 165 W. Va. 305, 270 S.E.2d 178 (1980)], attempting to enforce warranty rights granted under the West Virginia Consumer Protection and Credit Act [Reed v. Sears, Roebuck & Co., 188 W. Va. 747, 426 S.E.2d 539 (1992)], and testifying as a witness in a civil action against the employer [Page v. Columbia Natural Resources, Inc., No. 23469 (W. Va. Sup. Ct. Dec. 6, 1996)], as involving substantial public policy interests. Similarly, this Grievance Board has applied a Harless-type analysis to dismissal of an at-will public employee when the employee presents credible evidence that he or she was dismissed for reporting alleged violations of the West Virginia Governmental Ethics Act [Graley v. W. Va. Parkways Economic Development & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991)], or the termination decision was based on a prohibited consideration such as the employee's sex [Bellinger v. W. Va. Dept. of Pub. Safety, Docket No. 95-DPS-119 (Aug. 15, 1995)], or national origin [Hendricks v. W. Va. Dept. of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996)]. Grievant contends he was terminated

because of his handicap or disability resulting from his diagnosed seizure disorder. Public employers are prohibited from discriminating in terms and conditions of employment because of "handicap" underthe West Virginia Human Rights Act, W. Va. Code §§ 5-11-1, et seq., or "disability" under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12112-14 (1994). (See footnote 13) Both of these statutes represent substantial public policies as required by Harless. See Hendricks, supra; Bellinger, supra. This Grievance Board has subject matter jurisdiction over handicap-based discrimination claims. Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996). See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995).

The ADA provides, in pertinent part:

> 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.

Grievant contends that his seizure disorder constitutes a disability and he was terminated based upon that disability. That is, he submits that he was not disoriented on July 1, 1996, due to being under the influence of alcohol, or as a result of drinking alcohol on the job, but he was disoriented because of his seizure disorder. He also presented evidence that indicates he may suffer from alcoholism and impaired liver function, as well as a seizure disorder. Under the proper circumstances, any of these conditions could be recognized as a "disability" under the ADA. See 42 U.S.C. § 12102(2). Thus, Grievant'sspecific allegations of handicap or disability-based discrimination raise an issue of substan tial public policy which, if true, would prohibit his termination, notwithstanding his at-will employment status. See Lilly v. Overnight Transp. Co., 188 W. Va. 538, 425 S.E.2d 214 (1992); Hendricks, supra; Bellinger; supra; Graley, supra.

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 has a disability;

(2) he is otherwise qualified for the employment; and

(3) he was fired solely on the basis of his disability.

Doe v. Univ. of Md. Medical System Corp., 50 F.3d 1261, 1264-65 (4th Cir. 1995).

In this matter, Grievant has established that he has a disability in the form of a seizure disorder, an impairment which substantially limits a major life activity, (See footnote 14) but which can be corrected by proper medication. See 42 U.S.C. 12102(2); Ennis v. Nat'l Ass'n of Business & Educ. Radio, 53 F.3d 55 (4th Cir. 1995). Grievant has not established that his liver impairment is of a sufficient magnitude that it renders Grievant "disabled" within the meaning of the ADA. See Roush v. Weastec, Inc., 96 F.3d 840 (6th Cir. 1996). Likewise, Grievant has not demonstrated that his "alcohol abuse" had progressed to the level of alcoholism, a disability which may be protected under the ADA in certain circumstances. (See footnote 15) Thus, this condition likewise does not constitute a "disability" in these circumstances. See Roush, supra.

Whether Grievant established a prima facie case under the ADA is debatable, since he did not demonstrate that there was any animosity toward him based upon his disability and, thus, there is only a slight inference that his termination was the product of discrimination. See Runnebaum v. Nations Bank, 95 F.3d 1285 (4th Cir. 1996); Ennis, supra. However, assuming that Grievant did establish a prima facie case, the employer must be given an opportunity to demonstrate that the employment action at issue was taken for legitimate reasons, unrelated to prohibited discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Hendricks, supra; Bellinger, supra. Ultimately, a preponderance of the evidence indicates that Mr. Pritt focused his recommendation on the alcohol level discovered as a result of Grievant's aberrant behavior on July 1, 1996. Although Grievant's seizure disorder may have been responsible for setting this chain of events in motion, (See footnote 16) Grievant failed to demonstrate that his disability was a substantial basis for his dismissal. Thus, he has failed to establish his termination by RESA IV is in violation of the ADA or any other substantial public policy. See McNely v. Ocala Star-Banner Corp., 99 F.3d 1068 (11th Cir. 1996); Doe, supra; Runnebaum v. Nations Bank, 95 F.3d 1285 (4th Cir. 1996).

Grievant objected to any consideration of the hospital laboratory test in support of RESA IV's decision to terminate his employment. W. Va. Code § 18-29-6 provides that formal rules of evidence shall not be applied in hearings before this Grievance Board. Nonetheless, evidence offered by either party must be relevant and deemed to be reasonably probative of the point for which it is offered. In the instant matter, Grievant strenuously objects to admission of the hospital laboratory report,

contending that his blood was involuntarily taken in violation of his Fourth Amendment right to freedom from unreasonable search and seizure. This contention must be rejected for several reasons.

First, Grievant consented to the blood test. Although Grievant was presented with a Hobson's choice of being suspended or taking a blood test, the record indicates that Grievant elected to go to the hospital and be tested. Moreover, Grievant thereafter came forward and provided a copy of the laboratory report to his employer, and further signed a release for the employer to obtain a copy directly from the hospital. These actions were taken without any additional threats of adverse action by the employer, and without any protest by Grievant. See G Ex J. Accordingly, Grievant may not now complain that the blood test was conducted in violation of his rights.

Second, it appears that Mr. Pritt had probable cause, or at least reasonable suspicion, to require Grievant to submit to a blood test for alcohol. In West Virginia, probable cause exists if the facts and circumstances are sufficient to warrant the belief of a prudent person of reasonable caution that misconduct has occurred, and that evidence of misconduct may be found at a specific location. Syl. Pt. 3, State v. Lilly, 194 W. Va. 595, 461 S.E.2d 101 (1995). Stated another way, facts which would lead a reasonably cautious person to believe the search will uncover evidence of a crime will support a findingof probable cause. State v. Lease, 472 S.E.2d 59 (W. Va. 1996). Probable cause must be evaluated in the totality of the circumstances. Lilly, supra at Syl. Pt. 2.

In this matter, Mr. Pritt was aware of Grievant's aberrant and disordered behavior in the parking lot on July 1, 1996. In addition to receiving reliable reports from disinterested first-hand witnesses, Mr. Hollandsworth and Mr. McMillion, Mr. Pritt personally observed some of this conduct, including Grievant's extremely slow movements and disorientation. In addition, he was aware of a prior incident where Grievant had been reported on the job smelling of alcohol. Although Grievant presented a credible explanation for this behavior at the Level IV hearing, the test is whether the employer had sufficient evidence at the time the test was ordered to support the directive. Garrison v. Dept. of Justice, 72 F.3d 1566 (Fed. Cir. 1995). See Copeland v. Philadelphia Police Dept., 840 F.2d 1139 (3rd Cir. 1988), cert. denied, 490 U.S. 1004 (1989). See also Aguilar v. Texas, 378 U.S. 108 (1964). In the circumstances presented, Mr. Pritt had probable cause to direct Grievant to submit to a test for alcohol.

Reasonable suspicion is a less demanding standard than probable cause in terms of the quality

and quantity of the information known at the time a search is directed. See Alabama v. White, 496 U.S. 325 (1990). Again, what is reasonable depends upon all the facts and circumstances of the particular situation. Given the facts previously noted, Mr. Pritt clearly had reasonable suspicion to test for alcohol. See Garrison, supra. By at least reaching the reasonable suspicion threshold, Mr. Pritt's order complies with the standard for employee drug testing in West Virginia. Twiggs v. Hercules Corp., 185 W. Va. 155, 406 S.E.2d 52 (1990). Third, this Grievance Board has not previously adopted a general "exclusionary rule" precluding admission of evidence obtained in violation of Fourth Amendment rights. Indeed, the United States Supreme Court has declined to expand the exclusionary rule to a federal civil proceeding. United States v. Janis, 428 U.S. 433, 447 (1976). Moreover, the United States Merit Systems Protection Board, the agency which adjudicates adverse personnel actions involving federal civil service employees, has likewise rejected application of the exclusionary rule to its proceedings. Delk v. Dept. of Interior, 57 M.S.P.R. 528 (1993). Accordingly, even if the blood test at issue was improperly conducted, in the absence of a specific statutory rule prohibiting use of such evidence in proceedings of this nature, RESA IV properly considered the laboratory results in deciding to terminate Grievant's at-will employment. (See footnote 17)

Grievant further claims that RESA IV somehow violated his rights by its failure or refusal to submit this dispute to mediation, or some other form of alternative dispute resolution, prior to the Level IV hearing. W. Va. Code § 18-29-10 was added to the grievance procedure for education employees in 1992. This statute, provides, in pertinent part:

> To such extent as may be feasible with existing personnel and resources, the education employees grievance board shall attempt mediation and other alternative dispute resolution techniques to actively assist the parties in identifying, clarifying and resolving issues regarding the grievance at any time prior to the level four hearing.

Certainly, nothing on the face of this statute establishes any obligation on the part of an employer to agree to mediation. Accordingly, this contention is totally without merit.

Grievant points out that RESA IV was not compelled by any state or federal law to adopt a policy prohibiting alcohol in the work place, as contained in its "Drug-Free Workplace Policy." See R Ex 2. However, RESA IV notes that the Drug-Free Workplace regulation adopted by the West Virginia Department of Education, 126 C.S.R. 8 (1993), prohibits reporting to work under the influence of alcohol. See R Ex 8. Although the Department of Education's regulation may not apply to RESA IV (See footnote 18), it was not an abuse of discretion for RESA IV to adopt a similar policy for its

employees.

Finally, Grievant demonstrated at Level IV, through the testimony of Dr. Given, that the amount of alcohol in his blood was exaggerated by the medical test as compared to the result that would have been yielded in a forensic blood alcohol test. However, Dr. Given established that the correct reading would have been approximately .038 over six hours after Grievant reported to work. This Grievance Board recently upheld the termination of a school bus operator who reported for duty with over .04 alcohol in his system. Jones v. Barbour County Bd. of Educ., Docket No. 96-01-471 (Feb. 28, 1997). Mr. Pritt referred to a chart in the West Virginia Driver Licensing Handbook (See G Ex C.) to support his belief that Grievant's blood alcohol level would have been in excess of this .04 limit at the time he reported for duty, unless he had been drinking in violation of RESA's drug-free workplace policy in the interim. This Grievance Board has previously taken administrative notice of a similar chart contained in W. Va. Code § 60-6-24. See Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994). This chart specifically indicates that a certain percentage of alcohol is normally "burned up" in the time that elapses after a person takes his first drink. This is corroborated by Dr. Given's testimony that the average person metabolizes approximately 10 milliliters of alcohol per hour. There was insufficient evidence that Grievant's impaired liver function, prior history of alcohol abuse, or any other factor would substantially negate this process. Accordingly, a preponderance of the evidence supports Mr. Pritt's conclusion that Grievant either reported for work with a blood alcohol level over .04, or imbibed while on duty. Because Grievant was an at-will employee, RESA IV, through Mr. Pritt, was free to adopt any reasonable standard for determining if its employees are "under the influence" of alcohol. See Williams, supra. It was not unreasonable or an abuse of discretion to adopt the standard applicable to school bus operators and other employees required to carry commercial drivers licenses, even if this was not a requirement of Grievant's position as a computer technician. See Jones, supra.

Grievant submits that he was entitled to an evidentiary hearing before RESA IV could terminate his employment. In Logan v. West Virginia Regional Jail and Correctional Authority, Docket No. 94-RJA-225 (Nov. 29, 1994), this Grievance Board concluded that an at-will state employee does not have a property interest in his continued state employment sufficient to entitle such employee to any procedural due process protection. Even if Grievant was entitled to procedural due process, under the facts and circumstances in this grievance, there was substantial compliance with the due process

mandate in Boardof Education v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994), for a pre-termination hearing which includes written notice of the charges, an explanation of the evidence, and an opportunity to respond. Wirt, supra, at Syl. Pt. 3. Accordingly, because Respondent established that Grievant reported for work on July 1, 1996, with a blood alcohol level in excess of .04, Respondent demonstrated a proper reason to terminate Grievant's at-will employment under the RESA IV Drug-Free Workplace Policy then in effect. In addition to the foregoing discussion, the following findings of fact and conclusions of law are made in this matter.

FINDINGS OF FACT

1. Regional Education Service Agency (RESA) IV is a multi-county service agency established by the West Virginia Department of Education under authority of W. Va. Code § 18-2-26.

2. Commencing in June 1991, Grievant became employed by RESA IV as a Computer Technician. See G Ex A.

3. Elmer Pritt became Executive Director of RESA IV in July 1994.

4. Shortly after Mr. Pritt assumed his current duties as Executive Director, he spoke with officials from the Fayette County Board of Education who reported that at sometime in the past Grievant had been observed performing a service call at one of their schools while emitting the odor of alcohol.

5. After hearing that concern, Mr. Pritt spoke with Grievant about the accusation, and was assured that it would not be a problem in the future. Mr. Pritt informed Grievant that he would not tolerate such conduct. 6. Following the discussions described in Findings of Fact Nos. 4 and, 5 above, Mr. Pritt did not receive any further complaints relating to Grievant's alleged involvement with alcohol until July 1, 1996.

7. As of July 1, 1996, Mr. Pritt, was aware that Grievant was taking medication as a result of having had one or more seizures. Mr. Pritt was not aware that failure to take such medication could result in symptoms that would parallel someone under the influence of alcohol.

8. As of July 1, 1996, RESA IV had adopted a written "Drug-Free Workplace Policy" (Policy), which Grievant had acknowledged in writing, and which prohibits employees from reporting for work while under the influence of alcohol. See R Exs 2 & 3.

9. As of July 1, 1996, the Policy did not specifically define the term "under the influence," either directly or by reference. See R Exs 2 & 3.

10. As of July 1, 1996, the Policy did not contain a provision for alcohol testing, to include laboratory methodology, testing standards, or criteria for determining when or if a test should be directed.

11. On July 1, 1996, Mr. Pritt directed Grievant to report to Summersville Memorial Hospital to undergo a "blood alcohol test." Mr. Pritt permitted Grievant to select another RESA IV employee to accompany him to the hospital and Grievant selected John Sherwood for that duty.

12. Mr. Pritt believed that Grievant might have been drinking based upon the fact that he had been reported to have had alcohol on his breath on one occasion prior to July 1994, that Grievant was disoriented, his speech was unusually slow, his eyes looked "strange," and he was not acting in his normal, customary manner. In addition, Grievant did not appear capable of performing his duties as a Computer Technician.

13. In addition to suspecting that Grievant's actions might be influenced by indulgence in alcohol, Mr. Pritt believed that the doctor at the hospital where Grievant was to report for a blood alcohol test would be able to recognize if Grievant was in need of medical assistance.

14. Grievant was drinking beer and bourbon "off and on" from sometime after work on Friday evening to approximately midnight Sunday during the weekend preceding Monday, July 1, 1996.

15. Grievant could not recall whether or not he took his regular dosage of Dilantin on the morning of July 1, 1996. Grievant was aware that he should not take Dilantin when he was drinking alcohol.

16. The medical test performed on Grievant's blood revealed an alcohol content which would equate to a blood alcohol content of approximately .038 if a forensic blood alcohol test had been performed. See R Ex 7; Given testimony.

17. At the time Grievant reported for work at 8:00 A.M. on July 1, 1996, Grievant's blood alcohol content was somewhere in excess of .04.

18. Grievant's conduct prior to departing for Summersville Memorial Hospital, and on the way to the hospital, was consistent with an attempt to delay taking a blood alcohol test.

19. Up until July 1, 1996, Grievant had been performing his duties in a satisfactory manner. See G Exs A & F. 20. At the time Mr. Pritt decided to recommend Grievant's termination to the RESA IV Board of Directors, he was aware that a school bus operator could lose his commercial drivers license if he was found to have operated a bus while his blood alcohol level was in excess of .040 per cent. Mr. Pritt conferred with a RESA employee who deals with school bus operators and a school

nurse regarding the results of the blood test report from Summersville Memorial Hospital.

21. Grievant received notice on July 27, 1996, that he had a certified letter at his local Post Office. Grievant then called Mr. Pritt who informed him that the letter contained a recommendation to RESA IV that Grievant's employment be terminated.

22. On July 31, 1996, Grievant appeared, through counsel, before RESA IV, and expressed various objections to the recommended termination. This was not an evidentiary hearing.

CONCLUSIONS OF LAW

1. RESA IV is a multi-county service agency established by the West Virginia Department of Education. See W. Va. Code § 18-2-26.

2. "The various statutes under Section 18A of the West Virginia Code governing the contract and procedural rights of county board of education employees do not apply to employees of the several state Regional Education Services Agencies." St. Clair v. RESA- V, Docket No. RESA-88-186 (Apr. 27, 1990). See Sark v. RESA IV, Docket No. 89-RESA- 131 (Aug. 30, 1989).

3. Nothing in RESA IV's 1995 Personnel Policy or any other employer handbook contains a promise on which Grievant could reasonably rely in contending that his at-will employment status had been altered. See Eaton v. City of Parkersburg, No. 22486(W. Va. Sup. Ct. July 16, 1996). See also St. Peters v. Shell Oil Co., 77 F.3d 184 (7th Cir. 1996); Tolmie v. United Parcel Service, 930 F.2d 579, 581 (7th Cir. 1991); Doe v. First Nat'l Bank of Chicago, 865 F.2d 864, 872 (7th Cir. 1989).

4. An at-will employee is subject to dismissal for any reason which does not contravene some substantial public policy principle. Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978); Dufficy v. Div. of Military Affairs, Docket No. 93-DPS-370 (June 16, 1994); Graley v. W. Va. Parkways Economic Development & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

5. The prohibition against "discrimination" set forth in W. Va. Code § 18-29-2(m) does not necessarily limit or restrict the right of a public employer to decide which at-will employee it wishes to dismiss. In other words, a discharged employee cannot challenge his dismissal on the basis of discrimination under the grievance procedure, unless that discrimination rises to the level of a "substantial contravention of public policy." Wilhelm v. Dept. of Tax & Revenue, Docket No. 94-L-038 (Sept. 30, 1994), aff'd sub nom Wilhelm v. W. Va. Lottery, 479 S.E.2d 602 (W. Va. 1996).

6. Where a Grievant sets forth a specific allegation of disability or handicap-based discrimination which, if true, would violate the state Human Rights Act, W. Va. Code §§ 5- 11-1, et seq., and the

federal Americans With Disabilities Act, 42 U.S.C. §§ 12112-14 (1994), such Grievant has articulated a substantial public policy interest, and is entitled to a hearing on the question of the employer's actual motivation in terminating his or her employment. See Birthisel v. Tri-Cities Health Serv., 188 W. Va. 371, 424 S.E.2d 606 (1992); Graley v. W. Va. Parkways Economic Development & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991). See also, Wilhelm, supra. 7. "A terminated at-will employee must establish by a preponderance of the evidence that the employer's controlling motivation in his or her termination was a factor protected by a substantial public policy." Bellinger v. W. Va. Dept. of Public Safety, Docket No. 95-DPS-119 (Aug. 15, 1995). See Graley, supra.

8. An employee 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 has a disability;

(2) he is otherwise qualified for the employment; and

(3) he was fired solely on the basis of his disability.

Doe v. Univ. of Md. Medical System Corp., 50 F.3d 1261, 1264-65 (4th Cir. 1995). See Runnebaum v. Nations Bank, 95 F.3d 1285 (4th Cir. 1996); Ennis v. Nat'l Ass'n of Business & Educ. Radio, 53 F.3d 55 (4th Cir. 1995).

9. An employer may rebut a grievant's prima facie case by demonstrating that a legitimate, non-discriminatory reason was the controlling motivation in the termination decision. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) Frank's Shoe Store v. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Bellinger, supra; Graley, supra.

10. Although Grievant made a prima facie case of disability-based discrimination in regard to his termination from employment by RESA IV, Respondent established legitimate non-discriminatory reasons for his termination by demonstrating that he violated the RESA IV Drug-Free Workplace Policy by either reporting to work with a blood alcohol content greater than .04, or by imbibing while on duty. Grievant failed to establish that thiswas merely a pretext to terminate him based upon his disability resulting from a seizure disorder. See Frank's Shoe Store, supra.

11. In demonstrating that Grievant came to work on July 1, 1996, while under the influence of alcohol or imbibed in alcohol at work in violation of RESA IV's policy, RESA IV established that

Grievant's disability was not a motivating factor for terminating Grievant's at-will employment. See Hendricks v. W. Va. Dept. of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Bellinger, supra; Dufficy v. Div. of Military Affairs, Docket No. 93-DPS-370 (June 16, 1994).

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Nicholas County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. 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: March 31, 1997

Footnote: 1

At the beginning of the Level IV hearing, Grievant moved this Board to use only his initials and that of his family members, in order to protect his personal privacy. Grievant's motion was granted. See John C. v. Dept. of Public Safety, Docket No. 95-DPS-497 (Jan. 31, 1996). See also State ex rel. Billy Ray C. v. Skaff, 190 W. Va. 504, 438 S.E.2d 847 (1993); Nancy Viola R. v. Randolph W., 177 W. Va. 710, 356 S.E.2d 494 (1987).

Footnote: 2

Employees of Regional Education Services Agencies are included under the grievance procedure for education employees. See W. Va. Code § 18-29-2 (a) & (e).

Footnote: 3

Although his testimony on this point was not explicit, Mr. McMillion inferred that Grievant was simply going through the motions without accomplishing any meaningful work on the computer.

Footnote: 4

As smoking is prohibited on RESA property, Grievant had to leave the premises to smoke a cigarette.

Footnote: 5

Mr. Sherwood also related that Grievant accompanied him on a service call to Greenbrier East High School in the Spring of 1996, and Grievant had the odor of alcohol on his breath on that occasion. In addition, he recalled that he had

observed Grievant come to work in various states of impairment on 10 to 15 occasions during the past year and a half. This evidence was admitted for the limited purpose of rebutting Grievant's claim that he was either not drinking alcohol or was not under the influence of alcohol on July 1, 1996. These events were not reported to Mr. Pritt until after Grievant was terminated, and, therefore, were not referenced in the termination notice issued toGrievant.

Footnote: 6

Although Mr. Pritt's testimony was not specific, it is apparent that he was referring to the results of a forensic blood alcohol test, as would be used by a police agency.

Footnote: 7

In considering the normal metabolism of alcohol, Mr. Pritt made no allowance for Grievant's impaired liver function, as he was not on notice that Grievant had a problem of this nature. According to the record, this problem was first detected in tests conducted on July 10, 1996. In any event, the undersigned was not persuaded by Dr. Given's testimony that the degree of liver function impairment suffered by Grievant would have a significant impact on his metabolism of alcohol.

Footnote: 8

W. Va. Code § 18-2-26(a) provides as follows:

> *In order to consolidate and administer more effectively existingeducational programs and services so individual districts will have more discretionary moneys for educational improvement and in order to equalize and extend educational opportunities, the state board of education shall establish multicounty regional educational service agencies for the purpose of providing high quality, cost effective educational programs and services to the county school systems, and shall make such rules as may be necessary for the effective administration and operation of such agencies . . . .*

Footnote: 9

Literally, "to stand by things decided." This is the doctrine that when a court has laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same. Black's Law Dictionary 1577 (Revised 4th Ed. 1968). See W. Va. Dept. of Admin. v. W. Va. Dept. of Health & Human Resources, 192 W. Va. 202, 205, 451 S.E.2d 768, 771 (1994).

Footnote: 10

This places RESA employees in a legal status comparable to federal employees in the "excepted" service. See Fiorentino v. U.S., 221 Ct. Cl. 545, 607 F.2d 963 (1979), cert. denied, 444 U.S. 1083 (1980).

Footnote: 11

See W. Va. Code §§ 5-3-3 & 29-22-8(a)(1).

Footnote: 12

It is further noted that the RESA IV Drug-Free Workplace Policy which Grievant had previously acknowledged constitutes an addendum to the Personnel Policy. See R Exs 2 & 3. Thus, even if Grievant was not at-will, he was nonetheless required to comply with his employer's rule which prohibits coming to work under the influence of alcohol. See REx 3.

Footnote: 13

Respondent does not claim that it is not a "covered entity." See 42 U.S.C. § 12112. Because the ADA defines "person" in the same manner as in Title VII of the Civil Rights Act of 1964, state and local government agencies appear to be covered. See generally Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Williams v. Va. Employment Comm'n, 542 F.2d 1170 (4th Cir. 1976); United States v. City of Milwaukee, 395 F. Supp. 725 (E.D. Wis. 1975).

Footnote: 14

"Major life activities" are defined as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i).

Footnote: 15

However, even if Grievant had established that he suffered from the disability ofalcoholism, RESA IV could nonetheless enforce a standard that required him to report for work without alcohol in his system. See Schmidt v. Safeway, Inc., 864 F. Supp. 991 (D. Or. 1994).

Footnote: 16

It is equally likely that Grievant's drinking during the previous weekend caused him to fail to take his prescribed medication, either intentionally or through neglect, thus triggering the behavior that caused his employer to question his sobriety.

Footnote: 17

Because of the previous determinations that Grievant consented to the blood test and release of the laboratory results, and that, in any event, Mr. Pritt had probable cause, or at least reasonable suspicion to order the test, it need not de decided if protecting Grievant from unreasonable search and seizure represents a substantial public policy which Grievant can invoke to preclude termination of his at-will employment. See generally, Page, supra.

Footnote: 18

The regulation requires each county board of education to develop a policy containing standards consistent with the Department of Education policy. § 5.1, 126 C.S.R. 8 (1993). Since RESA IV is not a county board of education, it was not compelled to adopt the Policy in question.