GREG EDENS,

Grievant,

v. Docket No. 98-DOH-255

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Greg Edens grieves his dismissal from Respondent Division of Highways ("DOH") and contends he was "discharged without just cause." He requests as relief "reinstatement with full backpay plus interest; restoration of all benefits, including leave time, retirement pay, seniority; and to be made whole in every way." (See footnote 1) As this was a termination, the grievance was appealed directly to Level IV, and a Level IV hearing was held on September 7, 1998, and January 26, 1999. (See footnote 2) This case became mature for decision on February 16, 1999, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 3)

Issues and Arguments

Respondent states Grievant was dismissed for drinking on the job, and then driving a state vehicle while under the influence. Grievant denies the charge. The issue ofcredibility among the various witnesses is the key to resolving this grievance. Although Grievant was only charged with one incident of drinking on the job, other incidents involving alcohol at work were presented to establish the background of the situation. Grievant did not object to the presentation of this evidence, and indeed denied the majority of these events as well.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant had been employed by DOH as a Transportation Worker II. He was assigned to the North Charleston area. In this position, Grievant was required to possess a CDL and was qualified to operate a variety of vehicles. Grievant had been employed for almost ten years at the time of his dismissal.

2. In April 1990, Grievant asked DOH for a Medical Leave of Absence so he could be hospitalized for a month long treatment program for alcohol dependency. This request for leave was granted. (See footnote 4)

3. On October 1, 1993, Grievant and two other employees were written up for refusing to complete their assigned task. Instead of performing this assigned work, the employees all stated they were ill and left. In addition, when Grievant was asked if he had been drinking, he stated, "You're damn right I'm drinking." 4. On February 4, 1994, Grievant received a written reprimand for sick leave abuse. This warning suggested Grievant should "seek counseling for any problem you may have associated with this warning."

5. During Halloween in 1995, Dennis "Chuck" Runyon, a DOH Training Coordinator, saw Grievant and a co-worker purchase beer at a convenience store and place it in a state truck. He did not see either employee drink. At the time this incident occurred, he did not know Grievant's name. During DOH flood work in approximately the Fall of 1997, he found out Grievant's name and mentioned the incident to Grievant's then supervisor, Paul Lyttle.

6. Mr. Lyttle replaced Roger Higgenbottom as the Assistant County Supervisor at North Charleston in December 1995. (See footnote 5) Shortly after he was placed in charge, in approximately March of 1996, he engaged in an informal discussion with some of his employees. He stated he had heard some of the North Charleston employees drank on the job, and he wanted to tell them that this behavior was unacceptable. Grievant was one of the employees at this meeting, and he, as well as several employees, indicated they had drunk on the job in the past, but that they would no longer engage in this behavior. Mr. Lyttle repeated this warning a number of times, on several different occasions.

7. Several times during his tenure, Mr. Lyttle found beer cans at the workplace, and was aware one or more employees were drinking on the job, but he did not know who was

involved. 8. Mr. Lyttle smelled alcohol on Grievant's breath at 8:20 a.m. one morning, but at that time Grievant had been off work since 8:00 a.m. and stated he had gone down the hill to purchase a six pack before he returned to work to pick up his check.

9. In the past, prior to Mr. Lyttle's arrival, if drinking was reported to the supervisor no action was taken against the employee.

10. On February 7, 1998, Crew Leader, Joseph Weekley, saw Grievant at 7:15 a.m., open a beer can and drink from it. Grievant was on duty until 8:00 a.m. Mr. Weekley did not report this action, as prior complaints made to the former supervisor were not well received.

11. Over a period of several months, Ron Brown, a co-worker, had seen Grievant with a carton of beer in his truck at work and throw a beer can out of the truck window while at work. Mr. Brown also noted Grievant frequently had alcohol on his breath and appeared shaky. Mr. Brown saw Grievant and another employee, Larry Rouse drinking beer in their cars while on the lot after they had ceased work, but before official quitting or end of shift time had arrived.

12. Mr. Brown complained to his supervisor, Gary Westfall, and to Mr. Weekley about these actions. He was told that these type of things had been going on for a long time and to be quiet as nothing would be done.

13. Mr. Brown recycled aluminum cans and frequently found beer cans at work and in the areas where Grievant had worked that day. One time, Grievant and Mr. Rouse told Mr. Brown where he could find a lot of cans in the work area. The majority of the cans Mr. Brown retrieved were Milwaukee's Best Light, Grievant's favorite brand. 14. On March 2-3, 1998 **(See footnote 6)** **, Mr. Brown came to work when he was off-duty to pick up something from his locker. Grievant and David Eastwood were on SRIC (snow and ice removal) duty at this time. While there, Mr. Brown saw Grievant take a drink from a beer bottle.**

15. The next day, Mr. Brown found a beer can in the back of Grievant's truck at work. He wrapped the can in a rag and threw it away. He reported what he had seen and done to Mr. Westfall.

16. Mr. Westfall reported these events to Mr. Lyttle. Upon his own inspection of the premises, Mr. Lyttle also found beer cans.

17. Mr. Lyttle talked to Supervisor Rick Light. Mr. Light indicated Grievant and Mr. David Eastwood had brought his truck to him at home that same night, March 2-3, 1998, and it

appeared to him that Grievant had been drinking, as he smelled of alcohol, and had some trouble with his balance. The trip to Mr. Light's house occurred after Mr. Brown had seen Grievant drinking. (See footnote 7)

18. Mr. Lyttle discussed the situation with Grievant and offered to try to work something out so he would not be dismissed. He stated he would recommend a thirty day suspension, a transfer, and a treatment program. Grievant's response was he had already attended a treatment program, and that he did not mind the suspension, but he would nottake the transfer. He denied all charges and stated, "The state has nothing on me. They don't have any pictures or videos." (See footnote 8)

19. After Mr. Lyttle had discussed the situation with Grievant, Grievant called Mr. Brown a rat, and he stated Ron Brown would have a bad day when he returned to work. (See footnote 9)

20. On May 19, 1998, Grievant was handed a Disciplinary Action Notice which stated he was being dismissed for drinking on the job and then subsequently operating a state vehicle. This document also stated Grievant had harassed the employee who had reported him, and this action was also part of the reason for the dismissal.

21. Grievant was terminated by letter dated June 26, 1998. This letter from Jeff Black, Director of the Human Resources Division, stated the following pertinent information:

> On March 2, 1998, you consumed alcohol (beer) during work hours, and a short time later you operated a state vehicle. Immediately following your operation of the vehicle, you were observed to be under the influence of alcohol. In addition to the above,you used insulting and abusive language toward a co-worker who reported your drinking.

22. Operating a state vehicle while under the influence of alcohol is listed in DOH's Disciplinary Action Procedure as a first offense dismissal behavior.

23. Grievant was aware of and had agreed to comply with DOH's Drug Free Workplace Policy. 24. In an undated statement confirmed by their testimony, three employees, Mr. Eastwood, Mr. Rouse, and Michael Welch, stated they "did not observe Greg consuming any alcoholic beverages" on February 7, 1998. Testimony revealed these witness were with Grievant most of that work day, but had not been with him at all times. (See footnote 10)

25. In an undated statement confirmed by his testimony, Mr. Eastwood stated he was

asked by Mr. Lyttle if Grievant was drinking on the job on March 2-3, 1998. Mr. Eastwood's written response was "I did not see Greg drinking alcohol. . . . Greg consumed no alcohol in my presence."

26. At one time, the alcohol policy at DOH was not strictly enforced. Such has not been the case for the past several years.

27. Mr. Wade Withrow, a co-worker, was called as a witness pursuant to subpoena, and refused to answer whether he had ever seen Grievant drink on the job; he stated he was not going to get involved.

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. Dep't 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. Dep't of Health and Human Resources, DocketNo. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

State employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the 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. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); See also Section 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1998). The West Virginia Supreme Court of Appeals has also stated that "the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985). See Blake v. Civil Serv. Comm'n, 172 W. Va. 711, 310 S.E.2d 472 (W. Va. 1983); Serreno v. W. Va. Civil Serv. Comm'n, 169 W. Va. 111, 285 S.E.2d 899 (W. Va. 1982). This grievance requires a determination of whether Respondent proved the facts upon which the dismissal was based.

In Grievant's dismissal letter, he was charged with drinking on the job and subsequently driving a state vehicle while under the influence. Grievant denied he had consumed any alcohol on the job, and specifically denied the majority of events spoken to by DOH's witnesses. He does not remember the October 1, 1993 incident, but did state he remembered going home sick. The issue of credibility is the key to deciding this case, and it will be examined in depth. (See footnote 11) In order to decide whether DOH has met its burden of proof, it is necessary to resolve the issue of witness credibility, as the testimony of Grievant and parts of Grievant's witnesses' testimony contradicted Respondent's witnesses. An Administrative Law Judge is charged with assessing the credibility of the witnesses who appear before her. Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). "The fact that [some of] this testimony is offered in written form does not alter this responsibility." Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996).

The United States Merit System Protection Board Handbook ("MSPB Handbook") is helpful in setting out factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984). Some factors to consider in assessing a witness's testimony are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Id. Additionally, the Administrative Law Judge should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id. The undersigned Administrative Law Judge had an opportunity to observe the demeanor of the witnesses and to assess their words and actions during their testimony. Respondent's witnesses will be assessed first. Mr. Light, (See footnote 12) Mr. Lyttle, Mr. Runyon, Mr. Weekley, and Mr. Brown appeared to be straightforward in their testimony. Their testimony was internally consistent, consistent with prior written statements, and consistent with the testimony of others. It was clear that the majority of these witnesses would rather not be involved, but they did not appear to have any hostile feelings toward the Grievant, with the

exception of Mr. Brown. Mr. Brown obviously did not appreciate Grievant's hostile treatment of him from his first day of work and did not like the treatment he received after he reported Grievant's actions. However, Mr. Brown's negative feelings for the Grievant did not appear overwhelming, and he was clear in his testimony to admit when he did not know something for sure or when he did not see an action. For example, Mr. Brown stated he saw Grievant throw a beer can out of a state truck and drink out of a Styrofoam cup later that day, but he did not say he saw Grievant drink that day, smelled alcohol on Grievant's breath, or that he knew what was in the cup. While it is true that reporting the wrong behavior of co-workers may make you a rat in the eyes of your fellow employees, this action does not make you a liar.

Grievant attempted to prove Mr. Brown had invented or elaborated on the events surrounding his injury in order to demonstrate he was a liar. This attempt was unsuccessful. Testimony revealed the employee who was accused of injuring Mr. Brownreceived a suspension, and Mr. Brown is currently receiving benefits from Workers' Compensation for the injury.

Grievant's witnesses were circumspect in their testimony, and it is believed that what they said is for the most part true. (See footnote 13) **They stated they "did not see Greg consume alcohol" on the two days in question. What is probably more important here is what they did not say. They did not say they had never seen Grievant drink at the job site or smelled alcohol on his breath at the workplace. Also these employees were not with Grievant 100% of the time.**

As for the testimony related to what occurred on February 7, 1998, none of these employees claimed to be with Grievant at the close of shift at the time the incident occurred. It was also clear from the testimony that these men are friends of Grievant, did not want to see him lose his job, and do not like Mr. Brown. One of Grievant's witnesses was so determined to provide an "alibi" for Grievant on February 7, 1998, that he had to be directed several times to answer the question about being with Grievant 100% of the time. He clearly did not want to say he was ever apart from Grievant, but he also did not want to say they accompanied each other to the bathroom. Eventually, he agreed he was with Grievant the majority of the time, but not all the time.

The testimony of Mr. Rouse must be considered somewhat suspect. He was the supervisor on the job where Grievant is accused of drinking, and Mr. Brown testified that these two employees were together in a truck when he saw the beer carton and the canthrown out of the truck window. Clearly Mr. Rouse has an important personal stake in Grievant being cleared of the charges.

Mr. Warren Shirkey was one of Grievant's witnesses and his testimony disagreed sharply with that of Grievant, as well as other witnesses. He stated that no one ever called Mr. Brown a rat. Grievant stated just about everyone but himself called Mr. Brown a rat. The undersigned Administrative Law Judge finds that multiple employees, including Grievant called Mr. Brown a rat. It is implausible to believe that Grievant, who was dismissed in part because of Mr. Brown's testimony, would not call Mr. Brown names when all those about him were doing the same.

The undersigned Administrative Law Judge observed Grievant during his testimony. There was nothing remarkable in his demeanor. He, at times, tried to treat the charges as totally unbelievable, but this alone, given the seriousness of the situation, was not assessed as unusual. Nothing untoward was noted in his capacity to communicate. As with much testimony, Grievant's statements were self-serving. His perception and credibility were called into question by his explanation of his reasons for his alcohol treatment in 1990. He testified he went to a month long alcohol treatment program for alcohol dependency, because he was having marital problems. On closer questioning, he then stated he and his wife were having problems because of his drinking. Grievant also stated he was not an alcoholic and continued to drink to this day, but not to excess.

It is difficult to believe that an individual would place themselves in a thirty day alcohol treatment program, including taking unpaid leave, if they were not experiencing severe problems with alcohol abuse. The undersigned Administrative Law Judge will takeadministrative notice that total abstinence from all alcoholic beverages, is considered the approach of choice for individuals with drinking problems. (See footnote 14) **See Perdue, supra.**

Additionally, Respondent presented some testimony which was obviously hearsay. Relevant hearsay is admissible in administrative hearings. W. Va. Code §29-6A-6. The key

question is what weight to give this testimony. Several statements were attributed to Mr. Westfall, and he was not called as a witness by either party.

In Borninkhof v. Department of Justice, 5 MSBP 150, (1981), the Merit System Protection Board identified several factors that affect the weight hearsay evidence should be accorded. These factors are: 1) the availability of persons with first hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. Id.; Seddon v. West Virginia Dep't of Health/Kanawha-Charleston Health Dep't, Docket No. 90-8-115 (June 8, 1990).

No reason was given for the failure of Respondent to call Mr. Westfall, and this failure must decrease the weight given to his alleged statements. On the other hand his statements were consistent with the testimony of other witnesses. He did sign the DOHForm -12 which reported the events of October 1, 1993, and he signed the minutes of the March 17, 1998 meeting below the following statement, "The above statements are true and correct to the best of my knowledge." In this statement he noted he had heard Grievant call Mr. Brown a rat, and he reported Grievant had told him "I had better watch my drinking around here." This statement was made by Grievant after Mr. Westfall discussed the events on March 2-3, 1998, with him. These statements of Mr. Westfall will be accorded some weight as they are supported by the testimony of others, are consistent with the other facts of the case, and were signed with the above-identified statement indicating they were true.

Therefore, the undersigned Administrative Law Judge finds the total testimony of Mr. Brown, Mr. Lyttle, and Mr. Weekley, Mr. Light, and Mr. Runyon to be credible, consistent, and in more detail than the testimony of Grievant and his witnesses' testimony. As previously stated, a classified civil service employee can be dismissed only for good reason, and this means "misconduct of a substantial nature directly affecting the rights and interests of the

public, rather than upon trivial and inconsequential matters, or mere technical violations of statute or official duty without wrongful intent." Oakes, supra. Further, this Board clarified in Seddon, supra at 7, that even "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. . . ." Id. at 14.

Here, Grievant's misconduct was substantial and directly affected the rights and interest of others. It is imperative that state employees follow the Drug Free Workplace Policy, and this is especially true for employees who operate heavy equipment which cancause severe physical and financial harm. Respondent has proven its case that Grievant drank on the job and then drove a state vehicle on the public roads of this State, and as such had good cause to dismiss him.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. 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. Dep't 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. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. State employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the 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. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); See also Section 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1995). The West Virginia Supreme Court of Appeals has also stated that "the work record of a long-term civil service employee is a factor to be considered in

determining whether discharge is an appropriate disciplinary measure in cases of misconduct." Buskirk v. Civil Serv. Comm'n, 175 W. Va.279, 332 S.E.2d 579 (1985). See Blake v. Civil Serv. Comm'n, 172 W. Va. 711, 310 S.E.2d 472 (W. Va. 1983); Serreno v. W. Va. Civil Serv. Comm'n, 169 W. Va. 111, 285 S.E.2d 899 (W. Va. 1982). (See footnote 15)

3. Respondent has met its burden of proof and demonstrated Grievant was drinking on the job and subsequently drove a state vehicle while under the influence of alcohol.

4. Grievant's behavior of drinking and driving on the job, represents "good cause" for dismissal, meaning "misconduct of a substantial nature directly affecting the 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. 1, Oakes, supra.

Accordingly, this grievance is DENIED.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). 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.

Janis I. Reynolds

ADMINISTRATIVE LAW JUDGE

Dated: February 26, 1999

Footnote: 1

Grievant, through questioning of various witnesses, indicated he thought that the penalty, dismissal, even if the charges were true, was not warranted and a written reprimand would have been more appropriate. This argument was not presented in Grievant's proposed Findings of Fact and Conclusions of Law.

Footnote: 2

Another hearing was scheduled on November 4, 1998, but after a heated exchange between the representative for Grievant and the attorney for Respondent, Grievant and his representative did not wish to participate in the

scheduled hearing and left.

Footnote: 3

Grievant was represented by Mary Ann Uzelac from the Independent Union of Public Employees, and Respondent was represented by DOH's Attorney Timbera Wilcox.

Footnote: 4

Although Grievant had some leave time, the amount was insufficient to attend for the duration of the program.

Footnote: 5

Apparently, Mr. Higgenbottom did not want this transfer, and the belief among certain employees was that Mr. Higgenbottom was replaced because he had a drinking problem and was not dealing effectively with the employee drinking problems at North Charleston.

Footnote: 6

Since Grievant was on the night shift the events in question occurred from approximately 6:00 p.m. to 8:00 a.m.

Footnote: 7

Mr. Light testified that he could not be absolutely certain that Grievant was the one who smelled of alcohol, but he truly believed it was Grievant who smelled of alcohol.

Footnote: 8

Grievant was also offered this opportunity several more times, the last being the day of the first hearing.

Footnote: 9

Shortly after Mr. Brown reported Grievant's drinking to Mr. Westfall, he was injured by another employee, apparently as an act of retaliation for "telling on" Grievant. Mr. Brown has been off work since that time.

Footnote: 10

This statement was originally signed by six employees. The testimony of only three of the signers was presented. Respondent objected to the admission of this statement with all the names included in it. This objection was cured by the removal of the names of those who did not testify, as the statement was not sworn.

Footnote: 11

As revealed in the previous Findings of Fact, the issue of credibility has been resolved against Grievant on the majority of the issues.

Footnote: 12

Mr. Light, upon close questioning by the unemployment administrative law judge, said it could have been Mr.

Eastwood who was drinking, but clarified at the Grievance Board hearings, that he truly believed it was Grievant.

Footnote: 13

Mr. Bob Shinault was also called a witness by Grievant. He saw and heard nothing at all times. He did agree that while he and Mr. Brown were working together, Mr. Brown told him he believed Mr. Rouse and Grievant were drinking while they were waiting to complete a job.

Footnote: 14

It is noted that individuals with drinking problems are unreliable in reporting their alcohol consumption. See Perdue, supra.

Footnote: 15

It is unclear how many years it would take for an employee to be qualified or considered a long-term employee.