WILLIAM HENDERSON,

Grievant,

v. **Docket No. 99-DOH-189**

WEST VIRGINIA DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, William Henderson, employed by the Division of Highways (DOH or Respondent) in District Four, Monongalia County, filed a level one grievance on or about September 17, 1998, after he received a five day suspension following a random breath alcohol test. Grievant asserts the test was unfair, and requests the suspension be rescinded. The level one and level two hearing evaluators lacked authority to grant the requested relief. The grievance was denied following a level three hearing, and the matter was advanced to level four on May 10, 1999. A hearing was conducted in the Grievance Board's Morgantown office on July 29, 1999, at which time Grievant was represented by Kevin Church, AFSCME Council 77, and Respondent was represented by Nedra Koval, Esq. The matter became mature for decision with the receipt of Respondent's “Rebuttal to Grievant's Discussion and Arguments” on September 27, 1999.

The facts of this matter are not in dispute and may be set forth as the following formal findings of fact.

Findings of Fact

___1. Grievant has been employed by Respondent for approximately twenty-five years and has an unblemished work record. He is presently classified as a Transportation Crew Chief, a position which requires that he hold a CDL license. Grievant routinely drives a truck to deliver mail or reports, and to procure supplies, as part of his daily duties. 2. On August 26, 1998, Grievant was selected for random drug and breath alcohol testing, which is a condition of employment due to the nature of his position.

3. Respondent contracts with a private corporation, Emergency Medical Service Inc. (EMSI), to conduct the drug and alcohol testing. In August 1998, EMSI had completed approximately 2500 breath alcohol tests for Respondent.

4. EMSI trains its Breath Alcohol Technicians (BAT) not to permit the person being tested for breath alcohol to hold or grab the testing device as an equipment malfunction or other problems could ensue.

5. EMSI uses a testing instrument approved for use by the U.S. Department of Transportation (U.S.D.O.T.). (See footnote 1) The equipment allows the subject three attempts at providing an adequate breath sample. If an inadequate sample is received the instrument will flash “No Go”. The signal is repeated after a second unsuccessful attempt, and signals “Void”, after the third attempt in which there is inadequate breath. At that point the test will conclude with no results.

6. On August 26, 1998, Grievant failed on all three attempts to provide an adequate breath sample to complete the test. 7. On August 27, 1998, Grievant's physician examined him and reported there was no medical reason Grievant could not provide adequate breath for breath alcohol testing. Grievant does not dispute this report.

8 Grievant had successfully completed an EMSI provided breath alcohol test in 1997, and was found to have had no prohibitive breath alcohol concentration. Grievant claims that he was allowed to hold the instrument during that test.

9. Consistent with Division of Personnel Administrative Rule, Section 12.03, and Respondent's Policy on Drug and Alcohol Testing, Jeff Black, Director of Respondent's Human Resources Division, notified Grievant by letter of September 9, 1998, that he would be suspended effective that date for a period of “at least five (5) working days.” Grievant was also required to provide documentation that he had an appointment to be evaluated by a substance abuse professional.

10. Grievant provided documentation dated September 14, 1998, from the West Virginia School of Medicine, Department of Behavioral Medicine and Psychiatry, establishing that he had undergone “a clinical interview, labs, MAST, SASSI, ASI and Collateral Interview”, and was found to have “no problems with alcohol or drugs and consequently no treatment is recommended.”

11. Upon Grievant's return to duty, he was subject to a follow-up breath alcohol test on September 25, 1998. The test was completed on Grievant's third attempt.

Discussion

In disciplinary matters, the employer has the burden of proving each element of the charges by a preponderance of the evidence. W. Va. Code §29-6A-6; Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Symnsv. Div.of Highways, Docket No. 94-

DOH-091(July 7, 1994); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

Respondent asserts that its Policy provides that a failure to provide a sample without a valid medical reason is considered a refusal to test, and is treated as a positive test for disciplinary purposes. A positive test is defined as a breath alcohol concentration of .04 and above. Because Grievant failed to provide an adequate sample, and there was no medical reason for the failure, Respondent argues that it acted appropriately, reasonably, and in compliance with its own Policy, as well as that of the Division of Personnel, in imposing the five day suspension.

Grievant complains that the testing procedure was flawed because the BAT did not allow him to hold the device, and he could not get “a good seal” on it. Grievant also argues that his failure to complete the test was not a refusal to take the test, or a positive result, therefore, a five day suspension was too harsh a penalty. (See footnote 2)

At the level two hearing, John Tappan, the BAT who administered the test to Grievant on August 26, 1998, testified that he did not allow Grievant to hold the mouthpiece attached to the testing equipment, consistent with the training he had received. He recalled that after Grievant failed to provide an adequate sample on his first attempt,he explained to Grievant that he needed to wrap his mouth entirely around the mouthpiece, and blow long and hard, like he was blowing into a balloon. After the second failure, Mr. Tappan recalled that it was more difficult to figure out what was wrong. He stated that he denied Grievant's request to hold the mouthpiece, which could possibly interfere with the success of the test, and reiterated his instructions on how to complete the procedure. None of the other participants that day experienced any difficulty with the equipment or procedure according to Mr. Tappan. He instructed Grievant a third time, but again an inadequate sample was produced, and the test concluded.

Kenneth Schneider, Occupational Health Manager at EMSI, testified that he had trained Mr. Tappan as required by the U.S.D.O.T. in the collection of breath samples, and confirmed that the subject was not to hold the equipment during the testing pursuant to federal specifications, because it is a hand-held device with several buttons on the face of it which would contaminate the process if touched. In any event, Mr. Schneider stated that holding the unit would not assist the individual, since

it is a matter of only sealing your lips on the mouthpiece. Mr. Schneider demonstrated and described the Evidential Breath Testing device as a small unit, approximately 5 x 7 x 2 inches, attached to a laptop computer which allows the device to be menu driven. The mouthpiece is connected to the device with a one inch and one-eighth inch long, by five-sixteenth inch in diameter straw into which the individual exhales. Mr. Schneider explained the participant needed to provide a long, strong, breath of six seconds, because the sample is taken at the end of the breath, from deep lung tissue, which provides a more accurate reading. Having administered approximately 3,000 tests, he had not witnessed any problems similar to those experienced by Grievant. Upon his return to work, the breath alcohol test was administered to Grievant by Mr. Schneider, who stated that he instructed Grievant to take a deep breath, wrap his lips tightly around the straw, and blow as long and hard as he could until told to stop. Grievant made an attempt but was unable to provide enough air on the first try. On the second attempt, Grievant's tongue got in the way and he was unable to provide a sample. Prior to the third attempt, Mr. Schneider stated that he reinstructed Grievant and told him he really needed to concentrate, or they would end up with a voided test. Grievant complied, and provided a negative test result of .000. Mr. Schneider opined that while Grievant was cooperative, he just did not seem to want to follow the instructions properly, but possibly he did not understand or was not listening.

Three co-workers testified on Grievant's behalf. Two were with him the morning of August 26, 1998, and stated that he had not consumed any alcoholic beverages. The third co-worker testified that he had once experienced difficulty in completing the test and had assisted the BAT in positioning the mouthpiece.

Testifying in his own behalf, Grievant stated that on the first two attempts to produce a breath specimen, the air leaked around the outside of the straw when he was unable to maintain a seal on the mouthpiece. On the third attempt, the BAT held the mouthpiece at the wrong angle causing his tongue to hit it when he attempted to expel his breath. Grievant explained that he needs to move his head downward when he blows into something, such as a balloon, and “when somebody else is holding it, they're not moving with me when I go down.” (See footnote 3) Grievant attributes his successful completion of the Septembertest to the fact that Mr. Schneider provided better instructions than Mr. Tappan. Specifically, Mr. Schneider told him he needed to blow harder.

The evidence in this case presents an interesting situation. Grievant has an unblemished

employment history of twenty-five years. His supervisors find him to be cooperative. His co-workers testified that he had not consumed any alcohol on the day in question. Neither his physician nor his supervisors have any evidence that he has reported to work with alcohol in his system, or that he has any problem with alcohol. Grievant had successfully completed the breath test previously. Yet, this forty-two year old stated that on August 26, 1998, he could not manipulate his lips and tongue so as to blow into a straw with enough force to provide a breath sample. This unusual set of facts requires an assessment of Grievant's credibility.

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. Dept. of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). The United States Merit System Protection Board 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; and5) 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 record establishes that Grievant has not been subject to any prior discipline, is not known to have reported to work with alcohol in his system, is generally cooperative, and an overall good employee. The alcohol tests he has completed have all produced negative results. Notwithstanding these factors, there is no evidence that Grievant lacks the ability to understand simple directions, or to ask questions about procedures when in doubt of what is expected of him. There is also a lack of evidence that he explained to the BAT that he needed to hold his head at any certain angle, or was otherwise hindered in expelling his breath.

Grievant stated at level two that the testing procedure makes him very nervous because “I know what some of the problems is when you get in trouble . . . .” (Level II Transcript, p. 100). The question that arises is why would an employee be so nervous, and concerned about getting into trouble, unless there was a concern he would produce a positive test result? Finally, Grievant's explanation

for his failure to produce a sample is not plausible. Absent any medical condition to interfere in the process, Grievant's testimony that he could not close his lips tightly around the straw, or move his tongue to unblock the straw, is simply not credible.

Having determined that Grievant failed to provide an adequate sample without a valid medical reason, the next issue to be reviewed is whether a five day suspension was the proper measure of discipline to be imposed. Respondent's Drug and Alcohol TestingPolicy, effective January 1, 1995, provides for random testing of covered employees, defined as those who are required to possess a CDL to operate a commercial motor vehicle (Equipment Operators), or are subject at any given time, to be dispatched to operate a commercial motor vehicle that requires a CDL to operate. In compliance with federal regulations, the policy provides that covered employees are required to participate in the testing programs as a condition of employment. “Certain behaviors constitute a refusal to test, which automatically initiates a positive result, and Disciplinary Action, as defined by this policy, will be initiated.” One of those behaviors listed which constitutes a refusal to test is the “failure to provide adequate breath/urine samples without a valid medical reason . . . .”

A first offense of test results with an alcohol concentration of 0.04 or greater carries a minimum suspension of five working days. A first offense of test results with an alcohol concentration of 0.02 but less than 0.04 results in the employee being relieved from covered duty for no less than 24 hours from the time of being informed of the results, and progressive discipline in the form of a written reprimand.

Division of Personnel Administrative Rule, Section 12. 3 states:

Suspension - Eight (8) calendar days after oral notice confirmed in writing or by written notice, the appointing authority may suspend any employee without pay for cause or to conduct an investigation regarding an employee's conduct which has a rational nexus to the employee's performance of his or her job. The suspension shall be for a specific period of time, except where an employee is the subject of an indictment or other criminal proceeding. The appointing authority shall allow the employee being suspended a reasonable time to reply in writing, or upon request to appear personally and reply to the appointing authority or his or her designee. The eight (8) calendar day notice is not required for employees in certain cases when the public interest are best served by withholdingthe notice. The appointing authority shall file the statement of reasons for the suspension and the reply, if any, with the Director of Personnel.

The five day suspension was imposed consistent with Respondent's own Drug and Alcohol Testing Policy and the Division of Personnel Policy. Although Grievant disagrees with Respondent's determination that an employee's refusal to cooperate warrants the same discipline as a positive test of alcohol concentration of 0.04 or more, Ernie Larzo, Employment Manager for Respondent's Human Resources Division, testified that while the Drug and Alcohol Testing Policy was drafted in compliance with U.S.D.O.T. regulations as it pertains to collection, the type of equipment to be used, etc., the level of discipline imposed was discretionary with Respondent. Mr. Larzo recalled that it was determined that to protect the integrity of the policy, it must be severe, and the fact that an employee simply decides he or she would not take the test on any given day defeats the purpose of random testing. Therefore, the policy initially provided that anyone who refused to test was subject to dismissal. The policy was amended in November 1996, in part, to treat the refusal to test, or the failure to provide a sample without a valid medical reason, as a first offense positive, instead of dismissal.

An allegation that a particular disciplinary measure is disproportionate to the offense proven or otherwise arbitrary and capricious is an affirmative defense, and Grievant bears the burden of demonstrating that the penalty was clearly excessive or reflects an abuse of agency discretion, or an inherent disproportion between the offense and the personnel action. Jones v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Thompson v. W. Va. Dept. of Health & Human Serv., Docket No. 94-HHR-254 (Jan. 20, 1995). Mr. Larzo articulated a reasonable basis for Respondent's decision to impose a suspension for a refusal to test, and while the penalty is severe, Grievant has not demonstrated the discipline to be clearly excessive, an abuse of agency discretion, or disproportionate to the action, or otherwise arbitrary and capricious.

Grievant additionally requests consideration of mitigating circumstances to reduce his penalty to a written reprimand. Factors to be considered in the mitigation 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. See Stewart v. W. Va. Alcohol Beverage Control Comm., Docket No. 91-ABCC-137 (Sept. 19, 1991).

A strict application of the drug and alcohol testing policies, including the sometimes severe discipline imposed for an infraction, particularly in cases such as this where the individual is responsible for operating a motor vehicle, and safety is an inherent concern of the employer, is not

improper. See McCoy v. Dept. of Transp./Div. of Highways, Docket No. 98-DOH-399 (June 18, 1999); Edens v. Dept. of Transp./Div. of Highways, Docket No. 98-DOH-255 (Feb. 26, 1999); and Shoemaker v. Dept. of Transp./ Railway Maintenance Auth., Docket No. 95-RMA-218 (Sept. 29, 1995). Notwithstanding Grievant's long history of satisfactory employment, he was well aware of the drug testing policies, and had successfully completed the procedure in the past. Considering the potential harm caused by workers in safety sensitive jobs who might be under the influence of drugs or alcohol, the lack of credibility given Grievant's explanation, and the absence of any other similar situation in over 3,000 tests, mitigation is not warranted in this situation.

Consistent with the foregoing findings of fact and discussion, the following conclusions of law are appropriate.

Conclusions of Law

1. In disciplinary matters, the employer has the burden of proving each element of the charges by a preponderance of the evidence. W. Va. Code §29-6A-6; Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Symns v. Division of Highways, Docket No. 94-DOH-091(July 7, 1994); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992).

2. Respondent has proven by a preponderance of the evidence that it imposed the five day suspension upon Grievant consistent with the provisions of its Drug and Alcohol Testing Policy and the Division of Personnel Administrative Rule, Section 12.3.

3. An allegation that a particular disciplinary measure is disproportionate to the offense proven or otherwise arbitrary and capricious is an affirmative defense, and Grievant bears the burden of demonstrating that the penalty was clearly excessive or reflects an abuse of agency discretion, or an inherent disproportion between the offense and the personnel action. Jones v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Thompson v. W. Va. Dept. of Health & Human Serv., Docket No. 94-HHR-254 (Jan. 20, 1995).

4. Although the measure of discipline for an employee's failure to provide an adequate breath sample is greater than that for a positive test result of more than 0.02 but less than 0.04 alcohol concentration, Respondent's determination that the refusal to provide an adequate sample warranted a more severe punishment is not clearly excessive, in disproportion to the offense, or otherwise arbitrary and capricious.

5. Factors to be considered in the mitigation analysis include the employee's past disciplinary record, the clarity of notice to the employee of the rule violated, andwhether the employee was warned about the conduct. See Stewart v. W. Va. Alcohol Beverage Control Comm., Docket No. 91-ABCC-137 (Sept. 19, 1991).

6. Upon consideration of all the facts, mitigation is not warranted in this situation.

Accordingly, the 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. However, the appealing party is required by W. Va. Code §29- 5A-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: November 15, 1999 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

Respondent is subject to federal requirements and specifications regarding drug and alcohol testing.

Footnote: 2

Grievant also made an allegation that Respondent was not applying the Policy consistently, and was in the process of rehiring an employee who had been dismissed for failing a drug test. Inadequate information was provided to allow any meaningful consideration of this issue.

Footnote: 3

Grievant testified that several days later he inquired of his supervisors whether he could take either a blood or urine test to resolve the matter, and that Wayne Armstrong,Administrative Assistant to the Director of the Human Resources Division, advised that he could have taken a blood test. Mr. Armstrong was not available for the level two hearing due to health problems, so the source of his information is unknown. There is no such provision in Respondent's policy.