TIMOTHY FERRELL,

Grievant,

v. **DOCKET NO. 00-DOH-237**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

This grievance was submitted by Grievant Timothy Ferrell directly to Level IV, pursuant to W. Va. Code § 29-6A-4(e), on August 9, 2000, after he was dismissed from his employment with Respondent Department of Transportation/Division of Highways, effective August 16, 2000. Grievant sought as relief to be reinstated "with full benefits and no loss of seniority." A Level IV hearing was held on October 18, 2000. (See footnote 1) This matter became mature for decision upon receipt of Respondent's written argument on November 28, 2000. Grievant declined to submit written argument.

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, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public."

House v. Civil Service Comm'n, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, Buskirk v. Civil Service Comm'n, 332 S.E.2d 579, 581 (W. Va. 1985); Oakes v. W. Va. Dept. of Finance and Admin., 264 S.E.2d 151 (W. Va. 1980); Guine v. Civil Service Comm'n, 141 S.E.2d 364 (W. Va. 1965)." Scragg v. Bd. of Directors W. Va. State College, Docket No. 93-BOD-436 (Dec. 30, 1994).

Grievant had been employed by DOH for at least ten years when he was terminated from his employment as an equipment operator with the Division of Highways ("DOH") for testing positive for marijuana, as a result of a random drug test on July 26, 2000. As an equipment operator, Grievant was required to hold a commercial driver's license ("CDL"). This made him subject to random drug testing pursuant to the Federal Motor Carrier Safety Regulations (49 C.F.R. §§ 382.101, et seq.) promulgated by the United States Department of Transportation ("USDOT"), and the West Virginia Department of Transportation's ("DOT") Drug and Alcohol Testing Policy. This was Grievant's second positive test, and DOT's Policy states that a second positive test results in dismissal. Grievant had previously tested positive in 1998, when a urine specimen he provided as a result of a random drug test was determined to be adulterated; that is, testing showed it had been tainted with bleach. DOT's Policy defines an adulterated sample as a positive test. Grievant was suspended for five days without pay after the first positive test, and he did not grieve the suspension. Grievant was also required to see a substance abuse professional. (See footnote 2)

DOT's Drug and Alcohol Testing Policy became effective January 1, 1995. It was adopted as a result of federal drug testing requirements applicable to employees with CDL's. DOT's Policy applies to mechanics who are required to maintain commercial motor vehicles and employees who are required to hold CDL's. The Policy states that the penalty for a second positive drug test, for certain listed drugs, including marijuana, is dismissal. Neither the authorizing federal legislation, nor the USDOT regulations require dismissal after a second drug test.

Wayne Armstrong, Administrative Assistant to DOH's Director of Human Resources, testified that affected employees were given notice of the Policy, and that they would be subject to random drug testing. He stated that information sessions were held in every county in the state, copies of the

Policy were made available to employees, and the Policy is now available on-line.

Mr. Armstrong stated there was no evidence that Grievant was intoxicated or under the influence of any drug during work hours, nor was there any evidence that he ingested any drug during work hours. (See footnote 3)

Respondent argued it has a clear and unambiguous drug testing policy which complies with federal regulations, and the policy requires that the first failure of a random drug test results in an immediate five day suspension and treatment, and that a secondfailure results in dismissal. It asserted Grievant was covered by this policy, had notice of the policy, and was terminated in accordance with the policy.

Grievant pointed out that there was no allegation that Grievant's work was affected at any time. Grievant challenged the first drug test, and argued he was led to believe that after two years passed, he got a fresh start. As Grievant did not grieve the prior discipline he received for an adulterated sample, “the merits of [that action] cannot be placed in issue now. Jones v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); See Stamper v. W. Va. Dept. of Health & Human Resources, Docket No. 95- HHR-144 (Mar. 20, 1996); Womack v. Dept. of Admin., Docket No. 93-ADMN-430 (Mar. 30, 1994). Furthermore, all the information contained in the documentation of Grievant's prior discipline must be accepted as true. See Perdue v. Dept. of Health & Human Resources, Docket No. 93-HHR-050 (Feb. 4, 1994).” Aglinsky v. Bd. of Trustees, Docket No. 97-BOT-256 (Oct. 27, 1997).

As to Grievant's argument that he was led to believe the slate would be wiped clean after two years, he offered no evidence of this. The suspension letter stated, “any future positive controlled substance test result or alcohol concentration of 0.02 or greater will be cause for dismissal.”

Grievant also argued that DOH did not establish the chain of custody necessary to place the second drug test into evidence, because the person who was present when Grievant's urine specimen was sealed and labeled did not testify, nor did anyone from the testing laboratory. The only testimony offered was that of the doctor in Louisiana who interpreted the test report provided to him by the testing laboratory, Dr. Robert Pflug. Dr. Pflug never saw the urine specimen. He is certified as a Medical Review Officer, and testified that before he interprets the drug test reports, he makes sure the proper forms have been used, and everyone who is supposed to sign the documents, from the time the specimen is collected until the time he receives the results, has signed the forms. Hereferred

to this as verifying the chain of custody. He testified that he had verified the chain of custody on the urine specimen taken July 26, 2000, in accordance with USDOT requirements, and interpreted the test report, and that Grievant had tested positive for marijuana. He further testified that he had talked to a person identifying himself by name and social security number as Grievant, after he had interpreted the test report, and Grievant had told him he had used marijuana on July 4. Dr. Pflug explained that marijuana can be detected through a urine test several weeks after its use.

DOT's Policy provides with regard to collecting the specimen and maintaining the chain of custody as follows:

> Collectors will be trained in the procedures established by the federal regulations and will conduct all testing in accordance with those standards.
>
> At the collection site, employees will be asked to provide a urine sample for analysis. The split sample method of collection will be utilized, meaning the larger sample will be divided into two (2) smaller ones. Both bottles will be sealed and shipped in a single container to the laboratory for analysis. Chain of Custody forms and procedures, established in 49 CFR part 40 and part 382, apply to all urine collections and will easily identify test results so they are attributed to the correct employee. Laboratories have to be certified to perform the analysis by the U.S. Department of Health and Human Services. A Medical Review Officer, (a licensed Physician) certifies the results of the drug tests to the Human Resources Division.

As an administrative agency reviewing workplace grievances, chain of custody arguments are not common in Grievance Board proceedings. However, this same chain of custody argument was raised in a recent grievance, where the grievant, a probationary employee, had tested positive for marijuana, and the test result was challenged. The Administrative Law Judge stated:

> Dr. Pflug testified that all the evidence he had before him indicated the chain of custody had been maintained and this statement was not disproved. Thus it is clear that Respondent had presented evidence "that a reasonable person would accept as sufficient that a contested fact is more likely true than not", and Respondent has met its burden of proof Leichliter, supra.

McCoy v. Dep't of Transp., Docket No. 98-DOH-399 (June 18, 1999).

W. Va. Code § 29-6A-6 provides that in grievance proceedings:

> Formal rules of evidence shall not be applied, but parties shall be bound by the rules of privilege recognized by law. No employee shall be compelled to testify against himself or herself in a grievance involving disciplinary action. The burden of proof shall rest with the employer in disciplinary matters.

Even in applying the formal rules of evidence in a criminal proceeding, however, it is not necessary that every person who has ever touched a piece of evidence be called to testify about his or her contact with the item. "'It is only necessary that the trial judge, in his discretion, be satisfied that the evidence presented is genuine and, in reasonable probability, has not been tampered with.'" State v. Dillon, 191 W. Va. 648, 447 S.E.2d 583 (1994) (citing State v. Davis, 164 W. Va. 783, 266 S.E.2d 909 (1980)). The Supreme Court of Appeals of West Virginia has further specifically addressed whether a hearing examiner in an administrative hearing abused his discretion in admitting drug test results. The Court found no abuse of discretion where the hearing examiner found "no breaches of protocol occurred" in the submission of the specimen, and that the laboratory "did not indicate irregularities with regard to the sample." Stewart v. W. Va. Bd. of Examiners for Registered Professional Nurses, 197 W. Va. 386, 475 S.E.2d 478 (1996).

Applying the above analysis to the facts here, the undersigned concludes that Dr. Pflug's testimony establishes that the testing was conducted according to established policies, and that the documents show the chain of custody was maintained. This is sufficient, absent evidence to the contrary, to establish that the testing was in fact properly conducted upon a urine specimen provided by Grievant on July 26, 2000, and that marijuana was found to be present in Grievant's system.

Respondent has proven the charges against the Grievant. However, the undersigned may mitigate the discipline imposed if the penalty assessed is clearly excessive or clearly disproportionate to the offense. Factors to be considered in this analysis include the employee's past disciplinary record, the clarity of notice to the employee of the rule violated, whether the employee was warned about the conduct, andmitigating circumstances. Stewart v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-137 (Sept. 19, 1991). "[T]he work record of a long time civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." Buskirk, supra.

In this case DOT's Drug and Alcohol Testing Policy states clearly that a second positive test will result in dismissal. Respondent proved that it has taken steps to assure that all employees are made aware of the Policy. Grievant presented no evidence to dispute that he was aware of the Policy.

DOT's Policy, however, does not end the inquiry. DOT cannot, by adopting a policy, define good cause and eliminate consideration of the employee's work record espoused in Buskirk, supra. See

Conley v. Div. of Corrections, Docket No. 00-CORR-109 (June 30, 2000). DOT's Policy simply clearly defines the agency's view of good cause, and is one of the factors which must be considered.

This Grievance Board determined in Shoemaker v. West Virginia Department of Transportation/Division of Railroad Maintenance Authority, Docket No. 95-RMA-218 (September 29, 1995), that:

> The public has a significant interest in insuring that personnel who operate railroad equipment are not doing so while under the influence of drugs. Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989). Grievant worked for RMA in a safety-sensitive position, performing "covered service" as a train engineer. Thus, RMA demonstrated that Grievant's misconduct was of a substantial nature affecting the rights and interests of the public.

Mr. Shoemaker had tested positive for cocaine, three months after returning to work from voluntary drug rehabilitation treatment for drug abuse, although the decision does not state that he was under the influence of cocaine while on the job. The decision further found that "given the nature of Grievant's employment, RMA has established that discharge is an appropriate penalty, notwithstanding that this was Grievant's first offense after more than seven years of employment." Id. Since Shoemaker was issued, the Supreme Court of the United States, in a 9-0 decision, has touched on the issues at hand, in upholding an arbitrator's decision that a second positive drug test did not amount to "just cause" for termination of an employee, where the labor contract provided that an employee could only be terminated for "just cause." Eastern Associated Coal Corp. v. United Mine Workers of America, District 17, 2000 U.S. Lexis 8083, Appeal No. 99-1038 (Nov. 28, 2000). The arbitrator had reinstated the employee, and imposed instead a suspension without pay of slightly more than three months, reimbursement by the employee to the employer and the union for the arbitration cost, continued participation in a substance abuse program, continued participation in random drug testing, and that the employee sign a letter of resignation which would be effective should he test positive for drugs within five years. Although the case at hand differs from Eastern Associated Coal in that there is no contract to be interpreted, nor is there an arbitrator's decision to be evaluated under applicable standards, the Court's discussion of public policy is instructive, as is the arbitrator's decision initially that the employer had not demonstrated "just cause" for termination of the employee.

The Court noted that the provisions of the Omnibus Transportation Employee Testing Act of 1991

"make clear that the Act's remedial aims are complex. The Act says that 'rehabilitation is a critical component of any testing program,' § 2(7), 105 Stat. 953, that rehabilitation 'should be made available to individuals, as appropriate,' ibid., and that DOT must promulgate regulations for 'rehabilitation programs,' 49 U.S.C § 31306(e)." Nonetheless, USDOT in its regulations promulgated pursuant to this Act, did not require employers to provide rehabilitation or to "'hold a job open for a driver,'" leaving these decisions to "'management/driver negotiation.'" The Court further noted that the Act does not forbid reinstatement in a safety sensitive position after the statutory time periods. The Court stated:

> Regarding drug use by persons in safety-sensitive positions, then, Congress has enacted a detailed statute. And Congress has delegated tothe Secretary of Transportation authority to issue further detailed regulations on that subject. Upon careful consideration, including public notice and comment, the Secretary has done so. Neither Congress nor the Secretary has seen fit to mandate the discharge of a worker who twice tests positive for drugs. We hesitate to infer a public policy in this area that goes beyond the careful and detailed scheme Congress and the Secretary have created.
>
> We recognize that reasonable people can differ as to whether reinstatement or discharge is the more appropriate remedy here. But both employer and union have agreed to entrust this remedial decision to an arbitrator. We cannot find in the Act, the regulations, or any other law or legal precedent an "explicit," "well defined," "dominant" public policy to which the arbitrator's decision "runs contrary."

(footnote omitted.)

The arbitrator had relied upon the fact that the employee was not an addicted user, but rather had been found in a previous arbitration when he tested positive the first time, to be a recreational user; and the employee's statement, under oath, that some personal problems had caused this one time lapse in judgment. The employee's 17 year work record had been considered after the first positive test, and apparently was not factored in again. The arbitrator essentially gave the employee one more chance. Eastern Associated Coal Corp. v. United Mine Workers of America, District 17, 66 F. Supp. 2d 796 (S.D.W. Va. 1998).

In this case, several DOH employees, including employees who had supervised Grievant, testified that Grievant was an excellent employee during his 10 years of employment, and an excellent equipment operator. He has never been disciplined except for his prior suspension after a positive drug test. Testimony was also offered as to Grievant's solid reputation in the community, as a

valuable member of the community, willing to help others in need of assistance. He has no known history of violence or disruptive activity. No evidence was presented that Grievant was a drug addict, drug dealer, or even a known user of drugs. There is no allegation that Grievant was using marijuana on the job, or that he was under the influence while performing his duties. The reason DOT has a drug testing policy at all is because federal law requires it. While DOT's stance on drug use by employees required to hold CDL's is commendable, it does not embody the rehabilitative objectives envisioned by federal law when random drug testing became a requirement. It was not the goal of mandatory drug testing that employees who occasionally partake of the listed drugs be fired. In this instance, DOT's severe, non-rehabilitative, Policy has resulted in the discharge of an otherwise model employee. Certainly, DOH should not be required to hold a job open for a habitual drug user who requires months of rehabilitation in order to be certified to return to work, and federal law does not require this. However, there is no evidence that this is the case here. Dismissal is too severe a penalty under the facts of this case. The dismissal should be reduced on Grievant's work record to a thirty day suspension without pay. However, he cannot be returned to work until he is certified for return to work by a substance-abuse professional. To the extent Grievant has annual leave, he must use his annual leave for the period of time during which he must undergo treatment, and then take a leave of absence to complete the rehabilitation, if necessary, in accordance with the Division of Personnel's rules.

Grievant is cautioned not to read this decision as authorizing him to use drugs while on his own time. Grievant must recognize that as an employee with a CDL in a safety- sensitive position, he is subject to requirements to which other employees are not subject. DOH cannot hold Grievant's job open each time he tests positive for drugs while he goes through treatment.

The following Findings of Fact are made based upon the record developed at Level IV.

Findings of Fact

1. Grievant has been employed by DOH for at least ten years as an Equipment Operator. Prior to his dismissal he was an Equipment Operator III. 2. Grievant's position requires him to hold a CDL. Therefore, pursuant to federal statute, USDOT regulations, and DOT's Drug and Alcohol Testing Policy, he is subject to random drug and breath alcohol testing as a condition of his employment. Grievant was aware of DOT's Policy.

3. On February 11, 1998, Grievant was suspended for five days without pay for testing positive on a random drug test. The test showed that the urine sample was adulterated, or had been tampered with. DOT's Policy defines this as a positive test. Grievant did not grieve this suspension

4. On July 26, 2000, Grievant submitted to random drug testing, supplying a urine specimen as required.

5. Dr. Robert Pflug, a certified Medical Review Officer, received and interpreted the report from Grievant's drug test. He verified the chain of custody in accordance with USDOT requirements, and determined that Grievant had tested positive for marijuana.

6. Dr. Pflug talked to Grievant on the telephone after interpreting the test report. Grievant told him he had used marijuana on July 4.

7. July 4, 2000, was a state holiday, and Grievant did not work that day. Grievant did not appear at work while under the influence of a controlled substance, he did not ingest a controlled substance while on the job, nor was his work performance impaired in any way on the day he tested positive for marijuana use.

8. On August 2, 2000, Grievant was dismissed from his employment by DOH, effective August 16, 2000, because his urine sample tested positive for marijuana.

9. Except for his five day suspension for testing positive for drug use, Grievant was never disciplined by DOH. He was a good employee, and a good equipment operator.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Pursuant to W. Va. Code § 29-6A-6, the burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. Respondent proved the charges against Grievant.

3. The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." House v. Civil Service Comm'n, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which

means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, Buskirk v. Civil Service Comm'n, 332 S.E.2d 579, 581 (W. Va. 1985); Oakes v. W. Va. Dept. of Finance and Admin., 264 S.E.2d 151 (W. Va. 1980); Guine v. Civil Service Comm'n, 141 S.E.2d 364 (W. Va. 1965)." Scragg v. Bd. of Directors W. Va. State College, Docket No. 93-BOD-436 (Dec. 30, 1994).

4. The undersigned may mitigate the discipline imposed if the penalty assessed is clearly excessive or clearly disproportionate to the offense. Factors to be considered in this analysis include the employee's past disciplinary record, the clarity of notice to the employee of the rule violated, whether the employee was warned about the conduct, and mitigating circumstances. Stewart v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-137 (Sept. 19, 1991). "[T]he work record of a long time civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." Buskirk, supra. 5. The provisions of the Omnibus Transportation Employee Testing Act of 1991 “make clear that the Act's remedial aims are complex. The Act says that 'rehabilitation is a critical component of any testing program,' § 2(7), 105 Stat. 953, that rehabilitation 'should be made available to individuals, as appropriate,' ibid., and that [US]DOT must promulgate regulations for 'rehabilitation programs,' 49 U.S.C § 31306(e).” Eastern Associated Coal Corp. v. United Mine Workers of America, District 17, 2000 U.S. Lexis 8083, Appeal No. 99-1038 (Nov. 28, 2000). Nonetheless, the USDOT in its regulations promulgated pursuant to this Act, did not require employers to provide rehabilitation or to “'hold a job open for a driver,'” leaving these decisions to “'management/driver negotiation.'” Id. The Act does not forbid reinstatement in a safety sensitive position after the statutory time periods.

> Regarding drug use by persons in safety-sensitive positions, then, Congress has enacted a detailed statute. And Congress has delegated to the Secretary of Transportation authority to issue further detailed regulations on that subject. Upon careful consideration, including public notice and comment, the Secretary has done so. Neither Congress nor the Secretary has seen fit to mandate the discharge of a worker who twice tests positive for drugs. We hesitate to infer a public policy in this area that goes beyond the careful and detailed scheme Congress and the Secretary have created.

Id.

6. As a long-time employee with a good work record, with only one other disciplinary action against him, with no allegation that Grievant ever operated equipment while under the influence of drugs or alcohol, with no allegation that Grievant was a habitual user, and given the rehabilitative goals of the federal law requiring random drug testing of employees holding CDLs, dismissal was too severe a penalty in this instance for a second positive drug test for marijuana.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to his position as an Equipment Operator III, provided he completes the rehabilitation program prescribed by a substance-abuse professional, if any, after being evaluated by the substance-abuse professional, and passes a return-to-duty drug test. Grievant will then be subject to at least six random drug tests during the first year after he returns to work, as required by law. As Grievant cannot be reinstated until he meets these prerequisites, no back pay or benefits will be awarded.

Any party or the Division of Personnel may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: December 22, 2000

Footnote: 1

Grievant was represented by Mark Hobbs, Esquire, and Respondent was represented by Jennifer Francis, Esquire.

Footnote: 2

Grievant was required to undergo a second drug test shortly after the adulterated sample was tested, and apparently passed the second test.

Footnote: 3

The Omnibus Transportation Employee Testing Act of 1991, Public Law Number 102- 143, 105 Stat. 953, requires a

minimum one year CDL suspension for persons who drive a commercial motor vehicle while under the influence of drugs or alcohol, and a minimum ten year CDL suspension for a second offense of operating a commercial motor vehicle while under the influence. 49 U.S.C.S §§ 31310(b)(1)(A) and (c)(2).