DANIEL TEEL

Grievant,

v. **DOCKET NO. 01-BEP-466**

BUREAU OF EMPLOYMENT PROGRAMS/

WORKERS' COMPENSATION DIVISION,

Respondent.

DECISION

On August 6, 2001, Daniel Teel, Grievant, filed this grievance directly to Level IV against his employer, Bureau of Employment Programs, Workers' Compensation Division (BEP), alleging he was unfairly terminated due to alcoholism. He further stated “Under the American Disability Act [sic], I should have been allow[ed] to seek help for my illness.” As relief, he sought to be reinstated to his position with full pay and benefits, and to have all records of his termination removed, and to be made whole in every way.

Hearings were held on February 4, 2002, and April 12, 2002, at the Grievance Board's Charleston Office, with Grievant represented by counsel, Scott E. Elswick, Esq., and Respondent represented by Assistant Attorney General Patricia Shipman, Esq. The parties agreed to submit their proposed findings of fact and conclusions of law by May 31, 2002, and the matter became mature for decision on that date. Based on the testimony and evidence adduced at these hearings, I find the following facts were proven by a preponderance of the evidence:

FINDINGS OF FACT

1. Grievant was employed as a telephone operator, Office Assistant I (OA1), in BEP's Worker's Compensation Division until he was terminated for cause on August 1, 2001. His duties consisted of answering the telephone and directing calls, clerical work, answering questions and keeping supervisors informed of any problems.

2. On August 1, 2001, Grievant was given a letter from Robert J. Smith, Commissioner of BEP, stating in part:

> This letter is to inform you of my decision to dismiss you from your position as an Office Assistant I in the Workers' Compensation Division of the Bureau of Employment Programs. This action is effective immediately, Wednesday, August 1, 2001, as a result of your presenting yourself for work in an intoxicated state on Thursday, July 19, 2001, Friday, July 20, 2001 and Tuesday, July 31, 2001. This action is taken in accordance with Section 12.2 of the Administrative Rule of the West Virginia Division of Personnel.

[ALJ Exhibit No. 1]. The letter further referenced a provision of BEP Administrative Directive 6400.01, Employee Responsibility, which states in part, “[T]he following behaviors are prohibited: d)Using . . . alcoholic beverages on the job.”

3. Grievant received and signed a copy of Administrative Directive 6400.01 on June 21, 2001. [Resp. Exh. No. 1]. That directive also states:

> A) Employees will be counseled individually and in private on any behavior or grooming problems and given suggestions for improvement.
>
> B) Should deviant and unacceptable behavior continue, proper disciplinary procedures will be initiated, in accordance with Policy 6400.20/DISCIPLINARY ACTIONS.

___4. Policy 6400.20, which Grievant received and acknowledged on June 21, 2001, provides for a series of progressively severe disciplinary actions from oral reprimand to dismissal. However, it does contain a proviso stating:

> Flagrant misconduct which may result in demotion or dismissal without previous disciplinary action includes, <u>but is not limited to</u>, gross misconduct, theft, conviction of a felony related to the job, use of political influence to gain employment advantage, intoxication or use of unauthorized drugs on the job, insubordination, or willful destruction of State/Bureau property.

[Resp. Exh. No. 2].

5. Policy 6400.20 also states in part: “Disciplinary action will be determined by the circumstances of the misconduct, its seriousness, and the employee's work record and past disciplinary actions.”

6. Grievant acknowledged receipt of the West Virginia State Drug-Free Workplace Policy on June 21, 2001. This policy states in part:

> B. This 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 social occasions having a connection with the job or the agency.
>
> C. The unlawful possession, use, manufacture, distribution, or dispensation of alcohol and/or a controlled substance; the reporting to work under the influence of a controlled substance or alcohol; the presence of a non-medically prescribed controlled substance or alcohol in the body system; or possession of drug paraphernalia are all prohibited in the workplace.
>
> ___. . .
>
> Employees who are in violation of the provisions of the Drug-Free Workplace Act shall be subject to disciplinary action up to and including termination and may be required to participate in a drug rehabilitation or assistance program.

[Resp. Exh. Nos. 3 and 5].

7. Grievant was given a written reprimand on August 1, 1994, for violation of the Drug-Free Workplace Policy, stating that on July 28, 1994, Grievant was observed at work in an intoxicated state. [Resp. Exh. No. 4].

8. On June 3, 1998, Grievant was issued a written warning and "notice of final warning of impending disciplinary action if another incident of a similar nature should occur in the future." This letter cited the Drug-Free Workplace Policy, and stated that Grievant had voluntarily admitted to the use of alcohol during working hours. It further cited "[t]he smell of alcohol on [Grievant's] presence on May 29, 1998." The letter warned Grievant that:

> The next time you appear at work smelling of alcohol and/or with your speech being slurred, gate [sic] being staggered and continual deficiencies in your work, will be grounds for us to conclude that you are under the influence. As previously offered, you may volunteer to submit to a breath-a- lizer or blood-alcohol examination to show why you are not in violation of the Drug-Free Workplace Policy . . . If we should have any reason to believe that you have reported to work with alcohol in your system, you will be disciplined, up to and including dismissal.

[Resp. Exh. No. 4]. At no time during the course of events relevant to this grievance did Grievant request a test to determine whether he was in violation of the Drug-Free Workplace Policy, and Respondent did not offer a test.

9. On June 5, 1998, Grievant was given another letter stating in part:

> On the afternoon of June 4, 1998 the smell of alcohol appeared to be coming from

> your presence again. You informed me you had an appointment with someone at Shawnee Hills Monday June 8, 1998 to assist you with this behavior. I will hold off from any additional disciplinary action until after you attend this appointment.

[Resp. Exh. No. 4].

10. On April 4, 2001, Grievant was given a memorandum from George L. Flick, III, Interim Director, Claims, reciting provisions of the Drug-Free Workplace Policy, and stating that Grievant was sent home by his supervisor, Melissa McClain on March 13 and 14, 2001, and April 2, 2001, because he had been intoxicated. The memorandum further stated, “In order to continue employment with the Division you are to participate in an alcohol rehabilitation program. Any further instances of reporting to work in an intoxicated state will result in immediate termination of employment.” [Resp. Exh. No. 8].

11. Attached to the April 4, 2001, memorandum when it was given to Grievant were administrative file notes made by Ms. McClain on March 13, 14 and 16 and April 1 and 2, 2001. These notes memorialized Ms. McClain's observations of Grievant's erratic behavior and the smell of alcohol on March 13 and April 2, as well as Grievant's oraladmission to her on March 14 of long-term alcohol addiction, that he had completed an ineffectual rehabilitation program, and that he felt he could “drink himself sober.” [Resp. Exh. No. 8] (See footnote 1) .

12. Grievant provided Mr. Flick an undated letter from Teresa Lipscomb, a licensed social worker practicing with Family Dynamics Counseling and Mediation Services, that stated: “Please allow Mr. Teel to return to work on April 23, 2001. Mr. Teel has committed to participating in a Twelve Step Program on a daily basis and participating in Individual Therapy three times a week.” [Resp. Exh. No. 7].

13. Grievant resigned in June, 2001, and after about a week, he asked to be reinstated. While he was off, Ms. McClain was replaced as supervisor of the Grievant's unit by Beatrice Harper, who had been a back-up supervisor. After the Commissioner agreed to reinstate Grievant, Mr. Flick asked Ms. Harper if she would accept Grievant back on his old unit. Ms. Harper believed Grievant had been treated for his alcoholism problems, and was “happy to have him come back” so he could have a fresh start. He returned as an OA1 on June 16 or 17, 2001, replacing the temporary employee who had been filling his old position. 14. In her role as back-up supervisor, Ms. Harper was familiar with Grievant's prior work and was aware of the issues related to Grievant's alcohol use, including the alcohol-related medical problems he complained of. She had worked with Grievant and observed his

past behavior. She had reviewed Grievant's files, including Ms. McClain's file notes and discussed Grievant with Ms. McClain several times. She had also discussed Grievant with Mr. Flick.

15. Ms. Harper was told in June, 2001, after Grievant returned to work, that Grievant had not completed the treatment program she had assumed he completed after he resigned. Grievant told her he had completed the program, but it did not help.

16. After he returned to work in June, Ms. Harper smelled alcohol in Grievant's presence on more than one occasion. The first time, she counseled Grievant informally, and he said he would not come to work like that anymore. She observed that Grievant's behavior changed throughout the day, starting out good but getting worse as the day progressed. On one occasion, she overheard Grievant tell another employee he had drank during lunch.

17. Ms. Harper began to have trouble getting Grievant to do his work correctly and to stay at his workstation. He would disappear for breaks for too long, act raucously, talk loudly and discuss personal matters with customers. Grievant's coworkers complained to Ms. Harper about his behavior and the smell of alcohol. 18. Grievant called Ms. Harper on Monday, July 30, 2001, and said he could not come to work because he had a doctor's appointment. He had called her the previous Saturday and left a voice-mail message that he would not be in to work on Sunday because he had a doctor's appointment. Grievant worked Monday through Friday and was not expected to work on Sunday. Because he had insufficient sick leave to cover the Monday absence, Ms. Harper advised him he would have to use annual leave.

19. On July 31, 2001, Ms. Harper received reports from Anita Vermillion, Susan Spencer, Deborah Shuff and another employee about Grievant's odd behavior. On the same day, she called to Grievant while he was at his desk and he kept his head down and ignored her.

20. Prior to that day, she had had occasion to send Grievant home during the day when he said he did not feel good because his liver hurt. She saw that at those times his eyes were glassy, his speech was slurred, and he was leaning on his cubicle. Grievant attributed his condition to his liver illness and medication he was taking for it. (See footnote 2)

21. While Ms. Harper was Grievant's supervisor, she felt Grievant was an ineffective worker two days out of five, usually worse at the beginning of the week. 22. Sherry Ghanin is an OA3 who worked in the cubicle adjacent to Grievant after he was reinstated, and who shared some of Grievant's telephone duties. She observed that Grievant would disappear for varying amounts of time

throughout the day - more often than is allowed for regular breaks - leaving her to answer all the calls that came in. She also recalled that Grievant would report for work looking “glassy-eyed,” and say he was ill. She saw Grievant stand on chairs, “holler over cubicles,” and “get really loud.” While she never smelled alcohol on Grievant, she has sinus problems and cannot smell anything very well. In her opinion, Grievant rarely did any work unless the phone was ringing.

23. Judy C. Humphreys was a friend and coworker of Grievant, who had previously worked with Grievant, but at the times relevant to this grievance, worked in another part of the building, seeing him about twice a week in the hall or when he came to her office for coffee. She did see him outside the building on the way in on the morning of July 31, 2001, and did not smell alcohol. When she saw him, he seemed “perfectly normal,” was not acting strange, was in control and did not have glassy eyes.

24. Linda Smith is a deputy claims manager who worked in the same area as Grievant, approximately 15 feet away. She never smelled alcohol on Grievant, and considered him a quiet, soft-spoken gentleman. She does not remember July 31, 2001, being exceptional. 25. Susan Sizemore worked on a different unit but in the same area as Grievant, about ten feet away. She had no specific recollection of July 31, 2001, but never smelled alcohol on Grievant.

26. John Marisco is a claims manager who worked with Grievant from July 1998 to December 1999, and remained a friend thereafter. He saw Grievant often when they would take lunch or other breaks together, walk on the walking path two or three times per week, or visit each other at their workstations. He saw Grievant two or three times on the morning of the day he was terminated, and claims not to have smelled alcohol, and never to have seen him intoxicated.

27. Bob Bess, Manager of Safety and Loss Control, was asked to drive Grievant in Grievant's car to his son's place of employment on July 31, 2001, the day he was terminated. When they got in Grievant's car, which was parked in a visitor's spot, Mr. Bess observed Grievant remove a bottle of what looked like liquor from under the seat and drink from it, while they were still in the parking lot and while they were under way.

28. On July 19, 2001, Bernard Bannister, a customer service and security officer who mans the front desk of the BEP office building and patrols the parking lot, saw Mr. Teel entering the building that morning and spoke to him. Although he did not smell alcohol, Grievant was walking normally. When Mr. Bannister asked, Grievant denied he had been drinking. Mr. Bannister, who “used to

drink," nevertheless thought Grievant hadbeen drinking, because he observed that Grievant looked tired and his face was red. Mr. Banner suggested to Grievant that he should go home, or people would think he had been drinking, Grievant agreed, and left. Mr. Banner at no time saw Grievant drinking on the job or in the parking lot.

29. Brenda Knight is a deputy claims manager who was Grievant's back-up supervisor under both Ms. McClain and Ms. Harper. She regularly observed Grievant. There were less than five times, all in the last few months, that she could smell alcohol on Grievant when he was away from his workstation. Other times he was away she did not smell alcohol. Grievant told her the smell was because he had been drinking the night before. She did not see Grievant drinking.

30. On occasion, Ms. Knight observed that Grievant would be away from his desk more often after lunch, and would also be laughing and joking more. She heard about an incident where Grievant had been standing in his chair, but did not see it.

31. Deborah Shuff was one of Grievant's coworkers, who recalled that on July 31, 2001, Grievant was loud and disruptive, yelling across the office and shutting off the copier when she tried to use it.

32. Connie Johnson was a district manager and call center manager at the time Grievant was employed by Respondent, and was a liaison between employees and the executive director. On the day Grievant was terminated, Ms. Harper and several other employees tried to contact her regarding disturbances caused by Grievant. She went to Grievant's work area to investigate, but he was no there. In a later meeting, she observed that Grievant was "subdued," which she felt was unusual. She did not smell alcohol.

33. Margie Thomas, an employee in the Workers' Compensation Division, also observed Grievant in the building lobby on July 19, 2001. She likewise formed the impression from his physical appearance that he had been drinking, although she did not smell alcohol and noticed no odd behavior.

34. Anita Vermillion, a claims manager who works in close proximity to Grievant, observed him on or about July 31, 2001. She saw Grievant standing on his chair looking over the cubicle wall, being loud and talkative, and she could smell alcohol. She did not see him drinking. She reported her observations to Ms. Harper.

35. Susan Spencer, a Claims Deputy III also under the supervision of Ms. Harper, observed

Grievant outside the building on July 31, 2001, coming back from lunch with Mr. Marisco. At that time, she detected a strong smell of alcohol emanating from Grievant.

36. Grievant did report to work while under the influence of alcohol after he had been repeatedly warned not to do so.

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.

In sum, the evidence shows Grievant had some problems at work related to his alcohol use. After several disciplinary actions and on the verge of being terminated, he resigned, ostensibly to seek treatment. When he asked to be reinstated to his former position, his supervisors assumed he had successfully been treated, and welcomed him back. Whether or not he actually did complete treatment, he continued to have the same problems as before. When his behavior stretched his supervisors' patience to the limit, he was terminated.

Part of Grievant's claim is founded on a violation of the Americans with Disabilities Act (ADA), Public Law 101-336. It has previously been held that this Grievance Board does not have jurisdiction to determine whether the ADA has been violated, based upon the West Virginia Supreme Court of Appeal's holding in Vest v. Board of Education ofCounty of Nicholas, 193 W.Va. 222,455 S.E.2d 781 (1995). *See* Prince v. Bd. of Trustees/W. Va. Univers., Docket No. 7-BOT-276 (Nov. 5, 1997); Keatley v. Mingo County Bd. of Educ., Docket No. 95-29-257 (Sept. 25, 1995). Accordingly, this part of Grievant's claim has not been considered.

A large proportion of the evidence bears on Grievant's behavior and disciplinary history before he resigned. While none of this past history was admitted as a basis for the disciplinary action after he was reinstated, it is nevertheless relevant because it lends credibility to the inferences made based on observations of Grievant's consistent behavior after he returned. None of the prior disciplinary actions related to his alcoholic behavior was grieved or otherwise challenged at the time they

occurred, and are therefore presumed to have been valid.

Respondent alleged in its termination letter to Grievant that he presented himself for work "in an intoxicated state on Thursday, July 19, 2001, Friday, July 20, 2001, and Tuesday, July 31, 2001." [ALJ Exh. No. 1]. "Intoxication" is not precisely defined in the context of state employment and the Drug-Free Workplace policy as it is in driving under the influence cases. However, the vernacular definition encompasses various altered behavioral states and deteriorated physical capacities caused by consumption of a substance such as alcohol. *See* Black's Law Dictionary, West Publishing Co., St. Paul, Minn., 1979 (5th Ed.); The American Heritage Dictionary, Houghton Mifflin Co., Boston,1991 (2nd Coll. Ed.). These commonly accepted meanings are broad enough that, for purposes of the Drug-Free Workplace Policy, "intoxicated" and "under the influence" are synonymous. Hence, Respondent is not required to prove a certain level of alcohol in Grievant's body system or a certain level of impairment in order to sustain its charge of "intoxication" as a violation of the Drug-Free Workplace Policy, which simply prohibits "the reporting to work under the influence of a controlled substance or alcohol; [or] the presence of a non-medically prescribed controlled substance or alcohol in the body system."

Since no scientific tests were performed to confirm the presence or level of alcohol in Grievant's body, Respondent bases its determination on the observations of various coworkers of Grievant. Since none of these coworkers actually observed Grievant imbibing alcoholic beverages, it must be determined if the behavior they describe is consistent enough with the behavior of intoxicated persons that the inference may be safely drawn. In Unemployment Compensation cases, the Supreme Court of Appeals of West Virginia has, consistent with other jurisdictions, found that "evidence of 'drinker's breath' alone is insufficient to support a finding of intoxication." Federoff v. Rutledge, 175 W. Va. 389, 332 S.E.2d 855 (1985). In that case, the employer could not support a finding that the claimant was intoxicated or under the influence based on one person's observation of "red eyes"and a smell of alcohol, (See footnote 3) where his walk and speech were normal, even though the claimant had a history of alcohol-related disciplinary problems, was known to be alcoholic and reported to work four hours late. While the employer's charge of gross misconduct by intoxication was not proven by such evidence, the court did uphold a determination of simple misconduct because the employee appeared at work smelling of alcohol after he had been warned not to.

"Perdue v. Dept. of Health and Human Resources/Huntington State Hospital, Docket No. 93-

HHR-050 (Feb. 4, 1994), held, in Conclusion of Law Number 4, that it was a violation of the Drug-Free Workplace Policy for an employee to report to work with 'alcohol on his breath and in his body system.'" Evans v. W. Va. Dep't of Health and Human Resources, Docket No. 97-HHR-280 (Nov. 12, 1997). "It was sufficient proof that Grievant smelled of alcohol." Evans, *supra.* In Evans, three witnesses detected the smell of alcohol and two witnesses reported a disturbed gait, while another witness who was in close enclosed proximity with the grievant reported he did not smell alcohol. The employee in that case had been specifically directed not to report to work smelling of alcohol. In this case, the witness' observations are inconsistent but not always conflicting. Ms. Ghanin, who did not smell alcohol on Grievant, had a sinus problem. Her failure to detect the smell of alcohol does not necessarily mean the odor was undetectable by others. Likewise, the failure of Ms. Smith to notice unruly behavior by Grievant or the smell of alcohol on him would more likely indicate that she was unobservant more than it would indicate that others who did observe these things were not truthful. By contrast, direct observations of Grievant's conduct are reliable indicators that the conduct did occur. In other words, not seeing Grievant in an intoxicated state does not mean he was not intoxicated, but seeing him in an intoxicated state does mean he was intoxicated.

Grievant's prior history of alcohol-related work problems lends further support to the inference that similar behavior later is likewise alcohol-related. Witnesses reported the smell of alcohol and erratic behavior after June, 2001, when Grievant denied being under the influence of alcohol. The same behaviors and smell of alcohol were observed before he resigned, and he admitted that alcohol use caused those behaviors.

Mr. Marisco's testimony does contradict that of other witnesses, but it is not credible. Although his demeanor while testifying gave every indication of reliability, "demeanor is only one of the factors to be considered in assessing the credibility of a witness. Other factors include the witness' opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of witness' information. See Perdue v. Dept. of Health & Human Resources, Docket No. 93-HHR-050 (Feb. 4, 1994)." Meyers v. Dep't of Transportation/Div. of Highways, Docket No. 01-DOH-592 (April 1,2002).

Mr. Marisco's personal friendship with Grievant is a possible motive for bias and some of his

statements were implausible, evidencing that bias. Although the two spent a great deal of time together, Mr. Marisco claims Grievant never discussed his alcoholism. He also claims he never smelled alcohol on Grievant or observed inappropriate behavior. Grievant, however, showed a propensity to discuss his personal problems with anyone who would listen, including other less familiar coworkers and his supervisor. Grievant admitted past use of alcohol in the workplace, and other persons observed him intoxicated at work. It is highly unlikely that casual observers would notice overt behavior that went unnoticed by Grievant's friend who saw him for extended periods several times every day. For these reasons, Mr. Marisco's testimony is given little weight.

Grievant asserts in his brief that it is the testimony of Ms. Harper that is inconsistent and not credible. However the inconsistency stems from her testimony's contradiction of Mr. Marisco's. Further, her demeanor was forthright and she lacked any motive to prevaricate. Instead, the record indicates she went above and beyond the effort one wouldexpect of a supervisor to give Grievant the opportunity to maintain his position, but the leeway she gave him was abused.

Respondent met its burden of providing enough evidence to prove that it was more likely than not that Grievant violated the Drug-Free Workplace Policy by working while under the influence of alcohol, despite repeated warnings of the consequences for doing so. “Violation of the West Virginia Drug-Free Workplace Policy is an offense which may warrant dismissal of a civil service employee. [Citations Omitted].” Smith v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-512 (June 1, 1999). For these reasons, supported by the conclusions of law below, this grievance must be denied.

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. The Grievance Board does not have jurisdiction to determine whether the Americans with Disabilities Act has been violated. *See,* Vest v. Board of Education of County of Nicholas, 193 W.Va. 222, 455 S.E.2d 781 (1995). *See* Prince v. Bd.

of Trustees/W. Va. Univers., Docket No. 7-BOT-276 (Nov. 5, 1997); Keatley v. Mingo County Bd. of Educ., Docket No. 95-29-257 (Sept. 25, 1995).

2. The common definition of "intoxication" encompasses various altered behavioral states and deteriorated physical capacities caused by consumption of a substance such as alcohol. *See* Black's Law Dictionary, West Publishing Co., St. Paul, Minn., 1979 (5th Ed.); The American Heritage Dictionary, Houghton Mifflin Co., Boston, 1991 (2nd Coll. Ed.). These commonly accepted meanings are broad enough that, for purposes of the Drug-Free Workplace Policy, "intoxicated" and "under the influence" are synonymous.

3. "[E]vidence of 'drinker's breath' alone is insufficient to support a finding of intoxication." Federoff v. Rutledge, 175 W. Va. 389, 332 S.E.2d 855 (1985).

4. "Demeanor is only one of the factors to be considered in assessing the credibility of a witness. Other factors include the witness' opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence ornonexistence of any fact testified to by the witness, and the plausibility of witness' information. *See* Perdue v. Dep't of Health & Human Resources, Docket No. 93-HHR-050 (Feb. 4, 1994)." Meyers v. Dep't of Transportation/Div. of Highways, Docket No. 01-DOH- 592 (April 1,2002).

5. "[Perdue, *supra*] held, in Conclusion of Law Number 4, that it was a violation of the Drug-Free Workplace Policy for an employee to report to work with 'alcohol on his breath and in his body system.'" Evans v. W. Va. Dep't of Health and Human Resources, Docket No. 97-HHR-280 (Nov. 12, 1997). "It was sufficient proof that Grievant smelled of alcohol." Evans, *supra.*

6. "Violation of the West Virginia Drug-Free Workplace Policy is an offense which may warrant dismissal of a civil service employee. Rodak v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-536 (June 23, 1997); Perdue v. Dept. of Health & Human Resources, Docket No. 93-HHR-050 (Feb. 4, 1994); Kuhens v. W. Va. Div. of Highways, Docket No. 92-DOH-221 (Sept. 30, 1992)." Smith v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-512 (June 1, 1999).

7. Respondent met its burden of proving that the charges in its termination letter were accurate, warranting dismissal of Grievant for violation of the Drug-Free Workplace Policy.

For the foregoing reasons, this grievance is hereby **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 § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: June 10, 2002 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

These notes were admitted over the objection of Grievant. While they do not tend to prove Grievant was under the influence on the occasions mentioned in the termination letter, they are of limited benefit to clarify Respondent's institutional memory and the recidivist nature of Grievant's later behavior.

Footnote: 2

Grievant's counsel alluded several times to Grievant's various alcohol-related illnesses and to prescription medication he was taking for these illnesses, but at no time presented evidence to substantiate these conditions or explain what medications he was taking or their side-effects.

Footnote: 3

The court also noted that "the smell of alcohol" actually refers to the characteristic and identifiable smell of alcoholic beverages, since alcohol itself is odorless. Given that the aromatic portions of the beverages are unrelated to their alcohol content, smell alone is an unreliable indicator. Federoff, supra at 394, 859.