THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

TIFFANY JONES,
Grievant,

v. **Docket No. 2011-1212-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL,
Respondent.

DECISION

Grievant, Tiffany Jones, filed this grievance directly to level three on February 17, 2011, alleging that her termination was without good cause. She seeks to be made whole, including back pay with interest and restoration of benefits. The undersigned Administrative Law Judge conducted a level three hearing January 9, 2012, and June 28, 2012, at the Grievance Board's Westover office. Grievant appeared in person and by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Anne B. Ellison, Assistant Attorney General. This matter became mature upon receipt of the last of the parties' proposed findings of fact and conclusions of law on August 20, 2012.

Synopsis

Grievant was dismissed after she tested positive for the presence of marijuana in her system. Grievant was asked by her supervisor to report to a local emergency room for treatment after she inadvertently drank from a glass that contained gasoline. Grievant argues that there was not a sufficient reason to require her to report to the local hospital,

the urine sample was not correctly collected, and that dismissal was too severe under all the circumstances of the case. Under the very unique circumstances of this case, it was improper for Grievant to be disciplined because no reasonable basis for drug testing existed, and Respondent abused its discretion in dismissing Grievant.

The following findings of fact are based upon the record developed at level three.

Findings of Fact

1. Grievant was employed as a Health Service Worker at the William R. Sharpe, Jr. Hospital, a psychiatric care facility operated by the Bureau for Behavioral Health and Health Facilities of the Department of Health and Human Resources.

2. On December 27, 2010, Grievant was working at the hospital, and had brought a drink of tea from her house, which she left at the nurses' station while dispensing drinks to the patients on her unit.

3. When Grievant returned to the nurses' station and took a drink of her tea, she noticed right away that it tasted strange. A fellow employee was asked by Grievant to smell the drink, and he noticed that it smelled like gasoline. Other coworkers smelled Grievant's drink and also noticed that it smelled like gasoline.[1]

4. Grievant continued to work and did not complain to anyone of feeling sick or to any adverse effects as a result of the drink. She did indicate that she was tired from working four hours mandated overtime.

5. Jean Goff, Licensed Practical Nurse on Grievant's unit, arrived at work and was informed of the drink incident.

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[1]The West Virginia State Police performed testing on the Grievant's drink, and by forensic report dated January 10, 2011, reported the presence of gasoline in the drink.

6. Ms. Goff's supervisor, Debbie Hartman, requested that Grievant be sent to Stonewall Jackson Memorial Hospital for treatment. However, Grievant was not exhibiting or expressing any symptoms of ill effect and Ms. Goff was trying to get Grievant overtime relief so she could go home.

7. Grievant was seen and treated at Stonewall Jackson Memorial Hospital. Grievant was instructed that her time spent at the emergency room on December 27, 2010, would not be compensated work time. Grievant chose to file a worker's compensation claim.

8. Janice Woofter, Chief Nurse Officer, informed Grievant on January 19, 2011, that a urine test received from Stonewall Jackson Memorial Hospital tested positive for THC. Grievant denied using marijuana.[2]

9. On that same date, Grievant requested that Respondent retest her for the presence of THC in her system.

10. Donna Smith, Human Resource Director, met with Ms. Woofter and Grievant when they approached her to arrange the gathering of a urine sample to be drug tested. Ms. Smith informed Grievant that she could not make that decision, and that she would have to contact her supervisor.

11. Ms. Smith was informed that she did not have to conduct the requested drug test for Grievant according to Respondent's standard procedure. Instead of testing Grievant using their contracted vendor, Ms. Smith told Grievant on January 19, 2011, that she was suspended pending an investigation.

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[2]This same "drug abuse screen" reported negative for benzodiazepines. The record established that Grievant had been taking a benzodiazepine daily since July 2010.

12. On February 14, 2011, Respondent dismissed Grievant in a letter stating, “it has been determined that you tested positive for THC on 12/27/2011 after presenting to the local emergency room of Stonewall Jackson Hospital.” Respondent’s Exhibit No. 3.

13. The letter cited, as cause for the dismissal, an alleged violation of the West Virginia Division of Personnel’s *Drug and Alcohol Free Workplace Policy*.

14. In its decision to dismiss Grievant, Respondent relied entirely on a report submitted by Stonewall Jackson Memorial Hospital to BrickStreet, then forwarded to Respondent’s director of human resources, indicating that a “drug abuse screen” for Grievant tested positive for THC. Respondent’s Exhibit No. 1.

15. Respondent conceded that the drug testing of Grievant would not be in compliance with agency policy since it was not done at their direction. Respondent’s position at level three was that the testing procedures for the Behavioral Health and Health Facilities policy is not used by Respondent because it relates to the operation of vehicles.

16. It is unclear whether the laboratory at Stonewall Jackson Memorial Hospital followed the standards of the Federal Department of Health and Human Services in performing the drug tests. The record did not establish a chain of custody or calibration of the gas chromatography used in the testing. The record did establish the possibility of the existence of false positives being present in the testing.

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

Permanent 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).

Grievant was employed by Respondent as a Health Service Worker at William R. Sharpe, Jr. Hospital in Weston, West Virginia. Sharpe Hospital is a state-operated mental health facility. By letter dated February 14, 2011, Chief Executive Officer D. Parker Haddix informed Grievant of his decision to dismiss her, citing, in pertinent part, the following:

> The investigation has substantiated misconduct. It has been determined that you tested positive for THC on 12/27/2011[sic] after presenting to the local emergency room of Stonewall Jackson Hospital. The reason for your visit was a possible compensable worker's compensation claim. An employee who present [sic] with a positive result for THC is in violation of the West Virginia Division of Personnel DRUG- AND ALCOHOL-FREE WORKPLACE POLICY. More specifically, section III, heading D. Which states: The unlawful possession, use, manufacture, distribution, or dispensation of a controlled substance or illegal drug; the reporting to work under the influence of a controlled substance or illegal drug; <u>having an illegal drug in the body system</u>; or possession of drug paraphernalia are all prohibited in the workplace.

Grievant argues that Respondent failed to follow its own policy concerning a drug test conducted away from the workplace; there exists no credible evidence concerning the

collection procedure; the possibility of conducting independent testing of a split sample was not an available option. Particular concern is raised by the question as to why the Stonewall Jackson Memorial Hospital results would indicate a negative for a benzodiazepine prescription Grievant had been taking for seven months. The reliance on information obtained in the absence of policy mandated procedures established a clear abuse of discretion by Respondent. The undersigned agrees.

The governing policy for testing for substance use is the *Bureau for Behavioral Health Facilities Drug and Alcohol Testing Policy*. That policy provides, in pertinent part, the following:

> V. Procedures
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> 2. For Cause Drug Testing Protocol
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> a. All current and contract employees of DHHR may be subject to testing for reasonable suspicion under any of the following circumstances;
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> 1. If the employee's performance, behavior, appearance or odor cause reasonable suspicion that the employee is engaging in illegal drug use, inappropriate use of prescribed mediation or is under the influence of drugs or alcohol . . .
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> b. If any of the foregoing factors are present or observed, the person observing them should report them immediately to the Human Resource Director who will then contact the employee's immediate supervisor. The Human Resource Director and supervisor will meet with the employee to assess the situation. If it is found that testing should be conducted, the arrangement for the test will be done by the Human Resource Director in consultation with the Chief Executive Officer or his/her designee. If the Director of Human Resources is unavailable during normal working hours, the person who has observed any of the above-mentioned factors shall contact the employee's immediate supervisor . . .
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> c. The reporting employee or the employee's immediate supervisor, whichever the case may be, shall immediately, but before the end of the shift, document the behavior or conditions giving rise to the report by completing the "For Cause Drug Testing Form".

> d. The Director of Human Resources, or the Administrator on Call, as the case may be, in consultation with the Chief Executive Officer, shall determine whether it is appropriate to require the employee to submit to drug or alcohol testing. Such person may elect to interview the employee before making a decision.
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> f. The sample will be collected in accordance with the testing procedures established for the facility. This sample will be tested for at least the following substances: alcohol, marijuana, cocaine, opiates, amphetamines, phencyclidine (PCP), barbiturates, oxycodone, benzodiazepines, propoxyphene and methadone or derivatives thereof. The sample may be tested for other drugs as deemed prudent and/or necessary.

Procedures include the requirement that individuals tested be given a sealed collection kit; laboratory personnel will, in sight of the employee, divide the specimen into two specimens; the individual being tested will initial the bottle seal of each specimen; the individual tested will sign the certification statement and/or chain of custody as directed; test results are to first undergo evaluation by a medical review officer, a licensed physician, who then forwards the results and evaluation of those results to the designated employer representative.[3] In addition, the Division of Personnel's *Drug and Alcohol Free Workplace Policy* makes clear that testing should done "in accordance with legal and administrative disciplinary procedures."

The West Virginia Supreme Court of Appeals addressed the issue of drug testing in *Twigg v. Hercules Corporation*, 185 W. Va. 155, 406 S.E.2d 52 (1990), and it is controlling on the issue. The court held that there were two times an employer could require drug testing of an employee: the first is when an employee's job involves public safety and the second is when the employer had reasonable good faith objective suspicion of an employee's drug use. The court stating in Syllabus Point 2 that "[D]rug testing will

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[3]49 C.F.R. § 40.

not be found to be violative of public policy grounded in the potential intrusion of a person's privacy where it is conducted by an employer based upon reasonable good faith objective suspicion of an employee's drug usage or while an employee's job responsibility involves public safety or the safety of others."

Respondent conceded at level three that it was aware of another case in which the Respondent relied upon an outside source in making an employment decision. According to Ms. Cook, Respondent's Acting Human Resources Director, Sharpe Hospital received a report that one of its employees accompanying a patient to Stonewall Jackson Memorial Hospital smelled of an alcoholic beverage. Ms. Cook treated the report as grounds to conduct a "for cause" drug test, called in Respondent's contract vendor and had a urine test performed. The employee's test was positive for THC, and he was dismissed. *See Wease-Jones v. Dep't of Health and Human Res./William R. Sharpe, Jr. Hospital*, Docket No. 2010-1625-CONS (Jan. 19, 2011).

The undersigned finds no compelling reason under the undisputed facts of this case to depart from the precedent established in *Wease-Jones*, *supra*. Respondent should have followed its prior practice and taken the report from Stonewall Jackson Memorial Hospital as grounds to conduct a "for cause" test and used its contracted vendor to follow the procedure outlined in the Bureau's policy. As Grievant aptly points out, this was a course of action to which she was, by all accounts, eager to give consent. Instead, Respondent relied completely on an outside source of questionable reliability as cause for the dismissal of Grievant. In doing so, Respondent committed the age old fallacy of affirming the consequent. Policies are in place for a reason, and it is well established that

agencies must abide by their own established rules and procedures. *Layne v. Dep't of Health and Human Res.*, Docket No. 2008-0172-DHHR (Jan. 8, 2009).

The following conclusions of law support the decision reached.

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. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. Permanent 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).

3. Drug testing will not be found to be in violation of public policy grounded in the potential intrusion of a person's right to privacy where it is conducted by an employer based upon reasonable good faith objective suspicion of an employee's drug usage or while an employee's job responsibility involves public safety or the safety of others. *Syllabus Point 2*, *Twigg v. Hercules Corporation*, 185 W. Va. 155, 406 S.E.2d 52 (1990).

4. Respondent had reasonable suspicion to conduct a secondary alcohol and drug screen on Grievant based on the facts and circumstances of this grievance. However, Respondent relied completely on an outside source of questionable reliability as cause for dismissal of Grievant.

5. Respondent did not prove that Grievant's conduct constituted "gross disregard for professional responsibilities" or "wrongful intent" to violate state rules and regulations which is necessary for the dismissal of a permanent state employee in the classified service. *See Oakes*, *supra*. *See also Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004).

Accordingly, this grievance is **GRANTED**.

Respondent is **ORDERED** to reinstate Grievant to her position as a Health Service Worker, with applicable back pay, seniority, and benefits.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: November 20, 2012

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Ronald L. Reece
Administrative Law Judge