WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

STEVEN JOHNSON, JR.,
Grievant,

v. **Docket No. 2013-1095-CONS**

DIVISION OF HIGHWAYS,
Respondent.

D E C I S I O N

Steven Johnson, Jr., Grievant, filed grievances against his employer the West Virginia Division of Highways ("DOH"), Respondent. The first grievance filed on December 14, 2012, was regarding Grievant's initial suspension pending investigation of the instant matter. The second grievance filed on January 16, 2012, protested the termination of his employment. As authorized by W. VA. CODE § 6C-2-4(a)(4), the grievances were filed directly to level three of the grievance process. Subsequent to Grievant's request, the grievances were consolidated by Grievance Board Order dated January 29, 2013. Grievant protests his suspension and dismissal, contending that the disciplinary actions were without good cause and the dismissal was without a predetermination meeting. Grievant seeks "[t]o be made whole including backpay with interest and all benefits restored."

A level three hearing was held before the undersigned Administrative Law Judge on June 11, 2013, at the Grievance Board's Beckley facility. Grievant appeared in person and by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by Jason C. Workman, Esquire, DOH Legal Division.

Both parties submitted Proposed Findings of Fact and Conclusions of Law, this matter became mature for decision on July 15, 2013, on receipt of the last of these proposals.

Synopsis

Respondent suspended and ultimately terminated Grievant's employment for alleged violation of the State's Drug and Alcohol Free Policy in addition to DOT's policies regarding Standards of Work Performance and Conduct and Drug-Free Workplace. Respondent's disciplinary actions were based upon allegation and its faulty determination that Grievant ingested and was under the influence of marijuana at the workplace. Grievant protests. Without reliable affirming facts/proof, mere contested allegation is insufficient to justify the disciplinary action taken in the circumstance of this matter. Respondent did not adequately substantiate the allegation of wrongdoing and/or prove the forbidden conduct by a preponderance of the evidence. The termination of Grievant's employment was unlawful and not supported by reliable evidence. This grievance is GRANTED.

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

Findings of Fact

1. Grievant is a Transportation 2 – Craft Worker for the DOH, Respondent, and he has been employed full-time with Respondent since November 2008. Grievant's position does not require him to hold a Commercial Driver's License, and he is not a mechanic.

2. On December 13, 2012, Grievant was part of a crew of at least five employees assigned to maintenance work on Prosperity Road, with Grievant working on an asphalt recycling machine.

3. Melinda Dalton is a Transportation 2 – Equipment Operator in Raleigh County, West Virginia, and is a co-worker of Grievant. On December 13, 2012, Grievant and Ms. Dalton were both working on the same DOH crew near the town of Prosperity in Raleigh County.

4. Johnny Vass is currently a Highway Administrator 2 for Respondent, but on December 13, 2012, Mr. Vass was an Assistant Supervisor for Raleigh County in DOH District 10. Mr. Vass has worked for the DOH for over 24 years. Mr. Vass' responsibilities as Assistant Supervisor included traveling throughout Raleigh County to supervise road maintenance crews at various road sites.

5. Johnny Vass, then Assistant Supervisor for Raleigh County, was checking on the road crew assigned to Prosperity Road on December 13, 2012, when Melinda Dalton told him that Grievant, "was smoking, possibly, marijuana."

6. Assistant Supervisor Vass, after observing for a short period of time, was of the opinion that Grievant did not seem to be his normal self. Further, Vass was of the impression that Grievant's pupils were dilated.

7. Mr. Vass called his supervisor, District 10 Assistant Maintenance Engineer Joe Pack, with the allegation against Grievant, and was instructed to bring Grievant to his office. Mr. Pack was the Acting Raleigh County Supervisor on December 13, 2012, and

he had been acting in that position for one month. Mr. Pack temporarily stepped into the position as County Supervisor to fill a vacancy.[1]

8. Assistant Supervisor Vass drove Grievant in a closed cab pickup to meet Pack, and testified that he did not smell marijuana on Grievant.

9. Supervisor Pack spoke with Grievant. Upon speaking with Grievant, Pack believed that Grievant was under the influence of marijuana.

10. One of the reasons Pack cited in support of his conclusion that Grievant was under the influence of an illegal drug on December 13, 2012, was that there was a delayed response of five or more seconds by Grievant when questioned.

11. Another reason Supervisor Pack cited to support his conclusion that Grievant was, in Pack's opinion, under the influence of an illegal drug on December 13, 2012, was that Grievant had slurred speech. Over a period of time in excess of ten minutes, but less than one hour, Pack concluded that Grievant had slurred speech, delayed responses to questions, and an odor of marijuana.

12. Grievant offered to take a drug test on December 13, 2012, after being informed of the allegation that he smoked marijuana at the work-site.

13. No drug test was provided to Grievant.[2]

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[1]Joseph Pack works for DOH District 10 as the Assistant Maintenance Engineer, and he has served in this capacity for over four years. Mr. Pack is responsible for guiding county and interstate organizations regarding routine maintenance and procedure.

[2] Grievant does not occupy a mandatory drug testing position with the DOH. Employees holding a CDL are required to be drug tested both randomly and upon a finding of reasonable suspicion in accordance with both DOH policy and the Code of Federal Regulations. Grievant's position as a Transportation Worker 2 – Craft Worker does not require a CDL license.

14. After meeting with Grievant, Mr. Pack communicated with his superiors.

15. Kathleen Dempsey is currently the Assistant Director of Human Resources for the DOH. On December 13, 2012, Ms. Dempsey was the DOH Employment and Benefits Manager, and had served in that capacity for over three years. In her position as Employment and Benefits Manager, Ms. Dempsey managed all employment transactions including disciplinary actions. She reviewed disciplinary actions that were recommended by the several Districts of the DOH, and she was involved in the final decision-making process regarding the selection of all disciplinary action.

16. Supervisor Pack had Grievant's co-worker, Ms. Dalton, prepare a written statement on December 14, 2012, detailing what she had allegedly seen regarding Grievant the day before on December 13, 2012. The written statement was a part of the record in this case. R. Ex . 1. Ms. Dalton did not testify at the level three hearing.

17. Ms. Dempsey, in assessing the situation involving Grievant, was aware of the verbal statement of Ms. Dalton, considered the opinions of Mr. Vass and Mr. Pack, and spoke with District 10 management. After Ms. Dempsey reviewed all of the circumstances and spoke with high-level District 10 management, a decision was made to suspend Grievant immediately in recognition of the potential threat to Grievant, his co-workers, and the public's safety that would exist if Grievant was under the influence of an illegal substance and continued his work.

18. The Human Resources employee for District 10, Kristen Shrewsberry, emailed Supervisor Pack to inform him to suspend Grievant pending the outcome of an investigation.

19. The DOH Administrative Operating Procedures for Disciplinary Action Policy (hereinafter "DOH Disciplinary Policy") provides for immediate suspension or termination when an employee reports to work under the influence of alcohol or a controlled substance.

20. Grievant was suspended immediately pending the outcome of a DOH investigation pursuant to both its Disciplinary Policy and the DOP Administrative Rule. A suspension letter was issued to Grievant the following day on December 14, 2012.

21. It is unrebutted that Grievant has a speech impediment.

22. The West Virginia Division of Personnel (hereinafter "DOP") has promulgated a Drug and Alcohol Free Workplace Policy (hereinafter "DOP Drug Policy") generally applicable to employees of State agencies. The DOP Drug Policy states that "[i]t is the policy of West Virginia State government to ensure that its workplaces are free of illegal drugs and controlled substances by prohibiting the use, possession, purchase, distribution, sale, or presence in the body system, without medical authorization, of illegal or controlled substances." The Policy further provides that employees who are in violation are subject to disciplinary action up to and including termination.

23. The DOH Human Resources Division decided that, in view of all of the circumstances and witness observations, Grievant should be dismissed from his duties with the DOH for violating the DOH's zero tolerance Drug and Alcohol Free Workplace Policy. A dismissal letter was issued to Grievant on January 18, 2013.

24. The January 18, 2013 dismissal letter stated, in relevant part:

> The reason for your dismissal is your violation of the State's Drug and Alcohol Free Policy in addition to DOT's policies regarding Standards of

> Work Performance and Conduct and Drug Free Workplace. More specifically, but not limited to:
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> On December 13, 2012 you were witnessed smoking a marijuana joint while you were operating an asphalt recycler. The distinct smell of marijuana permeated from your body. Your eyes exhibited a glassy appearance and your speech was noticeably slurred. Furthermore, marijuana residue was observed on the top of your lunchbox when it was retrieved from the worksite.[3] You were removed from the worksite and returned to County Headquarters at which time another employee drove you home. Based on these facts and more specifically for the safety of your co-workers and the traveling public, your immediate dismissal is warranted.

R. Ex. 5

25. A predetermination meeting was not scheduled with Grievant prior to his dismissal.[4] See Testimony of Kathleen Dempsey, Assistant Director of Human Resources and Respondent's Proposed Findings of Fact and Conclusions of Law (PFOF/COL).

26. Grievant was not asked to meet with Respondent, nor give a formal statement, prior to the conclusion of Respondent's investigation and its decision to dismiss Grievant from employment. Subsequent to the initial meeting with Respondent's personnel

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[3] While Respondent initially cited flakes of unspecified vegetative material as an actionable cause for disciplinary action, for one reason or another, Respondent did not pursue this allegation at level three. The Grievance Board has long held that elements or allegations of a grievance which are raised, but not pursued or developed will be considered abandoned. *Bias v. Dep't. of Transportation/Division of Highways*, Docket No. 2008-1520-DOT (Sept. 22, 2009) (citing *Church v. McDowell County Bd. of Educ.*, Docket No. 33-87-214 (Nov. 30, 1987)). No evidence or testimony was presented to support a conclusion that Grievant's lunchbox contained marijuana residue. It was perceived Respondent abandoned this allegation. This contention is deemed unproved. The assertion as justification for the instant disciplinary action is noted but will not be addressed further by this decision.

[4] Respondent highlights language contained in the suspension letter of December 14, 2012, which stated that Grievant has "the right to respond to this action by contacting Jeff Black, Director Human Resources Division, either personally or in writing, for the purpose of communicating any reason why you [Grievant] believe it is unwarranted." Thus, Grievant was informed he could request a meeting regarding his suspension pending further investigation. The undersigned is of the opinion this language is not the same as **providing** a predisposition conference/hearing prior to termination.

on December 13, 2013, Grievant was not provided, in fact, with a direct opportunity to tell his side of events or to challenge the allegations against him.

27. Grievant's reading ability is not equal to that of a typical adult.[5] Further, Grievant has a speech impediment and he took speech improvement classes throughout his public school attendance.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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, a party has not met its burden of proof. *Id.*

Respondent terminated Grievant's employment for violation of the State's Drug and Alcohol Free Policy and DOT's policies regarding Standards of Work Performance (Drug Free Workplace). The specific reasons given for Respondent's January 15, 2013, dismissal of Grievant, stated in the January 18, 2013, letter are, "On December 13, 2012,

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[5] Grievant asserts that he cannot read, Grievant testified at level three that his mother reads his mail to him.

you were witnessed smoking a marijuana joint while you were operating an asphalt recycler. The distinct smell of marijuana permeated from your body. Your eyes exhibited a glassy appearance and your speech was noticeably slurred. Furthermore, marijuana residue was observed on the top of your lunchbox when it was retrieved from the worksite." R. Ex. 5.

I. Due process.

The question has been raised as to whether the instant Grievant was granted his full measure of due process. The West Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (*citing Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). "What is required to meet procedural due process under the Fourteenth Amendment is controlled by the circumstances of each case." *Barker v. Hardway*, 238 F. Supplement 228 (W. Va. 1968); *See Buskirk*, *supra*; *Edwards v. Berkeley County Bd. Of Educ.*, Docket No. 89-02-234 (Nov. 28, 1989).

It is a well-settled principle of constitutional law, under both the State and Federal Constitutions, that an employee who possesses a recognized property right or liberty interest in his employment may not be deprived of that right without due process of law. *Buskirk*, *supra*; *Clark*, *supra*. "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532,

542, 105 S.Ct. 1487, 84 L.Ed.2d 494, (1985), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). In circumstances of this case, the crucial question may be whether the due process protections afforded Grievant were sufficient.

It has previously been held that a full-blown hearing is generally not required before an employee may be terminated, but that employee has the minimum pre-deprivation right to at least have an opportunity to respond to the charges either orally or in writing. *Loudermill*, 470 U.S. at 542. An employee is also entitled to written notice of the charges and an explanation of the evidence. *Wirt*, *supra*. In other words, notice of the charges, explanation of the evidence and an opportunity to respond is due process that Respondent is required to provide.

The contention that Grievant was denied due process has some merit in the fact pattern of this case. Grievant was informed, in writing, of the charges against him, and Respondent identified the conduct for which he was to be terminated. See R. Ex. 5. However, it is not clear that Grievant was truly provided a predisposition meeting to be heard, address relevant events and the allegations levied against him. While the termination letter references a phone conversation of January 15, 2013, Respondent admits that no predetermination conference was held with Grievant, post December 13, 2013, but prior to termination January 18, 2013. See Testimony of Assistant Director of Human Resources Kathleen Dempsey and Respondent's submitted PFOF/COL.

It is recognized that there exist situations and fact patterns which do not lend themselves to predetermination termination conferences. A predetermination meeting with

the employee is not required when the cause of dismissal is gross misconduct and/or the dismissed employee's action(s) constitute a threat to the safety or welfare of persons or property. See DOP Administrative Rule 12.2. However, in that Grievant was already removed from the workplace, via suspension pending the investigative finding, the instant matter is not readily recognized as an example of where a predisposition conference prior to termination would be burdensome or constituted a threat to safety or property. There was conflicting information to be discussed. It is hard to understand why Respondent choose to ceremoniously terminate Grievant's employment without communicating directly with him prior to the final termination decision. 'Due Process' is not meant to be a ritualistic procedure without function. Further, it is unsettling that Respondent's Assistant Director of Human Resources was of the mistaken belief that the onus was upon Grievant to request a predetermination meeting. See level three testimony of Kathleen Dempsey.

The rationale for proper procedure (due process) is not always exulted, but the facts of this case highlight why due process has a place in all disciplinary matters. Procedural safeguards are in place for the protection of everyone, the workers, administration and the integrity of the system. It is hard to envision a situation more deserving of due process than where a lone disputed allegation of wrongdoing of a substantial nature is levied against an employee ill equipped to debate the charges.

A co-worker reported information, Grievant was accused of a wrongdoing, denied access to a test which could have definitively answered the issue in question, Grievant's own preexisting physical impairment(s) was touted as conclusive proof and Grievant was shown the proverbial door. In the circumstance of this matter it is apparent that the opportunity for a predisposition hearing and having a predisposition hearing are not

synonymous. Further, given Grievant's professed educational short coming,[6] it seems even more imperative that the instant Grievant be provided ample due process. Form should not be substituted for function when determining the dispositions of an individual's livelihood.

A formal predetermination meeting was not scheduled with Grievant for his dismissal, but both Grievant's suspension and dismissal letters provided him with the reasons for the disciplinary action taken, and the letters clearly and conspicuously afforded Grievant of an opportunity to call or meet with the Director of the Human Resources Division of DOH and to make statements regarding why the disciplinary sanction levied should not be taken. Grievant contacted his union representative for assistance in this matter. *The undersigned is not truly persuaded that the instant Grievant was provided ample due process* (emphasis added), nevertheless, Respondent, convinced that Grievant was guilty of gross misconduct, provided notice of the charges, explanation of the evidence and an opportunity to respond to the charges either orally or in writing. See R. Exs. 3 and 5. Also see footnote 4, *supra.*

II. CREDIBILITY

An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3)

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[6] It is presented without dispute that Grievant has a reading deficiency. See FOF 27.

reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. 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. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

Grievant's mannerisms with regard to his speech pattern and speed at which he communicates was not at odds with Respondent's stated observations, but such behavior is easily attributable to several other rational not associated with marijuana usage. The undersigned found that Grievant delays prior to responding in a conversation, and does so as his normal pattern of verbal communication. Having directly observed the demeanor of Grievant, the undersigned Administrative Law Judge notes that Grievant's testimony was candid, straightforward and consistent. His statements did not appear to be rehearsed or insincere. Indeed, he was direct and straightforward in responding to questions and relevant issue(s). The testimony of Grievant was informative, and provided a strong foundation for alternative interpretations to events reported. There exist plausible explanation for a number of facts that Respondent cited as proof of smoking a marijuana joint. (e.g., Grievant smokes cigarettes that are self rolled, he has a speech impediment and there is negative history between Grievant and the alleged witness to the disputed conduct.) Grievant's depiction of events are more likely than the interpretation presented by unsworn statements of a non-testifying co-worker.

Having observed the speech, mannerisms, expressions, demeanor and body language of Grievant, the undersigned finds that Grievant's testimony to be persuasive.

Grievant understood the importance of the information he was conveying. Grievant's attitude during his testimony tended to indicate honesty and fostered reliance. The information presented by Grievant was plausible. Grievant's explanation and depiction of his conduct relevant to the events in discussion are was more probable than not.

Grievant's statements regarding not smoking marijuana or being under the influence of an illegal substance on December 13, 2012, are found to be credible.

III. Merits

Respondent has the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008) The one and only person who allegedly witnessed Grievant smoke marijuana is employed by Respondent and under Respondent's administrative authority. Assistant Human Resource Director Kathleen Dempsey testified that the statement from the employee making the allegation was a basis for the decision to dismiss Grievant. Respondent's failure to produce this witness to testify is extremely troubling. Further, in review of R. Ex. 1, which is represented to be co-worker, Melinda Dalton's written statement, it is clear that Respondent interpreted information not represented by the document.

Respondent's interpretation of the alleged witness statements, includes the information that she "witnessed [Grievant] smoking marijuana on the job site." While the true facts are Ms. Dalton witnessed Grievant "smoking" what Grievant represented then and at level three to be "roll your own cigarettes" or self rolled cigarettes. Ms. Dalton represented that Grievant was smoking marijuana, a joint. She indicates that Grievant

continued "smoking the joint" even after another co-worker was present. See R. Ex. 1. It is noted that this identified co-worker was also not called to testify at level three.

Grievant testified he did not smoke marijuana on December 13, 2013, he admits to smoking self-rolled cigarettes. Grievant relays that employee Melinda Dalton and he were not friends. In fact, he indicates there was 'bad blood' between Ms. Dalton, her now husband and Grievant. It is possible that Ms. Dalton innocently mistook a hand-rolled cigarette for a joint. It is also possible it was not innocent. Grievant testified that Ms. Dalton and her husband have attempted to cause trouble for him in the past. It is speculative to identify the source of the discord between the individuals and it is uncontested that there is a lack of harmony between the three. As discussed earlier, the undersigned had opportunity to observe the demeanor of Grievant and appraise his attitude toward this action. Grievant's testimony was persuasive.

The written statement of employee Dalton, as presented at level three, is hearsay evidence. R. Ex. 1 Under the statutes and procedural rules relating to grievances, the formal rules are not applicable in grievance proceedings, except for the rules of privilege recognized by law.[7] The issue is one of weight rather than admissibility. An administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding.[8] *Weik v. Div. of Natural Resources*, Docket No. 2011-1270-DOC

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[7] *See generally* W. VA. CODE § 6C-2-4(a)(3).

[8] The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other

(Dec 2011); *Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (Mar. 11, 2010); *Warner v. Dep't of Health and Human Resources*, Docket No. 07-HHR-409 (Nov. 18, 2008)*; Miller v. W. Va. Dep't of Health and Human Resources*, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996).

Ms. Dalton did not testify, thus, the undersigned did not have the opportunity to observe her demeanor or evaluate the basis for her conjecture. It was not reasonably explained why Respondent did not present Ms. Dalton at level three, nor at a prior inquiry regarding the circumstances of Grievant's discharge.[9] Her unsworn written statement provides a conclusion which Respondent accepts as fact. The undersigned does not. Ms. Dalton's statements provide her interpretation of an event that Grievant disputes. Ms. Dalton provides that Grievant was smoking "marijuana." It is not clear why Ms. Dalton concludes that Grievant would be so brazen, in front of others, to roll and smoke a marijuana joint without any apprehension of consequences. However, it is not unreasonable for a man to roll a regular cigarette in front of others, smoke it , and not anticipate repercussion from his conduct. It is not established with any degree of reliability that the substance Grievant smoked on December 13, 2012, was marijuana. Respondent's exhibit number one is not reliable as presented and is given little to no

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information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (1997); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-8-115 (June 8, 1990).

[9] March 12, 2013, Board of Review WorkForce West Virginia Hearing. G. Ex. 1.

weight with regard to proving Grievant was smoking a marijuana joint. It is more likely than not that Grievant was smoking a self-rolled cigarette.

Supervisor Joseph Pack has received some training on curbing workplace substance abuse by identifying characteristics and objective signs indicating the use of illegal drugs or alcohol. However, it is not established that the procedure to follow when substance abuse is suspected was actually used properly in the circumstance of this case. Grievant has a slight speech impediment that could account for the accusation of slurred speech. Mr. Pack makes no allowance for this. Nor did Mr. Pack tend to acknowledge that Grievant, who must have been experiencing some degree of anxiety, was overly cautious about how he responded to Mr. Pack's inquiries. The allegation that Grievant had delayed response in answering questions is noteworthy, but not conclusive evidence of drug usage. It was observed by the undersigned that Grievant does at times delay prior to responding to questions. Other factors, not related to drug usage, easily explain this conduct.

Grievant worked with an asphalt recycling machine which heats asphalt to over 375 degrees Fahrenheit. It is not known to the undersigned what hot asphalt smells like but it is not believed to be a pleasant aroma and it is more than probable that such fumes would have an effect on the eyes of an employee directly involved in the process. Further, while Supervisor Pack alleged the aroma of marijuana, Assistant Supervisor Vass, who drove Grievant in a closed cab pickup to meet Mr. Pack, testified that he did not smell marijuana on Grievant.

Lastly, while Grievant does not fall under the mandatory requirements for drug testing, this ALJ is not persuaded that Respondent is barred from providing a drug test given that Grievant requested the definitive test. Grievant has successfully argued that,

"Grievant could not be compelled to submit to a drug test based on his right to privacy, a voluntary waiver of such a right — which Grievant testified, without rebuttal, to giving on December 13, 2012 — would more than authorize and legally permit Respondent to confirm or deny any reasonable suspicion with a drug screening test." Absent such confirmation Respondent's suppositions remain purely hypothetical, speculative and unproved. Respondent was not required to conduct a drug test, however, under the circumstances, it would have been both permissible and prudent.

Critical factors relating to the charges against Grievant are the subject of conflicting interpretations. An ill-substantiated allegation of wrongdoing is ripe for a due process discussion. Grievant unequivocally conveyed a willingness to submit to a conclusive testing procedure. Grievant's attitude during his testimony tended to indicate honesty and fostered reliance. The initial accuser did not testify. There is simply insufficient credible evidence in the record to establish that Respondent has met its burden of proof as it relates to the charge(s) contained in the letter of termination. The facts of this grievance matter viewed objectively do not justify Respondent's termination of Grievant's employment. Respondent acted responsibly in choosing to investigate the allegation thus, it is not found that the initial suspension was unwarranted.[10] Nevertheless, in the circumstances of this case, Respondent did not demonstrate, by a preponderance of the evidence, that Grievant violated DOH's zero tolerance of drug usage at the workplace.

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[10] Pursuant to the DOP Rules, "[a]n appointing authority may suspend any employee without pay for cause or to conduct an investigation regarding an employee's conduct which has a reasonable connection to the employee's performance of his or her job." W. Va. Code R. § 143-1-12.3.

Grievant's conduct is not established to be in violation of applicable Standards of Work Performance and Drug Free Workplace policies.

The following conclusions of law are thought to be appropriate in this matter:

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 Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. "Due process is a flexible concept, and . . . the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (citing *Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). Prior to an unpaid suspension, an employee is entitled to notice of the charges, an explanation of the evidence, and an opportunity to respond. *Id.* at Syl Pt. 3; *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994); *See Starkey v. Jefferson County Bd. of Educ.*, Docket No. 02-19-010 (April 8, 2002).

3. It is not established that Grievant's initial suspension pending an investigation was unlawful or in violation of Grievant's right to due process. Respondent did not provide Grievant a predetermination meeting subsequent to Grievant's suspension pending investigation but prior to the ultimate determination to terminate his employment.

4. 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*, 175 W. Va. 279, 332 S.E.2d 579 (1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Service Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *Scragg v. Bd. of Dir. W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

5. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Resources,* Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1993).

6. The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3)

reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. 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. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

7. An administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. *Weik v. Div. of Natural Resources*, Docket No. 2011-1270-DOC (Dec 7, 2011); *Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (Mar. 11, 2010); *Warner v. Dep't of Health and Human Resources*, Docket No. 07-HHR-409 (Nov. 18, 2008)*; Miller v. W. Va. Dep't of Health and Human Resources*, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996).

8. The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their

statements. *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (1997); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-8-115 (June 8, 1990)

9. Respondent failed to prove by a preponderance of the evidence that Grievant violated applicable State Drug and Alcohol Free Policy and/or DOT's policies regarding Standards of Work Performance and Conduct and Drug-Free Workplace.

10. Respondent failed to prove by a preponderance of the evidence the charges contained in Grievant's termination letter dated January 18, 2013.

11. Unemployment compensation benefits do not reduce the amount of back pay due to Grievant. Respondent properly raised the issue of mitigation of damages. "Unemployment compensation benefits may not be used to reduce an award of damages under the collateral source rule." *King v. West Virginia Department of Health and Human Resources,* Docket No 2013-0067-DHHR (June 13, 2013) citing *Teaford v. Raleigh County Bd. of Educ.*, Docket No. 96-41-279 (Feb. 4, 1998) (citing *Powell v. Wyoming Cablevision, Inc.*, 184 W. Va. 700, 403 S.E.2d 717 (1991); *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983).

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to his position, and to pay him all back pay to which he is entitled from the date his employment was terminated, and back pay for the period of time he was suspended without pay, plus interest, and restore all benefits, as though he had not been dismissed.

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: August 29, 2013

Landon R. Brown
Administrative Law Judge