THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DAVID FRANKLIN SHANNON,
Grievant,

v. **DOCKET NO. 2012-0959-DOC**

WORKFORCE WEST VIRGINIA,
Respondent.

DECISION

This grievance was filed directly at Level Three of the grievance procedure by Grievant, David Franklin Shannon, on March 13, 2012, challenging his dismissal by Respondent, WorkForce West Virginia, from his position as an Accounting Technician III assigned to its Compliance and Enforcement Unit. Grievant is asserting that his termination was "the latest occurrence of ongoing harassment and retaliation." As relief, Grievant seeks reinstatement to his position with full back pay, benefits and seniority, and "immediate cessation of all harassment and/or retaliation."

An evidentiary hearing was held at Level Three before the undersigned Administrative Law Judge on December 28, 2012, and January 7, 2013, at this Grievance Board's office in Charleston, West Virginia.[1] Grievant appeared *pro se* and Respondent was represented by Doren Burrell, Senior Assistant Attorney General. This matter became mature for decision on January 23, 2013, upon receipt of the parties' Proposed Findings of Fact and Conclusions of Law.

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[1] The hearing on December 28, 2012 was limited to taking the testimony of two of Respondent's

Synopsis

Respondent presented compelling circumstantial evidence that Grievant, having been duly placed on notice that Division of Personnel policy strictly prohibits bringing alcohol into the workplace, subsequently brought alcohol onto agency premises, consumed it, and attempted to avoid detection by disposing of the empty beer cans in public trash receptacles outside the building. Grievant had been verbally reprimanded for bringing beer to his work area in a backpack, had been placed on leave restriction for excessive leave, and warned on multiple occasions about taking unscheduled leave that did not involve a legitimate medical situation. Contrary to the pleadings in Grievant's grievance statement, there was no persuasive evidence that Grievant's supervisors engaged in any form of harassment or retaliation in addressing his alcohol possession. Further, the penalty of termination was reasonable in the circumstances presented.

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

Findings of Fact

1. Grievant was employed by Respondent, WorkForce West Virginia, as an Accounting Technician III in the Compliance and Enforcement Unit of the Unemployment Compensation Division. He had worked for Respondent for approximately 11 years.

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witnesses who were retiring from state government at the end of 2012.

2. Kathleen E. Phillips is employed by WorkForce West Virginia as a Program Manager I managing the Accounts Receivable Unit, and temporarily supervising the Compliance and Enforcement Unit.

3. Pamela Ann Belt is employed by WorkForce West Virginia as a Program Manager I supervising the Contribution Accounting Department.

4. Wade Wolfingbarger was employed by WorkForce West Virginia as the Assistant Director of Contribution Accounting.

5. Michael Moore was employed by WorkForce West Virginia as its Unemployment Compensation Director.

6. At the time of the events giving rise to this disciplinary action, Grievant, Ms. Phillps, Ms. Belt, Mr. Wolfingbarger, and Mr. Moore were located in the agency's principal office at 112 California Avenue, a multi-story office building on the State Capitol Complex, also identified as Building 4.

7. On the morning of February 2, 2012, one of Grievant's co-workers, Amber Hughart, told Ms. Belt that she observed Grievant remove a can of beer from a backpack and place it in his jacket pocket when she was in his office on the previous day, February 1, 2012. Ms. Belt, accompanied by Ms. Phillips, communicated Ms. Hughart's report to Mr. Wolfingbarger early that morning.

8. On February 2, 2012, Mr. Wolfingbarger was waiting for Grievant when he arrived for work around 9:15 AM. Mr. Wolfingarger escorted Grievant to Mr. Moore's office where they confronted Grievant regarding the allegation that he had beer in a backpack. Grievant explained that he was bringing the beer to work in his backpack so

he would not have to stop and walk some distance after dark to purchase beer on his way home from work. Mr. Wolfingbarger and Mr. Moore were aware that Grievant took public transportation to and from work because he did not have a valid driver's license. Grievant voluntarily surrendered his backpack to Mr. Wolfingbarger. The backpack contained a 12-pack of Bud Light beer in cans.

9. Mr. Wolfingbarger embargoed the backpack and its contents until the end of the day, at which time he returned the backpack and beer to Grievant, as Grievant was leaving the premises. Grievant was given a verbal reprimand for having alcohol on state property, and specifically warned by Mr. Wolfingbarger that the agency would not tolerate having alcohol on the premises for any reason.

10. The West Virginia Division of Personnel's Drug and Alcohol-Free Workplace Policy contains the following prohibition on alcohol in the workplace:

> The possession, use, distribution, or dispensation of alcohol; the reporting to work under the influence of alcohol, or having alcohol in the body system at work, whether the alcohol was consumed at work or away from work, are all prohibited in the workplace.

R Ex 1.

11. On February 17, 2012, during the work day, Ms. Phillips observed Grievant placing a white package into a trash can on California Avenue in front of the agency's building. Ms. Phillips, accompanied by Ms. Belt, went out to the trash can immediately thereafter, recovering the object Ms. Phillips had observed, which was in plain view on top of some other trash. They brought the item inside to Mr. Wolfingbarger, who unwrapped the package revealing an empty beer can which had

been crushed and wrapped in white paper towels, similar to the paper towels available in the building restrooms.

12. Later that day, at approximately 6:00 PM, Mr. Wolfingbarger retrieved the entire contents of the same public trash can from which Ms. Phillips and Ms. Belt had removed the crushed beer can wrapped in paper towels. Mr. Wolfingbarger found another 6 Bud Light beer cans on top of the trash, wrapped in white paper towels in the same manner as the first beer can that Ms. Phillips had brought into the building earlier.

13. On the evening of February 17, 2012, Mr. Wolfingbarger replaced the plastic liner in the trash can.

14. On one occasion, while Ms. Belt and Ms. Phillips were monitoring Grievant's actions, he was noted as being absent from his desk. While looking for him, they determined that he had returned through a back entrance to Building 4. They went outside behind Building 4 and looked in a nearby dumpster without finding anything remarkable. They proceeded to a public waste receptacle near another building behind Building 4. Inside that receptacle, they found two more crumpled Bud Light beer cans wrapped in white paper towels, just like all the others they had observed earlier.

15. Jonathon M. Reynolds is employed by WorkForce West Virginia in the Unemployment Compensation Division as an Investigator II. On February 20, 2012, Mr. Wolfingbarger called Mr. Reynolds at home, asking him to report to his office in Building 4 for a new assignment the next morning.

16. On the morning of February 21, 2012, Mr. Wolfingbarger checked the contents of the public trash can in which he had replaced the liner on February 17, and determined that it contained a minimal amount of new trash.

17. Later that same morning, Mr. Wolfingbarger, Ms. Belt, and Ms. Phillips met with Mr. Reynolds to provide background on their actions and observations since the beginning of the month which led them to suspect Grievant was bringing alcohol on agency premises and consuming it. Mr. Wolfingbarger asked Mr. Reynolds to investigate and acquire evidence to either confirm or refute these allegations. Mr. Reynolds was provided an empty office with a window overlooking the front of the building, from which vantage point the trash receptacle on California Avenue could be observed.

18. After Mr. Reynolds observed Grievant depart the building and take a bus to a scheduled doctor's appointment, he went outside and inspected the perimeter around Building 4, and the current contents of the trash can on California Avenue, verifying that there were no discarded beer cans in the trash, or anywhere around the building.

19. Later that day, after Grievant returned to his work area, Mr. Reynolds observed Grievant throw a white bundle of paper towels into the public trash receptacle in front of Building 4. After Grievant returned to his desk, Mr. Reynolds went out of the building and inspected the trash receptacle. He found only one new item, a package of paper towels approximately the size of a baseball. Inside the paper towels was a

crushed Bud Light beer can, containing as much as one teaspoon of beer, leaking into the paper towels.

20. Mr. Reynolds compared the paper towels wrapped around the beer can with the paper towels dispensed in the restrooms in Building 4, and determined that they appeared to be identical.

21. Less than an hour later, on February 21, 2012, Ms. Belt notified Mr. Reynolds that Grievant had left the building again. Mr. Reynolds observed Grievant approach the same trash can and toss a similar object into the trash receptacle. A few minutes later, Mr. Reynolds went outside, while under the observation of the building's security guard, and inspected and photographed the contents of the trash receptacle, retrieving another crushed Bud Light beer can with a small amount of beer residue wrapped in white paper towels. Mr. Reynolds left the building around 3:00 PM that afternoon.

22. On the evening of February 21, 2012, Mr. Wolfingbarger retrieved the contents of this trash receptacle on California Avenue, finding two additional Bud Light beer cans, wrapped similarly to the ones he had found on February 17, 2012.

23. On multiple occasions on February 21 and 22, 2012, Mr. Reynolds observed Grievant go into the men's restroom. Mr. Reynolds would then enter the rest room and note the stall which Grievant was in based upon the shoes Grievant was wearing, and he was able to hear the sound of Grievant drinking something while in the stall. Mr. Reynolds spoke with Grievant shortly after he came out of the restroom on some of these occasions, and smelled a strong odor of alcohol on his breath, as well as

the residue of alcohol on his lapels. Mr. Reynolds previously spent 25 years in the Military Police, thereby obtaining extensive experience observing persons who had been drinking alcohol.

24. On two or three occasions during the four to five year period preceding February 2012, Mr. Wolfingbarger and Mr. Moore provided information to Grievant regarding voluntary alcohol treatment programs in which he could participate, and some of Grievant's co-workers indicated that they would be willing to donate leave to facilitate his participation.

25. Although the quality of Grievant's work remained acceptable from all indications, Ms. Phillips observed that his productivity was significantly lower than his similarly-situated co-workers.

26. Ms. Phillips did not observe Grievant in an intoxicated state at any time but she smelled alcohol on Grievant's breath on multiple occasions. Ten of Grievant's co-workers, Alan Joseph, Selena Tooley, Theresa Hindle, Beverly Morris, Peggy Imler, Emma Coutz, Max Munday, Sharon Chapman, Marilyn Ratliff, and Diane Reese, testified in Grievant's behalf, stating that they had worked with him for various periods of time over the last several years but had never observed him intoxicated at work. Likewise, these witnesses never saw Grievant consume or possess alcoholic beverages in the workplace, or dispose of beer cans in the trash.

27. Two of Grievant's witnesses, Theresa Hindle and Emma Coutz, occasionally smelled alcohol on Grievant's breath at work. One of Grievant's witnesses, Peggy Imler, stated that she smelled alcohol on Grievant's clothing on one

or two occasions. None of these witnesses were able to exclude the possibility that this odor of alcohol resulted from Grievant drinking while off duty during the previous night.

28. Grievant presented evidence relating to various prescription medications he was taking, indicating that some of the side effects from those medications caused him to take more frequent bathroom breaks.

29. Mr. Moore met with Grievant on March 6, 2012, verbally notifying him that his dismissal was being considered for having alcohol in the workplace. Grievant responded to Mr. Moore, stating: "I have not brought beer to work with me since being cautioned. I do not consume at work and I don't consume at the Moose Lodge until work is over. I don't know how to respond. I am going to start not carrying a backpack. I don't know what else I can do. Absenteeism is due to my health problem. The only reason I'm here today is because I'm on restricted leave. I did not bring alcohol into this building. I don't know what else you want me to say. From now on I will stop carrying my backpack." R Ex 2.

30. On March 6, 2012, Grievant was given written notice that Russell Fry, Acting Executive Director of Workforce West Virginia, had decided to proceed with Grievant's dismissal. That notice recounted that Grievant had been issued a written reprimand for failure to meet acceptable attendance standards on February 9, 2012, and placed on leave restriction at that time. *See* R Ex 2.

31. There was no evidence presented that Grievant violated any leave policies following his reprimand, or that he violated any of the terms of his leave restriction which was imposed on February 9, 2012.

Discussion

Because this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges against Grievant by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *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*.

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 Serv. Comm'n*, 181 W. Va. 49, 51, 380 S.E.2d 216, 218 (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 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. 2, *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); Syl. Pt. 1, *Oakes v. W. Va. Dept. of Finance & Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). *See Guine v. Civil Service Comm'n*, 149 W. Va. 461, 468, 141 S.E.2d 364, 368-69 (1965).

Respondent presented direct evidence that Grievant brought alcohol on the premises on February 2, 2012. Mr. Wolfingbarger and Mr. Moore found a 12-pack of

beer in a backpack which Grievant carried to work with him and brought into his work area at the agency. Grievant was appropriately reprimanded and warned not to engage in such conduct again. However, as Grievant notes, there was no direct evidence that anyone actually saw him possess or consume alcohol on agency premises[2] on February 17, 21 or 22, 2012, the specific dates in the dismissal notice when he is alleged to have had alcohol on the premises. *See* R Ex 2.

Respondent presented compelling circumstantial evidence that Grievant had alcohol on agency premises on three separate days in February 2012, as alleged. Circumstantial evidence alone may be sufficient to meet an employer's burden to prove the charges against a disciplined employee by a preponderance of the evidence. *Galloway v. W. Va. Bd. of Trustees*, Docket No. 90-BOT-388 (Nov. 22, 1991). *See Bailey v. Logan County Bd. of Educ*., Docket No. 93-23-383 (June 23, 1994); *Kirk v. Mingo County Bd. of Educ*., Docket No. 89-29-99 (Sept. 12, 1999).

The most compelling circumstantial evidence pointing toward Grievant having alcohol on state property, as alleged, was presented in the testimony and written investigation report prepared by Mr. Reynolds, the Respondent's Investigator. *See* R Ex 8. Investigator Reynolds observed Grievant entering the restroom wearing a blue windbreaker jacket that could easily conceal a can of beer, was able to go into the restroom and identify the bathroom stall Grievant was in by noting his shoes, which were visible beneath the barrier, could hear the sound of Grievant drinking something

[2] It is irrelevant that no witness observed Grievant under the influence or intoxicated on any of these dates, because Respondent never alleged that he was intoxicated or unable to perform his duties at any time.

while in the stall, and smelled the strong odor of alcohol on Grievant's breath shortly after Grievant came out of the restroom.

In addition, Investigator Reynolds, from his vantage point in an empty office overlooking California Avenue, observed Grievant place white bundles into the public trash receptacle in front of Building 4 more than once during the work day. Immediately after observing Grievant discard these similar-appearing items, Investigator Reynolds proceeded to the trash receptacle, which he had inspected earlier to determine its contents, and removed the only trash which resembled the item he had seen Grievant discarding. In each case, this item turned out to be a beer can wrapped in white paper towels, containing a small amount of beer residue.

It is also probative that each empty beer can recovered from the trash receptacle, whether by Investigator Reynolds, Ms. Phillips, Ms. Belt, or Mr. Wolfingbarger, was a Bud Light can, the same brand which Mr. Wolfingbarger and Mr. Moore had observed in Grievant's backpack on February 2. Likewise, these beer cans were all crushed in a similar fashion and wrapped in white paper towels which Investigator Reynolds observed to be identical to the ones dispensed in the building restrooms. Moreover, Investigator Reynolds' documented observations and findings were substantially similar to what Ms. Phillips, Ms. Belt and Mr. Wolfingarger had seen and found in the trash receptacles. *See* R Ex 8.

Grievant presented evidence from multiple co-workers who had spent time with him in the work area over a period of years without observing him discarding beer cans, or appearing under the influence of alcohol. Likewise, they had never observed him

consume alcohol while at work. However, none of these witnesses testified specifically that they were close to Grievant on February 21 and 22, 2012, when Investigator Reynolds was shadowing Grievant, and noting a strong smell of alcohol. Based upon the activity which Investigator Reynolds observed, it would have been virtually impossible for any of these witnesses to have observed Grievant drinking on the job, unless they shared the same bathroom stall in the men's room.

Taken as a whole, there is compelling circumstantial evidence establishing that Grievant was in possession of alcohol on state property during his work day, and engaged in a concerted effort to conceal this activity from his supervisors and co-workers. Therefore, the charge which constitutes the basis for Grievant's dismissal was proven by a preponderance of the credible evidence of record.[3] Grievant had been previously reprimanded for bringing beer to work in a backpack and warned that any further such conduct would not be tolerated. His subsequent conduct, as demonstrated by a preponderance of the evidence, supports Respondent's decision to terminate his employment, notwithstanding his 11 years of generally satisfactory public service.

In his grievance, Grievant alleged that his termination represented "the latest occurrence of ongoing harassment and retaliation." W. Va. Code § 6C-2-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." What constitutes harassment varies upon the factual situation in each individual

[3] Grievant's leave problems are recited in the dismissal notice. However, there were no new allegations that transpired after Grievant was reprimanded and placed on leave restriction. Therefore, these events were considered for the limited purpose of evaluating Grievant's employment record, after the alcohol-related charges were found to be sustained by a preponderance of the evidence.

grievance. *Sellers v. Wetzel County Bd. of Educ*., Docket No. 97-52-183 (Sept 30, 1997). There was no persuasive evidence presented by Grievant that his employer's actions to enforce the alcohol-free workplace policy constituted harassment in the circumstances presented. Because Grievant made a concerted effort to avoid detection of his alcohol consumption on or about the premises, it was necessary for his supervisors to assign a professional investigator to establish the parameters of Grievant's conduct to the fullest extent possible, using lawful surveillance methods. This activity did not represent any form of prohibited harassment.

As for Grievant's allegation of retaliation, Grievant waited until his post-hearing written submission to assert that he had testified as a witness against a manager in an EEO-related investigation, and that the actions pertaining to his excessive leave use and this disciplinary action thereafter ensued. Grievant was advised at the close of the hearing that any evidence he wanted to be considered needed to be made a part of the record at the hearing, noting that any "evidence" supporting his position included in his post-hearing argument would not be considered. Accordingly, this allegation is not supported by any evidence of record, and it will not be considered.

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 Rule of the W. Va. Public Employees

Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. Non-probationary state employees in the classified service may 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. 2, *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); Syl. Pt. 1, *Oakes v. W. Va. Dept. of Finance & Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). *See Guine v. Civil Service Comm'n*, 149 W. Va. 461, 468, 141 S.E.2d 364, 368-69 (1965).

3. Circumstantial evidence alone may be sufficient to meet an employer's burden to prove the charges against a disciplined employee by a preponderance of the evidence. *Galloway v. W. Va. Bd. of Trustees*, Docket No. 90-BOT-388 (Nov. 22, 1991). *See Bailey v. Logan County Bd. of Educ*., Docket No. 93-23-383 (June 23, 1994); *Kirk v. Mingo County Bd. of Educ*., Docket No. 89-29-99 (Sept. 12, 1999).

4. Respondent established by a preponderance of the evidence that, on multiple occasions in February 2012, Grievant brought alcohol onto state property, after having been warned of the consequences of such conduct. Grievant's termination was based on good cause in the circumstances presented.

Accordingly, this grievance is **DENIED.**

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: January 29, 2013

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LEWIS G. BREWER
Administrative Law Judge