

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 97-49
BRUCE KING)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On July 25, 1997, Bruce King ("Grievant") filed a grievance against the State of Vermont Agency of Transportation ("Employer"), contesting his dismissal from his position as a Transportation Maintenance Worker B. Therein, Grievant alleged that his dismissal violated Article 14 of the collective bargaining agreement between the State of Vermont and the Vermont State Employees' Association for the Non-Management Unit, effective for the period July 1, 1996, to June 30, 1997 ("Contract"), because: 1) his dismissal was not based in fact or supported by just cause, 2) the Employer improperly bypassed progressive discipline, and 3) the Employer failed to apply discipline with a view towards uniformity and consistency.

A hearing was held on February 12, 1998, in the Labor Relations Board hearing room in Montpelier, before Board Members Catherine Frank, Chairperson; Carroll Comstock and John Zampieri. Grievant represented himself. Assistant Attorney General David Herlihy represented the Employer. Grievant and the Employer filed post-hearing briefs on February 24 and 26, 1998, respectively.

FINDINGS OF FACT

1. The Contract provides in pertinent part:

Article 14
Disciplinary Action

1. No permanent or limited status employee covered by this agreement shall be disciplined without just cause. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:

...

- b. apply discipline . . . with a view toward uniformity and consistency;
- c. impose a procedure of progressive discipline . . .
- d. In misconduct cases, the order of progressive discipline shall be:
 - i. oral reprimand;
 - ii. written reprimand;
 - iii. suspension without pay;
 - iv. dismissal.

...

f. The parties agree that there are appropriate cases that may warrant the State:

- 1. bypassing progressive discipline . . .

2. The appointing authority or authorized representative . . . may dismiss an employee for just cause . . .

10. In any misconduct case involving a suspension or dismissal, should the Vermont Labor Relations Board find just cause for discipline, but determine that the penalty was unreasonable, the Board . . . shall have the authority to impose a lesser form of discipline.

2. Grievant worked for the Employer for approximately 20 years. For several years preceding his dismissal, Grievant was employed as a Transportation Maintenance Worker III with the Employer, and was assigned to the District 8 region in the St. Albans area. Transportation Maintenance Workers III perform a variety of routine maintenance and repair duties relating to the state transportation system. Duties require the use of a variety of tools and vehicles, including driving a truck and operating a snowplow in the winter to clear the roads or to spread salt or sand on the

roads. Transportation Maintenance Workers III are required to possess a commercial driver's license (State's Exhibit 16).

3. In 1995, the federal government mandated random urinalysis testing to detect alcohol and substance abuse among employees holding certain safety sensitive positions, including all positions requiring a commercial driver's license. In accordance with the requirements of federal law and regulations, in 1995 the State and the Vermont State Employees' Association negotiated the State of Vermont Alcohol and Controlled Substance Testing Policy. The Policy, which has been effective at all times relevant, provides in pertinent part as follows:

I. Purpose

This policy is promulgated in accordance with the requirements of federal law and regulation, 49 CFR Parts 382, et al. The purpose of this policy is to establish an alcohol and controlled substances testing program for certain State of Vermont employees for the safety of all employees and the public and to help prevent accidents and injuries resulting from the misuse of alcohol and controlled substances by drivers of commercial motor vehicles. This policy outlines prohibited employee conduct concerning work related possession or use of alcohol or drugs (controlled substances) by commercial motor vehicle drivers and the steps that may be taken in response to violations of this policy. An Employee Assistance program is available and employees are encouraged to seek assistance for substance abuse programs that could affect their employment.

IV. Prohibitions

7. Controlled Substances Tests:

No CDL driver shall report for duty, remain on duty or perform a safety-sensitive function, if the driver tests positive for controlled substances as defined in 49 CFR. Each driver who has engaged in conduct prohibited by this section shall be subject to the provisions of section 382.605 of 49 CFR before being permitted to return to work performing safety sensitive duties, to include evaluation by a substance abuse professional, successful completion of any prescribed rehabilitation program, return to duty controlled substances test result with a verified negative result. Affected drivers shall be permitted to use sick leave (or annual, personal or compensatory time off if sick leave is exhausted) for the time necessary to attend any prescribed

rehabilitation program during normal working hours, and may be subject to unannounced follow-up alcohol and/or controlled substances tests following return to duty. In addition, any initial violation of the provisions of this section shall be considered to be a very serious, job-related offense, and will result in the driver being notified, in writing, of the extreme seriousness of the violation; that any similar conduct in the future could result in more severe disciplinary action; and that completion of any prescribed rehabilitation program is required . . . Such notice . . . may be used by the employer in a current or subsequent proceeding connected with a violation of this policy. Any subsequent violation of the provisions of this policy will result in disciplinary action.

. . .

VII. Miscellaneous Provisions

. . .

Split Sample Testing - In the event that: a CDL driver receives a positive test for controlled substances, as defined in 49 CFR; and federal regulations require that a split sample be made available for analysis; and the driver has the split sample independently analyzed by a qualified laboratory in accordance with applicable provisions of the federal regulations (49 CFR, part 40); and such independent analysis produces a verified negative result; *then the cost of the independent analysis shall be submitted to the employer for reimbursement, along with a copy of the independent laboratory's report (State's Exhibit 10).*

4. In order to meet the obligation for alcohol and controlled substance abuse testing, the Employer has contracted at all times relevant with Mobile Testing Services, a Vermont company that specializes in the administration of urinalysis tests. Mobile Testing Services is certified as a testing service for use in the federal alcohol and controlled substance abuse testing program. The laboratory to which *Mobile Testing Services sends the samples also is certified for use in the program.*

5. The Employer supplies Mobile Testing Services with current employee rosters, and Mobile Testing Services uses a computer program to generate randomly selected lists of employees to be tested. The Employer is required by federal regulations to test 50 percent of the Employer's commercial driver's license holders during a calendar year.

6. Mobile Testing Services follows federal regulations which dictate how urine is to be collected. Safeguards to ensure that the urine is not tampered with include safety-sealed collection bottles with tamper-proof seals, stickers applied to the lids, tamper-proof plastic bags to hold the sealed bottles, and safe storage documented by the use of a chain of custody document. The employee being tested witnesses all the steps taken to identify and seal the sample (State's Exhibits 6, 7, 9).

7. Federal regulations specify screening and confirmation cut-off levels of certain numbers of nanograms per milliliter for the metabolite that remains in the body after the ingestion of marijuana. Samples which indicate the presence of the marijuana metabolite, but are below the cut-off point, are tested as negative.

8. On August 19, 1996, Grievant was tested in accordance with the above-described requirements. His sample tested positive for the presence of the marijuana metabolite. Grievant did not contest the results of the test (State's Exhibit 6).

9. On August 26, 1996, Grievant was sent a letter by the Employer which provided in pertinent part as follows:

As you are aware you showed a positive result from a controlled substance test . . .

This letter is to impress on you the seriousness of this offense. Mere controlled substance usage violates both State and Federal law. Reporting to work while in any way under the influence of an illegal substance jeopardizes your safety, your co-workers and the safety of the traveling public. It is also cause to remove you from any assignment requiring a CDL, which covers many, if not most, of our job requirements.

Please pursue counseling and treatment as long as is required to prevent a reoccurrence of any substance abuse . . .

It is necessary at this point to remind you that any future positive test results may result in disciplinary action up to and including dismissal . . . (State's Exhibits 3, 13).

10. Grievant was removed from safety sensitive duties after the positive controlled substances test. Under the State's Alcohol and Controlled Substance Testing Policy, Grievant was not allowed to return to work until he had completed substance abuse counseling, a counselor recommended his return to safety sensitive duties, and he had a negative controlled substance test. Grievant completed these steps and was returned to service on January 20, 1997. His rehabilitation program included unannounced monthly follow-up testing for 12 months (State's Exhibit 3).

11. Grievant tested negative in samples taken during February, March and April, 1997 (State's Exhibit 3).

12. Grievant provided a sample on May 20, 1997. The sample tested positive for the marijuana metabolite (State's Exhibit 7).

13. Grievant exercised the option provided by federal regulations, and the State's Alcohol and Controlled Substance Testing Policy, to request a "split sample" test. At the time the urine sample is collected from an employee, the urine is placed in two containers. Only one is tested at the laboratory; the other remains sealed. At the request of an employee who has a positive result, the sealed container is sent for testing to a certified laboratory of the employee's choice. Grievant's "split sample" test also was positive (State's Exhibits 3, 8).

14. The Agency of Transportation Secretary delegated the authority to decide any disciplinary action to take against Grievant to Charly Dickerson, the Employer's Director of Human Resources. On June 9, 1997, Dickerson informed Grievant that the Employer was contemplating dismissing him. Dickerson stated:

...
The reason(s) dismissal is contemplated is as follows:

On Wednesday, June 4, 1997, the Agency of Transportation received confirmation that you failed to test negative for a controlled substance, for the second time. You were tested on 8-19-96 with a confirmed positive result. You were tested on 5-20-97 with a confirmed positive result which was also confirmed with a positive result on the split sample which you requested.

...
(State's Exhibit 1).

15. Dickerson provided Grievant with an opportunity to meet with him prior to deciding whether to dismiss him. Dickerson, and Pam Ankuda, Personnel Administrator for the Employer, met with Grievant and his VSEA representative, Gary Hoadley, on June 16, 1997. At the meeting, Grievant denied use of marijuana which could have resulted in a positive test when he provided the urine sample on May 20, 1997. He offered two possible reasons for the positive test. He told Dickerson that he had been on a fishing trip several days prior to May 20 and, while sitting in a car during the trip, two other persons had been smoking marijuana. He also indicated that he could have ingested marijuana by eating adulterated food at his place at work, explaining that other employees had threatened to bring in food containing marijuana so employees would test positive for controlled substance use (State's Exhibit 4).

16. The screening and confirmation cut-off levels, with respect to the numbers of nanograms per milliliter for the metabolite that remains in the body after the ingestion of marijuana, are established by the federal government to account for the ingestion of second-hand smoke. The cut-off levels are designed so that a person will not have a positive test from ingesting second-hand marijuana smoke, but will only exceed the cutoff levels from direct marijuana smoking.

17. Grievant has not demonstrated that his positive test for the marijuana metabolite resulted from the ingestion of second-hand smoke.

18. Grievant has not presented specific evidence to demonstrate that he could have ingested marijuana by eating adulterated food at his place at work.

19. On June 25, 1997, Dickerson sent Grievant a letter which provided in pertinent part as follows:

...
As outlined in the pre-termination letter dated June 9, 1997, in May of this year you tested positive for the presence of an illegal substance in violation of the State of Vermont's Alcohol and Controlled Substance Testing Policy. This is the second positive test within 12 months, and occurred within five months of being released to full duty from the previous incident. The testing is designed to screen out the likelihood that this substance was detectable due to secondary or passive means.

Effective July 2, 1997, you are terminated from your employment with the State for the above cited reasons and as outlined in the June 9, 1997 letter . . . This action is taken after considering all aspects of your employment and taking into account factors including the nature of the job, the requirements of your license, the potential impact your continued presence can have on the public, the state, and your co-workers. It also takes into account your time with the state and your work record, and the fact that you had adequate notice as to the seriousness of this behavior. It is my opinion that there is just cause for your dismissal . . . (State's Exhibit 2)

20. In deciding whether to dismiss Grievant, Dickerson determined that the fact that Grievant had worked for the Employer for approximately 20 years, and that he had a reasonably good work record during the previous 2-3 years, were factors in Grievant's favor. However, Dickerson ultimately determined that the seriousness of Grievant's offenses of two positive controlled substance tests, the impact of his decision on other state employees with commercial driver's licenses,

and the potential liability to the Employer of an employee injuring someone in a vehicle after testing positive for the second time, warranted dismissing Grievant.

OPINION

At issue is whether just cause existed for dismissal of Grievant from his position as a Transportation Worker B with the State Agency of Transportation. Grievant contends that his dismissal violated Article 14 of the Contract because his dismissal was not based in fact or supported by just cause, the Employer improperly bypassed progressive discipline, and the Employer failed to apply discipline with a view towards uniformity and consistency.

The ultimate criterion of just cause is whether an employer acted reasonably in discharging an employee for misconduct. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). There are two requisite elements which establish just cause for dismissal: 1) it is reasonable to discharge an employee because of certain conduct, and 2) the employee had fair notice, express or fairly implied, that such conduct would be grounds for discharge. Id. In re Grievance of Yashko, 138 Vt. 364 (1980).

We first establish whether the Employer has established the charges made against Grievant in the dismissal letter. The burden of proof on all issues of fact required to establish just cause is on the employer, and that burden must be met by a preponderance of the evidence. Grievance of Colleran and Britt, 6 VLRB 235, 265 (1983). The Employer charged Grievant with violation of the State's Alcohol and Controlled Substance Testing Policy due to testing positive for a second time within ten months to the presence of the controlled substance of marijuana. We have found by a preponderance of the evidence that the Employer has established these charges.

The Employer demonstrated that the process of collecting samples and testing for controlled substances is reliable, and was adhered to in this case when Grievant tested positive for the second time to the presence of the controlled substance of marijuana.

We have considered Grievant's defenses that his positive test for the marijuana metabolite could have resulted from the ingestion of second-hand smoke, or that he could have ingested marijuana by eating adulterated food at his place of work. We have concluded, however, that Grievant has failed to produce sufficient evidence to support these claims. The evidence before us indicates that the screening and confirmation cut-off levels for a positive controlled substances test established by the federal government, and applied in this case, are designed so that a person will not have a positive test from ingesting second-hand smoke, but will only exceed the cut-off levels from direct marijuana smoking. The evidence presented by Grievant with respect to ingestion of second-hand smoke is insufficient to overcome the presumption of the reliability of the cut-off levels to account for the potential presence of second-hand smoke established by the federal government. Grievant also has not presented specific evidence to demonstrate that he could have ingested marijuana by eating adulterated food at his place at work.

The charges against Grievant having been proven, we must determine whether the discipline imposed by the employer is reasonable given the proven facts. Id. at 266. We look to the factors articulated in Grievance of Colleran and Britt, 6 VLRB at 268-69, to determine the legitimacy of the particular disciplinary action. The pertinent factors here are: 1) the nature and seriousness of the offense, and its

relation to Grievant's responsibilities; 2) the effect of the offense upon supervisors' confidence in Grievant performing his duties; 3) the clarity with which Grievant was on notice that such conduct could lead to discipline; 4) the notoriety of the offense or its impact upon the reputation of the agency; 5) the employee's past work record, including length of service; 6) the potential for the employee's rehabilitation; and 7) the adequacy and effectiveness of alternative sanctions.

Grievant's offense was serious, particularly given his job duties as a Transportation Maintenance Worker to drive a truck and operate a snowplow. The use of controlled substances is at odds with the safe completion of Grievant's duties in such a safety-sensitive position. Use of controlled substances presented a threat to the safety of the public and co-workers, and created potential liability for the Employer if an employee whom had tested positive twice for using controlled substances injured someone in a vehicular accident. Given these considerations, Grievant's offense was sufficiently egregious to undermine both the Employer's and the public's confidence in his continued ability to perform his duties. Grievance of Gregoire, ___ Vt. ___, Sup.Ct.Doc.No. 95-228, slip op. at 9-10 (1996).

The seriousness of Grievant's offense is reflected in the federal government mandating random urinalysis testing to detect alcohol and substance abuse among employees holding a commercial driver's license. It is further reflected in the Alcohol and Controlled Substance Testing Policy negotiated by the State and the Vermont State Employees' Association. The Policy describes an initial positive controlled substances test as a "very serious, job-related offense", and states that

"(a)ny subsequent violation of the provisions of this policy will result in disciplinary action".

Grievant had fair notice that his offense could result in his dismissal. In testing positive for the presence of the marijuana metabolite ten months earlier, the Employer removed Grievant from safety sensitive duties pending his completion of substance abuse counseling and treatment, and warned him that "any future positive test results may result in disciplinary action up to and including dismissal". This provided clear notice to Grievant that controlled substances use would not be tolerated. Grievance of Smith, 11 VLRB 38, 47 (1988).

We recognize that Grievant had worked for the Employer for approximately 20 years, and that he had a reasonably good work record during the previous 2-3 years he had worked in the District 8 region in the St. Albans area. Given the seriousness of Grievant's offense of a positive controlled substance test within ten months of an initial positive test, however, and there being no evidence indicating Grievant was treated differently than other employees committing similar offenses, the Employer did not inappropriately bypass progressive discipline, and acted reasonably in dismissing Grievant. The Employer appropriately concluded that Grievant was not a good candidate for rehabilitation, and that a lesser sanction would not have been adequate to deter such conduct in the future by Grievant or other employees holding commercial driver's licenses. In sum, we conclude that just cause existed for Grievant's dismissal.

ORDER

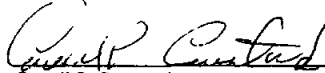
NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of Bruce King is DISMISSED.

Dated this 7th day of May, 1998, at Montpelier, Vermont.

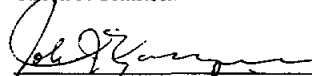
VERMONT LABOR RELATIONS BOARD



Catherine L. Frank, Chairperson



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