TIMOTHY FINLEY,

Grievant,

v. DOCKET NO. 05-DOH-031

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant Timothy A. Finley filed a grievance on December 6, 2004, in which he challenged his dismissal from employment with Respondent, the Department of Transportation/Division of Highways (DOH). He charges favoritism, discrimination and harassment. As relief, he is seeking reinstatement and back pay and, and at level four he also requested a raise to $12.15 per hour.

After proceeding through levels one, two and three, where the grievance was denied, a level four hearing was held in the Grievance Board's office on April 5, 2005. Grievant presented his own case, and Respondent was represented by counsel, Barbara Baxter. The matter became mature for decision at the close of the hearing.

Issues and Arguments

DOH terminated Mr. Finley's employment after it learned that his driver's license had been revoked for a period of ten years when he was convicted of third-offense driving under the influence (DUI). Mr. Finley was a Transportation Worker 3/Craftsworker, and a valid driver's license is a requirement for that position. Mr. Finley argued that otheremployees had lost their licenses but retained their jobs, and DOH distinguished these instances.

Based on a preponderance of the evidence adduced at the hearing, I find the following material facts have been proven:

Findings of Fact

1. Mr. Finley was employed by DOH as a Transportation Worker 3/Craftsworker (TW3) in the

District VII bridge department, headquartered in Weston.

2. The Division of Personnel Classification Specification for TW3 lists as “Special Requirements,” “A Valid West Virginia Motor Vehicle Operator's License.” It also states a Commercial Driver's License (CDL) may be required in Bridge Maintenance, but in Grievant's section, this was only a preference, not a requirement. Nevertheless, Grievant did have a Class A CDL.

3. In January, 2004, Grievant's operator's license and CDL was revoked when he pled *nolo contendre* to a charge of Driving Under the Influence. His Driver Record, provided by the Division of Motor Vehicles (DMV), shows that at the time his license was already revoked for a mandatory insurance violation.

4. After DOH learned of Mr. Finley's license revocation through a newspaper report, Highway Engineer 3 Richard White and District VII Personnel Officer Beverly Stalnaker investigated and were told by the DMV that the period of revocation was ten years.

5. At that point, Mr. White contacted Gary Clayton in the personnel office and later Jeff Black, DOH's Human Resources Manager, for advice. They attempted to find Mr. Finley an alternate position, closer to his home and that did not require an operator'slicense, but were unsuccessful. Mr. Black informed Mr. White the only remaining course of action was to terminate Mr. Finley's employment.

6. In 1991, an employee named Tom Montgomery had his license revoked for ten years for a similar offense, but before he could be terminated, he had petitioned the court for a sentence reduction. His revocation was reduced to two years, and he was allowed to drive to work with a Breathalyzer on his vehicle. Another former employee, John Kinney, was given similar consideration, as was Mr. Finley during a prior license revocation of shorter duration.

7. Grievant, who lives in Buckhannon, now walks to DOH's Equipment Division and gets a ride with someone from there to his Weston work location. Since his license revocation, he has been able to perform many of the labor-type functions of his job, but cannot drive a truck or operate a crane. Bridge maintenance workers rarely work alone, so when Grievant is working, there is usually another employee working who can drive.

8. Due to expenses related to his probation and fines, Mr. Finley is unable to hire a lawyer to work on getting his license revocation reduced to a shorter term.

Discussion

DOH, which bears the burden of proof in this disciplinary action, (See footnote 1) contends and has proven that Mr. Finley is no longer qualified for the position he holds, due to his lack of a valid motor vehicle operator's license. Mr. Finley, on the other hand, avers that the simple fact that he has been working for approximately two years without his license proves otherwise, and also contends that past treatment of others in similar situations is evidence of harassment, discrimination and favoritism.

There is no dispute that Mr. Finley's operator's license and CDL have been revoked for ten years, and there is no dispute that a valid license is a requirement for a TW3 position. Generally, 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." (See footnote 2) Grievant was not dismissed for on-the-job misconduct, but rather because his off-the-job conduct caused him to be unfit for the position he held. "'Fitness' for a classified position is defined as 'suitability to perform all essential duties of a position by virtue of meeting the established minimum qualifications and being otherwise qualified.' Division of Personnel Rule 3.40." (See footnote 3) Lack of fitness constitutes good cause for dismissal, (See footnote 4) and DOH has amply demonstrated that Grievant is unfit because he lacks an essential qualification for the position he holds.

Grievant has failed to show any mitigating circumstances that would require DOH to retain him in its employ. His charges of harassment, discrimination, and favoritism are unproven. "'Discrimination' means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." (See footnote 5) "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." (See footnote 6) In *The Board of Education of the County of Tyler v. White*, 605 S.E.2d 814(W. Va. 2004), the West Virginia Supreme Court of Appeals clarified the legal test for discrimination claims raised under the grievance procedure definition. A grievant must establish a case of discrimination by showing:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee. (See footnote 7)

An employee claiming favoritism must also show he is similarly-situated to another employee. (See footnote 8) Mr. Finley has failed to meet this first element of the discrimination test, because he has failed to identify an similarly-situated employee who was treated differently. All the employees, including himself, whose license revocations were overlooked, had revocations of much shorter duration. Even if Grievant were to get his revocation for third-offense DUI reduced, his license would still be revoked for other reasons. The other employees also had reliable means of transport to work that did not rely on another state employee using a state vehicle.

Grievant's harassment claim must fail also. “Harassment” means “repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.” (See footnote 9) Quite to the contrary, DOH has done everything in its power to accommodate Mr. Finley's irresponsibility. It has allowed him to work while a solution to his problem was sought, despite the hardship on the bridgecrew caused by having a member who was not fully capable of performing needed duties. It searched for a position that did not require driving and that was located closer to Mr. Finley's home. His claim that DOH harassed him is as ridiculous as getting caught behind the wheel while drunk for a *third* time. Grievant only has himself to blame for the consequences of his behavior.

The following Conclusions of Law support this decision:

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (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 (1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

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. "'Fitness' for a classified position is defined as 'suitability to perform all essential duties of a position by virtue of meeting the established minimum qualificationsand being otherwise qualified.' Division of Personnel Rule 3.40." *Adkins v. Div. of Labor*, Docket No. 04-DOL-071 (2005). Lack of fitness constitutes good cause for dismissal. *Id.*

4. Respondent met its burden of proving it had good cause to dismiss Grievant because he was unfit for his position.

5. "'Discrimination' means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." W. Va. Code § 29-6A-2(d). "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 29-6A-2(h).

6. A grievant must establish a case of discrimination and favoritism by showing, among other elements, that he or she has been treated differently from one or more similarly-situated employees. *Chaddock v. Div. of Corrections*, Docket No. 04-CORR-278 (2005); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (2004); *The Bd. of Educ. of the County of Tyler v. White*, 605 S.E.2d 814 (W. Va. 2004). *See also*, *Kincaid v. Div. of Corrections*, Docket No. 98-CORR-144 (1998); *Prince v. Wayne County Bd. of Educ.,* Docket No. 90-50-281 (1990).

7. Grievant has not met his burden of showing he was similarly-situated to another employee who was treated differently.

8. "Harassment" means "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." W. Va.

Code § 29-6A-2(l).

9. Grievant was not harassed.

For the foregoing reasons, this grievance is **DENIED**. Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred, and such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

April 15, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (1988).

Footnote: 2

Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980).

Footnote: 3

Adkins v. Div. of Labor, Docket No. 04-DOL-071 (2005).

Footnote: 4

Id.

Footnote: 5

W. Va. Code § 29-6A-2(d).

Footnote: 6

W. Va. Code § 29-6A-2(h).

Footnote: 7

Chaddock v. Div. of Corrections, Docket No. 04-CORR-278 (2005); Frymier v. Glenville State College, Docket No. 03-HE-217R (2004).

Footnote: 8

Kincaid v. Div. of Corrections, Docket No. 98-CORR-144 (1998); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (1990)

Footnote: 9

W. Va. Code § 29-6A-2(l).