THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

ROY REED,

Grievant,

v. **Docket No. 07-DOH-023**

Janis I. Reynolds

Senior Administrative Law Judge

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Roy Reed, was employed as a Transportation Worker 2 by Division of Highways ("DOH"). On January 24, 2007, he filed this grievance asserting he should not be terminated from his employment because he lost his driver's license, and he is still capable of performing the duties of this position. The Relief Sought is reinstatement into his position.

As this grievance concerned a dismissal, Grievant filed directly to Level IV. A Level IV hearing was held on May 3, 2007, and this case became mature for decision on that date, as the parties elected not to file proposed findings of fact and conclusions of law. Grievant represented himself and was assisted by his father Larry Patterson, and DOH was represented by Barbara Baxter, Esq.

Synopsis

Respondent asserts Grievant was terminated because he was unable to perform the essential duties of his position because he does not possess a driver's license, a minimum

qualification of the position. Grievant asserts it is not necessary for him to drive vehicles in his position, and others have been treated differently. (See footnote 1)

As Grievant did not present any evidence, and the evidence presented by DOH demonstrated the possession of a driver's license was an essential requirement of the position, this grievance is denied.

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

Findings of Fact

1. Grievant was employed as a Transportation Worker 2/Mechanic in District 3.
2. The class specification for Transportation Worker 2 identifies the following essential qualification, "Special Requirements: (1) A valid West Virginia Motor Vehicle Operator's license. . . ."
3. At the time of his termination, Grievant had worked for DOH as a temporary, probationary, and permanent employee for a total of approximately 1½ years.
4. In January 2006, Debbie Farnsworth, Administrative Services Manager for District 3, saw a notice of Grievant's arrest for DUI in the newspaper. This was during Grievant's probationary period. She was directed by DOH's Human Resources Division to find out if he had indeed been arrested, and if his driver's license had been revoked.
5. A Revocation Notice was issued on this DUI on January 13, 2006. Resp. Exh. 1.
6. Shortly thereafter, Grievant's supervisor, Dan Taylor, discussed the situation with Grievant, and Grievant confirmed he had been arrested.
7. Ms. Farnsworth talked to Lora Whitt at the Division of Motor Vehicles ("DMV"). Ms. Whitt confirmed Grievant's driver's license had been revoked, but since he had requested a hearing, he would be allowed to drive until the DMV Hearing Examiner made a decision on his case. If Grievant's appeal was denied, his driver's license would then be revoked.
8. Because Grievant had appealed this revocation and still had a driver's license, DOH permitted Grievant to continue in his position. During the appeal period, Grievant completed his probationary period and became a permanent employee.

9. On September 18, 2006, Grievant was again arrested for DUI. The Revocation Notice on this DUI was dated September 22, 2006. This Notice indicated he had prior arrests on September 13, 1999, and January 1, 2006. Resp. Exh. 1 & 2. This Revocation Notice indicated his driver's license was suspended effective October 27, 2006, for a period of one year.

10. On December 14, 2006, Mr. Taylor met with Grievant and informed him that he was recommending his termination, as he no longer met the minimum qualifications of his position. Grievant signed the RL 544 notifying him of this recommendation.

11. On January 18, 2007, Jeff Black, Director of the Human Relations Division, notified Grievant of his termination effective February 2, 2007. This letter also noted Grievant had pled guilty to second offense DUI and first offense driving on a suspended driver's license.

12. DOH is not required by any rule, regulation, statute, or policy to offer an employee a second chance in this situation. 13. After his termination, Grievant attended two programs: one for intermediate treatment for addiction and another for relapse prevention. Grievant's Exh. 1 & 2.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; 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 and 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.

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 & 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). Additionally, Division of Personnel Rule 3.40 defines "Fitness" as

"suitability to perform all essential duties of a position by virtue of meeting the established minimum qualifications and being otherwise qualified."

The issue presented is whether DOH violated any statutes, policies, rules, or regulations in terminating Grievant's employment. The evidence presented by Respondent was clear; Grievant was employed as a Transportation Worker 2 and one of the specific minimum qualifications of the position is possession of a driver's license. As Grievant's driver's license was revoked for one year, it is clear he was unable to perform the essentialduties of the position, and, therefore, did not meet the definition of fitness as stated by the Division of Personnel.

The above-discussion will be supplemented by the following Conclusions of Law.

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 (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 and 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.

2. State employees who are in the classified service can only be dismissed for "good cause." See Oakes v. W. Va. Dep't of Finance & 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).

4. "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

5. Respondent has met its burden of proof and demonstrated Grievant was unable to perform the essential duties of his position and did not meet the minimum qualifications required by the class specification.

Accordingly, 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 thegrievance occurred." Any 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.

Janis I. Reynolds

Senior Administrative Law Judge

Dated: May 16, 2007

Footnote: 1

Because Grievant presented no evidence on this issue, it will not be addressed further.