THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

MATTHEW QUEEN,

Grievant,

v. **Docket No. 06-DOH-439**

Sue Keller

Senior Administrative Law Judge

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Matthew Queen ("Grievant"), employed by the Division of Highways ("DOH") as an Transportation Worker 2, filed a grievance at level four on November 27, 2006, challenging the termination of his employment after the loss of his driver's license. For relief, Grievant requests reinstatement either as a Transportation Worker 2, Transportation Worker 1, or to any position in Upshur County or any bordering county. A prehearing conference call was conducted on January 7, 2007, with Grievant, representing himself, and DOH counsel Barbara Baxter. At that time, Grievant raised the issue of discrimination/favoritism as evidenced by different treatment afforded other employees in similar circumstances. Ms. Baxter was given an opportunity to review the records of the individuals cited by Grievant, and a second conference call was conducted on January 18, 2007. Both parties indicated they had no further evidence to offer, and that further hearing would not be necessary. The matter became mature for decision upon receipt of an affidavit completed by DOH Human Resources Director Jeff Black, on January 30, 2007.

Findings of Fact

1. Grievant was employed by DOH as a Transportation Worker 2 in October 2005. The Division of Personnel class specification for this position lists special requirements for this position to include a valid West Virginia Motor Vehicle Operator's license. The license is necessary because an essential

duty of the position is the operation of trucks and other vehicles in the construction and maintenance of the state highways.

2. Grievant was arrested on March 29, 2006, for driving under the influence. As this was his second offense, his driver's license was revoked for one year, effective September 6, 2006.

3. By letter dated November 17, 2006, DOH Human Relations Director Jeff Black advised Grievant that his employment was to be terminated for failure to maintain a valid driver's license, an essential requirement for his position.

4. Other DOH employees have been dismissed for the same reason as Grievant. 5. Due to a need for truck drivers but not laborers, who do not need a driver's license, DOH is now exercising a more stringent enforcement of the disciplinary policy.

Discussion

In dismissal cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for dismissing an employee. *W. Va. Code* § 29-6A-6. *Davis v. W.Va. Dept. of Motor Vehicles*, Docket No. 89-DMV-569 (Jan.22, 1990); *Broughton v. W. Va. Div. of Highways*, Docket No. 92-DOH-325 (Dec. 31, 1992). "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.*

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); *See also* 143 W. Va. C. S. R. 1 §§ 12.02 and 03.

This situation was previously addressed by the Grievance Board in *Finley v. Department of Transportation/Division of Highways*, Docket No. 05-DOH-031 (Apr. 15, 2005). In *Finley*, grievant lost his driver's license for a period of ten years after a thirdconviction of driving under the influence. Similarly, Grievant Queen 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." Lack of fitness constitutes good cause for dismissal, and DOH has amply demonstrated that Grievant is unfit because he lacks an essential qualification for the position he holds.

Although Grievant believed other employees who had lost their licenses had continued to be employed by DOH, he was unable to demonstrate discrimination, defined by *W. Va. Code* § 29-6A-2(d) as "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." In discussing discrimination claims under the grievance statutes, the Supreme Court of Appeals has noted that "[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]" *Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004). The employees identified by Grievant were found to have either have had their employment terminated, or had their licenses revoked in an earlier period before DOH's need for truck drivers was so crucial. Therefore, Grievant's claim of discrimination is not supported by the record. While Grievant may apply for any position posted by DOH which does not require a driver's license, DOH is not required to retain, or reassign, an employee who no longer meets the requirements for the position he holds. *Finley, supra.*

The following conclusions of law support this decision. Conclusions of Law

1. In dismissal cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for dismissing an employee. *W. Va. Code* § 29-6A-6. *Davis v. W.Va. Dept. of Motor Vehicles*, Docket No. 89-DMV-569 (Jan.22, 1990); *Broughton v. W. Va. Div. of Highways*, Docket No. 92-DOH-325 (Dec. 31, 1992).

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); *See also* 143 W. Va. C. S. R. 1 §§ 12.02 and 03.

3. *W. Va. Code* § 29-6A-2(d) defines discrimination as "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." In discussing discrimination claims under the grievance statutes, the Supreme Court of Appeals has noted that “[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]” *Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004). 4. DOH has proven by a preponderance of the evidence that Grievant's employment was terminated for good cause, *i.e.*, he is no longer qualified for the position of Transportation Worker 2.

5. Grievant has failed to establish that similarly situated employees have been treated differently, and that discrimination was involved in the decision to terminate his employment.

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 the grievance 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.

DATE: FEBRUARY 16, 2007 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE