THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

EDWARD GILBERT,
Grievant,

v. **DOCKET NO. 2009-0548-WVU**

WEST VIRGINIA UNIVERSITY,
Respondent.

DECISION

This grievance was filed by Grievant, Edward Gilbert, on October 17, 2008, against his employer, Respondent, West Virginia University. His initial statement of grievance reads: "[w]rongfully demoted from PG 12 to PG 7." The relief sought by Grievant is, "[p]lace Grievant in equivalent (or similar) position (in PG 12)."

A conference was held at level one on December 5, 2008, and January 12, 2009, at which time Grievant amended his grievance to add a claim of discrimination. A level one decision denying the grievance was issued on January 23, 2009. Grievant appealed to level two, and a mediation was held on March 11, 2009. An Order of Unsuccessful Mediation was entered on March 13, 2009, and Grievant appealed to level three. A level three hearing was held before the undersigned Administrative Law Judge on June 11, 2009, in the Grievance Board's Westover office. Grievant was represented by Diane C. Parker, Business Manager, LIUNA Public Employees' Local 814A, and Respondent was represented by Samuel R. Spatafore, Assistant Attorney General. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on July 20, 2009.

Synopsis

After his third at-fault accident, Grievant, a bus operator for Respondent, was notified that his driving privileges had been revoked by Respondent, and that he would be demoted. One of Grievant's accidents was caused by his own reckless disregard, and could have caused serious injuries to his passengers. In addition, he had failed to disclose an important change in his medical condition to Respondent. Respondent demonstrated it acted in accordance with its policy when it revoked Grievant's driving privileges. Grievant claimed he was discriminated against because he was demoted to a pay grade 7 position, while a co-worker who had his driving privileges revoked was demoted to a pay grade 11 position. Respondent looked for a position for Grievant for several months and could not find a position in a higher pay grade for which he was qualified. Grievant also claimed he was discriminated against because another co-worker did not have her driving privileges revoked after three minor maneuvering accidents. Grievant was not similarly situated to either co-worker.

The following Findings of Fact are made based upon the record developed at levels one[1] and three.

Findings of Fact

1. Grievant has been employed by West Virginia University ("WVU") for 10 years as a Bus Operator 2, pay grade 12. Grievant holds a CDL and drove road coaches for WVU, both in state and out of state.

---

[1] The parties submitted exhibits at the level one conference, which were made a part of the record at level three.

2. On December 4, 2006, Grievant was involved in an accident while driving a bus for WVU. While making a turn at a light in Morgantown, Grievant side-swiped a car, scraping the bumper of the bus, and popping the side mirror off the car. Grievant was at-fault in this accident.

3. Grievant is diabetic. WVU was aware of Grievant's condition. At one point it was necessary for Grievant to take insulin by injection. Because of this, Grievant was required to obtain a waiver from the governing agency before he was allowed to drive trips out of state. Grievant obtained this waiver. Grievant's doctor later placed him on oral medication for his condition, and Grievant made WVU aware of this change. At some point prior to April 8, 2008, Grievant's doctor returned him to insulin injections. Grievant did not make anyone at WVU aware of this change in his medical condition.

4. On April 8, 2008, Grievant was driving the WVU Dance Team to Florida in a road coach. During a break in the trip Grievant administered an insulin injection, apparently without first testing his blood sugar, causing his blood sugar level to become too low. Two to three hours into the trip, Grievant began swerving off the road, and out of his lane, frightening his passengers. Grievant was aware he was swerving, but did not pull the bus off the road. As Grievant exited Interstate 79 in West Virginia, to Route 19 South, he drifted into the center and ran over a sign, and finally brought the bus to a stop. When he called his supervisor, Russell David Barnett, to report the accident, Grievant's speech was slurred. The Dance Team Coach also talked to Mr. Barnett and made clear to him that the Dance Team would not continue on the trip with Grievant as the driver. The accident caused approximately $2000 damage to the bus, the bus had to be taken out of

service for several trips, resulting in additional costs to WVU, and another driver had to be called out to continue the trip. Grievant was at-fault in this accident.

5. In response to the April 8th accident, on April 22, 2008, Mr. Barnett issued a letter of warning to Grievant, for gross misconduct. The letter noted Grievant's failure to disclose that he was injecting insulin, which would affect the status of his CDL, and restricted him to local driving.

6. On September 19, 2008, a Mountain Line bus was parked in a turnaround on the WVU campus. Grievant was driving a WVU bus through the turnaround, and caught the Mountain Line bus on the bumper, scuffing the side of the WVU bus. Grievant was at-fault in this accident.[2]

7. On October 16, 2008, Keith Pyles, Jr., Motor Pool Supervisor, issued a memorandum to Grievant revoking his driving privileges, and advising him that he intended to demote him into a Campus Service Worker position.

8. Grievant provided WVU with information on his qualifications, and asked that he be placed in a position other than Campus Service Worker. Grievant presented information to WVU which indicated that he had extensive training and experience in fire fighting and rescue, supervision of firefighters and managing the affairs of a volunteer fire department, and some experience in performing small repairs on vehicles more than 10 years ago. Grievant was allowed to work in the bus garage for four to five months while WVU personnel tried to find another position for which Grievant was qualified. They were

---

[2] Grievant, in his post-hearing written argument quotes statements from what is referred to as a form filed by "the Supervisor." This form was not made a part of the record, and cannot be considered by the undersigned.

unable to find another position for which Grievant was qualified, and Grievant was demoted to a vacant Campus Service Worker position, pay grade 7, with a corresponding pay cut.

9. Another bus operator at WVU, W.J.,[3] had his driving privileges revoked by WVU after his fourth accident, and was advised that he would be demoted to a Campus Service Worker position. W.J. asked WVU to look for another position for him, and was allowed to work in the bus garage for about four months as the mechanic's helper. The mechanic in the bus garage needed some permanent help, and Mr. Barnett obtained approval for a new position in the bus garage. In December 2008, W.J. was placed in this new position in the bus garage assisting the mechanic, at a pay grade 11.

10. Grievant was not qualified for the new position in the bus garage assisting the mechanic, while W. J. was qualified for the position. There was only one such position available.

11. Another bus operator at WVU, R.J., had her driving privileges temporarily suspended for about a month, pending a review of her three accidents. In the first accident she bent the bumper on the bus when she backed into a pole which was out of her line of sight. The second accident occurred when she was making a turn and clipped the rear of a car, and the third accident occurred when she was parking the bus at a restaurant at night, and clipped a car. A determination was made by WVU personnel that the three accidents were all local maneuvering accidents, and that R.J.'s driving privileges would not be revoked. She did receive a letter of warning.

---

[3] The parties chose to identify Grievant's co-workers by their initials.

Discussion

In disciplinary matters, the employer bears the burden of proving the charges by a preponderance of the evidence. *Hoover v. Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable 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, a party has not met its burden of proof. *Id.*

Grievant's driving privileges were revoked after his third at-fault accident, making it impossible for him to perform the duties for which he was hired. Grievant did not contest the decision to revoke his driving privileges, except to argue he was discriminated against. Nonetheless, it will specifically be noted that WVU followed its own procedure in revoking Grievant's driving privileges. WVU has established a Fleet Management Procedure, effective July 1, 2005. That Procedure provides as follows with regard to revocation of driving privileges, at § 8.2:

> 8.2.1 Subject to 8.1.1, driving privileges may be revoked and the employee temporarily suspended, temporarily or permanently reassigned or terminated when it has been determined that the driver has performed any one or more of the following:
>
> . . .
>
> 8.2.1.6 Indicated negligent or incompetent driving by the accumulation of three or more at-fault accidents in the previous two fiscal years plus the current fiscal year.

Section 8.1 is entitled Driving Privilege Revocation Procedure, and states as follows:

> 8.1.1 The decision of revocation of **University-Owned Vehicle** driving privileges or of lesser enforcement action will be the responsibility of the employee's supervisor and/or other appropriate **University** personnel (i.e., **Fleet Manager**). There shall be a fact-finding phase to include consideration of severity and nature of the violation(s), consideration of the employee's past driving record and any other relevant facts.

Once Grievant's driving privileges were revoked, he could no longer continue in his Bus Operator position. Instead of letting Grievant go, as other state employers have done (*See Posey v. Lewis County Bd. of Educ.*, Docket No. 2008-0328-LewED (July 25, 2008), Respondent let Grievant continue to draw his salary for several months, while it tried to find him a job more to his liking than a Campus Service Worker position. Grievant believes Respondent should have found him a better job. Grievant, however, failed to demonstrate that Respondent was required to do so. Further, Grievant did not identify any other position which was vacant, which Respondent desired to fill[4], for which he was qualified. Rather, Grievant argued he was treated differently than W.J. and R.J.

For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

---

[4] In his written argument, Grievant pointed to a position which was filled by a temporary employee for a period of time, which Mr. Barnett thought was maybe a Handyman/Vehicle Washer position. The record contains no other information about this assignment, including whether it was ever a position which could be filled permanently, and whether it still exists.

> (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,
>
> ©) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant is not similarly situated to either W.J. or R.J. W.J. had his driving privileges revoked by WVU and received a letter advising him that he would be demoted to a Campus Service Worker position after his fourth accident, all of which occurred on campus and were maneuvering accidents. One of Grievant's accidents was caused by his own reckless disregard, and could have caused serious injuries to his passengers. When asked about this accident, Grievant did not seem concerned that he had been swerving off the road while transporting a bus load of people. Further, as Respondent pointed out, Grievant obviously was aware of the need to keep his employer informed about the state of his diabetes treatment, but neglected to mention when his doctor placed him on insulin injections. Grievant's only excuse for this was that no one asked him. While Grievant did not lie, he certainly was not forthcoming and honest with crucial information about his medical condition and his ability to take trips out of state. Grievant's letter of warning describes his actions as gross misconduct.[5]

---

[5] Both parties argued about whether Grievant needed to obtain another waiver to drive trips out of state when his medical condition changed, and whose responsibility it was to obtain such a waiver. The undersigned has concluded that this issue has no bearing

As to the placement of W.J. in a pay grade 11 position, when W.J. requested that WVU try to find him a different position, WVU let W.J. continue to draw his salary for several months while WVU personnel looked for another position for him, just as it did for Grievant. Ultimately, WVU was able to find W.J. another position for which he was qualified, which was not a Campus Service Worker position. However, there was only one such position available. While Grievant stated that he had some experience repairing vehicles, he did not demonstrate that he was as qualified as W.J. for that position, or even that he was qualified at all.

WVU temporarily suspended R.J.'s driving privileges while it reviewed her three accidents, as is set forth in WVU's procedure quoted above. Ultimately, WVU decided that these three accidents did not rise to the level that R.J's driving privileges should be revoked, and her privileges were returned to her after about a month. R.J.'s three accidents were minor maneuvering accidents, while, again, one of Grievant's was anything but. R.J.'s actions were not comparable to Grievant's.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of proving the charges by a preponderance of the evidence. H*oover v. Lewis County Bd. of Educ.*, Docket No.

---

on this matter. The issue is whether Grievant was honest with his employer about his medical condition, which clearly affected his ability to perform his duties. Further, Grievant admitted in his written argument that he did not file a grievance contesting the letter of warning, which concluded that his actions constituted gross misconduct. He cannot contest this letter now.

93-21-427 (Feb. 24, 1994); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989).

2. Respondent demonstrated that Grievant was involved in three accidents where he was at fault, one of which put passengers at risk, and that Grievant did not disclose crucial information regarding his medical condition to Respondent. Respondent followed its policy in revoking Grievant's driving privileges.

3. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (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,
>
> ©) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

4. Grievant was not similarly situated to the two employees to whom he compared himself.

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).

BRENDA L. GOULD
Administrative Law Judge

Date: July 23, 2009