THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

EDWARD D. JONES, Sr.,
Grievant,

v. **Docket No. 2009-0830-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant was employed by Respondent as a Transportation Worker 2 with the Department of Transportation, Division of Highways. He filed this grievance on December 22, 2008, alleging he was improperly terminated for losing his driver's license while other employees who lost their driver's license continue to work for Respondent. For relief, Grievant seeks to be reinstated to his previous position. A hearing was held on February 12, 2009, in the Grievance Board's Westover office. Grievant represented himself, and Respondent was represented by Barbara Baxter, Esq. This case became mature for decision at the conclusion of the hearing as the parties' declined to file Findings of Fact and Conclusions of Law.

Synopsis

Respondent terminated Grievant because he lost his driver's license as a result of being arrested for Driving Under the Influence of Alcohol (hereinafter DUI). Respondent asserts it terminated Grievant because he no longer was able to meet the minimum qualification of the job. Specifically, Grievant was required to maintain a Commercial Driver's License (hereinafter CDL).

From the grievance form, it appears as if Grievant is asserting wrongful termination,

as other employees have lost their driver's license and remained employed.

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 by Respondent as a Transportation Worker 2 with the Department of Transportation, Division of Highways.
2. A CDL is required to be a Transportation Worker 2 Equipment Operator.
3. On May 13, 2006, Grievant's license was revoked for DUI.
4. On October 21, 2006, his driving privileges were reinstated.
5. On June 28, 2007, Grievant's CDL was reinstated.
6. On September 22, 2007, Grievant was arrested for a subsequent DUI.
7. On July 29, 2008, a Final Order was entered by Joseph Cicchirillo, Commissioner of the West Virginia Division of Motor Vehicles, suspending Grievant's driver's license and CDL.
8. The Final Order specified a minimum of one year revocation of Grievant's license and a minimum of two years installation and use of the interlock device on all vehicles owned and operated by Grievant.
9. Respondent has no way to install the interlock device on the state-owned vehicles.
10. On July 29, 2008, when the Final Order was entered, Leslie Staggers, Administrative Services Manager, recommended Grievant be terminated, as he no longer had a CDL.
11. In October, 2008, Grievant was made aware of the disciplinary action.

12. As is Respondent's process, Grievant did meet with the District Engineer in November, 2008, to discuss the disciplinary action recommended.

13. After that meeting, all the relevant information concerning Grievant's disciplinary action was sent to Charleston to be reviewed by Jeff Black, Director of Human Resources. Then the information went through the legal division.

14. On December 5, 2008, Grievant received a letter from Mr. Black explaining that he would be terminated effective December 19, 2008, due to the loss of his CDL. It was explained that a Transportation Worker 2 Equipment Operator is required to maintain a CDL, and without that, Grievant could no longer meet the minimum qualifications of his job classification.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *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 & 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). 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 qualification and being otherwise qualified." *Reed v. DOH*, Docket No. 07-DOH-023, May 16, 2007.

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, it is clear he was unable to perform the essential duties of the position, and therefore, did not meet the definition of fitness as stated by the Division of Personnel. This is an unfortunate situation for the parties.

Respondent has met its burden, and this grievance must be denied. The undersigned, therefore, makes 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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Ramey v. W. Va.*

Dep't of Health,Docket No. H-88-005 (Dec. 6, 1988).

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. 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 qualification and being otherwise qualified." *Reed v. DOH*, Docket No. 07-DOH-023, May 16, 2007.

4. Grievant was properly terminated.

WHEREFORE, based upon the foregoing, the 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 Civil Action number should be included

so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: March 11, 2008

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Wendy A. Campbell
Administrative Law Judge