THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

PAUL DOUGLAS ROCKWELL,
Grievant,

v. **DOCKET NO. 2010-1070-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

This grievance was first filed at level three of the grievance procedure by Grievant, Paul Douglas Rockwell, on February 12, 2010, after he was dismissed from his employment by Respondent, Division of Highways, for failure to meet the minimum qualifications of his job. The statement of grievance reads:

> If that was the case about not meeting minimum qualifications I have been employed here for 24 years and [in] 1 more year I can retire. I work the 14 or 15 months ok and now I'm fired.

The relief sought by Grievant is "my job back, pay the same per hr.[,] leave and vacation time same and everything same as before."

A level three hearing was held before the undersigned Administrative Law Judge on April 29, 2010, at the Grievance Board's Westover, West Virginia office. Grievant appeared *pro se*, and Respondent was represented by Barbara L. Baxter, Esquire, Legal Division. This matter became mature for decision on or about June 8, 2010, upon receipt of the last of the parties' written arguments.

Synopsis

Grievant was dismissed from his employment by Respondent when he became unable to drive a state owned vehicle due to the "I" restriction placed on his drivers' license after his third DUI. Grievant no longer met the minimum qualifications for his position.

The following Findings of Fact are made based upon the record developed at the level three hearing.

Findings of Fact

1. Grievant was employed by the Division of Highways ("DOH" or "Respondent"), as a Transportation Worker 2/Craftsworker in Berkeley County, West Virginia.

2. The classification specification for a Transportation Worker 2, working as a Craftsworker, requires as a minimum qualification for the position that the employee hold a valid drivers' license.

3. On December 31, 2006, Grievant was arrested for driving under the influence of alcohol ("DUI"). Grievant refused to submit to the secondary chemical test. This was his third offense. Grievant's drivers' license and his commercial drivers' license were revoked on February 16, 2007. This was the second time Grievant's license had been revoked.

4. On September 17, 2009, Grievant became an active participant in the West Virginia Alcohol Test and Lock Program ("Interlock"), and became qualified to operate a motor vehicle only if it was equipped with an ignition Interlock device. An "I" restriction code was placed on his drivers' license.

5. On September 29, 2009, DOH requested Grievant's driving record from the Division of Motor Vehicles.[1]

6. DOH received Grievant's driving record from the Division of Motor Vehicles on or about October 2, 2009, which showed that Grievant's driving status was "'Valid/Interlock'" with an "I" restriction Code. The letter accompanying Grievant's driving record noted that for participants in the Interlock program, "an ignition Interlock device is not authorized for installation in a Commercial Motor Vehicle or "'B'" plated vehicle." The letter also stated that the scheduled date for removal of the "I" restriction Code from Grievant's license is September 17, 2011, "pending no new violations and all other requirements associated with this program have been satisfied."

7. The "I" restriction will actually be removed from Grievant's drivers' license in September 2010.

8. DOH does not install ignition interlock devices on its vehicles.

9. Grievant does not meet the minimum qualifications for the Transportation Worker 2 classification.

10. DOH has in recent years begun dismissing employees who no longer meet the minimum qualifications for their position due to the loss of their drivers' license, or restrictions on their license which render them incapable of operating a DOH vehicle. DOH does not take any action until the appeal process has been exhausted by the employee, and the action on the drivers' license is final.

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[1] The record does not reflect what prompted DOH to request Grievant's driving record at this time, nor does it reflect how DOH would become aware that an employee's driver's license had been revoked.

11. Grievant was dismissed from his employment by DOH effective February 1, 2010, for failure to meet the minimum qualifications of his job. The dismissal letter states:

> We have been informed that your driving status has been "Valid/Interlock" with the "1" restriction code since September 17, 2009. Your job classification requires that you have a valid WV Operator's License that permits you to operate agency vehicles. Since you have a restricted license, you no longer meet the minimum requirements of your job classification and are unable to perform the job duties of your classification.

12. Grievant had been an employee of DOH since August 1986, giving him 23 years of service when he was dismissed from his employment. He will be 55 years old in October 2010. Had he not been fired, Grievant would have been eligible to retire in late 2011.

13. At the time he was dismissed, Grievant was on leave restriction due to his excessive use of leave and failure to properly report off work. Grievant had received a written reprimand and a one day suspension for leave abuse. DOH and was in the process of imposing a five day suspension as Grievant had continued to not properly report off work.

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. *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*.

The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, ___,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

"Additionally, Division of Personnel Rule 3.39 defines 'Fitness' as 'suitability to perform all essential duties of a position by virtue of meeting the established minimum qualifications and being otherwise qualified.'" *Elmore v. Dep't of Transp.*, Docket No. 2010-1042-DOT. An employee assigned to a classification which requires the possession of a valid drivers' license as a minimum qualification has been found to be "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," and the termination was upheld. *Id.*

Grievant was hired into a position which required a valid drivers' license. It has been DOH's practice for some period of time to terminate the employment of employees who, due to the loss of or restrictions on their drivers' license, no longer meet the minimum qualifications for the classification to which they are assigned. In this instance in particular, Leslie Staggers, Administrative Services Manager for District 5, explained that DOH did not have a position in which Grievant could be placed in the Berkeley County area which did not require a drivers' license, and it did not have an operational need for an employee who could not drive a DOH vehicle. DOH needs drivers. DOH was not obligated to continue to employ Grievant in his position when he no longer met the minimum qualifications for the position. While this is an unfortunate situation, particularly in this instance where Grievant is close to retirement, Grievant bears responsibility for his own actions which resulted in a restricted drivers' license.

Grievant argued that DOH had continued to employ others who had lost their drivers' license. However, Grievant provided little factual information about these situations, did not provide the classification of any other employee whom he believed had been treated differently, and declined to provide the names of various individuals to whom he referred. Without this information, it is impossible to determine whether these individuals no longer met the minimum qualifications for their position, or whether these individuals had exhausted the appeal process, both of which would be prerequisites to dismissal under DOH's procedure. Grievant did identify two individuals whom he believed had received preferential treatment, Johnny Green and Dave Billing. Ms. Staggers testified that Mr. Green had always been a Transportation Worker 1, and that a drivers' license was not a requirement for that classification. Ms. Staggers was not familiar with Mr. Billing's

situation and Grievant was not able to state anything about Mr. Billing's situation except that DOH "had kept him on for years." Grievant also repeatedly referred to an employee in Jefferson County who was still a DOH employee, and who had a DUI, but Grievant declined to identify this individual. Grievant seemed to acknowledge that this individual had not exhausted his administrative appeals. Grievant also indicated under cross-examination that several of the instances to which he made reference had occurred several years ago. The undersigned cannot conclude from the information presented that DOH has deviated from its recent policy of dismissing employees who no longer meet the minimum qualifications for their position.

Finally, although Grievant did not articulate a legal argument, it was clear that he believed some consideration should have been given to his years of service, his experience, and to the fact that he was close to retirement. In legal terms, Grievant was arguing that the dismissal should be mitigated to a lesser penalty.

The argument that discipline is excessive given the facts of the situation is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action." *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved."

Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ.*, Docket No. 97-20-089 (May 5, 1997).

Mitigation of a penalty is considered on a case by case basis. *Conner v. Barbour County Bd. of Educ.*, Docket No. 95-01-031 (Sept. 29, 1995); *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. *Pingley v. Div. of Corr.*, Docket No. 95-CORR-252 (July 23, 1996).

The Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

In this case, DOH had the discretion to demote Grievant to a position which did not require a drivers' license. However, DOH needs drivers and had no position available for an employee who would not be able to drive a vehicle. Further, DOH has taken care to be consistent in the application of this practice to all employees in this situation. Finally,

although Grievant was a long term employee, his recent behavior was not exemplary. Grievant did not demonstrate that DOH abused its discretion.

The following Conclusions of Law support the Decision reached.

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. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, ___,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

3. "Additionally, Division of Personnel Rule 3.39 defines 'Fitness' as 'suitability to perform all essential duties of a position by virtue of meeting the established minimum

qualifications and being otherwise qualified.'" *Elmore v. Dep't of Transp.*, Docket No. 2010-1042-DOT. An employee assigned to a classification which requires the possession of a valid drivers' license as a minimum qualification has been found to be "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," and the termination was upheld. *Id.*

4. Respondent demonstrated good cause for dismissal of Grievant from his employment.

5. The argument that discipline is excessive given the facts of the situation is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action." *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ.*, Docket No. 97-20-089 (May 5, 1997).

6. The Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for

rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

7. Grievant did not demonstrate that Respondent abused its discretion when it decided he should be dismissed from his employment.

Accordingly, this grievance is **DENIED.**

Any party or the Division of Personnel 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: June 25, 2010