THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RANSOM THOMAS,
Grievant,

v. **Docket No. 2010-1316-DOR**

INSURANCE COMMISSION,
Respondent.

DECISION

Grievant Ransom Thomas is employed by Respondent Insurance Commission in the classification of Mail Runner. By letter dated March 16, 2010, Grievant was suspended for a period of ninety calendar days that coincided with the loss of his West Virginia driving privileges. Mr. Ransom filed a grievance form[1] dated April 1, 2010, contenting that;

> The decision to suspend for (90) calendar days was excessive and made in an arbitrary and capricious manner among other defects.

As relief Grievant sought;

> Return to a position within the Office of the Insurance Commission and. . . to be made whole.

A level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on July 12, 2010. Grievant appeared in person and through his representatives Delbert Price and Barbara Spradling, AFSCME [2] Council 77. Respondent Insurance Commission ("OIC") was represented by Gregory A. Elam, Esquire, OIC Associate General Counsel. Both parties submitted proposed findings of fact and

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[1] Because Grievant was suspended without pay, he waived levels one and two and filed the grievance at level three. *See* W. VA. CODE § 6C-2-4 (a) (4).

[2] American Federation of State County and Municipal Employees.

conclusions of law after the hearing. The last of these proposals was received at the West Virginia Public Employees Grievance Board on August 26, 2010. The grievance became mature for decision on that date.

Synopsis

Respondent suspended Grievant for a period of ninety calendar days which were the days Grievant's driver's license was suspended after he was charged with DUI. Respondent argues that holding a valid West Virginia driver's license is a minimum qualification for Grievant's job as a Mail Runner for the OIC. By losing his license he was no longer eligible for employment in that position. The OIC decided to suspend Grievant for the duration of the suspension of his license rather than dismiss him from employment due to his disqualification for the position.

Grievant argues that there was sufficient work that needed to be done at his work place that did not require a driver's license to keep him busy for ninety days. He avers that such an accommodation would not have interfered Respondent's mission and would have avoided the need for his suspension.

Respondent was able to prove that holding a valid West Virginia driver's license was a minimum requirement for Grievant's job and that assigning Grievant other tasks while his license was revoked was not required by law and would create scheduling problems within the agency. The Grievance is DENIED.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant Ransom Thomas is employed by Respondent OIC as a Mail Runner. He started working in that position as a temporary employee in December 2007 and became a permanent employee on November 18, 2008. Grievant Exhibit 3.

2. The West Virginia Division of Personnel classifications and specifications place the Mail Runner classification at pay grade two and state that a valid West Virginia Driver's License may be required as a minimum qualification.

3. The Mail Runner position that Grievant accepted was posted on October 3, 2008. Position also noted that a West Virginia Driver's License may be required as a minimum qualification. In the "duties" section of the posting the following was stated:

> Must be able to lift 50 pounds without assistance and a have a valid driver's license.

Respondent Exhibit 1.

4. On March 5, 2009,Grievant was arrested and charged with DUI after a blood alcohol test indicated that he had been driving with an alcohol blood level beyond the legal limit. Grievant was not convicted of DUI . His license was revoked by Administrative Order of the Division of Motor Vehicles after a hearing held on October 29, 2009. The revocation was to begin on March 18, 2010, and continue for no less than ninety calendar days.

5. In February 2010, Grievant told his immediate supervisor, Vickie Jo Marcum, that his license was going to be revoked by the Division of Motor Vehicles for ninety days. Ms. Marcum originally hoped that the agency would be able to avoid any employment impact for Grievant from the license revocation but later found out that this was not going to happen.

6. Supervisor Marcum reported the situation to Kathy Damron, the OIC Administrative Services Manager. Manager Damron held a pre-determination conference with Grievant on March 12, 2010, to tell Grievant that disciplinary action was being contemplated and to hear Grievant's views.[3]

7. Grievant responded to the information he received at the pre-determination conference by letter dated March 15, 2010. Grievant gave the following reasons for OIC to not take disciplinary action as a result of the suspension of his driver's license:

- There was a large amount of work to be done at the mail building that did not involve driving. Grievant could be assigned to do those tasks while his license was revoked.
- Because of the rotating schedule Grievant isn't assigned to drive every third week anyway.
- Another division of the OIC needed Imaging Operators and Grievant could be temporarily assigned to those duties while his driver's license was suspended.
- There were two previous incidents where mail runners were kept in the building and not allowed to drive:
  - An employee was unable to lift over fifty pounds by himself due to a medical condition that his doctor verified. He was assigned duties other than driving the mail route for a year to accommodate his medical condition.
  - An employee was kept in the building and prohibited from driving for a month as a result of repeatedly smoking cigarettes in the mail van.
- Grievant had demonstrated a good work ethic and demonstrated good character by informing supervisor Marcum of the impending license revocation.

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[3] The pre-determination meeting was attended by Grievant, his representative Barbara Spradling, Supervisor Marcum, Manager Damron and Associate General Counsel Gregory Elam.

Respondent Exhibit 4.

8. Upon receipt of the Grievant's response, Manager Damron looked into the issues raised by Grievant by contacting representatives of the West Virginia Division of Personnel and the manager of the other OIC division in question. Based upon her inquiry she reached several conclusions including the following:

- There are three regular Mail Runners who operate on a rotating schedule. Each Mail Runner drives a mail van for pick ups and deliveries for two consecutive weeks and on the third week that Mail Runner is assigned duties in the mail building that do not involve driving. Then the rotation starts anew.[4]

- The Mail Runner who is assigned to the building must fill in for either driver who may be absent due to illness and annual leave. This coverage occurs often and it would be very difficult to schedule the mail runs if the Mail Runner assigned to the building could not drive as needed.

- The jobs that were available in the other OIC division were in the Imaging Operator classification which is in pay grade six. Additionally, Grievant did not meet the minimum qualifications for those positions.

See also Respondent Exhibit 3.

9. By letter dated March 16, 2010, Grievant was notified that he was suspended without pay for a period "up to and not exceeding ninety (90) calendar days. . . " The reason stated for the suspension was that Grievant's driver's license was suspended and holding that license is required to perform the Mail Runner job and to meet the minimum qualifications for the position. Respondent noted that the suspension of Grievant's driver's

[4] There are two regular mail runs; the Hillcrest Run and the Capitol Run. Grievant Exhibit 6. Each driver runs the Hillcrest Run for a week , then the Capitol Run for a second week and is assigned to the building the third week. All three drivers rotate through this schedule. Grievant Exhibits 5 & 7.

license rendered him unfit for the Mail Runner position for the duration of the suspension. Grievant Exhibit 1.

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 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "A preponderance of the evidence is evidence 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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Respondent suspended Grievant for the ninety days that his West Virginia driver's license was revoked. The Division of Personnel classifications and specifications for the Mail Runner classification state that a valid West Virginia driver's license may be a minimum requirement for that position. Respondent OIC stated that a Mail Runner **must** have a valid driver's license when it posted the position that Grievant ultimately accepted. Additionally, two out of every three weeks of employment an OIC Mail Runner is required to drive the mail van for pick ups and deliveries. Possession of a valid West Virginia driver's license is a minimum requirement for the OIC Mail Runner position held by Grievant.

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 (May 26, 2010). An employee assigned to a classification which requires the possession of a valid driver's 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; See also Loudermilk v. Div. of Highways,* Docket No. 2010-0558-DOT (Oct. 8. 2010). Another state agency has consistently been dismissing employees who lose their driver's licenses if their positions require the employee to hold such a license. The Grievance Board has upheld such dismissal actions. *See Rockwell v. Dep't of Transp./Div. of Highways*, Docket No. 2010-1070-DOT (June 25, 2010); *Smith v. Dep't of Transp./Div. of Highways*, Docket No. 2010-0972-DOT (June 17, 2010); *Reed v. Dep't of Transp./Div. of Highways*, Docket No. 07-DOH-023 (May 16, 2007); *Loudermilk v. Div. of Highways,* Docket No. 2010-0558-DOT (Oct. 8. 2010).

Grievant argues that Respondent had a significant number of other duties that Grievant could have performed without driving and Respondent's failure to allow Grievant to perform those tasks rather than suspend him is arbitrary and capricious. Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*,

769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982))." While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of agency . *See generally*, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

There were non-driving duties available for Grievant to perform. In fact, every third week Grievant is assigned to the mail building where he performs warehouse functions. It is possible that Respondent could have assigned Grievant to these duties full time for ninety days and scheduled the remaining drivers to make the two mail runs. Grievant notes that Respondent took that step to accommodate one Mail Runner's temporary medical condition and when another Mail Runner was prohibited by the OIC from use of a mail van for thirty days.

Respondent does not deny that such a scheduling shuffle could be accomplished as it was done in the past. However, it notes that the Mail Runner assigned to the Mail Building must make the mail runs when one of the other Mail Runners is off work due to annual leave or sick leave. Having Grievant in that position when he is not able to drive would create a very difficult problem in scheduling for absent employees. Respondent was willing to deal with these issues to accommodate an employee's medical condition and to

deal with a specific disciplinary issue. However, it was not willing to disrupt the schedules of the other employees due to Grievant's poor decisions in his personal life. There was also the need for an Imaging Operator position in another division of the OIC. However, Grievant did not meet the minimum qualifications for that position and it would have resulted in Grievant moving from a pay grade two to a pay grade six. Even if respondent could have temporarily placed Grievant in the position for which he was not qualified, it felt that the pay raise would be an inappropriate benefit for Grievant's off work legal problems.

While reasonable people may disagree with this course of action, it cannot be found that Respondent's decisions were not supported by the facts or were unreasonable under the circumstances. Consequently, Respondent's actions were not arbitrary or capricious.

Grievant also argues that the suspension of Grievant for ninety working days is excessive and should be reduced. "The argument a disciplinary action was 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 the agency['s] 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)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001); *See also Gorby v. Dep't of Health & Human Ser.,* Docket No. 2010-0291-DHHR (Nov. 4, 2010). As noted above, the dismissal of employees who lost their driving privileges when a valid driver's license is a minimum qualification for their position has been consistently upheld. *Loudermilk v. Div. of Highways*, *supra.* While a ninety calendar day suspension is very long, it cannot be viewed as excessive under the circumstances of this grievance. Respondent has met its burden of proof and the grievance must be DENIED.

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 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "A preponderance of the evidence is evidence 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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

2. 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 (May 26, 2010). An employee assigned to a classification which requires the possession of a valid driver's 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; See also Loudermilk v. Div. of Highways,* Docket No. 2010-0558-DOT (Oct. 8. 2010).

3. Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982))." While a

searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of agency . *See generally*, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

4. "The argument a disciplinary action was 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 the agency['s] 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)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001); *See also Gorby v. Dep't of Health & Human Ser.,* Docket No. 2010-0291-DHHR (Nov. 4, 2010). Grievant was not able to prove that the penalty imposed by Respondent was excessive.

5. Respondent proved that a valid West Virginia driver's license was a minimum requirement for Grievant's position and when Grievant's license was suspended for ninety days a suspension for that period of time was reasonable and not excessive. Respondent met its burden of proof.

Accordingly, 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: DECEMBER 30, 2010.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE