THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RICKEY DALE DIXON,

Grievant,

v. **Docket No. 2010-1108-DOT**

DIVISION OF HIGHWAYS,

Respondent.

DECISION

This grievance involves the dismissal of Grievant Rickey Dale Dixon from employment with the West Virginia Division of Highways. Grievant was dismissed by letter dated February 1, 2010, for an incident that occurred while he was driving a snow plow truck on January 5, 2010. Mr. Dixon filed a grievance on February 22, 2010, contesting his dismissal and requesting that he be reinstated. Grievant waived levels one and two and asked for a hearing at level three.[1]

A level three hearing was held in the Charleston Office of the West Virginia Public Employees Grievance Board on June 8, 2010. Grievant appeared in person and through his Counsel, Richard J. Lindroth, Esquire. Respondent was represented by Jason C. Workman, Esquire. At the beginning of the hearing, Counsel for Grievant clarified the relief that Grievant was seeking reinstatement to his position, restoration of full tenure and back pay with interest.

Counsel for Respondent raised the issue of mitigation of damages by noting that if

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[1] *See* W. VA. CODE § 6C-2-4 (a) (4).

Grievant prevailed and was awarded back pay, the Respondent seeks to have wages Grievant earned while he was off work, to be deducted from any back pay award Grievant would receive.[2] Grievant argued that the action of the Respondent was malicious and therefore mitigation of any back pay award would be unwarranted. The parties were instructed to address this issue in their post-hearing proposals.

At the conclusion of the hearing the parties agreed to submit proposed findings of fact and conclusions of law no later than July 19, 2010. Both parties submitted fact/law proposals and the grievance became mature for decision on that date.

Synopsis

Grievant was accused of buying beer while he was on duty driving a snow plow truck to clear state roads. Grievant bought the beer at the direction of the co-worker who was supervising Grievant's driving because Grievant only had an instructional Commercial Drivers License ("CDL") at the time. All of the beer was consumed by Grievant's co-worker and there was no accusation that Grievant was under the influence of any controlled substance while on duty. While Grievant's actions demonstrated poor judgement, the punishment given to him was proven to be disproportionate to his infractions. The Grievance is Granted in part and Denied in part.

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.

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[2] This is a different issue than mitigation of the penalty given to the Grievant for his action. In that case, Grievant has the burden of proving that the punishment he received was disproportionate to the infraction he committed.

Findings of Fact

1. Grievant Dixon was initially employed by the Division of Highways ("DOH") on December 22, 2008, as a transportation worker. Part of his duties included driving a large truck with a snow plow for snow removal from the public highways.

2. In order to operate snow plow equipment for the DOH an employee must have a Commercial Driver's License ("CDL") which is issued by the state pursuant to the provisions of WEST VIRGINIA CODE § 17E-1-1 et seq.

3. Grievant held a Commercial Driver Instruction Permit ("CDIP") issued pursuant to WEST VIRGINIA CODE § 17E-1-9. An individual holding a CDIP may drive a commercial vehicle only if there is someone who holds a CDL occupying a seat beside the individual for the purpose of giving instruction or testing. A CDIP is only valid for six months. W. VA. CODE § 17E-1-9.

4. When a CDL holder is riding with a CDIP driver, the CDL holder is in charge of anything related to the operation of the vehicle and is present as an instructor and tester of the driver under permit. [3]

5. On January 4, 2010, Grievant was assigned to drive a snow plow truck for Snow Removal and Ice Control ("SRIC") duty. DOH employees on SRIC duty work twelve hour shifts. Grievant's shift started at 6 A.M. and ended at 6 P.M.

6. The truck Grievant was driving was a single axil, sixteen thousand pound capacity, Toyota ENO dump truck, with a snow blade ("Truck"). It was a relatively new

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[3] Testimony of Raymond Thompson, Manager of Driver Licensing for the DOH. Mr. Thompson has been working with the CDL licensing requirements for eighteen years for the DOH. He stated that the CDL instructor was the eyes and ears of the Agency when in the instructional role with a permit driver.

truck and no radio had been installed in it that would allow the driver to contact the district garage.

7. At the beginning of the shift on January 4, 2010, Jeff Petry was assigned to ride with Grievant Dixon during their SRIC shift. Jeff Petry, held a valid CDL and was therefore the instructor for Grievant who held a CDIP.

8. Grievant drove the truck and plowed the assigned roads for some time. Grievant and Mr. Petry took a break at Maynard's Market 7-11 near Clendenin and Mr. Petry gave Grievant money and told Grievant to buy him some beer. Grievant originally refused but Petry told him, "I'm your supervisor and you're going to buy me some beer."

9. Grievant bought a twelve pack of Natural Light beer for Mr. Petry and placed it on the ground outside the truck. Mr. Petry picked up the beer and got in the truck.

10. After a period of time Grievant noticed that Petry was drinking the beer while Grievant was driving. Grievant asked Mr. Petry to stop drinking several times and Mr. Petry refused and instructed Grievant to keep driving. Occasionally Grievant noticed that Mr. Petry had gone to sleep, but he would wake up and continue drinking.

11. Near the end of the SRIC shift the snow blade of the truck caught in a rut and the truck ended up sliding into a ditch.[4]

12. Because there was no radio in the truck, the property owner where the accident occurred called the district garage and reported the disabled truck. A crew came and pulled the truck from the ditch and Grievant drove it back to the garage.

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[4]There was a large amount of snow at that time and it was not unusual for such an accident to take place during SRIC duty. Grievant was not disciplined in any way related to the accident.

13. When Grievant arrived at the garage Mr. Petry was apparently passed out from consuming a large quantity of alcohol. Grievant's shift was over and he went home.

14. Co-workers at the district garage knew that Mr. Petry drank a lot but they were not aware that he drank on the job.

15. Grievant signed an "Employee Drug Awareness Certification Form" which certified that he received a copy of the West Virginia Division of Personnel Drug- and Alcohol - Free Workplace Policy and that he agreed to abide by the provisions of the policy. Grievant was given this form to sign during his orientation on December 22, 2008. Respondent Exhibit 7.

16. An investigation was conducted into the incident that occurred on January 4, 2010, and Grievant continued to drive the truck while the investigation was conducted. Grievant gave two statements to the investigator. Respondent Exhibits 2 and 3. The statements were generally the same except in the second statement Grievant indicated he bought beer for Mr. Petry on two occasions during the SRIC shift.[5]

17. By letter dated February 1, 2010, Jeff Black, the DOH Director of Human Resources Division, informed Grievant that he was dismissed from his employment as a Transportation Worker. The reasons for this action were :

- Purchasing alcohol (24 cans of beer) while on duty plowing and treating roads.
- Driving a commercial vehicle holding only a CDL permit while the CDL holder who was supposed to be providing instruction was drinking alcohol and, at times, unconscious.

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[5] Grievant later stated that he only bought beer once during the trip but signed the second statement because he was intimidated by the investigator.

These activities were alleged to be in violation of the State Drug- and Alcohol - Free Workplace Policy, the DOH standards for employee conduct and the West Virginia Uniform Commercial Drivers Licence Act.

18. Except for the incident on January 4, 2010, Grievant had a clean work record and was considered a hard working and capable employee by his supervisor and co-workers. Grievant successfully passed his test and received his CDL license shortly after he was dismissed by the DOH.

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).

Grievant is a permanent state employee in the classified service. 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 Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004) (per curiam). "*Oakes v. W.Va. Dept. of Finance and Administration*, *supra*, requires that a violation sufficient to support a dismissal be of a substantial nature and that if it involves a violation of a statute or official duty it must be done with wrongful intent." *Serreno v. West Va. Civil Serv. Comm'n*, 169 W. Va. 111, 115, 285 S.E.2d 899, 902 (1982) (per curiam). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. West Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777(1988).

Federal Motor Carrier Safety Regulations prohibit a driver of a commercial motor vehicle to be in possession of beer or other distilled spirits with an alcohol content of one half of one percent or greater by volume while the driver in on duty or driving.[6] Additionally, the West Virginia Division of Personnel Drug- and Alcohol - Free Workplace Policy states that the possession of alcohol is prohibited in the workplace. That policy also states that:

> It is the policy of West Virginia State government to ensure that its workplaces are free of alcohol**,** illegal drugs and controlled substances **by prohibiting the** use, possession, **purchase**, distribution, sale, or having such substances in the body system.

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[6] 49 C.F.R. 392. 5, states in part:
(a) No driver shall . . . (3) Be on duty or operate a commercial motor vehicle while the driver possesses wine of not less than one-half of one per centum of alcohol by volume, beer as defined in 26 U.S.C. 5052 (a), of the Internal Revenue Code of 1954, and distilled spirits as defined in section 5002(a)(8), of such Code.

(Emphasis added), *Id.*

There is no dispute as to whether Grievant purchased beer while he was on duty. He admitted that he bought a twelve pack of beer for Mr. Petry while he was on SRIC duty. Grievant argues that he was on break when he purchased the beer. However, it is undisputed that he drove the prominently marked State truck into the 7-11 parking lot and bought beer.

It is less clear that Grievant was in possession of the beer while driving the commercial vehicle. Grievant placed the beer on the ground for Mr. Petry while he was outside the truck and thereafter Mr. Petry put the beer in the vehicle and it was under his control. On the other hand, Raymond Thompson, Manager of Driver Licensing for the DOH, testified that the regular interpretation given to 49 C.F.R. 392.5 is that no alcoholic beverages are allowed in the cab of a commercial vehicle while the driver is on duty. His interpretation is entitled to some weight since he has been working with CDL regulations for the DOH for eighteen years and no contrary interpretations were offered.

Under these circumstances it is apparent that Grievant at least technically violated the spirit of Federal Motor Carrier Safety Regulations and the State Drug- and Alcohol - Free Workplace Policy. The question then becomes whether this violation was of such a serious nature as to justify the dismissal of a permanent state employee under the standard set out in *Oakes supra* and it progeny.

While Mr. Petry was not officially Grievant's supervisor, he was Grievant's instructor and coach while Grievant was driving under a CDIp. That distinction had very little practical meaning to Grievant. Manager Thompson testified that Mr. Petry was in control of the operation of the vehicle and Grievant was subject to his direction. A poor report by

Mr. Petry could have an extremely detrimental effect on Grievant's ability to obtain a permanent CDL. Petry's order for Grievant to buy beer for him left Grievant with very few good choices. If Grievant refused he was at the mercy of someone who had already demonstrated low ethical standards. If Mr. Petry was willing to order Grievant to buy beer for him while on duty it was not hard to imagine that he would give Grievant an unfavorable report if he refused. Grievant chose to comply but not participate.

Grievant initially resisted buying the beer and frequently attempted to persuade Mr. Petry to quit drinking. He did not participate in the consumption of the alcohol and did his best to complete his task of clearing state roadways assigned to him. There is no indication that the accident was due to Grievant's negligence but rather was attributable to the extremely adverse road conditions.[7] Unlike his instructor, Mr. Petry, Grievant did not set out to intentionally violate the rules and regulations of his employer. Rather, he tried to avoid becoming embroiled in Mr. Petry's behavior, as well as avoid any retaliation he might receive from his instructor for refusing his directive or turning him in.

Clearly, Grievant could have made other choices in this situation, but his conduct did not demonstrate "gross disregard for professional responsibilities" or "wrongful intent" to violate state rules and regulations. Therefore his conduct was not sufficient to justify his dismissal. *Oakes, supra; Serreno, supra;* and *Drown, supra.* However, discipline is appropriate for the technical violation of the State and Federal rules.

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[7] His situation was made more difficult because there was no two way radio in the truck that grievant could have used to get instructions during any of the periods when Mr. Petry was asleep.

In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995). While Grievant's work record was not particularly long it was good. His supervisor and his co-workers agreed that Grievant was a good worker who followed directions and was dependable. He completed his probationary period without incident and had nearly completed the requirements for his CDL. Additionally, his violation of policies in this situation were brought about by directions from his driving instructor who was in charge of the operation of the vehicle.

David Fisher is the Highway Administrator for the DOH Elkview Division where Grievant was assigned and he has 31 years of experience with the DOH. After the incident on January 4, 2010, Mr. Fisher believed Grievant would receive a suspension of three to five days. Director Black could not remember any situations that occurred that were the same as Grievant's. He felt dismissal was warranted but might have considered a lesser penalty if Grievant had a longer tenure with the agency. For the reasons set out above, dismissal is too harsh a penalty for Grievant's conduct. Given the nature of the offence and Grievant's work history, a suspension of ten working days is reasonable.

At the outset of the level three hearing, the DOH raised the issue of mitigation of damages. This a separate and distinct issue from the issue of mitigating the punishment discussed above. Because Grievant has been out of work for much more than ten working days, he will be entitled to back wages for additional days he would have been working had

he not been dismissed. DOH seeks to reduce the amount of the back pay award by the amount of wages Grievant received from other employment during this period. In the case of *Mason County Bd. of Educ. v. State Superintendent of Schools,* 170 W.Va. 632, 295 S.E.2d 719 (1982) the West Virginia Supreme Court of Appeals issued two syllabus points that squarely address this issue:

> 2. Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, will be deducted from any back pay award; however, the burden of raising the issue of mitigation is on the employer.
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> 3. Wages from any job taken by a wrongfully discharged employee will be deducted from his or her back pay award whether the work taken is comparable to the work contracted for or not, if the employee's performance of the job would have been incompatible with his or her performance of the contract.

Id.

Grievant argues that the dismissal of Grievant was wrongful and malicious. His counsel notes that the investigator was unduly harsh with Grievant and that the DOH introduced security pictures taken from a convenient store camera that allegedly showed Grievant purchasing a second twelve pack of beer for Mr. Petry. The pictures were inconclusive at best and were taken from a store that Grievant said he did not enter. Additionally, when shown the pictures at the Level three hearing, Director Black said he couldn't tell who was depicted buying the beer even though Grievant was sitting across the table.[8] Though there was insufficient proof to demonstrate that Grievant purchased two

[8] This administrative law judge had the same problem.

12-packs of beer for Mr. Petry, Grievant admitted to buying beer for his instructor while on the job. The penalty in this case was disproportionate to the conduct proven, but there is no evidence that the dismissal was malicious.[9]

Based upon the forgoing, the Grievance is GRANTED in part and DENIED in part.

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. Grievant is a permanent state employee in the classified service. 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

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[9] Counsel for Grievant also sought an award of attorneys fees. " It is well established that the Grievance Board does not have the authority to award attorney fees. *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996). West Virginia Code § 6C-2-6 is entitled, "Allocation of expenses and attorney's fees." It specifically states: "(a) Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense." *Cosner v. Div. of Highways*, Docket no. 2008-0633-DOT (Dec. 23, 2008).

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 Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004) (per curiam). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. West Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777(1988).

3. DOH proved that Grievant's conduct technically violated the West Virginia Division of Personnel Drug- and Alcohol - Free Workplace Policy and the Federal Motor Carrier Vehicle Safety Regulations, 49 C.F.R. 392.5. Therefore, some discipline was appropriate.

4. DOH did not prove that Grievant's conduct constituted "gross disregard for professional responsibilities" or "wrongful intent" to violate state rules and regulations which is necessary for the dismissal of a permanent state employee in the classified service. *See 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 Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004) (per curiam).

5. In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be

determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995).

6. Given the facts and the standard set out in *Oakes supra*, the dismissal of Grievant was clearly excessive and disproportionate to his conduct. A suspension of ten working days without pay is appropriate under the circumstances of the grievance in its entirety.

> 7. Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, will be deducted from any back pay award; however, the burden of raising the issue of mitigation is on the employer.
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> Wages from any job taken by a wrongfully discharged employee will be deducted from his or her back pay award whether the work taken is comparable to the work contracted for or not, if the employee's performance of the job would have been incompatible with his or her performance of the contract.

Syl. pts. 2 & 3*, Mason County Bd. of Educ. v. State Superintendent of Schools,* 170 W.Va. 632, 295 S.E.2d 719 (1982).

8. Grievant did not prove that the DOH acted maliciously in dismissing Grievant, and the deduction of any wages earned by Grievant while he was off work during the dismissal after the ten working day suspension must be deducted from any back pay he is entitled to as a result of this decision.

Accordingly, the Grievance is GRANTED IN PART and DENIED IN PART. Respondent DOH is ORDERED to immediately reinstate Grievance to his prior position with back pay and benefits minus pay for the ten-day suspension imposed herein.

Respondent DOH is entitled to deduct from the back pay award any wages Grievant earned while he was off work after the ten day suspension and before his reinstatement. Grievant is ORDERED to cooperate with reasonable effort of Respondent DOH to determining the amount of the back pay offset.

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 20, 2010.

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE