THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CARL D. LOUDERMILK,
Grievant,

v. **Docket No. 2010-0558-DOT**

WEST VIRGINIA DEPARTMENT
OF TRANSPORTATION/DIVISION
OF HIGHWAYS,
Respondent.

DECISION

By letter dated October 23, 2009, Grievant Carl D. Loudermilk was notified that his employment with the Division of Highways ("DOH") would be terminated. Mr. Loudermilk filed a grievance contesting his dismissal on November 4, 2009. The Statement of Grievance averred:

> Management has failed to meet the "just or good cause" provision or the Administrative Rule in my termination outlined in the Human Resources letter dated October 23, 2009.

As relief Grievant seeks:

> [to] be reinstated to my position and this discipline removed from my file and that I be made whole with all lost wages and benefits with appropriate interest and my 31 plus years of seniority reinstated.

Pursuant to W. VA. CODE § 6C-2-4 (a) (4), Grievant waived levels one and two and proceeded directly to level three for a hearing.

A level three hearing was held in Beckley, West Virginia, on May 5, 2010. Grievant appeared in person and through his representative, Delbert G. Price, AFSCME IUR.[1]

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[1] AFSCME IUR are acronyms for American Federal State County and Municipal Employees and International Union Representative.

Respondent was represented by Robert Miller, Esquire, with the DOH Legal Division. At the conclusion of the hearing, the parties agreed to submit Proposed Findings of Fact and Conclusions of Law. The latter of the proposals was received at the West Virginia Public Employees Grievance Board on June 24, 2010, and this matter became mature for decision on that date.

Synopsis

Grievant had been employed with the DOH for 31 years. The classification he held requires that he maintain a valid driver's license. Grievant lost his driver's license for ten months after being convicted of driving under the influence of alcohol. Respondent DOH dismissed Grievant because he no longer met the minimum qualifications for his classification and could not qualify for any other vacant position.

Respondent proved by a preponderance of the evidence that Grievant no longer met the minimum qualifications for his classification and position.

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 Carl Loudermilk has been employed continuously by the DOH since 1978. For the last fifteen years, he has been a welder with a classification of Transportation Worker 4.

2. The Department of Personnel ("DOP") classification specifications establish the minimum qualifications for positions in the state classified service. The DOP classification specification for the Transportation Worker 4 classification establishes that

one of the minimum qualifications for that position is “a valid West Virginia Motor Vehicle Operator’s License.” Respondent Exhibit 2.

3. Matthew L. Rowan is the Acting District Engineer/Manager in District Nine where Grievant was employed. Mr. Rowan was told informally in August 2009 that Grievant had lost his driver’s license for at least 45 days after being convicted for driving under the influence of alcohol (“DUI”). In early September 2009, Manager Rowan received notice from the DOH main office that Grievant’s license was revoked for at least ten months. Respondent Exhibit 6.

4. On September 21, 2009, Manager Rowan completed a Form RL-544 and gave a copy to Grievant to read and sign. Grievant signed the Form RL-544 the same day. Respondent Exhibit 1.

5. The Form RL-544 is a notice to DOH employees of recommended disciplinary action to be taken against them. In this RL-544 Manager Rowan recommended that Grievant be dismissed from employment because he no longer met the minimum qualification for the position he held. The form notified Grievant that he had the opportunity to respond to the recommendation personally or in writing within two days of receiving the RL-544.

6. On September 23, 2009, Manager Rowan completed a Form RL-546 which he and Grievant signed on that date. The RL-546 is a verification of disciplinary action and this form verified that Grievant was dismissed from employment with the DOH.

7. Manager Rowan forwarded the two forms to Jeff Black, Director of the DOH Human Resources Division. Manager Rowan attached a memorandum explaining the

reason for the dismissal and requesting that Grievant be considered for demotion to a vacant Transportation Worker 2 position in District Nine.

8. The Transportation Worker 2 that was to be posted in District Nine was for a gas house attendant. The position traditionally required little driving.

9. The DOP classification specification for the Transportation Worker 2 classification contains as a minimum qualification that the employee maintain "a valid West Virginia Motor Vehicle Operator's License." Respondent Exhibit 5. After losing his driver's license, Grievant did not meet the minimum qualifications for the posted position in the Transportation Worker 2 classification.

10. The DOH Administrative Operating Procedures related to disciplinary action state that an employee may be dismissed for "loss of required licensure when the same is a requirement for the employee's job classification." DOH Administrative Operating Procedures Section II, Chapter (III) (5) (g). Respondent Exhibit 4.

11. Director Black gave Grievant Loudermilk a letter dated October 23, 2009, informing Grievant that his employment with the DOH was terminated effective November 9, 2009. The reason for the termination was stated as Grievant's "failure to meet the minimum qualifications of [his] job as a result of [his] West Virginia Driver's license being revoked." Respondent Exhibit 3.

12. Grievant had been convicted of DUI on two previous occasions. Grievant was employed by the DOH at the time of both the prior convictions. On the first occasion, Grievant lost his driver's license for one year and on the second occasion he lost his

license for five years. On both of these occasions, Grievant continued to work for the DOH without a driver's license.[2]

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

[2] After Grievant's first conviction for DUI he obtained a work permit from the Department of Motor Vehicles that allowed him to drive to and from work. Such permits are no longer available, and were not available when Grievant lost his license for five years in the late 1980s.

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.*

A valid West Virginia Driver's license is required for both the Transportation Worker 4 classification in which Grievant has been employed and the Transportation Worker 2 classification to which Grievant hoped to be demoted. Because Grievant's driver's license was revoked he no longer met the minimum qualifications for either of those positions. Pursuant to the DOP Rules, Grievant was no longer suitable to perform the essential duties of his position. DOH administrative operating procedures also allow Grievant to be dismissed from employment for loss of licensure when the license is required to meet the minimum requirements of the classification in which the employee works. *See* Respondent Exhibit 4. Respondent proved by a preponderance of the evidence that a valid driver's license is required for Grievant's classification and that Grievant's driver's license had been revoked after he was convicted of DUI.

Grievant opines that, in reality, a driver's license is not required for him to perform the essential duties of his welding job. He argues that he rarely needs to drive a vehicle

when he is at work and on those occasions where he would need to travel to a work site, a helper could be assigned to drive the state vehicle. Grievant notes that he was able to perform his job adequately for five years when his license was previously revoked.

While Grievant would only need to drive occasionally to work sites in his welding position, a driver's license is a minimum requirement for his classification and the employer is not required to provide another employee to drive for him on those occasions. Director Black noted that, in recent years, the DOH has consistently been dismissing employees who lose their driver's licenses if their positions require the employee to hold such a license. Indeed, 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).

While it is tragic that Grievant's personal actions have caused the loss of his job with only a short time left before being eligible to retire, Respondent has met its burden of proof and the grievance is 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. *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).

3. DOH administrative operating procedures also allow Grievant to be dismissed from employment for loss of licensure when the license is required to meet the minimum requirements of the classification in which the employee works. DOH Administrative Operating Procedures Section II, Chapter (III) (5) (g). *See also, 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).

4. Respondent proved by a preponderance of the evidence that a valid driver's license is required for Grievant's classification and that Grievant's driver's license had been revoked after he was convicted of DUI. Consequently, the termination of Grievant's employment was justified.

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: October 8, 2010

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE