THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

WALTER WEBSTER ELMORE, Jr.,
Grievant,

v. **Docket No. 2010-1042-DOT**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant Walter Webster Elmore, Jr. filed a grievance against his employer, Division of Highways, on February 9, 2010. His statement of grievance reads:

> I received a DUI on 7-3-09, on my personal time. I made a mistake an [sic] I'm paying for it in some ways. I was let go at my Employment [sic]. I was a good worker and always did whatever was asked of me. I think if I didn't do my job my bosses would say so, even with the DUI. I did other jobs before I got the DUI. Run the loader, the roller, boss the crews. Did mechanic work. Clean around garage. Flagged. Run the mower for years.

His requested relief is, "I would like to go back to work and given a chance to show that I can still do my job and do it very well. And go back at the same pay. I ask please give me a chance to show that I just made a mistake. I have off drinking [sic]. I have the Inter-lock on my vichle [sic], paid my fine. I am doing everything I can."

As this grievance involves a termination, it was filed directly to level three. A hearing was held at the Grievance Board's Charleston office on March 30, 2010. Grievant appeared *pro se*, and Respondent was represented by Jason C. Workman, Esq. This case became mature for decision on May 4, 2010, upon the filing of findings of fact and conclusions of law.[1]

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[1]Proposed findings of fact and conclusions of law were only received from Respondent.

Synopsis

Grievant's Commercial Driver's License ("CDL") was invalidated when he received a conviction for Driving Under the Influence ("DUI"). Respondent terminated him, asserting that he was no longer minimally qualified for the position, as he is required to have a valid CDL.

Grievant asserts he has been a good worker during his tenure with Respondent, and he requests an alternative assignment instead of termination.

Respondent has met its burden of proof in this case, and therefore, this grievance is denied.

Findings of Fact

1. Grievant is employed by Respondent as a Transportation Worker 2 Equipment Operator.

2. The Transportation Worker 2 Equipment Operator classification specifications require that the employee have a valid Class A or B Commercial Driver's License ("CDL").

3. Grievant received a DUI, and as a result, both his driver's license and CDL were suspended.

4. Respondent received a report from the West Virginia Division of Motor Vehicles. The report stated that Grievant's CDL was suspended for one year as a result of a DUI.

5. On November 30, 2009, Grievant received written notice that he was being recommended for termination due to the loss of his CDL. Respondent placed in writing

that a valid driver's license is required for the position of Transportation Worker 2 and a valid CDL is required for an Equipment Operator.

6. On February 2, 2010, Jeff Black, Director of Human Resources, sent Grievant a termination letter stating, "The reason for your termination is your failure to meet the minimum qualifications of your job as a result of having an invalid Commercial Driver's license."

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *Hoover v. Lewis County Board of Education*, Docket No. 93-21-427; *Landy v. Raleigh County Board of Education*, Docket No. 89-41-232. A preponderance of the evidence is defined as "evidence which is 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." *Black's Law Dictionary* 1220 (8th ed. 2007); *Leichliter v. West Virginia Department of Health & Human Resources*, Docket No. 92-HHR-486. Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

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 & 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

3.39 defines "Fitness" as "suitability to perform all essential duties of a position by virtue of meeting the established minimum qualifications and being otherwise qualified."

The issue presented is whether Respondent 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 Equipment Operator 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 for one year, 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.

Grievant asserts that he has been a good employee during his tenure with Respondent. That is uncontested. Grievant requested Respondent place him in an alternate position or allow him to perform work that does not require driving for the remainder of the suspension of his license and CDL. While this is truly a tragic situation, Respondent must focus on the needs of the agency in getting work done. Mr. Black testified that a year's suspension on a CDL is too long to be without someone who could perform the necessary duties and would therefore affect Respondent's ability to perform the necessary work.

Respondent has met its burden in this matter. This grievance is denied.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *Hoover v. Lewis County Board of Education*, Docket No. 93-21-427; *Landy v. Raleigh County Board of Education*, Docket No. 89-41-232. A preponderance of the evidence is defined as "evidence which is 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." *Black's Law Dictionary* (6th ed. 1991); *Leichliter v. West Virginia Department of Health & Human Resources*, Docket No. 92-HHR-486. Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

2. 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 & 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 3.39 defines "Fitness" as "suitability to perform all essential duties of a position by virtue of meeting the established minimum qualifications and being otherwise qualified."

4. Respondent met its burden of proving Grievant is no longer able to perform the essential duties of the Transportation Worker 2 Equipment Operator position due to the loss of his CDL.

Accordingly, this 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: May 26, 2010

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Wendy A. Elswick
Administrative Law Judge