THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DAVID RAY CONN
Grievant,

v. **Docket No. 2011-0673-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, David Ray Conn, filed this grievance against Respondent on October 31, 2010. The statement of grievance states:

> Received letter 10/21/10 informing me that I would be terminated as of 11/6/10 for reason being my driver's license had been revoked. I am presently on workers comp plus place of employment discriminated against me in comparison to other employees whom have also had revoked license.

As relief, Grievant seeks "To be reinstated to job once released from workers comp or doctor."

A level one conference was held on December 8, 2010. The grievance was denied at that level. A level two mediation was held on April 19, 2011. A level three hearing was held before the undersigned on January 20, 2012, at the Grievance Board's office in Charleston, West Virginia. Grievant was represented by Erin Young, American Federation of State, County and Municipal Employees, AFL-CIO. Respondent was represented by counsel, Jason Workman, Esq. This matter became mature for decision upon final receipt of the parties' proposed findings of fact and conclusions of law on February 27, 2012.

Synopsis

Respondent argues that Grievant was properly terminated for failure to meet the minimum qualifications of his job. Grievant asserts that "management failed to meet the elements of just cause" when terminating him. Grievant argues that he was treated differently than similarly situated employees. Grievant also asserts mitigation of penalty is warranted.

Grievant was employed as a Transportation Worker 2. One of the specific qualifications of the position is possession of a driver's license. As Grievant's driver's license was revoked, it is clear he was unable to perform the essential duties of the position. Respondent has met its burden in this disciplinary matter.

Grievant failed to demonstrate that he was being treated differently from one or more similarly situated employees. Respondent has dismissed other employees guilty of revocation of their required driver's license due to a charge of driving under the influence of alcohol. Grievant failed to establish discrimination. Additionally, Grievant failed to prove that the penalty he received was so disproportionate to his offense that it indicates an abuse of discretion. Consequently, Grievant failed to demonstrate that mitigation of penalty is warranted.

Accordingly, this grievance is DENIED.

Findings of Fact

1. Grievant began full-time employment for Respondent as a Transportation Worker 2 in October 1996.

2. Grievant was arrested on October 18, 2008 for driving under the influence

of alcohol (DUI). This was Grievant's first and only DUI offense.

3. Grievant's license was suspended effective June 9, 2010, for a year.[1]

4. The classification specification for a Transportation Worker 2 requires a valid West Virginia Motor Vehicle Operator's license.[2]

5. Notice was given to Grievant that dismissal was being recommended. The Notice To Employee[3] was dated August 30, 2010. Under the section for reasons for the recommended action Respondent stated:

> DMV [Division of Motor Vehicles] has reported to Department of Highways that your driver license is invalid. Division of Personnel classification specifications require a valid drivers license for your position. DOH Operating Procedures Sec. II, Chapter 6, specify dismissal when an employee loses a license required by his job classifications.

6. Grievant was given an opportunity to meet with the district manager concerning his dismissal. Grievant met with the district manager on September 7, 2010.[4]

7. By letter[5] dated October 21, 2010, Grievant was notified of his termination. The letter stated, in part:

> Pursuant to Section 12.2 of the State Division of Personnel Administrative Rule and Section II, Chapter 6 of the Division of Highways Administrative Operating Procedures, your employment with the Department of Transportation, Division of Highways, as a Transportation Worker 2 is hereby terminated effective November 6, 2010 at the close of business.

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[1]Respondent's Ex. No. 2, Grievant's driver record from WV Division of Motor Vehicles.

[2]Respondent's Ex. No. 1, Classification Specification for Transportation Worker 2.

[3]Respondent's Ex. No. 4, Notice To Employee dated August 30, 2010.

[4]*Id.*

[5]Respondent's Ex. No. 5, Grievant's termination letter dated October 21, 2010.

...

The reason for your termination is failure to maintain licensure required for your position. More specifically:

Your driver's license (CDL) has been revoked. Possession of a valid driver's license is a minimum requirement to your job classification.

8. Grievant's termination was effective November 6, 2010.

9. Grievant was on worker's compensation at the time of his termination.

10. Grievant's license was reinstated on June 16, 2011.

11. At the time of Grievant's termination, the Division of Highways (DOH) Administrative Operating Procedures Section II, Chapter 6[6] stated, in part:

I. INTRODUCTION

Effective: 4/15/2007

A. PURPOSE

The purposes of this Policy are threefold:

1. Providing guidelines for managers and supervisors in exercising their responsibilities in recommending and administering disciplinary action;

2. Advising employees about agency expectations regarding employee work performance and conduct and the disciplinary process; and

3. Providing mechanisms by which employee work performance and conduct may be managed.

...

II. STANDARDS OF WORK PERFORMANCE AND CONDUCT

Effective: 4/15/2007

A. GENERAL

The Division of Highways expects its employees to meet certain

[6]Respondent's Ex. No. 3, Division of Highways (DOH) Administrative Operating Procedures Section II, Chapter 6.

standards of work performance and conduct regardless of the type of work or unit to which they are assigned. These standards include but are not limited to the following:

1. Possession of the required qualifications for a job classification and the ability to satisfactorily perform the job skills after a fair trial period;

...

III. DISCIPLINARY ACTION

Effective: 4/15/2007

...

B. TYPES OF DISCIPLINARY ACTION

...

5. Dismissal: An employee may be dismissed for cause, which requires that it be based on something of a substantial nature directly affecting the rights and interests of the public rather than trivial or inconsequential matters, or more technical violations of statute or official duty without wrongful intention.

Examples of poor performance or misconduct that may warrant dismissal in response to a single performance issue or instance of misconduct include...

g. loss of required licensure when the same is a requirement for the employee's job classification;

12. In the early to mid 2000s, the Division of Personnel decided to centralize licensure revocation for uniformity when employees lost their driver's licenses that held a position requiring a driver's license.[7]

13. Other employees for Respondent have been terminated for failing to maintain necessary licenses required by their respective positions.[8]

14. The suspension of an employee's driver's license as a result of unpaid child

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[7]Level three hearing testimony of Jeff Black, Director of the Human Resources Division for Respondent.

[8]*Id.*

support or tickets does not require the statutorily defined revocation period of a driver's license as does a DUI. Respondent requires employees who have lost their driver's license as a result of unpaid child support or tickets to have their license reinstated within a certain time frame or face termination.[9]

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 Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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 &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.*

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). Additionally, Division of Personnel Rule 3.40 defines "Fitness" as "suitability to perform all essential duties of a position by virtue of meeting the established minimum qualification and being otherwise

[9] *Id.*

qualified." *Reed v. DOH*, Docket No. 07-DOH-023 (May 16, 2007).

Respondent argues that Grievant was properly terminated for failure to meet the minimum qualifications of his job. Grievant asserts that "management failed to meet the elements of just cause" when terminating him. Grievant argues that he was treated differently than similarly situated employees. Grievant also asserts mitigation of penalty is warranted because his previous work performance lacked any disciplinary measures and because this DUI was his first DUI offense.

Grievant was employed as a Transportation Worker 2. One of the specific qualifications of the position is possession of a driver's license. As Grievant's driver's license was revoked, 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. Division of Highways (DOH) Administrative Operating Procedures Section II, Chapter 6 states that Respondent may terminate an employee when the employee loses a licensure that is a requirement for the employee's job classification. Further, this Grievance Board has held that termination is proper when an employee's driver's license is revoked and the employee's position requires possession of a license as a specific minimum qualification. *Jones v. DOH*, Docket No. 2009-0830-DOT (March 11, 2008). Respondent has met its burden in this disciplinary matter.

"Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." 156 C.S.R. 1 § 3. Grievant asserts that he was treated differently than similarly situated employees. Grievant argues that previous employees with suspended licenses, were permitted to arrange alternative work duties until they successfully reinstated their driver's license.

In order to establish a claim of discrimination, an employee must establish a *prima facie case* of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

> (a) that he or she has been treated differently from one or more similarly situated employee(s);
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
> (c) that the difference in treatment was not agreed to in writing by the employee.

The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

Other employees with revoked driver's licenses due to not paying child support or tickets are not similarly situated to Grievant. Grievant's DUI required a period of statutory suspension of his driver's license. Persons with licenses revoked due to non-payment of tickets or child support may be able to pay the penalty amount due and have their license reinstated.

Grievant asserts that he was discriminated against because he was dismissed while on worker's compensation. W.VA. CODE § 23-5A-3(a) proves that:

> It shall be a discriminatory practice within the meaning of section one [W.VA. CODE § 23-5A-1] of this article to terminate an injured employee while the injured employee is off work due to a compensable injury within the meaning of article four [W.VA. CODE § 23-4-1 *et seq.*] of this chapter and is receiving or is eligible to receive temporary total disability benefits, unless the injured employee has committed a separate and dischargeable offense. A separate dischargeable offense shall mean misconduct by the injured employee wholly unrelated to the injury or the absence from work resulting from the injury. A separate dischargeable offense shall not include absence resulting from the injury or from the inclusion or aggregation of absence due to the injury with any other absence from work.

Grievant losing his license for a statutory period of time for receiving a DUI was a

separate and dischargeable offense unrelated to his injury or absence from work resulting from the injury. Grievant failed to demonstrate that he was being treated differently from one or more similarly situated employees. Grievant failed to establish discrimination.

"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 Resources/Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). "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).

Grievant asserts that his discipline should be mitigated because this was his first DUI offense.[10] Grievant asserts that he did not have a history of disciplinary actions and had received satisfactory performance evaluations. No performance evaluations were introduced into evidence. The penalty was not clearly disproportionate to the offense

[10]Respondent's Policy to uniformly dismiss employees with suspended licenses when the position held by the employee requires the license, was revised on September 30, 2011. The Policy standard to which Grievant is held is the Policy in effect at the time of his dismissal.

proven. Respondent has dismissed other employees guilty of revocation of their required driver's license due to a DUI.[11] Grievant has failed to prove that the penalty he received was so disproportionate to his offense that it indicates an abuse of 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. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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 &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.*

2. 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).

3. Division of Personnel Rule 3.40 defines "Fitness" as "suitability to perform all essential duties of a position by virtue of meeting the established minimum qualification

[11]Level three hearing testimony of Jeff Black, Director of the Human Resources Divisions for Respondent.

and being otherwise qualified." *Reed v. DOH*, Docket No. 07-DOH-023 (May 16, 2007).

4. This Grievance Board has held that termination is proper when an employee's driver's license is revoked and the employee's position requires possession of a license as a specific minimum qualification. *Jones v. DOH*, Docket No. 2009-0830-DOT (March 11, 2008).

5. Grievant was unable to perform the essential duties of a Transportation Worker 2 because one of the specific qualifications of the position is possession of a driver's license and Grievant's driver's license was revoked.

6. Respondent met its burden in this disciplinary matter in demonstrating that Grievant was properly terminated.

7. "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." 156 C.S.R. 1 § 3.

8. In order to establish a claim of discrimination, an employee must establish a *prima facie case* of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
> (c) that the difference in treatment was not agreed to in writing by the employee.

The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

9. Grievant failed to demonstrate that he was being treated differently from one or more similarly situated employees, therefore, he failed to establish discrimination.

10. "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 Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996).

11. "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).

12. Grievant failed to prove that the penalty he received was so disproportionate to his offense that it indicates an abuse of discretion.

For the foregoing reasons, this grievance is hereby 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: April 6, 2012

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Jennifer Lea Stollings-Parr
Administrative Law Judge