

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**DELBERT LEON STARCHER,
Grievant,**

v.

Docket No. 2023-0523-DHHR

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU OF SOCIAL SERVICES,
Respondent.**

DECISION

Grievant, Delbert Leon Starcher, is employed by Respondent, Department of Health and Human Resources within the Bureau of Social Services. On December 22, 2022, Grievant filed this grievance against Respondent stating,

Grievant was informed on December 12, 2022 that his, "lapse in judgement has created concern on your ability to assess the safety of children specifically when allegations of substance abuse are included." Grievant admitted to his lapse in judgement when the incident happened and informed human resources he had already inquired about employee assistance in dealing with mental health and burnout to which the HR representative agreed. Grievant immediately took the necessary steps to deal with the situation. Grievant was expected to continue working in full capacity assessing safety for 3 months and is expected to continue doing so until January 3, 2023. This is contrary to the statement made earlier. Grievant, while not driving clients, has rode along for the safety of other employees while transporting clients. Grievant has agreed to utilize his own vehicle to complete assessments during the course of the interlock program. Grievant continues to point out that he was not working in any capacity when the infraction occurred. Grievant even refused to go out with another employee the weekend before because he was on call. Grievant is offended that a one time event has him labeled as a substance abuser when he had not drank for 20yrs and has not drank since."

The grievance was filed directly to level three. By order entered December 30, 2022, the grievance was transferred to level one as it did not appear to allege any of the

circumstances pursuant to West Virginia Code § 6C-2-4(a)(4) that would allow expedited filing. On May 26, 2023, the grievance was waived from level one to level three when Grievant clarified that he was protesting his demotion with loss of pay.

A level three hearing was held on October 19, 2023, before the undersigned at the Grievance Board's Charleston, West Virginia office via videoconferencing. Grievant appeared and was represented by Gordon Simmons. Respondent was represented by counsel, Katherine A. Campbell, Assistant Attorney General. This matter became mature for decision on November 20, 2023, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a Child Protective Services Worker. Grievant was demoted due to the restrictions on his driver's license imposed by his criminal conviction for driving under the influence of alcohol. An essential duty of a Child Protective Services Worker is transporting children. Respondent was justified in demoting Grievant for his inability to perform the essential duties of his position due to the restrictions on his driver's license imposed by his criminal conviction for driving under the influence. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent as a Child Protective Service Worker ("CPSW").

2. On August 28, 2022, while off-duty, Grievant was charged with driving under the influence of alcohol.

3. On August 29, 2022, Grievant promptly reported the charge to Respondent and Laurea Ellis, then Social Service Manager and now Deputy Commissioner, conducted a predetermination conference on the same day.

4. Grievant was briefly assigned to desk duty and then assigned to ride along with other CPSWs while the charge was pending.

5. After Grievant pled guilty to the charge, Ms. Ellis conducted a second predetermination conference with Grievant on November 17, 2022. During the conference, Grievant informed Ms. Ellis that his license would not be suspended if his application for an interlock device was approved.

6. An interlock device tests blood alcohol level by breath and prevents the operation of a vehicle if an illegal blood alcohol level is detected.

7. Grievant's application for an interlock device was approved so Grievant's driver's license was not suspended.

8. For a period of six months, Grievant was only permitted to drive with an installed interlock device on his personal vehicle.

9. The CPSW classification specification requires the possession of a valid driver's license and the use of a personal vehicle.

10. Although the classification specification requires the ability to use a personal vehicle, Respondent's current standard operating procedures require the use of a state vehicle or rental vehicle to transport clients. A personal vehicle may only be used if a state vehicle or rental vehicle are unavailable.

11. By letter dated December 12, 2022, Deputy Commissioner Melanie Urquhart demoted Grievant with prejudice to a Social Service Worker 3, which reduced his hourly pay from \$29 to \$25 per hour. As grounds for the demotion, Ms. Urquhart cited Grievant's inability to drive clients, concern regarding Grievant's ability to assess the safety of children relating to allegations of substance abuse, and violation of Policy 2108.

12. Once the restrictions on Grievant's driver's license were removed, Grievant applied for and received another CPSW position.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "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.*

Respondent asserts it was justified in demoting Grievant because he could not transport clients due to the restrictions on his license requiring the use of an interlock device and because his criminal conviction violated policy. Grievant asserts that his demotion was not justified because he did possess a valid driver's license and he could have continued to transport clients in his personal vehicle with the interlock device.

Demotion with prejudice is permitted by the Division of Personnel's administrative rule. W.VA. CODE ST. R. § 143-1-11.4 (2022). The Grievance Board has previously applied the same standard of review to disciplinary demotion as to dismissal of an

employee. *Smith v. Div. of Corr.*, Docket No. 2012-0412-MAPS (July 17, 2012). 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 W. VA. CODE ST. R. § 143-1-12.2 (2022).

It is undisputed that transporting clients is an essential duty of a CPSW. It is undisputed that Grievant could not drive a state vehicle or rental vehicle when his license was restricted to require the use of an interlock device. Respondent's standard operating procedure allows the use of a personal vehicle only if a state vehicle or rental vehicle are unavailable. Grievant's inability to use a state vehicle or rental vehicle to perform his essential duty was a result of his own criminal conduct. Driving under the influence is a serious offense, which is treated more harshly than most driving offenses. *Bird v. Kanawha Cty. Bd. of Educ.*, No. 18-0870 (W.Va. Supreme Court, Nov. 4, 2019)(memorandum decision). Respondent is not required to alter its standard operating procedures to accommodate Grievant. Respondent was not unreasonable in determining that it would not be appropriate to transport children in a vehicle with an interlock system. Given that children are often removed from their parents due to substance abuse, Respondent's concern that such could be a breach of public trust is reasonable. Although it is unfortunate that Grievant's one-time lack of judgment under difficult

circumstances resulted in his criminal conviction, Respondent was justified in demoting Grievant.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "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. Demotion with prejudice is permitted by the Division of Personnel's administrative rule. W.VA. CODE ST. R. § 143-1-11.4 (2022).

3. The Grievance Board has previously applied the same standard of review to disciplinary demotion as to dismissal of an employee. *Smith v. Div. of Corr.*, Docket No. 2012-0412-MAPS (July 17, 2012).

4. 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 W. VA. CODE ST. R. § 143-1-12.2 (2022).

5. Respondent was justified in demoting Grievant for his inability to perform the essential duties of his position due to the restrictions on his driver's license imposed by his criminal conviction for driving under the influence.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals.¹ Any such appeal must be filed within thirty (30) days of receipt of this decision. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

DATE: January 10, 2024

Billie Thacker Catlett
Chief Administrative Law Judge

¹ On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]” W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.