THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RONALD D. SMITH,
Grievant,

v. **Docket No. 2010-0972-DOT**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant Ronald D. Smith filed a grievance against his employer, Division of Highways, on January 25, 2010. His statement of grievance reads, "According to Section 12.2 Chapter 6 was terminated Jan. 20, 2010 for not having valid drivers license and or CDL license."

For relief, Grievant seeks "Now have valid drivers license and would seek Reemployment [sic] or Reclassification as a Craftsworker [sic] there is a position available at Summers County Dept of Highways."

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]

Synopsis

Grievant is employed by Respondent as a Transportation Worker 2. A requirement of that classification is that the employee have a driver's license and a commercial driver's

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

license ("CDL"). Grievant received a conviction for Driving Under the Influence ("DUI"), and as such both his driver's license and his CDL were suspended. Respondent terminated Grievant for not meeting the minimum qualifications of the position.

Grievant asserts he has gotten his driver's license back by having an interlock device placed on his car. Grievant argues he could be transferred to a position that does not require a CDL.

Respondent has met its burden of proving Grievant no longer meets the minimum qualifications for the position of Transportation Worker 2. Therefore, this grievance is denied.

Findings of Fact

1. Grievant was employed by Respondent as a Transportation Worker 2 Equipment Operator at the Summers County office and has been so employed for approximately 5 years.

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. By letter dated October 2, 2009, Grievant was informed by Matthew L. Rowan, P.E., Acting District Engineer/Manager, that Respondent had received notice that Grievant's driver's license had been revoked. The letter informed Grievant that he needed to take appropriate steps to have his license reinstated and provide Respondent with proof of reinstatement within three days of receiving the letter.

5. On November 9, 2009, Grievant met with Mr. Rowan and advised him that Grievant's license had been reinstated with the restriction that he have an interlock system installed on his vehicle for 24 months.

6. Respondent does not install or permit interlock systems on State vehicles.

7. At the November 9, 2009, meeting, Grievant was informed that Mr. Rowan would be recommending Grievant's termination because Grievant no longer met the minimum requirements of the job.

8. Grievant was given a chance to respond in writing to the recommendation for termination, but he declined.

9. By letter dated January 4, 2010, Grievant was terminated for failing to meet the minimum qualifications of the position.

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. Grievant's driver's license was revoked, and only reinstated under the condition that he have the interlock system installed on his vehicle for 24 months. Respondent does not install this system on their State vehicles. Nor do they permit it to be installed. Given that Grievant does not possess either a driver's license free from restriction nor does he possess a valid CDL, it is clear he is unable to perform the essential duties of the position, and therefore, does not meet the definition of fitness as defined by the Division of Personnel.

Grievant has 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.

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: June 17, 2010

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Wendy A. Elswick
Administrative Law Judge