



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11771

Hearing Date: July 15, 2022
Decision Issued: August 4, 2022

PROCEDURAL HISTORY

On October 25, 2021, Grievant was removed from employment by letter because of her inability to meet working conditions.

On November 22, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On December 8, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 15, 2022, a hearing was held by remote conference.¹

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUES

1. Whether Grievant met the conditions of employment?

¹ The hearing was originally scheduled for March 30, 2022 but continued for just cause.

2. Whether the Agency complied with State policy?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that Grievant's removal was warranted and appropriate under the circumstances. The employee has the burden of raising and establishing any affirmative defenses. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Behavioral Health and Developmental Services employed Grievant as a Direct Service Professional III at one of its facilities. Grievant's duties included responsibility for disabled individuals.

Grievant worked as a Mental Health Specialist in Anchorage, Alaska. Anchorage had a municipal code prohibiting "Offenses against Person." AMC8.10.010 prohibited "Assault." Section (B)(3) stated:

A person commits an assault if: *** By words or other conduct that person recklessly places another person in fear of imminent physical injury

While in Anchorage, Grievant engaged in a conflict with another person using text messages. Grievant described the conflict as, "It was a verbal altercation that was classified as verbal assault." She said "both of us were using cell phones to insult each other." She said there was no physical contact and the other person was not near her. Grievant said the "other guy who called police" thought she had a gun.²

On December 3, 2015, Grievant was arrested. Grievant pled not guilty, was represented by counsel, and tried by a jury. She was convicted on August 17, 2017 of violating Section AMC8.10.010(B)(3) and sentenced to 240 days in jail with 180 days suspended.

In April 2020, Grievant applied for her current position. During the interview she was asked about prior convictions and disclosed her assault conviction. The Agency completed a criminal background check. An HR employee told Grievant that her convictions were not barrier crimes and the Agency hired Grievant. Grievant began

² Grievant's demeanor during the hearing suggested the "other guy" mistakenly thought she had a gun.

working for the Agency on July 10, 2020. Grievant was a valuable employee. She displayed a good work ethic and interacted well with individuals at the Facility.

On August 11, 2021, Grievant applied for the position of Administrator on Duty at the Facility. She interviewed for the position on August 16, 2021 and was selected for the position subject to a background check.

On October 12, 2021, Grievant submitted a Disclosure Statement in which she reported her criminal convictions including “illegal use of phone.” She acknowledged that her disclosures were subject to verification.

The Facility Human Resource Department received the FBI’s report on Grievant. The FBI report showed that Grievant was convicted in Anchorage, Alaska of violating AMC8.10.010(B)(3) prohibiting “ASSAULT – WORDS / CONDUCT CREATE FEAR.”³ The Facility HR Director contacted the Agency’s Central Office HR for guidance on how to proceed. Following guidance from the Central Office HR staff, the Facility HR contacted Grievant to obtain her input. On October 22, 2021, the Facility HR Director was told Grievant had to be terminated.

On October 25, 2021, Grievant was removed from employment because she did not meet the conditions of employment. During the grievance hearing, the Agency cited Grievant’s conviction under AMC8.10.010(B)(3) as the sole basis for Grievant’s failure to meet the conditions of employment. The Agency asserted AMC8.10.010(B)(3) was substantially similar to Va. Code § 18.2-57, Assault and Battery, a barrier crime.

CONCLUSIONS OF POLICY

DHRM Policy 1.60 governs Standards of Conduct. This policy provides that “failure to successfully pass an agency’s background investigation” is an “inability to meet working conditions” which justifies an agency to remove an employee by memorandum or letter.

Departmental Instruction 506 governs Criminal History Checks and Background Verification Requirements. This policy requires criminal history checks for “applicants ... within the Department” including “[c]urrent workforce members who apply for a change of employment type (e.g. through transfer or promotion.)” DI 506 provides:

DBHDS state facilities are bound by state laws/regulations that prohibit employment of individuals that have certain (“barrier”) convictions. Absent controlling state laws/regulations, an employer must give fair consideration of the relationship between a conviction or charge and the applicant’s fitness for a specific job.

³ Agency Exhibit p. 17.

When these are considered in the context of the particular job sought and it is deemed that they make the safe and efficient operation of the job questionable, then employment may be denied or terminated. The burden is on the employer to establish that either the conviction or relevant charge has a bearing on the individual's capacity to perform the job successfully or that an adverse public reaction will impair the public service.

DI 506 lists assault and battery under Va. Code § 18.2-57 as a barrier crime preventing employment at the Facility.

Va. Code § 37.2-314(B) provides, "the Department shall not hire for compensated employment persons who have been convicted of (i) any offense set forth in clause (i), (ii), or (iii) of the definition of barrier crime in § 19.2-392.02."

Va. Code § 19.2-392.02(i) defines barrier crime as "any violation of ... 18.2-57 ... or any **substantially similar offense** under the laws of another jurisdiction." (Emphasis added.) In other words, conviction under Va. Code § 18.2-57 or any substantially similar offense under the laws of another jurisdiction are barrier crimes.

The Agency alleged that Grievant's conviction under AMC8.10.010(B)(3) was conviction of a substantially similar offense to assault under Va. Code § 18.2-57.⁴ If AMC8.10.010(B)(3) is a substantially similar offense to Va. Code § 18.2-57, then the Agency may remove Grievant. If AMC8.10.010(B)(3) is not a substantially similar offense to Va. Code § 18.2-57, the Agency's removal of Grievant must be reversed.

Va. Code § 18.2-57(A) provides, "[a]ny person who commits a simple assault or assault and battery is guilty of a Class 1 misdemeanor" Va. Code § 18.2-57 does not specifically define simple assault. The elements of simple assault are found in case law.

In Carter v. Commonwealth, 269 Va. 44, 47 (2005), the Court held:

The issue in this case is whether the present ability to inflict bodily harm is an element of assault for purposes of Code § 18.2-57(C).

Because the statute does not define assault, we look to the common law definition of the term. ***

Based on a review of our prior cases, we conclude that, like the majority of jurisdictions, our prior cases compel the conclusion that **a common law assault, whether a crime or tort, occurs when an assailant engages in an overt act intended to inflict bodily harm and has the present ability to inflict such harm or engages in an overt act intended to place the**

⁴ The Agency is alleging in essence that Grievant's behavior in Alaska would constitute a crime under Virginia law if Virginia law applied.

victim in fear or apprehension of bodily harm and creates such reasonable fear or apprehension in the victim. (Emphasis added.)

In Clark v. Commonwealth, 279 Va. 636 (2010), the Court held:

Regarding the common law crime of assault, this Court has stated that because assault requires an overt act, **words alone are never sufficient to constitute an assault.** (Emphasis added.)

In other words, an “overt act” is required for an assault conviction under Va. Code § 18.2-57 because words alone cannot constitute an assault.

The Hearing Officer does not believe Grievant engaged in an “overt act” that gave rise to her arrest on December 3, 2015. If Grievant had been in Virginia when she engaged in the behavior giving rise to her conviction in Alaska, it is unlikely she would have been convicted of assault and battery in Virginia under Va. Code § 18.2-57.

The phrase “substantially similar offense” is not defined under Va. Code § 19.2-392.02. The analysis, however, is similar to the analysis used to determine if an individual has a prior criminal conviction in another jurisdiction.

In Mason v. Commonwealth of Virginia, 64 Va. App. 599 (2015), the court was attempting to determine if a conviction in New York was substantially similar to Va. Code § 18.2-248(A) governing controlled substances or imitation controlled substances. The Court held:

The legislature did not define the phrase “substantially similar.” However, in the context of determining if another state’s statute is substantially similar to a code section, this Court has previously “establish[ed] that two things are ‘substantially similar’ if they have common core characteristics or are largely alike in substance or essentials.” *Johnson*, 53 Va. App. at 613, 674 S.E.2d at 543. ***

Simply put, to be substantially similar, and therefore admissible for the purposes of establishing a third or subsequent offense, the offense from another jurisdiction must be for conduct that would be a violation of Code § 18.2-248(A).

AMC8.10.010(B)(3) and Va. Code § 18.2-57 are similar in that they both involve misdemeanor crimes against persons and use the word “assault.” They are not substantially similar because conviction under Va. Code § 18.2-57 requires an overt act whereas conviction under AMC8.10.010(B)(3) does not have such a requirement. An overt act is core characteristic and an essential part of Va. Code § 18.2-57 and that essential part is not contained in AMC8.10.010(B)(3). Thus, Va. Code § 18.2-57 and AMC8.10.010(B)(3) do not have the same “common core characteristics” and are not “largely alike in substance or essentials.”

In conclusion, Grievant was not criminally convicted for an offense that is a substantially similar offense to Va. Code § 18.2-57. The Agency's decision to remove Grievant is not supported by the evidence.

DECISION

For the reasons stated herein, the Agency's decision to remove Grievant from employment is **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant's same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.^[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.