

Issues: Group II Written Notice (failure to follow policy), Group III Written Notice (failure to follow policy), and Termination; Hearing Date: 04/04/18; Decision Issued: 05/30/18; Agency: JMU; AHO: Carl Wilson Schmidt, Esq.; Case No. 11167; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11167

Hearing Date: April 4, 2018
Decision Issued: May 30, 2018

PROCEDURAL HISTORY

On January 9, 2018, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy regarding reporting arrests. On January 9, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow policies governing the operation of motor vehicles.

On January 11, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 5, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On April 4, 2018, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Counsel
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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:

James Madison University employed Grievant as an Equipment Repair Technician. No evidence of prior active disciplinary action was introduced during the hearing.

On November 18, 2017, Grievant was arrested for hunting from a vehicle, a misdemeanor under Va. Code § 29.1-521(6) and hunting with a firearm while intoxicated, a misdemeanor under Va. Code § 18.2-285. Grievant returned to work on January 6, 2018. Grievant did not inform the Supervisor or Agency managers about the arrest.

Grievant was charged on August 13, 2016 with driving while intoxicated, first offense, a misdemeanor under Va. Code § 18.2-266 and a civil violation for refusing a blood/breath test under Va. Code § 18.2-268.2. On August 13, 2016, the Arresting Officer presented Grievant with a Notice of Administrative suspension of Driver's License/Driving Privilege. The Arresting Officer noted that Grievant Driver's license was surrendered pursuant to Va. Code § 46.2-391.2. The Notice advised Grievant:

YOU ARE HEREBY NOTIFIED THAT YOUR PRIVILEGE TO DRIVE IN VIRGINIA IS SUSPENDED, AND ANY DRIVER'S LICENSE ISSUED TO YOU BY THE COMMONWEALTH OF VIRGINIA IS ALSO HEREBY SUSPENDED

When later questioned about the August 13, 2016 incident, Grievant told the Manager that he was working on his truck when a police officer pulled into his yard. The Arresting Officer handcuffed Grievant and placed Grievant in his police vehicle. The Arresting Officer drove Grievant to the police station where Grievant remained until the follow day.

Grievant told the Supervisor that he was concerned he might lose his driver's license. The Supervisor told Grievant that if Grievant lost his license he would have to go to human resources because the Supervisor could not hold his job if Grievant did not have a license. Grievant told the Supervisor he would go to court and beat the charges.

Grievant operated Agency motor vehicles as part of his job duties from August 12, 2016 thorough August 20, 2016 while his driver's license was suspended.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."¹ Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Failure to comply with written policy is a Group II offense.²

Group II Written Notice

The Agency alleged Grievant should receive a Group II Written Notice for failing to report his arrest for hunting with a firearm while intoxicated. Agency Policy 1110 governs Alcohol and Other Drugs. Under this policy, employees are required to:

Report an arrest for any offense related to criminal drug laws or alcoholic beverage control laws or laws that govern driving while intoxicated, based on conduct occurring on or off the workplace to your supervisor or designee within 72 hours of an arrest.

Grievant was not arrested for an offense related to criminal drug laws. He was not arrested for violating laws governing driving while intoxicated.

¹ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See, Attachment A, DHRM Policy 1.40.

The Agency's policy does not define alcoholic beverage control laws. Alcoholic beverage control laws are found in Va. Code Title 4.1 and relate to "the possession, sale, transportation, distribution, and delivery of alcoholic beverages in the Commonwealth." Grievant was arrested for hunting with a firearm while intoxicated. He was not arrested for possession, sale, transportation, distribution, or delivery of alcoholic beverages. The policy refers to driving while intoxicated but not hunting with a firearm while intoxicated. Grievant did not violate the Agency's policy.³

Group III Written Notice Use of State Vehicles

Agency Policy 4303 governs Use of State Vehicles. Section 5.2 provides:

An individual whose license is suspended or revoked is not authorized to drive any university vehicle under this policy.

On August 13, 2016, Grievant's driver's license was suspended. He operated Agency vehicles as part of his job duties while his license was suspended. Grievant acted contrary to Agency Policy 4303 thereby justifying the issuance of a Group II Written Notice.

In certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency. (For instance, the potential consequences of a security officer leaving a duty post without permission are likely considerably more serious than if a typical office worker leaves the worksite without permission.)

The Agency has presented sufficient evidence to elevate the disciplinary action from a Group II offense to a Group III offense. If Grievant had caused an accident injuring a student or member of the public, he would have exposed the Agency to additional risk of liability and public criticism by failing to be licensed than if he was operating an Agency vehicle while properly licensed.

Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant argued that his license was not taken by the Arresting Officer and he did not know his license was suspended. The Agency presented sufficient evidence to show that Grievant was advised by the Arresting Officer that his license was suspended. Thus, there remains a sufficient basis to support the Agency's disciplinary action.

³ Grievant also did not violate DHRM Policy 1.60.

Mitigation

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Human Resource Management”⁴ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**. The Agency’s issuance to the Grievant of a Group III Written Notice with removal is **upheld**.

APPEAL RIGHTS

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

Please address your request to:

Office of Equal Employment and 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.

⁴ Va. Code § 2.2-3005.

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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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