

Issue: Group III Written Notice with Termination (criminal conviction); Hearing Date: 09/22/17; Decision Issued: 10/13/17; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11054; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11054

Hearing Date: September 22, 2017
Decision Issued: October 13, 2017

PROCEDURAL HISTORY

On April 5, 2017, Grievant was issued a Group III Written Notice of disciplinary action for a conviction of driving while intoxicated. Grievant was given 90 days to remove any restrictions on her driver's license to retain employment. She was unable to do so and was removed from employment.

On April 19, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On July 18, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On September 22, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
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:

The Department of Corrections employed Grievant as a Corrections Officer at one of its facilities. An essential function of Grievant's position was transporting inmates using Agency vehicles. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was arrested for driving while intoxicated. At the time of her arrest, she was wearing her DOC Uniform and had completed her work shift approximately two hours earlier. On March 13, 2017, Grievant was convicted of driving while intoxicated. Her driver's license and privilege to drive was suspended or revoked for 12 months. She was granted a restricted driver's license. The Court ordered the Department of Motor Vehicles to provide Grievant with a restricted driver's license allowing her to operate a motor vehicle only for certain purposes including "travel during the hours of employment, IF the operation of a motor vehicle is necessary to the employment described below."

On April 5, 2017, the Warden mitigated the disciplinary action by affording Grievant the opportunity to remove certain restrictions on her driver's license. The Warden wrote:

You and I met on today's date to discuss the fact that your driver's license has restrictions which are in effect through March 12, 2018. As you

advised, these restrictions prohibit you from performing all of the essential functions of your position as a Corrections Officer, as you are not allowed to transport offenders or drive a state vehicle per Department Operating Procedure 411.1, Offender Transportation.

Effective today, you will have a 90-calendar day period in which to have the restrictions on your driver's license removed. Please submit any court documentation to me immediately upon your receipt of same. If you feel you will be unable to have these restrictions removed within the 90-day timeframe, and you wish us to assist you in seeking placement opportunities in positions which do not require an unrestricted driver's license, please submit a written request for said assistance to the Human Resource office at this facility. ***

We hope that you can resolve this matter within the 90-day period. However, if you have not submitted court documentation to me by Wednesday July 5, 2017, which verifies that there are no restrictions on your driver's license, we will have no choice but to remove you from your Corrections Officer position on that date, in accordance with DOC procedure.

At Grievant's request, on June 27, 2017, the Court amended the Order to state, "[Grievant] may operate a motor vehicle during the hours of her employment."

On July 7, 2017, the Warden sent Grievant a letter stating, in part:

As of July 5, 2017, the 90-day timeframe has elapsed and you have not submitted court documentation verifying that there are no restrictions on your driver's license. We will therefore have no choice but to remove you from your Corrections Officer position on July 5, 2017 in accordance with DOC procedure.¹

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."² Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should

¹ Agency Exhibit 9.

² Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

warrant removal.”³ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁴

Group III offenses include, “criminal convictions ... for driving under the influence.”⁵ Grievant was convicted of driving while intoxicated on March 13, 2017 thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee.

In this case, the Agency chose to mitigate the disciplinary action by giving Grievant a 90 day period to have any restrictions removed from her driver’s license. The Agency concluded Grievant did not meet the mitigation requirement and then removed her from employment.

The Agency was not obligated to mitigate the disciplinary action. When it chose to do so, it created the terms of mitigation and is allowed to interpret those terms even though its interpretation is not logical. The Agency has discretion to interpret mitigation terms it created.

The Agency’s interpretation of its mitigation standard is not logical. Grievant was obligated to transportation inmates during work hours. Grievant received a restricted driver’s license. That restricted license allowed her to drive motor vehicles during work hours and, she was authorized by the Court to drive inmates in State vehicles during work hours. Thus, Grievant was able to meet the essential functions of her position despite any other restrictions on her driver’s license. A rational application of the mitigation standard would be to continue Grievant’s employment with the Agency because she could perform all of her job duties. Instead, the Agency interpreted the mitigation standard to mean that Grievant had to remove all restrictions on her driver’s license in order to operate an Agency vehicle. The Agency relied on Operating Procedure 411.1, Offender Transportation, which provides:

Corrections Officers transporting offenders in a vehicle other than a bus are to be in possession of a valid Driver’s License (without Court imposed restrictions) issued by any state.

The Agency interpreted this section to mean ANY restriction on a driver’s license prohibited operation of an Agency vehicle (even though the only relevant restriction would be one preventing an employee from driving.) Grievant received a restricted driver’s license and, thus, by definition she was unable to meet this interpretation of the Agency’s policy. Even though Grievant’s driving restrictions were not related to her employment, (e.g. she could not drive to a friend’s house on the weekend), the Agency considered her unable to operate a State vehicle during work hours.

³ Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

⁴ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

⁵ DOC Operating Procedure 135.1 (D)(2)(bb).

Because the Agency crafted a mitigation standard it was not obligated to create, the Hearing Officer will defer to the Agency's interpretation of that standard even though its interpretation is not logical.

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"⁶ 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.

Grievant argued that the Agency permitted other employees with restricted driver's licenses to operate State vehicles and remain employed by the Agency. The examples presented by Grievant did not support her assertion. The Hearing Officer does not believe the Agency singled out Grievant for disciplinary action. In light of the standard set forth in the Rules, 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 III Written Notice of disciplinary action is **upheld**. Grievant's 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

⁶ *Va. Code § 2.2-3005.*

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 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.