

Issue: Group III Written Notice with Termination (acts and behavior of a serious nature unbecoming a Corrections Lieutenant); Hearing Date: March 15, 2002; Decision Date: April 11, 2002; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5394; **Administrative Review: Hearing Officer Reconsideration Request; Date of Request: April 14, 2002; Reconsideration Decision Date: April 29, 2002; Outcome: Request to reconsider denied;** **Administrative Review: EDR Ruling Request; Date of Request: April 14, 2002; EDR Ruling Date: 06/26/02; Outcome: HO did not abuse discretion nor exceed his authority (Ruling #2002-081)**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5394

Hearing Date: March 15, 2002
Decision Issued: April 11, 2002

PROCEDURAL HISTORY

On January 23, 2002, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Acts and Behavior of a Serious Nature Unbecoming a Corrections Lieutenant, ranking supervisor, by your involvement on or about 11/01/01, within the [City]. [Grievant] was officially charged with Petty Larceny. The Department of Corrections has a copy of the Police Report that is filed with the Internal Affairs Unit. A complete review of this report by the Internal Affairs Unit established your involvement in the Petty Larceny offense as charged within the [City].

On January 28, 2002, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On February 20, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 15, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Counsel
Deputy Sheriff
Police Officer
Photo Specialist
Two Cashiers
Customer Service Cashier
Human Resource Officer
Chief of Security
Office Services Assistant
Corrections Officer

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal.

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. 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 Lieutenant in one of its Facilities until his removal. He had been working for the Department for approximately 20 years and was a good employee.

On November 1, 2001, Grievant walked into the Wal-Mart and went to the electronics department where cameras are for sale. He told the Photo Specialist that he was employed by the State and worked at the Facility and was purchasing two cameras with the Facility's credit card. Cameras are normally kept in the safe; but because of Grievant's representations, the Photo Specialist trusted Grievant and allowed him to have two cameras and left the area while Grievant examined the cameras.

Grievant took a camera to the Cashier. Grievant told the Cashier he was purchasing the camera for his wife and did not know whether his wife would like the camera. Grievant paid for the camera. The value of the camera was \$171 and the store sold it for \$198.98. The store has an alarm to prevent shoplifting. The Cashier must decode a item, otherwise it will set off the alarm. The Cashier decoded the camera and placed it in a bag along with a receipt. Grievant left the store with the camera.

Several minutes later, the Cashier observed Grievant in the store with a camera. Grievant asked her for a bag and she asked him what he did with the bag she gave him. He told her he left the bag at the service desk and then walked towards the service desk. Grievant asked an employee for a bag but was refused. He then walked to another register and took a bag. He put the camera and receipt inside the bag. He then tried to walk through the alarm system but it sounded an alarm. Grievant then left the store and went to his vehicle in the parking lot.

The Deputy Sheriff drove into the Wal-mart parking lot and observed three women employees. They were looking for Grievant and discussing among themselves whether Grievant had stolen a camera. The Deputy Sheriff spoke with the women and they said they believed Grievant stole a camera from the store. The Deputy Sheriff observed Grievant walking towards them but then he abruptly turned around and walk in the opposite direction. The Deputy Sheriff caught up with Grievant and said "Those ladies think you have taken a camera. Let's go back and see if we can straighten this out." Grievant denied taking a camera and said he left it on a shelf inside the store. Grievant led the Deputy Sheriff and a store employee into the store to look for the camera. They looked at three shelves but the camera was not there. The Deputy Sheriff said to Grievant, "Let's go back and look at your vehicle."

Grievant agreed to let the Deputy Sheriff search the vehicle. The Deputy Sheriff did not find anything inside the vehicle. When Grievant opened the trunk, however, the Deputy Sheriff heard something fall to the ground. He looked down and observed a brown box containing a camera. Grievant continued to deny stealing the camera. The Deputy Sheriff knew Grievant had two cameras because the other camera obtained from Grievant was in a bag being held by the store manager inside the store.

A Police Officer arrived at the store after Grievant had been confronted with the theft. Grievant told the Police officer that he watched some guy take the camera and watched him go out the door of the store.

Grievant is well known in the community. The Agency received a fraud and abuse hotline complaint regarding Grievant's actions.

CONCLUSIONS OF LAW

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.” Department of Corrections Procedure Manual “(DOCPM)” § 5-10.15. Group II offenses “include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal.” DOCPM § 5-10.16. Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DOCPM § 5-10.17.

The facts of Grievant’s case do not fit neatly within one of the 25 examples of Group III offenses under DOCPM § 5-17.15. It is not necessary, however, for the Agency to identify a specific example which Grievant violated in order to support issuance of a Group III Written Notice. The examples are not all-inclusive and are intended only to illustrate some of the many types of behavior that could warrant disciplinary action.¹

Grievant planned to steal a camera, represented that he was acting on behalf of the Agency, stole the camera, and then denied stealing the camera while blaming the theft on someone else. As a Lieutenant, Grievant held a supervisory position only a few steps below the highest position (Warden) in the Facility. His actions jeopardized his ability to supervise subordinates. By representing himself to the community as an agent of the Agency, he injured the Agency’s reputation. Grievant’s actions have undermined the effectiveness of the Agency’s activities. The Agency’s judgement that Grievant should be removed must be upheld.

Grievant contends that the Agency’s discipline should be reversed for the following reasons:

- Arbitrary, capricious and malicious, predetermined disciplinary action.
- Disparity in the administration of disciplinary hearing and action.
- Unfair, inappropriate and inconsistent application of policy.
- Retaliation for utilizing the Employee Grievance Procedure, and going to a higher authority.
- Double jeopardy.
- Insufficient evidence to warrant disciplinary hearing.
- Recommending termination without cause.

There is little credible evidence to support Grievant’s defenses.

Grievant contends that the Agency disciplined him more harshly than it has other employees committing similar acts. He offered examples of employees retaining their jobs after being convicted of driving under the influence of alcohol and other general misdemeanors. Although an Agency must discipline its employees consistently, disciplinary action is evaluated on a case-by-case basis. These examples are not

¹ See, DOCPM § 5-10.7(C).

sufficiently similar to the facts of Grievant's case for the Hearing Officer to believe Grievant is being treated differently from other employees. The only example of theft offered by Grievant was when a vending machine broke inside the Facility. A sergeant advised several corrections officers that they could take the food from the vending machine. When the vending machine broke on a prior occasion, the sergeant held the food for the vending company but the company ended up throwing out the food. The sergeant concluded that it was better to eat the food than to let it go to waste. The Agency issued Group II Written Notices to all of the employees who took food. This example of theft is different from the facts of Grievant's case because the employees removing food did not plan the theft and believed the vending company would destroy the food if they did not take it. Their actions were wrong but were not of the type taken by Grievant.

Grievant contends he should not be disciplined for actions occurring outside of his employment. This argument fails because Grievant identified himself as an employee of the Agency while taking the camera. By identifying himself as an Agency employee, he made his actions part of the Agency's concern.

This case represents an unfortunate human tragedy. Earning the position of Lieutenant in a highly competitive workplace is no small achievement. The Commonwealth has invested significant time to train and develop Grievant into a capable supervisor. For what reasons Grievant would place his career in jeopardy are unknown. Continuing to employ Grievant within an Agency devoted to incarcerating individuals who have broken the law is not a reasonable option.

DECISION

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

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5394-R

Reconsideration Decision Issued: April 29, 2002

DISCUSSION

Grievant seeks reconsideration of the Hearing Officer's decision issued April 11, 2002 upholding the Agency's termination of Grievant's employment. He argues the decision should be reconsidered because: (1) during the Agency's pre-termination hearing on January 23, 2002, the Warden lacked all of the necessary information to justify Grievant's termination, (2) the Agency lacked sufficient information to terminate Grievant because it failed to properly conduct an internal investigation report, and (3) the Written Notice failed to properly document the disciplinary action to be taken.

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. "[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ..." to grant the request. The first and second allegations made by Grievant involve procedural matters occurring before the case was assigned to the Hearing Officer. Assuming for the sake of argument that Grievant's allegations are correct, he should have addressed those concerns by notifying the Agency of its non-compliance and pursuing remedies from the Director of the Department of Employment Dispute Resolution. Once the case had been qualified for a hearing before a Hearing Officer, Grievant forfeited the right to seek a remedy for any noncompliance. GPM § 6.3. Grievant's third allegation cannot be supported because hearing decisions are based on the evidence presented to the Hearing Officer regardless of what evidence was presented to the Agency during its pre-termination hearing. The Agency presented sufficient evidence to the Hearing Officer to uphold its disciplinary action.

DECISION

Grievant's request for reconsideration is **denied**.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

3. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
4. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer