

Issue: Group III Written Notice with Termination (conduct unbecoming a Corrections Officer); Hearing Date: March 20, 2002; Decision Date: March 25, 2002; Agency: Department of Corrections; AHO: David J. Latham, Esquire; Case Number: 5398



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5398

Hearing Date: March 20, 2002
Decision Issued: March 25, 2002

PROCEDURAL ISSUE

Due to availability of the participants, the hearing could not be docketed until the 27th day following appointment of the hearing officer.¹

APPEARANCES

Grievant
Warden
Legal Assistant Advocate for Agency
One witness for Agency

¹ § 5.1 of the *Grievance Procedure Manual* requires that a grievance hearing must be held and a written decision issued within 30 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

ISSUES

Was the grievant's conduct on October 26, 2001, November 29, 2001 and November 30, 2001 subject to disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice issued on December 17, 2001 because of conduct unbecoming a corrections officer which undermined his effectiveness as a law enforcement officer.² Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing. The Department of Corrections (Hereinafter referred to as "agency") has employed the grievant as a correctional officer for two years.

Prior to his employment with the agency, grievant had been found guilty of hunting from a roadway, hunting out of season, littering and other offenses.

On October 26, 2001 a state game warden apprehended grievant and charged him with public intoxication³ and "spotlighting" deer.⁴ Both offenses are violations of Virginia law.⁵ Grievant was held at a county jail overnight due to his intoxicated condition. He subsequently paid the fine for public intoxication before the matter went to trial. He was found guilty of spotlighting and paid a fine and restitution. Grievant reported his arrest to his superior officer.⁶ Grievant's lieutenant counseled him on October 28, 2001.⁷

On November 29, 2001, a federal game warden apprehended grievant and charged him with possession of a weapon in a vehicle, unauthorized taking of wildlife, possession of unlawfully taken wildlife, and littering.⁸ On November 30, 2001, a different federal game warden apprehended grievant in a different county and charged him with damaging natural features (9 trees cut, 57 nails in other trees) and, failure to dispose of garbage, sewage and rubbish.⁹ As of the date of this hearing, these six charges have not yet been adjudicated. Grievant

² Exhibit 2. *Grievance Form A*, filed January 9, 2002.

³ Exhibit 5. *Warrant of Arrest*, issued October 26, 2001.

⁴ Exhibit 4. *Warrant of Arrest*, issued October 26, 2001.

⁵ Code of Virginia § 18.2-388 provides that it a class 4 misdemeanor to appear in public in an intoxicated condition. § 29.1-523 provides that it is a class 2 misdemeanor to kill a deer between a half hour after sunset and a half hour before sunrise by use of a light attached to any vehicle or a spotlight or a flashlight.

⁶ Exhibit 6. Memorandum from lieutenant to major, October 28, 2001.

⁷ Exhibit 7. Memorandum from lieutenant to grievant, October 28, 2001.

⁸ Exhibit 8. *Violation Notices*, United States District Court, issued November 29, 2001.

⁹ Exhibit 8. *Violation Notices*, United States District Court, issued November 30, 2001.

would not indicate whether he is guilty because he has not yet been to court on these charges.

The Warden concluded that grievant's repeated violations of the law constituted conduct unbecoming a corrections officer and undermined grievant's effectiveness as a corrections officer. He verbally authorized a major to issue a Group III Written Notice to grievant and to terminate his employment on December 17, 2001.¹⁰

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.¹¹

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training¹² promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The

¹⁰ Exhibit 1. Written Notice, issued December 17, 2001.

¹¹ § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective July 1, 2001.

¹² Now known as the Department of Human Resource Management (DHRM).

Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Section V.B.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual Standards of Conduct Policy No. 1.60* provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence should normally warrant removal from employment.¹³ The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section 5-10.17 of the DOC Standards of Conduct addresses Group III offenses; one example is criminal convictions for acts of conduct occurring on or off the job which are plainly related to job performance or are of such a nature that to continue the employee in the assigned position could constitute negligence in regard to the agency's duties to the public or to other state employees.¹⁴

The agency has demonstrated, by a preponderance of the evidence, that grievant has a recidivist tendency with regard to the violation of game laws. He has been convicted of violation of game laws prior to employment, and then for similar offenses in October 2001. He was apprehended again in November 2001 for six additional offenses, including violation of game laws. Even though these charges have not yet been adjudicated, grievant did not deny his guilt when asked about the charges during the hearing. Grievant also acknowledged that he has since been arrested a fourth time – on March 12, 2002 for spotlighting.

Grievant took issue with the fact that the Written Notice states that his vehicle had been confiscated. Grievant's vehicle was not confiscated. The warden understood that grievant's vehicle was confiscated but now acknowledges that he may have been mistaken. However, this is merely a misstatement of facts in connection with the grievant's violation of game laws. Whether grievant's vehicle was or was not confiscated is not relevant to the reason he was disciplined and discharged. Therefore, this error in the statement of background facts does not alter the grievant's violation of game laws, and is not a mitigating circumstance.

Grievant contends that the agency has an internal procedure that requires three meetings with an employee who is being considered for discharge. Grievant met twice with the major and once with the Warden prior to his discharge. However, grievant states that he was not informed that the meeting

¹³ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹⁴ Exhibit 3. Department of Corrections Procedure Number 5-10, *Standards of Conduct*, June 1, 1999.

with the Warden was a formal meeting that constituted one of the three required due process meetings. The evidence is inconclusive as to whether this latter meeting qualifies as one of the required three meetings. Viewing the evidence in the light most favorable to the grievant, it will be assumed for the sake of argument, that grievant received only two meetings. However, grievant has not demonstrated that a third meeting would have made any difference. During the hearing, grievant did not present any new evidence or mitigating circumstances that he had not previously presented. Thus, even if one concludes that there may have been a defect in the pre-termination process, this procedural defect made no substantive difference.

Grievant argues that the Major who issued the Written Notice did not have written authority to do so from the Warden. The Standards of Conduct provides that only the organizational unit head (in this case, the Warden) may remove an employee, unless the unit head has indicated his written approval.¹⁵ Here, the undisputed testimony of the Warden is that he made the decision to terminate grievant's employment and that he delegated the issuance of the paperwork to the Major because the Warden was not available on that date. Therefore, it appears that the Warden did not fully comply with the procedural requirement found in the Standards of Conduct. However, this technical defect is not fatal because the intent of 5-10.27.C is to assure that subordinates of the Warden do not unilaterally discharge employees. Here, the Warden has testified, under oath, that he decided and directed grievant's removal from employment. Accordingly, the intent of the rule was fulfilled, notwithstanding the technical lapse in procedure.

Grievant argued that another employee at a different correctional facility was charged with the same offense as grievant and received a Group III Written Notice but was not discharged. Grievant raised this issue for the first time during his closing statement. During the hearing, grievant offered no testimony or documentary evidence to substantiate his contention. However, grievant had no knowledge of whether the other employee had previous offenses. If the other employee's offense was his first, the other correctional facility may have applied mitigation and not discharged him for a first offense. This is consistent with grievant's situation, i.e., grievant was not discharged after his offense in October 2001.

Finally, grievant believes that discharge was too harsh. The evidence indicates that grievant gave the agency no other option but to discharge him. It is clear that grievant has a flagrant disregard for violation of the law. In less than six months, grievant has been charged with the violation of nine laws. He has pleaded guilty to the first two offenses, has acknowledged his presence in the

¹⁵ Section 5-10.27.C of the Standards of Conduct states: "Except as otherwise directed by the Director, Deputy Director or Regional Director, any employee of an institution or other organizational unit may be removed, suspended, demoted or transferred within the unit with the written approval of the organizational unit head."

other offenses, and has not denied any of the violations. The agency has a serious and legitimate concern about grievant's behavior. The agency facility is located in a rural area of the state where most people quickly learn everyone else's business. The agency cannot afford to acquire the reputation of employing corrections officers who routinely and repeatedly violate the law. Therefore, under the circumstances present in this case, the agency's action was appropriate for the offense.

DECISION

The decision of the agency is hereby affirmed.

The Group III Written Notice and discharge of the grievant issued on December 17, 2001 is AFFIRMED. This disciplinary action shall remain active for the period specified in Section 5-10.19.A of the Standards of Conduct.

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 Resources 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 HRM, 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.

David J. Latham, Esq.
Hearing Officer