Issue: Group III Written Notice with termination (inability to perform job duties – loss of CDL license); Hearing Date: 08/13/02; Decision Date: 08/16/02; Agency: Virginia Department of Transportation; AHO: Carl Wilson Schmidt, Esq.; Case No.: 5491; **Administrative Review: Hearing Officer Reconsideration Request received 08/25/02; Reconsideration Decision Date: 08/30/02; Outcome: No newly discovered evidence of incorrect legal conclusions. Request denied.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5491

Hearing Date: August 13, 2002
Decision Issued: August 16, 2002

PROCEDURAL HISTORY

On May 8, 2002, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

> *Inability to Meeting Working Condition—Loss of CDL for 12 months. (CDL policy #HR –100)*

On May 31, 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 July 17, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 13, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Legal Assistant Advocate
Maintenance Supervisor

Transportation Operations Manager II
Spouse
Safety Engineering Manager

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 Virginia Department of Transportation employed Grievant for approximately 22 years as a Transportation Operator II. In order to hold the position, Grievant is required to have a valid Commercial Driver's License (CDL).[1] Approximately 35 percent of his job duties require a CDL. Grievant was a valuable employee. One supervisor described Grievant as "one of the best men I've got."

In April 2002, Grievant informed his supervisor that his CDL had been withdrawn for a period of a year and that he could not operate equipment requiring him to possess a CDL. Grievant was convicted of driving under the influence of alcohol.[2] He received a restricted driver's license, but the Court's Order states, "you may not operate a 'commercial motor vehicle' as defined[3] in Va. Code § 46.2-341.4."[4] The effect of the

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1 Grievant's employee work profile lists the education, experience, licensure, certification required for entry into the position. A valid CDL is listed as one of those requirements. Agency Exhibit 4.

2 Grievant was not working in his capacity as a State employee when he was operating his vehicle under the influence of alcohol.

3 Va. Code § 46.2-341.4 states in relevant part:

> "Commercial motor vehicle" means, except for those vehicles specifically excluded in this definition, every motor vehicle, vehicle or combination of vehicles used to transport passengers or property which either: (i) has a gross vehicle weight rating of 26,001 or more pounds; or (ii) has a gross combination weight rating of 26,001 or more pounds inclusive of a towed vehicle with a gross vehicle weight rating of more than 10,000

Court's Order was to prohibit Grievant from performing many of the duties required by his position. Upon learning that Grievant no longer had his CDL, the Agency removed him from employment by issuing a Group III Written Notice.

In the prior two years, the Agency terminated five employees required to have CDLs as part of their employment. Three of these employees were white and two were African-American.

CONCLUSIONS OF LAW

Section IV of DHRM Policy 1.60 addresses "Removals Due to Circumstances Which Prevent Employees From Performing Their Jobs." Section A states:

> An employee unable to meet the working conditions of his or her employment due to circumstances such as those listed below may be removed under this section. Reasons include: *** loss of license or certification required for the job.

Grievant's position as a Transportation Operator II requires that he maintain a valid CDL. When Grievant lost his CDL, he was no longer able to meet the working conditions of his employment due to the loss of license required for the job.

DHRM § 1.60(IV)(C) specifies the procedure the Agency must follow when an employee can no longer meet the working conditions of his or her employment:

> Prior to such removal, the appointing authority and/or Human Resource Office shall gather full documentation supporting such action and shall notify the employee, verbally or in writing, of the reasons for such a removal, giving the employee a reasonable opportunity to respond to the charges. Final notification of removal should be via memorandum or letter, **not by a Written Notice form**. (Emphasis added.)

Rather than providing Grievant with a memorandum or letter notifying him of his removal, the Agency issued Grievant a Group III Written Notice. Agency managers had debated whether to send Grievant a letter of removal or issue a Group notice. The managers chose to issue the Group notice because they believed doing so would afford

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pounds; or (iii) is designed to transport sixteen or more passengers including the driver; or (iv) is of any size and is used in the transportation of hazardous materials as defined in this section. Every such motor vehicle or combination of vehicles shall be considered a commercial motor vehicle whether or not it is used in a commercial or profit-making activity.

[4] Agency Exhibit 2.

Grievant greater procedural due process rights.[5] Although the Agency's objective is admirable and speaks well of the Agency, the Agency's action has unintended adverse consequences to Grievant.

An employee may be issued a Group Written Notice only for offenses reflecting unacceptable conduct. 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." DHRM § 1.60(V)(B). [6] 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." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

Receiving a DUI is not appropriate behavior, but under DHRM Policy 1.05 an employee is not subject to disciplinary action unless the DUI involves "conduct occurring in the workplace."[7] Grievant did not receive the DUI while working. Moreover, the Agency has not alleged that it disciplines its employees for receiving DUI's while not at the workplace. Thus, there is no basis to discipline Grievant under the Standards of Conduct.

A Group III Written Notice has an active life of four years.[8] If Grievant's Group III Written Notice is upheld, the notice will remain in Grievant's personnel file for four years thereby affecting his ability to obtain employment with another State agency or with a private employer. In contrast, his inability to maintain a CDL will expire in one year from the date of suspension. A situation may arise two or three years in the future where Grievant has had his CDL reinstated, yet he cannot obtain employment with another State agency because he has an active Group III Written Notice. The disciplinary action against him must be reversed.

Although the Written Notice must be removed from Grievant's record, the question arises as to whether the Agency has complied with the necessary procedures to remove Grievant from his employment. The Hearing Officer concludes that the Agency has sufficiently placed him on notice of the reasons for the removal and afforded him a reasonable opportunity to respond to the basis for removal.

[5] Agency managers believed that if they gave Grievant a letter of removal, he would not be able to appeal that decision to a hearing.

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

[7] DHRM 1.05(IV)(c).

[8] DHRM 1.60(VII)(B)(2)(c).

DHRM § 1.60(IV)(C) requires the Agency to notify Grievant of the reasons for removal and provide him with an opportunity to respond. There is no doubt that the Agency notified Grievant that he was being removed from employment because his position requires a CDL and he no longer is able to perform the duties of his position. For example, the letter attached to the Written Notice states:

> The purpose of this letter is to advise you that you are not able to perform the required duties of your position due to the loss of your CDL for one year as stated in the April, 2002 court order. Effective May 8, 2002, you are relieved of your job with the Virginia Department of Transportation at the Arcola area headquarters in accordance with the group III standards of conduct issued to you. As stated in the issuance of the group III written notice you have been notified that you have the right to grieve the disciplinary action taken.
>
> Prior to issuing this group notice, management has investigated and considered the court order (including joining the ASAP program), required functions of your position, referral to the Office of Safety and Health and Virginia Employee Assistance Program, applicable policies, past performance, special meetings with you to hear mitigating circumstances and the availability of advertised Non-CDL required positions.
>
> Based on all of these factors, it has been determined that your position does require a CDL and there are no mitigating circumstances or options available. Our District Human Resources Benefits Section will be in contact with you regarding your benefits.

The Agency has afforded Grievant the opportunity to respond to the reasons for removal by affording him a three-step grievance process and a hearing before a Hearing Officer. The Agency has met the substantive requirements of DHRM § 1.60(IV) and the removal must be upheld.

Grievant contends the Agency failed to follow its Policy HR-100 governing employees with commercial driver's licenses. This "policy establishes department-wide measures of corrective action to be imposed when an employee losses his/her commercial Driver's License …."[9] Section V(A)(3) states, "A first loss or disqualification of CDL and subsequent license suspension for twelve (12) months or longer shall result in termination." Grievant lost his CDL for one year. Thus, the Agency appropriately terminated him under its policy HR-100.

Grievant contends the Agency treated him differently from other employees and that this treatment resulted from racial discrimination against him. Little credible evidence was presented to support Grievant's contention of racial discrimination.

[9] Agency Exhibit 3.

Although Grievant is African-American and suspects he was discriminated against, that information alone is insufficient to support a claim for racial discrimination.

If an employee can show that he is treated differently from other employees without justification, the employee may establish a basis to reverse the Agency's action. In this case, it appears Agency management has treated all of its employees consistently. The Agency presented evidence of five employees who had lost their CDLs and all were removed from employment. Three of the five employees were white. Grievant presented credible evidence of an employee[10] holding a position similar to his position where that employee had likely been convicted of a DUI yet continued in his position. The employee had an ignition lock system on his personal vehicle requiring him to blow into the system before operating his personal vehicle and the employee had a reputation for excessive consumption of alcohol. What the Grievant has failed to do, however, is to show that the Agency's managers (other than that employee's immediate supervisor) knew that the employee had lost his CDL yet was retained in his position. The Agency presented credible testimony that it had researched that employee's driving record and not discovered any conviction for DUI or loss of CDL. The Hearing Officer can only concluded that if the employee[11] lost his CDL, it was not known to the Agency's managers such that the Agency should be deemed to have retained an employee without a CDL in a position requiring a CDL.

Grievant contends the Agency should let him fill another position. No evidence was presented showing the Agency had existing positions within its residency or district that were unfilled and suitable for Grievant. The Agency attempted to find other positions for him and none were available. The Agency is not obligated to create a new position for him even though he may otherwise be a valuable employee.

Grievant contends that he could be assigned to perform other tasks within his existing position that do not require a CDL until the expiration of a year period. The Agency is not required to modify Grievant's duties, especially given that it would be paying him to perform all duties listed in his employee work profile. The Agency also established that it would not be feasible to restrict Grievant's responsibilities because at some point during construction projects, he would have to operate heavy equipment in order to accomplish the work and be of assistance to others working with him. Having a CDL is a bona fide job requirement and essential function of Grievant's position.[12]

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[10] Grievant alleged that other employees had been convicted of DUI, but he did not present sufficient evidence for the Hearing Officer to conclude that those employee were in positions requiring CDLs. An employee who is convicted of DUI not related to his employment, need not be removed from employment or otherwise disciplined under the Alcohol and Other Drugs' policy, DHRM 1.05. Thus, evidence of conviction of DUI without other evidence regarding CDL is not sufficient to show inconsistent application of policy.

[11] The employee was not called as a witness thereby making it difficult to fully assess the circumstances surrounding his employment.

[12] It is not disputed that Grievant can perform the duties of his position that do not require a CDL.

Grievant contends he was not given adequate procedural due process by the Agency because he was not notified of pre-termination meetings during which he could adequately present his reasons for not being removed from employment. The Hearing Officer finds no violation of procedural due process by the Agency. If the Hearing Officer assumes for the sake of argument that Grievant's concerns are appropriate, the Agency's errors are harmless and have been remedied by providing Grievant with a hearing before a Hearing Officer. Grievant was able to present all aspects of his defense at the grievance hearing.

This case is unfortunate. Grievant clearly possesses significant skills and experience. Grievant is obviously disappointed that his successful career may have been ended by the loss of his CDL, but the Agency has complied with its own policies and with State policies. The removal must be upheld.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **rescinded**. The Agency is directed to remove the Group III Written Notice from Grievant's personnel file and to comply with DHRM § 1.60(IV)(B) regarding reporting to the Personnel Management Information System. Grievant will not be reinstated and shall receive no back pay or back benefits. His removal from employment 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.

<u>Administrative Review</u> – This decision is subject to four 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.

4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

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.

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Carl Wilson Schmidt, Esq.
Hearing Officer