

Issue: Group I Written Notice (failure to follow written policies and procedures);
Hearing Date: 10/08/02; Decision Date: 10/21/02; Agency: DMHMRSAS; AHO:
Carl Wilson Schmidt, Esq.; Case No.: 5538



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5538

Hearing Date: October 8, 2002
Decision Issued: October 21, 2002

PROCEDURAL HISTORY

On April 22, 2002, Grievant was issued a Group I Written Notice of disciplinary action for:

Failure to follow written policies and procedures. (Failure to report a conviction within 5 work days of the event.)

On May 6, 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 she requested a hearing. On September 16, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 8, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Legal Assistant Advocate
Supervisor
HR Consultant

HR Analyst
HR Manager
Hospital Director

ISSUE

Whether Grievant should receive a Group I Written Notice of disciplinary action.

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 Mental Health Mental Retardation and Substance Abuse Services employs Grievant as an Administrative and Program Specialist III. Her most recent evaluation shows her performance as a “Contributor.”¹ No evidence was presented of any prior group written notices against Grievant. She has been employed by the Agency for approximately 11 years.

On November 28, 2001, Grievant was convicted of a misdemeanor for violating *Va. Code § 46.2-896* and fined \$250. Grievant states in her written response² to the grievance,

On or about October 23, 2001, I was involved in a **minor** vehicle accident in the ... parking lot. After close inspection of both vehicles and determining that there was no damage to either vehicle I returned to my vehicle and left the shopping center.

I was notified the following date by [an officer] that the accident was reported to the police and the other party was claiming damage to their

¹ Grievant Exhibit 16.

² Agency Exhibit 2.

vehicle. I fully cooperated with [an officer] providing her with all the information that she was requesting.

Grievant did not report the conviction to the Agency.

The Agency originally issued Grievant a Group II Written Notice, but reduced that notice as part of the grievance step resolution.

CONCLUSIONS OF LAW AND POLICY

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).³ 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).

Virginia law creates a distinction between traffic infractions and felonies and misdemeanors. Traffic infractions are violations of public order and are not deemed to be criminal in nature.⁴ A traffic infraction⁵ is a violation of motor vehicle law that is neither a felony nor a misdemeanor.⁶ Grievant was convicted of a misdemeanor for violating *Va. Code* § 46.2-896. She was not convicted of a traffic infraction.

Departmental Instruction 506 (formerly DI 78) states that, “Employees ... must notify their supervisors of arrests or convictions within five (5) workdays of the event. *** Employees ... who fail to disclose an arrest or conviction within five (5) workdays of the event may be terminated.”⁷

“Failure to ... comply with established written policy” is a Group II offense. DHRM § 1.60(V)(B)(2)(a). Grievant failed to follow DI 506 thereby justifying issuance of at least a Group II offense. DI 506 provides for a greater penalty of termination. The Agency reduced its disciplinary action to a Group I Written Notice. The Agency’s actions must be upheld.

³ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁴ *Va. Code* § 18.2-8.

⁵ Grievant’s response to the disciplinary action sometimes describes her conviction as a traffic infraction. Grievant was not convicted of a traffic infraction. She was convicted of a misdemeanor.

⁶ *Va. Code* § 46.2-100.

⁷ Agency Exhibit 4.

Grievant contends that all facts regarding her conviction were unrelated to her employment. Although Grievant's assertion is correct, it is irrelevant. Grievant's obligation to report the conviction does not depend on whether the conviction is related to her employment. Had the conviction related to her employment, the Agency could have taken additional disciplinary action depending on the seriousness of the acts underlying the conviction.

Grievant argues the Agency failed to take progressive disciplinary action. This argument fails because agencies are not obligated to use informal counseling before using formal discipline as corrective action.

Grievant contends the Agency inconsistently disciplines its employees. The evidence showed that other employees who failed to report convictions were disciplined more severely than was Grievant.⁸ Thus, the evidence does not support Grievant's argument.

Grievant contends the Agency failed to timely issue disciplinary action because she was convicted more than six months before the Agency took action against her. Grievant's argument fails because whether the Agency acted timely in this matter depends on the date the Agency learned of the violation of the policy and not the date by which Grievant failed to timely report her conviction. The Agency learned of the violation on or about April 2, 2002 and then issued the Written Notice on April 20, 2002. Based on the evidence presented, the Agency acted timely in its issuance of disciplinary action.

Agencies are prohibited from using disciplinary action to retaliate against employees. Retaliation is defined by the *Grievance Procedure Manual* as:

Actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. "whistleblowing").

Grievant contends that the Agency retaliated against her for taking security measures to prevent theft from her office.

Grievant's supervisor reviewed the Virginia Court Case Information web site and searched under Grievant's name. Upon locating Grievant's name in the database, she concluded that Grievant has been convicted and failed to bring the conviction to the Agency's attention. The Supervisor testified that she suspected Grievant may have been convicted of a crime after she attended a social function where a retired employee

⁸ Grievant presented evidence of other employees who had been convicted of crimes but no disciplinary action was taken against them. See Grievant Exhibit 13. No action was taken because the Agency did not know the employees had been convicted of any crimes. Unless the Agency knew of the conviction and refrained from acting, Grievant has not established that the Agency has treated her differently from other employees with known convictions.

told the Supervisor that she had been in court and thought she recognized Grievant in the courtroom. The Supervisor did not know the retired woman's name. Based on the demeanor of the Supervisor and other factors concerning her testimony, the Hearing Officer finds the Supervisor's testimony regarding why she decided to search for Grievant's name to lack credibility. This absence of credibility permits the Hearing Officer to uphold Grievant's assertion that the agency targeted her.⁹ The question becomes whether the Supervisor's actions constitute retaliation.

Retaliation requires a finding that an "employee exercised a right protected by law or reported a violation of law." Although the Supervisor targeted Grievant, no evidence was presented showing that the Supervisor did so because Grievant exercised a right protected by law or reported a violation of law. Grievant has not established that the Agency retaliated against her. No basis exists to reverse the disciplinary action based on an allegation of retaliation.

DECISION

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

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision

⁹ The Supervisor did not use the web site to determine if any of her other employees had been convicted of offenses.

was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

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.¹⁰

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

Carl Wilson Schmidt, Esq.
Hearing Officer

¹⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.