

Issue: Group III Written Notice with 5-day suspension (criminal conviction occurring off job site); Hearing Date: 03/12/03; Decision Issued: 03/13/03; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 5666



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5666

Hearing Date:	March 12, 2003
Decision Issued:	March 13, 2003

APPEARANCES

Grievant
Representative for Grievant
Chief of Security
One witness for Agency

ISSUES

Was the grievant's conduct 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 grievance from a Group III Written Notice and five-day suspension issued for a criminal conviction for conduct occurring off the job.¹ Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.²

The Department of Corrections (Hereinafter referred to as “agency”) has employed grievant for one and a half years as a corrections officer. Grievant received a copy of the Employee Standards of Conduct and Performance, Procedure # 5-10, when she was hired.³ She also signed a Conditions of Employment form that states, in pertinent part, “Correction Officers are subject to call anytime.”⁴

In June 2002, grievant received a traffic citation for speeding and was scheduled to appear in court in July 2002. She failed to appear in court for the traffic citation. The judge suspended her drivers’ license and issued a *capias* warrant for her to appear on August 6, 2002 for a contempt of court citation. Grievant then went to the courthouse and paid the fine for her speeding ticket. Because she had paid the fine, grievant assumed (incorrectly) that she did not have to appear before the judge on the contempt citation. On August 7, 2002, grievant was cited for driving on a suspended license. On August 8, 2002, grievant went to the court to explain that she had already paid her fine.

While in court, grievant was arrested and served with another *capias* warrant for her failure to appear on August 6, 2002.⁵ The judge advised grievant that she would have to reappear on October 1, 2002 to answer the contempt charge, and appointed a lawyer to represent her. Grievant failed to appear in court on October 1, 2002; the judge issued another *capias* warrant for her arrest. Grievant was arrested on November 10, 2002 and the *capias* warrant was served on that date.⁶ Grievant appeared in court on the next docketed court date – December 3, 2002. Grievant was convicted of contempt pursuant to Va. Code § 19.2-128, and sentenced to 10 days in jail, with nine days suspended.⁷ She served the one-day sentence on December 3, 2002.

Grievant was not scheduled to work on December 3, 2002. She had requested the day off in advance in order to appear in court. The agency did not have any need to draft grievant on December 3, 2002.

¹ Exhibit 6. Written Notice, issued December 11, 2002.

² Exhibit 7. Grievance Form A, filed January 9, 2003.

³ Exhibit 4. Orientation checklist and acknowledgement form, signed June 11, 2001.

⁴ Exhibit 5. Conditions of Employment form, signed June 11, 2001.

⁵ Exhibit 1. *Capias* warrant served August 8, 2002. The warrant cited grievant for violation of Code of Virginia § 19.2-128, the contempt of court statute.

⁶ Exhibit 1. *Capias* warrant served November 10, 2002.

⁷ Exhibit 1. Disposition of contempt citation, December 3, 2002.

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. In all other actions, the employee must present his evidence first and must prove her claim by a preponderance of the evidence.⁸

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 Human Resource Management promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The 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 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 normally should warrant removal

⁸ § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

from employment.⁹ 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 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 their assigned position could constitute negligence in regard to the agency's duties to the public or to other state employees.¹⁰

Code of Virginia § 19.2-128.C provides:

Any person (i) charged with a misdemeanor offense or (ii) convicted of a misdemeanor offense and execution of sentence is suspended pursuant to § 19.2-319 who willfully fails to appear before any court as required shall be guilty of a Class 1 misdemeanor. (Emphasis added)

The basic facts in this case are undisputed. Grievant was convicted of contempt of court pursuant to Code of Virginia § 19.2-128, sentenced, and served the unsuspended portion of her sentence.¹¹ The agency disciplined grievant pursuant to Procedure Number 5-10 because her conviction constitutes conduct occurring off the job which is plainly related to job performance.

Grievant argues that Section 5-10.17.B.13 is inapplicable to her situation. However, it is clear that grievant's conviction is, indeed, plainly related to job performance. Grievant is a corrections officer, sworn to uphold the law. She is expected to provide security for inmates who have violated the law, and to set an appropriate example for those inmates. Now, grievant has herself broken the law and been convicted of a misdemeanor. While she may have received a lesser sentence than the inmates in her charge, she is nonetheless a convicted misdemeanant. Grievant's violation of the law sets a poor example not only for inmates, but also for her coworkers and for the public. Thus, grievant's conviction is related to her job performance.

Grievant offered reasons for missing her court dates. However, grievant's reasons are not persuasive. She knew of the August 6, 2002 court date but knowingly did not appear in court because she claims the court where she was raised (Queens, NY) would simply increase the fine if one didn't appear. While the Queens, NY court may well increase one's fine, it is not credible that the court would simply ignore one's failure to appear for a contempt citation.

⁹ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹⁰ Exhibit 3. Department of Corrections Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

¹¹ Grievant avers that she was required to spend only one or two hours of her one-day sentence in the courthouse lock-up. However, this does not alter the misdemeanor conviction that is now on her criminal record.

Grievant “forgot” the October 1, 2002 court date because she started working day shift on that date and was preoccupied with the shift change. After receiving two warrants to appear in court, it is difficult to believe that grievant simply forgot a third court-ordered appearance. However, even if grievant did forget, that does not constitute a legitimate excuse. Once grievant was placed on notice of the court date (grievant admitted during the hearing that she was told of the October 1, 2002 court date when she was in court on August 8, 2002), her failure to appear is considered willful in the eyes of the law.¹²

In the alternative, grievant argues that her punishment is too harsh. When grievant was hired she received a copy of the Standards of Conduct, which specifies that the prescribed discipline for a criminal conviction offense of this type is a Group III Written Notice. Thus, the agency issued the appropriate level of discipline for this offense. The agency could have terminated grievant’s employment but opted to consider mitigating circumstances (good performance, and no previous infractions) and instead imposed a suspension of five days. While the loss of pay for five days stung grievant, it is within the disciplinary measures allowed by the Standards of Conduct policy.

DECISION

The decision of the agency is affirmed.

The Group III Written Notice and five-day suspension issued on December 11, 2002 due to a criminal conviction relating to job performance are hereby UPHELD. The disciplinary action shall remain active for the period specified in Section 5-10.19.A of the Standards of Conduct.

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.

¹² See Hunter v. Commonwealth, 15 Va. App. 717, 427 S.E.2d 197 (1993).

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 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.¹³ 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.¹⁴

[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]

David J. Latham, Esq.
Hearing Officer

¹³ An appeal to circuit court may be made only on the basis that the decision was *contradictory to law*, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 2002 Va. App. Lexis 756, (December 17, 2002).

¹⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.