Issue: Group III Written Notice with termination (due to accumulation) (second DWI conviction); Hearing Date: 02/11/04; Decision Issued: 02/12/04; Agency: DOC; AHO: David J. Latham, Esq.; Case No.: 528; **Administrative Review: HO Reconsideration Request received 02/23/04; Reconsideration Decision Issued 02/24/04; Outcome: No basis to reopen hearing or change original decision.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 528

Hearing Date: February 11, 2004
Decision Issued: February 12, 2004

APPEARANCES

Grievant
Representative for Grievant
Three witnesses for Grievant
Warden
Advocate for Agency

ISSUES

Did grievant's conduct warrant 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 because he was convicted of driving while intoxicated (DWI).[1] Because of an accumulation of disciplinary actions, the grievant was removed from employment effective November 18, 2003. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[2]

The Department of Corrections (DOC) (Hereinafter referred to as "agency") had employed grievant as a corrections officer for four years. Grievant's performance evaluations for 2001, 2002, & 2003 rated him overall as a "Contributor." His evaluation in 2000 was "Exceeds Expectations."[3] At the time of his dismissal, grievant had one prior active disciplinary action – a Group II Written Notice for a DWI conviction.[4]

At the time of hire, grievant received training and a copy of the Standards of Conduct.[5] Grievant's work description provides that he is required to work all posts to which he may be assigned. It further provides that he may be required to transport inmates within the institution, to destinations throughout the institutional complex, to court, hospitals, medical appointments, or to other institutions in the region or state.[6]

When grievant was convicted of DWI in 2001, the agency could have removed grievant from employment pursuant to the Standards of Conduct Group III offense. However, the agency elected to give grievant a second chance and reduced his discipline on that occasion to a Group II Written Notice.

On July 20, 2003, grievant was again charged with DWI.[7] He was convicted in a county General District Court on November 10, 2003, fined, sentenced to 12 months in jail (suspended), placed on probation, issued a restricted driver's license, and ordered to perform community service.[8] Subsequently, the agency determined that grievant should be given a Group III Written Notice and removed from employment. Grievant was notified of the agency's decision on November 17, 2003 and given 24 hours to offer any evidence in his defense. The agency also offered grievant an opportunity to resign in lieu of removal from employment but grievant rejected the offer. Grievant was disciplined and removed from employment on November 18, 2003.

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[1] Agency Exhibit 1. Written Notice, issued November 18, 2003.
[2] Agency Exhibit 2. Grievance Form A, filed November 21, 2003.
[3] Grievant Exhibit 7. Grievant's Performance Evaluations, 2000-2003.
[4] Agency Exhibit 4. Written Notice, issued January 11, 2002.
[5] Agency Exhibit 6. New Employee Checklist and Orientation Checklist, September 10, 1999.
[6] Agency Exhibit 5. Grievant's *Employee Work Profile Work Description*.
[7] Va. Code § 18.2-266. Driving motor vehicle, engine, etc., while intoxicated, etc. (DWI).
[8] Agency Exhibit 1. Warrant of Arrest and court disposition.

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.[9]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated Standards of Conduct Policy No. 1.60. 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.2 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* 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 from employment.[10] The Department of

[9] § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

[10] DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

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, which are defined identically to the DHRM Standards of Conduct.[11] Among the examples of Group III offenses are 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 his assigned position could constitute negligence in regard to the agency's duties to the public or other state employees.

The agency has demonstrated, by a preponderance of evidence, (and grievant does not dispute) that grievant has been twice convicted of the criminal offense of driving a motor vehicle while intoxicated (DWI). Grievant's work description provides that he may be required to transport inmates on public roads. Thus, his criminal conviction is plainly related to his job. Given the fact that grievant has demonstrated a recidivist tendency with regard to DWI in a two-year period, the agency could be deemed negligent if it were to continue to allow grievant to remain in his position. Accordingly, the burden of persuasion to show any mitigating circumstances now shifts to grievant.

Grievant points out that he was not assigned as a transportation officer and therefore did not regularly transport inmates. However, grievant transported inmates on a few occasions within the first year he was employed (1999-2000). His work description still lists inmate transport as a responsibility that he can be called on to perform at any time. While grievant was not currently assigned to transport inmates, situations at correctional institutions can and do change from time to time. For operational or personnel reasons, agency management might at some point have a need to utilize grievant for the transport of inmates. Therefore, the fact that he was not currently transporting inmates is not persuasive.

Grievant learned from acquaintances that four other employees of the agency had been convicted of DWI. None of the four work at the same correctional center as grievant. Grievant obtained public records listing their convictions and claimed that all are still employed by DOC despite having received two DWI convictions. No evidence was presented regarding whether these employees had been disciplined, and if so, what level of discipline they received. Moreover, a careful review reveals that none of the four have a record that matches grievant's.[12] Employee G.W. had been disciplined for a DWI some years ago but the discipline became inactive before the second DWI in 2003. Employee J.N. received only one DWI charge. Employee R.B. had one DWI in 1996 and a second DWI in 2002. Assuming discipline was issued for the first offense in 1996, it would have been inactive by the time of the second offense. Similarly, employee A.J. had a DWI in 1993; any discipline would have become

[11] Agency Exhibit 7. Procedure Number 5-10*, Standards of Conduct,* June 15, 2002.
[12] Grievant Exhibit 2. Virginia Courts Case Information on four employees.

inactive by the time of the second DWI in 2000. Thus, unlike grievant, none of the four employees had committed two DWI offenses within such a relatively short period of time. Moreover, those who had been convicted twice had a span of five to seven years between offenses. Accordingly, any discipline issued for their first offense had become inactive before their second offense. Grievant's two offenses occurred just over two years apart, and therefore his first discipline was still active at the time of his second offense. There are no other employees at the facility where grievant is employed that have two or more convictions of criminal offenses.[13]

Grievant points out that an employee committee had sponsored a dance in December 2003 at which alcohol was served.[14] However, this dance was not sponsored by the agency, and was not held on state property. It was an event that an employee group sponsored, and it was held at a fire hall not located on state property. Moreover, prior to the event, the warden had cautioned employees to arrange for designated drivers if any of them consumed alcohol during the event. Accordingly, even though the agency was aware of the event, it was not a sponsor and did not encourage consumption of alcohol. The event was, in effect, a privately-sponsored event at which each employee was responsible for his or her own actions. It has no relevance to grievant's decision in July 2003 to drive a vehicle after consuming twice the legal limit of alcohol.

Grievant contended during the grievance resolution process that he should be given a second chance. However, as the warden correctly explained to him, the agency did give him a second chance when it did not remove him from employment after his first DWI conviction in 2001. If the agency were to give him another chance on this occasion, it would be his *third* chance. Given the serious nature of the offense, the agency decided that the two chances already given to grievant were sufficient. The hearing officer can find no basis to alter the agency's decision.

Grievant argues that the law bars the agency from disciplining and discharging him. He cites a statute that bars prosecution of the same act under two or more statutes.[15] However, grievant's reliance on the cited law is misplaced. The law provides that prosecution is barred only if the same act is a violation of two or more *statutes* or *ordinances*. A *statute* is "an act of the legislature declaring, commanding or prohibiting something."[16] An *ordinance* is also a statute but is the "term used to designate the enactments of the legislative

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[13] Grievant Exhibit 5. Agency response to grievant's request for information pursuant to the Freedom of Information Act, December 12, 2003.

[14] Grievant Exhibit 3. Flyer for Christmas dance.

[15] Grievant Exhibit 8. Va. Code § 19.2-294 provides: "If the same act be a violation of two or more statutes, or two or more ordinances, or of one or more statutes and also one or more ordinances, conviction under one of such statutes or ordinances shall be a bar to a prosecution or proceeding under the other or others."

[16] *Black's Law Dictionary*, revised Fourth Edition.

body of a municipal corporation" (such as cities, towns, or counties).[17] Grievant was convicted of DWI under a statute. However, the agency's Standards of Conduct policy is neither a statute nor an ordinance because it was not enacted by a legislature. Rather, the Standards of Conduct is a written *policy* designated by the agency as Procedure Number 5-10. Since the agency's written policy is neither a statute nor an ordinance, the agency is not barred by law from applying its disciplinary procedure.

DECISION

The decision of the agency is affirmed.

The Group III Written Notice issued on November 18, 2003 for a criminal conviction is hereby UPHELD. Grievant's removal from employment is also UPHELD. The disciplinary actions 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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

[17] *Ibid*.

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

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.[18] 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.[19]

[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]

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David J. Latham, Esq.
Hearing Officer

[18] 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*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

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

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Grievance No: 528

Hearing Date:	February 11, 2004
Decision Issued:	February 12, 2004
Reconsideration Request Received:	February 23, 2004
Response to Reconsideration:	February 24, 2004

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request 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. A request to reconsider a decision is made to the hearing officer. A copy of all requests must be provided to the other party and to the EDR Director. 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.[20]

OPINION

The reviewer received grievant's request for reconsideration on the 11th calendar day after the date of the original decision. In this case, the tenth calendar day fell on a weekend. The 11th day after the date of the original decision was the first business day following the final date for appeal. In those instances where the final date of appeal falls on either a holiday or weekend, the practice of this department has been to consider the

[20] § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

request timely filed if it is received on the first business day thereafter. Therefore, the request in this case is deemed timely filed.

Grievant's request for reconsideration did not reflect that a copy was sent either to the other party or to the EDR Director. In this case only, the hearing officer elects to waive that requirement in order to respond to grievant's concerns.

Grievant submitted two examples of other officers who have multiple active disciplinary actions. However, these documents are not probative. The discipline issued to Officer T.M. involved, at most, one criminal conviction (this conviction is only inferred, not proven by the documentation). The discipline issued to Officer W.M. involved the use of obscene or abusive language at the facility; there were no criminal convictions.

In any case, grievant failed to demonstrate that the documents could not have been presented at the hearing on February 11, 2004. The counseling memorandum and disciplinary actions were in existence prior to that date and, with the exercise of due diligence, grievant could have obtained and presented copies of this documentation during the hearing. Accordingly, grievant has not shown that the documents are *newly discovered* evidence.

DECISION

Grievant has not proffered any newly discovered evidence that would affect the Decision in this case, or any evidence of incorrect legal conclusions. The hearing officer has carefully considered grievant's argument and concludes that there is no basis to change the Decision issued on February 12, 2004.

APPEAL RIGHTS

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.[21]

[21] 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*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

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David J. Latham, Esq.
Hearing Officer