Issue: Group III Written Notice with termination (alcoholic beverages in a State-owned vehicle, assaulting an officer, obstruction of justice); Hearing Date: 01/07/05; Decision Issued: 01/10/05; Agency: DCJS; AHO: David J. Latham, Esq.; Case No. 7939; **Administrative Review: HO Reconsideration Request received 01/21/05; Reconsideration Decision issued: 01/24/05; Outcome: No newly discovered evidence or incorrect legal conclusions. No basis to reopen hearing; Administrative Review: DHRM Ruling request received 01/21/05; DHRM Ruling issued 03/07/05; Outcome: Upholds HO's decision**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7939

Hearing Date: January 7, 2005
Decision Issued: January 10, 2005

APPEARANCES

Grievant
Attorney for Grievant
Section Chief
Attorney for Agency
Five witnesses 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 grievance from a Group III Written Notice issued for being intoxicated and having alcoholic beverages in a state-owned vehicle, assaulting a police officer, and obstruction of justice.[1] As part of the disciplinary action, grievant was removed from state employment on September 29, 2004. 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 Criminal Justice Services (Hereinafter referred to as "agency") has employed grievant as an electronics technician for five years. His primary job is the servicing and certification of breathalyzer instruments located at various law enforcement agencies in his area of the state. The purpose of his position is to certify equipment, and to testify in court as an expert witness on matters of equipment operation and reliability.[3] He received the highest performance evaluations, his technical skills are considered first-rate, and he was considered conscientious and dedicated. Prior to this incident, grievant had an exceptionally good reputation in the agency. In fact, when grievant's direct supervisor was first notified about this incident, she believed that it was a prank because it was totally out of character for grievant.

State policy provides that possession of alcohol in the workplace (defined as including state-owned property such as vehicles) is a violation of policy subject to discipline under the Standards of Conduct.[4]

At about 1:00 p.m. on Sunday, September 19, 2004, grievant drove to a friend's house in his state-owned vehicle and loaned her money that she had requested. He stayed with the friend and her boyfriend, watching football and drinking beer (grievant estimates four bottles). The friend said she would drive to her mother's house to get money to repay the loan from grievant, and that grievant should return in about an hour. Grievant then left and drove home arriving about 9:20 p.m.

When grievant came home, he and his girlfriend had an argument.[5] At about 10:50 p.m., grievant drove back to the friend's house. He knew that she

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[1] Agency Exhibit 4. Written Notice, issued September 29, 2004.

[2] Agency Exhibit 1. Grievance Form A, filed October 26, 2004. [NOTE: Although the grievance form is dated September 26, 2004, grievance was not disciplined until September 29, 2004. Since the agency received the form on October 27, 2004, it is presumed that the date of filing was actually October 26, 2004]

[3] Agency Exhibit 6. Grievant's Employee Work Profile Work Description, October 2, 2003.

[4] Sections II.J & IV.A, Department of Human Resource Management (DHRM) Policy 1.05, *Alcohol and Other Drugs*, September 16, 1993.

[5] After grievant was arrested, his girlfriend called one of the deputies alleging that grievant had been using cocaine and methamphetamines that day. However, there was no corroborative evidence and no tests performed to determine illegal substance usage. Accordingly, this hearsay testimony was given no evidentiary weight in making a decision in this case.

had returned from her mother's house because her car was there. Grievant knocked on the front door but got no response. He went to the back door and the friend told grievant to go away. Grievant left and drove home. While grievant was knocking on the doors, the friend called the county sheriff's office complaining that grievant would not leave her property. Two deputy sheriffs, both in uniform and in separate marked patrol cars, were dispatched at 11:07 p.m. to the friend's residence. When the officers arrived at 11:29 p.m., grievant had already left. The friend told the officers that grievant had probably gone home and that he was driving a state-owned dark blue station wagon. One of the officers had observed that they passed a dark station wagon going in the opposite direction as they approached the friend's residence. The officers drove to grievant's residence arriving there at 11:35 p.m.

The first officer to arrive found grievant sitting in the state-owned vehicle in his driveway. He noted that grievant's speech was slurred, that his eyes were bloodshot, and that there was a strong odor of alcohol from grievant, especially when he spoke. There was an open bottle of beer in the console and other bottles of beer in a six-pack holder on the passenger seat. Grievant denied being at the friend's residence.[6] The second officer, arriving a few seconds behind the first, went to the front door of grievant's residence where he spoke with the mother of grievant's girlfriend. She said that grievant had just arrived and that grievant needed help because he was going to hurt someone. The second officer felt the tail pipe of the state vehicle and found it warm to the touch. He then went to the passenger window and told grievant he was under arrest.

Grievant told the officer that he had not done any f___ing thing wrong and he wasn't going anywhere. The first officer told grievant to get out of the car but grievant refused. The officers told grievant three times to get out of the car but he refused each time. The first officer grabbed grievant's arm and they struggled until the officer lost his grip or slipped and fell down an embankment next to the car. The second officer joined the first and both attempted to pull grievant out of the car but grievant resisted, holding the steering wheel with his right hand. The first officer told grievant he would pepper spray him if he didn't get out of the car. After repeating this three times, the officer pepper sprayed grievant. After a continuing struggle with grievant, during which he kicked one of the officers, they managed to get him out of the car, on the ground, and were able to handcuff him. The entire episode took about 10-15 minutes during which time grievant cursed and was combative. Grievant was taken to the county sheriff's office and brought before a magistrate. Grievant requested that he give a breathalyzer test but the magistrate said it was unnecessary because he could tell from grievant's slurred speech and other indicia that grievant was drunk. He charged grievant with public intoxication, assault on a police officer, and obstruction of justice.

[6] Agency Exhibit 7. Sheriff Deputy's narrative report, September 20, 2004.

The following day, the agency suspended grievant from work and retrieved the state vehicle from grievant's residence.[7] When retrieving the state vehicle, state employees found open and unopened bottles of beer in the front seat of the car as described by the deputies. They also found that the interior of the state vehicle was sufficiently dirty as to be inconsistent with grievant's contention that he had vacuumed the vehicle earlier that day.[8] Grievant was also advised that the agency would make a determination regarding possible disciplinary action following final resolution of the criminal charges.[9] On September 24, 2004, grievant was given an opportunity to tell his side to his supervisor. He told her that he had left the friend's house at about 4:30 p.m. On September 29, 2004, grievant recanted that version and said it was actually 9:20 p.m. After the agency had an opportunity to fully investigate the matter, and obtained the written reports from the sheriff's office, it concluded there was sufficient evidence to remove grievant from employment without waiting for the outcome of the criminal charges.

Subsequent to grievant's removal from employment, the charge of public intoxication was dismissed. Grievant was convicted of the obstruction of justice charge but has appealed the conviction. The third charge (assaulting a police officer) has not yet been tried.[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

[7] Agency Exhibit 3. Memorandum from Deputy Director to grievant, September 20, 2004.
[8] Agency Exhibit 1. Grievant had told the second-step respondent that he had vacuumed the state vehicle just before going to the friend's house on September 19, 2004.
[9] Agency Exhibit 2. Letter from Deputy Director to grievant, September 20, 2004.
[10] Agency Exhibit 8. Three arrest warrants.

> 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 his claim by a preponderance of the evidence.[11]

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.3 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.[12] The offenses cited in the Standards of Conduct are not all-inclusive, but are intended as examples of unacceptable behavior. Any offense that, in the judgment of an agency head, undermines the effectiveness of agency activities, may be considered unacceptable and treated in a manner consistent with the provisions of Policy 1.60.[13]

A preponderance of evidence demonstrates that grievant engaged in conduct that is sufficient to uphold his removal from employment. By his own admission, grievant drove a state vehicle on personal business after consuming a significant quantity of beer. The testimony of two deputies and the Director of the Laboratory established that grievant had both opened and unopened bottles of beer in the state vehicle. The two deputies who arrested grievant testified credibly as to grievant's verbally abusive and combative behavior when they attempted to arrest him, and to his physical assault against one of the officers.

It is undisputed that neither of the sheriff's deputies had ever met grievant previously. There was no evidence to suggest that either the deputies or the

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[11] § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

[12] Agency Exhibit 5. DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

[13] Agency Exhibit 5. Section V.A, Policy 1.60, *Ibid.*

magistrate had any knowledge of grievant, his friend, his girlfriend, or anyone else involved in this case prior to the incident of September 19, 2004. Therefore, grievant has not shown any motivation for the deputies to have falsified their testimony or for the magistrate to falsify his observations of grievant on September 19, 2004.

Grievant alleges that the sheriff's deputies pepper sprayed him after he was out of the vehicle. The deputies testified that they had sprayed grievant as they were attempting to drag him through the open door of the car. Grievant points to fact that the next day, the state employees who retrieved his state vehicle did not smell pepper spray in the car. It is possible that the pepper spray did not contaminate the inside of the vehicle if grievant was sprayed as they were trying to pull him out of the open door while grievant held the steering wheel with his right hand. Moreover, no competent evidence was offered to show how long the residual effects of pepper spray can be detected by smell. Moreover, this issue is somewhat of a red herring. The undisputed fact is that the deputies found it necessary to pepper spray grievant because he was resisting arrest. Had grievant been cooperative, the pepper spray would not have been necessary.

Grievant asserts that he did not drive the state vehicle to the friend's house when he returned there at about 10:50 p.m.; he claims he drove his white pickup truck. However, grievant's assertion is outweighed by the friend's statement that he was driving the blue state vehicle, the deputy's observation of a blue state vehicle on the road as they responded to the call, and the second deputy's finding that the state vehicle's exhaust was still warm when they found grievant sitting in the vehicle.[14] Grievant claims when he came home in the white pickup truck, he took the six-pack and open beer as he started toward his house but then changed his mind, walked to the state car and put the beer bottles in the state vehicle. Such behavior appears decidedly odd under the circumstances and, in any case, is outweighed by the evidence cited above.

Grievant claimed that he sustained multiple injuries during his arrest, however, he failed to present any photographs or documentation to substantiate this allegation during the hearing. Grievant claimed that his shirt had been ripped by the deputies but did not offer the shirt or any photographs to support this assertion. Grievant suggested that the sheriff's deputies could be lying about what occurred, however, he failed to offer any corroboration for this contention and, more importantly, failed to suggest any motivation for the officers to have falsified their testimony.

Grievant pointed out that this incident was isolated and outside the workplace. While these observations are accurate, they are irrelevant. Even incidents that are isolated and that take place outside the workplace can be a

[14] If, as grievant now claims, he last drove the state vehicle at 9:20 p.m., the tail pipe would not be warm when the deputy felt it at about 11:30 p.m. that night.

basis for removal from employment if they are sufficiently egregious as to undermine agency effectiveness.

Grievant also notes that of the three criminal charges against him, one was dismissed, one conviction is on appeal and therefore not final, and one has yet to be adjudicated. He argues that because the Standards of Conduct provides a Group III offense for criminal *convictions*, his dismissal from the agency is premature. If the agency's basis for dismissal was final criminal convictions, grievant's argument would have merit. However, in this case, the agency developed sufficient evidence during its investigation to conclude that grievant's actions violated the Standards of Conduct for reasons other than criminal convictions. It concluded that a preponderance of the available evidence showed that grievant drove a state vehicle after consuming alcoholic beverages (although the agency did not mention this specific offense in the Written Notice), had alcoholic beverages in the state vehicle, obstructed justice, and assaulted a police officer.

The agency further concluded that grievant's lack of respect for the law enforcement officers showed such a significant lack of judgment that the agency's relationship with the law enforcement agencies could be adversely affected. Grievant's job responsibilities often included training and giving examinations to law enforcement officers who operate the breathalyzers. One of the two deputies who arrested grievant is a breathalyzer operator for the sheriff's department.

Grievant cites a case (# 5437) decided by another hearing officer. First, a hearing officer is not bound by the decision of another hearing officer. Each case must be adjudicated on its own merits. Second, the cited case is not on point with the instant case. In case 5437, the hearing officer concluded that he had to rescind the agency's disciplinary action because affirmation would have been tantamount to writing or rewriting policy.[15] In the instant case, the agency's basis for discipline was not criminal convictions but rather a conclusion that grievant's actions by themselves constituted an offense sufficient to require removal from employment, regardless of the outcome of the pending criminal charges.

DECISION

The decision of the agency is affirmed.

[15] In case 5437, the agency disciplined an employee for possession of marijuana *outside* the workplace even though the employee had not been criminally convicted of that offense. The hearing officer found that possession of marijuana *outside* the workplace was not subject to discipline because the Standards of Conduct require a criminal conviction in order to constitute an offense. [NOTE: Although the grievant was convicted of possession of drug *paraphernalia*, drug *paraphernalia* is not addressed by Policy 1.05.]

The Group III Written Notice and removal from employment effective September 29, 2004 are hereby UPHELD.

APPEAL RIGHTS

You may file an administrative review request within **15 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:

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 15 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 15-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.[16] You must file a notice of appeal with the clerk of the circuit court in the

[16] 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

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[17]

[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

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that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

[17] 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:

Case No: 7939

Hearing Date:	January 7, 2005
Decision Issued:	January 10, 2005
Reconsideration Request Received:	January 21, 2005
Response to Reconsideration:	January 24, 2005

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 15 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.[18]

OPINION

Grievant argues that he should not be subject to discipline because the conduct for which he was disciplined occurred exclusively outside the parameters of his employment or employment responsibilities and, that the Standards of Conduct policy applies only to on-the-job conduct. Grievant's argument is flawed for two reasons. First, grievant was assigned a state vehicle for the sole purpose

[18] § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

of conducting state business. When one operates a state vehicle, one is, by definition, in the workplace because proper operation of the state vehicle is one of his employment responsibilities. There was ample evidence to conclude that, shortly prior to his arrest, grievant was operating the state vehicle. Moreover, prior to his arrest, grievant had been drinking alcoholic beverages and an open container (as well as several closed containers) of the alcoholic beverage was in the state vehicle. Grievant's operation of the state vehicle thus places him in the workplace. Second, even if one could somehow conclude that he was not in the workplace, the Standards of Conduct includes any offense that undermines agency effectiveness.[19] The Standards even cite as an example of such conduct, a conviction for illegal conduct that occurs off the job. In the instant case, the agency head concluded that the agency's relationship with law enforcement agencies would be adversely affected by retention of grievant in his position.

Grievant objects to mention in the decision of his operation of the state vehicle. This fact warranted inclusion in the decision for three reasons. First, it provides relevant background information to the incident for which he was disciplined. Second, during the hearing, grievant admitted to operating the vehicle on personal business after consuming alcoholic beverages. Finally, the Written Notice specifically states that grievant had been driving the state vehicle at the time the complainant called police. Therefore, the operation of the state vehicle for personal business was a specific element of the disciplinary action.

Grievant argues that the agency's disciplinary action was premature because it did not await the outcome of the criminal charges. The agency is not obligated to await the outcome of criminal charges against an employee. Although, it may elect to do so in some circumstances, the agency is free to conclude that grievant's misconduct, separate and apart from criminal charges, was sufficiently egregious to warrant disciplinary action. He also contends that the agency removed grievant from employment because of the criminal charges. In fact, both the testimony and evidence make it clear that the agency did not discipline grievant because of the criminal charges, but *because of his misconduct as it impacted agency operations*. The agency has taken no position with regard to grievant's right to defend himself against the criminal charges. But, even if grievant should ultimately be exonerated of all criminal charges, it would not change the outcome of this case. It is not unusual for defendants to escape criminal liability because of the higher standard of proof required for criminal conviction, or because of technical evidentiary deficiencies. However, in this administrative proceeding, a preponderance of evidence supports the agency's disciplinary action.

Grievant argues that the agency is required to prove the elements of a conviction before it can discipline off-the-job conduct. Grievant fails to support

[19] Agency Exhibit 5. Section V.A., DHRM Policy 1.60, *Standards of Conduct*, September 16, 1993.

this argument with any legal precedent or state policy. Moreover, the argument is unpersuasive. There are instances where an agency has insufficient information about off-the-job conduct upon which to base a disciplinary action; in such cases the agency waits for the outcome of the criminal trial before deciding upon disciplinary action. However, when the agency has been able to amass sufficient information about the incident, as it did in this case, it is able to make an independent conclusion as to whether the misconduct warrants discipline, based on a preponderance of the evidence. Thus, even if grievant had not been charged criminally in this case, the agency could reasonably have concluded that his misconduct was sufficient to warrant the disciplinary action.

DECISION

Grievant has not proffered either any newly discovered evidence or any evidence of incorrect legal conclusions. The hearing officer has carefully considered grievant's arguments and concludes that there is no basis to change the Decision issued on January 10, 2005.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 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.[20]

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David J. Latham, Esq.
Hearing Officer

[20] 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).

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
Virginia Department of Criminal Justice Services
March 7, 2005

The grievant, through his representative, requested an administrative review of the hearing officer's January 10, 2005, decision in Case No. 7939. The grievant was issued a Group III Written Notice with termination, and he filed a grievance to have the disciplinary action and termination reversed. The hearing officer upheld the Group III Written Notice and termination. The grievant requested the hearing officer to reconsider his decision and on January 24, 2005, the hearing officer issued a ruling in which he sustained his original decision. Summarily, the grievant objected to the hearing officer's decision on the following bases: 1) The conduct alleged against the grievant represents conduct occurring exclusively outside the parameters of his employment responsibilities; 2) The hearing officer's decision cites incidents relating to improper use of a state vehicle; however, a related violation of policy was not specifically alleged or raised in the grievant's written notice and therefore should not be applied *sua sponte* by the hearing officer; 3) The agency terminated the grievant because of criminal charges occurring outside of work, when the original notice stated that termination was based on his conduct. 4) DHRM disciplinary policy specifically describes criminal convictions occurring off the job that clearly are related to job performance. The grievant alleges that the policy indisputably is set at a higher standard for disciplining off the job conduct, requiring the agency to prove the additional elements of a conviction and a material relationship between the conviction and the employee's job performance.

FACTS

The Virginia Department Criminal Justice Services employed the grievant as an electronics technician until September 29, 2004. On September 19, 2004, the grievant, in a state-owned vehicle, drove to a friend's house and loaned her money that she had requested. While there he apparently consumed several bottles of beer while watching a football game. Before he left the friend's house, she promised to repay grievant that day by borrowing the money from her mother. He returned to the friend's house later that evening and attempted to gain entry to the friend's house. He knocked on both the front and back doors, after which the friend called the county sheriff's office and complained. In the meantime, the grievant returned to his residence and parked the state-owned vehicle in his driveway. When the two deputy sheriffs arrived, they found him sitting in

the driver's side seat. There was an opened beer bottle and several unopened bottles in the vehicle and he appeared to be intoxicated.

When the officers attempted to arrest him, he cursed at them and refused to leave the vehicle. Eventually, they physically removed him and took him before the county magistrate. The magistrate did not give him a breathalyzer test because it was obvious he was intoxicated. He was charged with public intoxication, assault on a police officer and obstruction of justice.

Following this incident, the agency suspended the grievant from work and removed the state-owned vehicle from his driveway. After removing the unopened beer bottles from the vehicle and conducting a full investigation, the agency determined that there was sufficient evidence to issue the grievant a Group III Written Notice with termination. The charge of public intoxication was dismissed; he was convicted on the obstruction of justice charge but has appealed the conviction. He has not been tried on the charge of assaulting the police officer.

The relevant policy, the Department of Human Resource Management's Policy No.1.60, states that it is the Commonwealth's objective to promote the well being of its employees in the workplace and to maintain high standards of professional conduct and work performance. This policy also sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions that agencies may impose to address behavior and employment problems. Section V, Unacceptable Standards of Conduct, of that policy sets forth examples of unacceptable behavior for which specific disciplinary action may be warranted. These examples are not all-inclusive.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found, but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by this Agency or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. The Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

DHRM Policy No. 1.60, Standards of Conduct, provides guidance to agencies for handling workplace and non-workplace misconduct and behavior and for taking corrective action, including incidents pending court action or investigation by law

enforcement agencies involving alleged criminal misconduct that occurred either on or off the job. While DHRM does not have the authority to address the hearing officer's interpretation and application of law, it is within the authority of this agency to address policy issues.

In the instant case, the hearing officer stated, in part, " A preponderance of evidence demonstrates that grievant engaged in conduct that is sufficient to uphold his removal from employment. By his admission, grievant drove a state vehicle on personal business after consuming a significant quantity of beer. The testimony of two deputies and the Director of the Laboratory established that grievant had both opened and unopened bottles of beer in the state vehicle. The two deputies who arrested grievant testified credibly as to grievant's verbal abuse and combative behavior when they attempted to arrest, and to his physical assault against one of the officers."

In summary, the Department of Human Resource Management has no bases for interfering with the hearing officer's decision. In reference to the grievant's four above concerns, this Agency makes the following observations: (1) While the behavior in this instant occurred away from the job, there are some behaviors, by their very nature, that may have a negative impact on the agency's ability to conduct its affairs. Management officials reserve the right to identify those behaviors and to discipline violators. (2) The concerns with the propriety of the hearing officer's entries regarding the improper use of the state vehicle represent an evidentiary issue that is not within the purview of this Agency's authority to address. (3) The grievant states that the hearing officer's decision bases for his dismissal is his general conduct whereas the agency's initial written notice and correspondence refer to his suspension as being based on the criminal charges pending an investigation. It is the opinion of this Agency that there is no contradiction here in that the grievant's general conduct was related to his resulting criminal charges. Adjudication of the criminal charges was not related to whether or not he was dismissed. (4) As stated in (1) above, there certain off the job behaviors that may have a negative impact on the agency's ability to conduct its business. An agency may take disciplinary action absent any criminal conviction. As stated by the hearing decision, "In the instant case, the agency's basis for discipline was not criminal convictions but rather a conclusion that grievant's actions by themselves constituted an offense sufficient to require removal from employment, regardless of the outcome of the pending criminal charges."

If you have any questions regarding this correspondence, please call me at (804) 225-2136.

_____

Ernest G. Spratley
Manager, Employment Equity Services