

Issue: Group III Written Notice with transfer and demotion (conduct which undermined effectiveness as a Corrections Officer); Hearing Date: 01/18/06; Decision Issued: 01/19/06; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8238; Outcome: Agency upheld in full; **Administrative Review: DHRM Ruling Request received 02/03/06; DHRM Ruling issued 04/12/06; Outcome: HO's decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8238

Hearing Date: January 18, 2006
Decision Issued: January 19, 2006

APPEARANCES

Grievant
Acting Warden
Advocate for Agency

ISSUE

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

Grievant filed a grievance from a Group III Written Notice for conduct that undermined his ability to be an effective corrections officer.¹ As part of the

¹ Exhibit 1. Written Notice, issued September 29, 2005. [NOTE: The agency initially issued the Written Notice citing as the offense "conviction of a misdemeanor crime of violence." However,

disciplinary action, grievant was allowed to transfer to a non-security position with a ten percent salary reduction. The grievance proceeded through the resolution steps; when the parties failed to resolve the grievance at the third step, the agency head qualified the grievance for a hearing.² The Virginia Department of Corrections (Hereinafter referred to as agency) has employed grievant as a corrections officer for less than two years.

In August 2005, grievant was charged with assault and battery of a family or household member. At trial on September 15, 2005, the court found that “there is sufficient evidence to justify a finding of guilt.”³ Because this was grievant’s first such offense, the court elected to adjudicate the matter pursuant to Va. Code § 18.2-57.3.⁴ The court deferred further proceedings and placed grievant on probation for two years, required alcohol or drug screening, attendance at an anger management program, and any other programs recommended by Community Corrections. If grievant completes all requirements of the programs and is of good behavior for two years, the charge against him will be dismissed.⁵

When the agency initially learned of the court’s action, it concluded that grievant had been convicted of the charge and issued a Group III Written Notice. Subsequently, upon learning that grievant was technically not convicted, the agency revised the description of offense and reissued an amended written notice on November 17, 2005. When the discipline was about to be issued, the agency had a non-security position available in the facility’s warehouse. Because of grievant’s “stable and outstanding record,”⁶ the agency offered him the opportunity to take that position with a ten percent salary reduction in lieu of removal from employment. Grievant accepted the offer and was transferred into the non-security position of warehouse specialist III.⁷

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

after grievant pointed out that he was not actually convicted, the agency reissued the written notice with a revised description of the offense.]

² Exhibit 2. Grievance Form A, filed October 21, 2005.

³ Exhibit 3. Deferred Finding Referral Order, September 15, 2005.

⁴ Exhibit 7. Va. Code § 18.2-57.3 provides that persons charged with a first offense of assault and battery against a family or household member may be placed on probation, subject to conditions, education and treatment programs.

⁵ Conversely, if grievant violates any term or condition of the Referral Order, the court may enter an adjudication of guilt and proceed as otherwise provided.

⁶ Exhibit 1. Written Notice, issued September 29, 2005.

⁷ Exhibit 4. Grievant’s Employee Work Profile Job Description, effective October 25, 2005.

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 his 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 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.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 VII of the DOC *Standards of Conduct* addresses removals due to circumstances that prevent an employee from performing the job.¹⁰ Section VII provides that an employee unable to meet the working conditions of employment may be removed from employment. This section lists examples of such circumstances but does not limit the section to just those examples. One example is a conviction of a misdemeanor or felony crime of domestic violence for employees whose jobs require (i) carrying a firearm; or (ii) authorization to carry a firearm.

⁸ § 5.8, EDR *Grievance Procedure Manual*, Effective August 30, 2004.

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

¹⁰ Exhibit 6. Operating Procedure Number 135.1, *Standards of Conduct*, effective September 1, 2005.

Section XII provides that offenses at the Group III level include acts and behavior of such a serious nature that a first occurrence normally should warrant removal. *Examples* of Group III offenses include acts of physical violence, and 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 to other state employees. Section IV.C provides that the offenses listed in the *Standards of Conduct* are illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation and may result in disciplinary action consistent with the severity of the offense.

It is important to note that the agency issued discipline in this case pursuant to Section XII of the Standards of Conduct. The agency did not remove grievant from his position under Section VII.¹¹ Therefore, the standard under which this case must be adjudged is the Section XII definition of a Group III offense, i.e., whether grievant's offense is of such a serious nature that a first occurrence normally should warrant removal from employment.

Va. Code § 18.2-57.3 gives a first-time offender a chance to demonstrate that his offense was a mistake that will not be repeated. The court mandated that grievant comply with certain requirements and remain on good behavior for two years. However, the law includes a proviso that states: "whenever a court places an individual on probation upon terms and conditions pursuant to this section, such action shall be treated as a conviction for purposes of § 18.2-308."¹²

In this case, it is clear that the court has *not yet* entered a conviction on grievant's record. The court could still enter an adjudication of guilt if grievant fails to comply with the terms of his two-year probation. However, the court has made a finding that there is sufficient evidence to justify a finding that grievant was guilty of assault and battery of a family or household member. Therefore, as a practical matter, grievant did commit the criminal offense of assault and battery as charged. The only reason that the court has not entered a formal adjudication of guilt in grievant's record is that the court has elected to give him a chance to demonstrate good behavior during a two-year probationary period.

Given the court's finding, grievant's offense is equivalent in seriousness to other Group III offenses such as an act of physical violence. His offense is also of such a nature that to continue him in a corrections officer position could constitute negligence in regard to the agency's duties. The agency believes that it could potentially result in liability exposure for the agency because corrections officers are required, at times, to carry and use firearms. Moreover, grievant's

¹¹ Section VII.C. requires that final notification of a removal under this section shall be via memorandum or letter, not by written notice.

¹² Va. Code § 18.2-57.3. [NOTE: § 18.2-308 prohibits carrying a concealed weapon, except for those persons specifically listed as exempt from this provision.]

offense is one that would have automatically required his removal from state employment but for the fact that the court decided to give him an opportunity to prove that he will not repeat the offense. Thus, grievant's offense, irrespective of whether it resulted in a conviction on his record, was sufficiently serious to constitute a Group III Written Notice.

The agency noted during the hearing that, should grievant successfully complete his two-year probation and have the charge dismissed, he could then reapply for a corrections officer position. The agency also gave due consideration to the issue of mitigation. While a Group III offense normally results in removal from employment, the agency noted grievant's stable and outstanding work performance during his relatively brief employment and decided to offer him an alternative position in lieu of removal. It is concluded that the agency appropriately evaluated and implemented the mitigation provision.

DECISION

The decision of the agency is affirmed.

The Group III Written Notice, transfer to a non-security position, and salary reduction on September 29, 2005 are hereby AFFIRMED.

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.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]

S/David J. Latham

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

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

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
Virginia Department of Corrections
April 12, 2006

The grievant has requested an administrative review of the hearing officer's decision in Case No. 8238. The grievant was issued a Group III Written Notice, a transfer to a non-security position and a 10% salary reduction. He filed a grievance to have the disciplinary action with the transfer and salary reduction reversed. In a decision dated January 19, 2006, the hearing officer upheld the Group III Written Notice with the transfer to a non-security position and salary reduction. The grievant contends that the hearing decision is inconsistent with Department of Human Resource Management's Policy 1.60, Standards of Conduct, and Department of Corrections' Standard Operating Procedure 135.1, Standards of Conduct. The agency head of the Department of Human Resource Management has asked that I respond to this request for an administrative review.

FACTS

The Virginia Department of Corrections employed the grievant as Corrections Officer until he was transferred to a lower level non-security position. On September 29, 2005, agency management officials issued a Group III Written Notice with a transfer and pay reduction to the grievant as follows:

Recent conviction of a Misdemeanor Crime of Domestic Violence on 9/15/05
which precludes continued placement in a job requiring carrying a firearm.

The written notice further indicated that in lieu of termination, agency officials accepted the request from the grievant to be transferred to a non-security position. Agency officials assumed that the grievant had been convicted of the misdemeanor. Upon further investigation, however, agency officials discovered that the courts had deferred the conviction. The Group III Written Notice was rewritten as follows:

On September 15, 2005, a Deferred Finding Referral Order was signed by Judge D. Paxson (Commonwealth of Virginia Docket #A-99455-02) in relationship to a charge of assault and battery of a family or household member. The Deferred Finding Referral Order states that there is sufficient evidence to justify a finding of guilt and places you on probation for a period of 2 years with specific conditions of alcohol and drug screening, anger management and any other programs as recommended by Community Corrections and requires you to "be of

good behavior.” Your conduct which resulted in this court action and your being on probation is of such a nature as to undermine your ability to be an effective Corrections Officer and creates a potential liability to the facility should you supervise inmates or carry a firearm.

The grievant contends that the hearing decision is inconsistent with state and agency policy because (1) the charge did not result in a conviction and (2) other officers at the institution have been charged with the same violations but were permitted to retain their positions. Because we deem the latter to be evidentiary in nature, this Agency has no authority to address that item.

The relevant policy, the Department of Human Resource Management’s Policy No. 1.60, Standards of Conduct, states as its objective, “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. The Department of Corrections has promulgated its own Standards of Conduct Policy that is patterned on DHRM’s Policy 1.60. Section VII of the DOC Standards of Conduct Policy addresses removals due to circumstances that prevent an employee from performing the job. Section VIII provides that an employee unable to meet the working conditions of employment may be removed from employment. One example of a condition listed is a conviction of a misdemeanor or felony crime of domestic violence for employees whose jobs require (1) carrying a firearm; or (2) authorization to carry a firearm.

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, the DHRM has the authority to determine whether the hearing officer’s decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This 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.

In the instant case, the hearing officer stated, in part, “It is important to note that the agency issued discipline in this case pursuant to Section XII of the Standards of Conduct. The agency did not remove grievant from his position under Section VII. Therefore, the standard under which this case must be adjudged is the Section XII definition of a Group II offense, i.e., whether grievant’s offense is of such a serious nature that a first occurrence normally warrant removal from employment.” The hearing decision continues, “VA. Code § 18.2-57.3 gives a first-time offender a chance to

demonstrate that his offense was a mistake that will not be repeated. The court mandated that grievant comply with certain requirements and remain on good behavior for two years. However, the law includes a proviso that

states: “whenever a court places an individual on probation upon terms and conditions pursuant to this section, such action shall be treated as a conviction for purposes of §18.2-308.”

Summarily, the hearing officer noted that even though the court issued a Deferred Finding Referral Order, that action was treated as a conviction. Accordingly, the hearing officer concluded that the grievant’s offense is equivalent in seriousness to other Group III offenses such as an act of physical violence. Furthermore, to continue him in a corrections officer position could constitute negligence in regard to the agency’s duties that could potentially result in liability exposure. Moreover, the hearing officer continued, the grievant’s offense is one that would have automatically required his removal from state employment but for the fact that the court decided to give him an opportunity to prove that he will not repeat the offense.

This Agency concurs with the interpretation and application of the relevant policy by the hearing officer and therefore has no basis to interfere with the execution of the decision.

Ernest G. Spratley
Manager, Employment Equity Services