

Issue: Wrongful termination; Hearing Date: 01/11/06; Decision Issued:
01/12/06; Agency: VCU; AHO: David J. Latham, Esq.; Case No. 8240;
Outcome: Agency upheld in full (termination was valid)



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8240

Hearing Date: January 11, 2006
Decision Issued: January 12, 2006

APPEARANCES

Grievant
Grounds Supervisor
Advocate for Agency

ISSUES

Was the grievant's conduct such as to warrant action under the *Standards of Conduct*?

FINDINGS OF FACT

The grievant filed a timely grievance from the agency's decision to remove him from employment.¹ Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.² Virginia Commonwealth University (Hereinafter referred to as "agency") has employed grievant as a building and grounds maintenance keeper for 27 years.

Grievant's work description includes turf management, litter control, equipment operation and maintenance, and snow and ice control.³ To perform these responsibilities, grievant must operate pickup trucks, dump trucks, riding mowers, and snow removal equipment. While the work is performed on the university's campus, the trucks and other equipment are frequently driven on public streets.

On August 27, 2005, grievant was arrested for driving while intoxicated. He was arraigned two days later and his case was continued to October. Grievant's license was confiscated by the arresting officer and suspended pending trial. On October 4, 2005, the general district court found grievant guilty as charged and sentenced him to six months in jail (all but ten days was suspended) and suspended his driver's license for three years.⁴

On October 6, 2005, grievant's supervisor gave him a due process notice and an opportunity to respond.⁵ Grievant responded by letter the following day.⁶ The agency decided that it had no alternative but to remove grievant from employment because the loss of a driver's license prevents him from meeting a licensure requirement of the position. The agency considered the fact that grievant had told his supervisor that he had been incarcerated due to a charge of brandishing a firearm rather than the actual conviction for driving while intoxicated. The agency also considered the fact that grievant had continued to operate state vehicles during the month of September even though his license had been suspended in August.

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

¹ Exhibit 3. Letter from Grounds Supervisor to grievant, October 11, 2005.

² Exhibit 6. Grievance Form A, filed November 1, 2005.

³ Exhibit 5. Grievant's Employee Work Profile Work Description, signed November 10, 2004.

⁴ Exhibit 4. Case details from general district court record, October 5, 2005.

⁵ Exhibit 1. Letter from grounds supervisor to grievant, October 6, 2005.

⁶ Exhibit 2. Letter from grievant to grounds supervisor, October 7, 2005.

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 his claim by a preponderance of the evidence.⁷

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 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 also provide for removal from employment due to circumstances which prevent employees from performing their jobs. An employee who is unable to meet the working conditions of his employment due to loss of license or certification required for the job may be removed from employment.⁸

It is undisputed that in order to meet the minimum requirements of his position, grievant must possess a valid Virginia driver's license. Grievant's license was suspended for three years beginning on October 4, 2005. Therefore, grievant does not meet one of the basic minimum requirements of his job position. Under these circumstances, the agency had no alternative but to remove grievant from employment. If the agency had not removed grievant from employment it would have potentially exposed the university to a liability situation if a vehicle driven by grievant became involved in a collision on public streets.

⁷ § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective August 30, 2004.

⁸ Exhibit 7. Section IV, DHRM Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

Grievant understands that the agency had to follow state policy. However, because grievant has 27 years of service, he feels that the agency should have been able to find other work that did not require a driver's license. Grievant has a good performance record and, other than loss of his driver's license, there is no reason that he cannot work. The grounds supervisor stated that grievant is free now to apply for other positions, either classified or hourly, providing the positions do not have a driver's licensure requirement.

In addition, grievant testified that he will be eligible in February to obtain a restricted driver's license and he fully expects the court to grant his request for such a license. The restricted license would permit grievant to drive to and from work, and to drive as required by his job. If grievant is able to obtain a restricted license, he is free to apply for any vacant position at the university.

While it is unfortunate that grievant lost his job, the agency had no choice but to remove grievant for the reasons stated above. Hopefully, with the imminent reinstatement of a restricted driver's license, grievant will again be able to find a position at the agency. Grievant is encouraged to work with the agency's human resources department to determine what openings he might qualify for. Even if he cannot immediately return to the grounds position, there may be other positions for which he is qualified until a position becomes available in the grounds department.

DECISION

The removal action of the agency is affirmed.

Grievant's removal from employment due to the loss of a valid Virginia driver's license on October 10, 2005 is 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.⁹ You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.¹⁰

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

S/David J. Latham

David J. Latham, Esq.
Hearing Officer

⁹ 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).

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