

Issue: Misapplication of policy and Group III Written Notice with termination (criminal conviction); Hearing Date: 07/06/06; Decision Issued: 07/07/06; Agency: VCU; AHO: David J. Latham, Esq.; Case No. 8325/8369; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Nos: 8325 & 8369

Hearing Date: July 6, 2006
Decision Issued: July 7, 2006

APPEARANCES

Grievant
Director of Transportation Safety Training Center
Advocate for Agency

ISSUES

Did the agency follow policy when it suspended grievant? Did grievant's actions warrant disciplinary action under the Commonwealth of Virginia 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 challenging his suspension pending an agency investigation.¹ When the agency subsequently terminated grievant's employment with a Group III Written Notice for alleged criminal convictions,

¹ Agency Exhibit 1. Grievance Form A, filed March 6, 2006.

grievant filed a second grievance challenging the disciplinary action.² As part of the disciplinary actions, grievant was removed from state employment effective March 14, 2006.³ Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing. Virginia Commonwealth University (hereinafter referred to as "agency") has employed grievant for almost three years as an information technology specialist.⁴

Grievant's position requires, *inter alia*, that he provide statewide installation, set-up and training for new Micro Traffic Records System users, provide on-site technical assistance and training for system users, and conduct regional training courses.⁵ To accomplish the required travel, his work description requires that he possess a valid Virginia Driver's License. During the 12-month period preceding his removal from employment, grievant worked approximately 230 days (after holidays and leave are subtracted) and traveled 37 days on agency business. Thus, approximately 18 percent of his workdays were spent traveling on agency business.

On February 23-24, 2006, grievant traveled on agency business to two locations in southwest Virginia. Grievant drove his personal vehicle but the agency reimbursed him at the personal mileage rate for miles traveled.⁶ At 12:34 a.m. on February 24, 2006, grievant was arrested by a police department for driving under the influence (DUI) of alcohol. Grievant submitted to a breathalyzer test and recorded a blood alcohol content (BAC) of .11 percent. Under Virginia law, it is illegal to drive or operate a motor vehicle with a BAC of greater than .08 percent. A magistrate issued a warrant against grievant for DUI, ordered that he be held until sober, and suspended his driver's license for seven days.

As a result of being in jail on the morning of February 24, 2006, grievant was unable to keep a scheduled appointment with a law enforcement agency. Late that morning, grievant contacted the law enforcement agency and rescheduled his appointment for a date in March. Grievant then drove back to Richmond. Grievant did not advise his supervisor of what had occurred. The supervisor first learned about grievant's arrest when he came to work on February 27, 2006 and received an e-mail from the police department's chief. When grievant came to work, he did not disclose his arrest to his supervisor and told him only that he had been unable to have the meeting on February 24th.

Grievant's supervisor suspended grievant effective March 1, 2006 pending investigation of the matter. He also asked grievant to provide a copy of his driving record from the Department of Motor Vehicles. DMV provided a seven-

² Agency Exhibit 1. Grievance Form A, filed April 12, 2006.

³ Agency Exhibit 1. Group III Written Notice, issued March 14, 2006.

⁴ Agency Exhibit 6. Grievant's Employee Work Profile Work Description, December 14, 2005.

⁵ *Id.*

⁶ Agency Exhibit 5. Travel Expense Reimbursement Voucher, February 28, 2006.

year record of grievant's driving record reflecting that his license was suspended, and that he had been convicted of speeding three times - in 2001, 2004, and 2005, and that his license suspended for 13 days in 2005, from January 18 through February 1, 2005.⁷ On January 28, 2005, grievant drove his vehicle on agency business even though his license was suspended at that time.⁸ Court records also show that he was convicted of public intoxication in November 2005. Although grievant was not working at the time of his arrest for public intoxication, he was arrested in a county in which the agency does business with the law enforcement agency.

When the agency employed grievant in 2003, grievant disclosed on his employment application that he had been convicted of DUI (1995), reckless driving (1998), failing to obey a highway sign (2001), and speeding on four occasions (twice in 1999, 2000, and 2001).

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

⁷ Agency Exhibit 4. Transcript of Driver History Record as of March 1, 2006.

⁸ Grievant Exhibit 1. Grievant's compilation of agency business travel dates from November 2004 through February 2006. See also Agency Exhibit 5. Travel Voucher, February 1, 2005.

circumstances. In all other actions the grievant must present his evidence first and prove his claim by a preponderance of the evidence.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 effective September 16, 1993. The *Standards* 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 of Policy No. 1.60 provides that Group III offenses include acts and behavior that are the most severe and of such a serious nature that a first occurrence normally should warrant removal from employment.¹⁰ The offenses listed in the Standards of Conduct are intended to be illustrative, not all-inclusive. Accordingly, an offense that in the judgment of the agency head undermines the effectiveness of the agency's activities or the employee's performance should be treated consistent with the provisions of the Standards of Conduct.¹¹

The agency has cited grievant for "*criminal* convictions for illegal conduct." Grievant correctly observes that, generally, traffic infractions are violations of public order as defined in Va. Code § 46.2-100 and are not deemed to be criminal in nature. However, two of grievant's convictions were criminal in nature because they are misdemeanors. In December 2004, grievant was found guilty in District Court of reckless driving – a Class 1 misdemeanor.¹² In January 2005, grievant was convicted of public intoxication – a Class 4 misdemeanor.¹³ Pursuant to the Standards of Conduct, these two criminal convictions for illegal conduct occurring off the job can be considered Group III offenses if they are clearly related to job performance or are of such a nature that to continue grievant in his position could constitute negligence in regard to the agency's duty to the public.

In this case, the agency has offered persuasive testimony that grievant's criminal convictions, as well as his multiple traffic infractions for speeding, are related to his job performance and would pose a serious negligence problem to

⁹ § 5.8, EDR *Grievance Procedure Manual*, effective August 30, 2004.

¹⁰ Agency Exhibit 7. Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

¹¹ *Id.* Section V.A.

¹² Va. Code § 46.2-868.A states: "Every person convicted of reckless driving under the provisions of this article shall be guilty of a Class 1 misdemeanor." Grievant was convicted of speeding in excess of 80 miles per hour, which constitutes reckless driving pursuant to Va. Code § 46.2-862.

¹³ Va. Code § 18.2-388 states: "If any person ... is intoxicated in public ... he shall be guilty of a Class 4 misdemeanor."

the agency in terms of both potential liability and reputation. Grievant's primary responsibility has been to provide software support for local law enforcement agencies to help them reduce the frequency and severity of traffic crashes. Grievant observes that his convictions did not occur during work hours and did not involve state-owned vehicles. However, at least one or more of these incidents occurred while grievant was traveling on agency business. Therefore, there was a potential for the involvement of worker's compensation insurance had grievant been in a crash while intoxicated or while speeding. There is also the potential for liability insurance involvement should a crash occur during work hours. In addition, the reputation of the agency and the Transportation Safety Training Center are damaged when its own employee is known by its customers – local law enforcement agencies – to employ a person who has multiple speeding convictions, public intoxication convictions, and driving license suspensions. Accordingly, the agency has demonstrated, by a preponderance of evidence, that grievant has criminal convictions, as well as multiple traffic infractions, that are of such a nature as to be inimical to his continued employment.

Further, grievant was unable to attend a scheduled meeting with a customer because grievant was in jail due to intoxication. While grievant asserts that the person with whom he was supposed to meet did not mind rescheduling, the fact is that the meeting had to be rescheduled. This wastes the time of both grievant and the person with whom he was going to meet. Moreover, the law enforcement agency, including the chief of police, knew that grievant's failure to attend the meeting was due to grievant's illegal conduct.

In addition, grievant's job description requires that he have a valid Virginia Driver's License. On two occasions, grievant's license was suspended and yet he continued to drive his personal vehicle while on agency business. On January 28, 2005, and again on February 24, 2006 when he drove back to Richmond after being released from jail, grievant drove his vehicle on agency business even though his license to drive was suspended on both occasions. Doing so could have resulted in significant potential liability to the agency had grievant been involved in a traffic crash.

Grievant failed to advise his supervisor of his convictions and suspensions after he was employed. The Standards of Conduct policy requires employees to report to their supervisor any circumstance that prevents satisfactory work performance.¹⁴ It is implicit from the employment application that the agency requires disclosure of all violations of law including traffic convictions. If the agency wants this information before hiring, it obviously wants to have this information on a continuing basis. In addition, grievant knew that he was required to have a valid driver's license. When an employee's license is suspended, he does not have a valid driver's license. Knowing that his license

¹⁴ Agency Exhibit 7. Section III.D.1. DHRM Policy 1.60, *Id.*

was suspended, grievant nonetheless drove his vehicle on agency business on two occasions exposing the agency to significant potential liability.

For all of the above reasons, the agency has demonstrated that grievant's actions and his failures to disclose relevant information to the agency were related to his job performance and of such a nature that to continue him in his position would constitute negligence in regard to agency duties to the public. Therefore, grievant's offenses warrant a Group III Written Notice.

Grievant objected to his suspension. The Standards of Conduct provides that a suspension may be imposed pending an investigation of an employee's conduct by his or her agency.¹⁵ The agency acted appropriately under the circumstances to conduct an investigation. There is no basis for grievant's claim that the agency acted too hastily. There is also no evidence that grievant's privacy was violated any more than was required to conduct a full investigation.

Mitigation

The normal disciplinary action for a Group III offense is removal from employment. The policy provides for reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, grievant has been employed for less than three years which is not considered long service. He has performed his work satisfactorily. However, there are aggravating circumstances. Grievant's conduct off the job is sufficiently egregious and his failures to report his license suspensions are such as to overcome any possible mitigation. Accordingly, the aggravating circumstances outweigh the mitigating circumstances. Therefore, the discipline in this case is within the limits of reasonableness.¹⁶

DECISION

The agency fairly applied policy when it suspended grievant in order to investigate his driving record.

The disciplinary action of the agency is affirmed.

¹⁵ Agency Exhibit 7. Section VIII.B.1.a., DHRM Policy 1.60, *Id.*

¹⁶ *Cf. Davis v. Dept. of Treasury*, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at 5-6 (1981) holding that the Board "will not freely substitute its judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

The Group III Written Notice and grievant's the removal from employment effective March 14, 2006 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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. 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.¹⁷ 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.¹⁸ You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[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

¹⁷ 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).

¹⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.