

Issues: Group III Written Notice (failure to report criminal conviction), and termination; Hearing Date: 02/13/07; Decision Issued: 03/21/07; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esq.; Case No. 8511; Outcome: Group III – Partial relief, reduced to Group II with suspension; termination – Full relief, employee reinstated.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8511

Hearing Date: February 13, 2007
Decision Issued: March 21, 2007

PROCEDURAL HISTORY

On September 5, 2006, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to report conviction of a misdemeanor crime of domestic violence. On September 14, 2006, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On January 18, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 13, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

1. Whether Grievant engaged in the behavior described in the Written Notice?

2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Corrections employed grievant as a Corrections Officer at one of its Facilities until his removal effective September 5, 2006. The purpose of his position was:

Maintains security, custody and control over inmates at the institution and while in transport by observing and initiating correction and disciplinary actions for inappropriate behavior. Supervise inmates' daily activities and observes and records their behavior and movement to ensure their safe and secure confinement. Ensure participation in mandated treatment programs in support of the Facility's Mission Statement.¹

In February 2000, Grievant was charged with assault and battery but the charge was dismissed. Grievant did not report the charge to the Agency.

In June 2006, Grievant was arrested for Assault and Battery, Domestic Relations Court. He pled *nolo contendere* to the charge. In accordance with VA Code § 18.2 – 57.3, the JDR Judge did not enter a finding of guilt at that time.² Instead, the JDR

¹ Agency Exhibit 4.

² The court did not prohibit Grievant from carrying a firearm.

Judge placed grievant on probation under the supervision of Community Corrections. Grievant's case remains on the Juvenile and Domestic Relations Court's docket and is scheduled to be reviewed on July 29, 2008.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."³ Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal."⁴ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁵

Group III offenses include:

Failure of an employee whose job requires carrying a firearm or authorization to carry a firearm to report conviction for a 'misdemeanor crime of domestic violence'.

Failure to report a criminal conviction to the employee's supervisor within one workday of the conviction.

Grievant has not yet been convicted of a crime. The JDR Judge did not enter a finding of guilt. The Agency has not presented sufficient evidence to support the issuance of a Group III Written Notice and, thus, the Group III Written Notice issued to Grievant must be reversed.

The Agency argues Grievant has been convicted because he admitted to committing a crime and was treated for all practical purposes by the court as having been convicted of a crime. Although this is true, Agency's Standards of Conduct refer to a conviction as being necessary to support a Group III offense. If the Agency intends to discipline employees for engaging in criminal behavior for which they are not convicted, the Agency must place employees on notice by specifying such terms in its Standards of Conduct.

The Agency's Standards of Conduct does not define "conviction". DOC Procedure 5-45 defines conviction as:

³ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

⁴ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁵ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

A formal criminal charge which has been adjudicated in a Circuit Court, Juvenile and Domestic Relations Court, or General District Court (or the equivalent in another state or federal jurisdiction), except for those traffic infractions which are defined as violations of public order and are classified as neither a felony nor a misdemeanor.

This definition is ambiguous. Under this definition, if an employee is charged falsely with a criminal offense and acquitted by a Court with the charges dismissed, the employee would nevertheless be convicted merely for being charged with an offense. In regular discourse, the term “conviction” means a finding of guilt by a court. If the Agency wishes to change that definition, it must clearly define what it means by the term conviction.

“[F]ailure to ... comply with applicable established written policy” is a Group II offense.⁶

DOC Procedure 5-45 states:

Employees charged with a criminal offense either on or off the job, or a moving traffic violation which occurs on the job or in a state vehicle, shall inform their organizational unit head immediately, if received during normal working hours or the next work day if received during non-working hours.

In 2000 and 2006, Grievant was charged with a criminal offense but failed to immediately report the charge. Grievant failed to comply with established written policy thereby justifying the issuance of a Group II offense. A suspension of up to ten workdays is permitted upon the issuance of a Group II Written Notice without prior active disciplinary action.⁷

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Employment Dispute Resolution....”⁸ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-

⁶ Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

⁷ The Agency could have issued Grievant a Group II Written Notice for the 2000 failure and another for the 2006 failure to report but chose to issue only one notice. The Hearing Officer cannot elevate the level of disciplinary action given only one notice was issued.

⁸ *Va. Code § 2.2-3005.*

exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice with ten workday suspension.

The Agency is ordered to **reinstate** Grievant to his former position, or if occupied, to an objectively similar position. Grievant is awarded full **back pay**, from which interim earnings (including unemployment compensation) and a ten workday suspension must be deducted. Grievant's full **benefits** and **seniority** are restored.

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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

3. If you believe that 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. Please address your request to:

Director
Department of Employment Dispute Resolution

830 East Main St. STE 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 all of your appeals to the other party and to the EDR Director. 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. 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.⁹

[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/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.