

Issues: Group III Written Notice and termination (Criminal Conviction); Hearing Date: 09/05/07; Decision Issued: 10/01/07; Agency: ABC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8661; Outcome: No Relief, Agency Upheld in Full; **Judicial Review: Appealed to Chesapeake Circuit Court on 10/29/07; Outcome pending**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8661

Hearing Date: September 5, 2007
Decision Issued: October 1, 2007

PROCEDURAL HISTORY

On April 5, 2007, Grievant was issued a Group III Written Notice of disciplinary action with removal for engaging in conduct that might compromise the integrity of himself and the Department and failing to report his arrest without delay. On April 26, 2007, 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 August 1, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 5, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

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 Alcoholic Beverage Control employed Grievant as a Special Agent since April 1, 1986 until his removal effective April 5, 2007. The purpose of his position was:

Special Agents are assigned to the Bureau of Law Enforcement Operations and provide specialized law enforcement services and guidance to other law enforcement officers, public officials, citizens of the Commonwealth, persons manufacturing, selling and transporting alcoholic beverages and transporting and selling tobacco products. This position: is assigned to one of eight large geographic regions; manages law enforcement operations in a specific geographic territory; initiates and conducts a wide range of moderate to complex investigations and makes arrests for violations of alcohol, tobacco, narcotics, fraud, financial fraud statutes and testifies in state and federal courts. Special agents routinely: conduct surveillance; work undercover; manage undercover operations; supervise underage buyers of alcohol beverages and tobacco; develop and perpetuate confidential sources of information; and serve as Agency Advocates, preparing and presenting disciplinary cases to ABC Hearing

Officers. Some Special Agents have additional assignments such as instructor, electronic surveillance technician, pilot, or member of a local, state or federal task force.¹

Grievant had no prior disciplinary action. He planned to retire on January 2, 2008.

On June 11, 2006, Grievant went shopping at a local retail store where he regularly shopped for men's clothing. The Sales Associate was working that day. Grievant had purchased many items of clothing from the Sales Associate during the prior two years. The Sales Associate was a 78 year old man who had had problems operating the store's cash register. Grievant and the Sales Associate were being observed through a hidden camera by an off duty Sergeant of the local Police Department. Grievant attempted to purchase a necktie and a pullover sport shirt. As the store was closing at approximately 6 p.m., Grievant left the store and went to the parking lot. The Sergeant stopped Grievant and confronted him. The Sergeant believed Grievant had received clothing from the Sales Associate without paying for the items. Grievant had attempted to use his debit card to purchase the items but the transactions did not register on the card. The Sergeant presented Grievant with a Virginia Uniform Summons charging him with petit larceny under Va. Code section 18.2-96.²

On June 13 at 2:35 p.m., Grievant notified the Special Agent in Charge of the arrest. The Special Agent in Charge had already been notified of the arrest by the Sergeant. The Special Agent in Charge was concerned and disappointed that Grievant had waited until that time to notify him of the arrest. Grievant was delayed in notifying the Special Agent in Charge because Grievant was examining Agency policy to determine if he was obligated to report the matter to his supervisor. He found a policy stating, "Employees will not knowingly violate the laws of the United States, the Commonwealth or any other state, county, city or other political subdivision. Any conviction must be brought to the immediate attention of the employee's supervisor." Since Grievant had not yet been convicted, he did not believe he had to bring the matter to his supervisor's attention. Shortly thereafter, Grievant changed his mind and decided to tell his supervisor of the arrest.

On March 26, 2007, Grievant and his attorney appeared in the local General District Court before the Judge. The Sales Associate also appeared in court at the same time. The loss prevention camera operator testified and played for the Court a video of the transactions between Grievant and the Sales Associate. The Sergeant who confronted Grievant also testified. An employee who worked with the Sales Associate testified that he observed the Sales Associate having problems operating the cash register system. The Sales Associates testified that he got "rattled sometimes" and had hurried the transactions because the store was closing for the evening. He testified he

¹ Agency Exhibit 4.

² The value of the items taken was approximately \$78.50.

did not intend to permit Grievant to take items without paying for them. Grievant testified that he did not intend to steal merchandise from the store.

After hearing the evidence and the argument of counsel, the Judge ruled:

I find the evidence sufficient to find them guilty, place them on probation in terms of court costs, order both of them to complete Shoplifters Alternative. Quite frankly, I don't believe either one of them.

Refer them to Diversion Services.

Continued to June 21st, 2 p.m.

It won't be necessary for your witnesses to be back.

They're both barred from the ... department store.

The Special Agent in Charge testified that because of the Judge's statement that he did not believe Grievant, the Agency would have to advise the Commonwealth Attorneys and defense attorneys of the Judge's statement with respect to any criminal prosecutions in which Grievant would be involved.

Grievant discussed the Court's decision with his attorney. Grievant decided not to appeal the Judge's decision because the case would be dismissed after a period of time. Grievant paid the required court costs and complied with the Judge's instructions. The criminal case was dismissed.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).³ Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

Under the Agency's Standards of Conduct provides, in part:

Any employee who is the plaintiff in any civil action, is charged with a traffic infraction, learns that he or she may be the defendant in any civil or criminal action, or who is the subject of a protective order, shall report such action to the Director without delay.⁴

³ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁴ Agency Exhibit 5. These Standards of Conduct are effective April 21, 2006 and only replace General Order No. A-002 in part. In a memorandum dated March 27, 2006, the Agency Head informed

In addition, the Agency's Standards of Conduct provides, in part:

Bureau employees must scrupulously avoid any conduct which might compromise their personal integrity, or that of fellow employees, or the Department Employees should speak and write the truth at all times and in cases where they are not allowed to divulge the facts by policy, they will say nothing. Employees will not make false statements, or falsify any written or verbal report or willfully and intentionally withhold material matter from such reports or statements.⁵

Based on the findings of the General District Court, the Agency concluded that Grievant's integrity was so compromised so as to render him unable to perform his duties with the Department. The Agency concluded Grievant engaged in theft and was untruthful as a witness in court. The Agency has presented sufficient evidence to support its decision in this matter. The Court transcript reveals the Judge's findings and opinion regarding Grievant's transaction at the department store and his testimony before the Court. Accordingly, the Group III Written Notice must be upheld. Removal is authorized upon the issuance of a Group III Written Notice.⁶

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...."⁷ 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-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.

Grievant contends the disciplinary action should be mitigated because of his length of service, his satisfactory work performance, and he did not engage in theft and

employees that the Agency would be operating under General Order 10 and General Order A-002 to the extent they did not conflict. See Hearing Officer Exhibit 1.

⁵ Agency Exhibit 6. General Order A-002.

⁶ Grievant's failure to report does not form a basis for taking disciplinary action. Grievant's delay was explained by his attempt to determine his reporting responsibilities.

⁷ *Va. Code § 2.2-3005.*

did not lie, contrary to the Court's assertion. Grievant's length of service and satisfactory work performance, alone, are not mitigating circumstances under the *Rules*.

Grievant denies he engaged in theft or that he lied to the Court. He presented evidence showing that he had swiped his credit card two times in the cash register system and twice signed his name on the pin-pad. He was given two receipts along with the clothing and Store bags to hold the clothing. Grievant presented evidence that the Sales Associate was a 78 year old man with difficulty operating the cash register system. In order to conclude that Grievant engaged in theft, it would be necessary to first conclude that Grievant and the Sales Associate agreed to pretend that they had entered into a sales transaction but intended not to record the transaction on the Store's cash register system.⁸ Grievant presented substantial evidence showing the events as they occurred on June 11, 2006 and showing the unlikelihood that he entered into an agreement with the Sales Associate to obtain free clothing. Grievant presented evidence to show that he did not know he had obtained goods without paying for them. He also presented evidence showing that his testimony before the Hearing Officer was truthful.

This case raises the question of whether the Hearing Officer can examine the evidence before him and reach a conclusion contrary to the Court's decision. In other words, is the Hearing Officer bound by the findings and determinations of the Court. In this case, the Hearing Officer listened to several hours of testimony from numerous witnesses. The Hearing Officer had ample opportunity to determine whether Grievant was testifying truthfully and to form a conclusion regarding whether Grievant engaged in theft.

The Hearing Officer concludes that under the *EDR Rules for Conducting Grievance Hearings*, the Hearing Officer cannot make an independent determination of whether Grievant engaged in theft or untruthfully denied stealing. Although grievance hearings are *de novo*, the Agency is entitled to rely on the findings of a Court and entitled to incorporate those findings into its decision-making. If the Hearing Officer were to conclude that Grievant did not engage in theft and lying and then reverse the disciplinary action, this would place agencies in the position of having to second-guess the findings of a court. Agencies are entitled to an appropriate level of deference when they base their decisions on objective facts before them. The Court's findings were objective facts outside of the control of the Agency. Accordingly, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

This case also raises the question of whether a Hearing Officer can make a recommendation if that recommendation would be contrary to the findings of the Court. In EDR Ruling 2007-1549 and 1550, the EDR Director examined a hearing officer's authority to make recommendations and stated:

⁸ Even if one assumes that the Sales Associate intended to give merchandise to Grievant because Grievant was a good customer, this assumption would not be sufficient to conclude that Grievant knew what the Sales Associate intended to accomplish.

The EDR standard for reviewing a recommendation is whether the hearing officer's recommendation is tantamount to an abuse of discretion. As to the allegation that this recommendation is overly broad and intrusive, EDR recognizes that management reserves that exclusive right to manage the affairs and operations of state government, and that the hearing officer is not a "super personnel officer." Nevertheless, the grievance procedure has long held that where a hearing officer does not have the authority to order a particular action, he may offer prudent recommendations that would be reasonable in resolving the issues between the parties. Standing alone, recommendations, which must conform to law and policy, do not compel the agency to act. However, by statute, a party may petition the circuit court in the jurisdiction in which the grievance arose for an order implementing a recommendation. If the circuit court orders implementation of the recommendation, only then is the agency bound to act on the recommendation. (citation omitted)

If the Hearing Officer were to find that Grievant did not engage in theft and did not lie before the Hearing Officer and then recommend that the Agency consider these facts and possibly restore Grievant to his position or permit him to resign in lieu of disciplinary action, the Hearing Officer's recommendation would be contrary to the Court's decision and, again, place the Agency in the position of having to disregard the findings of a Court. Based on this consideration, the Hearing Officer will not make a recommendation in this case.

DECISION

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