Issue: Group III Written Notice with termination (criminal conviction); Hearing Date: 09/05/07; Decision Issued: 09/10/07; Agency: VDOT; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 8677; Outcome: No Relief, Agency Upheld in Full.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case Nos. 8677

Hearing Date: September 5, 2007
Decision Issued: September 10, 2007

PROCEDURAL HISTORY

On May 24, 2007, Grievant was issued a Group III Written Notice of disciplinary action with removal based on his May 15, 2007, conviction of a Class 1 misdemeanor—petit larceny. 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 8, 2007, the Hearing Officer received the appointment from the Department of Employment Dispute Resolution. On September 5, 2007, a hearing was held at the Agency's headquarters.

Both sides submitted exhibit notebooks with numbered exhibits that were, without objection from either side, admitted into the grievance record and will be referred to as Agency's or Grievant's Exhibits, numbered respectively.

APPEARANCES

Grievant
Counsel for Grievant
Advocate for Agency
Representative for Agency
Two witnesses for both Agency and Grievant (including Agency Representative)

ISSUES

Whether Grievant should receive a Group III Written Notice of disciplinary action with termination for criminal conviction of petit larceny.

The Grievant requests a reduction in the level of discipline and, alternatively, mitigation and reinstatement to his position, back pay and benefits, and an award of attorney's fees.

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.

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.

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resource Management (DHRM) promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. 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. Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment. A specific enumerated example of a Group III offense is criminal convictions for illegal conduct occurring on or off the job that clearly are related to job performance or are of such a nature that to continue employees in their positions could constitute negligence in regard to agencies' duties to the public or other state employees.[1]

[1] Agency Exhibit 6. Section V.B.3, DHRM Policy 1.60, Standards of Conduct, September 16, 1993.

The Grievant was hired in July 2006 by the External and Construction Audit Division of the Agency. Testifying from the Agency were the Director of the division and the Audit Manager directly supervising the Grievant. The claimant also requested these witnesses to attend the hearing. The responsibilities of the External and Construction Audit "directorate" include the investigation of the books and transactions of contractors doing business with the Agency, to verify the costs and charges claimed by contractors. The Grievant's job as an entry-level auditor required him to exercise judgment in an area of work responsibilities that requires integrity, although his work was reviewed and approved by his superiors. The Agency witnesses testified that the audits have the potential to be contentious. The Director testified that with the Grievant's conviction for petit larceny he could no longer "vouch" for the Grievant. The Agency requires a criminal background check for the Grievant's position. Agency's Exhibit 4; Grievant's Exhibit 3.

The Grievant concedes the fact of his conviction of petit larceny on May 15, 2007. Agency Exhibit 5. Because Grievant has been convicted of petit larceny, his testimony is subject to impeachment as a matter of law. In *Johnson v. Commonwealth*, 31 Va. App. 37, 43 (2003), the Virginia Court of Appeals held:

> Where the purpose of the inquiry is to impeach a witness' veracity, cross-examination concerning a witness' prior convictions is limited to prior felony convictions and convictions for misdemeanors involving moral turpitude. Misdemeanor crimes of moral turpitude are limited to those crimes involving lying, cheating and stealing, including making a false statement and petit larceny.

Both Agency witnesses testified that there was, as part of the Grievant's job, the requirement to testify in court if auditing claims were challenged or litigated. While actually testifying in court is admittedly rare, the Agency cannot simply disregard this job requirement, and the Grievant's credibility is automatically at issue when he testifies, and having a criminal record inviting impeachment is a valid Agency concern. Thus, because the conviction affects the claimant's job, the Agency has shown an adequate basis for the Group III Written Notice.

The Agency's witnesses, and the Grievant, testified that he had a good work record thus far for the Agency. Grievant's Exhibits 1 and 2; Agency's Exhibit 3. There is no record of prior, active disciplinary notices.

The Grievant made a very sympathetic explanation of why his conduct giving rise to the conviction lacked any criminal intent. Without detailing his entire story, the Grievant insisted that he did not intend to steal anything—that it was a mistaken impression by the retail establishment. Nevertheless, the Grievant was charged with felony grand larceny, and he consented to a guilty plea resulting in his conviction of the misdemeanor petit larceny, rather than the charged felony of grand larceny. Agency's Exhibit 5. The grievance procedure is not the forum to challenge the sufficiency or appropriateness of the criminal conviction. Thus, in considering the criminal conviction, we cannot look behind the conviction.

Because of the potential adverse relationship with the affected contractors, and the potential of being called upon to present testimony, I find that the conviction clearly relates to

job performance. I also find that the Agency could be at risk for having an auditor with a criminal conviction involving moral turpitude. I further find that to continue an employee in his position in the audit division could constitute negligence in regard to the Agency's duties to the public or other state employees. This finding is based on the described level of trust and accountability required of the auditors, and the confidence the Agency and the public must have in those serving as auditors. According to the Agency's witnesses, the Grievant would have to be called upon to work alone, in the field, making judgment decisions regarding his audit responsibilities. The Grievant's position has responsibilities to the general public, and it requires work directly with the public in the form of private contractors doing business with the Agency.

Mitigation

The normal disciplinary action for a Group III offense is a Written Notice and removal from state 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.

The Grievant submits that mitigating factors weigh in favor of reinstatement. While his tenure for this agency was less than one year, he had a good record of state service spanning 18 years. The Grievant was well liked by his superiors, and his job performance was very good. The Grievant submits that these circumstances and his tenure of good standing should mitigate the discipline to a less severe level than termination.

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution." Va. Code § 2.2-3005(C)(6). EDR's Hearing Rules provide in part:

> The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances," such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or … an employee's long service, or otherwise satisfactory work performance." 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.

Hearing Rules § VI.B.1 (alteration in original). Therefore, if the agency succeeds in proving (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. Hearing Rules § VI.B.

In this case, the first two elements have been met. Although the Grievant has 18 years of service with other agencies, the grievant does not have long service with this agency. Both

witnesses for the Agency testified that the claimant had a good work record and was performing well in the ten months until his discharge. Both Agency witnesses testified that they weighed the decision to remove grievant very carefully. Because of grievant's good work reputation and very good work performance thus far, the agency was reluctant to remove him from employment. However, because the Grievant's job was an entry level position, and because the directorate had no other less trustworthy position to offer as a demotion or transfer for the Grievant, the agency considered that Grievant's guilty plea to the charges left it no alternative to termination. Given its audit responsibilities, the agency concluded that it could not allow one convicted of a misdemeanor involving moral turpitude to continue in a position of trust. As the Director stated, he could no longer vouch for this employee. While the result is harsh, as all terminations are, given this circumstance, the discipline in this case is within the limits of reasonableness.[2]

The Grievant complains that the Agency explored only its auditing section of the Department for a possible position for demotion or transfer. The auditing directorate did not explore the entire Agency for a transfer position, and the Grievant submits that the Agency had an obligation to search elsewhere within the Agency for other, alternative positions. This argument presumes an obligation by the Agency to exhaust all possible lesser sanctions. I find no authority that requires an Agency to exhaust all possible lesser sanctions or, alternatively, show that termination was its only option. The Agency has the management prerogative to act within a continuum of discipline as long as the Agency acts within the bounds of reasonableness.

Under the EDR's Hearing Rules, the hearing officer is not a "super-personnel officer." Therefore, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. In this case, the Agency's action in assessing a Group III offense is within the bounds of specific policy. The Agency's witnesses testified that they carefully weighed mitigation, but the nature of the Grievant's job did not allow them to continue the Grievant's employment. The Agency's witnesses added that there were no other positions available within the division for demotion or transfer. I find it is within the bounds of reasonableness for the Agency to terminate an employee of less than one year's tenure upon the conviction of a crime involving moral turpitude. It is unfortunate that the Agency is losing an otherwise valuable employee, but there are no factors which would make it unreasonable to impose the Agency's choice to remove Grievant. The Agency's witnesses were genuinely regretful of the termination decision.

Finally, although the Grievant did not assert such, I find that there was no evidence that the Agency's actions were based on any improper motive. To the contrary, I believe both Agency witnesses were genuinely sorrowful over the circumstances and the termination, and I find they exhibited good faith business judgment.

[2] *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.'"

DECISION

For the reasons stated herein, I uphold the Group III Written Notice and the termination.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804)371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main Street, Suite 400, Richmond, VA 23219 or faxed to (804)786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision.** (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,

2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer