

Issue: Group III Written Notice with termination (criminal charge); Hearing Date: 12/12/07; Decision Issued: 12/14/07; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8754; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8754

Hearing Date: December 12, 2007
Decision Issued: December 14, 2007

PROCEDURAL HISTORY

On August 10, 2007, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to notify the unit head of a criminal charge against him. On September 6, 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 November 19, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 12, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
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 Corrections employed Grievant as a Correctional Officer at one of its Facilities until his removal effective August 10, 2007. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On Sunday August 5, 2007 at 1:08 a.m., Grievant was stopped while driving his vehicle and was arrested by a local Deputy Sheriff for driving under the influence, refusal to take a breathalyzer, possession of marijuana, and carrying a handgun. He was released from jail on August 5, 2007 at 8:20 a.m.

On Monday August 6, 2007 at 9:20 a.m., Grievant called the Office Services Specialist and asked to speak with the Major. The Office Services Specialist told Grievant that the Major was not in Operations and that she would let the Major know that Grievant called. Grievant told her that he needed to speak with the Major concerning jail. She told Grievant that he could come up to Operations or go to the Administration Building if he needed to talk with the Major immediately. Grievant explained that he was not at work and he would call the Major later.

Grievant called the Officer Services Specialist again on August 6, 2007. She tried to transfer his call to Master Control but she could not do so. Instead she transferred his call to the Watch Office. There was no one in the Watch Office, so she asked Grievant to call back again. The Office Services Specialist did not inform the Major that Grievant was trying to reach him because she thought that he was able to speak with the Major.

On Tuesday August 7, 2007, Grievant called the Office Services Specialist and asked to speak with the Major. She informed Grievant that the Major was not at work and was taking sick leave. She told him the Major would not be back to work until August 8, 2007.

On Wednesday, August 8, 2007, Grievant reported to work as scheduled.¹ On Thursday, August 9, 2007, Grievant reported work as scheduled. The Major was working on August 9, 2007. While looking through a video camera inside the Facility, the Major observed Grievant working. The Major met with Grievant and Grievant explained the facts surrounding his arrest.

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.”² 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.”³ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁴

DOC Procedure 5-45.6(B) provides:

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.

Failing to report a criminal charge is not listed as a Group III offense under the Agency’s Standards of Conduct. The Agency argues Grievant should receive a Group III Written Notice based on Virginia Department of Corrections Operating Procedure 135.1(IV)(C), *Standards of Conduct*. This section states, “[t]he list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense.”

¹ Grievant was not scheduled to work on August 6 or 7, 2007.

² Virginia Department of Corrections Operating Procedure 135.1(X)(A).

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

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

This provision requires that the offense level be “consistent with the provisions of this procedure based on the severity of the offense.” Under the facts of this case, the level of discipline is not consistent with a Group III offense. Although the Agency’s Standards of Conduct provide that conviction of a criminal offense may constitute a Group III offense, being charged with a crime is not listed as a Group III offense. The Agency argued that being charged with a crime may cause an employee to lose his or her driver’s license or right to possess a weapon. This would affect the Agency’s ability to assign such an employee to many security posts in a Facility. Although the Agency’s argument is valid, no evidence was presented to show that the Grievant in this case worked in a post without a valid driver’s license or without the right to possess a weapon.

“[F]ailure to ... comply with applicable established written policy” is a Group II offense.⁵ Grievant failed to immediately report his arrest to the unit head⁶ at the Facility. Grievant should receive a Group II Written Notice for failure to comply with established written policy. A suspension of 10 workdays is authorized by the Agency’s Standards of Conduct and is appropriate under the facts of this case.

Grievant argues that he attempted to speak with the Major because Grievant’s supervisor had instructed Grievant to report matters relating to security directly to the Major. Grievant’s argument fails because Grievant’s arrest was not a matter relating to security at the Facility. It was a matter relating to Grievant’s status as an employee.

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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

⁵ Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

⁶ The Warden would have been the unit head at the Facility.

⁷ *Va. Code § 2.2-3005.*

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 a ten workday suspension. The Agency is ordered to reinstate Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue. The Agency is directed to reduce Grievant's back pay to account for the 10 work day suspension.

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.⁸

[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

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.