

Issues: Group III Written Notice (criminal conviction) and Termination; Hearing Date: 07/10/08; Decision Issued: 07/21/08; Agency: VDOT; AHO: John R. Hooe, III, Esq.; Case No. 8874; Outcome: Full Relief; Addendum Decision issued 08/19/08.

**COMMONWEALTH OF VIRGINIA  
Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER**

**In the matter of : Case No. 8874**

Hearing Date: July 10, 2008  
Decision Issued: July 21, 2008

**PROCEDURAL ISSUE**

As discussed during the pre-hearing telephone conference conducted on June 4, 2008, the hearing in this matter was conducted on Thursday, July 10, 2008. The normal thirty-five calendar day deadline for decision was waived on behalf of the Grievant by his attorney to serve the best interest of the Grievant.

**APPEARANCES**

Grievant  
Attorney for Grievant  
Representative for Agency  
Agency Advocate

**EXHIBITS**

The Agency presented the Hearing Officer with a notebook which includes five tabs and the related Exhibits as follows:

Tab 1 - Witness List  
Tab 2 - Grievance Package Including Written Notice, Grievance Form A and Certification for Hearing  
Tab 3 - Copy of Policy 1.60-DHRM Standards of Conduct  
Tab 4 - Virginia State Police Individual Record  
Tab 5 - Order of the Circuit Court of Virginia dated March 4, 2008  
The Grievant provided the Hearing Officer with the following Exhibits:

1. Criminal History Records Checks, Policy No. 2.10-A
2. Hiring, Policy No. 2.10
3. Employee Work Profile, HR-67-2
4. Work Description, HR 67-1
5. Criminal Complaint
6. Order Entered in the Circuit Court
7. Email date March 12, 2008
8. Letter from Grievant's Attorney dated June 3, 2008 and Agency Response dated

June 18, 2008, including enclosures  
9. Virginia Code Sections 9-1-902 and 18.2-370 through 18.2-370.5

### **ISSUE**

1. Was the Grievant's conviction of misdemeanor sexual battery grounds for a Group III written notice and termination from employment?
2. Are there mitigating circumstances as set out in the Standards of Conduct which would allow the Agency to reduce the disciplinary action?

### **WITNESSES**

Two witnesses testified for the Agency, namely the resident administrator for the Agency and the district human resources manager for the Agency.

The Grievant's witnesses consisted of two former co-workers at the Agency.

### **FINDINGS OF FACT**

The Grievant filed a timely appeal from a Group III written notice issued on April 10, 2008 the disciplinary action taken under the Group III notice was termination from employment effective April 10, 2008 following failure to resolve the matter at the third resolution step, the grievance was qualified for a hearing.

All of the evidence indicated that the Grievant was a very good worker for the Agency for twenty-four years and up until the date of his termination. It was un-rebutted that he was very well liked by his co-workers and would be well received if reinstated to his former job.

The evidence established that the position formerly held by the Grievant was not one which required a criminal history check before hiring. However, the Agency believed that due to the requirements of the job formerly held by the Grievant, the Grievant necessarily would work unsupervised on occasion and possibly would have contact with the public while unsupervised.

The Order entered in the Circuit Court sentencing the Grievant found the Defendant guilty of a misdemeanor sexual battery, sentenced the Defendant to twelve months in jail, suspended all twelve months of the sentence and placed the Grievant on twelve months unsupervised probation.

The criminal complaint against the Grievant states that "On October 1, 2007, a child aged 10 years old, accompanied by her parent, reported that (the Grievant) touched her genitalia outside her clothing on several occasions from November 2006 to January 2007." The Grievant testified that the child in question was the daughter of the woman he had met on the internet in 2006, married in June 2007 and had separated from as a result of the criminal complaint and conviction.

By way of mitigation, evidence was introduced indicating that between April 4, 2003 and November 19, 2007 other employees of the Agency had been guilty of moving traffic violations, felony drug distribution charges, felony drug possession charges and violation of alcohol and drug policy. None of the other employees were terminated from their positions.

### **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 (A) 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 circumstances.

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 promulgated Standards of Conduct Policy No. 1.60. 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 to provide appropriate corrective action.

The Standards Of Conduct Policy No. 1.60 states that the Group III offenses are those which "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal." A specific Group III offense enumerated and relied upon by the Agency is as follows: "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 to other state employees."

In the instant case, the Agency has not shown that the criminal conviction is clearly related to job performance and has also failed to show that to continue the Grievant in the Grievant's position of employment would constitute negligence in regard to the Agency's duties to the public or to other state employees.

It is the Hearing Officer's conclusion that the Agency has not demonstrated by a preponderance of the evidence that the Grievant is guilty of a Group III offense and should be terminated. The Hearing Officer also finds that the manner in which the Agency has dealt with other employees for offenses which the Hearing Officer believes would much more likely pose a risk to the public are circumstances that would warrant mitigation of this disciplinary action if otherwise founded.

### **DECISION**

The disciplinary action of the Agency is reversed. The Group III Written Notice issued on April 10, 2008 shall be removed from the Grievant's employee file, the Grievant shall be reinstated to his employment and all of the Grievant's related benefits shall be restored.

### **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. 14<sup>th</sup> Street, 12<sup>th</sup> 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 Capital Square, 830 East Main, Suite 400, Richmond, Virginia 23219 or faxed to (8-4) 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 5 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes **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.

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John R. Hooe, III  
Hearing Officer

**COMMONWEALTH OF VIRGINIA**  
**Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

**ADDENDUM to**  
**DECISION OF HEARING OFFICER**

**In the matter of : Case No. 8874**

Hearing Date: July 10, 2008  
Decision Issued: July 21, 2008  
Addendum Issued: August 19, 2008

The Hearing Officer received the Grievant's Petition for Attorney's Fees dated July 29, 2008, together with the required Attorney's Affidavit.

Upon consideration of the matters set out in the Petition and the Affidavit, and in accordance with Section 7.2(e) of the Department of Employment Dispute Resolution Grievance Procedure Manual and Virginia Code Section 2.2-3005.1.A, the Hearing Officer finds as follows:

1. The Grievant is entitled to recover reasonable attorney's fees and costs in this matter.
2. The invoices for attorney's fees indicate that the Grievant was billed for 41.90 hours for services provided by his counsel from April 15, 2008 through July 10, 2008, the date of the Grievance Hearing. A reasonable hourly rate allowed for such services is \$131.00 per hour, resulting in allowable attorney's fees in the amount of \$5,488.90, plus reasonable costs expended in the amount of \$415.72.
3. The 3.8 hours billed for services rendered on July 22, 2008 and July 23, 2008 to read the Hearing Officer's Decision, discuss it with the Grievant and further work in researching and preparing the Petition for attorney's fees and the related Affidavit will not be allowed.

**DECISION**

The Grievant is awarded \$5,488.90 and related costs in the amount of \$415.72.

### **APPEAL RIGHTS**

Within 10 calendar days of the issuance of this Fees Addendum, either party may petition the EDR Director for a decision solely addressing whether the Fees Addendum complies with the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings. Once the EDR Director issues a ruling on the propriety of the Fees Addendum, and if ordered by EDR, the Hearing Officer has issued a Revised Fees Addendum, the original decision becomes “Final” as described in Section VII (B) of the Rules and made by appealed to the Circuit Court in accordance with Section VII (C) of the Rules and Section 7.3 (a) of the Grievance Procedure Manual. The Fees Addendum shall be considered part of the Final Decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

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John R. Hooe, III  
Hearing Officer