

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 08/18/08; Decision Issued: 08/20/08; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8902; Outcome: No Relief – Agency Upheld in Full.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8902**

Hearing Date: August 18, 2008  
Decision Issued: August 20, 2008

**PROCEDURAL HISTORY**

On January 23, 2008, Grievant was issued a Group II Written Notice of disciplinary action for failure to meet a condition of employment.

On February 21, 2008, Grievant timely filed a grievance to challenge the Agency's action. During the Step Process the disciplinary action was reduced to a Group I Written Notice. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On July 16, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 18, 2008, 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 employs Grievant as a Corrections Officer at one of its Facilities. The purpose of his position is to, "[p]rovide security and supervision of adult offenders." One of Grievant's job duties includes transporting inmates over the public highway using State vehicles. No evidence of prior active disciplinary action against grievance was introduced during the hearing.

Grievant lives in North Carolina and has remained at the same address since 1994. He has had a North Carolina driver's license for many years. On February 11, 2003, Grievant received a speeding ticket for driving 80 in a 65 mile an hour zone in Virginia. The summons to appear in court (the ticket) listed Grievant's address correctly with the numbers 102. The summons advised him of his court date on March 18, 2003 at 9 a.m. Grievant did not appear on the court date and did not prepay the ticket. He was found guilty and given a \$75 fine plus court costs. On March 18, 2003, the Court sent Grievant a Form DC225 entitled "Notice to Pay and of Suspension for Failure to Pay" advising him that payment was due now and that the Court must receive his payment prior to the suspension date shown on the form.

Grievant did not timely pay the Court. On April 2, 2003, Grievant's permission to drive in Virginia was suspended for failure to pay court costs and fines.

On December 22, 2005 Grievant was convicted of speeding in Virginia on November 28, 2005. Grievant did not appear in Court or pre-pay the fine. He was

ordered to pay the Court a fine plus court costs. He did not timely pay those costs. The Court sent Grievant another Form DC225 on December 22, 2005 notifying him of his obligation to pay, otherwise his license would be suspended in Virginia.<sup>1</sup>

In January 2008, the Agency learned that Grievant might not have a valid driver's license to operate a vehicle in Virginia. The Agency required Grievant to produce a Virginia DMV transcript. This transcript showed the two speeding convictions and two suspensions. It also showed an incorrect address for Grievant. The address was correct except that the house address was listed as 21 instead of 102.

### **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."<sup>2</sup> 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."<sup>3</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>4</sup>

"[F]ailure to ... comply with applicable established written policy" is a Group II offense.<sup>5</sup> One of Grievant's conditions of employment is:

Correction Officers must possess a valid Driver's License in order to operate State vehicles, and should have the ability to drive standard transmission vehicles.

The underlying objective of this condition of employment is to ensure that Agency employees operating State vehicles in Virginia do so the appropriate authority from the Commonwealth. Grievant regularly operated State vehicles as part of his employment even though his privilege to drive in Virginia had been suspended since 2003. At the time the Agency required Grievant to produce a transcript of his driving record, Grievant was operating State vehicles while his privilege to drive in Virginia had been suspended. The Agency has presented sufficient evidence to support the issuance of a Group II

---

<sup>1</sup> It does not appear that Grievant's driving privileges in Virginia were restored after they were first suspended in 2003. It is unclear why it would be necessary for his privileges would be suspended again.

<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

Written Notice for failure to comply with established written policy. The Agency mitigated that disciplinary action to a Group I Written Notice.

Grievant contends he should not be disciplined because he did not receive notice that his license had been suspended. He points out that the Virginia DMV transcript shows an incorrect home address for him. Grievant's argument fails for two reasons. First, Grievant had notice that he would be expected to pay a fine for speeding. He received his notification when he was handed a speeding ticket. He knew that he had to appear in court on a specific date otherwise judgment would be entered against him. When Grievant did not appear on the court date, he knew that he would have to pay the fine or he would have to suffer the consequences for failing to do so. Grievant contends that he paid the 2003 ticket, albeit late. He says he was unaware that there remained an unpaid balance. It is Grievant, however, who is responsible for ensuring that all of the fine, fees, and interest were to be paid. Second, it was not the Virginia DMV who sent Grievant notification that his license had been suspended. It was the Court who notified Grievant using District Court Form 225. There is no reason to believe that the Court's records contained incorrect information regarding Grievant's address.

*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...."<sup>6</sup> 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.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action 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:

---

<sup>6</sup> *Va. Code § 2.2-3005.*

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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>7</sup>

[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

---

<sup>7</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.