

Issues: Group III Written Notice (criminal conviction) and Termination; Hearing Date: 09/22/08; Decision Issued: 09/25/08; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 8942; 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 No: 8942

Hearing Date: September 22, 2008  
Decision Issued: September 25, 2008

**PROCEDURAL HISTORY**

The Grievant received a Group III Written Notice on June 18, 2008 for:

On June 05, 2008, you were convicted of a Misdemeanor for being an Accessory to a Shoplifting Crime and received 20 days with 10 days active time. You returned to work on 6/14 and did not report this conviction to your supervisor until 6/16. This is a Group III offense under DOC 135.1 Standards of Conduct: #13) "Criminal convictions for conduct occurring on or off the job of such a nature that to continue the employees in their assigned positions could constitute negligence in regard to the agency's duties..."

Pursuant to the Group III Written Notice, the Grievant was terminated on June 18, 2008. On July 3, 2008, the Grievant timely filed a grievance to challenge the Agency's actions. On September 2, 2008, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On September 22, 2008, a hearing was held at the Agency's location.

**APPEARANCES**

Grievant  
Agency Party  
Agency Representative

**ISSUE**

1. Whether or not the Grievant's conviction as an Accessory to Shoplifting violated DOC 135.1 Standards of Conduct and justified Grievant's termination.

**AUTHORITY OF HEARING OFFICER**

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in Tatum v. VA Dept of Agriculture & Consumer Servs., 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

### **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 Agency provided the Hearing Officer with a notebook containing six (6) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1. The Grievant provided the Hearing Officer with a notebook containing four (4) tabbed sections and a document which was added as a fifth (5<sup>th</sup>) tab and placed in the front of the notebook, and that notebook was accepted in its entirety as Grievant's Exhibit 1.

The basic evidence presented to the Hearing Officer was uncontroverted. The Grievant acknowledged that she had been convicted as an Accessory to a shoplifting charge in Henrico County and, pursuant thereto, served ten (10) days in jail. The Grievant further acknowledged that she did not notify the Agency of this conviction until some time after she was released from jail. Virginia Department of Corrections Operating Procedure 135.1 sets forth the Standards of

Conduct for this Agency. It provides for three (3) levels of offenses and Group III offenses are found at 135.1 (XII).<sup>1</sup> Section 135.1 (XII)(B)(13) and (24) provide as follows:

Group III offenses include:

- (13) Criminal convictions for conduct occurring on or off the job which are plainly related to job performance or are of such a nature that to continue the employees in their assigned positions could constitute negligence in regard to the Agency's duties to the public or to other state employees; and
- (24) Failure to report a criminal conviction to the employee's supervisor within one (1) work day of the conviction.<sup>2</sup>

A first occurrence of a Group III offense normally results in termination. The Grievant does not dispute that she was convicted of a criminal offense in Henrico County and served ten (10) days in jail and she does not dispute that she did not notify her Supervisor within one (1) day of the conviction. Indeed, she acknowledges that she notified her Supervisor several days after the fact.

### **MITIGATION**

*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>3</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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency. The Hearing Officer, after considering the above-referenced examples, finds no basis for mitigation in this matter.

### **DECISION**

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<sup>1</sup> Agency Exhibit 1, Tab 5, Page 9

<sup>2</sup> Agency Exhibit 1, Tab 5, Page 9-10

<sup>3</sup> Va. Code § 2.2-3005

For reasons stated herein, the Hearing Officer finds that the Agency acted properly in terminating the Grievant.

### **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 14<sup>th</sup> Street, 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 Street, Suite 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 your appeal 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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.<sup>4</sup> 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>5</sup>

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<sup>4</sup>An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E.2d 319 (2002).

[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]

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William S. Davidson  
Hearing Officer

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<sup>5</sup>Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.