

Issues: Group III Written Notice (criminal conviction) and Termination; Hearing Date: 02/25/09; Decision Issued: 02/26/09; Agency: DMV; AHO: Carl Wilson Schmidt, Esq.; Case No. 9021; 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: 9021

Hearing Date: February 25, 2009
Decision Issued: February 26, 2009

PROCEDURAL HISTORY

On September 11, 2008, Grievant was issued a Group III Written Notice of disciplinary action with removal for a criminal conviction.

On September 12, 2008, 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 January 5, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 25, 2009, 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 Motor Vehicles employed Grievant as a MCSC Station Manager at one of its Facilities. The purpose of his position was:

Responsible for the planning, management and coordination of operations for a 24 hour permanent weighing facility, including supervision of personnel, budget, maintenance of equipment and properties, training, safety and employee performance relative to implementation of regulations, laws, policies and procedures and overseeing DMV service functions for liquidated damage payments, reinstating suspended drivers and running transcripts.¹

Grievant had general oversight of the Facility at which he worked. He had been employed by the Agency for approximately 12 years prior to his removal effective September 11, 2008. Other than the facts giving rise to this disciplinary action, Grievant's work performance was satisfactory to the Agency. One subordinate described Grievant as one of the best managers she had ever known.

On September 11, 2001, Grievant was convicted in the local General District Court of discharging a weapon in public contrary to Va. Code § 18.2-280. He was sentenced to ten days in jail with that sentence suspended.

¹ Agency Exhibit 4.

On September 3, 2008, Grievant was convicted in the local General District Court of pointing or brandishing a firearm contrary to Va. Code § 18.2-282. This section provides:

§ 18.2-282. Pointing, holding, or brandishing firearm, air or gas operated weapon or object similar in appearance; penalty.

A. It shall be unlawful for any person to point, hold or brandish any firearm or any air or gas operated weapon or any object similar in appearance, whether capable of being fired or not, in such manner as to reasonably induce fear in the mind of another or hold a firearm or any air or gas operated weapon in a public place in such a manner as to reasonably induce fear in the mind of another of being shot or injured. However, this section shall not apply to any person engaged in excusable or justifiable self-defense. Persons violating the provisions of this section shall be guilty of a Class 1 misdemeanor or, if the violation occurs upon any public, private or religious elementary, middle or high school, including buildings and grounds or upon public property within 1,000 feet of such school property, he shall be guilty of a Class 6 felony.

B. Any police officer in the performance of his duty, in making an arrest under the provisions of this section, shall not be civilly liable in damages for injuries or death resulting to the person being arrested if he had reason to believe that the person being arrested was pointing, holding, or brandishing such firearm or air or gas operated weapon, or object that was similar in appearance, with intent to induce fear in the mind of another.

C. For purposes of this section, the word "firearm" means any weapon that will or is designed to or may readily be converted to expel single or multiple projectiles by the action of an explosion of a combustible material. The word "ammunition," as used herein, shall mean a cartridge, pellet, ball, missile or projectile adapted for use in a firearm.

Grievant was also convicted of impersonating a law enforcement officer contrary to Va. Code § 18.2-174. This section provides:

§ 18.2-174. Impersonating officer.

Any person who shall falsely assume or exercise the functions, powers, duties and privileges incident to the office of sheriff, police officer, marshal, or other peace officer, or who shall falsely assume or pretend to be any such officer, shall be deemed guilty of a Class 1 misdemeanor.

Grievant was sentenced to 90 days in jail. His sentence was suspended. Grievant was placed on unsupervised probation for three years.

Following Grievant's conviction, an unidentified employee working with Grievant called a member of the Agency's Human Resource staff and expressed concern about whether it was safe to continue working with Grievant.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."² Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

"[C]riminal 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 position could constitute negligence in regard to agencies duties to the public or other state employees."

Grievant was convicted of illegal conduct occurring off the job. Some of the Agency's duties include establishing regulations governing the use of motor vehicles and enforcing those regulations. The Agency's credibility and reputation is undermined when employees involved in applying regulations having the force of law do not themselves obey the law, especially criminal laws. Pointing or brandishing a firearm and impersonating a law enforcement officer represent extreme behavior. Once a person has done something of that nature, it raises concerns regarding whether that person could repeat the behavior. Grievant worked at a weight station alongside of State troopers. He sometimes wore a uniform with patches.³ The Agency provides a setting where it would be easy for someone to impersonate a law enforcement officer and if an employee did so, it could be highly disruptive to the Agency's operations. The Agency is obligated to provide a safe workplace and consider the concerns of its employees regarding whether they will remain safe while working. When an employee learned of Grievant's convictions, the employee contacted the Agency's human resource staff and expressed concern about working alongside of Grievant because of the additional risk he presented. It was appropriate for the Agency to consider this complaint when determining whether to take disciplinary action.⁴ The Agency has presented sufficient evidence to support its conclusion that permitting Grievant to remain employed may constitute negligence within the context of its duties to the public

² The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

³ The Agency recently changed its uniforms over concerns about them appearing too much like the uniforms of law enforcement officers.

⁴ Grievant presented evidence of his co-workers who were not fearful of him. None of those employees, however, knew he was being disciplined for two criminal convictions.

and to other employees. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice an employee may be removed from employment.

Grievant presented evidence suggesting the judge did not receive an accurate account of the facts surrounding Grievant's actions. For example, he disputes that he had a firearm. He argues he pled no contest in order to avoid having his wife and son testify in court.

It is not the role of the Hearing Officer to overturn, in effect, the decision of a court. Although Grievant's arguments and evidence regarding his innocence are significant, all of them either were or could have been presented to the court. The Agency has the right to rely on the conclusions of the court.

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..."⁵ 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.

Grievant contends the disciplinary action should be mitigated because the Agency has inconsistently disciplined employees. Grievant presented evidence of at least two other employees who were convicted of Class 1 misdemeanors yet they remained employed by the Agency. Grievant's argument fails. The two other employees were convicted of petit larceny. A crime of theft is significantly different from a crime that could lead to physical violence such as pointing or brandishing a firearm. The Agency has not inconsistently disciplined its employees based on the evidence presented.

Grievant contends the disciplinary action should be mitigated because of his good character and excellent work history. There is no doubt that Grievant was a strong performer while working for the Commonwealth. He has many valuable management skills and abilities. In this case, however, the Agency fully considered his work history and length of service. When these factors are considered, the Agency's discipline does not exceed the limits of reasonableness and, thus, there is no basis to mitigate the disciplinary action.

⁵ *Va. Code § 2.2-3005.*

In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

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

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
600 East Main St. STE 301
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.⁶

[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

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.