

Issue: Group I Written Notice (failure to follow policy); Hearing Date: 08/25/09;
Decision Issued: 09/09/09; Agency: DOC; AHO: Sondra K. Alan, Esq.;
Case No. 9141; Outcome: No Relief – Agency Upheld in Full.

DECISION OF HEARING OFFICER

In RE: Case 9141

Hearing Date: August 25, 2009

Decision Issued: September 9, 2009

PROCEDURAL ISSUES

The Grievant filed a request for hearing after he had exhausted a first step (2-13-09), a second step (3-12-09) and a third step (4-24-09) review. The agency qualified the matter for hearing on June 18, 2009. The matter was scheduled for a pre-hearing telephone conference on August 6, 2009 at which time the case was set for August 25, 2009 at 1:00 p.m. at the facility. Grievant was represented pro-se and the Agency was represented by a legal advocate, both of whom were present at the hearing. Testimony was taken in person. Each person was sworn and the matter was completed August 25, 2009.

APPEARANCES

Grievant
Agent
Agent Legal Assistant

ISSUE

Should Grievant's disciplinary action be back dated to the event which caused the discipline, March 2007?

FACTS

Grievant was arrested for a DUI in March of 2007 and later convicted. Grievant did advise a superior of his arrest. Grievant's conviction did not come to the attention of the appropriate Agency party until the fall of 2008. A Group II disciplinary action was issued after the matter was investigated on January 14, 2009.¹ Both Grievant and Agency bear partial responsibility for the matter not

being processed promptly. The Group II action was appropriate for the offense. The Group II disciplinary action was reduced to a Group I at a 3rd step resolution on April 24, 2009.

CONCLUSION OF LAW AND POLICY

The Agency followed the proper actions for keeping with their policies^{2,3,4} Policy 1.05 Alcohol and Other Drugs states very specifically the State's policy on use of alcohol in the work place. Department of Corrections policy regarding DUI offenses also makes clear the nature of the offense and the disciplinary action to be considered.

OPINION

There are several problems with the management of this disciplinary action both on the part of Grievant and the Agency. However, the Hearing Officer was presented with evidence for, and specifically asked to address, only one (1) issue.

Had Grievant been reprimanded for his conviction by the Agency near the time of the offense, he would have received a Group II write-up with a three (3) year active life of the offense in his record or approximately from April 2007 to March of 2010. Instead, the Group II, which was later reduced to a Group I was

1 Agency Exhibit Form 129-01-004 Revises 7-07

2. Agency Exhibit Policy 1.05 Alcohol and Other Drugs, updated 11-29-06

3 Agency Exhibit 4 Operating Procedure 135.1 Group II (7)

4 Agency Exhibit 2 DOC Memorandum HR-2006-3

instituted after the Agency head was made aware of the offense and issued in January of 2009, the active life being from January 2009 to January 2011. This is only an eight (8) month difference from April 2010 to January of 2011. Grievant admitted in testimony he knew he should have been reprimanded. Grievant did report his DUI to his superior. Somewhere along the line of command, the offense, was neglected and not acted upon. The fact that the reprimand was issued later rather than sooner was totally within Grievant's ability to control. If he desired the discipline time to run sooner, he could have made the request for a review. Instead, he waited to be "found out" and then wanted the disciplinary period to be back dated. With this logic, if he had remained silent for four (4) years, then been reprimanded with a Group II, he could have escaped any active time whatsoever. The discipline could have been erased before it started. This is simply not a logical conclusion.

DECISION

The Group I discipline by the Agency being on Grievant's record for two (2) years from the date it was issued is appropriate.

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 was 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. Address your request to:

Director
Department of Human Resource Management
101 N. 14th St, 12th Floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E. 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. 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.¹ 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.² [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.

Judicial Review of Final Hearing Decision

Within thirty (30) 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.

Sondra K. Alan, Hearing Officer

¹ 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).

² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.