

Issue: Group III Written Notice with termination (conduct unbecoming an employee of the Commonwealth); Hearing Date: 01/20/10; Decision Issued: 02/07/10; Agency: DOC; AHO: Lorin A. Costanzo, Esq.; Case No. 9252; Outcome: No Relief – Agency Upheld.

**Commonwealth of Virginia
Department of Corrections**

DECISION OF HEARING OFFICER

In the matter of Case Number 9252

Hearing Date: January 20, 2010
Decision Issued: February 7, 2010

PROCEDURAL HISTORY

Grievant received a Group III Written Notice, with termination, issued August 20, 2009 for "Conduct unbecoming an employee of the Commonwealth: As a result of an investigation by the United States Postal Service [*Grievant*] admitted to signing and cashing a money order that she knew was taken illegally from the United States Post Office.¹

This matter preceded through the resolution steps and when agreement was not reached Grievant requested qualification of her grievance and on December 8, 2009 this matter was qualified for hearing. A hearing officer was appointed effective January 4, 2010 and a grievance hearing was held on January 20, 2010.

APPEARANCES

Grievant
Agency Representative
Agency Party Designee (who was also an Agency witness)
Agency Witnesses: Human Resources Officer
Special Agent

ISSUES

Were the Grievant's actions such as to warrant disciplinary actions under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the

¹ Agency Exhibit Tab 1, Written Notice.

evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.²

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Grievant was employed by the Virginia Department of Corrections ("DOC") as a Correctional Officer. Her duties involve contact with and supervision of incarcerated individuals.

Grievant admitted to signing and depositing a money order in the amount of \$450.00 which was taken from a US Post Office by an individual who was a part-time postal employee. She further admitted that she anticipated it would be paid for the next day.³

On August 12, 2009 a joint interview of Grievant was conducted by an investigator of the United States Postal Service and by an Agency investigator (an investigator of the Office of the Inspector General). In the August 12, 2009 interview Grievant admitted to signing a money order she was aware was taken from the United States Post Office. Grievant signed a statement which indicated:

On May 15, 2009 I had a talk with ____ (*identity provided in statement but redacted herein*) about paying rent. She said she could get a money order and we could pay it back on the 16th when I got paid. The money order number is ____ (*number provided in statement but redacted herein*) and the amount was \$450.00. I deposit it into my account and paid the rent. I thought she had paid it back the next day, on the 16th. She brought home the blank money order for \$450.00 that I signed and deposited. I did question her about doing that, & getting in trouble."⁴

On August 17, 2009 Grievant met with Warden and other individuals. Grievant was read her August 12th written statement at the meeting and admitted that her statement was correct.⁵

On August 20, 2009, Grievant was issued a Group III Written Notice with termination. When the Written Notice was issued, Grievant was the subject of an

² Department of Employment Dispute Resolution, Grievance Procedure Manual, ("GPM") Section 5.8 and 9.

³ Testimony and Agency Exhibit Tab 2.

⁴ Agency Exhibit Tab 2.

⁵ Agency Exhibit Tab 3.

investigation by the U.S. Postal Service. She was not indicted and was not convicted of a crime.⁶

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code Section 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth of Virginia. This legislation includes provisions for a grievance procedure and 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 pursue legitimate grievances. Code Section 2.2-3000(A) sets forth the Virginia grievance procedure and provides, in 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 employee disputes which may arise between state agencies and those employees who have access to the procedure under Section 2.2-3001."

The Department of Corrections ("DOC"), pursuant to Va. Code §53.1-10, has promulgated its own *Standards of Conduct* patterned on the state Standards, but tailored to the unique needs of the Department of Corrections. Section I. of the *Standards of Conduct* states:

"This operating procedure sets forth the Commonwealth's Standards of Conduct and disciplinary process that the Department of Corrections (DOC) must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when the conduct impacts an employee's ability to do his or her job, or influences the agency's overall effectiveness."

Section IV. C. of the *Standards of Conduct* provides, "The list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense."

Section XII of the *Standards of Conduct* addresses Group III offenses. These offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.

VDOC Operating Procedure, *Standards of Ethics and Conflict of Interest*,

⁶ Testimony.

Effective Date: April 1, 2008, Number: 101.3 provides at Section IV. A., "Employees of the Department shall conduct themselves by the highest standards of ethics so that their actions will not be construed as a conflict of interest or conduct unbecoming an employee of the Commonwealth."⁷

Grievant signed the Correctional Center's Employee *Orientation Checklist* dated: 9/25/07 thereby indicating, "My signature below indicates all information in Part A and Part B has been discussed with me. I have completed, fully Understand, and signed all forms in Part A. and I have received a copy of and fully understand all information in Part. B." Included were Employee Standards of Conduct, Policy No. 135.1, Standards of Ethics and Conflict of Interest, and Department Procedure 57 (superseded by Policy 101.3 in April of 2008).⁸

DOC Human Resources Memorandum HR-2006-3 Subject: Guidance on Criminal Convictions Including DUI and Other Criminal Charges (Effective Date: October 24, 2006) provides that:

"Additionally, employees who are criminally charged may be administratively charged based on the same conduct (if the Department has the evidence to prove it) and the administrative disciplinary action can move forward rather than waiting for the criminal charges to be processed."

Grievant contends that she should be returned to work as she was not charged with a crime, was never a suspect in any crime, and that her termination was for something not related to work. Grievant stated in her attachments to Grievance Form A that, "They fired me for getting a money order on one day and paying it back the next day." She further contended that she was never suspect in any crime.⁹

When Grievant was issued the Written Notice she was not under indictment and had not been convicted of a crime. The evidence did indicate that she was being investigated by the Postal Service and had been interviewed with both Agency and Postal Service investigators present. Furthermore, the evidence indicated that she had given both written and oral statements to the investigators making certain admissions (discussed herein) as to her conduct and actions.

On August 12, 2009, in the presence of both Agency and Postal Service investigators, Grievant admitted to signing and depositing a money order that was taken from the a post office. She provided in her written statement that the money order was a blank money order for \$450.00 and she gave the money order number. In the statement, which she wrote and signed, she stated that:

On May 15, 2009 I had a talk with ____ (*individual's relationship*)

⁷ Agency Exhibit Tab 6.

⁸ Agency Exhibit Tab 7.

⁹ Agency Exhibit Tab 1.

provided in statement is redacted herein) about paying rent. She said she could get a money order and we could pay it back on the 16th when I got paid. The money order number is ____ (*number provided in statement but redacted herein*) and the amount was \$450.00. I deposit it into my account and paid the rent. I thought she had paid it back the next day, on the 16th. She brought home the blank money order for \$450.00 that I signed and deposited. I did question her about doing that, & getting in trouble. She also on May 26th had put my name & _____'s (*individual identified in statement but redacted herein*) name on another money order for \$450.00 that I was not aware of. He also showed me another money order for \$200.00 that I really don't remember about" ¹⁰

On August 17, 2009 Grievant met with Warden and other individuals. Grievant was read her August 12th written statement at the meeting and admitted that her statement was correct. Evidence indicated that at this meeting Grievant admitted:

- She knew it was wrong but that money was very tight and she did not want to be late on paying the rent because she would have to pay a late charge.
- She knew she could get into trouble, but had no idea that she could be charged with a felony or lose her job
- She signed one U.S. Postal check/money order and had no other knowledge of two others.
- She had no idea that she was jeopardizing her job by signing that check. She just knew it was wrong, but didn't realize how wrong it was. ¹¹

As discussed above, the *Standards of Conduct* allows for matters outside the workplace to be addressed that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency. These matters may be considered a violation of the *Standards of Conduct* and may result in disciplinary action being taken.

Section XVII E. of the *Standards of Conduct* provides that, "Regardless of the status of any criminal investigation or process, the Department may determine at any time to institute disciplinary charges against the employee under the Standards of Conduct, up to and including termination, based upon the facts or evidence of conduct that prompted the criminal investigation or process."

The Written Notice does not allege a criminal conviction, indictment, or a formal

¹⁰ Agency Exhibit Tab 2.

¹¹ Agency Exhibit Tab 3.

charge. While criminal conviction may be a basis for a Written Notice it is not the only basis for a Written Notice. Agency gave consideration to the evidence of conduct that prompted the criminal investigation or process and instituted disciplinary charges under the Standards of Conduct. Her admissions and admitted actions were considered.

The Written Notice was issued for conduct unbecoming an employee of the Commonwealth and specifically referenced Grievant's admission to signing and cashing a money order that she knew was taken illegally from the United States Post Office. The Written Notice further provided that, "This type of behavior is completely unacceptable for a law enforcement officer, a Department of Corrections employee, and an employee of the Commonwealth of Virginia."

The *Standards of Ethics and Conflict of Interest* provides at Section IV. A. that, "Employees of the Department shall conduct themselves by the highest standards of ethics so that their actions will not be construed as a conflict of interest or conduct unbecoming an employee of the Commonwealth." Section IV. B. of the *Standards of Ethics and Conflict of Interest* further indicates that as to prohibited conduct, "The rules listed below are intended to be illustrative but not all-inclusive, of unacceptable conduct."¹²

Grievant provided oral and written admissions which are discussed above. She verified the correctness of her written and signed statement of 8/12/09. On 8/17/09 management read the 8/12/09 written statement to her and she admitted it was correct. Her statements admitted she discussed with an individual getting a money order and paying it back on the next day. She admitted that she and this individual discussed if they could be getting into trouble. Grievant stated she knew she could get into trouble, but she had no idea that she could be charged with a felony or lose her job. She admitted to signing and depositing into her account a money order that she knew was taken from the United States Postal Service. She described the money order as being a blank money order for \$450.00 when it was brought to her. Her statement identified the money order by amount and by its money order number.

Consideration was given to nature of the unique duties and responsibilities of Agency and of Grievant as a Correctional Officer within Agency. This matter involves a Correctional Officer who admitted (orally and in writing) to conduct and actions which the Agency considered, and indicated in the Written Notice, as being "Completely unacceptable for a law enforcement officer, a Department of Corrections employee, and an employee of the Commonwealth of Virginia". Regional Director stated at the second resolution response that "I feel this behavior cannot be tolerated as it does not exemplify the Department's Values or Code of Ethics."¹³

Upon reviewing the facts de novo (afresh and independently, as if no determinations had yet been made) it is determined that (i) Grievant engaged in the behavior described in the Written Notice; (ii) The behavior constituted misconduct; (iii)

¹² Agency Exhibit Tab 6.

¹³ Agency Exhibit Tab 1.

the Agency's discipline was consistent with law and policy; and (iv) the Agency's discipline did not exceed the limits of reasonableness.

The normal disciplinary action for a Group III offense is a Written Notice and removal from state employment. Policy provides for reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) and employees long service or otherwise satisfactory work performance. The agency's decision was within the limits of reasonableness. Under the *Rules for Conducting Grievance Hearings*, Section VI, B, 1, 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.

For the reasons stated above, Agency has proven, by a preponderance of the evidence, that the disciplinary action of issuing a Group III Written Notice and disciplinary action of termination was warranted and appropriate under the circumstances.

DECISION

For the reasons stated above, the Agency's issuance of a Group III Written Notice with disciplinary action of termination is hereby **UPHELD**.

APPEAL RIGHTS

As Sections 7.1 through 7.3 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.

You may file an Administrative review request within **15 calendar days** from the date the decision was issued.

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 are 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: Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219.

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: Director, Department of Employment Dispute Resolution, Main Street Centre, 600 East Main, Suite 301, Richmond, VA 23219.

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 day; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **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 calendar days of a final hearing 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.

Lorin A. Costanzo, Hearing Officer

Copies: Grievant
Agency
EDR