

Issue: Group III Written Notice with termination (unethical conduct); Hearing Date: 02/02/10; Decision Issued: 02/03/10; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 9268; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9268

Hearing Date: February 2, 2010
Decision Issued: February 3, 2010

PROCEDURAL HISTORY

On September 18, 2009, Grievant was issued a Group III Written Notice of disciplinary action with removal for being found guilty of public intoxication.¹

On September 28, 2009, 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 she requested a hearing. On January 19, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 2, 2010, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

¹ The Written Notice incorrectly states that Grievant was disciplined for failing to report the conviction to the Agency.

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 Juvenile Justice employed Grievant as a Juvenile Corrections Officer at one of its Facilities until her removal effective September 18, 2009.

On September 9, 2009, Grievant pled guilty in General District Court to a misdemeanor charge of public intoxication. She informed her supervisor that she had been charged with public intoxication.

Grievant worked with wards residing at the Facility. Her work performance was satisfactory to the Agency prior to the conviction. One of her responsibilities was to serve as a role model for the wards she supervised.

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

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

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.”

DHRM Policy 1.60 states that Group III offenses include offenses “that, for example, endanger others in the workplace, **constitute illegal or unethical conduct**; neglect of duty; disruption of the workplace; or other serious violations of policies, procedures, or laws.” (Emphasis added). Attachment A to DHRM Policy 1.60 lists Group III offenses as including “criminal convictions for illegal conduct occurring on or off the job that clearly are related to job performance”.

Institutional Operating Procedure 1106 sets forth the Agency’s Staff Code of Conduct/Code of Ethics. Section 1106-4.4 describes Unprofessional Conduct to include:

Being convicted of a criminal offense, pleading guilty to a criminal offense with or without conviction, failure to report a guilty plea or conviction or failure to report an arrest or indictment for a criminal offense.

Grievant pled guilty to public intoxication. She was convicted of a criminal offense occurring off the job. Because Grievant’s position required her to serve as a role model to juvenile offenders, the criminal conviction undermined her ability to perform her job. The Agency has presented sufficient information to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, the Agency may remove Grievant from employment.

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...”³ 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 based on the inconsistent application of disciplinary action. Grievant presented evidence of a Lieutenant who was convicted in January 2005 of driving under the influence of alcohol

³ *Va. Code § 2.2-3005.*

following an automobile accident. A Supervisor was convicted of a misdemeanor for passing bad checks within the past year. He did not receive any disciplinary action. An Officer was convicted of driving under the influence approximately 2 1/2 years ago but did not receive disciplinary action.

The Agency presented evidence of an Officer who was convicted of reckless driving while operating his own vehicle and was removed from employment. He was removed from employment within the past year and a half.

Disciplinary action is supposed to be issued consistently among employees after considering the unique aspects of each case and each employee. In this grievance, evidence was presented suggesting Grievant may not have been treated consistently with other employees. Three employees were convicted of crimes but not removed from employment. One other employee was convicted of a crime and removed from employment. Of the four employees convicted of crimes, two of those employees were convicted of driving under the influence of alcohol. These two employees are clearly similarly situated to Grievant who was convicted of an alcohol related offense. The evidence also suggests the facts of Grievant's case may not be similar to the facts of the other cases. Writing bad checks and reckless driving are not similar to public intoxication.

Whether the Agency's actions are inconsistent must be measured within the context of the policies in place at the time of decision-making. DHRM Policy 1.60 was revised in April 2008. Prior to the change of the Standards of Conduct in April 2008, it is not clear that an employee could be disciplined for crimes occurring outside of the workplace. In other words, the Lieutenant and Officer who were convicted of DUI may not have been subject to disciplinary action under the prior policy.⁴ After April 2008, one employee was convicted of writing bad checks but not disciplined. Another employee was convicted of reckless driving and was removed from employment. The Agency argued that its practice was to distinguish between employees based on the public nature of the action. If this analysis is applied to the two cases occurring after April 2008, the Agency can distinguish between writing bad checks which may affect only those involved in the crime as opposed to reckless driving which occurs on the public highways and may be witnessed by many people who observed the employee speeding. Regardless of whether this analysis is sound, it appears that Agency managers believe such a distinction exists with respect to the public nature of the crimes committed by employees.

To determine whether an Agency has engaged in the inconsistent application of disciplinary action such that mitigating circumstances exists, the question is whether the Agency intended to single out a particular employee for discipline when compared to similarly situated employees. In this case, the Hearing Officer cannot conclude that the

⁴ No evidence was presented to show that the Agency had its own policy in place prior to April 2008 that would have supported the taking of disciplinary action for conviction of crimes occurring outside the workplace.

Agency singled out Grievant for discipline. The Agency's perception of the criminal offenses shows it did not view Grievant and the employee who was convicted of writing bad checks to be similarly situated. Thus, there does not appear to be any specific intent to discipline Grievant more harshly than other employees. Based on the evidence presented, the Hearing Officer cannot conclude that the Agency inconsistently applied disciplinary action in such a manner as to create a mitigating circumstance.

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

Grievant argued that the Agency had agreed not to take disciplinary action against her until another charge against her for assaulting a police officer was resolved. At the time of the hearing, that charge was pending in Circuit Court. Grievant's argument fails. No policy prohibits the Agency from issuing disciplinary action once it realizes the existence of a basis to take 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.⁵

[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

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