

Issue: Group II Written Notice with Suspension (Criminal Conviction); Hearing Date: 06/03/10; Decision Issued: 06/04/10; AHO: Carl Wilson Schmidt, Esq.; Case No. 9324; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9324

Hearing Date: June 3, 2010
Decision Issued: June 4, 2010

PROCEDURAL HISTORY

On February 2, 2010, Grievant was issued a Group III Written Notice of disciplinary action with demotion for being convicted of reckless driving.¹

On February 22, 2010, 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 May 5, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 3, 2010, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?

¹ The Written Notice does not specify the extent to which Grievant received a disciplinary pay reduction.

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 Corrections employed Grievant as a Sergeant at one of its Facilities until his demotion to a Corrections Officer. Some of Grievant's duties included the operation of motor vehicles for the Agency. With the exception of disciplinary action, Grievant's work performance for the Agency was exceptional. He had consistently high rated performance evaluations. Grievant had prior active disciplinary action consisting of a Group III Written Notice issued on June 18, 2009 for unauthorized use or misuse of state property or records and computer/Internet misuse.

On December 10, 2009, Grievant was stopped while operating a motor vehicle with a minor passenger and charged with violation of Virginia Code Section 18.2-266, driving a motor vehicle while intoxicated. Grievant had consumed alcohol prior to being stopped by law enforcement officers.

On January 8, 2010, Grievant entered into a plea agreement amending the charge against him to "Reckless Driving". Grievant's driver's license was suspended for a period of six months and he was issued a restricted license. He was sentenced to 12 months probation and 50 hours of community service. Grievant was fined \$500 with \$250 suspended.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.”² Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.”³ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁴

Virginia Department of Corrections Operating Procedure 135.1(IV)(C), *Standards of Conduct*, states, “[t]he 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.”

The Agency contends that Grievant should receive a Group III Written Notice of disciplinary action for conviction of reckless driving. Although conviction of reckless driving is not specifically mentioned in Attachment 2 of the Agency's Standards of Conduct, there is sufficient evidence to support the Agency's opinion. The Agency is in the business of enforcing the punishment given to individuals convicted by courts of committing crimes. An employee who is convicted of a crime undermines the Agency's moral authority to enforce punishment against those who have engaged in unlawful behavior. The Agency's opinion is consistent with its Standards of Conduct which defines Group III offenses to include “criminal 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 positions could constitute negligence in regard to agencies' duties to the public or to other state employees.” The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice of disciplinary action. The question becomes whether mitigating circumstances exist that would justify reduction of the disciplinary action.

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

² Virginia Department of Corrections Operating Procedure 135.1(X)(A).

³ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁴ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁵ *Va. Code § 2.2-3005*.

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 that the disciplinary action should be mitigated. There is sufficient evidence to support some mitigation of the disciplinary action based on the Agency's treatment of Sergeant J who also works at the Facility. Sergeant J was convicted of driving under the influence of alcohol. Sergeant J had a prior active Group II Written Notice of disciplinary action. On February 1, 2010, the Agency issued a Group II Written Notice of disciplinary action to Sergeant J but did not demote him. The Agency's primary witness testified that it was the Agency's practice at that Facility to issue a Group II Written Notice to an employee who received his or her first conviction for driving under the influence. Since Sergeant J had received his first conviction for driving under the influence, the Agency chose to issue to him a Group II Written Notice.

Although Grievant's actions and the punishment he received were consistent with driving under the influence, his criminal conviction was reduced to reckless driving. A conviction for reckless driving would not be more serious or significant than a criminal conviction for driving under the influence. Since Grievant had received his first conviction, he should have been issued nothing higher than a Group II Written Notice in order to be consistent with the Agency's internal practice. Accordingly, the Group III Written Notice must be reduced to a Group II Written Notice.

Grievant argues that he should not have been demoted because Sergeant J was not demoted. A Group II Written Notice standing by itself does not form a basis to demote an employee. When a Group II Written Notice is considered with prior active disciplinary action, however, a basis to demote an employee may exist. Sergeant J could have been demoted based on the accumulation of disciplinary action because he had a prior active Group II Written Notice. Grievant had a prior active Group III Written Notice. The Agency's decision to demote Grievant but not Sergeant J is not unreasonable. When prior active disciplinary action is considered, Grievant and Sergeant J are different. Because Grievant and Sergeant J are different in terms of their prior disciplinary action, the Agency had discretion to treat them differently with respect to demotion. Accordingly, the Agency's decision to demote Grievant must be upheld.⁶

⁶ Grievant argued that prejudice was involved in the issuance of his disciplinary action. No credible evidence was presented to support this allegation. The Agency did not take disciplinary action against Grievant based on "prejudice."

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice. Grievant's demotion based on the accumulation of disciplinary action 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.⁷

[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

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.