

Issue: Group III Written Notice with Termination (violation of drug/alcohol policy);
Hearing Date: 07/23/10; Decision Issued: 08/03/10; Agency: DOC; AHO:
Thomas J. McCarthy, Jr., Esq.; Case No. 9363; Outcome: Full Relief;
Administrative Review: AHO Reconsideration Request received 08/16/10;
Reconsideration Decision issued 08/24/10; Outcome: Original decision
affirmed; Administrative Review: DHRM Ruling Request received 08/16/10;
Outcome pending.

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re: Case Number 9363

Hearing Date: July 23, 2010
Decision Issued: August 3, 2010

APPEARANCES

Grievant
Agency Representative
1 Witnesses for Agency
0 Witnesses for Grievant

ISSUE

“Was the Group III Written Notice with termination in violation of Commonwealth of Virginia Policy 1.05 and a plea of guilty on a Class 6 felony issued to Grievant proper?”

FINDINGS OF FACTS

1. Grievant is a fifteen (15) year employee of the Department without problems during that time.
2. Grievant has been promoted to the Corrections Officer grade of Lieutenant.
3. Grievant has had no other criminal charges previously or pending.
4. Grievant entered into a plea agreement, admitting that he was guilty of “unlawfully and feloniously attempting to obtain a controlled substance by fraud, in violation of Section 18.2-258.1 of the *Code of Virginia*, which is a Class 6 felony.
5. The Circuit Court Judge, based on the Grievant’s clean record, has taken the Grievant’s case under advisement since Grievant is a first offender with findings as required by Sections 18.2-251 and 18.2-258 of the *Code of Virginia*.

6. The Circuit Court trying the Grievant has not found the Grievant guilty of the charge against him, and unless Grievant commits another crime before March 21, 2011 at 9:00 a.m., in all probability there will be no finding of guilt for this offense.

7. The Warden who issued the Group III with termination on April 2, 2010, explained in the Second Resolution Step letter in this matter that the Group III Written Notice, "for a violation of Department of Human Resource Management Policy 1.05, Alcohol and Other Drugs, was for a finding of guilt on a Class 6 Felony.

8. The charge precipitating this Grievance is still under advisement at the Circuit Court level and no finding of guilt has been made or rendered.

APPLICABLE LAW OR POLICY AND OPINION

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment. [Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir. 2001) (citing Munday v. Waste Mgmt. of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997))].

The grievance statutes and procedures reserve to management the exclusive right to manage the affairs and operations of state government. [See Virginia Code Section 2.2-3004(B)].

Code of Virginia Sections 18.2-251 and 18.2-258 permit a Circuit Judge in the case of a defendant with a clean record to take the matter under advisement for a year and dismiss the charge if the defendant is not charged with a crime during the one year period.

DECISION

This Hearings Officer will not attempt to contravene a Circuit Judge's ruling. While the Warden, as explained by the Regional Director, had reason to believe the admission of guilt by the Grievant was tantamount to a finding of guilt, no finding of guilt has been made and unless other factors intervene, will not be until March 10, 2011, at 9:00 a.m.

I find the Group III Written Notice with Termination based on a non-existing finding of guilt premature and therefore improper. Based on the language of DHRM Policy Number 1.05, a finding of guilty "(entering a plea of guilt ...)", such a finding has not been made even though a plea has been submitted and this case is under advisement at the Circuit Court level.

APPEAL RIGHTS

As 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.

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 is 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 the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia, 23219 or faxed to (804) 371-7401.
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 the EDR Director, Main Street Centre, 600 East Main, Suite 301, Richmond, Virginia, 23219 or faxes to (804) 786-0111.

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 days; 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 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.

Thomas J. McCarthy, Jr.
Hearing Officer

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
RECONSIDERATION OF DECISION OF HEARING OFFICER

In re: Case Number 9363

Hearing Date: July 23, 2010
Decision Issued: August 3, 2010
Reconsideration Date: August 24, 2010

The Department has requested this Hearing Officer to reconsider and change the decision in the above matter.

I have reviewed the evidence and reconsidered the decision in this grievance.

It appears that the Department wants to adopt those actions that are in its favor, i.e., the plea of guilty to obtain the termination under DHRM policy, while it ignores the full point and import of the *Code of Virginia*, Section 18.2-251, which allows the Circuit Court Judge to take this matter under advisement for a year and then, upon fulfillment of the terms and conditions imposed, discharge the defendant (the Grievant in this case) and dismiss the matter without adjudication of guilt.

Code of Virginia, Section 18.2-251, goes on to say, "Discharge and dismissal under this [code] section shall be without adjudication of guilt and is a conviction only for the purposes of applying this section in subsequent proceedings."

I still maintain that the matter will not be over until the year runs and the Judge makes the final ruling in the matter. The Circuit Court is in control of the matter and I will not rule in contravention of the Judge's ruling. The previous decision for the above reasons, after reconsideration, stands.

Thomas J. McCarthy, Jr., Esquire
Hearing Officer