Issue: Group III with Termination (failure to report incarceration); Hearing Date: 07/23/10; Decision Issued: 08/16/10; Agency: DOC; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9366; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 08/30/10; Outcome pending.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9366

Hearing Date: July 23, 2010
Decision Issued: August 16, 2010

PROCEDURAL HISTORY

On March 9, 2010, Grievant was issued a Group III Written Notice of disciplinary action for failure to report an incarceration related to a prior conviction and sentencing for driving while intoxicated (DWI).

Grievant timely filed a grievance to challenge the Agency's action. The outcome of the resolution steps was not satisfactory to the Grievant and se requested a hearing. On June 28, 2010, the Department of Employment Dispute Resolution (EDR) appointed the Hearing Officer. A pre-hearing conference was held by telephone on July 1, 2010. The hearing was scheduled at the first date available between the parties and the hearing officer, Friday, July 23, 2010, on which date the grievance hearing was held, at the Agency's regional facility.

The Agency and Grievant submitted documents for exhibits that were, without objection, admitted into the grievance record, and will be referred to as Agency's or Grievant's Exhibits. All evidence presented has been carefully considered by the hearing officer. During the hearing, the Agency submitted additional documents identified as Agency's Exh. 7 and 8. The Grievant was granted one week post-hearing to submit clarifying information regarding the meaning of the exhibits; the Agency will be allowed an additional week to submit information in rebuttal. For this reason, good cause was shown to extend the timeline for completing the grievance hearing and decision. On July 29, 2010, the Grievant submitted additional explanation from his DWI attorney. Nothing further was received by the Agency and the record closed on August 16, 2010.

APPEARANCES

Grievant
Counsel for Grievant
Representative/Advocate for Agency
Witnesses

ISSUES

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?

The Grievant requests rescission or reduction of the Group III Written Notice, reinstatement to his position, with back pay, and attorney's fees.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act 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 to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent 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 employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency's Operating Procedure No. 135.1, Standards of Conduct, defines Group III offenses to include types of act and behavior of such a serious nature that a first occurrence normally should warrant removal. Agency Exh. 6. One such example stated in the policy is

> violation of DOC Operating Procedure 040.1, *Litigation (to be issued-see current Department Procedure 5-45 Receipt of Writs, Summons, Subpoenas and Criminal Convictions and Department Procedure and Department Procedure 1-5 Tort Claims, Potential Litigation: Notice to the Office of Attorney General).* (considered a *Group III* offense depending upon the nature of the violation;

The Agency's Operating Procedure No. 040.1, Litigation, states:

> I. PURPOSE
> This operating procedure establishes actions to be taken by employees and supervisors when an event occurs tht could result in liability to the Department; or when a writ, summons, subpoena, criminal charge or criminal conviction is received by an agent of the Department.
>
> IV. Procedures
> A. Notifications
> 1. Employees receiving a judicial writ, summons, or subpoena shall notify their organizational unit head immediately, if received during normal working hours, as to the exact nature of the suit, writ, summons or subpoena. If received during non-working hours, employees shall notify their organizational unit head the next day. The organizational unit head shall notify the next management level (Regional Director or Deputy Director) and the Attorney General's Office as appropriate.

Among the policy definitions, "subpoena" is defined as a "written order issued by a judicial officer requiring a specified person to appear in a designated court as a witness or to bring material to the court." "Writ" is defined as an "order issued by a court for the purpose of compelling a person to do or to stop doing something mentioned therein, such as an order of protection." The policy shows it became effective November 15, 2009, and supercedes department procedure 5-45. Agency Exh. 4. Department procedure 5-45 was not produced for the grievance record.

The Offense

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

The Agency employed Grievant as a welding/sheet metal supervisor, with one active Group III Written Notice. The Grievant has been a valued employed with the Agency for 21

years. The Agency's witnesses testified that the Grievant was a talented, valuable employee for the Agency.

In 2007, The Grievant was convicted of a 2006 offense of driving while intoxicated (DWI). The Grievant was sentenced to jail for 30 days, with 25 suspended. The Agency was aware of the conviction and would not allow the Grievant to use annual leave to serve his sentence. As long as he served on the weekends while scheduled to be off from work, the Agency raised no concern. The Grievant served 5 days on weekends. The Agency took no special procedures with respect to the Grievant's sentence. In addition to the suspended jail time, the convicting court placed the Grievant on probation and required him to complete the alcohol safety action program (VASAP).

In 2009, VASAP subjected the Grievant to a urinalysis that showed alcohol. Because of this apparent violation of the VASAP program, the Grievant was returned to the convicting court which ordered him to serve another 10 days in jail. The Grievant was allowed by the court to satisfy that sentence with another 5 days served on the weekends in December 2009. The Grievant did not specifically advise the Agency of the 2009 jail time.

The Agency witnesses testified to the security basis and rationale for requiring Agency employees to report any incarceration. According to Agency witnesses, by mixing with a population of offenders (some of whom are coming from or headed to the Agency's facilities), the Grievant could leak (even unwittingly) information about the Agency's security procedures. The Grievant was knowledgeable about the Agency's tool procedures, key procedures, and overall metal fabricating systems, including the fencing. The Agency's witnesses testified that the Agency must be aware of these incarceration situations to protect the security of the Agency's facilities. The Agency's rationale for reporting such circumstances is sound; however, the Agency did not establish that any specific procedures or protections would have been implemented for the Grievant's weekend jail time.

According the Grievant's DWI attorney (through post-hearing submission), the original conviction occurred in February 2007, and the Grievant was sentenced to 30 days in jail with 25 suspended, among other conditions. A condition was attending VASAP. In October 2007, VASAP filed a noncompliance report with the convicting court alleging that the Grievant failed to attend a reinstatement program and failed to attend a rescheduled reinstatement program. Based on that report, the convicting court issued a Show Cause order. At the show cause hearing, the Grievant testified the failures to attend the meetings were due to certain work conflicts and a death in his family. The court took the matter under advisement and reinstated the Grievant to the VASAP.

Further, according to the DWI attorney, in August 2008, VASAP filed a second noncompliance report with the court alleging the Grievant had tested positive for alcohol at an intake interview and based on that report the court issued a second Show Cause. The evidence as the show cause hearing was that the blood-alcohol content was minimal and the court again took the matter under advisement and reinstated the Grievant into VASAP.

Thereafter, the Grievant entered VASAP and concluded treatment and all class requirements. However, the Grievant was under the mistaken belief that when he completed all phases of the program he was no longer under the requirement not to consume alcohol and he tested positive for alcohol at his VASAP exit interview. In December 2009, the court imposed 10 days of the previously suspended sentence based upon the positive alcohol screen at the Grievant's exit interview.

The Grievant was allowed by the court to satisfy that sentence with another 5 days served on the weekends in December 2009. The Grievant did not specifically advise the Agency of the 2009 jail time.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

> While the hearing officer is not a 'super personnel officer' and shall give appropriate deference to actions in Agency management that are consistent with law and policy... 'the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action.'

As referenced above, a violation of Operating Procedure No. 040.1 falls squarely within the Group III category of offenses. The Agency, however, has the burden of proving the Grievant's conduct constitutes a violation of applicable policy. I find that a Show Cause order that results in jail time constitutes a triggering event under Operating Procedure No. 040.1. The policy addresses judicial writ, summons, or subpoena, and I find that a Show Cause order falls within those categories.

The Grievant testified that he believed the Show Cause and imposition of additional days in jail that were originally suspended were part of the original sentencing in 2007 for which he had notified the Agency. The Agency took no special measures when he was first incarcerated in 2007, as long as his time served did not interfere with his job. The Grievant testified that he considered the whole thing to be one sentence. Based on his manner, tone, and demeanor, I find the Grievant to be credible. Additionally, the Grievant, by counsel, argues that the Written Notice did not sufficiently put the Grievant on notice of the policy violation. This is a due process issue, but it is also wound up in a mitigating factor of the Grievant's notice of the policy.

The operable policy was effective November 15, 2009. The predecessor policy was not submitted by the Agency, so that is not before the hearing officer. Given that the Operating

Procedure No. 040.1 became effective November 15, 2009, and since there was no evidence produced that the Grievant was made aware of this policy by the time he served his weekend sentence in December 2009, I find failure of notice to be a mitigating factor. I also find reasonable the Grievant's belief that he had already satisfied any policy requirement to notify the Agency when he did so after his 2007 conviction. The Grievant's understanding shows, further, that the Agency's interpretation of the policy was not communicated to the Grievant. Finally, the Agency has not shown that it would have done anything differently for the Grievant's December 2009 weekend jail sentence than it did for his 2007 weekend jail sentence.

In order to determine whether the agency's discipline has exceeded the tolerable limits of reasonableness, the hearing officer must examine all relevant factors. The *Rules* provide a non-exclusive list of factors for consideration by the hearing officer, notably:

> • Lack of Notice: The employee did not have notice of the rule, how the agency interprets the rule, and/or the possible consequences of not complying with it. However, an employee may be presumed to have notice of written rules if those rules had been distributed or made available to the employee. Proper notice of the rule and/or its interpretation by the agency may also be found when the rule and/or interpretation have been communicated by word of mouth or by past practice. Notice may not be required when the misconduct is so severe, or is contrary to applicable professional standards, such that a reasonable employee should know that such behavior would not be acceptable

If, after weighing all relevant factors, the hearing officer determines that the agency's action exceeded the bounds of reasonableness, the hearing officer may mitigate the disciplinary action. I find that the Grievant did not have sufficient notice of the Agency's procedure that was effective November 15, 2009. Further, I find the Grievant did not have sufficient notice of the Agency's interpretation of the policy to include this specific circumstance of the imposition of previously suspended sentence of which the Agency was aware. Because of the mitigating factors, I conclude that the Group III Written Notice is excessive and should be reduced to a Group I Written Notice.

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 **reduced** to a Group I Written Notice. The termination exceeds the permissible discipline for a Group I Written Notice, thus, the Agency is ordered to reinstate Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue. Grievant is further entitled to seek a **reasonable attorney's fee**, which cost shall be borne by the agency.

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 Street, Suite 301, Richmond, VA 23219 or faxed 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.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer