

Issues: Group II Written Notice (failure to comply with policy) and Removal (inability to meet work conditions); Hearing Date: 09/17/10; Decision Issued: 09/22/10; Agency: VSU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9408; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9408

Hearing Date: September 17, 2010
Decision Issued: September 22, 2010

PROCEDURAL HISTORY

On June 16, 2010, Grievant was issued a Group II Written Notice of disciplinary action for failure to comply with written policy. The Written Notice did not result in Grievant's removal. On June 16, 2010, Grievant was issued a memorandum removing him from employment because he no longer met a condition of his job, namely being certified as a VCIN operator.

On July 16, 2010, Grievant timely filed a grievance to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On September 1, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 17, 2010, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
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?
5. Was Grievant's removal from employment allowable under policy?

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 and that Grievant's removal was in accordance with State policy. 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 Virginia State University employed Grievant as a Communications Officer within its Police Department until his removal effective June 16, 2010. He began working for the Agency on August 25, 2008. Grievant's work performance was satisfactory to the Agency with the exception of the facts giving rise to the Group II Written Notice. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant earned a certification from the Department of Criminal Justice Service as a Virginia Crime Information Network (VCIN) operator. Grievant began working for the Agency in October 2008 as a Communications Officer. His duties included answering both emergency and non-emergency calls. Maintaining certification as a VCIN operator was a condition of Grievant's employment.

On June 26, 2008, Grievant was stopped by a law enforcement officer and charged with driving on a suspended license. The matter was scheduled for July 15, 2008. Grievant failed to appear in court on July 15, 2008. As a result, the Court issued a show cause order against Grievant. The proceeding was originally scheduled for October 7, 2008 but was continued until November 4, 2008. Grievant was found guilty and received a 30 day sentence with 28 days suspended. Because Grievant failed to appear on October 7, 2008, a Capias – Failure to Appear was issued. Grievant was

arrested on October 9, 2008. On November 4, 2008, Grievant was found guilty and sentenced to 60 days in jail with 50 days suspended. Grievant was also found guilty of driving on a suspended license. He was sentenced to six months in jail with six months suspended.

In February 2010, Grievant applied for the position of Police Officer with the Agency. He submitted an application of employment disclosing prior convictions including his Failure to Appear. The Agency conducted a background review of Grievant and discovered that he had been incarcerated.

The Chief of Police sent the Captain of the Virginia State Police a letter dated May 12, 2010 stating, in part:

We are currently interviewing candidates for the position of police officer. One of our full-time police communications officers applied for the position in this process. As standard procedure, we put his information into NCIC/VCIN for an initial background check To our surprise we discovered that he had an arrest The arrest, which was not reported to us, stemmed from traffic charges involving Driving on a Suspended Operator's License in 2008. [Grievant] failed to appear in court on his charges which resulted in a Capias: Contempt of Court in [Locality] General District Court. The matter was adjudicated on November 4, 2008 in which [Grievant] was found guilty of Contempt of Court with 60 days imposed and 50 days suspended leaving 10 days of incarceration in jail.

Due to [Grievant's] current position in police communications and his certification with NCIC/VCIN, we request your guidance as to how to proceed with this matter as it applies to the state police guidelines governing the use and operation of the NCIC/VCIN system. More specifically where it states: "... to have an arrest history for a felony or serious misdemeanor" I would appreciate your review of this case and advice as to whether or not [Grievant's] situation falls under the state guidelines prohibiting him from remaining a terminal operator.

[Grievant] has been a valued employee with the Department of Police and Public Safety and I don't want to lose him. However, I will not jeopardize the Department's certificate should with NCIC/VCIN for his poor judgment.

The Captain from the Virginia State Police sent the Chief a letter dated June 4 2000 and stating, in part:

Thank you for your letter dated May 12, 2010, concerning the conviction of your VCIN certified employee, Communications Officer [Grievant].

After a careful review of the serious misdemeanor conviction and the Fail to Appear in Court Conviction, I am revoking Communications Officer [Grievant's] VCIN Certification for the violation of the VCIN Operation Manual, Page I-16, Section C, Paragraph 6. (The certification of any

terminal operator convicted of a felony or serious misdemeanor shall be revoked.)¹

On June 11, 2010, the Chief of Police sent Grievant a memorandum stating, in part:

It has come to my attention that you have been decertified by the Virginia State Police as a VCIN certified operator because of a court conviction involving a traffic violation for which you failed to appear in court and subsequently spent time incarcerated. *** As a result, you are notified that you are being removed, immediately, from your position as Emergency Communications Officer (dispatcher) and placed on Pre-disciplinary Leave with pay, pending further review which could result in termination from the position of dispatch or in Department of Police and Public Safety.

You are advised that in accordance with Department of Human Resource Management Policy and Procedures you have until close of business June 16, 2010 to respond and/or present evidence why termination should not be effected.

On June 16, 2010, the Chief of Police sent Grievant a memorandum stating, in part:

The purpose of this memorandum is to notify you of the decision regarding your employment with Virginia State University. In accordance with the Department of Human Resource Management Policy 1.60 – Standards of Conduct, Section H., Removal Due to Circumstances which Prevent Employees from Performing their Jobs, Item I, Inability to meet working conditions – loss of license or certification required for the job, your employment with the Virginia State University is terminated effective June 16, 2010. You were decertified by the Virginia State Police as a Virginia Crime Information Network (VCIN) certified operator because of a court conviction involving a traffic violation for which you failed to appear in court and subsequently spent time incarcerated.

Grievant appealed the decertification with the Virginia State Police and met with the Captain to discuss his appeal. The Captain of the Virginia State Police sent Grievant a letter dated July 9, 2010 stating:

Thank you for meeting with me on July 1, 2010. After a careful review of our records, the document you submitted and your explanation, I am reducing your revocation to a 60 day suspension. Your period of suspension ends July 13, 2010. Your VCIN record will reflect an inactive status on July 14, 2010, and will be changed to an active status upon notification by a criminal justice agency.

¹ Agency Exhibit 1.

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 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.”

Failure to follow policy is a Group II offense.³ Virginia State University Department of Police and Public Safety Police Manual Policy Number A-4.0(V) (P) (1) provides:

Employee shall immediately notify their supervisor if they have been arrested, subpoenaed to court, or have otherwise been involved in any legal proceedings accept divorce.

Grievant began working for the Agency on August 25, 2008. He was arrested on October 9, 2008. Grievant did not report that arrest to his supervisor thereby acting contrary to policy. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow policy.

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....”⁴ 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 argued that the disciplinary action against him should be mitigated because he did not receive notice of the policy. Grievant did not testify or otherwise present any evidence that would support this assertion. During cross-examination, the

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

³ See, Attachment A, DHRM Policy 1.60.

⁴ *Va. Code § 2.2-3005.*

Chief of Police testified that Grievant admitted to him that Grievant's coworkers had advised Grievant to report the arrest to the Agency. This suggests the Grievant knew or should have known to investigate further his obligation to report the matter to the Agency. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant was removed from employment pursuant to a memorandum issued by the Chief of Police and not pursuant to a Written Notice. DHRM Policy 1.60(H)(1) states:

Inability to meet working conditions

An employee unable to meet the working conditions of his or her employment due to circumstances such as those listed below may be removed under this section. Reasons include:

- loss of driver's license that is required for performance of the job;
- incarceration for an extended period;
- failure to obtain license or certification required for the job;
- loss of license or certification required for the job;
- inability to perform the essential functions of the job after reasonable accommodation (if required) has been considered;
- failure to successfully pass an agency's background investigation;
- or
- conviction of a misdemeanor crime of domestic violence for employees whose jobs require: (a) carrying a firearm; or (b) authorization to carry a firearm.

Prior to such removal, the appointing authority and/or Human Resource Office shall gather full documentation supporting such action and notify the employee, verbally or in writing, of the reasons for such a removal, giving the employee a reasonable opportunity to respond to the charges. Final notification of removal should be via memorandum or letter, not by a Written Notice form.

Employees may challenge removals through the Employee Grievance Procedure, and may direct questions regarding this procedure to the Department of Employment Dispute Resolution.

Agencies may, based on mitigating circumstances, demote or transfer and reduce the employee's duties with a minimum 5% reduction in salary, or transfer them to an equivalent position without a reduction in salary as an alternative to termination.

Grievant was required to have a VCIN certification in order to perform his job. He lost that certification on June 4, 2010. On June 16, 2010, the Chief of Police provided Grievant with a memorandum notifying him that because of his decertification with the Virginia State Police as a VCIN operator he was being terminated from his position as and Emergency Communications Officer (dispatcher). The Agency considered whether

Grievant could be demoted or transferred to another position within the Police Department and concluded that no other position was available. The Agency has complied with DHRM Policy 1.60(H)(1). Grievant's removal from employment must be upheld.

Grievant argued that the subject section of the June 11, 2010 memorandum incorrectly states "Notification of Disciplinary Action" and that the June 16, 2010 memorandum refers to his "termination." Grievant is correct that the June 11, 2010 memorandum should not have referred to disciplinary action. Grievant was not removed from employment pursuant to disciplinary action. This error, however, is harmless error and does not affect the outcome of this case.

Grievant argued that there is a difference under State policy between "removal" and "termination" and that the Agency improperly terminated him instead of removing him. This argument fails. The effective removal and termination is the same – an employee is no longer employed by an agency. Although DHRM Policy 1.60(H)(1) refers to removal, it also mentions termination. The June 11, 2010 memorandum states "you are being removed, immediately, from your position". The June 16, 2010 refers to Grievant as being "terminated." The Agency's choice of words does not affect the outcome of this case.

Grievant argued that the Agency should not have removed him from employment because he filed an appeal of the decertification with the Virginia State Police. Although the Agency had discretion to hold its removal of Grievant in abeyance pending the appeal, nothing in State policy requires the Agency to do so. At the time of Grievant's removal, he did not hold a required certification to perform his job. Accordingly, the Agency was authorized to remove him at that time.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. Grievant's removal pursuant to a memorandum dated June 16, 2010 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.