

Issue: Group III Written Notice with Termination (DUI Conviction); Hearing Date: 11/08/10; Decision Issued: 11/10/10; Agency: DOC; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9444; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION

In the matter of: Case No. 9444

Hearing Date: November 8, 2010
Decision Issued: November 10, 2010

PROCEDURAL HISTORY

Grievant was a corrections sergeant for the Department of Corrections (“the Agency”), with 25 years of state service. On April 6, 2010, the Grievant was charged with driving under the influence (“DUI”), having had two previous DUI convictions within the last 10 years. On July 22, 2010, the Agency issued a Group III Written Notice to the Grievant, with discharge, for a third charge of driving under the influence (“DUI”) within 10 years, in violation of Va. Code §§ 18.2-266 and 18.2-270. The Grievant had no other active Written Notices.

Grievant timely filed a grievance to challenge the Agency’s disciplinary action. The outcome of the resolution steps was not satisfactory to the Grievant and he requested a hearing. On October 13, 2010, the Department of Employment Dispute Resolution (“EDR”) appointed the Hearing Officer. A pre-hearing conference was held by telephone on October 14, 2010. The hearing ultimately was scheduled for the first date available between the parties and the hearing officer, November 8, 2010, on which date the grievance hearing was held, at the Agency’s facility.

The Agency submitted documents for exhibits that were, without objection from the Grievant, accepted into the grievance record, and they will be referred to as Agency’s Exhibits. The Grievant offered no additional exhibits. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Advocate for Grievant
Representative/Advocate for Agency

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 and reinstatement to his position, with back pay.

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 Standards of Conduct, Operating Procedure 1.35, defines Group III offenses to include acts and behavior of such a serious nature that a first occurrence normally should warrant removal. Agency Exh. 5. An example stated in the policy is "27. criminal charges or criminal convictions including felonies and misdemeanors for driving under the influence (DUI)." Agency Exh. 5. "Regardless of the status of any criminal investigation or process, the Department may determine at any time to institute disciplinary charges against the employee under the Standards of Conduct, up to and including termination, based upon the facts or evidence of conduct that prompted the criminal investigation or process." Section XVII, Agency Exh. 5.

Va. Code § 18.2-270.C. provides the following:

C. 1. Any person convicted of three offenses of § 18.2-266 committed within a 10-year period shall upon conviction of the third offense be guilty of a Class 6 felony. The sentence of any person convicted of three offenses of § 18.2-266 committed within a 10-year period shall include a mandatory minimum sentence of 90 days, unless the three offenses were committed within a five-year period, in which case the sentence shall include a mandatory minimum sentence of confinement for six months. In addition, such person shall be fined a mandatory minimum fine of \$1,000.

2. The punishment of any person convicted of a fourth or subsequent offense of § 18.2-266 committed within a 10-year period shall, upon conviction, include a mandatory minimum term of imprisonment of one year. In addition, such person shall be fined a mandatory minimum fine of \$1,000. Unless otherwise modified by the court, the defendant shall remain on probation and under the terms of any suspended sentence for the same period as his operator's license was suspended, not to exceed three years.

As an expression of the Commonwealth's public policy addressing DUI, the penalty for such third offense within a ten-year period is provided in Va. Code § 18.2-271.C.:

C. If a person (i) is tried on a process alleging a third or subsequent offense of violating § 18.2-266 or subsection A of § 46.2-341.24, or any substantially similar local ordinance, or law of any other jurisdiction, within ten years of two other offenses for which the person was convicted, or found not innocent in the case of a juvenile, under § 18.2-266 or subsection A of § 46.2-341.24 or any valid local ordinance or any law of any other jurisdiction substantially similar to § 18.2-266 or subsection A of § 46.2-341.24 and (ii) is convicted thereof, such conviction shall of itself operate to deprive the person so convicted of the privilege to drive or operate any motor vehicle, engine or train in the Commonwealth and such person shall not be eligible for participation in a program pursuant to § 18.2-271.1 and shall, upon such conviction, have his license revoked as provided in subsection B of § 46.2-391. The court trying such case shall order the surrender of the person's driver's license, to be disposed of in accordance with § 46.2-398, and

shall notify such person that his license has been revoked indefinitely and that the penalty for violating that revocation is as set out in § 46.2-391.

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 corrections sergeant, a supervisory position, with 25 years of state service. Although the Grievant has no other active disciplinary actions, the Agency presented documentation of two prior DUI convictions within the last 10 years. The Agency's warden testified that a valid driver's license is a condition of employment. *See* Employee Work Profile, Agency Exh. 2. The warden testified that the Grievant's post was at an ancillary facility 35 miles away from the primary facility, and that driving was a required job function. Upon learning of the Grievant's DUI arrest in April, he allowed the Grievant more than 90 days to have his case resolved. The arrest documentation indicates the Grievant's breath alcohol test was .11. Agency Exh. 1. The warden testified that the Grievant professed innocence of the charge, but, to his (the warden's) knowledge, the charge remains pending and unresolved. Va. Code § 18.2-270 provides that a conviction in this case would be a class 6 felony.

The warden testified that he held discussions with the Grievant's defense attorney and the Commonwealth's attorney in an effort to protect the Grievant's job, but the warden received no indication that the charge would yield anything other than a conviction for DUI, at some level, even if reduced to a misdemeanor. The warden expressed concern over the Grievant losing his job and the effect on his family. The warden was remorseful over the consequence the Grievant faced, but the warden did not believe he could mitigate the charge below a Group III with discharge because the Agency could not tolerate the legal responsibility of a corrections officer with three DUI offenses within 10 years. With the Agency's concern, even if the Grievant was permitted legally to drive for work purposes, the severity of the situation could not be outweighed with mitigation.

The Grievant elected not to testify.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional

judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a “super-personnel officer” and must be careful not to succumb to the temptation to substitute his judgment for that of an agency’s management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

Under Virginia Code § 2.2-3005, the hearing officer has the duty to “receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution.” The warden testified that he considered the valuable service of the Grievant as a mitigating factor, but that some offenses and circumstances present such a severe situation that they cannot be mitigated to less than discharge. This offense, according to the warden, is such a case.

While the hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances, the hearing officer is permitted to mitigate a disciplinary action if, and only if, it exceeds the limits of reasonableness. There is no authority that requires an Agency to exhaust all possible lesser sanctions or, alternatively, show that termination was its only option. Even if the hearing officer would have levied a lesser discipline, the Agency has the management prerogative to act within a continuum of discipline as long as the Agency acts within the bounds of reasonableness.

The Agency presents a position in advance of its role as guardian of public and institutional safety and asserts that the Grievant’s history of DUI creates too much liability and legal responsibility to risk further employment of the Grievant in a position that requires driving. The hearing officer accepts, recognizes, and upholds the Agency’s important role in public safety and the valid public policies promoted by the Agency and its policies. I find that the conviction clearly relates to job requirement and performance. I also find that the Agency could be at substantial risk for having a corrections sergeant with an extensive DUI record driving for the Agency, and such retention could constitute negligence concerning the Agency’s duties to the public or other state employees. Accordingly, I find no mitigating circumstances that render the Agency’s action outside the bounds of reasonableness.

It is unfortunate that the Agency is losing an otherwise valuable employee, but there are no factors that would make it unreasonable to impose the Agency’s choice to remove Grievant. The Agency’s warden was genuinely regretful of the termination decision.

DECISION

For the reasons stated herein, the Agency’s issuance of the Group III Written Notice and termination is **upheld**.

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.

A handwritten signature in blue ink, appearing to read "Cecil H. Creasey, Jr.", written in a cursive style.

Cecil H. Creasey, Jr.
Hearing Officer