

Issues: Group II Written Notice (failure to follow policy), Group III Written Notice (conduct unbecoming) and Termination; Hearing Date: 04/27/11; Decision Issued: 04/28/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9563; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9563

Hearing Date: April 27, 2011

Decision Issued: April 28, 2011

PROCEDURAL HISTORY

On January 13, 2011, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to comply with established written policy. On January 13, 2011, Grievant was issued a Group III Written notice of disciplinary action with removal for conduct unbecoming an officer.

On January 19, 2011, 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 April 5, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 27, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate

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?

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 Corrections Officer at one of its Facilities. The purpose of his position was to "provide security for adult offenders at the institution and while in transport; supervises the daily activities of offenders while observing and recording their behavior and movement to ensure their safe and secure confinement."

Over a several year period, Grievant received several tickets for moving violations while operating his vehicle. He did not timely pay the fines associated with those tickets and his driver's license was suspended. Grievant did not notify the Agency that his driver's license was suspended. On March 2, 2010, Grievant was convicted in the local General District Court of driving on a suspended driver's license. He was fined \$200 and required to pay court costs of \$71. On January 6, 2011, Grievant was convicted in the local General District Court of driving on a suspended driver's license. He was sentenced to 90 days in jail with 80 days suspended. He was fined \$100 and had to pay court costs of \$81.

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.”¹ 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.”² Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”³

Group II Written Notice

In July 2008, Grievant received and agreed to abide by Conditions of Employment For All Employees. Section 6 of this policy states:

All security employees are to have a valid driver’s license, and should have the ability to operate standard transmission vehicles. All security employees will notify their supervisor (using the Notification Form) of all moving traffic violations received on or off the job. In addition, those officers transporting inmates may not have been convicted of a moving traffic violation in the past three (3) years.⁴

“[F]ailure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁵ Grievant failed to notify his supervisor of numerous traffic violations thereby acting contrary to the Agency’s policy as stated in Grievant’s Conditions of Employment for All Employees. In addition, he failed to maintain a valid driver’s license. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Group III Written Notice

“[C]riminal convictions for conduct occurring on or off the job which are plainly related to job performance” is a Group III offense. On March 2, 2010 and January 6, 2011, Grievant was convicted of misdemeanors for driving with a suspended driver’s license. For the second condition, he was sentenced to 90 days in jail with 80 days suspended. By serving time in jail, Grievant was in circumstances similar to the circumstances of the offenders he would supervise on a daily basis is a Corrections Officer. The Agency expected Grievant to conduct himself in a manner to serve as a positive example for the offenders he supervised. Serving time in jail is behavior inconsistent with setting a positive example and amounted to conduct unbecoming a Corrections Officer. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice or receiving a criminal conviction relating to job

¹ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

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

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

⁴ Agency Exhibit 5.

⁵ Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

performance. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Mitigation

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..."⁶ 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 contends that the disciplinary action against him should be mitigated because the Agency has inconsistently applied disciplinary action. He presented evidence that Officer S was convicted on April 18, 2007 of driving with a revoked driver's license. She received a \$150 fine and was required to pay \$66 in court costs. On April 18, 2007, she was also convicted for a second time of driving under the influence. She was sentenced to 12 months in jail with 11 months suspended. She received a \$500 fine and was required to pay \$130 in court costs. Grievant argued that the Agency permitted Officer S to remain an employee and, thus, he should be permitted to remain an employee.

The evidence showed that the Agency did not take disciplinary action inconsistently. Unlike Grievant, Officer S informed the Agency of her convictions. Upon learning of the convictions, the Agency took disciplinary action against Officer S and removed her from employment. She filed a grievance to challenge the Agency's action. As part of the grievance process, Officer S and the Agency agreed that Officer S would no longer work as a corrections officer but instead would work in the records room performing nonsecurity work. Several years later, when she received a driver's license again, Officer S applied for a position with the Agency as a Corrections Officer. She was selected from among those candidates seeking the position. No evidence was presented that Grievant sought a nonsecurity position with the Agency. Based on these facts, the Hearing Officer cannot conclude that the Agency applied disciplinary action inconsistently. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

⁶ *Va. Code § 2.2-3005.*

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow established written policy is **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal 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].

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.