Issue: Group III Written Notice with Termination (conduct unbecoming); Hearing Date: 07/28/11; Decision Issued: 08/01/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9653; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9653

Hearing Date: July 28, 2011
Decision Issued: August 1, 2011

PROCEDURAL HISTORY

On February 18, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for conduct unbecoming a Corrections Officer.

On March 9, 2011, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On July 11, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 28, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
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?

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 until her removal on February 18, 2011. She began working at the Facility in September 1995. The purpose of her position was to, "provide security and supervision of adult offenders at this facility."[1] No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant was issued a Warrant of Arrest alleging that on July 27, 2010, Grievant violated Va. Code § 18.2-103 "without authority and with the intention of converting goods or merchandise to the use of the accused or another person without having paid the full purchase price thereof, or with the intention of defrauding the owner of the value of the goods or merchandise, willfully conceal or take possession of goods or merchandise having a value of less than $200 and belonging to [store name]."

On October 4, 2010, Grievant was tried by the local General District Court. Grievant filed an appeal of that decision to the Circuit Court for a trial *de novo*. In the Circuit Court, Grievant entered an Alford plea based on a proffer from her legal counsel.

The Court stated:

> At this point, I'm going to make a finding that the evidence would be sufficient to find her guilty, but I am not going to find her guilty today. By

[1] Agency Exhibit 4.

agreement, I am going to take this under advisement for a period of six months. During that six-month period, ma'am, you must be of good behavior, you must complete the shoplifting class for [Court Services], and you must pay your court costs in full.

Grievant responded: "I don't mind that."

The Court stated:

If those things are done, then the charge will be dismissed. Okay? If that's not done within that six-month period, then you will be found guilty and will be back here for sentencing.

Grievant's incurred Court Cost of $821. If Grievant meets the Court's conditions, the charges against her will be dismissed August 15, 2011.

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."[2] 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."[3] Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."[4]

Virginia Department of Corrections Operating Procedure 135.1(IV)(C), *Standards of Conduct,* states, "[t]he list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense."

The Agency considers engaging in criminal behavior (regardless of conviction) to be conduct unbecoming a Corrections Officer and a Group III offense. Although Grievant was not convicted, she engaged in behavior contrary to a statute defining criminal behavior, Va. Code § 18.2-103.

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[2] Virginia Department of Corrections Operating Procedure 135.1(X)(A).

[3] Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

[4] Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

An Alford plea is a variation of a guilty plea.[5] In, Parson v. Carroll, 636 S.E.2d 452 (2006), the Court held:

> In *Alford,* the Supreme Court upheld the constitutionality of a guilty plea in which a criminal defendant did not admit his participation in the acts constituting the crime. 400 U.S. at 37-38, 91 S.Ct. 160. The Court explained that "while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty." *Id.* at 37, 91 S.Ct. 160. The Court stated that, therefore, "[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."
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> Page 455
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> *Id.* Based on this holding in *Alford,* the courts in this Commonwealth in the exercise of their discretion have permitted criminal defendants who wish to avoid the consequences of a trial to plead guilty by conceding that the evidence is sufficient to convict them, while maintaining that they did not participate in the acts constituting the crimes. *See e.g., Patterson v. Commonwealth,* 262 Va. 301, 302 n. 1, 551 S.E.2d 332, 333 n. 1 (2001); *Reid v. Commonwealth,* 256 Va. 561, 563 n. 1, 506 S.E.2d 787, 788 n. 1 (1998); *Zigta v. Commonwealth,* 38 Va.App. 149, 151 n. 1, 562 S.E.2d 347, 348 n. 1 (2002); *Perry v. Commonwealth,* 33 Va.App. 410, 412-13, 533 S.E.2d 651, 652-53 (2000).

Grievant's Alford plea meant that she was "conceding that the evidence is sufficient to convict [her], while maintaining that [she] did not participate in the acts constituting the crimes." The Circuit Court found "that the evidence would be sufficient to find her guilty". The Court's finding that the evidence would be sufficient to find her guilty is no different from saying sufficient facts existed to show that Grievant violated Va. Code § 18.2-103.

Va. Code § 18.2-103 provides:

> Whoever, without authority, with the intention of converting goods or merchandise to his own or another's use without having paid the full purchase price thereof, or of defrauding the owner of the value of the goods or merchandise, (i) willfully conceals or takes possession of the goods or merchandise of any store or other mercantile establishment, or (ii) alters the price tag or other price marking on such goods or merchandise, or transfers the goods from one container to another, or (iii) counsels, assists, aids or abets another in the performance of any of the above acts, when the value of the goods or merchandise involved in the

[5] Cobbins v. Commonwealth, 53 Va. App. 28, 668 S.E2d 816 (2008).

> offense is less than $200, shall be guilty of petit larceny and, when the value of the goods or merchandise involved in the offense is $200 or more, shall be guilty of grand larceny. The willful concealment of goods or merchandise of any store or other mercantile establishment, while still on the premises thereof, shall be prima facie evidence of an intent to convert and defraud the owner thereof out of the value of the goods or merchandise.

By engaging in criminal conduct contrary to Va. Code § 18.2-103, Grievant engaged in conduct unbecoming a Correctional Officer. Sufficient evidence was presented at the hearing to support the Agency's conclusion that Grievant engaged in criminal behavior.

Grievant argued that as part of her Alford plea she was asserting her innocence to the charges and that the Court did not convict her of any crime. Although Grievant's assertion is true, it is not necessary for the Agency to show the Grievant admitted guilt or that she was convicted of a crime. DOC Operating Procedure 135.1(IX)(C)(2) states:

> A conviction is not necessary to proceed with a disciplinary action. The Unit Head must determine whether the evidence is sufficient to have an impact on the Department, its employees, the public, and its perception of the Department.

The Agency is in the business of supervising the behavior of individuals who have engaged in criminal behavior. Having a Corrections Officer who engaged in criminal behavior supervise offenders who engaged in criminal behavior impacts the Department because it undermines the legitimacy of the Corrections Officer's authority to supervise inmates. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for conduct unbecoming a Corrections Officer. Upon the issuance of a Group III, the agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

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

[6] Va. Code § 2.2-3005.

consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated based on her length of service and otherwise satisfactory job performance. It would be an extraordinary case in which an employee's length of service and satisfactory work performance were sufficient to mitigate disciplinary action. This case is not extraordinary. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

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 **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].

S/Carl Wilson Schmidt

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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.