

Issue: Group III Written Notice with Termination (criminal conviction); Hearing Date: 10/25/11; Decision Issued: 10/26/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9698; Outcome: Full Relief; **Administrative Review: DHRM Ruling Request received 11/03/11; DHRM Ruling issued 02/16/12; Outcome: Remanded to AHO; Remand Decision issued 02/17/12; Outcome: Original decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9698

Hearing Date: October 25, 2011
Decision Issued: October 26, 2011

PROCEDURAL HISTORY

On July 18, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for being charged with and convicted of trespassing and assault and battery.

On August 15, 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 he requested a hearing. On October 3, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 25, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative

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 his removal effective July 18, 2011. Grievant had prior active disciplinary action. On March 5, 2011, Grievant received a Group II Written Notice with a three workday suspension for being convicted of driving under the influence of alcohol.

On October 23, 2010, Grievant was charged with trespassing contrary to Virginia Code Section 18.2-119 and misdemeanor assault contrary to Virginia Code Section 18.2-57. On June 28, 2011, the General District Court convicted Grievant of both charges.

On June 28, 2011, Grievant appealed his convictions in the General District Court to the Circuit Court. The Circuit Court is scheduled to address Grievant's criminal appeals on November 16, 2011.

On June 28, 2011, Grievant was placed on Pre-Disciplinary Leave with Pay in accordance with Operating Procedure 135.1. He was removed from employment on July 18, 2011 following a Group III Written Notice for criminal conviction.

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

There are several ways an agency can establish a basis to take disciplinary action against an employee who has engaged in criminal conduct. First, the agency can show that the employee was convicted of a crime in General District Court and that the employee has failed to appeal that conviction to the Circuit Court. Second, the agency can show that the employee was convicted of a crime in Circuit Court regardless of whether the employee appeals that conviction to the Virginia Court of Appeals.⁴ Third, if the General District Court or the Circuit Court does not formally convict the employee, the agency can show that the Court’s findings are tantamount to a conviction. For example, if a Circuit Court finds that an employee engaged in criminal conduct but takes the matter under review for a period of time, the Circuit Court’s finding is tantamount to a conviction. Fourth, the agency can present the facts underlying the criminal allegations that show the employee engaged in criminal behavior even though a Court has not yet addressed the criminal allegations.

The Agency has not established a basis for disciplinary action against Grievant. Grievant appealed his convictions in General District Court to the Circuit Court. The Circuit Court has the matter scheduled for trial on November 16, 2011 and, thus, the outcome of that proceeding is not yet known. When Grievant appealed the decision of the General District Court, that appeal served to vacate the conviction of the General District Court. Once the General District Court conviction was vacated by the appeal, Grievant’s status returned to an individual without a criminal conviction against him. In other words, at the time of the grievance hearing, Grievant had not been convicted of any crime. There is no basis for the Agency to take disciplinary action against Grievant for being convicted of a crime.

The Agency did not present evidence of the underlying behavior by Grievant that gave rise to the criminal charges against him. In other words, the Agency did not present evidence from the alleged victims that Grievant engaged in trespassing and assault and battery.

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 An appeal to the Virginia Court of Appeals does not automatically vacate the decision of the Circuit Court. Compare this to an appeal from the General District Court to the Circuit Court.

The Agency did not present evidence a final court decision that served as the equivalent of a conviction not under a de novo appeal. For example, the Agency did not present evidence of a court finding sufficient facts to establish guilt but taking the matter under review for a period of time.

The Group III Written Notice must be reversed.

Operating Procedure 135.1(VI)(D)(4) states:

Any employee who is formally charged with a criminal offense (that is related to the nature of his or her job or to the DOC mission) by outside authorities shall be immediately suspended without pay for a period not to exceed ninety calendar days. The DOC has the option to allow an employee to charge accrued annual, overtime, compensatory, or family personal leave to this period of suspension provided the employee has sufficient balances.

The Agency placed Grievant on pre-disciplinary leave. It is likely the Agency would have suspended Grievant for up to 90 days pending the outcome of the criminal offense if the Agency had not decided to remove Grievant from employment. Accordingly, the Hearing Officer will order back pay only after considering a period of suspension up to 90 days.

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 **rescinded**. 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 after accounting for a period of suspension up to 90 days.

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.

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

The Department of Corrections

February 16, 2012

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9698. For the reasons stated below, we remand this decision to the hearing officer so he can revise it to be in compliance with policy. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

According to the hearing officer's PROCEDURAL HISTORY, the following occurred:

On July 18, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for being charged with and convicted of trespassing and assault and battery.

On August 15, 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 he requested a hearing. On October 3, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 25, 2011, a hearing was held at the Agency's office.

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct? 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)?
3. 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 hearing officer submitted the following in his 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 his removal effective July 18, 2011. Grievant had prior active disciplinary action. On March 5, 2011, Grievant received a Group II Written Notice with a three workday suspension for being convicted of driving under the influence of alcohol.

On October 23, 2010, Grievant was charged with trespassing contrary to Virginia Code Section 18.2-119 and misdemeanor assault contrary to Virginia Code Section 18.2-57. On June 28, 2011, the General District Court convicted Grievant of both charges.

On June 28, 2011, Grievant appealed his convictions in the General District Court to the Circuit Court. The Circuit Court is scheduled to address Grievant's criminal appeals on November 16, 2011.

On June 28, 2011, Grievant was placed on Pre-Disciplinary Leave with Pay in accordance with Operating Procedure 135.1. He was removed from employment on July 18, 2011 following a Group III Written Notice for criminal conviction.

In his CONCLUSIONS OF POLICY, the hearing officer stated the following:

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

There are several ways an agency can establish a basis to take disciplinary action against an employee who has engaged in criminal conduct. First, the agency can show that the employee was convicted of a crime in General District Court and that the employee has failed to appeal that conviction to the Circuit Court. Second, the agency can show that the employee was convicted of a crime in Circuit Court regardless of whether the employee appeals that conviction to the Virginia Court of Appeals. Third, if the General District Court or the Circuit Court does not formally convict the employee, the agency can show that the Court's findings are tantamount to a conviction. For example, if a Circuit Court finds that an employee engaged in criminal conduct but takes the matter under review for a period of time, the Circuit Court's finding is tantamount to a conviction. Fourth, the agency can present the facts underlying the criminal allegations that show the employee engaged in criminal behavior even though a Court has not yet addressed the criminal allegations.

The Agency has not established a basis for disciplinary action against Grievant. Grievant appealed his convictions in General District Court to the Circuit Court. The Circuit Court has the matter scheduled for trial on November 16, 2011 and, thus, the outcome of that proceeding is not yet known. When Grievant appealed the decision of the General District Court, that appeal served to vacate the conviction of the General District Court. Once the General District Court conviction was vacated by the appeal, Grievant's status returned to an individual without a criminal conviction against him. In other words, at the time of the grievance hearing, Grievant

had not been convicted of any crime. There is no basis for the Agency to take disciplinary action against Grievant for being convicted of a crime.

The Agency did not present evidence of the underlying behavior by Grievant that gave rise to the criminal charges against him. In other words, the Agency did not present evidence from the alleged victims that Grievant engaged in trespassing and assault and battery.

The Agency did not present evidence a final court decision that served as the equivalent of a conviction not under a de novo appeal. For example, the Agency did not present evidence of a court finding sufficient facts to establish guilt but taking the matter under review for a period of time.

The Group III Written Notice must be reversed.

Operating Procedure 135.1 (VI)(D)(4) states:

Any employee who is formally charged with a criminal offense (that is related to the nature of his or her job or to the DOC mission) by outside authorities shall be immediately suspended without pay for a period not to exceed ninety calendar days. The DOC has the option to allow an employee to charge accrued annual, overtime, compensatory, or family personal leave to this period of suspension provided the employee has sufficient balances.

The Agency placed Grievant on pre-disciplinary leave. It is likely the Agency would have suspended Grievant for up to 90 days pending the outcome of the criminal offense if the Agency had not decided to remove Grievant from employment. Accordingly, the Hearing Officer will order back pay only after considering a period of suspension up to 90 days.

In his DECISION, the hearing officer stated the following:

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is rescinded. 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 after accounting for a period of suspension up to 90 days.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review

the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In the instant case, the hearing officer rescinded the disciplinary action and ordered that his Agency reinstate him to his former position, or if occupied, to an objectively similar position. In addition, the Agency was directed to provide the grievant with backpay less any interim earnings that the grievant received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue after accounting for a period of suspension up to 90 days.

The hearing officer's decision to rescind the disciplinary action and to reinstate the grievant to his former position with back pay less any interim earnings is consistent with policy. However, the hearing officer's inclusion of a "period of suspension up to 90 days" into the calculation of back pay and/or benefits is not consistent with policy. In the instant case, the agency in its disciplinary action against the grievant did not include a 90-day suspension. While the hearing officer opines that "It is likely the Agency would have suspended Grievant for up to 90 days pending the outcome of the criminal offense if the Agency had not decided to remove Grievant from employment.", it is inconsistent with policy to factor in the effects of a disciplinary action that was not initiated by the agency. Therefore, we deem that portion of the hearing decision to be inappropriate and remand the decision to the hearing officer for modification.

Ernest G. Spratley
Assistant Director,
Office of Equal Employment Services



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9698-R

Reconsideration Decision Issued: February 17, 2012

RECONSIDERATION DECISION

The DHRM Director issued a ruling on February 16, 2012 stating:

The hearing officer's decision to rescind the disciplinary action and to reinstate the grievant to his former position with back pay less any interim earnings is consistent with policy. However, the hearing officer's inclusion of a "period of suspension up to 90 days" into the calculation of back pay and/or benefits is not consistent with policy. In the instant case, the agency in its disciplinary action against the grievant did not include a 90-day suspension. While the hearing officer opines that "It is likely the Agency would have suspended Grievant for up to 90 days pending the outcome of the criminal offense if the Agency had not decided to remove Grievant from employment.", it is inconsistent with policy to factor in the effects of a disciplinary action that was not initiated by the agency. Therefore, we deem that portion of the hearing decision to be inappropriate and remand the decision to the hearing officer for modification.

The Hearing Officer reduced Grievant's award of back pay by 90 days and explained the reasoning for not awarding full back pay as follows:

The Agency placed Grievant on pre-disciplinary leave. It is likely the Agency would have suspended Grievant for up to 90 days pending the outcome of the criminal offense if the Agency had not decided to remove Grievant from employment. Accordingly, the Hearing Officer will order back pay only after considering a period of suspension up to 90 days.

The Hearing Officer's authority to award back pay is governed by the EDR Grievance Procedure and the EDR Rules for Conducting Grievant Hearings. Under these policies, the Hearing Officer has discretion to award full, partial, or no back pay. The Hearing Officer's discretion is subject to review by the EDR Director and the standard of review is "abuse of discretion." No appeal was made to the EDR Director. Nothing under the Grievance Procedure permits the DHRM Director to review the Hearing Officer's discretion for an award of back pay.

Upon reconsideration, the Hearing Officer concludes the award of back pay was appropriate for the reasons stated in the Original Hearing Decision. There is no basis to change the Original Hearing Decision and that decision remains in effect.

APPEAL RIGHTS

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.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer