

Issue: Group III Written Notice with Termination (Criminal Conviction); Hearing Date: 11/02/11; Decision Issued: 11/03/11; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 9703; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9703

Hearing Date: November 2, 2011
Decision Issued: November 3, 2011

PROCEDURAL HISTORY

On July 27, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for receiving a second conviction for Driving Under the Influence of Alcohol.

On August 21, 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 12, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 2, 2011, 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?

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 Juvenile Justice employed Grievant as a Lieutenant/Shift Commander at one of its Facilities. Grievant's work performance was considered to be excellent by his coworkers. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On April 30, 2000, Grievant received a document entitled Conditions of Employment stating:

When you are selected and accept employment at the [Facility] you are accepting specific conditions of employment at this facility. The following statements cover these conditions;

3. A Driver's License is required. All employees must possess a valid driver's license in order to operate State vehicles. The Driver's License must be submitted to Personnel for a copy to be retained in file. If the Driver's Licenses is suspended, employee MUST notify his/her supervisor and Personnel immediately.¹

¹ Agency Exhibit 8.

On October 20, 2008, Grievant was convicted of Driving Under the Influence of Alcohol in a local General District Court. On November 3, 2008, Grievant received a Notice of Improvement Needed/Substandard Performance stating:

On October 20, 2008, you were found guilty of DUI. This is not the conduct becoming of an employee of [Facility] or the Department of Juvenile Justice and is in violation of the Staff Code of Conduct.

Improvement Plan:

[Grievant] will review and study the Staff Code of Conduct.

[Grievant] will also be made aware that this is in fact a violation of Employee Standards of Conduct 160.V.B.3.I which states Criminal convictions for illegal conduct occurring on or off the job that clearly are related to job performance or are of such a nature that to continue employees in their positions could constitute negligence in regard to the agency's duties to the public or to the other state employees and that future occurrences could result in disciplinary actions being invoked up to and including termination.²

On June 5, 2011, Grievant was arrested for a second offense of Driving Under the Influence of Alcohol. On July 20, 2011, Grievant was convicted of a second offense of Driving Under the Influence of Alcohol. He was fined \$2,500 with \$1,500 suspended. He was sentenced to jail for 180 days with 170 days suspended for a three-year period. He was placed on probation with the Virginia Alcohol Safety Action Program. His driver's license was suspended for three years but was he authorized to receive a restricted license when he became eligible to receive one. Upon the restoration of his privilege to drive, he was ordered to operate only a motor vehicle that was equipped with a functioning, certified ignition interlock system.

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."³ 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."

² Agency Exhibit 10.

³ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Group III offenses include “criminal convictions for illegal conduct occurring on or off the job that clearly are related to job performance”⁴ One of the responsibilities of the Agency is to supervise juveniles who have been convicted of misdemeanors or felonies. The Agency expects security employees to serve as role models for juveniles under its control. Grievant was advised in 2008 that the Agency considered a conviction for Driving Under the Influence of Alcohol to be a violation of the Standards of Conduct and to justify removal. On July 20, 2011, Grievant was convicted for a second time of Driving Under the Influence of Alcohol. He was incarcerated, fined, and had his driver’s license suspended. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for receiving a criminal conviction that related to job performance. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency’s decision to remove Grievant must be upheld.

This case is unfortunate. Grievant argued that he was a good employee and that he was capable of returning to work. Although these assertions may be true, they do not provide a basis to remove the disciplinary action. Grievant argued that the Agency failed to recommend him for treatment with the Employee Assistance Program. The evidence showed that Grievant referred himself to the program. The Agency’s failure to recommend Grievant for treatment with the Employee Assistance Program is not a basis to reverse the disciplinary action.

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....”⁵ 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. In light of this standard, 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**.

⁴ See, Attachment A, DHRM Policy 1.60.

⁵ *Va. Code § 2.2-3005.*

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.⁶

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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