

Issue: Group III Written Notice with termination (criminal conviction); Hearing Date: 06/25/12; Decision Issued: 06/26/12; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 9841; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9841

Hearing Date: June 25, 2012
Decision Issued: June 26, 2012

PROCEDURAL HISTORY

On February 2, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for conviction of a criminal offense of driving while intoxicated.

On February 29, 2012, 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 May 30, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 25, 2012, 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 Juvenile Justice employed Grievant as a Juvenile Correctional Officer at one of its facilities. He had been employed by the Agency for approximately seven years prior to his removal effective February 2, 2012. Grievant's duties involved supervising juvenile who had been convicted of crimes including alcohol related crimes. The Agency expected Grievant to serve as a role model for youth offenders.

On December 4, 2011, Grievant was arrested for driving while intoxicated with a blood alcohol content of .23. On January 11, 2012, he was convicted by the local General District Court of a misdemeanor and sentenced to six months in jail with five months and twenty days suspended. His driver's license was removed for one year but he was given a restricted driver's license. He was required to operate a vehicle only with a vehicle ignition interlock system. That restriction was later amended to enable him to operate a vehicle while at work without an interlock ignition 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.”¹ 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.”

Group III offenses include “criminal convictions for illegal conduct occurring on or off the job that clearly are related to job performance”² Grievant was convicted of a misdemeanor for driving under the influence of alcohol. The conviction related to his job performance because he supervised juveniles convicted of crimes including alcohol related offenses. One of Grievant’s functions was to serve as a role model for youth offenders. Being convicted of a misdemeanor undermined the legitimacy of his authority to supervise juvenile offenders. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. 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.

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....”³ 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 the disciplinary action should be mitigated based on the inconsistent application of disciplinary action. He presented evidence that Officer H engaged in similar behavior but was permitted by the Agency to remain employed. When an employee alleges the inconsistent application of disciplinary action, the primary question becomes whether the Agency singled the employee out for disciplinary action. The Agency’s witness testified that the Agency distinguished between Grievant and Officer H because Grievant served ten days in jail but Officer H did not. Because juvenile correctional officers supervise offenders who are incarcerated, the Agency considers incarceration to be of material significance. The Agency presented evidence that it adopted a practice distinguishing between employees based on whether they

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See, Attachment A, DHRM Policy 1.60.

³ Va. Code § 2.2-3005.

were incarcerated and did not adopt a practice to single out Grievant based on an inappropriate reason. There exists sufficient evidence for the Hearing Officer to conclude that Grievant was not singled out for disciplinary action for an improper purpose. 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.⁴

[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

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.