

Issues: Group III Written Notice (criminal conviction) with Suspension, Demotion & Pay Reduction; Hearing Date: 09/28/12; Decision Issued: 10/04/12; Agency: DOC; AHO: Lorin A. Costanzo, Esq.; Case No. 9905; Outcome: No Relief – Agency Upheld.

**Commonwealth of Virginia
DEPARTMENT OF CORRECTIONS**

DECISION OF HEARING OFFICER

In the matter of: Case No: 9905

Hearing Date: September 28, 2012

Decision Issued: October 4, 2012

PROCEDURAL HISTORY

On June 22, 2012, Grievant was issued a Group III Written Notice with an 80 hour suspension and demotion to a lower pay band with 5% disciplinary pay reduction for *Written Notice Offense Code/Category 76, Criminal Conviction*. The *Nature of Offense and Evidence* indicated:

"On November 24, 2011 [*Grievant*] was arrested by [*Sheriff*] and charged with two (2) Class IV Felonies of Animal Cruelty. On May 4, 2012 [*Facility*] Administration was notified by [*Grievant*] that he accepted a Plea Agreement of Misdemeanor Charges "Cruelty to Animals: General" in lieu of the pending felony charges of Cruelty to Animals. Per Operating Procedure 135.1 V. Groups of Offenses and Mitigating Circumstances A.3. [*Grievant's*] conviction has had a negative impact on the public perception of the DOC. Therefore, a Group III, 10 day suspension and demotion to lower pay band of Officer is warranted."¹

On July 11, 2012, Grievant timely filed a grievance to challenge the Group III Written Notice. The grievance proceeded through the resolution steps and on July 23, 2012, when the parties failed to resolve the grievance, Grievant requested qualification of his grievance for a hearing. On August 6, 2012 Agency Head qualified the grievance for a hearing.² The Department of Human Resources Management, Office of Employment Dispute Resolution assigned this matter to the undersigned Hearing Officer effective September 5, 2012.

Grievance hearing was held on September 28, 2012 with Grievant in attendance. By agreement of the parties, exhibits were admitted *en masse* at hearing.

APPEARANCES

Grievant
Agency Representative
Agency Party Designee (who was also a witness)
Additional Agency witness: Major

¹ Agency Exhibits Tab 1, Written Notice.

² Agency Exhibits Tab 3, Grievance Form A.

ISSUES

Whether the issuance of a Group III Written Notice with 80 hour suspension and demotion to lower pay band with 5% disciplinary pay reduction was warranted and appropriate under the 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.³ A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.⁴

FINDINGS OF FACT

After reviewing the evidence admitted at hearing and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

On June 22, 2012 Grievant was issued a Group III Written Notice with 80 hour suspension and demotion to lower pay band with 5% disciplinary pay reduction effective 6/25/12, New Role Title: Security Officer III. The Written Notice indicated under "Type of Offense", Written Notice Offense Code/Category "76", "Criminal conviction".⁵

On November 26, 2011 Grievant was arrested on two felony charges (Class 6 Felonies) of violation of Section 3.2-6570 of the Code of Virginia alleged to have occurred on or about 11/20/11. The Arrest Warrant indicated, "Short Offense Description (not a legal definition): **ANIMAL CRUELTY: COMPANION DOG, CAUSE DEATH**". Grievant was released on recognizance November 26, 2011.⁶

On May 8, 2012 Grievant pled guilty in Circuit Court to two misdemeanor charges of CRUELTY TO ANIMALS: GENERALLY, (§ 3.2-6570 of the Code of Virginia). A Circuit Court Judge of the Commonwealth of Virginia found Grievant guilty of two misdemeanors of CRUELTY TO ANIMALS: GENERALLY, (§ 3.2-6570 of the Code of Virginia). In each misdemeanor Grievant received a 12 month jail sentence which was suspended for 1 year, was placed on probation for 1 year, and ordered to pay a fine. Additionally, Grievant was ordered to pay restitution and complete a period of community service.⁷

³ DHRM, Office of Employment Dispute Resolution, Grievance Procedure Manual, ("GPM") Section 5.8.

⁴ DHRM, Office of Employment Dispute Resolution, Grievance Procedure Manual, ("GPM") Section 9.

⁵ Agency Exhibits Tab 1.

⁶ Agency Exhibit s Tab 2, Warrant of Arrest, Agency Exhibits Tab 3.

⁷ Agency Exhibits Tab 2, Order .

Grievant was employed by Agency as a Corrections Sergeant at Facility, a correctional unit housing Offenders in the Commonwealth of Virginia. Grievant was a supervisor at Facility and has approximately 25 years of service with Agency.⁸

Grievant has no active Written Notices.

Events surrounding the Grievant's actions, charges, and convictions were the subject of public press coverage. Both Facility and Agency Central office received inquiries as to matters and as to the Agency stance on matters.⁹

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code Section 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth of Virginia. This legislation includes provisions for a grievance procedure and balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and pursue legitimate grievances.

Code Section 2.2-3000(A.) sets forth the Virginia grievance procedure and provides, in part, "It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes which may arise between state agencies and those employees who have access to the procedure under Section 2.2-3001."

Standards of Conduct:

The Department of Corrections ("DOC"), pursuant to Va. Code §53.1-10, has promulgated its own *Standards of Conduct* patterned on the state Standards, but tailored to the unique needs of the Department.

The *Standards of Conduct* (Operating Procedure Number 135.1, Effective Date: April 1, 2011) divide unacceptable behavior 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 behaviors of such a serious nature that a first occurrence normally should warrant removal.¹⁰

Section IV. of the *Standards of Conduct, Operating Procedure 135.1* states, in pertinent part:

- C. The standards of conduct outlined in this procedure are designed to protect the well-being and rights of all employees, to assure safe, efficient government operations, and to assure compliance with public law.

⁸ Agency Exhibits Tab 3, Written Statement of 5/22/12.

⁹ Testimony.

¹⁰ Agency Exhibits Tab 6, DOC Operating Procedure 135.1, "Standards of Conduct".

D. The Standards of Conduct

1. Establish a fair and objective process for correcting or treating unacceptable conduct or work performance
2. Distinguish between less serious and more serious actions of misconduct, and provide corrective action accordingly

E. The 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.

Section V. A. of Operating Procedure: 135.1 *Standards of Conduct* provides:

3. Appropriate disciplinary action for employees who are facing criminal charges or convictions (both felonies and misdemeanors) must be assessed as to the employees position, level of responsibility, and ability to perform the functions of the position including the ability to carry out all job requirements, the nature of the conviction, the impact the conviction has on the DOC and its employees, the public, and its perception of the DOC and other mitigating factors including prior discipline, length of service and performance.
 - a. Charges or situations that involve crimes against persons are subject to a disciplinary charge that could include termination.
 - b. A conviction is not necessary to proceed with a disciplinary action. The Unit Head must to determine whether the evidence is sufficient to have an impact on the DOC, its employees, the public and its perception of the DOC.

Section V. D.2. of Operating Procedure: 135.1 *Standards of Conduct* provides, in pertinent part, that Group III offenses include, but are not limited to:

- m. Criminal convictions for conduct occurring on or off the job which are plainly related to job performance or are of such a nature that to continue the employees in their assigned positions could constitute negligence in regard to the agency's duties to the public or to other state employees.

Operating Procedure:135.1, *Attachment 2*, provides the normal disciplinary action for a Group III is, for a first offense, Written Notice and discharge. In lieu of discharge, the agency may: (1) suspend without pay for up to 30 workdays, and/or (2) demote or transfer with disciplinary salary action."¹¹

Convictions on plea:

Grievant provided a written statement to Agency dated May 22, 2012. This writing stated that in November of 2011, while on his farm, Grievant observed three of his neighbor's dogs chasing four of his show horses and, in previous incidents, the dogs had severely wounded two of his horses. Grievant further indicated in his written statement, "At the time of

¹¹ Agency Exhibits Tab 6.

this incident, believing I was within the right of law to protect my livestock, I shot twice, killing two of the three dogs.”¹²

The evidence indicates, and Grievant does not contest, that he was arrested, charged with two felonies, and subsequently entered a plea of guilty to two misdemeanors. The evidence further indicates, and Grievant does not contest, he was found guilty of two misdemeanors. On each misdemeanor he was sentenced to 12 month in jail with the 12 months suspended for a period of one year. Also, he was required to pay a fine in each misdemeanor, was ordered to pay restitution, and was ordered to perform community service.

Agency notification

Agency acknowledges and the evidence indicates that Grievant was forthright in bringing matters to Agency’s attention from the start. He informed management of the possibility of criminal charges prior to the charges being brought. Grievant was truthful in notifying Agency of matters, did not attempt to conceal matters, and kept Agency timely apprised of matters as they developed throughout the court process.

Grievant:

Grievant contends his misdemeanor convictions are not plainly related to his job performance and he raises issues of fair and objective discipline. He notes that, other than one verbal reprimand, he has no disciplinary actions or Written Notices issued in the years he has been employed with agency.¹³

Group III

Criminal convictions for conduct occurring on or off the job which are plainly related to job performance or are of such a nature that to continue the employees in their assigned positions could constitute negligence in regard to the agency’s duties to the public or to other state employees is listed in Operating Procedure: 135.1 as an example of a Group III offense.

Furthermore, Operating Procedure: 135.1 indicates the 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.

Agency:

Grievant informed Agency that charges were possible concerning his actions in shooting two dogs. Major consulted with Regional Office and met with Grievant to discuss matters. Major advised Grievant of Agency stance and policy concerning an employee receiving criminal charges and told Grievant that policy indicated an employee receiving criminal charges could be placed on suspension pending outcome of the court hearing.

Superintendent also met with Grievant a number of times and discussed policy and procedures including Operating Procedure 135.1 and its ramifications to Grievant’s situation.

¹² Agency Exhibits Tab 3.

¹³ Agency Exhibits Tab 3.

Superintendent discussed applicable sections and Grievant was given a copy of the Standards of Conduct (Operating Procedure 135.1) twice. Superintendent was contacted by Grievant's attorney representing him on the criminal charges and he spoke with counsel. Superintendent testified that Grievant's attorney was told, when he asked as to Agency's stand on what would happen, that no determination would be made until the outcome of the criminal charges.

Grievant and Agency maintained communications and discussed matters relating to the charges and the status of matters pending with the Court. Grievant was available and was responsive to Agency's inquiries and request for information.

As a result of the criminal charges Grievant was placed on administrative leave and allowed to utilize his accumulated leave during this period. In late December of 2011 early January of 2012 management decided to offer Grievant a non-security position at another Facility until his court proceedings were concluded. Grievant agreed to this and subsequently Grievant was temporarily assigned to another Facility in a position that would not place him in regular contact with Offenders.¹⁴

On or about May 4, 2012 Grievant notified Superintendent he plead guilty to two misdemeanor charges and was convicted of two misdemeanors. After being notified of the convictions, management at Facility consulted with Human Resource Director, Regional Administrator, and Chief of Operations. Management was concerned with the nature and severity of the criminal convictions, with supporting the mission of Agency, and its obligations to the public. Management was also concerned with the facts and how the public viewed the facts.

Shortly after the incident involving Grievant occurred, management took notice of press coverage related to the incident. Both local and other newspapers were involved with reporting the situation and a foundation was involved in looking into matters. Both Facility and Agency's Central Office received inquiries related to Grievant's actions/charges. A number of phone calls were received inquiring as to what Agency was doing concerning Grievant. Management was aware of public interest in matters.

Management reviewed matters and took into consideration the nature of Agency's duties and obligations to the public, its employees, and the offenders it is charged with supervising. Management gave consideration to Agency's commitment to public safety. The incident involved use of a firearm and Grievant acknowledged in his written statement of May 22, 2012 his use of a firearm when he indicated, "... I shot twice, killing two of the three dogs."¹⁵

Management assessed and gave consideration to:

- Grievant's position being a supervisor;
- Grievant's duties and responsibilities as a supervisor;
- Grievant's ability to perform the functions of his job in light of matters;
- The nature and severity of his convictions;
- The impact of Grievant's actions and convictions; and
- The public's perception of Agency in light of Grievant's actions and convictions.

¹⁴ Testimony.

¹⁵ Agency Exhibits Tab 3.

Concern was expressed over Grievant's demonstration of poor decision making off the job and how this could affect Agency, staff, and offenders. Management felt that leaving Grievant in his supervisory position did not support the mission of Agency or the professionalism it expects from its employees both on and off the job. Grievant's position requires him to make sound decisions daily. Management felt that given the facts and decisions which led to the convictions, Grievant could not continue in his supervisory capacity and be effective in enforcing rules and regulations as to staff and the offender population.

Grievant's convictions and the circumstances leading up to his convictions negatively impacted Agency and the public's perception of Agency. Public inquiries relating to Grievant's actions had to be addressed by Agency. A number of newspapers reported on matters related to this incident. Public interest and concern was expressed not only as to Grievant's actions but as to how Agency would be addressing matters and what was the Agency's stand on the conduct of its employee.

Agency, after consideration of the above discussed matters, determined that a Group III Written Notice was appropriate and Grievant was issued a Group III Written Notice with an 80 hour suspension and demotion to a lower pay band with 5% disciplinary pay reduction.

Mitigation:

Under the *Rules for Conducting Grievance Hearings*, Section VI, B, 1, 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.

Operating Procedure 135.1, Attachment 2 provides that the Normal Disciplinary Action for a first offense of a Group III is issuance of a Written Notice and discharge. In lieu of discharge, the agency may: (1) suspend without pay for up to 30 workdays, and/or (2) demote or transfer with disciplinary salary action."

The evidence indicates that Agency took into consideration mitigating circumstances. Management made the determination not to discharge Grievant and not to utilize the maximum 30 workday suspension without pay provided for in *Operating Procedure 135.1*.

The Agency's discipline is not found to exceed the limits of reasonableness.

CONCLUSION

Based upon the evidence presented at hearing and for the reasons presented above, the Agency has proven by a preponderance of the evidence that (i) Grievant engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the Agency's discipline was consistent with law and policy. Furthermore, the disciplinary action of issuing a Group III Written Notice with 80 hour suspension and demotion to lower pay band with 5% disciplinary pay reduction was warranted and appropriate under the circumstances.

DECISION

For the reasons stated above, the Agency's issuance to Grievant of a Group III Written Notice with 80 hour suspension and demotion to lower pay band with 5% disciplinary pay reduction is **UPHELD**.

APPEAL RIGHTS

As the *Grievance Procedure Manual* (effective date: July 1, 2012) sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

A. Administrative Review:

A hearing officer's decision is subject to administrative review by both EDR and Director of DHRM based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or e-mail. A copy of all requests for administrative review must be provided to the other party, EDR, and the Hearing Officer.

A party may make more than one type of request for review. All requests for administrative review must be made in writing and **received by** the reviewer within 15 calendar days of the date of the original hearing decision. "**Received by**" means delivered to, not merely postmarked or placed in the hands of a delivery service.

1. A challenge that the hearing decision is inconsistent with state or agency policy is made to the DHRM Director. This request must refer to a particular mandate in state or agency policy with which the hearing decision is inconsistent. The director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401 or e-mailed.

2. Challenges to the hearing decision for noncompliance with the grievance procedure and/or the Rules for Conducting Grievance Hearings, as well as any request to present newly discovered evidence, are made to EDR. This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Office of Employment Dispute Resolution's ("EDR's") authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, VA 23219, faxed to EDR (EDR's fax number is 804-786-1606), or e-mailed to EDR (EDR's e-mail address is edr@dhrm.virginia.gov).

B. Final Hearing Decisions:

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.

C. Judicial Review of Final Hearing Decision:

Once an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law. A notice of appeal must be filed with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision.

S/Lorin A. Costanzo

Lorin A. Costanzo, Hearing Officer

Copies: Agency Representative
Grievant
Agency
EDR