

Issues: Group II Written Notice (failure to follow policy), and Termination due to accumulation); Hearing Date: 01/27/17; Decision Issued: 01/30/17; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10907; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10907

Hearing Date: January 27, 2017
Decision Issued: January 30, 2017

PROCEDURAL HISTORY

On October 6, 2016, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy. Grievant was removed from employment based on the accumulation of disciplinary action.

On October 11, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On November 14, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 27, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representatives
Agency Party Designee
Agency's 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 Behavioral Health and Development Services employed Grievant as a Security Officer at one of its facilities. He had been employed by the Agency for approximately 26 years. He received favorable performance evaluations. Grievant had prior active disciplinary action. On April 26, 2016, Grievant received a Group II Written Notice for unauthorized use of State property.

Part of Grievant's daily duties involved driving a State vehicle throughout the Facility. He was required to possess a valid Virginia driver's license as a condition of driving a State-owned vehicle and as a condition of employment.

On June 12, 2015, Grievant completed an Employee Information Change Form informing the Agency that Address 1 was his old address and Address 2 was his new address.

Grievant's Driver's License showed his address as Address 1.

On June 2, 2016, Grievant was stopped by a law enforcement officer who presented Grievant with a Virginia Uniform Summons for operating a vehicle with an expired inspection. The officer wrote Grievant's address on document as Address 1. Grievant was informed he was "SUMMONS TO APPEAR" in the local General District Court on July 19, 2016.

Grievant signed the Virginia Uniform Summons. Directly above his signature appeared:

I PROMISE TO APPEAR AT THE TIME AND PLACE SHOWN ABOVE. SIGNING THIS SUMMONS IS NOT AN ADMISSION OF GUILT. I CERTIFY THAT MY CURRENT MAILING ADDRESS IS AS SHOWN ABOVE.

On its front page, the Virginia Uniform Summons stated, "READ NOTICE ON REVERSE SIDE".

The back page of the Virginia Uniform Summons stated:

BY SIGNING THIS SUMMONS, YOU HAVE CERTIFIED TO YOUR CURRENT MAILING ADDRESS. OFFICIAL NOTICES WILL BE MAILED TO THAT ADDRESS (UNLESS YOU HAVE NOTIFIED THE COURT OF A CHANGE OF ADDRESS) AND SUCH NOTICES ARE CONSIDERED ADEQUATE NOTICE EVEN IF YOU DO NOT ACTUALLY RECEIVE THEM. YOU MUST NOTIFY THE COURT OF ANY CHANGE OF ADDRESS TO ALLOW SUCH NOTICES TO REACH YOU. IF THE COURT HAS BEEN NOTIFIED OF A CHANGE OF ADDRESS, OFFICIAL NOTICES WILL BE MAILED TO THAT NEW ADDRESS, AND NOTICES SENT TO SUCH ADDRESS WILL BE CONSIDERED ADEQUATE NOTICE.

IF YOU FAIL TO ENTER A WRITTEN OR COURT APPEARANCES, YOU MAY BE TRIED IN YOUR ABSENCE. IF FOUND GUILTY, THE COURT WILL IMPOSE SENTENCE. IN ADDITION, THE VIRGINIA DEPARTMENT OF MOTOR VEHICLES OR THE LICENSING AUTHORITY WHICH ISSUED YOUR DRIVER'S LICENSE WILL BE NOTIFIED OF ALL CONVICATIONS PERTAINING TO THE OPERATION OF A MOTOR VEHICLE. ***

IF YOUR LICENSE IS SUSPENDED OR REVOKED YOU WILL BE REQUIRED TO PAY A REINSTATEMENT FEE TO THE VIRGINIA DEPARTMENT OF MOTOR VEHICLES AND COMPLY WITH THE APPLICABLE ADMINISTRATIVE REINSTATEMENT REQUIREMENTS OF THE VIRGINIA DEPARTMENT OF MOTOR VEHICLES.¹

Grievant did not prepay the fine in order to avoid appearing in court. On July 19, 2016, Grievant forgot to appear in the local District Court. He was busy performing duties for his job with the Agency as well as a part-time job requiring him to work

¹ Agency Exhibit 7.

approximately 24 hours per week. The Court found Grievant "Guilty in Absentia."² He was fined \$30 with court costs of \$97.

On July 20, 2016, the Court mailed a Notice to Pay and Suspension for Failure to Pay (DC-225) form addressed to Grievant at Address 1. The letter informed Grievant that:

YOUR DRIVER'S LICENSE IS SUSPENDED EFFECTIVE ON THE SUSPENSION DATE IF YOU FAIL TO PAY. TO AVOID SUSPENSION, PAYMENT IN FULL MUST BE RECEIVED BY THE COURT PRIOR TO THE SUSPENSION DATE.³

The suspension date shown on the form was August 18, 2016.

Grievant did not receive the DC-225 form because he was living at Address 2.

The vehicle Grievant was driving passed inspection in July 2016.

Grievant did not pay the fine and court costs by August 18, 2016. His license was suspended effective August 18, 2016.

Grievant continued to drive a State vehicle as part of his work duties after August 18, 2016 and without a valid driver's license.

On September 23, 2016, the Agency reviewed Grievant's driving record and realized that Grievant's driver's license was suspended. The Agency notified Grievant that his license was suspended and removed him from duties involving operating a State vehicle.

Grievant paid the fine and court costs on November 21, 2016.

The Agency considered Grievant's length of service and work performance prior to issuing disciplinary action.

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."⁴ Group II offenses "include acts of misconduct of a more serious

² Grievant Exhibit 2.

³ Grievant Exhibit 2.

⁴ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

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.”

Department Instruction 506 governs Criminal History Checks and Background Verification Requirements. Section 506-1 of policy provides, “individuals hired by the Department who will operate state owned or leased vehicles are required by the Commonwealth to have a valid driver’s license” Indeed, section 506-5 provides:

When a workforce member is assigned responsibilities that involve operation of a state vehicle to travel to work-related assignments a valid driver’s license is required.

Failure to follow policy is a Group II offense.⁵ Grievant was required by the Agency’s policies to have a valid driver’s license when he drove a State vehicle as part of his work duties. Grievant’s driver’s license was suspended on August 18, 2016 which prohibited him from operating any vehicle including State vehicles. Grievant continued to operate a State vehicle without a valid driver’s license until the Agency discovered he did not have a valid license. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.⁶

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices there by justify the Agency’s decision to remove him from employment.

Grievant argued that he did not know that his driver’s license was suspended because the notice of suspension was sent to his former address, not his current address, and he did not actually receive the notice of suspension. It is not necessary for the Agency to show that Grievant had actual knowledge that his driver’s license had been suspended in order to meet its burden of proof. An agency may support issuance of a Group II Written Notice if it can show that an employee knew or should have known that his actions were contrary to policy.

Grievant signed the Virginia Uniform Summons to confirm that his current address was Address 1. He did not correct the information on the summons. Grievant could have prepaid the fine and court costs to avoid appearing in court but failed to do so. Grievant was informed of the hearing date and could have appeared in court but failed to do so. The Virginia Uniform Summons informed Grievant that if he failed to appear in court, he would be tried in his absence. The summons also informed Grievant that official notices would be sent to his address on the summons and that

⁵ See, Attachment A, DHRM Policy 1.60.

⁶ The Agency also alleged Grievant should receive the Group II Written Notice because he failed to report his receipt of a summons to the Agency. It is unnecessary for the Hearing Officer to address this issue since the Agency has established that Grievant acted contrary to policy by operating a State vehicle without a valid driver’s license.

notice would be deemed adequate even if he did not receive the notices. Grievant had several opportunities to avoid having his driver's license suspended and learn that his license had been suspended. If Grievant had exercised any of these opportunities he would have known that license was suspended and would have known not to operate any State vehicles.

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 Human Resource Management"⁷ 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 contended the disciplinary action should be mitigated because the Agency did not fully consider his work history and performance. The evidence showed that the Agency considered Grievant's length of service and work history. Nevertheless, an employee's length of service and work history is rarely a basis to mitigate disciplinary action.

Grievant argued that the disciplinary action should be mitigated because the Agency inconsistently disciplined other employees. In order to establish an inconsistent application of disciplinary action, an employee must show that similarly situated employees were treated differently by agency managers. In this case, Grievant has not identified any other employees who operated State vehicles without a valid driver's license and who received lesser disciplinary action than did Grievant.

It is certainly debatable whether it is in the Commonwealth's best interest to lose an employee who was otherwise performing adequately and devoted to his work simply because his driver's license was revoked for failing to pay court fees and costs. Once the Agency meets its burden of proof, the Hearing Officer's authority, however, is restricted to considering whether the disciplinary action exceeds the limits of reasonableness. The Agency's disciplinary action in this case is consistent with State policy. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

⁷ *Va. Code § 2.2-3005.*

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. Grievant's removal based on the accumulation of disciplinary action 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 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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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.⁸

[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

⁸ Agencies must request and receive prior approval from EDR before filing a notice of appeal.