

Issues: Group II Written Notice (criminal conviction) and Termination (due to accumulation); Hearing Date: 02/23/17; Decision Issued: 02/28/17; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 10950; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 10950

Hearing Date: February 23, 2017
Decision Issued: February 28, 2017

PROCEDURAL HISTORY

On November 28, 2016, the Grievant was issued a Group III Written Notice, which stated as follows:

On August 31, 2016, you were convicted for Driving While Intoxicated in the Hanover General District Court. This is a violation of OP 135.1, Standards of Conduct, which categorizes a “conviction of a first driving under the influence (DUI) off the job and in a private vehicle” as a Group II offense. ¹

Pursuant to the Written Notice before me, the Grievant was terminated on November 28, 2016. ² On December 23, 2016, the Grievant timely filed a grievance to challenge the Agency’s actions. ³ On January 23, 2017, this appeal was assigned to me. On February 23, 2017, a hearing was held at the Agency’s location.

APPEARANCES

Advocate for Agency
Agency Representative
Witnesses
Grievant

ISSUES

Did the Grievant have an accumulation of other active formal disciplinary actions such that the Written Notice before me warranted termination?

¹ Agency Exhibit 1, Tab 1, Page 1

² Agency Exhibit 1, Tab 1, Page 1

³ Agency Exhibit 1, Tab 2, Page 1

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.⁴ Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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. The employee has the burden of proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened.⁵ However, proof must go beyond conjecture.⁶ In other words, there must be more than a possibility or a mere speculation.⁷

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of the witness, I make the following findings of fact:

⁴ See Va. Code § 2.2-3004(B)

⁵ *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

⁶ *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

⁷ *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

The Agency provided me with a notebook containing nine tabs and that notebook was accepted in its entirety as Agency Exhibit 1, without objection.

The Grievant did not provide a documentary evidence notebook, but instead relied upon the documentary evidence submitted by the Agency.

On April 17, 2016, the Grievant was arrested for a violation of VA Code Section 18.2-266. On August 31, 2016, the Grievant either pled or was found guilty to the offense of Driving While Intoxicated (“DWI”), first.⁸ Accordingly, the issue of the DWI offense is finalized and is only before me to the extent that it becomes part of an accumulation of disciplinary actions.

On April 4, 2016, the Grievant was issued a Group III Written Notice.⁹ The Grievant grieved that Written Notice and, on December 8, 2016, the Hearing Officer who heard that matter reduced the Group III Written Notice to a Group II Written Notice.¹⁰ That Group II Written Notice is now final.

Accordingly, on November 28, 2016, when the Written Notice, which is before me, was issued, there was an existing active Group III Written Notice in the Grievant’s file. Subsequently, approximately ten days later, the prior Group III Written Notice was reduced to a Group II Written Notice.

The Agency’s Standards of Conduct, Policy 135.1(V)(C)(1), states as follows:

These include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant termination.

I have before me two Group II Written offenses, the prior Group III Written Notice, which was reduced to a Group II Written Notice by a Hearing Officer, and the guilty finding regarding DWI. The only issue before me is whether or not two Group II offenses must always lead to termination. The Grievant testified and took the position that policy does not require that an accumulation of two Group II offenses always result in termination. The Grievant testified regarding the quality of his service, albeit for less than two years, with the Agency. The Grievant called one character witness and a stipulation was entered into between the Grievant and the Agency regarding three other character witnesses. The witness who testified before me and the stipulation of the other three witnesses was that the Grievant was a good officer and that he followed orders. However, the Grievant called as his own witness an Assistant Warden and, when asked if she thought his matter deserved reconsideration inasmuch as he had only two Group II active Written Notices and not a Group II and a Group III Written Notice, she testified that she did not feel his matter required reconsideration.

Unlike many matters before me, the issue here is not whether or not the act alleged to have been committed was in fact committed. The prior Group III and now Group II Written notice is final. The finding of guilt in the DWI matter is final. It is clear from the Standards of

⁸ Agency Exhibit 1, Tab 4, Pages 1 and 2

⁹ Agency Exhibit 1, Tab 6, Page 1

¹⁰ Agency Exhibit 1, Tab 6, Pages 2 and 3

Conduct that two active Group II Written Notices normally warrant termination. From the evidence presented before me, while the Grievant may have been a good officer for the less than two years that he worked for the Agency, he clearly accumulated two Group II Written notices and I find termination was proper.

MITIGATION

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the Agency disciplinary action.” 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

I find no reason to mitigate the Written Notice before me.

DECISION

For reasons stated herein, I find that the Agency has borne its burden of proof in this matter and that the issuance of the Group II Written Notice to the Grievant, with termination, was proper.

APPEAL RIGHTS

You may file an administrative review request 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. You may fax your request to 804-371-7401, or address your request to:

Director of the Department of Human Resource Management
101 North 14th Street, 12th Floor
Richmond, VA 23219

2. 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. You may fax your request to 804-786-1606, or address your request to:

Office of Employment Dispute Resolution
101 North 14th Street, 12th Floor
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 of the original hearing decision. A copy of all requests for administrative review must be provided 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 administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.¹¹ 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.¹²

[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]

William S. Davidson
Hearing Officer

¹¹An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹²Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.