

Issues: Group II Written Notice (criminal conviction), and Termination due to accumulation; Hearing Date: 12/08/17; Decision Issued: 01/22/18; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11112; Outcome: Partial Relief.



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11112**

Hearing Date: December 8, 2017  
Decision Issued: January 22, 2018

**PROCEDURAL HISTORY**

On October 4, 2017, Grievant was issued a Group II Written Notice of disciplinary action with removal for receiving a criminal conviction.

On October 10, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On October 23, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On December 8, 2017, 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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Corrections employed Grievant as a Corrections Officer at one of its facilities. Grievant had prior active disciplinary action. Grievant received a Group III Written Notice with a five workday suspension on September 24, 2014.

Grievant learned of a significant health concern regarding his child. He drove his vehicle to an area he thought was secluded and consumed an excessive amount of alcohol. Local law enforcement confronted Grievant. On June 4, 2016, Grievant was issued a Warrant of Arrest for Driving While Intoxicated in the locality. Grievant notified the Agency's Human Resource Officer he had received the warrant. Grievant appeared before the local General District Court. He was convicted of reckless driving. He was sentenced to 90 days in jail with 88 days suspended, supervised probation for 12 months, and fined \$250 plus court costs. He was required to attend the Virginia Alcohol and Substance Abuse Program. Grievant's driver's license was suspended for six months.

Grievant appealed the General District Court decision to the Circuit Court. On September 7, 2017, the Circuit Court convicted Grievant of reckless driving but removed the requirement for an ignition interlock system and the restricted driver's license for six months. The Circuit Court required Grievant to remain in supervised probation for 12 months.

Grievant informed the Agency of the status of his court proceedings. He did so on a timely basis and with the information available to him.

## CONCLUSIONS OF POLICY

Unacceptable behavior is divided 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.”<sup>1</sup> 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.”<sup>2</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>3</sup>

“Criminal convictions for conduct occurring on or off the job which are plainly related to job performance” is a Group III offense. “Conviction of a first driving under the influence (DUI) off the job and in a private vehicle” is a Group II offense.

Reckless driving is a misdemeanor under Virginia law that could affect Grievant’s ability to drive. Being able to drive was a requirement of his position. Thus, the Agency has established a basis for some level of disciplinary action.

Although the Agency has established a basis for disciplinary action, it has not established the appropriate level of disciplinary action. Grievant was charged with DWI, but convicted of reckless driving. The criminal punishment for reckless driving is typically lower than the punishment for DWI/DUI. One could argue that the same logic should be applied to the Agency’s Standards of Conduct and a conviction for reckless driving should receive discipline at a level lower than a Group II Written Notice. On the other hand, the Agency’s Standards of Conduct establishes that a criminal conviction can be a Group III offense. Attachment 1 to the Agency’s Standards of Conduct is entitled “Guidance on Criminal Convictions” and provides guidance for disciplinary actions related to driving under the influence and other criminal charges. How the Agency treats reckless driving offenses may depend on the contents of Attachment 1. The Agency failed to provide Attachment 1 as an exhibit. The Hearing Officer does not take judicial notice of agency specific policies such as Operating Procedure 135.1. Without knowing the contents of Attachment 1, the Hearing Officer cannot verify that the Agency has issued an appropriate level of disciplinary action. The Agency’s decision to issue a Group II Written Notice instead of a Group I Written Notice is not sufficiently explained under the Agency’s policies.

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<sup>1</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

Because the Agency has not established the appropriate level of disciplinary action, only a Group I Written Notice is appropriate. Grievant has a prior active Group III Written Notice. Upon the accumulation of any additional disciplinary action, an employee with an active Group III Written Notice may be removed from employment. Accordingly, the Agency has presented sufficient evidence to support its decision to remove Grievant from employment.

*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 ....”<sup>4</sup> 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 further the disciplinary action.

## DECISION

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

## APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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

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<sup>4</sup> Va. Code § 2.2-3005.

You must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.<sup>[1]</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>[1]</sup> Agencies must request and receive prior approval from EEDR before filing a notice of appeal.