

Issue: Group III Written Notice with Termination (criminal charge); Hearing Date: 02/25/19; Decision Issued: 03/08/19; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11310; Outcome: No Relief – Agency Upheld; **Administrative Review Request Received 03/22/19; EDR Ruling No. 2018-4892 issued 04/15/19; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11310

Hearing Date: February 25, 2019
Decision Issued: March 8, 2019

PROCEDURAL HISTORY

On December 4, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for a criminal conviction.

On December 21, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On January 14, 2019, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On February 25, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
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 Regional Principal. He had been employed by the Agency since 2012 and with its predecessor since July 2004. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant had an ongoing conflict with a coworker. The coworker attended a graduation and Grievant observed the coworker in the audience. That conflict weighted on his mind. After work, Grievant went to work-out and then went to his home. Ms. B resided with Grievant at his home. Grievant had an argument with Ms. B. He touched her against her will. The local police were called and came to Grievant's home. A police officer asked Grievant if he put his hands on the woman and Grievant said "yes." The woman did not suffer any physical injuries. She did not seek medical treatment regarding Grievant's actions.

On September 28, 2018, Grievant was arrested for violating Va. Code § 18.2-57.2 with respect to Ms. B. Va. Code § 18.2-57.2(A) provides:

Any person who commits an assault and battery against a family or household member is guilty of a Class I misdemeanor.

Grievant called the Administrator shortly after the arrest and notified the Administrator of the arrest.

On October 2, 2018, the Deputy Director gave Grievant a memorandum notifying him that, “effective immediately you are suspended without pay, in accordance with the Standards of Conduct, pending the resolution of the Warrant of Arrest executed on September 28, 2018 out of [county name] County Assault on family member. *** Furthermore, in accordance with the Standards of Conduct, charges or situations that involve crimes against persons are subject to a disciplinary charge that could include termination; a conviction is not necessary to proceed with disciplinary action.”¹

Grievant appeared in the local Court on November 21, 2018 and pled “Nolo Contendere” on the advice of his Counsel. Grievant was tried and the Court found “facts sufficient to find guilt but defer adjudication/disposition to 11/21/20.”² The Court imposed costs on Grievant.

Grievant called the Administrator and told the Administrator the outcome of the court proceedings.

On November 30, 2018, the Administrator presented Grievant with an Administration of Employee Discipline: Due Process Notification.

On December 3, 2018, the Administrator met with Grievant and listened to his response to the due process notice. Grievant presented a letter with six items supporting mitigation.

Later in the day on December 3, 2018, the Administrator met with Ms. R and two other employees to discuss how to treat Grievant. The Administrator presented Ms. R with Grievant’s letter outlining the six reasons to mitigate the disciplinary action. They considered all six items and discussed extensively at least three of the factors.

Ms. R asked the Administrator if Grievant’s conflict with the coworker contributed to the conflict between Grievant and Ms. B. The Administrator said he did not believe so because he questioned how one incident could have caused the other.

Ms. R and the Administrator discussed whether to place Grievant in another position such as being a tester where he would not supervise other people. They concluded that that was not a viable option.

Ms. R spoke with HR and talked with the Chief of Operations and discussed how the Agency usually treated situations like Grievant’s. She also spoke with the Regional Administrator regarding this how to discipline Grievant. Both managers told Ms. R that DOC’s current administration usually handled situations like Grievant’s as Group III with removal. The Agency decided to remove Grievant from employment.

¹ Agency Exhibit 6.

² Agency Exhibit 5.

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.”³ 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.”⁴ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁵

DOC Operating Procedure 135.1 (F) addresses Criminal Charges and Convictions. This section provides:

Appropriate disciplinary action for employees who are facing criminal charges or convictions (both felonies and misdemeanors) must be assessed as to the employee’s position, level of responsibility, duties and responsibilities, 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 under mitigating factors including prior discipline, length of service, and performance. ***

Charges or situations that involve crimes against persons are subject to a disciplinary charge that could include termination.

A conviction is not necessary to proceed with a disciplinary action. The Unit Head must determine whether the evidence is sufficient to have an impact on the DOC, its employees, and the public and its perception of the DOC.

Attachment I *Guidance on Criminal Conviction* provides guidance for disciplinary actions related to driving under the influence and other criminal charges.

Group III offenses include, “Criminal charges or criminal convictions (See Criminal Charges and Convictions of this operating procedure.) Attachment I provides:

Charges that result in a court finding that “there is sufficient evidence for a finding of guilt and the imposition of the action is held in abeyance for a

³ Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

⁴ Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

⁵ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

period of time”, may be dealt with on an administrative basis, not as a conviction but as conduct which has been factually proved.⁶

On November 21, 2018, the Court facts were sufficient to find guilt that Grievant committed an assault and battery against a family or household member contrary to criminal law. Thus, Grievant engaged in behavior justifying a criminal charge and supporting 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.

Grievant alleged the Agency had decided to terminate Grievant prior to considering his response to the due process memorandum. Ms. R testified that they did not plan to terminate Grievant prior to receiving Grievant’s response and only decided to terminate after considering Grievant’s response. The evidence showed that the Agency fully considered the mitigating circumstances Grievant presented to the Agency for its consideration.

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 presented significant and substantial information regarding his work performance prior to the domestic assault. He advanced in the organization because of his continued employment success. He performed his job duties with dedication and commitment. By every measure other than the criminal charge, Grievant was a valuable employee to the Agency.

Grievant presented evidence showing that the charges against him were an aberration. It is clear that the odds are minimal that Grievant would engage in similar behavior in the future.

⁶ DOC Operating Procedure 135.1 (V)(E)(2)(aa).

⁷ Va. Code § 2.2-3005.

Grievant has established that his removal may not have been in the best interest of the Commonwealth of Virginia. What he has not established, however, that the Agency's disciplinary action was contrary to policy or exceeded the limits of reasonableness. The Agency's decision was consistent with its Standards of Conduct. The Agency had discretion whether to remove Grievant from employment. The Agency considered Grievant's work performance and the reasons he offered regarding why he should not be removed from employment. The Agency considered the nature of Grievant's behavior and its possible impact on the Agency's reputation and Grievant's ability to serve as a role model for inmates. The Agency considered whether the Grievant's conflict with his coworker may have cause his behavior directed towards Ms. B. The Hearing Officer cannot reverse disciplinary action simply because he may not agree with the discipline. Only if the Grievant can show that the discipline was not consistent with policy or exceeded the limits of reasonableness, can the Hearing Officer reverse the disciplinary action. Grievant has not met this burden. 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 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 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 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.^[1]

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.